Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-278

SEPTEMBER TERM, 2020

State of Vermont v. Roger H. Demers*	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 490-9-18 Cacr
		Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction by jury of driving under the influence, third offense (DUI). He argues that the trial court abused its discretion by refusing to consider or grant his pro se motion to continue trial. We affirm.

At trial, the State presented testimony from two police officers, Locke and Tetreault. The officers were parked next to each other in their respective cruisers in a parking lot just off South Main Street in Hardwick when Officer Tetreault saw defendant, whom he knew, driving south. This was a matter of concern because the officers believed, and later confirmed, that defendant's driver's license was suspended. Officer Locke followed the vehicle to a convenience store, where it pulled around the building and parked on the south side. When Locke pulled up, defendant was standing next to his vehicle. Defendant told Locke that he had not been driving. Locke detected an odor of alcohol while speaking to defendant and informed Tetreault, who had just arrived, that he suspected defendant was impaired. Tetreault also smelled an odor of alcohol and observed that defendant's speech was slurred, and he had bloodshot and watery eyes. Defendant told Tetreault that he had consumed three beers earlier in the day. Tetreault noticed a thermos in defendant's car and asked him what was in it. Defendant grabbed the thermos, opened it, and said it was beer, then poured the contents on the ground. Based on these observations as well as preliminary breath and field sobriety tests, Tetreault arrested defendant for DUI. Defendant later agreed to give an evidentiary breath test, which indicated that his blood alcohol level was well above the legal limit. Defendant continued to insist that he had not been driving. However, Tetreault had "[n]o doubt whatsoever" that he had seen defendant driving.

Defendant testified that on the date in question, he had gone to a pig roast at the home of his friend in the early afternoon. He stated that he parked his car at the nearby convenience store because he knew he was going to be drinking. He left the gathering at around 8:00 p.m. and walked to the convenience store, where he intended to call his brother to pick him up. He was just entering the store when the police cruiser pulled up with its blue lights on. On cross-examination, defendant agreed that he had not told the police officers the address where he had been or the host's name, or the names of any people who had been present. He conceded that he was standing next to his car when police arrived, not walking toward it. He also agreed that he did not claim that he was

not driving until after Officer Tetreault began to process him for the DUI charge, instead stating, "just let me blow; just let me blow." The jury found defendant guilty. This appeal followed.

On appeal, defendant argues that his conviction must be reversed because the trial court abused its discretion by denying his pro se motion to continue the trial so that the friend who hosted the pig roast could testify on his behalf. We conclude that the record does not demonstrate an abuse of discretion, and therefore affirm.

On the morning of trial, defendant told the court that he wanted a new attorney because his attorney had failed to secure a material witness, namely, the friend who hosted the pig roast. Defendant claimed that he was only notified two days earlier that the witness would be needed at trial. Defendant had spoken to the witness that night, and the witness informed defendant that he would not be able to make it to trial on the scheduled date because he had an appointment with a heart specialist. Defendant stated that he was not comfortable going forward without his witness, who would testify that defendant walked from the pig roast to the store.

The trial court interpreted this as a pro se motion to continue, which it denied, stating that such a motion had to come from defendant's attorney. Defendant stated, "if a motion can—to continue would get me to the point where I would have my witness present for the hearing, that would be fine, too." The court stated that it would consider whether defendant had "good grounds" to replace his attorney, and if not, then he could represent himself and the court would consider the motion to continue. The court noted that it was the attorney's role to decide trial strategy and whom to call as witnesses. The court asked if there was any record of a statement from the witness. Defendant's attorney stated that there was not because the witness was not interviewed by police or deposed by counsel. Defendant's attorney explained that her office had attempted to call the witness three times. Each time, there was a message stating that the voicemail was not set up. Defendant's attorney stated that she was not provided with the witness's address.

The trial court expressed concern that although defendant had represented what the witness would say, there was no affidavit or statement that confirmed that representation. It asked defendant whether the witness was available by phone. Defendant responded that the witness was at a doctor's appointment, "and the way Mark is, as far as his phone goes, if you try to call him, he won't answer his phone. . . . And if it's a number he recognizes, he'll return the call. That's how he does things." The court denied the motion to replace counsel, stating that the trial would proceed, and asked defendant if he wanted to represent himself. Defendant indicated that he preferred to keep his assigned counsel, and the trial proceeded.

Defendant argues that the court should have recognized his motion to continue as an implied request for hybrid representation, which the court had discretion to grant. While it is true that a court may grant a request for hybrid representation, this does not mean that the court is required to accept a pro se motion or pleading filed by a defendant who is represented by counsel. In re Morales, 2016 VT 85, ¶ 29, 202 Vt. 549. "An orderly presentation of a litigant's case is important and the trial court may impose controls on the filing of pro se motions by represented litigants to accomplish that end." Id. Whether to accept a pro se motion filed by a represented defendant is a matter within the trial court's discretion, and we will reverse its decision only if it totally withheld its discretion or exercised that discretion on grounds "clearly untenable or unreasonable." State v. Sims, 158 Vt. 173, 185-86 (1991).

The trial court acted within its discretion in refusing to accept defendant's pro se motion. The court explained that a represented person is ordinarily not allowed to file motions. The court noted that when a person is represented, it is the attorney's role to decide which witnesses to call.

The court stated that defendant could seek to proceed without representation, in which case the court would consider his motion to continue. Defendant did not wish to do so, and the court denied the motion. The record shows that the court considered the issues at stake and made a decision based on the facts before it. It did not abuse or withhold its discretion. See State v. Crannell, 170 Vt. 387, 407 (2000) (affirming trial court's decision to refuse to consider defendant's pro se motion because defendant was represented by counsel, defendant had not waived his right to counsel or sought to proceed pro se, and standard court procedure required motions be filed by attorney), overruled on other grounds by State v. Brillon, 2008 VT 35, ¶¶ 41-42, 183 Vt. 475.

Defendant argues that the court was obligated to grant a continuance to avoid depriving him of his constitutional right to call witnesses in his defense. We review the denial of a motion to continue for abuse of discretion. State v. Heffernan, 2017 VT 113, ¶ 18, 206 Vt. 261. "Because a motion to continue must be decided in the light of the circumstances surrounding each individual case, we will not interfere with the trial court's decision if there is a reasonable basis to support it." State v. Schreiner, 2007 VT 138, ¶ 14, 183 Vt. 42.

It is true that the U.S. and Vermont Constitutions guarantee defendant the right to call witnesses in his favor. See State v. Kelly, 131 Vt. 582, 588 (1973). However, this right is not absolute; it only applies "where the witnesses to be called will offer competent and material testimony." Id. Furthermore, the right may be limited by the need for "rules of procedure that govern the orderly presentation of facts and arguments." Taylor v. Illinois, 484 U.S. 400, 411 (1988). "The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." Id.

Vermont Rule of Criminal Procedure 50 requires that a motion to continue be filed "at least two days before the date the trial calendar is called." V.R.Cr.P. 50(b)(2). A motion to continue that is founded on the absence of a witness must be accompanied by an affidavit stating the witness's name and place of residence, the substance of the witness's expected testimony, and the measures taken to secure the witness's attendance. V.R.Cr.P. 50(c)(1). The rule further provides that a party is not entitled to a continuance based on the absence of a material witness "whom it is in the power of such party to summon, except when such witness is sick or otherwise disabled from attending court, unless he or she shall have caused such witness to be regularly summoned to attend." V.R.Cr.P. 50(c)(3). Defendant acknowledges that his motion to continue did not comply with these requirements. He maintains, however, that the circumstances of this case required the court to grant the motion anyway, citing our decision in State v. Heffernan, 2017 VT 113.

In Heffernan, we held that a trial court abused its discretion in denying the defendant's motion to continue trial until a witness who had been hospitalized could attend. Id. ¶ 23. The witness had given a statement to police that supported the defendant's claim that he acted in self-defense, and she had been subpoenaed to testify. Just after jury selection, the defendant learned that the witness had been hospitalized. The defendant immediately filed a motion to continue the trial on the ground that a material witness was disabled from attending court. The motion was supported by an affidavit filed by defense counsel as well as paperwork from a mental-health counselor detailing the witness's diagnosis, the seriousness of her condition, and her expected discharge date. The trial court denied the motion based on the lack of a physician's affidavit. We held that the court should have granted the continuance despite the failure to obtain the affidavit because it was undisputed that the witness was ill and the defense had worked diligently to secure her attendance and tried to get an affidavit from the physician. Id. ¶¶ 24-25. We concluded that the error prejudiced the defendant because the witness's testimony was vitally important to

defendant's self-defense argument. Id. ¶ 28. We therefore reversed and remanded the case for a new trial. Id. ¶ 32.

Defendant argues that the facts of this case similarly required the trial court to grant his request for a continuance. We disagree. Unlike in Heffernan, defendant's motion to continue was not even close to complying with Rule 50. The motion was untimely. It was not supported by an affidavit from defendant or anyone else, making it difficult for the court to assess the substance or importance of the witness's testimony or the validity of the reason for the absence. See State v. Ives, 162 Vt. 131, 141 (1994) (noting that trial court may deny motion for continuance on ground that it is not supported by affidavit). Most importantly, defendant's proposed witness was never subpoenaed to attend. Although defendant asserted that the witness was at a doctor's appointment, he did not claim that the witness was sick or otherwise disabled from attending court or provide any support for such a claim. Rule 50 makes clear that the court is not required to grant a continuance under these circumstances. See V.R.Cr.P. 50(c)(3) (stating party not entitled to continuance based on absent witness if witness was not summoned to attend, unless witness was sick or otherwise disabled). The trial court therefore did not abuse its discretion in denying the requested continuance. Because we find no abuse of discretion, we do not address the parties' arguments regarding prejudice. See Heffernan, 2017 VT 113, ¶ 18 (explaining that to reverse decision denying continuance, this Court must find abuse of discretion, which in turn must have resulted in prejudice to defendant).

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Karen R. Carroll, Associate Justice

_____
William D. Cohen, Associate Justice