

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

AARON DANIEL CANTLEY,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 260761

Ingham Circuit Court

LC No. 03-000461-FC

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree murder, MCL 750.316. We affirm.

Defendant was convicted of killing Tehesah Wallace at her home in Lansing on or about January 12, 2003. According to the prosecutor's theory of the case, defendant repeatedly cut Wallace in the throat and neck with a knife, and then took her credit cards, identification, and rental car. Upon conviction by a jury, defendant was sentenced to life in prison without the possibility of parole. Defendant thereafter moved for a new trial, which the trial court denied. Defendant now raises five arguments on appeal, each of which the Court will address in turn.

I. Denial of Substitute Counsel

Defendant first argues that the trial court erroneously denied his request for substitute counsel. We disagree. A trial court's decision regarding substitution of counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

An indigent defendant is guaranteed the right to counsel, but is not entitled to have the attorney of his choice appointed simply by requesting that the trial court replace his original attorney. *Id.* at 462; *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). In order to obtain new counsel, the defendant must demonstrate good cause for the dismissal of his appointed attorney and show that the substitution will not unreasonably disrupt the judicial process. *Id.* "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.* However, "[a] defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Id.* at 166-167.

Here, the record discloses that defendant had previously obtained new counsel after his first attorney reported that defendant had requested that counsel engage in unethical conduct, including suborning perjury. When defendant requested replacement of his second attorney, the second attorney alleged similar conduct on defendant's part. The trial court found that defendant's desire for a new attorney was based on counsel's refusal to agree to defendant's improper requests, and that appointment of a new attorney for this reason would be futile because defendant was likely to renew his improper requests to any new attorney who was appointed. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request for a new attorney.

II. Great Weight of the Evidence

Defendant next argues that he is entitled to a new trial because the verdict was against the great weight of the evidence. We disagree. A trial court's decision to grant or deny a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16-17; 577 NW2d 179 (1998).

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). When the evidence conflicts, the resolution of credibility issues must be left to the jury, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or [the testimony] contradicted indisputable physical facts or defied physical realities." *Id.* at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410; 124 NW2d 255 (1963).

In the instant case, the prosecution presented footprint, fingerprint, and DNA evidence linking defendant to the crime scene, as well as evidence that defendant possessed the victim's identification card, credit cards, and rental car shortly after the crime. The evidence also showed that defendant had a relationship with the victim, and two witnesses testified that defendant admitted that he had killed the victim. In addition, contrary to what defendant asserts, the forensic evidence supported the prosecutor's theory that the victim was killed on January 12, 2003. Defendant has not demonstrated any inconsistencies in the testimony or evidence presented that would contradict indisputable physical facts or otherwise show that the evidence and testimony was so impeached that it was deprived of its probative value. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. Withholding of Evidence

Next, defendant contends that the prosecution deprived him of a fair trial by withholding evidence of the victim's telephone records and footprint comparison evidence that allegedly showed a similarity between bloody sock-covered footprints found at the crime scene and defendant's footprint exemplars.

Initially, we conclude that defendant waived any claim of error regarding the footprint evidence. On the second day of trial, defendant complained that the footprint evidence had not been timely provided. The prosecutor agreed to present the material relating to the footprint evidence to defense counsel on January 15, 2004, several days in advance of the proposed

testimony concerning this evidence, which was presented on January 20, 2004. The trial court asked defense counsel whether this would be sufficient to satisfy his objection. Counsel responded affirmatively. Defendant is not allowed to assign as error on appeal something that his own counsel deemed proper at trial, because to do so would permit him to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). In light of defense counsel's acknowledgment that receipt of the footprint materials on January 15 would be sufficient to satisfy his concerns, any claim of error with respect to this issue was affirmatively waived. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

We review defendant's claim of misconduct relative to the victim's telephone records de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Defendant appears to argue that the prosecutor failed to timely disclose this evidence, resulting in a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Due process requires the prosecutor to disclose evidence in his possession that is exculpatory and material. *Brady, supra*; *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998). In order to establish a *Brady* violation, a defendant must establish that: (1) the state possessed evidence favorable to the defendant; (2) he neither possessed the evidence nor could have obtained it himself with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester, supra*, at 281.

Here, defendant cannot meet this test. First, there is no basis for concluding that the phone record evidence was favorable to the defendant. At a posttrial *Ginther*¹ hearing, defense counsel testified that he found nothing in the phone records that would support defendant's case. When asked whether he had considered presenting evidence relating to the records, counsel stated that he had not because the evidence was actually highly inculpatory. The victim made a cellular phone call to defendant on January 12, 2003. After that call, there were no further calls made by defendant to the victim, or calls made by the victim to anyone else.

Second, there is no basis for concluding that, had defendant received the information sooner, the outcome of the trial might have been different. Counsel received the information four days before trial, and the evidence was not presented until the fifth day of trial, thus giving defense counsel time to prepare. Counsel also effectively cross-examined the officer who presented these records in an attempt to undermine the probative value of the evidence.

Defendant does not explain how earlier disclosure of the evidence might have allowed him to either preclude its admission or more effectively challenge the evidence. Under the circumstances, defendant has not shown that he was denied a fair trial due to the timing of the prosecutor's disclosure of the victim's telephone records.

IV. Ineffective Assistance of Counsel

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant argues that he was denied the effective assistance of counsel. Claims of ineffective assistance of counsel involve a mixed question of law and fact. The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court's factual findings for clear error, and the trial court's constitutional determinations are reviewed de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that counsel did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the point where the defendant was deprived of a fair trial and a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.*

A. Failure to Call Expert Witnesses

Defendant first argues that trial counsel was ineffective for failing to present expert testimony concerning the DNA evidence found at the crime scene. We disagree.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses may constitute ineffective assistance only if it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, the record discloses that defendant initially considered having an independent expert examine the DNA evidence. Thereafter, however, the prosecutor and defense counsel met with the forensic scientist who performed the DNA testing to discuss the results. At a pretrial hearing, defense counsel stated that he and defendant had discussed the matter and decided that additional testing was not necessary and would not be in defendant's best interests. At the *Ginther* hearing, counsel testified that defendant had instructed him not to pursue a motion for an independent expert because the laboratory results did not include or exclude defendant as a source of the DNA and were thus inconclusive. Defendant has not presented anything to show that further testing or examination by another expert could have affected the admissibility of the evidence or the test results. The record clearly establishes that the decision not to pursue further DNA testing by an independent expert was a matter of trial strategy, and defendant has not shown that the failure to obtain an independent expert deprived him of a substantial defense.

Defendant also argues that defense counsel was ineffective for failing to consult, or call as a witness, an independent forensic pathologist to dispute the prosecution's contention that the victim was killed on January 12, 2003. We find no merit to this claim. Defense counsel testified that he did consult with an independent pathologist and sent him the autopsy report and the crime scene photographs. The pathologist advised counsel that the victim had probably been killed two to seven days before the police found her body, but agreed that the timeframe could be longer if the victim was lying in a cold setting. The victim was killed in her home (which sat on a concrete slab) and there was evidence that her furnace was not working around that time. Under

the circumstances, it was not unreasonable for counsel to conclude that the pathologist's testimony could bolster the testimony of the prosecutor's expert witness concerning the time of death. Defendant has failed to show that counsel's decision was objectively unreasonable or that he was deprived of a substantial defense.

B. Cross-examination of Witnesses

Defendant next argues that counsel failed to effectively cross-examine various prosecution witnesses. Trial counsel's decisions how and whether to cross-examine witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Ineffective assistance of counsel can take the form of a failure to cross-examine a witness only if the failure deprives the defendant of a substantial defense. *Id.*

Defendant argues that counsel was ineffective for failing to impeach Kenneth Taylor by inquiring about previous "violent altercations" between Taylor and defendant. At the *Ginther* hearing, defendant testified that he had previously punched Taylor in the mouth for taking defendant's compact discs. Counsel's failure to elicit testimony that defendant had previously aggressively attacked Taylor was not objectively unreasonable considering the prosecution's theory that defendant murdered the victim by attacking her following a dispute.

Defendant also asserts that counsel failed to question Taylor about Taylor's request for consideration in his own criminal case in exchange for his testimony in defendant's case. The record indicates that Taylor revealed to the jury that he was incarcerated when he initially approached the police with his story, and the reasons he had decided to testify. At the *Ginther* hearing, it was established that Taylor did not receive any consideration in his own criminal case in exchange for his cooperation in this case. There was an inference at trial that Taylor hoped to obtain favorable treatment when he initially approached the police. Taylor's credibility might have been enhanced had the jury been aware that Taylor ultimately did not receive any consideration, and decided to cooperate anyway. Under the circumstances, defendant has failed to overcome the presumption that counsel's decision not to further pursue this subject was reasonable trial strategy.

Defendant also argues that counsel was ineffective for failing to reveal inconsistencies between another witness's trial testimony and her initial statement to the police. The witness's initial claim that she did not know that defendant possessed the victim's credit card when they went to a store was inconsistent with a portion of her trial testimony. However, defendant has not shown that the failure to disclose this inconsistency deprived him of a substantial defense.

Next, although defendant complains that defense counsel failed to explore whether Takoya Cooper received any consideration in a separate drunk driving case in exchange for her testimony in this case, defendant has not presented any evidence showing that Cooper actually received any consideration in exchange for her testimony. Defendant also asserts that counsel failed to question Cooper about inconsistencies in her testimony relative to whether she knew Kenneth Taylor, but the record discloses that counsel did question Cooper about this matter. Defendant further complains that counsel failed to question Cooper about her alleged mental illness or possible drug problem. Counsel testified at the *Ginther* hearing that he interviewed Cooper before trial and she stated that she was participating in counseling, possibly because of a

drug problem. However, Cooper also revealed that defendant and his father had pressured her to change her testimony. Counsel explained that he avoided questioning Cooper about these issues because he believed it was in defendant's best interest to avoid the subject. Under the circumstances, defendant has not demonstrated that counsel was ineffective in his cross-examination of Cooper. In addition, defendant has not demonstrated that Cooper was not competent to testify.

Defendant also argues that counsel was ineffective for failing to question one of the victim's acquaintances about whether the victim was a violent person who had previously stabbed a former boyfriend, Phillip Villapando.² Counsel testified that he did not pursue this line of questioning because he thought it was irrelevant because defendant was not claiming self-defense. Although this testimony could have provided some support for defendant's theory that another person killed the victim, its absence did not deprive defendant of a substantial defense. Defendant had already introduced evidence that Villapando had threatened to kill the victim when he got out of prison.

C. Failure to Challenge Footprint Evidence

Defendant argues that defense counsel was ineffective for failing to properly examine the footprint evidence before trial and for not objecting to this evidence on the ground that it lacked acceptance in the scientific community. In arguing this issue, however, defendant does not discuss the standard for determining the admissibility of scientific evidence generally, or whether counsel could have properly objected to the evidence. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. . . . Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

In addition, defendant provides no indication, through expert evaluation or otherwise, that the footprint evidence is not generally accepted in the scientific community or was otherwise improperly admitted. Thus, defendant has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818, 2003. We therefore reject this claim of error.

D. Failure to Seek Acquittal

Defendant argues that counsel was ineffective for disregarding his instructions to argue only for an acquittal. At the *Ginther* hearing, counsel explained that defendant wanted to pursue a strategy of arguing for an acquittal, not for a lesser second-degree murder conviction, but that defendant wavered on this issue during trial.

² One of defendant's theories was that Villapando, who was in prison at the time of the charged offense, ordered another person to kill the victim.

As a general rule, without the defendant's consent, "a complete concession of defendant's guilt . . . constitutes ineffective assistance of counsel." *People v Kryztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). However, "[a]n attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Shultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978); see also *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994) (declining to "second-guess counsel's trial tactic of admitting guilt of a lesser offense").

Here, defense counsel did not concede defendant's guilt, even to the lesser offense of second-degree murder. He instead stated that defendant had maintained his innocence of all charges. In his closing argument, counsel stated that defendant had an alibi, argued that several prosecution witnesses had lied during their testimony, argued that the DNA evidence pointed to an unidentified person as the killer, and stated that there was no evidence of either premeditation or a murder during the commission of a felony.

In sum, the record does not support defendant's claim that defense counsel failed to seek an acquittal or improperly conceded defendant's guilt.

E. Failure to Request a Cautionary Jury Instruction

Defendant argues that defense counsel was ineffective for failing to request a drug addict jury instruction, CJI2d 5.7, in light of Taylor's admitted use of marijuana and other substances. Defense counsel admitted that he was unaware that such an instruction existed. However, this Court has held that an instruction regarding the special scrutiny that ought to be given to the testimony of an addict-informant should be given, on request, only where the testimony of the informant is the only evidence linking the defendant to the offense. *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999); *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994). Here, Taylor's testimony was corroborated by Tikesha Thompson, Christina Bruce, and Takoya Cooper. In addition, physical evidence linked defendant to the crime. Thus, the trial court was under no obligation to give the instruction had it been requested. Therefore, defendant cannot show that, but for counsel's mistake, the outcome of his trial would likely have been different.

F. Failure to Call Witnesses

Defendant argues that defense counsel was ineffective for failing to call as a witness a woman who allegedly told the police during the investigation that the victim was seeing a man in Flint who had children. Defendant asserts that this information would have supported his theory that Kenneth Taylor, who has children, may have killed the victim. However, there is no evidence supporting defendant's theory that Taylor and the victim had an intimate relationship, or that there was any hostility between them. Thus, defendant has not shown that the failure to call this witness deprived him of a substantial defense.

V. Improper Questioning

Defendant lastly argues that the prosecutor was improperly allowed to question his father about bloodstains that were found at his home during a search on February 26, 2003. We

disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Here, the questioning was relevant to show the witness's possible bias or efforts to disrupt the investigation of defendant, his son. MRE 401; *People v Layher*, 464 Mich 756, 762-763; 631 NW2d 281 (2001). Further, to the extent that the testimony improperly revealed that defendant was in a fight, it was harmless as there is no reasonable probability that this information affected the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999). The testimony indicated that defendant was attacked from behind while trying to assist another. Contrary to what defendant asserts, then, the testimony did not portray defendant as a generally violent person.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto