

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN SAMUEL BAILEY,

Defendant-Appellant.

UNPUBLISHED

December 16, 2003

No. 242417

Wayne Circuit Court

LC No. 96-503960

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(b); assault with intent to murder, MCL 750.83; two counts of armed robbery, MCL 750.529; and felony-firearm, MCL 750.227b. He was sentenced to mandatory life imprisonment without parole for the first-degree felony murder conviction, 20 to 30 years' imprisonment for the assault with intent to murder conviction, 15 to 25 years' imprisonment for the two robbery armed convictions, and the mandatory consecutive two-year term for felony-firearm. This case is before us on leave granted by our Supreme Court. We affirm defendant's convictions but remand to the trial court for the court to vacate the armed robbery conviction relating to the murder victim.

Defendant first contends that the prosecutor caused error requiring reversal where he introduced evidence of the plea bargain entered into between the testifying accomplice and the prosecution (the accomplice was permitted to plead guilty to armed robbery and felony firearm and avoid a murder charge) and of the sentence he received following his plea. Defendant failed to preserve this issue by objecting, *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999), so we review it for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant bears the burden of demonstrating that plain or obvious error occurred and that the plain error affected the defendant's substantial rights; i.e., that it "affected the outcome of the lower court proceedings." *Id.*

We conclude that defendant has failed to demonstrate plain, outcome-determinative error. As in our decision in *People v Dowdy*, 211 Mich App 562, 570-572; 536 NW2d 794 (1995), the prosecutor in this case questioned the accomplice about his plea agreement – an agreement that he was reneging on – not about a conviction in a trial. Defendant did not object to the prosecutor's questioning, and, in fact, cross-examined the accomplice extensively concerning his "deal." This was part of defendant's strategy of casting doubt on the accomplice's credibility and

showing that he was disavowing the bargain he had made with the prosecutor – a bargain he allegedly made only to escape a life sentence. This Court will not permit defendant to use the plea agreement at trial to undermine the accomplice’s credibility and then complain on appeal that he was prejudiced by its introduction. *Id.* at 572.

Defendant next contends that the prosecutor committed misconduct that deprived him of his right to a fair trial by eliciting testimony that the accomplice had promised to testify truthfully, thereby suggesting that the prosecutor had some special knowledge of the accomplice’s veracity. We disagree.

Once again, defendant failed to object; therefore he must establish outcome-determinative plain error to prevail on this claim. *Carines, supra* at 763. Based on the accomplice’s past performance, the prosecutor expected him to attempt to disavow his prior statements and testimony. Therefore, when the accomplice commenced his testimony by admitting that he had committed an armed robbery with another person, but claimed that he could not remember the other person, the prosecutor was justified in reminding him of his agreement to testify truthfully.

Moreover, defendant elicited the fact that the accomplice had agreed to testify truthfully, but also got him to state that his testimony at trial was a lie – as were, allegedly, his prior statements to the police and at the plea taking, and his testimony at the preliminary examination. Where a reluctant witness decided to disavow his prior statements and testimony, the prosecutor did not commit misconduct by reminding the witness of his agreement to testify truthfully. Furthermore, because defendant also elicited this information in an effort to show that the witness had lied previously, defendant has failed to demonstrate outcome-determinative plain error.

Defendant next contends that the prosecutor improperly elicited a hearsay statement of identification from the accomplice. Defendant did not object to this testimony, so he must establish outcome-determinative plain error. *Carines, supra* at 763. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). The prosecutor did not offer this statement for the truth of the matter asserted – that the other robber was “Steven Lockhardt” – but, rather to show how further investigation led the police to conclude that defendant was the second robber. Therefore, the admission of the police officer’s testimony concerning the accomplice’s identification of “Steven Lockhardt” did not violate the prohibition against the admission of hearsay. Additionally, the officer’s testimony constituted a third party’s statement concerning an identification that is properly admissible under MRE 801(d)(1)(C). *People v Malone*, 445 Mich 369, 371; 518 NW2d 418 (1994).

Finally, it was central to defendant’s trial strategy to elicit the fact that the accomplice had identified “Steven Lockhardt” – not defendant – as the second robber, the man who murdered the victim. Because he had a good reason not to object, defendant may not use this testimony to his advantage at trial and then on appeal claim that its admission caused error requiring reversal. See e.g., *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001), and *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987) (defense’s injection of hearsay, combined with failure to object, waives issue of propriety of admission of hearsay). Moreover, the statement of

identification was properly admitted, and defendant has failed to demonstrate outcome-determinative plain error.

Defendant next contends that the trial court abused its discretion by failing to grant his trial-day request for an adjournment so that he could replace his appointed counsel with retained counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Charles O Williams*, 386 Mich 565, 571-572; 194 NW2d 337 (1972). We review the trial court's exercise of discretion affecting defendant's right to counsel of choice for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). An abuse of discretion occurs when the result is so contrary to fact and logic that it demonstrates perversity of will, defiance of judgment, or an exercise of passion or bias. *Id.* We find no abuse of discretion on this record.

To determine whether the trial court abused its discretion in denying defendant's motion for a continuance, this Court must evaluate five factors: (1) whether defendant was asserting a constitutional right; (2) whether he had a legitimate reason for asserting that right; (3) whether he was guilty of negligence in failing to assert the right sooner; (4) whether defendant was responsible for previous adjournments of the trial; and (5) whether the defendant demonstrated prejudice resulted from the trial court's decision. *Williams, supra* at 578; *Echavarria, supra* at 369.

Defendant was asserting his right to assistance of counsel. But it must be noted that defendant already *had* counsel. He was in fact asserting a right to *substitute* retained counsel of his own choosing for his appointed counsel. This Court has generally restricted a defendant's ability to replace his appointed counsel with another appointed counsel to situations where the defendant establishes good cause for the substitution. See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), citing *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

Regarding defendant's right to retain counsel of choice, Michigan courts have long recognized such a right as an essential element of the right to counsel. In *Williams, supra* at 578, our Supreme Court held that the trial court abused its discretion by refusing to grant a continuance to permit the defendant to procure substitute counsel for existing counsel with whom the defendant had developed a difference of opinion as to whether to proceed with an alibi defense. Michigan also specifically guarantees a criminal defendant the right to retain counsel of choice in its Constitution¹ and by statute.² *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993). But the right to counsel of choice is not absolute. *People v Kryzstopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). "A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *Kryzstopaniec, supra*, citing *Wilson v Mintzes*, 761 F2d 275, 280 (CA 6, 1985).

¹ "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." Const 1963, art 1, § 13.

² MCL 763.1 provides: "On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself...."

The second factor to be considered when evaluating the trial court's exercise of discretion requires that the defendant establish a "legitimate reason" for seeking the continuance. *Williams, supra* at 578. A "legitimate reason" for substitution of counsel must be based on good cause. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Mack, supra* at 14, citing *Williams, supra*. Here, defendant claimed that his counsel failed to file a written motion to quash. But counsel was permitted to orally argue the motion, and defendant does not explain how counsel's presentation was deficient. The trial court found no merit to counsel's motion, and counsel was not required to file frivolous motions. *Traylor, supra* at 463. Therefore, defendant cannot complain that his counsel's failure to file a written motion to quash was a legitimate reason to request substitution of counsel.

Defendant also claimed that he had not received the preliminary examination transcript and other discovery documents until the days immediately before trial. But counsel explained why defendant had not given him the materials until just before trial, and defendant has failed to indicate any deficiency in his counsel's performance related to the alleged tardy provision of the transcript or the discovery materials. This allegation does not establish good cause to justify substitution of counsel.

Finally, defendant contends that he had not discussed his defense with counsel. But counsel stated that he and defendant had discussed his defense and that, because he did not intend to have defendant testify, he did not need to have lengthy strategy discussions with him. Defendant has failed to allege that he disagreed with the defense strategy his counsel pursued during the trial; consequently, this allegation does not justify the substitution of counsel.

Significantly, defendant waited until the morning of the first day of trial to announce that he wanted to substitute retained counsel for his appointed counsel. He did not indicate when he would retain new counsel, or when new counsel would be prepared and available to conduct the trial. So, we find no abuse of discretion in the trial court's determination that defendant was negligent in waiting until the morning of trial to request substitution of counsel and an adjournment of trial. Therefore, defendant has failed to demonstrate that the trial court abused its discretion in denying his trial-day request for a continuance. *Echavarria, supra* at 368; *Krysztopaniec, supra* at 598.

Defendant next contends that the prosecutor committed misconduct in rebuttal argument by saying that "all that it takes for the triumph of evil over good is for good men and good women to do nothing. Based on the evidence you've heard, to acquit this man would indeed have been the triumph of evil over good." Defendant failed to object to this comment; consequently, he must demonstrate outcome-determinative plain error. *Carines, supra* at 763. Defendant cannot satisfy this requirement: the comment was responsive to defense counsel's argument that it was not reasonable or moral to convict defendant on the accomplice's testimony, and had he objected, any prejudice could have been eliminated by a curative instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant next contends that his trial counsel failed to provide effective assistance because he did not object to the trial errors defendant has raised on appeal. Defendant has failed to preserve this claim by moving for a new trial or an evidentiary hearing. *People v Sabin (On*

Second Remand), 242 Mich App 656, 658; 620 NW2d 19 (2000). This Court must review the existing record de novo to determine if defendant has demonstrated that his “counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced [him]” that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

We have rejected defendant’s claims of error, and counsel was not required to make futile objections. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Furthermore, counsel’s actions are presumed to have been based on trial strategy, and this Court does not second-guess trial counsel regarding matters of trial strategy. *Pickens*, *supra* at 330. Finally, any minimal prejudice occasioned by the prosecutor’s remarks in rebuttal was effectively dissipated by the trial court’s admonition that the statements and arguments of counsel were not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Therefore, defendant has failed to demonstrate a deprivation of his right to effective assistance of counsel.

Defendant also claims and the prosecution concedes that defendant should not have been convicted and sentenced for both first-degree felony murder and the predicate felony of armed robbery. The remedy for improper conviction for both felony murder and the underlying felony is to vacate the conviction and sentence for the predicate felony. *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). We therefore remand this case to the trial court for the ministerial task of vacating conviction and sentence for the armed robbery of the murder victim (Count 3) and correcting the judgment of sentence.

We remand for vacation of Count 3 and correction of the judgment of sentence. Defendant’s remaining convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Jane E. Markey

/s/ Patrick M. Meter