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. 2020-083

MARCH TERM, 2021

State of Vermont v. Kyle Lenher*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 185-2-17 Rdcr
		Trial Judge: Thomas A. Zonay

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

Defendant appeals from his sexual assault conviction following a jury trial. He argues that the court committed structural error in denying his motion to continue the trial because it wrongfully denied him his counsel of choice. He also asserts that the court erred in instructing the jury about circumstantial evidence. We affirm.

I. Motion to Continue

A. Facts

We begin with the facts relevant to defendant's first argument. In February 2017, defendant was charged with committing a sexual assault in mid-August 2016. In May 2017, attorney Jeffrey Lichtman of New York and his associate Paul Townsend entered their appearances on defendant's behalf. After several continuances, the court set a jury draw for May 22, 2019, with trial scheduled for the following week. On May 6, 2019, Mr. Townsend moved to continue the trial. He stated that, although he had been overseeing defendant's case for more than two years, he had accepted a new job and would be leaving his current firm before the trial date. "As such," he stated, "another attorney at the [firm] w[ould] be taking over as the primary attorney on the case" and that person would need time to become familiar with the case. Mr. Townsend indicated that the State did not take a position on his request.

The court denied the motion the following day. It recounted the procedural history of the case, noting that Mr. Townsend had been representing defendant since May 2017. It explained that the jury draw, originally scheduled for November 2018, had been continued at Mr. Townsend's request because he was engaged in a federal trial. The matter was reset for February 2019 and again continued based on a stipulated motion by the State. In March 2019, Mr. Townsend filed a motion for dates certain for trial. The parties and court discussed potential trial dates at a March 21, 2019, pretrial conference. With the parties' agreement, the court scheduled the jury draw for May 22, 2019, with four trial dates specially assigned for May 28-31. At the time the dates were selected, there was no mention of any potential delay due to counsel's unavailability.

The court had altered its calendar and specially assigned another case to different dates in reliance on the trial being set.

As set forth above, Mr. Townsend based his request on his departure from his firm and the time it would take for a new attorney to become familiar with the case. He did not submit an affidavit in support of his request or indicate when he first knew that a continuance would be necessary. See V.R.Cr.P. 50(c)(1) ("Motions for continuance shall be accompanied by an affidavit stating the reason therefor and the time when such reason was first known."). The court found that Mr. Townsend had not shown that he could not arrange to try the case either before he left his current firm or in his new position. The court recognized that defendant was not incarcerated pending trial and that he might not oppose the continuance. But, the court explained, there were other interests that must be considered, including that of the putative victim who had been waiting for more than two years for the case to be tried and the fact that it was very difficult to schedule and reschedule a four-day trial.

On May 14, 2019, Mr. Lichtman, the firm's principal, moved for reconsideration. He provided an affidavit, which set forth the following. Although he and Mr. Townsend were both admitted pro hac vice in May 2017, Mr. Townsend performed all of the pretrial work. Mr. Townsend was defendant's primary, and essentially, only, point of contact with the firm. Mr. Lichtman supervised Mr. Townsend. Mr. Lichtman detailed all the work that Mr. Townsend had performed in the case, Mr. Townsend's familiarity with the matter, and the shared understanding between defendant and Mr. Townsend that, if the case went to trial, Mr. Townsend would try it.

Mr. Lichtman averred that on April 18, 2019, he learned that Mr. Townsend would be joining a new firm in approximately four weeks. Mr. Lichtman reminded Mr. Townsend of his ethical obligations with respect to this case and proposed various options for moving forward. Mr. Townsend continued to work on the case. On May 8, Mr. Townsend notified Mr. Lichtman that his request for a continuance was denied. Mr. Lichtman again reminded Mr. Townsend of his ethical obligations. On Mr. Townsend's last day with Mr. Lichtman's firm, Mr. Townsend copied Mr. Lichtman on an email to local counsel in this case wherein Mr. Townsend indicated that he did not intend to participate in the trial. For the third time, Mr. Lichtman reminded Mr. Townsend of his ethical obligations. He offered to keep Mr. Townsend on through the end of the trial, but Mr. Townsend's new employer refused this arrangement. Given these circumstances, Mr. Lichtman sought a sixty-day continuance so that another of his associates could prepare to try the case.

The court indicated that the request would be addressed at a May 16, 2019, pretrial conference. It added that Mr. Townsend had not been granted leave to withdraw from the case, and until such time as a motion to withdraw was granted, he was expected to fulfill his ethical obligations. See V.R.Cr.P. 44.2(c) ("An attorney who has entered an appearance shall remain as counsel until granted leave to withdraw by the court . . . . Leave to withdraw after a status conference has been held, or if no status conference is held after 28 days have elapsed since arraignment, will be granted only for good cause shown and on such terms as the court may order.").

The court denied the motion for reconsideration at the May 2019 hearing. It explained that the case was over two years old and the trial dates had been specially assigned at Mr. Townsend's request. It found that when Mr. Townsend was negotiating with his new employer, he knew he had entered an appearance in this case, he had not been granted leave to withdraw, and the trial dates were specially assigned. He could have asked to delay his start at the new firm. Whatever the needs of the new firm, the court found that defendant was also in need of his attorney being

ready to go forward, the putative victim needed finality, and the court needed to keep its cases moving forward, especially a two-year-old case that was specially assigned for a four-day trial. The court found that these needs were more important than the needs of Mr. Townsend's new firm to have someone start immediately. Mr. Townsend tried the case and defendant was found guilty.

B. Arguments on Appeal

Defendant argues that, by denying Mr. Townsend's motion to continue, the court denied defendant his right to the counsel of his choice in violation of the Federal and Vermont Constitutions. In his appellate brief, defendant identifies Mr. Lichtman or his firm as his counsel of choice. He contends that he need only show that the court abused its discretion in denying his request because this was a structural error that requires no showing of prejudice. He cites Kaley v. United States in support of this statement. See 571 U.S. 320, 336-37 (2014) ("[W]rongful deprivation of choice of counsel is 'structural error,' immune from review for harmlessness, because it 'pervades the entire trial.' " (quoting United States v. Gonzalez–Lopez, 548 U.S. 140, 150 (2006))). He contends that the court abused its discretion because it "chose to prioritize the demands of its schedule, the interests of a non-objecting putative victim," and his interests even though his counsel had filed the motion to protect his interests. Defendant maintains that the requested continuance was relatively short and would have preserved his right to his counsel of choice, which was Mr. Lichtman's law firm.

Defendant fails to show that the court abused its discretion and thus, we need not consider if he must also show prejudice. See State v. Heffernan, 2017 VT 113, ¶ 18, 206 Vt. 261 (explaining that Vermont Supreme Court reviews denial of motion to continue for abuse of discretion and "that, to reverse the trial court's decision, the abuse of discretion must have resulted in prejudice to the defendant"). In considering defendant's arguments, we rely on the trial court's findings, which are supported by the record. The question for the court was whether it should continue trial, as Mr. Townsend requested, because Mr. Townsend was moving to a new firm. Given that the court rejected the premise that Mr. Townsend's move to a new law firm would prevent him from continuing to represent defendant, the court did not abuse its discretion in declining to grant a continuance so that new counsel could get up to speed. See State v. Schreiner, 2007 VT 138, ¶ 14, 183 Vt. 42 ("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.").

We reject defendant's characterization of the trial court's ruling as depriving defendant of counsel of his choice. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); Vt. Const. ch. I, art. 10 (providing "[t]hat in all prosecutions for criminal offenses, a person hath a right to be heard by oneself and by counsel"); see also Gonzalez-Lopez, 548 U.S. at 144, 150 (explaining that an element of Sixth Amendment right to counsel is the right of a defendant who does not require appointed counsel to choose their own counsel, with certain limitations, and holding that "[a] choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." (emphasis omitted)).

For one thing, the motion at issue was not a motion by Mr. Townsend for leave to withdraw or a motion by any other lawyer to enter an appearance; it was a motion for a continuance. Moreover, neither defendant's initial motion to continue, filed by Mr. Townsend, nor his motion to reconsider, filed by Mr. Lichtman, indicated that defendant no longer wanted to be represented by Mr. Townsend. Nor did either pleading indicate that defendant preferred Mr. Lichtman or his firm as his counsel of choice over Mr. Townsend, who had been representing him from the outset

of the case. The record shows that Mr. Townsend unilaterally decided that his move to a new law firm meant that he would no longer be trying the case on defendant's behalf. That was not a choice left solely to Mr. Townsend. As the court explained, Mr. Townsend had entered a notice of appearance and he had not been given leave to withdraw. Insofar as the court made it clear that Mr. Townsend would not be granted leave to withdraw, the assumption and rationale underlying the motion for a continuance did not apply.

We do not accept defendant's suggestion on appeal that his desire to proceed with counsel from Mr. Lichtman's firm was implicit in Mr. Lichtman's motion to reconsider. In the affidavit in support of his motion to reconsider, Mr. Lichtman explained that even after Mr. Townsend indicated on his last day of work with Mr. Lichtman that he did not intend to try defendant's case, Mr. Lichtman reminded him of his ethical obligation not to abandon his client and offered to employ him through the duration of the trial. Mr. Lichtman's continuing willingness to find a way to enable Mr. Townsend to complete the trial undermines defendant's claim on appeal that defendant no longer wanted to be represented by the only lawyer who had worked with him on his case for the preceding two years. Mr. Lichtman's affidavit reinforces the conclusion that his request for a continuance to allow a new and as yet unnamed associate to get up to speed on the case was a response to Mr. Townsend's asserted intention to end his representation of defendant, not a response to defendant's request to cut ties with Mr. Townsend. Mr. Lichtman appeared to believe that the only choice was to assign a new associate to the case. But the court's authority was not so limited. It properly considered the circumstances of the case, concluded that the needs of Mr. Townsend's new firm did not take precedence over other compelling needs, and held Mr. Townsend to his ethical obligations. The court did not find, as defendant asserts, that Mr. Townsend "would not be ready for trial" or that he "ceased preparing for [defendant's] trial."

As defendant acknowledges, each case must be decided on its own facts. See Ungar v. Sarafite, 376 U.S. 575, 589-90 (1964) (recognizing trial court's discretion in ruling on motion to continue and that "deciding when a denial of a continuance is so arbitrary as to violate due process . . . . must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied"). The court considered the facts at issue here and it provided reasonable grounds for its decision. As set forth above, the case was very old, and the trial dates had been specially assigned at Mr. Townsend's request. Mr. Townsend knew that he had not been granted leave to withdraw from this case at the time he accepted his new position. He had various options available to him that would allow him to fulfil his ethical obligations to defendant. Even if, as Mr. Lichtman represented, Mr. Townsend's new firm had pressing needs, the court found other needs more compelling. The case needed to be tried, both for defendant's and the putative victim's sakes, and the court needed to keep its cases moving forward, especially a two-year-old case that was specially assigned for a four-day trial. While defendant disagrees with the court's conclusion, he fails to show an abuse of discretion.

II. Jury Instructions

We thus turn to defendant's challenge to the jury instructions. During the charge conference, the court proposed instructing the jury that "circumstantial evidence alone may be sufficient proof of the commission of a crime upon which to find the defendant guilty." Defendant suggested adding at the end of this sentence: "or the noncommission of a crime upon which you find the defendant not guilty." Defendant acknowledged that his proposed language was not based on case law or model jury instructions. The court declined to include his proposed language. It explained that defendant failed to show such language was required and the court found it "clunky" and likely to "sow more confusion than straighten it out."

Defendant argues on appeal that the court committed reversible error in denying his request. According to defendant, the court failed to fully instruct the jury of the law and it created a one-sided jury instruction favoring the prosecution. He contends that the error was not harmless because both sides made extensive use of circumstantial evidence to attack or support the putative victim's testimony.

We find no error. As we have explained:

> We review jury instructions as a whole and not piecemeal, in order to ensure that they accurately state the law on every theory fairly put forward by the evidence. Within those parameters, the trial court may exercise its discretion in the wording of the jury charge; a defendant is not entitled to have specific language included.

State v. Baird, 2006 VT 86, ¶ 30, 180 Vt. 243 (quotations omitted) (citation omitted); see also State v. Hendricks, 173 Vt. 132, 142 (2001) ("[J]ury instructions fall within the ambit of the trial court's discretion.").

The charge here accurately stated the law, and "there is no fair ground to say that the jury has been misled." State v. Vuley, 2013 VT 9, ¶ 41, 193 Vt. 622. We affirmed this same standard instruction in Baird, finding that "the instructions on circumstantial evidence," which included the language above, "accurately and fairly reflect the law." 2006 VT 86, ¶¶ 29, 31. In that case, we rejected the argument that, because the court declined to include specific language about circumstantial evidence proposed by the defendant, reversal was required. Id. ¶ 29. We reach the same conclusion here. The court acted within its discretion in concluding that an instruction referencing "proof of nonguilt" was not required by law and it might generate confusion.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice