# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 26, 2013 |
| v | No. 305352<br>Wayne Circuit Court |
| DERRICK ELLIS MYERS,<br><br>Defendant-Appellant. | LC No. 10-012159-FC |

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant, Derrick Ellis Myers, of two counts of assault with intent to commit murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The court sentenced defendant to concurrent prison terms of 18 to 30 years for each assault conviction and two to five years for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the shooting assault of Alvin Haskins Jr. and Alvin Haskins Sr. at a gas station. Just as they arrived, another car pulled in and gunfire erupted from the passenger side of that vehicle. Alvin Sr. received a nonfatal gunshot wound. Alvin Jr. was not injured. Both witnesses identified defendant as the person who shot at them.

Appointed appellate counsel raises two issues on appeal on defendant's behalf. Defendant raises additional issues in a pro se Standard 4 brief filed pursuant to Administrative Order 2004-6, Standard 4.

## I. COUNSEL'S BRIEF

### A. *BATSON* OBJECTION

During jury selection, the prosecutor exercised four peremptory challenges to excuse African-American jurors. After the fourth challenge, defendant objected on the ground that the prosecutor had impermissibly dismissed the jurors on the basis of their race. Defendant argues on appeal that the trial court erred by overruling the objection.

A prosecutor cannot use peremptory challenges to strike jurors on the basis of their race. *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986); see also *People v Barker*, 179 Mich App 702, 707; 446 NW2d 549 (1989). Whether a peremptory challenge has been improperly exercised in violation of *Batson* involves a three-step test:

> First, there must be a prima facie showing of discrimination based on race. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. . . . [T]rial courts [are] to consider all relevant circumstances in deciding whether a prima facie showing has been made.
>
> Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied.
>
> Finally, the trial court must decide whether the non-challenging party has carried the burden of establishing purposeful discrimination. . . . [T]he establishment of purposeful discrimination comes down to whether the trial court finds the . . . race-neutral explanations to be credible. . . . If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. [*People v Bell*, 473 Mich 275, 282-283; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005) (internal quotations and citations omitted).]

The applicable standard of review for a *Batson* objection depends on which of *Batson*'s three steps is in dispute. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005). "[T]he first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review. A trial judge must first find the facts and then must decide whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny." *Id.* at 342. The second step is reviewed de novo on appeal. *Id.* at 344. The third step is a question of fact that is reviewed for clear error. *Id.* at 344-345.

In this case, the first step is not at issue. Plaintiff concedes that defendant made a prima facie case of discrimination. Further, because the trial court proceeded to the second and third steps, the first step is moot. See *id.* at 338.

The second step considers whether the prosecutor has a neutral explanation for the challenge. *Bell*, 473 Mich at 283. A neutral explanation is one "based on something other than the race of the juror." *Knight*, 473 Mich at 337 (internal quotations and citation omitted). The explanation need not rise to the level needed to justify a challenge for cause. *Barker*, 179 Mich App at 706. Further, the reason offered need not be persuasive or even plausible. *Clarke v Kmart Corp*, 220 Mich App 381, 384; 559 NW2d 377 (1996). "Unless a discriminatory intent is

inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Knight*, 473 Mich at 337 (internal quotations and citation omitted).

The third step considers whether the race-neutral reasons offered by the prosecutor were credible or merely a pretext for discrimination. *Bell*, 473 Mich at 283. "[T]he critical question . . . is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). Because "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), . . . the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008).

During voir dire, the trial court asked potential jurors if they or a friend or family member had been the victim of a crime. Juror D.C. asked the court to "describe what you mean by crime, what kind of crime?" The court told the juror that it could be any kind of criminal charge. D.C. did not respond further. The prosecutor explained that she excused juror D.C. because even after the court answered the question, the juror "still appeared to me to not be able to take in and answer the simple question that was presented to her." Because the explanation did not on its face evince a discriminatory intent, it was race neutral and the trial court did not err in so finding. Further, the trial court did not clearly err to the extent it found the explanation credible. Other jurors had no difficulty understanding the court's question. Just before the judge's exchange with juror D.C., the court asked potential jurors if they or a friend or family member had been charged with a crime. One juror responded that a friend had been convicted of assault, and two others responded that relatives had been convicted of drug offenses. Because there was no apparent reason for juror D.C. not to understand what the court meant by the word "crime," the trial court did not clearly err to the extent it found that defendant had not established purposeful discrimination with respect to the dismissal of juror D.C.

During voir dire, the trial court asked juror A.B. if there was any reason he could not be fair and impartial. He hesitated in answering and then stated, "It's hard to say," but answered yes when the court asked if "we can count on your best[.]" The prosecutor followed up with juror A.B., asking if he could be fair and impartial. A.B. expressed a fear of being "targeted by whoever" for sitting on a jury. He added that he did not trust the police and stated, "It would be hard for me to believe" the testimony of a police officer because "they stick together. They've got their own little codes[.]" The prosecutor explained that she excused juror A.B. because he "was reluctant to be on the jury from the beginning," indicating "that he was fearful and didn't want to be involved." Further, juror A.B. believed that "the police acted together and supported each other," and he "would not make direct eye contact with [the prosecutor]." Because the explanation did not on its face evince a discriminatory intent, it was race neutral, and the trial court did not err in so finding. Further, the trial court did not clearly err to the extent it found the explanation credible. The prosecutor's explanation was based on the juror's own words, and the trial court agreed that juror A.B. "didn't want to be here, had an attitude." Therefore, the trial court did not clearly err by finding that defendant had not established purposeful discrimination with respect to the dismissal of juror A.B.

During voir dire, the trial court asked juror T.W. if there was any reason he could not be fair and impartial. He stated that his grandmother was in a nursing home where she was not receiving the best of care. T.W. stated that he was "the only one that's back and forth up there" and his "mind is really focused on her." He indicated that he would try his hardest to give the case his full attention. The prosecutor explained that she excused juror T.W. because he expressed reluctance to be on the jury and had indicated that his concern for his grandmother "took over a lot of his thoughts." The prosecutor also commented that the juror's attire, including a message on his t-shirt, was inappropriate for court. Because the explanation did not on its face evince a discriminatory intent, it was race neutral, and the trial court did not err in so finding. Further, the trial court did not clearly err to the extent it found the explanation credible. While the trial court apparently did not give credence to the reason relating to juror T.W.'s clothing, it did accept the reason relating to juror T.W.'s attentiveness. The explanation was based on the juror's own words, and the trial court agreed that "the whole business about his grandmother" almost caused the court to dismiss the juror for cause. Therefore, the trial court did not clearly err by finding that defendant had not established purposeful discrimination with respect to the dismissal of juror T.W.

During voir dire, the trial court asked juror R.J. if she or a friend or family member had ever been charged with a crime. She explained that a good friend had been convicted of felonious assault and "served ten months." The juror was dissatisfied with the outcome of the case because she apparently believed that her friend had acted in self-defense. She did state that she would not hold the outcome of her friend's case against "somebody else." The prosecutor explained that she excused R.J. because she

> did not look at me. . . . She indicated that she had a friend that was charged with Felonious Assault and that he was convicted of that and that he served some time, and that she was not happy with the . . . way the criminal justice system played out. The Court asked her if I was the prosecutor that handled the case and if she would hold that against us, and she never looked at us when she indicated that she wouldn't. Based upon her unwillingness to look at us and her demeanor, I didn't feel that she would be an appropriate juror for this jury.

Because the explanation did not on its face evince a discriminatory intent, it was race neutral, and the trial court did not err in so finding. Further, the trial court did not clearly err by finding the explanation credible. The explanation was based on the juror's own words, and the trial court seemed to agree that the juror might harbor some bias against the prosecutor because of her dissatisfaction with the outcome of the friend's case. Therefore, the trial court did not clearly err by finding that defendant had not established purposeful discrimination with respect to the dismissal of juror R.J.

Because the trial court did not clearly err by finding that the prosecutor provided plausible, race-neutral reasons for dismissing the jurors, it properly denied defendant's *Batson* objection. Accordingly, defendant's constitutional rights were not violated.

B. PROSECUTORIAL MISCONDUCT/INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that certain remarks by the prosecutor during closing argument denied him a fair trial. He contends that the remarks were improper and that trial counsel was ineffective for failing to object to them. Because there was no objection to the prosecutor's remarks at trial, review of defendant's substantive prosecutorial misconduct claim is limited to plain error affecting substantial rights. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); see also *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). Further, because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request for an evidentiary hearing, review of that issue is limited to errors apparent from the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); see also *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor's remarks in context on a case-by-case basis. *Id.* at 272-273. "The propriety of a prosecutor's remarks depends on all the facts of the case." *Rodriguez*, 251 Mich App at 30. The prosecutor's remarks are not to be taken out of context; his closing argument should be considered in its entirety and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Hedelsky*, 162 Mich App 382, 386; 412 NW2d 746 (1987); *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

The prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). But it is improper for the prosecutor to inject into the case an issue broader than the defendant's guilt or innocence. *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999). She may not inject "unfounded or prejudicial innuendo into the proceedings," *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983), or "argue facts not in evidence or mischaracterize the evidence presented," *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The prosecutor also may not vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness. *Bahoda*, 448 Mich at 276.

During closing argument, the prosecutor told the jury that it was responsible for determining whether the Haskinses "are telling you the truth when they tell you that the defendant, Derrick Myers, is the person that shot at them back on August 14th." She rhetorically asked, "And how is it that you determine credibility?" and then presented various circumstances for the jury to consider. Defendant has not shown plain error with respect to this aspect of the prosecutor's argument. The prosecutor never suggested that she had some special information, unknown to the jury, that the Haskinses were truthful witnesses. She told the jury that it was up to it to determine whether the Haskinses were credible witnesses and in making that determination, it could consider whether the Haskinses had any reason to lie and whether it would make any sense for them to do so. The prosecutor may comment on the credibility of her

own witness during closing argument and argue from the facts that a witness should be believed, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), or that the witness has no reason to lie, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Further, because the jury should rely on its own common sense and everyday experience in evaluating the evidence, *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991), it is not misconduct for the prosecutor to appeal to the jury's common sense. *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992).

During closing argument, the prosecutor also stated that the Haskinses were "very brave in coming forward in admitting and telling the police that this person is the person that tried to . . . kill them on that day. Often times that doesn't happen. There's a mentality now about snitching and telling on folk." Defendant has not shown plain error with respect to this aspect of the prosecutor's argument because the argument was tied to the evidence in this case. Alvin Jr. had testified that it was rumored that he had come forward and cooperated with the police with regard to a murder investigation, as a result of which defendant had a problem with Alvin Jr. The prosecutor argued that this was the motive for the shooting. If Alvin Jr. was shot at because he was rumored to have cooperated with the police in a prior matter, it was not improper to argue that he was brave for cooperating with the police in this case.

Because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to object. "Defense counsel is not required to make a . . . futile objection." *Goodin*, 257 Mich App at 433. Accordingly, defendant's constitutional rights were not violated.

## II. DEFENDANT'S STANDARD 4 BRIEF

### A. BINDOVER DECISION IN DISTRICT COURT

Defendant contends that the district court abused its discretion in binding him over for trial because the Haskinses gave inconsistent testimony. This issue has not been preserved for appeal because defendant did not file, and the trial court did not rule on, a motion to quash. See *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

In his presentation of this issue, defendant divines error from excerpts of the transcript set forth in the question presented, but he does not explain why these excerpts show that the evidence as a whole was insufficient to warrant a finding that a crime was committed or to establish probable cause to believe that he committed it. See, generally, *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). An issue may be deemed abandoned where a defendant fails to brief the merits of a claim of error. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In any event, even if the district court erroneously concluded that sufficient evidence was presented at the preliminary examination to bind over defendant for trial, the error is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). In other words, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004). Defendant has not presented any argument that the evidence at trial was insufficient to support his convictions and thus has not shown any error, constitutional or otherwise.

## B. INEFFECTIVE ASSISTANCE OF COUNSEL

In the nine-page question-presented section of defendant's Standard 4 brief, defendant presents a laundry list of complaints about events in the district court and the trial court. Many complaints are vague or incomprehensible, and none are analyzed in any meaningful way. Accordingly, we deem the issues abandoned, see *Harris*, 261 Mich App at 50, and confine our analysis to the ineffective assistance of counsel claim presented in the argument section of defendant's brief. Again, because defendant did not raise this issue in the trial court, review is limited to errors apparent from the existing record. See *Rodriguez*, 251 Mich App at 38; *Snider*, 239 Mich App at 423.

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant's first claim of ineffective assistance of counsel is presented as follows:

> During the testimonies of both Haskin's Sr. and Jr., there were serious discrepancies between what he said on the stand and what he said in the police report and defense counsel failed to properly cross-examine the witnesses to bring out this discrepancy and failed to file the proper motion to get a directed verdict of acquittal, or a motion to have a mistrial declared. Defense counsel failed to challenge the differences between witnesses statements in police reports versus testimony made during preliminary examination and trial.

The record shows that during cross-examination, defense counsel elicited Alvin Jr.'s admission that he told the police at different times that the gun was a handgun and an AK-47. Counsel also elicited that Alvin Sr. underestimated defendant's height when describing him to the police. The police reports are not in evidence; thus, the record does not support defendant's claim that they contained other significant discrepancies with which the Haskinses could have been impeached. Therefore, the record does not support defendant's claim that counsel was ineffective for failing to impeach the witnesses further.

The record shows that counsel used the preliminary-examination transcript to show that Alvin Jr. changed his mind about the type of gun he saw based on what the clerk told him. Counsel also used the preliminary-examination transcript to show that Alvin Sr. had said that he did not know who shot him. Defendant has not explained what other testimony from the preliminary examination was so significant that it should have been used to further impeach the witnesses. Thus, defendant has not established either a deficiency by counsel or resulting prejudice.

A motion for a directed verdict requires the trial court to determine whether the evidence, viewed in a light most favorable to the prosecution, is sufficient for a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *People v Aldrich*, 246

Mich App 101, 122; 631 NW2d 67 (2001). Alvin Jr. and Alvin Sr. both identified defendant as the shooter. "[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Therefore, the fact that the witnesses were impeached or could have been further impeached would not have warranted a directed verdict. Defense counsel was not ineffective for failing to make a meritless motion. See *Goodin*, 257 Mich App at 433.

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Defendant has not explained why the fact that the witnesses were impeached or were not sufficiently impeached constitutes an irregularity warranting the declaration of a mistrial. There is no basis for concluding that counsel was ineffective for failing to move for a mistrial.

Defendant's second claim of ineffective assistance of counsel is presented as follows: "Defense counsel failed to raise the lack of any supporting physical evidence during cross examination. Specifically, at preliminary examination and during trial." Alvin Sr. testified that he was shot, police officers testified to finding what appeared to be bullet holes in Alvin Jr.'s car and in the gas-station store, and one officer testified to seeing spent shell casings just outside the store. Thus, there was physical evidence to corroborate the Haskinses' testimony that a shooting took place. During cross-examination at trial, police officers admitted that they did not look for evidence, such as vehicles or weapons, at defendant's house that would connect him to the crime. The officer in charge admitted that he did not know if the shell casings were tested for fingerprints. The record thus shows that defense counsel did "raise the lack of any supporting physical evidence during cross examination" at trial.

Defendant's third claim of ineffective assistance of counsel is presented as follows: "Defense counsel also failed to have any officers testify as to the body posture of the deceased necessary to explain the improbable trajectory of the bullet." There is no merit to this claim. No person died, and there was no testimony at trial regarding bullet trajectories, improbable or otherwise.

Defendant's fourth claim of ineffective assistance of counsel is presented as follows:

> There was no powder residue on defendants [sic] hands to meet the state requirement of a gun having been fired on the elements set forth by the state requirements of investigative tools and agents. There was no serial number ever traced on the gun and it was never linked to the defendant or anyone else. Defense counsel failed to bring this issue into court via a motion or an objection of any kind.

There was no testimony at trial regarding whether defendant's skin or clothing was tested for gunshot residue. One can infer that no residue testing was conducted due to the fact that defendant was not arrested until more than two months after the shooting. There was no testimony at trial that a gun had a serial number that could be used to trace ownership. One can infer that a serial number, if one existed, did not link the gun to defendant because there was no

evidence that a gun was ever recovered. In any event, the police do not have a duty to seek and find exculpatory evidence, *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995), and the prosecution is not required to seek and find exculpatory evidence or test evidence for a defendant's benefit, *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Therefore, counsel was not ineffective for failing to object to the absence of such evidence. See *Goodin*, 257 Mich App at 433 ("Defense counsel is not required to make . . . a futile objection."). Defendant has not explained what type of motion defense counsel should have filed and why the absence of the motion prejudiced his case. Accordingly, defendant has not sustained his burden of establishing that defense counsel was ineffective.

Defendant's fifth claim of ineffective assistance of counsel is presented as follows: "Prior to the start of trial, defendant asked trial counsel to obtain copies of all the police documents and record's pertaining to the full discovery, this was never done." It is not clear if defendant means that defense counsel failed to provide him with copies of documentary evidence for his own use or that counsel was unaware of valuable evidence because he failed to obtain documentary evidence while preparing for trial. In any event, because defendant neither identifies any documentary evidence that was not produced nor explains how the absence of any evidence affected the outcome of trial, this ineffective assistance of counsel claim cannot succeed.

Defendant's last ineffective assistance of counsel claim is based on defendant's claims that he filed a pretrial "motion to dismiss due to police/prosecutorial misconduct" on his own behalf, which defense counsel failed to present to the trial court for a ruling, and that because defense counsel would not pursue the motion, the trial court should have appointed substitute counsel.

The record shows that the trial court was aware that defendant had a motion to be presented. Defendant stated that he filed a motion, but the trial court register of actions does not show that a motion to dismiss was ever filed. Neither the trial court nor the prosecutor had seen the motion, and it appears that defense counsel had not seen it either because he had to ask defendant if he had filed a motion. Because neither the trial court nor counsel was familiar with the motion, it was not objectively unreasonable for defense counsel to have the court defer ruling on the motion until he could review it and have it properly filed and served if counsel determined that it had any merit. Because there is no motion to dismiss in the record, it cannot be determined whether there was any merit to it. Defendant has not offered any basis for concluding that any motion would have affected the outcome of the proceedings. Therefore, defendant has not shown that he was prejudiced by defense counsel's failure to present the motion to the trial court.

To the extent defendant takes issue with the trial court's failure to appoint substitute counsel, his claim is without merit. An indigent defendant has a right to counsel but not to counsel of his choice. *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). Further, an indigent defendant is not entitled to have new counsel appointed "whenever and for whatever reason dissatisfaction arises with counsel provided for him." *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974). "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."

*People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005), abrogated in part on other grounds by *Giles v California*, 554 US 353, 367-368; 128 S Ct 2678; 171 L Ed 2d 488 (2008). "Appointment of 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).

In this case, defendant never expressed dissatisfaction with defense counsel or requested that new counsel be appointed. Further, counsel's failure to file a motion does not by itself establish good cause because the decision whether to file a pretrial motion comes within the scope of professional judgment and trial strategy, *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001), and such matters are "entrusted to the attorney and do not justify substitution of counsel," *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). An indigent defendant's right to counsel does not include the "right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983).

Affirmed.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering