STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE LAMAR-DANTE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 348382
Kent Circuit Court
LC No. 18-001931-FC

Before: SAWYER, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

Defendant, Deandre Lamar-Dante Johnson, appeals as of right his jury convictions of second-degree murder, MCL 750.317; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On appeal, defendant argues (1) that the trial court violated his due-process rights when it denied trial counsel's motion to withdraw and did not appoint new counsel; (2) that the trial court erred by denying trial counsel's request for a mistrial after the prosecution showed the jury a prejudicial photograph that the trial court previously deemed inadmissible; (3) that the trial court denied defendant's right to a fair trial when it permitted the prosecution to present irrelevant and unduly prejudicial testimony concerning the victim's identity, or, in the alternative, that trial counsel was ineffective for failing to object to that testimony; (4) that the trial court violated defendant's Confrontation Clause right by admitting prior preliminary hearing testimony from a since-deceased witness; and (5) that defendant is entitled to resentencing because the prosecution failed to provide proper notice when seeking a sentence enhancement for habitual offenders. We affirm.

On October 22, 2017, at about 7:41 p.m., neighbors in an apartment complex in Grand Rapids heard gunshots. At approximately 8:00 p.m., defendant hailed an Uber in the vicinity of the apartment complex. Sometime shortly before 9:00 p.m., the victim's fiancée returned home and found the victim "slumped over, laid down in a puddle of blood." Another neighbor was able to confirm that he saw defendant, wearing blue jeans and a white T-shirt, inside the victim's apartment earlier that evening. Defendant's uncle and his uncle's girlfriend also testified for the prosecution. Both described how defendant called to ask for a ride that evening and then

eventually confessed to having killed the victim. Defendant's uncle assisted defendant by selling defendant's .40 caliber semiautomatic handgun to a friend and helping to burn defendant's clothing in a secluded spot. This testimony was corroborated by the individual who purchased the gun and a firearms examination by the Michigan State Police that matched the firearm to the cartridge casings found at the scene. The prosecution also presented evidence of the burn pile and a 911 call that reported the fire at approximately 10:40 p.m. Included in the burn pile were True Religion jeans buttons and rivets, the same brand of jeans that defendant acknowledged wearing that night. After deliberating for less than two hours, the jury returned a guilty verdict on all three counts.

We review for an abuse of discretion defendant's argument that the trial court erred by foreclosing any possibility of allowing substitution of appointed counsel. See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

> 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. [*Id.*]

"Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic," *id.*, but decisions about defense strategy that are not fundamental in nature, "including what evidence to present and what arguments to make, are matters of trial strategy, and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel," *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011). A breakdown in the attorney-client relationship may also constitute good cause. *People v McFall*, 309 Mich App 377, 383; 873 NW2d 112 (2015). However, "[a] defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Traylor*, 245 Mich App at 462.

We recognize that there was an obvious tension between defendant and counsel. However, the record supports a conclusion that defendant was responsible for any breakdown in the attorney-client relationship. The history of this case reflects a pattern of defendant showing displeasure with appointed counsel. Notably, the trial court had previously agreed to substitute former appointed counsel after that attorney-client relationship became "turbulent" and defendant had, similarly to the present circumstances, filed a grievance. Defendant was not entitled to have the attorney of his choice, see *id.*, and there is no question that the trial court previously made defendant fully aware that a defendant may not obtain new appointed counsel simply by repeatedly filing grievances against current counsel, see *Strickland*, 293 Mich App 397-398. Although the record is not entirely clear on the nature of the disagreement between defendant and counsel or how it related to defense strategy, defendant does not explain on appeal what about this disagreement affected matters of fundamental trial strategy or how this information was relevant at all to raising a particular defense theory. Absent any indication otherwise, we conclude that the disagreement between defendant and appointed counsel "with regard to trial strategy or

professional judgment" was the type that "do[es] not warrant appointment of substitute counsel." See *id.* at 398.[1]

In any event, when defense counsel performs adequately to protect a defendant's interests at trial, the defendant is not prejudiced by the denial of a request for substitute counsel and the conviction will not be set aside. See *People v Buie*, 298 Mich App 50, 67; 825 NW2d 361 (2012). Defendant makes only conclusory assertions that he was denied a right to a fair trial; he raises no argument concerning how some other counsel might have proceeded differently and, by doing so, even plausibly obtained a different result in light of the overwhelming evidence of defendant's guilt. Reviewing the record as a whole, there is no reason to suspect that counsel was inattentive or disinterested in zealously advocating on defendant's behalf.

We also reject defendant's argument that the trial court erred by denying defendant's request for a mistrial after the prosecution showed the jury a prejudicial photograph of defendant holding a large amount of cash during closing arguments that had already been excluded by the trial court. "The trial court should only grant a mistrial for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial and when the prejudicial effect of the error cannot be removed in any other way." *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014). In *Lane*, 308 Mich App at 61, this Court held that a prosecutor's unintentional introduction of video evidence suggesting a defendant's gang affiliation and criminal history, which the prosecutor had previously agreed should have been redacted, did not require a mistrial. This Court agreed with the trial court that "the information had been on the screen for only seconds and that it could be remedied with a curative instruction." *Id.* In this case, defendant is unable to demonstrate that the prosecutor intentionally presented or improperly emphasized the unedited photograph. It appears to have been an honest mistake, quickly corrected. Indeed, the record only suggests that the photograph was on the screen for a short period before the prosecutor switched slides upon noticing its unedited state. The circumstances presented are extremely similar to *Lane*. Defendant does not argue why some curative instruction would not have alleviated any prejudicial effect of the jurors observing the photograph in its unedited form. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (stating that "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements" and that "jurors are presumed to follow their instructions"). Accordingly, the trial court did not err in denying defendant's request for a mistrial.

