IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SANTIAGO VALLE-PINO,
Appellant.

No. 2 CA-CR 2019-0277
Filed March 25, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20181325001
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Santiago Valle-Pino was convicted of ten counts of sexual conduct with a minor under the age of fifteen, and thirteen additional counts of sexual conduct with a minor at least the age of fifteen while in a position of trust. The trial court sentenced him to three consecutive life terms, followed by consecutive and concurrent prison terms totaling 145 years. On appeal, Valle-Pino contends the court erred by not granting his newly retained counsel's motion to continue trial, and by giving a flight jury instruction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Pena*, 235 Ariz. 277, ¶ 5 (2014). Valle-Pino and his girlfriend lived together with several children they had together and through other relationships. After living together for about a year, Valle-Pino began sexually abusing his girlfriend's daughter, A.M., who was then nine or ten years old. A.M. reported the abuse after Valle-Pino had abused her on several occasions by touching her breasts and vagina with his hands. After an investigation, Valle-Pino was charged with several sexual offenses against A.M., but at trial, A.M., then eleven years old, recanted. Valle-Pino was acquitted of all charges.

¶3 Not long after that trial, Valle-Pino moved into the household again and resumed the abuse. Valle-Pino's conduct escalated to include digital and penile penetration of A.M.'s vagina and oral sexual contact. He also began forcing her to stimulate his penis with her mouth and hands to the point of ejaculation. The abuse continued on a frequent basis for the next several years.

¶4 When A.M. was sixteen, her mother allowed her to move into a shed on the property that had been converted into living space. Because she could lock the door, Valle-Pino was unable to abuse her for several weeks. However, Valle-Pino once again abused her during a car ride to the

store to pick up Thanksgiving supplies, and again a few weeks later after she had come home from school feeling unwell.

¶5 After this last instance, A.M. reported the abuse. In a phone call, A.M.'s mother confronted Valle-Pino with incriminating texts he had sent to A.M. after the last instance of abuse. Valle-Pino, a truck driver who was preparing to drive out of state, never returned home and instead fled to Mexico. Three months later, he was arrested in San Luis, near the Mexican border.

¶6 A grand jury indicted Valle-Pino for twenty-three counts of sexual conduct with a minor, ten for incidents occurring when A.M was under fifteen years old. After a seven-day trial, a jury found Valle-Pino guilty of all charges, and he was sentenced as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Trial Continuance

¶7 Valle-Pino contends the trial court abused its discretion in denying his motion to continue the trial, arguing the decision left his newly retained counsel without sufficient time to prepare. He maintains the court's denial of his motion violated his right to adequate representation and counsel of his choice. A denial of a continuance "will only be disturbed upon a showing of a clear abuse of . . . discretion and prejudice to defendant." *State v. Amaya-Ruiz*, 166 Ariz. 152, 164 (1990). Although denying counsel adequate time to prepare a case for trial may deny the defendant a substantial right, time constraints by themselves do not create prejudice. *State v. Burns*, 237 Ariz. 1, ¶ 13 (2015) (citation omitted). In determining whether denial of a continuance denied a defendant a substantial right, we look at the totality of the circumstances. *Id.*

¶8 Valle-Pino was initially represented by a public defender. A little over a year after the public defender's appointment, on May 13, 2019, Valle-Pino's newly retained private counsel filed a notice of substitution of counsel, stating that he was "aware of the current trial date, set for July 16, 2019, and avows to this Honorable Court that he can and will be ready to proceed at that time." At a status conference that day, which new counsel did not attend because he was out of town, the trial court granted previous counsel's motion to withdraw and ordered her to provide the case file to new counsel within four days.

¶9 At a status conference on May 21—new counsel's first appearance in the case—he again said, "I can be ready for trial, Judge." But

he indicated that preparing for trial would take a lot of work, stating that the file was "pretty voluminous," and previous counsel had not reviewed disclosure with Valle-Pino, interviewed witnesses, or retained experts. The court treated counsel's statements as a motion to continue trial, and asked the state to respond. The state opposed the motion, pointing out that new counsel had avowed he would be ready for trial and the victim was anxious for trial and opposed any continuance. New counsel acknowledged that he had certified he would be ready, but said he "was not aware of what really what the status was" until he reviewed the file and then talked to his client. After the court confirmed that new counsel had said he would be ready, it denied the motion.

¶10 On June 12, new counsel filed a second, written motion to continue. He stated that "at the time [he had] avowed that he would be ready for trial, an incorrect assumption had been made that [previous counsel] had at least performed due diligence in preparation for trial." He said he had not learned "the full scope of the prior counsel's lack of preparation until after he took on the case." He cited numerous burdens, including ones he had mentioned before and new ones: the need to review additional disclosure from the state, some of it not yet received; the need to review testimony from the previous trial after the state had filed its intent to use the prior testimony against Valle-Pino; the fact that the state had not yet provided him the transcripts from the previous trial; the need to prepare for an additional witness the state had disclosed; and difficulty in securing an expert witness. He argued that a continuance was necessary to protect Valle-Pino's due process right to a fair trial and effective assistance of counsel.

¶11 At the motion hearing, counsel stated he was "not ready to go" to trial and thought there was "no way that we could be fully prepared and [e]ffective as much as I would like to be by this July 16th." The state opposed the motion, again asserting that the victim opposed it and "would like to see this case resolved." The state argued that the case was not that complex and asserted that new counsel could have learned the number of witnesses and the state's intent to use testimony from the previous trial from the record. Finally, the state asserted that it had no duty to disclose the trial transcripts and they were available from the court reporter. New counsel did not rebut these assertions.

¶12 The trial court once again denied the continuance. Although it found no "dilatory motive on the part of the defense in requesting the postponement," it found the case was not particularly complex, given the fact that there was only one victim. It also found that rescheduling the trial

would be "highly inefficient" for the court and considered the fact that the victim was "anxious to proceed."

¶13 A trial court may grant a continuance of trial "only on a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Ariz. R. Crim. P. 8.5(b). "The court must consider the rights of the defendant and any victim to a speedy disposition of the case." *Id.* In considering whether to grant the defendant a continuance to allow newly retained counsel additional time to prepare for trial, "[a] trial court has 'wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.'" *State v. Aragon*, 221 Ariz. 88, ¶ 5 (App. 2009) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)). "But an 'unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay' violates a defendant's right to counsel of choice." *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (internal quotation omitted). In reviewing a motion to continue by substitute private counsel of the defendant's choice, we consider factors including

> whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to 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. (quoting *State v. Hein*, 138 Ariz. 360, 369 (1983)).

¶14 In this case, the trial court did not abuse its discretion in denying the first request for continuance. New counsel had initially avowed that he would be ready for trial, and the court relied on that avowal in granting existing counsel's motion to withdraw. Although in his oral motion new counsel indicated that getting prepared for trial would be challenging, he again avowed he would be ready for trial without a continuance, suggesting that the motion was one of convenience rather than necessity. The court was entitled to rely on counsel's avowals and to conclude that counsel indeed had enough time to be ready. *Cf. United Metro Materials, Inc. v. Pena Blanca Props., LLC*, 197 Ariz. 479, ¶ 22 (App. 2000) (no abuse of discretion where court relied entirely on counsel's avowals in granting time extension).

¶15 Nor did the trial court abuse its discretion in denying the second motion. The court properly considered factors including the complexity of the case, its effect on the court's calendar, the convenience to the victim, and whether the requested continuance was dilatory. *See Aragon*, 221 Ariz. 88, ¶ 5; *Hein*, 138 Ariz. at 369. Most of these factors, including the relative lack of complexity of the case, the inconvenience to the court in delaying the trial, and the victim's desire to get the trial over with as soon as possible, weighed against granting the continuance. Although the court found that new counsel was not dilatory, "that fact does not by itself make the trial court's ruling improper" but rather "must be examined in light of all other considerations." *Hein*, 138 Ariz. at 370.

¶16 Nor has Valle-Pino shown any extraordinary circumstance that required a continuance. New counsel had more than two months to prepare. Most of the circumstances he mentioned were either known to him or evident in the record when he avowed to the court he could be ready. To the extent that new circumstances arose—disclosure of an additional witness, some additional discovery—they were foreseeable in kind and scope. Valle-Pino has not demonstrated that any of these circumstances compelled the trial court to delay the trial.

¶17 Finally, Valle-Pino cites no case, and we are aware of none, in which a conviction was reversed in circumstances analogous to those here. *E.g.*, *Aragon*, 221 Ariz. 88, ¶¶ 2, 7 (trial court erred in denying continuance for newly retained private counsel where motion filed six days before trial and court based denial on erroneous conclusion that trial deadline, only twelve days away, still applied); *Hein*, 138 Ariz. at 369-70 (affirming denial of continuance where case was not complex, trial had been continued twice, and delay would inconvenience witnesses and codefendant); *State v. Ramos*, 239 Ariz. 501, ¶¶ 5, 15-20 (App. 2016) (affirming denial of continuance eight days before trial where continuance was requested for dilatory purposes, case was not complex, and delay would have inconvenienced state and its witnesses). The trial court was in the best position to decide whether the trial must be continued because of extraordinary circumstances, *see Hein*, 138 Ariz. at 368, and we see no abuse of discretion in the court's conclusion that such circumstances did not exist here.

Flight Instruction

¶18 Valle-Pino argues that Arizona courts should cease issuing flight jury instructions, following other jurisdictions that have abolished them over concerns that flight may not be closely associated with consciousness of guilt. *See, e.g.*, *Fenelon v. State*, 594 So. 2d 292, 295 (Fla.

1992) (abolishing flight instructions). As Valle-Pino correctly acknowledges, however, our supreme court has expressly permitted flight instructions "if the state presents evidence from which jurors may infer 'consciousness of guilt for the crime charged.'" *State v. Parker*, 231 Ariz. 391, ¶ 44 (2013) (quoting *State v. Edwards*, 136 Ariz. 177, 184 (1983)); *see also State v. Thornton*, 187 Ariz. 325, 334 (1996) ("Leaving the state justifies a flight instruction as long as it invites some suspicion of guilt."). A grant of relief on this basis would therefore require us to overrule our supreme court, which we cannot do. *See State v. Lucero*, 223 Ariz. 129, ¶ 24 (App. 2009) (court of appeals bound by decisions of supreme court). Acknowledging this, Valle-Pino makes the argument here only to preserve the issue.

¶19 Alternatively, Valle-Pino argues that the flight instruction should not have been given because his travelling to Mexico was not immediate and he had reasons other than guilt to do so. Again, he appropriately concedes that precedent from our supreme court binds us to a contrary conclusion. *See Parker*, 231 Ariz. 391, ¶¶ 46, 50 (flight instruction not precluded for delay in flight, which "goes to the weight of the evidence," or for alternative explanations for flight, which "simply create a fact question for the jury to decide"); *see also Lucero,* 223 Ariz. 129, ¶ 24. Because he has not challenged the flight instruction on any other basis, we do not further address it.

Disposition

¶20 For the foregoing reasons, we affirm Valle-Pino's convictions and sentences.