

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONCHA DUBOSE,

Defendant-Appellant.

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UNPUBLISHED

March 16, 1999

No. 203020

Recorder's Court

LC No. 94-013107

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to five to ten year's imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant was granted bond and commencement of her sentence was deferred until disposition of this appeal. We affirm.

I

Defendant first argues that the trial court erred in denying her motion for directed verdict where the court, on the record, declared that there was insufficient evidence to support a conviction. We disagree.

We review the validity of a motion for a directed verdict by the same standard as the trial court. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). The trial court must consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution. *Id.* If a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt, the court must deny the motion. *Id.* However, if the evidence is insufficient to support a conviction, due process requires that the trial court direct a verdict of acquittal. *People v Lemmon*, 456 Mich 625, 633; 576 NW2d 129 (1998).

Prior to trial, the court had granted defendant's motion to quash the information based on the fact that insufficient evidence had been presented at the preliminary examination to support a bindover. However, this Court reversed the decision of the trial court and ordered the trial to commence. *People v DuBose*, unpublished order of the Court of Appeals, entered 8/28/96 (Docket No. 1887461). Following the prosecution's proofs at trial, defendant moved for a directed verdict. The court indicated that it wanted to grant the motion, but held the decision in abeyance. Only after the jury returned their verdict did the court deny the motion. On the record, the court indicated that, but for the earlier reversal, it would have granted defendant's motion. Although it was error for the court to postpone its decision on a motion for a directed verdict until after the jury's deliberations, MCR 6.419, the error was harmless where the prosecution presented sufficient evidence to convict defendant. *People v Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995).

The crime of second-degree murder requires that the defendant cause the death of another with malice and without justification. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

In this case, the jury was required to make an inference that, because the victim was killed by a close-range entry wound to the right flank in defendant's car where defendant had been a passenger, defendant must be responsible for the victim's death. The prosecution presented the testimony of the victim's treating physician and the medical examiner. Both men testified that the victim had suffered an abdominal wound in which a bullet entered the right side of the victim's body. Although the treating physician did not speculate as to the distance involved, the medical examiner testified that the burning around the wound indicated that the shot had been fired within one inch of the victim's body. Defendant's statements to police placed her in the front passenger's seat of the car. It is true that the prosecution made no attempt to explain why defendant would want to kill the victim. However, the fact remains that a jury could have inferred defendant's guilt based on defendant's proximity to the victim and the type of wound inflicted, as well as the fact that defendant did not take the victim to the nearest hospital. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Therefore, although the trial court erred in delaying its decision, it did not err in denying defendant's motion for a directed verdict.<sup>1</sup>

## II

Defendant next argues that her convictions violated her constitutional right not to be placed twice in jeopardy.<sup>2</sup> Specifically, defendant argues that the trial court actually acquitted defendant when it declared that there was insufficient evidence to support a conviction at the conclusion of the prosecution's case and then erroneously submitted the case to the jury. We review issues relating to double jeopardy de novo. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998).

Regardless of what it said on the record, the court did not grant defendant's motion. A court speaks only through its written orders. *People v Davie (After Remand)*, 225 Mich App 592, 600; 571 NW2d 229 (1997). Because defendant was never formally acquitted, the submission of the case to the jury was not a violation of defendant's constitutional rights. See *People v Mehall*, 454 Mich 1, 6-7; 557 NW2d 110 (1997).

### III

Defendant next argues that the trial court erred in failing to determine whether defendant knowingly and intelligently waived her constitutional right to testify. We disagree. A trial court is not required to advise a defendant of his right to testify, nor must there be an on-the-record waiver of the right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

### IV

Defendant's final argument on appeal is that she was denied her constitutional right to be represented by counsel of her own choosing where the trial court refused to adjourn the case while her lead counsel was ill. We disagree. A trial court's grant or denial of a request for an adjournment is reviewed for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 883 (1998).

At the outset of trial, the court was informed that defense counsel, Arthur Brand, was unable to attend the trial due to health problems. Defendant requested an adjournment, but the court denied the request and ordered co-counsel, Rosemary Robinson, to proceed with trial. Defendant argues that, where she was deprived of the attorney of her choice, reversal is mandated regardless of the adequacy of the substitute counsel's performance.

Defendant relies upon several federal cases to support her contention that the harmless error rule does not apply to the sixth amendment right to counsel. However, these cases all involved a trial court's denial of substitution of counsel for defendants who wanted to either fire their retained counsel or replace court-appointed counsel. See, e.g., *Bland v California Dep't of Corrections*, 20 F3d 1469 (CA 9, 1994); *Wilson v Mintzes*, 761 F2d 275 (CA 6, 1985); *Releford v United States*, 288 F2d 298 (CA 9, 1961). In the present case, the facts surrounding the court's decision to proceed with trial are different from the cases cited by defendant.

Defendant was not denied the right to substitute counsel. Brand and Robinson had worked on the case together for some time, and Robinson was fully apprised of the facts surrounding the case. Therefore, defendant was actually represented by both attorneys and the absence of one was not a denial of counsel.

In *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983), the United States Supreme Court held:

Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the

assistance of counsel. [*Id.* at 11, quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964).]

In *Morris*, the Court determined that the trial court did not abuse its discretion in denying the defendant's motion for a continuance because, although the defendant's attorney was legitimately ill, substitute counsel was available and fully prepared to proceed to trial. *Id.* Here, the court may have considered that the case was not highly complex in that it would last only two days. The court also considered the fact that Robinson had been sitting second chair on the case and was fully aware of the facts and strategy that defendant would employ. The court's decision, therefore, was not "unreasonable and arbitrary" and prejudice is not presumed. *Id.*

In order to show that a court's decision denying an adjournment was an abuse of discretion, defendant must show that she was prejudiced as a result of the court's decision. *Pena, supra*, 224 Mich App 661; *People v Kryztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Defendant does not argue that her defense was prejudiced as the result of Robinson's representation. Accordingly, we hold that the trial court did not abuse its discretion when it refused to grant defendant's request for an adjournment.

Affirmed.

/s/ Janet T. Neff  
/s/ Michael J. Kelly  
/s/ Harold Hood

<sup>1</sup> The trial court indicated that it was denying the motion, not because the evidence taken in a light most favorable to the prosecution supported a conviction, but merely because it feared reversal. Although the rationale was faulty, the Court will not reverse a trial court's decision where the court reached the right result for the wrong reason. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

<sup>2</sup> US Const, Am V; Const 1963, art 1, §15.