

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 09-262

REX ALLEN HAYES, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 7, 2009

APPEAL FROM THE ASHLEY
COUNTY CIRCUIT COURT,
[NO. CR2007-16-1]

HONORABLE SAM POPE, JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

Following a collision on Highway 425 near Hamburg, the prosecuting attorney in Ashley County charged appellant Rex Allen Hayes with the offenses of driving while intoxicated (second offense), negligent homicide in the death of Matthew Skender, first-degree battery of Matthew, and aggravated assault involving Justin Skender. The jury acquitted appellant of negligent homicide but found him guilty of driving while intoxicated as a second offense and the lesser-included offenses of second-degree battery and first-degree assault. The trial court sentenced appellant to a year in jail for the misdemeanor offenses of driving while intoxicated and assault to be served concurrently with a six-year term of imprisonment for the felony of second-degree battery.

For reversal of his convictions, appellant argues that the trial court erred by denying his motion for a continuance and by giving an instruction on second-degree assault that

allowed the jury to consider that he used his vehicle as a deadly weapon. We find no error and affirm.

On January 3, 2007, Justin Skender drove his truck while pulling an empty trailer. His grandfather, Matthew Skender, rode as a passenger. Traveling at a high rate of speed in his vehicle, appellant approached the Skenders from behind. Appellant struck the Skenders' trailer, causing both vehicles to crash. The Skender vehicle hit a culvert and overturned several times, ejecting Matthew from the vehicle. Witnesses testified as to appellant's erratic driving before the wreck, and those who stopped to offer assistance after the accident stated that appellant smelled of alcohol. Corporal Roy White of the Ashley County Sheriff's Department also testified that he detected the odor of intoxicants on appellant. Corporal White stated that he found an empty, half-gallon bottle of vodka in appellant's vehicle. Deputy Michael Vorhease transported appellant to jail and administered a breathalyzer test. Appellant registered .20% on the test.

As a result of the wreck, Justin sustained various cuts to his body, including a deep laceration to his head. Matthew, who was in relatively good health before the accident, also suffered a scalp laceration, as well as multiple pelvic fractures. An ambulance transported Matthew to a hospital in Little Rock, and doctors subsequently released him to a nursing home. Matthew died the day after he was admitted to the nursing home. The medical examiner who performed Matthew's autopsy testified that he died as a result of heart disease exacerbated by the injuries sustained in the accident.

The trial court scheduled the trial for Tuesday, August 12, 2008. Prior to jury selection on that day, appellant announced to the court that he had discharged his attorney, effective at 9:00 a.m. the previous day. Appellant stated that he had lost confidence in his attorney and asked for a continuance in order to engage the services of another lawyer. Appellant informed the court that he had scheduled an appointment with another attorney that afternoon. Appellant further explained that his attorney advised him of a plea offer made by the prosecutor on the Friday before trial, and that after meeting with his attorney on Saturday and Sunday, appellant became increasingly dissatisfied with his attorney. Appellant claimed that his attorney failed to discuss defense strategies and seemed unprepared for trial. Appellant also said that he felt his attorney was pressuring him to accept the plea offer. Appellant stated that, if the trial court denied his request for a continuance, then he would refuse to allow his attorney to represent him and that appellant would prefer to represent himself.

Appellant's attorney advised the court that he worked with appellant over the weekend, but the attorney asked for a continuance because appellant had taken the case file the previous morning to have a copy made but had not returned it. Considering that appellant's attorney did not have access to the case file the day before trial, the prosecutor was amenable to a continuance but only for twenty-four hours because of the medical examiner's schedule. The trial court denied appellant's motion for a continuance. The court commented that seventy-five jurors had been summoned, that the witnesses were in place,

and that appellant had not shown good cause. The trial court allowed appellant a few moments to consider his request to proceed without an attorney. After explaining to appellant the disadvantages of self-representation, the trial court relieved counsel and allowed appellant to proceed pro se. The court ordered the attorney to remain as standby counsel, but appellant refused to allow the attorney to sit with him.

Appellant argues on appeal that the trial court erred by not granting his motion for a continuance so that he could obtain another attorney. Our criminal rules of procedure provide that a court shall grant a continuance “only upon a showing of good cause and only for so long as necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.” Ark. R. Crim. P. 27.3. A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reversed on appeal in the absence of a clear abuse of that discretion. *Jackson v. State*, 2009 Ark. 336, 321 S.W.3d 260. The burden of establishing an abuse of discretion falls squarely on the shoulders of the appellant. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008). An appellant must not only demonstrate that the trial court abused its discretion by denying a motion for a continuance, but must also show prejudice that amounts to a denial of justice. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

It is also well established that the right to counsel of one’s choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly,

efficient, and effective administration of justice. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004). Once competent counsel is obtained, the request for a change in counsel must be considered in the context of the public's interest in the prompt dispensation of justice. *Id.* The trial court may also consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to the defendant. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995).

In this case, appellant's request for a continuance came on the day of trial. Our review of the record discloses that the trial court had granted appellant four continuances and had continued the case once at the State's request to accommodate the medical examiner's schedule. The trial date had been scheduled for over a month, and the jury venire and witnesses were assembled. The trial court was not persuaded by appellant's claim that his attorney was not prepared to mount a defense. Ultimately, appellant obtained an acquittal on the most serious charge of negligent homicide, and the jury convicted him of lesser-included offenses on two other charges. Thus, based on the record before us, we cannot conclude that appellant suffered prejudice that amounts to a denial of justice. Considering all of these circumstances, we find no abuse of the trial court's discretion for not allowing yet another continuance.

Appellant's remaining argument is that the trial court erred by instructing the jury on second-degree battery in accordance with Arkansas Code Annotated section 5-13-202(a)(3)

(Supp. 2009), which provides that a person commits that offense if the person recklessly causes serious physical injury to another person by means of a deadly weapon. Appellant recognizes that a vehicle can be considered a deadly weapon depending on the manner in which the vehicle was employed. See *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976). However, he contends that it was error for the trial court to give an instruction including this element under the facts of this case. The record reflects that appellant interposed no objection to this instruction at trial. It is a well-settled rule that arguments not raised at trial cannot be raised for the first time on appeal. *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008). The trial court warned appellant that pro se litigants are held to the same standards as attorneys. See *Eliot v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000). Thus, the fact that appellant elected to represent himself at trial does not excuse his failure to object.

We also note that, in advance of the trial court's decision to give this instruction, the court granted appellant's request to give an instruction on third-degree battery that also included the element of physical injury caused by means of a deadly weapon. See Ark. Code Ann. § 5-13-203(a)(3) (Repl. 2006). Under the doctrine of invited error, one who is responsible for error cannot be heard to complain. *Ferguson v. State*, 90 Ark. App. 119, 204 S.W.3d 113 (2005). The record is clear that appellant raised no objection to the instruction, and appellant invited any alleged error committed by the trial court in giving the instruction. For these reasons, we affirm on this point.

Affirmed.

Cite as 2009 Ark. App. 663

GLADWIN and GLOVER, JJ., agree.