

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESTER EUGENE WAKEFIELD,

Defendant-Appellant.

UNPUBLISHED

July 31, 2008

No. 278554

Kent Circuit Court

LC No. 06-011717-FC

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of unlawful imprisonment, MCL 750.349b, assault with intent to do great bodily harm less than murder, MCL 750.84, and torture, MCL 750.85. We affirm.

Complainant Kay Rohn, defendant's girlfriend, alleged that during a two-day period, defendant held her against her will in their home for extended periods, struck her with his fists, and otherwise assaulted her. The jury convicted defendant as noted above, but acquitted him of one count of felonious assault, MCL 750.82.

Before sentencing, defendant, acting *in propria persona*, moved to "vacate sentencing" and for a new trial, alleging that new evidence had been discovered and that the prosecutor and defense counsel had conspired to convict him. Defendant sought to dismiss defense counsel, whom he had retained, and requested that the trial court appoint counsel to represent him at sentencing. The trial court observed that defendant was entitled to terminate counsel's representation, but it declined to appoint new counsel and otherwise denied defendant's motion.

The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 20 to 40 years for unlawful imprisonment, 15 to 30 years for assault with intent to do great bodily harm less than murder, and 27 to 50 years for torture.

Defendant argues that the trial court denied him his Sixth Amendment right to counsel when it refused to appoint substitute counsel. We disagree.

The constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 20; *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). A trial court's

erroneous deprivation of a defendant's right to retained counsel of his choice is a structural error requiring reversal. *Id.* at 150.

An indigent person entitled to appointed counsel is not entitled to choose his own lawyer. See *id.* at 144. "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001) (internal citations and quotation marks omitted). A trial court's decision regarding substitute counsel is reviewed for an abuse of discretion. *Id.*

Defendant retained counsel to represent him at trial, but apparently defendant did not agree with counsel's strategy and came to believe that counsel conspired with the prosecutor to convict him. Defendant sought to dismiss retained counsel and to have the trial court appoint counsel to represent him at sentencing. The trial court informed defendant that he had every right to terminate retained counsel's representation, but that doing so would not automatically entitle him to obtain appointed counsel. Defendant seems to be under the mistaken belief that the trial court was required to appoint counsel to represent him simply because he did not agree with the strategy employed by retained counsel and wished to dismiss that attorney. This assertion is not supported by the law. Defendant made no showing that he was entitled to appointed counsel because he was indigent. Defendant was not deprived of the right to counsel of his choice.

Additionally, defendant argues that defense counsel rendered ineffective assistance by eliciting hearsay information from an unknown radiologist regarding Rohn's injury. Defendant asserts that had this information not been placed before the jury, it is reasonably probable that the jury would not have convicted him of assault with intent to do great bodily harm less than murder. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. *Id.* To demonstrate the existence of prejudice, a defendant must show "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different," *id.*, and that "the result that did occur was fundamentally unfair or unreliable," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The emergency room physician who treated Rohn testified that a CT scan showed a fracture of the zygomatic arch, the area just below the temple, on the right side of Rohn's face. On cross-examination, defense counsel inquired whether the physician could determine the age of the zygomatic-arch injury. The physician indicated that he could not and that a radiologist with whom he had spoken could not offer an opinion on that question. Defense counsel confirmed with the physician that if the injury showed no sign of healing (Rohn's injury did not), the best estimate that could be made was that it had occurred within the past 48 hours. The

physician reiterated, however, that there was “no way to know” exactly when the injury occurred.

Defendant did not seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Decisions such as what type of questions to put to a witness are presumed to be matters of trial strategy. See *Rockey, supra* at 76. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). On direct examination, defendant testified that, on an occasion before the one at issue in the trial, he and Rohn became involved in a physical altercation after drinking alcohol to excess, and Rohn sustained an injury to her right eye area. It is reasonable to assume that defense counsel was attempting to associate that injury with the fracture that appeared on the CT scan. Thus, counsel had a legitimate reason to ask whether the age of that injury could be determined.

Moreover, the physician testified on direct examination that he observed various injuries about Rohn’s person, including bleeding in both ears, a tear underneath her tongue,¹ bruising, and swelling of the left knee, in addition to the fracture below Rohn’s temple. Rohn’s testimony, if believed by the jury, established that defendant inflicted various and serious injuries during the period in question; therefore, it is not reasonably probable that had the jury not heard one piece of information, i.e., that the fracture below Rohn’s right temple could have occurred within 48 hours of Rohn’s appearance in the emergency room, it would have found defendant not guilty of assault with intent to do great bodily harm less than murder. Therefore, defendant has not shown that counsel’s performance resulted in prejudice, *Carbin, supra* at 600, and that the result that did occur was fundamentally unfair or unreliable. *Odom, supra* at 415.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto

¹ Rohn testified that defendant placed his hand in her mouth and attempted to tear the area under her tongue.