

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRY A. FOWLER,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 168931

LC No. 92-121589

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,*JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of criminal sexual conduct, MCL 750b(1); MSA 28.788. Defendant subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to twenty-five to one hundred years' imprisonment. We affirm.

Defendant's daughter, who was six-years old at the time of trial, testified that her father sexually molested her and that he did this "lots of times." The victim told her mother about this, and the information was relayed to the police. Sandra Fowler, defendant's ex-wife and mother of the victim, witnessed defendant abuse the girl on one occasion. She related that she once saw defendant with his hand in their daughter's underwear. Defendant denied ever sexually abusing his daughter.

I

Defendant first argues that the trial court abused its discretion in denying his request for substitute counsel. We disagree. The decision regarding substitution of counsel is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

An indigent defendant is guaranteed the right to counsel. However, he is not entitled to another attorney simply because he requests one. Substitute counsel is warranted only where good cause is

* Circuit judge, sitting on the Court of Appeals by assignment.

shown and where substitution will not unreasonably disrupt the judicial process. Good cause exists where there is a legitimate difference of opinion between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.* Removal can also be justified by gross incompetence, physical incapacity, or contumacious conduct. *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993).

Defendant complained before trial that his attorney failed to provide him with information regarding the trial. Defendant also claimed that counsel refused to address his case in light of his recent divorce from his wife. The trial court rejected counsel's claim and noted that defendant's request came on "the eve of trial." Defense counsel indicated that he had received all pertinent information from the prosecutor's files. After questioning the parties, the trial court indicated that it was satisfied that all relevant information had been given to the defense and that adequate time had been allocated to permit the defense to meet and formulate strategy. At trial, defense counsel was able to elicit that defendant and his ex-wife fought frequently and defendant was able to proclaim his innocence. The court did not abuse its discretion in denying defendant's request.

II

Defendant next asserts that the trial court committed error requiring reversal in failing to adequately warn him of the hazards of self-representation. The Supreme Court has held that a trial court must comply with MCR 6.005(D) and (E), as well as the three-part test set forth in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), in order to permit a defendant to proceed pro se. *People v Dennany*, 445 Mich 412, 432 (Griffin, J.); 519 NW2d 128 (1994). In order for a defendant to dismiss his counsel and proceed pro se, 1) the defendant's request must be unequivocal, 2) the trial court must determine whether defendant is asserting this right knowingly, intelligently, and voluntarily, and 3) the trial court must determine that the defendant's decision to proceed in propria persona will not be disruptive or burdensome. *Anderson, supra* at 367-368.

Where there is error but it is not a complete omission of the court rule and *Anderson* requirements, whether the error requires reversal depends on the nature of the noncompliance. *People v Lane*, 453 Mich 132, 134 n 2; 551 NW2d 382 (1996); *Dennany, supra* at 439 (Griffin, J.). After reviewing the record, we conclude that the trial court did not advise defendant of the risks of self-representation as required by MCR 6.005(D). However, we find that this omission does not constitute error requiring reversal. As in *Anderson*, although

the trial court did not explicitly inform defendant . . . of the dangers and disadvantages of self-representation[,] . . . the sophisticated and comprehensive nature of defendant[]'s expressed reasons for dissatisfaction with his appointed counsel, together with his history of personal involvement with the criminal justice system, indicates that he knew what he was doing and made his choice with eyes open. [*Anderson, supra* at 370-371.]

Moreover, the trial court permitted defendant to proceed pro se with his attorney present as an advisor. The Supreme Court has held that the presence of stand-by counsel does not eliminate the waiver-of-counsel requirements. See *Dennany, supra* at 446 (Griffin, J.), 456-458 (Levin, J.). However, in the present case, not only was appointed counsel available for consultation, but he conducted the voir dire and the examinations of all but two of the witnesses, and in addition presented the closing argument. Defendant has failed to indicate how he was prejudiced by the trial court's failure to warn him of the hazards of self-representation. We therefore conclude that, under the circumstances of this case, the trial court's omission was harmless error.

III

Defendant further contends that the trial court abused its discretion in denying his motion for an adjournment in order to pursue further discovery. We review the denial of a continuance for abuse of discretion. Some factors to be considered include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, (4) had requested previous adjournments, and (5) had been prejudiced. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Defense counsel stated at trial that the prosecutor had provided him with "everything" from her file. Defendant does not indicate what he did not receive that might have affected the outcome of the trial. See *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). The trial court noted that defendant was provided "sufficient time" to develop a strategy. We conclude that defendant has failed to demonstrate that he is entitled to prevail on this claim. The trial court did not abuse its discretion in denying defendant's motion.

IV

Defendant also contends that he was not arraigned. However, the lower court's computer docket indicates that defendant had been arraigned, and the trial court was satisfied by the court reporter's statement that defendant had in fact been arraigned on December 21, 1992. The trial court's findings of fact are reviewed for clear error. *People v Truong*, 218 Mich App 325, 330; ___ NW2d ___ (1996), slip op p 2. On appeal, defendant merely repeats his assertion that the arraignment did not take place without presenting any evidence that the trial court's finding was clearly erroneous. Accordingly, reversal is not required.

V

Finally, defendant argues that the trial court abused its discretion in excluding the testimony of Dr. Terrance Campbell. The determination regarding the admissibility of expert testimony is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

Expert testimony is generally admissible when the scientific or technical evidence is from a recognized discipline, the testimony is helpful to the trier of fact in understanding relevant evidence, and the expert is qualified. *People v Christel*, 449 Mich 578, 590; 537 NW2d 194 (1995). However, the admissibility of syndrome evidence is limited to a description of the uniqueness of a specific behavior brought out at trial. *Id.* at 591.

In the present case, defendant sought to have Campbell testify as to how children may be influenced by others to make an accusation of sexual assault. However, defendant has not established a basis in the trial testimony for arguing that the complainant's allegations arose from suggestive questioning. Fowler testified that she asked the complainant what defendant had done and afterward never discussed the incident with her. The complainant testified that the first person that she told of the incident was Fowler. Sandra Knapp testified that she is trained in how to ask non-suggestive questions by making general, rather than specific, queries. Thus, defendant has not linked the proffered testimony to specific behavior brought out at trial. Accordingly, the trial court properly excluded Dr. Campbell's testimony on the basis of relevancy. See *id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.