STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2013
v	No. 311598 Wayne Circuit Court
AUDREY COKLOW-EL, Defendant-Appellant.	LC No. 12-001055-FH

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

MURRAY, J. (*dissenting*).

Throughout the trial court proceedings, defendant repeatedly insisted that she represent herself. The trial court, out of an abundance of caution, had appointed standby counsel to provide assistance to defendant during the course of the proceedings. At the start of defendant's trial, defendant continued to want to represent herself. After the trial court denied a motion to adjourn, defendant, for the first time, indicated a desire to have counsel appointed (and not her standby counsel). For the reasons set forth below, I would hold that, in denying defendant's motion, the trial court did not violate defendant's state or federal constitutional right to counsel. Therefore, I respectfully dissent.

Initially, it is important to point out that defendant's only challenge to the trial court's decision to deny her request for counsel is on constitutional grounds. Defendant does not contest that she was advised during the proceedings about the pitfalls of representing oneself, or that her waiver of her right to counsel was done in a knowing, voluntary, and intelligent manner. Consequently, the only question for this Court to decide is whether the trial court's decision to deny defendant her request for counsel on the day of trial violated her state or federal constitutional right to counsel.

As the prosecutor points out in her brief on appeal, courts have repeatedly made it clear that trial courts are not required to grant a defendant's requests regarding representation when a defendant makes such a request on the first day of trial. See, e.g., *United States v Mackovich*, 209 F3d 1227, 1237-1238 (CA 10, 2000); *United States v Proctor*, 166 F3d 396, 402 (CA 1, 1999); *Robards v Rees*, 789 F2d 379, 383-384 (CA 6, 1986). Instead, trial courts must take many different factors into consideration in determining whether to grant a request at such a late time in the proceedings. See *Proctor*, 166 F3d at 402; *People v Morton*, 175 Mich App 1, 8-9; 437 NW2d 284 (1989). This holds true in part because courts must be sensitive to the

unfortunate fact that these late requests are oftentimes merely gamesmanship employed by defendants in an attempt to negatively impact the trial and lay a foundation for later appellate arguments. See *People v Dennany*, 445 Mich 412, 436; 519 NW2d 128 (1994); *United States v Tolliver*, 937 F2d 1183, 1187 (CA 7, 1991). As one court accurately stated, the Sixth Amendment "does not grant the defendant license to play a cat and mouse game with the court, or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." *United States v Allen*, 895 F2d 1577, 1578 (CA 10, 1990).

Here, the trial court was presented with such a dilemma. On the one hand, the court recognized the importance of an individual being represented by counsel during the course of her criminal proceedings. On the other hand, the court recognized that defendant had requested to represent herself throughout the course of the proceedings (and had been repeatedly warned of the perils of self-representation) and had only made the request for counsel after her motion to adjourn had been denied on the first day of trial. And, defendant did not want standby counsel—who was familiar with the case—to represent her. Although the trial prosecutor did not think that she would be prejudiced by the inevitable delay caused by granting defendant's request, the court must take into consideration other factors in making this decision, including the inconvenience to the court, the jury, witnesses, and other litigants. *Tolliver*, 937 F2d at 1187. The trial court's remarks in denying defendant's request reflect concern for the prospective jurors who were just outside the courtroom, the witnesses present, and the last minute timing of defendant's request. In light of the entire proceedings leading up to defendant's request, and because defendant continued to have an appointed standby attorney available throughout these proceedings, I would hold that the trial court's decision did not deny defendant her constitutional right to counsel.[1]

Finally, defendant raises an unpreserved challenge to the trial court's purported requirement that defendant make an opening statement to the jury. However, there is no factual basis for defendant's argument, as a review of the transcript reveals that the trial court simply advised defendant that it may be more beneficial for her to make an opening statement, but left it to her discretion to do so. It was only after defendant met with her standby counsel that she decided to make an opening statement to the jury. As such, there was no violation of the court rule and no plain error.

For these reasons, I would uphold defendant's conviction and sentence.

/s/ Christopher M. Murray

[1] Although the majority concludes that the trial court violated MCR 6.005(E), defendant has not argued that the trial court violated this court rule. As we have repeatedly indicated, it is not our responsibility to make legal or factual arguments for a party, see *Rorke v Savoy Energy LP*, 260 Mich App 251, 260; 677 NW2d 45 (2003), and that is precisely what is necessary for this Court to do in order to address the propriety of the trial court's decision under MCR 6.005(E).