COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00286-CR

DEDIRE COOPER A/K/A DESIRE JOY COOPER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1349146D

MEMORANDUM OPINION[1]

A jury convicted Appellant Dedire Cooper, also known as Desire Joy Cooper, of murder, and the trial court sentenced her to thirty years' confinement. Appellant brings three points on appeal, arguing that the trial court reversibly erred by denying her motion for continuance after trial counsel experienced a medical emergency and had to be admitted to the hospital and that the trial court

[1]*See* Tex. R. App. P. 47.4.

denied her Fifth, Sixth, and Fourteenth Amendment rights by forcing her to proceed with co-counsel and by denying her the right to counsel of her choice, who was too ill to continue immediately but was expected to recover within four to six weeks. Because the trial court did not abuse its discretion or violate Appellant's constitutional rights by requiring her to complete trial with co-counsel, we affirm the trial court's judgment.

Brief Facts

Appellant was charged with the murder of Antonio Wilson, the father of her cousin's children. She retained attorney Jim Shaw to represent her in the trial of the case. Jury selection began on Monday, July 13, 2015, and testimony began the next day. On Wednesday night, July 15, 2015, Shaw was admitted to the hospital with a subdural hematoma. On July 16, the trial court continued the trial until July 20. Shaw underwent a craniotomy on Friday, July 17, 2015. He was expected to recover in four to six weeks. On July 20, Appellant filed a motion for continuance, asserting that requiring Shaw's co-counsel, James Renforth, to proceed with the trial without Shaw would violate her Sixth Amendment right to secure counsel of her own choosing and her Fourth and Fourteenth Amendment rights to due process. Appellant filed two affidavits under seal—her own and that of Renforth. In her affidavit, she stated,

> Me and Mr. Shaw had several discussions regarding the case that Mr. Renforth was not present for. Including: If I was going to take the stand and other strategies that Mr. Shaw was discussing with me about the case, like what witnesses to put on. Also Mr. Renforth was not present when myself and Mr. Shaw observed the scene.

> Although I think Mr. Renforth is an excellent attorney, I hired and expected Mr. Shaw to try and finish my case. I just think it's unfair to me to have to finish my case without my attorney.

Renforth met with the judge and both prosecutors and requested a continuance. After a hearing, the trial court denied the motion. Appellant then moved for a mistrial, which the trial court also denied. The trial then proceeded.

After learning that Renforth had been with Shaw for eleven years, the trial judge stated on the record,

> Okay. The Court is very much aware of the working relationship between Mr. Shaw and Mr. Renforth. The Court is very much aware of Mr. Renforth's involvement in this case from basically the minute that the case was filed from coming to court on [Appellant's] behalf, to being present throughout the entire trial, to assisting Mr. Shaw.
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> The Court is also very much aware of Mr. Renforth's background as far as his experience as far as an adult probation officer, a Tarrant County prosecutor, and now having been with Mr. Shaw for 11 years. I have never seen ineffective assistance being rendered by Mr. Renforth in all of his work. He is always very professional, very much a product of student of the law.
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> And, [Appellant], . . . you and Mr. Renforth need to spend some time between now and possibly Monday afternoon because he has been actively involved in this case. Mr. Shaw's firm is retained, which he is a member of that firm. And if Mr. Shaw is unavailable on Monday, it is the Court's intention to proceed Monday afternoon at 1:00 o'clock with Mr. Renforth.

Renforth's ability as a lawyer was never in question. Although there was some mention of his not having participated in some of the trial preparation and investigation, nothing in the record suggests that he was not fully prepared to undertake the portion of the trial left to him after Shaw was admitted to the hospital. The State called a single witness, Detective Jeremy Rhoden, during

that portion of the trial, the remainder of its case in chief. Appellant testified on her own behalf. The punishment trial, which was before the trial judge, did not occur until July 30, 2015, nine days after the jury was excused.

Denial of Motion for Continuance

We address Appellant's three points together because they are intertwined.[2] All relate to the trial court's denial of Appellant's motion to continue the trial until Shaw could return. Article 29.13 of the code of criminal procedure, which governs the midtrial motion for continuance brought and denied in this case, provides,

> A continuance or postponement may be granted on the motion of the State or defendant after the trial has begun, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had.[3]

Whether to grant a motion for continuance based on counsel's illness after trial has begun is within the discretion of the trial court.[4] Generally, a trial court abuses its discretion when its decision lies outside the zone of reasonable

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[2]*See, e.g.*, *Russeau v. State*, 785 S.W.2d 387, 390 (Tex. Crim. App. 1990) ("We will address the two points . . . together, because the . . . issue[s] . . . are intertwined.").

[3]Tex. Code Crim. Proc. Ann. art. 29.13 (West 2006).

[4]*Rosales v. State*, 841 S.W.2d 368, 372–73 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 949 (1993).

disagreement.[5] In a case involving the denial of a motion for continuance, a trial court reversibly abuses its discretion only when the record shows that the defendant was prejudiced by the denial.[6]

Appellant relies on cases emphasizing a defendant's right to effective representation of counsel.[7] Nothing in the record suggests that co-counsel's performance was not fully competent. And, although co-counsel did not participate in some of the trial preparation and investigation, lead counsel tried the entire case up to the State's last witness. We cannot glean from the record how the trial would have been different had lead counsel completed the trial or what deficiency co-counsel exhibited. We therefore conclude that Appellant has not met her burden of showing that she was denied effective representation by the absence of lead counsel.[8]

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[5] *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

[6] *See* Tex. Code Crim. Proc. Ann. art. 29.13; *Rosales*, 841 S.W.2d at 373 ("Failure to grant a motion for continuance where lead counsel has been debilitated does not amount to an abuse of discretion . . . where the record shows nothing that could have been done for appellant that was not properly done by counsel who managed the case during trial.") (internal quotation marks and citation omitted); *see also Gonzales v. State*, 304 S.W.3d 838, 842–43 (Tex. Crim. App. 2010) (holding, in context of pretrial motion for continuance, that reversible error is predicated on both error in the denial of the continuance and resultant harm).

[7] *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984); *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046 (1984); *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 667 (1981).

[8] *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013).

The remainder of Appellant's complaint is that she was denied counsel of her choice. The issue of a defendant's being required to proceed without counsel of her choice because of preferred counsel's incapacity is relatively rare. Here, counsel's illness was sudden and very serious, requiring immediate surgery. No gamesmanship of any kind on the part of either the defense or the prosecution is even hinted at. A frightened defendant in a felony case understandably relies on retained counsel. At the same time, the trial court has an obligation to assure a fair trial and to employ the court's resources efficiently.[9] The State had almost completed its portion of the trial on guilt. Very little of the trial was left untried. There is no suggestion that co-counsel did not perform competently. The jury had already taken several days out of their lives to perform the important duty of jury service. The trial judge was forced to weigh the additional imposition on the jury of a continuance lasting four to six weeks against retrying the case against proceeding with co-counsel. Trying the same case twice also impacts other defendants waiting on the attention of the court, either for hearings on motions or for trial of their cases.

The *Rosales* court reminds us that

> [w]here denial of a continuance has resulted in representation by counsel who was not prepared, or denial of representation by counsel altogether, through no fault of the accused, [Texas Court of

[9]*See Rosales*, 841 S.W.2d at 374.

> Criminal Appeals] has not hesitated to declare an abuse of discretion.[10]

But that is not the situation here. Considering the record as a whole, and applying the appropriate standard of review, we conclude that because co-counsel was sufficiently conversant with the case to provide Appellant competent representation after lead counsel was hospitalized for surgery through no one's fault, and because the trial was so near its conclusion, the trial court did not abuse its discretion by denying Appellant's request for a four- to six-week continuance,[11] nor did the trial court's proceeding with the trial infringe on Appellant's due process or assistance-of-counsel rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments.[12]

Conclusion

This kind of case must be decided on a case-by-case basis.[13] Given the facts of this case, we overrule Appellant's three points and affirm the trial court's judgment.

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[10] *Id.* at 372.

[11] *Id.* at 373.

[12] *See* U.S. Const. amends. V, VI, XIV.

[13] *See Steward v. State*, 422 S.W.2d 733, 737–38 (Tex. Crim. App. 1968).

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 20, 2016