

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PRENTIS W. WILSON,

Defendant-Appellant.

UNPUBLISHED

October 2, 2001

No. 220559

Wayne Circuit Court

Criminal Division

LC No. 98-011135

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316, first-degree felony murder, MCL 750.316, arson of real property, MCL 750.73, and arson of personal property in excess of \$50, MCL 750.74. He was sentenced to life without parole for each of the murder convictions, life imprisonment for the arson of real property conviction, and sixty-four to ninety-six months' imprisonment for the arson of personal property conviction, all sentences to be served concurrently. He appeals as of right. We affirm.

Defendant was charged with killing and dismembering his mother, Ivy Jones, and her boyfriend, Henry Lee Carter, and of subsequently burning his mother's minivan and flower shop in an attempt to destroy evidence of the crimes.

I

Defendant first argues that the trial court erred by refusing his requests for substitute counsel. We review a trial court's decision whether to appoint new counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

An indigent defendant is entitled to have counsel appointed for him, but "is not entitled to counsel of his choice nor is he entitled to different counsel whenever and for whatever reason dissatisfaction arises with counsel provided for him." *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974); see also *Mack, supra* at 14; *People v O'Brian*, 89 Mich App 704, 707; 282 NW2d 190 (1979). Appointment of substitute counsel is appropriate only upon a showing of good cause and where the substitution will not unreasonably disrupt the judicial process. *Mack, supra* at 14. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a *fundamental* trial tactic." *Id.* (emphasis

added). Thus, while a complete breakdown of the attorney-client relationship or a bona fide irreconcilable disagreement concerning the pursuit of a substantial defense may justify the appointment of new counsel, *O'Brian, supra* at 708, disagreements fairly characterized as matters of professional judgment or trial strategy do not justify substitution of counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001); *O'Brian, supra*. Moreover, a defendant's mere allegation that he lacked confidence in trial counsel is not good cause to support a substitution. *Traylor, supra* at 463.

In the present case, defendant's complaints about counsel did not rise to the level of disagreement to warrant an appointment of substitute counsel. Before trial, defendant wrote a number of letters requesting substitution of counsel. At a hearing on the issue, defendant stated that he desired new counsel because counsel failed to provide him with discovery materials, failed to file requested motions, and failed to provide him with a copy of an amended information. Upon further inquiry, it was determined that counsel had given defendant a copy of all materials in her possession and that the discovery materials sought by defendant had not yet been turned over to counsel, despite counsel's repeated requests. Defendant also wanted counsel to file a motion to suppress evidence of blood taken from him pursuant to a search warrant, but counsel determined, after researching the issue, that the search was proper. Additionally, although the prosecutor moved to amend the information, an amended information was never actually filed. Before trial, defendant again moved to replace counsel, claiming that counsel was unfamiliar with the case. Defendant also stated that he "needed" four witnesses called and had not had a chance to prepare his defense with counsel. The trial court again denied defendant's request after becoming satisfied that counsel was familiar with the issues in the case.

Our review of the record convinces us that defendant's dissatisfaction with counsel involved no more than minor communication difficulties and disagreements on certain matters of trial strategy that fall short of establishing good cause for substitution. *O'Brian, supra* at 708. Also, the record does not support defendant's claim that defense counsel did not take defendant's case seriously. Most of defendant's complaints involved differences of opinion regarding evidentiary issues and possible witnesses, which involve trial tactics and professional decisions that do not support a finding of good cause for substitution. See *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *Traylor, supra* at 463; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, defendant does not specify how his overall trial strategy differed from that of counsel. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). For these reasons, we conclude that the trial court did not abuse its discretion in denying defendant's requests for substitute counsel.

II

Defendant next argues that the trial court improperly allowed several witnesses to testify concerning statements made by Ivy Jones to the effect that she was fearful of defendant and that defendant had threatened to kill her and her boyfriend if she did not pay him money. The statements were admitted under the catch-all exception to the hearsay rule, MRE 804(B)(6).

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, "when deciding whether the

admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause." *Lilly v Virginia*, 527 US 116, 137; 119 S Ct 1887; 144 L Ed 2d 117 (1999).

The statements in question were admitted under MRE 804(b)(6), which provides:

(6) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Defendant argues that the statements made by his mother to others lacked sufficient indicia of reliability to be admissible under this rule.

In *People v Welch*, 226 Mich App 461, 466-467; 574 NW2d 682 (1997), this Court observed that, in order to bear "adequate indicia of reliability" so as to be properly admissible under both the Sixth Amendment and the catch-all hearsay exceptions, hearsay testimony must either fall within a "firmly rooted hearsay exception" or occur under circumstances with "particularized guarantees of trustworthiness" considering "the totality of the circumstances surrounding the making of the statement and those rendering the declarant particularly worthy of belief." This Court also observed that the trustworthiness requirement "serves as a surrogate for the declarant's in-court cross-examination" and, therefore, the requirement "is satisfied if the court can conclude that cross-examination would be of 'marginal utility.'" *Welch, supra* at 467-468.

In *People v Lee*, 243 Mich App 163; 622 NW2d 71 (2000), a case involving the prosecution's attempt to introduce a deceased victim's statement regarding the identity of his killer under circumstances not falling within the "dying declaration" exception of MRE 804(b)(2), this Court summarized some factors used to establish the indicia of reliability for purposes of the catch-all exceptions:

When determining whether a statement has adequate "indicia of reliability," the totality of the circumstances surrounding the making of the statement must be considered. Factors to be considered include (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the

declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*Lee, supra* at 178.]

Here, the circumstances surrounding Jones' statements to the three police officers resemble the situation in *United States v Accetturo*, 966 F2d 631 (CA 11, 1992), which is cited with approval in *Lee, supra*. As this Court in *Lee* observed:

In *United States v Accetturo*, . . . the court looked at several factors when determining that the statements of the deceased victim were admissible under the catchall hearsay exception: the statement was written in the victim's handwriting; the statement was made voluntarily; the statement was given to law enforcement authorities, who were likely to investigate further; the victim agreed to assist police in the investigation, which indicated that he knew the veracity of his story would be tested; the victim was not responding to leading questions or undue police influence when the statements were made; the victim witnessed "first-hand" the events in his statement; the victim feared for his life and had no incentive to manufacture a statement that would alert the defendants that he had gone to the police. [*Lee, supra* at 175.]

Here, the circumstances surrounding Jones' statements indicate that they were made spontaneously and voluntarily, as a result of her personal knowledge, to police officers who were likely to investigate further, and with probable knowledge that defendant would learn of the statements. Additionally, the statements were repeated to three separate officers and were consistent with each other. Considering the totality of the circumstances, we conclude that the trial court did not abuse its discretion in finding that the statements were sufficiently trustworthy to fall within the scope of MRE 804(b)(6).

However, we are not convinced that the statement made to defendant's aunt was admissible under MRE 804(b)(6). Although this statement was consistent with the others and based upon personal knowledge of the declarant, it was not given to a police officer and the record is devoid of any indication whether this statement was made spontaneously or voluntarily. Thus, based on an independent review of the "guarantees of trustworthiness" of this statement, *Lilly, supra*, we cannot conclude that the statement satisfied this necessary element. Nonetheless, we conclude that any error in admitting this statement was harmless beyond a reasonable doubt under the circumstances. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). The erroneous admission of hearsay evidence is harmless where the same facts are shown by other competent evidence. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988); *People v Hoerl*, 88 Mich App 693, 702; 278 NW2d 721 (1979). In this case, not only did three police officers testify regarding similar threats, but the same evidence was also elicited through the testimony of the victim's niece regarding statements made directly by defendant and through the unchallenged introduction of similar statements made by defendant's brother. Thus, reversal is not required.

III

Defendant next alleges several instances of prosecutorial misconduct.

Defendant initially argues that the prosecutor improperly introduced his previous criminal history, contrary to MRE 404(b). However, even if it was improper for the prosecutor to initially reference defendant's criminal history, the record indicates that defendant not only reintroduced this information in greater detail in his own testimony, but expressly acquiesced to references and questioning concerning this issue. Under the circumstances, we conclude that defendant has waived any claim of error with respect to this issue. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant also argues that the prosecutor improperly questioned him about the veracity of various prosecution witnesses and the veracity of statements made by Jones to others before her death. Because defendant did not object to the challenged testimony at trial, he must show outcome-determinative plain error to avoid forfeiture. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We agree that it was improper to ask defendant to comment on the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, defendant was not unfairly prejudiced. We first note that, before the prosecutor's questioning, defendant had repeatedly testified that Jones was, in fact, lying when she told both her family members and the police that he had threatened her, thus mitigating any prejudicial effect of the prosecutor's later questions. See, e.g., *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000) (otherwise improper prosecutorial remarks may not require reversal if they address issues raised by defendant). Additionally, a timely objection by defense counsel could have cured any prejudice. See *Buckey*, *supra* at 17.

Defendant also contends that the prosecutor improperly commented on his failure to support his theory of defense with additional evidence, namely, a copy of the deed to his mother's home. Defendant did not preserve this issue with an appropriate objection at trial and we find no plain error with respect to the prosecutor's comments. *People v Fields*, 450 Mich 94, 104-118; 538 NW2d 356 (1995).

Defendant also argues that the prosecutor improperly introduced evidence that he had stabbed another individual during a fight shortly before he was arrested, and that this misconduct was exacerbated by the prosecutor's remarks during closing argument. When the prosecutor initially sought to elicit this evidence, the trial court sustained defense counsel's objection based on relevancy and lack of foundation. Therefore, we conclude that the prosecutor's subsequent references to this issue during defendant's cross examination and closing argument were improper. See *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Shutte*, *supra* at 720. However, in light of the overwhelming evidence against defendant we conclude that this error was harmless.

IV

Defendant next argues that he was denied a fair trial because of an isolated comment by the trial court characterizing defendant's testimony as speculation. Although arguably improper, we cannot see how this isolated comment deprived defendant of a fair trial or unduly influenced

the jury. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Moreover, considered in the context of the case,¹ the trial court's instruction to the jury to disregard any judicial comment or conduct that might seem to indicate an opinion was sufficient to cure any prejudice. Accordingly, we conclude that defendant was not deprived of a fair trial.

V

Defendant also argues that the trial court erred by precluding defense counsel to inquire into whether defendant's mother was involved in illegal drug activities in order to cast doubt on defendant's identity as her killer and show that someone involved in drug dealing may have actually killed her. A party seeking admission of excluded evidence is obliged to make an offer of proof to provide an adequate basis to allow this Court to evaluate the claim of error. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Here, no evidence was presented or offered indicating that defendant's mother continued to be involved with drugs or the drug trade after her release from prison approximately six years earlier. Thus, the trial court did not abuse its discretion.

VI

Lastly, defendant argues that he was denied due process because of the long delay between the commission of the offenses and the charges filed by the prosecutor. The offenses occurred in June 1996 and defendant was charged in August 1998. After thoroughly reviewing defendant's claims of prejudice and balancing the prosecution's stated rationale for the delay, including the need to obtain further physical evidence linking defendant to the killings, we find no error under the circumstances. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999); *People v Adams*, 232 Mich App 128, 140; 591 NW2d 44 (1998).

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen

¹ The characterization of defendant's testimony as speculation was not totally inaccurate, as the record reveals that defendant speculated as to reasons why his mother would tell others he had threatened her. Also, the record reflects that defendant displayed a somewhat belligerent attitude while testifying, often refusing to abide by the court's evidentiary rulings.