STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2008
v	No. 277551 Washtenaw Circuit Court
LARRY DESHAWN LEE, Defendant-Appellant.	LC No. 06-000987-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 277552 Washtenaw Circuit Court
LARRY DESHAWN LEE, Defendant-Appellant.	LC No. 06-000988-FH

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with two offenses in two separate files, which were consolidated for trial before a jury. In LC No. 06-000987-FH, he was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), against DL. In LC No. 06-000988-FH, he was convicted of third-degree criminal sexual conduct, MCL 750.520d(1), against CB. Defendant was sentenced to nine months in jail for the fourth-degree CSC conviction and 3 to 15 years' imprisonment for the third-degree CSC conviction, to be served concurrently. He appeals as of right. We affirm.

I. Basic Facts

Defendant, an openly homosexual man, was convicted of sexually assaulting two heterosexual men while they were sleeping or incapacitated. The victims did not know each other and only saw each other in relation to this case. On March 6, 2006, DL was at an Ann Arbor bar with Mike Allers and others. While there, DL met defendant. During the night, DL and others "were taking turns buying rounds" of drinks. When the bar closed at 2:00 a.m.,

approximately 15 people, including defendant, went to DL's apartment for an after-party. After socializing until about 4:00 a.m., DL went to bed while people were still in his apartment. Allers testified that he saw DL sleeping under the covers in his bed. When Allers left the party, he observed defendant performing oral sex on another male in the hallway of the apartment building. DL testified that he later awoke to the sensation of someone performing oral sex on him. When DL looked down, his boxers had been pulled down and defendant's face was next to his genitals. In response to DL's questions, defendant indicated that DL wanted it. DL was "in shock," "very upset," and demanded that defendant leave. When defendant failed to comply, DL left the room. Defendant eventually left by cab. At trial, DL denied being flirtatious or sexually aggressive toward defendant. Allers corroborated DL's statements in this regard.

In contrast, defendant testified that DL initiated their sexual encounter. DL was allegedly flirtatious and sexually aggressive throughout the night, and told defendant that he was "heteroflexible."[1] Defendant claimed that DL chased him around the apartment, followed him into the bathroom, kissed him on the lips, and grabbed his penis, causing defendant to fall backward and knock the sink off the wall. Defendant was upset and left in a cab. Defendant denied pulling down DL's boxers, performing oral sex on DL, or performing oral sex with another male in the hallway of the building.

On June 3, 2006, CB attended a party with his fraternity brother, Luke Stein; approximately 50 people attended the party. CB consumed several alcoholic beverages over the course of the evening. CB remembered using the bathroom at about 2:30 a.m. CB's next memory was briefly waking up in a bedroom with his pants down, boots off, and defendant performing oral sex on him. CB heard defendant say, "let me finish," and he blacked out again. CB woke at dawn, was taken out to a cab, and told to "shut up." CB recalled waking up in his bed the next afternoon. He subsequently reported the sexual assault. CB did not recall seeing defendant at the party and denied socializing, flirting, or kissing him. CB denied consenting to any sexual act with defendant.

Stein saw defendant at the party. Stein last saw CB around 1:45 a.m., and Stein was asked to leave the party about 2:00 a.m. According to Stein, on the next afternoon, CB was crying, "really upset," and "still seemed like he was intoxicated in some way." After CB told Stein what had occurred, Stein drove him to the police station to report the sexual assault. Stein testified that CB had never expressed a sexual interest in men and was dating a woman.

Defendant testified that CB initiated their sexual encounter, which defendant described as consensual. At the party, CB allegedly was flirtatious, complimentary, and asked to accompany defendant to his apartment. At the apartment, CB and defendant kissed and performed oral sex on each other. CB allegedly wanted to have intercourse during their encounter, which defendant declined. Defendant claimed that CB's demeanor changed after CB ejaculated because he was concerned that others would think he was a homosexual. Defendant testified that CB did not appear intoxicated during their sexual encounter.

[1] DL denied making this statement.

Bianca Johnson, defendant's former close friend, testified that defendant expressed a sexual interest in young, straight, white men but also disliked those same men for how they treated women. Defendant allegedly pursued straight white men to humiliate them and "pay them back" for their treatment of women. Defendant denied expressing any intent to "pay back" straight men. The defense presented two additional witnesses, who testified that defendant never expressed a desire to "get back" at white males.

II. Substitute Counsel

Defendant argues that the trial court abused its discretion by failing to conduct an adequate inquiry into the attorney-client breakdown before denying his request for new counsel. We disagree.

A. Background

During pretrial proceedings, defendant wrote the trial court five letters expressing, inter alia, his dissatisfaction with appointed counsel. At the conclusion of an evidentiary hearing on a different matter, the following exchange occurred:

> *Defendant*: Judge, I would just like to address the - -
>
> *The court*: No.
>
> *Defendant*: Trial court just about an issue not related to this. It's just an issue - -
>
> *The deputy*: He said no.
>
> *Defendant*: Just an issue about my representation.
>
> *The court*: I - -
>
> *Defendant*: I've been basically unsatisfied on the basis of no show appointments and, and matters raised at - - were not dealt with earlier enough when we had the time to deal with them.
>
> *The court*: Yeah, you wrote me letters about that, Mr. Lee.
>
> *Defendant*: (No audible response.)
>
> *The court*: Stop. You wrote me letters about that. This is going to be your attorney at trial. There has been so far as I can see effective representation. I'm not going to take any further action on that.

B. Standard of Review

"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).

> "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." [*Id.* (citation omitted).]

C. Analysis

Initially, we reject defendant's claim that he is entitled to a new trial because the trial court's inquiry into the breakdown of the attorney-client relationship was inadequate. "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 the letters to the court, defendant explained counsel's alleged inadequacies with detailed specificity. The trial court acknowledged receiving those letters and, therefore, was aware of defendant's complaints regarding the performance of appointed counsel.

Furthermore, defendant's complaints did not establish good cause for the appointment of new counsel. Defendant repeatedly expressed dissatisfaction that "none of [his] requests have come to fruition." Defendant claims that despite his instructions, counsel failed to file the following motions: (1) "motion for severance of trials;" (2) "motion for an evidentiary hearing;" (3) "Motion for a request to see there [sic] witnesses [sic] list"; (4) "Motion for Bond Hearing;" (5) "Motion for suppressed evidence" by the police; (6) "motion for Entrapment hearing"; and (7) "motion for request of any arrangement deals, made in exchange for testimonies of witnesses."

The record discloses that the subject matter of the first five motions was pursued by counsel. Defense counsel filed a motion to sever on October 2, 2006, which the trial court denied on October 10, 2006. A motion to reduce bond was filed on August 8, 2006, and granted on August 22, 2006. Also, an evidentiary hearing was held on October 13, 2006, which addressed defendant's challenge to certain testimony under MRE 404(b). It was unnecessary for counsel to request the prosecution's witness list at that juncture. MCL 767.40a(3) provides that "[n]ot less than 30 days before trial, the prosecutor shall send to the defendant or his attorney a list of the witnesses the prosecuting attorney intends to produce at trial." The record reveals that the prosecution properly filed its witness list and also filed an amended witness list noting the addition of a witness. Counsel was not required to file a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

With regard to the "Motion for suppressed evidence," defendant claimed that a police officer submitted a "falsified document" in order to convict him. Defendant explained that when typing his written statement, the officer intentionally "cut out" a portion where defendant told DL "what happened" when he was falsely accused of sexual assault in a different case. The "suppressed evidence" that defendant instructed counsel to request was his original written statement that included the missing portion. The record reveals that defense counsel filed a motion for additional discovery requesting defendant's written statement on September 22, 2006.

The motion was withdrawn on October 10, 2006, because the requested discovery had been provided. Indeed, when discussing the police officer's alleged misconduct in a different letter, defendant wrote, "By the way, we finally got the original written document."

The remaining two motions were related to defendant's general claim that he was "entrapped" and that there was a "conspiracy to convict" and "KAHOUTS going on." The "motion for request of any arrangement deals, made in exchange for testimonies of witnesses" was related to a prosecution witness, Bianca Johnson. Defendant explained that Johnson sought to "gain employment with both the LAPD and the AAPD." In exchange for Johnson's testimony, the police allegedly helped Johnson gain access into defendant's apartment to retrieve *her* belongings and "as [he] here[s] [sic] it she *may* have gotten [sic] some letter of recommendation . . . do not quote [him]." Defendant did not have factual support for these allegations and does not otherwise identify a factual basis for these claims on appeal. For the same reasons, there was no legitimate basis to support a "motion for entrapment." Thus, counsel's failure to execute defendant's instructions in this regard did not establish good cause for substitution of counsel.

An additional basis for defendant's request for new counsel was that counsel did not follow his instructions with regard to defense tactics or use his "legal references" in arguing his case. This claim does not find support in the record. And, decisions about defense strategy, including what arguments to make and what evidence to present, are matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and also fall within the category of professional judgment that is entrusted to the attorney and do not warrant appointment of substitute counsel. *Traylor, supra* at 463. We also reject defendant's claim that counsel was inadequate because she allowed a law student to perform certain tasks. Pursuant to MCR 8.120(D), a properly supervised law student may advise an indigent defendant and negotiate and appear on his behalf. Furthermore, defendant's allegations that appointed counsel "hated gay people" did not constitute good cause to appoint substitute counsel as the claim was unsubstantiated.

In addition, defendant was generally dissatisfied because he "was not happy" with appointed counsel, she missed certain visits, did not return phone calls, and did not provide him with certain newspaper articles. However, these generalized claims did not articulate a difference of opinion with regard to a fundamental trial tactic and were not substantial. A mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause. *Traylor, supra* at 463; *People v Otler*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974). Likewise, defendant's general unhappiness with counsel's representation is insufficient. See, e.g., *Traylor, supra* at 463. Also, defendant's mere request that the trial court "fire[]" appointed counsel and "hire [him] someone highly competent and fabulo[us]" does not provide a basis for substitution of counsel. As previously noted, an indigent defendant is not entitled to have the attorney of his choice appointed simply by requesting that the attorney be replaced. *Id.* at 462. In sum, because there was no bona fide basis to support a finding of good cause to appoint new counsel, the trial court did not abuse its discretion by denying defendant's request for new counsel.

III. Effective Assistance of Counsel

Defendant also argues that defense counsel was ineffective for failing to secure a defense witness's presence at trial. We disagree.

A. Background

At trial, Ami Bhatt testified that she attended DL's after-party and, while there, used the bathroom. As she was leaving the bathroom, she brushed against the sink and it fell off the wall. She and a friend unsuccessfully attempted to put the sink back on the wall. Bhatt did not know DL or defendant before that night. DL testified that he learned there was a problem with the sink before he went to bed that evening. As he walked passed the bathroom, he observed a man and a woman, whom he later learned was Bhatt, standing next to the sink, which was on the floor. No attempt was made to repair the sink that night. In contrast, defendant asserted that DL chased him around the apartment, followed him into the bathroom, kissed him on the lips, and grabbed his penis, causing defendant to fall backward and knock the sink off the wall.

Defendant contends that Monique Banks could have corroborated his version of the events, particularly that DL's sexual advances caused defendant to knock the bathroom sink off the wall. On the second day of the two-day trial, however, defense counsel asked for an adjournment because she had learned the day before that Banks was unavailable for trial. The following exchange occurred:

> *The court*: First of all, you did approach the bench earlier and I indicated you could preserve an issue and raise it a [sic] more convenient time. Now would be that time.
>
> [*Defense counsel*]: Thank you, your Honor. I learned yesterday after trial that one of our witnesses Monique Banks - -
>
> * * *
>
> [*Defense counsel*]: Is - - her grandmother died and she's in Mississippi and she's not able to be here for this trial. She was a very important witness for the defense. She was present at [DL's] apartment and at the bar in the case regarding [DL]. We'd ask the Court for a continuance so she can be present to testify in this matter.
>
> *The court*: Prosecutor?
>
> [*Prosecutor*]: Your Honor, our position is we object. This trial's been scheduled for quite some time and so - -
>
> *The court*: Was she ever interviewed?
>
> [*Defense counsel*]: I interviewed her, your Honor. She was actually subpoenaed for the first trial date. She was in contact with me but I did not know that her grandmother died until just yesterday.

