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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1181**

State of Minnesota,
Respondent,

vs.

Ismael Hernandez,
Appellant.

**Filed April 28, 2014
Affirmed
Larkin, Judge**

Polk County District Court
File No. 60-CR-12-1195

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court abused its discretion by refusing to appoint substitute counsel without first determining whether exceptional circumstances existed. We affirm.

FACTS

On May 22, 2012, respondent State of Minnesota charged appellant Ismael Hernandez with first-degree criminal sexual conduct, alleging that he anally raped a woman on May 19. The district court appointed a public defender to represent Hernandez.

Hernandez's attorney filed a demand for discovery on June 6. Hernandez and his attorney appeared in court on June 11. The Polk County Attorney's Office provided discovery materials to Hernandez's attorney on June 12, including police reports, photos, BCA lab reports, and witness statements. On June 14, Hernandez filed a letter with the district court requesting another attorney. In his letter, Hernandez explained, in relevant part:

My public defender I know is not representing me adequately. I've left a message for him last Wednesday cause I needed to speak with him in hopes that I could get some ground work done on my behalf. [My public defender] waited till my court date this Monday to see me and stated that he did not want to talk to me. I'm at the point where I'll even get a fair chance at defending myself. Nothing seems to be getting done. It's almost been a month since I've been accused and nothing has happened on my behalf.

The court administrator's office sent Hernandez a letter dated June 20, instructing him to raise his request with the district court at his next scheduled hearing. On June 27, Hernandez appeared in court with his attorney and waived his right to have an omnibus hearing within 28 days. Neither Hernandez nor his attorney raised the substitution-of-counsel issue.

On October 2, Hernandez appeared in court and stated: "[A]fter careful consideration, months of consideration, I would like to go forward and dismiss . . . my attorney. And that is why I want to give you a letter of recommendation and just explaining a lot of things and why I choose to do this." The district court responded:

If you fire [your public defender] as your attorney, I'm not appointing another attorney to represent you in the matter. You understand that? All I do is make a determination on whether you qualify for the public defender's services, and then it's up to the public defender to assign an attorney to represent you in this case.

And once you make a decision to fire the public defender, then it's going to be up to you to represent yourself or hire an attorney to represent you, or there may be the possibility of stand-by counsel. But I would urge you to give this careful, careful consideration before you make this decision.

Hernandez replied: "Well, I know I cannot afford an attorney. I cannot afford an attorney whatsoever. And I also have no knowledge of law and would not be able to represent myself whatsoever. So I guess in my best interests, it would be to stay with [my attorney]."

The case was tried to a jury from January 7 through January 14, 2013. Hernandez's attorney tried the case with co-counsel. During the course of the trial,

Hernandez's attorney argued motions in limine; made a record that he had discussed the state's plea offer with Hernandez; requested that witnesses be sequestered; questioned potential jurors; objected for cause to the seating of two potential jurors; gave an opening statement; cross-examined the state's witnesses; made objections; called and examined defense witnesses; presented exhibits; and gave a closing argument.

The jury found Hernandez guilty, and the district court sentenced Hernandez to serve 144 months in prison. This appeal follows.

DECISION

Hernandez argues that "[t]he [district] court committed reversible error by telling [him] he would have to represent himself or hire a private lawyer if he was unhappy with his appointed lawyer, without first determining whether exceptional circumstances existed to justify appointing substitute counsel." The Minnesota Supreme Court recently summarized the law governing requests for substitute court-appointed counsel as follows:

The United States and Minnesota Constitutions guarantee a criminal defendant the right to the assistance of counsel for his defense. If the defendant cannot employ counsel, the defendant is entitled to appointed counsel. But the right of an indigent defendant to court-appointed defense counsel is not an unbridled right to be represented by counsel of [the defendant's] choosing.

When a defendant raises complaints about the effectiveness of appointed counsel's representation and requests substitute counsel, the district court must grant such a request only if exceptional circumstances exist and the demand is timely and reasonably made. Exceptional circumstances are those that affect appointed counsel's ability or competence to represent the client. But a defendant's general dissatisfaction with appointed counsel does not amount to an exceptional circumstance. When the defendant

voices serious allegations of inadequate representation, the district court should conduct a searching inquiry before determining whether the defendant's complaints warrant the appointment of substitute counsel.

State v. Munt, 831 N.W.2d 569, 586 (Minn. 2013) (quotations and citations omitted).

“[Appellate courts] review the district court’s decision to appoint substitute defense counsel for an abuse of discretion.” *Id.*

Hernandez argues that the district court committed reversible error at the October 2 hearing by “fail[ing] to inquire into the circumstances leading to [his] request for new counsel.” But “[a] defendant has the burden of showing the existence of exceptional circumstances.” *State v. Clark*, 698 N.W.2d 173, 177 (Minn. App. 2005), *aff’d*, 722 N.W.2d 460 (Minn. 2006). And the district court has no duty to conduct a “searching inquiry” unless a defendant “voices serious allegations of inadequate representation.” *Munt*, 831 N.W.2d at 586. At the October 2 hearing, Hernandez told the district court only that he wanted “to go forward and dismiss” his attorney. Although he stated that he had a letter “explaining a lot of things and why I choose to do this,” he did not tell the district court what was in the letter and it does not appear that the letter was filed with the district court. On appeal, Hernandez does not reveal the contents of the letter or otherwise explain how his attorney lacked the ability or competence to adequately represent him. In sum, Hernandez has not voiced serious allegations of inadequate representation—either in the district court or on appeal—that require further inquiry.

Hernandez cites *State v. Lamar* and argues that “it ‘is not an accurate statement of the law’ for the [district] court to inform the defendant that the court cannot appoint substitute counsel.” 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). But since deciding *Lamar*, this court has clarified that although “it would be an incorrect statement of the law to say that a criminal defendant may not have a different public defender under any circumstances,” the statement would not be inaccurate if made to a defendant under circumstances in which the defendant was not entitled to substitute counsel. *Clark*, 698 N.W.2d at 178 (“[I]n these circumstances, the statement was not inaccurate because Clark’s request was untimely and he failed to demonstrate exceptional circumstances.”). In this case, the district court stated to Hernandez: “once you make a decision to fire the public defender, then it’s going to be up to you to represent yourself or hire an attorney to represent you, or there may be the possibility of stand-by counsel.” But because Hernandez had not alleged or demonstrated exceptional circumstances justifying substitution of counsel, the district court did not misstate the law as it applied to Hernandez’s request.

Hernandez also argues—apparently based on his June 14 letter—that his “concerns about his attorney not communicating with him and not diligently representing him” raised “a concerning question about his attorney’s ability and willingness to effectively represent him and was sufficiently serious on its face to require a searching inquiry before his request for new counsel could be rejected.” (Quotation omitted.) In his June 14 letter, Hernandez complained that his attorney waited five days to respond to a message, stated that his attorney did not want to talk to him, and expressed a general

concern that “[n]othing seems to be getting done.” But Hernandez filed his June 14 letter just two days after his attorney received the discovery materials from the county attorney’s office. And Hernandez did not raise any concerns regarding his attorney when he appeared at the next hearing, even though the court administrator had instructed him to raise his request for substitute counsel at that hearing. Although Hernandez expressed dissatisfaction with his attorney at the October 2 hearing, his statements did not establish the existence of exceptional circumstances. *See Munt*, 831 N.W.2d at 586 (“[A] defendant’s general dissatisfaction with appointed counsel does not amount to an exceptional circumstance.” (quotation omitted)).

Moreover, even if the district court had erred, Hernandez would need to show prejudice to obtain relief. Most errors—even constitutional errors—are reviewed under a harmless-error standard. *See Minn. R. Crim. P. 31.01* (stating that errors that do not “affect substantial rights must be disregarded”); *State v. Kuhlmann*, 806 N.W.2d 844, 850 (Minn. 2011) (“Generally, most constitutional errors are reviewed for harmless error.”). Although an erroneous deprivation of a defendant’s Sixth Amendment right to choice of counsel entitles the defendant to reversal of his conviction, because the error is structural and not subject to review for harmlessness, “the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-51, 126 S. Ct. 2557, 2563-65 (2006). Thus, Hernandez must show prejudice to obtain relief. Yet he does not allege ineffective assistance of counsel, trial error, or that the evidence is insufficient to sustain his conviction. It is unclear how this court could find prejudicial error on this record.

Lastly, Hernandez makes a number of assertions in his pro se supplemental brief that are unsupported by legal argument or citation to legal authority. Those issues are waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (concluding that claims in a pro se supplemental brief were waived because the brief contained no argument or citation to legal authority supporting the claims).

Affirmed.