

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LYNN GERMAIN,

Defendant-Appellant.

UNPUBLISHED
February 22, 2007

No. 265372
Wayne Circuit Court
LC No. 05-005421-01

Before: O’Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 57 months’ to 10 years’ imprisonment. We affirm.

On appeal defendant argues that he was denied his right to counsel and forced to represent himself at trial. We review a trial court’s factual findings for clear error and any application of an interpretation of law or application of a constitutional standard to uncontested facts de novo. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). We review a trial court’s decision to appoint substitute counsel for abuse of discretion. *Id.* at 193 n 25.

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel for his defense. US Const, Am VI; Const 1963, art 1, § 20. To determine whether a defendant has validly waived this right, the trial court must substantially comply with the requirements set forth in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976) and MCR 6.005. *People v Adkins (After Remand)*, 452 Mich 702, 706; 551 NW2d 108 (1996), overruled in part on other grounds *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004). In evaluating a defendant’s election to forego legal counsel and engage in self representation, a trial court is required to determine whether: (1) defendant’s request was unequivocal, (2) defendant asserted the right knowingly, intelligently, and voluntarily, and (3) defendant’s self-representation would not disrupt, inconvenience, or burden the court. *Anderson, supra* at 367-368. In addition, MCR 6.005 requires the court to advise the defendant of the charge, maximum and minimum prison sentences, the risks of self-representation, and permit defendant the opportunity to consult with his appointed lawyer. MCR 6.005(D)(1) and (2); *Williams, supra* at 642-643.

The trial court substantially complied with the requirements of *Anderson* and MCR 6.005 in this case. Although the trial court did not expressly ask defendant if he wanted to represent himself after appointed counsel noted defendant's request to proceed in propria persona, the court did ask defendant if he understood his rights and cautioned defendant throughout the trial that he would be held to the same standards as an attorney, with no concessions for his inexperience. Defendant acknowledged his understanding and demonstrated his comprehension of the trial court's instructions by immediately making a discovery motion and indicating his intent to preserve his rights for the record.

Because defendant indicated that he understood his rights and proceeded to make formal motions before the court, defendant's assertion of his right to represent himself was unequivocal and was made knowingly, intelligently, and voluntarily. See *Adkins, supra* at 734 (a defendant's behavior is relevant in determining whether the waiver of the right to counsel was made knowingly, intelligently, and voluntarily). It is also worth noting that at sentencing, defendant objected to the court's reference to his appointed counsel as his legal representative. Defendant elaborated, "[Appointed counsel] doesn't represent me now, he didn't represent me then. I represented myself, pro se, the record will reflect [sic]. I would intend to represent myself, pro se, in the absence of you having appointed another attorney, like I requested."

In complying with MCR 6.005, the court cautioned defendant on several occasions that he would be held to the same standards as an attorney – a risk inherent in self-representation. However, the trial court failed to address the maximum and minimum prison sentences of the charge against defendant. Nevertheless, defendant, who was 49 years old at the time of trial, demonstrated an awareness that a conviction for this offense could result in a substantial length of incarceration based on this offense being a violation of a prior plea agreement entered into by defendant in another jurisdiction. Given that "the effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands," *Adkins, supra* at 723, the requirements of MCR 6.005 were sufficiently satisfied.

Defendant also claims that the trial court forced him to represent himself. Although every criminal defendant has the right to the assistance of counsel, "no defendant is entitled to the appointed counselor of his choice." *Russell, supra* at 193 n 25. Although defendant indicated at the start of trial that he wished to represent himself and proceeded to make motions and examine witnesses, defendant claimed at several points during the trial that he wanted legal counsel because he was forced to represent himself and claimed that his appointed counsel was ineffective. However, the record does not support either of these assertions.

To the contrary, the record indicates that appointed counsel was available to assist defendant as stand-by counsel throughout the trial. The trial court told defendant during trial that he had an attorney at his disposal. Although defendant claimed that he had "fired" appointed counsel, defendant did not hesitate to tell the court that he was directing a question to appointed counsel rather than the court, wanted appointed counsel to file subpoenas, and was allowing appointed counsel to object to the jury instructions. Defendant's appointed counsel requested medical records from the prosecutor at defendant's instruction. Thus, defendant was not denied the right to counsel during trial. *Russell, supra* at 193 n 25. Rather, this Court would note that defendant was afforded the benefit of "hybrid" counsel when the trial court made available appointed counsel to assist defendant in his representation. Notably, "[a] defendant who asserts his right to self-representation has no absolute entitlement to standby counsel." *People v*

Kevoorkian, 248 Mich App 373, 422; 639 NW2d 291 (2001). As explained by the Michigan Supreme Court in *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994), “[A] defendant has a constitutional entitlement to represent himself or to be represented by counsel-but not both.” Hence, defendant was neither deprived of counsel nor forced to represent himself.

Further, when defendant’s claim that he was forced to represent himself is considered in the context of his conduct throughout trial, it is readily apparent that defendant was intentionally manipulating and delaying the proceedings rather than evidencing an honest concern about his right to counsel. For example, defendant accused the court of racial bias and using ‘legal jargon, or legalese,’ accused the prosecution of perjury, was argumentative toward and directed improper questions to witnesses, interrupted the court during its rulings, and waited until he finished presenting his case to inform the court that he wanted to call three additional witnesses. Defendant’s behavior in the courtroom was so egregious that, at one point during trial, the judge had defendant removed from the courtroom for a brief period. However, during defendant’s absence from the courtroom, no witnesses or motions were presented. Because “other facts, such as evidence of a defendant’s intentional manipulation or delay of the court proceedings as a tactical decision may favor a judicial finding of a knowing and intelligent waiver,” *Adkins, supra* at 723-724, defendant’s conduct at trial actually supports the conclusion that he waived, rather than was denied, his right to counsel.

Defendant next asserts that the judge was biased against him. We review a trial court’s factual findings regarding a motion for disqualification for an abuse of discretion, but review the application of the law to the facts de novo. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). To support a claim of judicial bias pursuant to MCR 2.003(B)(1), a judge must have actual bias or prejudice concerning a party. *Wells, supra* at 391. Bias or prejudice is defined as “an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.” *Cain v Dep’t of Corrections*, 451 Mich 470, 495 n 29; 548 NW2d 210 (1996), quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980). This bias must be both “personal and extrajudicial,” such that “the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding.” *Cain, supra* at 495. The test for disqualification comprises not just “whether or not actual bias exists but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.” *People v Houston*, 179 Mich App 753, 757; 446 NW2d 543 (1989) (citation omitted).

Defendant claims that the judge’s bias was evidenced by his denigrating and belittling remarks to defendant and because the judge made it impossible for defendant to function as a lawyer. Although some of the judge’s comments belie a critical attitude toward defendant’s efforts at self representation, *Wells, supra* at 391, there is no demonstration by defendant that there was “such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.” *Houston, supra* at 757. Defendant displayed a pattern of behavior at trial that evidenced an attempt to deliberately manipulate the proceedings. Defendant even admits in his appellate brief that he displayed a “tendency to unduly disrupt the judicial proceeding.” As such, defendant has failed to demonstrate that any purported bias on the part of the judge was extrajudicial or personal in origin. Rather, the actions and comments complained of by defendant, constituted

merely a response to defendant's disrespectful and disruptive behavior within the courtroom. *Cain, supra* at 495-496.

Contrary to defendant's claim that the judge made it impossible for him to function as a lawyer, the record indicates that the judge permitted defendant to make an opening statement and closing argument, examine witnesses, and bring forth a myriad of motions. The judge even permitted defendant to recall two different witnesses during the presentation of his case. Although defendant focuses on disparaging remarks made by the judge regarding defendant's efforts at self representation and defendant's temporary removal from the courtroom for disruptive behavior, there is no evidence that these actions comprised judicial impartiality or deprived defendant of a fair trial. Rather, the complained of actions by the judge were merely consistent with the court's power and discretion to control the trial proceedings. MCL 768.29; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). In light of these facts, the judge adequately "[held] the balance between vindicating the interests of the court and the interests of the accused." *Houston, supra* at 757.

Defendant contends that the judge denied him the opportunity for complete discovery and to call witnesses and improperly made conclusions from a witness's testimony favorable to the prosecution in the jury's presence. These arguments fail when placed in their proper context. Although defendant alleged that the information provided to him by the prosecution was incomplete, he has failed to specify what information was purportedly withheld. The prosecution asserted that any items defendant had requested were provided or were not in existence. Defendant indicated at the end of the first day of trial that he wanted to call, as a witness, the physician who treated the victim. However, defendant failed to subpoena this witness, who was not endorsed by the prosecution. In addition, defendant had the physician's report available. Contrary to defendant's assertion, the judge did not improperly draw conclusions for the prosecution, but merely summarized a witness's testimony to forestall defendant from arguing with the witness. Finally, we would note that defendant's right to due process was not violated because the trial judge was able to adequately balance the court's interests with defendant's interests, despite defendant's intentional manipulation of the proceedings. See *Cain, supra* at 498 (citation omitted).

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot