

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATHEW LUKE WOLFE,

Defendant-Appellant.

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UNPUBLISHED

October 8, 2009

No. 286700

Ingham Circuit Court

LC No. 07-001595-FH

Before: M. J. Kelly, P. J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of interfering with electronic communications, MCL 750.540(5)(a), and domestic assault and battery, second offense, MCL 750.81(3).<sup>1</sup> We affirm.

I. Basic Facts

This matter involves an altercation between defendant and the victim, his former girlfriend. Allegedly, defendant pushed and grabbed the victim with both hands, threw her to the ground, and kicked her in the stomach several times. Officers were called to the residence and defendant was arrested and charged. Before trial, defendant sent the victim several letters in which he asked that she refuse to testify or that she deny that he struck her, and also admitted to breaking her cell phone during the incident.

On the first day of trial, defense counsel was present during voir dire and presented an opening statement to the jury. The prosecution then proceeded with its case and produced two witnesses, including the victim and Matthew Salmon, one of the officers who responded to the residence. While cross-examining the victim, defense counsel revealed defendant's probation status in an attempt to impeach the victim's credibility. Concerned that a mistrial would be necessary because of the prejudicial nature of defense counsel's question, the trial court excused the jury from the courtroom and asked defense counsel whether defendant would concur in a mistrial. The following colloquy then occurred:

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<sup>1</sup> This appeal has been decided without oral argument pursuant to MCR 7.214(E).

THE COURT: [Defense counsel, you] discussed the matter with your client and it's your client's desire to do what?

DEFENSE COUNSEL: He would like to continue with the trial.

DEFENDANT: Per se [sic].

THE COURT: Sir, you have an attorney.

DEFENSE COUNSEL: Per se [sic]. He'd like to continue per se [sic].

The trial court continued:

THE COURT: I note that [defendant] has requested that he be permitted to defend himself; is that correct?

DEFENSE COUNSEL: That's correct, Your Honor.

THE COURT: Well, that's denied. He has an attorney. So long as you're here to assist him in his presentation of his defense. Now, do you wish to question witnesses, sir?

DEFENDANT: Yes, Your Honor.

THE COURT: Any problem with that, [prosecutor]?

PROSECUTOR: You know, Judge, I guess I'd have a concern as whether or not that in itself would be prejudicial, that halfway during the trial he—I mean, he starts—

THE COURT: Well, if I prepare an instruction or give the jury an instruction that [defendant] has now decided he wishes to pursue his own defense and that [defense counsel] is here to assist him in presentation of that defense, would there be a problem?

PROSECUTOR: No, Your Honor.

THE COURT: Okay. [Defense counsel], you'll have to stay on to assist the gentleman in asking questions.

The trial court then called the jury back into the courtroom and informed the jurors that defendant had chosen to “pursue his own defense” and that defense counsel would “stay on to assist [defendant] in doing that . . . .” The trial court did not inform defendant that he was waiving his Sixth Amendment right to counsel, did not make any explicit findings that defendant was knowingly, intelligently, and voluntarily asserting his right to self representation, and did not otherwise explain to defendant the dangers of self representation.

After that, defendant proceeded to cross-examine the victim. Defendant brought out testimony that tended to impeach the victim's credibility and was consistent with the defense theory of the case, including the fact that her memory had been impaired by her medication and also by the fact that she was intoxicated when the altercation occurred. In addition, defendant established that her trial testimony was inconsistent with her testimony from the preliminary examination. In the process of cross-examining the victim, defendant twice sought and was granted permission to speak with counsel.<sup>2</sup> Defendant then cross-examined officer Salmon, who admitted that he never spoke to the victim and did not observe any visible bruising on her.

On the second day of trial, defense counsel informed the trial court that defendant wanted counsel to resume his original role as defense counsel, which the trial court permitted. The prosecution presented an additional witness, the other officer who responded to the residence, Stephanie Bokovoy. Defense counsel cross-examined officer Bokovoy and presented two witnesses for the defense, including defendant. Defense counsel then gave a closing argument and the trial court provided the jury with instructions, to which defense counsel did not object. The jury returned a verdict of guilty on both counts.

Subsequently, defendant moved for a new trial on the basis that the trial court's failure to obtain a valid waiver of defendant's Sixth Amendment right to counsel constituted a structural error requiring automatic reversal. The trial court disagreed and denied the motion. It reasoned that "defendant did a better job than [defense counsel.]" This appeal followed.

## II. Right to Counsel

Defendant raises the same argument he raised in his motion for a new trial and posits that because he was deprived of counsel without a valid waiver during a critical stage of the proceedings he is entitled to automatic reversal. While we agree that the trial court's failure to obtain a valid waiver constitutes error, see *People v Anderson*, 398 Mich 361, 367-368, 247 NW2d 857 (1976); MCR 6.005(D), we disagree with defendant's contention that this error was a structural error that requires reversal. We review constitutional questions de novo. *People v Billings*, 283 Mich App 538, 541; \_\_\_ NW2d \_\_\_ (2009).

### A. Structural Error

Because there is no dispute between the parties that defendant's waiver of his right to counsel was ineffective, we must consider whether the error is nonstructural, such that it is subject to a harmless error analysis, or structural. See *People v Willing*, 267 Mich App 208, 223; 704 NW2d 472 (2005). Structural errors require automatic reversal, whereas nonstructural errors require proof beyond a reasonable doubt that the error was harmless. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000); *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). As this Court stated in *Willing*, *supra* at 224:

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<sup>2</sup> It is unclear from the record whether defendant spoke with counsel on both occasions. And, aside from these incidents, there is no indication on the record that defense counsel had any other involvement during this portion of the proceedings.

It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal. While the harmless error doctrine is not entirely inapplicable to ineffective waivers of the right to counsel, it has been limited to cases in which the effect of the deprivation of counsel does not “pervade the entire proceeding” . . . [Footnote omitted.]

Stated differently, to be deemed a structural error, the deprivation of counsel must be (1) total or complete, (2) at a critical stage of the proceedings, and (3) must contaminate the entire proceeding. As this Court has previously concluded, the assistance of a standby counsel constitutes a “total deprivation of counsel” because counsel, in this advisory capacity, is not responsible for directing the defendant’s defense and is not “counsel” within the meaning of the Sixth Amendment. *Id.* at 227-228. And, generally, critical stages include those proceedings that occur after the initiation of adversarial judicial proceedings, *Anderson (After Remand)*, *supra* at 402, and “that [hold] significant consequences for the accused,” *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

Here, defense counsel took on a purely advisory role for approximately half of the complainant’s testimony and for all of officer Salmon’s testimony. Defendant was left unrepresented during these critical stages of the proceedings, which included the testimonies of two of the prosecution’s three witnesses and which was defendant’s only chance to develop testimony from the complainant and officer Salmon consistent with his defense theory. Further, during the testimonies of these two witnesses, defendant was at risk of having inculpatory and unfairly prejudicial evidence admitted against him, which an attorney, trained in the rules of evidence, could have potentially prevented the jury from hearing. Thus, it is plain that defendant suffered a complete deprivation of counsel at a critical stage of the criminal proceeding.

Having concluded that defendant was completely deprived of counsel during a critical stage of the proceeding, we must determine whether the effect of that deprivation contaminated the entire proceeding. In other words, if the evil caused by the Sixth Amendment violation is limited, such that the entire proceeding is not infected by the violation, then application of the harmless error test is appropriate. See *Satterwhite v Texas*, 486 US 249, 257; 108 S Ct 1792; 100 L Ed 2d 284 (1988); *People v Murphy*, 481 Mich 919, 921-923; 750 NW2d 582 (2008) (Markman, J., concurring). Such an inquiry necessarily requires us to examine and determine the scope of the error’s effect on the proceedings.

In the present matter, although defendant was totally deprived of counsel at a critical stage in the trial, defendant has not identified, or even argued, how this error contaminated the entire proceedings. Rather, during cross examination of the victim, defendant elicited testimony consistent with counsel’s defense theory—mainly, that the victim’s testimony should not be believed over defendant’s testimony because the victim had previously lied regarding the incident and that her memory was affected by medication and alcohol. In addition, defendant succeeded in casting doubt on officer Salmon’s testimony by establishing that Salmon did not observe any injuries on the victim. Significantly, however, defendant has not identified any defenses that he lost, or testimony that should have been developed in support of such defenses, as a result of his deprivation of counsel. In such circumstances, we cannot conclude that defendant’s *in propria persona* examination of the two witnesses involved a necessary or inevitable impact on the subsequent proceedings, such that the denial of counsel constituted

structural error. Accordingly, because the Sixth Amendment violation did not undermine the entire criminal proceeding, and thus was not a structural error, we will apply the harmless error test.

#### B. Harmless Error

As noted, the harmless error test requires proof beyond a reasonable doubt that the error was harmless. *Anderson (After Remand)*, *supra* at 405-406. This inquiry requires us to assess the error in the context of all the other evidence presented and determine whether “there is no reasonable possibility that the evidence complained of might have contributed to the conviction.” *Id.* (quotation marks and citation omitted).

Applying this test, we find that the error was harmless. We reach this conclusion after a review of the record evidence, which reveals that the jury was faced with the task of resolving a credibility contest between the prosecution’s witnesses and defendant’s witnesses. The verdict indicates that the jury believed the victim’s testimony over defendant’s testimony. The jury’s finding of guilt is supported by additional documentary evidence that corroborated the victim’s version of events. Specifically, letters defendant had written to the victim were admitted into evidence, in which defendant admitted to breaking her cell phone and in which he asked her to refuse to testify or to say that he never hit her. And, defendant’s prior domestic assault conviction was also admitted into evidence. Further, the testimony elicited while defendant was representing himself was not obviously and unfairly prejudicial to the extent that it contributed to the jury’s verdict. Rather, the testimony elicited by defendant was beneficial to his defense. Thus, in light of the overwhelming evidence in support of defendant’s guilt, we conclude that defendant’s deprivation of counsel did not contribute to the jury’s verdict and the error was harmless.

Affirmed.

/s/ Michael J. Kelly  
/s/ Kirsten Frank Kelly  
/s/ Douglas B. Shapiro