

COURT OF APPEALS OF TEXAS, SECOND APPELLATE DISTRICT AT FORT WORTH

Jason Wayne Carlile v. The State of Texas

No. 02-19-00468-CR · No. No. 02-19-00468-CR · Decided November 24, 2021

SUMMARY

The Texas Court of Appeals, Second District, Fort Worth, affirmed Jason Wayne Carlile’s convictions for aggravated sexual assault and sexual assault. The court held that Carlile failed to preserve his claims concerning belated discovery disclosures, that the trial court did not abuse its discretion in denying a continuance, and that his attorneys’ intentional nonparticipation in the trial did not warrant relief under ineffective-assistance principles.

CASE DETAILS

COURT	Court of Appeals of Texas, Second Appellate District at Fort Worth
WRITING FOR THE COURT	Wade Birdwell; Bassel; Womack
JURISDICTION	Texas
DECIDED	November 24, 2021
DOCKET	No. 02-19-00468-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from convictions for two counts of aggravated sexual assault of a minor and six counts of sexual assault of a minor.
STANDARD OF REVIEW	Preservation of error requires a timely and specific objection or request. A ruling on a motion for continuance is reviewed for abuse of discretion, viewing the evidence in the light most favorable to the trial court's ruling and generally deferring to supported historical findings, while reviewing legal questions and non-credibility-dependent mixed questions de novo. Reversible error from denial of a continuance requires both an abuse of discretion and harm. Ineffective-assistance claims ordinarily require deficient performance and prejudice, although prejudice may be presumed under Cronin when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.
PRECEDENTIAL VALUE	unpublished_nonprecedential

TOPICS

criminal procedure

appellate procedure

right to counsel

ineffective assistance

discovery criminal

PRACTICE AREAS

criminal procedure

constitutional law

appellate procedure

evidence

QUESTIONS PRESENTED

1. Whether Carlile preserved complaints that the State's belated production of FBI and clinic records violated *Brady v. Maryland*, the Michael Morton Act, due process, and the prosecutor's statutory duty.
2. Whether the trial court abused its discretion by denying Carlile's motion for a continuance based on recently produced discovery.
3. Whether Carlile was denied effective assistance of counsel and a fair trial when his attorneys intentionally refused to participate in the trial, and whether prejudice should be presumed under *United States v. Cronin*.

HOLDINGS

1. Carlile's claims that the State violated *Brady*, the Michael Morton Act, due process, and the prosecutor's duty were not preserved because he did not make a timely, specific objection or request identifying those grounds in the trial court.
2. The trial court did not abuse its discretion by denying Carlile's motion for a continuance based on the late-produced FBI and Rose Street records.
3. Carlile was not entitled to relief for ineffective assistance or an unfair trial because he and his attorneys intentionally and knowingly engineered counsel's nonparticipation to create reversible error, and Carlile acquiesced in that strategy. The *Cronic* presumption of prejudice therefore did not provide relief.

KEY QUOTATIONS

"To show prejudice, the appellant should show "with considerable specificity how the defendant was harmed by the absence of more preparation time than he actually had," such as by demonstrating "what additional information, evidence[,] or witnesses the defense would have had available if the motion for delay had been granted."" (12)

"However, if an appellant can demonstrate that defense counsel 'entirely failed to subject the prosecution's case to meaningful adversarial testing,' so that there was a constructive denial of the assistance of counsel altogether, then prejudice, because it is 'so likely,' is legally presumed." (16)

"Because Carlile knew of and acquiesced in the deliberate fabrication of the error that he complains of on appeal, any error was invited, and his claims of ineffective assistance and an unfair trial are rejected." (22)

FACTUAL BACKGROUND

The State produced potentially exculpatory discovery in batches, including an FBI file and clinical records, shortly before trial. Carlile had already received two continuances, had over a year to prepare, and had retained three attorneys and four mental-health experts. After the trial court denied another continuance and mandamus relief was denied, Carlile and his attorneys deliberately abstained from participating in the trial, having stated in mandamus filings that they intended to create an ineffective-assistance violation.

PROCEDURAL HISTORY

Carlile was indicted on two aggravated-sexual-assault counts and seven sexual-assault counts; the trial court dismissed one sexual-assault count. The trial court denied Carlile's third motion for continuance based on late-produced discovery and denied his attorneys' motion to withdraw. After mandamus relief was denied by the court of appeals and the Texas Court of Criminal Appeals, Carlile's attorneys deliberately declined to participate in the trial. A jury convicted him on all remaining counts and assessed consecutive sentences. The court of appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- *Ingerson v. State*, 559 S.W.3d 501, 503 n.3 (Tex. Crim. App. 2018)
- *Brady v. Maryland*, 373 U.S. 83, 87 (1963)
- *Spielbauer v. State*, 622 S.W.3d 314, 318 (Tex. Crim. App. 2021)
- *Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020)
- *Gonzalez v. State*, 616 S.W.3d 585, 591, 594 (Tex. Crim. App. 2020), cert. denied, No. 21-5327, 2021 WL 5043646
- *Golliday v. State*, 560 S.W.3d 664, 670 (Tex. Crim. App. 2018)
- *Ahn v. State*, No. 02-17-00004-CR, 2017 WL 6047670, at *6 (Tex. App.—Fort Worth Dec. 7, 2017, no pet.)
- *Martinez v. State*, No. 08-14-00130-CR, 2016 WL 4447660, at *6 n.5 (Tex. App.—El Paso Aug. 24, 2016, pet. ref'd)
- *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007)
- *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019)
- *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)
- *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014)
- *Green v. State*, 374 S.W.3d 434, 441 (Tex. Crim. App. 2012)
- *Gonzales v. State*, 304 S.W.3d 838, 841-43 (Tex. Crim. App. 2010)
- *Nichols v. State*, No. 02-13-00566-CR, 2014 WL 7779272, at *1 (Tex. App.—Fort Worth Feb. 5, 2014, pet. ref'd)
- *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996)
- *Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. Crim. App. 1995)

- Rosales v. State, 841 S.W.2d 368, 374 (Tex. Crim. App. 1992)
- Dotson v. State, 146 S.W.3d 285, 297 (Tex. App.—Fort Worth 2004, pet. ref'd)
- Cannon v. State, 252 S.W.3d 342, 348-52 (Tex. Crim. App. 2008) (op. on reh'g)
- United States v. Cronin, 466 U.S. 648, 658-59 (1984)
- Wenzel v. State, 855 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd)
- Little v. State, 819 N.E.2d 496, 503 (Ind. Ct. App. 2004)
- People v. Aiken, 380 N.E.2d 272, 275 (N.Y. 1978)
- Ortega v. State, 644 S.W.2d 912, 913 (Tex. App.—Fort Worth 1983, no pet.) (en banc)
- Beasley v. State, 634 S.W.2d 320, 321 (Tex. Crim. App. [Panel Op.] 1982)
- Prystash v. State, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999)
- Woodall v. State, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011)
- Love v. State, 600 S.W.3d 460, 481 & n.15 (Tex. App.—Fort Worth 2020, pet. ref'd)
- Moreno v. State, No. 04-01-00406-CR, 2002 WL 1573426, at *5 (Tex. App.—San Antonio July 17, 2002, no pet.)

OPINION

PER CURIAM.

In the Court of Appeals Second Appellate District of Texas at Fort Worth
 _____ No. 02-19-00468-CR _____ JASON
 WAYNE CARLILE, Appellant V. THE STATE OF TEXAS, Appellee On Appeal from the 78th
 District Court Wichita County, Texas Trial Court No. 61,562-B Before Birdwell, Bassel, and
 Womack, JJ. Memorandum Opinion by Justice Birdwell MEMORANDUM OPINION Appellant
 Jason Wayne Carlile appeals his convictions for aggravated sexual assault and sexual assault.

We affirm. I. BACKGROUND Carlile was indicted for two counts of aggravated sexual assault of a minor we will refer to as Kate and seven counts of sexual assault of a minor we will refer to as Laura.¹ See Tex. Penal Code Ann. §§ 22.011,.021. He was arrested in November 2018.

The trial court later dismissed the last count of sexual assault. The early stages of the prosecution proceeded without incident. The State produced batches of potentially exculpatory documents on at least four occasions.

In May 2019, Carlile requested a continuance, the State did not oppose, and the continuance was granted. In August 2019, Carlile filed another motion for continuance in which he alleged that two of his four retained mental health experts would be unavailable on the scheduled trial date and that they needed additional time to review the case files. At the hearing on the motion, the State warranted that it had fulfilled its discovery duty, stating on the record, “We have turned everything over in this case.” This continuance was granted as well, and the case was reset for December 9, 2019.

However, as the trial setting drew near, the State produced two more batches of documents, one on November 19 and another on November 26. Carlile again moved 1 We use aliases for these minors to protect their privacy. See Tex. R. App. P. 9.10(a)(3); *Ingerson v. State*, 559 S.W.3d 501, 503 n.3 (Tex. Crim. App. 2018). 2 for a continuance, citing the need for additional time to investigate the newly produced records and to retain experts to review them.

Carlile also filed a motion to recuse, which was promptly denied. After an evidentiary hearing—the details of which we discuss later—the trial court denied Carlile’s motion for continuance on December 3, 2019. The trial court later entered findings that most of the documents were straightforward and concerned subjects already known to the defense. According to the court’s findings, Carlile had not established what additional time to investigate the documents would achieve, and he had not shown his diligence in investigating the documents.

The belated production of documents and the denial of Carlile’s motion for continuance are the subject of his first three issues on appeal. Carlile’s attorneys then moved to withdraw, claiming that they were unprepared for trial.

The trial court denied the motion to withdraw on December 3. On December 4, voir dire began. However, Carlile filed a mandamus petition in this court on the same day, and our stay brought the trial to a halt. In his filings, Carlile threatened that if he were not granted mandamus relief in the form of a continuance, his attorneys would purposefully take no part in the trial in order to create a violation of his right to effective assistance and ensure reversal on appeal.

After review, we denied mandamus relief. On December 8, Carlile petitioned for mandamus relief in the Texas Court of Criminal Appeals. In his filings, Carlile repeated his threat to boycott the trial if he were not granted relief.

The court denied relief. 3 Once the mandamus proceedings concluded, trial resumed, and the State broached the topic of Carlile’s threat to refrain from participating in the trial. The trial court offered Carlile time to confer with his attorneys about this plan, but after a fifteen- minute conference, Carlile’s attorneys announced that they still did not plan to participate.

With Carlile’s attorneys abstaining, the State and the trial court conducted a formal trial essentially on their own. During voir dire, the State screened the venire for prejudice. The State called and questioned several witnesses, and at one point, it initiated a hearing on the admissibility of its own expert.

After the State rested, it asked the trial court to admonish Carlile about his Fifth Amendment rights and his right to testify. The nonparticipation of Carlile’s attorneys is the subject of his fourth issue on appeal.

After hearing the evidence, the jury found Carlile guilty on both counts of aggravated sexual assault and six counts of sexual assault. For the counts of aggravated sexual assault, the jury assessed punishment at life imprisonment and a fine of \$10,000.

For the counts of sexual assault, the jury assessed punishment at twenty years and a fine of \$10,000. The trial court sentenced Carlile accordingly, with the sentences to run consecutively. II. DISCOVERY VIOLATIONS In his first and second issues on appeal, Carlile argues that the State violated his rights by belatedly turning over hundreds of pages of records from the FBI and a clinic⁴ that treated the complainant Kate.

According to Carlile, the untimely production of these documents violated *Brady v. Maryland*,² the Michael Morton Act,³ his due process rights,⁴ and the prosecutor's duty to see that justice was done.⁵ The State responds that Carlile did not preserve these complaints.

We agree with the State. "The burden of preserving error for appellate review rests on the party challenging the trial court's ruling," usually the appellant. *Spielbauer v. State*, 622 S.W.3d 314, 318 (Tex. Crim. App. 2021).

The burden is placed on the complaining party in order "to prevent blindside attacks on the trial court's rulings." *Id.* Preservation requires a timely, specific objection or request. *Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020). "An objection or request is sufficiently specific if the trial court is aware of the complaint or if the grounds are apparent from the context." *Gonzalez v. State*, 616 S.W.3d 585, 591 (Tex.

Crim. App. 2020), cert. denied, No. 21-5327, 2021 WL 5043646 (Nov. 1, 2021). Magic words are not required, but the litigant must let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him. *Id.* A general objection will not 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963). 2 Tex. Code Crim. Proc.

Ann. art. 39.14. 3 U.S. Const. amend. XIV. 4 Tex. Code Crim. Proc. Ann. art. 2.01. 5 5 preserve error unless the legal basis is obvious to the trial court and opposing counsel. *Id.* "A complaint is obvious if there are statements or actions on the record that clearly indicate what the judge and opposing counsel understood the argument to be." *Id.* (internal quotation omitted). "Parties are not permitted to bootstrap a constitutional issue from the most innocuous trial objection, and trial courts must be presented with and have the chance to rule on the specific constitutional basis for admission because it can have such heavy implications on appeal." *Golliday v. State*, 560 S.W.3d 664, 670 (Tex.

Crim. App. 2018) (internal quotation omitted). Carlile filed a four-page motion for continuance, but it did not mention any of the grounds he argues on appeal. At the hearing, Carlile's attorneys spoke at length about the underpinnings of their motion, and they cross-examined multiple witnesses concerning the need for a continuance. But at no point in the hearing did Carlile's

attorneys mention, in connection with the FBI file or clinic record, any of the grounds he now raises on appeal.

Nor did the context of the hearing make any of those grounds obvious. Rather, Carlile's arguments in the motion and at the hearing revolved solely around garden-variety continuance concerns: the need for more time to investigate the new documents and the leads they purportedly contained. Without a timely and specific objection or request, nothing is preserved for our review.

See Dixon, 595 S.W.3d at 223. "A reviewing court should not address the merits of an issue that has not been preserved for appeal." Ahn v. State, No. 02-17-00004-CR, 2017 WL 6047670, at *6 (Tex. App.—Fort Worth Dec. 7, 2017, no pet.) (mem. op., not designated for publication) (declining to review the merits of unpreserved Brady and Michael Morton Act arguments); see Gonzalez, 616 S.W.3d at 594 (same as to due process argument); Martinez v. State, No. 08-14-00130-CR, 2016 WL 4447660, at *6 n.5 (Tex.

App.—El Paso Aug. 24, 2016, pet. ref'd) (not designated for publication) (same as to Article 2.01 argument). Because Carlile's first and second issues are not preserved, we overrule them without respect to their merit. III. CONTINUANCE In his third issue, Carlile complains that the trial court erred by denying his motion for continuance after the State produced new documents shortly before trial.

He asserts that the denial of a continuance deprived him of his rights to a fair trial and effective assistance of counsel. Carlile filed his motion for continuance on November 27, 2019. He alleged that the district attorney had recently provided him with 252 pages of new FBI records pertaining to the case as well as 121 pages of new clinical records concerning Kate's treatment at Rose Street Mental Health Treatment.

Carlile requested additional time to investigate the psychiatric care providers who were named in the Rose Street records and to retain experts to review the discovery. When the motion was filed, voir dire was set to begin the following week, on December 3. Carlile had previously sought and obtained two continuances. 7 At the hearing on Carlile's motion, the State gave a timeline of events through witnesses and unchallenged factual representations on the record.⁶ By early November, the State believed it had turned over all the necessary discovery to the defense—"everything that we had in our possession," the State's investigator testified.

However, later in November, the State learned of a previously unknown FBI file concerning a 2006 investigation of Carlile; no sexual abuse was disclosed during the investigation, and ultimately, federal authorities elected not to prosecute Carlile.

The State received the FBI file on November 19 and turned the file over to the defense "immediately," two weeks before voir dire was set to commence. The State represented that of the

252 pages in the file, approximately 150 pages had already been provided to the defense “on multiple occasions” because Carlile had received files containing the same documents.

Of the 100 newly produced pages, some contained narrative accounts and notes drafted by the FBI agent who investigated Carlile. Much of the rest was administrative forms, “just stuff that the government checks a box off on one piece of paper and goes to the next.” The FBI file did contain 41 names of people involved in the FBI inquiry who had not previously been mentioned in discovery.

6 See *Trevino v. State*, 864 S.W.2d 499, 501 n.2 (Tex. Crim. App. 1993) (relying on counsel’s unchallenged representations on the record as support for findings of fact and conclusions of law); see also *Comeaux v. State*, 445 S.W.3d 745, 748 (Tex. Crim. App. 2014) (taking counsel’s unchallenged representations on the record as established fact for purposes other than evidentiary sufficiency); *Watkins v. State*, 245 S.W.3d 444, 451 (Tex.

Crim. App. 2008) (same); *Pharris v. State*, 165 S.W.3d 681, 688–89 (Tex. Crim. App. 2005) (same). 8 As to the Rose Street records, the evidence showed that those, too, had only recently been discovered and had promptly been produced to the defense. Early on in the case, the office manager of Rose Street wrote a letter to the district attorney’s office stating that any records of Kate’s treatment between 2007 and 2010 had been destroyed.

However, in the week before the continuance hearing, Rose Street informed the State that it did have some of Kate’s records after all. The State’s investigator went to pick those records up “within the hour” that he learned of them on November 26 and he turned them over to the defense “as soon as” he obtained the records.

The Rose Street records documented a counselor’s observations of Kate and the medications she was taking. Like the FBI file, the Rose Street records reflected that Kate did not disclose any sexual abuse at that point.

After hearing the arguments and evidence, the trial court denied Carlile’s motion for continuance. The trial court later entered detailed findings of fact and conclusions of law. As to the FBI file, the court found that the file was produced to the defense on November 19, 2019, and that the evidentiary portion of trial was set for December 10, 2019, at which point Carlile would have had the FBI file for 21 days.

The findings stated that the newly produced pages in the FBI file consisted of 40 pages of administrative forms, 9 pages of grand jury subpoenas, and 54 pages of narrative. The court further found that from “previous disclosures made by the State, the defense was well aware of the prior federal investigation” and “possessed voluminous records 9 relating to that investigation.” But the court found that “[t]he defense wholly failed to show at the hearing what steps it had taken to follow up on the records that had been previously disclosed and why the additional records

offered anything new about the FBI investigation of which the defense was not already aware.” It continued, “While the defense listed some new names in the additional records, the defense failed to articulate what significance those names had, what steps the defense had taken to investigate those records, or why anyone listed in those records would be material to the defense in the case.” Thus, the trial court concluded that the defense failed to carry their burden to show why the FBI file necessitated a continuance.

As to the Rose Street records, the court found that these 121 pages of therapy records were produced to the defense on November 26, 2019, “immediately upon the State’s receipt of those records from Rose Street Mental Health.” The records discussed Kate’s mental health, therapy, and medications. By the time of trial, Carlile would have had the Rose Street records for 14 days.

According to the court, the records were “straightforward, not particularly complex, and not relevant to the issues raised in Defendant’s charges.” The court further noted Carlile had already designated four mental health experts, but none of them had testified as to why the Rose Street records were relevant, what effort they had made to investigate the records, what additional investigation might yield, or why the records required further delay.

Based on these circumstances, the court concluded that Carlile’s “eve-of-trial motion for continuance was not supported by the necessary sworn testimony,... that 10 the defense failed to carry its burden, and that it was baseless and sought solely for delay.” Carlile does not challenge these findings and conclusions on appeal.

The truth, merit, and sufficiency of the grounds for continuance “shall be addressed to the sound discretion” of the trial court and “shall not be granted as a matter of right.” Tex. Code Crim. Proc. Ann. art. 29.06(6).

We therefore review the trial court’s ruling on a motion for continuance for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). A trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019).

A trial court does not abuse its discretion unless its ruling lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Under this standard, we view the evidence in the light most favorable to the trial court’s ruling. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014).

As a general rule, we afford almost total deference to a trial court’s determination of the historical facts that the record supports, especially when the trial court’s fact findings are based on an evaluation of credibility and demeanor. *Green v. State*, 374 S.W.3d 434, 441 (Tex. Crim. App. 2012).

We afford the same amount of deference to the trial court's rulings on questions concerning the application of law to fact if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id.* We review de novo mixed questions of law and fact that do not hinge on assessments of credibility and demeanor. *Id.* We review a trial court's determination of legal questions de novo.

State v. Arellano, 600 S.W.3d 53, 57 (Tex. Crim. App. 2020). Carlile asserts that the denial of a continuance infringed his constitutional rights to a fair trial and effective assistance of counsel. The appellant in *Gonzales v. State* likewise argued that the denial of his motion for continuance "deprived him of various of his constitutional rights." 304 S.W.3d 838, 841 (Tex.

Crim. App. 2010) (cleaned up). The court held that in order to show reversible error predicated on the denial of a pretrial motion for continuance, the appellant is required to demonstrate both that the trial court abused its discretion by denying the motion and that the lack of a continuance harmed him. See *id.* at 842–43.

Thus, the requirements to establish an abuse of discretion and prejudice apply when, as here, the appellant attempts to infuse the denial of a continuance with special constitutional significance. See *id.*; *Gallo*, 239 S.W.3d at 764 (holding same as to alleged deprivation of effective assistance and due process through denial of continuance).

To show an abuse of discretion, the appellant should make a "showing that the case made for delay was so convincing that no reasonable trial judge could conclude that scheduling and other considerations as well as fairness to the State outweighed the defendant's interest in delay of the trial." *Gonzales*, 304 S.W.3d at 843; *Nichols v. State*, No. 02-13-00566-CR, 2014 WL 7779272, at *1 (Tex.

App.—Fort Worth Feb. 5, 2014, pet. ref'd) (mem. op., not designated for publication). To show prejudice, the appellant should show "with considerable specificity how the defendant was harmed by the 12 absence of more preparation time than he actually had," such as by demonstrating "what additional information, evidence[,] or witnesses the defense would have had available if the motion for delay had been granted." *Gonzales*, 304 S.W.3d at 842–43; *Kerr v. State*, Nos. 02-20-00034-CR, 02-20-00035-CR, 2021 WL 3793817, at *3 (Tex.

App.—Fort Worth Aug. 26, 2021, no pet.) (mem. op. on reh'g, not designated for publication). "That counsel merely desired more time to prepare does not alone establish an abuse of discretion." *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996).

The assertion that counsel did not have time to adequately investigate medical records for potential mitigating evidence without any showing of harm likewise fails to establish an abuse of discretion. *Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. Crim. App. 1995).

The uncontested findings, which are supported by the record, show that the trial court did not abuse its discretion by denying the motion for continuance. Carlile's trio of attorneys had already had over a year to prepare for the December trial setting, having previously obtained two continuances, and he did not specify the amount of additional time he might require for his third continuance, giving the trial court no sense of how long justice would be delayed.

See *Rosales v. State*, 841 S.W.2d 368, 374 (Tex. Crim. App. 1992) (listing "the length of delay requested" and "whether other continuances were... granted" as factors relevant to the need for continuance in some contexts). Most of the documents were duplicative of other discovery, and many of the rest were dry administrative forms.

The court found that Carlile already had 13 "voluminous records" concerning the FBI inquiry, and he offered no reason to believe that the 100 pages of newly produced documents concerning the same issue might materially impact his case if he were given more time to investigate. Absent was any evidence of harm, such as that inadequate preparation time with respect to the FBI file gave rise to "unfair surprise, an inability to effectively cross-examine the State's witnesses, or the inability to adduce crucial testimony that could have been given by potential witnesses." *Dotson v. State*, 146 S.W.3d 285, 297 (Tex.

App.—Fort Worth 2004, pet. ref'd) (citing *Janecka*, 937 S.W.2d at 468). As for the Rose Street records, there was a clear incongruity between, on the one hand, Carlile's professed need to retain new experts to review the records and, on the other hand, Carlile's notice that he could call up to four different retained psychological experts at trial. According to the findings, Carlile offered no proof that his team of lawyers and experts had undertaken due diligence as to the records and no proof that further time and attention to the records would generate additional material for trial.

Just the opposite, the content of the records was straightforward and irrelevant according to the trial court, which further suggested that Carlile's demand for a continuance based thereon was a "contrived reason[]" for delay. See *Rosales*, 841 S.W.2d at 374.

In sum, Carlile offered no evidence to justify imposing the "inconvenience [on] the witnesses, the opposing counsel, and the trial court" that a continuance would represent. See *id.*; *Phifer v. State*, No. 05-18-01232-CR, 2020 WL 1149916, at *12 (Tex. 14 App.—Dallas Mar. 10, 2020, pet. ref'd) (mem. op., not designated for publication) (concluding, based on similar considerations, that the trial court did not abuse its discretion by denying a continuance for further inquiry into 850 pages of newly produced documents); *Reichle v. State*, No. 06-14-00073-CR, 2015 WL 392846, at *8–9 (Tex.

App.—Texarkana Jan. 30, 2015, pet. ref'd) (mem. op., not designated for publication) (same, 250 pages); *Suazo v. State*, No. 03-08-00460-CR, 2010 WL 5018971, at *3–4 (Tex. App.—Austin Dec. 10, 2010, no pet.) (mem. op., not designated for publication) (same, 110 pages); *Baxter v. State*,

No. 07-99-0412-CR, 2001 WL 360677, at *1 (Tex. App.—Amarillo Apr. 11, 2001, no pet.) (not designated for publication) (same, 216 pages).

We overrule Carlile’s third issue. IV. INEFFECTIVE ASSISTANCE OF COUNSEL In his fourth issue, Carlile submits that he was denied his constitutional rights to effective assistance of counsel and a fair trial. As Carlile points out, his trial attorneys “conducted no voir dire, exercised no peremptory strikes, made no opening statement, examined no witnesses, made no objections, presented no defense, made no closing argument and presented nothing on punishment.” “Defense counsel did not even ‘fog a mirror’ during trial,” he argues.

According to Carlile, this was a violation of his Sixth Amendment rights. However, that is apparently how Carlile and his attorneys wanted it. After Carlile’s motion for continuance was denied, his counsel began a boycott of the trial, 15 saying, “Your Honor, because we don’t have an expert to review the records that were received by us on the 19th and November 26th, I do not know how to effectively voir dire this panel.

I rest.” In his mandamus filings, Carlile explained the motive behind his attorney’s nonparticipation: he vowed that if he were not granted mandamus relief in the form of a continuance, his attorneys would “say nothing” during trial “so that even a blind, deaf and dumb appellate court will have no choice but to conclude that Relator was denied his constitutionally-guaranteed effective assistance of counsel.” In a mandamus petition before the court of criminal appeals, Carlile stated that this boycott would extend to all phases of the trial.

When the stays were lifted and the trial recommenced, the State began the proceeding by narrating into the record a portion of the mandamus filings in which Carlile’s attorneys had threatened to refrain from participating in the trial.

The State urged Carlile to rethink the matter, and the trial court offered Carlile time to confer with his attorneys about reconsidering their “plan of action.” But after a fifteen-minute conference, Carlile’s attorneys returned and announced that they still did not plan to participate. At trial, Carlile’s attorneys did not subsequently voice any argument, lodge any objections, present any evidence, or otherwise take part in the adversarial process.

Carlile maintains that he was denied effective assistance. He further submits that because the deprivation was so complete, prejudice should be presumed under the rule of *United States v. Cronin*, 466 U.S. 648, 658–59, 104 S. Ct. 2039, 2046–47 (1984). 16 But as we explain, *Cannon v. State* sets out relevant points of distinction that anticipated cases like this one, where defense counsel’s failure to participate in the adversarial process appears to be intentional, strategic, and with the defendant’s blessing.

See 252 S.W.3d 342, 350 (Tex. Crim. App. 2008) (op. on reh’g). *Cannon* shows that where these signs of artifice are present, there should be no relief on grounds of ineffective assistance despite

counsel's failure to participate in trial.

In order to establish ineffective assistance of counsel, an appellant must usually demonstrate both deficient performance and prejudice. *Id.* at 348–49. That is, he must demonstrate that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 349. "However, if an appellant can demonstrate that defense counsel 'entirely failed to subject the prosecution's case to meaningful adversarial testing,' so that there was a constructive denial of the assistance of counsel altogether, then prejudice, because it is 'so likely,' is legally presumed." *Id.* (cleaned up) (quoting *Cronic*, 466 U.S. at 658–59, 104 S. Ct. at 2046–47).

If there is a "complete denial" of assistance of counsel, the Sixth Amendment is violated. *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047. In *Cannon*, this rule was applied to facts that, at least superficially, resemble those before us. There, as here, counsel for the defendant presented an oral motion for continuance and a written motion to recuse on the first day of trial.

Cannon, 252 S.W.3d at 343. The motion to recuse explained that counsel had recently filed an ethics 17 complaint against the trial judge for biased treatment in another case. *Id.* at 344. The trial judge denied the motion to recuse out of hand. *Id.* Defense counsel then announced that he was not ready for trial, that he would be unable to effectively represent his client, and that he could not participate in the trial.

Id. The trial judge denied the motion for continuance and began the trial. *Id.* Throughout the proceedings, counsel protested that he was unable to effectively represent his client under the circumstances, and he refused to participate in most stages of the case. See *id.* at 344–46.

The court of criminal appeals held that these facts presented one of the "rare" instances when there was a complete denial of counsel, justifying a presumption of prejudice. *Id.* at 350. However, in reaching this holding, the court specially noted the absence of three conditions. See *id.* First, it noted the absence of any indication in the record that counsel was acting on an improper "motive" when he professed to be unprepared; the court elected to "take counsel at his word" and "not speculate that he may have had some other motive for his behavior" that was not concretely shown by the record.

See *id.*; see also *Wenzy v. State*, 855 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Second and third, the court noted "the record contains no suggestion that appellant failed to cooperate with defense counsel, or that appellant directed, agreed with, or acquiesced in defense counsel's behavior." *Cannon*, 252 S.W.3d at 350.

The court went on to summarize other cases in which similar ineffective- assistance claims were rejected, usually because one of these three conditions was present. See *id.* at 350–52 (summarizing *Martin v. McCotter*, 796 F.2d 813, 820 (5th Cir. 1986), *United States v. Sanchez*, 790 F.2d 245, 253–54 (2d Cir. 1986), and *Warner v. Ford*, 752 F.2d 622, 625 (11th Cir.

1985)). The case before us embodies two of the conditions identified in *Cannon* as points of distinction whereupon relief may not be available despite counsel’s nonparticipation in trial. First, we need not speculate as to whether Carlile’s attorneys had an improper motive because, as the State accurately put it, “Carlile and his attorneys spread their joint motive all over the record.” Carlile’s mandamus filings with this court and the court of criminal appeals expressly stated that the goal was to manufacture a Sixth Amendment violation and, with it, a certainty of reversal on appeal.

At trial, counsel’s message was somewhat different; counsel claimed to be unprepared because of the belated production of documents by the State. However, the circumstances did not suggest a genuine lack of preparedness on counsel’s part. Carlile’s three retained attorneys had over a year to prepare for the trial and four mental health experts available to call.

Yet counsel were claiming to be wholly unprepared because they had inadequate time to retain a mental health expert and to investigate records that the trial court deemed largely irrelevant, duplicative, and uncomplicated.

The trial court could have rationally concluded that this claimed unreadiness was merely a pretext for the motive Carlile expressly set out in his mandamus filings. A second condition from *Cannon* is also present: there was some indication that Carlile was aware of his attorneys’ calculation and that he acquiesced in it.

As soon as the mandamus proceedings concluded and trial resumed, the first item of business that was taken up was the threat of nonparticipation. The State recited—in open court and in Carlile’s presence—his own filings back to him, wherein his attorneys had vowed to sabotage the trial if not granted relief.

The State urged Carlile to reconsider and to confer with his attorneys. The trial court asked counsel, “do you need time to confer with your client or is your plan of action already planted in cement?” Counsel indicated that they would like to confer with Carlile.

After a fifteen-minute conference, counsel returned and announced, “we do not plan to present any *voir dire* or make any objections in the case.” A fair inference from this scene is that Carlile was made aware of and acquiesced to his attorney’s gambit to put on no defense. See *Little v. State*, 819 N.E.2d 496, 503 (Ind. Ct. App. 2004) (relying in part on appellant’s presence at hearings where the alleged ineffectiveness—a defect in his attorney’s licensure—was discussed prior to trial in order to establish appellant’s foreknowledge of and tacit assent to the ineffectiveness).

This ploy and Carlile's acquiescence to it weigh heavily against a finding of ineffective assistance.⁷ See *People v. Aiken*, 380 N.E.2d 272, 275 (N.Y. 1978) (“[W]e emphasize that a defendant who absents himself from trial may not succeed on appeal by raising counsel’s purported ineffectiveness where counsel affirmatively, as a matter 7 We express no opinion on which or how many of the conditions identified in *Cannon* must be present before counsel’s nonparticipation in trial will be rejected as a basis for an ineffective-assistance claim.

We only hold that where these two conditions are present, no Sixth Amendment violation will be found. 20 of trial strategy, sought to obstruct the trial of his client.”). “There is no room in our profession for the playing of games.” *Ortega v. State*, 644 S.W.2d 912, 913 (Tex. App.—Fort Worth 1983, no pet.) (en banc). “A defendant may not create reversible error by his own manipulation.” *Beasley v. State*, 634 S.W.2d 320, 321 (Tex.

Crim. App. [Panel Op.] 1982). This principle has found many iterations. For instance, a trial court does not err when it denies a mistrial based on the defendant’s own outbursts during the proceedings, see *George v. State*, 446 S.W.3d 490, 503 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d), or when it denies a motion for continuance where the defendant has voluntarily absented himself during trial, see *Martin v. State*, 727 S.W.2d 820, 823 (Tex.

App.—Fort Worth 1987, no pet.). No appellate relief is in order when the defendant himself was the source of the impermissible conversation with jurors that he attacks on appeal, see *Franks v. State*, 961 S.W.2d 253, 255 (Tex. App.—Houston [1st Dist.] 1997, pet. ref’d), or when he protests about the lack of a sentencing pronouncement that he himself interrupted, see *Hawkins v. State*, No. 02-15-00338-CR, 2016 WL 4474351, at *7–8 (Tex.

App.—Fort Worth Aug. 25, 2016, pet. ref’d) (mem. op., not designated for publication). The same estoppel logic that runs through these cases also runs through the invited-error rule. See *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999).

The law of invited error provides that a party cannot take advantage of an error that it invited or caused, even if the error involves an absolute or waivable-only right. *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *Parnell v. State*, No. 02-19-00070-CR, 2020 21 WL 5666565, at *5 (Tex. App.—Fort Worth Sept. 24, 2020, pet. ref’d) (mem. op., not designated for publication). “In other words, a party is estopped from seeking appellate relief based on error that it induced.” *Woodall*, 336 S.W.3d at 644. “To hold otherwise would be to permit him to take advantage of his own wrong.” *Id.* One Texas court has applied the invited-error rule to dispose of a fair-trial claim such as the one Carlile brings here.

See *Moreno v. State*, No. 04-01-00406-CR, 2002 WL 1573426, at *5 (Tex. App.—San Antonio July 17, 2002, no pet.) (not designated for publication). Texas courts have also extended the invited-error rule to ineffective- assistance claims. See *Aguirre v. State*, No. 11-11-00313-CR,

2013 WL 5776948, at *1 (Tex. App.—Eastland Oct. 24, 2013, no pet.) (mem. op., not designated for publication); In re R.S., No. 14-08-01013-CV, 2009 WL 3191515, at *5 (Tex.

App.—Houston [14th Dist.] Oct. 1, 2009, pet. denied) (per curiam) (mem. op.); see also Love v. State, 600 S.W.3d 460, 481 & n.15 (Tex. App.—Fort Worth 2020, pet. ref'd). Finally, courts have found that the case for invited error is stronger where, as here, the defendant knows of the allegedly ineffective stratagem and acquiesces to it. See People v. Velez, 903 N.E.2d 43, 52–53 (Ill.

App. Ct. 2009); Little, 819 N.E.2d at 503; Lahmann v. State, 509 S.W.2d 791, 795 (Mo. Ct. App. 1974) (rejecting ineffective-assistance claim because “[t]he tactic of counsel sitting mute during the trial was with the knowledge and approval of the appellant”; granting relief on such a tactic would be “inimical to the proper functioning” of the justice system).

22 We join the ranks of these courts. “Appellant and his counsel intentionally and knowingly followed a course of action and ‘gambled’ on its success.” Lahmann, 509 S.W.2d at 795. “To reward such tactics would defy both the purposes of the Sixth Amendment and common sense.” Sanchez, 790 F.2d at 254.

Because Carlile knew of and acquiesced in the deliberate fabrication of the error that he complains of on appeal, any error was invited, and his claims of ineffective assistance and an unfair trial are rejected. We overrule his fourth issue.

V. CONCLUSION We affirm the judgment. /s/ Wade Birdwell Wade Birdwell Justice Do Not Publish Tex. R. App. P. 47.2(b) Delivered: November 24, 2021 23