

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

VINCENT TYRONE NEELY, a/k/a VINCENT
TYRONE NEELEY,

Defendant-Appellant.

UNPUBLISHED

December 12, 2006

No. 262542

Calhoun Circuit Court

LC No. 2004-002355-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349, felon in possession of a firearm, MCL 750.224f, two counts of first-degree criminal sexual conduct, MCL 750.520b,¹ and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 763.12, to concurrent prison terms of 75 to 115 years for the kidnapping conviction, 15 to 40 years for the felon-in-possession conviction, and life imprisonment for each of the first-degree CSC convictions, to be served consecutive to four concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. Ineffective Assistance of Counsel

Defendant first argues that defense counsel was ineffective for failing to challenge the validity of his arrest, which he claims was illegal because it followed the police's warrantless entry into his apartment. Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

¹ One count was charged under subsection (1)(c) (sexual penetration during the commission of another felony) and the other count was charged under subsections (1)(c), (e) (sexual penetration while actor is armed with a weapon), and (f) (actor causes personal injury and uses force or coercion to accomplish the sexual penetration).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

It is undisputed that the police did not have consent to enter defendant's apartment and that entry was effectuated without a warrant. Generally, a warrantless search is unreasonable; however a warrant is not required when "exigent circumstances" exist. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000). Exigent circumstances permitting the police to enter a dwelling without first obtaining a warrant exist if the officers have probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contains evidence or perpetrators of the suspected crime. *Id.* at 408. The police must also show the existence of an actual emergency on the basis of specific and objective facts that reveal the necessity for immediate action to (1) prevent the imminent destruction of evidence, (2) protect the officers or others, or (3) prevent the escape of a suspect. *Id.*

Defendant asserts that the police had no reason to believe that he was still in the apartment. We disagree. The police responded within hours of the reported sexual assault and the car the victim described was still in the parking lot. When the victim left the apartment, defendant was sleeping and the police arrived in the early morning hours.

We also disagree with defendant's argument that there were no exigent circumstances to justify a warrantless entry. The record discloses that the police officers were aware that a gun had been used in the incident, and that another woman, Frederick, had been with defendant. When they knocked on the door and received no answer, they were concerned for the safety of themselves and Frederick, who still could have been in the apartment. It was this concern that led the police to enter the apartment.

The police have authority to conduct a protective search without a warrant if they reasonably believe that the area in question harbors an individual who poses a threat to them or to others. Such a search must be quick and limited, and conducted for the sole purpose of ensuring the safety of police officers and other persons.² *People v Cartwright*, 454 Mich 550, 557; 563 NW2d 208 (1997). We reject defendant's argument that the police could not reasonably have been concerned for their safety, because there was no evidence that the gun had been used or was even loaded. The validity of a warrantless entry of a dwelling for a protective

² Defendant does not contend that the scope of the police officers' search was beyond that allowed for a protective search, and the evidence showed that the officers' initial search was limited to locating persons and securing the apartment.

search depends on the reasonableness of the response, as perceived by the police. *Id.* at 559. The information the police had was that a gun had been used in the incident. Regardless of whether the gun was actually loaded or even operational, it was reasonable for the police to believe that the presence of a gun posed a threat to their safety. Even though Frederick was more of a suspect than a victim at the time defendant was arrested, it also was reasonable for the police to assume that she potentially could be in danger. Frederick allowed the victim to leave while defendant was asleep and, after knocking and receiving no response, the police could not be sure if Frederick was injured or if defendant might shoot at them. Under the circumstances presented, it was not unreasonable for the police to decide that immediate action was needed to ensure their safety and the safety of others. Because the initial entry and protective sweep of the apartment was legal, and the police located defendant during this search, defendant's warrantless arrest was also legal. MCL 764.15(1)(c). Accordingly, defense counsel was not ineffective for failing to challenge the validity of defendant's arrest.

II. Defendant's Post-Arrest Silence

Defendant argues that the trial court erred in allowing the prosecutor to question him about why he did not tell the police that the sexual acts were consensual. We disagree. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

The credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). But the constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001). "The defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda*^[3] warnings." *Solmonson*, *supra* at 664-665.

A review of defendant's videotaped interview shows that defendant answered some preliminary questions such as how far he had gone in school, when he last slept and ate, and whether he was on any medication, but then became uncooperative and refused to answer any more questions. Defendant argues that his act of remaining silent was sufficient to invoke his Fifth Amendment right to remain silent and, therefore, it was improper to use his silence against him at trial. We disagree.

