STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MERVIN DUANE HAGUE,

Defendant-Appellant.

UNPUBLISHED
May 19, 1998

No. 186698
Branch Circuit Court
LC No. 94-115845-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ROLAND THORN,

Defendant-Appellant.

No. 187322
Branch Circuit Court
LC No. 95-005882-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID IRVANGELO GARDEMANN,

Defendant-Appellant.

No. 187323
Branch Circuit Court
LC No. 95-005892-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 187865
Branch Circuit Court
LC No. 95-025893-FH

SCOTT EDWARD HILDEBRAND,

Defendant-Appellant.

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

In these consolidated cases, defendants appeal by right their convictions by jury of obtaining more than $100 by false pretenses, MCL 750.218; MSA 28.415, securities fraud, MCL 451.501; MSA 19.776(101), and conspiracy to commit those offenses, MCL 750.157a; MSA 28.354(1). Defendant Thorn was also convicted of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). The trial court sentenced defendant Hague to concurrent terms of imprisonment of 2½ to 10 years for his convictions. The court sentenced defendant Gardemann to concurrent terms of imprisonment of 3 to 10 years and defendant Hildebrand to concurrent terms of imprisonment of 6 1/3 to 10 years for their convictions. The court enhanced defendant Thorn's sentences as a second felony offender under MCL 769.10; MSA 28.1082 and sentenced him to concurrent terms of imprisonment of 5 to 15 years for obtaining money by false pretenses and securities fraud, 5 to 10 years for conspiracy to commit the offenses, and 1 to 7½ years for possession of a firearm. We affirm.

This case arises from defendants' acts in soliciting money from Michigan residents to share in the proceeds of two lawsuits against the federal government. The prosecutor alleged that defendants falsely represented that two lawsuits were either in progress or successfully completed and that qualified individuals who filed "claims" with defendants (at $300 per claim) could receive millions of dollars from the lawsuit proceeds. The prosecutor established that, contrary to defendants' statements, the lawsuits had been dismissed, no class action existed, and defendant Hildebrand had not been appointed a receiver to disburse millions of dollars from the purported proceeds of one of the suits. The prosecutor further established that, contrary to defendants' representations, individuals could not share in the proceeds purportedly recovered from the federal government by merely paying defendants $300 and filing a claim.

Attorney Robert E. Anderson represented defendants Hague, Thorn, and Gardemann at trial, whereas defendant Hildebrand proceeded in propria persona. The jury returned guilty verdicts on the charged offenses.

I. Defendants Hague, Thorn & Gardemann

A. Joint Representation

Defendants Hague, Thorn, and Gardemann argue that their attorney's joint representation of them denied them their right to effective assistance of counsel. This Court reviews constitutional issues

de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). In undertaking our review, however, we recognize the trial court's superior ability to evaluate witness credibility and will defer to the court's findings when the determination turns on such an evaluation. C.f. *People v Catey*, 135 Mich App 714, 726; 356 NW2d 241 (1984).

The right to counsel under the Sixth Amendment entails "a correlative right to representation that is free from conflicts of interest." *Wood v Georgia*, 450 US 261, 271; 101 S Ct 1097; 67 L Ed 2d 220 (1981). Multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980). If the trial court fails to conduct an inquiry after a timely objection or when it knows or reasonably should know a particular conflict exists, the reviewing court presumes prejudice and will reverse. *Id.*; *United States v Levy*, 25 F3d 146, 154 (CA 2, 1994). The Supreme Court, however, has never held that "the possibility of prejudice that 'inheres in almost every instance of multiple representation' justifies the adoption of an inflexible rule that would presume prejudice in all such cases." *Burger v Kemp*, 483 US 776, 783; 107 S Ct 3114; 97 L Ed 2d 638 (1987). Instead, the defendant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his counsel's performance. *Id.*; *Cuyler, supra* at 350. If the defendant meets this burden, this Court presumes prejudice and must reverse his conviction because unconstitutional multiple representation is never harmless error. *Burger, supra* at 783; *Cuyler, supra* at 349; *Holloway v Arkansas*, 435 US 475, 487-491; 98 S Ct 1173; 55 L Ed 2d 426 (1978).

In *People v Larry Smith*, 456 Mich 543, 556-557; ___ NW2d ___ (1998), the Michigan Supreme Court recently discussed the United States Supreme Court's treatment of ineffective assistance claims involving conflicts of interest, stating as follows:

> In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), this Court adopted the ineffective assistance of counsel standard articulated by *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove a claim of ineffective assistance of counsel under *Pickens* and *Strickland*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial. *Strickland*, pp 688-689. In dicta however, *Strickland* cited *Cuyler's* rule for cases involving ineffective assistance of counsel claims premised on an actual conflict of interest. *Id.*, p 692. *Cuyler* calls for a heightened standard in conflict of interest claims. In circumstances involving a conflict of interest, *Cuyler* stated that "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, p 692. This heightened standard is not a rule of prejudice per se; rather, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.*, quoting *Cuyler, supra*, pp 348-350.

In considering an alleged conflict of interest based on trial counsel's pending prosecution in the same county as the defendant whom he represented, the Court rejected a per se rule, favoring "the reasoned approach of *Cuyler*, *supra*." *Id.* at 558.

We begin our analysis by considering whether the trial court fulfilled its inquiry obligation under the Sixth Amendment and complied with MCR 6.005(F), the court rule regarding joint representation. Under the Sixth Amendment, the trial court must conduct an inquiry after a timely objection or when it knows or reasonably should know a particular conflict exists. *Levy, supra* at 154. To satisfy the Sixth Amendment, the trial court must "investigate the facts and details of the attorney's interest to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." *Id.* at 153. In doing so, the court is entitled to rely on counsel's representations regarding the possibility of conflicts. *Id.* at 154; *United States v Crespo de Llano*, 838 F2d 1006, 1012 (CA 9, 1987).

In this case, the trial court queried defendants and counsel regarding the joint representation:

> THE COURT: Please be seated.
>
> I wanted to take up a couple of matters preliminarily before the jury is brought back in.
>
> We discussed these in chambers before the jury selection process.
>
> First of all, the Court is required to inquire of the three Defendants who are represented by Mr. Anderson to make sure that they are aware and wish to waive their right to have separate counsel.
>
> First of all, Mr. Hague, you are aware that you could be represented by another attorney?
>
> DEFENDANT HAGUE: Mr. Anderson is my attorney.
>
> THE COURT: No, I know that. What I'm saying is you understand that you have the right to be represented by an attorney separate from the attorney representing Mr. Thorn and Mr. Gardemann?
>
> DEFENDANT HAGUE: I understand.
>
> THE COURT: Okay. And it is your choice and desire to be represented by Mr. Anderson, even though he is representing the two Co-Defendants at the same time?
>
> DEFENDANT HAGUE: Yes, it is.

THE COURT: Okay. Mr. Thorn, the same questions of you; you are aware that you have the right to be represented by counsel separate and apart from the attorney representing Mr. Gardemann and Mr. Hague?

DEFENDANT THORN: Yes, sir.

THE COURT: And it is your desire, nevertheless, to be represented by Mr. Anderson?

DEFENDANT THORN: It is.

THE COURT: Thank you.

And, Mr. Gardemann, the same questions of you, sir; you, too, are aware that you have the right to be represented by an attorney separate and apart from the attorney representing the two other Co-Defendants?

DEFENDANT GARDEMANN: Yes, I do.

THE COURT: And understanding that it is your desire to, nevertheless, be represented as well by Mr. Anderson?

DEFENDANT GARDEMANN: Yes, sir.

THE COURT: Thank you.

And, Mr. Anderson, as also is required of the Court to inquire of you, do you know of any possible conflict in your representing the three Defendants?

MR. ANDERSON: I do not, at this time, know of any reason to believe that any of the defenses offered by any of these three Defendants would be inconsistent. I so (sic) I do not believe that there is any conflict in representing these three Defendants in the same case.

THE COURT: Thank you.

Assuming arguendo that the multiple representation triggered the trial court's inquiry obligation,[1] we conclude that the exchange between the trial court, counsel, and defendants satisfied the Sixth Amendment because the court was entitled to rely on counsel's representation that no conflict existed. *Levy, supra* at 154; *Crespo de Llano, supra* at 1012. We agree, however, with defendants' assertion that the trial court did not strictly comply with the requirements of MCR 6.005(F), which provides in pertinent part:

> Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that

might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests:

(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

The trial court's failure to comply in full with MCR 6.005(F), however, does not, in itself, constitute error requiring reversal. *People v LaFay*, 182 Mich App 528, 531; 452 NW2d 852 (1990); *People v Gamble*, 124 Mich App 606, 611; 335 NW2d 101 (1983). Defendants must show that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. *Burger, supra* at 783; *Cuyler, supra* at 350; *Larry Smith, supra* at 557. An actual conflict is evidenced "if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action." *Sullivan v Cuyler*, 723 F2d 1077, 1086 (CA 3, 1983); accord *Kirby v Dutton*, 831 F2d 1280, 1282 (CA 6, 1987).

In this case, defendants contend that a conflict of interest arose in Anderson's representation when Hague informed Anderson of the substance of his intended trial testimony. According to Anderson, Hague informed him shortly before trial that he would testify that he told Thorn and Gardemann that Hildebrand was stealing money and that the "money wasn't going to Colorado." On the basis of Hague's prior statements, Anderson believed that Hague would commit perjury if he testified in accordance with his expressed intentions. He confronted Hague with his belief, but Hague did not waiver regarding his planned testimony. Anderson determined that he could not permit Hague to perjure himself and ultimately decided not to call any of defendants at trial. Anderson testified at Thorn's *Ginther*[2] hearing that he advised Thorn not to testify because he could not allow Hague to testify. Anderson maintained that allowing Thorn and Gardemann to testify would harm Hague's case because the jury would draw a negative inference from the fact that codefendants chose to testify while Hague did not. Defendants argue that they each were denied the effective assistance of counsel by Anderson's representation of them after he learned of Hague's planned testimony.

We reject defendant Hague's claim because he has not shown that an actual conflict of interest adversely affected Anderson's performance. Anderson certainly acted properly in advising Hague not to testify. *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995). Therefore, the conflict of interest did not adversely affect Anderson's representation of Hague because, under the standards of ethical conduct, Anderson would have had to act in the same manner even if he had not represented the other defendants. *Id.*

We likewise conclude that the conflict did not adversely affect Anderson's representation of defendants Thorn and Gardemann. Initially, we agree that an attorney's conduct in basing his advice to one client on what is good for another client can satisfy the *Cuyler* test because it may adversely effect counsel's performance. See *Castillo v United States*, 34 F3d 443, 446 (CA 7, 1994). We employ, however, the helpful test adopted by the First, Second, and Third Circuits to determine adverse effect on the basis of an attorney's alleged omissions:

> First, [the defendant] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict or not undertaken due to the attorney's other loyalties or interests. [*United States v Fahey*, 769 F2d 829, 836 (CA 1, 1985); accord *United States v Gambino*, 864 F2d 1064, 1070 (CA 3, 1988), and *Winkler v Keane*, 7 F3d 304, 309 (CA 2, 1993).]

In this case, the defense tactic of calling all defendants to testify was not a plausible alternative strategy. It did not possess sufficient substance to amount to a viable alternative. The prosecutor presented substantial evidence to establish defendants' fraudulent actions. In the face of the uncontradicted evidence, trial counsel proffered a defense that hinged on the meaning of the words defendants used to solicit the "claims." Trial counsel essentially argued that because defendants and the claimants did not ascribe the legal meanings to words such as "class action" and "receiver," defendants did not engage in fraud. Regarding this defense strategy, the trial court remarked:

> [Q]uite frankly, I was very impressed, to the point of wondering seriously what the impact of the argument and the use of the strategy would be upon the jury. Thinking that, indeed, it may well have won the day.

Had defendants testified in this case, they would have had to explain on cross-examination certain compelling evidence, such as the whereabouts of the money collected from the claimant-victims. They would also have had to explain their conduct in continuing to accept claims after they possessed documents clearly stating that the court had dismissed the lawsuits. This testimony would certainly have undermined their defense.

Further, we recognize the trial court's superior position to evaluate Anderson's credibility. *Catey, supra* at 726. The trial court denied Thorn's motion for new trial, reasoning in part:

> [T]he court does not accept the argument that simply because Mr. Anderson would not call Mr. Hague as a witness that he would not call Mr. Thorn. And, indeed, it was clear from the testimony that it was, in fact, not Mr. Anderson's decision, but the Defendant's alone not to testify during the course of the trial.

We, like the trial court, also view Anderson's testimony with some skepticism. The trial court noted as follows:

> The Court, as an aside, would indicate that it was clear, from Mr. Anderson's testimony, that he was emotionally involved, had represented [Thorn] in other matters, as well. And, as he testified, regarded Mr. Thorn as a friend.

We therefore conclude that the defense tactic of calling all defendants to testify was not a viable alternative under the circumstances of this case. Accordingly, trial counsel's active representation of conflicting interests does not require reversal because it did not adversely affect his performance. *Cuyler, supra* at 350; *Larry Smith, supra* at 557.

B. Defendants Thorn & Gardemann's Remaining Issues

Defendants Thorn and Gardemann argue that they were denied the effective assistance of counsel by Attorney Anderson's conduct and decisions at trial. We disagree. To establish ineffective assistance of counsel, defendants must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced them so as to deprive them of a fair trial. *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). Defendants must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994). Regarding the second requirement, defendants must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnson,* 451 Mich 115, 122; 545 NW2d 637 (1996).

We reject defendants Thorn and Gardemann's contention that Anderson's presentation of a meritless defense denied them a fair trial. Although counsel erroneously believed that the court would grant a directed verdict because the victims did not believe that they had been defrauded, counsel's representation did not deny defendants a fair trial. Defendants have not demonstrated that counsel's action prejudiced them. *Pickens, supra* at 338. Counsel presented a defense that turned on the meaning of the words defendants used to solicit claims. The trial court observed that this defense actually caused it to question whether the jury would return a guilty verdict. Therefore, in the end, counsel provided constitutionally adequate representation.

Defendant Thorn also argues that Anderson's failure to testify on his behalf and move to sever the gun charge denied him the effective assistance of counsel. We disagree. Anderson's testimony at the *Ginther* hearing revealed that his potential testimony was marginally relevant. We conclude under these circumstances that Anderson did not err by failing to testify for Thorn because, as Anderson stated at the hearing, Thorn would not have trusted another attorney. Regarding the gun charge, Anderson properly relied on Thorn's representation that he had not been convicted of the underlying felony as stated in the information. Further, Anderson presented a witness who testified that he, not Thorn, actually possessed the weapons. We therefore conclude that Anderson's decision did not so prejudice defendant Thorn as to deny him a fair trial.

Defendant Thorn additionally contends that Anderson erred in not challenging the constitutionality of the gun charge. We disagree. The offense of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6), neither violates a person's right to bear arms under Const 1963, art 1, § 6, nor the Ex Post Facto Clauses of the United States and Michigan Constitutions.

People v Green, __ Mich App __, __; __ NW2d __ (Docket No. 194995, issued 3/20/98) slip op p 4; *People v Tice*, 220 Mich App 47, 52; 558 NW2d 245 (1996). Counsel was not required to pursue this futile motion. *Daniel, supra* at 59. Accordingly, in docket numbers 187322 and 187323, we affirm defendants Thorn and Gardemann's convictions.

C. Defendant Hague's Remaining Issues

We reject defendant Hague's assertion that he was denied the effective assistance of counsel by attorney Anderson's conduct and decisions at trial. Because defendant did not raise this issue below, review is foreclosed unless the alleged deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

First, Anderson's failure to move for a separate trial did not deny defendant Hague the effective assistance of counsel. Counsel employed an acceptable strategy of presenting a common defense to the charged offenses. C.f. *Holloway, supra* at 482-483. This Court will not substitute its judgment for that of counsel on matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Similarly, trial counsel's decision not to sever defendant Thorn's gun charge did not sufficiently prejudice defendant Hague to require a new trial.

We likewise reject defendant Hague's argument that Anderson should have claimed that the prosecutor offered him immunity from prosecution and objected to the jury instruction regarding securities fraud. The record does not reflect that the prosecutor violated the terms of the purported immunity agreement. Further, the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Counsel was not required to pursue these futile matters. *Daniel, supra* at 59.

Defendant Hague also argues that Anderson's failure to object to evidence regarding the Iowa Attorney General's actions to halt defendants' allegedly fraudulent practices denied him the effective assistance of counsel. We disagree. Defendant has not shown that, had counsel acted differently, the result of this case would have been different and the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant Hague further argues that he is entitled to resentencing because his presentence investigation report was factually inaccurate and the trial court improperly scored offense variable 9. We disagree. The court indicated that it would disregard the references to uncharged alleged criminal activity and other allegedly improper behavior. The court affirmatively stated that it was not "inflamed" by the presentence report. The court further indicated that it would consider defendant's statements regarding his asserted lesser role in the conspiracy in fashioning a sentence. Thus, the trial court properly resolved defendant's challenges to his presentence report by indicating that it would not consider the allegedly inaccurate information. *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988). Finally, regarding offense variable 9, defendant does not state a cognizable claim on appeal because he merely attacks the sufficiency of the evidence to support the trial court's scoring decision. *People v Mitchell*, 454 Mich 145, 177-178; 560 NW2d 600 (1997). Accordingly, in docket number 186698, we affirm defendant Hague's convictions and sentence.

II. Defendant Hildebrand

Defendant Hildebrand argues that the trial court erred in allowing him to waive his right to counsel and proceed in propria persona. We disagree. This Court reviews constitutional issues de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). Regarding challenges to the trial court's decision to allow a defendant to represent himself, this Court reviews the record to determine whether the trial court substantially complied with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D). *People v Adkins*, 452 Mich 702, 706; 551 NW2d 108 (1996); *People v Ahumada*, 222 Mich App 612, 614; 564 NW2d 188 (1997). We are mindful, however, that the trial judge is in the best position to determine whether a defendant knowingly and voluntarily waived his right to counsel. *Adkins, supra* at 723.

This Court recently summarized the *Anderson* and court rule requirements in *Ahumada, supra* at 614-615:

> There are three main requirements with which a court must comply in this context. First, the defendant's request must be unequivocal. [*Adkins, supra* at 722.] Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. *Id.* In assuring a knowing and voluntary waiver, the trial court must make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with eyes open. *Id.* Third, the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. *Id.* In addition, MCR 6.005 requires the trial court to offer the assistance of an attorney and to advise the defendant about the possible punishment for the charged offense.

Under the substantial compliance test, the trial court must discuss the substance of these requirements with the defendant and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. *Adkins, supra* at 726-727.

We conclude that the trial court substantially complied with the waiver of counsel procedures in this case. The record reflects that defendant Hildebrand notified the court five days before trial that he wished to discharge his counsel and proceed in propria persona. Defendant unequivocally requested to represent himself during the following exchange:

> [The Prosecutor]: The only thing I want to make clear – and I understand what Mr. Hildebrand is saying about not finding any attorneys in this state. What I want clear on the record is that he wants to represent himself.
>
> THE COURT: And, under the circumstances as you have described them, is that the case, Mr. Hildebrand?
>
> DEFENDANT HILDEBRAND: Yes, it is.

The record also evinces a knowing, intelligent, and voluntary waiver of defendant's right to counsel. The trial court explained to defendant that he had a right to be represented by an attorney and informed him of the risks inherent in his decision to represent himself. The court elicited defendant's admission that he was not a lawyer and explained that he likely did not have the same skill and knowledge regarding court rules and procedures as an attorney. Defendant stated that he understood those risks, but did not believe that any properly registered or licensed attorneys existed in Michigan. The trial court delved into defendant's belief and learned that defendant believed that attorneys must be registered with the Secretary of State. The trial court explained to defendant that no such requirement existed and Michigan allows attorneys to practice in the state if they receive permission from the Michigan Supreme Court. Defendant stated that he understood, but steadfastly maintained that, under his definition of a licensed attorney, none existed in Michigan. The trial court further advised defendant that it believed that representation by counsel would be in his best interest. Defendant again stated that he understood the risks and desired to represent himself. His only concern involved obtaining his case file from defense counsel. Counsel gave defendant the file, whereupon the trial court permitted defense counsel to withdraw and allowed defendant to represent himself at trial.

Defendant correctly notes that the trial court did not offer him the opportunity to consult with an attorney regarding his decision and did not inform him of his maximum sentence. We nevertheless conclude that the trial court substantially complied with the waiver procedure. Defendant knew of his maximum sentence because he received a copy of the information at his arraignment that listed both the charges and the maximum penalties. Defendant signed a written acknowledgment that he either read the information or had it explained to him. Regarding an opportunity to consult with counsel, defendant repeatedly stated that he could not locate a properly registered attorney in Michigan. Thus, an opportunity to consult with counsel would not affect defendant's decision. We therefore conclude that the trial court substantially complied with the requirements of *Anderson* and the court rule by conveying the substance of those requirements to defendant and eliciting a knowing, intelligent, and voluntary waiver of defendant's right to counsel. Defendant made his decision to proceed in propria persona with his eyes open.

Defendant Hildebrand next argues that the trial court erred in admitting evidence of citizen complaints and actions by the Iowa Attorney General to halt defendants' allegedly fraudulent practices. Defendant, however, did not preserve this issue by objecting below. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). "It is well established that objections to admissibility not properly raised at trial cannot be later asserted on appeal." *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997). No miscarriage of justice would result from our failure to review in this case. *Mayfield, supra* at 661.

Defendant Hildebrand further contends that the trial court abused its discretion by basing its decision to sentence him to a term that exceeded the guidelines range on factors already taken into consideration in the guidelines. We disagree. This Court reviews a sentencing decision for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 541; 505 NW2d 16 (1993). In this case, the trial court properly departed from the guidelines' range of one to three years because the guidelines did not adequately account for defendant's role as the leader of the conspiracy. *People v Coulter*, 205

Mich App 453, 456; 517 NW2d 827 (1994). That the guidelines also accounted for this factor did not preclude a departure. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). We agree with the trial court that the recommended range did not reflect the seriousness of the instant offense. The record reflects that defendant Hildebrand led a conspiracy that took advantage of people's mistrust of the federal government and swindled money from those who could least afford it. Under these circumstances, the trial court did not abuse its discretion in sentencing defendant to a term that is proportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 667; 461 NW2d 1 (1990). We therefore affirm defendant Hildebrand's convictions and sentence in docket number 187865.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] The requirement under MCR 6.005(F) that the trial court inquire into multiple representation in all cases in which two or more defendants are jointly charged or their cases otherwise joined is broader than that required under the Sixth Amendment. We do not suggest, as Justice Brennan would have held in *Cuyler, supra* at 351-353 (Brennan, J. concurring), that multiple representation in a joint trial always triggers the trial court's Sixth Amendment inquiry obligation.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).