

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT EDWARD EMERY,

Defendant-Appellant.

UNPUBLISHED

April 23, 2009

No. 282613

Wayne Circuit Court

LC No. 07-006705-FC

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm, MCL 750.84, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to one to ten years' imprisonment for the assault with intent to do great bodily harm conviction, 17 to 26 years' imprisonment for the armed robbery conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, one to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Because the trial court did not err when it refused to appoint substitute counsel during trial, did not err when sentencing defendant, and, because defendant was not denied the effective assistance of counsel at trial, we affirm.

This case arises from a shooting that occurred at a residence on Belding in Westland, Michigan around midnight on February 3, 2007. On that date, Jessica Sloup received a call from defendant at about 9:00 p.m., asking her to come over to his new house and bring the man she was dating, Daniel Popovits, so they could all hang out that night. Sloup picked up Popovits when he got off work and drove him to defendant's house, arriving around midnight. Defendant was standing on the porch when they arrived and let them in the house. Another man, Jason Shuford, was present in the house when Sloup and Popovits arrived. Shortly after they arrived, defendant came out of the kitchen, sneaking around a corner with a gun pointed at Popovits. Defendant approached Popovits and pistol-whipped him on the left side of his head. Then, defendant pointed the gun at Popovits's face. When Popovits reached for the gun, defendant fired it. The bullet hit Popovits in his left forearm, and exited out his elbow. After shooting Popovits, defendant told him to empty his pockets and demanded his keys and cell phone with the gun still pointed at him. Popovits complied, emptying his pockets of his cell phone and cash. Defendant told Popovits and Sloup to leave, which they did. Sloup was driving Popovits to the

hospital when they were pulled over by a police officer. A week after the incident, police arrested defendant in West Virginia. Defendant stood trial and was convicted of multiple charges in connection with the events. He now appeals as of right.

First, defendant argues that the trial court abused its discretion by failing to appoint substitute counsel when the record showed that the attorney-client relationship had deteriorated. Defendant specifically contends that the refusal of his trial counsel to challenge the credibility of prosecution witnesses pursuant to his request demonstrated that the attorney-client relationship had reached an impasse and effective representation was impossible. This Court reviews a trial court's decision regarding substitute counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). The Sixth Amendment affords criminal defendants the right to retain counsel of their own choosing. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). However, the constitutional right to counsel of one's choice is not absolute. *Id.* at 557. An indigent person who is entitled to appointed counsel is not entitled to choose his own lawyer. *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004). Appointment of substitute counsel is warranted upon a showing of good cause for the substitution and that the substitution will not unreasonably disrupt the judicial process. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005); *Traylor, supra* at 462. Good cause is shown where "a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A defendant must state any differences of opinion regarding trial tactics with specificity. *Traylor, supra* at 463.

During the first day of trial testimony, defendant raised concerns about his counsel. He asserted that there had been a breakdown in communication because his counsel had refused to challenge the credibility of the prosecution witnesses, Sloup and Popovits. Defendant wanted his counsel to recall these witnesses. Defendant also complained his counsel had refused to raise certain unspecified motions on his behalf. The trial court had previously appointed substitute counsel for defendant before trial and refused to again appoint substitute counsel. When defendant suggested representing himself, the trial court discouraged defendant, but indicated it would allow him to do so with current defense counsel acting as standby counsel. Defendant did not find this satisfactory and allowed his current counsel to continue to represent him.

The trial court did not abuse its discretion by refusing to appoint substitute counsel. Defendant's primary complaint was his disagreement with how his counsel attacked the credibility of prosecution witnesses. But defendant failed to show good cause because there was no legitimate difference of opinion. *Mack, supra* at 14. Defense counsel attacked the credibility of prosecution witnesses by calling Jason Hicks and Brandon Secreto, who testified that Sloup told them Jason Shuford was responsible for the shooting. Defense counsel even asked Sloup on cross-examination whether she told Secreto that Shuford shot the victim. It is clear from the record that defense counsel did attack the credibility of prosecution witnesses, but in a different manner than defendant wanted. The manner in which a witness is questioned does not constitute good cause because it is not a fundamental trial tactic. *People v Jones*, 168 Mich App 191, 195; 423 NW2d 614 (1988). With regard to unspecified motions defendant requested his counsel to file, defendant failed to specifically articulate what those motions concerned, and defense counsel maintained that they were frivolous. The unheeded request by counsel to file frivolous motions does not constitute good cause for substitute counsel. *Traylor, supra* at 463.

Additionally, an appointment of substitute counsel would have unreasonably disrupted the judicial process. Defendant did not raise the problems he had with his counsel until the middle of the first day of trial testimony and the second day of trial. A substitution of counsel at this point in the proceedings would have required delaying proceedings and forced the rescheduling of the trial. For all of these reasons, the trial court did not abuse its discretion.

Next, defendant argues he was denied the effective assistance of counsel because his counsel failed to present evidence that would impeach the credibility of the victim and Sloup. Defendant contends that because the only evidence that he was convicted on came from these two witnesses, defense counsel's outright refusal to challenge their credibility made him ineffective. Defendant also asserts that considering the emphasis placed on the victim's and Sloup's testimony, there is a reasonable probability that the result would have been different if not for defense counsel's errors. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). "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 error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Dixon, supra* at 396.

Defendant only raises issues involving trial strategy. Here, defense counsel called two witnesses, as well as defendant, in order to present defendant's version of events and to impeach Sloup's and the victim's credibility. The decision to call or question witnesses is presumed to be a matter of trial strategy. *Dixon, supra* at 398. The failure to question a witness or present other evidence is considered ineffective assistance of counsel only when it denies the defendant a substantial defense. *Id.* Beyond the issue of credibility, defendant does not elaborate on the substantial defense that his counsel failed to raise. The record indicates that defense counsel vigorously attacked the credibility of prosecution witnesses by calling additional witnesses at trial. While defendant and defense counsel did not agree on the best way to attack the credibility of prosecution witnesses, this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Therefore, defendant was not denied the effective assistance of counsel.

Finally, defendant argues that the trial court erred by increasing his maximum sentence for the armed robbery conviction from 25 to 26 years after the trial court was informed that the initial sentence of 17 to 25 years violated the *Tanner* rule. *People v Tanner*, 387 Mich 683, 690;

199 NW2d 202 (1972). Defendant contends that the error may only be corrected by reducing the minimum sentence, rather than increasing the maximum. An assertion that a sentence is legally invalid is a question of law, which this Court reviews de novo. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). At sentencing, the trial court initially verbalized a sentence for defendant of 17 to 25 years' imprisonment for his armed robbery conviction. Defendant then informed the trial court of the possible *Tanner* violation. After the prosecution and defendant conferred on this issue, they agreed that the trial court needed to alter the sentence to avoid violating this rule. The trial court agreed and immediately changed defendant's maximum sentence to 26 years before the sentencing hearing ended.

Tanner's "two-thirds" rule, which provides that a "court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence," has been codified in MCL 769.34(2)(b). *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003). Defendant argues that the trial court's modification of his sentence violated the rule set forth in *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994). In *Thomas*, the Michigan Supreme Court held that the trial court erred in changing the defendant's sentence by raising the maximum to address the *Tanner* violation after the defendant moved to set aside his sentence several months after the sentence was given. *Id.* at 391-394. This case is different from *Thomas* because the trial court was informed of its error and changed defendant's sentence before the sentencing hearing ended and importantly, before entering the written judgment of sentence.

A court speaks through written judgments and orders rather than oral statements. *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993). In this case, while defendant was still present, the trial court modified the sentences on the record before it actually imposed defendant's sentences by court order. Based on these circumstances, the trial court had the authority to modify the sentences and defendant is not entitled to resentencing.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio