

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID OMAR ADAMS,

Defendant-Appellant.

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UNPUBLISHED

April 2, 2009

No. 281668

Wayne Circuit Court

LC No. 07-011849-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of life imprisonment for the murder conviction and 1 to 7-1/2 years' imprisonment for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. Because we conclude that defendant was not denied his right of self-representation, that the trial court did not abuse its discretion in denying defendant's request for substitute counsel or in refusing to admit evidence of defendant's previous acquittal on charges relating to possession of the murder weapon, and that counsel was not ineffective for failing to challenge the continued presence of a juror who had contact with the victim's father on the jury panel, we affirm.

Defendant was convicted of fatally shooting Brian Carter, Jr., on June 23, 2007. Defendant's friend, Key'Jon Mills, testified that he saw defendant shoot the victim. Key'Jon's brother, Darriyon, testified that he heard defendant arguing with the victim, but did not see the shooting. Detroit police officers arrested defendant, Darriyon, and Perry Walker on July 3, 2007. The three men were sleeping in a van, and two guns, one of which was later identified as the murder weapon, were discovered inside the van.

On appeal, defendant argues that the trial court abused its discretion when it denied his request for substitute counsel at a pretrial conference. Defendant claims that the trial court erred by not conducting a proper inquiry into the reasons for his dissatisfaction with defense counsel, and that he should have been permitted to represent himself with the assistance of standby counsel.

We first address defendant's claim regarding self-representation. There exists no constitutional right to standby counsel.<sup>1</sup> *People v Kevorkian*, 248 Mich App 373, 422; 639 NW2d 291 (2001). However, a trial court may allow standby counsel as a matter of grace. *Id.* A defendant seeking to proceed in propria persona must make an unequivocal request for self-representation. *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004); *United States v Martin*, 25 F3d 293, 295 (CA 6, 1994). The purpose of this requirement is to "abort frivolous appeals by defendants who wish to upset adverse verdicts after trials at which they had been represented by counsel." *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). Any ambiguity is resolved in favor of representation by counsel. *Russell, supra* at 193. Where a defendant merely expresses dissatisfaction with counsel's performance, the motion will not be understood as a motion to proceed pro se, but rather as an appeal to the trial court's discretion to substitute counsel. *Martin, supra* at 296. A defendant's request for standby counsel is also a valid consideration in determining whether the defendant made an unequivocal request for self-representation. *People v Hicks*, 259 Mich App 518, 530; 675 NW2d 599 (2003).

The record in this case discloses that defendant did not make an unequivocal request for self-representation. At best, he expressed a continuing expectation that he be allowed to engage in some form of hybrid representation with the assistance of appointed counsel to fully educate him regarding the applicable law. Defendant did not make an unambiguous attempt to retract his prior request for appointed counsel, but rather complained that counsel was not doing enough to assist him and lacked a positive attitude. Defendant expressed a desire to pursue various motions and for counsel to satisfy his request for discovery materials. He asserted that current counsel was "invisible" and ineffective, and sought the appointment of counsel "that knows so much about the law that he want to help me know about the law so I can defend myself and know what's going on and know what's being said here."

Because the record does not demonstrate that defendant made an unequivocal request for self-representation, we reject defendant's argument that the trial court failed to follow proper procedures for determining whether to allow self-representation. The trial court appropriately treated defendant's dissatisfaction with defense counsel as a request for substitute counsel. *Martin, supra* at 296. Further, defendant has failed to show an abuse of discretion in the trial court's decision to deny substitute counsel. *Russell, supra* at 192 n 25; *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." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the

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<sup>1</sup> "Standby counsel" involves "a situation in which a pro se defendant is given the assistance of advisory counsel who may take over the defense if for some reason the defendant becomes unable to continue." *People v Dennany*, 445 Mich 412, 439 n 15; 519 NW2d 128 (1994) (opinion of Griffin, J.) It differs from "hybrid representation," which involves "an arrangement whereby both the defendant and his attorney would conduct portions of his trial and share joint presentation of his defense, while the defendant retains ultimate control over defense strategy." *Id.* at 440 n 17.

defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record.” *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). The trial court must make an inquiry sufficient to make an informed decision. *United States v D’Amore*, 56 F3d 1202, 1205 (CA 9, 1995), overruled on other grounds *United States v Garrett*, 179 F3d 1143 (CA 9, 1999).

Contrary to defendant’s argument on appeal, the record reflects that the trial court sufficiently inquired into the reasons for defendant’s dissatisfaction with defense counsel to make an informed decision. Although the trial court did not direct specific questions to defendant regarding his dissatisfaction, the record reflects that defendant was given an opportunity to express his complaints and that the trial court, through information provided by both defendant and defense counsel, was adequately apprised of the nature of defendant’s complaints. The material question, therefore, is whether defendant demonstrated good cause for substitution, an issue defendant does not address.

We agree with plaintiff that good cause was not established. Defendant’s complaint regarding counsel’s failure to provide discovery materials was in the process of being resolved when defendant sought substitute counsel. Further, defendant’s dissatisfaction regarding various motions did not establish good cause because such matters fall within the categories of professional judgment and trial strategy, which are entrusted to defense counsel. *Traylor, supra* 463. We find nothing in the record to indicate a legitimate difference of disagreement between defendant and defense counsel with regard to fundamental trial tactics. See *Mack, supra* at 14. At most, the record indicates that defendant sought to pursue pretrial motions that were frivolous or premature. Additionally, while defendant claimed that defense counsel did not have a positive attitude, there was no showing that defense counsel was disinterested or unwilling to communicate with defendant regarding this or any of defendant’s other pending cases. To the contrary, it is apparent from the record that defense counsel was familiar with defendant’s various claims. Defendant’s generalized statement of dissatisfaction, under the circumstances presented to the trial court, did not establish good cause for substitution. See *Traylor, supra* at 463; *People v Meyers (On Remand)*, 124 Mich App 148, 165-167; 335 NW2d 189 (1983). Accordingly, the trial court did not abuse its discretion by refusing to appoint substitute counsel.

Defendant next argues that he was denied his due process right to present a defense when the trial court refused to allow him to present evidence that he was acquitted of charges arising from the July 3, 2007 discovery of guns found inside the van that defendant was occupying. Defendant asserts that evidence of his acquittal of those charges would have diminished the relevance of the testimony regarding the discovery of the murder weapon in the van.

Defendant preserved this issue for appeal to the extent that he argues that the evidence was relevant. We review preserved issues concerning a trial court’s evidentiary rulings for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But “[a]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Because defendant’s due process argument was not raised below, this issue is not preserved. We therefore limit our review of this constitutional issue to plain error affecting defendant’s substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant, as the proponent of the acquittal evidence, had the burden of establishing its relevance and admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004).

In general, an acquittal in a criminal case means only that the prosecution did not prove the charged crime beyond a reasonable doubt. *People v Oliphant*, 399 Mich 472, 498 n 14; 250 NW2d 443 (1976). In the context of criminal cases where the prosecutor introduces other-acts evidence, courts generally take a case-by-case approach to the admissibility of evidence of a defendant's acquittal of charges arising from the other acts. See *Kinney v People*, 187 P3d 548, 555-557 (Colo, 2008). Decisions of this Court have differed regarding the relevance of acquittal evidence in the context of other-acts evidence. See *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205 (1981), rev'd on other grounds 411 Mich 1046 (1981); *People v Bolden*, 98 Mich App 452, 460-462; 296 NW2d 613 (1980). The admissibility of other-acts evidence itself is governed by MRE 404(b)(1) and MCL 768.27, upon which the evidentiary rule is based. *People v Hall*, 433 Mich 573, 585; 447 NW2d 580 (1989); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 60-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (discussing the analytical framework that has evolved in Michigan for determining the admissibility of other-acts evidence).

Although the trial court's decision in this case indicates that it considered the relevance of defendant's acquittal of charges arising out of the July 3, 2007 incident in the context of MRE 404(b), it is clear that evidence regarding the discovery of the murder weapon in a van occupied by defendant was relevant and admissible under MRE 401, independent of any consideration of MRE 404(b). "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *Hall, supra* at 580-581. "The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty." *People Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Thus, the trial court erred to the extent that it treated the discovery of the murder weapon in the van occupied by defendant as other-acts evidence and then evaluating the relevancy of defendant's acquittal of the associated charges in that context.

But the trial court reached the right result because, even under a proper framework, defendant failed to establish the relevancy of the acquittal evidence. To be relevant under MRE 401, evidence must be "material (related to any fact that is of consequence to the action)" and have "probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *Sabin, supra* at 57.

In this case, an eyewitness testified that defendant shot the victim on June 23, 2007. The prosecutor merely used the subsequent discovery of the murder weapon on July 3, 2007, to further link defendant to the shooting. The prosecutor was not required to prove that defendant possessed the gun on July 3, 2007. Further, this case did not involve a situation in which the jury was apprised of, or would have likely concluded, that there was an earlier, separate trial arising out of the July 3, 2007 incident. Because defense counsel failed to demonstrate that the fact of the earlier trial, let alone the disposition of that trial, was probative of any fact of consequence to the charged murder or weapons charges in this case, the evidence was not admissible. Cf. *Prince v Lockhart*, 971 F2d 118, 122 (CA 8, 1992) (evidence of acquittal on drug possession charges was not relevant at separate trial on drug theft charge). We will not reverse a trial court's evidentiary ruling when the right result was reached. *Bauder, supra* at 187.

Because the proffered acquittal evidence was not relevant, defendant's related due process claim also fails. The right to present a defense does not include the right to present irrelevant evidence. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Therefore, there was no plain constitutional error. *Carines, supra* at 763.

Defendant next argues that he was denied a fair and impartial trial where, following jury selection and a lunch recess, a juror revealed a brief episode of contact with the victim's father, with whom the juror had a former employment relationship. We conclude that defendant waived any issue related to the trial court allowing the juror to remain on the jury panel because defense counsel affirmatively informed the trial court, "I see nothing to indicate that there has been a taint of this juror or this jury." Unlike the failure to object, which constitutes a forfeiture of an issue subject to review for plain error, a waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Thus, we limit our review to defendant's claim that defense counsel was ineffective for not challenging the juror's continued presence on the jury panel. Because defendant did not raise an ineffective assistance of counsel claim below, our review of this issue is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was deficient and prejudicial. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant's inability to establish prejudice is dispositive of this claim. A defendant who receives an impartial jury has no valid ground to complain. *People v Badour*, 167 Mich App 186, 190; 421 NW2d 624 (1988), rev'd on other grounds sub nom *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). Here, the juror in question was excused before deliberations. Further, the record discloses that the excused juror did not discuss his contact with the victim's father with the other jurors, and the trial court instructed the other jurors not to discuss the excused juror's contact with a "witness." Jurors are presumed to follow their instructions. *Bauder, supra* at 190. Accordingly, on this record, there is no basis for concluding that defendant was prejudiced by the presence of the juror in question. Further, because defendant has not set forth any additional facts requiring further development of the record to determine if defense counsel was ineffective, a remand is not warranted. MCR 7.211(C)(1)(a); *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Affirmed.

/s/ Henry William Saad  
/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra