STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2014
v	No. 312071 Wayne Circuit Court
TRAVIS SANTELL LONGMIRE, Defendant-Appellant.	LC No. 11-011861-FC

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 15 to 25 years for the armed robbery conviction, and one to five years for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons explained in this opinion, we affirm.

Defendant's convictions arose from the robbery of a Burger King restaurant in Detroit. The prosecution presented the testimony of three of the four Burger King employees who were present at the time of the robbery. According to the testimony, two men, one wearing a striped shirt and one wearing a white t-shirt, entered the restaurant. The man wearing the t-shirt placed an order and gave the shift manager and cashier, RR, a $5 bill. When RR opened the register, the man wearing the striped shirt, later identified as defendant, produced a handgun and pointed it at RR. As RR pleaded with defendant not to shoot, defendant took money from the register. Two other employees, SS and TR, observed defendant from their respective vantage points in the restaurant and, after defendant left the store, SS and TR again observed him in the parking lot. SS and TR each identified defendant at both a live lineup and at trial. The defense theory at trial was that defendant had been misidentified as the robber.

I. SELF-REPRESENTATION AT THE *WADE*[1] HEARING

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Before trial, defendant was permitted to represent himself at a *Wade* hearing, with his appointed attorney serving as standby advisory counsel. Defendant now argues on appeal that structural error occurred because the trial court failed to secure a valid waiver of his right to counsel by complying with *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976) and the requirements set forth in MCR 6.005(D).

A defendant's right to the assistance of counsel at trial is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). While a defendant may elect to forgo the assistance of counsel, any waiver of the right to counsel must be knowingly, voluntarily, and intelligently made by the defendant. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). Every reasonable presumption should be made against the waiver of the right to counsel. *Russell*, 471 Mich at 187. A trial court's factual findings surrounding a waiver are reviewed for clear error, while in contrast "an interpretation of the law or the application of a constitutional standard to uncontested facts" is reviewed de novo. *Id*.

When confronted with a defendant's initial request for self-representation, a trial court must determine, under standards established in *Anderson*, 398 Mich at 367-368, that

> (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*Russell*, 471 Mich at 190.]

A trial court must also satisfy the requirements of MCR 6.005(D). *Russell*, 471 Mich at 190. This court rule provides that a court may not permit the defendant's initial waiver of the right to counsel without:

> (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
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> (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. [MCR 6.005(D).]

It is not necessary, however, for a court to employ a "word-for-word litany approach" to demonstrate compliance with these requirements. See *Russell*, 471 Mich at 191. Instead, it is sufficient for the court to "substantially comply" with the substantive requirements. *Id.* "The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach." *People v Adkins (After Remand)*, 452 Mich 702, 727; 551 NW2d 108 (1996), overruled in part on other grounds by *Williams*, 470 Mich at 641 n 7. While the trial court must be certain that the requirements for a proper waiver are met, superficial irregularities will not give rise to an "appellate parachute." *Russell*, 471 Mich at 191. Once a

defendant waives his right to counsel, a trial court is obligated to reaffirm the waiver at any subsequent proceedings in accordance with MCR 6.005(E).

Although this case involves defendant's self-representation at a *Wade* hearing, defendant's initial waiver of his right to counsel occurred at an earlier district court hearing. Like the parties, we have considered not only what occurred at that district court hearing, but the hearings leading up to, and including, the *Wade* hearing in circuit court to determine whether the trial court substantially complied with the waiver requirements.

With regard to the first requirement established by *Anderson*, 398 Mich at 367, defendant's repeated affirmations before and during the *Wade* hearing clearly establish that he made an unequivocal request for self-representation. At the continued preliminary examination, defendant clearly informed the trial court that it was his desire to represent himself. At the subsequent arraignment in circuit court, although defendant reaffirmed his waiver of counsel, he indicated to the court that the reason he was representing himself was because the attorneys were not addressing an issue that he felt should be addressed, which could be construed as equivocal. At the *Wade* hearing, however, defendant had clearly reaffirmed his unequivocal waiver of counsel by expressing to the court, in response to direct questioning, that he wanted to continue to represent himself. In fact, at the outset of the *Wade* hearing, defendant announced his appearance as "Travis Longmire, acting in pro per." On this record, there is no question that, at the time of the *Wade* hearing, defendant had made an unequivocal request to represent himself.

Considering the second requirement of *Anderson*, although the trial court did not engage in an explicit colloquy with defendant regarding the dangers and disadvantages of self-representation as required by MCR 6.005(D)(1), the court did advise him of the dangers and disadvantages of self-representation during several exchanges at the various hearings. The court advised defendant of his right to counsel and encouraged defendant not to represent himself, noting his attorney's competency in the practice of law. The court also cautioned defendant that representing himself meant doing all the work himself, that the court would not tolerate defendant wasting its time, and that defendant had to follow the rules and procedures. At one point, the court asked defendant if he realized that he was "facing some very serious charges?" Defendant responded, "Correct." Defendant consistently affirmed his decision to proceed without counsel, and it is clear from the record that defendant did so "with eyes open," *Anderson*, 398 Mich at 368, because he wanted to control his case at the *Wade* hearing. The trial court was not required to pressure defendant into relinquishing his right to waive counsel. See *People v Morton*, 175 Mich App 1, 7; 437 NW2d 284 (1989). Because the record clearly establishes a knowing, intelligent, and voluntary assertion of the right to self-representation, substantial compliance with the second *Anderson* requirement was satisfied.

We likewise conclude that the third *Anderson* requirement was satisfied, even though the trial court did not make an express determination that defendant would not disrupt, unduly inconvenience, or burden the court and the administration of the court's business. Although the potential for undue disruptions existed because of defendant's lack of legal training, the record clearly establishes that the trial court adequately accounted for this factor by requiring defendant to comply with the rules and procedures of the court and warning defendant on more than one occasion that it would not tolerate defendant "wasting it's time."

Further, with regard to MCR 6.005(D), the trial court complied with MCR 6.005(D)(2) by offering defendant the opportunity to consult with his appointed lawyer, which defendant accepted. Defendant remained assisted by standby counsel during the two-day *Wade* hearing, and standby counsel advised defendant on several occasions on the record, even making certain arguments on defendant's behalf and asking occasional questions of witnesses. Although, as the prosecution concedes on appeal, the trial court failed to advise defendant of the charges and possible prison sentences as required by MCR 6.005(D)(1), the mere fact that a judge does not expressly discuss the charges and possible penalties with a defendant is not enough to defeat a finding of substantial compliance with waiver procedures. See *Adkins (After Remand)*, 452 Mich at 731. Here, the trial court reminded defendant that he faced "very serious charges." The specific charges in the information and the possible penalties were read at the initial preliminary examination. Further, at the circuit court arraignment, as the trial court read the charges in the information, standby counsel noted, for the record, that she had provided defendant with a copy of the information and the preliminary guidelines. Thus, the record establishes that defendant was aware of the seriousness of the charges.

In sum, "[d]efendant was fully apprised of the risks he faced by choosing to represent himself and he knowingly and voluntarily chose to accept them. He may not now be heard to complain about his choice." *Williams*, 470 Mich at 645 (internal citation and quotation omitted). Accordingly, defendant has not established any basis for relief with respect to this issue.[2]

II. SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURE

Defendant argues on appeal that the trial court violated due process by refusing to suppress identification testimony offered by two eyewitnesses. In particular, defendant maintains that that SS's and TR's identification testimony was tainted by impermissibly suggestive pretrial lineup procedures in which defendant was the only individual to appear in both the live lineup and a prior photographic array viewed by both SS and TR.[3] Defendant raised this argument below in a pretrial motion to suppress the identification testimony, which

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[2] Indeed, even if we agreed with defendant's assertion that the trial court failed to substantially comply with the waiver requirements, any related error in the deprivation of counsel would be harmless. An ineffective waiver of the right to counsel constitutes harmless error if "the effect of the deprivation of counsel does not 'pervade the entire proceeding'—for example, cases in which 'the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial.'" *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005) (citation omitted). Here, the *Wade* hearing related solely to the admissibility of identification evidence. As discussed *infra*, the evidence was properly admitted, meaning there was no pervading evil caused by defendant's self-representation at the *Wade* hearing.

[3] Upon viewing the array, SS selected defendant's picture and indicated that he looked familiar; TR chose someone other than defendant from the photo array. Both later identified defendant in a live line-up and at trial. TR explained her discrepancy by noting that her view during the robbery was of defendant's profile, and, while the photo array showed defendant only from the front, during the line-up he was asked to turn to the side.

the trial court denied following a *Wade* hearing. On appeal, "[t]he trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* Constitutional issues and questions of law relevant to a motion to suppress are reviewed de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). The fairness or suggestiveness of an identification procedure is considered in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a "substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). This Court has previously rejected the argument that identification procedures are unduly suggestive where a defendant is the only participant to appear in both a display of photographs and a subsequent lineup. *People v Currelley*, 99 Mich App 561, 568; 297 NW2d 924 (1980); see also *People v Soloman*, 82 Mich App 502, 507; 266 NW2d 453 (1978).[4] Accordingly, defendant's argument regarding the propriety of the identification procedures in this case are without merit, and the trial court did not clearly err in rejecting defendant's claim that the pretrial identification procedures were unduly suggestive. Because there was no unduly suggestive pretrial identification procedure, it is not necessary to determine if an independent basis existed for SS's and TR's in-court identifications. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) ("The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive.").

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. We have reviewed each of defendant's arguments and find them to be without merit.[5]

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[4] Other jurisdictions to consider the matter have reached similar conclusions. See, e.g., *United States v Martin*, 391 F3d 949, 952-953 (CA 8, 2004) (finding use of two photographic spreads sharing only a picture of the defendant was not impermissibly suggestive); *United States v Harris*, 281 F3d 667, 670 (CA 7, 2002) (rejecting claims that the lineup was unduly suggestive where the defendant was the only person to appear in both a photo array and subsequent line-up); *United States v Concepcion*, 983 F 2d 369, 379 (CA 2,1992) (holding that the placement of a suspect's picture in a second photo array after a witness failed to select anyone from the first array does not make the second array unduly suggestive or create a substantial likelihood of misidentification).

[5] In his Standard 4 brief, defendant also challenges the trial court's ruling allowing SS's and TR's identification testimony at trial. As explained *supra*, the trial court did not err by admitting this evidence.

A. FALSE CONFESSION

Defendant first asserts that police and prosecution lied about an "irrelevant video confession," and prevented defendant from viewing the video, in order to bring false allegations against defendant, thereby violating due process. While the admissibility at trial of defendant's videotaped statement was raised and addressed in the trial court, defendant did not argue that the charges against him were improperly based on that confession or that he was denied an opportunity to view the recording. Because an objection on one ground is insufficient to preserve an appellate challenge based on a different ground, *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003), defendant's present arguments relating to the confession are unpreserved. Accordingly, we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In support of his argument, defendant cites to MCR 6.201(B)(1) and (2), which prohibit the prosecution from withholding exculpatory evidence and mandate that the prosecution must, upon request, provide defendant with police reports and interrogation records concerning the case. In this case, however, there is no evidence that the prosecution violated these rules. In the trial court, defense counsel moved to preclude defendant's recorded statement as irrelevant because the discussion on the video related to a robbery at Burger King on August 15, rather than August 14. The trial court granted the motion. Contrary to defendant's arguments on appeal, the record shows that the recorded statement had been in defendant's possession for at least seven months before trial, and that, more than four months before trial, the court entered an order to accommodate defendant's viewing of the recording in jail. Although there were some technical difficulties playing the recording initially, it is apparent from defense counsel's argument that she had viewed it and was aware of its contents. Accordingly, the defense was not deprived of an opportunity to view the evidence.

Further, the record is devoid any factual support for defendant's claim that the contents of the recording were "false" or that the police officers or the prosecutor lied. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009). The factual basis concerning the recorded statement was delineated on the record and the scenario supports that the interviewing officer was questioning defendant about a robbery on a different date, August 15, perhaps inadvertently, but thereby making the statement irrelevant to this case. Despite defendant's assertion to the contrary, the record does not support his claim that he was charged with the August 14 robbery because of the irrelevant "said-confession." Rather, the record discloses that the police received an anonymous tip that defendant was involved in the August 14 robbery and, after his arrest, restaurant employees positively identified defendant as the person who robbed the restaurant on that date. At the preliminary examination, RR, the only testifying witness, identified defendant as the perpetrator. The prosecutor did not rely on, or even mention, the recorded statement, and neither did the district court in binding defendant over for trial. Indeed, ultimately the prosecution presented sufficient evidence to convict defendant at trial without introducing the video evidence. On these facts, defendant has not demonstrated plain error.

B. PERJURED TESTIMONY

Defendant argues that he is entitled to a new trial because a police officer gave perjured testimony at the *Wade* hearing when she testified that only three witnesses viewed defendant's live lineup and that there were common witnesses to both the August 14 robbery and the robbery at the same restaurant on August 15. Defendant did not raise this argument in the trial court, meaning it is unpreserved and reviewed for plain error. *Carines*, 460 Mich at 763-764. Relevant to defendant's argument, a prosecutor has a constitutional duty to inform the trial court and a criminal defendant when a government witness offers perjured testimony, and a prosecutor must correct false evidence when it is presented. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

In this case, initially, it is questionable whether the officer's testimony can even be considered false. Although eight witnesses viewed a lineup in which defendant was a participant, only three of those witnesses were associated with the August 14th robbery that led to the charges against defendant. It appears that the officer was merely limiting her testimony to the August 14th robbery when she testified that three witnesses viewed defendant's lineup. Regardless, to the extent there was any confusion, the prosecutor acted timely and appropriately to clarify the officer's testimony, eliciting testimony on redirect examination that only three witnesses associated with this case viewed defendant's live lineup and the other individuals who viewed the line-up were unrelated to the August 14th robbery. At the prosecutor's request, a police officer also delineated the names of the witnesses associated with each robbery, and the prosecutor again clarified that there were only three witnesses from the August 14 robbery who viewed defendant's live lineup. Consequently, there is no basis for concluding that defendant was prejudiced by the injection of false testimony that was not corrected. Defendant has failed to demonstrate a plain error.

C. PROCEDURAL ERRORS

In his several remaining issues, defendant presents imprecise arguments, which appear to challenge the validity of the complaint, as well as the prosecutor's compliance with MCR 6.104. In the trial court, defendant, acting in propria persona, moved for dismissal of the charges against him, arguing, inter alia, that the complaint was not lawfully filed and that he was not timely arraigned. The trial court denied the motions. We review a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). A trial abuses its discretion when "when its decision falls outside the range of principled outcomes." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012).

1. THE COMPLAINT

On appeal, defendant argues that the complaint lacked sufficient factual allegations. However, contrary to defendant's argument, the complaint did not necessarily have to contain factual allegations to support a finding of probable cause. See MCR 6.101; MCL 764.1d. Specifically, defendant's argument appears to be premised on the assertion that the complaint was deficient because the officer who signed it as the complaining witness lacked personal knowledge of the events surrounding the crime. To this end, defendant argues that RR was required to sign the complaint. Neither MCR 6.101 nor MCL 764.1a, which governs complaints, require the complaint to be signed by either an eyewitness or a person with personal knowledge.

Rather, factual allegations contained in the complaint "may be based upon personal knowledge, information and belief, or both." MCL 764.1a(3). See also *People v Collins*, 52 Mich App 332, 336; 217 NW2d 119 (1974) ("The fact that the complaint was based on complainant's information and belief, rather than his personal knowledge, does not divest the court of jurisdiction to try the case."). Consequently, as the trial court aptly observed, the signature of the officer is sufficient to meet the criteria. In sum, the complaint in this case was valid because it was signed and sworn, it stated the substance of the accusations against defendant, and it cited the name and statutory citation of the offense. See MCL 764.1a(1), MCL 764.1d, MCR 6.101.

We also reject defendant's claim that all charges against him should have been dismissed because the complaint was not properly date stamped as required by MCR 8.119(C). The record shows a date stamp of August 20 on the complaint and warrant, designating when the complaint and warrant were sworn before the magistrate. In addition, the lower court register of actions shows that the warrant was the first document filed in the circuit court case. Defendant is not entitled to relief on these facts.

2. MCR 6.104(D)

Under MCR 6.104(D), if an accused is arrested without a warrant, the prosecutor must file the complaint "at or before the time of arraignment." "On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint . . . ." *Id.* MCR 6.104(D) also requires the court to comply with MCL 764.1c. Here, the record shows that the felony complaint was filed before the arraignment and, upon receiving the felony complaint, the magistrate issued an arrest warrant for defendant that same day. A complaining witness and the magistrate signed the felony complaint, and the magistrate signed the arrest warrant. The warrant contained an endorsement that a finding of reasonable cause was made. The record also shows that defendant was arraigned the next day, and pleaded not guilty to the charges against him. In all respects, the prosecutor complied with MCR 6.104(D).

3. DELAYED ARRAIGNMENT

Lastly, defendant argues that his convictions must be reversed because he did not receive a probable cause hearing within 48 hours of his warrantless arrest. MCR 6.104(A) provides that "unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment . . . ." See also MCL 764.13 ("A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested."). The United States Supreme Court has held that any delay of more than 48 hours must be presumed unreasonable, and in such circumstances the government must demonstrate the existence of a bona fide emergency or other extraordinary circumstance justifying the delay. *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). Periods of less than 48 hours may also be held unreasonable, but is the arrested individual's burden to prove the delay was unreasonable. *Id.* at 56. Examples of unreasonable delay are those for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. *Id.* In evaluating whether a delay in a particular case is unreasonable, courts must allow a substantial degree of flexibility. *People v Manning*,

243 Mich App 615, 628; 624 NW2d 746 (2000). In some circumstances, an unreasonable delay may necessitate the exclusion of evidence obtained during the delay. *Id.* at 642-643. See also *People v Mallory*, 421 Mich 229, 240-241; 365 NW2d 673 (1984). However, "[w]hile an improper delay in arraignment may necessitate the suppression of evidence obtained as a result of that delay, the delay does not entitle a defendant to dismissal of the prosecution." *People v Harrison*, 163 Mich App 409, 421; 413 NW2d 813 (1987).

In this case, police arrested defendant on the evening of August 16, relying on outstanding warrants unrelated to the robbery at issue in the case. A warrant for the present offenses was prepared on August 17 and submitted to the prosecutor's office on the morning of August 18. The warrant was signed August 20, and defendant's arraignment was held August 21. However, even supposing that defendant was belatedly arraigned, the delay would not have entitled him to dismissal of the prosecution before trial, see *id.*, and it does not merit reversal of his convictions. Defendant points to no evidence that was collected during the delay which would require suppression. On the contrary, the photo array was shown to witnesses on August 16, sometime before defendant's arrest that day. On the following day, August 17, well within the 48 hour period, defendant was placed in a live lineup, identified as the perpetrator by two witnesses, and interviewed by the police. Thus, the evidence presented at defendant's trial was gathered contemporaneously with his arrest. There is no indication in the record that any evidence was gathered during any unreasonable delay between defendant's arrest and arraignment. Consequently, defendant was not entitled to dismissal.

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher