

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 28, 2014

v

DEVON SHIVERS,

No. 305426
Saginaw Circuit Court
LC No. 10-035084-FC

Defendant-Appellant.

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant, Devon Shivers, appeals as of right from his jury-trial convictions of assault with intent to murder, MCL 750.83; first-degree home invasion, MCL 750.110a(2); carrying a dangerous weapon with unlawful intent, MCL 750.226; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because the trial court did not err in refusing to adjourn defendant's second trial date or in scoring Offense Variable (OV) 5 and OV 9, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a shooting at a home in Saginaw, Michigan. The prosecution argued that defendant, upset over being swindled by Dontae Martin in a drug deal, entered the home of Dontae's mother and shot her five times. Defendant argued that he was not the perpetrator and that this case was a matter of mistaken identity.

Defendant's trial was originally scheduled to start on February 10, 2011. But on the day trial was scheduled to begin, defendant asked the court to appoint substitute counsel. He contended that his present counsel did not visit him frequently enough and that he did not trust his counsel. The trial court granted defendant's request and adjourned the trial, but it warned defendant that on the next trial date, the trial would go forward as scheduled.

On the rescheduled trial date of April 19, 2011, defendant again sought to change lawyers and requested an adjournment so that Mr. Czuprynski¹, counsel retained by his family members, could prepare to defend the case.² Defendant again contended that his appointed counsel had not visited him frequently enough and that he did not trust appointed counsel. The trial court fully explored the circumstances leading to the trial-day request for new counsel and an adjournment. While not denying defendant his right to substitute counsel should retained counsel choose to appear and take over the case, the trial court refused to adjourn the trial:

The county has paid \$1110 to bring the jurors in today. Mr. Czuprynski's [sic] known about this for three weeks, never once made any effort to contact the Court to determine when a trial date was until 11:30 today, and by then it was too late to call off jurors.

We are going to proceed with trial today

* * *

[H]e knew it was set for this afternoon. He chose to go to depositions, chose not to contact the Court for three weeks after he had received this retainer.

This is a capital case. Defendant's in jail. This is the second trial setting. He's had -- on the day of trial last time, he asked for a new attorney and was granted a new attorney, and now it's the second day of trial and here we are again asking for a new attorney.

I'm not going to deny him a new attorney, but we are going to pick a jury this afternoon. If Mr. Czuprynski [sic] wants to come here and sit with [defense counsel] and try the case tomorrow, that's his choice. If he chooses not to, [defense counsel] will try the case.

The trial court also noted that the victim, who was likely anxious, was prepared for a second time to testify. The trial court gave Czuprynski's associate, who was present at the hearing, an opportunity to call Czuprynski and ascertain whether he wished his associate to assist defendant in picking a jury. Czuprynski's associate later advised the court that Czuprynski would pass on the case because he was not prepared for trial. The trial took place, and defendant was represented by his appointed counsel.

¹ On appeal, defendant points out that Mr. Czuprynski's name is misspelled in the trial transcripts as Mr. Czruprynski.

² Mr. Czuprynski did not attend the hearing on April 19, 2011; instead, he sent his associate, who indicated that Czuprynski was attending a deposition in another matter.

The prosecutor presented evidence at trial that defendant came to the victim's home looking for Dontae, whom defendant indicated had just robbed him. After the victim told defendant that Dontae was not home, defendant shot her five times. The victim's two five-year-old grandsons were located approximately 20 feet from the shooting when it occurred. The jury convicted defendant of the crimes charged.

The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to prison terms of 356 months to 60 years for assault with intent to murder, 10 to 30 years for first-degree home invasion, two to seven and one-half years for carrying a dangerous weapon with unlawful intent, and three two-year terms for felony-firearm.

This Court remanded this case to the trial court with instructions that the trial court consider defendant's challenges to the scoring of OV 5, MCL 777.35, regarding psychological injury to a member of a victim's family, and OV 9, MCL 777.39, regarding the number of victims. The trial court conducted a hearing and concluded that OV 5 was properly scored at 15 points and that OV 9 was properly scored at 10 points.

II. ADJOURNMENT AND COUNSEL OF CHOICE

Defendant argues that the trial court denied him the constitutional right to counsel of his choice by refusing to grant an adjournment so that retained counsel could take over the case and prepare for trial. We disagree.

We review de novo whether defendant was denied his constitutional right to counsel of his choice. See *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (questions of constitutional law are reviewed de novo). We review for an abuse of discretion a trial court's denial of a defendant's request for an adjournment so that the defendant can retain counsel of his or her choice. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

The Sixth Amendment affords a criminal defendant who does not require appointed counsel the right to retain counsel of his choice. *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S CT 2557; 165 L Ed2d 409 (2006). "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Id.* at 151. However, "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney . . . who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v United States*, 491 US 617, 624-625; 109 S Ct 2646; 105 L Ed 2d 528 (1989). Courts have recognized this to include circumstances where a retained attorney is willing to represent a defendant without funds because funds will be advanced to the attorney through other avenues such as friends or family. See, e.g., *United States v Inman*, 483 F2d 738, 739-740 (CA 4, 1973) ("The Sixth Amendment right to counsel includes . . . the right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by an attorney of his own choosing."); *United States v Stein*, 541 F3d 130, 155-156 (CA 2, 2008) ("[T]he Sixth Amendment protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain."). The "erroneous deprivation of the right to counsel of

choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.” *Gonzalez-Lopez*, 548 US at 150 (emphasis added and quotation marks omitted).

“Although substitution of appointed counsel is a matter within the sound discretion of the trial court, a defendant must be afforded a reasonable time to select his own retained counsel.” *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993) (citations omitted). This right is not absolute, however, as a trial court must balance the defendant’s right against the public’s interest in the prompt and efficient administration of justice. *People v Aceval*, 282 Mich App 379, 386-387; 764 NW2d 285 (2009). Furthermore, the United States Supreme Court has emphasized that trial courts have “wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar” *Gonzalez-Lopez*, 548 US at 152.

“[T]o invoke the trial court’s discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence.” *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). “‘Good cause’ factors include ‘whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.’” *Id.*, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992); see also *People v Wilson*, 397 Mich 76, 81-82; 243 NW2d 257 (1976); *People v Shuey*, 63 Mich App 666, 671-673; 234 NW2d 754 (1975). These factors, “while not the *sine qua non* to a determination of abuse of judicial discretion, are useful criteria in this case.” *Wilson*, 397 Mich at 81.

We conclude that the trial court neither abused its discretion by denying defendant’s request for an adjournment nor erroneously deprived defendant of his right to counsel of choice. With respect to the request for adjournment, the trial court had already granted defendant’s prior request for substitute appointed counsel and adjourned the trial. At that time, the trial court expressly warned defendant that the rescheduled trial would go forward. On the second scheduled trial date, the parties met in the morning to discuss the afternoon’s trial proceedings, at which time defendant made no mention of a desire to replace his second court-appointed counsel. In the afternoon, at the time trial was scheduled to begin, the trial court noted that it had received a telephone call two hours earlier from Czuprynski’s office, seeking an adjournment. Defendant then requested for the first time that his second court-appointed counsel be replaced by Czuprynski, who was retained by defendant’s family about one month earlier. The trial court fully explored the circumstances for the eleventh-hour request, weighed the competing interests, and made the decision that further delay was not appropriate, providing several reasonable bases for its decision. Although defendant sought to exercise his constitutional right to counsel of his choosing, defendant expressed only general discontent with his second court-appointed counsel, as he had done with his first appointed counsel. The record reveals that appointed counsel communicated with defendant by letter and in person both well and shortly before trial was scheduled to begin. Further, counsel told the court that he was ready for trial. Under the circumstances, we find that the trial court did not abuse its discretion by denying the last-minute request for an adjournment. See, generally, *Coy*, 258 Mich App at 18; *Akins*, 259 Mich App at 556.

With regard to defendant’s constitutional right to counsel of choice, the trial court stated that it would permit Czuprynski to participate at trial with appointed counsel; however,

Czuprynski decided not to because he was unprepared. To the extent defendant argues that he was erroneously deprived of the right to counsel of his choice because the court's denial of the request for adjournment led to Czuprynski's decision not to participate in trial, the public's interest in the prompt and efficient administration of justice, *Aceval*, 282 Mich App at 386-387, and the demands of the trial court's calendar, *Gonzalez-Lopez*, 548 US at 152, outweighed defendant's request to disrupt the judicial process for a second time to allow for preparation by Czuprynski—whom defendant had yet not met during the approximate one month that Czuprynski had been retained—where the court, the attorneys, the victim, and the citizens called into court for jury service were ready to proceed with trial at the time scheduled.

Accordingly, the trial court neither abused its discretion by denying defendant's request for an adjournment nor erroneously deprived defendant of his right to counsel of choice.

III. SCORING OF OV 5 AND OV 9

Defendant argues that he is entitled to resentencing because no evidence supported the trial court's scoring of OV 5 and OV 9. We disagree.

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.*

A score of 15 points is appropriate for OV 5 if “[s]erious psychological injury requiring professional treatment occurred to a victim’s family.” MCL 777.35(1)(a). However, “the fact that treatment has not been sought is not conclusive.” MCL 777.35(2).

The trial court correctly scored OV 5 at 15 points. The victim testified that her grandsons were frightened when the incident occurred. Afterwards, one grandson began acting out in school and having nightmares, he became “clingy” with his grandmother, and he grew frightened when somebody came to the door. He received counseling with a psychiatrist as a result of the incident and was still receiving counseling three years later when his grandmother testified at the remand hearing. The other grandson began wetting the bed. The victim stated that her grandchildren had not engaged in such behavior before the incident. The trial court's scoring of OV 5 at 15 points was supported by the requisite evidence. See, generally, *Hardy*, 494 Mich at 438.

A score of 10 points is appropriate for OV 9 if “[t]here were 2 to 9 victims who were placed in danger of physical injury or death[.]” MCL 777.39(1)(c).

The trial court correctly scored OV 9 at 10 points. Defendant notes that he did not direct his actions at the children, who were in a nearby room; however, evidence showed that the grandchildren were about 20 feet from the shooting and in a position to be harmed by the gunfire. Specifically, the victim testified that at one point she was 15 feet from the shooter and her grandchildren were five or six feet from her. She also testified that some bullets were ricocheting in her house. A detective testified at the remand hearing that the gun used in the incident was a .40 caliber and that bullets fired from a .40 caliber are capable of passing through numerous walls. The children could have been hit by a stray bullet or a bullet passing through a

wall. They were in danger of being injured or killed as a result. The trial court properly scored the grandchildren as victims under OV 9.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro