

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL F. SHAVKEY,

Defendant-Appellant.

UNPUBLISHED

April 18, 1997

No. 180492

Saginaw Circuit Court

LC No. 93-8383 FC

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), breaking and entering an occupied dwelling ("B&E"), MCL 750.110; MSA 28.305, kidnapping, MCL 750.349; MSA 28.581, first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and resisting and obstructing a police officer. MCL 750.479; MSA 28.747. All of these arise out of the circumstances surrounding the strangulation death of defendant's former girlfriend, Christine Saroya. Defendant was sentenced to life imprisonment without the possibility of parole for the felony murder conviction. He was also sentenced to two additional terms of life imprisonment for kidnapping and CSC I, ten to fifteen years' imprisonment for B&E, and 365 days in the county jail for resisting and obstructing. All sentences are to run concurrently. Defendant now appeals as of right, and we affirm.

Defendant argues that defense counsel failed to interview and call six witnesses whose testimony would have supported his insanity defense. Further, defendant contends that counsel failed to provide him with police reports or the preliminary examination transcript, thereby hindering defendant's ability to assist in his own defense. Finally, defendant argues that counsel failed to have a possibly exculpatory DNA test done on defendant. Defendant claims that due to these alleged problems with his counsel, the trial court abused its discretion by refusing to appoint substitute counsel and he received ineffective assistance of counsel.

Appointment of substitute counsel is only warranted upon a showing of good cause and where the substitution will not unreasonably disrupt the judicial proceedings. *In re Conley*, 216 Mich App 41,

46; 549 NW2d 353 (1996). “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 Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). As for the claim of ineffective assistance, to prevail the defendant “must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms. . . . [and] that there is a reasonable probability that, but for counsel’s error, the result would have been different.” *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

“Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense.” *People v Lavearn*, 210 Mich App 679, 683; 506 NW2d 909 (1993), rev’d on other grounds 448 Mich 207; 528 NW2d 721 (1995). The substance of the testimony of the six proposed witnesses was presented at trial through an expert witness. Because the record indicates that five of the six were members of defendant’s family, defense counsel could reasonably have decided that their relationship to defendant would have limited their effectiveness as witnesses. Further, although not a part of the record and not technically reviewable, see *People v Johnson*, 144 Mich App 125, 130; 373 NW2d 263 (1985), the two affidavits supplied by defendant indicate that those two witnesses would have testified that defendant was depressed around the time of the murder. Such testimony would not have tended to demonstrate that defendant was unable to appreciate the wrongfulness of his behavior or to conform his behavior to the requirements of the law, the relevant legal standard. Second, the record indicates that defendant was eventually given access to the requested documents. Third, because there was no genetic evidence from the crime scene to which a DNA test of defendant could have been compared, performing a DNA test on defendant would have served no purpose. Therefore, defendant has failed to establish that counsel’s actions deprived him of a substantial defense.

Because defense counsel’s performance was objectively reasonable, and because defendant failed to show that counsel’s performance was in any way prejudicial, defendant has failed to establish that he was denied his right to effective assistance of counsel. *Stanaway*, *supra* at 687-688. Further, this same evidence fails to establish that a legitimate difference of opinion had developed between defendant and his counsel concerning a fundamental trial tactic. Thus, defendant has also failed to establish that good cause existed for the appointment of substitute counsel. *Mack*, *supra* at 14.

Defendant has also filed a Standard 11 brief in which he raises two additional issues. First, he contends that at the preliminary examination the trial court improperly utilized suggestive and leading questions to enable a five year old witness to identify defendant. He also raises various other objections to the examination of this witness.

We interpret defendant’s argument to claim that because of alleged errors concerning the admission of evidence during the preliminary examination, he should not have been bound over for trial. The purpose of a preliminary examination is to determine whether a crime has occurred and whether there is probable cause to believe that the defendant committed the crime. *People v Laws*, 218 Mich App 447, 451-452; 554 NW2d 586 (1996). Here, assuming *arguendo* that error occurred, the court was still justified in binding defendant over because, discounting entirely the testimony of the witness in

question, sufficient evidence was presented that a crime occurred and that defendant committed it. Further, error due to improperly admitted evidence at a preliminary examination will not require that a later verdict be set aside unless, on the whole record, the error resulted in a miscarriage of justice. *People v Hall*, 435 Mich 599, 603-604; 460 NW2d 520 (1990). Therefore, because defendant has failed to convince this Court that a miscarriage of justice occurred, evidentiary errors occurring at the preliminary examination stage would not warrant setting aside the verdict.

Defendant also submits that the trial court abused its discretion in refusing to allow the defense adequate time to prepare for trial. The decision whether to grant a continuance is within the discretion of the trial court. *People v Charles O Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972). After a thorough review of the record, we find no abuse of discretion.

Affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell