

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 3, 2012

v

JOSEPH KENYETTE JONES,

Defendant-Appellant.

No. 299990
Wayne Circuit Court
LC No. 10-002005-FH

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

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, for which he was sentenced to a prison term of one to ten years. Defendant appeals as of right. For the reasons set forth in this opinion we affirm the conviction and sentence of defendant.

Defendant was convicted of assaulting his ex-girlfriend by striking her with his car and driving over her. Testimony at trial indicated that defendant went to the house where the victim was staying and demanded that she return a car that defendant had purchased for her. Following an argument, the victim gave defendant the keys to the car. After the victim retrieved some of her personal belongings from the car, defendant began backing down the driveway. According to witnesses, the victim again approached the car, apparently to obtain something she had left in the car. The car abruptly shifted from reverse to forward in the direction of the victim, who went toward the grass next to the driveway to avoid being hit. However, according to testimony of some of the eyewitnesses, the car angled toward her, striking her while she was standing on the grass, and drove over her. Defendant then backed up and he again drove over the victim, and then left.

Over the course of the trial, it became readily apparent that defendant did not deny he struck the victim with the car. Following the close of proofs, the contested issue before the jury was whether defendant specifically intended to strike the victim with his car. Hence, his defense theory was premised on a theory of accident. To support this defense, defendant's trial counsel made extensive use of a civil action filed by the victim against defendant wherein she allegedly claimed that her injuries were the result of defendant's negligence.

During his testimony to the jury, defendant claimed that while backing down the driveway, he quickly drove forward to avoid an oncoming vehicle. He denied intending to hit

the victim with his car or seeing the victim before he struck her, an assertion that formed the basis of defense counsel's closing argument to the jury. However, defense counsel never requested that the trial court give an instruction on the defense theory of accident, and none was given to the jury.

Following defendant's conviction, his trial counsel filed a motion for a new trial based on his failure to request a jury instruction on the theory of accident. Without making arguments on the merits of the motion, defense counsel withdrew the motion, thus the trial court did not make a ruling on the initial motion for new trial. However, after defendant filed his claim of appeal, he filed a motion to remand on the issues of ineffective assistance of counsel and the trial court's failure to allow him to hire new counsel. This Court granted the motion in part, "limited to the issue of whether defense counsel was ineffective for not requesting an instruction on accident."¹ Following an evidentiary hearing on remand, the trial court issued an order on September 13, 2011, holding that defendant was not deprived of the effective assistance of counsel and denying defendant's motion for a new trial.

On appeal, defendant raises two issues. First he argues that defense counsel's failure to request a jury instruction on the defense of accident constituted ineffective assistance of counsel sufficient to warrant a new trial. Second, defendant argues that the trial court's failure to allow defendant to discharge his retained counsel on the day of trial violated his due process rights.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at trial because trial counsel failed to request a jury instruction on the defense of accident, which was the principal defense theory at trial. After conducting a post-trial evidentiary hearing on this issue, the trial court found that defense counsel's failure to request an accident instruction fell below an objective standard of reasonableness, but also found that defendant was not prejudiced by the omission. Accordingly, it determined that defendant was not entitled to a new trial based on ineffective assistance of counsel.

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

¹ *People v Jones*, unpublished order of the Court of Appeals, entered June 23, 2011 (Docket No. 299990).

We concur with the finding of the trial court that defense counsel's failure to request an accident instruction fell below an objective standard of reasonableness. The trial court's ruling was premised on the fact that accident was the principal defense theory at trial and defense counsel conceded at the post-trial hearing that his failure to request an accident instruction was an omission on his part, and was not based on any trial strategy. Hence, there was no clear error in the trial court's finding on this issue. The question therefore remains as to whether defense counsel's failure to request an instruction of accident was sufficient to establish the requisite prejudice that necessitates a new trial.

In ascertaining whether defendant had established the requisite prejudice for a new trial on a claim of ineffective assistance of counsel, the trial court stated, in relevant part:

In this particular case the defendant is charged with the crime of assault with intent to do great bodily harm less than the crime of murder.

In that instruction on assault with intent to do great bodily harm, there is specific language that indicates that the defendant at the time of the assault must have had the specific intent to do great bodily harm to the complainant, and certainly the defense of accident would negate that particular intent.

I do find that I am bound to follow the ruling in Hawthorne. I find that Hawthorne has the controlling language in this particular matter.

So I find that the second prong of the Strickland and Pickens Standard has not been met by the defense. And so the Court's finding is that there is not ineffective assistance of counsel.

It is clear that the trial court relied on *People v Hawthorne*, 474 Mich 174; 713 NW2d 724 (2006) in concluding that defendant failed to establish that he had been prejudiced by defense counsel's failure to request an instruction on the defense of accident. In *Hawthorne*, our Supreme Court determined that a trial court's failure to give a jury instruction on the defense of accident in a case where accident was a central issue at trial did not require reversal because the error was not outcome determinative and did not undermine the reliability of the verdict. *Id.* at 176. Referring to its decision in *People v Rodriguez*, 463 Mich 466; 620 NW2d 13 (2000), which also involved a failure to instruct on a defense theory, the Court in *Hawthorne* stated:

We explained that "nonconstitutional preserved error is evaluated under the standard set forth in" [*People v*] *Lukity* [460 Mich 484; 596 NW2d 607 (1999)]. *Id.* at 473. Under *Lukity*, the defendant has the burden to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice. MCL 769.26 sets forth a presumption that such an error does not warrant reversal "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, *supra* at 496 (quoting MCL 769.26). "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *Rodriguez*, *supra* at 474[.] [*Hawthorne*, 474 Mich at 181-182 (citations omitted).]

The Court in *Hawthorne* determined that the trial court's failure to instruct on the defense of accident did not undermine the reliability of the jury's verdict because "[t]he jury instructions explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that defendant possessed the intent required for murder." *Id.* at 185 (citation omitted). The Court also observed that the jury had been instructed on the lesser offense of statutory involuntary manslaughter, but instead concluded that the defendant was guilty of second-degree murder. The Court reasoned that if the jury had any doubts regarding whether the defendant had the requisite intent to second-degree murder, it could have convicted him of involuntary manslaughter, which does not require a finding of malice. *Id.* Accordingly, the Court concluded that the instructional error did not affect the reliability of the verdict.

Defendant argues that the trial court erred in relying on *Hawthorne* because that case did not involve an ineffective assistance of counsel claim. Though defendant's assertion is correct, such an assertion does not negate that the rationale employed in *Hawthorne* is equally applicable to an analysis of the prejudice prong of an ineffective assistance of counsel claim. In both instances, a reviewing court is required to evaluate the effect of an error on the outcome of the proceeding. To establish ineffective assistance of counsel, a defendant is required to show not only that counsel made a serious error, but also that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Johnson*, 451 Mich at 124. Thus, it was appropriate for the trial court to rely on the reasoning in *Hawthorne* in its evaluation of the prejudice prong of defendant's ineffective assistance of counsel claim.

In this case, defendant testified that he did not intentionally strike the victim with his car. He explained that she was hit when he drove his car forward to avoid an oncoming vehicle and that he did not see the victim in his path before he struck her. Defense counsel argued that defendant could not be guilty of assault with intent to do great bodily harm because the collision was accidental. The trial court instructed the jury that it could not convict defendant of assault with intent to do great bodily harm unless it found that all elements of the offense were proven beyond a reasonable doubt, including that "defendant intended to cause great bodily harm." Hence, for the jury to convict defendant of assault with intent to do great bodily harm less than murder, it must have found, beyond a reasonable doubt, that defendant possessed the specific intent to do great bodily harm.² The jury instructions explaining the intent element of assault with intent to do great bodily harm less than murder made it clear that a finding of accident would be inconsistent with a finding that defendant possessed the intent required for the crime charged. See, *Hawthorne*, 474 Mich at 185. Further, the jury was also instructed on the lesser offense of felonious assault, but instead concluded that defendant was guilty of assault with intent to do great bodily harm less than murder. The jury's decision to convict defendant of the higher offense further supports the conclusion that defendant was not prejudiced by defense counsel's failure to request an accident instruction.

² In *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997), this Court held that "Assault with intent to commit great bodily harm is a specific intent crime."

On these facts, the trial court did not clearly err in finding that defendant failed to establish a reasonable probability that the outcome of the trial would have been different if defense counsel had requested an instruction on accident. Accordingly, defendant failed to establish the requisite prejudice to prevail on a claim of ineffective assistance of counsel.

Though not fully developed within his brief, defendant's assertion that the failure of defense counsel to request an instruction of accident denied defendant his "constitutional guarantee" to present a complete defense belies the record evidence presented in this case. Defendant was not precluded from arguing that his actions constituted an accident, thereby negating the specific intent necessary for conviction of the charged offense. The record reveals that defense counsel was able to cross examine the victim with her civil complaint wherein she allegedly averred that her injuries were the result of negligence, thus not specifically intended by defendant. Additionally, defendant testified that his striking the victim with an automobile was solely the result of an accident. Although defense counsel failed to request an instruction on accident, he was allowed every opportunity to present the defense of accident. Accordingly, failure to request an instruction on the defense of accident did not deprive defendant of the opportunity to present the defense that his actions were the result of an accident.

II. SUBSTITUTION OF COUNSEL

For his second issue, defendant argues that the trial court erred when it denied his request to adjourn the trial so that he could obtain new counsel. Defendant also argues that the trial court erred by failing to conduct a full adversarial hearing prior to considering defendant's request. This Court reviews for an abuse of discretion a trial court's exercise of discretion affecting a defendant's right to counsel of choice, including whether to adjourn trial to allow a defendant to retain the counsel of his choice. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003).

When allowed an opportunity to address the trial court as to why defendant desired new counsel defendant initially stated that he had lost confidence in his attorney. The basis for this loss of confidence, as explained by defendant, was premised on two general themes. First, defendant asserted that "We haven't discussed anything to prepare for trial." Next, defendant asserted that he was unable to contact his counsel by phone. He ended his remarks by stating "So I just lost confidence in him, and I just want to be able to get my money back from him and hire another attorney and try to prepare for this trial."

Following defendant's remarks to the trial court, defense counsel responded that defendant was the "type of client that needed a lot of contact." However, as to the issue of whether defense counsel was prepared for trial, he asserted that he had gone through the police reports and preliminary examination with the defendant "... line by line."

Following this exchange, the trial court stated:

And, Mr. Jones, I have to share this with you. Today is the date and time scheduled for jury trial. That there have been citizens who have taken time off from work who have come down here to serve on your case . . . But the notion that you decide to come in and let me know on the very day of trial when we have

set aside this time for your case. We have brought in jurors. We have subpoenaed witnesses, and you claim you have some dissatisfaction, but you haven't let us know. That doesn't make it . . .

In *Akins*, 259 Mich App at 557, this Court explained:

“The Sixth Amendment guarantees an accused the right to retain counsel of choice.” “However, the right to counsel of choice is not absolute.” “A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated.”

“When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision.” [Citations omitted.]

We concur with the finding of the trial court that defendant failed to offer a valid reason for seeking new counsel. Although defendant stated that he had lost confidence in counsel, he did not identify any specific disagreement with counsel concerning a fundamental trial tactic. Defendant also failed to offer a legitimate reason for waiting until the day of trial to make his request, leading the trial court to conclude that the timing of defendant's request was more likely an attempt to delay the trial. Although defendant relies on counsel's failure to request an accident instruction to argue that his lack of confidence in counsel was justified, there was no showing that counsel was not otherwise prepared for trial. Counsel stated that he was prepared to proceed and the trial record demonstrates that counsel was familiar with the case and the anticipated testimony. Counsel knew that defendant could offer a different version of the facts, as he had investigated the victim's civil lawsuit, which he used to support the defense theory of accident. We cannot find that the ruling by the trial court to proceed to trial with defendant's counsel amounted to an abuse of discretion. *Akins*, 259 Mich App at 557.

Citing *United States v Jennings*, 945 F2d 129, 132 (CA 6, 1991), defendant additionally asserts that the trial court was required to conduct an evidentiary hearing to properly determine whether a break-down in the attorney-client relationship had occurred and if good cause existed to allow retention of new trial counsel. *Jennings* does not stand for the proposition that an evidentiary hearing is required for a proper determination of whether “good cause” exists when a defendant requests substitution of counsel. Rather, the Court held: “the record does indicate that the district court did not permit the defendants to explain fully their reasons for dissatisfaction with counsel in open court. Instead, the court instructed each defendant to submit his letter to the clerk and indicated it would consider the letters later. Unfortunately, the record does not reveal if the district court did, in fact, consider the letters or whether the district court ever formally made a ruling as to each defendant's request for new counsel. We cannot begin to determine whether the defendant's dissatisfaction with their appointed counsel was justified because neither

defendant's letter was made part of the record." *Jennings*, 945 F2d at 132. Ultimately, the matter was remanded to the trial court " . . . for the purpose of allowing the district court to personally inquire from each defendant his reasons for dissatisfaction with counsel." *Id.*

The issue of whether a trial court is required to conduct an evidentiary hearing in such matters was decided by this Court in *People v Ceteways*, 156 Mich App 108, 118-119; 401 NW2d 327 (1986), wherein this Court stated:

It is a defendant's responsibility to seek a hearing. Following the trial court's refusal to grant one, the correct remedy on appeal is to order the hearing. The parameters of the testimony the trial court is required to take were recently discussed by this Court in *People v Morgan* [144 Mich App 399, 402; 375 NW2d 757 (1985).] There, defense counsel asked to be removed on the first day of trial because his client had lost faith in him. The trial court asked counsel whether he was prepared for trial and committed to represent his client to the best of his abilities, and counsel replied in the affirmative. The trial court then denied the motion. On appeal, this Court held:

"While the trial court should have tried to elicit information from the defendant concerning any problems with the attorney-client relationship, the court succeeded in questioning the defense counsel regarding his preparedness and ability to work on the case. The trial court's inquiry was adequate to insure that defendant would be competently represented at trial." [*Morgan, supra* at 402.]

It would appear, then, that what is required under both *Ginther* and *Morgan* is that the trial court elicit testimony from the attorney and the defendant in order to assess any issues of fact. A full adversary proceeding, with counsel representing both the attorney and the defendant, is not required. Indeed, the suggestion of *Morgan* is that questioning the attorney alone is sufficient in some circumstances, and *Ginther* explicitly says that failure to explore defendant's claim does not always require that the conviction be set aside. But that is beside the point, because here the trial judge clearly elicited testimony from the attorney and the client to gauge the truth of the matter, and disbelieved the client. Defendant's version of the facts covers several pages of uninterrupted talking in the transcript; defendant said what he had to say. An adversary hearing might package defendant's version of the facts more attractively, but the key to the question was what was said, privately, between attorney and client, and assessing that factual issue was essentially a matter of judging credibility. There was no error in failing to grant a hearing. [Footnotes omitted.]

Hence, the trial court fulfilled its obligation under both *Jennings* and *Ceteways* by eliciting testimony from both defendant and trial counsel in order to access any issues of fact. The evidence elicited by the trial court from both defendant and his counsel was sufficient to allow the trial court to rule on defendant's request. Lastly, in stark contrast to defendant's assertion that an evidentiary hearing was required, this Court clearly stated: "A full adversary proceeding, with counsel representing both the attorney and the defendant, is not required." *Ceteways*, 156 Mich App at 119. In view of the fact there is no requirement for an evidentiary

hearing on such matters and the trial court elicited sufficient factual evidence from which a ruling could be made on defendant's request for substitute counsel, defendant was not denied due process.

Affirmed.

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