APPENDIX

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APPENDIX A

Supreme Court of Colorado

The People of the State of Colorado, Petitioner,
v.
William Allen Davis, Respondent.

Supreme Court Case No. 21SC388

April 10, 2023

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 18CA641

Attorneys for Petitioner: Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado

Attorney for Respondent: Mallika L. Magner, Crested Butte, Colorado

Attorneys for Amici Curiae Colorado Criminal Defense Bar, National Association for Public Defense, and Office of Alternate Defense Counsel: Reppucci Law Firm, P.C., Jonathan D. Reppucci, Denver, Colorado

En Banc

JUSTICE HART delivered the Opinion of the Court, in which CHIEF JUSTICE BOATRIGHT, JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.

JUSTICE HART delivered the Opinion of the Court.

¶1 As we explain in more detail in *People v. Rainey*, 2023 CO 14, 527 P.3d 387, a companion case to this one, the Sixth Amendment to the United

States Constitution does not guarantee a criminal defendant continued representation by a particular court-appointed attorney. Therefore, a court confronted with a request for a continuance in which a defendant seeks continued representation by their appointed attorney is not required to apply the eleven-factor test we established in *People v. Brown*, 2014 CO 25, 322 P.3d 214. Instead, such a request should be considered with a view to determining whether a defendant can show that replacing particular appointed counsel would prejudice the case. Only then is that defendant entitled to a continuance to enable that attorney to continue the representation.

¶2 Here, the trial court correctly considered whether defendant William Allen Davis would be prejudiced if his appointed counsel was replaced by a different public defender and concluded that he would not be. We therefore reverse the division's opinion remanding for application of the *Brown* factors.

I. Facts and Procedural History

¶3 On April 20, 2017, Davis was charged with vehicular eluding, reckless driving, and driving under restraint after failing to yield to a Parks and Wildlife officer at Golden Gate Canyon State Park. The court appointed Garen Gervey as Davis's public defender and set the trial for November 20, 2017.

¶4 On October 30, 2017, Davis, through counsel, moved for a continuance because (1) Gervey had another trial set for the same day and (2) due to a scheduling misunderstanding, investigation was still being completed in the case. The trial court denied the motion.

¶5 Davis then filed a second motion to continue the trial, this time asserting his "right to continued representation by counsel of choice [under] *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002)," and stating that he "does not consent to a new attorney stepping in to handle his trial."

¶6 The court denied the motion after holding a hearing in which it emphasized the scheduling difficulties it was having in trying to set a trial date and stated that because this case was "essentially a traffic case," it would likely be straightforward enough to be tried in a single day. In denying the motion, the court also observed, quoting from *People v. Coria*, 937 P.2d 386, 389 (Colo. 1997), that the "substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice." The court explained that it perceived no prejudice because it would not take an attorney "of any competence any time to prepare," and therefore denied Davis's motion.

¶7 On the morning of trial, Davis, through newly substituted counsel, again moved for a continuance. The court denied the motion, and the trial proceeded. The jury convicted Davis of vehicular eluding, reckless driving, and driving under restraint.

¶8 Davis appealed his conviction, asserting, as relevant here, that the trial court should have granted his continuance because he had a right to be represented by his original public defender.

¶9 The division adopted the holding from *People v. Rainey*, 2021 COA 35, 491 P.3d 531, that indigent defendants have a constitutional right to continued representation by appointed counsel and district courts must apply the *Brown* factors when consider-

ing a continuance to enable continued representation by appointed counsel. *People v. Davis,* No. 18CA641, ¶¶ 10, 15, 18–19, 2021 WL 1691903 (Apr. 22, 2021). Accordingly, the division reversed Davis's conviction and remanded for further proceedings. *Id.* at ¶¶ 20–21.

¶10 The People petitioned this court for review, and we granted certiorari to determine whether the Sixth Amendment provides a right to continued representation by appointed counsel and whether a trial court is required to apply the *Brown* test when ruling on a defendant's continuance to enable continued representation.[1]

II. Analysis

¶11 After setting out the applicable standard of review, we explain the two Sixth Amendment rights that have been recognized by the United States Supreme Court and this court—the right to the effective assistance of counsel and the more limited right to choice of counsel. We then explain why any right to continued representation by a particular attorney flows from the initial right to choose that attorney. Next, we reaffirm that the conflict line of cases discussing a defendant's entitlement to waive a potential attorney-client conflict does not establish a Sixth

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[1] We granted certiorari on the following issues:

1. [REFRAMED] Whether the Sixth Amendment right to counsel of choice encompasses continued representation by a particular public defender once appointed.
2. [REFRAMED] Whether trial courts are required to apply and make record findings on the eleven-factor test from *People v. Brown*, 2014 CO 25, 322 P.3d 214, when assessing a defendant's request to continue trial so that a particular public defender can continue to represent him.

Amendment right to continued representation by a specific appointed attorney. Finally, we explain that a trial court considering a defendant's request for a continuance so that a particular court-appointed attorney can continue the representation should consider whether the defendant would be prejudiced by denial of the continuance.

A. Standard of Review

¶12 Appellate courts review a trial court's denial of a motion for a continuance for an abuse of discretion. *Brown*, ¶ 19, 322 P.3d at 219. However, where, as here, the question is whether the appellate court applied the correct legal standard, we review de novo. *Ronquillo v. People*, 2017 CO 99, ¶ 13, 404 P.3d 264, 267.

B. The Sixth Amendment Right to Counsel

¶13 The Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16. Both federal and state case law define the precise contours of this right to counsel.

¶14 Because legal representation "is critical to the ability of the adversarial system to produce just results," *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), criminal defendants have the right to a court-appointed attorney if they cannot otherwise retain counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343–44, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Moreover, "the right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 (quoting

McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). This right to effective representation derives "from the purpose of ensuring a fair trial," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), and is constitutionally guaranteed to all criminal defendants, *Strickland*, 466 U.S. at 685, 104 S.Ct. 2052. The right to effective assistance of counsel "imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez*, 548 U.S. at 148, 126 S.Ct. 2557.

¶15 For those defendants who hire counsel or find private counsel to represent them pro bono, the Sixth Amendment also provides a distinct right to choose a particular attorney. *See id.*, at 144, 126 S.Ct. 2557. The right to hire counsel of choice "is the right to a particular lawyer regardless of comparative effectiveness." *Id.* at 148, 126 S.Ct. 2557.

¶16 The right to the effective assistance of counsel is constitutionally guaranteed for all criminal defendants. The right to choice of counsel is not. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). As the Supreme Court has explained, this is because "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). The right to choose an attorney is therefore more limited than the right to the effective assistance of counsel.

¶17 Even for defendants who hire counsel, the right to counsel of choice is circumscribed. For example, there are times when "judicial efficiency or 'the public's interest in maintaining the integrity of the judicial process,' may be deemed more important than the defendant's interest in being represented by a particular attorney." *Brown*, ¶ 17, 322 P.3d at 219 (quoting *Rodriguez v. Dist. Ct.*, 719 P.2d 699, 706 (Colo. 1986)). Thus, when defendants request a continuance to enable their hired counsel of choice to represent them in a particular proceeding, the court must balance the right to counsel of choice against the public's interest in a fair and efficient judicial system. *Id.* at ¶ 22, 322 P.3d at 220. In *Brown*, we established a multi-factor test that courts should apply in considering that balance. *Id.* at ¶ 24, 322 P.3d at 221.

¶18 For the reasons we describe in more detail in *Rainey*, the Sixth Amendment does not include a third right—independent of the right to the effective assistance of counsel or the right to hire counsel of choice—to continued representation by a particular appointed attorney from the moment that attorney has been appointed. The United States Supreme Court has not recognized such a right, and we decline to do so here.

C. Defendants' Interest in Continued Representation by Particular Counsel

¶19 Still, as we explained in *Rainey*, a defendant with appointed counsel has an interest in continued representation by that attorney if they can demonstrate that prejudice would result from substitution with a different court-appointed attorney.

¶20 The division here concluded that the right to continued representation was a constitutional right and therefore followed the *Rainey* division's analysis and asserted that the eleven-factor *Brown* test was the proper standard to apply. But where, as here, a defendant's continuance request does not implicate the Sixth Amendment, the *Brown* test does not apply. *People v. Travis*, 2019 CO 15, ¶¶ 13–17, 438 P.3d 718, 721–22 (declining to apply *Brown* where the "right to be represented by counsel of the defendant's choosing" was not implicated).

¶21 That does not, however, mean that a trial court has unbounded discretion to grant or deny a continuance in the face of an indigent defendant's request for more time to allow appointed counsel to continue the representation. Every defendant enjoys a basic due process right to a fair trial and "an unreasoning and arbitrary insistence upon a trial date in the face of a justifiable request for delay can amount to an abuse of discretion." *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988). The decision to grant or deny a continuance is within the broad discretion of the trial court, and "[t]here are no mechanical tests for determining whether the denial of a continuance constitutes an abuse of discretion." *Id.* Rather, whether such a denial is so arbitrary as to violate due process can "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." *Id.* (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)); *see also Travis*, ¶ 12, 438 P.3d at 721 (explaining that a court considering a request for a continuance where the right to choice of counsel is not

involved will look at the totality of the circumstances).

¶22 Where, as here, the circumstances involve a defendant's request for a continuance to allow continued representation by appointed counsel, the trial court must consider whether denying the continuance would prejudice the defendant's right to a fair trial. *See People v. Gardenhire*, 903 P.2d 1165, 1168 (Colo. App. 1995) (holding that, "[a]bsent any evidence of prejudice based on the public defender's replacement with another public defender," there is "no reversible error in the trial court's ruling"); *see also Coria*, 937 P.2d at 389 (citing *Gardenhire* and, while addressing an adjacent question, stating that "[t]he substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice"). The court must balance the risk of prejudice against any concerns about the fair and efficient administration of the justice system.[2]

¶23 Here, the trial court, correctly applied this prejudice standard in ruling on Davis's motion. The court noted that Davis's case was "essentially a traffic case," there were no experts, and the case would "not take any lawyer of any competence any time to prepare." The trial court thus concluded that it could not find any prejudice in denying Davis's continuance request.

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[2] It bears mentioning that although the standard we adopt today differs in form from *Brown*'s eleven-factor test, its function is not so different as to deny a defendant with appointed counsel any meaningful protection enjoyed by a defendant who hires counsel or finds a private attorney to take their case pro bono.

III. Conclusion

¶24 Defendants with court-appointed attorneys do not have the right to choose a specific attorney. Without the right to choose counsel at the outset of a representation, there is no basis under the Sixth Amendment for a right to continuity of counsel.

¶25 Nevertheless, such defendants do have an interest in continued and effective representation by court-appointed counsel, and this interest must be given weight by district courts in the face of a request for a continuance. Because we find that continuity of counsel for defendants with appointed counsel is an aspect of their general interest in due process rather than a right guaranteed by the Sixth Amendment, prejudice is the proper standard for a district court to follow when deciding whether to grant such a continuance.

¶26 Accordingly, we reverse the division's decision to the contrary and remand for further proceedings consistent with this opinion.

JUSTICE GABRIEL dissented.

JUSTICE GABRIEL, dissenting.

¶27 For the reasons set forth in my dissent in *People v. Rainey*, 2023 CO 14, ¶ ¶ 40–45, 52–74, 89–93 (Gabriel, J., dissenting), I believe that under long-settled precedent of this court, the Sixth Amendment guarantees criminal defendants, whether of means or indigent, the right to the continuity of counsel. Accordingly, I would conclude here that, in denying Davis's request for a continuance without recognizing his Sixth Amendment rights, the trial court misapplied the law and therefore abused its discretion.

See People v. Johnson, 2021 CO 35, ¶ 16, 486 P.3d 1154, 1158 ("A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law.") (citations omitted).

¶28 In light of the foregoing, I would further conclude, as I did in my dissent in *Rainey*, ¶ 74, that the factors that we adopted in *People v. Brown*, 2014 CO 25, ¶ 24, 322 P.3d 214, 221, apply in this context to guide the determination as to whether an indigent defendant is entitled to a continuance to ensure the continuity of court-appointed counsel. Unlike in *Rainey*, however, I do not believe that the record here is sufficiently developed to allow us to assess the *Brown* factors in the first instance. *Cf. People v. Gilbert*, 2022 CO 23, ¶ 27, 510 P.3d 538, 546–47 (noting that when the record is sufficient to allow an appellate court to assess the *Brown* factors, it may do so). Specifically, the trial court in this case did not consider *any* of the factors outlined in *Brown*. Instead, relying on what I believe to be inapposite dicta from *People v. Coria*, 937 P.2d 386, 389 (Colo. 1997), *see Rainey*, ¶¶ 69–71, the court addressed only whether Davis would be prejudiced by the substitution of counsel and whether substitute counsel could provide Davis effective assistance of counsel. Accordingly, like the division below, I would reverse Davis's conviction and remand this case to the trial court to make findings on the record as to each of the applicable *Brown* factors and to apply the correct legal standard. *See People v. Davis*, No. 18CA641, ¶ 20, 2021 WL 1691903 (Apr. 22, 2021).

¶29 For these reasons, I would affirm the division's judgment. I therefore respectfully dissent.

APPENDIX B

Colorado Court of Appeals

Court of Appeals No. 18CA0641
Gilpin County District Court No. 17CR73
Honorable Dennis J. Hall, Judge

The People of the State of Colorado, Plaintiff-Appellee,
v.
William Allen Davis, Defendant-Appellant.

JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division VII Opinion by JUDGE GROVE

Fox and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced April 22, 2021

Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Mallika L. Magner, Alternate Defense Counsel, Crested Butte, Colorado, for Defendant-Appellant

¶ 1 Defendant, William Allen Davis, appeals his convictions for vehicular eluding (class 5 felony), reckless driving (class 2 misdemeanor), and driving under restraint (misdemeanor). He contends that the trial court improperly (1) denied his motion for a trial continuance; (2) allowed expert testimony in the

guise of lay testimony; and (3) denied his challenge for cause to a juror who ultimately sat on the jury. We hold that the trial court applied the wrong legal standard to Davis's motion to continue the trial and, accordingly, reverse his conviction and remand the case for additional findings. Depending on the trial court's findings on remand, Davis may be entitled to a new trial. We therefore decline to address his contentions of trial error in this appeal. If the trial court reinstates Davis's conviction, those arguments may be re-raised in the event that Davis files an appeal.

I. Background

¶ 2 On April 16, 2017, Davis was fishing at Golden Gate Canyon State Park. As Colorado Parks and Wildlife Officer Mueller arrived to check fishing licenses, he noticed that Davis stopped fishing and walked away. Mueller caught up to Davis and confirmed that Davis had a fishing license.

¶ 3 Davis proceeded to the parking lot, got into his vehicle, and began driving. Mueller got into his patrol car, and a short time later, he saw Davis's car driving in the center of the road. Mueller estimated that Davis's car was traveling at approximately forty miles per hour in a twenty-five-mile-per-hour zone, so Mueller turned on his emergency lights and fell in behind Davis. Rather than pulling over, Davis sped up. Mueller then called for additional support.

¶ 4 An officer responded to Mueller's call and parked her patrol car on the road with its emergency lights activated as Davis was approaching. Davis weaved around the officer's car, going partially off the road to do so, and then blew through a stop sign with Mueller still in pursuit. Davis was going so fast

that he "fishtailed" around another car on the road a short time later and then continued past another marked patrol car that was stopped in the middle of the road with its emergency lights activated. Davis then ran through a second stop sign and swerved around yet another vehicle.

¶ 5 Finally, Davis stopped in the middle of the road, got out of his vehicle, and faced Mueller, who told him to put his hands in the air. After looking straight at Mueller, Davis got back into his car and drove away. Davis finally stopped when he arrived at his residence, where he was arrested.

¶ 6 Once Davis was in custody, the officers discovered that his driver's license had been revoked and suspended. Davis had formerly been convicted of two revoked-license-related driving offenses. For this series of events, Davis was charged with and convicted of vehicular eluding, reckless driving, and driving under restraint.

II. Motion for Continuance

¶ 7 Davis was charged on April 20, 2017, and the trial was set for November 20, 2017. On October 30, 2017, Davis, through counsel, filed an unopposed motion for a continuance because his public defender had another trial set for the same date. Without holding a hearing, the trial court denied this motion on November 9, 2017. As a result, the original public defender transferred the case to a colleague.

¶ 8 On November 16, 2017, Davis's original public defender filed a second motion for a continuance, this time based on Davis's "right to continued representation by counsel of his choice." Among other things, the motion asserted that "Mr. Davis has in-

formed undersigned counsel and his office that he does not consent to a new attorney stepping in to handle his trial," and, quoting *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002), argued that he was entitled to continue the attorney-client relationship with his public defender in the absence of "a demonstrable basis in fact and law to terminate that appointment." The trial court denied the motion after holding a hearing the next day, noting that in *People v. Coria*, 937 P.2d 386, 389 (Colo. 1997), the supreme court wrote that "[t]he substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice." Because the case was not complex, the court ruled, it would not "take any lawyer of any competence any time to prepare," and Davis would not be prejudiced by a substitution of counsel.

¶ 9 On the morning of the day of the scheduled trial, Davis moved to continue the trial for a third time. Once again, his motion for a continuance was denied.

¶ 10 Davis asserts that the trial court erroneously denied these motions. Although *Coria* has never been explicitly overruled, we agree that the court's reliance on dicta from that case was misplaced. As we explain below, before rejecting the continuance — which had the effect of depriving Davis of continued representation by his original public defender — the court should have more thoroughly considered the circumstances that resulted in the request for a continuance and the impact that granting the motion would have on, among other things, the prosecution's ability to present its case, the inconvenience to witnesses, and the court's docket. *See People v. Brown*,

2014 CO 25, ¶ 24; *see also People v. Rainey*, 2021 COA 35, ¶ 29.

A. Standard of Review

¶ 11 Whether to grant a motion to continue a trial "is addressed to the sound discretion of the trial court, and [its] ruling will not be disturbed in the absence of an abuse of discretion." *People v. Alley*, 232 P.3d 272, 274 (Colo. App. 2010) (quoting *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988)). The court's "failure to understand the range or criteria upon which [its] discretion is to be exercised can amount to an abuse of that discretion." *Pierson v. People*, 2012 CO 47, ¶ 21. And the court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004). Whether the court applied the correct legal standard is a question of law reviewed de novo. *Ronquillo v. People*, 2017 CO 99, ¶ 13.

B. Analysis

¶ 12 Davis contends that the trial court should have granted him a continuance because (1) he had a right to be represented by his original public defender and (2) additional time would allow his attorney to conduct additional investigation and potentially procure additional evidence. We need only consider the first of these arguments and conclude, based on our analysis, that additional findings are needed.

1. Choice of Counsel

¶ 13 Davis contends that a continuance was required in order to ensure that he was represented by his counsel of choice — the public defender originally

assigned to his case. The trial court rejected this argument, ruling that "when it comes to representation through the Public Defender's Office, the case law is very clear that there is no right to a particular attorney."

¶ 14 The People recognize that, generally, a court's broad discretion over scheduling matters must be exercised in a manner that does not undermine a defendant's Sixth Amendment right to counsel of choice. *See, e.g.*, *Ronquillo v. People*, 2017 CO 99. But they argue that this general rule does not apply here because indigent defendants such as Davis do not have a Sixth Amendment right to counsel of choice at all.

¶ 15 In *Rainey*, another division of this court rejected a virtually identical argument, holding that it "cannot be squared with our supreme court's well-settled precedent." *Rainey*, ¶ 12. We agree with that holding. In *Harlan*, our supreme court held that the Sixth Amendment applies differently at different phases of an indigent defendant's representation. Specifically, "[w]hile there is no Sixth Amendment right for an indigent defendant to choose his appointed counsel, that defendant is 'entitled to continued and effective representation'" by court-appointed counsel of choice "in the absence of a demonstrable basis in fact and law to terminate that appointment." *Harlan*, 54 P.3d at 878 (citation omitted); *accord Williams v. Dist. Ct.*, 700 P.2d 549, 555 (Colo. 1985). "Thus, while no right exists for an indigent defendant to choose his counsel, once chosen, the indigent defendant's choice is afforded great weight." *People v. Nozolino*, 2013 CO 19, ¶ 17.

¶ 16 We acknowledge that there is a split of authority on this question. *See State v. McKinley*, 860 N.W.2d 874, 879-80 (Iowa 2015) (collecting cases). Moreover, we recognize that our supreme court — at least in dicta — has not consistently confirmed an indigent defendant's presumptive right to continued representation by court-appointed counsel. *See, e.g.*, *Coria*, 937 P.2d at 389.[1] But *Harlan* addresses the issue definitively, and "[t]o the extent that these precedents conflict, we are bound to follow the supreme court's most recent pronouncement." *People v. Washington*, 2014 COA 41, ¶ 25.

2. Additional Findings Are Needed

¶ 17 Because *Harlan* creates a presumption in favor of an indigent defendant's choice of counsel that is "entitled to great weight," 54 P.3d at 878 (quoting *Rodriguez v. Dist. Ct.*, 719 P.2d 699, 707 (Colo. 1986)), specific findings are necessary anytime that a court makes a decision that would terminate that relationship. *See Rainey*, ¶ 23. In cases like this one, where the defendant's counsel of choice cannot appear unless a continuance is granted, "some combination of interests including prejudice to the prosecution and the victim's rights may overcome the presumption." *Id.* at ¶ 19.

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[1] In addition, at least one division of this court has explicitly held that the Sixth Amendment right to choice of counsel does not apply to indigent defendants. *People v. Gardenhire*, 903 P.2d 1165, 1168 (Colo. App. 1995) ("Absent any evidence of prejudice based on the public defender's replacement with another public defender, we perceive no reversible error in the trial court's ruling [denying the defendant's motion for a continuance]."). We decline to follow *Gardenhire* here.

¶ 18 In *Brown*, our supreme court outlined several factors that a trial court should consider when "determin[ing] whether the public's interest in the efficiency and integrity of the judicial system outweighs the defendant's Sixth Amendment right to counsel of choice." *Brown*, ¶ 30. And in *People v. Stidham*, 2014 COA 115, a division of this court — correctly, in our view — applied those factors to a defendant's request for a continuance that was necessary to ensure his hired counsel's availability at a sentencing hearing. The Sixth Amendment, *Stidham* held, "is . . . implicated when a defendant has hired a law firm and then wants to be represented by only a particular attorney within that firm." *Id.* at ¶ 10. The same is true here. While an indigent defendant has no veto power over the appointment of a particular attorney at the outset of his case, issues of constitutional dimension arise once an attorney-client relationship is established. *See Harlan*, 54 P.3d at 878.

¶ 19 Whether or not court-appointed counsel is involved, to ensure that a defendant's Sixth Amendment rights are accounted for (and to facilitate appellate review), a court issuing an order on a motion to continue that will necessitate a substitution of defense counsel "must demonstrate that it weighed the full range of factors that might affect its exercise of discretion." *People v. Travis*, 2019 CO 15, ¶ 12. Here, the record makes clear that the trial court did not consider the factors outlined in *Brown*, and instead addressed only whether Davis would be prejudiced by the substitution of counsel just a few days before trial. We do not question the trial court's conclusion that extensive preparation would be unnecessary given the case's lack of complexity. But

the potential for prejudice to the defendant is only one of many potential factors bearing on whether a motion for a continuance should be granted.

¶ 20 Accordingly, we must reverse Davis's conviction and remand the case for the trial court to make findings on the record as to each applicable *Brown* factor and apply the correct legal standard. *See, e.g.*, *Brown*, ¶ 29 (remanding for court to make additional findings and apply the correct standard). If, after considering each *Brown* factor on the record, and affording great weight to Davis's wish for continued representation by his original public defender, the court concludes that the presumption of continued representation has been rebutted, it may reinstate Davis's judgment of conviction. As we note above, we decline to consider Davis's contentions of trial error. If the trial court reinstates Davis's conviction and he appeals, he may re-raise those contentions at that time.

III. Conclusion

¶ 21 The judgment is reversed, and the case is remanded so that the trial court may apply the *Brown* factors and determine whether Davis is entitled to continued representation by his original public defender.

JUDGE FOX and JUDGE HARRIS concur.

APPENDIX C

Colorado Supreme Court

Certiorari to the Court of Appeals, 2018CA641
District Court, Gilpin County, 2017CR73

Petitioner:

William Allen Davis,

v.

Respondent:

The People of the State of Colorado

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 8, 2024.

APPENDIX D

Colorado Court of Appeals

Court of Appeals No. 18CA0641

Gilpin County District Court No. 17CR73

Honorable Dennis J. Hall, Judge

The People of the State of Colorado, Plaintiff-Appellee,
v.
William Allen Davis, Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII Opinion by JUDGE GROVE

Fox and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced June 22, 2023

Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Mallika L. Magner, Alternative Defense Counsel, Crested Butte, Colorado, for Defendant-Appellant

¶ 1 Defendant, William Allen Davis, appeals his convictions for vehicular eluding (class 5 felony), reckless driving (class 2 misdemeanor), and driving under restraint (misdemeanor). We previously reversed Davis's convictions, holding that the trial court improperly denied his request for a trial con-

tinuance. *See People v. Davis*, (Colo. App. No. 18CA0641, Apr. 22, 2021) (not published pursuant to C.A.R. 35(e)) (*Davis I*). After granting the People's petition for a writ of certiorari, the supreme court reversed our ruling and remanded the case for further proceedings. *See People v. Davis*, 2023 CO 15, ¶ 26.

¶ 2 We now address the remaining issues that Davis raised on appeal: that the trial court improperly (1) allowed expert testimony in the guise of lay testimony and (2) denied his challenge for cause to a juror who ultimately sat on the jury. Because we conclude that the trial court did not err, we affirm.

I. Background

¶ 3 The relevant facts are outlined in *Davis I*. In brief, evidence at trial showed that Davis was arrested and charged after he eluded a police officer attempting to conduct a traffic stop and then led that officer and others on a chase in rural Jefferson County.

¶ 4 Once Davis was in custody, the officers discovered that his driver's license had been revoked and suspended. Davis had formerly been convicted of two revoked-license-related driving offenses. For this series of events, Davis was charged with and convicted of vehicular eluding, reckless driving, and driving under restraint.

