STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL HADLEY,

Defendant-Appellant.

UNPUBLISHED
March 20, 2003

No. 232658
Wayne Circuit Court
LC No. 99-012470-02

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony-murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and ten to twenty years' imprisonment for the armed robbery conviction, and a consecutive two-year term for the felony-firearm conviction. We vacate defendant's armed robbery conviction and sentence, but affirm the convictions and sentences for first-degree murder and felony-firearm.

I. In-Court Identifications

Defendant argues that his courtroom identifications by Officers Bush and Archambeau were improper because the officers could have recognized him from photographs they found in the suspects' car. Because defendant did not object to the identification testimony at trial, we review this issue for plain error affecting defendant's substantial rights. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant relies on *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977), and *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998), in support of his argument. In *Gray*, our Supreme Court held that a witness who has been exposed to an unduly suggestive identification procedure may not make a courtroom identification of the defendant unless the prosecution can establish an independent basis for the identification. *Gray, supra* at 114-115. The Court set forth eight factors, adopted from *Kachar*, that a court should consider in determining whether a witness has a sufficient independent basis for an identification. *Id.* at 116, quoting *Kachar, supra* at 95-96.

Here, there was no "unduly suggestive identification procedure." *Gray* and its progeny[1] involve situations where a witness was asked to identify an individual under circumstances where the person's identity was improperly suggested by the police identification procedure. The instant cases did not involve a police identification procedure. Further, there was no "suggestion" that the photographs the officers found in the suspects' car depicted the perpetrator. Instead, both officers testified that they independently recognized that the person in the photograph was the person they saw driving the car and then run away. Consequently, there was no basis to suppress their courtroom identifications of defendant.

II. Effective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel because trial counsel failed to move to suppress the officers' in-court identifications.

> The standard for determining whether a defendant was denied the effective assistance of counsel was explained by the Michigan Supreme Court in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. *Id.* at 312. [*People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000).]

As previously discussed, there is no merit to defendant's argument that the officers' courtroom identifications of defendant should have been suppressed because of an impermissibly suggestive identification procedure. Because an objection on this ground would have been futile, counsel was not ineffective for failing to object. *Id.* at 425.

III. Substitute Counsel/Motion to Withdraw

Defendant also argues that the trial court erred in denying his motion for substitute counsel and counsel's motion to withdraw. We review these matters for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). In *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), this Court stated:

> 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

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[1] See, e.g., *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000) (this Court agreed that a photographic lineup would have been improperly suggestive because the only available photograph of the defendant showed him in a boat); *People v Williams*, 244 Mich App 533, 544-545; 624 NW2d 575 (2001) (where the police asked a witness to identify the defendant's voice from a recording with three voices, and two were obviously not the defendant's voice).

> legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [Citations omitted.]

Review of a trial court's decision on a defendant's motion for substitute counsel is closely intertwined with review of a decision on an attorney's motion to withdraw. In *Echavarria, supra* at 369, this Court set forth five factors to consider in reviewing a trial court's decision to deny an attorney's motion to withdraw combined with a defendant's motion for a continuance to obtain another attorney. The factors are:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.*]

Here, defendant has not asserted a constitutional right necessitating substitution of counsel. He also failed to establish a legitimate reason or good cause for substitution of counsel. He merely expressed dissatisfaction that counsel did not visit him in the months preceding trial. Although he complains generally that this deprived him of an opportunity to participate in planning his defense, he does not state what contributions he could have made. He also argues that defense counsel did not file "important pretrial motions," to wit: a motion to suppress the officers' courtroom identification testimony, and a motion to exclude Officer Edwards' testimony about defendant's custodial statement. As discussed elsewhere in this opinion, neither of these motions would have aided defendant. Because defendant's dispute with counsel did not entail a bona fide dispute or a legitimate difference of opinion over a fundamental trial tactic, defendant failed to establish good cause for the motion.

Moreover, requesting substitute counsel on the first day of trial would have unreasonably disrupted the judicial process and delayed the trial. It was not an abuse of discretion for the trial court to deny the motions under these circumstances.

IV. Prosecutorial Misconduct

Defendant claims that Officer Edwards' testimony regarding defendant's custodial statement constituted prosecutorial misconduct. Although defendant presents this as an issue of prosecutorial misconduct, it is, in substance, an evidentiary issue. Because defendant failed to preserve this issue with an objection to the challenged testimony at trial, we review it under the plain error rule of *Carines, supra*.

We find no plain error. A defendant's own statements are not hearsay and are admissible as an admission by a party opponent under MRE 801(d)(2). *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Defendant argues, however, that his statement should not have been admitted because it was not really a "formal statement," but rather a police-controlled, editorialized statement that Edwards spliced together from the 3-1/2 hour interrogation that preceded Edwards' production of the written statement. The record does not support defendant's description of the statement that Edwards typed. Although Edwards admitted that the statement was not a verbatim account of the entire interrogation, he also denied that it was a "summary."

He acknowledged that he generally "controls" the delivery of statements, but denied dictating the contents of statements. Rather, he explained that "controlling" a statement meant that he kept the statement in chronological order and eliminated unimportant matters, such as requests for bathroom breaks.

Defendant argues, in essence, that Edwards' testimony regarding the custodial statement was not admissible because it was not a verbatim account of the entire interrogation, from beginning to end. However, we are not aware of any authority holding that a police officer is restricted to giving verbatim accounts of an entire interrogation from beginning to end. We conclude that any concerns related to the integrity, accuracy and reliability of Edwards' method of taking defendant's statement here pertain to the weight and credibility of Edwards' testimony regarding the statement, not its admissibility. Defense counsel vigorously cross-examined Edwards about the statement and his methods of obtaining it, and gave the jury ample opportunity to decide whether the statement was worthy of credence. Accordingly, we find no plain error.

Defendant relies on *People v McGillen # 1*, 392 Mich 251; 220 NW2d 677 (1974), for the proposition that the prosecution may introduce only the "defendant's statement," not an officer's "editorialized version" of the statement. This is an overbroad reading of *McGillen # 1*. In that case, the officer questioned the defendant after he asserted his *Miranda*[2] rights. *Id.* at 256-264. The officer extracted an ambiguous statement out of context, and presented it to the jury in a context that gave it a highly incriminating connotation. *Id.* Nothing in *McGillen #1* prohibits an officer from presenting only the defendant's final statement and version of events, without a verbatim account of every oral exchange that occurred before the statement was reduced to writing.

V. Double Jeopardy

We agree that defendant's dual convictions and sentences for both first-degree felony-murder and the underlying felony violates the constitutional protections against double jeopardy. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Consequently, we vacate defendant's armed robbery conviction.

Defendant's convictions and sentences for first-degree felony-murder and felony-firearm are affirmed. His conviction and sentence for armed robbery are vacated.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).