COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MIGUEL ANGEL MORENO,	§	No. 08-21-00212-CR
Appellant,	§	Appeal from the
v.	§	County Criminal Court No. 1
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20200C07849)

MEMORANDUM OPINION

The State charged Appellant by information with driving while intoxicated. A jury found Appellant guilty, and the trial court sentenced Appellant to 180 days in the county jail, probated for 18 months. In two issues, Appellant contends the trial court erred in (1) denying a motion for continuance and allowing an expert witness to testify without proper notice as required by Article 39.14 of the Code of Criminal Procedure, and (2) refusing to instruct the jurors they must not speculate when considering the evidence presented at trial. We affirm. Because all issues are settled law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

Factual and Procedural History

Sergeant Raul Puentes-Lowry of the El Paso Police Department initiated a traffic stop after witnessing Appellant driving while texting. During the stop, Puentes-Lowry noticed that Appellant's eyes were glossy and bloodshot, which he testified was a sign of intoxication. Puentes-

Lowry questioned Appellant, who first denied he was texting or drinking alcohol, but later admitted to both. Puentes-Lowry asked Appellant to step out of his vehicle, at which time he identified the odor of alcohol on Appellant's breath. Appellant refused to perform the standard field sobriety tests, and Puentes-Lowry arrested Appellant for driving while intoxicated. Appellant initially refused to provide a breath or blood sample, but later agreed to provide a breath sample at the police station. After conducting the standard 15-minute observation of Appellant, Puentes-Lowry, a certified intoxilyzer operator, collected Appellant's breath sample. The results of the breath test showed an alcohol concentration above the 0.08 gram statutory limit.

During pretrial discovery, Appellant filed a motion requesting compliance with Article 39.14 of the Code of Criminal Procedure and a request for disclosure of expert witnesses. The State did not provide a formal witness list. However, it did file a request for subpoenas which listed Officer Puentes-Lowry and Martha Mendoza, the El Paso Police Department's Intox Supervisor. The State's original subpoena request did not provide Mendoza's address, but the State later amended the request to add her address eight days before trial.

At trial, the State called Mendoza to testify, and Appellant objected due to insufficient notice under Article 39.14 of the Code of Criminal Procedure. The trial court overruled Appellant's objection. Mendoza testified about her educational background, which included training on the intoxilyzer and the effects of alcohol on a person's mental and physical faculties. She identified the report containing Appellant's breath-test results, which was admitted over Appellant's Article 39.14 objections. She testified that breath tests produce results in units of g/210L. The results of Appellant's breath tests showed an alcohol concentration of 0.110 and 0.104 g/210 L, which Mendoza testified exceeds the 0.08 gram statutory limit after unit conversion. During cross

examination, Appellant's counsel questioned Mendoza about the history of breath-alcohol science and factors that influence alcohol absorption.

During the charge conference, Appellant requested the trial court instruct the jury they should not "indulge in guesswork or speculation." The trial court denied Appellant's request, and the jury found Appellant guilty as charged in the information.

Notice Under 39.14(b) and Appellant's Motion for Continuance

In his first issue, Appellant contends the trial court erred in denying his request for a short continuance and allowing Mendoza to testify as an expert without proper notice. Appellant's motion for continuance was made orally during trial. Because the Code of Criminal Procedure requires any motion for continuance be in writing, we conclude it is not properly preserved and do not address it. *See* TEX. CODE CRIM. PROC. ANN. art. 29.03.

Regarding the trial court's decision to allow Mendoza's testimony, Article 39.14(b) of the Code of Criminal Procedure requires the State to give notice of witnesses it intends to call upon a defendant's request. *Id*. art. 39.14(b); *Castaneda v. State*, 28 S.W.3d 216, 223 (Tex. App.—El Paso 2000, pet. ref'd). We review a trial court's decision to allow testimony from an undisclosed witness for an abuse of discretion. *Castaneda*, 28 S.W.3d at 223. When considering whether the trial court abused its discretion, we consider whether the prosecutor acted in bad faith and whether the defendant could have reasonably anticipated the witness would testify, despite the witness being omitted from the witness list. *Id.*

On December 8, 2020, Appellant filed a motion requesting compliance with Article 39.14 of the Code of Criminal Procedure. The same day, Appellant also filled a request for disclosure of expert witnesses. The State responded with a subpoena request, listing Mendoza and her job title in July of 2021. The original subpoena request did not provide Mendoza's address. However, on

November 8, 2021, only eight days before trial, the State filed an amended request, which did provide her address. Although the amended subpoena request, which included Mendoza's address was not filed within twenty days of trial as required by Article 39.14(b), the State acknowledged in response to Appellant's offer of proof that it provided Mendoza's address to Appellant in an email on August 5, 2021. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(b). Appellant acknowledges in his brief that he saw Mendoza's name on the subpoena list more than twenty days before trial.

At trial, Appellant objected to Mendoza's testimony because her address was not disclosed within the twenty-day statutory period, and she was not properly designated as an expert. The trial court overruled Appellant's objections, noting Mendoza was listed on the State's subpoena in July of 2021 as the "Intox Supervisor," which the trial court indicated should have provided Appellant with the appropriate notice. The trial court also confirmed the information about Mendoza was available to Appellant in the State's public portal.

Appellant states in his brief he cannot show bad faith; thus, we do not consider the first factor. *See Castaneda*, 28 S.W.3d at 223. Instead, we consider whether Appellant could have reasonably anticipated Mendoza would testify. *Id.* We consider:

> (1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise (i.e., the defendant was aware of what the witness would say, or the witness testified about cumulative or uncontested issues); and (3) the degree to which the trial court was able to remedy that surprise[.]

Hamann v. State, 428 S.W.3d 221, 228 (Tex. App.—Houston [1st] 2014, pet. ref'd).

The record indicates Appellant timely received the intoxilyzer maintenance records, the results of Appellant's breath-alcohol test, and Mendoza's name and job title. Also, although only eight days before trial, Appellant received her contact information.

Appellant also contends he could not have anticipated from the provided information that Mendoza would testify about the effects of consuming alcohol. The Code of Criminal Procedure, however, does not require the State to disclose the subject or nature of an expert's testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(b); *see also Tamez v. State*, 205 S.W.3d 32, 39 (Tex. App.—Tyler 2006, no pet.). Our review of the record shows Appellant's counsel effectively cross-examined Mendoza about the technical functions of the intoxylizer, which indicates he was able to anticipate the substance of her testimony. Based on this record, we can not say Appellant was surprised or disadvantaged by the admission of Mendoza's testimony.

We conclude the trial court did not abuse its discretion because Appellant could reasonably have anticipated that the State would call Mendoza to testify regarding the intoxylizer and the results. *See Vigil v. State*, No. 07-05-0288-CR, 2006 WL 733989, at *1–2 (Tex. App.—Amarillo Mar. 23, 2006, no pet.) (mem. op., not designated for publication) (rejecting the State's contention that a subpoena request meets the requirements of a witness list but finding no abuse of discretion in allowing the subpoenaed witnesses to testify where the defendant had access to the State's files and the list of subpoenaed witnesses). We overrule Appellant's first issue.

Jury Instruction

In his second issue, Appellant contends that the trial court erred by failing to instruct the jury they should not "indulge in guesswork or speculation" while deliberating. Appellant further contends that because appellate review prohibits speculation, a jury must be instructed to avoid speculation in order to reach a conclusion beyond a reasonable doubt. The trial court must charge the jury on the law applicable to the case, which requires the jury to be instructed on the elements of the offense charged, including statutory definitions that affect the meaning of the elements of the offense. TEX. CODE CRIM. PROC. ANN. art. 36.14; *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex.

Crim. App. 2011). We review a claim of jury charge error using a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether there was error in the charge; second, if we find error, we must determine whether the defendant suffered sufficient harm which requires reversal. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013).

Generally, neither party is entitled to an instruction that "(1) is not grounded in the Penal Code, (2) is covered by the general charge to the jury, and (3) focuses the jury's attention on a specific type of evidence that may support an element of an offense or a defense." *Walters v. State*, 247 S.W.3d 204, 212 (Tex. Crim. App. 2007); *see also Kirsch*, 357 S.W.3d at 651. "Even a judge's innocent attempt to provide clarity for the jury by including a neutral instruction can result in an impermissible comment on the weight of the evidence." *Beltran De La Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019). Further, trial courts may not instruct a jury on non-statutory presumptions or evidentiary sufficiency rules. *See Brown v. State*, 122 S.W.3d 794, 799–800 (Tex. Crim. App. 2003); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.04 (providing that the jury is the exclusive judge of facts except "where the law directs that a certain degree of weight is to be attached to a certain species of evidence.").

The record shows the trial court considered the *Walters* requirements before denying the requested instruction. *Walters*, 247 S.W.3d at 212. First, the trial court considered whether the instruction was authorized by statute, and Appellant's counsel conceded the language was not a required statutory inclusion. Then, the trial court stated the request to avoid speculation was included in the language of the charge, which instructed the jury to only consider the evidence before them. Finally, the trial court concluded on the record the requested instruction would be an impermissible comment on the weight of the evidence and denied Appellant's request. Here, we conclude the trial court did not err in denying Appellant's request that the jury be instructed not to

"indulge in guesswork or speculation." Although the requested instruction did not single out or emphasize any piece of evidence before the jury, it was "unnecessary and [would not] clarify the law for the jury." *Brown*, 122 S.W.3d at 801. Because we conclude that there was no error in omitting the requested language from the charge, there is no need to address harm. Appellant's second issue is overruled.

CONCLUSION

We overrule Appellant's issues on appeal and affirm the judgment of the trial court.

SANDEE B. MARION, Chief Justice (Ret.)

December 29, 2022

Before Rodriguez, C.J., Alley, J., and Marion, C.J. (Ret.)
Marion, C.J. (Ret.) (Sitting by Assignment)

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