

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 10, 2014

v

JAMES ROBERT BLUE,
Defendant-Appellant.

No. 315292
Ingham Circuit Court
LC No. 11-001009

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2), for which he was sentenced to serve 7 to 20 years in prison. On appeal, defendant challenges the trial court's denial of his request to substitute counsel, and he also raises claims of ineffective assistance of counsel. We affirm.

Defendant first argues that the trial court erred by denying his request for substitute counsel. On the first day of trial defendant requested that he be allowed to bring in his own attorney because he believed that appointed counsel was not ready for trial. The trial court found that defendant failed to show good cause and that the delay caused by the substitution would unreasonably disrupt the judicial process, and thus, denied the request.

“A trial court’s decision regarding substitution of counsel will not be disturbed absent an abuse of discretion.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Although an indigent defendant is entitled to court-appointed counsel, he is not entitled to the attorney of his choice. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Substitute counsel is warranted only after a showing of good cause and a showing that substitution would 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.* (citation omitted).

We agree with the trial court that defendant failed to show good cause and that substitution would unreasonably disrupt the judicial process. Defendant sought new counsel based solely on the fact that he felt his attorney was not prepared for trial. However, the record indicates otherwise, considering that counsel had a clear trial strategy and succeeded in excluding fingerprint evidence, which would have incriminated defendant. Further, at the time

of defendant's request, the case had been pending before the trial court for over a year, having been adjourned multiple times. The trial was scheduled for that day and a jury panel had been called. Thus, the trial court did not abuse its discretion when it denied defendant's request to retain his own attorney.

Additionally, defendant argues that the trial court's denial of his request for substitute counsel left him with court appointed counsel who rendered ineffective assistance. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. "Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761, lv den 471 Mich 873 (2004). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Solmonson*, 261 Mich App at 663, citing *Strickland*, 466 US at 687-688. The deficient performance must be so prejudicial that it deprived defendant of a fair trial "such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Solmonson*, 261 Mich App at 663-664.

Defendant argues that counsel did not adequately explain the consequences of being convicted at trial. Defendant argues that he was led to believe he would receive the same outcome as his codefendants that pleaded guilty to a lesser charge and received jail time. However, defendant fails to explain why he believed this. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006) (noting that a party may not leave it to this Court to search for authority to sustain or reject its position). Defendant further argues that counsel told him that if he was convicted at trial, his sentencing guidelines would be 19 to 30 months. It does appear that the sentencing information report attached to defendant's appellate brief that was supposedly drafted by counsel indicates that defendant's minimum guidelines would be 19 to 30 months. But this is not consistent with the scores defense counsel assigned to each variable. According to the report, counsel determined defendant's prior record variable (PRV) level to be D and his offense variable (OV) level to be II. This would make defendant's minimum guidelines range 51 to 85 months for a class B crime. Also on that report, there appear to be other estimated guidelines ranges, presumably made by counsel based on various ways the OVs could be scored. Additionally, counsel submitted an affidavit in which he states that he received an email from the assistant prosecutor three days before trial which outlined the prosecution's latest plea offer and also discussed defendant's sentencing guidelines as being 51 to 85 months. Counsel attests that he attempted to contact defendant before trial, but defendant refused to meet with him. Counsel attests that defendant also refused the plea offer, maintaining his innocence. Counsel further attests that on the morning of the trial, he gave defendant a copy of the email and after reviewing

it, defendant still wanted to proceed with a trial. Defendant's statements before the trial began and in his appellate brief suggest that he was aware of this email. Thus, the record does not support defendant's claim that he was unaware of the consequences of being convicted by a jury, and there is no indication that counsel's performance fell below an objective standard of reasonableness.

Defendant next argues that counsel did not adequately review the plea offer with defendant. As discussed, however, the record indicates otherwise and counsel submitted an affidavit attesting that he showed defendant the email that contained the plea offer. Even if counsel had failed to present the offer to defendant, defendant would be entitled to relief because he has not shown that he would have accepted the offer. *Missouri v Frye*, ___ US ___, 132 S Ct 1399, 1409-1410; 182 L Ed 2d 379 (2012). The record shows that defendant maintained his innocence throughout the trial and at sentencing. Thus, defendant has failed to show that he received ineffective assistance of counsel in this regard.

Defendant next argues that counsel did not adequately prepare for trial; however, the record indicates otherwise. Counsel made multiple objections and had a clear strategy for the case. Before trial, counsel obtained the fingerprint evidence that incriminated defendant and succeeded in excluding that evidence. Even the trial court noted that counsel was "diligently" prepared to argue his motion in limine to exclude the fingerprint evidence. Defendant further argues that counsel should have obtained the DNA results of "swabs" collected from the car by the police. However, even the prosecution did not obtain these results, and it was agreed by the parties that they would not be used at trial. Moreover, defendant has not shown how the failure to present this evidence would have substantially benefited his case. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 581 NW2d 1 (1997), vacated in part on other grounds 457 Mich 866 (1998). And counsel is afforded wide latitude on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Thus, defendant has failed to show that counsel was ineffective in this regard.

Defendant next argues that counsel made prejudicial statements to the jury by referring to defendant as "Rob" during voir dire and his opening statement, which was a fact that needed to be proved by the prosecution. Although it may not have been a sound decision for defense counsel to tell the jury defendant's nickname, defendant has failed to establish prejudice, given that the prosecution presented witnesses, including defendant's mother, who testified that defendant's nickname was in fact "Rob." And the jury was instructed to base their verdict on the evidence presented at trial, and not on the attorneys' statements, which also helps to alleviate any danger of prejudice, given that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, defendant has failed to show counsel was ineffective when he referred to him as "Rob."

Defendant next argues that counsel was ineffective because he sent another attorney, who knew nothing about the case, to represent defendant at sentencing. However, stand-in counsel appeared with defendant's approval, and thus, defendant has waived this issue for appellate review. *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) ("A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right.").

Finally, defendant argues that stand-in counsel rendered ineffective assistance at sentencing in challenging the scoring of OVs 4, 16, and 19, which in turn, resulted in sentencing errors. We review for clear error the trial court's factual findings under the sentencing guidelines; those findings must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo the application of the facts to the law. *Id.*

Counsel argued that OV 4 and OV 19 were misscored, but the trial court declined to change the scoring. Contrary to defendant's argument, the fact that an argument does not succeed does not compel a conclusion that counsel rendered ineffective assistance in making the argument. See *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008) (stating that "[a] failed strategy does not constitute deficient performance"). The record shows that stand-in counsel comprehensively represented defendant and made appropriate objections. Thus, defendant has not overcome the presumption that stand-in counsel rendered effective assistance.

Further, we find no errors warranting resentencing in the trial court's scoring of OVs 4, 16, and 19. OV 4 directs a trial court to score 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Treatment does not have to be sought. The fact that the psychological injury may require treatment is enough. MCL 777.34(2). The complainant testified that the incident caused him to experience panic attacks and anxiety, and he was experiencing anxiety during his testimony, which is sufficient to support the score. *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013). Even though the complainant admitted to using medical marijuana for the anxiety, contrary to defendant's argument, this does not negate the fact that psychological injury occurred.

OV 16 addresses stolen, lost, or damaged property. A score of one point is appropriate if "[t]he property had a value of \$200.00 or more but not more than \$1,000.00." MCL 777.46(1)(d). This OV was scored for damage to the door and the theft of the marijuana plants. Because defendant did not object to this OV, our review is for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The record contains no evidence of the exact value of the property, thus we cannot determine whether this OV was properly scored. However, if we assume that OV 16 was incorrectly scored, a one-point reduction to defendant's OV level would not change his guidelines range. Further, the trial court did not place emphasis on this variable when sentencing defendant. Rather, it is clear from the record that the trial court based the sentence on defendant's prior criminal history, the egregious nature of defendant's actions, and defendant's attempt to cover up the crime. Thus, because defendant did not raise this issue at sentencing, in a motion for resentencing, or in a motion for remand, and defendant's minimum sentence would still fall within the appropriate guidelines range had OV 16 been scored at 0 points, resentencing is not warranted. MCL 769.34(10).

Finally, OV 19 directs the trial court to score 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." To interfere means "to oppose so as to hamper, hinder, or obstruct." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). Here, there was testimony that defendant asked an acquaintance, who

had picked defendant and his brother up after they fled from the police despite efforts to stop them, to report the car used in the home invasion as stolen. This was clearly an attempt to flee from and deceive the police, which is sufficient to support the score. See *id.* at 344.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens