STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2013
v	No. 306087 Wayne Circuit Court
BRIAN MITCHELL GIETEK, Defendant-Appellant.	LC No. 10-007408-FH

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for felony failure to pay child support, MCL 750.165. Defendant was sentenced to five years' probation and ordered to pay restitution in the amount of $78,663. Because we determine that the trial court failed to substantially comply with case law and MCR 6.005(D) when it determined that defendant had waived his right to counsel, we reverse and remand for a new trial.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from a warrant issued by the Wayne County Prosecutor's Office against defendant, charging one count of failure to pay child support, MCL 750.165. The prosecution alleged that defendant failed to pay child support during the period of July 2009 through February 2010. At defendant's preliminary examination (where he was represented by counsel) defendant was bound over to the trial court.

During the final pretrial conference, defendant requested to represent himself at trial. The following discussion occurred:

> *Ms. Braxton [for defendant]*: In addition to that, Your Honor, Mr. Gietek is indicating that he wishes to be counsel on this case. So I'm not sure how the Court wants to deal with that. He said he wants to be the second attorney on this case.
>
> *The Court*: Well we don't do second -- well if you wish to represent yourself, Mr. Gietek, you have an absolute right to do so and I will appoint Ms. Braxton to assist you.

The Defendant: I'm sorry, Your Honor. I didn't hear you.

The Court: I said if you want to represent yourself on this case, you have a right to do so and I will appoint Ms. Braxton to assist you if that's what you prefer.

The Defendant: Okay. Thank you.

Ms. Braxton: Thank you very much, Your Honor.

Ms. Courtright [for the People]: Judge, for the record, given that Ms. Braxton is stand-by counsel, I would just ask that I be allowed to exchange discovery and witness lists with her at her office.

Ms. Braxton: And, Your Honor --

Ms. Courtright: Versus directly with the defendant.

Ms. Braxton: Understanding that I am appointed as stand-by counsel, I will, with regards to the witness list and things of that nature, discovery, communicate with Ms. -- with the attorney general directly unless Mr. Gietek has a problem with that.

And I will communicate with him first all of the information that will be presented, understanding that there are certain things by law that have to be presented to the attorney general in this case.

Is that satisfactory to you, Mr. Gietek?

The Defendant: Yes.

The Court: Okay.

Also discussed during the final pretrial conference was the amount of defendant's total arrearages. The prosecution stated that the total amount was $78,621; defendant objected to that amount claiming that the amount he "was arraigned on" was $21,000[1] and that the total amount included nonpayment for which he was already convicted. Counsel Braxton offered to review the preliminary examination transcript and the trial court stated it would order the transcript.

On the date set for trial, defendant requested an adjournment so that he could properly prepare a defense to the allegedly new amount of arrears for which he was being charged. The trial court stated that the total amount of arrears that defendant took issue with was documented in the Felony Information, which had been provided to the defense at the preliminary

[1] This figure appears to be an error on either defendant's or the stenographer's part. The amount unpaid during the charging period appears to have been roughly $2,100 to $2,400.

examination, and that because he was his own attorney, he could not depend on others to provide him the information he needed to prepare his defense. The trial court ultimately granted an adjournment of slightly over three weeks, and provided defendant with a copy of the judgment of divorce, the uniform child support order, an order modifying defendant's child support obligation, and a receipt for credit applied to his account for sale of property.

Defendant's jury trial was held on June 16, 2012. At the beginning of the proceeding, defendant told the court that he "never received an audit on the moneys owed on this case[,]" which the trial court "noted for the record." At trial, the prosecution presented two witnesses. The first, Natalie Watkins, defendant's former wife, testified that they were married for a period of time and had five children together. In December 1995, Watkins obtained a judgment of divorce against defendant in Wayne County that required defendant to pay child support. Watkins further testified that during the charging period of July 2009 through February 2010, their youngest son was under the age of 18 and still in high school. During that period, Watkins did not receive monthly child support payments from defendant. On cross-examination, defendant attempted to question Watkins about the child's paternity and location of residence, but the trial court sustained objections to those lines of questioning.

The prosecution also presented testimony from Dean Garber, a senior domestic relations specialist for the Wayne County Friend of Court. He testified that he was familiar with defendant's file, and stated that defendant's judgment of divorce contained an order for child support. He testified that defendant's file did not show that any payments were made during the period of July 2009 through February 2010, but that defendant had made payments totaling $5,345.78 during the period of January 2009 through June 2009. Garber also testified that the total arrearages amount for defendant's file was $81,473. Defendant objected that the $81,473 figure included arrearage amounts that were not part of the case; the trial court overruled defendant's objection stating, "[t]hat's not necessarily true." On cross-examination, Garber testified that if a payer made a payment greater than required under his child support order, the overage would be applied to past arrearages, if any, and would not be applied to cover future payment obligations. After closing arguments, the jury returned a guilty verdict. This appeal followed.

II. WAIVER OF RIGHT TO COUNSEL

Defendant claims he is entitled to a new trial because he did not knowingly and intelligently waive his right to counsel. Because defendant did not raise this issue at trial, it is unpreserved. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). This Court will consider an unpreserved claim of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. See *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). A defendant's ineffective waiver of his right to counsel may be error

requiring reversal. *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994). We therefore review defendant's claim.[2]

A. STANDARD OF REVIEW

When determining whether a defendant has waived the Sixth Amendment right to counsel, this Court reviews the entire record de novo, but may not disturb the trial court's factual findings regarding a knowing and intelligent waiver unless that ruling is clearly erroneous. See *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). '"[T]o the extent that a ruling involves an interpretation of law or the application of a constitutional standard to uncontested facts, our review is de novo."' *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), quoting *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), cert den 543 US 1095 (2005).

B. REQUIREMENTS FOR EFFECTIVE WAIVER OF COUNSEL

A trial court must make three findings before granting a defendant's request to waive the right to counsel. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). First, the waiver request must be unequivocal. *Id*. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. *Id*. at 368. And third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. *Id*. Regarding the second element, the trial court must inform the defendant of the potential risks of self-representation, "so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id*. These requirements were

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[2] Our Supreme Court has recently made statements that arguably indicate that there is *no* preservation requirement for ineffective waiver of counsel claims. See *People v Vaughn*, 491 Mich 642, 657; 821 NW2d 288 (2012). In *Vaughn*, the Court stated "While certain constitutional rights are preserved absent a personal waiver, those rights constitute a narrow class of foundational constitutional rights that 'are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process.'" *Id*., citing *State v Butterfield*, 784 P2d 153, 156 (Utah, 1989). According to the Court, only two fundamental rights fell into this "narrow class," one of which was the right to counsel. *Id*., citing *Johnson v Zerbst*, 304 US 458, 655-656, 58 S Ct 1019, 82 L Ed 1461 (1938). The Court stated further, "Because the right to counsel 'invokes, of itself, the protection of a trial court,' preservation of the right does not require an affirmative invocation." *Id*. at 656, citing *Zerbst*, 304 US at 655-656. Finally, the Court noted that "[T]he Supreme Court of the United States has already identified . . . two constitutional rights distinct from the class of 'structural errors' that *do* fall outside the ordinary issue preservation requirements *because* they require a personal waiver." *Vaughn*, 491 Mich at 683 n 42 (emphasis in original). Because the issue before the Court in *Vaughn* was whether the defendant preserved his claim that he was denied his right to a public trial, these statements are obiter dictum and lack the force of an adjudication. *Roberts v Auto-Owners Ins Co*, 422 Mich 495, 597-598; 374 NW2d 905 (1985). Because in any event we determine that it is appropriate to review defendant's claim, we do not decide, as a matter of law, whether preservation requirements exist for claims of ineffective waiver of counsel.

codified in MCR 6.005(D), which prohibits a court from granting a defendant's waiver request 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.

A trial court need only substantially comply with the requirements of MCR 6.005(D) and *Anderson*. *People v Russell*, 471 Mich 182, 191-192; 684 NW2d 745 (2004). "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id*. at 191.

The record in this case reveals that the trial court failed to substantially comply with *Anderson* and MCR 6.005(D). Defendant attempted to waive his right to counsel at the final pretrial conference. However, the exchange between the trial court and defendant falls far below, and in fact is devoid of, the colloquy between the trial judge and defendant that *Anderson* and MCR 6.005(D) require. While defendant did unequivocally waive his right counsel, the trial court failed to examine whether his waiver was knowing and intelligent. The trial court did not discuss the possible maximum and mandatory minimum prison sentences, the nature of the charges, or the risks involved in self-representation, as required by case law and court rule. See *Anderson*, 398 Mich at 367-368; MCR 6.005(D). Because the trial court failed to substantially comply with *Anderson* and MCR 6.005(D), defendant could not have knowingly, intelligently, and voluntarily waived his right to counsel, and his attempted waiver was ineffective. See *Russell*, 471 Mich at 191-192.

In addition, the trial court's error is compounded by the fact that it failed to remind defendant of his rights at each subsequent hearing as required by MCR 6.005(E), which 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 (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

At each subsequent hearing, including the originally scheduled trial date (at which the jury trial was adjourned) and the trial proceeding itself, the trial court failed to advise defendant of his right to appointed counsel and did not confirm with defendant that he wished to continue to waive that right. This too fell far below substantial compliance with the court rule and case law standard.

C. HARMLESS ERROR ANALYSIS

Because we have determined that the trial court erred in accepting defendant's waiver of counsel, we must next determine whether the error was structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). A structural error requires automatic reversal, while a nonstructural error does not require reversal if proved harmless beyond a reasonable doubt. *Id.*

In *Willing*, this Court examined whether an ineffective waiver of counsel was a structural error and stated, "[W]e must determine whether [the defendant's] ineffective waiver resulted in a total or complete deprivation of his right to counsel, whether this total deprivation occurred during a critical stage of the proceeding, and whether the effect of the deprivation pervaded the entire proceeding." *Willing*, 267 Mich App at 224. "The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal." *Russell*, 471 Mich at 194 n 29.

The prosecution concedes that the trial court erred, but contends that the error was harmless since the error was not structural in nature and defendant conducted himself as competently as a licensed attorney would at trial. This argument is unavailing.

First, defendant was totally deprived of counsel. The assistance of standby counsel does not negate this total deprivation, because standby counsel is not responsible for directing the defendant's defense, and is not "counsel" within the meaning of the Sixth Amendment. *Willing*, 267 Mich App at 224. In this case, defense counsel acted as standby counsel during the entire trial, from voir dire through the jury verdict, although defense counsel apparently resumed representation of defendant at sentencing. Defendant thus was deprived of counsel during all stages of trial.

Second, defendant was deprived during a critical stage of the proceedings, i.e., the entire trial. The prosecution concedes that trial is a critical stage of the proceedings.

Third, we conclude that the effect of defendant's deprivation during a critical stage of the proceedings pervaded the entire trial. The prosecution argues that, because defendant conducted himself competently, the error did not pervade the proceeding. We disagree. The Supreme Court has stated that "[n]either the quality of a defendant's advocacy skills nor his technical legal knowledge are 'relevant to an assessment of his knowing exercise of the right to defend himself.'" *People v Holcomb*, 395 Mich 326, 337; 235 NW2d 343 (1975), quoting *Faretta v California*, 422 US 806, 836; 95 S Ct 2525; 45 LEd2d 562 (1975). Moreover, defendant did not have the assistance of counsel during jury voir dire, opening statement, direct examination, admission of evidence, and other important aspects of trial, and was severely hampered by that lack of assistance. Specifically, defendant's lack of legal knowledge precluded him from (1)

formulating proper objections to the admission of evidence, (2) effectively cross-examining witnesses, and (3) arguing for the presentation of defense witnesses despite the lack of a witness list.[3] Although defendant was able to articulate an argument that he believed he had "pre-paid" child support for the relevant time period, on balance we conclude that the deprivation of counsel pervaded defendant's entire proceeding.

Because defendant's deprivation of counsel during trial was therefore a structural error, automatic reversal is required. *Willing*, 267 Mich App at 224. Consequently, we are not required to determine whether the absence of counsel during defendant's trial seriously affected the fairness of the proceedings. *Jones*, 468 Mich at 355. Nonetheless, we note that at least two instances during trial, when defendant was unable to articulate his objection to the Felony Information and properly object to the admission of evidence of the total arrearages, call to mind the types of concerns the United States Supreme Court expressed regarding the denial of counsel during a criminal trial:

> 'If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.' [*Gideon v Wainwright*, 372 US 335, 345; 83 S Ct 792; 9 L Ed 2d 799 (1963), quoting *Powell v Alabama*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932).]

Defendant was without appointed counsel during critical stages of trial proceedings, and that absence pervaded the trial. The trial court's error in failing to advise defendant under MCR 6.005(D) and *Anderson* was plain and structural in nature, requiring automatic reversal. *Willing*, 267 Mich App at 224. In light of our conclusion on this issue, we decline to address defendant's remaining arguments on appeal.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra

[3] The record reflects that the trial court asked defendant if he wanted to call any witnesses, to which defendant stated "I was originally told I couldn't have any witnesses or any evidence, so I don't have any witnesses or anything [sic] evidence." The trial court responded, "You were not told that. That's not true. I told you in fact to file a witness list and you failed to do so."