DA 20-0173

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 145

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH PAUL DEWISE,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DC 18-39A
Honorable Holly B. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Joseph P. Howard, Joseph P. Howard P.C., Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Marty D. Lambert, Gallatin County Attorney, Eric N. Kitzmiller, Deputy County Attorney, Bozeman, Montana

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Submitted on Briefs: June 22, 2022

Decided: July 19, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 A jury in the Eighteenth Judicial District Court, Gallatin County, found Joseph Paul DeWise (DeWise) guilty of deliberate homicide, a felony, in violation of § 45-5-102, MCA, and attempted deliberate homicide, a felony, in violation of §§ 45-4-103 and 45-5-102, MCA. DeWise appeals the District Court's May 13, 2019, Order denying his motion for new counsel. We restate the issue on appeal as follows:

> *Whether the District Court abused its discretion when it denied DeWise's request to substitute counsel.*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The historical and factual background of DeWise's offenses—including his statements to law enforcement, the court, and his attorneys—provide context for DeWise's interactions with trial counsel and thus inform the issue presented.

1. DeWise's Offenses.

¶3 DeWise and his wife, Lauren, moved to Bozeman in 2016 from Florida. A year later, Lauren disclosed a lengthy history of physical abuse by DeWise to her friend, Audria Butler (Butler). Shortly thereafter, DeWise began contacting Butler through Facebook Messenger, alternating between asking Butler for help with his marriage and warning Butler to stay away from Lauren. Butler previously volunteered in a local domestic violence nonprofit, Haven, and believed Lauren was afraid to leave DeWise and did not know how to remove herself safely from a violent relationship.

¶4 In mid-November 2017, Lauren decided to move into Butler's Belgrade home with Butler and her roommate, Ashley VanHemert (VanHemert). On the night Lauren moved in, Butler said she noticed Lauren's car was gone and in its place was DeWise's truck parked in the driveway. Butler testified that DeWise sent over 30 text messages to Lauren that night, including "something to the extent of, 'Open the door. I've been beating on this door.'" After learning DeWise had visited their home, the women began locking their door, which Butler later testified they "hadn't [done] prior to that for the two years [she] lived there." Butler further testified that she borrowed a shotgun from a friend and kept it in her bedroom following DeWise's visit. During the two months Lauren lived in Butler's home, Butler also witnessed several "erratic, aggressive, threatening, and then apologetic" messages from DeWise to Lauren.

¶5 VanHemert had never met DeWise and did not know Lauren prior to Lauren moving into the home. VanHemert knew Lauren was seeking a divorce from DeWise "because he was emotionally and physically abusive." VanHemert testified to an incident in December 2017 where DeWise came to the home around midnight when they were asleep and began pounding on the door for approximately five to ten minutes. Despite VanHemert's entreaties, Lauren refused to call the police, and neither of them addressed or acknowledged DeWise. VanHemert also indicated DeWise would text Lauren constantly in the early part of January 2018.

¶6 On January 4, 2018, Lauren attended a birthday party for the couple's daughter at DeWise and Lauren's home. Following the party, Butler said Lauren told her she "felt like

she would probably not be able to go back to [her] house" due to DeWise's abusive and badgering behavior. On the morning of January 7, 2018, Butler returned home from a night away. She noticed her back door was broken and saw boot prints which were larger than what Lauren or VanHemert would have left. She testified her "first thought was [DeWise] was here."

¶7 Butler went upstairs to check on Lauren and VanHemert and discovered Lauren dead in her bedroom.[1] Butler went to VanHemert's room next, where she discovered a bloody VanHemert lying on the floor asking for help. Butler testified that she "screamed [and] stood there briefly trying to decide if [she] could help her, and [she] turned around, and . . . after seeing her alive[,] was concerned [DeWise] was still in [the] home. So [Butler] ran down the stairs and out the front door." She ran to a neighbor's house who called 911. Butler later testified that she automatically thought DeWise had broken into her home

> [b]ecause of all of the threatening things he said to Lauren. Because of all of the terror he had already caused her. Because of the aggressive things he had said to me. Because he had already been to my home, and frankly, the act of switching those vehicle[s] was very upsetting to me—the first day—and it's one of those culminations of all of the factors. I don't question it at all.

¶8 VanHemert survived and was able to testify at DeWise's trial. She explained that on January 6, 2018, she went out with her boyfriend and returned home between 11:30 p.m. and midnight and got ready for bed. Her next memory was waking up in the hospital

[1] The State introduced evidence at trial that Lauren sustained five gunshot wounds from small caliber bullets, resulting in her death.

after sustaining several gunshot wounds. VanHemert testified that she did not remember being shot, but knew she was "shot in the back of the head . . . in the right carotid artery, and . . . on [her] right side as well—like, [her] arm." VanHemert suffered a stroke because of the gunshot wounds. At the time of DeWise's trial, VanHemert was still suffering from the physical aftermath of her injuries.

¶9 At trial, DeWise's 15-year-old son and Lauren's stepson, J.D., testified he had observed several arguments between Lauren and DeWise and that he "was just trying to survive." J.D. testified that DeWise "had trackers in [Lauren's] vehicle because he was paranoid she was cheating on him all the time" and that he actually observed DeWise installing a tracker in her vehicle. J.D. would accompany DeWise when he confronted Lauren as a means of protecting his four-year-old sister. On the night of January 6, 2018, J.D. observed DeWise collecting several items in a plastic shopping bag, which J.D. assumed was work-related. DeWise told J.D. "to go get ready for something. He didn't specify what to get ready for." DeWise told J.D. to leave his phone at their home and to get into DeWise's vehicle. DeWise ignored J.D.'s attempts to ascertain their destination. J.D. testified to a "bad feeling" as they approached Lauren's home. J.D. explained that DeWise pulled out a pistol and told him, "As long as you do what I say, you'll be fine. You'll be okay." J.D. testified that DeWise put on a mask and gloves, gave J.D. a mask and gloves to wear, and made him walk in front of DeWise as they approached Lauren's home. DeWise kicked in the back door, pushed J.D. inside, and began searching rooms. J.D. observed DeWise enter one room, have a brief interaction with its occupant, and fire

several shots. When DeWise entered Lauren's room, J.D. "heard [her] gasp, and then [DeWise] shot her multiple times." DeWise and J.D. left the home and stopped at a Town Pump, where DeWise picked up a six-pack of beer.

¶10 After returning home, DeWise ordered J.D. to give him his boots, to put all his clothing in the washing machine, and to take a shower. DeWise left the home briefly, taking J.D.'s boots with him. Upon returning, DeWise told J.D. to dispose of some old smoke grenades and .22 caliber ammunition at the Bozeman Pond Park. It took J.D. several trips to dispose of the munitions. After returning from the park, J.D. testified that DeWise sat down on the couch and told J.D. not to incriminate him "because you don't want to find out the consequences of that," which J.D. took as an open-ended threat. DeWise instructed J.D. to say the family was home all evening watching television.

¶11 J.D.'s older sister, N.D., testified to an "unhealthy" relationship with DeWise because "he had complete control over [her] decisions and [her] opinions. He instilled fear into [her] to where he was always in control." N.D. described Lauren and DeWise's relationship as abusive and corroborated J.D.'s testimony regarding the tracking devices DeWise installed on Lauren's vehicle. She additionally described recordings DeWise made of N.D. to persuade Lauren to return. N.D. explained her reluctance to participate but clarified that DeWise "would tell [her] to speak about certain things, and the way he says it is you know how to answer him, and you know that . . . he wants you to say what he wants you to say."

¶12 N.D. testified that on the night of January 6th DeWise woke her up and told her that he had killed Lauren and needed her "cooperation, as in listening to what he had to say." N.D. further testified to receiving a jail phone call from DeWise following his arrest. During the phone call, DeWise asked N.D. to convince J.D. to turn himself in and confess to shooting Lauren and VanHemert because J.D. "would only be in jail for a little while, and then he would get back out and life would be normal."[2] N.D. explained that DeWise coached her on what to say and that she followed his instructions and did not immediately tell the truth to investigators out of fear.

¶13 DeWise testified at trial that he was sick on January 6th and spent most of the day resting in his recliner. He explained that the only time he left the house that day was to get beer from Town Pump around midnight. DeWise consistently maintained his innocence and reiterated his belief that he was falsely accused.

2. DeWise's Trial and Interactions with Counsel.

¶14 On February 2, 2018, the State charged DeWise with the deliberate homicide of Lauren and the attempted deliberate homicide of VanHemert. The Office of the State Public Defender (OPD) assigned Annie DeWolf (DeWolf) and Alex Jacobi (Jacobi) to DeWise's case. Trial was set for February 2019.

¶15 DeWise sent his first letter to the District Court on November 26, 2018. DeWise alleged that he only learned about his February 2019 trial date through a chance meeting

[2] The record indicates that this phone call resulted in a separate case charging DeWise with felony witness tampering.

and that DeWolf and Jacobi had failed to review discovery with him. He claimed he had "no effective legal counsel" and requested new counsel and a later trial date. The District Court issued an Order directing DeWise to complete OPD's grievance procedure first.

¶16 DeWise sent another letter to the District Court requesting new counsel on November 29, 2018. He alleged that DeWolf had repeatedly failed to meet with him and that DeWolf "was also against Supreme Court Justice Kavanaugh being nominated based on allegations and she clearly appears prejudiced against me as well." He further alleged that counsel "has contributed to me attempting suicide once" and that he was being "railroaded after being framed." DeWise included several calendar pages detailing the dates of his meetings with DeWolf and Jacobi. DeWise annotated one calendar page reflecting his belief that DeWolf and Jacobi were "obviously so biased against [him] they [could not] absorb straightforward facts. . . . They [thought he had] to be guilty just like they thought Judge Kavanaugh had to be guilty. They all should be fired." The District Court issued a second Order and noted that it would not review DeWise's request until OPD had the opportunity to consider his grievance and the appointment of alternate counsel.

¶17 On January 8, 2019, the District Court issued another Order following several ex parte letters from DeWise. In the first letter, DeWise alleged that he only learned about developments in his case through the news and asked the District Court to deny counsel's motion to suppress. DeWise's second letter alleged that he "still [did] not have access to an attorney" and asked the District Court to postpone his trial and grant him permission to

contact witnesses so he could respond regarding a motion in limine filed by counsel. DeWise's third letter again requested the District Court continue his February trial date. DeWise claimed that his "case remind[ed] [him] of the Satanic Ritual Abuse case from 1993 in Texas" because of the "overzealous prosecutor." He alleged that he had "been denied effective, available counsel," that he had not reviewed all available discovery, and that he was barred from speaking to witnesses. DeWise's fourth letter requested that "motions be frozen or suspended" until he had access to counsel. His fifth letter requested N.D. be removed from the State's list of witnesses so he could speak with her about several topics. The District Court ordered that DeWise's letters would not be accepted and directed DeWise to speak with counsel regarding their contents.

¶18 The District Court held a motions hearing on February 4, 2019. DeWise confirmed his request for new counsel and waived his right to a speedy trial.[3] DeWolf explained that DeWise's complaint with OPD had been denied and that DeWise's appeal of the denial was also denied. The District Court vacated DeWise's February trial date and requested

[3] DeWise later objected and argued that he had to choose between his request for new counsel and a speedy trial. His exchange with the District Court, however, proves otherwise:

> [District Court]: So are you, in fact, waiving your right to have a speedy trial in this case?
>
> [DeWise]: Yes, ma'am.
>
> [District Court]: And you understand that by doing that—I don't know—I think probably the next possible [trial] setting I would have is going to be November.
>
> [DeWise]: If that's what I have to do—I mean, if that's—that's just what I have to do.

DeWise file a motion under seal so the court could determine whether his complaints were substantial and warranted a hearing.

¶19 DeWise's motion describing his complaints against DeWolf and Jacobi largely recycled his previous complaints and correspondence to the District Court. He outlined the bases for the District Court to hold a hearing as follows:

> A. Lack of availability of counsel
> B. Failure to provide adversarial defense
> C. Lies, misinformation, and "gaslighting" of [DeWise] by Jacobi and DeWolf
> D. Insults directed at [DeWise] by Jacobi and hostility directed at [DeWise] by Jacobi and Eric the Investigator
> E. Retaliatory behavior after OPD complaint
> F. Threats of retaliatory behavior after OPD complaint if [DeWise] should continue seeking new counsel
> G. Breach of confidentiality by DeWolf and Jacobi and threat of further breach should [DeWise] continue to proceed with complaint
> H. Assistance to the State in prosecution of [DeWise] by DeWolf and Jacobi.

DeWolf and Jacobi filed a response to DeWise's complaints. They stated their wish to continue working with DeWise and addressed each of DeWise's complaints. DeWolf and Jacobi noted the voluminous discovery and that they had spent 187 hours working on DeWise's case and over 53 hours in person with DeWise.[4] Conversely, they noted that only two hours had been spent defending against DeWise's allegations. They denied "gaslighting" DeWise, argued that they provided candid advice regarding the options available to DeWise, and denied that any breakdown in communication occurred. DeWolf

[4] The record reflects that discovery continued as late as three days before the start of DeWise's December 2019 trial.

and Jacobi denied assisting the State in prosecuting DeWise and argued that they had always maintained DeWise's right to confidentiality and attorney-client privilege. Finally, counsel denied any conflict of interest existed and rebutted DeWise's claim of retaliatory action.

¶20 The District Court issued its Order regarding DeWise's motion for new counsel on May 13, 2019. The District Court comprehensively outlined DeWise's complaints and DeWolf and Jacobi's responses to the complaints. The District Court noted:

> [m]any of Defendant's complaints regarding counsel involve strategic and tactical decision-making or other such aspects of their representation. The gravamen of these complaints is Defendant's belief that counsel are providing ineffective assistance. Ineffective assistance of counsel complaints are not to be considered by the Court as a basis for granting a request for substitution of assigned counsel.

Regarding DeWise's other allegations, the District Court concluded that "nothing in Defendant's allegations indicates that these issues have resulted in a complete breakdown of communication between Defendant and counsel." Based on this Court's criteria set forth in *State v. Johnson*, 2019 MT 34, 394 Mont. 245, 435 P.3d 64, the District Court denied DeWise's motion and concluded that DeWise's complaints were not seemingly substantial and thus no further hearing was warranted.

¶21 Trial took place from December 2nd through 10th, 2019. The State presented several witnesses, including Butler, VanHemert, N.D., and J.D. DeWise presented his testimony and the testimony of a friend. The jury found DeWise guilty of both counts and that DeWise had used a firearm to commit the offenses.

¶22 At a sentencing hearing on February 4, 2020, the District Court heard testimony from VanHemert and her family. DeWise blamed the charges on his mental health and argued, "We're all victims. Whether I'm guilty or not." He maintained his innocence, claimed he "was lynched in the Montana tradition," and accused the District Court of buying "[his] attorneys pizza for lunch during the trial." The District Court imposed a 100-year sentence to the Montana State Prison for each count, to run consecutively, and imposed a 10-year consecutive weapon enhancement for each offense. DeWise was made ineligible for parole. DeWise appeals.

STANDARD OF REVIEW

¶23 A request to substitute counsel rests within the sound discretion of the district court and is reviewed for an abuse of that discretion. *Johnson*, ¶ 13. We likewise review for an abuse of discretion a district court's analysis of whether a defendant's claims are seemingly substantial and necessitate a further hearing. *State v. Schowengerdt*, 2018 MT 7, ¶ 16, 390 Mont. 123, 409 P.3d 38. A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Cheetham*, 2016 MT 151, ¶ 13, 384 Mont. 1, 373 P.3d 45.

DISCUSSION

¶24 *Whether the District Court abused its discretion when it denied DeWise's request to substitute counsel.*

¶25 Both the United States Constitution and the Montana Constitution guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Mont. Const. art II, § 24. The right to effective counsel does not, however, grant a

defendant the right to counsel of his or her choice. *Johnson*, ¶ 14. A defendant is "constitutionally entitled to counsel with whom he may mount an adequate defense." *Johnson*, ¶ 17 (citations omitted). However, a defendant may not demand dismissal or substitution of counsel simply because he or she lacks confidence in, or does not approve of, appointed counsel. *Cheetham*, ¶ 18.

¶26 In *Johnson*, we clarified that a trial court's inquiry into a defendant's substitution request should focus on whether the defendant presented material facts showing good cause for the substitution request as demonstrated by the following: "(1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant." *Johnson*, ¶ 20. When faced with a request to substitute counsel, the district court must first perform an adequate initial inquiry to determine whether the defendant's complaints are seemingly substantial. *State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371. The threshold determination on review is whether the district court made an adequate inquiry into the defendant's claim. *State v. Happel*, 2010 MT 200, ¶ 14, 357 Mont. 390, 240 P.3d 1016. A district court's initial inquiry may prove adequate where the court considered the defendant's complaints together with counsel's specific explanations addressing the complaints. *Gallagher*, ¶ 15 (citations omitted). Conversely, a district court's initial inquiry is inadequate if the court fails to conduct even a cursory inquiry into the defendant's complaints. *Gallagher*, ¶ 15 (citations omitted).

¶27 A hearing is only required if, upon completion of the initial inquiry, the district court determines the defendant's complaints are seemingly substantial. *Happel*, ¶ 14. District courts should consider the circumstances of a defendant's substitution motion, including the degree to which the conflict prevented the mounting of an adequate defense. *Johnson*, ¶ 23. A defendant must demonstrate more than the feeling that communication with counsel is unsatisfactory. *Johnson*, ¶ 23. Instead, a defendant must present material facts demonstrating a deterioration in the attorney-client relationship, to the point of irreconcilable conflict or breakdown in communication, that prevents the mounting of an adequate defense. *Johnson*, ¶ 23. A defendant's general ineffective assistance of counsel claim is insufficient to warrant substitution of counsel. *Johnson*, ¶ 19.

¶28 DeWise does not contest the adequacy of the District Court's initial inquiry. Rather, DeWise contends the District Court abused its discretion when it concluded that DeWise's complaints failed to satisfy the "seemingly substantial" threshold to warrant a hearing.

¶29 The District Court did not abuse its discretion when it determined DeWise failed to raise seemingly substantial complaints about DeWolf and Jacobi. DeWise's motion recited his correspondence to the District Court, wherein he first raised complaints relating to the effectiveness and strategic decisions of counsel. DeWise's ex parte letters did not allege any breakdown in communication or an irreconcilable conflict with DeWolf and Jacobi. Rather, his correspondence suggests DeWise questioned counsel's independent strategic assessments and believed his attorneys had not spent enough time with him personally or had not developed a satisfactory defense. In summary, DeWise's ex parte correspondence

reflects his general belief that counsel provided ineffective assistance. *See Johnson*, ¶ 19. These communications failed to demonstrate an actual conflict of interest, any irreconcilable conflict, or any breakdown in communication between DeWise and counsel. DeWise's motion set forth additional reasons for new counsel, including "gaslighting," DeWise's belief counsel was treating him in a hostile or retaliatory manner, and DeWise's allegation that DeWolf and Jacobi breached confidentiality. However, DeWise again relied upon his ex parte communications to support these allegations, which failed to demonstrate any substantiality to his complaints. DeWise's motion suggests a general dissatisfaction with counsel, an insufficient basis for a substitution request. *See Cheetham*, ¶ 18.

¶30 Conversely, DeWolf and Jacobi specifically addressed each of DeWise's complaints and denied any conflict existed or that communications had broken down. While DeWolf and Jacobi admitted they were unable to meet DeWise as often as they hoped, they nonetheless presented evidence of substantial work on DeWise's case. DeWolf and Jacobi noted their desire to continue communicating and working with DeWise and denied any hostile, insulting, or retaliatory behavior. DeWise's calendars indicate he continued meeting with members of his defense team even after his initial complaint to the District Court, and counsel's response indicated their willingness to continue working with DeWise through his trial. DeWolf and Jacobi satisfactorily established there was no good cause to substitute them. The District Court properly denied DeWise's substitution request.

CONCLUSION

¶31 The District Court made an adequate initial inquiry and did not abuse its discretion when it denied DeWise's substitution request because he failed to demonstrate any seemingly substantial complaints warranting a further hearing. DeWise's convictions are affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE