STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 300281 Kalamazoo Circuit Court
ROBERT LAMONT MOORE, Defendant-Appellant.	LC No. 2008-001671-FC

Before: HOEKSTRA P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to consecutive sentences of 16 to 30 years' imprisonment for the armed robbery conviction and 2 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm the convictions and sentence of defendant.

I. BASIC FACTS

John Allegretti testified that on Sunday, September 28, 2008, defendant, an acquaintance of his for about 20 years, came over to his apartment to watch a football game. Defendant arrived at the apartment with two other men, each armed with a gun. Defendant ordered Allegretti to "[g]ive up the guap."[1] When Allegretti did not do so immediately, the man with the long gun told Allegretti to "shut the fuck up, bitch." He then hit Allegretti in the face with the butt of the gun. After defendant commanded the two men to "[c]heck his pockets," Allegretti ran to his balcony, yelling at Kassie Pillars, who lived in the apartment below his, to call 911. Allegretti jumped over the balcony banister, and swung himself to the balcony of Pillars's apartment. When the police arrived, defendant was not present. Almost a year later, Allegretti saw defendant outside a hospital. The two got into a "scuffle," which Allegretti hoped would prompt the security guards to telephone the police. However, defendant was not arrested for the robbery until January 2010.

[1] "Guap" is a street term for money.

Defendant presented an alibi witness, Earlinia Moore, who was the mother of his five-year-old son. Earlinia testified that defendant called her around 4:00 p.m. on September 28, 2008, to ask for a ride from his mother's house because he was running from the police. Defendant told Earlinia that he and Keitha Tigues, his girlfriend, had "got into it" and that Tigues had called the police. Earlinia remembered the time of the telephone call and that it came on a Sunday because the "church bus," which her three children were riding, pulled up as she was talking to defendant. Defendant arrived at Earlinia's house between 5:00 p.m. and 5:30 p.m., and he stayed the night.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues on appeal that improper comments by the prosecutor in closing and rebuttal argument denied him a fair trial. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). We review claims of prosecutorial misconduct on a case-by-case basis, examining the record and reviewing the prosecutor's comments in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

Defendant claims that the prosecutor shifted the burden of proof when, in her rebuttal argument, she stated that defendant had not presented any motive for why Allegretti would lie. In addition, defendant claims that the prosecutor denigrated defense counsel when she referred to defense counsel's questioning of police tactics as "red herrings." We review these unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

"[A] prosecutor may not comment on a defendant's failure to testify or present evidence, i.e., the prosecutor may not attempt to shift the burden of proof." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor may comment "on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005) (quotation marks and citations omitted). "[A]ttacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *Id.* at 635. The defense theory was that Allegretti lied about defendant's involvement in the armed robbery, and in closing argument, defense counsel repeatedly argued that Allegretti lied about defendant committing the armed robbery. However, defendant failed to present any evidence suggesting a motive for Allegretti to lie. When read in context, the prosecutor's comment that "there is absolutely no motive presented by the defense as to why John Allegretti would come into court" was an attack on the credibility of the theory advanced by the defense. Accordingly, the prosecutor's comment did not shift the burden of proof. *McGhee*, 268 Mich App at 634-635.

A prosecutor may not personally attack defense counsel, *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010), or counsel's credibility, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). A prosecutor may not suggest that defense counsel is attempting to mislead the jury. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Such arguments undermine the defendant's presumption of innocence as they shift the focus from the evidence presented to defense counsel's personality. *Id.* Here, the prosecutor's comment that defense counsel's argument to "blame the police" are "just red herrings" was not a

suggestion that defense counsel was attempting to distract the jury from the truth. When read in context, the prosecutor's comment was an attack on the credibility of the claim by the defense that the police did not do a proper investigation. The prosecutor argued that, based on the facts and circumstances of the case, the police did conduct an adequate and thorough investigation. Because a prosecutor may respond to an issue raised by the defendant, *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008), the prosecutor's comment was not improper.

Defendant also argues that the prosecutor denigrated defense counsel when she suggested that counsel concocted the alibi defense as a strategy necessitated by the testimony of Pillars.[2] In closing argument, the prosecutor argued that Allegretti's testimony was consistent with that of Pillars's testimony. After briefly summarizing Pillars's testimony, the prosecutor stated:

> You can only wonder if--if we didn't have Kassie Pillars in this case, what would the defense had [sic] been then? Would it have been that John Allegretti did this all to himself? That he caused these injuries, he put the butt of a gun to his face, and then called the police, and said that . . . Robert Moore committed the crime.

Defendant objected, arguing that "it's improper to discuss what the defense may have been" and that "we're supposed to argue about facts in evidence, or evidence that could not have been produced, not what an alternate theory should have or could have been that was not even presented." The trial court overruled the objection. It concluded that the argument "essentially relates to credibility and analysis of the evidence." The trial court informed the jury that the lawyers' arguments "do need to be based on the evidence in the case and not fantasy. But they can argue from that largely as they see fit." The prosecutor then continued her argument, "So if--if we didn't have Kassie Phillips (sic), would then the theory be that John Allegretti did this himself. But no, they couldn't argue that because we had Kassie Phillips [sic]. So now it has to be one of alibi."

As the trial court noted when ruling on defendant's objection, the argument at issue here addressed "the credibility and analysis of the evidence." In so doing, the prosecutor did not reference opposing counsel. Rather, the gist of her argument was that the testimony of the neighbor, who was an unimpeachable, independent witness, made it difficult to challenge the victim's claim that he was assaulted and robbed, and consequently, the defense resorted to presenting an alibi defense. Making this argument, which was based on the nature of the testimony presented by the prosecution, did not denigrate opposing counsel. To the contrary, the argument made by the prosecutor was a permissible attack drawn from the evidence on the credibility of defendant's alibi defense. Consequently, we assign no error.

III. SUFFICIENCY OF THE EVIDENCE

[2] Defendant also challenges this remark in his standard 4 brief.

Defendant next argues on appeal that his conviction for felony-firearm, which was based on an aiding and abetting theory, was not supported by sufficient evidence.[3]

We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.* Circumstantial evidence and the reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

In *People v Moore*, 470 Mich 56, 69; 679 NW2d 41 (2004), our Supreme Court held that "aiding and abetting the commission of felony-firearm is no different from aiding and abetting the commission of any other felony."[4] It explained the proof required to convict a defendant of felony-firearm on an aiding and abetting felony:

> Under the aiding and abetting statute, MCL 767.37, the correct test for aiding and abetting felony-firearm in Michigan is whether the defendant "procures, counsels, aids, or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony]."
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> The prosecutors must do more than demonstrate that defendants aided the commission or attempted commission of the underlying crimes . . . . Rather, the prosecutors must demonstrate that defendants specifically aided the commission of felony-firearm. Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant performed acts or gave encouragement that assisted in the carrying or possession of a firearm during the commission of a felony. [*Id.* at 70-71.]

When viewed in the light most favorable to the prosecution, defendant's actions and words demonstrated an intent to procure, counsel, aid, or abet the possession of a firearm during

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[3] Defendant makes the same argument in his standard 4 brief.

[4] The Court overruled the holding of *People v Johnson*, 411 Mich 50; 303 NW2d 442 (1981), that a defendant is only guilty of aiding or abetting the commission of felony-firearm if the defendant assisted in obtaining or retaining possession of the firearm. *Moore*, 470 Mich at 58-59, 69.

the commission of the armed robbery. Defendant called Allegretti and procured an invitation to watch football at Allegretti's apartment, thereby ensuring that Allegretti would open his apartment door when defendant later knocked. Defendant arrived at Allegretti's door with two men, each armed with a gun. The three men entered Allegretti's apartment together after Allegretti opened the apartment door. The man carrying a pistol pointed it at Allegretti's face, forcing Allegretti to back into the apartment. Defendant demanded Allegretti to hand over "the guap," and when Allegretti questioned defendant, the man with the shotgun hit Allegretti in the face with the butt of the gun. Defendant then ordered the two men to check Allegretti's pockets for money. Defendant encouraged and assisted his accomplices' possession of firearms by specifically relying on the firearm possession to intimidate Allegretti, all of which was accomplished by defendant ensuring entrance into Allegretti's apartment. See *id.* at 71, 73. Accordingly, defendant's conviction for felony-firearm based on an aiding and abetting theory is supported by sufficient evidence.

IV. DEFENDANT'S STANDARD 4 BRIEF

In his standard 4 brief, defendant makes numerous claims that he was denied the effective assistance of counsel. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Because defendant never moved for a *Ginther*[5] hearing, our review of defendant's claims of ineffective assistance is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

First, defendant claims that counsel was ineffective for failing to discover and utilize Allegretti's criminal record. However, the record establishes that in a request for discovery defense counsel asked for Allegretti's criminal record. In addition, Allegretti's criminal history is not contained in the lower court record; therefore, the record does not establish that evidence of Allegretti's criminal past was admissible. See, e.g., MRE 609 (stating that only crimes containing elements of dishonesty, false statement, or theft are admissible to impeach a witness's credibility). Accordingly, defendant fails to establish that counsel's failure to question Allegretti about his criminal record fell below an objective standard of reasonableness. *Uphaus*, 278 Mich App at 185.

Second, defendant claims that counsel was ineffective for failing to call Donnie Williams, who was Allegretti's best friend, and two other men, Matthew Justice and Johnny West, as witnesses. However, there is nothing in the record to indicate what the testimony of these three men would have been had they been called as witnesses. Accordingly, even assuming counsel was ineffective for failing to investigate the three men and to secure their presence at trial, the record does not establish that counsel's deficient performance prejudiced defendant. *Id.*

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

Third, defendant claims that counsel was ineffective for calling the emergency room doctor who treated Allegretti on September 28, 2008, as a witness. Again, however, there is nothing in the record to indicate the doctor's potential trial testimony. Therefore, even if counsel was ineffective in any manner for failing to call the emergency room doctor as a witness, the record does not establish that counsel's deficient performance prejudiced defendant. *Id.*

Also, regarding the emergency room doctor, defendant claims that his right to cross-examine or confront the doctor was violated. Although the doctor was not called as a witness, Allegretti's emergency room records were admitted into evidence. Testimonial hearsay of a nontestifying declarant is prohibited unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009). "Statements are testimonial if the 'primary purpose' of the statements or the question that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.*, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Defendant does not identify any statements in Allegretti's emergency room records that can be attributed to the emergency room doctor, much less does he make any argument that such statements could be considered testimonial. Accordingly, there is no merit to defendant's claim that he was denied his right to confront the emergency room doctor.

Fourth, defendant claims that defense counsel was ineffective for failing to cross-examine Allegretti regarding all the inconsistencies in his story. However, the questioning of witnesses is a matter of trial strategy, *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008), and this Court will not second-guess counsel on matters of trial strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Regardless, defense counsel questioned Allegretti regarding all the inconsistencies in Allegretti's story that defendant has identified on appeal. Defendant further claims that, based on all the inconsistencies in Allegretti's story, defense counsel was ineffective for failing to move to suppress Allegretti's trial testimony. However, defendant cites no authority for the proposition that a witness's trial testimony can be suppressed simply because parts of it are inconsistent with the witness's previous testimony or statements.

Fifth, defendant claims that defense counsel was ineffective for failing to call the medical records specialist as a witness. However, the failure to call a particular witness at trial is presumed to be a matter of trial strategy, *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009), and, as already stated, this Court will not second-guess counsel on matters of trial strategy, *Rice*, 235 Mich App at 445. In addition, the failure to call a particular witness only constitutes ineffective assistance if it deprived the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure of defense counsel to call the medical records specialist as a witness did not deprive defendant of a substantial defense where Earlinia testified that defendant was hospitalized in the month before the armed robbery.

Sixth, defendant claims that defense counsel was ineffective for failing to file a motion to quash that he had requested her to file. Counsel is not required to make futile motions. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant does not identify the substance of the motion to quash that he requested counsel to file, much less does he argue that a motion to

quash would have been meritorious. Accordingly, defense counsel was not ineffective for failing to file a motion to quash.

Defendant next argues that there were violations of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when the prosecutor removed the emergency room doctor from its witness list and when the prosecutor called Allegretti to the stand. A defendant has a *Brady* claim when the prosecutor fails to disclose evidence that is exculpatory and material, regardless whether the defendant requests the disclosure. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To establish a *Brady* violation, a defendant must prove:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

Here, defendant does not identify any evidence favorable to him that the prosecutor suppressed. We find no merit to defendant's claims of any *Brady* violations.

Defendant next claims that the prosecutor used the evidence of his two domestic violence charges to paint him as a bad man. Evidence of a defendant's other crimes, wrongs, or acts is not admissible to prove action in conformity therewith. MRE 404(b)(1); *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). However, evidence of a defendant's other bad acts may be used for noncharacter purposes. MRE 404(b)(1); *People v Roper*, 286 Mich App 77, 92; 777 NW2d 483 (2009). Here, the two police reports of defendant engaging in domestic violence against Tigues were not used by the prosecutor to establish that defendant was a bad person. Rather, the parties used the evidence of the domestic violence reports to evaluate the credibility of Earlinia's alibi testimony. For example, that there was a police report that defendant engaged in domestic violence on September 28, 2008, before 3:30 p.m. provided corroboration to Earlinia's testimony. Accordingly, we reject defendant's argument that the prosecutor used evidence of the two domestic violence charges as improper character evidence.

Similarly, defendant argues that the prosecutor improperly impeached him with evidence of the two domestic violence charges and Earlinia with evidence of an outstanding traffic warrant. "It is well settled that the use, for impeachment purposes, of evidence of an arrest not resulting in conviction is erroneous." *People v Westbrook*, 175 Mich App 435, 437; 438 NW2d 300 (1989). However, defendant fails to recognize that the evidence of the domestic assault charges and the outstanding traffic warrant was not used to impeach him and Earlinia. The prosecutor did not use the evidence to argue that Earlinia could not be believed because there was an outstanding warrant for her arrest, nor did the prosecutor claim that defendant's acts of domestic violence made him a bad person or his defense could not be believed.

Defendant argues that the prosecutor attempted to gain the jury's sympathy when she focused on pictures of Allegretti's children. "A prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. We have reviewed the pertinent portion of the trial transcript, where the prosecutor questioned Allegretti regarding Exhibit

Number 3, and we find nothing in the prosecutor's questions that could be interpreted as an appeal for the jury's sympathy. Defendant also argues that the prosecutor made improper comments in her opening and closing arguments. However, defendant fails to identify specific statements of the prosecutor that he believes were improper. A defendant may not leave it to this Court to search for a factual basis to sustain his position. *Petri*, 279 Mich App at 413. The claim is abandoned.

Defendant next asserts that the elements of armed robbery were not met where Allegretti told a police officer on the night of the armed robbery that nothing had been taken from his apartment. Defendant also claims there was not sufficient evidence for the jury to find that defendant acted in concert with the two gunmen. In *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007), this Court set forth the elements of armed robbery:

> [A] prosecutor must now prove, in order to establish the elements of armed robbery, that (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.

Here, when Allegretti's testimony is viewed in the light most favorable to the prosecution, *Cline*, 276 Mich App at 642, a rational trier of fact could find that defendant acted in concert with the two gunmen and that the elements of armed robbery were proved beyond a reasonable doubt.

Defendant argues that because only one out of the 48 members of the jury venire was African-American, the venire was not a representative cross section of the community. A defendant's Sixth Amendment right to trial by jury, US Const, Am VI, includes the right to have a jury venire from a representative cross section of the community. *People v Bryant*, 289 Mich App 260, 265-266; 796 NW2d 135 (2010). To establish a prima facie violation of the fair-cross-section requirement, a defendant must establish the following:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Assuming, as did the trial court, that African-Americans were underrepresented in the jury venire, defendant makes no claim that the underrepresentation of African-Americans was due to systematic exclusion, which is "exclusion 'inherent in the particular jury-selection process utilized.'" *Bryant*, 289 Mich App at 273, quoting *Duren*, 439 US at 366. Accordingly, defendant fails to establish a prima facie case of a violation of the fair-cross-section requirement.

Defendant also complains that his jury was not impartial because several of the jurors were victims of theft crimes and others knew the prosecutor or the prosecutor's husband. Jurors are presumed competent and impartial, *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008); *People v Johnson*, 245 Mich App 243, 272; 631 NW2d 1 (2001) (opinion by O'CONNELL, P.J.), and it is the defendant's burden to prove that a juror was not impartial or that the juror's impartiality is in reasonable doubt. *Miller*, 482 Mich at 550. Defendant makes no argument that any of the jurors he claims were not impartial were, in fact, partial or that their impartiality was in reasonable doubt. We find no merit to defendant's argument that he was denied an impartial jury.

Defendant next argues that the trial court erred in denying his request for substitute 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).

Regarding the appointment of substitute counsel, this Court has stated:

> 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.* at 462 (citation omitted).]

Defendant does not identify a "fundamental trial tactic" on which he and defense counsel disagreed. The record indicates that defendant and counsel disagreed regarding how to serve a witness, which motions to make, and what evidence to present. "Counsel's decisions about defense strategy, including what evidence to present and what arguments to make, are matters of trial strategy and disagreements with regard to trial strategy or professional judgment do not warrant appointment of counsel." *People v Strickland*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298707, issued July 28, 2011), slip op 3. Accordingly, the trial court did not abuse its discretion in denying defendant's request for substitute counsel.

Defendant raises numerous other issues in his standard 4 brief, including, but not limited to, whether he was denied his right to present a defense when certain witnesses did not testify, that he was denied his right to due process because the prosecutor presented the testimony of Allegretti knowing that it was inconsistent with his previous statements, and the jury was not properly instructed on his alibi defense and aiding and abetting. We have reviewed the remaining arguments, and conclude that they are abandoned due to defendant's failure to provide supporting authority. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment

with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).[6]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[6] We note that there is no section in the body of defendant's standard 4 brief that corresponds with question 8 of the "amendment of questions involved." That issue is abandoned because defendant failed to brief the merits of the alleged error. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001).