

The State responds defendant did not produce an attorney ready, willing, and able to make an unconditional appearance. We agree with the State and affirm.

¶ 4

I. BACKGROUND

¶ 5 In August 2010, a McLean County grand jury indicted defendant for retail theft over \$150 (720 ILCS 5/16A-3(a) (West 2010)) and burglary (720 ILCS 5/19-1(a) (West 2010)). On November 12, 2010, defendant announced he was ready to proceed to trial and requested a November 17, 2010, date.

¶ 6 On November 17, 2010, the trial court called the case for trial. Defendant's appointed counsel responded, in relevant part, as follows:

"So now I have seen and my client has seen the videos, but in light of that, now that we have seen it—and Gary Johnson, a private attorney[,] came in this morning. My client has hired Gary previously on other matters. My client would be asking also in addition to that—I would say, I listed one of my possible witnesses as Don Calhoun. I'm still trying to contact that person. If we had to go today, I would put him down as one of the defendant's witnesses and try to get ahold [*sic*] of him. However, I would ask that we set the matter either for the December calender, which I think is my client's first choice, to hire an attorney and get Don Calhoun subpoenaed, if possible. Or in the alternative, just kick it to Thursday and if Gary enters, so be it, and if not, I would still be his public defender. We would ask for that at this time."

The State objected to the motion for continuance and stated, "In terms of hiring counsel, this is literally the morning of trial. The State believes this simply is too late to delay the process for that reason."

¶ 7 The trial court denied the motion, and stated:

"Well, the Court notes this is the second calendar that this case has been on. Apparently it was set for trial on the October calendar. On the defendant's motion, it was continued to this calendar. On the 12th [of November], both sides answered ready for trial, and I believe we set it today at the request of all parties to make that accommodation.

It doesn't appear in the file to be any prior indication that the defendant was attempting to hire private counsel. This is the morning of trial. We have slotted it for today's date. At this juncture, I would deny the defendant's motion to continue."

¶ 8 Defendant's appointed counsel represented defendant at trial. The evidence presented at trial showed on August 6, 2010, defendant and a woman entered a Normal, Illinois, grocery store and proceeded to remove liquor bottles from the shelf and conceal them in the woman's purse. As defendant and the woman attempted to leave the store without paying, store security stopped the woman but defendant continued out of the store. Three bottles of tequila, two bottles of whiskey, and four bottles of Jagermeister, totaling \$220.91 in value, were removed. We note defendant's witness, Don Calhoun, did appear and testified. The jury found defendant guilty of retail theft and burglary.

¶ 9 In December 2010, defendant filed a motion for a new trial arguing the trial court erred in denying defendant's motion for continuance before trial. Defendant's motion asserted the court infringed upon defendant's right to be represented by retained counsel of his choosing.

¶ 10 In May 2011, the trial court held a posttrial motion and sentencing hearing. Defendant was represented by private counsel, who argued the court erred in not granting a continuance to permit defendant to be represented by counsel of his choosing. In ruling on the motion, the court stated:

"It is only on November 17 that the Court heard defendant's request for a new attorney—to hire private counsel. While the [posttrial] motion indicates that Gary Johnson appeared in the courtroom, and that may have occurred; however it was not in the presence of this Court—it was not in the presence of this Court when the case had been called. It may have occurred that morning while counsel and parties were meeting, but it was not in the context of him appearing to the Court and indicating to the Court that he intended to represent [defendant]. In fact, that was not the case. There was no entry of appearance on file, and given the prior announcement that defense was ready for trial, the Court denied the motion to continue on the basis of hiring new counsel."

The court denied the motion for a new trial. It sentenced defendant to concurrent terms of four years' imprisonment for retail theft and four years' imprisonment for burglary.

¶ 11 In May 2011, defendant filed a motion to reconsider sentence. The trial court

denied the motion.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues the trial court improperly denied his right to counsel of choice. Defendant contends the court abused its discretion because (1) his trial counsel "informed the judge that there was a private attorney in the courtroom that [defendant] had worked with previously and [he] wanted to hire him as his counsel," (2) the court failed to make a proper inquiry into the "validity or seriousness" of this request for new counsel on the day of trial and "was unable to fulfill its duty to balance the defendant's constitutional right to counsel of choice with the judicial interest of trying the case with due diligence," and (3) a "potential substitute counsel was in the courtroom, and a mere fifteen-minute delay could have determined if [defendant] had the resources to hire him and if counsel could be ready for trial the following day."

¶ 15 The State responds defendant's motion did not show an attorney was ready, willing, and able to make an unconditional entry of appearance, and "[t]he brief reference to the desire to hire an attorney in the midst of a request for a continuance to retain the presence of a witness with no explanation as to why a new attorney was being sought was simply insufficient to require the court to grant a continuance." We agree with the State.

¶ 16 A. Standard of Review and Right to Counsel of Choice

¶ 17 A criminal defendant's right to counsel of choice is constitutionally protected. *People v. Green*, 42 Ill. 2d 555, 557, 248 N.E.2d 116, 117 (1969). A violation of defendant's right to choice of counsel is a fundamental constitutional error affecting a substantial right and

defendant is not required to show prejudice. *People v. Montgomery*, 373 Ill. App. 3d 1104, 1112, 872 N.E.2d 403, 410-11 (2007) (quoting *People v. Bingham*, 364 Ill. App. 3d 642, 649, 847 N.E.2d 903, 910 (2006)); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-51 (2006).

¶ 18 "The determination whether to grant a continuance for substitution of counsel is a matter left to the discretion of the trial court, and will not be overturned absent an abuse of that discretion." *People v. Segoviano*, 189 Ill. 2d 228, 245, 725 N.E.2d 1275, 1283 (2000). "The factors to be considered in evaluating a trial court's exercise of its discretion include the diligence of the movant, the right of the defendant to a speedy, fair and impartial trial, and the interests of justice." *Segoviano*, 189 Ill. 2d at 245, 725 N.E.2d at 1283; see also *People v. Tucker*, 382 Ill. App. 3d 916, 920, 889 N.E.2d 733, 737 (2008) (articulating factors to consider, including "whether [defendant] has informed the trial court of his efforts to obtain counsel"); *People v. Walker*, 232 Ill. 2d 113, 125-26, 902 N.E.2d 691, 697-98 (2009) (other relevant factors for motion to continue). A trial court will not be found to have abused its discretion in denying a motion for continuance to obtain substitute counsel " 'where new counsel is unidentified' " (*People v. Staple*, 402 Ill. App. 3d 1098, 1103, 932 N.E.2d 1064, 1069 (2010) (quoting *People v. Jones*, 269 Ill. App. 3d 925, 932, 647 N.E.2d 612, 617 (1995))) or "in the absence of ready and willing substitute counsel" (*Segoviano*, 189 Ill. 2d at 245, 725 N.E.2d at 1283). "Especially when a defendant cannot 'articulate an acceptable reason for desiring new counsel and is already being represented by an experienced, court-appointed criminal lawyer, it is not an abuse of discretion to deny defendant's trial-day request for a continuance.' " *Staple*, 402 Ill. App. 3d at 1103, 932 N.E.2d at 1069 (quoting *People v. Jackson*, 216 Ill. App. 3d 1, 7, 574 N.E.2d 719, 723 (1991)).

¶ 19

B. Defendant's Claim

¶ 20

In the instant case, defendant's oral motion for a continuance for substitution of counsel referred to an attorney defendant had retained in prior matters, made a vague statement the attorney "came in" that morning, requested time "to hire an attorney," and if defendant did not retain private counsel, then counsel "would still be his public defender." As the trial court made clear, the private attorney was not before the court ready to make an entry of appearance when the motion was made. Contrary to the implication in defendant's posttrial motion and brief to this court, defendant's potential private counsel did not sit in on the hearing on the motion to continue. The public defender said, "Gary Johnson, a private attorney[,] came in this morning." It is not clear whether the attorney "came in" to the public defender's office or "came in" to the courtroom earlier that morning. Either way, though, there is no indication Gary Johnson was then sitting in the courtroom, ready to go. Nor did defendant represent private counsel had been retained and was ready, willing, and able to perform. Defendant's cited authority is distinguishable on this point. See *People v. Young*, 207 Ill. App. 3d 130, 134, 565 N.E.2d 309, 312 (1990) (trial court advised the defendant's family had retained private counsel, and counsel was present and ready, willing, and able to make an entry of appearance). Compare *Staple*, 402 Ill. App. 3d at 1104, 932 N.E.2d at 1069 (trial court properly denied motion to continue on day of trial, where defendant had not hired substitute counsel and did not allege counsel was ready, willing, and able to represent her), with *People v. Brisco*, 2012 IL App (1st) 101612, 971 N.E.2d 20 (denial of motion to substitute counsel error where new defense counsel was present in court and ready to file an appearance), and *Tucker*, 382 Ill. App. 3d at 923-24, 889 N.E.2d at 739-40 (denial of motion to substitute counsel error where defendant's counsel informed trial court the

defendant did not want him as his attorney and he had hired a new attorney). Defendant's motion made no reference why new counsel was sought at this time—when he had answered ready for trial five days earlier—nor did it articulate why court-appointed counsel could not—on the day of trial—continue to represent him. See *Staple*, 402 Ill. App. 3d at 1104-05, 932 N.E.2d at 1069-70; *People v. Basler*, 304 Ill. App. 3d 230, 232, 710 N.E.2d 431, 432-33 (1999) (defendant's motion for a continuance to seek private counsel claimed she and her appointed attorney did not agree on certain matters). The circumstances in this case do not rebut the appearance that defendant's request was for the purposes of delay and the court did not abuse its discretion in denying defendant's motion.

¶ 21

III. CONCLUSION

¶ 22 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 23 Affirmed.