

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE COOPER,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 272071

Wayne Circuit Court

LC No. 06-005227-01

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of another person under 13 years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). The trial court sentenced defendant to 25 to 50 years' imprisonment for each CSC I conviction and 5 to 15 years' imprisonment for his CSC II conviction. Defendant appeals as of right. We affirm.

I. Facts

In February 2006, defendant began living with Billy J. Taylor III and his 11-year-old son, the victim in this case.¹ Taylor and defendant had been friends for years. After moving in, defendant often baby-sat the victim when Taylor was at work. He also bought the victim treats that Taylor could not afford (such as candy and snacks). The victim testified that on more than three occasions when his father was away from the house, defendant would tickle him until he turned away. Then, defendant would place his hand inside the victim's boxer shorts and digitally penetrate his anus. The victim claimed that these instances in which penetration occurred took place in both the Kentucky Street and Prairie Street homes. At first, the victim did not tell his father about these incidents because he was afraid his father would think he was gay and because defendant told him after each instance of abuse that his father would punish and "whop" him. The victim also testified that on one occasion after defendant penetrated him, he saw defendant take a penis pump from a black bag and place the pump on his penis. Following this,

¹ Defendant, Taylor, and the victim lived on Kentucky Street in Detroit until March 2006, when they moved to a house on Prairie Street.

defendant invited the victim to meet him in the bathroom, where the victim saw defendant sniff the finger he used to penetrate him, masturbate, and ejaculate on the toilet.

When Taylor arrived home one evening in late April 2006, he saw the victim run to his room wearing only boxer shorts, although the victim was not allowed to wander the house in his underwear. At first, Taylor threatened to “whop” the victim, but he then thought that the situation “wasn’t right.” Taylor checked the victim’s buttocks and asked if defendant touched him. Although the victim said that defendant had not touched him, Taylor noted that the victim’s buttocks looked as if they were “standing open.” Taylor took the victim to his sister’s house. There, the victim was asked if something had happened when he was alone with defendant. The victim claimed that “he didn’t know.” Taylor then took the victim to another relative’s house, where the victim told him about the abuse. Taylor contacted the police, who later arrested defendant.

At the time of defendant’s arrest, police confiscated a black bag belonging to defendant and found a yellow penis pump inside. When the bag was later searched at the Wayne County Jail, no penis pump was found.

In contrast to this version of events, defendant testified that he never initiated sexual contact with the victim, but noted that the victim “poked [him] in the butt with his finger” on two occasions. Defendant claimed that the victim lied about the abuse because defendant was planning to tell Taylor that the victim had poked him. Defendant also denied owning any type of sexual device such as a penis pump. He thought that Taylor was a strict parent and that the victim was afraid of his father. Regardless, the jury convicted defendant of two counts of CSC I and one count of CSC II.

II. Motion for Adjournment

Defendant first argues that the trial court’s denial of his motion for an adjournment denied him his right to present a defense. We disagree. We review a trial court’s ruling on a motion for an adjournment or continuance for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). Defendant’s claim that he was denied his right to present a defense is unpreserved, so we review this claim for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

In challenging the denial of a motion for an adjournment, a defendant must show both good cause and due diligence, and that denial of the motion would prejudice the defendant. *Coy*, *supra* at 18-19. “‘Good cause’ factors include ‘whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.’” *Id.* at 18, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

In claiming he was precluded from presenting a defense, defendant contends that as a consequence of the denial of his motion for an adjournment, his counsel was unable to adequately investigate potential witnesses who would testify regarding the victim’s credibility and was unprepared for trial. This argument fails. “Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability

in the ascertainment of guilt and innocence.” *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

With respect to his claim that the denial of his motion for an adjournment precluded him for presenting witnesses at trial, although defendant was not negligent in investigating witnesses and had not requested previous adjournments, the denial of his motion was proper. “MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters” *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). Extrinsic evidence is “[e]vidence that is calculated to impeach a witness’s credibility, adduced by means other than cross-examination of the witness.” Black’s Law Dictionary (8th ed). Here, because defendant claimed that an adjournment was necessary for further investigation of witnesses whose testimony would impeach the victim, any further investigation would have yielded extrinsic evidence. Therefore, the trial court did not abuse its discretion when it denied the motion on these grounds. In addition, defendant has failed to show prejudice. Indeed, despite his claim that more time was needed for investigation, defendant still presented the testimony of two school employees who testified that the victim had a reputation for fabricating stories. Thus, this aspect of defendant’s claim fails.

Also, defense counsel had more than “mere days” to prepare, as defendant argues on appeal. Indeed, not only had defense counsel represented defendant since the preliminary examination, which occurred over a month-and-a-half before trial, but defense counsel also admitted that he had obtained all discoverable material in the case. Moreover, defense counsel identified potential defense witnesses and proffered their testimony to the court on the first day of trial, indicated that he was prepared to present his case in chief on the second day of trial, and did not begin presenting his case until the third day of trial, five days after the court denied his motion for an adjournment. In light of this, it appears that defense counsel was adequately prepared for trial. Thus, the trial court did not abuse its discretion, prejudice defendant or deprive defendant of his right to present a defense when it denied defendant’s motion to adjourn the trial.

Defendant also claims that he was denied his right to present a defense because the denial of his motion for an adjournment precluded him from taking a polygraph examination. We disagree. Initially, we note that MCL 776.21(5) provides that a defendant charged with criminal sexual conduct has the right to a polygraph examination if he requests it. This right continues until “the presumption of innocence has been displaced by a finding of guilt, i.e., when an accused is no longer ‘alleged’ to have committed the offense.” *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003). However, defendant’s failure to receive a polygraph examination does not constitute reversible error.

In cases involving preserved, nonconstitutional error, a defendant must demonstrate, “‘after an examination of the entire cause,’” that it “‘is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The reviewing court must examine the nature of the error and assess its effect “‘in light of the weight and strength of the untainted evidence.’” *Id.* at 495 (citation omitted). [*Id.* at 396-397.]

It is not more probable than not that any error in this case resulting from defendant's failure to receive a polygraph examination was outcome-determinative. First, the evidence supporting defendant's conviction was relatively strong: the victim provided detailed statements concerning defendant's sexual misconduct and had little motive to falsify his testimony. Further, even if defendant had taken and passed a polygraph examination, the results would not have been admissible at trial. *Id.* at 397. Also, defendant had previously been given the opportunity to take a polygraph examination and had refused. He again requested a polygraph examination during the pretrial hearing, six days before his trial was scheduled to begin. Even if defendant had received a polygraph examination immediately before trial, it is unlikely that his counsel would have had time to use any information gathered from the examination to find additional witnesses to testify for defendant. Finally, defendant testified in his defense at trial, giving the jury the opportunity to hear his testimony and determine the credibility of his assertions of innocence. Accordingly, defendant's failure to receive a polygraph examination does not constitute outcome-determinative error requiring reversal of his convictions.

Defendant also contends that as a consequence of the court's denial of his motion for an adjournment, he was denied the effective assistance of counsel. The determination whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first determine the facts and then decide whether these facts constitute a violation of the defendant's right to effective assistance of counsel. *Id.* We review factual findings for clear error and review constitutional determinations de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). We limit our review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). As noted above, the denial of the motion for an adjournment did not prejudice defendant. Further, given that defense counsel presented witnesses supporting his theory of the case, twice moved for a polygraph examination at defendant's request, and thoroughly prepared for trial, defendant has not shown that counsel's performance fell below an objective standard of reasonableness. *Id.* Thus, this claim fails.

III. Requests for Substitute Counsel

Defendant next argues that the trial court abused its discretion in failing to appoint substitute counsel. Specifically, he claims that the trial court failed to investigate whether a breakdown in the attorney-client relationship occurred and whether there was good cause to appoint new counsel. We disagree. We review a trial court's decision regarding the substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "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." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A

defendant is entitled to appointment of substitute counsel “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.” *Id.* (citations omitted). Although claims that defense counsel is not “adequate or diligent” or where defendant asserts that “his lawyer is disinterested” may establish good cause, *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973), mere allegations that defendant lacks confidence in counsel do not establish good cause to substitute counsel, *Traylor, supra* at 463.

Defendant first requested substitute counsel on the ground that he and his counsel were “not getting along” because his counsel failed to ask certain questions at the preliminary examination. The trial court did not abuse its discretion when it denied this motion. Defendant explained the basis of his disagreement with counsel at the arraignment only after the trial court required defendant to specify the basis of his disagreement. Thus, defendant’s contention that the trial court failed to properly investigate his claim is wrong on its face. Regardless, defendant has not identified on appeal the questions that he claims defense counsel failed to ask, and he “may not leave it to this Court to search for a factual basis to sustain or reject his position.” *Id.*, quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Thus, this claim fails.

Regarding defendant’s second request for substitute counsel, defendant claimed that a substitution was necessary because he was “not getting the result that [he was] looking for” and because his counsel had failed to communicate with him and provide information about the case. Before the trial court ruled on this motion, defense counsel interjected that he had provided defendant with all the discovery materials that he had received and that had filed motions for an investigator and for additional discovery. In light of this, it was unnecessary for the trial court to inquire further into defendant’s request for new counsel because it was clear that defendant’s claim was baseless. Further, defendant’s complaints did not involve a legitimate difference of opinion regarding a fundamental trial tactic. *Mack, supra* at 14. Defendant’s request expressed nothing more than a vague lack of confidence in his counsel. This, however, is insufficient to support a showing of good cause. *Traylor, supra* at 463. Therefore, the trial court did not abuse its discretion when it denied this request for new counsel.

III. Jury’s Request to Rehear Testimony

Defendant next argues that the trial court’s response to the jury’s request to rehear testimony effectively foreclosed the possibility that the jury would be permitted to rehear testimony later. We disagree. Counsel failed to challenge the trial court’s instructions to the jury. Accordingly, this issue is unpreserved, and we review for plain error affecting substantial rights. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *Carines, supra* at 763-764, 774.

Regarding a jury’s request to review testimony during deliberations, MCR 6.414(J) provides:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The

court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

During its deliberations, the jury requested trial transcripts. In response, the trial court explained that a transcript of the whole trial was not immediately available, which was why the jurors were permitted to take notes and use their collective memories to recall testimony, and that it would take “quite a bit of time” for the court reporter to transcribe a portion of the trial should the jury make a request for particular testimony. The court then ordered the jury to continue its deliberations. This did not amount to a denial to rehear testimony or a foreclosure of the possibility that the jury’s request could be granted. Instead, the court merely explained to the jurors that a transcription was not readily available and if they requested a specific portion of testimony, it would take time to prepare the transcript. Thus, defendant has failed to show plain error.

IV. Claims of Error Raised in Standard 4 Brief

A. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. At trial, defendant challenged the prosecution’s opening statement and questioning of the victim. We review these preserved issues of prosecutorial misconduct de novo “to determine if the defendant was denied a fair and impartial trial.” *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). We review defendant’s remaining claims for plain error affecting his substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines, supra* at 763. If a curative instruction could have alleviated any prejudicial effect, we will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant claims that the evidence presented at trial did not support the prosecutor’s opening statement and closing argument. However, defendant fails to articulate any specific impropriety by the prosecutor. Thus, defendant has abandoned this argument. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). However, in light of the fact that defendant raised this argument *in propria persona*, we will briefly discuss his allegations of error on the merits.

During his opening statement, the prosecutor merely stated what he expected to prove at trial, i.e., that defendant digitally penetrated the victim and warned the victim not to tell his father. Informing the jury what the evidence will show is the appropriate function of an opening statement. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). During his closing argument, the prosecutor recounted the evidence presented at trial and argued that this was sufficient for the jury to convict defendant of the charges beyond a reasonable doubt. This argument was proper because a prosecutor may argue the evidence as well as all reasonable inferences arising from it as they relate to the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Also, during closing argument, the prosecutor noted that, contrary to defendant’s claim, the victim did not fabricate his testimony. “[A] prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury

believes.” *Thomas, supra* at 455. Accordingly, both the prosecutor’s opening statement and closing argument were proper.

Regardless, the trial court instructed the jury that the attorneys’ arguments were not evidence. Given that jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), these instructions would have eliminated any potential for prejudice from the prosecution’s remarks, *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Therefore, the prosecutor’s remarks did not violate defendant’s substantial rights. See *Carines, supra* at 763-764.

Defendant also argues that the prosecution presented misleading and false evidence. This claim fails. Although “the prosecutor may not knowingly use false testimony to obtain a conviction . . . [and] has a duty to correct false evidence[.]” *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998) (citations ommitted), defendant has failed to show how any of the evidence presented was misleading or false other than by reference to his own affidavits attached to his brief on appeal. Notwithstanding that it is impermissible to expand the record on appeal, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), defendant’s affidavit indicating that the victim’s father was not at work on one of the days on which he abused the victim hardly establishes that the prosecutor knowingly presented misleading or false evidence. Indeed, the victim’s father testified that he was away from the house because he was going to a casino, not because he was at work.

In addition, defendant’s bare assertion that the victim fabricated his testimony does not establish that the prosecution knowingly presented false evidence, let alone that the victim was untruthful. Also, even though the prosecutor elicited testimony that a police officer found a sexual device in defendant’s bag at the time of his arrest, the prosecutor also stipulated that a search of defendant’s bag at the jail did not reveal this item. Thus, the prosecutor did not knowingly present misleading or false evidence.

Defendant also claims that the prosecution asked improper leading questions of the victim. We disagree. MRE 611(c)(1) states that “[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.” Regarding the development of testimony, this Court has held that “a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses.” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Here, the prosecutor’s leading questions reiterated testimony that the victim had already provided in response to open-ended questions. This was proper. Indeed, not only was the victim 11 years old at the time of trial, but the subject matter of his testimony was also of a graphic and sexual nature. Given that the victim’s rendition of events was somewhat disjointed, the prosecutor’s leading questions merely provided continuity to the victim’s testimony. In light of this, the questioning of the victim was proper.

B. Jurisdiction

Next, defendant next argues that the trial court lacked personal jurisdiction over him in this case. We disagree. Again, we review unpreserved issues for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764, 774. Personal jurisdiction is “vested in the circuit court upon the filing of a return of the magistrate . . . ‘before whom the defendant

had been examined.”” *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998), quoting *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 119; 215 NW2d 145 (1974). Following the preliminary examination, the district court bound defendant over for trial and filed a return to the circuit court. Thus, the circuit court properly acquired personal jurisdiction over defendant.

Defendant contends that the trial court lacked jurisdiction because the complaint mistakenly referred to another individual with the same name as defendant. However, there is no evidence in the record to support this claim. Regardless, MCR 6.101(A) provides, “A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.” The complaint filed against defendant comported with all requirements of MCR 6.101(A). Thus, defendant has failed to establish any deficiencies in the complaint that deprived the trial court of personal jurisdiction.

In addition, defendant contends that the trial court “rushed” his trial by not allowing further investigation of this case and failing to appoint substitute counsel. However, as noted above, the trial court did not abuse its discretion regarding these matters. Defendant also claims that the trial court permitted the introduction of inadmissible evidence. However, defendant has failed to specify any evidence that was inadmissible. Therefore, he has abandoned this argument. *Kevorkian, supra* at 389.