II. Lay Witness Testimony

¶ 5 Colorado Parks and Wildlife Officer Mueller was the first officer to attempt to stop Davis for speeding. Testifying as a lay witness, he estimated for the jury Davis's driving speeds when he first tried to initiate

the stop and at various points throughout the chase. In a pretrial motion, defense counsel moved to preclude this testimony, arguing that "a lay person [cannot] simply look at a vehicle and tell how fast it is going and then have a legitimate opinion in that regard." Accordingly, defense counsel objected "based on the lack of expert disclosures, endorsements or any discovery relating to how it is that [Mueller] formed that opinion."

¶ 6 The trial court overruled Davis's objection and allowed the testimony to proceed, ruling that an "average lay witness" is capable of making "visual speed estimates." Davis contends that this ruling was an abuse of discretion. We disagree.

A. Applicable Law and Standard of Review

¶ 7 CRE 701 defines the scope of lay witness opinion testimony. Under Rule 701, lay witness testimony in the form of opinions or inferences must be "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [CRE] 702."

¶ 8 CRE 702, on the other hand, concerns the admissibility of expert testimony. Under this rule, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." CRE 702.

¶ 9 The critical factor in distinguishing between lay and expert opinion testimony is the basis for the

witness's opinion. *People v. Dominguez*, 2019 COA 78, ¶ 40. To determine whether the testimony in question is testimony that an ordinary person could give, courts consider whether ordinary citizens can be expected to know certain information or to have had certain experiences. *Id.* Expert testimony is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have. *Venalonzo v. People*, 2017 CO 9, ¶ 22 (citing *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005)).

¶ 10 We review a trial court's evidentiary decision for abuse of discretion. *Venalonzo*, ¶ 15.

B. Analysis

¶ 11 Colorado courts have long held that estimating the speed of a car is appropriately in the purview of a lay witness. *Sherry v. Jones*, 133 Colo. 160, 164, 292 P.2d 746, 748 (1956). Because an ordinary citizen, without any specialized knowledge or training, may testify as a lay witness to the speed of a vehicle, an officer may do so as well. *See People v. Ramos*, 2012 COA 191, ¶ 14 (finding that "a police officer may only offer [lay] opinion testimony . . . when the basis of that opinion arises from experiences or information common to the average lay person"), *aff'd*, 2017 CO 6.

¶ 12 Simply having some training on estimating the speed of passing vehicles does not disqualify Mueller from giving lay testimony. Mueller's testimony was not dependent upon his specialized knowledge, and therefore, it was not expert testimony. *See People v. Warrick*, 284 P.3d 139, 146 (Colo. App. 2011) (observing that because the police of-

ficer's testimony was not based on a "process of reasoning which can be mastered only by specialists in the field," it was properly considered lay testimony). As a result, the trial court did not err by allowing Mueller to testify as a lay witness under CRE 701.

III. Challenge for Cause

¶ 13 Davis contends that the trial court erroneously denied his challenge for cause to Juror G. We disagree.

¶ 14 During voir dire, Juror G said that he was the former neighbor to Undersheriff Bayne, who testified at trial. Davis, who had exhausted all of his peremptory challenges, challenged Juror G for cause. After questioning Juror G, the trial court denied the challenge and Juror G served on the jury.

A. Applicable Law and Standard of Review

¶ 15 Due process requires a fair trial, which necessarily includes the right to challenge a juror for cause. *People v. Wilson*, 114 P.3d 19, 21 (Colo. App. 2004). To protect a defendant's right to a fair trial with an impartial jury, a trial court must excuse biased or prejudiced persons from the jury. *Id.*; *see* § 16-10-103(1)(j), C.R.S. 2022 (stating the court must sustain challenges for cause where "[t]he existence of a state of mind in the juror evinc[es] enmity or bias toward the defendant or the state"); *see also* Crim. P. 24(b)(1)(X). Thus, we reverse a trial court's denial of a challenge for cause "if a prospective juror is unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the

court's instructions." *People v. Hancock*, 220 P.3d 1015, 1016 (Colo. App. 2009).

¶ 16 A trial court has broad discretion when considering a challenge for cause, and we review its ruling for an abuse of that discretion while examining the entire voir dire of the prospective juror. § 16-10-103; *Carrillo v. People*, 974 P.2d 478, 486 (Colo. 1999); *Hancock*, 220 P.3d at 1016. Because the trial court is in the best position to determine a prospective juror's credibility, demeanor, and sincerity in explaining his or her state of mind, we defer to the trial court's ruling on a challenge for cause. *Hancock*, 220 P.3d at 1016 (stating that appellate courts rarely reverse a trial court's ruling because "it is recognized that, where a juror's recorded responses are unclear or ambiguous, 'only the trial court can assess accurately the juror's intent from the juror's tone of voice, facial expressions, and general demeanor'" (quoting *People v. Young*, 16 P.3d 821, 825-25 (Colo. 2001))).

B. Relevant Facts

¶ 17 At the outset of the trial, the court explained to both the attorneys and the prospective jurors that because the community in Gilpin County is so small, and because many people know the law enforcement officers, the court cannot dismiss a juror simply because he or she knows one of the law enforcement officers who is testifying. Instead, the question is: "[I]s there anything about your relationship with [a witness] that would keep you from hearing that person's testimony with an open mind?"

¶ 18 As the court predicted, multiple prospective jurors knew some of the witnesses. Some were ex-

cused for their inability to be impartial, such as the husband of one of the witnesses.

¶ 19 During voir dire, Juror G explained that he had been the next- door neighbor of one of the witnesses, Undersheriff Bayne, for six years, and that they had gone snowmobiling together. However, when asked if Bayne's testimony would "automatically get weight over anybody else['s]," Juror G responded, "Oh no. I guess, it's just like [another prospective juror] said there, that people have different perspectives on what's [sic] happens, you know." When pressed further about whether Juror G could be "fair listening to [Bayne's] testimony like anybody else's," Juror G responded, "Yes."

¶ 20 After voir dire was completed, Davis challenged multiple jurors for cause, including Juror G. The court granted some of the challenges, but with respect to Juror G and a few others, it said, "I'm going to inquire of others; and depending on their answers, I will either grant or deny the challenge and we then we [sic] can make a complete record later when we have a chance."

¶ 21 Addressing the prospective jurors again, the court explained, "[M]ost people know Undersheriff Bayne so I can't excuse someone just because they know [him]. Do you think you would be able to hear the undersheriff's testimony with an open mind and give it whatever weight you think it deserves?" The court continued: "[T]he bottom line for me is I read that instruction on the credibility of witnesses. When the undersheriff testifies, would [you] be able to apply that instruction to his testimony?" Juror G responded, "Yes."

¶ 22 Davis's attorney used his peremptory challenges on several other jurors. However, he remained concerned about Juror G. Davis's attorney explained:

> [Juror G], on the other hand, had a relationship with Undersheriff Bayne to include recreational activities where the two of them would go out snowmobiling together. He said that they were neighbors for approximately six years, and [Juror G] moved out of that home but he still owns the home next to Undersheriff Bayne and asked him –- so Undersheriff Bayne is keeping an eye on your house, and he said yes, he is.
>
> And so that there is a relationship between [Juror G] and Undersheriff Bayne that is significant enough in nature that I also believe he's unable to adequately determine or question Undersheriff Bayne's credibility as a witness; but instead, I believe that [Juror G] has already concluded that Undersheriff Bayne will be a credible and honest witness in this case and will take everything he says as the truth without doing a further determination that we would expect of a juror.
>
> But again, given the other jurors that were currently on the panel at that point in time, I was forced to make a strategy call; and of the possible jurors remaining, left [Juror G] on the panel.

¶ 23 The court responded:

> I think it was [Juror C] that said that ten different people could see an event differently and it doesn't mean that anyone is lying and that

> she would be able to hear testimony with an open mind and give it whatever weight it deserved.
>
> And [Juror G] used the same example when I inquired of him. I think it [is] important to note and I have noted this before that we are a small community here. The population of Gilpin County is less [than] 6,000 and there are people in government like Undersheriff Bayne who pretty much knows everybody and it's just something that you have to deal with in a small community. . . .
>
> I don't think that [Juror G] will have any trouble evaluating the testimony of someone he knows. He seems like a bright gentleman and he understands his job as a juror so I don't think — and it is more of a (inaudible) in this one that the grounds weren't established that would justify a challenge for cause.

¶ 24 With that, the court denied Davis's challenge of Juror G for cause, and Juror G remained on the jury.

C. Analysis

¶ 25 Juror G did not express any hesitation about his impartiality. When asked if he would believe Bayne over other witnesses, he responded "[o]h no" and elaborated about why he could believe those witnesses with different perspectives from Bayne. Later, when Juror G was asked directly if he could remain impartial despite his relationship with Bayne, he answered "yes" without qualification. An attorney's speculation about a juror's bias, despite the juror's clear articulation of his ability to be im-

partial, is insufficient to remove the juror for cause. *See* § 16-10-103(1)(j) ("[N]o person summoned as a juror shall be disqualified . . . if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.").

¶ 26 Therefore, we conclude that the trial court did not abuse its discretion when it declined to remove Juror G for cause.

IV. Conclusion

¶ 27 The judgment is affirmed.

JUDGE FOX and JUDGE HARRIS concur.