

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 15, 2020

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JERRY A. THIGPEN

**Appeal from the Criminal Court for Trousdale County
No. 2016-CR-62 Brody N. Kane, Judge**

No. M2019-00047-CCA-R3-CD

A Trousdale County jury convicted the defendant, Jerry A. Thigpen, of assault, a Class A misdemeanor. Following a sentencing hearing, the trial court imposed a sentence of eleven months, twenty-nine days in confinement. On appeal, the defendant argues the trial court erred in denying the defendant's motions to recuse; the State committed prosecutorial misconduct; trial counsel was ineffective; the imposed sentence was excessive; the court reporter should have disqualified herself; the indictment was fatally erred; the jury was biased; trial counsel colluded with the State and the trial court; and the evidence was insufficient to support his conviction. The defendant also argues he was denied the right to counsel on appeal. After reviewing the record and considering the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J. ROSS DYER, J., delivered the opinion of the court, in which D. KELLY THOMAS, JR. and CAMILLE R. MCMULLEN, JJ., joined.

Jerry A. Thigpen, Hartsville, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Clark B. Thornton, Senior Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Jack Bare, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The procedural history of this case is extensive and complicated. For the sake of clarity, we will summarize only the procedural history and hearing testimony regarding the issues presented before this Court.

Following an incident at the Trousdale County Board of Equalization meeting on June 6, 2016, the defendant was indicted for one count of assault. At the defendant's arraignment on December 6, 2016, the trial court asked the defendant whether he planned to hire an attorney, and the defendant expressed his desire to represent himself. The defendant then requested information about the trial court's recusal in an unrelated case in which the defendant was a victim. The trial court explained that he recused himself from that case because he knew the defendant, Kent Smith, from the trial court's election campaign.

On January 19, 2017, the defendant filed a pro se motion for recusal, arguing recusal was necessary because the trial court recused himself in a prior case in which the defendant was the victim; the trial court set an excessive bail amount; and the defendant met with the trial judge's wife to discuss possible representation in a civil matter. On February 21, 2017, the trial court denied the motion for recusal, stating:

I don't know [the defendant] at all. I don't know him at all and I don't see any reason that I would recuse myself from this matter. I don't have any ill will toward [the defendant].

...

I don't believe the bail amount was punitive in any way, so I think that's kind of a misreading of the statute on the part of [the defendant].

...

Additionally, [the motion] refers to speaking with Angela Kane regarding matters involving [the defendant] and Kit (sic) Smith and Thomas Dewayne Byrd. Obviously, my wife does practice law.

...

We don't discuss her practice or my responsibilities. I have no knowledge of any kind of discussions between Ms. Kane and [the defendant].

On June 19, 2017, the trial court asked the defendant if he wished to waive his right to counsel. The defendant informed the trial court that he had discussed his case with several attorneys and considered the possibility of requesting a public defender. However, he was not certain how he wished to proceed. Because the defendant's trial date was quickly approaching, the trial court gave the defendant until the end of the day

to complete an affidavit of indigency. The defendant replied that he was “not interested in filling that out today” but denied he was waiving his right to a public defender and requested two weeks to decide how to proceed. The trial court denied the defendant’s request and informed the defendant he would need to retain counsel if he wished to be represented at trial.

The defendant subsequently filed an affidavit of indigency, and counsel was appointed on August 23, 2017.¹ However, on October 16, 2017, counsel filed a motion to withdraw, contending the defendant’s demands were “outside the scope of reasonable and effective representation on the charge at issue in this case.” According to counsel, the defendant’s “extreme demands” caused counsel to “experience[] increasing stress, including waking up in the middle of the night worrying about what [counsel had] come to refer as ‘the [defendant] situation.’” Counsel contended “no ethically scrupulous attorney known to [counsel] would ever be good enough to satisfy this defendant.” Following a hearing, counsel was allowed to withdraw, and another attorney was appointed to represent the defendant.

On January 30, 2018, the defendant’s second counsel filed a motion to withdraw in which he argued it was “impossible for [counsel] to represent [the defendant]” due to the defendant’s dissatisfaction with counsel’s performance. Additionally, the defendant “threatened [counsel] with the Board of Professional Responsibility unless [c]ounsel file[d] volumes of motions and other pleadings that . . . have nothing to do with the assault charge at issue.” The defendant’s second counsel received permission to withdraw on February 6, 2018, and the Public Defender’s office (“trial counsel”) was appointed to represent the defendant.

On April 19, 2018, trial counsel filed a motion to withdraw, arguing continued representation of the defendant “will result in a violation of the Rules of Professional Conduct or other law.” Specifically, trial counsel contended the defendant filed pro se petitions with this Court while represented by trial counsel; harassed staff at trial counsel’s office and is barred from the premises; refused to meet with trial counsel at the courthouse; researched trial counsel’s personal information, which made trial counsel uncomfortable; accused trial counsel of committing legal malpractice; spoke with other attorneys concerning his case, eroding attorney-client privilege; threatened to report trial counsel to the Board of Professional Responsibility; and accused trial counsel of theft. The trial court denied trial counsel’s motion on April 23, 2018, reasoning:

The [d]efendant’s actions are designed for the sole purpose of delaying the trial of this cause and are similar in nature with his previous behavior with

¹ The defendant’s affidavit of indigency is not included in the record.

his two prior appointed attorneys. The appointment of what would be [d]efendant's **fourth** lawyer for a Class A [m]isdemeanor would unduly delay the timely progression of this case, work a hardship on the [c]ourt's calendar and serve no legitimate purpose. Justice delayed is justice denied. Both the [d]efendant and the alleged victim are entitled to closure on this action which has been pending since December 2016. (emphasis in original)

At the trial on April 24, 2018, Thomas Dewayne Byrd testified he is the Trousedale County Property Assessor, and, as part of his duties, he is required to send property owners a notice of changes in their property value. If an owner has any concerns about these changes, he or she can schedule a meeting with Mr. Byrd. If the owner is still unsatisfied, he or she may come before the Board of Equalization ("the Board") to argue their case. Mr. Byrd testified the Board is comprised of five members appointed by the Trousedale County Commission. The Board meets once a year for two to three days in order to hear appeals from property owners. Although Mr. Byrd is not a member of the Board, he attends the meeting each year to provide the Board with property records or other information they may need to make a decision.

Prior to the Board's meeting on June 6, 2016, a decision was made to prohibit cell phones and other recording devices from the meeting. In addition, Mr. Byrd contacted the Trousedale County Sheriff's Department to request the presence of an officer at the meeting for "the safety of the [B]oard."

According to Mr. Byrd, the defendant arrived at the Board meeting on June 6, 2016, and announced his desire to record the meeting. He then walked into the meeting room and began setting up his tripod and camera. Mr. Mark Abbotoy, the chairman of the Board, asked the defendant to come back the next night so that Mr. Abbotoy could discuss the recording ban with the County Attorney. However, the defendant refused to come back and continued recording the meeting. Meanwhile, Mr. Byrd, who was sitting at his desk in the corner of the room, approached the defendant's camera and picked it up to remove it from the room. The defendant immediately reached for his camera, hit Mr. Byrd in the side of the head, and kicked him on his left side. Mr. Byrd did not retaliate but instead backed the defendant out of the room and into the hallway. Mr. Byrd testified he was afraid the defendant would try to hit him again following the incident.

On cross-examination, Mr. Byrd acknowledged the defendant has had an issue with his property taxes since approximately 2010. He also agreed he was both taller than the defendant and outweighed him by almost eighty pounds. Mr. Byrd agreed, when an officer asked if he wished to file a police report against the defendant, Mr. Byrd declined to do so and told the officer the defendant could return to the meeting if he did not bring

his camera. The defendant did come back the following night, and Mr. Byrd testified he was not afraid of the defendant at that time.

Sergeant David Morgan with the Trousdale County Sheriff's Department testified he was at the Board's meeting on June 6, 2016, and spoke with the defendant prior to the start of meeting. The defendant was adamant that he wanted to take his video camera into the meeting that night and indicated "it [was] not going to be peaceful" if anyone tried to stop him. Sergeant Morgan left the meeting shortly after this statement was made.

Lloyd Butts testified he is a member of the Board and was present at the meeting that night. The defendant arrived and informed the Board that he intended to record the meeting. As the defendant began setting up his camera on a tripod, Mr. Byrd informed him that recording was not permitted. When Mr. Byrd reached toward the defendant's camera, a "scuffle" occurred. The defendant, who was "excited and rather aggressive," kicked Mr. Byrd. After the altercation, the defendant was removed from the building, and Mr. Butts stayed in the meeting room. On cross-examination, Mr. Butts testified the decision to prohibit recording equipment was made prior to the Board's arrival.

Brenda Gross, the Deputy Property Assessor for Trousdale County, testified she attends the Board's meetings to assist Mr. Byrd, and, on June 6, 2016, Ms. Gross was sitting at her desk when the defendant entered the meeting room. When she looked up from her paperwork, Ms. Gross observed the defendant setting up a camera. A moment later, Ms. Gross looked back up and saw the defendant punching and kicking Mr. Byrd. After the confrontation, Mr. Byrd "pushed" the defendant out of the room, and Ms. Gross remained in the meeting room.

Elizabeth Harper testified she was on the Board in 2016, and present at the meeting that night. Before the defendant entered the meeting room, Ms. Harper heard "some commotion in the hallway about the [defendant's] camera," so when the defendant came in everyone was "trying to stay calm." The defendant began setting up his camera, and Mr. Byrd moved to stand in front of him. The defendant was angry and announced it was his right to record the meeting. As Mr. Byrd moved to pick up the camera, the defendant hit him, and Ms. Harper ran behind the desk to avoid the confrontation. On cross-examination, Ms. Harper testified there was a "no recording" sign posted when she arrived at the meeting, and the decision to prohibit recording devices came from Mr. Byrd.

Eric Holder testified he is a member of the Board, and, during the meeting in 2016, the defendant "barged" into the room and began setting up his tripod. Mr. Byrd stood in front of the defendant and asked him to come back the following night so he

could speak with the County Attorney. Because the defendant continued to set up his camera, Mr. Byrd asked the defendant to leave. As Mr. Byrd put his hand on the defendant's camera, the defendant "hit Mr. Byrd in the back of the head."

Mark Abbotoy testified he was the chairman of the Board during the meeting on June 6, 2016. Prior to the meeting, Mr. Byrd discussed his desire to prohibit recording devices with the Board. Shortly after the meeting began, the defendant entered the meeting room and began setting up his camera equipment. Mr. Byrd told the defendant he could not record the meeting but could come back the following night to allow Mr. Byrd to speak with the County Attorney first. However, the defendant "was there clearly to stir up a fight" and continued setting up his equipment. Mr. Byrd touched the defendant's camera, and the defendant kicked Mr. Byrd's side and punched him on the back of his head. Following the altercation, Mr. Abbotoy went outside to inform the police that the defendant had assaulted Mr. Byrd.

Deputy Troy Calhoun with the Trousdale County Sheriff's Department testified he received a call over his police radio on June 6, 2016, instructing him to assist with an unruly person at the Board's meeting. When Deputy Calhoun arrived on the scene, the defendant was standing in the parking lot, and Mr. Byrd was near the back door. The defendant demanded to know why he was not able to bring his recording equipment into the meeting room. While Deputy Calhoun was speaking with the defendant, Mr. Abbotoy came outside and informed Deputy Calhoun that the defendant had assaulted Mr. Byrd. Deputy Calhoun instructed Mr. Byrd and Mr. Abbotoy to go back inside the building.

The defendant called Sergeant Brandon Basford with the Trousdale County Sheriff's Department who testified he was contacted on June 6, 2016, by Officer Willie Dodson regarding a dispute between the defendant and Mr. Byrd. When Sergeant Basford arrived, the meeting had not yet begun, and he informed Mr. Byrd that he could not keep the defendant out of a public meeting simply because he wished to record the meeting. Although Sergeant Basford stayed on the premises to keep the peace, he did not witness the altercation inside.

Following deliberations, the jury found the defendant guilty of assault, a Class A misdemeanor. On May 30, 2018, a hearing was scheduled to discuss several pleadings filed by trial counsel and the defendant. However, on the morning of the hearing, trial counsel filed a motion to withdraw. Additionally, that morning the defendant filed a pro se "notice of ineffective counsel and motion to substitute counsel" contending, in part, trial counsel "attempted to frustrate the defendant," "proactively defrauded and attempted to deceive the defendant," and "made statements that are false and intentionally devoid of material facts." The defendant also filed a pro se motion for recusal, arguing the trial

court failed to recuse himself in a criminal contempt matter stemming from this case and condoned “racially charged hate conduct in his disgraceful court.”

When the hearing began, the trial court announced

I arrived this morning to a multitude of additional filings by [the defendant] alleging ineffective assistance of counsel despite being represented by an attorney, motion of recusal of myself. I’ve even got a disk that was provided. I did read the materials. I’ve not listened to the disk.

I also have a motion to withdraw filed by the Public Defender’s Office relating to various behaviors on the part of [the defendant] and an inability to get along, which obviously has been a recurring history from past representations.

I’ve just had enough. I’m recusing myself from this matter. I’m not making any further decisions. This will be referred out to another judge to handle it. I don’t believe I’ve done anything legally or factual for any reason really that I should recuse myself.

[The defendant] has no confidence in the fairness of the [c]ourt and I’m going to let him have a fresh start. So a new judge will decide the Public Defender’s motion, his motion, the sentencing in this matter.

However, the trial court did not transfer the case to another judge and instead filed an order on June 7, 2018, reversing his oral ruling, stating

This [c]ourt on May 30, 2018, announced it was recusing itself. This decision was based upon a new set of pleadings filed by the [d]efendant, pro se, without the use of his court appointed counsel. This recusal was not based upon any legal basis as noted by the [c]ourt.

Upon further reflection the [c]ourt reverses that prior ruling and will oversee this case to its conclusion. As there is no legal or factual basis for recusal, for the [c]ourt to recuse itself would not be fair to the individuals involved, would cause needless delay, cost, would waste valuable time of another [c]ourt to familiarize itself with the facts of the case, and, of most importance, is wholly unnecessary.

Following the trial court's order, trial counsel filed a motion for recusal arguing there "might be" an appearance of impropriety if the trial court hears the sentencing in the defendant's case. A hearing was held on June 18, 2018, during which the trial court stated he was "frustrated" when he orally recused himself but was confident that he could be fair. The trial court also considered trial counsel's motion to withdraw. The defendant was asked if he wished to represent himself, and he answered that he "wish[ed] to be relieved of the Public Defender's Office and retain [his] own counsel." The defendant explained, while he had not yet retained counsel, his friends planned to hire someone to represent him. The defendant also agreed that, if he was not able to hire counsel by the sentencing hearing, the defendant would proceed pro se.

The defendant's friends subsequently hired counsel ("sentencing counsel") for the defendant, and a sentencing hearing was held on August 8, 2018. The defendant was sentenced to eleven months, twenty-nine days in confinement at 70%. The defendant subsequently filed a motion for new trial in which he argued the evidence at trial was insufficient to support his conviction, the trial court erred in refusing to grant the motion for recusal, and trial counsel was ineffective for refusing to call witnesses on the defendant's behalf.

A hearing on the motion for new trial was held on November 9, 2018. Prior to the hearing, sentencing counsel moved for permission to withdraw, stating he and the defendant disagreed about what issues to include in an amended motion for new trial. Sentencing counsel did not feel comfortable including many of the defendant's proposed issues and believed the defendant should be allowed to file a pro se amended motion for new trial. The trial court denied sentencing counsel's motion and proceeded with the motion for new trial hearing, noting "this case has been pending for . . . right at two years." Sentencing counsel did not present any witnesses or evidence during the hearing. Regarding the ineffective assistance of counsel claim, sentencing counsel stated the defendant insisted on including this claim due to trial counsel's refusal to call certain witnesses on the defendant's behalf. Following the conclusion of the hearing, the trial court denied the motion for new trial and granted sentencing counsel's motion to withdraw. This timely pro se appeal followed.

Analysis

On appeal, the defendant asserts (1) the trial court erred in failing to grant the defendant's motion for recusal; (2) the evidence at trial was insufficient to support the defendant's conviction for assault; (3) the State committed prosecutorial misconduct; (4) trial counsel was ineffective for failing to call witnesses, impeach witnesses, or introduce exculpatory evidence; (5) the defendant's sentence was excessive; (6) the court reporter should have disqualified herself; (7) the indictment was invalid due to unqualified

panelists; (8) the jury was biased; (9) the trial court, State, and trial counsel colluded to deprive the defendant of a fair trial; and (10) the defendant was deprived the right to counsel on appeal. The State contends the defendant has waived many of his issues for failing to adequately support them with argument and/or raise them in his motion for new trial. The State further contends the evidence was sufficient to support the defendant's conviction, the trial court did not err in denying the motions for recusal; and the defendant failed to prove his claim of ineffective assistance of counsel.

We must first address the State's contention that many of the defendant's issues are waived for failing to support them with authority and for failing to include many of them in his motion for new trial. As the State noted, the defendant has failed to cite any authority for his claims, and many of the claims in his brief are no more than a single, conclusory sentence. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10. Furthermore, most of the defendant's claims were not included in his motion for new trial. "[I]n all cases tried by a jury, no issue presented for review shall be predicated upon . . . misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(e). Here, the only issues included in the defendant's motion for new trial were the sufficiency of the evidence, the denial of the motions for recusal, and the ineffective assistance of counsel. Therefore, the defendant's remaining issues are waived. However, because the defendant's right to counsel claim did not arise until after the motion for new trial hearing, we will also address this claim.

I. Motion for Recusal

The defendant argues the trial court erred in denying his numerous motions for recusal. The State contends there was no evidence of judicial bias which would have warranted disqualification at any point during the litigation.

A trial judge should grant a motion to recuse if the judge "has any doubt as to his ability to preside impartially in a criminal case or whenever his impartiality can reasonable be questioned." *Pannel v. State*, 71 S.W.3d 720, 725 (Tenn. Crim. App. 2001) (citing *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995)). Similarly, recusal is appropriate "when a person of ordinary prudence in the judge's position would find a reasonable basis for questioning the judge's impartiality." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). This Court reviews a trial court's denial of a motion to recuse *de novo*. Tenn. R. Sup. Ct. 10B § 2.01.

Following an exhaustive review of the record, we find no evidence of judicial bias. Although the defendant argues the trial court had “numerous abuses of discretion,” he has failed to describe with specificity any examples in his brief. The appellate record in this case consists of over 2,000 pages. “[I]t is not the duty of this [C]ourt to scour the record in search of the facts supporting a defendant’s argument.” *State v. Sharod Winford Moore*, No. M2015-00663-CCA-R3-CD, 2016 WL 3610438 at *8 (Tenn. Crim. App. June 28, 2016), *perm. app. denied* (Tenn. Nov. 17, 2016). The defendant also argues the trial court should have granted the motion for recusal following the reversal of its oral ruling. However, as the trial judge noted, there was no legal or factual basis for his initial decision to recuse himself. Our review of the transcript supports the trial judge’s conclusion that he was frustrated when he discovered the defendant had once again filed numerous last-minute pleadings prior to the hearing. The trial judge reversed his oral ruling a week later and remained on the defendant’s case out of judicial efficiency and fairness to all parties. The defendant has not pointed to anything in the record which would indicate the recusal of the trial judge was warranted at any stage of this case. Instead, it is apparent from the record that the trial court did everything possible to accommodate the defendant, who was clearly attempting to drag the litigation out as long as possible. The defendant is not entitled to relief on this issue.

II. Sufficiency

The defendant argues the evidence was insufficient to support his conviction of assault. Specifically, the defendant contends the “jury and disqualified defense counsel assisted the 13th juror who remained blind to the facts and evidence.” The State contends the evidence was sufficient to support the defendant’s conviction.

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court has stated the following rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere, and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The jury convicted the defendant of assault, a Class A misdemeanor. As charged in this case, assault occurs when a person intentionally or knowingly causes another to reasonably fear imminent bodily injury. Tenn. Code Ann. § 39-13-101(a)(2). Viewed in the light most favorable to the State, Mr. Byrd testified that a decision was made to prohibit recording devices from the Board meeting on June 6, 2016. The defendant arrived at the meeting with a video camera and stated he planned to record the meeting. Although Mr. Byrd explained that recording equipment was not allowed, the defendant set up his video camera and began recording the meeting. As Mr. Byrd picked up the defendant’s camera to remove it from the meeting room, the defendant punched Mr. Byrd in the head and kicked him in the side. After the altercation ended, Mr. Byrd testified he was afraid the defendant would hit or kick him again. Based on this testimony, a rational jury could find the defendant guilty of assault beyond a reasonable doubt. The defendant is not entitled to relief on this issue.

III. Ineffective Assistance of Counsel

The defendant generally argues trial counsel failed to call witnesses, impeach witnesses, and introduce exculpatory evidence. The defendant bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court’s application of the law to the facts is *de novo*, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel presents mixed questions of fact and law. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Thus, this Court reviews the defendant's post-conviction allegations *de novo*, affording a presumption of correctness only to the trial court's findings of fact. *See id.*; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the standard for determining ineffective assistance of counsel applied in federal cases is also applied in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. In order for a claim of ineffective assistance of counsel to succeed, both prongs of the *Strickland* test must be satisfied. *Id.* Thus, courts are not required to even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

A defendant proves a deficiency by showing "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the defendant shows there is a reasonable probability, or "a probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Here, although the defendant included an ineffective assistance of counsel claim in his motion for new trial, he failed to call any witnesses or present any evidence at the motion for new trial hearing and, therefore, cannot establish prejudice. *See Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). The petitioner is not entitled to relief on this issue.

IV. Right to Counsel on Appeal

The defendant argues he was denied the right to counsel on appeal. Specifically, the defendant contends he did not waive his right to counsel when he asked the trial court to remove his third appointed attorney. The State does not address this issue in its brief.

In criminal prosecutions, defendants are guaranteed the right to counsel by both our federal and state constitutions. U.S. Const. Amend. VI; Tenn. Const. art. I, § 9. This right applies to both the trial and the first direct appeal as of right. *Douglas v. California*, 372 U.S. 353, 357 (1963); *Lovin v. State*, 286 S.W.3d 275, 284 (Tenn. 2009). Similarly, the accused has a right to self-representation. *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984). Because the right to self-representation and right to counsel are rights in the alternative, the defendant cannot, for obvious reasons, assert both at the same time. *Lovin*, 286 S.W.3d at 284. The right to counsel is deemed so important that “the wrongful deprivation of a criminal defendant’s right to counsel is a structural error which so contaminates the proceeding that reversal is mandated.” *State v. Holmes*, 302 S.W.3d 831, 838 (Tenn. 2010). Whether a defendant has waived the right to counsel or asserted the right to self-representation is a mixed question of law and fact reviewed de novo with a presumption of correctness of the trial court’s factual findings. *State v. Hester*, 324 S.W.3d 1, 29-30 (Tenn. 2010).

A. Waiver

The right to self-representation may only be asserted after the defendant “knowingly and intelligently waives the valuable right to assistance of counsel.” *Northington*, 667 S.W.2d at 60. To exercise the right to self-representation, a defendant must (1) make a timely request to proceed pro se; (2) clearly and unequivocally assert the right to self-representation; and (3) knowingly and intelligently waive the right to counsel. *Hester*, 324 S.W.3d at 30-31. A defendant who has waived the right to counsel may not later assert that he was deprived of the assistance of counsel. *State v. Small*, 988 S.W.2d 671, 673 (Tenn. 1999). Additionally, the waiver of the right to counsel must be completed in writing. Tenn. R. Crim. P. 44(b)(2).

Here, the defendant did not sign a waiver of counsel. Furthermore, while the trial court frequently inquired into the defendant’s decision to proceed pro se, the defendant

wavered between wishing to represent himself and demanding appointed counsel. Because the defendant did not clearly and unequivocally assert his right to self-representation, we conclude the defendant did not waive his right to counsel.

B. Forfeiture

Although we conclude the record does not support a finding that the defendant expressly waived his right to counsel, we hold the defendant nevertheless forfeited his right to counsel on appeal. A defendant who engages in “extremely serious misconduct” may forfeit the right to counsel without a warning regarding the potential for implicit waiver or an explanation of the dangers of self-representation. *State v. Carruthers*, 35 S.W.3d 516, 548 (Tenn. 2000). Forfeiture may occur when a defendant utilizes the right to counsel to manipulate, delay or disrupt trial. *Id.* at 549. The trial court must consider the following factors in determining whether forfeiture has occurred: “(1) whether the defendant has had more than one appointed counsel; (2) the stage of the proceedings, with forfeiture ‘rarely . . . applied to deny a defendant representation during trial’; (3) violence or threats of violence against appointed counsel; and (4) measures short of forfeiture have been or will be unavailing.” *Holmes*, 302 S.W.3d at 839 (quoting *Commonwealth v. Means*, 907 N.E.2d 646, 659-61 (2009)). Because forfeiture is an extreme sanction, “only the most egregious misbehavior will support a forfeiture of [the right to counsel] without warning and an opportunity to conform [the defendant’s] conduct to an appropriate standard.” *Id.* at 846. The record in this case demonstrates that the defendant’s conduct both pre- and post-trial was egregiously manipulative and that he engaged in this conduct with the aim of delaying, disrupting, and/or preventing the orderly administration of justice.

The defendant’s numerous pro se efforts to delay the disposition of his case, both while he did not have counsel and once counsel was appointed, began at his arraignment and continued at every opportunity throughout the twenty-seven-month period between the date of the offense and the date of sentencing. The defendant filed countless pro se pre- and post-trial motions, many of which were filed while represented by counsel. In addition, the defendant repeatedly filed unnecessary subpoenas, summoning everyone from the mayor of Trousdale County to Governor Bill Haslam.

After being given numerous opportunities, the defendant finally established his indigency eight months after his indictment, and the trial court immediately appointed counsel. Less than two months after his appointment, the defendant’s first attorney sought permission to withdraw due to the defendant’s excessive and unrelenting demands, noting “no ethically scrupulous attorney known to me would ever be good enough to satisfy this defendant.” The trial court immediately appointed another attorney. Three months later, the defendant’s second appointed attorney also filed a

motion to withdraw in which he stated the defendant threatened to report him to the Board of Professional Responsibility unless he filed frivolous pleadings. The trial court immediately appointed trial counsel. However, five days prior to trial, trial counsel also filed a motion to withdraw, contending, in part, the defendant: (1) filed pro se pleadings during trial counsel's representation; (2) was barred from trial counsel's premises for harassing staff members; (3) refused to meet trial counsel at the courthouse because he believed it was bugged; (4) watched trial counsel's office to monitor trial counsel's whereabouts; (5) researched trial counsel's personal information, including his address, which made trial counsel "severely uncomfortable;" (6) claimed trial counsel was committing legal malpractice; (7) eroded attorney-client privilege by talking to other attorneys about his case; (8) accused trial counsel of intentionally delaying motions and crafting them to fail; (9) threatened trial counsel's law license; (10) attacked trial counsel through verbal and electronic communications; and (11) accused trial counsel of theft. In denying trial counsel's motion to withdraw, the trial court held,

The [d]efendant's actions are designed for the sole purpose of delaying the trial of this cause and are similar in nature with his previous behavior with his two prior appointed attorneys. The appointment of what would be [d]efendant's **fourth** lawyer for a Class A [m]isdemeanor would unduly delay the timely progression of this case, work a hardship on the [c]ourt's calendar and serve no legitimate purpose. (emphasis in original)

Following his trial and while still represented by trial counsel, the defendant filed pro se a "notice of ineffective counsel and motion to substitute counsel" in which he argued trial counsel "basely attempted to frustrate the defendant," "proactively defrauded and attempted to deceive the [] defendant," and "made statements that are false and intentionally devoid of material facts [to] the Court of Criminal Appeals." These assertions include allegations of unethical conduct. *See* Tenn. Sup. Ct. R. 8 RPC 1.3, 1.4, 3.3(a)(1). Trial counsel was ultimately allowed to withdraw following the conclusion of the defendant's trial. However, the defendant stated he did not want to represent himself and wished to retain counsel with the help of friends. The defendant also agreed he would represent himself at the sentencing hearing if he was unable to retain counsel by that time. Sentencing counsel, who represented the defendant at the sentencing hearing and on the motion for new trial, was later retained on the defendant's behalf by friends of the defendant.² Prior to the motion for new trial hearing, sentencing counsel requested permission to withdraw, stating he and the defendant disagreed about which issues to

² Although the defendant was able to retain counsel with the help of a third party, his right to the appointment of counsel remained intact. "The question in inquiries as to insolvency is not whether the defendant's friends or spouse or relatives have the ability or readiness or willingness to provide the funds, but whether the defendant personally has the means, or property which can be converted to the means to employ an attorney to represent him. *State v. Gardner*, 626 S.W.2d 721, 724 (Tenn. Crim. App. 1981).

include in an amended motion for new trial. The trial court initially denied sentencing counsel's motion and ordered the hearing to continue, noting "this case has been pending for . . . right at two years." However, following the conclusion of the hearing, the trial court granted sentencing counsel's motion to withdraw.

The defendant did not limit his pro se efforts to delay and disrupt the litigation to the trial court. He also filed numerous pleadings with this Court, oftentimes while represented by counsel, requesting permission to appeal the trial court's orders. Additionally, the defendant filed a civil lawsuit against the trial judge in federal court. Also named as defendants in the federal lawsuit were trial counsel, the prosecutors and court reporter in this case, a Circuit Court judge, the District Public Defender, two County Clerks, and the District Attorney. In addition to filing a civil lawsuit, the defendant also threatened to file complaints with the Board of Professional Responsibility against at least two of his three appointed attorneys.

The defendant also presented an inconsistent narrative to the trial court. Although the defendant stated at least twice that he wished to represent himself, both times he later told the trial court that he had not waived his right to counsel and demanded that counsel be appointed to represent him. The Tennessee Supreme Court observed that "[d]isingenuous invocations of the right of self-representation that are designed to manipulate the judicial process constitute an improper tactic by a defendant and are not entitled to succeed." *Hester*, 324 S.W.3d at 33.

Finally, the defendant demonstrated a complete unwillingness to cooperate with his attorneys. The record is clear that, had another attorney been appointed, the defendant would have manufactured reasons to force him or her to seek permission to withdraw.

Reviewing the factors set forth in *Holmes*, we conclude the defendant's actions in this case constitute forfeiture of his right to counsel on appeal. The defendant was appointed three different attorneys and was represented by counsel during trial. Additionally, we find that measures short of requiring the defendant to proceed pro se would have been unavailing. The defendant's conduct throughout the entire litigation was carefully calculated to control the proceedings. Regarding the third *Holmes* factor, although the defendant in this case did not physically assault or threaten to assault appointed counsel, the lack of violence does not prevent the forfeiture of the right to counsel. See *State v. Parsons*, 437 S.W.3d 457, 485-86 (Tenn. Crim. App. 2011) (holding, although the defendant did not physically assault appointed counsel, the third factor in *Holmes* was satisfied when the defendant "committed 'acts of violence' against the professional reputations of each of his two appointed lawyers" by filing complaints with the Board of Professional Responsibility, naming them as defendants in a federal

civil lawsuit, and accusing them of unethical behavior in pleadings). Here, the defendant threatened to file complaints with the Board of Professional Responsibility against at least two of his appointed attorneys and accused them of unethical behavior in numerous pleadings, which are a matter of public record. The defendant also named trial counsel as a defendant in a federal civil lawsuit. Because all four factors in *Holmes* are satisfied in this case, we conclude the defendant forfeited his right to counsel on appeal, and therefore, he is not entitled to relief on this issue.

Conclusion

Based on the foregoing authorities and reasoning, the judgment of the trial court is affirmed.

J. ROSS DYER, JUDGE