DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. EDWARD FAYE PARKS, Appellant.	)	1 CA-CR 12-0284 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. S815CR201100853

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
And William Scott Simon, Assistant Attorney General
Attorneys for Appellee

The Brewer Law Office — Show Low
By Benjamin M. Brewer
Attorney for Appellant

D O W N I E, Judge

¶1 Edward Faye Parks appeals his convictions and sentences for disorderly conduct and aggravated assault of a peace officer. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 A sheriff's deputy stopped Parks after he failed to stop completely at a stop sign. Parks had no Arizona driver's license but stated he had a California license. After running Parks' identifying information, the deputy learned that Parks' Arizona license was suspended, and his California license was expired. He advised Parks his truck would be impounded and directed him to remove the keys from the ignition. When Parks instead reached for the gear shift, the deputy and Parks' passenger both yelled, "don't do it . . . it's not worth it." The deputy reached into the cab for the keys, whereupon Parks put the truck in gear, "hit the gas," and "took off pretty quick." The deputy suffered a "brush burn" from the "elbow to the arm pit" and a bruised hip.

¶3 Parks was charged with two counts of aggravated assault of a peace officer, class 2 felonies, and one count of aggravated assault, a class 4 felony. The State alleged Parks

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005) (citation omitted).

had two prior felony convictions and that he committed the present offenses while on parole from a felony offense. The jury found Parks guilty of disorderly conduct with a weapon, a class 6 felony (Count 1); aggravated assault of a peace officer, a class 2 felony (Count 2); and aggravated assault of a peace officer, a class 4 felony (Count 3). Parks received concurrent prison terms of 3.75 years, 15.75 years, and 10 years respectively.

¶4 Parks timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

I. Request to Retain Private Counsel

¶5 Parks was indicted in July 2011. At a January 3, 2012 hearing, he requested new counsel because he was unhappy with appointed counsel's handling of his case and because she was allegedly married to a deputy sheriff. The latter statement proved to be untrue. The court denied Parks' request. Over the State's objection, though, the court continued trial to February 14 so defense counsel could complete interviews.

¶6 At the January 30 pretrial management conference, counsel advised that interviews were complete and that the defense was ready for trial. She also stated that Parks had

just informed her he was "very ill." Counsel requested a three to four week continuance so Parks could resolve his medical issues. The State objected and requested substantiation of the medical condition. The court continued the management conference to February 6, advised Parks to provide medical information, and cautioned him to "assume that your case is going to trial [in] two weeks."

¶7 On February 6, defense counsel withdrew the motion to continue based on Parks' medical condition. She stated that Parks had informed her that day he was "looking into hiring private counsel, and . . . would like to proceed to trial with private counsel"; she provided the name of an attorney with whom Parks had spoken. The State objected, arguing Parks had had ample time to retain counsel and that it was a "one-witness trial." Defense counsel responded that the trial had not been "continued many times" and that Parks "was saving money for private counsel."

¶8 The court stated that Parks had had adequate time to hire an attorney. The court also voiced concern that if it did not try the case as scheduled, it did not know when its calendar could accommodate a trial. The court denied the continuance request, but stated:

> My denying the request to continue does not preclude you from hiring your own attorney. Now, whether [Ms. C.], or anyone else for

> that matter, would be willing to take a case and go to trial with one week's notice, that would be up to them; and it may be that this case is simple enough that there's no reason that she or some other attorney wouldn't be able to do that.
>
> So you can still, between now and next week, do whatever you would need to do to try to hire an attorney to represent you; but you just need to understand that if you hire a new attorney, that new attorney, before they can even enter a notice of appearance in this case has to certify that they are aware of the trial date and will be prepared to try this case.

¶9 Trial began as scheduled on February 14, with appointed counsel representing Parks. Parks contends the court abused its discretion by denying a continuance, which effectively prevented him from retaining counsel, in violation of his Sixth Amendment rights.

¶10 "It is axiomatic that an accused enjoys the right to assistance of counsel for his defense." *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983) (citation omitted). "It is also axiomatic that a motion for a continuance is directed to the discretion of the trial court, and that court's ruling will not be disturbed absent a clear abuse of discretion." *Id*. (citation omitted). The trial court is accorded substantial discretion because it is "in a position to judge the inconvenience of a continuance to the litigants, counsel, witnesses" and to determine whether "extraordinary

circumstances" warrant the continuance and whether "delay is indispensible to the interests of justice." *Id*. (internal quotation marks omitted) (citations omitted). Consequently the right to a choice of counsel is not absolute, but is "subject to the requirements of sound judicial administration." *Id*. at 369, 674 P.2d at 1367 (citation omitted). Factors a court should consider include: "whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience of the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory." *Id*. (citation omitted).

¶11 We find no abuse of discretion. The charges had been pending since July 2011. Parks made no mention of seeking private counsel until eight days before trial -- in February 2012. Even then, he merely conveyed that he was "looking into" hiring counsel and "saving money" to do so. He had not yet retained counsel and gave no indication that he had the current financial wherewithal to do so.[2] Although the trial had not been continued numerous times, the court was clearly concerned that a

[2] *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and *State v. Aragon*, 221 Ariz. 88, 210 P.3d 1259 (App. 2009), do not assist Parks. Those cases involved defendants who had actually hired private counsel and were seeking substitution.

continuance would create calendar issues in terms of rescheduling the trial. And as Parks acknowledges, "[t]he case was not complex at all." The State presented one witness, and Parks was the only defense witness.

¶12 The court did not prevent Parks from hiring private counsel for trial on February 14 and did not abuse its discretion in denying a continuance for that purpose, especially when Parks gave no indication he was capable of retaining counsel presently or in the near future.

II. Hearsay Objection

¶13 The deputy testified at trial that, as Parks reached for the gear shift, both he and the passenger began yelling "don't do it" and "it's not worth it." The court overruled Parks' hearsay objection and also permitted the prosecutor to elicit the passenger's follow up statement: "It's only a driving on suspended." The passenger did not testify at trial.

¶14 Parks contends the court erred by admitting this evidence because it was hearsay. He also argues the testimony violated his right to confront witnesses, though he admits we review this claim for fundamental error only because he did not object on this basis below. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted).

¶15 We review a ruling on a hearsay objection for an abuse of discretion. *State v. Chavez*, 225 Ariz. 442, 443, ¶ 5, 239

P.3d 761, 762 (App. 2010) (citation omitted). Before engaging in fundamental error review, we must first find that the court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991) (citations omitted).

¶16 The court ruled that the statements were not being offered for the truth of the matters asserted. *See* Ariz. R. Evid. ("Rule") 801(c)(1), (2) (a statement is hearsay if offered for the "truth of the matter asserted"). We agree. The statements were not offered to prove that it was not "worth it" to flee or to establish that Parks in fact was driving on a suspended license -– a point that was conceded at trial. As the State notes, "[t]he significance of the words was that they were said and how they affected [Parks], not the truth of what was said."[3] Finally, because the statements were neither testimonial nor hearsay, they did not implicate the Confrontation Clause.

III. Citation

¶17 Parks testified that what the deputy told the jury at trial "did not happen." He admitted being stopped for running a stop sign and also admitted being told his license was suspended, but he claimed the deputy said he was not going to

[3] Even if the statements were hearsay, the State correctly argues that the record would support admitting them under the excited utterance exception. *See* Rule 803(2); *see also State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (appellate court may affirm on any basis supported by the record).

cite him, so he drove home. According to Parks, the officer never reached through the window and was not struck by the vehicle.

¶18 The State called the deputy in rebuttal, asking whether he had in fact advised Parks he was not going to give him a citation. The officer denied such a statement, testifying he had written out a citation while in his patrol car after running Parks' information. The only reason he did not give it to Parks was because Parks left the scene. Over objection, the officer produced the citation, which was admitted into evidence.

¶19 Parks argues the court erred in admitting the citation because it had not been disclosed. We review a ruling on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004) (citation omitted). Rule 15.7(a), Arizona Rules of Criminal Procedure ("Criminal Rule"), permits the court to impose any sanction it finds appropriate unless the failure to disclose was "harmless or that the information could not have been disclosed earlier even with due diligence and the information was disclosed immediately upon its discovery." We also review claims that a court imposed insufficient sanctions for an abuse of discretion. *State v. Cota*, 229 Ariz. 136, 148, ¶ 48, 272 P.3d 1027, 1039 (2012) (citation omitted). "We do not disturb the trial court's ruling [regarding sanctions] unless the

defendant can show prejudice and an abuse of discretion." *State v. Jackson*, 186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996) (citation omitted).

¶20 It is clear from the record that neither the prosecutor nor defense counsel had seen the citation prior to trial. It is also clear that the citation's existence was not relevant until Parks testified.

¶21 Criminal Rule 15.1(h) states that "[u]pon receipt of the notice of defenses required from the defendant," the State must disclose the names and addresses of all persons the State intends to call as rebuttal witnesses, "together with their relevant written or recorded statements." Parks' notice of defenses listed generic defenses such as, "General Denial, Lack of Specific Intent and Insufficiency of State's Evidence." The record supports the trial court's finding that the State could not have known how Parks would testify and could not have anticipated "that the fact that the officer wrote out the citation [was] going to be relevant." The court did not abuse its discretion in admitting the citation. *Cf. State v. Sullivan*, 130 Ariz. 213, 216-17, 635 P.2d 501, 504-05 (1981) ("It is obviously unreasonable to require the State to list in advance of trial and prior to the presentation of the defendant's case the names of all potential rebuttal witnesses, since the prosecution can rarely anticipate what course the

defense will pursue."); *State v. Binford,* 120 Ariz. 86, 89, 584 P.2d 67, 70 (App. 1978) (rejecting challenge to undisclosed prosecution rebuttal witnesses who "were called to rebut certain testimony of the appellant which was the product of his last minute decision to take the stand").

¶22 Finally, even if the court erred in admitting the citation, Parks has not demonstrated any non-speculative prejudice or explained how his defense would have differed had the citation been disclosed. During cross-examination, defense counsel got the deputy to admit he had never shown the citation to anyone and did not attach a copy of it to the report he wrote about the incident or attempt to serve Parks with it after the fact.

CONCLUSION

¶23 Parks' convictions and sentences are affirmed.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
PHILIP HALL, Judge