

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN A. WEBB,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 231978

Wayne Circuit Court

LC No. 00-005645

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, assault with intent to commit great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Following a bench trial, defendant was convicted of unarmed robbery, MCL 750.530, and aggravated assault, MCL 750.81a. The trial court sentenced defendant, a second habitual offender, MCL 769.10, to an enhanced term of forty-seven months' to twenty years' imprisonment for the robbery conviction, and a concurrent term of one year in prison for the assault conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his trial counsel rendered ineffective assistance and deprived him of his presumption of innocence when counsel conceded defendant's guilt by inviting the trial court to find him guilty of unarmed robbery and aggravated assault. Because defendant failed to request a new trial or evidentiary hearing addressing the alleged ineffective assistance, this Court limits its review of defendant's claim to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). A defendant alleging ineffective assistance of counsel must establish that counsel's performance fell below an objective level of reasonableness and that a reasonable probability exists that but for counsel's errors the outcome of the proceedings would have been different. The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Sabin, supra* at 659.

It is well-established that arguing that a defendant is guilty of an offense does not necessarily constitute ineffective assistance of counsel. Where the evidence obviously points to the defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others. Such a trial tactic may actually improve the defendant's credibility. *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8

(1988), overruled on other grounds in *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998).

In this case, substantial evidence supported a finding that defendant robbed the victim. The victim, who identified defendant at trial, testified that defendant beat and kicked her and took her purse as she left Henry Ford Hospital late one evening. Immediately following the robbery, an eyewitness to the crime, who apparently knew defendant, led the victim to a nearby apartment building where defendant had fled after the crime. Within half an hour of the crime, the police had arrived and arrested defendant. The arresting officer testified that after the police removed defendant from the apartment building, the victim and the witness to the crime both identified defendant as the assailant. Furthermore, a police investigator who interviewed defendant within thirteen hours of the crime testified that defendant voluntarily confessed to beating and robbing the victim, and a copy of defendant's recorded confession was admitted into evidence.¹ Defense counsel spent most of his closing argument emphasizing the scarcity of evidence that defendant possessed a gun while committing the crime,² and arguing that the weak evidence of a weapon warranted the court's rejection of the most serious armed robbery charge, and the additional firearm charges. Counsel concluded, "We are asking the court to find my client guilty *at most* of unarmed robbery and aggravated assault." [Emphasis added.] Under the circumstances, we find counsel's argument a wholly appropriate effort to minimize defendant's culpability, and we will not second guess counsel's successful strategic decision on appeal. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Defendant next argues that the trial court improperly and "cursor[il]y" denied his motion to appoint a substitute counsel "based primarily on administrative concerns." This Court reviews for an abuse of discretion a trial court's decision regarding substitution of counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

An indigent defendant is guaranteed the right to counsel, but 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 on 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. *Id.* A defendant's mere allegation that he lacked confidence in his trial counsel is not good cause to substitute counsel. *Id.* at 463.

¹ Defendant was the only witness in his own defense. According to defendant, on the night of the crime he, the victim, and several others smoked crack inside the apartment where the police later arrested him. Defendant averred that the victim had attacked him on discovering that the supply of crack had evaporated, and that he had beaten the victim in self-defense. Defendant denied ever leaving the apartment on the evening of the crime. Regarding his statement to police, defendant alternatively denied giving the police a confession to the crime and argued that the police coerced his confession.

² While the victim believed that she saw the butt of a handgun in defendant's hand before he struck her, she was not absolutely certain. The arresting officers found no guns or other weapons inside the apartment where they found defendant. In his confession, defendant denied using a weapon.

Defendant and defense counsel apprised the court of defendant's wish for substitute counsel on the morning of the scheduled trial date.³ Although the trial court gave defendant ample opportunity to explain the basis for his dissatisfaction with defense counsel, defendant for the most part rambled incoherently,⁴ occasionally suggesting generally that "this lawyer here is not assisting me . . . during this trial." Defense counsel explained that defendant had accused him "of selling [defendant] down the river"⁵ and improperly investigating the case, and that "we seemed to get in quite a lot of arguments." The court ultimately denied the motion for substitution, explaining its concern that defendant's dissatisfaction would not diminish with the appointment of a substitute counsel and that to avoid undue delay the trial should proceed as scheduled. In light of defendant's generalized dissatisfaction with defense counsel, the absence of any specific, legitimate difference of opinion between defendant and his counsel regarding a fundamental trial tactic, and the untimeliness of defendant's motion made on the morning of trial, we cannot conclude that the trial court abused its discretion in denying his request for substitute counsel. *Traylor, supra*.

Defendant further asserts that the trial court violated his rights to confront witnesses against him and to due process when the court utilized the victim's unsworn statements at the sentencing hearing as its basis for scoring offense variable four, which gauges the crime's psychological impact on the victim. Because defendant failed to raise any objection to the victim's testimony at the sentencing hearing, we review this issue only to determine whether a

³ The record does not substantiate defendant's claim that he "sought [substitute] counsel more than one week before his trial was scheduled."

⁴ As one example, defendant offered the following explanation for wanting substitute counsel:

I state another lawyer in the process of my position because I'm not getting a fair opposition of what's going on. And it's not effective toward my way of being. And a lot of opposition, I can't come forward to that what happened and a lots of remarks they establish on it's not true. And I needed a new court appointed lawyer to verify and to justify that what really happened and bring out the truth. Either I think I can get another lawyer or I might have to have a jury trial or basically I'm trying to suggest a bench trial; but my belief and action affirms the case that is pending on me is very not true.

And I can not let myself be held against my justice because of cases that pending on me that wasn't true. It is not true. For myself explanatory. A lot of these cases I have not been involved by. And I would like a new lawyer to represent me in this case in this matter.

Despite several attempts by the trial court to clarify the basis for defendant's desire for substitute counsel, defendant offered several more incomprehensible statements, one of which included defendant's clearly expressed position that "I would like more chance to have a better lawyer to investigate my case."

⁵ To the extent that defendant argues on appeal that defense counsel "did sell him down the river, by requesting the court convict defendant of Robbery Unarmed and Aggravated Assault," as we discussed above defense counsel successfully employed appropriate trial strategy on defendant's behalf, ultimately winning defendant's conviction of a lesser felony and a misdemeanor.

plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant's argument that the trial court erred in permitting the victim to make an unsworn statement not subject to cross examination wholly lacks merit. To the extent that defendant suggests that the victim's statement constituted hearsay, it is well-established that the Michigan Rules of Evidence do not apply to sentencing proceedings. MRE 1101(b)(3); *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985). The victim of a crime has a statutory right "to appear and make an oral impact statement at the sentencing of the defendant," MCL 780.765, and the impact statement may include an "explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim." MCL 780.763(3)(a); *People v Steele*, 173 Mich App 502, 504-505; 434 NW2d 175 (1988). See also MCR 6.425(D)(2)(c) (mandating that a trial court at sentencing "give the defendant . . . and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence"). Furthermore, the trial court in fashioning a sentence has every right to take into account the effect of the crime on the victim. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). The mandatory sentencing guidelines require that the trial court consider whether defendant's unarmed robbery occasioned any "[s]erious psychological injury requiring professional treatment . . . to a victim." MCL 777.34(1)(a). Even accepting defendant's characterization of the victim's sentencing hearing statement as hearsay, the "consideration of hearsay by the sentencing court does not deprive the defendant of any constitutional right so long as the defendant is afforded an adequate opportunity to rebut any matter that he believes to be inaccurate." *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988). The record of the sentencing transcript indicates that defendant had the opportunity to argue that the evidence of psychological injury to the victim was lacking, and defendant fails to explain how he was deprived of an opportunity to rebut the victim's statement. Accordingly, we conclude that the trial court's consideration of the victim's statement at the sentencing hearing did not result in plain error that affected defendant's substantial rights. *Carines, supra*.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter