

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SMITH,

Defendant-Appellant.

UNPUBLISHED

January 6, 2004

No. 239297

Wayne Circuit Court

LC No. 00-011009-01

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Following a bench trial, defendant was found guilty of one count of first-degree criminal sexual conduct (CSC) with a person under thirteen (digital penetration), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to twenty to forty years' imprisonment on the first-degree CSC conviction and seven to twenty years' imprisonment on each of the second-degree CSC convictions. Defendant appeals as of right. We affirm.

The charges against defendant stemmed from an assault on his then ten-year-old daughter, who lived with her mother but was temporarily staying with defendant at her grandmother's house while her mother was away.

I

On appeal, defendant first asserts that he was denied his Sixth Amendment right to counsel because the trial court allowed defendant to proceed at trial with hybrid representation.¹ We disagree.

Defendant failed to object to this alleged error in the trial court; therefore, the issue is not properly preserved for appellate review. Claims of unpreserved, constitutional error are

¹ “‘Hybrid representation’ describes an arrangement whereby both the defendant and his attorney would conduct portions of his trial and share joint representation of his defense, while the defendant retains ultimate control over defense strategy. *State v Gethers*, 197 Conn 369, 383; 497 A2d 408 (1985).” [*People v Dennany*, 445 Mich 412, 440 n 17; 519 NW2d 128 (1994).]

reviewed for plain error. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.* at 763. “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.* “Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse.” *Id.* “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.*

The right to counsel in a criminal proceeding is a substantive right guaranteed by the United States and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20. Conversely, the United States Supreme Court has held that the right of self-representation is implicitly guaranteed in the Sixth Amendment of the United States Constitution.² *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975). The right of self-representation under Michigan law is expressly secured by both constitution and statute. Const 1963, art 1,³ § 13, MCL 763.1;⁴ *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Dennany*, 445 Mich 412, 427; 519 NW2d 128 (1994) (opinion by Griffin, J.). However, the right to proceed without counsel, while constitutionally protected, is not absolute, *Dennany, supra* at 427. Rather, the determination whether self-representation is appropriate is within the discretion of the trial judge. *Adkins, supra* at 721 n 16, citing *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976).

“Proper compliance with the waiver of counsel procedures . . . is a necessary antecedent to a judicial grant of the right to proceed in propria persona. Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by

² The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

³ Const 1963, art 1, § 13 provides:

A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

⁴ MCL 763.1 provides:

On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.

the defendant.” *Adkins, supra* at 720-721. A trial court must thus elicit from a defendant a waiver of his right to counsel before granting a defendant’s request to invoke the right to self-representation. *Id.* at 720-721. Three requirements must be met for an effective waiver of counsel: (1) the defendant’s request must be unequivocal; (2) the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily; and (3) the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. *Id.* at 722. In addition, a trial court must also comply with MCR 6.005(D), which requires that the court advise a defendant of the charge, the possible penalty for the offense, the risk involved in self-representation, and also provide the defendant with the opportunity to consult with counsel. *Id.*

In the instant case, the trial court initially appointed counsel to represent defendant. When defendant became dissatisfied with his appointed counsel, the trial court appointed different counsel to represent him. When defendant became dissatisfied with his second appointed counsel and indicated that he wanted to represent himself, the trial court appointed yet a third attorney to represent him. The trial court noted that it was appointing a third attorney, and that at a future hearing, the issue of the roles defendant and appointed counsel would play at trial would be explored. When defendant’s third appointed counsel repeatedly made requests for an adjournment, the trial court appointed yet a fourth attorney, James O’Donnell, to represent him.

At a hearing on July 13, 2001, defendant asserted his right to self-representation. The trial court questioned defendant about the decision to represent himself, in accordance with MCR 6.005(D)(1) and (2). The trial court and defendant engaged in the following colloquy:

Q. And, in spite of all of that, you wish to represent yourself?

A. Yes, I do.

Q. And do you want Mr. O’Donnell to continue to be appointed as standby counsel, advisory counsel?

A. Yes.

Q. All right. Then what I will do is suggest that you cross out that line in the bottom before you sign this form where it says “I do not want standby counsel.” Cross that line out and initial it.

Defendant then signed the waiver of right to counsel form, but crossed out and initialed the sentence “I do not want standby counsel.” The trial court then questioned defendant again regarding the exercise of his right to represent himself:

Q. All right, and you did read the part that indicates that you want to be your own lawyer and you have no doubt about your decision; is that correct, you read that?

A. Yes.

Q. And do you understand it?

A. Yes.

Q. Do you have any questions at all about this form?

A. No.

Defendant eventually went to trial with *two* attorneys to aid him, O'Donnell and David Lankford. Defendant invited substantial participation by O'Donnell and Lankford at trial:

Mr. O'Donnell: At this point I'm going to be doing the opening argument because Mr. Smith has asked me to and I shall.

Mr. O'Donnell: Mr. Smith, you and I discussed the questions I was going to ask Ms. Laqueta Westbrook?

The Defendant: Yes.

Mr. O'Donnell: The Court's aware we have Mr. Lankford here and we're going to ask him to cross-examine the DNA expert.

Mr. Lankford: For the record, David Lankford, second chairing – third chairing.

Mr. O'Donnell: Mr. Smith asked that I cross-examine the police officer so with the Court's permission, I will.

Mr. O'Donnell: Judge, at this time Mr. Smith asked me to make the motion, so I will make the motion he's asking me to make.

Mr. O'Donnell: Mr. Smith, you have been acting as your own counsel through this case; right?

Mr. Smith: Yes.

Mr. O'Donnell: But you relied upon myself and Mr. Lankford to assist you at various times; is that correct?

Mr. Smith: Yes.

Thus, defendant and the two attorneys each conducted certain portions of trial and shared joint presentation of the defense. However, on appeal, defendant now argues that the trial court's discretionary permission of such hybrid representation denied him the right to counsel because his waiver of his right to representation was not unequivocal. We disagree.

"[A] defendant has either a right to counsel or a right to proceed in propria persona, but not both." *Adkins, supra* at 720, citing *Dennany, supra* at 442. "A judge, however, has discretion to appoint, either sua sponte or by request, standby counsel to assist the pro se defendant." *Id.* at 720 n 15. See also *Dennany, supra* at 443.⁵ The distinct but related issue of hybrid representation has been similarly treated as a matter within the sound discretion of the trial court. See *Dennany, supra* at 440-443; *People v Kevorkian*, 248 Mich App 373, 420-422; 639 NW2d 291 (2001). "[A]llowing hybrid representation does not compromise a defendant's right to proceed in propria persona." *Kevorkian, supra* at 421, citing *People v Griffen*, 36 Mich App 368, 372; 194 NW2d 104 (1971), overruled on other grounds in *People v Reed*, 393 Mich 342, 351; 224 NW2d 867 (1975).

Recently, in *People v Hicks*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 239981, issued 12/2/03), this Court rejected the defendant's claim that his request to represent himself with the assistance of standby counsel was equivocal as a matter of law. The defendant relied on the following language from the plurality opinion in *Dennany, supra* at 446:

Because there is no substantive right to standby counsel, the trial court is under no obligation to grant such a request. Consequently, a request to proceed pro se with standby counsel – be it to help with either procedural or trial issues – can never be deemed to be an unequivocal assertion of the defendant's rights.

The *Hicks* Court responded as follows:

We agree with the first proposition, that there is no substantive right to hybrid representation and that the trial court is under no obligation to grant a request for standby counsel. However, the second proposition, upon which defendant relies to argue that because he requested standby counsel when he announced his desire to represent himself, his request was equivocal as a matter of law, is one that we reject. [*Hicks, supra*, slip op at p 5.]

The *Hicks* Court noted that although three justices in *Dennany* endorsed the principle set forth in the lead plurality opinion that a request for standby counsel makes a request for self-representation equivocal, four other justices disagreed (albeit for different reasons) that a request to proceed pro se accompanied by a request for standby counsel can never amount to an

⁵ "Standby counsel" refers to a situation in which a pro se defendant is given assistance of advisory counsel who may take over the defense if for some reason the defendant becomes unable to continue. See *Dennany, supra* at 439.

unequivocal assertion of a defendant's rights. *Id.*, slip op at pp 5-6. The *Hicks* Court consequently concluded:

The lead plurality opinion in *Dennany* does not represent binding authority, and we are not inclined to follow it. See *Felsner v McDonald Rent-A-Car, Inc.*, 193 Mich App 565, 569; 484 NW2d 408 (1992). On the contrary, we conclude that a request for self-representation can be accompanied by a request for standby counsel and maintain its unequivocal nature. As Justice Boyle stated, a request for standby counsel does not necessarily indicate that the defendant is vacillating concerning his desire to represent himself. *Dennany, supra* at 468 n 12. Inherent in the trial court's ability to evaluate a waiver of counsel is the ability to determine whether the defendant is vacillating in his choice or merely requesting that which, as Justice Cavanagh noted, will likely be granted to the defendant anyway.

Here, the trial court permitted defendant to represent himself after defendant repeatedly stated his desire to do so. The trial court was in the best position to determine from the circumstances whether defendant requested standby counsel because he did not want to represent himself or because he recognized that it would be difficult to navigate his trial with limited knowledge of the law.

* * *

We will not disturb the trial court's discretionary decision to permit self-representation merely because defendant requested standby counsel in connection with expressing his desire to represent himself. Notably, defendant does not claim on appeal that the trial court misapprehended his intentions. He merely claims that because he combined his request for self-representation with a request for standby counsel, his request was equivocal as a matter of law. Permitting 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, see *Adkins, supra* at 724, which we will not condone. [*Id.*, slip op at p 6, footnotes omitted.]

We agree with the rationale expressed by this Court in *Hicks* and, applying that rationale to the present case, reject defendant's similar claim that his request for self-representation was equivocal as a matter of law, and he was denied his right to counsel, because the trial court permitted hybrid representation. The record set forth above clearly reflects that following the trial court's proper compliance with waiver of counsel procedures, *Adkins, supra*, defendant firmly and unequivocally insisted on his right to represent himself, and chose to do so with the ancillary assistance of not one, but two, attorneys. As the *Hicks* Court noted, "The trial court was in the best position to determine from the circumstances whether defendant requested [hybrid] counsel because he did not want to represent himself or because he recognized that it would be difficult to navigate his trial with limited knowledge of the law." *Hicks, supra*, slip op at p 6. Under the circumstances, we find no reason to disturb the trial court's discretionary decision to permit hybrid representation.

In *U.S. v Treff*, 924 F2d 975, 979 (CA 10, 1991), the Tenth Circuit Court of Appeals commented on the type of “cat and mouse game” defendant is engaging in on appeal:

It follows that if a defendant in a criminal proceeding makes an *equivocal* demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules. If the district court denies defendant’s equivocal demand to represent himself, the defendant, on appeal, will argue that his constitutional right to self-representation has been denied. And if the district court grants defendant’s demand for self-representation, the defendant, on appeal, will argue that his waiver of his right to counsel was not intelligent, knowing and unequivocal. All of which is a form of the “cat and mouse” game mentioned in *United States v Padilla*, 819 F 2d 952, 959 (CA 10, 1987) and in *United States v Gipson*, 693 F2d 109, 112 (CA 10, 1982), *cert denied*, 459 US 1216; 103 S Ct 1218; 75 L Ed 2d 455 (1983). [Emphasis in original.]

See also *Adkins, supra* at 724-725; *Dennany, supra* at 436, 440-441.

Under the circumstances, defendant’s argument is disingenuous at best, and realizes “the potential for savvy defendants to use these competing rights as a means of securing an appellate parachute.” *Adkins, supra* at 724.

II

In a related argument, defendant also maintains that he was denied his right to counsel because the trial court failed to reaffirm defendant’s waiver of the right to counsel before each proceeding as required by MCR 6.005(E).⁶ However, “the failure to comply with MCR 6.005(E) is to be treated as any other trial error.” *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996). Unpreserved, nonconstitutional error is forfeited unless the defendant demonstrates that error affected his substantial rights, i.e., affected the outcome of the lower court proceedings. *Id.* at 140; *Carines, supra* at 763. Reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.*

Here, the record indicates that the trial court failed to adhere to the court rule and engage defendant in the colloquy set forth in the MCR 6.005(E). However, assuming *arguendo* that error occurred, a review of the trial record demonstrates that the court’s failure to follow the

⁶ MCR 6.005(E) provides:

If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding . . . need show only that the court advised the defendant of the continuing right to a lawyer’s assistance . . . and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer’s assistance is not wanted.

court rule was not decisive of the outcome and did not affect defendant's substantial rights. The overwhelming evidence proved defendant's guilt. See text, issue IV, *infra*. Moreover, defendant clearly knew of his rights and had the assistance of counsel to the extent that he desired. The error, if any, thus did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Lane, supra; Carines, supra*. Accordingly, the issue is forfeited.

III

Next, defendant argues that he was denied his right to self-representation because the trial court did not allow him to cross-examine the complaining witness. We disagree.

We review a trial court's limitation of cross-examination for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). The trial court has broad discretion "to impose reasonable limits on . . . cross-examination based on concerns about . . . prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). See also *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Moreover, as previously noted, a defendant has no constitutional right to hybrid representation, but a trial court may, in its discretion, allow a defendant that form of representation. *Dennany, supra; Kevorkian, supra*. It follows, therefore, that if the court permits a defendant to proceed with hybrid representation, the court may "place reasonable limitations and conditions upon the arrangement." *United States v Nivica*, 887 F2d 1110, 1121 (CA 1, 1989).

We conclude that the trial court did not abuse its discretion in denying defendant's request to cross-examine the victim. The trial court recognized the potential that the proceedings would be disrupted by defendant's cross-examination of the victim, his ten-year-old daughter:

I guess my concern is here we have a child who is your child and I have seen you get very very angry and be very abusive and I'm very concerned that we get the truth here and I want the truth to come out through a proper cross-examination and so my – you happen to have and I have appointed carefully one of the best attorneys in this state, and I'm simply going to stand by my ruling that he will cross-examine your daughter and you may cross-examine everyone else.

I just think it is inappropriate and she is only, was only ten when it happened and she's only 12 now. You are still a person of great influence in her life and I think it would be unfair to her to allow you to cross-examine her and in

my discretion, especially when I have seen you when you were on your bad behavior.⁷

Consequently, the trial court directed that counsel, not defendant, would cross-examine the victim. Indeed, defense counsel extensively and effectively cross-examined the victim, bringing out inconsistencies in her testimony. Here, as in *Nivica, supra* at 1121-1122, defendant “asked, and was permitted, to represent himself with an appointed lawyer serving actively as co-counsel – a luxury unavailable to most *pro se* defendants (who ordinarily are allowed, at a maximum, the safety net of ‘standby’ counsel).” We therefore conclude that the trial court did not abuse its discretion in denying defendant’s request to cross-examine the victim in the instant case.

IV

Finally, defendant contends there was insufficient evidence to sustain his convictions for first- and second-degree criminal sexual conduct with a person under thirteen. We disagree.

A challenge to the sufficiency of the evidence in a bench trial is reviewed *de novo* on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), *aff’d* 466 Mich 39; 642 NW2d 339 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001); *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). The trial court’s factual findings are reviewed for clear error; a finding of fact is considered “clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made.” *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). “An appellate court will defer to the trial court’s resolution of factual issues, especially where it involves the credibility of witnesses.” *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

In the instant case, viewed in the light most favorable to plaintiff, there was ample evidence to sustain defendant’s convictions. The elements of first-degree CSC involving a child under thirteen years of age are that the defendant engages in sexual penetration with a person under thirteen years of age. MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). “Sexual penetration” is defined in part as “any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.” MCL 750.520a(1). MCL 750.520c(1)(a) provides in pertinent part that a person is guilty of second-degree CSC “if the person engages in sexual contact with another person” and the “other person is under 13 years of age.” *People v Lemons*, 454 Mich 234, 252; 562 NW2d 447 (1997); *People v Crayne*, 163 Mich App 19, 22-23; 413 NW2d 721 (1987). “Sexual contact” is defined as the intentional touching of the victim’s or actor’s intimate parts or the

⁷ The trial court’s reference to defendant getting “very, very angry” and “very abusive” was an apparent reference to defendant’s behavior at an earlier proceeding wherein he had to be removed from the courtroom due to an outburst.

intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k). "Intimate parts" include the primary genital area, groin, inner thigh, buttock, or breast of a human being. MCL 750.520a(c).

As previously noted, "questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Here, the victim testified that she was awakened by defendant touching her buttocks, and that defendant penetrated her vagina once with his finger and twice with his penis. On cross-examination, defense counsel elicited some inconsistencies between her testimony at the preliminary examination and her testimony at trial: i.e., whether defendant's penis actually penetrated her or instead touched her private parts. The trial court noted that the victim's testimony contained some inconsistencies and ambiguities, but it nonetheless determined that she was a credible witness and that her testimony had not been changed in any way or tested in any significant manner.

The trial court also found to be credible the testimony of the examining nurse and physician, who both testified that the victim was injured to the extent there was entry into the vagina with a finger, a penis, or both. Further, sperm was found on the victim's private parts, the back of her thighs, and her buttocks. Based on this evidence, the trial court determined that the victim was penetrated. The trial court further found that the victim's grandmother was a credible witness and noted her testimony that the victim told her that defendant did not penetrate her with his penis. The trial court opined that there was no question that the victim was penetrated by defendant's finger. The trial court further found that the examining nurse and physicians all followed proper procedures, and that the DNA was not contaminated. The trial court found persuasive an expert witness' testimony and conclusion that the semen belonged to defendant.

Under these circumstances, the trial court could reasonably construe that both sexual penetration and sexual contact occurred. Viewed in a light most favorable to the prosecution, we conclude that sufficient evidence was presented from which a rational trier of fact could find that the essential elements of first-degree criminal sexual conduct with a person under thirteen, digital penetration, and two counts of second-degree criminal sexual conduct with a person under thirteen were proven beyond a reasonable doubt. *Harmon, supra*.

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette