

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE GEORGE TINSLEY,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 178125

LC No. 94-000214

Before: McDonald, P.J., and White and P. J. Conlin*, JJ

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316; MSA 28.548, assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison without parole for the felony murder conviction, life in prison for the assault with intent to commit armed robbery conviction, and two years' imprisonment for the felony-firearm conviction to run consecutively to the two life sentences. We affirm.

Defendant's convictions stem from an incident in which two armed men attempted to rob a convenience store. One of the men shot and killed the store's owner. An autopsy later revealed that he had been shot twice with a 380 automatic caliber weapon. The deceased's father was also working in the store. Both armed men pointed guns at the older man, hit him, and ordered him to open the cash register. No money was stolen from the store. Defendant was arrested the following day on an unrelated charge of carrying a concealed weapon. At the time of his arrest, he was carrying a loaded 32 caliber handgun, ten live 32 caliber rounds, and five live 380 caliber rounds. The 380 caliber rounds were of the same type as the bullets removed from the deceased.

Defendant's first argument on appeal is that the trial court abused its discretion in denying his motion for an adjournment to obtain new counsel and denying his counsel's motion to withdraw. Both motions were raised on the first day of trial before the jury was seated. The decision to grant or deny a motion for adjournment is within the trial court's discretion and will not be reversed on appeal absent an

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

abuse of that discretion. *City of Lansing v Hartsuff*, 213 Mich App 338; 539 NW2d 781 (1995). Similarly, the decision regarding substitution counsel is within the trial court's discretion and will not be overturned absent an abuse of that discretion. *People v Mack*, 190 Mich App 7; 475 NW2d 830 (1991).

Defendant contends that the trial court's refusal to grant an adjournment to allow the appointment of substitute counsel denied his right to assistance of counsel. We disagree. A criminal defendant is entitled to have an assigned lawyer replaced upon a showing of adequate cause, so long as substitution of counsel will not unnecessarily disrupt the judicial process. *Mack, supra* at 14. To determine whether the trial court abused its discretion in denying defendant's motion to adjourn, this Court will consider whether "(1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion." *Hartsuff, supra* at 351.

In moving for new counsel, defendant's only complaint about his attorney was that they did not communicate well and that his attorney had not adequately discussed the case with him. Defendant's attorney had met with defendant at least twice, however, and gave him discovery materials. Moreover, although defendant had been in custody for almost six months before trial, he did not request substitution of his court-appointed attorney until the first day of trial. Finally, defendant does not assert on appeal that any prejudice resulted to him from the trial court's denial of his motions. Although an indigent defendant is guaranteed his constitutional right to be represented by counsel, "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 the substitution will not unreasonably disrupt the judicial process." *Mack, supra* at 14. We find that the trial court did not abuse its discretion in denying defendant's motions.

Defendant next argues that the trial court abused its discretion when it admitted into evidence the fact of his subsequent arrest, the ammunition and handgun in his possession, and statements he made to the police following the arrest. Before the trial began, the trial court ruled that pertinent facts about defendant's arrest the day after the charged offenses occurred could be admitted, including defendant's possession of 380 caliber ammunition, but the court disallowed evidence of the 32 caliber handgun and ammunition because the deceased had been shot with a 380 caliber weapon. During the trial, the prosecution again moved to allow admission of the gun. This time, the court admitted the gun into evidence as probative of identity and opportunity of the perpetrator of the assault with intent to commit armed robbery because the type of weapon used by the second assailant was unknown.

Defendant contends that the admission of evidence about his arrest for an unrelated offense violated MRE 404(b) as an impermissible use of evidence of other crimes, wrongs, or acts. In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court articulated a clarified standard for admission of evidence of other crimes or wrong acts. Under the *VanderVliet* standard, such evidence may be admitted if "(1) it is relevant to an issue other than defendant's character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not

substantially outweighed by the danger of unfair prejudice.” *People v Cadle*, 204 Mich App 646, 655; 516 NW2d 520 (1994).

The decision to admit evidence is within the sound discretion of the trial court and should not be disturbed absent a finding that an unprejudiced person, considering the facts upon which the trial court relied, would conclude that there was no justification for the ruling made. *People v Rockwell*, 188 Mich App 405; 470 NW2d 673 (1991). The trial court did not abuse its discretion in admitting evidence of defendant’s arrest for an unrelated offense committed a day after the charged offenses occurred. The fact of the arrest and the gun and ammunition in defendant’s possession were relevant to an issue other than defendant’s character and propensity. All were probative of the material issues of identity of the perpetrators as well as defendant’s opportunity to commit the offenses. Prejudice which resulted to defendant, if any, was cured by the trial court’s instruction to the jury that evidence relating to defendant’s possession of a firearm and ammunition when arrested could only be used to determine the identification of the person who committed the charged offenses.

Affirmed.

/s/ Helene N. White
/s/ Gary R. McDonald
/s/ Patrick J. Conlin