A defendant's invocation of his right to silence must be unequivocal. *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001). Defendant asserts that his invocation did not need to be verbal, but provides no authority for his position. We note that our Supreme Court has refused "to characterize as a matter of law nonutterances as being the equivalent of an

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

affirmative exercise of Fifth Amendment rights.” *People v McReavy*, 436 Mich 197, 201-202 n 2; 462 NW2d 1 (1990). We therefore conclude that the trial court properly determined that defendant’s decision to be mute did not invoke his Fifth Amendment right to silence. Thus, the trial court did not abuse its discretion in permitting the prosecutor to cross-examine defendant regarding his decision to remain silent.

III. Motion to Withdraw

Defendant argues that the trial court erred in denying defense counsel’s motion to withdraw. Although defendant did not file or separately move for substitute counsel, defense counsel moved to withdraw because defendant was not satisfied with his representation. The trial court concluded that defense counsel’s representation had been adequate and was not convinced that the attorney-client relationship had broken down. This Court reviews for an abuse of discretion a trial court’s decision regarding a defense counsel’s motion to withdraw as counsel. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005).

In *Bauder*, this Court concisely explained the appropriate legal framework.

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. When a defendant asserts that the defendant’s assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant’s claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record. [*Id.* (citations omitted).]

Defendant asserts that he established good cause. We disagree.

Defendant’s complaints were that he and his family members had not been able to contact defense counsel, that defense counsel had not sent him paperwork, and that defense counsel failed to file a motion at the preliminary examination regarding evidence found in the apartment that was to be used against him. The evidence before the trial court did not indicate that there was “a legitimate difference of opinion” between defendant and his counsel regarding “a fundamental trial tactic.” The record discloses that defense counsel filed several pretrial motions on defendant’s behalf and, on appeal, defendant does not indicate what additional motions he wanted counsel to file that were not. To the extent that defendant believes that counsel should have filed a motion challenging the police officers’ warrantless entry into his apartment, we have already concluded that such a motion would have been futile. The trial court did not abuse its discretion in determining that good cause for defense counsel’s removal had not been shown.

IV. Sufficiency of the Evidence

In a supplemental pro se brief, defendant asserts that there was insufficient evidence to support his “kidnapping conviction and accompanying charges.” The only argument he presents, however, is that there was no evidence that the victim was held against her will, which applies to the kidnapping conviction. Defendant does not address the sufficiency of the evidence regarding his other convictions. “[A]n 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 [of an issue] with little or no citation of supporting authority. Such cursory treatment constitutes abandonment of the issue.” *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citations omitted).

In any event, there is no merit to defendant’s argument because it is based on an improper view of the evidence. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant was charged with kidnapping by forcibly or secretly confining the victim. To prove this form of kidnapping, the prosecution had to prove beyond a reasonable doubt that defendant wilfully, maliciously, and without lawful authority forcibly or secretly confined or imprisoned another against his or her will. MCL 750.349; *People v Jaffray*, 445 Mich 287, 297; 519 NW2d 108 (1994). This form of kidnapping does not require specific intent, but does require a finding of asportation. *Id.* at 298. The asportation must be in furtherance of the kidnapping itself and not merely “movement incidental” to the commission of an underlying offense. *People v Vaughn*, 447 Mich 217, 224; 524 NW2d 217 (1994), overruled in part on other grounds *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

At trial, the victim testified that she was forced into defendant’s car by defendant and Frederick. She also testified that between the time she got into defendant’s car and the time she left defendant’s apartment, she never felt free to leave. Frederick similarly testified that after the victim initially got into the car, she was not free to leave. The victim repeatedly testified that she did not try to leave because she feared for her safety. The evidence showed that the victim was taken to a wooded area where she was physically assaulted by both defendant and Frederick, that the victim was aware that defendant had a gun, and that the victim was then taken to defendant’s apartment where she was sexually assaulted. The evidence was sufficient to enable the jury to find that defendant wilfully, maliciously, and without lawful authority forcibly confined the victim against her will. Although defendant testified that the victim willingly got into his car and voluntarily accompanied him and Frederick to his apartment, the credibility of defendant’s testimony was for the jury to determine. This Court will not interfere with the jury’s role of determining the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

V. Motion to Quash

Defendant also argues that the trial court erred in denying his motion to quash because there was insufficient evidence at the preliminary examination to show that he committed the kidnapping and the accompanying charged crimes. However, defendant presents no actual argument explaining why the evidence was insufficient. Therefore, this issue may be deemed abandoned. *Matuszak, supra* at 59. In any event, because defendant's convictions were supported by sufficient evidence at trial, any error would be harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder