

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE BANKS,

Defendant-Appellant.

UNPUBLISHED

April 16, 2013

No. 308181

Wayne Circuit Court

LC No. 11-004668-FC

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 40 to 60 years' imprisonment for his assault with the intent to murder conviction, 20 to 40 years' imprisonment for his assault with the intent to do great bodily harm conviction (this sentence vacated), 20 to 40 years' imprisonment for his felon in possession of a firearm conviction, and five years' imprisonment for his felony-firearm (second offense) conviction. For the reasons set forth in this opinion, we affirm.

I. FACTS

This appeal arises from an incident that occurred on March 30, 2011, at 10:00 p.m. in Detroit. The victim picked up defendant in a taxi cab at a town house located at 4614 Stockton Street. Defense counsel stipulated that defendant was the individual in the taxi cab because defendant was not present at trial. Defendant put \$20 in the taxi deposit box and he requested to be driven to the intersection of Mack and Seyburn Street. While in the cab, defendant asked the victim where he was from and his name. The victim told defendant that he was from Bangladesh. Defendant then asked the victim, "What's your belief?" The victim answered defendant's question, after which defendant became silent.

As they approached the corner of Seyburn Street and Mack, defendant asked the victim to let him out of the taxi cab, and when the victim stopped his cab at the corner, defendant fired several gun shots at the victim through a partition in the cab. Defendant then fired another gunshot and demanded that the victim give him all of his money. The victim then showed defendant all of his money and told him that it would not fit through the taxi cab deposit box, so

he opened the driver-side window and threw the money outside the cab telling defendant to “keep it.” Defendant then shot the victim for a fourth time. The bullet entered the right side of the victim’s back and exited through his stomach, prompting the victim to again ask defendant why he was shooting him. According to the victim, defendant did not reply and he kept “shooting, shooting, and shooting.” The victim testified he was certain he would die as he was shot four times. There were a total of seven or eight shots fired.

In an attempt to save his life, the victim began driving the taxi at a speed of 70 miles per hour in order to reach someone that could help him, running several red lights in order to obtain the attention of the police. Defendant was still in the cab ordering the victim to let him out and hitting the partition between himself and the victim. When the victim saw a police vehicle located at Conner Street and Harper Street, he began honking his horn, activating his high beam lights, and waving his hand in an effort to stop the police vehicle.

Officers Ryan May and Christopher Hardwood were driving in a fully marked police scout vehicle on the day of the incident. Officer May was driving the police vehicle, he pulled over to the side of the road after seeing the victim flashing his taxi cab lights. When the victim drove up next to the driver side of the police vehicle, Officer May noticed that the victim’s clothes were covered in blood and that he was pointing to the rear of his taxi cab. The victim told Officer May that defendant “shot” him, he shined his flashlight in the back of the taxi cab and could see defendant in the cab with an assault rifle. Officer May told Officer Hardwood that defendant had a gun. Officer Hardwood exited the passenger side of the police vehicle, ran to the cab and opened up the rear door. Officer May then crawled out the passenger side door of the police vehicle and circled around to the other side of the taxi cab. After Officer Hardwood opened up the rear door, a black assault rifle fell to the ground. The officers arrested defendant and searched him for additional weapons. In addition to the assault rifle, they found a brown paper bag filled with nine millimeter ammunition on defendant. The victim survived the gunshot wounds after surgery and an extensive stay in the hospital.

At defendant’s final conference, he expressed that he wanted to waive his right to counsel. The trial judge and defendant had the following exchange:

Defendant: I want to make this clear. I don’t want to have this [sic] as my counselor no longer. I’ve have [sic] had three counselors out of this Legal Aid Defenders firm, and neither one of them has represented me adequately, so I want to represent myself.

The Court: You want a new lawyer?

Defendant: No. I want to represent myself.

The Court: I don’t want to let you do that. Number one, there are some serious issues here involving -- well, you’ve got two capital offenses with which you are charged which could result in life imprisonment.

Defendant: Okay, that’s fine.

The Court: Well, it's not fine. If you try to represent yourself you have a very strong likelihood of losing.

Defendant: I'm willing to take that chance, sir.

The Court: You don't even have an understanding of what you're facing. You know you do have—you are familiar somewhat with the criminal justice system. You've been incarcerated under, I think, another name. You've also used—you used both Terrence Banks and Wendell Banks?

Defendant: Indeed.

The Court: All right. The risk that you run in representing yourself are [sic] just too great. I don't think – well, I don't think you're capable of representing yourself in a capital case first of all. Second, you need to have legal counsel. I'm not suppose to advise you as to how to proceed, but when you're faced with these kind of changes, you need legal counsel.

Defendant: And that's fine, sir. I'm a Moors National and we do have a treaty with the United States, therefore the counsel- I can have assistance through the counsel.

The Court: For what counsel?

Defendant: From the embassy.

The Court: Where were you born?

Defendant: I was born in Michigan.

The Court: All right. Well, I know your beliefs that you claim you are a citizen of somewhere else, but you have no diplomatic immunity, so you are subject to the laws of this jurisdiction.

Defendant: But, I'm not a Fourteenth Amendment citizen neither.

The Court: I'm not even going to try to debate that with you because what you're saying is complete and utter nonsense.

Defendant: Okay, sir. That's fine.

The Court: And you don't even understand it, that's why you need a lawyer.

Defendant: Excuse me, sir. All I'm asking for is to appear in propria persona. That's all I need for you to do is to grant me that. My risk of losing, that's my risk. I feel like my risk is even greater with this public defender.

The Court: All right. I can appoint someone from another office for you. But, you know, it's going to be a complete disaster, I'm going to tell you, if you try to represent yourself. All this stuff about being a national and these treaties and all that, you need to get that out of your mind.

Defendant: I'm willing to take the chance, sir.

* * *

The Court: All right. I have to appoint someone, a standby counsel.

Defendant: I'm not taking no one.

The Court: Listen to what I'm saying. You're not even paying attention. You need to have a standby counsel. You can represent yourself, but you need to have a standby counsel, somebody to help you make objections with respect to the admission of evidence. And it would—well, you have to have at least a standby counsel. You can represent yourself, but you need standby counsel, somebody to help you make objections with respect to the admission of evidence. You have no background in that. You don't even know the rules of evidence. And it would—well, you have to have at least a standby counsel. You can represent yourself, but you need standby counsel for technical issues. All right.

Defendant: So, could you make it a matter of the Court record that I can have more library time over at the jail?

The Court: No. I don't control what goes on in the jail. That's up to the sheriff.

Defendant: You can make it a court order.

The Court: No, its up to the sheriff. I don't do that. There's no provisions for me to order more library time for you.

Defendant: Okay.

Following this exchange, defendant was afforded the right to represent himself. On August 19 and October 18 of 2011, defendant appeared before the trial court in propria persona. On August 19, 2011, defendant argued two motions challenging the trial court's jurisdiction and a motion to dismiss based on procedural grounds. The trial court denied both motions. On October 18, 2011, defendant again appeared before the trial court in propria persona at his pretrial hearing where he rejected the prosecutor's plea offer.¹ On December 1, 2011, the first

¹ It is undisputed that during the August 19, 2011 and October 18, 2011 appearances before the trial court, the trial court did not offer defendant the opportunity to consult with counsel, nor was his waiver of counsel affirmed.

day of trial, defendant was removed as counsel because the trial court determined that his court conduct was “a disruption in the proceedings.” The trial court then appointed standby counsel to represent defendant for the remainder of the trial. Defendant was convicted as stated above and this appeal ensued.

II. RIGHT TO COUNSEL

On appeal, defendant argues that the trial court failed to substantially comply with the waiver of counsel procedures set forth in MCR 6.005(D) and MCR 6.005(E) in granting defendant’s request to proceed in propria persona. Specifically, defendant argues that the trial court failed to adequately explain to defendant the risks of self representation.

The standard of review in questions concerning the waiver of counsel was set forth by our Supreme Court in *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004):

Although engaging in a de novo review of the entire record . . . , this Court does not disturb a trial court’s factual findings regarding a knowing and intelligent waiver of [Sixth Amendment] rights ‘unless that ruling is found to be clearly erroneous.’ [*People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983).] Credibility is crucial in determining a defendant’s level of comprehension, and the trial judge is in the best position to make this assessment.

Although we review for clear error the trial court’s factual findings regarding a defendant’s knowing and intelligent waiver of [Sixth Amendment] rights, . . . the meaning of “knowing and intelligent” is a question of law. We review questions of law de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000), quoting *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). Thus, the reviewing court is not free to simply substitute its view for that of the trial court, but must be careful to respect the trial court’s role in determining factual issues and issues of credibility.

The right of self-representation under Michigan law is secured by Const 1963, art 1, § 13 and by statute, MCL 763.1. In *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976) the Court held that a trial court must make three findings before granting a defendant’s waiver request. First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. 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. See also, *Williams*, 470 Mich at 642.

Consistent with *Anderson*, and *Williams*, MCR 6.005(D)(1) governs procedures concerning a defendant’s waiver of the right to an attorney. It prohibits a court from granting a defendant’s waiver request without first 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.

A. DEFENDANT’S WAIVER WAS UNEQUIVOCAL.

In this case, during the waiver of counsel proceeding, defendant clearly informed the trial court that it was his desire to proceed without benefit of counsel. Defendant stated: “All I’m asking for is to appear in propria persona. That’s all I need for you to do is to grant me that. My risk of losing, that’s my risk. I feel like my risk is even greater with this public defender.” Later in the proceeding, defendant clearly reaffirmed his waiver of counsel by stating to the trial court: “I’m not taking no one.” On this record, there is no question that defendant’s waiver of counsel was unequivocal.

B. DEFENDANT’S WAIVER WAS KNOWING, INTELLIGENT, AND VOLUNTARY.

As previously quoted, the trial court informed defendant that he was facing a maximum sentence of life. The trial court warned defendant that his lack of knowledge of law, specifically the rules of evidence and how to make objections, would make self-representation a problem for defendant. The trial court pleaded with defendant to accept standby counsel to assist defendant in matters such as evidentiary issues. Defendant responded by indicating he was confident that he stood a better chance at trial by representing himself rather than request the trial court appoint new counsel. Thus, defendant was fully apprised of the risks he faced by choosing to represent himself and the record evidence clearly establishes that he knowingly and voluntarily chose to accept those risks.

C. REQUIREMENTS OF MCR 6.005(D).

Trial courts must substantially comply with the waiver of counsel procedures set forth in *Anderson* and MCR 6.005(D) before granting a defendant’s request to proceed in propria persona. Substantial compliance requires the court to discuss with the defendant the waiver of counsel requirements set forth in both *Anderson* and the court rule, and to find that the defendant fully understands, recognizes, and agrees to abide by these procedures. *People v Adkins (After Remand)*, 452 Mich 702, 706; 551 NW2d 108 (1996). Our review of the record evidence presented in this matter reveals that the trial court advised 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. See MCR 6.005(D)(1). The trial court informed defendant that he was charged with two capital offenses, possible life sentences if convicted of his charges, explained the complexity of litigating his trial without knowledge of evidence or court procedures, and informed defendant that he had a strong likelihood of losing if he tried the case himself. In addition, the trial judge repeatedly warned defendant that he did not think proceeding in propria persona was in defendant’s best interest and insisted that he have standby counsel. For example, the trial court stated, “All right. The risk that you run in representing yourself are [sic] just too great. I don’t think – well, I don’t think you’re capable of representing yourself in a capital case first of all. Second, you need to have legal counsel. I’m not suppose to advise you as to how to proceed, but when you’re faced with these kind of changes, you need legal counsel.”

In this matter we find that the trial court substantially complied with the requirements of MCR 6.005(D). *Adkins*, 452 Mich at 706. See also, *Williams*, 470 Mich at 646-647. Accordingly, the trial court did not err in granting defendant’s request to waive counsel and allowing defendant to proceed in propria persona.

D. REQUIREMENTS OF MCR 6006(E).

Defendant also argues that the trial court did not comply with the requirements of MCR 6.005(E). Specifically, defendant argues that the trial court did not obtain defendant's reaffirmation that a lawyer's assistance was not needed at all subsequent to proceedings. In *People v Lane*, 453 Mich 132, 137-138; 551 NW2d 382 (1996), our Supreme Court stated: "MCR 6.005(E) requires only that the record show that the court advised the defendant of the right to an attorney and informed the defendant that an attorney would be appointed for him if the defendant were indigent, and that defendant either waived the right to counsel or requested a lawyer. In most circumstances, these requirements would be adequately met by the judge telling the defendant that in the upcoming proceeding he has the right to an attorney, at public expense if necessary, and asking the defendant whether he wishes to have an attorney or continue to represent himself. If, in the judge's opinion, the defendant no longer clearly understands the options afforded to him, and the disadvantages of each, the judge should once again engage in the extensive *Anderson* litany before obtaining either a valid waiver or a request for counsel." (Internal citations omitted).

In this case, the prosecution concedes that the trial court failed to explicitly advise defendant on the record of his right to a lawyer's assistance and failed to determine if defendant still waived that right at the August 19, 2011 and October 18, 2011 hearing before the trial court. Thus, we agree with defendant that the trial court committed plain error by failing to engage in what our Supreme Court has termed the "*Anderson* litany" at the afore-mentioned proceedings. The question before us then is whether the trial court's failure to engage in the *Anderson* litany warrants reversal of defendant's convictions. We find that the failure of a trial court to comply with MCR 6.005(E) is harmless error.

First, the facts as presented in this case persuade us that the error involved here was not decisive of the outcome. First, the evidence against defendant can best be described as overwhelming. The victim in this case was shot numerous times. Defendant conceded at trial that he was in the cab at the time the victim was shot. The victim sped his cab up in order to gain the attention of police officers, his efforts were rewarded, when the victim approached the officers they witnessed smoke billowing from the cab, a clear indication that the shooting had just occurred. Police officers saw the bloody victim pointing at defendant in the back of his cab, they arrested defendant who was in possession of two weapons.

Additionally, defendant was granted his request to proceed in propria persona. Nothing in the record leads us to conclude that even if the trial court would have given defendant the *Anderson* litany, defendant would have changed his mind. Defendant was adamant that he be allowed to represent himself, exclaiming to the trial court when being asked to allow standby counsel, "I'm not taking no one." Nothing in the record involving defendant's subsequent appearances before the trial court leads us to conclude that he entertained the notion of changing his mind relative to proceeding in propria persona. Accordingly, defendant has failed to establish the form of prejudice necessary to preserve an issue that was not raised before the trial court.

III. STANDARD 4 BRIEF.

In his Standard 4 brief, defendant argues that the trial court abused its discretion and committed a double jeopardy violation because it refused to properly instruct the jury concerning the charges of assault with intent to commit murder and assault with intent to do great bodily harm.

The trial court did not abuse its discretion or commit a double jeopardy violation by giving jury instructions for the charges of assault with intent to commit murder and assault with intent to do great bodily harm. In *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), the Michigan Supreme Court held “that a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” “The *Cornell* Court concluded that instructions on ‘cognate’ lesser offenses, which contain one element or some elements not found in the greater offense, are no longer permitted under MCL 768.32(1).” *People v Brown*, 267 Mich App 141, 146; 703 NW2d 230 (2005). The specific intent to do great bodily harm required to convict defendant of assault with intent to do great bodily harm, is different from the specific intent to kill that is required to sustain a conviction of assault with intent to commit murder. *Id.* 149-150. “Therefore, assault with intent to do great bodily harm less than murder is a necessarily included lesser offense of assault with intent to commit murder.” *Id.*

As stated *supra*, assault with intent to do great bodily harm is a necessarily included lesser offense of assault with intent to commit murder. Therefore, defendant was not denied a fair trial because the trial court gave separate jury instructions for the charges of assault with intent to commit murder and assault with intent to do great bodily harm. The trial court listed the charges on the verdict form as listed under the felony information. In addition, the trial court stated, “The Court would interject itself if the defendant were found guilty of both the assault with intent to murder and great bodily harm [.]” As a result, defendant was sentenced for his conviction of assault with intent to commit murder so that he would not be deprived of his double jeopardy rights. Finally, defendant’s double jeopardy claim is meritless because the trial court vacated his assault with intent to do great bodily harm sentence. Thus, there is no violation of defendant’s constitutional right against double jeopardy.

Also, in his Standard 4 brief, defendant argues that he was denied his constitutional right to confrontation because the victim was allowed to wear a hood during defendant’s preliminary examination. Defendant was not denied his constitutional right to confront an accusatory witness. Generally, a defendant’s Sixth Amendment right to confrontation is a question of constitutional law that this Court reviews de novo. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011). “This [, however,] Court reviews the effect of an unpreserved constitutional error under the plain-error standard.” *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009). “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 and obvious, and 3) the plain error affected substantial rights.” *Carines*, 460 Mich at 763.

Defendant has failed to demonstrate that the trial court violated his constitutional right to confront an accusatory witness by allowing the victim to wear a hood during defendant’s preliminary examination. Considering the facts, it was reasonable for the victim to feel “some fear of retaliation” after the allegations of defendant’s gun violence. Therefore, it was not

unreasonable for the court to allow the victim to testify with a hood. In addition, defendant has failed to demonstrate that he was not afforded the right to confront the victim during his preliminary examination testimony. The victim was cross-examined, under oath, in the presence of defendant by defense counsel at the preliminary examination. Also, there is no evidence that the court was unable to observe the victim's demeanor. Therefore, defendant's argument is without merit.

Defendant also argues that his trial counsel was ineffective because they failed to object to the victim wearing a hood while testifying at defendant's preliminary examination, failed to meet with defendant until minutes before the preliminary examination, and failed to discuss that the victim requested to wear a hood.

Defendant has failed to demonstrate that his trial counsel was ineffective during the preliminary examination. This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *Id.* Questions of constitutional law are reviewed by this Court de novo. *Id.*

A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. *People v Russell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 304159, issued September 4, 2012) (slip op at 1).

Failing to raise a futile objection does not constitute ineffective assistance of counsel. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

First, as stated *supra*, permitting the victim to wear a hood during the preliminary examination did not deprive defendant of his right to confront the prosecution's witness. Therefore, defense counsel was not obligated to raise a futile objection. See *Ericksen*, 288 Mich App at 201. In addition, defendant has failed to show that trial counsel's failure to meet with defendant minutes before the preliminary examination, and counsel's alleged failure to inform defendant of victim's intention to wear a hood during the preliminary examination, would have changed the result of the proceeding. See *Russell*, ___ Mich App at ___ (slip op at 1) (stating that a defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable). There is no indication that trial counsel habitually met with defendant only minutes prior to any other hearings. More importantly, there is no record evidence to determine if, in fact, defendant's allegations are true. Therefore, defendant's claims of ineffective assistance of counsel are without merit.

Lastly, in his Standard 4 brief, defendant argues that the prosecutor committed misconduct because he vouched for the prosecution's witness during closing argument.

The prosecutor did not commit prosecutorial misconduct when he asserted that the jury could decide whether the victim's testimony was credible. "The prosecutor may not vouch for the character of a witness or place the prestige of his office behind him." *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The propriety of the prosecutor's comments does not turn on "magic words" such as "We know," "I know," or "I believe." *Id.* The test of whether the prosecutor vouched for the character of a witness is if the prosecutor attempts to place the credibility of her office behind the case or suggests that she possesses extrajudicial information on which the defendant should be convicted. *Id.* at 399. An example includes a prosecutor stating that defense counsel was personally not a credible person and therefore he had failed to prove his case. *People v Bairefoot*, 117 Mich App 225, 304-305; 323 NW2d 302 (1982). However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW 2d 631 (2004).

Defendant mischaracterizes the prosecutor's statement during his closing argument. Defendant argues, "The prosecution asserted the testimony of [the victim] was 'The Truth', and that no further testimony would have been needed." During closing argument, the prosecutor stated, "And to be honest, this trial could have been shorter. I could have stopped right there because as the trier of the fact, if you believe the testimony of [the victim], that's enough. That's the truth. You decide what happened. So if you believe his testimony then that was enough." The prosecutor's statement did not reference that the victim's testimony was "The Truth," but argued that his testimony provided sufficient evidence of defendant's guilt if the jury found the victim to be credible. The prosecutor commented on the credibility of victim, which is proper because the victim was the prosecution's witness. See *Thomas*, 260 Mich App 455. Therefore, defendant has failed to demonstrate that the prosecutor attempted to place the credibility of his office behind the case or suggest that he possessed extrajudicial information. See *Reed*, 449 Mich at 399. Thus, defendant's prosecutorial misconduct argument is without merit.

Defendant also argues that the prosecutor misrepresented the facts concerning the victim's availability for the preliminary examination, and thus, the trial court did not have good cause to adjourn the preliminary examination three separate times. The Michigan Supreme Court has held that "a defendant must raise the issue of a twelve-day rule violation immediately before the commencement of the preliminary examination. Failure to raise the issue waives appellate review on the question." *People v Crawford*, 429 Mich 151, 168 ; 414 NW2d 360 (1987). Defendant failed to raise this issue immediately before the commencement of the preliminary examination. Therefore, the issue is waived.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher