

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT L. TRAYLOR,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

Nos. 176625; 176626

Oakland Circuit Court

LC Nos. 93-127913-FH;

93-127517-FC

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

In Docket No. 176625, defendant pleaded guilty to attempted breaking and entering a building with intent to commit larceny therein, MCL 750.110a; MSA 28.305(a); attempted breaking and entering a coin-operated device, MCL 752.811a; MSA 28.643(101(a); and to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced as an habitual offender to 2 ½ to 10 years' imprisonment. In Docket No. 176626, defendant was convicted by a jury of unarmed robbery, MCL 750.530; MSA 28.798. Thereafter, defendant pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to one to thirty years' imprisonment. Defendant appeals each conviction as of right. We affirm.

Docket No. 176626

Defendant first contends that he was denied effective assistance of counsel because his counsel told the trial court that he was not certified to handle the interlocutory appeal defendant was seeking. We disagree. After a thorough review, we conclude that defendant has failed to meet his burden of establishing a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668, 691-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). The allegedly improper comment does not appear to have affected the result of trial. The trial court did not rely on defense counsel's comment in denying defendant's motion to quash the information.

Additionally, because the jury found enough evidence to convict defendant, the error, if any, in the proceedings contesting the bindover is harmless. *People v Dunham*, 220 Mich App 268, 276-277; ___ NW2d ___ (1996); *People v Fiedler*, 194 Mich App 682, 695; 487 NW2d 831 (1992); *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991). Further, we conclude that the magistrate did not abuse its discretion in binding defendant over for trial for armed robbery. By exposing his weapon and then telling the gas station clerk to leave the store, defendant used violence and fear to take property over which the clerk would have otherwise had possession and control. *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976); see, generally, *People v Smedley*, 37 Mich App 325, 331; 194 NW2d 383 (1971). Accordingly, the bind over was proper and an appeal would have been futile.

Next, defendant asserts that the trial court abused its discretion in refusing to appoint substitute counsel. *People v Morgan*, 144 Mich App 399, 401; 375 NW2d 757 (1985). We disagree. In *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), this Court summarized the review of a trial court's decision to deny substitution of appointed counsel as follows:

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. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972). The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion. *People v Reinhardt*, 167 Mich App 584, 590; 423 NW2d 275 (1988).

Additionally, we look to determine whether defendant was prejudiced by the trial court's denial of defendant's request for substitute counsel. *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985).

After applying this standard to the present case, we hold that the trial court did not abuse its discretion in denying defendant's request for a new attorney. *Mack, supra* at 14. First, even though defendant did not file a written motion to replace his second appointed attorney, the record reveals that the trial court thoroughly examined defendant's claims at the April 13, 1994, motion hearing. Defendant cites no authority for the proposition that the trial court was obligated to interrogate the movant to uncover additional, unmentioned reasons behind the withdrawal request. Second, defendant has not supported his claim that a legitimate disagreement existed between himself and his second attorney regarding trial tactics. Third, defendant has neither evidenced his claim that he created a conflict of interest by filing a grievance against his trial counsel, nor offered authority for the proposition that such

an action requires appointment of another attorney. Fourth, defendant has failed to sustain his burden of showing that he was prejudiced by the trial court's decision to deny his request for a different attorney.

Defendant further claims that the trial court erred in denying defendant's motion for a directed verdict. Again, we disagree. In reviewing a trial court's ruling on a directed verdict, we view the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

At trial, gas station clerk James Stewart testified that defendant entered the gas station requesting free motor oil. When Stewart refused, defendant went to his vehicle and returned with a gun. Defendant showed Stewart the butt of the gun and told him to get out of the station; whereupon Stewart ran across the street and watched defendant walk in and out of the gas station twice. After defendant left, Stewart returned to find a can of oil and some cigarettes missing. Viewing this testimony in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *Beebe, supra* at 159. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

Docket No. 176625

Defendant claims that his guilty plea was involuntary in light of the fact that there had been a breakdown in the attorney-client relationship. However, defendant did not file a motion to withdraw his plea on this basis in the trial court. Accordingly, this issue has been waived. MCR 6.311(C); *People v Beasley*, 198 Mich App 40, 43; 497 NW2d 200 (1993). Further, in *People v Vonins (After Remand)*, 203 Mich App 173, 175; 511 NW2d 706 (1993), this Court held that unconditional guilty pleas are not invalidated by claims that defense counsel was ineffective in refusing to file an interlocutory appeal contesting an order denying a defendant's motion to quash the information. Issues relating to the state's capacity to prove factual guilt are waived by an unconditional guilty plea. *Id.* at 176.

Affirmed.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra