

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT JAMES ANDERSON,

Defendant-Appellant.

UNPUBLISHED

July 20, 2006

No. 260593

Kalamazoo Circuit Court

LC No. 04-001249-FC

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to fifteen to thirty-five years' imprisonment. Defendant appeals as of right. We affirm.

In the early morning hours of August 13, 2004, defendant and Otis Belin went to a house rented by Bruce Ramsdell and Thomas Gormley. Angela Kirk and her children were staying with Ramsdell and Gormley at the time. Defendant and Belin kicked in a door and entered the house. Gormley fled just before they entered. Once inside, Belin put a knife to Kirk's throat as she tried to call the police. Defendant subsequently threatened Kirk, his ex-girlfriend, with an orange pipe. Ramsdell engaged in a fistfight with defendant and Belin. His wallet was stolen before defendant and Belin fled. Ramsdell, Gormley, and Kirk all knew defendant and Belin, and identified them as their assailants. Defendant and an alibi witness claimed that defendant was elsewhere drinking at the time of this incident. Defendant testified that the allegations against him were fabricated. He claimed that Ramsdell and Kirk had a vendetta against him because defendant was dating Ramsdell's ex-girlfriend, who was Kirk's former best friend.

Defendant first argues the trial court erroneously denied his mid-trial request to proceed in propria persona or be appointed substitute counsel. Generally, we review a trial court's factual findings surrounding a defendant's waiver of his Sixth Amendment right to counsel for clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). However, if the ruling involves an issue of law or constitutional question, review is de novo. *Id.* We will not disturb a trial court's decision on a defendant's motion for substitute counsel absent an abuse of discretion. *People v Taylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed

2d 562 (1975), and explicitly guaranteed by the Michigan Constitution and state statute, Const 1963, art 1, § 13, and MCL 763.1. However, the right is not absolute, and several requirements must be met before a defendant may proceed in propria persona. *People v Anderson*, 398 Mich 361, 366-367; 247 NW2d 857 (1976). The trial court must determine that the three factors set forth in *Anderson* are met before granting a defendant's request to represent himself: (1) the defendant's request must be unequivocal, (2) the defendant must assert his right knowingly, intelligently, and voluntarily after being informed of the hazards and drawbacks of self-representation, and (3) the defendant's self-representation must not unduly inconvenience the court and its proceedings. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), citing *Anderson*, *supra* at 367-368.

Additionally, the trial court must comply with MCR 6.005. *People v Ahumada*, 222 Mich App 612, 614; 564 NW2d 188 (1997). MCR 6.005(D) provides that a court may not permit the waiver of counsel 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.

These requirements ensure that the defendant knowingly and intelligently waives counsel with open eyes. *Ahumada*, *supra* at 614. Every presumption should be made against waiver. *Id.* at 617. Whether a knowing and intelligent waiver of counsel exists depends on the particular circumstances of a case, including the defendant's background, experience, and conduct. *Anderson*, *supra* at 370. Although a defendant's general competence is relevant to whether he knowingly and intelligently asserts his right to self-representation, his legal competence is not. *Anderson*, *supra* at 368.

In the present case, the trial court properly denied defendant's request for self-representation. Defendant made his request on the morning of the second day of trial. When the trial court asked defendant if he was voluntarily giving up his right to counsel, defendant replied, "[t]hat's correct. Unless I can get another attorney." Additionally, defendant stated that representing himself was "not something I want to do," but he thought he had to represent himself to impeach the testimony of the prosecution's witnesses. Defendant also stated, "I don't want to represent myself. I would definitely prefer not to." We find that the trial court correctly ruled that defendant's request for self-representation was equivocal and involuntary. A trial court does not err in denying an equivocal request for self-representation. *Anderson*, *supra* at 367. Our review of the record indicates that defendant's chief complaints about counsel's representation stemmed from defendant's misunderstanding of Michigan's rules of evidence. While his legal competence was irrelevant to whether he knowingly and intelligently asserted his right to self-representation, *id.* at 368, we find it pertinent to whether his self-representation would unduly inconvenience or burden the court. Thus, the trial court properly ruled that

defendant did not overcome the presumption against waiver of his right to representation by counsel. *Ahumada, supra* at 616-617.¹

Next, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to properly attack the accusing witnesses' credibility by failing to properly question the witnesses about their motives to fabricate the charges. The denial of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error, and questions of law are reviewed de novo. *Id.* Our review is limited to mistakes apparent on the record because no *Ginther*² hearing was held. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and he was prejudiced by the representation. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to prejudice, the defendant must demonstrate a reasonable probability that the result of the proceedings would have been different had it not been for counsel's errors. *Id.* at 312, 326-327.

A defendant must also overcome the strong presumption that counsel's performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The decision to call or question witnesses is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to question a witness or present other evidence is considered ineffective assistance of counsel only when it denies the defendant a substantial defense. *Id.* The record indicates that through his cross-examination and argument, defense counsel vigorously asserted the defense strategy at trial. Defendant has not established that defense counsel's performance fell below an objective standard of reasonableness. *Pickens, supra* at 302-303. We will not substitute our judgment for that of defense counsel regarding trial strategy matters, nor will we evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Furthermore, we note that defendant is unable to establish prejudice because substantial evidence of defendant's guilt was presented at trial. Therefore, any failure to further cross-examine witnesses did not deprive defendant of a substantial defense or affect the outcome of the trial. *Pickens, supra*.

¹ We additionally hold that the trial court did not abuse its discretion when it declined to appoint substitute defense counsel. Defendant has not properly presented this issue for appeal because he failed to raise it in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nevertheless, we have reviewed the entire record and reject defendant's argument that he demonstrated good cause for the appointment of substitute counsel. Defendant did not demonstrate a legitimate difference of opinion between himself and his appointed counsel with regard to a fundamental trial tactic. *Traylor, supra* at 462. They both agreed to an alibi defense, and defense counsel adequately tested the credibility of the prosecution witnesses. Moreover, we find that substitution of counsel on the second day of this two-day jury trial would have unreasonably disrupted the judicial process. *Id.*

² *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Finally, in his Standard 4 brief, defendant argues he was denied his constitutional right to confront his accusers because the trial court forced him to continue being represented by counsel who did not properly confront them. We review this unpreserved, constitutional claim under the plain error standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant has a constitutional right to confront accusers. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The principal protection provided by the Confrontation Clause to a criminal defendant is the right to conduct cross-examination. *Id.* The right, however, is not unlimited. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). A defendant's right of confrontation consists of four requirements: (1) a face-to-face meeting of the defendant and the witnesses against him; (2) witnesses who are competent to testify under oath or affirmation; (3) cross-examination; and, (4) an opportunity for the trier of fact to observe the witnesses' demeanor. *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), citing *Maryland v Craig*, 497 US 836, 846, 851; 110 S Ct 3157; 111 L Ed 2d 666 (1990). We find that defendant was not denied his right of confrontation. Ramsdell, Gormley, and Kirk testified under oath; defendant had the opportunity to cross-examine them; and the jury had an opportunity to observe their demeanor. Defendant had a reasonable opportunity to test the truth of their testimony. Additionally, we have already concluded that defense counsel's performance did not constitute ineffective assistance of counsel. There was no violation of defendant's constitutional rights.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray