

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT KARLEESE BURTLEY,

Defendant-Appellant.

UNPUBLISHED

April 30, 1996

No. 176428

LC No. 9366024 FH

Before: Fitzgerald, P.J. and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

Defendant appeals of right his conviction by jury of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant later pleaded guilty to being an habitual offender, second offense, under the controlled substances statute, MCL 333.7413(2); MSA 14.15(7413)(2). The court initially sentenced defendant to a term of imprisonment of 32 to 48 months. Subsequently, the court vacated that sentence and imposed a term of imprisonment of five to eight years. We affirm in part, vacate defendant's sentence, and remand for resentencing in accordance with this opinion.

On May 18, 1993, authorities conducted surveillance on a house in Lansing as a result of information that defendant Lamont Burtley was en route to drop off crack cocaine. Within thirty minutes, defendant alighted from a car that pulled into the home's driveway. Defendant walked onto the porch, said hello, and walked back toward the car. When police officers confronted defendant, defendant put up his arms and ran. The police retrieved a baggie that had flown from defendant's hands. After testing, the police found that the baggie contained 37 rocks of crack cocaine, which totaled 6.21 grams.

Defendant first argues that the circuit court should not have denied his counsel's motion to withdraw, and should have appointed substitute counsel. We review a court's decision regarding substitution of counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d

* Circuit judge, sitting on the Court of Appeals by assignment.

830 (1991). Defendant contends that he could not confide in counsel because counsel had represented, in an unrelated drug case one year earlier, the stepbrother of a man whom defendant had been charged with murdering. Defendant was scheduled to be tried for the murder one week following trial in the instant matter. The circuit court refused to grant the motion, finding that no conflict existed because counsel's representation of the stepbrother had ceased, and that defendant's tactics were merely dilatory.

Substitute counsel is warranted only where a defendant shows good cause and where substitution will not unreasonably disrupt the judicial process. *Mack, supra* at 14. Good cause arises where a legitimate difference of opinion develops between a defendant and his appointed counsel regarding a fundamental trial tactic. *Id.* In this case, defendant has not shown that he had a legitimate difference of opinion with his counsel regarding a fundamental trial tactic. Instead, the record reveals that defense counsel was prepared and adequately represented defendant.

Also, the mere allegation that a defendant lacks confidence in his attorney, which is not supported by a substantial reason, does not amount to good cause, particularly when the request is belated. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989). Defendant failed to provide the court with a substantial reason for his lack of confidence in counsel. Defendant did not show an actual conflict of interest. Further, although counsel advised defendant of the circumstances four months before trial, defendant filed his motion for substitution just days before trial.

Additionally, in his motion to withdraw in this case, defense counsel wrote that defendant "refused" to assist counsel in preparing his defense. Also, an evaluator from the Center for Forensic Psychiatry wrote that defendant was capable of working with his attorney but did not choose to do so. A defendant may not intentionally break down the attorney-client relationship by refusing to cooperate with his appointed counsel and later argue that good cause exists for substitution. *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985), *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983).

Further, the circuit court heard counsel's motion to withdraw on the date set for trial. The jury and witnesses were present, and the prosecutor was ready to proceed. A substitution of counsel at that point would have unreasonably delayed the judicial process. See *People v Kenneth Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985). The circuit court therefore did not abuse its discretion in refusing defendant's motion for substitution of counsel.

Next, defendant asserts that the court erred by giving the jury the following instruction on flight:

Now there has been some evidence that the Defendant attempted to hide some substance in his possession after the police attempted to arrest him. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also attempt to hide things because of a consciousness

of guilt. You must decide whether the evidence is true, and, if true, whether it shows that the Defendant had a guilty state of mind.

The above instruction was not perfect. Nonetheless, the circuit court did not err because the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. See *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Defendant next contends that the prosecutor solicited prejudicial testimony from a police officer. As defendant did not object to this testimony, review is foreclosed unless the prejudicial effect of the prosecutor's conduct was so great that it could not have been cured with an appropriate instruction, and the failure to review would result in a miscarriage of justice. *People v Warren (After Remand)*, 200 Mich App 586, 589; 504 NW2d 907 (1993). Moreover, it is possible that defense counsel purposely did not object to this testimony as a trial tactic to attempt to show that defendant's brother was the supplier, rather than defendant.

Defendant argues that the officer should not have testified regarding what he "knew of" defendant. The testimony at issue was not responsive to the prosecutor's questions. When a police officer makes unresponsive remarks, this Court will scrutinize the statements to ascertain that the officer has not ventured into forbidden areas that could prejudice the defendant. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983), *People v McCarver*, 87 Mich App 12, 15; 273 NW2d 570 (1978).

The officer also testified that he "had numerous contacts with [defendant] in the past." The officer added that he "had previous police contacts [with defendant] based on my job with the Lansing Police Department." Although the officer improperly injected his prior contacts with defendant, the nature of the previous contacts was not clear. Although this testimony was error, the error was not harmful error and did not prejudice defendant.

Defendant also argues that he should not have been charged as a second offender because his first offense was not under the controlled substances statute. Defendant's previous conviction was for attempted possession with intent to deliver marijuana. It is an offense separate from the instant offense. Further, MCL 333.7413; MSA 14.15(7413) lists convictions that may form the grounds for a sentence enhancement for a later offense. Attempted possession with intent to deliver marijuana is not among them. Hence, the circuit court improperly enhanced defendant's sentence. *People v Briseno*, 211 Mich App 11, 18; 535 NW2d 559 (1995), *People v Anderson*, 202 Mich App 732, 732-735; 509 NW2d 548 (1993).

Finally, defendant asserts that he is entitled to resentencing because the circuit court improperly considered certain facts. When sentencing defendant, the circuit court commented that defendant's 37 rocks of cocaine and \$350 cash supported the greater charge of delivery. The record reflected that defendant was arrested with the cocaine and cash near a known crack house. A drug enforcement officer testified that, in his expert opinion, 37 rocks of cocaine indicated an intent to deliver, not an intent

to personally use the drugs. The court may consider record evidence that a defendant committed a greater offense as an aggravating factor. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995), *People v Tyler*, 188 Mich App 83, 86; 468 NW2d 537 (1991).

. Affirmed in part, sentence vacated, and remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Maura D. Corrigan

/s/ Chad C. Schmucker