STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIJAH ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
April 11, 1997

No. 186291
Recorder's Court
LC No. 94-009957

Before: Holbrook, P.J., and White and S. J. Latreille*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second degree murder, MCL 750.317; MSA 28.549, and sentenced to twenty to forty years' imprisonment. Defendant appeals. We affirm in part, but remand for an evidentiary hearing.

I

We first address two of defendant's arguments: that the trial court erred when it denied defense counsel's motions to withdraw from representing defendant, and that the trial court erred in denying defendant's motion for an evidentiary hearing for the purpose of supplementing the record on the issue of ineffective assistance of counsel.

Defendant's trial counsel filed a motion to withdraw,[1] which was heard on February 8, 1995, the week before trial began. At the hearing, defense counsel stated that his reason for moving to withdraw was that defendant had filed a grievance against him with the Attorney Grievance Commission. The trial court denied the motion after the following colloquy:

MR. MITCHELL: . . . . This matter is set for trial Monday.

* Circuit judge, sitting on the Court of Appeals by assignment.

I received in January a grievance from Mr. Alexander, through the Attorney Grievance Commission, in which he alleged some things. I was, obviously, forced to respond to [sic].

He makes it very clear that he does not want me as his lawyer, which I don't have a problem with. Obviously I disagree with his allegations, with respect to the grievance.

Given that this matter is still under investigation, which I've not gotten a disposition from the Attorney Grievance Commission, I feel that I would be in an obviously awkward position were I to continue to represent Mr. Elijah Alexander.

THE COURT: I don't think so. The mere fact that someone files a grievance, or a defendant files a grievance I think is not a basis for me to excuse you from representing the case.

I'll see you on Monday for trial, Mr. Mitchell.

MR. MITCHELL: Well, just for the record, your Honor, I think I'd place on the record the nature of the grievance. This is the situation that I believe I've been placed in.

That if I am unsuccessful, I don't know where the Grievance Commission is in their investigation at all. But, if for some reason I am unsuccessful in the defense of Mr. Alexander that that will somehow come to bear on the Grievance Commission's consideration.

THE COURT: Unsuccessful means what?

You are here to represent your client to the best of your ability. That's what I assume that you will be doing. So, if it comes out, you know, as you say, unsuccessful, you know, that's a judgment call.

MR. MITCHELL: Unsuccessful, I suppose, at least in Mr. Alexander's mind is that he's not acquitted. He has—he accuses me of being a liar. He accuses me of not listening to him. He professes his innocence, and believes he—he says that I'm ineffective. He is, in fact, requesting new legal representation.

THE COURT: Alright. See you on Monday.

Defense counsel renewed his motion to withdraw on the first day of trial, February 13, 1995, and the trial court denied the motion after the following colloquy:

MR. MITCHELL: . . . . While I'm aware, your Honor, that today is the day scheduled for trial in this matter, and that the Court has previously ruled on a motion that I've made on Mr. Alexander's request, actually that I withdraw from this matter.

> I simply want to point out to the Court again that because of the precarious nature of the grievance, and those factual matters, at least that Mr. Alexander has placed before the Grievance Commission, **I do feel that there has been a breakdown in the attorney/client relationship, and that I am not able to represent Mr. Alexander at this time. He has indicated, your Honor, that he does not wish my services** –
>
> THE COURT: Counsel, you're simply basing that on the fact that he filed a grievance on you? That's what you told me the other day, right?
>
> MR. MITCHELL: Well, he's indicated, Judge, that he does not wish to have me as his attorney.
>
> THE COURT: That's not his choice, okay. Alright?
>
> Are you prepared to go trial in this case?
>
> MR. MITCHELL: I am prepared, your Honor. However, I think the record should reflect the fact that my client – **I have not talked to Mr. Alexander, and I don't feel comfortable in talking to him**.
>
> THE COURT: Counsel, I made the ruling the other day, okay. You asked me that then, and I haven't heard anything different. We're going to trial in this case.
>
> MR. MITCHELL: **Perhaps the Court should inquire of Mr. Alexander** –
>
> THE COURT: Mr. Mitchell, we're going to trial, okay. [Emphasis added.]

Trial commenced and resulted in a conviction.

Around February 27, 1995, defendant, proceeding in propria persona, filed a motion for new trial and evidentiary hearing.[2] Defendant's handwritten motion argued that trial counsel failed to supply defendant with complete discovery of information even at trial, never properly secured witnesses for the defense, did no pretrial investigation or interviews of prosecution witnesses, and did not file motions requested by defendant. Defendant's motion further argued that long before trial, he and trial counsel had a very serious communication breakdown, that defendant reported trial counsel to the Attorney Grievance Commission, that trial counsel received a copy of the grievance before trial, that defendant was falsely informed that a new attorney would be appointed when he reported counsel to the grievance commission, that trial counsel attempted to withdraw on the first day of trial, and that trial counsel did no trial preparation, had no trial strategy and defended defendant under pretense and in a perfunctory manner.

Defendant's motion was set for hearing on March 9, 1995, the date of sentencing. At the hearing, defendant's trial counsel raised the issue of defendant's having filed a motion for new trial and

evidentiary hearing on his own. The trial court stated that it did not intend to address defendant's motion:

> I really do not intend to address it [defendant's motion for new trial and evidentiary hearing], because what he raised there, I think, is somewhat was discussed before about the statements being made, and about your representation and so forth.
>
> I still feel, and I reiterate that, there seems to be a pattern now, and I think – I have observed it, other judges have observed that when defendants who are dissatisfied with their attorney, and think that their attorney is not doing what they want them to do, regardless of what that attorney's efforts may be that they file a grievance and hope that that's going to cause the Court to respond by taking that person off of the case.
>
> I am of the mind, you know, that if the attorney is doing what I think the attorney should be doing, and they are doing what they should be doing to represent that person, just the mere fact of that person filing that grievance with no grounds being stated other than their general dissatisfaction I think that that is not a sufficient basis for a new lawyer to be appointed. Particularly on the eve of trial. I don't think anybody should be able to manipulate the process by being able to do that.
>
> I think that perhaps this entire Bench, or this Court is going to have to probably take notice of how often that's done, and the fact that that's [sic] probably just gets around the jail in some kind of way. You know, if you do that, you know, you can get another lawyer. But, I don't think that that in and of itself is going to be the basis for allowing that.
>
> I'm not granting a new trial in this case. I'm not even granting an Evidentiary Hearing on it. Some of this has already been preserved already on the record. There's nothing that I would do now than [sic] I've already done. If a higher court wishes to review that and do something about it, then they may.

On October 3, 1995, defendant, through appellate counsel, filed both a motion to remand in this Court and an appellate brief. This Court denied the motion to remand.

We review a trial court's decision regarding substitution of counsel for an abuse of discretion. *People v Morgan*, 144 Mich App 399, 400; 375 NW2d 757 (1985). Although an indigent defendant, entitled to the appointment of a lawyer at public expense, is not entitled to choose his lawyer, he may become entitled to have his assigned lawyer replaced upon a showing of adequate cause. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973); *People v Flores*, 176 Mich App 610, 613-614; 440 NW2d 47 (1989). When a defendant asserts that his assigned lawyer is not adequate or diligent, or is disinterested, the court should hear his claim and, if there is a factual dispute, take testimony and state findings and conclusion. *Ginther, supra* at 442. A court's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside; a remand to the trial court for an evidentiary hearing may

be appropriate. *Id.* at 442-443. A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the processes of the appellate courts. *Id.* at 443-444.

The trial court improperly failed to hear defendant's claims when trial counsel twice moved to withdraw. *Ginther, supra* at 442. Trial counsel stated to the court that the attorney-client relationship had broken down, that defendant did not wish him to represent him, that defendant believed trial counsel lied to him, and that he had not talked with defendant and did not feel comfortable talking to defendant. Under these circumstances, it was incumbent on the trial court to question defendant regarding his claims and, if there was a factual dispute, to take testimony and state findings and a conclusion. *Id.* Because the trial court failed to question defendant regarding the alleged breakdown in the attorney-client relationship, defendant's claims depend largely on matters not contained in the trial court record.[3] Accordingly, we remand for an evidentiary hearing for the purpose of allowing defendant to supplement the record regarding his claims. *Id.* at 442-443. The court should examine the issue from the standpoint of counsel's motions to withdraw, including the reasons for defendant's dissatisfaction and the import of counsel's assertion that he had not talked to defendant and did not feel comfortable talking to him, as well as from the standpoint of defendant's motion for new trial based on ineffective assistance of counsel.

II

Defendant next argues that the trial court abused its discretion when it denied his motion to quash the felony information charging him with first-degree murder. Defendant argues that the trial court failed to address the lack of evidence of premeditation, deliberation, and specific intent at the preliminary examination. In order to establish that a crime has been committed at the preliminary examination stage, a prosecutor need not prove each element beyond a reasonable doubt, but he must present some evidence of each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Oster*, 67 Mich App 490, 495; 241 NW2d 260 (1976). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). To convict a defendant of first-degree murder on an aiding and abetting theory, the prosecutor must prove that the defendant had the specific intent to kill or gave assistance to the principal with knowledge that the principal possessed the requisite intent. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1993).

We have reviewed the preliminary examination transcript and conclude that it establishes that the prosecution presented sufficient evidence, on an aiding and abetting theory, that defendant specifically intended to kill, or defendant gave assistance to his brother with knowledge that his brother intended to kill, the complainant, and that the killing was committed with premeditation and deliberation. An eyewitness to the shooting, an admitted drug dealer, testified that the complainant sold crack cocaine for him on the corner across the street from where defendant and his brother sold crack. The witness also testified that on several occasions prior to the shooting, he and defendant had heated discussions about the fact that defendant was encroaching on the area controlled by the witness and the

complainant. There was also testimony that just before the shooting a car in which defendant and his brother were riding drove slowly by the complainant, and then turned around and came back to where the complainant was standing. Further, there was testimony that at the time of the shooting, defendant sat in the driver's seat of the car he and his brother were in, with the engine running, while his brother, who had gotten out of the car, pumped a shotgun at least three times, firing into the complainants' body, and that after defendant's brother got back in the car, defendant sped away. Thus, the district court could have reasonably inferred that defendant and his brother intended to kill the complainant or defendant gave assistance to his brother with knowledge that his brother intended to kill the complainant to settle a dispute over "drug turf." *Usher, supra,* 196 Mich App at 232-233.

III

Defendant next argues that the trial court erred in denying defendant's motion for new trial based on prosecutorial misconduct. Defendant argues that the prosecutor improperly commented with regard to the jury letting defendant "walk out the door" if it did not believe defendant did anything wrong; improperly argued that she had "no personal interest" in the case, thereby implying that defense counsel had an interest in the outcome of the trial; and made inappropriate "civic duty" arguments by referring to the City of Detroit.

Defendant failed to preserve the issue of prosecutorial misconduct with regard to the "walking out the door" remarks because he did not object below. *People v Rollins,* 207 Mich App 465, 470-471; 525 NW2d 484 (1994). We agree with the trial court that the second comment did not suggest that defense counsel had something to gain such that a cautionary instruction was necessary. As to the prosecutor's alleged civic duty remarks, defendant did not object below, and has not set forth any reasons to support his argument that the trial court's sua sponte curative instruction was inadequate. We conclude that defendant was not denied a fair trial and the trial court did not err in denying defendant's motion for a new trial on the basis of prosecutorial misconduct.

We affirm in part, but remand for an evidentiary hearing for the purpose of supplementing the record as set forth above.[4] We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Stanley J. Latreille

[1] The motion is not in the lower court record, only the order denying the motion is in the record.

[2] Defendant's motion is not in the lower court record, although there is a notation stating that defendant's motion would be heard on March 9, 1995, the date on which defendant was sentenced. Defendant attached a copy of his motion to his supplemental appellate brief.

[3] Under these circumstances, it is not surprising that defendant's appellate brief, filed by appellate counsel, fails to provide facts supporting that there was a bona fide breakdown in the attorney-client relationship between defendant and trial counsel and that trial counsel's assistance was ineffective. We do note that defendant does provide such facts in supplemental appellate brief and affidavit, filed in propria persona, by leave of this Court.

Defendant's supplemental brief argues that he spoke to trial counsel regarding his confession not being voluntary and containing inaccurate facts, and also discussed with counsel that he had an alibi. Defendant further argues that trial counsel misled him into believing that he would file a motion to suppress the confession and an alibi defense, and that when defendant realized that trial counsel would not do so, the attorney-client relationship broke down and he filed a grievance.

Although we can appreciate the prosecution's argument that we should decline to consider facts pertinent to these arguments which defendant presents for the first time in his supplemental appellate brief because they are not part of the lower court record and the record on appeal cannot be enlarged by ex parte affidavit, *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970), we cannot ignore that defendant was denied an opportunity to state the substance of his claims below.

[4] In light of our disposition, we do not address defendant's argument, presented in his supplemental brief, that he was denied due process by the prosecution's use of an involuntary confession and the trial court's failure to conduct a hearing to determine voluntariness. These are essentially ineffective assistance of counsel arguments. See note 3, *supra*.