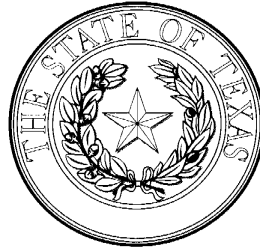


Opinion issued July 21, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00757-CR
NO. 01-20-00758-CR

OSCAR R. CORTEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case Nos. 1639001& 1639000**

MEMORANDUM OPINION

A jury found appellant Oscar R. Cortez guilty of the offenses of misdemeanor assault and aggravated kidnapping.¹ The trial court assessed his

¹ Cortez was charged with the offense of aggravated assault in trial court cause number 1639000. The jury found him guilty of the lesser-included offense of

punishment at a \$500 fine and 17 years' imprisonment for the offenses, respectively. In his sole appellate issue raised in each appeal, Cortez argues that the trial court abused its discretion in denying his motion for continuance. We affirm.

Background

Cortez was charged with the offenses of aggravated assault of a family member and aggravated kidnapping in connection with an incident involving his ex-girlfriend. Cortez forced her into a car at gunpoint, drove her to his home, and struck her repeatedly. She was able to escape and returned home, where she reported the events to police. Cortez was arrested on July 20, 2019, and held in custody.

Cortez's case was reset numerous times but was ultimately set for trial on October 26, 2020. On October 14, 2020, Cortez moved for a continuance based on the impacts caused by the on-going COVID-19 pandemic. Cortez cited the health concerns related to the pandemic and asserted that "[a] jury trial during the middle of this pandemic poses enormous public health risks." Cortez argued generally that conducting a jury trial during a pandemic would impair his right to effective assistance of counsel; would deny him the right to a trial before a fair cross-section of the community; would compromise his right to meaningful confrontation; would

misdemeanor assault, and he appealed, resulting in appellate cause number 01-20-00758-CR. The aggravated-kidnapping charge was tried in trial court cause number 1639001 and resulted in appellate cause number 01-20-00757-CR.

deny him the rights to compulsory process to present evidence and to testify; would compromise his right to be present and to be judged without a prejudicial face covering; would compromise his right to trial by an impartial jury and an uncoerced verdict; would compromise his right to be free of coercive pressure to plead guilty; and would violate his due process right to exercise reasonable care toward his health and safety as a person confined by state action.

Cortez's motion for continuance did not seek a continuance for any particular length of time. Nothing in the motion specifically referenced the Supreme Court of Texas's Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster (Emergency Order 26), setting out certain protocols for in-person proceedings during the COVID-19 state of disaster. Nothing in the record indicates that Cortez requested a hearing on his motion for continuance.

The trial court denied the motion without holding a hearing. Voir dire commenced on October 23, 2020, and trial commenced on October 26, 2020. Cortez did not object to the trial court's failure to hold a hearing on his motion for continuance. He did not object to any of the protocols put into place in response to the COVID-19 pandemic.

Following a jury trial on guilt-innocence, the jury found Cortez guilty of aggravated kidnapping and the lesser-included offense of misdemeanor assault. The trial court assessed a \$500 fine for the assault and 17 years' imprisonment for

the aggravated kidnapping. Cortez did not file a motion for new trial. This appeal followed.

Motion for Continuance

In his sole appellate issue, Cortez argues that the trial court violated Emergency Order 26 and abused its discretion by denying his motion for continuance.

A. Standard of Review

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. 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. *Id.* at 825–26.

B. Analysis

Cortez argues that, pursuant to Emergency Order 26, dated September 18, 2020, the trial court had no discretion to deny his motion for continuance without a hearing. Emergency Order 26 provides, in relevant part:

3. Courts must not conduct in-person proceedings contrary to the *Guidance for All Court Proceedings During COVID-19 Pandemic*

(“Guidance”) issued by the Office of Court Administration, which may be updated from time to time, regarding social distancing, maximum group size, and other restrictions and precautions. Prior to holding any in-person proceedings, a court must submit an operating plan that is consistent with the requirements set forth in the Guidance. Court must continue to use all reasonable efforts to conduct proceedings remotely.

. . . .

6. A district court . . . must not conduct an in-person jury proceeding unless[, among other procedures,] . . . (d) the court has considered on the record any objection or motion related to proceeding with the jury proceeding at least seven days before the jury proceeding or as soon as practicable if the objection is made or filed within seven days of the jury proceeding[.]

Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster, 609 S.W.3d 135 (Tex. 2020).

However, Cortez’s motion for continuance did not make any reference to Emergency Order 26 or its requirement that a trial court “consider[] on the record any objection or motion related to proceeding with the jury proceeding[.]” *Id.* Cortez did not request a hearing on his motion for continuance, nor did he object in any way to the trial court’s failure to hold a hearing or otherwise “consider on the record” his complaints. Contrary to Cortez’s assertion, the procedures set out in Emergency Order 26 are not absolute, systemic rights, nor are they waivable-only, i.e., rights that are fundamental to the proper functioning of the adjudicatory process that may be abandoned only if the record reflects that they have been waived. *See, e.g., Proenza v. State*, 541 S.W.3d 786, 792 (Tex. Crim. App. 2017)

(discussing “three distinct kinds” of error-preservation rules; recognizing that unless right is absolute, systemic right or waivable-only right, ordinary error-preservation rules of procedural default—which is loss of right for failure to raise matter by objection—apply”); *see also In re State ex rel. Ogg*, 618 S.W.3d 361, 364 (Tex. Crim. App. 2021) (discussing COVID-19 emergency order and stating that “the Emergency Order [did not] purport to authorize courts to modify substantive rights” but instead “address procedural matters.”).

Thus, because Cortez failed to bring his complaint about the lack of a hearing before the trial court, we conclude that he did not preserve it for consideration on appeal. *See* TEX. R. APP. P. 33.1(a); *Grado v. State*, 445 S.W.3d 736, 738–39 (Tex. Crim. App. 2014) (recognizing general requirement that contemporaneous objection must be made to preserve error for appeal); *cf. Obella v. State*, 532 S.W.3d 405, 407 (Tex. Crim. App. 2017) (holding, in context of motion for new trial hearing, that “a reviewing court does not reach the question of whether a trial court abused its discretion in failing to hold a hearing if no request for a hearing was presented to it”) (internal quotation marks omitted).

Cortez further argues that even if the trial court had discretion to deny the motion without holding a hearing, the court abused its discretion by denying his motion for continuance. He argues that being compelled to participate in a jury trial in the midst of the COVID-19 pandemic deprived him of his Sixth

Amendment right to counsel. He further argues that we should presume prejudice flowing from the trial court's denial of his motion for continuance without holding a hearing.

We conclude, however, that Cortez 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. *See Kinnett*, 623 S.W.3d at 906 (“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.’”). The harms outlined by Cortez in his motion for continuance were all speculative, and “[s]peculation will not suffice to obtain reversal for a trial court’s failure to grant a continuance.” *See id.* Cortez argued, for example, that he would be deprived of his right to counsel because communication with his counsel could be difficult as a result of COVID-19 safety protocols and because COVID-19 protocols and related stress could prevent counsel from devoting full attention to Cortez’s trial. But Cortez failed to identify any specific instance in which he was unable to communicate with his counsel or any way in which his counsel’s performance was otherwise hampered or impaired. Furthermore, Cortez failed to file a motion for new trial or to obtain a post-judgment hearing in which he could produce evidence regarding any actual harm he suffered during trial as a result of the denial of his motion for continuance. *See*

Nwosoucha, 325 S.W.3d at 825–26 (holding that defendant can ordinarily make showing of specific harm “only at a hearing on a motion for new trial,” because only then will he be able to produce evidence regarding what benefit additional delay could have provided).

We overrule Cortez’s sole issue on appeal.

Conclusion

We affirm the trial court’s judgment in each appeal.

Richard Hightower
Justice

Panel consists of Justices Kelly, Hightower, and Farris.

Do not publish. TEX. R. APP. P. 47.2(b).