STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE SETTLES,

Defendant-Appellant.

UNPUBLISHED
December 9, 2004

No. 249207
Wayne Circuit Court
LC No. 02-011591-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and three counts of second-degree CSC, MCL 750.520c(1)(b). The trial court sentenced defendant to 124 to 250 months' imprisonment for the first-degree CSC convictions, and to concurrent sentences of five to fifteen years' imprisonment for the second-degree CSC convictions. Defendant appeals as of right, asserting that his counsel was ineffective for deviating from MCR 2.511 regarding replacement of challenged jurors, and by failing to object to late discovery, specifically, medical records. We affirm.

Defendant first asserts that he was denied the effective assistance of counsel by his counsel's handling of voir dire and failure to object to the introduction of medical records on the ground that there had been a discovery violation. We disagree.

To justify reversal on the ground of ineffective assistance, a defendant must establish that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and that the resultant proceedings were fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant first argues that counsel provided ineffective assistance by failing to comply with the method of jury selection prescribed by MCR 2.511(F), which states that after a challenge is exercised, another juror must be selected and examined before further challenges are made. Counsel did, indeed, exercise two challenges at a time, and on one occasion did so immediately after the prosecutor exercised a challenge and before that juror was replaced. There is no indication, however, that counsel exercised challenges in this fashion because he was

required to do so by the court. Rather, it appears that counsel knew that he did not want these persons on the jury and that he simply sought to expedite the process by exercising his peremptory challenges two at a time. In fact, the court rules contemplate such action. MCR 2.511(E)(3) provides:

> Peremptory challenges must be exercised in the following manner:
>
> (a) First the plaintiff and then the defendant may exercise one or more peremptory challenges . . .

Defendant next asserts that counsel was ineffective in not objecting to the prosecutor's late production of medical records. However, the record reflects that while counsel had just been provided with the records, he was aware of them and had discussed them. Further, defendant has not shown how he was prejudiced by the late production.

Defendant further argues that he was denied his due process rights when the court refused his request for the appointment of new counsel. We disagree.

We review the trial court's decision regarding substitution of counsel for an abuse of discretion. *People v Traylor,* 245 Mich App 460, 462; 628 NW2d 120 (2001). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *Id.*, quoting *People v Mack,* 190 Mich App 7, 14; 475 NW2d 830 (1991). "When a defendant asserts that his assigned lawyer is not adequate or diligent or asserts . . . that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *People v Ginther,* 390 Mich 436, 442; 212 NW2d 922 (1973), see also 5A Saltzman & Deming, Michigan Court Rules Practice (2002 ed), § 6005.4, p 55, stating in pertinent part:

> Defendant may be entitled to a change of counsel, whether appointed or retained. When a defendant asserts that his assigned lawyer is not adequate or diligent or that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion. Further, a defendant is entitled to a substitution of appointed counsel when discharge of the first attorney is for "good cause," and does not disrupt the judicial process. Where "defendant expressed dissatisfaction with counsel, [but] failed to identify a legitimate difference of opinion between himself and his attorney with regard to the conduct of his defense", he did not show good cause. Nor was good cause shown where defendant claimed he lacked confidence in his attorney's ability to represent him at sentencing because, according to defendant, he was not sufficiently experienced, but the attorney had assured the trial court that that [sic] he was familiar with the issues and otherwise ready to proceed. [Citations omitted.]

At a pretrial hearing, defendant sought to ask the court for an independent DNA test. The court stated that he should discuss the matter with his lawyer. Defendant responded that he did not have a lawyer. Counsel then explained that defendant was not speaking with him on that day, that based on previous communications, counsel sent all the discovery materials to defendant, that defendant had indicated that he wished to represent himself, and that counsel had

advised him that it would be unwise to do so, especially where there was scientific evidence involved. Counsel then asked defendant "Do you want to represent yourself or you want me to represent you?" Defendant responded "Not you, that's for sure. Not you." Counsel then stated that the court could relieve him, but he was not asking to withdraw, or asking his boss to relieve him. Defendant responded "I am." The court stated: "Well, your request to have new counsel is denied, Mr. Settles. If you want to at anytime hire your own lawyer, you are free to do that." Defendant responded "Okay." On the first day of trial, a short colloquy made clear that defendant had chosen to proceed with assigned counsel, rather than represent himself, but that he was unhappy with the choice. Again, he was not asked, and did not volunteer why he was dissatisfied with counsel.

While the court should have inquired and made a record regarding defendant's reason for requesting substitute counsel, see *Ginther, supra* at 441-442, *Traylor, supra* at 462-464; *Mack, supra* at 14, defendant has made no showing that he was prejudiced by the court's refusal to appoint substitute counsel. Defendant's general assertion that his ability to assist in his defense was hampered by the difficulty in communicating with counsel is insufficient to support his claim. Counsel performed effectively and defendant has shown no grounds for reversal.

After argument in this matter, defendant was granted leave to file a supplemental brief in propria persona. He first asserts that counsel was ineffective in several respects and deprived him of due process. We disagree.

Counsel was not ineffective in failing to secure the exclusion of the DNA evidence because the evidence was admissible to show that defendant had impregnated his daughter. Defendant has not shown that an independent DNA expert would have testified any differently than the expert who testified. Defendant has not shown that counsel was ineffective due to a "failure to motion for probable cause hearing." The DNA evidence was not crucial to a showing of probable cause. Assuming defendant is correct in his assertion that he was arrested in his mother's home without a warrant, he has not shown how he was prejudiced. Nor has he shown prejudice from any delay in his arrest. While some of the mother's testimony may indeed have been inadmissible hearsay, it was clearly cumulative. As to the lesser offense instructions, defendant has not shown how he was prejudiced by counsel's failure to request the instructions where the victim's age and defendant's relationship to the victim were undisputed. Nor has defendant shown prejudice from a failure to challenge the chain of custody regarding the DNA evidence. In sum, defendant's arguments in his brief in propria persona do not warrant reversal.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot