STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2007
v	No. 271086 Wayne Circuit Court
JERALD CONNELL JAMES, Defendant-Appellant.	LC No. 06-000926-01

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree premeditated murder, MCL 750.316(1)(a), and one count each of being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. After a jury trial, he was convicted of one count each of first-degree murder, second-degree murder, MCL 750.317, felon in possession of a firearm, and felony-firearm. The trial court ultimately sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of life imprisonment without parole for the first-degree murder conviction, 750 months' to 100 years' imprisonment for the second-degree murder conviction, and two to five years' imprisonment for the felon-in-possession conviction, all consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the shooting deaths of Cheryl Parks and Angela Jackson. The evidence at trial established that around the time of the shootings, both victims were passengers in a car driven by defendant, and that all three had been drinking and using cocaine. Defendant gave a statement to the police in which he admitted shooting Parks; defendant explained that he "lost it" because the victims were arguing. In the statement, defendant related his belief that he may have shot Jackson at the same time that he shot Parks. After shooting Parks, defendant admitted in his statement that he dumped her body on the street. According to his statement, defendant continued driving around with Jackson, but later "kicked" her out of the vehicle and may have shot her again. At trial, defendant denied killing either victim. He testified that at the time of the shootings he was at home sleeping, and denied making any statements to the police.

I. Substitution of Counsel

Defendant first contends that the trial court erred by denying his request to appoint substitute counsel. On the first day of trial, defendant requested that his assigned counsel be removed from the case and substitute counsel appointed. Defendant told the trial court that there had been "no communication" with counsel, that counsel failed to provide transcripts, telephone records, and other discovery materials, and that three weeks earlier, defendant filed a complaint against counsel with the Attorney Grievance Commission. Counsel stated that he visited defendant on multiple occasions and provided him with all available transcripts. Additionally, counsel described two recent jail visits with defendant in which defendant refused to accept proffered discovery materials and abruptly "removed himself" from counsel's presence.

The trial court questioned defendant, counsel, and the prosecutor in detail before reciting detailed findings of fact on the record and denying defendant's motion for substitution of counsel.

"A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). With respect to the potential substitution of an indigent defendant's appointed counsel, this Court has explained as follows:

> An indigent defendant is guaranteed the right to counsel; however, he 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 upon 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. [*Traylor, supra* at 462 (internal quotation omitted).]

"A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Id.*

We initially reject defendant's argument that the trial court employed an improper or inadequate procedure when addressing his request for substitute counsel. "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). In this case, the trial court allowed both defense counsel and defendant to state their positions. Defendant did not dispute that defense counsel fairly summarized their pretrial contacts and counsel's other pretrial efforts on his behalf. In light of the trial court's accurate observation that no significant factual disputes existed between defendant's and defense counsel's versions of events, we find that the trial court properly ruled on defendant's request for substitute counsel without conducting an evidentiary hearing.

Regarding the merits of defendant's conflict with his counsel, defendant acknowledged that two days before trial began defense counsel provided him with a copy of the preliminary examination transcript. Defendant could not specify what other transcripts he needed or what relevant information they might contain. He conceded that when defense counsel sought to meet

with him shortly before trial, he refused to speak with counsel because he felt upset that counsel had not earlier provided transcripts. Defense counsel showed the trial court a receipt signed by defendant substantiating that trial counsel had given defendant additional discovery materials, which counsel summarized as including a "DNA report, PCR of Officer Hampton, evidence tech reports, rental receipt, [and a] call detail from Cingular bill."[1]

The trial court denied defendant's motion for substitution because (1) the court's review of the file revealed "no record of any letters . . . indicating [defendant's] dissatisfaction with Mr. Goze [defense counsel] or request for other counsel," (2) defendant waited until the day trial was to commence to request new counsel, (3) defense counsel had conducted "extensive discovery," which he either turned over to defendant, or attempted to deliver to defendant before trial but which material defendant refused, (4) defense counsel made a number of pretrial visits to defendant, filed pretrial motions including a request for discovery and a motion to suppress defendant's statement to the police, and affirmatively expressed his readiness for trial, (5) the court respected defense counsel and viewed him as a good and competent attorney, (6) "defendant was present at the preliminary examination, and there was an attempt to deliver that transcript," but "the request for . . . the transcript[s] of the other hearing[s] where no testimony was taken do not strike this Court as particularly relevant to these proceedings, such as the arraignment or the final conference," and (7) the court believed defense counsel's representation that he had attempted to discuss possible trial strategies with defendant, although defendant may not have "hear[d] exactly what he wanted to hear" from counsel.

The trial court then expressly recognized the applicable legal propositions that a defendant may not premise a request for alternate counsel on a communication problem that the defendant himself created by refusing to speak to counsel, and that the filing of a grievance, standing alone, did not establish good cause warranting a substitution of counsel. The trial court accurately concluded that defendant had failed to make any showing of good cause for appointing substitute counsel, i.e., either a legitimate difference of opinion between he and defense counsel concerning a fundamental trial tactic, or "a bona fide irreconcilable dispute regarding a substantial defense." The trial court acknowledged the existence of "perhaps some acrimony between defendant and counsel," "but . . . not[hing] rising to the level of warranting a substitution of counsel." The trial court additionally found that "any substitution . . . on the date of trial without any prior notice to this Court with . . . witnesses waiting will certainly unreasonabl[y] disrupt the judicial process."[2]

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[1] We address defendant's purported need for telephone records in § III(A), *infra*.

[2] The trial court file contains two undated and unsigned handwritten letters to the trial court requesting termination of defendant's relationship with defense counsel. The letters primarily set forth the bases that defendant announced on the record on May 3, 2006, as well as defendant's belief that defense counsel was "working with the prosecutor." To both letters, defendant attached his April 19, 2006 request that the Attorney Grievance Commission investigate defense counsel; the request for investigation consists of one page and its "statement of facts" simply lists various provisions of the Michigan Rules of Professional Conduct.

The timing of these letters is not clear from the trial court file. The file contains two

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In summary, defendant made an inadequate showing of good cause, a prerequisite to an order substituting counsel. For example, defendant offered nothing to substantiate that he and defense counsel had a legitimate difference of opinion regarding any specific fundamental trial tactic, or that defense counsel otherwise performed inadequately, lacked diligence, or exhibited disinterest in his case. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991); *People v Meyers (On Remand)*, 124 Mich App 148, 166; 335 NW2d 189 (1983). To the contrary, the record reflects that defense counsel prepared for trial, provided defendant with discovery materials, attempted to communicate with defendant, and expressed his readiness for trial. Defendant's filing of an unsubstantiated grievance against defense counsel also did not suffice to demonstrate good cause for appointing substitute counsel. *Traylor*, *supra* at 463. Because the only conflict or friction between defendant and defense counsel stemmed from defendant's admitted refusal to interact with counsel, we conclude that the trial court did not abuse its discretion in denying his request for substitute counsel.

II. Sufficiency of the Evidence

Defendant next argues that insufficient evidence of premeditation supported his conviction of first-degree murder for causing Jackson's death. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "[A] reviewing court is required to make credibility choices in support of the jury verdict." *Id*. at 400. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id*. (internal quotation omitted).

To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that he premeditated and deliberated the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "To show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (internal quotation and citations omitted). Premeditation and deliberation both "may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Anderson*, *supra* at 537.

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loose envelopes bearing the trial court's address in defendant's hand. The envelopes are postmarked March 20, 2006 and April 20, 2006, but they were not stamped as received by the trial court, and the file does not contain a list of docket entries. Even were we to assume that the envelopes accompanied defendant's handwritten letters, and that the trial court inaccurately found that defendant waited until the first day of trial to request substitute counsel, we need not consider the effect of defendant's request on the proceedings in light of our finding that the trial court correctly concluded that defendant failed to establish good cause to warrant a substitution.

Evidence admitted at trial established that around the time of the shootings, defendant was dating Parks and living with Jackson, and that on the evening of December 26, 2005, both victims were passengers in defendant's car. According to defendant's statement to the police, Parks and Jackson argued, he "just snapped" and shot Parks, and then "kicked her out of the car." The police discovered Parks lying in the street at approximately 2:45 a.m. In his statement to police, defendant admitted that after disposing of Parks's body, he continued to drive around with Jackson "for a little while." Although defendant speculated to the police that he may have shot Jackson at the same time he shot Parks, the medical examiner opined that Jackson's wounds would have caused extensive bleeding. Because the police found little blood evidence in defendant's car, a reasonable inference arises that defendant did not shoot both victims at the same time. Additionally, the police found Jackson's body at a different location. A witness in the vicinity of that location testified that she heard gunshots around 3:00 a.m., which testimony also supports a reasonable inference that defendant shot Jackson and discarded her body at a second location. We conclude that when viewed in the light most favorable to the prosecution, the evidence enabled the jury to find beyond a reasonable doubt that a sufficient period of time elapsed between defendant's shooting of Parks and the time he shot Jackson to afford him the opportunity to reflect and take a "second look," and thus that he shot Jackson with premeditation and deliberation.

III. Defendant's Standard 4 Brief

Defendant raises several issues in a supplemental pro se Standard 4[3] brief, none of which have merit.

A. Effective Assistance of Counsel

Defendant first alleges that trial counsel was ineffective. Because defendant did not raise this issue in a motion for a new trial or a request for an evidentiary hearing, our review is limited to any mistakes of counsel apparent from the existing record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "[A] defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show the existence of a reasonable probability that, but for his counsel's alleged error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

We reject defendant's claim that defense counsel was ineffective for conceding at the preliminary examination that the evidence supported a bindover for second-degree murder.

[3] Supreme Court Administrative Order 2004-6, Standard 4.

Defense counsel made his statement in the context of arguing that the evidence did not support a bindover on the higher charge of first-degree murder, as argued by the prosecution. Counsel's statement did not concede defendant's guilt or prejudice defendant's opportunity to present a defense at trial.

Furthermore, defense counsel was not ineffective for withdrawing defendant's motion to suppress his statements to the police. Because defendant decided before an evidentiary hearing took place that he no longer intended to challenge the voluntariness of the statements, but instead had adopted the position that he never made the statements, an evidentiary hearing under *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), was not necessary. Rather, the question whether defendant made the statements in the first instance constituted an issue of fact for the jury to decide at trial. *Id*. at 337-338.

Defendant next argues that defense counsel was ineffective for not obtaining records of telephone calls received by defendant and the victims on December 26, 2005 and early December 27, 2005. Defendant repeatedly mentioned in his testimony at trial that he had desired the records to help him recall the timing of events that occurred earlier in the day, well before the victims were killed. On appeal, however, defendant has failed to make any showing that the records had relevance to his defense or toward disproving any claim by the prosecution concerning the circumstances surrounding the victims' deaths. Consequently, defendant has failed to substantiate this ineffective assistance contention.

Defendant also suggests that defense counsel did not permit him to testify as extensively as he wanted to at trial, but only allowed him to respond to limited areas of inquiry. Decisions concerning what scope or extent of a defendant's testimony to elicit before the jury fall well within the realm of defense counsel's discretion as a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id*. at 76-77. Moreover, the record discloses that defendant had the opportunity at trial to deny shooting the victims, testify that he was at home when they were shot, and deny making any statements to the police. Because defendant offers no explanation what other specific testimony he could have provided, the record does not support this claim of ineffective assistance.

Defendant's final allegation of ineffective assistance is that defense counsel failed to call defense witnesses and present evidence favorable to him. The defense contended at trial that defendant was home alone when the victims were killed, and defendant testified at trial to this version of events. Although defendant bears the burden to produce factual support for his claim of ineffective assistance of counsel, on appeal he once again fails to explain what additional favorable evidence existed that defense counsel did not present. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The record thus does not support defendant's claim that defense counsel was ineffective for failing to present additional evidence.

B. Altered Transcripts

Defendant contends that several transcripts prepared in this matter either were altered or inaccurately reflect what occurred in the trial court. Defendant did not raise this issue in the trial court, and at no point has he filed a motion to correct the record. Therefore, he has not preserved

this issue, and we limit our review to whether any plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

This Court applies a presumption of correctness to certified records of court proceedings. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). A defendant may, however, overcome the presumption of accuracy.

> [I]n order to overcome the presumption of accuracy and be entitled to relief, a petitioner must satisfy the following requirements: (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to subchapters 7.200 and 7.300 of our court rules. [*Id*. at 476 (footnotes omitted).]

Independent corroboration of an alleged inaccuracy can consist of affidavits, police reports, or preliminary examination transcripts, as well as other parts of the transcript that call into doubt the portion of the transcript at issue. *Id*. at 476 n 2.

In this case, defendant has not overcome the presumption of accuracy because he has not provided any independent corroboration of the alleged inaccuracies, for example, affidavits from trial witnesses declaring that their testimony was inaccurately transcribed. Furthermore, he has not explained how the alleged inaccuracies adversely affected his ability to obtain postconviction relief. Accordingly, we reject this claim of error.

C. Right to a Public Trial

Defendant argues that the trial court infringed on his right to a public trial because the court prevented members of his family from entering the courtroom during closing arguments. The Sixth Amendment guarantees every defendant in a criminal case the right to a "speedy and public trial." US Const, Am VI; Const 1963, art 1, § 20. "Although the right to an open trial is not absolute, that right will only rarely give way to other interests." *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). In this case, nothing in the record suggests that the trial court closed the courtroom at any point during these proceedings or otherwise sought to exclude defendant's family members. We therefore find no basis for concluding that his right to a public trial was violated.

D. Defendant's Confession

Defendant insists that he never gave a confession or statement to the police and that one of the statements attributed to him was factually impossible. Defendant does not elaborate any argument in presenting this issue, but merely asserts conclusorily that he gave the police no statements.

A police witness testified at trial that defendant confessed to shooting both victims, while defendant denied making any statements. Whether defendant actually made any statements was a question of fact for the jury to decide, and the jury also had the prerogative to determine whether to believe any or all portions of defendant's statements. *Walker, supra* at 337-338.

Because the trial court properly submitted these questions to the jury for its consideration, we detect no error relating to the trial testimony concerning defendant's statements.

E. Prosecutorial Misconduct

Defendant asserts that the prosecutor engaged in misconduct during both her opening statement and closing argument, but he fails to identify any specific conduct or remarks that he believes amounted to misconduct. Defendant makes no claim that any conduct of the prosecutor prejudiced his right to a fair trial. Given defendant's inadequate briefing of his prosecutorial misconduct argument, we conclude that he has abandoned appellate review of this issue. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006) (observing that the appellant may not simply "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").

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher