STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v JEROME ROMEY SUEING, Defendant-Appellant.	No. 268490 Kent Circuit Court LC No. 04-010944-FH

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of indecent exposure, MCL 750.335a. We affirm.

Defendant first argues that he was deprived of his right to counsel where he did not equivocally waive his right to counsel, and that the trial court abused its discretion in granting his request to exercise his right to self-representation. We review for clear error a trial court's finding whether the defendant's waiver of counsel was knowing and intelligent. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). We review de novo as a question of law the determination of the meaning of a knowing and intelligent waiver. *Id*. We review for an abuse of discretion a trial court's decision to permit a defendant to represent himself. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The Sixth Amendment provides defendants with the right to counsel at all critical stages of the criminal process. *Williams*, *supra* at 641; US Const, Am VI. The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); US Const XIV. Courts should indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 2d 1461 (1938). However, the United States Constitution does not force a lawyer upon a defendant, and a criminal defendant may choose to waive representation and represent himself. *Iowa v Tovar*, 541 US 77, 87-88; 124 S Ct 1379; 158 L Ed 2d 209 (2004). Invalidly permitted self-representation resulting in a complete deprivation of the right to counsel at a critical stage of the proceeding is structural error requiring reversal, but a limited deprivation can be harmless error. *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005).

The right of self-representation is provided for in Const 1963, art 1, § 13 and MCL 763.1. A trial court must make certain findings before granting a defendant's request to waive his right to counsel. *Williams*, *supra* at 642. First, the request to waive the right to counsel must be unequivocal. *Id*. Additionally, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made, and the trial court should inform the defendant of the potential risks involved in self-representation. *Id*. Finally, the trial court must be satisfied that the defendant's self-representation will not be disruptive, burdensome, or amount to an undue inconvenience. *Id*. "A waiver is sufficient if the defendant 'knows what he is doing and his choice is made with eyes open.'" *Id*., quoting *Adams v United States ex rel McCann*, 317 US 269, 279; 63 S Ct 236; 87 L Ed 2d 268 (1942).

MCR 6.005(D)(1) sets out the proper procedure regarding a defendant's waiver of the right to counsel. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first:

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Before trial, defendant moved, in propria persona, to discharge his attorney and requested that he be allowed to represent himself, based on his experience as a paralegal. The trial court did not rule on the motion. Following jury selection, defendant again expressed his dissatisfaction with his attorney, and asked the trial court to rule on his pretrial request to represent himself, but after a discussion with the trial court, he decided to keep his appointed counsel. At trial the following day, the prosecutor and defense counsel gave their opening statements, and the prosecutor examined, and defense counsel cross-examined, two witnesses. Defendant then decided to waive his right to counsel and exercise his right to self-representation.

The record reveals that defendant's request to waive his right to counsel was ultimately unequivocal. *Williams*, *supra* at 642. Defendant maintains that he only represented himself because of his dissatisfaction with defense counsel, and relies on *Willing*, *supra* at 220-223, to support his argument that his waiver was equivocal. However, in *Willing*, the defendant "never expressed the desire to represent himself or to waive his right to counsel before the trial court." *Id*. at 221. Rather, "the only thing [the defendant] said on the subject was that he would either like an adjournment in order to retain another attorney or, alternatively, another court-appointed attorney." *Id*. Here, although defendant expressed his dissatisfaction with defense counsel, he did not seek another attorney, and instead repeatedly expressed the desire to represent himself. Therefore, we conclude that *Willing* is not applicable here.

Further, the record reflects that defendant weighed his options, and decided whether to exercise his right to counsel or to waive his right to counsel and represent himself. Defendant vacillated between his two options on the first and second day of trial, but ultimately decided to represent himself with his attorney as standby counsel. "[A] request for self-representation can be accompanied by a request for standby counsel and maintain its unequivocal nature." *Hicks*, *supra* at 528. Indeed, "[p]ermitting defendant, equipped with the benefit of hindsight, to retract

his clearly stated desire to represent himself solely because he requested standby counsel is tantamount to permitting him to harbor an appellate parachute[.]" *Id*. at 530.

The record also reveals that the trial court apprised defendant of the danger of self-representation, and that defendant's waiver of his right to counsel was knowing, intelligent, and voluntary. *Id*. Defendant presented as an astute layperson with a legal background. Defendant demonstrated his familiarity with caselaw and court rules, and the trial court recognized as much. Defendant fully contemplated the consequences of his decision, and his waiver was sufficient because he 'kn[e]w what he [wa]s doing and his choice [wa]s made with eyes open.'" *Id*., quoting *Adams*, *supra*, 317 US at 279. Implicit in the trial court's grant of defendant's request to waive his right to counsel was a determination that defendant's self-representation would not disrupt the trial proceedings. *Id*.

Additionally, the record reflects that the trial court complied with the requirements set out in MCR 6.005(D). The trial court complied with MCR 6.005(D)(1) by advising defendant of "the charge [and] the maximum possible prison sentence for the offense." The trial court also complied with MCR 6.005(D)(1) by advising defendant of "the risk involved in self-representation." Finally, the trial court complied with MCR 6.005(D)(2) by offering defendant "the opportunity to consult with an appointed lawyer."

"Defendant was fully apprised of the risks he faced by choosing to represent himself and he knowingly and voluntarily chose to accept them. He may not now be heard to complaint about his choice." *Williams*, *supra* at 645.

> To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. [*Id* (Internal citation and quotation omitted).]

Defendant next argues that his right to confront his accuser was violated where the trial court denied his request to recall two excused witnesses for additional cross-examination. We review de novo whether a defendant was afforded the right to confront his accusers. *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000). We review for an abuse of discretion a trial court's decision whether to recall witnesses. *Williams*, *supra* at 643.

A defendant has a constitutional right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, "[t]he right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to . . . cross-examine on any subject." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "The right of cross-examination . . . may bow to accommodate other legitimate interests of the trial process . . . ." *Id*. Indeed, "'[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of

the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id*., quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

At trial, after the first two prosecution witnesses were examined by the prosecutor and cross-examined by defense counsel, defendant informed the trial court that defense counsel failed to ask the witnesses a list of questions he provided to defense counsel. Defendant then indicated that he wanted to represent himself from that point forward, and that he wanted to re-call the witnesses and ask them certain questions. Defense counsel indicated that he addressed all of the issues contained within the questions provided by defendant, except for one of a questionable sexual nature directed to the victim. The trial court confirmed that all of defendant's questions had been covered by defense counsel, and ruled that it was unnecessary to re-call the witnesses.

The record reveals that defense counsel cross-examined the witnesses on all relevant issues, thereby satisfying defendant's right to confrontation. Further, "[a] defendant who elects to proceed in propria persona after proceedings are underway . . . is not entitled to retry the case." *Williams*, *supra* at 643; MRE 611(a). The trial court properly exercised its discretion in imposing reasonable limits on cross-examination, specifically noting that the questions defendant sought to ask were redundant and cumulative. *Adamski*, *supra* at 138.

To the extent defendant argues that he should have been allowed to recall the witnesses for further cross-examination because the trial strategy changed, the record refutes his assertion. Defendant maintained throughout the entire proceeding that he was not present when the crime occurred and that it was simply a case of mistaken identity. The record also belies defendant's assertion that the trial court *required* him to submit his list of questions and erroneously *shared* that list with the prosecutor. In fact, defendant sua sponte proffered his list of questions to the trial court, stating "I gave [defense counsel] a list of questions right here. *You can put them in the record if you want to*." Further, the record does not support defendant's assertion that the trial court supplied his list of questions to the prosecutor. Rather, the prosecutor only addressed questions that defendant and defense counsel earlier discussed on the record. A "'[d]efendant should not be allowed to assign error on appeal to something which [he] deemed proper at trial. To do so would allow defendant to harbor error as an appellate parachute.'" *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002), quoting *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988). Defendant was afforded his constitutional right to confront his accuser, and the trial court properly exercised its discretion in denying defendant's request to recall two excused witnesses for additional cross-examination.

Defendant next argues that the lower courts abused their discretion in denying his request for a corporeal lineup. We review for an abuse of discretion a lower court's decision on a defendant's motion for a lineup. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). "Michigan law permits a trial court to grant a defendant's motion for a lineup if the court chooses to do so in an exercise of its discretion." *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981).

After reporting the incident to the police, the victim identified defendant in a photographic lineup. The victim identified defendant in court as the perpetrator at both the preliminary examination and at trial. The district court denied defendant's request for a corporeal lineup, which request was made after the preliminary examination was underway. "A

right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *McAllister*, *supra* at 471. While eyewitness identification was a material issue because the defense theory of the case was misidentification, defendant failed to demonstrate the existence of a reasonable likelihood of mistaken identification that a lineup would tend to resolve. Little chance of mistaken identification existed because an adequate, independent basis existed for the eyewitness' in-court identification. *Gwinn*, *supra* at 250. The victim testified that defendant "was someone that [she] had seen around the neighborhood before," and that they "were familiar" and had "spoken a couple of times." The victim acknowledged defendant when he entered the coffee shop, and defendant engaged in conversation with her, attempting to discern how he knew her. Defendant then sat down at a table approximately ten feet away from the victim, and stared at her while exposing himself. The victim testified that she wore contacts and was wearing them at the time of the incident. Further, there were small lamps on every table in the coffee house, as well as light coming in from a large window. And, the victim previously identified defendant in a photographic lineup. The district court properly exercised its discretion in denying defendant's request for a corporeal lineup.

Defendant next argues that he was denied the effective assistance of counsel. A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). We review for clear error the trial court's factual findings, and review de novo the trial court's constitutional determinations. *Id*. To prove ineffective assistance of counsel, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 58.

Defendant first argues that his counsel was ineffective for failing to move for a corporeal lineup. However, the district court properly denied defendant's proper requests for a corporeal lineup, and defense counsel is not ineffective for declining to bring a meritless motion. *People v Ish*, 252 Mich App 115, 199; 652 NW2d 257 (2002).

Defendant next argues that his counsel was ineffective for expressing his satisfaction with the jury at the conclusion of voir dire, without first consulting with defendant. It is well settled that defendants have the ultimate authority to make certain fundamental decisions regarding their case. *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Specifically, defendants may decide whether to plead guilty, whether to waive a jury, whether to testify in their own defense, and whether to appeal. *Id*. Beyond that, nothing suggests that "the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Id*.

"[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy." *People v Johnson,* 245 Mich App 243, 259; 639 NW2d 1 (2001). Defense counsel's decision to express his satisfaction with the jury before exercising the remaining peremptory challenges constituted a matter of trial strategy. And, we will not second-guess matters of trial strategy on appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant also argues that defense counsel was ineffective for failing to interview and subpoena his ex-wife. Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *McGhee*, *supra* at 626. It is important to first note that, however, contrary to defendant's assertion, defense counsel did not refer to defendant's ex-wife during opening statement. While defense counsel specifically mentioned the names of the alibi witnesses, including the ex-wife, during voir dire to make certain that none of the jurors knew the witnesses, he indicated only that he "*might* be calling" them as witnesses. During opening statement, however, defense counsel merely stated that the jury was "going to hear from" alibi witnesses, but he did not refer to those witnesses by name.

The record reveals that defense counsel filed a notice of alibi listing defendant's friend, two of defendant's sisters, and defendant's ex-wife. At trial, defendant called his friend and two sisters to testify as alibi witnesses. Defendant claims that defense counsel failed to subpoena defendant's ex-wife. While there is no record evidence to support or refute his assertion, defendant's ex-wife did not, in any event, testify at trial. However, the record reveals that the alibi testimony of defendant's ex-wife would not have placed defendant at her house at the time of the incident. See *People v Moreno*, 112 Mich App 631, 639; 317 NW2d 201 (1981) (matter of trial strategy not to call prospective alibi witnesses where they would not have placed defendant at a different location at the time the crime occurred). The incident at issue occurred around 4:00 p.m., and defendant was allegedly not dropped off at his ex-wife's house until between 6:00 and 8:00 p.m. Therefore, even if defense counsel failed to subpoena defendant's ex-wife, we presume it was a matter of trial strategy, not to be second-guessed with the benefit of hindsight. *Dixon*, *supra* at 398; *Moreno*, *supra* at 639.

Defendant also argues that defense counsel was ineffective for failing to provide him with discovery materials, because he was unable to determine whether the trial testimony of the prosecution witnesses was consistent with their prior statements. Defendant has failed to demonstrate that, if he had received the alleged discovery materials, the outcome of his trial would have been different. *McGhee*, *supra* at 625, 628. Thus, defendant has not met his burden of demonstrating ineffective assistance of counsel. *Matuszak, supra.*

Defendant received the effective assistance of counsel to which he was constitutionally entitled.

Finally, defendant argues on appeal that his right of access to the courts was violated where he was denied access to the law library, and where the law library was inadequate. Defendant raises this issue for the first time on appeal; therefore, it is unpreserved. We review unpreserved constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

It is well settled that prisoners and incarcerated defendants have a constitutional right of access to the courts. *People v Mack*, 190 Mich App 7, 20; 475 NW2d 830 (1991). The United States Supreme Court has established that, "in the absence of other forms of adequate legal assistance, this right of access to the courts requires providing prisoners with adequate assistance from persons trained in the law *or* adequate law libraries to assist prisoners in the filing of legal papers." *Id*. "'Prisoners are to be supplied some means of obtaining legal assistance, be it in the form of adequate prison libraries, "jailhouse lawyers," or outside legal assistance.'" *Id*., quoting *Walker v Mintzes*, 771 F2d 920, 931 (CA 6, 1985). "However, the constitutionally guaranteed

right is the 'right of access to the courts, not necessarily to a prison law library.'" *Mack*, *supra* at 7, quoting *Walker*, *supra* at 932. "Restricted access to a law library is not, per se, a denial of access to the courts." *Mack*, *supra* at 7.

This Court has held that "'[a] state is not required under the law to offer a defendant law library access once it has fulfilled its constitutional obligation to provide him with competent legal assistance.'" *Id*. at 24, quoting *United States ex rel George v Lane*, 718 F2d 226, 233 (CA 7, 1983). A "state satisfie[s] its constitutional obligation when it offer[s] defendant the assistance of counsel." *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1996). The constitutional obligation is satisfied even where a defendant declines the assistance of counsel. *Id*.

Here, documentary evidence indicates that defendant was declared ineligible to use the law library for the reason that he had an attorney. "The state was not required to offer defendant law library access once it fulfilled its obligation to provide him with competent legal assistance." *Id*. Because the state was not required to offer defendant law library access, defendant's argument concerning the adequacy of the law library is irrelevant. Further, defendant admits that, three weeks before trial, he ***was*** granted access to the law library for one hour a day, two days a week.

Defendant also notes that he requested access to the law library at the end of trial for appeal purposes, and that the trial court never fulfilled its promise to make such "arrangements." However, again, because defendant has appointed counsel on appeal, his arguments concerning access to, and adequacy of, the law library, are irrelevant. Defendant received the access to courts to which he was entitled, and no error occurred in this case.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra