

DEC 22 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

MARION LEWIS,)	
)	NOT FOR PUBLICATION
Appellant,)	
v.)	Case No. F 2004-577
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

OPINION

C. JOHNSON, JUDGE:

Appellant, Marion Lewis, was found guilty by a jury in Oklahoma County District Court, Case No. CF 2002-5082, of First Degree Rape (Counts 1-5, 8-12), after former conviction of a felony, in violation of 21 O.S.2001, § 1111; of Forcible Oral Sodomy, after former conviction of a felony, in violation of 21 O.S.2001, § 888 (Counts 6 and 7); and of Indecent or Lewd Acts with a Child under Sixteen, after former conviction of a felony, in violation of 21 O.S.2001, § 1123 (Count 13). Jury trial was held on April 12-15, 2004, before the Honorable Susan W. Bragg, District Judge. The jury set punishment at life without the possibility of parole on Counts 1 – 12, and at twenty (20) years imprisonment on Count 13. Judgment and Sentence was imposed on June 2, 2004, and Judge Bragg ordered the sentences be served consecutively. Thereafter, Mr. Lewis filed this appeal.

Mr. Lewis raises three propositions of error:

1. The trial court failed to adequately warn Mr. Lewis of the dangers of self-representation. Accordingly, Mr. Lewis's purported waiver of the right to counsel was not "knowingly" entered and his subsequent convictions violate the Sixth Amendment;

2. The trial court ignored significant information that cast doubt on Mr. Lewis's competency to stand trial. The error creates an unacceptable possibility that Mr. Lewis was tried while incompetent in violation of his Fourteenth Amendment rights;
3. The trial court's refusal to grant a continuance deprived Mr. Lewis of the ability to call witnesses and to present a defense. His convictions, accordingly, violate the due process clause of the Fourteenth Amendment.

A recitation of the facts is unnecessary because reversible error occurred when the trial court refused to grant a continuance after allowing Mr. Lewis to proceed *pro se*. Its failure to afford Mr. Lewis additional time to prepare his case for trial violated his due process right to present a defense. Okla. Const. art.II, § 20; U.S. Const. amend. XIV.

The decision to grant or deny a motion for continuance is within the sound discretion of the trial court whose decision will not be disturbed unless an abuse of discretion is shown. *Warner v. State*, 2001 OK CR 11, ¶ 14, 29 P.3d 569, 575. This Court will examine the entire record to ascertain whether or not the defendant has suffered any prejudice by the trial court's denial of the request. *Waterdown v. State*, 1990 OK CR 65, ¶ 5, 798 P.2d 635, 638; *Ochoa v. State*, 1988 OK CR 41, ¶ 8, 963 P.2d 583, 590.

In this case, Mr. Lewis filed numerous *pro se* pleadings for many months prior to trial expressing his desire to proceed *pro se*. He also filed numerous applications for subpoenas. His *pro se* pleadings were never acted upon or even acknowledged by the trial court until four (4) days prior to trial. At a

motion hearing held at that time, the trial court granted Mr. Lewis's request to proceed *pro se*.

Following the trial court's decision to allow Mr. Lewis to represent himself, the State filed a Motion in Limine seeking to preclude Mr. Lewis from introducing, mentioning or displaying any evidence regarding any child welfare actions or investigations involving any of the witnesses or introducing documents relating thereto because the same was not made available to the State through discovery. Mr. Lewis responded that he had made every effort to comply with discovery through his *pro se* pleadings and that he would call a DHS witness to authenticate his documents. Extensive discussion and argument relating to Mr. Lewis's trial strategy was held. Stand-by counsel noted for the trial court that Mr. Lewis sought to handle his case differently than the way stand-by counsel had prepared the case and thus wanted to introduce documentary evidence and witnesses that stand-by counsel had not prepared to call. Counsel suggested Mr. Lewis be afforded a brief continuance to obtain his witnesses to defend the case the way he wanted to defend it, because the trial court had only four days earlier granted his request to proceed *pro se*. Following further discussion with Mr. Lewis, the prosecutor and stand-by counsel, the trial court denied Mr. Lewis's request for continuance stating its concern about the cost to the State because it had paid for out-of-state witnesses to be present for trial and referencing the fullness of the trial court's docket.

Under all the facts and circumstances presented here, denial of Mr. Lewis's request for continuance based upon the fact that the State would be "out" the cost of its witnesses or based upon the trial court's docket was improper. Mr. Lewis suffered prejudice from the trial court's denial of his request for a short continuance, to obtain witnesses he believed were vital to his defense; its ruling deprived Mr. Lewis of his right to due process and his right to present a defense.

The record reflects Mr. Lewis filed numerous requests to "discharge" his retained counsel and to proceed *pro se*. His pleadings reflected he wanted to proceed *pro se*, because Watson was not defending him in the manner he wanted. "With retained counsel, a defendant has made a choice regarding the counsel who will represent him or her." *Miller v. State*, 2001 OK CR 17, ¶ 48, 29 P.3d 1077, 1087. Here, no one questioned Watson's competence in defending the case except Mr. Lewis. "A defendant who elects to proceed *pro se* after dismissing his counsel, whom he considers to be ineffective, should also be provided time for preparation." *Coleman v. State*, 1980 OK CR 75, ¶ 6, 617 P.2d 243, 245.

The district court docket, filed here as four volumes of Original Record, shows Mr. Lewis made numerous requests to proceed *pro se* and his requests, like his applications for subpoenas, were completely ignored by the district court. Had the trial court not ignored his numerous motions and considered any one of his numerous requests to proceed *pro se* or his Applications for

Subpoenas, Mr. Lewis might have been afforded the opportunity to obtain his subpoenas and handle his defense in the way that he wanted.

Here, where Mr. Lewis was granted his right to self-representation only four days prior to trial, he should have been afforded some opportunity to obtain witnesses to sponsor evidence he believed relevant and vital to his defense. The trial court's abuse of discretion in denying Mr. Lewis's request for continuance violated his due process right to present a defense. Okla. Const. art.II, § 20; U.S. Const. amend. XIV. When the refusal of a continuance operates to deprive a defendant of a fair trial, a conviction may be reversed. *Yeargain v. State*, 1975 OK CR 84, ¶ 15, 535 P.2d 693, 696.

Although this error affected a constitutional right, it is subject to harmless error analysis. *Gore v. State*, 2005 OK CR 14, ¶ 30, 119 P.3d 1268, 1277. We cannot say the error was harmless beyond a reasonable doubt.

Accordingly, because we find merit to the issue raised in Proposition Three, the remaining propositions of error are rendered moot and need not be addressed.

DECISION

The Judgment and Sentences imposed in Oklahoma County District Court, Case No. CF 2002-5082, are hereby **REVERSED AND REMANDED FOR A NEW TRIAL** consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN W. BRAGG, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	DISSENTS
A. JOHNSON, J.:	CONCURS
D. LEWIS, J.:	SPECIALLY CONCURS

RC

LUMPKIN, VICE PRESIDING JUDGE: DISSENTS

I find the trial court did not abuse its discretion in denying Appellant's request for a continuance. The record reflects Appellant was repeatedly warned about the dangers of self-representation; however he chose to proceed *pro se*. The record also shows Appellant was informed by the trial court that in representing himself, he would be held to the same standards as a licensed attorney. Appellant failed to file a written motion for continuance and accompanying affidavit pursuant to 22 O.S. 2001, § 584 and 12 O.S. 2001, § 668. This omission in itself is fatal. *Harris v. State*, 1992 OK CR 74, ¶ 8, 841 P.2d 597, 600.

However, reviewing only for plain error, I find none. When considering the overruling of a motion for a continuance, we examine the entire record to ascertain whether or not the appellant suffered any prejudice by the denial. *Bryson v. State*, 1994 OK CR 32, ¶ 31, 876 P.2d 240, 254. In his verbal request for a continuance, Appellant failed to show the trial court who his witnesses would be,¹ if granted the continuance, when they would be available, how their proposed testimony would be relevant and material and what fact their testimony would tend to prove.

The record shows Appellant sought to admit allegations of child abuse investigations involving the victim by the Department of Human Services of Oklahoma and Tennessee. However, these allegations were properly found to be

hearsay by the trial court and excluded from evidence. Appellant's allegations of a purported FBI investigation regarding alleged previous sexual abuse of the victim was without any supporting evidence and therefore properly found inadmissible. Appellant also sought to introduce a document of termination of parental rights in Texas to show the victim of a child sexual assault committed by Appellant in Texas was older than alleged. The State objected to this evidence on the grounds that Appellant had pled guilty to that offense and that the date of the child's birth on the document was a typographical error and Appellant should introduce the birth certificate of that victim if there was a real dispute as to her age. Appellant again offered no support for his claim but merely withdrew the document. Based upon this record, the evidence Appellant sought to introduce, if he had been granted a continuance, was not relevant and would therefore have not been admissible at trial. If his alleged additional evidence would not have been admitted at a continued trial, I fail to see how granting the continuance would have changed the ultimate outcome of the trial.

Although Appellant had no constitutional right of stand-by counsel once his request to proceed *pro se* was granted, he was afforded stand-by counsel by the trial court. Even stand-by counsel did not see the alleged relevance of Appellant's sought after evidence.

Further, the schedules of the judge and counsel, the fullness of the court's docket, and travel arrangements of witnesses are proper considerations for the court in determining whether to grant or deny a motion for a continuance. Based

¹ With the exception of FBI Agent Vinidictus, who was the only purported witness Appellant

upon the record in this case, Appellant has failed to show he suffered any prejudice as a result of the trial court's denial of a continuance. Therefore, I dissent to the reversing of this case for a new trial.

named.