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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2186**

State of Minnesota,  
Respondent,

vs.

Jamie Ray Beach,  
Appellant.

**Filed February 25, 2013  
Affirmed  
Larkin, Judge**

Dodge County District Court  
File No. 20-CR-09-780

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Paul Kiltinen, Dodge County Attorney, Mantorville, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Ted Sampsell-Jones, Bridget Kearns Sabo, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and  
Rodenberg, Judge.

## UNPUBLISHED OPINION

**LARKIN**, Judge

A jury found appellant guilty of first-degree criminal sexual conduct and first-degree burglary. Appellant was represented by court-appointed counsel at trial. Appellant claims that the district court abused its discretion by denying his request to continue the trial so he could have more time to earn additional funds with which to hire a private lawyer to replace his court-appointed attorney. Because the district court did not abuse its discretion by denying a continuance, we affirm.

### FACTS

Respondent State of Minnesota charged appellant Jamie Ray Beach with first-degree criminal sexual conduct and first-degree burglary. Beach was represented by court-appointed counsel from July 2009 through August 3, 2010. Beach retained private counsel, who represented him at trial. The first trial ended with a hung jury on November 5. The state informed the district court that it would retry the case. The district court lowered Beach's bail, and Beach was released from custody pending retrial. The district court scheduled the case for a second trial on March 7, 2011.

On January 18, the district court allowed Beach's private attorney to withdraw as attorney of record. In his affidavit supporting his ex parte motion for discharge, Beach's attorney stated that "Mr. Beach is in the process of gathering funds to hire another attorney to represent him and needs an extension of the March 7, 2011 jury trial." At a February 23 pretrial hearing, Beach appeared pro se and asked the district court to continue the trial for 90 days to provide him with time to hire an attorney. The district

court refused to postpone the March 7 trial date and told Beach to “get your attorney by that time, or a concrete plan of some sort.” On March 7, Beach appeared pro se and applied for a public defender. The district court determined that he qualified for court-appointed counsel and reappointed the public defender who had originally represented Beach. The district court continued the trial date to June 20.

On June 7, Beach moved the district court to continue the trial “for 90 days on the grounds that [he] wishes to hire private counsel to represent him in this matter,” asserting that he had “two-thirds of the retainer money required and need[ed] an additional 3 months to earn the remaining fee.” On June 9, Beach’s public defender filed an affidavit with the district court stating that Beach “has earned \$10,000 toward attorney fees and believes he needs another \$6,000 to hire a private attorney of his choice.” The public defender further stated: “As of June 9, 2011, Mr. Beach has decided to hire Richmond McCluer . . . and has an appointment on Monday June 13, 2011 to meet with Mr. McCluer.” The public defender also informed the district court, in an e-mail exchange, that she would remain as attorney of record if Beach did not retain a private attorney and that she would be prepared to represent Beach at trial. The district court denied Beach’s motion via e-mail on June 10, but stated: “If private counsel comes on board Monday June 13, that may raise a different question.”

When Beach appeared for trial on June 20, he had not retained a private attorney. He appeared with his public defender and renewed his request for a continuance so he could obtain the additional funds necessary to hire McCluer. The district court denied the request and explained that if another attorney was willing to take the case and requested a

continuance to prepare for trial, the court would consider a continuance. But the district court stated:

So continue for lack of preparation, I don't have that motion in front of me, and no, there's not going to be a continuance. You may get fired tomorrow or the attorney may raise the fee. I don't have an attorney here with a certificate of representation. If I have that I'll give it consideration.

The trial proceeded as scheduled, and the jury found Beach guilty of both offenses. The district court subsequently sentenced Beach to serve 153 months in prison. Beach appeals, arguing that the district court violated his constitutional right to counsel of choice by denying his motion for a continuance.

## DECISION

### I.

The Minnesota Supreme Court has previously addressed the issue raised in this case, namely, whether a district court abuses its discretion by denying an indigent defendant's request for a continuance so he can obtain private counsel to replace his court-appointed attorney. *See, e.g., State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998); *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). The applicable substantive law, as well as the standard of review, is summarized as follows.

The U.S. Const. Amend. VI and Minn. Const. art. 1, § 6, provide a criminal defendant in this state the right to have the assistance of counsel for his defense. This right includes a fair opportunity to secure counsel of his choice. An indigent defendant has the right to be provided competent counsel in all criminal proceedings. However, the right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his choice. Although he may request a substitution of counsel, his request will be granted

only if exceptional circumstances exist and the demand is timely and reasonably made. The granting of such a continuance is a matter within the [district court's] discretion, and [its] decision should be based on all facts and circumstances surrounding the request. A defendant may not demand a continuance for the purpose of delay or obtain a continuance by arbitrarily choosing to substitute counsel at the time of trial. In determining whether the [district] court was within its sound discretion in denying a motion for a continuance, this court looks to whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial.

*Vance*, 254 N.W.2d at 358-59 (citation omitted).

Under Minnesota precedent, a district court has discretion to deny an indigent defendant's request for a continuance to obtain private counsel when the motion is made at or near the time of trial; the defendant is represented by competent, prepared, court-appointed counsel; and no private lawyer is available and willing to represent the defendant. *See Worthy*, 583 N.W.2d at 278 (holding that district court did not abuse its discretion by denying request for continuance made on the day of trial, because defendants' court-appointed attorneys were experienced, competent, and prepared for trial, and defendants articulated no valid reason for firing them and could not provide the court with name of attorney willing to represent them); *Vance*, 254 N.W.2d at 359 (holding that district court did not err in denying continuance sought a few days before trial when defendant had "a competent and able public defender who had thoroughly investigated the facts and was prepared for trial" and defendant could not be certain of securing private representation); *see also State v. Caldwell*, 639 N.W.2d 64, 69 (Minn. App. 2002) (holding that district court did not abuse its discretion by denying request for

continuance made on the day of trial, because the defendant had not made an effort to hire a private attorney in the three months prior to trial, did not attempt to show a basis for asserting that his court-appointed attorney was not properly representing him, was not employed, and failed to demonstrate how he could pay for a private attorney), *review denied* (Minn. Mar. 27, 2002).

Even though *Worthy* and *Vance* are apposite, Beach does not discuss these cases in his briefing. Instead, he primarily relies on *State v. Courtney* as support for his counsel-of-choice claim. 696 N.W.2d 73 (Minn. 2005). In *Courtney*, the supreme court held that a district court did *not* abuse its discretion by denying a defendant's request for a trial continuance, after "[b]alancing [the defendant's] right to counsel of his choice against the public interest of maintaining an efficient and effective judicial system, and in light of [the defendant's] lack of diligence" in obtaining counsel. *Id.* at 82. However, the defendant in *Courtney* was not represented by court-appointed counsel when he requested a continuance. *Id.* Instead, he was substituting one private attorney for another private attorney. *Id.*

The fact that a defendant was represented by court-appointed counsel at the time of the continuance request is significant because "the right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his choice." *Vance*, 254 N.W.2d at 358; *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S. Ct. 2557, 2565 (2006) (stating, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"); *see also* Minn. R. Crim. P. 5.04, subd. 1(2)(c) (explaining that the district court must appoint a public defender only if the

defendant is “financially unable to obtain counsel”). Because an indigent defendant’s right to counsel of choice is limited, we focus our analysis on precedent addressing continuance requests by indigent defendants—*Worthy* and *Vance*—both of which support the district court’s ruling.

Beach moved for a continuance on June 7, less than two weeks before trial and again on the day of trial. *See Worthy*, 583 N.W.2d at 278 (continuance request made on first day of trial); *Vance*, 254 N.W.2d at 359 (continuance request made a few days before trial). At that point, Beach was represented by a public defender who had previously represented Beach in this case from July 2009 through August 3, 2010, and who had been reappointed on March 7, 2011. The public defender informed the district court that she was prepared and willing to defend Beach at trial. *See Worthy*, 583 N.W.2d at 278 (reasoning that the court-appointed attorneys were “experienced, competent, and prepared to try the case”); *Vance*, 254 N.W.2d at 359 (“[D]efendant was provided with a competent and able public defender who had thoroughly investigated the facts and was prepared for trial.”). When Beach asked for an additional 90-day continuance on June 7, he did not identify a private attorney who was willing to represent him. *See Worthy*, 583 N.W.2d at 278 (reasoning that neither defendant “could provide the court with the name of another attorney who would be willing to represent them”); *Vance*, 254 N.W.2d at 359 (“[Defendant] could not be certain of securing counsel and merely stated that someone would attempt to raise the money.”). Nor did he allege that his public defender was incompetent or not prepared for trial. *See Worthy*, 583 N.W.2d at 278 (reasoning that neither defendant “had good cause for firing his attorney”); *Vance*,

254 N.W.2d at 359 (“[Defendant] had no cause to be dissatisfied with his assigned counsel.”).

Even though the circumstances here are strikingly similar to those in *Worthy* and *Vance*, Beach contends that the district court abused its discretion by denying a continuance in this case. Beach argues that the United States Supreme Court’s holding in *Gonzalez-Lopez* “largely overruled the standard that had previously been used by Minnesota courts in reviewing choice-of-counsel claims.” We disagree that *Gonzalez-Lopez* affects the analysis used to determine whether a district court erroneously denied a continuance request implicating the right to counsel of choice.

In *Gonzalez-Lopez*, the government agreed that a federal district court had deprived the defendant of his right to counsel of choice by erroneously denying his retained out-of-state attorney’s request for admission pro hac vice. *Gonzalez-Lopez*, 548 U.S. at 144, 126 S. Ct. at 2561. But the government argued that “the Sixth Amendment violation is not ‘complete’ unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington* . . . i.e., that substitute counsel’s performance was deficient and the defendant was prejudiced by it.” *Id.* As to the sole issue raised—the remedy for a violation of the right to counsel of choice—the Supreme Court concluded that “[n]o additional showing of prejudice is required to make the violation ‘complete,’” harmless-error analysis does not apply, and that “erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as ‘structural error.’” *Id.* at 146-50, 126 S. Ct. at 2562-64 (quotation omitted).

Thus, *Gonzalez-Lopez* instructs that an established violation of the federal constitutional right to counsel of choice is a structural error that requires reversal. The decision does not address whether a district court's denial of an indigent defendant's request for a continuance to obtain funds to hire a private attorney results in a choice-of-counsel violation. In fact, the opinion states that an indigent defendant does *not* have a federal constitutional right to counsel of choice. *Id.* at 151, 126 S. Ct. at 2565. *Gonzalez-Lopez* therefore does not affect our determination regarding whether the district court violated Beach's limited right to counsel of choice by denying a continuance in this case.

Beach does not cite any authority supporting his assertion that the district court abused its discretion by denying a continuance.<sup>1</sup> And his procedural arguments are unavailing. He argues that the district court "failed to consider the relevant factors," "failed to balance the right to counsel against the need for efficient trials," and "relied entirely on reasons that were irrelevant, illogical, or purely hypothetical." Beach also complains that "the district court made no factual findings *at all*," when denying his motion. But the caselaw does not require the district court to consider any particular factors. Instead, "[t]he granting of such a continuance is a matter within the [district

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<sup>1</sup> Contrary to his assertion at oral argument, *United States v. Sellers*, does not support Beach's position. 645 F.3d 830 (7th Cir. 2011). *Sellers* held that a federal district court violated a defendant's right to counsel of choice by denying his request to continue a scheduled trial so his newly retained attorney could be substituted for counsel of record. *Id.* at 834. The circuit court recognized that the Sixth Amendment right to assistance of counsel includes the right, "when the defendant has the means to retain his own attorney, to be represented by counsel of choice." *Id.* Because the defendant in *Sellers* was not indigent and had retained his attorney of choice, *Sellers* is distinguishable and unpersuasive. *See id.* at 833-34.

court's] discretion, and [its] decision should be based on all facts and circumstances surrounding the request.” *Vance*, 254 N.W.2d at 358. Moreover, the district court is not required to make findings of fact when ruling on a motion for a trial continuance. *Compare* Minn. Stat. § 631.02 (2008) (providing that the court may grant a continuance upon motion of either prosecution or defense if the moving party has shown sufficient cause) *with* Minn. R. Crim. P. 11.07 (stating that the court “must make findings and determinations on the omnibus issues in writing or on the record within seven business days of the Omnibus Hearing”).

From January 18, when Beach’s private attorney withdrew, to June 20, the scheduled trial date, Beach had more than five months to hire private counsel. During that time, the district court appointed a public defender, granted one continuance, and indicated that it would consider another continuance if a new attorney filed a certificate of representation and needed additional time to prepare for trial, explaining that it was not willing to consider a continuance unless it had “an attorney here with a certificate of representation.”<sup>2</sup> The district court’s implicit reasoning is consistent with precedent—an indigent defendant’s request for a continuance on the day of trial need not be granted, and the trial thereby delayed, when competent, court-appointed counsel is willing to represent the defendant and no private attorney has come forward to take the case. *See Worthy*, 583 N.W.2d at 278; *Vance*, 254 N.W.2d at 359. Beach had a “fair opportunity to secure

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<sup>2</sup> We observe that although the district court denied Beach’s February 23 request for a 90-day continuance, it granted a continuance on March 7, after reappointing the public defender to represent Beach. By continuing the March 7 trial date to June 20, the district court provided Beach with a longer continuance than he had asked for on February 23.

counsel of his choice,” and the district court did not abuse its discretion by denying Beach’s motion for a continuance. *See Vance*, 254 N.W.2d at 358.

## II.

Beach’s pro se supplemental brief asserts a number of purported errors, including that (1) a judge who had previously been removed presided over a hearing in his case, (2) he was in custody 16 months prior to his first trial, (3) he was retried after a mistrial, (4) the first-degree criminal-sexual-conduct charge against him was “too high,” and (5) a member of the jury was a family member of the complainant’s friend. Beach does not cite legal authority as support for his claims of error.

An assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Because there is no obvious prejudicial error, the issues in Beach’s pro se supplemental brief are waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that claims in a pro se supplemental brief were waived because the brief contained no argument or citation to legal authority supporting the claims).

**Affirmed.**