Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-294

APRIL TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
Camille Deslandes	}	
	}	DOCKET NO. 587-9-05 Oscr
		Trial Judge: Howard E. VanBenthuysen

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for driving while under the influence of intoxicants (DUI), third offense. We affirm the district court's decision denying defense counsel's motion to withdraw, but reverse on the basis that the jury was not required to reach a unanimous verdict.

The following facts are undisputed. In the early morning of September 4, 2005, defendant drove to Corey Keefe's house. Defendant had previously given Keefe a car, but had since been concerned about how Keefe was using the car, and so decided to take it back. Defendant drove to Keefe's house with the intention of taking the car back. Sometime after defendant arrived at Keefe's house, he returned to his own car and went to sleep. Keefe called the police, who arrived to find that (1) the engine of defendant's car was still warm, (2) defendant was asleep or unconscious in the driver's seat, and (3) defendant was intoxicated. Defendant was arrested and processed for DUI.

The primary factual issue at trial was whether defendant was drunk when he drove to Keefe's house or whether he only got drunk after arriving, and then simply decided to sleep in his car. Both defendant and his mother testified in support of the latter scenario, while Keefe testified that defendant had been drinking all day and was drunk when he arrived at Keefe's home. The trooper who arrested defendant observed only that the engine of defendant's car was still warm, that defendant was intoxicated, and that defendant gave conflicting statements about how long he had been sleeping in his car.

On appeal, defendant first alleges that the district court erred in denying his attorney's motion to withdraw. A few days before trial, defendant had a heated argument with his attorney, and the two ceased trial preparation. The morning trial was scheduled to begin, defendant's attorney moved to withdraw, citing the arguments with his client and lack of direct trial preparation. The court inquired further and concluded that the argument between counsel and defendant did not go to whether

counsel was competent, but represented a disagreement over trial strategy (whether certain evidence was relevant to the defense). The court told defendant that the trial would go forward that day, and he could either accept his assigned counsel or represent himself pro se. Defendant stated that he wanted an opportunity to find new counsel, and the court responded that his request came too late. Defendant ultimately agreed to go forward with his assigned counsel.

We review the district court's decision on a motion to withdraw for an abuse of discretion. V.R.Cr.P. 44.2(c) (leave to withdraw granted within the discretion of the court). While defendant's attorney said that going forward would constitute "per se ineffective assistance of counsel," this is properly regarded as an off-the-cuff comment rather than a well-considered legal conclusion. In fact, the district court continued to explore whether the attorney was prepared to go forward, and was satisfied that he was. There is no indication that defendant was not provided with competent counsel. Defendant was only entitled to competent counsel, not the counsel of his choice. See State v. Ahearn, 137 Vt. 253, 263 (1979). Further, to the extent this issue is properly framed as a denial of a request for continuance, defendant has not demonstrated error. Defendant made the request on the morning that trial was scheduled to begin. Witnesses were present. Defendant not only sought time to find other counsel, but to obtain a loan of $5,000 to pay for his new counsel. Finally, defendant had in place competent counsel who was ready to go forward that day. The district court did not abuse its discretion. See State v. Hicks, 167 Vt. 623, 625 (1998) (mem.) (absent unusual circumstances, there is no abuse of discretion in denying a motion for continuance to seek new counsel).

Defendant's second argument on appeal is that the district court erred in instructing the jury on the elements of the offense because the instructions did not require the jury to reach a unanimous verdict regarding those acts that rendered defendant criminally liable for DUI. Defendant did not object to the instruction at trial, and therefore our review is for plain error only. State v. Prior, 2007 VT 1, ¶ 6 (mem.).[1] "We find plain error only in exceptional circumstances where we must do so to prevent a miscarriage of justice or an error that strikes at the very heart of the defendant's constitutional rights." Id. (internal citation and quotation omitted).

Here, the State amended the information to allege operation, and confirmed at the beginning of trial that the allegation the State would prove was only that defendant operated the vehicle while intoxicated. Further, the State's evidence at trial was that defendant drove to Keefe's house while drunk. Keefe testified to this effect. The state trooper did not offer an opinion on the issue one way or another, except to note that the engine of defendant's car was still warm and that defendant was intoxicated when the trooper arrived at the scene. By contrast, it was defendant who claimed that he only drank once he arrived at Keefe's home, and then went to sleep in the car with no intention

[1] In Prior, we affirmed defendant's conviction for violating an abuse prevention order where the court instructed the jury that defendant violated the order if he either followed or stalked the victim. The basis of our holding was that the terms "following" and "stalking" had virtually the same definition. Id. ¶¶ 6-7.

of driving until later that day.[2]

The district court instructed the jury as to the essential elements of the crime, including that defendant "operated" a motor vehicle:

> The word operate covers all matters and things connected with the presence and use of motor vehicle on the highway, whether they are in motion or at rest. Operation may be shown by a person sitting behind the wheel of a motor vehicle with the engine running or with the ability to turn on and operate the vehicle. It may also be shown by a person attempting to move the vehicle, whether or not the engine is running.

During deliberations, the jury sent a note to the judge asking whether having the keys in the car—regardless of their location—counted as the "ability to drive" under the operation instruction. The court directed the jury's attention to the written instructions. The jury returned to say they were deadlocked; the court asked them to continue deliberations in an effort to reach a verdict. The jury ultimately returned a verdict of guilty.

Defendant argues that this indicates that the jury was not necessarily unanimous. In other words, some jurors could have concluded that defendant drove to Keefe's house while drunk, while others may have concluded that he got drunk only after arriving, but was still guilty of DUI because he had the ability to drive as he was in the driver's seat with the keys in the car.

In State v. Zele, we held that,

> As a general rule, when evidence at trial reflects two or more criminal acts, but defendant is charged with only one such act, the State must elect the specific act it seeks to use as the basis for conviction. The rule avoids the risk that certain jury members will base a determination of guilt on one act, while others will rely on another, the result being an absence of unanimity that the defendant committed any single identifiable criminal act. The rule also protects from the danger that jurors will be swayed by the quantum of proof introduced

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[2] Defendant's position tracks the affirmative defense available under 23 V.S.A. § 1201(f):

> [T]he defendant may assert as an affirmative defense that the person was not operating, attempting to operate, or in actual physical control of the vehicle because the person:
>
> (1) had no intention of placing the vehicle in motion; and
>
> (2) had not placed the vehicle in motion while under the influence.

> as to all the acts when, in fact, there has been insufficient proof on any one of the alleged acts standing alone.

168 Vt. 154, 158 (1998) (internal citations and quotations omitted). The risks and dangers warned of in Zele were present in this case. The evidence indicated that defendant drove to Keefe's house while intoxicated and also that he was sitting in the driver's seat of his car while intoxicated. While the State maintained that it was pursuing a theory of operation (as opposed to attempted operation or actual physical control), the instruction to the jury permitted conviction based on either act. The State should have sought to narrow the instruction to identify the conduct that triggered defendant's DUI liability.

Further, the question sent to the court by the jury during its deliberations strongly suggests that any confusion was actually prejudicial to defendant. Accordingly, defendant's conviction must be vacated and the matter remanded for a new trial.

Reversed and remanded for a new trial.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice