

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 27, 2012

v

FRANKLIN DELANO ROOSEVELT JOHNSON,
JR.,

No. 301326
Genesee Circuit Court
LC No. 09-024317-FH

Defendant-Appellant.

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Defendant Franklin Delano Roosevelt Johnson, Jr. appeals as of right his jury-trial convictions of first-degree home invasion, MCL 750.110a(2); unarmed robbery, MCL 750.530; and resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to the following concurrent sentences: 10 to 20 years' imprisonment for first-degree home invasion, 114 months to 20 years' imprisonment for unarmed robbery, and 23 months to 15 years' imprisonment for resisting and obstructing a police officer. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of a late-night home invasion and robbery that occurred at Ronald and Carolyn Sherwood's home on January 10, 2009. At about 1:00 a.m., Carolyn awoke to the sound of a "really loud . . . hard pounding" on her front door. She heard the voice of a man she did not know saying, "[L]et me in. Open the door. I want in." The man pounded on the door for three or four minutes. Carolyn then heard the man at her back door, followed by the sound of "the breaking of the . . . windows of the backdoor [sic]." Carolyn called 911. Carolyn unsuccessfully attempted to push the intruder out of the house. The intruder then robbed the Sherwoods and exited through the back door. The police arrived a few minutes later.

Flint Police Officers Rodney Hall and Gail Cotter responded to the 911 dispatch call at the Sherwoods' home. Officer Hall inspected the Sherwoods' broken back door and saw a single set of footprints, which he followed. The snow on the ground was fresh, so it was "good tracking." Officer Cotter followed Officer Hall in her police cruiser. The footprints led Officer Hall to the front porch of a house about 150 yards away from the Sherwoods' residence. Officers Hall and Cotter saw defendant on the front porch. Defendant matched the description of

the intruder that the 911 dispatcher provided. Defendant entered the house. Officer Cotter gained entry through the front door and began to search the house.

Sergeant Bill Meyer also responded to the 911 dispatch call. As he approached the area of the Sherwood's home, he observed Officer Hall near an intersection close by. He then spotted the cruiser driven by Officer Cotter and proceeded to follow her to the second house. He also saw defendant enter the second house. Officer Meyer parked his cruiser and proceeded toward the rear of the home. He came upon a detached garage where he saw defendant standing by the garage door. Sergeant Meyer instructed defendant to stop, but defendant began running. Sergeant Meyer gave chase and caught up to defendant. Defendant raised a clenched fist to Sergeant Meyer. Believing that defendant was about to strike him, Sergeant Meyer hit defendant in the mouth to subdue him and then arrested him. Sergeant Meyer obtained permission from the owner of the house to search the premises for Carolyn's stolen purse. Upon opening the garage door, he recovered a purse matching the description of Carolyn's purse; the purse contained her personal property, including her state identity card. When defendant was placed in the back of the squad car, Officer Hall saw that defendant's Nike Air Force shoes appeared to match the shoeprints in the snow that he had followed outside of the Sherwoods' home. Officer Hall recognized defendant because they went to the same high school.

At the police station, defendant was placed in the holding area along with a suspect from another crime: Eric Anderson. After a short time in the holding area, defendant was taken to the hospital to treat cuts on his hand. At the hospital, Officer Hall noticed that defendant was not wearing the Nike Air Force shoes that he was wearing in the squad car; a call back to the holding cell determined that defendant switched shoes with Anderson while they were in the holding area. At trial, Anderson confirmed that he had switched shoes with defendant while they were both in the holding area.

Keith Lamont, an investigator in the Trace Evidence Unit of the Michigan State Police Forensic Laboratory, tested physical evidence obtained at the Sherwoods' home. He analyzed two pairs of shoes: the Nike Air Force shoes that defendant was wearing at the time of his arrest and Anderson's shoes that defendant had put on in the holding area. Comparing the tread pattern of each shoe to the photographs of the shoeprints in the snow from the crime scene, Lamont concluded that Anderson's shoes could not have made the footprints in the snow but that the Nike Air Force shoes could have made the footprints.

Heather Johnson, a forensic practitioner with the Michigan State Police Forensic Science Division, tested a blood sample collected at the crime scene and concluded that the DNA did not match defendant; however, it did match Carolyn. Johnson also tested DNA in both pairs of shoes and concluded that defendant's DNA was in both pairs of shoes.

About three weeks after his arrest, defendant wrote a letter to the presiding judge requesting that he replace defendant's attorney, James Zimmer. Defendant wrote, through a surrogate, that "I am informing the court that I do have a reading and writing disability that needs attention and understanding from my attorney. This has not happened to date." At his arraignment, defendant complained about Zimmer's representation:

THE COURT: You also have the right to have an attorney, including if you're indigent and unable to hire your own lawyer, an attorney at public expense would be appointed, Mr. Zimmer, to represent you at all Court proceedings. Do you understand that?

THE DEFENDANT: Yes. But I - - yeah, I understand that. But I state this on the record that I'm not getting the right procedure help from this lawyer here.

THE COURT: Well, he can help you very much if you will listen to him. But he has to be listened to.

On March 5, 2009, Zimmer filed an answer to the prosecution's demand for mandatory disclosure and listed two alibi witnesses. The next day, the trial court ordered that Zimmer be replaced by Mark Latchana.

Shortly after he was appointed as defendant's counsel, Latchana met with defendant. Defendant indicated that he wanted the DNA results from the crime scene analyzed before trial. At a hearing on March 13, 2009, the trial judge told defendant that it might be "six to nine months" before those results would come back:

THE COURT: You'll be sitting in jail until we get the lab reports if that's what you want. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: You do want the DNA analyzed, is that correct?

THE DEFENDANT: I really would.

Later, the judge asked defendant if he understood that he was giving up his right to a speedy trial; defendant said he understood.

On June 8, 2009, defendant, though a surrogate, wrote a letter to the Chief Judge of the Seventh Judicial Circuit, requesting that Latchana be replaced as his counsel. Defendant wrote that Latchana did not visit him in jail and that he needed extra help with his representation because of his learning disabilities, which Latchana was not providing. Latchana then moved to withdraw as defendant's counsel. In his motion, Latchana wrote that he "maintained contact with Defendant during the course of these proceedings," that he had "filed court pleadings as requested by the Defendant during the course of these proceedings," but that, nonetheless, the attorney-client relationship had broken down. The court held a hearing on the motion, and Latchana explained that there was not much he could do with defendant's case until the DNA evidence was analyzed. The judge agreed, stating that they were "in a holding pattern" and that there was "nothing [they could] can do until the DNA comes back." The Court adjourned Latchana's motion to withdraw, and Latchana remained defendant's counsel.

Trial began on March 17, 2010. Before the jury's empanelment, defendant reiterated to the judge his complaints about Latchana's representation. The trial court permitted defendant to speak extensively about the nature of his concerns with defense counsel. Defendant told the

judge that Latchana had only met with him the day before trial, that he was left in the dark about the defense strategy Latchana intended to pursue, and that he was not made aware of the results of the DNA analysis. Following defendant's statements, the judge asked Latchana if he was ready to proceed with trial. Latchana indicated that he was, and the trial court stated, "Good. We're ready to go. This case has been delayed for a very long time on the Court's docket, due to the DNA procedures." Discussion was held about some of defendant's expressed concerns regarding the DNA results, which Latchana clarified, and the court turned to matters of trial presentation. Defendant interjected, apparently unclear about whether he was entitled to new counsel, and the trial court indicated, "You have a lawyer, well qualified. He's ready to go. Case ready." During the trial, Latchana did not call the alibi witnesses identified by Zimmer. The jury convicted defendant on the counts described above.

After defendant was convicted, the judge granted Latchana's motion to withdraw as counsel on November 5, 2010. On November 8, 2010, Latchana was replaced by Michael Ewing, defendant's third attorney. At sentencing, Ewing commented on "communication issues" that he had been having with defendant. The trial court sentenced defendant as set forth above, leading to the present appeal.

II. APPOINTMENT OF NEW COUNSEL

Defendant's sole issue on appeal is whether the trial court abused its discretion in denying his request for substitute counsel before trial. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Strickland*, 293 Mich App 393; ___ NW2d ___ (2011), slip op at 2, quoting *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.*, quoting *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

"An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Traylor*, 245 Mich App at 462. Indeed, "[a]ppointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.*

Defendant argues that the trial court abused its discretion in not appointing new counsel because Latchana failed to call the two alibi witnesses whom Zimmer listed in defendant's mandatory disclosure. However, the decision to call a witness is a question of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Moreover, disagreements about trial strategy or professional judgment are insufficient bases on which to appoint new counsel. *Strickland*, slip op at 3. Defendant's counsel could easily have made the calculation that pursuing an alibi defense would have been flimsy in light of the evidence the prosecution intended to present. Footprints in fresh snow leading out of the Sherwood's home led the officers who responded to the scene directly to defendant, who was only about 150 yards away from the Sherwood's home when he was apprehended. The footprints in the snow matched the shoes defendant was wearing when he was apprehended. And defendant's DNA matched DNA

taken from the shoes. Furthermore, the police recovered Carolyn's stolen purse in defendant's vicinity when he was apprehended. Officer Hall, one of the arresting officers, was able to positively identify defendant because the two had attended high school together. And defendant matched the description of the intruder provided by the 911 dispatcher. In light of this evidence, it was an eminently reasonable strategic decision for defendant's trial counsel not to call alibi witnesses, and no good cause existed on that basis to replace defendant's trial counsel.

Defendant also argues that one year elapsed between the time of his preliminary examination and the trial and that Latchana never visited him in prison during that time. Defendant argues that the trial court failed to investigate his concerns about Latchana's representation and should have appointed new counsel given his frustration with Latchana during the one-year period. However, the year-long delay was the result of defendant's own choice: defendant waived his speedy-trial rights because he wanted to await the results of DNA tests before proceeding to trial. Moreover, the trial court allowed defendant to address the court at length about Latchana's representation on the first day of trial. See *Strickland*, slip op at 2. Latchana emphasized to the court that he had maintained contact with defendant and filed motions at defendant's request, thus refuting the lack-of-contact claim. See *id.* at 2-3. Although the court was aware of defendant's dissatisfaction with his appointed counsel during the year that he awaited trial due to letters defendant sent to the trial judge, mere disagreements between an attorney and his client are insufficient to warrant reversal. See *id.* Similarly, a mere allegation that a defendant lacks confidence in or is unhappy with his or her counsel does not establish adequate cause. *Id.* at 2. Nothing in defendant's letters gave rise to good cause to replace his trial counsel, and the court did not abuse its discretion by failing to do so sua sponte. Moreover, defendant's dissatisfaction with Latchana was not unique to Latchana. Latchana was the second of three attorneys to represent defendant between his arrest and sentencing; defendant either had "communication issues" or expressed dissatisfaction with all three attorneys.

Defendant further argues that, given his limited mental capacity and his illiteracy, Latchana failed to adequately explain the charges against him. This argument is unsubstantiated by the record. Defendant does not argue to this Court that Latchana gave him something to read with no help. Nor does defendant claim that Latchana, upon request, failed to either read or explain something to him. Defendant simply asserts that (1) he is illiterate and has learning disabilities and that (2) he was unsatisfied with his counsel—without demonstrating a meaningful connection between the two. Furthermore, defendant stated on the record at his arraignment that he understood each of the charges against him.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher