

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABBAS ALI,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 229326

Wayne Circuit Court

LC No. 99-009623

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a). He was sentenced to life imprisonment. Defendant now appeals as of right. We affirm.

I. Request for a New Attorney

Defendant first argues that the trial court abused its discretion in denying his request to retain new counsel. We disagree. The substitution of appointed counsel is within the sound discretion of the trial court. *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993). Likewise, we review a trial court's decision whether to grant a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). The determination of whether a trial court abused its discretion in denying a defendant the opportunity to replace appointed counsel with retained counsel turns on whether there was a bona fide dispute and whether the defendant's request was timely brought and not the result of negligence or a delay tactic. *People v Battles*, 109 Mich App 487, 490; 311 NW2d 779 (1981); *People v Shuey*, 63 Mich App 666, 671, 234 NW2d 754 (1975), citing *People v Charles O Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972). Similarly, when reviewing a trial court's decision to deny a defendant's motion for a continuance to obtain another attorney, we consider the following factors:

(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.* at 369. See also *Shuey*, *supra.*]

Application of the foregoing factors to the instant case reveals that the trial court did not err in denying defendant's request to obtain a new attorney.

In this case, the question whether appointed counsel would continue to represent defendant arose for the first time at a pretrial proceeding, which took place two months before the start of trial. At that time, defendant's attorney represented that defendant was satisfied with appointed counsel, but that defendant's family wished to retain new counsel for defendant. The trial court denied the family's request for new counsel, finding that if defendant was satisfied with appointed counsel, there was no reason to inquire further. We find no error in the trial court's decision. Although it might have been helpful if the trial court had elicited statements from defendant personally in the matter, we will not presume from this record that appointed counsel misrepresented defendant's satisfaction with him, in gross violation of ethical duties of zealous representation, see *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538; 599 NW2d 493 (1999), and of candor before a tribunal, see MRPC 3.3(a)(1). Accordingly, we find no abuse of discretion.

The question of substituting defendant's appointed counsel arose again on the first day of trial. This time defendant stated on the record that he wanted to fire appointed counsel because he was not happy with him. The trial court refused to adjourn the trial and denied defendant's request. Thereafter, the trial court also denied defendant's brothers' request to change defendant's attorney after defendant's brother informed the court that the family changed defendant's lawyer. We find no error. Although defendant was asserting his constitutional right to counsel, there appears to be no legitimate reason for defendant to assert the right. The record does not indicate that a bona fide dispute existed between defendant and his appointed counsel at that time, but only that defendant expressed a general dissatisfaction with counsel's efforts. However, upon further questioning, defendant expressed agreement to continue with appointed counsel. Furthermore, because defendant waited until the first day of trial to assert his right, his request was not timely brought. Instead, we find that defendant was negligent in failing to assert his right earlier. See *Echavarria, supra* at 369-370 (trial court did not abuse its discretion in refusing to allow the defendant to be represented by counsel of his choice where the defendant was found negligent in waiting until the day of trial to assert his right to counsel). Moreover, the record indicates that it was defendant's family members that were insistent about replacing defendant's appointed counsel, not defendant. Accordingly, we find that the trial court did not abuse its discretion in refusing to grant defendant's last-minute request to retain new counsel.

II. Jury Instructions

Defendant also argues that the trial court's instructions on the elements of causation for first-degree and second-degree murder had the effect of directing a verdict of guilty on that element and shifting the burden of proof, thereby denying defendant a fair trial. However, defendant failed to object to the jury instructions at trial and in fact, expressed satisfaction with the instructions as given. Because defendant affirmatively approved the jury instructions, his waiver extinguished any error on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

III. Defendant's Custodial Statement

Defendant next claims that the trial court erred in declining to rule on the voluntariness of a statement defendant allegedly made to police while in custody. Before trial, the defense filed a motion to suppress this statement as involuntary in that the police, through “improper threats and promises,” induced defendant to sign the statement. At the conclusion of the *Walker*¹ hearing, the trial court denied defendant’s motion, finding that whether defendant made the statement at all was not a question of voluntariness, but a question of fact for the jury at trial. However, defense counsel expressly approved the trial court’s ruling. In fact, defense counsel stated, “I agree it’s going to have to go before the jury at this point and we’ll have to take it up with them and it will be a question of fact as to whether he understood [the police officer] and whether that was something he said or was made up by the officer.” Accordingly, defendant waived his right to challenge the court’s ruling when he expressly agreed with the trial court’s decision regarding the handling of the issue. *Id.* Again, a defendant may not waive objection to an issue before the trial court and then seek appellate review for his waiver has extinguished any error. *Id.* at 214-215. Because defendant waived the issue, there is no error to review. See *id.* at 218-219.

IV. Ineffective Assistance of Counsel

Last, defendant argues that he was denied the effective assistance of counsel based on three errors. We disagree. Because defendant’s motion to remand for an evidentiary hearing based on ineffective assistance of counsel was denied, this court’s review is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

The constitutional right to counsel is a right to the effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel’s error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel’s competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims he was denied the effective assistance of counsel when his trial counsel acquiesced in the trial court’s ruling regarding the voluntariness of defendant’s statement. Even assuming that the trial court erred in failing to address the voluntariness of defendant’s statement² and that trial counsel was deficient in agreeing with the trial court’s

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

² The issue whether a statement has been made at all and a determination as to the voluntariness with which a statement was signed are two separate matters. *People v Neal*, 182 Mich App 368, (continued...)

erroneous ruling, we are not persuaded that, but for counsel's error, the result of the proceedings would have been different. *Noble, supra*. Indeed, we hold that the use of defendant's statement at trial did not prejudice him in that it did not affect the outcome of the proceedings. The evidence of defendant's guilt was overwhelming independent of his statement. Two eyewitnesses directly implicated defendant in the attack on the victim. In fact, defendant admitted to one of the witnesses that he had "sliced [the victim's] stomach." Thus, the prosecutor's case was not at all dependent on defendant's partially conflicting statements to the police. Further, the jury heard defendant's denials concerning the veracity of the statement attributed to him, and was instructed to decide for itself whether defendant made the statement, and if so how much weight to afford it. Because the use of that statement at trial did not result in prejudice to defendant, we therefore conclude that the matter does not support a claim of ineffective assistance of counsel.

Defendant next argues that trial counsel's failure to raise defendant's invocation of his right to remain silent as a ground to suppress the custodial statement constituted ineffective assistance of counsel.³ Because we previously determined that the admission of defendant's statement did not prejudice him, a claim of ineffective assistance of counsel on this ground must also fail.

Defendant also asserts he was denied the effective assistance of counsel when his trial counsel failed to object to the instructions on causation. First, "jury instructions are to be read as a whole, not extracted in a piecemeal fashion." *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Additionally, imperfect instructions do not require reversal "if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997) (citations omitted). In this case, when read as a whole, the jury instructions adequately protected defendant's rights and did not shift the burden of proof or have the effect of directing a verdict on the element of causation. Because we conclude that the instructions, taken as a whole, should have steered the jury away from any erroneous treatment of the element of causation for murder, we conclude that trial counsel's failure to object or seek clarification at trial did not constitute ineffective assistance of counsel.

(...continued)

371; 451 NW2d 639 (1990). The former being a question of fact to be decided by the trier of fact. *Id.* However, "where . . . a defendant claims that he involuntarily signed a statement and that the statement was fabricated by police, . . . the trial court must determine, assuming the defendant made the statement, whether he did so voluntarily." *Id.* at 372. If it is found that the defendant voluntarily made the statement, the defendant is free to argue that the police fabricated it, but if the statement was involuntarily made, it is inadmissible, regardless of the defendant's claim that he never actually made it. *Id.*

³ It should be noted that defendant does not argue that the trial court erred in admitting defendant's statement when the police failed to "scrupulously honor" defendant's invocation of his right to remain silent, but only that counsel was ineffective in failing to raise such an argument as grounds for suppression of the statement. Therefore, this Court will only address the issue as it relates to ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell