

Cite as 2022 Ark. 7
SUPREME COURT OF ARKANSAS
No. CR-21-85

ANTHONY R. BEARD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: January 20, 2022

APPEAL FROM THE HOT SPRING
COUNTY CIRCUIT COURT
[NO. 30CR-17-190]

HONORABLE CHRIS E WILLIAMS,
JUDGE

AFFIRMED.

ROBIN F. WYNNE, Associate Justice

Anthony Beard appeals his conviction by a Hot Spring County jury of one count of rape and two counts of second-degree sexual assault. For his sole point on appeal, Beard argues that the trial court abused its discretion by denying his motion for continuance. We affirm.

Because Beard does not challenge the sufficiency of the evidence to convict him, we will only discuss the facts relevant to his argument on appeal. In 2018, Beard was convicted of the rape of his minor stepdaughter T.M., second-degree sexual assault of his minor stepdaughter M.L., and second-degree sexual assault of another minor girl, J.C. He was sentenced to life plus forty years in prison. This court reversed and remanded for a new trial. *Beard v. State*, 2020 Ark. 62, 594 S.W.3d 29.

On remand, Beard was charged with the rape of T.M., second-degree sexual assault of M.L., and second-degree sexual assault of J.C. The trial court appointed a public defender for Beard and set the trial for August 27 and 28, 2020. Beard subsequently retained private counsel, who had represented him in his first appeal. On August 6, three weeks before trial, Beard's new counsel entered his appearance and filed a motion to substitute counsel and a motion for continuance. The trial court granted the motion to substitute counsel on August 13 and set a hearing on the motion for continuance for August 17, ten days before trial. At the hearing, Beard's counsel argued that he was unable to adequately prepare for trial because he did not have access to discovery materials or other materials necessary for Beard's defense. Specifically, Beard's counsel claimed that he needed time to subpoena certain phone records from AT&T, Beard's cell phone carrier. Beard's counsel told the trial court that he had obtained the State's file earlier that day and previous defense counsel's file a few days earlier. He also said he needed time to advise Beard about a plea offer. The State did not object to a continuance. The State told the trial court that it did not intend to introduce additional evidence or call witnesses who had not testified at the first trial. The trial court denied the motion and stated that Beard's counsel was "capable of getting ready" for trial, reasoning that he had handled the prior appeal and that the State did not intend to call any witnesses other than those who had testified at the first trial. The trial court offered to sign any orders directing AT&T to expedite the disclosure of the phone records. Beard's counsel did not prepare any such order.

The trial was held as originally scheduled. J.C. testified that Beard touched her breasts, vagina, and buttocks when she was around twelve years old. M.L. testified that Beard touched her breasts and put his penis on her vagina and buttocks when she was around twelve or thirteen years old. T.M. testified that Beard put his fingers into her rectum and attempted to put his penis into her rectum when she was between eight and ten years old. Beard denied the allegations and contended that T.M. and M.L.'s mother coached the victims to fabricate the allegations. Beard renewed his motion for continuance prior to trial and again after the close of the State's case. The trial court again denied the motion. The jury found Beard guilty of the rape of T.M., second-degree sexual assault of M.L., and second-degree sexual assault of J.C. Beard was sentenced to an aggregate eighty years in prison and \$30,000 in fines. Beard timely appealed.

For his sole point on appeal, Beard argues that the trial court abused its discretion by denying his motion for continuance. He contends that it is unreasonable to expect new counsel to prepare for a trial on one Class Y felony and two Class B felonies involving three victims in only ten days. Beard acknowledges that his counsel had handled his prior appeal but contends that preparing an appeal brief and preparing for trial are completely different. Beard argues that the AT&T phone records—specifically, text messages he exchanged with J.C. and the mother of the other two victims—were crucial to his defense, and that the trial court's failure to allow his counsel time to obtain the records was prejudicial.

Under Arkansas Rule of Criminal Procedure 27.3, a “court shall grant a continuance only upon a showing of good cause and only for so long as is 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.” The denial of a motion for continuance is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. *Hendrix v. State*, 2019 Ark. 351, at 3, 588 S.W.3d 17, 19. An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance but also show prejudice that amounts to a denial of justice. *Ware v. State*, 348 Ark. 181, 195, 75 S.W.3d 165, 173 (2002). When a motion for continuance is based on a lack of time to prepare, we will consider the totality of the circumstances. *Id.*

This court has acknowledged that “a last-minute change in counsel *may* occasion, or require, a continuance in order to give the attorney time to prepare.” *Greene v. State*, 335 Ark. 1, 31, 977 S.W.2d 192, 207 (1998) (emphasis in original). A factor the trial court considers in deciding whether to grant a request to substitute counsel is whether the change in counsel will necessitate a continuance. *Id.* Once the trial court has permitted a change in counsel, the new counsel must be accorded sufficient time to prepare for trial. *Id.*

Beard relies on *Leggins v. State*, 271 Ark. 616, 609 S.W.2d 76 (1980), to support his contention that the trial court abused its discretion in failing to grant a continuance following a last-minute change in counsel. In *Leggins*, the defendant requested a change of counsel two weeks before trial, but he did not identify a new attorney or provide a material reason for his request. The trial court denied the request. This court affirmed, reasoning that “the trial court appropriately treated his request as a motion for continuance since a change of attorneys so close to trial would have required the granting of one.” *Id.* at 618, 609

S.W.2d at 78. We can distinguish this case from *Leggins*. Here, unlike the defendant in *Leggins*, Beard had already retained new counsel who was familiar with the case because he represented Beard in his first appeal. And the trial court had already granted Beard's motion to substitute counsel when it considered his motion to continue. As we have stated, a last-minute change in counsel may—not must—occasion or require a continuance. *Greene*, 335 Ark. at 31, 977 S.W.2d at 207.

Beard also cites *Butler v. State*, 339 Ark. 429, 5 S.W.3d 466 (1999), and *Gonzales v. State*, 303 Ark. 537, 798 S.W.2d 101 (1990), but these cases can likewise be distinguished. In *Butler*, we held that it was an abuse of discretion to deny the defendant's repeated requests for a continuance because the State failed to provide full discovery of the names of individual victims related to specific counts—in a case involving five victims and fourteen counts—to the defendant and his counsel until noon on the first day of trial. 339 Ark. at 433, 5 S.W.3d at 468–69. Here, Beard's counsel received the State's file ten days before trial, and counsel was familiar with the charges from his prior representation. In *Gonzales*, we held that it was an abuse of discretion to deny a continuance where appointed counsel did not learn he was to represent the defendant until the day before trial, and the defendant spoke little English and was unable to communicate with counsel without an interpreter. 303 Ark. at 539–40, 798 S.W.2d at 102. In this case, Beard's counsel entered his appearance three weeks before trial, and there was no language barrier.

As for the text messages that Beard argues were crucial to his defense, he fails to show how that evidence would have assisted his defense. Beard allegedly exchanged messages with

J.C. in 2015, when she was seventeen, several years after the incidents for which he was charged occurred. And he allegedly exchanged messages with T.M. and M.L.'s mother in 2016, about a year after the victims initially disclosed the incidents. Beard does not explain how messages exchanged well after the incidents for which he was charged took place would be helpful—or even relevant—to his defense. Plus, Beard did not submit an order to the trial court directing AT&T to expedite disclosure of the phone data despite the trial court's invitation to do so.

Considering the totality of the circumstances, we hold that the trial court did not abuse its discretion in denying Beard's motion for continuance. As the trial court reasoned, Beard's counsel had handled his first appeal and so was familiar with the case. The State did not call any witnesses who had not testified at the first trial. Beard's counsel had the previous defense counsel's file and the State's file before the hearing on the motion for continuance. And Beard did not specify which witnesses he would call or defenses he would present if his counsel had more time to prepare.

Nor has Beard shown prejudice. Beard argues that he was prejudiced by not having time to obtain the text messages he exchanged with J.C. and with T.M. and M.L.'s mother, noting several references to those messages in his trial testimony. We are not persuaded. As discussed above, Beard did not show how those messages—which were allegedly exchanged well after the incidents occurred and after the victims disclosed them—would have assisted his defense. The denial of a continuance to get these messages does not amount to a denial of justice. See *Ware*, 348 Ark. at 195, 75 S.W.3d at 173. Beard also generally contends that

the trial court's failure to give his counsel additional time to prepare for trial was prejudicial, but he does not specify what his counsel would have done differently if granted more time. This court will not presume prejudice when the appellant offers no proof of it. *Hendrix*, 2019 Ark. 351, at 7, 588 S.W.3d at 21.

Affirmed.

Mark Alan Jesse, for appellant.

Leslie Rutledge, Att'y Gen., by: *Jacob H. Jones*, Ass't Att'y Gen., for appellee.