

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH PAUL SZALAY,

Defendant-Appellant.

UNPUBLISHED
March 28, 1997

No. 193096
Recorder's Court
LC No. 95-003351

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of felonious assault, MCL 750.82; MSA 28.277, one count of carrying a concealed weapon (CCW), MCL 750.227(2); MSA 28.424(2), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). When defendant committed those offenses, he was on probation for arson, MCL 750.73; MSA 28.268. Pursuant to MCL 769.10; MSA 28.1082; MCL 769.13; MSA 28.1085, defendant was sentenced to four to six years' imprisonment on each of the assault convictions, five to seven and one-half years on the CCW conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm

Defendant first contends that the trial court abused its discretion when it refused to grant an adjournment of the trial until defendant retained private representation. We disagree.

We review a trial court's decision whether to grant or deny a motion for continuance for an abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). We also review a trial court's grant or denial of a defendant's request for substitution of counsel for an abuse of discretion. *People v Flores*, 176 Mich App 610, 614; 440 NW2d 47 (1989). "Although an indigent defendant is constitutionally guaranteed the right to counsel, he is not entitled to the appointment of an attorney of his choice." *Id.*, p 613. Nevertheless, an indigent defendant may become entitled to have his assigned lawyer replaced upon a showing of adequate cause if, and only if, the substitution does not

disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973); *Flores, supra*, pp 613-614.

When making the determination whether a trial court abused its discretion by denying a defendant's request for an adjournment, we must consider whether:

(1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. [*Sinistaj, supra*, 184 Mich App 201 (citing *People v Wilson*, 397 Mich 76, 80; 243 NW2d 257 (1976), and *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972)).]

In this case, at no time during his arrest or the December 25, 1995, letter to the trial court, did defendant ever once refuse the right to an appointed attorney obtained as a result of defendant's indigent status. Rather, the record establishes that defendant exercised that right on several occasions prior to his preliminary examination and trial. Similarly, during that same period of time, defendant never sought to retain private representation, and at trial, defendant offered no concrete proof that he was actually retaining such representation. In addition, we find no support in the record for defendant's claim of a breakdown in the attorney-client relationship and the fact that defendant filed a grievance against counsel with the State Attorney Grievance Commission does not change this conclusion. *People v Meyers (On Remand)*, 124 Mich App 148, 166; 335 NW2d 189 (1983). The trial court's inquiry into and defense counsel's statement to the effect that he was prepared and committed to try defendant's case to the best of his abilities sufficiently safeguarded defendant's right to counsel. *People v Morgan*, 144 Mich App 399, 401-402; 375 NW2d 757 (1985). Further, the record supports the trial court's conclusion that defendant's request for an adjournment was simply a delay tactic that would have unreasonably disrupted the judicial process had the request been granted. *People v Fleisher*, 322 Mich 474, 483; 34 NW2d 15 (1948); *Flores, supra*, pp 613-614. Therefore, because defendant has failed to demonstrate any prejudice resulting from the trial court's denial of his request for an adjournment in order to retain private representation, we find that no abuse of discretion resulted. *Sinistaj, supra*, p 201.

Defendant next argues that the trial court erred when it failed to ascertain on the record whether defendant's decision to represent himself at trial was knowingly, intelligently, and voluntarily made. We disagree.

We review de novo questions of law such as whether a trial court complied with the requirements that must be satisfied before a defendant will be allowed to proceed in pro per. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996). Although a defendant has a constitutional right to proceed in pro per, when he exercises that right, the defendant effectively waives his Sixth Amendment right to counsel. *Faretta v California*, 422 US 806, 819-820, 834-835; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976); *People v Ramsey*, 89 Mich App 260, 264; 280 NW2d 840 (1979). Before a trial court can allow a

defendant to proceed in pro per, the following requirements must be met: (1) the defendant's request must be unequivocal; (2) the defendant's assertion of that right must be knowing, intelligent and voluntary; and, (3) the court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *Anderson, supra*, p 368. Defendant must also be advised by the trial court of the charge, the maximum possible sentence, any mandatory minimum sentence, and the risk involved in self-representation. MCR 6.005(D); *People v Blunt*, 189 Mich App 643, 649-650; 473 NW2d 792 (1991); *People v Kimber*, 133 Mich App 184, 189; 348 NW2d 60 (1984). Further, the trial court must offer the defendant an opportunity to *consult* with a lawyer. MCR 6.005(D).

Here, defendant did not in fact proceed in pro per. Although defendant initially sought to represent himself, the trial court stated and defense counsel agreed that counsel would be available to *assist* defendant, and counsel actually *conducted* the majority of the trial without objection from defendant. Moreover, defendant expressly requested defense counsel's assistance throughout the trial and on several occasions, voiced his approval of counsel's performance. Therefore, we find that there is no need to determine whether the trial court properly complied with the requirements for allowing defendant to proceed in pro per. Indeed, under the facts of this case, we are convinced that defendant simply "s[at] back and harbor[ed] error to be used as an appellate parachute" and we will not award that conduct. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995).

Defendant next contends that the prosecution committed reversible error by referring to a fourth count of felonious assault against defendant that was dismissed when the complainant failed to show up at the preliminary examination. However, defendant failed to preserve this issue by objecting below. We have carefully reviewed the record and conclude that an appropriate instruction would have cured any prejudice that may have resulted from the prosecution's remarks. Therefore, no miscarriage of justice will result from our failure to grant defendant relief on the asserted ground of prosecutorial misconduct. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

Finally, defendant argues that his sentences for three counts of felonious assault and one count of CCW, as enhanced by defendant's habitual offender status, violated the principle of proportionality. We disagree.

We review for an abuse of discretion a defendant's claim that the sentence imposed for his conviction violated the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The principle of proportionality requires that sentences be proportionate to the "seriousness of the circumstances surrounding the offense and the offender." *Id.* Review of an habitual offender sentence is subject to the same review "without reference to the [sentencing] guidelines." *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Here, we find that the sentences imposed for the challenged convictions were proportionate to the seriousness of the circumstances surrounding the offense and defendant. In an attempt to resist arrest, defendant pulled out a loaded gun and pointed it in the direction of three officers. Defendant's conduct was made more egregious because he created the risk of a gasoline-ignited explosion or fire

and the loss of more lives than just those of defendant and the three officers. In addition, defendant had four prior misdemeanor convictions, two of which involved violent behavior directed toward other persons. Thus, defendant had a history of assaultive conduct. Moreover, at the time defendant committed the instant offenses, he was on probation for arson. Accordingly, we find that the trial court did not abuse its discretion in imposing the habitual offender sentences for defendant's convictions.

Affirmed.

/s/ Myron H. Wahls

/s/ Harold Hood

/s/ Kathleen Jansen