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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1047**

State of Minnesota,
Respondent,

vs.

Laveal Oneal Allen,
Appellant.

**Filed May 16, 2011
Affirmed
Collins, Judge***

Dakota County District Court
File No. 19HA-CR-09-1380

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County
Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and
Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges his conviction of aiding and abetting first-degree aggravated robbery, arguing that the district court abused its discretion by denying his request for a continuance of the trial in order to retain counsel of his choice. We affirm.

DECISION

Appellant Laveal Oneal Allen argues that he was denied his choice of counsel, contending that this was a structural error requiring reversal of his conviction. On the morning of his jury trial, Allen was accompanied by his appointed public defender and a private attorney. The private attorney noted his appearance “on behalf of Mr. Allen’s family who tried to get me retained on contingency if the court would grant our motion today for the continuance of the trial.” The district court denied a continuance; thus, the issue presented on appeal is not whether Allen was denied his choice of counsel, but whether the district court abused its discretion in denying Allen a continuance of the trial. *See State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005) (stating that a district court’s ruling on a request for a continuance is reviewed for an abuse of discretion). In determining whether the district court acted within its discretion in denying a continuance, we look “to whether [Allen] was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial.” *State v. Vance*, 254 N.W.2d 353, 358-59 (Minn. 1977); *Courtney*, 696 N.W.2d at 81 (“A defendant must show that he was prejudiced to justify reversal.”).

Allen argues that he was prejudiced because previous continuances were not attributable to him. We disagree. Allen first appeared on March 25, 2009, when a public defender was appointed to represent him. The district court set a trial date for October 20, 2009. A settlement conference was scheduled for September 30, but Allen was granted a continuance because his attorney had recently been assigned the case after Allen's first appointed attorney left the public defender's office. At the rescheduled settlement conference on October 9, Allen's attorney requested a continuance in order to further investigate the matter, and the district court continued the trial to November 3. Although it was the prosecutor who moved for a continuance when the case was called for trial on November 3, Allen's assertion that this continuance was not attributable to him is negated by the following excerpt from the record:

THE COURT: This matter is set for jury trial today; and we had a number of conversations about this case this morning in chambers. . . . And, [defense counsel], you just filed an alibi defense, is that correct?

[DEFENSE COUNSEL]: That is correct, Your Honor. In fact, I faxed it to [prosecutor] last night well past normal business hours.

. . . .

[PROSECUTOR]: Yes, Your Honor. Because I've just received a - - the notice of the alibi witness this morning, the state is requesting a continuance. My principal investigator . . . is currently in Ireland and will be until Saturday; and in order to properly respond to this alibi witness, the state requests a continuance to investigate and disclose any other possible witnesses.

The district court continued the trial to January 4, 2010. Both the prosecutor and Allen's appointed public defender were then prepared for trial.

Allen argues that he was prejudiced because he was not permitted counsel of his choice. We disagree. The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1 § 6. “This right includes a fair opportunity to secure counsel of [one’s] own choice.” *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). But an indigent defendant does not have “the unbridled right to be represented by counsel of his own choosing.” *Id.* at 299, 176 N.W.2d at 264. Rather, an indigent defendant must accept the court’s capable appointee. *Id.*

The district court appointed a public defender to represent Allen at his initial appearance, after Allen asserted that he was unemployed, without assets, and unable to hire an attorney. There is no showing that those qualifying circumstances had changed as of the trial date; indeed, Allen was then incarcerated at MCF-St. Cloud stemming from an unrelated conviction. It is irrelevant that on the morning of trial Allen was accompanied by a private attorney arranged by Allen’s family, given that the attorney stated that his representation of Allen was *contingent* on the district court granting a continuance. The district court denied the motion; thus, the private attorney was never retained by or on behalf of Allen.

Furthermore, a defendant’s request for a substitution of counsel will be granted “only if exceptional circumstances exist and the demand is timely and reasonably made.” *Vance*, 254 N.W.2d at 358. Under Minnesota caselaw, “exceptional circumstances are those that affect a court-appointed attorney’s ability or competence to represent the client.” *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). A defendant has the burden

of showing the existence of exceptional circumstances. *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998).

Because multiple pretrial and trial continuances attributable to Allen had been granted, and it is undisputed that both the prosecutor and Allen's appointed public defender were ready for trial on January 4, 2010, the district court was well within its discretion to deny further continuance of the trial.

Affirmed.