

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDELL JONES III,

Defendant-Appellant.

UNPUBLISHED

December 21, 2021

No. 352111

Calhoun Circuit Court

LC No. 2018-003095-FC

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of one count of felonious assault, MCL 750.82; one count of carrying a concealed weapon, MCL 750.227; and one count of carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve 14 to 48 months' imprisonment for the conviction of felonious assault, 18 to 60 months' imprisonment for the concealed weapon conviction, and 2 years' imprisonment for the felony-firearm conviction. We reverse defendant's convictions, vacate his sentence, and remand to the trial court for a new trial. We further direct the trial court to address the pretrial release of defendant within 28 days of the release of this opinion and accompanying order.

I. BACKGROUND

This case stems from an altercation between defendant, Cedell Jones III, and Phillip and Erica Overley. In the early morning hours, defendant, driving alone in his car, encountered a motorcycle with Phillip driving and Erica sitting on the back. Defendant thought that the Overleys were following him, and the Overleys thought that defendant was driving erratically. Eventually, both vehicles stopped near each other. According to the Overleys, defendant got out of his car, pointed a gun at Phillip's helmet, and fired. There was no damage as a result of the alleged gun shot to helmet. On the other hand, Defendant testified that he was forced to stop because Phillip parked his motorcycle in front of his car in the road. Next, defendant testified, Phillip approached defendant's car and Phillip put both of his hands on the car frame, near the driver's side window. Defendant stated that he tried to drive away, but could not as a result of Phillip's parked motorcycle

and another car that was parked to the right of defendant's car. Defendant eventually exited his car holding a gun and Phillip and defendant then wrestled over the gun. According to defendant, the gun fired while the two men were wrestling and while both men had their hands on the gun. Both defendant and the Overleys said that defendant then got back in his car. According to the Overleys, defendant then got back out of his car, and with Phillip standing between defendant and Erica, defendant pointed his gun at them and told the Overleys either to not follow him or not to call the police. Defendant denied that he got out of his car the second time or that he ever pointed a gun at either of the Overleys.

Defendant was represented by appointed counsel. The day before trial was scheduled to begin, defendant requested an adjournment so that he could retain counsel, explaining that he had already found an attorney willing to represent him. The trial court held that defendant could be represented by retained counsel, but it refused to adjourn the trial. The trial court initially believed—not unreasonably—that defendant wished to have substitute counsel appointed. The trial court correctly informed defendant that he was not entitled to appointed counsel of his choosing. However, the trial court permitted defendant to clarify that he wished to retain new counsel and that an attorney was willing to take his case if the trial court granted an adjournment. The trial court then recognized its misapprehension and permitted defendant to explain the basis for his request.

According to defendant, there was a lack of communication between him and his defense counsel and counsel had failed to promptly inform him of new evidence before trial. Defendant also asserted that his defense counsel was unprepared for trial and that he and defense counsel disagreed on strategic matters regarding evidence. Defense counsel disagreed that there had been a lack of communication and represented that she was prepared for trial, although she admitted that she and defendant disagreed on some strategic matters. Defense counsel contended that to the extent she encountered difficulty preparing for trial, some of the blame lay with defendant, who had failed to read a police report she provided to him and had delayed in providing possible defense witnesses. However, defense counsel conceded that she had received a CD with photographs and video and audio recordings from the investigative process approximately eight months previously; she failed to inform defendant about the evidence, and she and defendant had only reviewed the evidence the previous day. Further, although defense counsel did not file a motion to withdraw, she had no objection to defendant obtaining retained counsel.

The trial court ruled that defendant could be represented by his retained counsel of choice but that the trial would begin the following day and no adjournment would be granted, stating:

Had you wished to retain your own attorney you had time to do that. But at this point it would cause prejudice to the People and it would also inconvenience the schedule of the Court to give you a last-minute adjournment to retain an attorney.

At trial, defendant was convicted of one count of felonious assault, one count of carrying a concealed weapon, and one count of felony-firearm. The jury found defendant not guilty of assault with intent to murder and one count of felony-firearm. Defendant now appeals.

II. DENIAL OF COUNSEL OF CHOICE

Defendant first argues that he was denied his Sixth Amendment right to counsel of choice on the basis that the trial court denied his request for an adjournment. Had the trial court granted the adjournment, defendant would have been represented at trial by his retained counsel of choice. We conclude that the trial court abused its discretion in denying defendant's request for an adjournment to accommodate the counsel he sought to retain. We further conclude that defendant was denied his Sixth Amendment right to counsel of choice because the trial court failed to grant defendant's request for an adjournment.

A. STANDARD OF REVIEW

"We review for an abuse of discretion a trial court's exercise of discretion affecting a defendant's right to counsel of choice." *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003) (cleaned up). An abuse of discretion occurs when the trial court's decision "falls outside the range of principled outcomes." *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016). A trial court's factual findings are reviewed for clear error. MCR 2.613(C). "Clear error occurs if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018) (cleaned up). Questions of constitutional law, such as whether defendant was denied his right to counsel of choice, are generally reviewed de novo. See *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018).

B. PRINCIPLES OF LAW

A defendant has a constitutional right to counsel, which includes the right of a defendant to choose his or her own retained counsel. US Const, Am VI; 1963 Const, art 1, §§ 13 and 20. As our Supreme Court has recognized:

The right to assistance of counsel is a precious constitutional right. It is probably the most important right of any defendant in a criminal trial It is guaranteed by the United States Constitution and has been included in every Constitution of this State since Michigan entered the Union. This right has been jealously protected by the courts and is of critical importance to any defendant in a criminal trial. Hence, whenever this right is asserted, the trial court must take special care to insure that it is protected. [*People v Williams*, 386 Mich 565, 575-576; 194 NW2d 337 (1972) (cleaned up).]

This Court has recognized that "[t]he Sixth Amendment commands that the accused be defended by the counsel he [or she] believes to be best." *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009) (cleaned up). "Deprivation of the right is 'complete' when the defendant is *erroneously* prevented from being represented by the lawyer he wants." *Id.* (cleaned up). The erroneous deprivation of a defendant's right to retain counsel of his choice is a structural error¹

¹ "[S]tructural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Duncan*,

requiring reversal without a showing of prejudice. *United States v Gonzalez-Lopez*, 548 US 140, 152; 126 S Ct 2557; 165 L Ed 2d 409 (2006); see *Aceval*, 282 Mich App at 386 (“It is not necessary that a defendant show prejudice; it is enough that a defendant merely show that a deprivation occurred.”).

There are, however, limits to a defendant’s right to choose counsel. We must balance the defendant’s right to counsel of his choice and “the public’s interest in the prompt and efficient administration of justice” to determine whether the defendant’s right to choose counsel has been violated. *Akins*, 259 Mich App at 557 (cleaned up). Trial courts have wide latitude in balancing the right to counsel of choice against the demands of the court’s calendar and fairness. *Gonzalez-Lopez*, 548 US at 152; *Aceval*, 282 Mich App at 387. When reviewing a trial court’s decision to deny a motion for 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. [*Akins*, 259 Mich App at 557 (cleaned up).]

However, as indicated, when the Sixth Amendment right to counsel is at issue, a defendant is not required to show prejudice. *Gonzalez-Lopez*, 548 US at 152; *Aceval*, 282 Mich App at 386. Furthermore, it is clear that defendant was not merely engaging in delaying tactics, and although our dissenting colleague accurately observes that trial was delayed several times, nothing in the record suggests that those delays were attributable to defendant. Consequently, the only two concerns meaningfully at issue are whether defendant had a legitimate reason for asserting the right and whether defendant was negligent in asserting the right.

C. ANALYSIS

As an initial matter, we note that the trial court technically did not forbid defendant to retain counsel of his choosing, although affording no time for retained counsel to prepare for trial achieved the same effective result.

In *Williams*, the defendant requested an adjournment to obtain new counsel on the day before trial because of a disagreement with his counsel on whether to call certain alibi witnesses. *Williams*, 386 Mich at 574-575. Our Supreme Court concluded that the defendant’s reason for seeking new counsel “was a bona fide dispute and not a delaying tactic.” *Id.* at 576. Therefore, although the defendant made his request the day before trial was set to begin, the defendant “was not guilty of negligence in informing the court of his desire for different counsel” because the disagreement had only occurred the day before. *Id.* The trial court denied defendant’s request for

462 Mich 47, 52; 610 NW2d 551 (2000) (cleaned up). “Structural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence” *Id.* at 51 (cleaned up).

an adjournment to obtain new counsel in part because of the burden it would impose on the court's docket. *Id.* at 576-577. However, our Supreme Court held that "the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance." *Id.* at 577. Further, the Court also concluded that the purpose of defendant's request was not a "delaying tactic" and that the defendant had not caused prior adjournments, despite the trial court's contrary findings, because there was no evidence to support such findings. *Id.*

Similarly, in the instant case, defendant was asserting his constitutional right to counsel and had a legitimate reason for asserting this right. Defense counsel had received evidence, including video evidence admitted at trial, approximately eight months before trial and had only informed defendant of the evidence the day before trial was set. Defendant was also not negligent for his eleventh-hour request for different counsel because he was only made aware of the issues that led to his request the day before trial. There was no evidence that defendant had been notified of the evidence earlier. Additionally, there was no evidence that defendant requested new counsel as a delaying tactic or that he had requested previous adjournments. Importantly, as discussed, it is unnecessary for defendant to show prejudice. We do not necessarily disagree with our dissenting colleague's assessment that defendant was probably not surprised by anything on the CD. However, we think it misses the point that failing to keep defendant apprised of evidence that had the *potential* to be important, especially when viewed in combination with defendant's disagreement with his counsel's proposed tactics, is a legitimate reason to abruptly lose all faith in counsel.²

Plaintiff argues that this case is similar to *Akins*, 259 Mich App at 545, because the trial court did not prohibit defendant from retaining counsel, but rather denied an "eleventh hour" adjournment. In *Akins*, the defendant first requested an adjournment to retain new counsel approximately one month before trial. *Id.* at 557. The defendant asserted "general claims that his attorney was not competently representing him and specifically protested that his attorney had not filed a motion to have a separate jury from his codefendants." *Id.* Approximately 2½ weeks before trial at a hearing, the defendant renewed his request that he be allowed to dismiss his counsel because counsel "was not good enough to represent him and because he disapproved of his attorney's [sic] talking with the prosecutor." *Id.* at 558. In concluding that the trial court did not abuse its discretion by denying defendant's request, this Court concluded that the trial court allowed defendant to retain any attorney he wanted as long as the attorney could be present for the scheduled trial date. *Id.* Additionally, this Court concluded that the trial court's reluctance to adjourn trial was reasonable because defendant was scheduled to be tried jointly with his codefendant. *Id.* This Court also noted that the defendant failed to establish that he had legitimate complaints about his trial counsel's performance, which supported the trial court's conclusion that defendant's request was a delay tactic. *Id.* at 558 n 15.

² We also do not necessarily disagree with our dissenting colleague that defendant seemingly made his own contributions to any breakdown between himself and appointed counsel. However, we do not believe the record shows counsel's failure to inform defendant of the CD was due to any act or omission committed by defendant.

Defendant apparently had some concerns about his appointed counsel for “several months” before trial. Defendant was released on bond, so as the trial court observed, it would have been physically possible for defendant to seek out and retain new counsel at a much earlier date. However, not all disagreements are created equal. Vague concerns and unspecified strategic disagreements might not be enough to drive a client to seek new counsel until those concerns are suddenly and starkly confirmed by an unambiguous failure to keep the client informed of concrete evidence. Furthermore, minor issues can accumulate to the point of becoming intolerable. See *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (“From [defense] counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.”). The record does not disclose any reason why defendant should have raised his concerns with the trial court earlier, even if doing so was realistically possible. The trial court noted that “we’ve had status conferences where you appear but you don’t go on the record and [appointed counsel] disappears in the back room.” In context, it is unclear whether the trial court used “you” to refer to defendant or as a more general abstraction. It is therefore unclear whether defendant had been personally present, or whether the trial court was reassuring defendant that his appointed counsel had been acting with diligence. In any event, the lower court register of actions reflects that those status conferences, seemingly all held in chambers, had last occurred approximately eight months previously. We are unable to conclude that defendant was negligent in failing to pursue substitute retained counsel before he became aware of any solid reason for doing so.

The trial court provided two additional reasons for denying defendant’s request for an adjournment: (1) that it would prejudice the prosecution, and (2) that it would inconvenience the trial court’s schedule. The trial court noted that this was a 2018 case, and that defendant had had time to retain an attorney if he so wished. We also do not dispute our dissenting colleague’s observation that—although not cited by the trial court—witness memories tend to decay over time, and one witness would shortly become unavailable. However, as discussed, there is nothing in the record to suggest that the age of the case was attributable to defendant, and the fact that defendant technically could have sought retained counsel earlier overlooks whether defendant had any earlier reason to do so. As stated earlier, the trial court’s schedule alone is not an adequate reason to deny an otherwise proper request for an adjournment. *Williams*, 386 Mich at 577. Witness unavailability might have been more persuasively countervailing, had the trial court considered the issue. However, in the absence of any exploration on the record of how long the witness would remain unavailable and whether the witness could have testified by telephone or videoconferencing software, we have no basis for upholding the trial court’s ruling. Therefore, we conclude that the trial court abused its discretion by denying defendant’s request for an adjournment to obtain retained counsel.

Because we conclude that the trial court abused its discretion in denying defendant’s request for an adjournment to retain counsel, we also conclude that defendant was denied his Sixth Amendment right to counsel. The structural error infected the entire trial and requires automatic reversal. See *Duncan*, 462 Mich at 51. Having determined that the trial court improperly denied defendant’s request for an adjournment to obtain new counsel where there was no justification for doing so, that the trial court violated the defendant’s Sixth Amendment right to counsel, that such an action is not subject to harmless-error analysis, and that prejudice need not be shown, we vacate

defendant's convictions and sentence and remand for a new trial.³ Additionally, within 28 days of the release of this opinion, the trial court shall address the reinstatement of pretrial release of defendant pending an appeal or a new trial. See MCR 7.216(A)(7); MCR 7.208(G); see also MCL 765.7 and MCR 6.106.

We reverse defendant's convictions, vacate his sentence, and remand the case for a new trial and proceedings consistent with this opinion. We retain jurisdiction as to the issue of defendant's pretrial release.

/s/ Michelle M. Rick

/s/ Amy Ronayne Krause

³ In light of our holding, we need not consider the remaining issues that defendant raised on appeal, including sufficiency of the evidence, prosecutorial error, and jury instruction defects. See *People v Johnson*, 215 Mich App 658, 673; 547 NW2d 65 (1996). Although we note that these issues raised other compelling concerns, these issues can be remedied during a new trial should one be undertaken.

Court of Appeals, State of Michigan

ORDER

People of MI v Cedell Jones III

Docket No. 352111

LC No. 2018-003095-FC

Michelle M. Rick
Presiding Judge

Amy Ronayne Krause

Anica Letica
Judges

Pursuant to the majority opinion issued concurrently with this order, this case is REMANDED for a new trial and further proceedings consistent with the opinion of this Court. We retain jurisdiction as to the issue of defendant's pretrial release.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, within 28 days of the release of this opinion, the trial court shall address the reinstatement of pretrial release of defendant pending an appeal or new trial. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

/s/ Michelle M. Rick
Presiding Judge

Letica, J. would decline to remand for the reasons set forth in the dissent.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

December 21, 2021
Date

Jerome W. Zimmer Jr.
Chief Clerk