STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 293103 Midland Circuit Court
EUGENE RAY LILLY, Defendant-Appellant.	LC No. 08-003928-FH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm, MCL 750.84, aggravated stalking, MCL 750.411i, interference with electronic communication, MCL 750.540(5)(a), two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, destruction of property greater than $1,000 but less than $20,000, MCL 750.377a(1)(b)(*i*), and destruction of property less than $200, MCL 750.377a(1)(d). Defendant was sentenced to serve 140 months to 20 years for the home invasion conviction, which was to be served consecutive to defendant's remaining concurrent sentences of 5 to 10 years for assault, 2 to 5 years for aggravated stalking, 1 to 2 years for interference with communications, 2 to 4 years for both counts of felonious assault, 2 to 5 years for felony malicious destruction of property, and 90 days for misdemeanor destruction of property. Defendant appeals as of right and we affirm.

Defendant's conviction arose from an incident that occurred at the home of his estranged wife, Teresa. Teresa had initiated divorce proceedings and obtained a personal protection order (PPO) against defendant. On June 8, 2008, Teresa was at home with her teenage son and her elderly mother. After her son noticed that the phone line had gone dead, defendant appeared at Teresa's bedroom window armed with a sickle. Defendant demanded entry and told Teresa that he had cut the phone lines to prevent her from summoning help. He also threatened to harm her son if she refused to let him in. When defendant went to the front door of the home, Teresa sent him to the back door and had her son exit from the front door to summon help. Defendant entered the home from the back door while still armed with the sickle. Teresa was able to talk defendant into putting down the weapon and going outside to talk.

In the meantime, Teresa's son had been able to get to his grandfather and apprise him of the situation. They contacted the police and returned together to Teresa's home. Defendant

attacked Teresa's father, knocking him to the ground. With her help, Teresa's father returned to his vehicle and attempted to leave, but defendant retrieved the sickle and went after him. Defendant swung the sickle several times toward the man's head and struck his arm as he attempted to defend himself, inflicting serious injuries. Defendant also damaged his vehicle. After the Teresa's father drove away, defendant used the sickle to damage Teresa's vehicle before disappearing into the woods.

Defendant first argues his constitutional rights were denied when the trial court denied his request for substitution of counsel immediately before trial. We review a trial court's decision related to a request for substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 102 (2001). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

An indigent defendant is constitutionally guaranteed the right to counsel. *Traylor*, 245 Mich App at 462. However, this right does not include the right to choice of counsel by simply requesting substitute counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). In order to warrant substitution of counsel, a defendant must show good cause exists and that the requested substitution will not "unreasonably disrupt the judicial process." *Id.* Good cause for substitution exists where a "legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental trial tactic." *People v Williams*, 386 Mich 565, 574; 194 NW2d 337 (1972).

While the record confirms that defendant and his trial counsel held differing views as to who should be called to testify at trial and what questions should be asked, such divergence does not automatically constitute a "legitimate" difference of opinion related to "a fundamental trial tactic." There is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Further, the trial court had previously determined that some of the witnesses that defendant wished to call were not relevant to the issues at trial. Defendant's preferences aside, trial counsel's refusal to call irrelevant witnesses cannot be characterized as a "legitimate" difference related to a fundamental trial strategy because defendant's preferred strategy was not viable.

Moreover, defendant's claim that he was actively involved in his defense and that trial counsel refused to ask the questions he wanted is insufficient alone to demonstrate that good cause for substitution of counsel existed. First, defendant's version of counsel's preparation and involvement in the case was not only at odds with counsel's, but also with the prosecutor's. Additionally, defendant has not demonstrated that the questions he wished to be asked would have been relevant to the matter at hand or in any other way complied with the rules of evidence. While an attorney is charged with the responsibility to act "with zeal in advocacy upon the client's behalf," MRPC 1.3, comment, an attorney has the right, indeed the duty, to exercise professional judgment in advancing the interests of the client, MRPC 1.2, comment ("[A] lawyer is not required to . . . employ means simply because a client may wish that the lawyer do so."). The attorney has authority to pursue a strategy in line with the client's objectives and "assume responsibility for technical and legal tactical issues," like how to question the witnesses presented in order to best effectuate those objectives. *Id.* Thus, defendant has failed to show that the court abused its discretion in denying the motion for substitute counsel.

Next, defendant maintains that the imposition of consecutive sentences was improper because three of the charged offenses did not arise from the same transaction. We disagree. We review a trial court's decision to impose consecutive sentences for an abuse of discretion. *People v St John*, 230 Mich App 644, 646; 585 NW2d 849 (1998).

In Michigan, consecutive sentences may only be imposed when specifically authorized by statute. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). MCL 750.110a(8) authorizes a trial court to exercise its discretion to "order a term of imprisonment for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

Here, the home invasion was admittedly completed prior to the assault on Teresa's father and the destruction of property. Nevertheless, the additional crimes occurred in quick succession. In addition, defendant's actions from the time of his arrival at the home until he fled can be viewed as an overall scheme or plan to commit crimes not just against Teresa, but her family as well. While defendant's physically violent conduct subsided briefly, he engaged in a physical altercation with Teresa's father almost immediately upon the latter's arrival at the scene. During the attack he severely injured Teresa's father and damaged his vehicle with the sickle. He then used the sickle to damage Teresa's vehicle before fleeing into the woods. All of these actions can properly be considered as being a part of a single criminal transaction. Thus, the trial court did not err in imposing consecutive sentencing.[1]

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[1] Defendant relies in large part on *People v Hampton*, 439 Mich 860; 475 NW2d 822 (1991), which reversed *People v Hampton* (*On Remand*), 188 Mich App 675; 470 NW2d 499 (1991). The defendant in *Hampton* was convicted of third-degree criminal sexual conduct and sentenced as a third-offense habitual offender. *Hampton*, 188 Mich App at 676. At issue was whether the defendant's prior two felony convictions "'may only be considered as one criminal transaction, incident, or episode'" for purposes of habitual offender enhancement. *Id.* at 676-677, quoting *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990). This Court first reversed the trial court's denial of the defendant's motion for resentencing in *People v Hampton*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 1987 (Docket No. 90767), vacated *People v Hampton*, 436 Mich 884; 461 NW2d 372 (1990), and again on remand, *Hampton*, 188 Mich App at 677. Citing *Preuss* and *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), our Supreme Court concluded that two breaking and entering convictions arose from "two separate criminal transactions." *Hampton*, 439 Mich at 860.

Nowhere in *Hampton* did the Supreme Court state that two offenses are not part of the same criminal transaction if the first was completed before the second. Most significantly, however, *Hampton* dealt with habitual offender enhancement, and the cases on which it relied were overruled in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008). *Gardner* states, "Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately. The text of those laws does not include a same-incident test. This Court erred by judicially engrafting such a test onto the unambiguous statutory language." *Id*. at 68 (emphasis in original). Thus, defendant's argument, which overplays the holding in *Hampton*, is predicated on employing a test applied to an analysis of a different statutory sentencing provision

Defendant additionally challenges his sentencing based on the claim that his judgment of sentence erroneously indicates that he was sentenced as a habitual offender. We note that an amended judgment has already been filed correcting the typographical error, rending this argument moot. *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009).

Defendant further argues that trial counsel's failure to suppress the improperly filed habitual offender notice constituted ineffective assistance of counsel. We disagree. Defendant failed to preserve this issue because he did not request a new trial or an evidentiary hearing after the trial. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Thus, our review is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

The record demonstrates that defendant was not sentenced as a habitual offender even though the habitual offender notice was not dismissed. Further, defendant fails to establish the factual predicate for his argument that he was prejudiced because he may otherwise have received a more favorable plea offer is not persuasive. *Id*. at 601. Defendant has provided no factual support for his claim that a more favorable plea deal would have been forthcoming if the habitual offender notice had been suppressed.

Defendant also argues that there was insufficient evidence presented at trial to support his convictions and that his trial counsel was ineffective for failing to adequately investigate and present an alibi defense. These assertions are based on defendant's contention that he was traveling out of state at the time he was supposed to have been verbally informed that a PPO had been issued. The only charge against defendant in which the existence of a PPO was an element of the crime was aggravated stalking.

The only support defendant provides for this assertion is his own self-serving affidavit, in which he avers that he made trial counsel aware of the alleged baggage claims that would have proved he "was not in Michigan at the time I was allegedly notified of the existence of a PPO." At trial, a proof of service that indicated that defendant had been served was admitted without objection. Further, Teresa testified that defendant was aware of the PPO based on telephone conversations they had prior to the incident at issue. Viewed in the appropriate light, and deferring to the jury's superior position to assess witness credibility, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992), the evidence was

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advanced by our Supreme Court in a set of judicial opinions that have been rejected for employing and applying the test itself.

sufficient to support the finding that defendant was aware of the PPO and thus was guilty of aggravated stalking.

Defendant also argues that defense counsel was ineffective because he did not adequately investigate and pursue his alleged alibi defense, i.e., that defendant was on a plane at the time he was allegedly served with the PPO.[2] However, no mention was ever made at trial that defendant was actually on a plane when the PPO was served. Defendant insists that proof in the form of a flight manifest for the identified flight could have been easily obtained by counsel, yet he fails to provide the baggage claims he asserts he has to show that he was on the identified flight. The record is also at odds with defendant's assertion that counsel representing him at the preliminary examination could provide evidence that the police tampered with the proof of service.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens

[2] The defense that defendant asserts trial counsel should have pursued is not technically an alibi because it would not place "'defendant elsewhere than at the scene of the crime'" at the time it was committed. *People v McGinnis*, 402 Mich 343, 346; 262 NW2d 669 (1978), quoting *People v Watkins*, 54 Mich App 576, 580; 221 NW2d 437 (1974). However, the import of the alleged evidence is similar, i.e., it would place defendant on a plane when he was supposed to have been verbally notified of the PPO.