Defendant also argues that the trial court erred by permitting the prosecution to present testimony about the victim's family life, including a picture of the victim at his son's birthday party. We conclude that defendant waived any challenge to the admission of the photograph exhibit because defendant's counsel expressed clear satisfaction with the trial court's decision to allow its admission and publication to the jury. See *People v Hershey*, 303 Mich App 330, 349; 844 NW2d 127 (2013). Because defendant did not object to the testimony of the victim's mother, we review the admission of that testimony only for plain error. See *id.* It is fundamental that the prosecution must prove each element of a crime beyond a reasonable doubt. See *People v Mette*,

[1] We also note it was defendant's responsibility to request substitute counsel at the earliest possible moment, not minutes before the start of trial. See *McFall*, 309 Mich App at 384.

243 Mich App 318, 330; 621 NW2d 713 (2000). Contrary to defendant's argument, the testimony from the victim's mother was relevant to establishing important aspects of the prosecution's theory of the case, including the location and circumstances of the victim's residence and knowledge that the victim sold marijuana and other drugs from that property. It was also relevant that the victim's mother kept in close contact with her son, which added credence to her testimony concerning his activities and longstanding relationship with defendant, as well as how she had recently seen them together. Although this information might have been introduced through some other means, it is a defendant's conduct that brings about a trial's possible witnesses. See *People v Guenther*, 188 Mich App 174, 181; 469 NW2d 59 (1991).[2]

We similarly find no error in the admission of a deceased witness's preliminary examination testimony at trial. "Constitutional questions, such as those concerning the right to confront witnesses at trial, are reviewed de novo." See *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). "[T]he Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). Prior testimony, such as that given during a preliminary examination, is testimonial and its admission at trial implicates a defendant's confrontation right. See *People v Bruner*, 501 Mich 220, 229; 912 NW2d 514 (2018). "Unavailability as a witness includes situations in which the declarant is unable to be present or to testify at the hearing because of death." See *People v Farquharson*, 274 Mich App 268, 272 n 1; 731 NW2d 97 (2007); see also MRE 804(a)(4). As to the requirement that defendant have a prior opportunity for cross-examination, " '[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *People v Sardy (On Remand)*, 318 Mich App 558, 564; 899 NW2d 107

[2] Because the challenged evidence was relevant to the prosecution's theory of the case, we reject defendant's argument that his trial counsel was ineffective for failing to object to the admission of this evidence. It is unremarkable that defense counsel chose not to object to a grieving mother's short and specific testimony about her late son's activities, a tactic that could have easily backfired by drawing attention to inconvenient facts or characterized the defense as callous and unfeeling. It can be sound strategy not to object because to do so would only draw attention to the challenged evidence. See, e.g., *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).

Even assuming trial counsel should have objected and that the trial court would have excluded the challenged evidence, we would still conclude that there was not a reasonable probability that a different outcome would have resulted in light of the significant amount of incriminating evidence brought forward by the prosecution. Moreover, the challenged testimony was not uniformly helpful to the prosecution's case. For instance, the victim's mother testified that she had seen the victim and defendant together only a week before the shooting at her son's home, that she had "an hour of respectful conversation" with him, and that she was not aware of any arguments or disagreements between them. This evidence was consistent with the defense theory that defendant and the victim were friendly and that someone else must have committed the crime.

(2017), quoting *United States v Owens*, 484 US 554, 559-560; 108 S Ct 838; 98 L Ed 2d 951 (1988); see also *Crawford v Washington*, 541 US 36, 54; 124 S Ct 1354; 158 L Ed 2d 177 (2004) ("The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.").

To the extent that defendant argues inferentially that his counsel was somehow unmotivated, ineffectiveness of counsel was an entirely separate theory for relief that defendant neither raised nor briefed. "Failure to brief an issue on appeal constitutes abandonment." *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009). In any event, the preliminary examination transcript reflects that defendant's counsel did in fact conduct a forceful cross-examination that elicited an admission from the witness that he regularly purchased illegal drugs from the decedent, was unemployed, and that he was under investigation for a separate homicide. The record reflects that defendant had ample *opportunity* for effective cross-examination of the witness at his preliminary examination. Therefore, the trial court did not violate defendant's Confrontation Clause right by admitting the witness's preserved preliminary examination testimony. See, e.g., *People v Garay*, 320 Mich App 29, 39; 903 NW2d 883 (2017) (holding that admission of preliminary examination testimony with opportunity for cross-examination did not violate defendant's right of confrontation), overruled in part on other grounds by *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018).[3]

Defendant's final argument that the prosecution failed to serve the habitual-offender notice required by MCL 769.13 also lacks merit. Contrary to defendant's understanding, the record does in fact contain a proof of service filed on March 7, 2018, specifically memorializing how the prosecution served a copy of the information containing the habitual-offender notice upon defendant's counsel on March 6, 2018. Moreover, the record is replete with additional references to defendant's habitual-offender status. Because defendant does not argue—and could not prove—that he was unaware that the prosecution was seeking the enhancement or that he lacked an opportunity to contest its applicability, under a harmless-error standard, resentencing is not required. See *People v Head*, 323 Mich App 526, 543-544; 917 NW2d 752 (2018).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Brock A. Swartzle

[3] In his questions presented, defendant also refers to MRE 804(b)(1) as an additional basis for appellate relief but fails to mention it again in his briefing. Accordingly, we hold this alternative argument abandoned. See *McGraw*, 484 Mich at 131 n 36.