STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM THOMAS CARTER,

Defendant-Appellant.

UNPUBLISHED
February 27, 1998

No. 186398
Macomb Circuit Court
LC No. 94-002282 FH

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of unlawfully driving away an automobile, MCL 750.413; MSA 28.645, and sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to an enhanced term of five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant and two other men drove two vehicles into a General Motors parking lot. The police and General Motors security personnel, who were conducting a surveillance operation at the parking lot, observed defendant break into an Oldsmobile Cutlass. The police apprehended the two men but defendant left the parking lot driving the Cutlass. Defendant was apprehended the next day. The Cutlass was recovered several months later.

On appeal, defendant identifies numerous instances in which he contends he was denied the effective assistance of counsel. We find no merit to defendant's arguments.

To establish whether a defendant's right to the effective assistance of counsel has been so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation was so prejudicial as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Without evidence of prejudice, ineffective assistance will not be found. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

First, defendant argues that defense counsel erred in failing to object to the admission of an unauthenticated tape recording and transcript. However, defense counsel is not required to make objections that are groundless, *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995), or that invite the trial court to overrule and risk the jury's disapproval, *People v Reed*, 449 Mich 375, 399-400; 535 NW2d 496 (1995) (Boyle, J., with Brickley, C.J., and Riley, J.). We conclude that the tape and transcript were admissible. Therefore, defendant's counsel had no duty to argue against their admission.

If a tape recording is shown to be "what its proponent claims," then it has been authenticated sufficiently under MRE 901. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). A tape recording may be authenticated pursuant to MRE 901 by having a knowledgeable witness identify the voices on the tape. *Id.* at 50. In this case, the prosecution claimed that the tape was a recording of police radio transmissions during the surveillance operation. The prosecution showed these tapes to be what it claimed them to be through the testimony of the officer who made the tape recording. The officer identified the voices on the tape recording and testified that the tape was not edited and accurately reflected the events that were transmitted over the police radios.

Defendant argues that the tape was effectively edited because it does not begin when the officers first saw the two vehicles drive into the parking lot. However, proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. *Id*. at 52. The tape recording need only meet the minimum requirements for admissibility. *Id.* Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly. *Id.* Therefore, the fact that the tape does not begin running until approximately twenty minutes after the two vehicles first entered the parking lot does not make the tape inadmissible. The tape does not need to tell the whole story of the case. The jury listened to testimony that the tape did not begin when the two vehicles first entered the parking lot. They were not misled regarding the contents of the tape. It is up to the finder of fact to give the appropriate weight to the tape.

Defendant also alleges that defense counsel erred in failing to object to the admissibility of the transcript of the tape. However, both defendant and defendant's counsel listened to the tape outside the presence of the jury to ensure the accuracy of the transcript of the tape, and defendant did not object to the accuracy. The only issue that arose was the misidentification of several of the speakers. However, the correct speakers were identified by the officer who created the tape. The record indicates that the parties essentially stipulated to the accuracy of the transcript when the prosecution made a statement that both parties had had an opportunity to listen to the tape and read the transcript, and neither side objected. Defendant's counsel agreed that defendant had no objection to the fairness or accuracy of the transcript and did not object to it being admitted. Moreover, defendant does not argue now that the words contained in the transcript are inaccurate. Therefore, we conclude that the tape and transcript were properly admitted. *People v Lester*, 172 Mich App 769; 432 NW2d 433 (1988). Defendant has failed to establish ineffective assistance of counsel on this ground. *Pickens, supra*;

Second, defendant argues that defense counsel erred in failing to raise the issue of defendant's right to counsel at a photographic identification. We disagree. In the case of

photographic identification, the right of counsel attaches with custody. *People v Kurylczyk*, 443 Mich 289, 298 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993). In this case, defendant was not in custody at the time of the photographic identification. Thus, he had no right to counsel and his attorney was, therefore, not ineffective in failing to raise the issue. *Pickens*, *supra*.

Third, defendant argues that defense counsel erred during opening statement by stating that defendant faced a life sentence. However, a curative jury instruction was given soon after the statement. Thus, we conclude that defendant has failed to establish that he was prejudiced by defense counsel's opening statement. *Id*.

Fourth, defendant argues that defense counsel erred in failing to object when a police officer testified that he (the officer) had had four prior contacts with defendant. However, this testimony, which was offered to explain the officer's identification of defendant, did not indicate the circumstances of these contacts or necessarily imply that defendant had a prior record. We conclude that defendant has failed to establish that he was prejudiced by counsel's failure to object to this testimony. *Id*.

Fifth, defendant argues that his trial counsel erred in failing to object to testimony indicating that drugs were found in the Cutlass after it was recovered. However, even assuming that counsel erred in failing to object to this testimony, we conclude that defendant has not shown that he was prejudiced by this testimony or that the outcome of the case would have been different given the substantial evidence against him. Therefore, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel. *Id.*

Sixth, defendant argues that defense counsel erred in failing to object when the prosecution called a witness who was not listed on the prosecution's witness list. However, defendant has failed to specify how he was prejudiced by this alleged error. Moreover, defendant stated during his sentencing hearing that he had asked his attorney to subpoena the witness for trial. Accordingly, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel on this ground. *Id*.

Seventh, defendant asserts that his trial counsel erred in failing to call as witnesses defendant's two accomplices, the police officers who ultimately found the Cutlass, and two persons apprehended with the Cutlass. However, defendant has failed to assert how the testimony of these witnesses would have provided him with a substantial defense that would have affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Accordingly, on this record, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel on this ground. *Pickens, supra*.

Eighth, defendant claims that counsel erred in failing to seek discovery of certain evidence. However, defendant does not explain how this evidence would have been relevant to or have provided defendant with a defense in this case. Accordingly, we do not find ineffective assistance of counsel on this ground. *Id*.

Ninth, defendant argues that counsel erred in failing to object to the admission of a traffic ticket that had not previously been produced to the defense. The ticket was recovered from one of the two vehicles driven into the parking lot by defendant and his two accomplices. However, defendant's trial counsel was not required to make objections that were groundless, *Rodriguez*, *supra* at 356, or that would invite the court to overrule and risk the jury's disapproval, *Reed*, *supra* at 399-400. If the ticket was admissible, then defendant's trial counsel had no duty to argue against its admission.

Defendant does not claim that the prosecution withheld the ticket from defendant despite a discovery request. Rather, he argues that because the ticket was not listed on the police report, it should have been excluded. However, the officer who prepared the report testified that while searching the vehicle for weapons, he discovered the ticket. He testified that he only included a partial list of the contents of the vehicle in the police report and that a full inventory of the vehicle was prepared at the lot where the vehicle was towed. We find that defendant does not have a basis for excluding the traffic ticket. Even though he claims he was surprised at trial by the ticket, he could have discovered the existence of the ticket by requesting a copy of the inventory of the contents of the vehicle. Moreover, because the ticket was issued to defendant before the vehicle was impounded, it is reasonable to surmise that defendant was aware of the ticket. We do not find ineffective of assistance of counsel on this ground. *Pickens, supra*.

Next, defendant argues on appeal that his conviction was against the great weight of the evidence because the evidence did not establish that he was the individual involved in the theft of the Cutlass. However, although defendant's first appellate counsel filed a motion for a new trial, his subsequent counsel did not follow up on the motion. Because the trial court did not rule on the motion, we decline to review this issue on the ground that it is not preserved. *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991).

Next, defendant raises several grounds for his argument that he was denied a fair trial. Specifically, defendant contends that he was denied a fair trial when the trial court denied defense counsel's motion to withdraw. We disagree.

This Court reviews the trial court's decision to grant or deny a motion to withdraw as counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 15; 475 NW2d 830 (1991). While an indigent defendant is guaranteed the right to counsel at public expense, he is not entitled to have an attorney of his choice appointed to represent him by requesting that the originally appointed attorney be replaced. *Id.* Rather, substitution of counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists when a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.* However, the mere allegation that defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause. *People v Otler*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974).

In this case, defendant's request for substituted counsel was not supported by a showing of a substantial reason. It appears from the lower court record that appointed counsel demonstrated dedication and commitment to defendant's case. The record reveals that appointed counsel was well

prepared at trial and competent to represent defendant. As previously discussed, defendant's counsel was not ineffective in representing defendant.

Moreover, the basis for defendant's counsel's motion to withdraw was a grievance defendant filed against him with the Attorney Grievance Commission. Defendant stated that he lacked confidence and trust in his attorney. However, the reasons defendant gave for the lack of confidence and trust in his attorney were not substantial. Defendant made unsupported allegations that his trial counsel had disclosed defense tactics to the prosecution and had condoned the violation of defendant's constitutional rights. Our examination of the lower court record does not reveal any violation of defendant's constitutional rights. Nor were we able to determine from the lower court record any defense tactic that was improperly disclosed to the prosecution. Therefore, we do not find that the trial court abused its discretion in denying defense counsel's request to withdraw.

We have reviewed the remaining grounds asserted by defendant in support of his argument that he was denied a fair trial and find that they, either singularly or cumulatively, do not warrant reversal. *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

Finally, defendant raises three grounds for his argument that he should be resentenced. Specifically, defendant first claims that resentencing is warranted because the trial court improperly scored an offense variable. However, resentencing is not warranted on this ground because the guidelines do not have the force of law and are inapplicable to habitual offenders. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997); *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996).

Second, defendant contends that he is entitled to resentencing because a supplemental information charging defendant with being an habitual offender was not timely filed under MCR 6.112(C). However, review of the record reveals that the prosecutor's notice of intent to seek sentence enhancement was timely filed under the requirements of MCL 769.13(1); MSA 28.1085(1), amended effective May 1, 1994. See *People v Ellis*, 224 Mich App 752, 754-755; 569 NW2d 917 (1997). Accordingly, resentencing is not warranted on this ground.

Finally, defendant argues that he should be resentenced because his enhanced sentence of five to fifteen years' imprisonment is disproportionate. We disagree. In light of the circumstances of the offense and defendant's extensive prior criminal record, we conclude that the sentence is proportionate to the offense and the offender. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski