[Cite as *State v. Griesmar*, 2010-Ohio-824.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-061**
- vs -	:	
MARTEL F. GRIESMAR,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000506.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Craig T. Weintraub, 323 West Lakeside Avenue, #450, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Martel F. Griesmar, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court found Griesmar guilty of Burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(1); Burglary, a felony of the fourth degree, in violation of R.C. 2911.12(A)(4); Domestic Violence, a felony of the fourth degree, in violation of R.C. 2919.25(A); and Escape, a felony of the

second degree, in violation of R.C. 2921.34(A)(1); and sentenced him to a total of three years in prison.

{¶2} For the following reasons, we affirm the decision of the trial court.

{¶3} On August 1, 2008, Nicole Lainhart called 9-1-1 to report that Griesmar, Lainhart's ex-boyfriend and father of her minor child, had "broke in [her] house" and was "acting all crazy." Officers arrived at Lainhart's residence and Lainhart told the officers that Griesmar had kicked down the door and pushed her onto the floor, tearing her clothing. At the time of the incident, Lainhart's friend, Peter Gialamas was present in the residence with Lainhart. Gialamas was upstairs when Griesmar entered the house and he claimed that, although he did not see Griesmar break down the door, he heard the door being "forced open."

{¶4} While Lainhart was talking to the police, Griesmar called 9-1-1. Griesmar asked the dispatcher whether Lainhart had called 9-1-1. He stated that he wanted to file a report against Lainhart and an unsuccessful attempt was made to locate him. Griesmar later voluntarily appeared at the police station. He told officers that he no longer lived in the residence with Lainhart and that he had gone there to speak with her about her parenting skills. He stated that Lainhart had let him in the residence and an argument ensured. He claimed she had punched him near his left eyebrow and used a knife to jab him in the chest multiple times. Griesmar additionally reported that Lainhart had pushed him through the front door, causing the damage, and had thrown a wine bottle at him while he was leaving.

{¶5} Griesmar was placed under arrest and charged with Burglary, Domestic Violence, and Vandalism. He was subsequently handcuffed and taken to a patrol car.

As the officer unlocked the car door, Griesmar ran away and was eventually subdued and charged with Escape.

{¶6} On December 19, 2008, Griesmar was indicted by a Lake County Grand Jury on one count of Aggravated Burglary, two counts of Burglary, one count of Domestic Violence, and one count of Escape. The matter was set for jury trial on March 24, 2009.

{¶7} On March 17, 2009, Griesmar filed a Motion to Continue, in which he stated that he "is extremely dissatisfied with current [appointed] counsel and feels very uncomfortable proceeding to trial without an attorney of his choosing." Furthermore, he "has secured the necessary funds with which to hire [a private] attorney" and "has also spoken with an attorney potentially willing to represent him so long as a reasonable continuance can be secured."

{¶8} On March, 23, 2009, the trial court denied Griesmar's motion, finding that "this case has been pending since August 2, 2008, the date on which the Defendant was arrested, and that the trial date of March 24, 2009 was set over two months ago on January 11, 2009. Thus, the Defendant has had ample time to retain an attorney. The Court will not delay this matter any longer because Defendant waited until the eleventh hour to allegedly obtain private counsel."

{¶9} On March 24, 2009, Lainhart failed to appear for the trial as scheduled and a bench warrant was issued for her arrest. The warrant was withdrawn the next day when Lainhart appeared for trial.

{¶10} The jury found Griesmar not guilty of Aggravated Burglary and guilty of Burglary, a felony of the second degree, Burglary, a felony of the fourth degree, Domestic Violence, a felony of the fourth degree, and Escape, a felony of the second

degree. Griesmar was later sentenced to serve a stated prison term of three years for the Burglary charges, which were merged together, one year for the Domestic Violence charge and three years for the Escape charge, both to run concurrent with the Burglary charge term, for a total of three years in prison.

{¶11} Griesmar timely appeals and raises the following assignments of error:

{¶12} "[1.] The trial court's denial of appellant's request for a continuance to retain counsel prior to commencement of trial was a denial of his sixth amendment right and an abuse of discretion."

{¶13} "[2.] Appellant was denied his right to effective representation of counsel as protected by the sixth amendment of the United States Constitution and Article 1, Section 10 of the Ohio Constitution.

{¶14} "[3.] Appellant was denied a fair trial and the court abused it's [sic] discretion when it permitted the state to cross-examine their witness with a prior out of court statement without proof of surprise and affirmative damage.

{¶15} "[4.] Appellant was denied due process because the evidence was legally insufficient and was against the manifest weight."

{¶16} In his first assignment of error, Griesmar argues that "he was no longer indigent since he just received his tax refund and had the ability to hire counsel." Accordingly, he claims that the "trial court's decision to not grant [him] a brief continuance to retain private counsel of his choice" was an abuse of discretion.

{¶17} "The Supreme Court of Ohio has stated, 'the grant or denial of a continuance is a matter [which] is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.' An abuse of discretion connotes more than simply an

error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." *State v. Mays*, 11th Dist. No. 2001-T-0071, 2003-Ohio-63, at ¶14 (citations omitted).

{¶18} Whether the trial court abused its discretion by denying a motion to continue depends upon the reasons for the requested continuance at the time the request was made. *State v. Ngiraingas*, 11th Dist. No. 2004-A-0034, 2005-Ohio-7058, at ¶32 citing *State v. Powell* (1990), 49 Ohio St.3d 255, 259. "On appeal, 'the reviewing court must weigh potential prejudice against 'a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice. 'Relevant factors include 'the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or *** dilatory, purposeful, or contrived; [and] whether the defendant contributed to the circumstance which gives rise to the request[.]'" Id. (citations omitted).

{¶19} In *Mays*, 2003-Ohio-63, at ¶13, "[a]t the commencement of the trial, appellant moved for a continuance because there were irreconcilable differences between [his appointed counsel] and appellant on the day of the trial and because appellant's family had come forth stating that they wished to contribute money so appellant could obtain new counsel." This court denied Mays' argument, reasoning that the trial court was "'never given any indication that there was any problem or concern' regarding appellant and his relationship with [his counsel]", "no other attorney appeared at the outset of the trial whom was ostensibly retained by appellant's family", his attorney "indicated that he was prepared to try the case, and appellant did not indicate a time frame with respect to his request for a continuance." Id. at ¶16 and ¶17.

{¶20} In *Ngiraingas*, 2005-Ohio-7058, at ¶35, this court held that the "appellant had ample time to request a continuance prior to trial. The record demonstrates that appellant was appointed counsel more than three months before the jury trial commenced. Absent from the record is any explanation made by appellant justifying his eleventh hour request for a continuance. Also, appellant failed to provide the trial court with an adequate reason why his appointed counsel should be replaced. Therefore, the request could be seen as a delay tactic." When a defendant's request for new counsel is made for purposes of delay or made in bad faith, the court's interest in the orderly and efficient administration of justice outweighs the defendant's right to counsel of his choice. *State v. Haberek* (1988), 47 Ohio App.3d 35, 41.

{¶21} Prior to the start of Griesmar's jury trial, the court, counsel, and Griesmar had a discussion on the record regarding his Motion to Continue. Griesmar told the court he had a conflict with his attorney regarding a plea bargain. In addition, Griesmar stated that he didn't "feel [his appointed attorney] is going to represent [him] to [his] standard." Furthermore, he "[j]ust got [his] refund from [his] tax return" and "a couple people [were going to] help [him] out" in retaining private counsel.

{¶22} "While the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate *** rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *State v. Fentress*, 5th Dist. No. 2001CA00155, 2002-Ohio-2477, at ¶23, quoting *State v. Jones* (2001), 91 Ohio St.3d. 335, 342, quoting *Wheat v. United States* (1988), 486 U.S. 153, 159. In order to justify the discharge of court-appointed counsel, a defendant must show "good cause, such as a conflict of interest, a complete breakdown in communication, or an

irreconcilable conflict which leads to an apparently unjust result." *State v. Blankenship* (1995), 102 Ohio App.3d 534, 558, citing *State v. Pruitt* (1984), 18 Ohio App.3d 50, 57.

{¶23} Similar to *Ngiraingas* and *Mays*, Griesmar had ample time to request a continuance and/or obtain private counsel of his choosing. Prior to the motion, Griesmar never expressed any dissatisfaction with his court appointed attorney. Griesmar failed to provide the court with a time frame for hiring new counsel. Additionally, a private attorney never entered a notice of appearance. Moreover, Griesmar failed to provide the trial court with an adequate reason why his appointed counsel should be replaced. Accordingly, the trial court did not abuse its discretion in denying Griesmar's request for a continuance.

{¶24} Griesmar's first assignment of error is without merit.

{¶25} In his second assignment of error, Griesmar asserts that his trial counsel was ineffective by failing to file a Motion to Suppress his statements, by not requesting a mistrial, and lastly, by not requesting a limiting jury instruction about the victim's prior inconsistent statement.

{¶26} The Ohio Supreme Court has held that "[c]ounsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668. Moreover, "'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, *** that course should be followed.'" Id. at 143, quoting

Strickland, 466 U.S. at 697. To establish prejudice, a defendant must show "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at paragraph three of the syllabus.

{¶27} Griesmar first argues that his counsel was ineffective for failing to file a Motion to Suppress. Griesmar reasons that the officer that met with him, Officer Baldrey, "attempted to portray the meeting with [Griesmar] as a witness interview however Baldrey's intent was to cover 'the basic elements of the crime' that Lainhart alleged." Additionally, Griesmar alleges that he was "in custody and should have received Miranda warnings from Baldrey despite any portrayal that [he] was a witness and was free to leave." Therefore, he argues that his counsel "was obligated to file a motion to suppress."

{¶28} The State argues that Griesmar's argument is "misleading and speculative because there is nothing in the record regarding whether or not *Miranda* warnings were or were not given." We agree. "This court has consistently held that 'an appellate court's review is strictly limited to the record that was before the trial court, no more and no less.'" *State v. Moore*, 11th Dist. No. 2007-L-196, 2008-Ohio-5941, at ¶30 (citations omitted).

{¶29} Griesmar's typed statement to the police reflected the voluntary nature of his meeting with Baldrey; "I have arrived at the station on my own to give my side of the story. I understand that I am free to leave at any time." Griesmar's 9-1-1 call indicated that he wanted to "make a police report" and was ultimately going to go to the Painesville Police department. Consequently, his counsel was not ineffective for failing to file a Motion to Suppress.

{¶30} Griesmar next argues that his counsel was ineffective for failing to request a mistrial after Lainhart testified that Griesmar was "a convicted felon."

{¶31} At trial, Lainhart stated that Griesmar was "never on [her] lease because he is a convicted felon." Griesmar's counsel objected and the judge subsequently sustained the objection and told the jury that they were "instructed to disregard that comment." Moreover, Griesmar's counsel had stipulated to Griesmar's prior felony conviction for Domestic Violence.

{¶32} "The court's actions were sufficient to render the purported error harmless. [*State* v.] *Garner*, 74 Ohio St.3d [49], 59 [1995-Ohio-168], ("a jury is presumed to follow the instructions, including curative instructions, given it by a trial judge"). *State v. Dalton*, 11th Dist. No. 2008-P-0097, 2009-Ohio-3149, at ¶55.

{¶33} Finally, Griesmar contends that his counsel was ineffective for not requesting a limited instruction regarding Lainhart's prior inconsistent statement. Griesmar contends that "[t]he absence of such an instruction created further prejudice as it allowed the jury to consider her prior statements as substantive evidence when determining [Griesmar's] guilt."

{¶34} Griesmar is essentially complaining about his counsel's trial strategy. Counsel may have declined to request a limiting instruction regarding Lainhart's statement out of concern that, if such an instruction were given, the statement would be once again called to the jury's attention. "Strategy and tactical decisions exercised by defense 'well within the range of professionally reasonable judgment' need not be analyzed by a reviewing court." *State v. Mull*, 11th Dist. No. 2008-L-128, 2009-Ohio-3654, at ¶38, quoting *State v. Walker* (1993), 90 Ohio App.3d 352, 359 (citation omitted).

{¶35} Even assuming that counsel's failure to request a limiting instruction was deficient for purposes of an ineffective assistance of counsel claim, we find that Griesmar has not demonstrated a reasonable probability that, but for that deficient failure, he would have been acquitted of the charges. The state presented considerable evidence of Griesmar's guilt. The reliability of the verdict is not shaken by the absence of a limiting instruction. Griesmar was neither prejudiced nor prevented from having a fair trial.

{¶36} Griesmar's second assignment of error is without merit.

{¶37} Griesmar next asserts that the trial court improperly declared Lainhart a hostile witness and abused its discretion in allowing the State to impeach her with a prior inconsistent statement. Griesmar claims that the state lacked surprise and affirmative damages. Griesmar reasons that the State "was on notice of the nature of Lainhart's demeanor. As such, the State was unable to claim surprise." We disagree.

{¶38} "A hostile witness is a witness who surprises the calling party by turning against him." *State v. Fields*, 8th Dist. No. 88916, 2007-Ohio-5060, at ¶14. "A witness is properly considered 'hostile' when that witness 'demonstrates hostility during his examination by changing his testimony significantly from that which counsel had good reason to expect.'" *State v. McClean*, 11th Dist. No. 98-L-239, 2000 Ohio App. LEXIS 2664, at *5 (citation omitted).

{¶39} "It is within the broad discretion of a trial court to determine whether a party is taken by surprise by the testimony of a witness called by that party, so as to permit that party to impeach its own witness." *State v. Dearmond*, 179 Ohio App.3d 63, 2008-Ohio-5519, at ¶27 (citations omitted). "Ordinarily, 'surprise,' under Evid.R. 607(A), can be shown if the testimony is materially inconsistent with a prior written

statement and counsel did not have reason to believe that the witness would recant. *** And 'affirmative damage' is established when the witness testifies to facts which contradict, deny, or harm the trial position of the party calling the witness." Id. at ¶28 (citation omitted).

{¶40} The record before us reveals surprise and affirmative damage. The State expected Lainhart to testify, consistent with her prior statements to police and consistent with the theory of the State's case, that Griesmar broke into her house and pushed her to the ground. Although the State expected her to be uncooperative, as evinced by the State's opening statement, the State did not expect her to testify in a manner wholly inconsistent with her testimony to the Grand Jury, statements to the State, and statements to the police. However, Lainhart unexpectedly testified in a manner that was contradictory to the version of events she provided in her previous statements.

{¶41} The State's counsel testified that Lainhart "is answering in a way that is a surprise to me. Not consistent with the statement to the police, inconsistent with her statement to me." The court found that Lainhart was "being evasive with her responses. Even more so, she is certainly adding unsolicited responses and explanations to answers that are not being asked by the prosecutor. *** While she may have been uncooperative, if you will, up to this point with regard to having contact, from what's been represented here, she has never in the past, *** has ever said anything differently from what she told the prosecutor, what she told the police [and] *** testified to the Grand Jury." Accordingly, it was not an abuse of discretion to declare Lainhart a hostile witness.

{¶42} Additionally, Lainhart was properly impeached with her prior inconsistent statement. "[T]he credibility of a witness *** may be attacked by the party calling the

witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." Evid.R. 607(A).

{¶43} "[T]he Supreme Court has said that 'when taken by surprise by the adverse testimony of its own witness, the state may interrogate such witness concerning his prior inconsistent *** statement *** for the purpose of refreshing the recollection of the witness, but not for the purpose of offering substantive evidence against the accused." *Dearmond*, 2008-Ohio-5519, at ¶26 (citations omitted). The record reveals that Lainhart's written statement was used only for the purposes of impeachment; in fact, the statement was not admitted into evidence.

{¶44} Griesmar's third assignment of error is without merit.

{¶45} In his final assignment of error, Griesmar contends that his convictions for Burglary and Domestic Violence were against the manifest weight and sufficiency of the evidence.

{¶46} The analyses for considering the weight and sufficiency of the evidence are related, but distinct. The Ohio Rules of Criminal Procedure provide that a defendant may move the trial court for a judgment of acquittal "if the evidence is insufficient to sustain a conviction." Crim.R. 29(A). "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e. "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black's Law Dictionary (6 Ed.1990) 1433. Essentially, "sufficiency is a test of adequacy," that challenges whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. Id.

{¶47} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶48} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the greater amount of credible evidence." *Thompkins*, 78 Ohio St.3d at 387 (citation omitted) (emphasis omitted). Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the verdict as a matter of law, *** weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" Id.

{¶49} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387 (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether "in resolving conflicts in the evidence, the jury clearly lost its way and created such a

manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. (citation omitted).

{¶50} It is well-settled that "[d]irect evidence, circumstantial evidence, or both may establish an element of the charged offense." *State v. Griffin*, 1st Dist. No. C-020084, 2003-Ohio-3196, at ¶44, citing *State v. Durr* (1991), 58 Ohio St.3d 86, 92.

{¶51} In order for a jury to find Griesmar guilty on a charge of Burglary, in violation of R.C. 2911.12(A)(1) the State must prove, beyond a reasonable doubt, that Griesmar did "by force, stealth, or deception *** [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense."

{¶52} As to Griesmar's Burglary convictions, the jury was presented with evidence that Griesmar was no longer living with Lainhart. Namely, Griesmar's name was not on the lease and testimony from responding officers indicated both Lainhart and Griesmar stated they were no longer living with each other. Officers Baldrey and Soto testified that Lainhart told them Griesmar had kicked down the door. Photographic evidence depicted Lainhart's door with significant damage to the frame. The 9-1-1 call placed by Lainhart stated that Griesmar broke into her house and had kicked down the door. Additional testimony from Lainhart's friend, Gialamas, indicated that he heard Lainhart's door being "forced open" and identified Griesmar as the intruder.

{¶53} In order for a jury to find Griesmar guilty on a charge of Domestic Violence, in violation of R.C. 2919.25(A), the State must prove, beyond a reasonable doubt, that Griesmar did "knowingly cause or attempt to cause physical harm to a family or household member." "R.C. 2919.25 does not require the state to prove that a victim has sustained actual injury since a defendant can be convicted of domestic violence for merely attempting to cause physical harm to a family member." *State v. Summers*, 11th Dist. No. 2002-A-0074, 2003-Ohio-5866, at ¶31.

{¶54} As to Griesmar's Domestic Violence conviction, Lainhart indicated in her Domestic Violence Complaint Form that Griesmar had thrown her to the ground and ripped her clothing. The responding officer testified that Lainhart had told him "that the father of her child, Mr. Griesmar, came into the apartment and pushed her down while she was trying to dial 9-1-1." The 9-1-1 tape corroborates the testimony of the officer; on the tape, Lainhart can be heard yelling "get away from me" followed by commotion and the abrupt ending of the call.

{¶55} Although Lainhart's testimony was contrary to the testimony of the officers and the 9-1-1 recording, "[i]t is well-settled that when assessing the credibility of witnesses, '[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.'" *State v. McKinney*, 11th Dist. No. 2006-L-169, 2007-Ohio-3389, at ¶49 (citations omitted). "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." Id., citing *Warren v. Simpson*, 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at *8. "If the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a

manner consistent with the verdict." *State v. Grayson*, 11th Dist. No. 2006-L-153, 2007-Ohio-1772, at ¶31 (citation omitted).

{¶56} After careful review of the entire record, weighing the evidence and all reasonable inferences and considering the credibility of the witnesses, this court cannot conclude that the trial court clearly lost its way when it found Griesmar guilty of Burglary and Domestic Violence. The jury was in the best position to evaluate the credibility of witnesses and give proper weight to their testimony. See *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus. Based upon the aforementioned testimony, we cannot conclude that the trial court created a manifest miscarriage of justice when it convicted Griesmar of Burglary and Domestic Violence. Additionally, after viewing the evidence in a light most favorable to Griesmar, there was sufficient evidence to convict Griesmar of Burglary and Domestic Violence.

{¶57} Griesmar's fourth assignment of error is without merit.

{¶58} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, finding Griesmar guilty of Burglary, Domestic Violence, and Escape and sentencing him to a total prison term of three years, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶59} I respectfully dissent regarding the majority's position with respect to the first assignment of error.

{¶60} Prior to beginning the trial, the court allowed the following colloquy in regard to appellant's motion to obtain counsel.

{¶61} "THE DEFENDANT: Oh, yes, Your Honor. I don't feel comfortable with Mr. Schwartz representing me in the case. We have had very many conflicts with him telling me one thing, the prosecutor one thing. Just conflict of interest.

{¶62} "I finally have money to get a private attorney. I would like to hire a private attorney to represent me. I don't feel like he is representing me the best that he can or he should.

{¶63} "THE COURT: Why is that?

{¶64} "THE DEFENDANT: Well, he told the prosecutor that I wanted to plea bargain deal. When he came back, told me that's the deal that the prosecutor offered me. So he was kind of conflicting; saying I wanted one thing but he told me the prosecutor, that's the deal that came from the prosecutor.

{¶65} "THE COURT: I am not following you. I am sorry.

{¶66} "THE DEFENDANT: Well, the prosecutor – he came back and told me he wanted to plea out to two felony fours and a felony five.

{¶67} "THE COURT: 'He' meaning who? The prosecutor or your attorney?

{¶68} "THE DEFENDANT: No, Aaron. Then he told the prosecutor that's the deal I wanted. That's not the deal I said to Aaron. He told the prosecutor that's the deal I wanted too. He was –

{¶69} "THE COURT: You are saying that he told the prosecutor that you were interested in pleading to –

{¶70} "THE DEFENDANT: Yes.

{¶71} "THE COURT: -- two F-4'S and an F-5?

{¶72} "THE DEFENDANT: Yes.

{¶73} "THE COURT: That's not correct?

{¶74} "THE DEFENDANT: That's not correct, yes. I finally got my income tax check and –

{¶75} "THE COURT: Did you tell them that, Mr. Schwartz, that you were informed by Mr. Griesmar?

{¶76} "MR. SCHWARTZ: At the pretrial we had probably six weeks ago, it was my understanding at the time Mr. Griesmar was interested in pleading to something so long as the escape charge was reduced to a felony five. That's what I told Mr. Condon. Mr. Condon did make that offer. I relayed that offer to Martel. He declined to take that offer.

{¶77} "THE COURT: Okay. So what's the conflict then? You are saying that wasn't accurate?

{¶78} "THE DEFENDANT: Yes. There has been other things.

{¶79} "THE COURT: That weren't accurate? What is that?

{¶80} "THE DEFENDANT: There has been other things. Just I don't feel he is going to represent me to my standard.

{¶81} "THE COURT: The problem is, Mr. Griesmar, we are scheduled for trial today. This has been pending since August, this case.

{¶82} "THE DEFENDANT: I know. I just got my income tax check back, just now got help with money to get a private attorney. I don't want to prolong this any longer.

{¶83} "THE COURT: Not prolonging any longer, been pending since August. This trial has been set on this day since January 11th. Set two and a half months ago for this day. You have known from that date, from that time, this has been set for this time. I am not going to at the last second let someone come in and prolong the trial even longer claiming to get a new lawyer at this point.

{¶84} "THE DEFENDANT: Just got my refund from my tax return, couple people help me out. Just happened. Last week I hired an attorney. Then he talked to the prosecutor and I don't know if he talked to you or somebody else. Then he said he couldn't take my case on such short notice unless I get a week or two extension so he can build up evidence and help me in trial.

{¶85} "THE COURT: Well anything else you want to put on the record?

{¶86} "I can assure you of this: Mr. Schwartz and Ms. Grieshammer are very good, competent lawyers. They're going to represent your interest to the best of their abilities. Their abilities are very good. You may disagree with that. I can tell you they are not going to shortchange you because you perceive some type of a conflict.

{¶87} "THE DEFENDANT: I don't feel comfortable with him representing me.

{¶88} "THE COURT: Well, you could have – I don't know what to tell you. You have a right to a lawyer. You could get a lawyer. You could have another lawyer represent you at this trial, represent yourself if you want to proceed with that. We are going to trial today. Mr. Schwartz, Mrs. Grieshammer have been appointed to represent you. Certainly don't have the right to have an attorney of your own choosing appointed.

If you wanted to retain a lawyer, you could of have done that. As I indicated, this has been set for eight months or pending eight months. The trial has been set for two and a half months.

{¶89} "THE DEFENDANT: Yes, but –

{¶90} "THE COURT: We have a jury here. Not going to delay the matter any longer."

{¶91} It is clear the trial court told appellant one thing, then incorrectly misstated the law.

{¶92} The trial court abused its discretion by denying appellant's request for a continuance to retain counsel prior to the commencement of trial. The Sixth Amendment provides, in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense." The Sixth Amendment includes the right to counsel of choice. See *United States v. Gonzalez-Lopez*, (2006) 548 U.S. 140, 144-145. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.

{¶93} This writer recognizes that a defendant's fundamental Sixth Amendment right to counsel must be weighed against the need for efficient and effective administration of criminal justice. However, the trial court's deprivation in the instant matter of appellant's choice of counsel entitles him to a reversal of his conviction. See *Gonzalez-Lopez*, supra, at 144-145.

{¶94} Accordingly, I dissent.