

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 10, 2012

v

JAMES STEPHAN ZIMMERMANN,

Defendant-Appellant.

No. 300757
Saginaw Circuit Court
LC No. 09-032749-FH

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempting to solicit another to possess a controlled substance with intent to deliver, MCL 333.7407a(1), subornation of perjury, MCL 750.424, and interference with a witness in a criminal case, MCL 750.122(7)(b). He was sentenced to 18 to 240 months' imprisonment for the attempt conviction, 36 to 180 months' imprisonment for the subornation of perjury conviction, and 18 to 120 months' imprisonment for the witness interference conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

In a previous trial, defendant was convicted of aggravated stalking, extortion, attempted unlawful imprisonment and felonious assault arising from an incident that occurred on December 3, 2007 involving defendant's ex-wife, Antonina Zimmerman-Petrova (Petrova).¹ While defendant was in jail awaiting trial on those charges, a letter, bearing defendant's name and the address of the Saginaw County Jail in the return address area of the envelope, was "returned to sender" because the address for the intended recipient, Gregg Dickhausen, was insufficient. Saginaw County Sheriff Deputy Corrections Officer Richard DeLong worked at the jail and intercepted the letter. Consistent with jail procedures, DeLong cut open the letter to search for

¹ This Court affirmed defendant's conviction in *People v Zimmermann*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2010 (Docket No. 287895). The Supreme Court denied defendant's application for leave to appeal on September 27, 2010. *People v Zimmermann*, 488 Mich 871; 788 NW2d 434 (2010).

contraband. He saw a notation, "Do not tell my lawyer about this. I don't know how he would react." DeLong then read the entire letter.

The letter was introduced at trial and read into the record. In the letter, defendant asked Dickhausen to plant more than 28 grams of drugs, prepared to look like they were intended for distribution, in Petrova's car. He instructed that someone named Matt should then report to the police that he witnessed her conducting a drug deal with the children in the car. Defendant hoped Petrova would be arrested for the drugs and child endangerment. Ideally, Petrova would be unable to testify at defendant's trial, defendant would get out of jail, and he would get custody of the children. He added:

"Holy s***, before I forget, I was with you on 12-3-07. You were at my house. Truth is I was home with B[.],^[2] but I don't want him involved. . . . You were there that night and we had pizza at my house. Prosecutor would tear [B.] apart, and he doesn't need any more hell. Hope you understand this.

We will just need to get our story straight before court begins. We will do this later."

The letter was signed: "Thanks, Zim."

Saginaw County Sheriff's Detective Sergeant Randy Pfau contacted Frankenmuth Police Detective Randy Flathau. At Detective Flathau's behest, Sergeant Pfau confirmed by reference to a written log that Dickhausen had visited defendant while in jail on December 20, 2007. Visitors at the jail spoke with an inmate by phone while the inmate was on the other side of a partition. Pfau obtained a recording of the visit, at which Robert Bordeaux was also present; the recording, a CD, was admitted into evidence. It was subsequently played for the jury during Dickhausen's testimony. While a copy of the CD has not been provided on appeal, it appears that there was a discussion about planting drugs in Petrova's car.

Dickhausen testified that he visited defendant in jail four to five times and that he received six to seven letters from defendant, which he threw out. He said that in these exchanges, defendant asked him to plant drugs on Petrova and make sure she did not make it to the trial by disabling her vehicle. A CD of one of the conversations at the jail, which also involved Robert Bordeaux, was played for the jury. Dickhausen said he did not follow through on the plan to put drugs in Petrova's car because he did not want to put himself at risk. However, Dickhausen perjured himself at defendant's earlier trial when he said he and defendant had watched a football game at defendant's home on the night in question. Defendant apparently did not directly ask Dickhausen to provide an alibi. Dickhausen said his privileges to visit defendant at the jail had been suspended because of a verbal disagreement with a deputy, but that he had met with defendant's attorney, who told him defendant "had believed that I was with him on the night in question and that they needed me to testify to that fact to provide an alibi for him." He was told that if he testified in this trial he would not be charged with perjury.

² B. was defendant's son.

The jury convicted defendant of attempting to solicit another to possess a controlled substance with intent to deliver, subornation of perjury, and interference with a witness in a criminal case. He was sentenced as outlined above. The trial court denied defendant's motion for new trial. Defendant appeals as of right.

II. AUTHENTICATION AND CHAIN OF CUSTODY

Defendant first argues, through appellate counsel, that the letter from defendant to Dickhausen was improperly admitted as evidence. In his Standard 4 brief, defendant also argues that the CD of a conversation defendant had with Dickhausen while in jail was improperly admitted. Defendant argues that these documents were not properly authenticated and that there was a problem with the chain of custody. We disagree. We review a trial court's decisions on evidentiary questions for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 901(a) provides that authentication "as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b)(2) provides that a nonexpert opinion about handwriting will satisfy this requirement, whereas MRE 901(b)(4) provides that "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" will satisfy the requirement. In *Champion v Champion*, 368 Mich 84, 88; 117 NW2d 107 (1962), the Court stated:

Proof that the proffered writing is authentic may be made by direct or circumstantial evidence. While it is agreed that the genuineness of a letter can best be established by identification of the handwriting, when this is not possible, indirect or circumstantial evidence may be resorted to. [Citation omitted.]

With respect to FRE 901, which is identical to MRE 901(a), the Court in *United States v Thompson*, 449 F 3d 267, 274 (CA 1, 2006), found that an anonymous letter could be attributed to the defendant where evidence indicated the return address was that of the defendant and the "letter's content precisely fit[] Thompson's circumstances and predicament." Also on point is *Thomas v State*, 734 NE2d 572 (Ind, 2000), in which the court applied Ind Evidence Rule 901(a), which is also identical to MRE 901(a). *Id.* at 573. There, the defendant objected to admission of a letter where his name and the address of the Arizona State Prison, where he had been incarcerated at the time the letter was written, were on the letter's return address. *Id.* at 573-574. The letter showed knowledge of details that were not likely to have been known by anyone in that prison besides the defendant. *Id.* at 574. These facts were deemed to have established an adequate foundation. *Id.*

Defendant argues that there was insufficient evidence to show that he was the one who wrote and mailed the letter because there was no handwriting expert, no witness who saw

defendant write or mail the letter, and no showing that the letter returned was the letter mailed. However, not only would Dickhausen's nonexpert testimony have sufficed, MRE 901(b)(2)³, but defendant's name and the jail where he was incarcerated were in the return address, the letter was returned unopened, it was signed by "Zim," it referenced defendant's wife and their children, and it referenced the fact that defendant was facing trial where his wife was expected to testify against him. Defendant's circumstances and predicament were set forth at length. This evidence was sufficient to support a finding that the letter was in fact written by defendant.

Defendant also claims that the chain of custody in this case was inadequate. We disagree. Here, the officer who opened the letter when it was returned to the jail verified at trial that the four-page letter inside the envelope was the letter he intercepted. This letter was sufficiently unique that it would not have been confused with other evidence. It was reasonably probable that it was not exchanged, contaminated or tampered with. Thus, any deficiency with the chain of custody would simply go to the weight of the evidence. See *People v White*, 208 Mich App 126, 129-131; 527 NW2d 34 (1994)

Regarding the CD, a jail visitation log showed that Dickhausen visited defendant at the jail at 1:50 p.m. on December 20, 2007. The officer who made the recording indicated that the CD in question had his initials, defendant's name and ID number, and a notation that the visit was on December 20th, on phone number 9 at "13.5 hours." He testified that the recording was the entire conversation and that there were no additions or deletions. This was sufficient to show that the CD was a recording of the defendant's conversation at the jail with Dickhausen. There is no authority to suggest that voice identification experts were needed or that a videorecording of defendant engaged in the conversation was warranted. This testimony established the accuracy and trustworthiness of the evidence, making evidence regarding the chain of custody unnecessary. See *United States v DeJohn*, 368 F3d 533, 542 (CA 6, 2004).

III. TESTIMONY AND PHYSICAL EVIDENCE REGARDING DEFENDANT'S PRIOR CONVICTION

Defendant next argues through counsel that the trial court erred in permitting defendant's ex-wife and two other witnesses to testify about the events leading to defendant's prior convictions, and by admitting a coat and ski mask purportedly owned by defendant and used in the prior crime. We disagree. We review a trial court's decisions on evidentiary questions for an abuse of discretion. *Smith*, 456 Mich at 550.

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

³ Admittedly, Dickhausen testified *after* the letter was admitted into evidence.

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence of prior bad acts to be admissible under MRE 404(b), the prosecution must prove that: (1) it is offering the evidence to prove something other than defendant's bad character or criminal propensity; (2) the evidence is relevant under MRE 402⁴; and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice under MRE 403⁵. *People v VanderVliet*, 444 Mich 52, 74–75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). “

When defendant objected to testimony by these three witnesses regarding the prior crimes, the prosecution noted that, as part of the subornation of perjury charge, it had to prove that Dickhausen had falsely testified he was with defendant at defendant's home on the night of the previous crimes. It therefore sought to prove that defendant committed the previous offenses and was in the parking lot. The trial court restricted the testimony to identification. The crux of the testimony of the three witnesses was that defendant was at the site of the prior crime. They did not testify about the crimes committed during the encounter and thus, there was no violation of MRE 404(b).

As for the introduction of the coat and hat and/or testimony relating to them, it is noted that these items were found when defendant's residence was searched. That three witnesses were able to describe someone wearing the same clothing, with two identifying the person as defendant, tended to show that defendant was not home watching a movie with Dickhausen at the time of the alleged crimes, and that Dickhausen testified falsely when he said otherwise. Because false testimony is an element of subornation of perjury, CJI2d 14.3, this evidence was relevant. Defendant relates this to prior bad acts, but the clothing was not a prior bad act.

IV. PROSECUTORIAL MISCONDUCT

Defendant next argues, again through counsel, that the prosecutor argued facts not in evidence and denigrated defendant. We disagree. We review the issue de novo to determine if defendant was denied a fair and impartial trial, reviewing the record and evaluating the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

A prosecutor may not argue facts not in evidence or mischaracterize the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, contrary to defendant's claim, Dickhausen testified that defendant asked him to make sure defendant's wife

⁴ “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.” MRE 402.

⁵ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403.

did not make it to the trial by disabling her vehicle. Moreover, the prosecutor did not mischaracterize the evidence when he suggested in closing argument that defendant had told Dickhausen in the letter to testify to a false alibi. A prosecutor may argue the evidence and make reasonable inferences to support his theory of the case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). Even if defendant did not directly ask Dickhausen to testify, he also said in the letter that he was really with his son that night but did not think his son would fare well with the prosecutor. Defendant also wrote, “I was with you on 12-3-07. You were at my house. . . . You were there that night and we had pizza at my house.” Also, defendant said they would get their “stories straight” before trial. The prosecutor’s statement was, therefore, a fair inference.

Defendant next challenges in his Standard 4 brief the prosecutor’s implication during voir dire that defendant had denigrated women and African Americans. The prosecutor was inquiring whether this evidence would impair the jurors’ ability to fairly judge the evidence. In the letter to Dickhausen, defendant referred to Petrova as a “b****,” “psycho b****,” “f****ing evil c***,” and “psycho a**.” In the letter, defendant suggested that when the call was made to the police after drugs were planted in Petrova’s car, the caller should say that he had “witnessed a drug deal between her and a big n*****.” Clearly, defendant denigrated both women and African Americans in a letter that was to be reviewed by jurors. In context, the prosecutor’s comments did not amount to misconduct.

We agree with defendant (through counsel) that the prosecutor should not have remarked that “a person who represents himself has a fool for a client.” Coupled with this remark was the observation that defendant had not accurately stated the law during his closing argument and did not appear to fully understand the charges. For example, defendant stated, categorically, that appeals were for judge’s mistakes and not for those of the jury. “[S]hould you make a mistake and convict Mr. Zimmermann of this crime,” he argued, “there can be no appeal.” As to the reasonable doubt standard, defendant stated: “You need to remember it is not enough the prosecution proves that Mr. Zimmermann might have done it, could have done it, possibly did it or even probably did it. On the evidence you have heard and under the rules the Court is going to give you, no mistake should be possible.” Defendant implied that circumstantial evidence would not be sufficient for a conviction. He argued that an inmate guide, which had protocols for opening inmate mail, was a contract, and that even if he was guilty the jury had to follow the contract and enforce it. Defendant claimed that to be convicted of *an attempt*, there had to be an actual solicitation, inducement, or intimidation to possess cocaine. As for intimidation of a witness, defendant appears to have suggested that the prosecutor had to prove bribery as well as threats or intimidation.

A prosecutor should refrain from denigrating a defendant but the comments “will be reviewed in context to determine whether they constitute error requiring reversal.” *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). The comments about defendant not presenting the law accurately and about defendant not fully comprehending the charges against him constituted fair commentary on defendant’s closing argument and challenged the accuracy of defendant’s argument. A prosecutor is not required to phrase his arguments in the blandest possible terms. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), *aff’d* 475 Mich 101 (2006). While an unfortunate choice of words, the reference did not rise to the level of denying defendant a fair and impartial trial.

V. REFERENCE TO DEFENDANT'S PRIOR CONVICTIONS

In his Standard 4 brief, defendant takes issue with the prosecutor's and the trial judge's references to defendant's prior convictions. Defendant did not object to the trial court's reference, which was included in the information read to the jury as part of the preliminary instructions. Defendant did not object when the prosecutor asked potential jurors whether they would be influenced by the fact that defendant was in jail awaiting trial on other crimes when the subject crimes were committed, or by the fact that the original charges arose out of a nasty divorce and involved a personal protection order. However, defendant did object to the prosecutor's reference to the actual prior crimes in his opening statement. This is the only aspect of this issue that is preserved. The unpreserved issues are reviewed for plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

There was no plain error with regard to the judge's reference to the prior crimes. MCR 6.412 requires that before voir dire, the court must give appropriate preliminary instructions; the commentary advises such instructions can be found in the Michigan Criminal Jury Instructions. CJI2d 1.8 instructs the court to read the information. Count II of the information dealing with subornation of perjury included references to the charges in the previous trial. Had defendant objected, the court presumably could have modified the information. However, given that the rules provided for the reading of the information, there was no plain error.

The failure to object to the questions posed by the prosecutor during voir dire was likely tactical. It was in defendant's interest to know that jurors would not prejudge him based on his being in jail awaiting trial on other crimes or the fact that the original charges arose out of a nasty divorce involving a personal protection order. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007).

The prosecutor's reference to the prior crimes during opening statement came before defendant's motion in limine to exclude references to these crimes. During argument on the motion, the prosecutor maintained that he had to prove defendant was in the parking lot where the crimes occurred and committed the prior offenses, and was not with Dickhausen as Dickhausen had previously testified. While the trial court concluded that the references should omit allusions to the actual charges, the prosecutor was making a good-faith argument and his opening statement was in keeping with the argument.

The prior crimes were already before the jury owing to the court's reading of the information. It was legitimately established that defendant was in jail awaiting a criminal trial. The letter suggested that defendant was incarcerated for an aggressive crime against his wife. Under these circumstances, even if the jury were not aware of the actual charges, it would likely have presumed that defendant was charged with the type of crime listed. Accordingly, the references did not result in a miscarriage of justice.

VI. RESTRICTION OF DEFENDANT'S MOVEMENT IN THE COURTROOM

Defendant next argues in his Standard 4 brief that the trial court erred when it restricted his movements within the courtroom. He did not object when the court advised he could stand in a certain place when cross-examining or when the prosecutor objected to defendant approaching a witness. There was a discussion off the record after which defendant's attorney approached witnesses when necessary. A trial court has a "latitude of discretion . . . in the conduct of a trial." *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961); see also *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Moreover, MCL 768.29 provides that it is the judge's duty "to control all proceedings during the trial." It is not clear from the record why the trial court restricted defendant from approaching witnesses. However, defendant has not demonstrated that this unpreserved issue amounted to plain error that affected a substantial right. *Carines*, 460 Mich at 763-764.

VII. FAILURE TO APPOINT SUBSTITUTE COUNSEL

In his Standard 4 brief, defendant argues that the trial court erred in failing to appoint substitute counsel. 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; 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. 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) (citations omitted).]

Defendant complained that although requested, counsel had not sent him the trial and sentencing transcripts of the previous trial, including the trial court's ruling in that case on exclusion of the letter, and the preliminary examination transcript relative to the instant case. Moreover, he argued, counsel had not subpoenaed the former and current sheriffs as requested and had not filed a motion to quash. With regard to the transcripts, counsel explained that he had advised defendant to get the trial and sentencing transcripts from his appellate attorney in that case because this would have resulted in minimal expense. Defendant explained that he planned to use the sentencing transcript from the previous trial to show that the prosecutor was somehow extorting him with the plea offered in this case. The court explained that this was a nonissue with respect to his current trial.

There was some confusion regarding the preliminary examination transcript. When it was made clear that defendant wanted a transcript of Dickhausen's testimony, the court ensured that he got a copy. Defendant said he wanted to subpoena the sheriffs to establish that, according to an inmate guide, they were not supposed to read letters that came to the jail. The guide in fact stated that letters would be opened but not read unless there was a security concern. The court found counsel's refusal to subpoena the sheriffs for this purpose reasonable.

Defendant explained that he wanted the transcript of the previous court's ruling on the exclusion of the letter because it might shed light on the legal argument underpinning the

exclusion. The court noted that the ruling was irrelevant to this trial because it was not binding, and further noted that defendant was “speculating that there might have been something that he might have said that you might be able to use.”

Defendant did not establish good cause for the appointment of substitute counsel. In essence, his request was based on counsel’s failure to honor these various requests. With the exception of the preliminary examination transcript, there were sound reasons for not complying. Defendant did not identify how the transcripts or witnesses would have been relevant to the case before the court. Moreover, he did not set forth any basis in support of a motion to quash. For these reasons, defendant has not established entitlement to substitute counsel because he has not shown that there were legitimate differences with respect to their approaches to this case. Moreover, defendant has not established that the failure to provide him with the transcripts or the subpoenas was error or that it denied him a fair trial.

VIII. DENIAL OF SELF-REPRESENTATION

In his Standard 4 brief, defendant next argues that the trial court precluded him from representing himself during voir dire, that the court inappropriately interjected itself during counsel’s voir dire questioning, and that he was wrongfully excluded from discussions regarding jury instructions. We disagree. Defendant did not contemporaneously object, therefore, review is therefore for plain error affecting a substantial right. *Carines*, 460 Mich at 764-765.

Defendant asked to represent himself with the assistance of co-counsel. When self-representation is requested, a trial court must determine that: (1) the defendant’s request is unequivocal; (2) the defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation; and (3) the defendant’s self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court’s business. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

Here, the trial court recited this third factor and then said that defendant would assist advisory counsel with voir dire. In response to defendant’s motion for a new trial on this ground, the court explained that it was concerned defendant would ask incriminating questions and that if it allowed questions that might prejudice defendant, it would not have been protecting defendant’s rights. It noted that it had discretion over the scope and conduct of the voir dire process under MCR 6.412(C). Defendant has not identified any questions that he would have asked that might have elicited more pertinent information from jurors. There has been no showing of plain error that affected a substantial right.

Regarding the court’s interruption of defense counsel during voir dire, it appears that the court was seeking to focus the inquiry on what mattered. Counsel was asking whether a divorce was amicable when the court interjected that the question should be whether the juror could be fair and impartial regardless. The court similarly focused on this question when counsel asked whether the jurors would want themselves as a jury if they were defendant. Nothing about these interjections denied defendant a fair and impartial trial.

Defendant argues that the court gave the jury a definition of subornation of perjury when he was not present. There is no indication that the court addressed the jurors in defendant's absence. Defendant has not identified any instructions that would have been different had he participated in the discussions regarding instructions. Thus, even if he should have been but was not present, he has not shown that a substantial right was affected.

IX. THE JURY ARRAY

Defendant next argues that the trial court erred by excusing jurors for cause who had misdemeanor convictions.⁶ We disagree. It is not clear from the record that the excused jurors had only misdemeanor convictions. In any event, the trial court indicated that the jurors were excused because they had all been prosecuted by the prosecutor's office. MCR 2.511(D)(10) provides in pertinent part:

The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

* * *

(10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution[.]

Because the court rule supports the trial court's action, there was no abuse of discretion in denying a new trial on this basis.

X. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence was insufficient to convict him, and that he was convicted for a different crime than the one charged. In reviewing the sufficiency of the evidence, we review the record evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). Circumstantial evidence and reasonable inferences arising therefrom can constitute sufficient proof. All reasonable inferences and credibility choices must be drawn in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

MCL 750.122(3)(a) proscribes discouraging or attempting to discourage a witness from attending, testifying, or giving information at a future official proceeding; MCL 750.122(7)(b) makes this a felony if the violation is in a criminal case where the penalty may exceed ten years. Defendant seems to argue that he could not have committed this crime because his actions would not have interfered with his wife's testimony. Defendant seems to argue that even if his plan had

⁶ Defendant made the same unsuccessful argument in his prior appeal.

succeeded and Petrova was arrested, she could have been brought into testify. However, this does not negate the fact that defendant attempted to discourage the testimony. The evidence was sufficient.

Regarding the subornation of perjury, defendant asserts that the comment in the letter could not be construed as a request that Dickhausen perjure himself and, in any event, it could not have resulted in subornation because Dickhausen did not receive it. However, Dickhausen testified that the request that he perjure himself came from defendant through his lawyer. The letter simply tended to buttress Dickhausen's claim.

As for the attempt to solicit another to possess a controlled substance, defendant suggests he was charged under one statute and convicted under another with no amendment of the information, and that the proofs were insufficient as to the crime for which he was actually convicted. The felony information charged defendant under MCL 333.7407a(1) with "attempt to commit Controlled Substance – Inducing to Violate – Felony, MCL 333.7407A-A." MCL 333.7407a provides:

(1) A person shall not attempt to violate this part.

(2) A person shall not knowingly or intentionally solicit, induce, or intimidate another person to violate this part.

(3) Except as otherwise provided in section 7416, a person who violates this section is guilty of a crime punishable by the penalty for the crime he or she attempted to commit, or by the penalty for the crime he or she solicited, induced, or intimidated another person to commit.

His judgment of sentence recites that he was convicted of "C/S ATTEMPT-FELONY" and lists the code violation as MCL 333.7407A1-A. It appears that subsection (1) was referenced because this was an attempt; defendant was charged and convicted of attempting to induce another to violate Part 74 of the Controlled Substances Act. Thus, while subsection (2) was involved, the information and judgment of sentence reflect that defendant was charged and convicted of the same offense.

During the prosecutor's opening statement, the prosecutor indicated that the controlled substance involved was cocaine. The jury verdict form described Count 1 as involving cocaine. Defendant argues that since "the Part" of the controlled substances act⁷ that he was charged with violating involved cocaine, the prosecutor was required to establish the amount of cocaine involved in order to secure a conviction. In fact, MCL 333.7401(2) imposes different penalties for possession with intent to deliver based on the controlled substance and quantity involved. However, MCL 333.7401 criminalizes possession with intent to deliver *a controlled substance*. Thus, to establish that defendant committed the crime for which he was charged and convicted, the prosecutor had only to show that defendant attempted to induce another to possess a

⁷ MCL 333.7101 *et seq.*

controlled substance with intent to deliver. The actual controlled substance involved and the quantity involved are not essential elements. Here, the letter and Dickhausen's testimony established that he was inducing Dickhausen to possess a controlled substance with the intent to plant it in the vehicle belonging to defendant's wife. This was sufficient to establish the elements of attempt to solicit another to possess a controlled substance.

XI. INMATE GUIDE

Defendant next argues in his Standard 4 brief that an inmate guide, which was not in effect at the time the letter was opened and read, was improperly excluded. We disagree. We review a trial court's decisions on evidentiary questions for an abuse of discretion. *Smith*, 456 Mich at 550. Defendant thought that the policy in effect was violated and that it was significant that the policy was subsequently changed. However, the language in the letter about not telling defendant's lawyer was sufficient to raise a red flag about a security violation. Thus, there was no violation of the policy in effect. That there may have been a subsequent change or clarification to the inmate policy was not relevant.

Defendant argues that his constitutional right to present a defense was abrogated when the trial court would not allow him to have parts of the inmate guide read into the record, even though it allowed prosecution exhibits to be read into the record. However, defendant has not put forth any basis for finding that the subject excerpts were relevant. It appears he was trying to establish that the letter was a minor violation of unauthorized use of mail that should not have resulted in prosecution. However, defendant was being charged for crimes that came to light in the letter, not because he used the mail in some unauthorized manner.

Defendant also argues that the judge returned the inmate guide to the prosecutor so that it was not available for the jury. Defendant misconstrues what transpired. After the inmate guide was admitted as an exhibit, the court requested a copy and the prosecutor provided him with one. It appears that the judge was returning the copy, and not the exhibit itself.

XII. USE OF OVERHEAD PROJECTOR

Defendant next argues that he was wrongfully denied use of the prosecution's overhead projector. Defendant has not cited any authority for the proposition that one party, even the prosecution, must be compelled to allow another party to use its equipment during a trial. Moreover, defendant has not established any prejudice from the inability to use the projector. While he did not have the opportunity to show the jury certain definitions and instructions on the projector, he was not precluded from covering these matters in his closing argument. There is no basis for his assertion that the jury would have returned a favorable verdict had it seen the information on an overhead projector.

XIII. VISITATION LOGS

Defendant next argues that jail visitation logs showing Dickhausen was at the jail on December 20, 2007, were improperly admitted because they were not provided as part of discovery. We disagree. A trial court's decision on the appropriate remedy for noncompliance with a discovery order is reviewed for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Here, defendant and counsel were given the opportunity

to review the documents before questioning proceeded. There was no showing of bad faith on the part of the prosecutor or any indication that defendant was prejudiced by the admission of this evidence. Although Dickhausen could not remember the exact date that he was at the jail until he was shown the exhibit, he indicated that he had been at the jail to visit around that time. Moreover, the CD was of a conversation that included Dickhausen and defendant on the date in question. Thus, there was no abuse of discretion.

XIV. BIND-OVER

Finally, defendant argues that he should not have been bound over for trial. We disagree.

A bindover is warranted when there is evidence indicating that a felony occurred and probable cause to believe that the defendant committed the felony. *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003).

In binding defendant over for trial, the court represented that it had reviewed Dickhausen's testimony from the previous trial as well as defendant's letter to Dickhausen. Defendant does not appear to contest that the letter provided enough evidence to bind him over, but rather takes issue with the court's representation that it had read the letter. There is no reason to question the court's representation other than the fact that the transcript did not expressly state that a pause was taken while the court was doing so.

In the letter, defendant tells Dickhausen to follow defendant's wife and put drugs packaged to look like they were for delivery in her car so that she would be arrested. Further, he tells Dickhausen that he was at defendant's house on the subject day, and then immediately says he was actually with his son but that he does not want to get his son involved, giving rise to an inference that he was asking Dickhausen to misrepresent that they were together. Given that all indications suggested that the letter was from defendant, there was probable cause to believe that he had written it. Moreover, the contents were sufficient to show or give rise to an inference that defendant attempted to solicit Dickhausen to solicit drugs for distribution, that he asked Dickhausen to give a false alibi, and that he made an effort to interfere with testimony by his wife.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly