

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 18, 2012

V

DOUGLAS ROY BURNS,

Defendant-Appellant.

No. 305037
Oakland Circuit Court
LC No. 2010-234389-FC

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of two counts of assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Because the trial court did not abuse its discretion by excluding evidence of defendant's mental illness, defendant was not denied his right to present a defense, defendant received the effective assistance of counsel, and defendant has failed to establish plain error regarding the trial court's failure to respond to letters requesting substitute counsel, we affirm.

Defendant's convictions arise out his assault of two police officers on May 27, 2010. City of Pontiac Police Sergeant Ryan Terry and Officer Tim Morton responded to defendant's home because of a dispute between defendant and his neighbors. Defendant was irate and yelled at the officers to get off of his property. Terry and Morton returned to defendant's home later that day because of threats that defendant had made to the mayor of Pontiac over the telephone. As the officers talked to defendant's wife at the front door, they could hear defendant yelling in the background. When defendant came to the front door, he was wearing only a bathrobe with large front pockets, and Terry saw defendant place a small handgun into one of the pockets. Terry yelled "gun, gun, gun" to alert Morton that defendant had a gun, and the officers unsuccessfully attempted to subdue defendant. After a brief struggle, defendant fired two shots at the officers, prompting Morton to fire one shot at defendant, which missed and struck a piano. Defendant then fired a third shot at the officers, who sustained nonlife-threatening injuries. Defendant was eventually subdued and apprehended after additional police officers arrived and sprayed tear gas into defendant's home.

Defendant first argues that he was denied his right to present a defense when the trial court ruled that he could not present evidence that he suffered from bipolar disorder. We review

de novo as a question of law whether a defendant was denied his constitutional right to present a defense. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). We review for an abuse of discretion a trial court's decision to exclude evidence. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

It is well established that a criminal defendant has a state and federal constitutional right to present a defense. *Id.* at 249-250. This right is not absolute, however, and an "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). In *People v Carpenter*, 464 Mich 223, 236; 627 NW2d 276 (2001), our Supreme Court held that the Legislature's enactment of MCL 768.21a¹ demonstrates its "intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." (Emphasis in original.) "Hence, a defendant is not entitled to offer evidence of a lack of mental capacity for the purpose of avoiding or reducing criminal responsibility by negating the intent element of an offense." *People v Yost*, 278 Mich App 341, 354-355; 749 NW2d 753 (2008). "[T]his does not mean[, however,] that a defendant who is legally sane can never present evidence that he or she is afflicted with a mental disorder or otherwise has limited mental capabilities." *Id.* at 355. If such evidence is offered "for a relevant purpose other than to negate the specific intent element of the charged crimes," it may be admissible.

Defendant concedes that, because he was determined to be legally sane, he was not able to present an insanity defense at trial. He argues that evidence of his mental illness was nevertheless admissible to show that his actions throughout the day of the shooting were not those of a normal person, but rather, occurred because of his mental condition. Defendant contends that the evidence was thus admissible as character evidence pursuant to MRE 404(a)(1). That rule provides, in relevant part, that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except . . . [e]vidence of a pertinent trait of character offered by an accused" Thus, "[u]nder MRE 404(a)(1) a defendant may offer evidence that he or she has a character trait that makes it less likely that he or she committed the charged offense." *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009).

The trial court properly denied defendant's request to admit evidence of his mental illness. Contrary to defendant's argument that the evidence was properly admissible as character

¹ MCL 768.21a(1) provides, in relevant part:

It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. . . . Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.

evidence to explain his actions on the day of the shooting, the only relevant purpose of the evidence would have been to try to convince the jury that his mental illness prevented him from forming the specific intent necessary to commit assault with intent to commit murder. Character evidence under MRE 404(a)(1) is evidence that “makes it less likely that he or she committed the charged offense.” *Id.* The only manner in which evidence of defendant’s mental illness could have made it less likely that he committed assault with intent to commit murder is if the evidence negated his specific intent, i.e., his mental illness prevented him from forming the specific intent to kill.² Evidence of a defendant’s diminished capacity short of legal insanity is inadmissible for this purpose. *Carpenter*, 464 Mich at 236, 241. Because a defendant may not introduce evidence of his “lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent,” *id.* 241, the trial court did not abuse its discretion by excluding the evidence. Further, because evidence of defendant’s mental illness was not properly admissible, the trial court’s exclusion of the evidence did not deny defendant his constitutional right to present a defense.

In his Standard 4 brief on appeal, defendant argues that his trial counsel rendered ineffective assistance in numerous respects. For example, defendant contends that counsel was ineffective for failing to call certain, unidentified witnesses, failing to cross-examine Terry and Morton regarding their failure to test defendant’s hands for gunshot residue, failing to question the officers regarding ownership of the gun and failing to have it tested for fingerprints, failing to cross-examine the officers regarding why the camera in the police vehicle was not functioning, failing to conduct any ballistics investigation regarding the gunshot that Morton fired, and failing to subpoena police officers to testify regarding why they broke into the front door of the home when officers had already broken into a sliding glass door at the back of the home.

We initially note that defendant failed to preserve this issue for our review by moving for a new trial or a *Ginther*³ hearing in the trial court. See *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Our review is therefore limited to mistakes apparent on the record. *Id.* In addition, defendant fails to cite any authority in support of his conclusory assertions, nor does he provide citations to the record. Accordingly, he has abandoned his claims of error. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (a defendant “bears the burden of establishing the factual predicate for his claim”); *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006) (a defendant abandons a claim of error by failing to adequately brief the issue). Further, although defendant alleges a litany of reasons why trial counsel’s performance fell below an objective standard of reasonableness, he does not allege that he was prejudiced by counsel’s alleged deficient performance. See *Carbin*, 463 Mich at 600 (a defendant must show that counsel’s deficient performance prejudiced his defense). In any event, we have reviewed the

² We note that defendant testified in his own defense and denied possessing a gun that day or ever having fired a gun during his lifetime. Defendant’s argument that evidence of his mental illness was admissible as character evidence to explain his actions on the day of the shooting is does not coincide with his trial testimony that he did not fire a weapon.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

record and conclude that defendant's claims are either unsupported by the record, lack merit, or have no bearing on any issue pertinent to this case.

Defendant next argues in Standard 4 brief that he was denied his state and federal constitutional due process rights when the trial court failed to respond to his letters asking the court to appoint substitute counsel. Because defendant's letters are not included in the lower court record and the record does not reflect that defendant requested substitute counsel, our review of this issue is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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. [*People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

Good cause does not exist simply because a defendant alleges, unsupported by a substantial reason, that he lacks confidence in his trial counsel. *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011). "Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Id.*

There is no indication in the lower court record that defendant moved for the appointment of substitute counsel, nor does the record demonstrate good cause for the appointment of substitute counsel. Although defendant alleges that he wrote two letters to the trial court wherein he complained about his appointed attorney, those letters, as previously indicated, are not part of the lower court record, and defendant did not attach them to his Standard 4 brief. Thus, because there is no factual support for defendant's claim, he is unable to demonstrate plain error affecting his substantial rights. Moreover, in his Standard 4 brief defendant does not argue that there existed a legitimate difference in opinion between he and trial counsel regarding a fundamental trial tactic. He has therefore failed to establish good cause for the substitution of appointed counsel. See *Strickland*, 293 Mich App at 398. Accordingly, defendant has failed to show that the trial court's failure to respond to his letters constituted to plain error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio