[Cite as *State v. Chatmon*, 2016-Ohio-1201.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
GLEN CHATMON	:	Case No. 15 CAA 09 0072
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 15-CR-I-02-0083
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 21, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAHAN S. KARAMALI 140 North Sandusky Street Delaware, OH 43015	DAVID H. BIRCH 2 West Winter Delaware, OH 43015

Farmer, P.J.

{¶1} On February 20, 2015, the Delaware County Grand Jury indicted appellant, Glen Chatmon, on one count of theft in violation of R.C. 2913.02. Said charge arose from a shoplifting incident at Saks Fifth Avenue.

{¶2} On March 19, 2015, the trial court appointed a public defender, Attorney Christopher Soon, to represent appellant. A jury trial was scheduled for September 3, 2015. On September 2, 2015, Attorney Soon filed a motion to withdraw as counsel. The matter was heard during a status conference held on the same day. By judgment entry filed same date, the trial court denied the motion.

{¶3} A jury trial commenced on September 3, 2015. The jury found appellant guilty as charged. By judgment entry filed September 4, 2015, the trial court sentenced appellant to eight months in prison, to be served consecutively to a prison sentence appellant had received in Lake County.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO HEAR AND APPOINT APPELLANT DIFFERENT COUNSEL."

II

{¶6} "THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶7} Appellant claims the trial court erred in denying him new counsel and in failing to engage him in a separate colloquy regarding his dissatisfaction with his court appointed counsel. Appellant claims "structural error." We disagree.

{¶8} As stated by the Supreme Court of Ohio in *State v. Jones,* 91 Ohio St.3d 335, 343, 2001-Ohio-57:

> Factors to consider in deciding whether a trial court erred in denying a defendant's motion to substitute counsel include "the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense." *United States v. Jennings* (C.A.6, 1996), 83 F.3d 145, 148. In addition, courts should "balanc[e]***the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice." *Id.* Decisions relating to the substitution of counsel are within the sound discretion of the trial court. *Wheat [v. United States],* 486 U.S. at 164, 108 S.Ct. at 1700, 100 L.Ed.2d at 152.

{¶9} Appellant argues it was "structural error" to deny him new counsel. In support of his arguments, appellant points this court to Justice Scalia's opinion in *United States vs. Gonzalez-Lopez,* 548 U.S. 140, 126 S.Ct. 2557 (2006). We find *Gonzalez-*

Lopez to be a strictly defined discussion on a defendant's right to employ counsel of his/her own choosing.

{¶10} In *Gonzalez-Lopez,* the defendant was denied his personally chosen counsel that he had employed after the District Court denied said counsel's admission pro hac vice. The Government conceded the error, but argued "prejudice" under the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), should be applied in determining whether the defendant was denied a fair trial. Based upon the circumstances of the case, the *Gonzalez-Lopez* court classified the error as structural error, thereby negating the "harmless error" analysis generally applied (147-148):

> The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.***It has been regarded as the root meaning of the constitutional guarantee. See *Wheat [v. United States],* 486 U.S., at 159, 108 S.Ct. 1692; *Andersen v. Treat,* 172 U.S. 24, 19 S.Ct. 67, 43 L.Ed. 351 (1898). See generally W. Beaney, The Right to Counsel in American Courts 18-24, 27-33 (1955). Cf. *Powell, supra,* at 53, 53 S.Ct. 55. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. 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.

> To argue otherwise is to confuse the right to counsel of choice-which is the right to a particular lawyer regardless of comparative effectiveness-with the right to effective counsel-which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

{¶11} We find *Gonzalez-Lopez* to be a narrowly applied case-specific standard based upon the caveat included in Justice Scalia's opinion at 151-152:

> Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, *post,* at 2567, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. See *Wheat,* 486 U.S., at 159, 108 S.Ct. 1692; *Caplin & Drysdale,* 491 U.S., at 624, 626, 109 S.Ct. 2646. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See *Wheat,* 486 U.S., at 159–160, 108 S.Ct. 1692. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id.,* at 163–164, 108 S.Ct. 1692, and against the demands of its calendar, *Morris v. Slappy,* 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within

> the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat, supra,* at 160, 108 S.Ct. 1692. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel. However broad a court's discretion may be, the Government has conceded that the District Court here erred when it denied respondent his choice of counsel. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis.

{¶12} We conclude the error argued in this case is subject to the "harmless error" standard and the second prong of *Strickland* (counsel's deficient performance prejudiced the defense so as to deprive the defendant of a fair trial) because defense counsel herein was court appointed, not counsel of personal choice or preference and personally employed by appellant.

{¶13} Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶14} By judgment entry filed March 19, 2015, the trial court appointed public defender Christopher Soon to represent appellant. A jury trial was set for September 3,

2015. On September 2, 2015, Attorney Soon filed a motion to withdraw, setting forth his reasons as follows:

> As a result of a miscommunication concerning the possible resolution of this case by a plea agreement, Mr. Chatmon has lost confidence in present counsel's ability to fairly and adequately represent him herein. Consequently, at Defendant's request, the undersigned asks he be given leave to withdraw personally, and that another attorney be appointed to represent Mr. Chatmon through the Delaware County Public Defender's Office.

{¶15} During a status conference on September 2, 2015, Attorney Soon explained the conflict as follows (September 2, 2015 T. at 4-5):

> I went to the jail, spoke with Mr. Chatmon yesterday. Prior to that Mr. Penkal and I had had some communication, either I misunderstood what he said, misheard him, or perhaps he misspoke, but frankly I think I misunderstood what he said. Based on our prior conversations, went in, spoke with Mr. Chatmon, thought we may have had an understanding. Came out and immediately called Mr. Penkal to confirm that we were in agreement. Discovered there was no agreement in what was in his mind and what was in my mind and speaking with Mr. Chatmon was completely

different and it hinged on whether concurrent or consecutive would be a likely outcome for any kind of agreed sentence on the case.

As a consequence of that, Mr. Chatmon indicates to me he no longer has any confidence in my ability to represent him. I do not take that as a personal slight. I am prepared to represent him and proceed to trial tomorrow if the Court would feel that was necessary and appropriate. However, whenever a situation like this arises and someone requests I be relieved and replaced by a new appointed counsel, I never oppose that. I think it's in the Court's interest and significantly in favor of the Defendant to allow them to feel comfortable with their counsel in any kind of criminal proceeding. And it has been certainly the past practice of the Courts in this area to allow at least one change of counsel when they're appointed through the Public Defender's Office.

So I would at this time ask the Court to relieve me and allow someone else to be appointed through the Public Defender's Office. I did speak with Mr. Chatmon and he does understand as this is the eleventh hour request, it will be necessary to continue his case. It would obviously be unfair for him or for new counsel to expect them to proceed with trial in the morning on this matter. He is willing to consent to a further continuance waiving time if the Court will allow my withdraw and appointment of new counsel.

{¶16} The state did not oppose the substitution of another Public Defender for Attorney Soon. *Id.* at 5. The trial court did not make a separate inquiry of appellant, and denied the motion, stating the following (*Id.* at 6-7):

> THE COURT: Thank you. Well, I certainly understand your approach to it, Mr. Soon. It sounds like you handled things professionally. I'm frankly not hearing anything that causes me to doubt your abilities and nothing that I've seen in your past work here and in other courts causes me to doubt your abilities and if all this is is simply a miscommunication, to me that's not any reason to have a new lawyer and so I'm not inclined to grant the motion is where I'm going here. Anybody can mishear something and then convey what they thought they heard but that doesn't call into doubt that person's overall ability to be a lawyer and so I'm not going to grant this motion.
>
> Looking at my September schedule, it seems to be quite full. If I don't have a trial tomorrow, it's going to be a challenge for me to get this trial in and I've already continued this once as I recall because of a witness issue and now this last minute request comes in and to me this is something that's happened, miscommunication has been cleared up. Now there seems to be an understanding as to what the offer is. If the offer isn't accepted, that's fine, but this doesn't have anything to do with the attorney's ability to represent the Defendant effectively in a trial, so the motion is denied. The trial will go forward tomorrow.

{¶17} Attorney Soon requested a moment to confer with appellant which the trial court granted. *Id.* at 7-8. Thereafter, nothing further is on the record. *Id*. at 8.

{¶18} The morning of the jury trial, the prosecutor placed on the record the state's plea offer. September 3, 2015 T. at 6-7. Attorney Soon informed the trial court that appellant had declined the offer, but asked the trial court to "inquire directly" with appellant. *Id*. at 7.

{¶19} The trial court asked appellant several questions regarding his decision to decline the offer. *Id*. at 7-9. Appellant then requested additional time to discuss the case with Attorney Soon, but was clear that he was rejecting the plea offer and was ready to proceed with the trial. *Id*. at 9-11. After a further discussion on the issue of proof, the trial court once again asked appellant if he had any other questions and appellant stated, "[n]o, sir." *Id.* at 11-14.

{¶20} Based upon our review of the dialogue prior to the commencement of the jury trial, we find the trial court gave appellant the opportunity to speak. Appellant stated he was ready for trial. Appellant did not volunteer a statement that he wanted new counsel.

{¶21} Although it is advisable to afford a defendant the opportunity to explain his/her dissatisfaction or conflict with his/her attorney, it is not per se a denial of effective assistance of trial counsel. The issue becomes whether the lack of a dialogue and/or the denial resulted in undue prejudice to appellant.

{¶22} Two loss-prevention employees of Saks Fifth Avenue testified consistently as to their observations of appellant as he walked through the store placing items in a shopping bag and then exiting the store without paying for them. September 3, 2015 T.

at 54-59, 82-88. They attempted to apprehend appellant out in the parking lot, but he broke free and fled. *Id.* at 59, 88. The bag of shoplifted clothing was taken from appellant during the struggle. *Id*. Both witnesses identified appellant in open court as the individual they observed shoplift the items and exit the store. *Id*. at 68, 88-89.

{¶23} There was no other direct testimony other than the officer called to the scene. Defense counsel filed a notice of alibi (July 2, 2015), made two motions to dismiss during the trial, and argued inconsistencies in the witnesses' testimonies as to the timing of their observations, the height of the perpetrator, and the name on the shopping bag. The main argument raised was the witnesses' identification of appellant. *Id.* at 43-44, 74, 94, 106-108.

{¶24} Upon review, we fail to find any undue prejudice to appellant by the trial court's denial to appoint new counsel.

{¶25} Assignment of Error I is denied.

II

{¶26} Appellant claims his conviction was against the manifest weight of the evidence as he challenged the reliability and credibility of the identification testimony. We disagree.

{¶27} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and 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." *State v. Martin,* 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The

granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶28} The two loss-prevention employees identified appellant in open court as the individual they observed as concealing items in a shopping bag, leaving the store, and when confronted, resisting arrest and fleeing. September 3, 2015 T. at 68, 88-89. Defense counsel argued their testimony was inconsistent as to whether the shopping bag used to conceal the items was from Macy's or Nordstrom's, the amount of time of the observation period (15 minutes versus 45), and whether the perpetrator was six feet or under six feet tall. *Id.* at 106-107. Unfortunately, a videotape of the incident was not available.

{¶29} As triers of fact, the jury had the right and duty to determine the credibility of the identification testimony. The credibility of the identification testimony was solely within the province of the jury. Both loss-prevention employees observed appellant via cameras, on the floor of the store, and in a face-to-face encounter when they attempted to apprehend him. We cannot say the jury lost its way in reaching the guilty verdict. Sufficient evidence was presented, if deemed credible, to substantiate the guilty finding beyond a reasonable doubt. We do not find any manifest miscarriage of justice.

{¶30} Assignment of Error II is denied.

{¶31} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Hoffman, J. and

Wise, J. concur.

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