STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 3, 2013
v	No. 308329 Wayne Circuit Court
DOUGLAS CORNELL JACKSON, Defendant-Appellant.	LC No. 09-003769-FC

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b, assault with intent to do great bodily harm, MCL 750.84, and unlawful imprisonment, MCL 750.349b. The trial court originally sentenced defendant to 20 to 50 years' imprisonment for each first-degree criminal sexual conduct conviction, 2 to 10 years' imprisonment for the assault with intent to do great bodily harm conviction, and 2 to 15 years' imprisonment for the unlawful imprisonment conviction. Defendant appealed to this Court and argued multiple issues. This Court affirmed defendant's convictions, but remanded for resentencing because the trial court departed from the sentencing guidelines range without stating substantial and compelling reasons, and to correct clerical errors on defendant's judgment of sentence and register of actions.[1] On remand, the trial court resentenced defendant to 20 to 40 years' imprisonment for each first-degree criminal sexual conduct conviction, 2 to 10 years' imprisonment for the assault with intent to do great bodily harm conviction, and 2 to 15 years' imprisonment for the unlawful imprisonment conviction. Defendant now appeals as of right. We affirm.

I. ALLOCUTION

Defendant argues that he is entitled to a second resentencing because the trial court denied him the opportunity to allocute at the resentencing hearing. We disagree.

[1] *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2011 (Docket No. 295994).

This Court reviews de novo the scope and applicability of the right to allocute. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003). MCR 6.425(E)(1)(c) requires that the trial court "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]" "The defendant must merely be given an opportunity to address the court if he chooses." *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). The trial court need not make "a personal and direct inquiry" as to whether the defendant wishes to address the court; rather, "the trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is imposed." *Id*.

Here, defendant was not denied his right to allocute at resentencing. Throughout the resentencing hearing, defendant was permitted by the trial court to speak freely, interrupt his attorney, and interject his statements and arguments. For example, with regard to the scoring of offense variable (OV) 4 of the sentencing guidelines, defendant interrupted stating: "I wanna' say that there was no psychological injury. Excuse me. There was no psychological injury. The victim never indicated that she moved, that she had trouble sleeping, or that she was on any type of medication that --." With regard to the scoring of OV 8, defendant interjected: "Kidnapping. You charged me with kidnapping. That's a - - if you charge me with kidnapping, that's not to be scored." With regard to the scoring of OV 10, defendant interrupted asking: "Who was intoxicated? Who was intoxicated?" With regard to OV 13, defendant interrupted, stating: "You can't score that - - ." However, when the court announced that it was ready to resentence defendant, defendant's attorney said "Okay" and defendant said nothing. After the trial court began stating its sentencing decision, defendant interrupted the court twice, but not to ask for an opportunity to address the court. It was only after the court announced its sentence that defendant requested to address the court. The trial court granted defendant's request and defendant was permitted to address the court at some length. Defendant read from a prepared document and that document was also admitted into evidence by the trial court.

Under the circumstances of this case, we conclude that defendant was given ample opportunity to address and advise the trial court of circumstances he believed should be considered before his sentence was imposed. See MCR 6.425(E)(1)(c); *Petit*, 466 Mich at 628. Further, defendant was not precluded or prevented from addressing the trial court during the resentencing hearing and clearly felt comfortable doing so. See *id*. However, even if we concluded that the trial court's actions were deficient in this regard, we would still hold that resentencing is not warranted. See *id*. at 632. When defendant specifically requested to address the trial court, his request was granted and defendant was permitted to address the court at length. Further, this was defendant's second opportunity to advise the trial court of any factors he believed were important for the trial court to consider in imposing the sentence. And defendant fails to demonstrate that any purposes of allocution would be served by granting him another opportunity to allocute. Accordingly, we conclude that defendant is not entitled to resentencing.

II. MOTION TO DISQUALIFY TRIAL JUDGE

Defendant next argues that the trial court erred in denying his motion to disqualify the trial judge on remand on the basis of actual bias. We disagree.

In order to preserve a judicial qualification issue for appellate review, a defendant must first move for disqualification before the challenged judge and, if the motion is denied, request referral to the chief judge of the circuit court for review of the motion de novo. MCR 2.003(D)(3)(a)(i); *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Because defendant failed to seek review of the denial of his motion to disqualify the trial judge by the chief judge of the circuit court, defendant has not preserved this issue for review. *Id*.

This Court reviews defendant's unpreserved claim for plain error affecting substantial rights. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). Under the plain error standard, defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

A judge is disqualified if she cannot impartially hear a case, including:

> (1) when she is personally biased or prejudiced for or against a party or attorney; (2) when she has personal knowledge of disputed facts; (3) when she has been involved in the case as a lawyer; (4) when she was a partner of a party or lawyer within the preceding two years; (5) when she knows that she or a relative has an economic interest in the proceeding or a party to the proceeding; (6) when she or a relative is a party or an officer, director, or trustee of a party; (7) when she or a relative is acting as counsel in the proceeding; or (8) when she or a relative is likely to be a material witness in the proceeding. [*People v Wade*, 283 Mich App 462, 469-470; 771 NW2d 447 (2009); see also MCR 2.003(C).]

"[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *Wade*, 283 Mich App at 470. Generally, a showing of actual, personal prejudice is required to disqualify a judge under MCR 2.003. *Id*. However, "there might be situations in which the appearance of impropriety on the part of the judge . . . is so strong as to rise to the level of a due process violation." *Id*., quoting *Cain v Dep't of Corrections*, 451 Mich 470, 503, 512 n 48; 548 NW2d 210 (1996). Consequently, a showing of actual bias is not required when the judge "(1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision maker." *Wade*, 283 Mich App at 470.

Defendant's motion to disqualify the trial judge on remand was properly denied because defendant failed to establish actual, personal prejudice. The trial judge determined that defendant was disruptive during the May 26, 2011 hearing, in which defendant repeatedly interrupted the hearing to state that Patricia Slomski, his court-appointed attorney on remand, was not his attorney. The trial judge removed defendant because he was "being disruptive and argumentative with the Court." The trial judge did not exhibit prejudice toward defendant. See *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006), citing *Illinois v Allen*, 397 US 337, 343; 90 S Ct 1057; 25 L Ed 2d 353 (1970) (a defendant may be removed from the courtroom if he continues to be disruptive). Instead of continuing the proceeding without defendant present, the trial judge continued the proceeding with defendant in "the courtroom

lock-up facility." This does not amount to actual, personal prejudice by the trial court. Likewise, the trial judge's order for a determination regarding defendant's competency did not amount to actual prejudice. "Whether [a] defendant is competent to stand trial is an ongoing concern of the court, and the issue of competence may be raised at any time during or after trial." *People v Garfield*, 166 Mich App 66, 74; 420 NW2d 124 (1988). Slomski informed the court that, based on her discussions with defendant, she was not substantially convinced that defendant could appreciate the nature of the proceedings or assist counsel in a rational way. Considering his own counsel's concerns, as well as defendant's outbursts during the hearing, the trial court's decision to order an evaluation of defendant's competency does not demonstrate bias.

Defendant further argues that disqualification was necessary because he filed a lawsuit in federal court against the trial judge and a complaint with the Judicial Tenure Commission. These actions, defendant argues, created a conflict that required the trial judge to disqualify herself. Defendant's argument is misguided because the mere filing of a complaint is insufficient to require automatic disqualification:

> [W]e disagree that the mere filing of a party's or attorney's complaint is sufficient to require automatic disqualification. To hold otherwise would allow an attorney to judge shop by filing even frivolous grievances. We note that the Judicial Tenure Commission's proceedings are confidential as to the judge until a complaint is filed by the commission, the judge is privately censured, or the investigation is dismissed. MCR 9.207. Hence, we believe that disqualification is not required until the judge is privately censured or a complaint is filed by the Judicial Tenure Commission itself. [*People v Bero*, 168 Mich App 545, 552; 425 NW2d 138 (1988).]

Thus, defendant failed to overcome the heavy presumption that the trial judge was impartial. See *Wade*, 283 Mich App at 470.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that he was denied effective assistance of counsel on remand. First, defendant argues that the trial court's failure to appoint defendant's appellate counsel on remand denied him effective assistance of counsel. We disagree.

To properly preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Defendant did neither, but simply stated in his brief: "In order to preserve the appearance of justice Appellant's case must be remanded for a Ginther hearing and evidentiary hearing." Therefore, the issue is unpreserved. Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *Id.* Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). The trial court's findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

The Sixth Amendment guarantees a defendant's right to counsel. *People v Buie*, 298 Mich App 50, 67; 825 NW2d 361 (2012). An indigent defendant is entitled to the appointment of effective counsel, but he does not have the right to have an attorney of his choosing appointed. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). As this Court stated in *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991):

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.

At the first hearing on remand, defendant objected to Slomski's representation because defendant wanted his appellate counsel to represent him on remand. Slomski was later removed after she informed the trial court that defendant filed a lawsuit against her in federal court. Although the trial court appointed new counsel, defendant's argument that he was entitled to have his appellate counsel represent him on remand is misguided because defendant did not have the right to have counsel of his choosing appointed. See *Portillo*, 241 Mich App at 543. Therefore, the trial court's appointment of counsel did not deny defendant effective assistance of counsel.

Defendant also contends that the trial court erred in ordering a competency evaluation; thus, his counsel was ineffective for failing to object to the trial court's order for a competency evaluation, and for failing to prepare to challenge the findings of that evaluation. Defendant does not argue that the trial court erred in determining that he was competent to be resentenced on remand.

Effective assistance of counsel is presumed. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish "counsel's representation fell below an objective standard of reasonableness." *Vaughn*, 491 Mich at 669, citing *Strickland*, 466 US at 688. The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). This Court determines whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Vaughn*, 491 Mich at 670, citing *Strickland*, 466 US at 690. Second, the defendant must show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669, citing *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694.

In this case, defendant has failed to establish that counsel's representation fell below an objective standard of reasonableness. See *Vaughn*, 491 Mich at 669. Defendant's own counsel informed the court that, based upon her discussions with defendant, she was not substantially convinced that defendant could appreciate the nature of the proceedings or assist her in a rational way. Defendant was also combative, aggressive, and uncooperative at previous proceedings. In light of these facts, the trial court could harbor a bona fide doubt as to defendant's competency. See *Garfield*, 166 Mich App at 74. Consequently, defense counsel was not required to object to the trial court's order for the determination of defendant's competency and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

IV. SENTENCING

Finally, defendant argues that he is entitled to resentencing because the trial court failed to articulate substantial and compelling reasons in support of its sentence of 20 to 40 years' imprisonment for each first-degree criminal sexual conduct conviction. We disagree.

This Court must affirm minimum sentences that are within the sentencing guidelines range unless there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Here, on remand, the trial court determined the sentencing guidelines range to be 171 to 285 months, not 126 to 210 months as defendant claims on appeal. Defendant does not claim that there was an error in scoring or reliance on inaccurate information; thus, we must affirm defendant's sentences for the first-degree criminal sexual conduct convictions. See *Steele*, 283 Mich App at 490.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder