In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00166-CR

GREGORY CARL LOHN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 452nd District Court
McCulloch County, Texas
Trial Court No. 5966

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss
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MEMORANDUM OPINION

In McCulloch County,[1] Texas, Gregory Carl Lohn was indicted on seven counts of aggravated sexual assault and one count of sexual assault. Pursuant to a plea agreement, Lohn pled guilty to one count of aggravated sexual assault, and the State waived the remaining counts. The trial court accepted Lohn's plea of guilty and, after a hearing on punishment, sentenced him to seventy-five years' imprisonment.

On appeal, Lohn argues that the trial court erred during the punishment hearing by allowing the State to call a witness not previously disclosed and by recessing the punishment hearing to give him time to prepare for this undisclosed witness. We affirm the trial court's judgment.

On March 31, 2015, at the outset of the punishment hearing, the State called its first witness, Melodee Huggins, and Lohn objected on the basis that the State failed to provide him with a witness list pursuant to his motion for discovery and that he had no notice that the State intended to call this witness or any witness. The State claimed to have emailed its witness list to Lohn, but Lohn denied ever having received it. The State represented to the court that it had spoken to Lohn, informing him that the witness list was filed, but Lohn did not recall such a conversation. The State produced a cover letter used when filing various motions and its witness list, and the letter showed that it was copied to Lohn's counsel via email, though the State was unable to produce proof that Lohn received it. Though denying receipt of the witness list, Lohn's

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[1]Originally appealed to the Third Court of Appeals in Austin, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Third Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

trial counsel, Todd Steele, did not dispute that the letter and witness list depicted his correct email address.

The trial court then ensured that Lohn received a copy of the witness list and, on its own motion, recessed the hearing so the parties could "resolve this issue." Lohn objected:

> [Defense Attorney]: . . . and for the record, I do want to -- Judge, I want the Court to understand and I hope the State understands that I've got to protect the record. I'm going to object to a continuance at this point.
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> THE COURT: I'm not continuing the case. I'm recessing the case on my own motion, which you can object to, but I just want to make sure --
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> [Defense Attorney]: Well, I'll object to the Court recessing the case because that's, in essence, what we have asked for before. The State announced ready. They did not want to delay the case, and we have prepared tirelessly to get ready for today, and we're ready.
>
> THE COURT: Okay. All right. Well, I think just for the record the way I remember things occurring is that your continuance was denied, but then subsequent to that there was the plea and the negotiations, so I understand what your objection is. You're objecting to the Court recessing the hearing. So I've recessed the -- the matter on my own motion, which we will discuss settings momentarily.

About three months later, on June 15, 2015, the punishment hearing resumed, the State called two witnesses, and Lohn called four witnesses. After closing arguments, the trial court sentenced Lohn to seventy-five years' imprisonment.

In one multifarious point of error, Lohn contends that the trial court erred both by allowing the State to call a witness despite the State having failed to provide him with a witness list and by recessing the punishment hearing and holding it later. We are authorized to ignore multifarious points of error. *Cuevas v. State*, 742 S.W.2d 331, 336 n.4 (Tex. Crim. App. 1987); *Foster v. State*,

101 S.W.3d 490, 499 (Tex. App.—Houston [1st Dist.] 2002, no pet.). In the interest of justice, we will address both of Lohn's arguments. We conclude that neither presents harmful error.

Failure to object and move for a continuance waives any error in allowing a witness who was not previously disclosed to testify over a claim of surprise or failure of notice. *See Barnes v. State*, 876 S.W.2d 316, 328 (Tex. Crim. App. 1994); *see also Rodriguez v. State*, 597 S.W.2d 917 (Tex. Crim. App. 1980) (failure to request postponement or seek continuance waives any error urged in appeal on basis of surprise). Here, Lohn objected to the State's witness, but failed to request a continuance—in fact, even objecting to the trial court's decision to recess the punishment hearing. Accordingly, Lohn failed to preserve for our review the issue regarding allowing the previously undisclosed witness.

We also conclude that recessing the punishment trial was not error. Granting a recess rests in the sound discretion of the trial court. *Williams v. State*, 481 S.W.2d 119, 123 (Tex. Crim. App. 1972). "A trial judge necessarily has broad discretion to deal with the many unexpected situations which arise during trial." *Johnson v. State*, 583 S.W.2d 399, 405 (Tex. Crim. App. 1979) (trial recess granted). We review for an abuse of discretion a trial court's ruling on a continuance request. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007); *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996). When a continuance is denied, an abuse of discretion has not occurred unless the movant is actually prejudiced. *Gallo*, 239 S.W.3d at 764. A simple claim that counsel had inadequate time to interview a witness does not, standing alone, establish prejudice. *Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. Crim. App. 1995). Likewise, a simple claim of harm from a recess does not establish harm. When a trial court acts within its discretion

in recessing trial and no harm from the recess is established, the trial court's action will be sustained. *Hoppes v. State*, 725 S.W.2d 532, 535 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

While Lohn claims harm from the recess, no harm has been shown. In fact, the recess was the trial court's attempt to give Lohn time to prepare for the witness by delaying the trial. It has not been demonstrated that the trial court abused its discretion in recessing the punishment trial sua sponte or that Lohn was harmed thereby.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: January 28, 2016
Date Decided: February __, 2016

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