

Opinion issued December 20, 2022.



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00724-CR

GLENIS DIONICIO CORDOVA-LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1578342**

OPINION

In October 2020, a jury found appellant Glenis Dionicio Cordova-Lopez guilty of aggravated sexual assault of a child and assessed his sentence at 60 years' imprisonment and a \$10,000 fine. *See* TEX. PENAL CODE § 22.021. The court sentenced him in accordance with the jury's verdict. On appeal, he argues that

conducting the trial during the COVID-19 pandemic was structural error requiring reversal and that the trial court erred by denying his motion for a continuance. We affirm.

Background

The case against Cordova-Lopez began on January 29, 2018, when the complaint against him was filed. In April 2019, after two appointed attorneys had withdrawn from his case, the trial court appointed counsel that ultimately represented Cordova-Lopez at trial. On November 6, 2019, the case was set for pretrial conference on March 10, 2020, and for jury trial on April 10, 2020.

On March 13, 2020, the Texas Supreme Court and the Court of Criminal Appeals issued the first emergency order in response to the COVID-19 pandemic. *See First Emergency Order Regarding the COVID-19 State of Disaster*, 596 S.W.3d 265 (Tex. 2020). Cordova-Lopez's trial was postponed, and pretrial litigation continued over the next several months.

On September 18, 2020, the Texas Supreme Court issued the emergency order that was in effect during Cordova-Lopez's trial. *See Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d 135 (Tex. 2020). On the same day, Cordova-Lopez moved to continue jury selection and trial on the grounds that conducting a trial during the pandemic was problematic and would deny him a fair trial. The motion was denied. The court's order includes a signed,

handwritten notation from the judge stating, “Amended motion for continuance[.] [B]oth sides stated ready for trial. Defense attorney stated[,] ‘Defendant wants jury trial.’”

On September 25, 2020, the State filed an amended notice of intent to use extraneous offenses and prior convictions. The notice contained additional allegations that Cordova-Lopez engaged in sexual assault of an additional child. Five days later, Cordova-Lopez moved for a continuance to investigate the newly alleged extraneous acts. The court refused to permit the State to admit evidence of the new extraneous offenses and denied the continuance.

Jury selection was held at NRG Stadium on October 5, 2020. Cordova-Lopez reurged his motion for continuance prior to voir dire and again before testimony began in the trial. The motion was denied each time. Trial ended on October 9, 2020.

Structural Error

Cordova-Lopez suggests that conducting a jury trial during the COVID-19 pandemic is structural error that requires automatic reversal with no harm analysis. We disagree.

A. Standard of Review

Structural error may be raised for the first time on appeal barring an express waiver of the right. *Mendez v. State*, 138 S.W.3d 334, 342 (Tex. Crim. App. 2004).

“A structural error affects the framework within which the trial proceeds, rather than simply an error in the trial process itself,” and it is not amenable to a harm analysis. *Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014) (internal citations and quotations removed). Structural errors are reversed automatically without a harm analysis. *Id.* Structural errors demand reversal because harm to the defendant is irrelevant, either because we protect the right for reasons independent of preventing harm to the defendant, the harm flowing from the violation of the right is simply too hard to measure, or the violation of the right always results in fundamental unfairness. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

Texas courts only treat error as structural if the United States Supreme Court has labeled it as such. *Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017) (holding that all errors are subject to harm analysis, with limited exception of certain federal constitutional errors labeled “structural” by United States Supreme Court). All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors. *Schmutz*, 440 S.W.3d at 35. Structural errors include a total deprivation of the right to counsel, lack of an impartial trial judge, denial of self-representation, denial of a public trial, and lack of proper reasonable doubt instruction. *See United States v. Marcus*, 560 U.S. 258, 263 (2010).

B. Analysis

Cordova-Lopez gives several reasons why conducting trial during the pandemic is structural error. He alleges that conducting the trial in October 2020 amounted to a complete denial of counsel. He also argues that he was not tried before a fair cross-section of his community. He alleges that the pandemic safety precautions infringed upon his right to meaningful confrontation. He alleges that his right to an impartial jury and uncoerced verdict was impeded. Finally, he argues that his right to a fair trial was compromised by participants wearing face coverings. None of these issues are considered structural error, and all his arguments are speculative in nature.

1. Cordova-Lopez was not denied his right to counsel.

Cordova-Lopez has not established that he suffered from a complete denial of his right to counsel. The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. A complete denial of the constitutional right to counsel at trial is a structural defect that affects the framework of the trial. *Williams v. State*, 252 S.W.3d 353, 357 (Tex. Crim. App. 2008). When the right to trial counsel has been violated, prejudice is presumed because the trial has been rendered inherently unfair and unreliable. *Id.*

Cordova-Lopez has not demonstrated that he was actually or constructively denied his right to counsel. The record reflects that counsel was present and an active participant throughout the entire process, including pretrial, trial, and punishment phases. The record is silent as to what, if any, actual deficiencies in counsel's representation occurred. Cordova-Lopez cites to *Powell v. Alabama* and contends that holding a trial with the threat of illness caused by the pandemic is like forcing counsel to try a capital case on short notice and under threat of mob violence. *See Powell v. Alabama*, 287 U.S. 45, 52–56 (1932). But the circumstances in *Powell* do not support the conclusion that Cordova-Lopez was completely deprived of counsel. In *Powell*, the Court held that in a capital case, where the defendant cannot employ counsel or represent himself, the trial court has a duty to assign counsel at such a time that allows counsel to effectively aid in case preparation and trial. *Id.* at 71. Cordova-Lopez's trial counsel represented him for more than a year before the trial occurred. Counsel attended and participated fully in the proceedings. Cordova-Lopez has not shown that he was denied his right to counsel.

2. Cordova-Lopez was not denied the right to a venire with a fair cross-section of the community.

Cordova-Lopez argues that fear of contracting COVID-19 caused potential venire members to stay at home, rendering a fundamentally unfair panel. He argues that the racial make-up of the panel was not consistent with census data from

Harris County at the time and that the venire underrepresented groups that he identifies with, such as Latinos and males, while overrepresenting Caucasians, females, and college-educated people.

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant an impartial jury selected from sources reflecting a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 526, 530–37 (1975). Although venire panels must represent a fair cross-section of the community, there is no requirement that the petit jury chosen for a particular case “mirror the community and reflect the various distinctive groups in the population.” *Gray v. State*, 233 S.W.3d 295, 300 (Tex. Crim. App. 2007) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)).

In order for a defendant to establish a prima facie violation of the fair-cross-section requirement, the defendant must show that: (1) the group alleged to be excluded is a “distinctive” group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to the systematic exclusion of the group in the jury selection process. *Berghuis v. Smith*, 559 U.S. 314, 327 (2010); *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Cordova-Lopez cannot make a prima facie case that he was denied fair representation in the venire panel. First, he does not cite authority to support his contention that college-educated or unemployed individuals, specifically, are distinctive community groups to satisfy the first prong. *See Weeks v. State*, 396 S.W.3d 737, 743 (Tex. App.—Beaumont 2013, pet. ref'd) (noting that “Hispanics” and “African-Americans” are distinctive groups, but that Supreme Court has not decided whether social and economic factors may support fair-cross-section claim). He also has not satisfied the third prong. He has not made a showing that underrepresentation, if it occurred at all, was due to systematic exclusion of the group in the selection process. *See Berghuis*, 559 U.S. at 332 (holding that merely pointing to host of factors that, individually, or in combination, might contribute to group’s underrepresentation does not establish prima facie case); *May v. State*, 738 S.W.2d 261, 268 (Tex. Crim. App. 1987) (holding that disproportionate representation in single panel does not demonstrate systematic exclusion of distinctive groups in violation of Sixth Amendment). Cordova-Lopez speculates that the pandemic caused particular groups of people to choose not to respond to a jury summons. The trial court stated on the record that more than 50% of the venire panel classified themselves as members of a minority or non-white group. To the extent Cordova-Lopez argues that his right was violated because jury did not include individuals of groups matching his identity, “[d]efendants are not

entitled to a jury of any particular composition.” *Taylor*, 419 U.S. at 538. Cordova-Lopez has not made a prima facie case of systematic exclusion.

3. Cordova-Lopez was not denied the right to a fair trial due to auditory difficulties.

Cordova-Lopez argues that the safety precautions implemented during his trial were so restrictive that participants could not hear. He argues that this amounts to a deprivation of his right to a fair trial.

The record does not support Cordova-Lopez’s argument. Cordova-Lopez cites to 70 excerpts from the transcript involving references to seeing or hearing or “inaudible” portions of the dialogue or testimony. The citations he relies on involve verification that participants could hear or instructions to inform them what to do if they could not. The citations also involve directions to participants to speak up or stay near a microphone, after which audible dialogue is reported. His record references include instructions to respond verbally for the court reporter or to stand in a particular place so that the reporter could hear testimony or dialogue. In several record citations where a participant could not hear, the question, response, or testimony is clarified and repeated. Additionally, the record reflects efforts to ensure that witnesses who testified via Zoom, for either the State or the appellant, could hear and be heard.

The record reflects that the trial court adopted safety measures to minimize the spread of COVID-19 and resolved technical issues as they arose. Cordova-

Lopez does not claim that any “inaudible” portions of the record were significant or necessary. He also did not attempt to correct any purported inaccuracies in the reporter’s record. *See* TEX. R. APP. P. 34.6(e), (f). The record does not support Cordova-Lopez’s argument that trial participants could not hear each other.

4. Cordova-Lopez was not denied a fair trial because participants wore masks.

Cordova-Lopez speculates that facial coverings worn by the parties and witnesses prevented the jury from fully evaluating witness credibility, violated his right of confrontation, and compromised his right to be present and judged without prejudice. Cordova-Lopez does not articulate specific instances that were affected by facial coverings. He does not cite to any authority to support that his arguments related to facial coverings are structural error. *See Lake*, 532 S.W.3d at 411 (holding that error is treated as structural only when United States Supreme Court has labeled it as such); *cf. United States v. Smith*, No. 21-5432, 2021 WL 5567267, at *2 (6th Cir. Nov. 29, 2021) (holding that requirement that jurors wear face masks, to extent it was erroneous, was harmless error).

To the extent Cordova-Lopez argues that permitting witnesses to wear masks violated his right to confrontation, such a violation does not amount to structural error. *See Lake*, 532 S.W.3d at 411; *see also Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020) (holding that denial of physical, face-to-face confrontation is reviewed for harmless error). Finally, he does not assert that

he was made to wear a facial covering against his will or made to wear a distinctive facial covering compared to others at the trial. *Estelle v. Williams*, 425 U.S. 501, 512–13 (1976) (holding that failure to object to being tried in prison attire is sufficient to negate the presence of compulsion necessary to establish constitutional violation).

We overrule Cordova-Lopez’s argument that conducting a jury trial in October 2020 during the COVID-19 pandemic was structural error.¹

Motion for Continuance

Cordova-Lopez argues that the trial court abused its discretion by denying his motion for continuance. We disagree.

A. Standard of Review

Texas Code of Criminal Procedure Article 29.03 provides, “A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown; which cause shall be fully set forth in the motion. A continuance may be only for as long as is necessary.” TEX. CODE CRIM. PROC. art.

¹ We find no authority in other state or federal jurisdictions for the notion that holding a trial during the COVID-19 pandemic is structural error. It is a well-established principle that the Constitution entitles a defendant to “a fair trial, not a perfect one.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Davis v. State*, 203 S.W.3d 845, 849 (Tex. Crim. App. 2006). “This principle applies with even greater force during a public health emergency, where protective measures such as plexiglass partitioners, disposable microphones, face masks, and social distancing upend traditional notions of what a ‘normal’ trial looks like. However, different does not necessarily mean unfair.” *United States v. Smith*, No. 21-5432, 2021 WL 5567267, at *1 (6th Cir. Nov. 29, 2021) (holding juror face mask requirement during trial in September 2020 was not structural error).

29.03. Article 29.11 further provides, “No argument shall be heard on a motion for a continuance, unless requested by the judge; and when argument is heard, the applicant shall have the right to open and conclude it.” *Id.* art 29.11

We review a trial court’s ruling on a motion for continuance for an abuse of discretion. *Kinnett v. State*, 623 S.W.3d 876, 906 (Tex. App.—Houston [1st Dist.] 2020, pet. ref’d) (citing *Guerrero v. State*, 528 S.W.3d 796, 799 (Tex. App.—Houston [14th Dist.] 2017, pet. ref’d)). “To establish an abuse of discretion, the appellant must show that the trial court erred in denying the motion for continuance and that the denial ‘actually and specifically prejudiced appellant’s defense.’” *Id.* (quoting *Guerrero*, 528 S.W.3d at 800); see *De Vaughn v. State*, 239 S.W.3d 351, 355 (Tex. App.—San Antonio 2007, pet. ref’d) (“In order to establish an abuse of the trial court’s discretion, an appellant must show that the denial of his motion for continuance resulted in actual prejudice.”). “Speculation will not suffice to obtain reversal for a trial court’s failure to grant a continuance.” *Kinnett*, 623 S.W.3d at 906 (quoting *Nwosoucha v. State*, 325 S.W.3d 816, 825 (Tex. App.—Houston [14th Dist.] 2010, pet. ref’d)).

“An appellate court will conclude that the trial court’s denial of a motion for continuance was an abuse of discretion ‘only if the record shows with considerable specificity how the defendant was harmed by the absence of more preparation time than he actually had.’” *Nwosoucha*, 325 S.W.3d at 825 (quoting *Gonzales v. State*,

304 S.W.3d 838, 842 (Tex. Crim. App. 2010)). “A defendant can ordinarily make such a showing only at a hearing on a motion for new trial,” because only then will he be able to produce evidence regarding what benefit the additional delay could have provided. *Nwosoucha*, 325 S.W.3d at 825–26.

B. Analysis

Cordova-Lopez moved for a continuance two weeks before trial, arguing that the COVID-19 pandemic and its safety protocols would impede his rights. The trial court denied the motion the same day. Cordova-Lopez reurged his motion before the start of voir dire and after voir dire but before testimony began. Each time the trial court denied the motion.

The motion advanced multiple arguments to support a continuance including:

- Harris County was in the middle of a health emergency.
- COVID-19 is a contagious virus that trial counsel did not want to contract a second time.
- The risks to citizens and trial participants could not easily be mitigated.
- Trial would impair the defendant’s right to effective assistance of counsel.
- The veniremen would not be a fair cross-section of the community.

- Cordova-Lopez would be denied the right to meaningful confrontation, compulsory process, to present evidence, to testify, and to be free of coercive pressure to plead guilty.
- Cordova-Lopez would be prejudiced by wearing a face covering in violation of his right to be present.
- The jury would not be impartial, and the trial would result in a coerced verdict.
- The trial would violate due process because the State could not exercise reasonable care toward the health and safety of a confined person.

Cordova-Lopez has failed to demonstrate that the trial court erred in denying his motion for continuance or that he was actually and specifically prejudiced by the denial. *Kinnett*, 623 S.W.3d at 906 (quoting *Guerrero*, 528 S.W.3d at 799) (“To establish an abuse of discretion, the appellant must show that the trial court erred in denying the motion for continuance and that the denial actually and specifically prejudiced appellant’s defense.”); see *Cortez v. State*, No. 01-20-00757-CR, 2022 WL 2837330, at *3 (Tex. App.—Houston [1st Dist.] July 21, 2022, no pet.) (mem. op., not designated for publication) (concluding trial court did not err in denying continuance for speculative harms related to COVID-19). Speculation does not suffice to obtain reversal for a trial court’s failure to grant a continuance. *Kinnett*, 623 S.W.3d at 906. Cordova-Lopez argues that the emphasis

on safety measures related to COVID-19 caused jurors to be distracted and worried about their safety, but he does not articulate how any alleged worries resulted in prejudice.

The record reflects that the trial court implemented several precautions to facilitate a trial in October 2020. For example, additional precautions were taken for voir dire. Voir dire took place at NRG Stadium to allow for greater distance between the participants. The court allowed additional time for jury selection to accommodate the conditions. Each venireperson was seated at least six feet from any other and given a mask and face shield. Each venireperson had a microphone to be heard. If comfortable, veniremen were permitted but not required to lower their masks during questioning. The court allowed the attorneys to move about the well so that they could ask all 65 potential jurors questions and wait for answers. The court allowed extra time for questioning when potential jurors had difficulty seeing or hearing. Neither Cordova-Lopez nor the State requested to meet with any jurors individually.

Prior to the start of trial, the trial court admonished the jury that the court had put safety measures in place and that jurors should alert the court if at any point they could not hear. Jurors were seated at least six feet apart and instructed that as long as they left their face shield on and remained stationary, they could lower their face masks. Cordova-Lopez has not articulated any specific instance in

which the COVID-19 precautions hampered or impaired him. Furthermore, he did not file a motion for new trial or seek to obtain a post-judgment hearing to produce evidence regarding any actual harm he suffered during trial because of the denial of his motion for continuance. *Cortez*, 2022 WL 2837330, at *3 (citing *Nwosoucha*, 325 S.W.3d at 825–26).

We overrule Cordova-Lopez’s issue on appeal.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Kelly, Rivas-Molloy, and Guerra.

Publish. TEX. R. APP. P. 47.2(b).