C. Sufficiency of the Evidence

Defendant contends that insufficient evidence was presented to support his convictions. This claim fails. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). When the sufficiency of the evidence is challenged, we review the evidence “in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

Defendant was convicted of two counts of CSC I for sexual penetration with another person under 13 years of age. MCL 750.520b(1)(a). Sexual penetration is defined, in relevant part, as “sexual intercourse . . . or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL 750.520a(p). Defendant was also convicted of CSC II for sexual contact with another person under 13 years of age. MCL 750.520c(1)(a). Sexual contact is defined as “the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification” MCL 750.520a(o). Intimate parts include “the primary genital area, groin, inner thigh, buttock, or breast of a human being.” MCL 750.520a(d).

Here, the victim testified that on more than three occasions and in two different residences, defendant tickled him and, when the victim turned away, defendant placed his hand inside the victim’s underwear and digitally penetrated his anus. Defendant also placed a sexual device on his penis and summoned the victim into the bathroom where the victim saw defendant

sniff his finger and masturbate. The victim was 11 years old. In light of these facts, a reasonable juror could conclude that defendant penetrated and touched the victim (i.e., when defendant tickled the victim and placed his hand inside the victim's underwear) for purposes of sexual arousal or gratification. Thus, sufficient evidence existed to support defendant's convictions.

Defendant argues that because no DNA evidence was discovered linking him to the offenses, insufficient evidence existed to support his convictions. Defendant also notes that there were discrepancies throughout the victim's testimony. However, a victim's testimony need not be corroborated to sustain the offense with which defendant was charged. MCL 750.520h. Further, it is the role of the jury, rather than this Court, to assess witness credibility. *Wolfe, supra* at 514-515. In this case, the jury evidently found the victim credible. Therefore, DNA evidence was unnecessary to sustain a conviction. Consequently, this claim fails.

D. Ineffective Assistance of Counsel

Last, defendant claims that he was denied the effective assistance of counsel where counsel failed to present DNA evidence and adequately cross-examine the victim. We disagree. Our review is limited to errors apparent on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). We presume that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses are matters trial strategy, "which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, counsel's failure to call witnesses or present other evidence only constitutes ineffective assistance "if it deprives the defendant of a substantial defense." *Id.* A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Given the nature of the offenses (i.e., digital penetration and sexual contact), the decision not to present testimony regarding DNA would have made no difference in the outcome of this case where identity was not even an issue. Similarly, in contrast to defendant's bare assertion that his counsel's cross-examination of the victim was inadequate, the record reveals that defense counsel raised issues concerning the victim's credibility throughout his cross-examination. Thus, defendant has failed to show that his counsel's actions were not sound trial strategy, let alone that he was denied a substantial defense.

Defendant also argues that his counsel failed to challenge the jurisdiction of the trial court and instances of prosecutorial misconduct. Notwithstanding that defense counsel objected during the prosecution's opening statement and direct examination of the victim, defendant's claims of prosecutorial misconduct and jurisdiction are meritless, as noted previously. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Defendant also argues that his counsel failed to obtain and provide him with discovery and to adequately prepare for trial. However, defense counsel obtained and provided defendant with all discovery materials and was thoroughly prepared for trial. Further, the record is devoid of any support for defendant's claim that his counsel failed to adequately meet with him before trial. Therefore, defendant has failed to establish a factual predicate showing that he was denied the effective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (a defendant must establish a factual

predicate to support a claim of ineffective assistance of counsel). Thus, defendant was not denied the effective assistance of trial counsel.

Defendant also contends that he was denied the effective assistance of appellate counsel. “The test for ineffective assistance of appellate counsel is the same as that for trial counsel.” *Pratt, supra* at 430. Although defendant bases this claim on the alleged failure of appellate counsel to raise relevant issues on appeal, defendant has failed to enumerate any such issues. Thus, defendant has failed to establish a factual predicate supporting his claim. *Hoag, supra* at 6. Regardless, defendant submitted a Standard 4 brief on appeal. Each issue raised in that brief lacks merit. The failure to raise meritless claims does not constitute ineffective assistance of appellate counsel. *People v Reed*, 449 Mich 375, 402; 535 NW2d 496 (1995) (Boyle, J.). Therefore, defendant’s claim fails.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly