

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOREN DEPREE GREENE,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 262676

Jackson Circuit Court

LC No. 04-001348-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b (multiple variables), and first-degree home invasion, MCL 750.110a(2). The trial court sentenced him as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 440 to 660 months for the CSC conviction and 320 to 640 months for the home invasion conviction, with the sentences to be served consecutively to his then-current prison term. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred by refusing to adjourn trial to allow his trial counsel time to review certain discovery materials regarding DNA evidence. A trial court's decision whether to adjourn trial is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

To invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show good cause. MCR 2.503(B)(1). Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003). And with regard to a motion to adjourn based on the unavailability of evidence, MCR 2.503(C) provides:

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

Here, the trial court did not abuse its discretion in denying an adjournment. Defense counsel should not have waited until the first day of trial to commence to move to adjourn. MCR 2.503(C)(1) plainly requires an individual to bring a motion in a more timely fashion. Further, defendant has not identified who or what type of expert would have been called had he been given the protocol information and has not identified what he would have discovered if he was given more time to review the manual and accreditation materials. Additionally, defendant has failed to demonstrate that he was prejudiced by the trial court's refusal to adjourn. Under these circumstances, we cannot conclude that the trial court abused its discretion by denying the motion to adjourn.

Defendant next argues that he was effectively denied the qualified Sixth Amendment right to retained counsel of his choice by the trial court's refusal to grant an adjournment. We conclude that no plain error occurred.¹

The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). A defendant invokes the right only by requesting counsel. *Id.* While not absolute, a criminal defendant generally has a constitutional right to choose his or her own attorney. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003).

Here, defendant primarily relies on *Linton v Perini*, 656 F2d 207 (CA 6, 1981), and *United States v Burton*, 189 US App DC 327; 584 F2d 485 (1978), in support of his argument. However, both *Linton* and *Burton* are distinguishable because those decisions involved a defendant's qualified Sixth Amendment right to retain counsel, a right that is not implicated here because defendant did, in fact, have retained counsel. Defendant's attempt to broadly apply the principles involved in those cases to the facts of the present case is misplaced.

Defendant next argues that the trial court erred by denying defendant's motion for a mistrial. The motion was premised on defendant's argument that he was precluded from effectively cross-examining the prosecution's DNA expert because he did not receive the laboratory protocol information in time to adequately prepare for trial.

A trial court's decision whether to grant a mistrial is reviewed for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (internal citations omitted). Here, defendant fails to identify any prejudice that resulted by receiving the protocol information at the time that it was received. Moreover, the trial court stated that, if requested, defense counsel would be given a short break to review the protocol information before cross-examination. Defense counsel did not request a recess to review the information. Under these circumstances, we find no abuse of discretion in the trial court's denial of the motion for mistrial.

¹ This argument is unpreserved because it was not raised below. *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2001).

Defendant next argues he was denied the effective assistance of counsel at trial. This claim is unpreserved² because it was not raised below in a request for an evidentiary hearing or in a motion for new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, our review of this claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600. In addition, there is a strong presumption that defendant's counsel's performance was sound trial strategy. *Id.*

It appears that defense counsel's decision to ask Detective Tomlin whether defendant confessed to the crimes charged, which drew a negative response, and whether defendant denied committing the crimes, which drew an affirmative response, was a way to present defendant's defense without subjecting him to cross-examination if he had testified and was a matter of trial strategy. This Court will not substitute its judgment for that of trial counsel on matters involving trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, in light of the fact that "the DNA analysis of the sperm cells from the vaginal swab . . . from [the complainant] matched all 13 of the genetic loci to the known sample of [defendant]," there is not a reasonable probability that the result would have been different had defense counsel not questioned Detective Tomlinson about defendant's statements.

Lastly, defendant argues that he was denied his right to a fair trial because of the cumulative effect of the previously alleged errors. However, defendant's argument must fail because no prejudicial errors occurred. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

² Defendant's alternative request for an evidentiary hearing must be denied because he has failed to raise this in a proper, timely motion for remand. MCR 7.211(C)(1)(a); MCR 7.212(A)(1)(a)(iii).