

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID COCHISE BOARDS,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 199758

Calhoun Circuit Court

LC No. 96-000637-FH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM

Defendant David Cochise Boards was charged and convicted of breaking and entering, MCL 750.110; MSA 28.305. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to four to twenty years' imprisonment for his offense. Defendant appeals his conviction and sentence as of right. We affirm.

I.

Defendant first claims on appeal that the prosecutor failed to present sufficient evidence upon which the jury could find him guilty of breaking and entering a building. Specifically, defendant argues that there was insufficient evidence that he was the person who broke into the lumber yard and foreman's building. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To establish the elements of breaking and entering a building, MCL 750.110; MSA 28.305, the prosecution must prove beyond a reasonable doubt that (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny or felony therein. *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Because there were no witnesses to the crime, the prosecution's case against defendant was based upon circumstantial evidence, which in conjunction with the reasonable inferences arising from the

evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Police Officers John Hancotte and Kenneth Wright followed tracks in the snow leading from the foreman's building to the south corner of the U.S. Lumber Company's fenced-in yard at Lafayette Street. Hancotte testified that those were the only tracks inside the lumber yard. Apparently, there had been a fresh snowfall since the gates were locked for the weekend. Hancotte and Wright observed that the tracks continued on the other side of the fence. Trooper Gary Lisle of the Michigan State Police canine unit, who is an expert qualified in the field of dog tracking and handling, was called in to track the suspect. Lisle had his dog, Max, track the human scent beginning from the footprints on the outside of the lumber yard fence. Lisle testified that the track where Max began did not appear to be contaminated and was no more than an hour old. The scent that Max followed coincided with the footprints leading away from the fence. On several occasions, Lisle observed the same footwear impressions in areas where snow was present. Lisle believed that the subject was running most of the time because the strides were far apart. Max followed the scent for approximately a mile until he reached a pickup truck parked in a salvage yard. The police found defendant inside the truck and searched him; the search revealed, among other things, several wrenches similar to those reported missing from U.S. Lumber.

On appeal, defendant does not challenge the admissibility of the dog-tracking evidence; however, he claims that the prosecution's case relied primarily on that evidence, which, as a matter of law, is insufficient to sustain a conviction. While dog-tracking evidence, standing alone, is not sufficient to support a guilty verdict, *People v Laidlaw*, 169 Mich App 84, 93-94; 425 NW2d 738 (1988), there was other corroborating evidence of identity. First, Officer Kusler, who searched defendant after he was taken into custody, found several tools on defendant's person. Morgan identified two of those tools, a 3/8ths inch and a 7/16ths inch open end box wrench, as wrenches that looked like those that were taken from his desk. Morgan could not be absolutely certain that the wrenches were his, however, because the tools bore no unique or identifying marks and he did not recall the name brand of his wrenches.

In addition, Leanora Brun-Conti, an expert in the area of footwear impression analysis, compared a "known impression" made from the left shoe worn by defendant at the time of his arrest to footwear impressions photographed inside of the lumber yard. She determined that defendant's tennis shoes could have made the photographed impressions given that they were consistent as to both tread design and the size of the tread with the impressions left in the snow. Because the impressions were not very clear and had insufficient individual characteristics, however, Brun-Conti could not say with absolute certainty that defendant's shoe made the impression. Although Morgan and Brun-Conti could not testify with absolute certainty, they provided sufficient corroborating evidence of identity. *Truong, supra*. Therefore, viewing the evidence in a light most favorable to the prosecution, we find that sufficient evidence existed to prove the elements of breaking and entering beyond a reasonable doubt.

II.

Next, defendant claims that the trial court abused its discretion by denying defendant's request for substitute counsel and defendant's right to represent himself. The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset absent

a showing that the court abused its discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Likewise, this court reviews for an abuse of discretion a trial court's denial of a defendant's request for self-representation. *People v Ahumada*, 222 Mich App 612, 616-617; 564 NW2d 188 (1997).

On September 17, 1996, the day trial was to begin in this case, the court heard defense counsel's motion to withdraw, which had been filed on September 13. According to defense counsel, she was not aware of any problems between herself and defendant until a week earlier when defendant wrote a letter to the court indicating that there had been a breakdown in the attorney-client relationship. Defense counsel stated that their relationship had deteriorated significantly since that time, however. She stated that defendant would not listen to her advice and had asked her to do things that would violate the ethical standards of her profession. Upon defendant's insistence that defense counsel reveal his alleged unethical requests, defense counsel told the court that she believed that defendant was claiming a breakdown in the attorney-client relationship as a means of getting his trial adjourned. Apparently defendant was on parole at the time that the instant offense was committed and, according to defense counsel, he believed that his parole would be discharged if he continued to delay the trial. Defense counsel initially refused to cooperate in defendant's plan because she did not believe that there was a breakdown in their relationship, but she ultimately filed a motion to withdraw because a true breakdown had occurred.

Defendant stated that he wrote a letter to the court on September 8, 1995, explaining his problems with defense counsel. Defendant complained that defense counsel interviewed prosecution witnesses against his wishes because he did not want her to reveal their defense strategy. He also complained that defense counsel called his probation officer contrary to his request. The trial court found defendant's claims to be without merit and denied defense counsel's motion to withdraw, thereby implicitly denying defendant's request for substitute counsel. Defendant informed the court that he had taken steps to hire a private attorney. Defendant stated that he had received letters in response from three attorneys but was having difficulty contacting them because their offices would not accept collect calls. The court informed defendant that he had a right to hire an attorney, but that due to the tardiness of his request, his attorney would have to be retained and file an appearance that day. Defendant then asked the court, "[w]hat if it is my decision to represent myself, your Honor?" The court denied defendant's request to represent himself because his request was tardy and would have seriously disrupted the proceedings.

A

We will first address the trial court's denial of defendant's request for substitute counsel. An indigent person entitled to appointed counsel is not entitled to choose his own lawyer. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *In re Conley*, 216 Mich App 41, 46; 549 NW2d 353 (1996). Inadequacy, lack of diligence, or a lack of interest on the part of the lawyer can establish good cause. *Ginther, supra* at 441-442. Genuine disagreement over the use of a substantial defense or of a fundamental trial tactic is adequate cause, but

a mere allegation that a defendant lacks confidence in his lawyer is not, particularly where the request is belated. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989).¹

We agree with the trial court that defendant failed to show good cause supporting his request for substitute counsel. The complaints that defendant expressed during the hearing did not constitute a genuine disagreement over the use of a substantial defense or of a fundamental trial tactic. Defendant did not claim that defense counsel was inadequate or not interested in his case. Rather, defense counsel appeared to be competent and was well prepared for trial. Moreover, it appears that defendant had an ulterior motive for seeking a substitution of his appointed counsel. According to defense counsel, defendant believed that his parole would be discharged if he continued to delay his trial. Finally, defendant did not raise his concerns regarding his appointed counsel until his letter of September 8, which was nine days before trial was scheduled to begin. Substitution of counsel at that late point in the proceedings would have caused substantial delay and inconvenience to the court. Under the circumstances, the trial court did not abuse its discretion by denying defendant's request for substitute counsel.

B

Next, we consider whether defendant was wrongfully denied his right of self-representation. A criminal defendant's right to represent himself is implicitly guaranteed by the state and federal constitutions. US Const, Am VI; Const 1963, art 1, § 13. The right is not absolute, however. A defendant's request to represent himself must be unequivocal. *Ahumada, supra* at 614. Further, the court must determine that the defendant not only asserted the right to self representation knowingly, intelligently and voluntarily but also will not unduly disrupt the court while acting as his own counsel. *Id.* at 614-615. As the court noted, defendant never sought to exercise his right of self-representation until the first day of trial. Allowing defendant to begin to represent himself at that point in the proceedings would have caused serious disruption and delay. Defendant's trial had already been adjourned at least once. Furthermore, the court was aware that defendant's request to represent himself may have been motivated by his desire to delay the trial. Finally, defendant's request to represent himself was not "unequivocal." Defendant only asked what would happen if he chose to represented himself. Defendant's inquiry does not constitute an unequivocal request for self representation; rather, it seems that he was "testing the waters" or exploring his options for alternative representation. Therefore, the trial court did not abuse its discretion by denying defendant's request to represent himself.

Affirmed.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

¹ *Tucker, supra*, was remanded, *sub nom*, in *People v Musick*, 437 Mich 867; 462 NW2d 586 (1990).