

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

AUDREY COKLOW-EL,

No. 311598
Wayne Circuit Court
LC No. 12-001055-FH

Defendant-Appellant.

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

PER CURIAM.

Defendant appeals as of right her jury trial convictions of forgery, MCL 750.248, uttering and publishing, MCL 750.249, and recording a fraudulent conveyance of real property, MCL 565.371. Defendant was sentenced to five years' probation. We reverse.

I. FACTUAL BACKGROUND

Defendant recorded an affidavit of allodial title¹ in the Wayne County Register of Deeds, fraudulently claiming ownership of property located in Detroit. At defendant's preliminary examination, she initially claimed that she had counsel, but the person she identified was not a licensed attorney. When asked whether she wanted a lawyer or wanted to represent herself, defendant replied that she did not want a lawyer. At the arraignment on the information, the trial court again asked defendant if she desired appointed counsel, and she declined.

While defendant was appointed standby counsel, at a pretrial motion hearing she asked the court to discharge her standby counsel. The court declined, and warned her of the dangers of self-representation. The court also provided her a waiver of right to an attorney and acknowledgment of dangers of self-representation form.

¹ "Allodial title denotes absolute ownership of property over which no one can bring a superior claim." *People v Johnson-El*, 299 Mich App 648, 650; 831 NW2d 478 (2013) (quotation marks omitted).

Before jury selection began on the first day of trial, the trial court again denied defendant's request to discharge standby counsel and her request for an adjournment. When defendant and standby counsel informed the court that defendant felt she was no longer able to represent herself and wanted an attorney, the trial court found that defendant had not been reasonably diligent in seeking counsel. Although the prosecution stated that it would not be prejudiced if an adjournment was granted, the trial court ordered that the trial would proceed with defendant representing herself. Defendant now appeals.

II. RIGHT TO COUNSEL

A. STANDARD OF REVIEW

Defendant contends that the trial court erred when it refused to grant her request for appointment of counsel. "We review for clear error the trial court's factual findings surrounding a defendant's waiver. However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

B. ANALYSIS

"The Sixth Amendment provides that the accused in a criminal prosecution 'shall enjoy the right . . . to have the Assistance of counsel for his defence'" and "[t]his requirement was made applicable to the states through the Due Process Clause of the Fourteenth Amendment." *Russell*, 471 Mich at 187, quoting US Const, Am VI. When reviewing a waiver of the right to counsel, "[t]he United States Supreme Court has stated that courts should indulge every reasonable presumption against waiver of fundamental constitutional rights." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004) (quotation marks and citation omitted).

After a defendant invokes an initial waiver of her right to counsel, a trial court must satisfy the requirements of MCR 6.005(E), which provides:

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

- (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
- (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
- (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

“[B]efore accepting a waiver of counsel, the trial court *must* satisfy the requirements of MCR 6.005 and inform the defendant of the risks of self-representation.” *People v Belanger*, 227 Mich App 637, 642; 576 NW2d 703 (1998) (emphasis added). In accordance with this mandate, the trial court in the instant case cited to MCR 6.005, and read the court rule into the record. When denying defendant’s request for counsel, the trial court acknowledged that there was “a two-fold requirement” under the court rule, as prejudice was required. While defendant did not specifically cite to this court rule on appeal, we note that defendant is challenging the trial court’s ruling, which was based on MCR 6.005. Moreover, the prosecution specifically addresses MCR 6.005(E) in its appellate brief.²

In the instant case, before jury selection on the first day of trial, defendant’s standby counsel informed the court that defendant was no longer able to represent herself. The court responded that defendant had elected to represent herself from the beginning of the case, and it was too late to make the determination that she was unable to do so now. The court then read MCR 6.005, and asked the prosecution if it would experience any prejudice if an adjournment was granted. The prosecution replied that it would not experience prejudice and would merely subpoena the witnesses again. However, the trial court replied that defendant had not actually requested a lawyer. When standby counsel then asked defendant if she was requesting a lawyer, defendant replied that she was. The trial court then asked defendant why she had not done so before, and defendant replied that she was sorry. The trial court commented on the lateness of the request, and defendant simply stated “[o]verwhelmed.” Eventually, the trial court ruled that defendant had not been reasonably diligent in requesting counsel, and denied her request for counsel.

However, MCR 6.005(E), provides that after an initial waiver of the right to counsel, if a defendant subsequently indicates that she desires the assistance of counsel, the court “must” either appoint a lawyer or allow defendant a reasonable opportunity to retain one. MCR 6.005(E). Here, defendant informed the court that she was no longer able to represent herself and wanted a lawyer. To the extent that her behavior “created any ambiguity regarding [her] desire to unequivocally waive [her] right to trial counsel, any ambiguity should have been resolved in favor of representation[.]” *Russell*, 471 Mich at 193.

Moreover, MCR 6.005(E) provides that the court may refuse to adjourn the proceeding for defendant to obtain counsel if an adjournment would “significantly prejudice the prosecution” and “the defendant has not been reasonably diligent in seeking counsel.” Although the trial court found that defendant had not diligently sought counsel, it failed to find that prejudice would result. In fact, when the trial court asked the prosecution if it would be

² Further, the prosecution does not raise the issue of defendant’s failure to cite to MCR 6.005(E) as being preclusive to our consideration of the court rule in this appeal.

prejudiced if an adjournment was granted, the prosecution responded that it would not. We likewise discern no evidence that the prosecution would have been “significantly prejudice[d]” in this case. MCR 6.005(E).

Generally, the failure to comply with MRE 6.005(E) is reviewed for actual, rather than presumed, prejudice because subsequent waivers of counsel do not carry the same constitutional implications of an initial waiver of counsel. *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996); see also *People v Willing*, 267 Mich App 208, 225; 704 NW2d 472 (2005). However, this case does not involve a mere failure to remind defendant that she had a continual right to counsel or her subsequent defective waiver of counsel. Instead, defendant revoked her waiver and asserted her right to counsel, which the trial court rejected. There was no subsequent waiver of counsel at trial, as defendant unequivocally communicated her desire for counsel.

Representation by counsel is indispensable to the fair administration of the criminal justice system. See *Brewer v Williams*, 430 US 387, 398; 97 S Ct 1232; 51 L Ed 2d 424 (1977). The defendant was completely deprived of counsel at a critical stage, namely, the entire trial. *People v Collins*, 298 Mich App 458, 470; 828 NW2d 392 (2012). The absence of counsel pervaded the proceedings, as defendant was left without counsel during opening statements, cross-examination, defendant’s testimony, and closing arguments. The assistance of standby counsel did not negate the harm, as “[s]tandby counsel does not *represent* the defendant” and is not “counsel within the meaning of the Sixth Amendment.” *Willing*, 267 Mich App at 227-228 (emphasis in original) (quotation marks and citation omitted). Therefore, we agree with defendant that error requiring reversal occurred.³

III. CONCLUSION

The trial court improperly denied defendant’s request for an attorney. We reverse. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael J. Riordan

³ Because the resolution of this issue is dispositive, we decline to address defendant’s arguments regarding the opening statement.