The court: So we didn't subpoena her for this trial?

[*Defense counsel*]: No, your Honor. She was a willing person to come in.

The court: She was what?

[*Defense counsel*]: She was a willing person to come in.

The court: Um-hum. And when she did she leave town?

[*Defense counsel*]: I don't know. I had a message on my machine that said she was in Mississippi because her grandmother died and she asked me to call her and let her know things were going.

The court: And when was that?

[*Defense counsel*]: That was yesterday I received the message, your Honor. I've been trying to call her since last week.

The court: Oh so you haven't been in contact with her since last week?

[*Defense counsel*]: Correct.

The court: But she hasn't - - so she hasn't been down there that whole time?

[*Defense counsel*]: I don't know.

The court: Do you know, Mr. Lee?

* * *

[*Defendant*]: I'm not sure when exactly her grandmother died. I'm estimating it was sometime within that week because she - -.

The court: Last week you mean?

[*Defendant*]: Yeah.

The court: Well, if I had known this at the beginning of trial I would have entertained the motion to adjourn trial. But it's not going to be possible without any information about when she would be available or the jury, or for the jury.

Defendant filed a post-conviction motion for an evidentiary hearing and a new trial on this basis. In an affidavit, Banks averred that she would testify that she observed defendant and DL talking at the bar and at DL's after-party. She was later in line to use DL's bathroom when she saw defendant come out of the bathroom "upset," followed by DL. She then went into the bathroom and observed that the sink was broken. She subsequently asked DL about the sink and "he said nothing." Banks acknowledged receiving a subpoena for the first trial date, but noted

that she did not receive a subpoena for the second trial date. She also claimed that she left "a couple of messages" for defense counsel. Relying on Banks's affidavit, the trial court ruled that "the argument about Ms. Banks is too tenuous to justify a *Ginther*[2] hearing or a new trial."

B. Standard of Review

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

C. Analysis

We conclude that, assuming a deficient performance by counsel, the requisite prejudice has not been established. Banks's testimony was not critical to preserve the fairness of defendant's trial and, in light of all the circumstances, there is no reasonable probability that, but for counsel's failure to secure her testimony, the verdict would have been different. Defendant asserts that Banks "would have corroborated [his] version of events with regard to [DL]." According to Banks's affidavit, however, she would only have testified that at some point during the night, defendant appeared upset as he and DL left the bathroom and she observed that the sink was broken. She did not claim to have witnessed the critical acts that actually comprised the crux of the defense theory. Specifically, Banks did not aver that she witnessed DL pursuing defendant around the apartment, being sexually aggressive toward defendant, or seeing defendant leave DL's apartment. In addition, Bhatt claimed to have broken the sink. The jury could have reasonably found Bhatt more credible because she did not know defendant or DL, whereas Banks was defendant's friend. Further, Banks's testimony had little bearing on the case involving CB. Given these circumstances and the strong evidence of defendant's guilt, defendant has not established the prejudice prong of his ineffective assistance claim.

IV. Adjournment

Defendant alternatively argues that the trial court abused its discretion when it denied his request for an adjournment of trial after defense counsel discovered that Banks was not available to testify. We disagree.

"No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *Snider*, *supra* at 421. When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

(1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider*, *supra*.

Here, under the circumstances presented, the trial court did not abuse its discretion in denying the motion to adjourn. Moreover, defendant cannot demonstrate prejudice. As discussed with regard to defendant's ineffective assistance of counsel claim, Banks's testimony was not imperative to protect the fairness of defendant's trial and there is no reasonable probability that the verdict would have been different had Banks testified. Reversal is not warranted under these circumstances.

V. Joinder

Defendant further argues that the trial court erred when it denied his motion to sever the two CSC cases for trial. We disagree. We review a trial court's ruling on a motion to join or sever charges for an abuse of discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). Interpretation of MCR 6.120, the court rule on joinder and severance, is reviewed de novo. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003).

MCR 6.120(B) provides:

> [T]he court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

MCR 6.120(C) provides:

> On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

Joinder of the offenses was appropriate under MCR 6.120(B)(1)(c). The evidence indicated that the acts against the individual victims were "part of a single scheme or plan" by defendant to sexually assault heterosexual young, white males to humiliate them and "pay them

back" for their treatment of women. In each case, defendant performed oral sex on a young, heterosexual, white man while he was sleeping or incapacitated. Each victim testified that he awoke to defendant performing oral sex on him. In each case, defendant's defense was that the victims were sexually aggressive toward him and initiated the sexual contact. The two cases were presented distinctively and the facts were not complex. While defendant contends that the time frames for the two offenses varied, temporal proximity is not required to establish a single scheme or plan. *People v Tobey*, 401 Mich 141, 152 n 15; 257 NW2d 537 (1977) (joinder is allowed for offenses that are part of a single scheme, even if considerable time passes between them). Finally, defendant has not established prejudice, given that, had the offenses been severed for separate trials, evidence in one trial of the other sexual assault not currently being tried would have been admissible under MRE 401-404. See MRE 404(b) (evidence of other crimes, wrongs, or acts admissible to prove "scheme, plan, or system in doing an act"); *Girard, supra* at 18 ("[B]ecause the evidence regarding defendant's possession of child sexually abusive material would have been admissible at a separate trial on the CSC I charges . . ., defendant cannot establish that a different outcome was likely had the charges been severed and separate trials held."). Consequently, joinder of the offenses was appropriate, the trial court did not abuse its discretion in denying defendant's request for severance, and, assuming any error, it was harmless.

VI. Defendant's Supplemental Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. Ineffective Assistance of Counsel

Because defendant failed to raise these issues in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

1. Transgender Appearance

Defendant argues that defense counsel was ineffective for advising him to appear at trial as a transgender without warning him of the possibility that the jury may be prejudiced against him because of his appearance. We disagree.

Defendant acknowledges that the decision to appear before the jury dressed as a woman was a strategic one, and the record supports that defendant's appearance was a critical part of the defense strategy. Before trial, defense counsel moved to allow defendant to appear in court as he appeared to the victims during the alleged sexual assaults. In the motion, defense counsel stated: "Defendant's appearance is very much a relevant piece of evidence." Defense counsel noted that both victims claimed to be heterosexual men, but "when defendant is fully dressed there is no mistaking him for a heterosexual man." "A jury must see him the way he really is." This premise was continued throughout trial. For example, in opening statement, defense counsel maintained that defendant is an "openly homosexual man," and subsequently argued in closing that both DL and CB simply consented to homosexual acts with defendant that they later regretted. She argued that DL socialized with defendant at a bar with full awareness of

defendant's homosexuality because a person "can't meet [defendant] and not know who he is. What you see is what you get." She further argued that defendant was "being persecuted for being different."

To the extent that defendant relies on the fact that the defense strategy was not successful, nothing in the record suggests that trial counsel's decision to proceed in this manner was unreasonable or prejudicial. "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." *Rockey*, *supra* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

2. Removal of Jurors

We reject defendant's claim that defense counsel was ineffective for failing to request the removal of jurors who were biased against him because of his transgender appearance. A prospective juror may be removed for cause if the challenging party shows that the juror has a bias against a party, a state of mind that will prevent the juror from rendering a just verdict, or if the juror has opinions that would improperly influence the juror's verdict. MCR 2.511(D)(2), (3), and (4). But here, defendant has not identified any record evidence that any juror was biased against him because of his transgender appearance. The record shows that the trial court questioned prospective jurors and tested their reaction to homosexuality. During voir dire, defendant was dressed as a woman. The trial court instructed the jury pool that "defendant states and claims that he is openly homosexual." The court asked the prospective jurors if they "have any strong feelings about homosexuality that would prevent [them] from fairly hearing this trial or affect [their] verdict." Each prospective juror responded, no. The court also asked each potential juror if he or she could be a fair and impartial juror in this case, to which each juror responded in the affirmative. The purpose of voir dire is to expose potential juror bias so that a defendant may be tried by a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Because the record does not disclose a basis for defense counsel to request the removal of any jurors, defendant cannot establish a claim of ineffective assistance of counsel.

3. Law Intern

Defendant also argues that he received ineffective assistance of counsel when defense counsel allowed a student intern to act as an attorney, without any supervision, and the intern advised him to proceed with a jury trial instead of a bench trial. We disagree.

First, as discussed in section II(C), a law student may advise an indigent defendant pursuant to MCR 8.120(D)(1), and the attorney supervising the intern is not required to be present while the intern is dispensing advice. MCR 8.120(D)(2)(a). Furthermore, in his brief, defendant states that the intern advised him to proceed with a jury trial because the same trial judge had previously acquitted him in a similar case, and the judge may not have much sympathy for defendant appearing before him again with the same charges against him. Accepting defendant's statements as true, the reasoning supporting the recommendation to proceed with a jury trial is not objectively unreasonable. *Frazier*, *supra* at 243. Moreover, the decision to proceed to trial by jury, rather than by judge, is a matter of trial strategy, *People v Anderson*, 112 Mich App 640, 646; 317 NW2d 205 (1981), which this Court will not assess with the benefit of

hindsight. *Rockey, supra* at 76-77. In addition, defendant cannot establish prejudice. Defendant's implication that he would have been acquitted had the trial judge tried him is based on conjecture.

4. Jury Composition

We reject defendant's claim that defense counsel was ineffective for failing to challenge the sexual orientation composition of the jury and for failing to ensure that the jury "included some gay as well as heterosexual orientation." "A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). "To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving 'that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process.'" *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003) (citation omitted). Underrepresentation may be measured by measuring the disparity between how many of the distinctive group are in the jury array and how many are in the community. *Hubbard, supra* at 473-474. However, the fair-cross-section requirement does not entitle the defendant to a jury that "mirrors the community and reflects the various distinctive groups in the population." *Id.* at 472.

Defendant cites no support for his suggestion that, as a homosexual, he is a member of a "distinct group" for purposes of the fair-cross-section requirement. Furthermore, the record does not indicate the sexual orientation of any members of the jury pool. There is no data in the record to show the proportion of homosexuals within the community as compared with heterosexuals. Additionally, there is no evidence of systematic exclusions of homosexuals from jury pools in Washtenaw County. As previously indicated, the record does show that the trial court directly questioned prospective jurors with regard to their views of homosexuality as it related to their ability to render a fair and just verdict. Considering counsel's actions in light of the law and facts available on the record, there is no basis for concluding that defense counsel acted below an objective standard of reasonableness by failing to challenge the sexual orientation of the jury.

B. New Trial

We also reject defendant's claim that he is entitled to a new trial because the trial court should not have granted his motion to appear at trial dressed as a woman. It is well settled that a party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Consequently, defendant has waived this issue on appeal, and any error was extinguished. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000).

C. Inadmissible Hearsay

We reject defendant's claim that Bianca Johnson's testimony concerning statements that defendant made to her was inadmissible hearsay and unfairly prejudicial. We review the trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *Id.*

Defendant's statements to Johnson with regard to his desire to "pay back" heterosexual, white men were admissible under MRE 801(d)(2), as admissions by a party-opponent. The statements were relevant because they established a motive for defendant to sexually assault the victims. See MRE 401 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Furthermore, the evidence was not inadmissible simply because the nature of the evidence was prejudicial, and defendant has not demonstrated that he was *unfairly* prejudiced by the evidence. See MRE 403.

D. Shackling

Defendant lastly contends that his convictions must be reversed because he was prejudiced when the jurors observed him shackled at trial. We disagree. We review a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

"Freedom from shackling is an important component of a fair trial." *Id.* at 404. To justify reversal of a conviction on the basis of being shackled, the defendant must show that prejudice resulted. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988); *People v Meyers (On Remand)*, 124 Mich App 148, 164; 335 NW2d 189 (1983). The basis for defendant's claim is that the jury observed him in handcuffs when the jury verdicts were announced. Because the jury had already reached its verdicts before defendant appeared in restraints, there is no basis for concluding that defendant was prejudiced. Accordingly, a new trial is not required on this basis.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald