STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DEQUAN POSTELL,

Defendant-Appellant.

UNPUBLISHED
April 29, 2004

No. 245728
Calhoun Circuit Court
LC No. 02-001933-FC

Before: Bandstra, P.J., and Sawyer and Ftizgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; three counts of possession of a firearm during the commission of a felony, MCL 750.227b; first-degree home invasion, MCL 750.110a(2); and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to prison terms of forty years for the armed robbery convictions, five years for the felony-firearm convictions, ten years for the first-degree home invasion conviction, and five years for the felon in possession conviction. Defendant appeals as of right. We affirm defendant's convictions and remand for correction of the judgment of sentence.

Defendant first argues that the trial court abused its discretion when it denied the prosecutor's suggestion that trial be adjourned because of newly discovered evidence seized the weekend before trial. We disagree.

Adjournments in criminal cases are not to be granted except for good cause shown. MCL 768.2. In reviewing this issue, this Court must consider (1) whether defendant is asserting a constitutional right, (2) whether there is a legitimate reason for asserting the right, (3) whether defendant is guilty of negligence, (4) whether adjournments were at defendant's behest, and (5) whether prejudice to defendant will result. *People v Bell*, 155 Mich App 408, 413; 399 NW2d 542 (1986).

The trial court's denial of the adjournment did not prevent defense counsel from preparing for trial or presenting a defense. The two transcripts of recorded phone conversations and the letters that were introduced were not introduced into evidence until the fourth day of trial. Thus, defense counsel had four days to formulate a response to the new evidence. In addition, defense counsel knew in advance which letters and transcripts would be introduced. During the hearing on the pretrial motion where the trial court considered an adjournment,

defense counsel requested that the prosecutor inform him in advance which letters would be introduced at trial, and the trial court agreed that the prosecutor was to indicate which letters he intended to use. The trial court also concluded that it would give defense counsel additional time during trial to discuss and look at the correspondence to be admitted. During trial, the court gave defense counsel an opportunity to listen to the recordings of the phone conversations and to compare the recordings with the transcripts. Thus, defense counsel had time, in addition to the two to three hours he received on the first day of trial, to investigate the evidence and determine its accuracy and authenticity.

Furthermore, because defendant had several days in addition to time during trial to investigate the letters and transcripts of telephone conversations introduced at trial, he has failed to establish prejudice. As the record shows, defense counsel did challenge the authenticity, accuracy, and relevancy of the transcripts, envelopes, and letters at trial. Because defendant was not denied the opportunity to challenge the authenticity, accuracy, and relevancy of the documents, he has failed to establish prejudice. In addition, defense counsel conducted a voir dire of each witness called to testify who had a part in executing the search warrants. Thus, defendant was not denied an opportunity to investigate the new witnesses. Under these circumstances, we conclude that the trial court did not abuse its discretion when it declined to adjourn trial. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), mod on other grounds 457 Mich 885 (1998).

Defendant next argues that the trial court abused its discretion when it denied his request to appoint substitute counsel. Again, we disagree.

Although an indigent defendant has a constitutionally guaranteed right to appointed counsel, *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989), he "is not entitled to counsel of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Mack, supra*. Rather, appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), citing *Mack, supra*. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Mack, supra*.

Here defendant failed to establish good cause when he requested the substitution. Defendant refers to his dissatisfaction with the jury selection process as one of several factors demonstrating good cause. Although defendant contends that he disagreed with counsel regarding the impaneled jury, the jury selection did not occur until after defendant's request to substitute counsel had been denied. Thus, his objections regarding jury selection could not have constituted "a showing of good cause." In any event, the record does not reflect any objections on defendant's part before trial counsel accepted the jury, and as trial counsel explained during a motion for mistrial, defendant initially agreed with the impaneled jury. Thus, defendant's dissatisfaction with the jury selection process did not constitute good cause.

Defendant further argues that he established good cause because he objected to trial counsel's opening statement. Again, trial counsel had not even made an opening statement when defendant requested substitution of counsel. The opening statement was not made until the fifth

day of trial. Accordingly, defendant's dissatisfaction with trial counsel's opening statement could not have been good cause when defendant requested substitute counsel.

Defendant also contends that trial counsel's failure to request transcripts of codefendant Robert Smith's trial concerned him. Trial counsel's decision not to request transcripts of codefendant's trial is a matter of professional judgment or trial strategy. This Court has held that disagreements fairly characterized as matters of professional judgment or trial strategy do not justify substitution of counsel. *Traylor*, *supra* at 463. Thus, trial counsel's failure to request the transcripts cannot be deemed good cause.

Defendant also argues that trial counsel's act of losing some photographic evidence was good cause for his substitution. As with the other grounds that defendant argues establish good cause, there is no indication that the trial court was made aware of trial counsel's actions when it denied defendant's request for substitute counsel. The record indicates that the only issue discussed during defendant's request was defendant's belief that he and his counsel had a "conflict." The loss of the photographs was not raised until defense counsel moved to adjourn trial after the court denied defendant's request for substitute counsel. Because the record does not indicate that trial counsel's loss of photographs was an argument that defendant presented in support of his request for substitute counsel, counsel's act of losing the photographs cannot be deemed good cause.

Further, although defendant argues on appeal that he and defense counsel had a fundamental disagreement over trial tactics, defendant never specified what the disagreement involved. Where an indigent defendant offers the trial court no concrete reasons for seeking a new court-appointed attorney, the trial court cannot be deemed to have abused its discretion in denying the request for substitute counsel. *People v Grenier*, 34 Mich App 93, 95; 190 NW2d 742 (1971).

We further conclude that substitution of counsel on the day trial was set to begin would have unreasonably disrupted the judicial process because it would have required the court to adjourn trial in order for substitute trial counsel to familiarize himself with the case. *People v Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985). Accordingly, in light of the fact that defendant failed to establish good cause and the fact that substitution of counsel on the day of trial would have unreasonably disrupted the judicial process, we conclude that the trial court did not abuse its discretion when it denied defendant's request for new counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Defendant also contends that the prosecutor's misconduct deprived him of his right to a fair trial. Reviewing this issue de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), we disagree.

Defendant claims that the prosecutor engaged in misconduct that deprived him of a fair trial by not executing search warrants for certain evidence until the weekend before trial was set to commence. However, there is no evidence that the prosecutor acted in bad faith. A finding of misconduct may not be based upon a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

The prosecutor explained on the record that when he met with one of the victims, Robert James, to review some of the witnesses that defense counsel listed, he learned that defendant was sending letters from jail to defense witnesses and coaching them regarding their alibi testimony. Because defendant has presented this Court with no evidence that the prosecutor acted in bad faith and delayed execution of the warrants, defendant has failed to establish misconduct. The record reveals no dilatory tactics on the part of the prosecutor. Absent a showing of bad faith, the prosecutor's attempt to admit this newly discovered evidence cannot be deemed misconduct.

Defendant also challenges the prosecutor's introduction of evidence that defendant encouraged his girlfriend to mail him marijuana during his pretrial incarceration as an improper attempt to admit bad acts evidence that portrayed defendant in a bad light. Contrary to defendant's argument on appeal, any statements that defendant may have made to his girlfriend in a letter he wrote to her regarding how to mail marijuana to jail would not be inadmissible bad acts evidence. A prior statement is not a prior bad act under MRE 404(b). *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), aff'd on other grounds, 437 Mich 149 (1991), citing *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988).

Further, after defendant objected to the evidence on the grounds that the testimony was irrelevant and unduly prejudicial, the prosecutor explained that he introduced the evidence to show that, contrary to defendant's testimony on redirect that the jail personnel go through all correspondence, there is a way to avoid having one's mail searched, and that is to place materials in a professional envelope bearing an attorney's firm name and address. At that point the court instructed the prosecutor that he could cover that point but not belabor it. The prosecutor then finished questioning defendant on the issue of whether jail personnel search mail bearing an attorney's return address.

It is well recognized that a prosecutor need not use the least prejudicial evidence available to establish a fact at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Here, although the prosecutor's questioning did not portray defendant in the best light, the prosecutor sought to introduce the evidence to contradict defendant's earlier testimony that all correspondence received in the county jail is examined. Again, because a finding of misconduct may not be predicated on a good-faith attempt to admit evidence, *Noble, supra*, and because a prosecutor may contest evidence presented by the defendant, *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), defendant has failed to establish misconduct that deprived defendant of his right to a fair trial.

Defendant also challenges the prosecutor's questioning regarding biblical references defendant made in a letter to his girlfriend. Here, the prosecutor's statements regarding defendant's biblical references were not improper and did not deprive defendant of his right to a fair trial. Although a prosecutor may not inquire as to the religious beliefs of a witness, MCL 600.1436; MRE 610; *People v Leshaj*, 249 Mich App 417, 420; 641 NW2d 872 (2002), he need not use the least prejudicial evidence to establish a fact at issue. *Fisher supra*. The prosecutor's theory at trial was that defendant robbed the victims to obtain money so that he could marry his girlfriend. Defendant's statements to his girlfriend that he would have done anything, including "hit up God" to make her happy, support the prosecutor's position that defendant committed robbery to obtain money to marry his girlfriend. Thus, because the prosecutor introduced the evidence to show that defendant robbed the victims to make his girlfriend happy, we conclude that defendant has failed to establish that he was denied a fair trial.

Defendant further contends that the trial court erred in failing to give the jury the requested alibi instruction. Defendant is mistaken on the facts. The trial transcript indicates that the court did in fact read to the jury the requested alibi instruction. Accordingly, defendant's argument lacks merit.

Defendant next argues that the trial court erred when it permitted the prosecutor to improperly impeach defendant by bringing up his past criminal history. Defendant is again mistaken on the facts. The trial transcript indicates that the prosecutor never introduced defendant's prior convictions for purposes of impeachment.

Defendant further contends that the trial court abused its discretion when it permitted the prosecutor to play recorded phone conversations at trial. Reviewing this issue for an abuse of discretion, *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003), we find no error.

On appeal defendant provides this Court with no basis for his contention that the prosecutor failed to lay a proper foundation, other than his one-line conclusory sentence that the prosecutor failed to do so. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Further, in light of the testimony of Sherri Mason, the services manager whose responsibilities included maintaining the call records and the computer server used to record calls placed from the Calhoun County Jail, we conclude that the prosecutor did lay a proper foundation.

In addition, contrary to defendant's argument, the recorded conversations were relevant and the probative value of the recordings was not substantially outweighed by the danger of unfair prejudice. Defendant's recorded apology to victim Robert James is relevant evidence because it has a tendency to make defendant's guilt more probable than without the evidence. MRE 401. Likewise, the second recorded conversation admitted is relevant evidence because the conversation shows a motive for defendant's actions and because defendant's statements that he "did it" tend to show his guilt. *Id.* Moreover, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the evidence was highly probative of defendant's guilt and because the references in the conversations to defendant's past criminal conduct were sporadic, would not have prompted the jury to convict defendant, and because defendant could anticipate that the prosecutor would attempt to use recorded statements defendant made from prison implicating him in the crimes. Thus, we find no abuse of discretion.

Defendant further argues that the trial court abused its discretion when it admitted correspondence seized during the execution of a search warrant into evidence at trial. Reviewing the court's admission of this evidence for an abuse of discretion, *Katt, supra*, we find no error.

The evidence presented at trial indicates that the prosecutor laid a proper foundation for the introduction of the letters into evidence. To be authenticated, the evidence must establish that the proffered matter is what its proponent claims. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 73; 577 NW2d 150 (1998); MRE 901. At trial, detective Brad Wise testified that he and detective Greg Huggett executed a search warrant at Jami Small's residence and that several letters from defendant were seized from the kitchen and basement areas. Wise identified trial exhibits 22 and 24 as being the same letters and card that he seized from Small's residence. He identified exhibit 22 as the same letter seized because of the watermarks and running ink on the letter. Likewise, he identified trial exhibit 24 based on the handwriting and

the addressee. Detective Dave Huggett testified that, in executing a search warrant at Small's residence, he discovered correspondence in a bedroom dresser. According to Huggett, the letter introduced as trial exhibit 23 was the very letter that he seized and he identified it by its evidence tag and by the handwriting style and page numbering. Detective Brann testified that he searched Fredonia Postell's residence and found a letter relating to defendant's case. He identified the letter produced at trial as a copy of the letter he seized. In light of this testimony identifying the letters produced as the letters seized, the trial court did not err in concluding that the prosecutor laid a proper foundation for the letters.

Defendant also contends that the challenged evidence was inadmissible hearsay. However, defendant's letters are not hearsay because they constitute admission by a party opponent. MRE 801(d)(2) provides that a statement is not hearsay if it is "offered against a party and is (A) the party's own statement…." Here, all of the challenged letters introduced at trial, except for a letter Jami Small wrote to defendant that was seized from his cell, were letters that defendant had written. Accordingly, they were not hearsay. Further, Jami Small's letter to defendant, in which Small purportedly goes over the contrived alibi testimony, is not hearsay because it qualifies as an admission by a co-conspirator pursuant to MRE 801(d)(1)(2)(E), which provides that a statement is not hearsay if "it is offered against a party and is…(E) a statement by a coconspirator of a party during the course and in furtherance of a conspiracy on independent proof of the conspiracy…." Accordingly, we conclude that the trial court did not abuse its discretion in admitting the letter.

Defendant further argues that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. However, in light of the fact that the letters, which contained defendant's admission to committing the robbery, as well as his attempts to bribe one victim into not testifying and to offer perjured testimony at trial, were highly probative of guilt. Further, because it is unlikely that any references to defendant's uncharged criminal conduct or personal sexual acts would outweigh this testimony, we conclude that the court's admission of the evidence was proper.

Defendant next contends that the trial court abused its discretion when it admitted into evidence transcripts of telephone conversations that according to defendant, were inaccurate. Reviewing this issue for an abuse of discretion, *Katt, supra*, we find no error.

Although defendant argues that the prosecutor failed to lay a proper foundation, he is mistaken. As the testimony of the transcriber indicates, the transcriber was experienced at transcribing, she played back portions of the recorded conversations to ensure that she accurately transcribed the information, and after comparing the written transcripts with the recorded conversations, she concluded that the transcripts were "fair and accurate." She also identified the transcripts introduced at trial to be the transcripts that she created. Thus, having presented this evidence, the prosecutor laid a proper foundation for the admission of the evidence.

In addition, although defendant argued that there were a number of incomplete sentences and phrases in the transcripts that the jury could have taken out of context, defendant has failed to provide this Court with any actual examples of those incomplete sentences or phrases that he claims were inaccurate. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). "It is not sufficient for a party 'simply to announce

a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because defendant has failed to properly present his argument, we will not consider it.

Defendant also argues that the trial court abused its discretion when it denied defendant's motion for mistrial after the jury discussed extraneous information about the case presented in a newspaper article. However, because defendant never moved for a mistrial regarding this issue, the trial court cannot be deemed to have abused its discretion.

Defendant next contends that a flaw in the judgment of sentence that makes it susceptible to the interpretation that defendant's felon in possession of a firearm sentence is consecutive to all other counts entitles him to a new sentencing hearing. Reviewing this sentencing issue for an abuse of discretion, *People v Gonzales*, 256 Mich App 212, 227; 663 NW2d 499 (2003), we find no grounds for a new sentencing hearing. Contrary to defendant's assertion on appeal, the "Court Recommendation" section of the judgment of sentence makes plain that defendant is to serve his felon in possession of a firearm sentence first, concurrently with his two armed robbery sentences. However, we note that the sentence "Counts II, IV, & VI to run concurrent with each other, but consecutive to Counts I, III, V & VI" should provide "…but consecutive to Counts I, III, V & VII" in order to accurately reflect the court's sentencing decision. Nevertheless, while this typographical error requires correction, it does not warrant a new sentencing hearing because it does not represent "an invalid sentence imposed on the basis of a misconception of the law" as was the case in *People v Thomas*, 223 Mich App 9, 11-12; 566 NW2d 13 (1997).

Defendant further contends that the judgment of sentence is inaccurate because felony-firearm sentences may only run consecutively to a sentence for the predicate offense. Although defendant accurately states the law on this issue, defendant's felony-firearm sentences do run consecutively to the predicate offenses. The predicate offenses to which the felony-firearm sentences are connected include the two armed robbery offenses and the first-degree home invasion offense. At sentencing, the court ordered defendant to serve the felony-firearm sentences concurrently to each other, but consecutively to the sentences for armed robbery and first-degree home invasion. The fact that the felony-firearm sentences also run consecutively to the felon in possession of a firearm sentence that defendant is to serve concurrently to his armed robbery sentences is of little significance because, pursuant to MCL 750.227b(2), defendant was required to serve the felony-firearm sentences after the armed robbery and home invasion sentences. Defendant will have finished serving his five-year felon in possession sentence long before he finishes serving his concurrent armed robbery sentences or his home invasion sentence. Accordingly, defendant is not entitled to a new sentencing hearing.

Defendant's convictions are affirmed. We remand for the ministerial task of correcting the judgment of sentence to provide that Counts II, IV and VI are to run consecutively to Counts I, II, V and VII, rather than to Counts I, II, V and VI. Jurisdiction is not retained.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald