Opinion issued August 10, 2021.

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00289-CR

JONATHAN WILLIAM DAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court No. 1
Tarrant County,[1] Texas
Trial Court Case No. 1498320

MEMORANDUM OPINION
ON REMAND FROM THE COURT OF CRIMINAL APPEALS

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[1] Originally appealed to the Second Court of Appeals in Fort Worth, the Texas Supreme Court transferred this case to this Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE § 73.001.

A jury found appellant Jonathan William Day guilty of the misdemeanor offense of evading arrest or detention, and the trial court assessed his punishment at 220 days in county jail. In three points of error, appellant contends (1) the evidence was insufficient to support the jury's verdict, (2) the pretrial identification process involving a punishment-phase witness was so suggestive that it tainted his in-court identification of appellant as the suspect in a 2017 unadjudicated offense, and (3) the trial court erred in overruling appellant's objection to the testimony of an expert witness not listed on the State's witness list.

On original submission, a panel of our Court sustained appellant's first point of error. We held that the evidence was insufficient to support appellant's conviction for evading arrest or detention because the State failed to prove that it had lawfully detained him. Given our disposition, we did not address appellant's second and third points of error. We reversed the trial court's judgment and rendered a judgment of acquittal. *See Day v. State*, No. 01-18-00289-CR, 2019 WL 2621740 (Tex. App.—Houston [1st Dist.] June 27, 2019) (mem. op., not designated for publication).

On the State's petition for discretionary review, the Court of Criminal Appeals reversed our judgment, concluding that a rational jury could find that the officer's attempted arrest or detention of appellant was lawful given the existence of an outstanding warrant for his arrest. *See Day v. State*, 614 S.W.3d 121, 123 (Tex. Crim. App. 2020). The Court of Criminal Appeals held that implicit in this Court's

holding that the evidence was insufficient to establish that appellant's detention was lawful was "the conclusion that the unreasonably prolonged detention [of appellant] tainted the subsequent discovery of [his] arrest warrant."[2] *Id*. at 125. The Court held that the word "lawfully," as it appears in the evading statute under which the State charged appellant, does not incorporate exclusionary rule principles but is rather an element of the charged offense. *Id*. at 129. Noting that the "validity or existence of a warrant authorizing Appellant's arrest at the time Appellant fled from [the officer's] attempt to arrest him" was undisputed, the Court concluded that the "jury was entitled to find, from the evidence before it, that at the moment of flight, the officer was attempting to lawfully detain Appellant on the existing arrest warrant." *Id*. at 127, 130.

The Court of Criminal Appeals remanded the case to this Court with instructions to address appellant's remaining points of error. *See id.* Upon consideration of appellant's second and third points of error, we affirm.[3]

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[2] The Court stated: "The [State Prosecuting Attorney] does not challenge the court of appeals' conclusion that the initial detention [of appellant] was unreasonably prolonged. We therefore proceed on the assumption that it was." *Day v. State*, 614 S.W.3d 121, 125 n.10 (Tex. Crim. App. 2020).

[3] The factual and procedural backgrounds of the case are fully discussed in the prior opinions of this Court and the Court of Criminal Appeals. We do not repeat them here.

Pretrial Identification

In his second point of error, appellant contends that the pretrial identification procedure involving a punishment-phase witness was so suggestive that it tainted the in-court identification of appellant as the suspect in a 2017 unadjudicated offense.

A. Standard of Review and Applicable Law

"[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (citing *Stovall v. Denno*, 388 U.S. 293 (1967)); *Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988); *Nunez-Marquez v. State*, 501 S.W.3d 226, 235 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). We review de novo whether a particular pretrial identification procedure amounted to a denial of due process. *Nunez-Marquez*, 501 S.W.3d at 235; *see also Gamboa v. State*, 296 S.W.3d 574, 581 (Tex. Crim. App. 2009) (applying standard in context of reviewing ruling "on how the suggestiveness of a pre-trial photo array may have influenced an in-court identification"). In making this determination, we engage in a two-step process. First, we determine whether the pretrial identification procedure was impermissibly suggestive. If we conclude that it was, we then determine whether the impermissibly suggestive nature of the pretrial identification gave rise to a "very substantial

likelihood of irreparable misidentification." *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993); *Nunez-Marquez*, 501 S.W.3d at 235; *Burkett v. State*, 127 S.W.3d 83, 86 (Tex. App.—Houston [1st Dist.] 2003, no pet.). "It is the appellant's burden to prove the in-court identification is unreliable by proving both of these elements by clear and convincing evidence." *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

We consider the totality of the circumstances to determine whether the pretrial identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Gamboa*, 296 S.W.3d at 581–82 (quoting *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998)). If the totality of the circumstances reveals a substantial likelihood of irreparable misidentification, admission of the defendant's identification amounts to a denial of due process. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972). On the other hand, if the pretrial procedure was impermissibly suggestive, but the totality of the circumstances reveals no substantial likelihood of misidentification, identification testimony is deemed reliable and thus admissible. *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999). "Reliability is the critical question." *Id. at* 196.

B. Identification Testimony

Haltom City Police Sergeant K.W. Nichols ("Sergeant Nichols") testified as a witness for the State during the punishment-phase of trial. Sergeant Nichols

testified he was working patrol in the traffic division on March 16, 2017, when he tried to stop appellant for speeding. When the prosecutor asked Sergeant Nichols if he could identify appellant in the courtroom, defense counsel objected and requested to take the witness on voir dire.

On voir dire, Sergeant Nichols testified that on March 16, 2017, he was stationary on Beech Street when he observed an approaching car speeding about 400 feet away. As the car passed him, Sergeant Nichols noticed that the driver was not wearing a seatbelt. He observed the driver for "maybe a second" as the car passed him, at which point Sergeant Nichols initiated a traffic stop. During Sergeant Nichol's pursuit, the car crashed into a tree and the driver fled the scene. Sergeant Nichols learned the driver's identity from the female passenger in the car.

When Sergeant Nichols returned to the police department, he asked a fellow detective if he could help him locate appellant, stating appellant "kind of looks like you."[4] The detective asked Sergeant Nichols if he would recognize appellant in a lineup and Sergeant Nichols responded that he would. Before the detective created a photospread, a booking photo of appellant appeared on his screen together with appellant's name and date of birth. Sergeant Nichols testified that he identified appellant from the photograph and the corresponding identifying information.

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[4] It is unclear from the record whether Sergeant Nichols thought appellant resembled the detective who was assisting him or another detective.

Defense counsel objected to Sergeant Nichols's in-court identification of appellant as inadmissible. He argued the identification was based on a suggestive pretrial procedure and there was no evidence of an intervening circumstance mitigating the suggestiveness of the out-of-court identification. The prosecutor argued that Sergeant Nichol's testimony went to the weight of the evidence rather than its admission. The trial court agreed with the State and overruled defense counsel's objection.

Sergeant Nichols identified appellant in court. He then offered testimony about his attempted traffic stop on March 16, 2017. He testified that he knew the driver of the car was not wearing a seatbelt because the windows on the driver and passenger sides were rolled down and he had a "very clear view of what [he] was seeing." After Sergeant Nichols began pursuing the car, he turned on his siren and lights. The car eventually left the road and crashed into a tree. The driver exited the car and fled the scene. After checking on the female passenger, Sergeant Nichols called other units for assistance. He testified that when the driver got out of the car and fled, he committed the offense of evading detention or arrest (the "2017 unadjudicated offense"). Sergeant Nichols testified that when he later saw the booking photograph of appellant on the detective's computer screen, he stated, "[t]hat's him."

C. Analysis

Appellant contends the trial court erred in allowing Sergeant Nichols to identify him in court because his out-of-court identification of appellant was impermissibly suggestive and gave rise to a substantial likelihood of irreparable misidentification.

1. Suggestiveness of Pretrial Identification Procedure

Sergeant Nichols testified he identified appellant from a booking photograph and the corresponding identifying information on the photo. The use of a lone photograph, with none of the traditional safeguards of a lineup or a photographic array, is inherently suspect and courts have condemned such practice uniformly. *See Stovall*, 388 U.S. at 302; *Delk*, 855 S.W.2d at 706; *Madden v. State*, 799 S.W.2d 683, 694–95 (Tex. Crim. App. 1990); *Lopez v. State*, 230 S.W.3d 875, 880 (Tex. App.—Eastland 2007, no pet.); *Loserth*, 985 S.W.2d at 543; *see also Simmons v. United State*s, 390 U.S. 377, 383 (1968) (describing general hazards of initial photo identification).

The State defends the pretrial identification procedure arguing that the detective did not tell Sergeant Nichols that the person in the booking photo was appellant, but instead Sergeant Nichols reached the conclusion on his own. While this may be true, Sergeant Nichols reached his conclusion based on a single photograph after he asked the detective to help him locate appellant. Additionally,

the photograph Sergeant Nichols viewed contained other identifying information—including appellant's name, which Sergeant Nichols had learned before from the female passenger in the car. This is precisely the type of impermissible pretrial identification procedure courts have condemned.

Having determined that Sergeant Nichols's viewing of a single photograph was an impermissibly suggestive identification procedure, we next consider whether appellant established that the procedure gave rise to a very substantial likelihood of irreparable misidentification. *Gamboa*, 296 S.W.3d at 581–82.

2. Substantial Likelihood of Irreparable Misidentification

Reliability is the "linchpin" in determining admissibility of identification testimony. *Nunez-Marquez*, 501 S.W.3d at 237 (quoting *Burkett*, 127 S.W.3d at 88). Thus, even when a pretrial identification procedure is impermissibly suggestive, identification testimony is still admissible if the indicia of reliability outweigh the suggestiveness, such that there is no substantial likelihood of irreparable misidentification. *Id.*

In conducting this analysis, we weigh the following five nonexclusive factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972) against the corrupting effect of the impermissibly suggestive pretrial identification procedure to determine whether the in-court identification is admissible: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the

accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the time of the confrontation; and (5) the lapse of time between the alleged act and the time of the confrontation. *See also Ibarra*, 11 S.W.3d at 195. Because all of these factors are issues of historical fact, we weigh them deferentially in a light favorable to the trial court's ruling. *See id.* We then weigh the factors, viewed in this light, de novo "against the 'corrupting effect' of the suggestive identification itself." *Santos*, 116 S.W.3d at 454 (internal quotations omitted).

a. Opportunity to View Perpetrator at Time of Offense

Sergeant Nichols testified he was stationary when the car passed him and that the windows on the driver and passenger sides were rolled down. He testified he had a "very clear view of what [he] was seeing." But Sergeant Nichols also testified that his view of the driver lasted for "maybe a second." Thus, while the fact that Sergeant Nichols had a "very clear view" weighs against appellant, the fact that he was only able to see the driver for "maybe a second" weighs in appellant's favor. *See Nunez-Marquez*, 501 S.W.3d at 237 (concluding that robbery victim had "great opportunity" to see robber where robber stood about six or seven steps from victim throughout encounter that lasted thirty-five to forty minutes); *Burkett*, 127 S.W.3d at 88 (concluding complainant had "adequate opportunity" to view perpetrator at time of offense where record showed complainant had clear view of perpetrator in

car parked "right next" to her car, "the lighting [at 11:40 a.m.] was good," and complainant testified that she "got a good look at [appellant]" for about 15 to 20 seconds).

b. Degree of Attention

Sergeant Nichols did not offer testimony on the degree of attention he paid to appellant during commission of the 2017 unadjudicated offense. Given his experience as a trained police officer, however, he could be expected to pay close attention to detail. This factor weighs against appellant. *See Lopez*, 230 S.W.3d at 881 (concluding that sergeant was trained undercover officer who could be expected to pay scrupulous attention to detail); *see also Ibarra*, 11 S.W.3d at 196 ("Viewing these deferentially, Wells' experience as a trained police officer and his concern for his wife could have heightened his ability to take in detail despite the fact that their infant son was screaming in the car.").

c. Accuracy of Description

There is nothing in the record establishing that Sergeant Nichols provided a prior description of appellant. Although Sergeant Nichols testified that he told a detective that appellant "kind of looks like you," the record does not reflect the detective to whom Sergeant Nichols was referring. Without more, we cannot determine the accuracy of his statement. This factor weighs in favor of appellant. *See Cantu v. State*, 738 S.W.2d 249, 253–54 (Tex. Crim. App. 1987) (noting that

witness's prior "very general" description of perpetrator, while technically accurate, weighed in favor of defendant); *Nunez-Marquez,* 501 S.W.3d at 238 (concluding that although defendant fit within robbery victims' general description of perpetrator provided to police, description lacked specificity and therefore factor weighed in favor of defendant).

d. Level of Certainty

Sergeant Nichols testified that when he saw the photo of appellant on the detective's computer screen, he stated, "that's him." This positive and immediate identification weighs against appellant. *See Burkett,* 127 S.W.3d at 89 (concluding fact that witness identified defendant as perpetrator "immediately and without hesitation" weighs against finding irreparable misidentification).

e. Time Between Crime and Confrontation

Sergeant Nichols saw the photograph of appellant on March 16, 2017—the same day the unadjudicated offense occurred. Eleven months later, on February 27, 2018, Sergeant Nichols confronted and identified appellant in court. Courts have found even longer periods of time have no recognizable effect on a witness's identification when the witness provides a detailed description at the time of trial, and the witness's out-of-court identification and subsequent identification and confrontation at trial are consistent. *See, e.g., Barley*, 906 S.W.2d at 35 (concluding lapse of twelve months between crime and witnesses' confrontation with defendant

had no recognizable effect on witnesses' recollection or identification as evidenced by their fairly detailed descriptions at time of trial); *Delk*, 855 S.W.2d at 707 (finding passage of eighteen months between crime and witness's confrontation with defendant at trial did not detract from identification given details witness managed to recall and consistency in her testimony); *Brown v. State*, 64 S.W.3d 94, 101 (Tex. App.—Austin 2001, no pet.) (concluding period of eight months had no detrimental effect on accuracy or consistency of witness's identification of defendant where witness's recollections were consistent).

Sergeant Nichols did not provide a detailed description of appellant either at trial or in March 2017. Without a description, we cannot determine whether the eleven-month lapse between Sergeant Nichol's initial viewing of appellant's photo and his subsequent confrontation with appellant had any discernible effect on his recollection or identification of appellant at trial.

Only two of the five *Biggers* factors—the degree of attention that Sergeant Nichols paid to appellant, based on his experience as a trained police officer, and his immediate identification of appellant upon seeing his photo in March 2017—were sufficiently met. *See Biggers*, 409 U.S. at 199. Viewed in the light most favorable to the trial court's ruling, we cannot conclude from the totality of the circumstances that the indicia of reliability outweighed the corrupting effect of the challenged

pretrial identification procedure. The trial court thus erred in overruling appellant's motion to suppress Sergeant Nichols's in-court identification.

3. Harm[5]

In assessing the harm arising out of a violation of constitutional rights, we must reverse a judgment of conviction unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. TEX. R. APP. P. 44.2(a); *Chapman v. California*, 386 U.S. 18, 24 (1967); *see Rubio v. State*, 241 S.W.3d 1, 3 (Tex. Crim. App. 2007). If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error was not harmless beyond a reasonable doubt. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000) (citing *Satterwhite v. Texas*, 486 U.S. 249 (1988)). The harm analysis applies equally to the assessment of punishment. *Ex parte Russell*, 738 S.W.2d 644, 646 (Tex. Crim. App. 1986) (citing *Jordan v. State*, 576 S.W.2d 825, 830 (Tex. Crim. App. 1978)). We must be able to conclude from the record that the erroneously admitted evidence was, in fact, harmless as to punishment beyond a reasonable doubt. *Id.* at 646. In doing so, we look to the facts and circumstances of each case. *Ex parte Flores*, 537 S.W.2d 458, 460 (Tex. Crim. App. 1976).

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[5] Appellant's brief does not include a discussion of harm.

Besides Sergeant Nichols's testimony during the punishment-phase of the trial, the jury heard evidence of appellant's numerous prior convictions, which included second-degree felony theft of a vehicle in 2014, state jail felony theft of a vehicle in 2013, theft of property in 2013, third-degree felony possession of a controlled substance in 2009, driving while intoxicated and felony repetition in 2006, aggravated assault on a peace officer in 1994, driving while intoxicated in 1994, fleeing the scene of an accident in 1994, and assault–bodily injury in 1993.

Although the prosecutor referred to the 2017 unadjudicated offense at the end of his closing argument, stating that the offense occurred two months prior to the charged offense involved at trial, he spent far less time on the 2017 unadjudicated offense than he did on appellant's multiple prior convictions, repeatedly referring to appellant's "long list of priors" and "nonstop litany of offenses" in an attempt to persuade the jury to sentence appellant to the maximum punishment. *See, e.g.*, *Ex parte Russell*, 738 S.W.2d at 646 (concluding reasonable probability existed that admission of evidence related to void prior robbery conviction might have affected verdict in light of prominence given by prosecutor to prior offense in jury argument in effort to seek higher punishment); *Plante v. State*, 692 S.W.2d 487, 495 (Tex. Crim. App. 1985) (concluding that defendant was not harmed by introduction of inadmissible extraneous transactions where high number of admissible transactions negated possibility of harm and defendant received ten-year sentence when

maximum sentence available was twenty years' confinement). Ultimately, the jury assessed appellant's punishment at 220 days' confinement in the Tarrant County Jail—less than the maximum sentence of one year for the charged misdemeanor offense of evading arrest or detention.[6]

After carefully reviewing the record, we conclude the erroneous admission of Sergeant Nichol's identification testimony was harmless as to punishment beyond a reasonable doubt. We overrule appellant's second issue.

Evidentiary Objection

In his third point of error, appellant contends the trial court erred in overruling his objection to the testimony of an expert witness who was not listed on the State's witness list.

A. Standard of Review and Applicable Law

Generally, notice of the State's witnesses must be given upon request by the defense. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993), *cert. denied*, 512 U.S. 1246 (1994). If the trial court allows a witness who was not listed on the State's list to testify, we review that decision for an abuse of discretion. *See id.* at 40; *Hardin v. State*, 20 S.W.3d 84, 88 (Tex. App.—Texarkana 2000, pet. ref'd). Among the factors we review to determine whether a trial court abused its discretion

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[6] An individual adjudged guilty of a Class A misdemeanor shall be punished by: (1) a fine not to exceed $4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement. *See* TEX. PENAL CODE § 12.21.

are whether (1) the State's actions in calling a previously undisclosed witness constituted bad faith, and (2) the defendant could have reasonably anticipated that the witness would testify. *Wood v. State*, 18 S.W.3d 642, 649 (Tex. Crim. App. 2000) (citing *Martinez*, 867 S.W.2d at 39).

In determining whether the State acted in bad faith, the main area of inquiry is whether the defense shows that the State intended to deceive the defendant by failing to provide the defense with a witness's name. *See Nobles v. State*, 843 S.W.2d 503, 515 (Tex. Crim. App. 1992). In examining whether the defense could have reasonably anticipated the State to call the witness, reviewing courts generally examine (1) the degree of surprise to the defendant, (2) the degree of disadvantage inherent in that surprise, such as whether 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, such as by granting the defense a recess, postponement, or continuance, or by ordering the State to provide the witness's criminal history. *See Martinez*, 867 S.W.2d at 39; *Nobles*, 843 S.W.2d at 514–15.

B. Analysis

On February 20, 2018, appellant filed his motion requesting the State to list its witnesses for both phases of a criminal trial. On February 26, 2018, the State filed its witness list and its disclosure of State's experts. The witness list named

"Joel Garcia, TCSO," and the disclosure of State's experts named "Joel Garcia, TCSO, Fingerprint Expert."

At trial, the State called Corporal Paul Rojas ("Corporal Rojas") to testify as its fingerprint expert after informing the trial court that its original expert, Joel Garcia ("Officer Garcia"), was sick. Appellant objected that Corporal Rojas was not listed on any of the State's lists. The prosecutor explained that he had provided notice as soon as was practical and that the State was willing to wait until the next day when Officer Garcia would be available. The judge asked defense counsel whether he wanted to proceed with Corporal Rojas or wait for Officer Garcia, stating that he did not find that appellant was surprised by a fingerprint expert. The trial court then recessed the trial so that both parties could speak with Corporal Rojas.

Following the recess, Corporal Rojas testified that he had compared appellant's fingerprints to those on file at the Tarrant County Jail and that appellant was the same person who had committed several other offenses in the past, including misdemeanor assault, felony assault, driving while intoxicated, possession of a controlled substance, and several separate thefts of a vehicle. Appellant did not request a continuance based on Corporal Rojas's testimony.

There is no evidence in the record that the State acted in bad faith. The State informed appellant that it intended to call another fingerprint expert as soon as it knew that its original witness could not testify due to illness. Once the State knew

it would call Corporal Rojas as its fingerprint expert, the State emailed appellant and notified the trial court. *See Branum v. State*, 535 S.W.3d 217, 226 (Tex. App.—Fort Worth 2017, no pet.) (finding there was no showing that State acted in bad faith when it immediately notified defendant of its replacement expert witness).

The record also shows appellant could have reasonably anticipated the State to call a fingerprint expert. Although the State did not provide appellant with Corporal Rojas's name, it notified appellant on the day voir dire began that it planned to call a fingerprint expert. *See Hamann v. State*, 428 S.W.3d 221, 228 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (concluding that although designated fingerprint expert was surprise to defendant, degree of disadvantage was minimal because appellant knew State would call fingerprint expert to testify and intended to introduce evidence of his previous convictions); *Gowin v. State*, 760 S.W.2d 672, 674 (Tex. App.—Tyler 1988, no pet.) (holding that, when State failed to identify fingerprint expert by name until morning of trial, trial court did not abuse its discretion in allowing expert's testimony because defendant knew that State intended to prove prior DWI convictions and should have reasonably anticipated that State would call expert fingerprint witness to do so). The State provided this notice to appellant even though appellant moved to list the State's witnesses and for discovery of punishment evidence on February 20, 2018, less than thirty days before voir dire began, and thus untimely. *See* TEX. CODE CRIM. PROC. 39.14(b). The trial

court also allowed appellant to question Corporal Rojas before he testified, effectively remedying any surprise arising from the expert's identity or the nature of his testimony. *See Hamann*, 428 S.W.3d at 228 (citing *Stoker v. State*, 788 S.W.2d 1, 14–16 (Tex. Crim. App. 1989) (concluding that trial court did not err in allowing unnamed witness to testify as to identity of illicit substance in part because trial court granted brief continuance during trial for defense counsel to interview witness), *disapproved of on other grounds by Leday v. State*, 983 S.W.2d 713 (Tex. Crim. App. 1998)).

We conclude the trial court did not abuse its discretion in allowing Corporal Rojas to testify. *See Martinez*, 867 S.W.2d at 39; *Nobles*, 843 S.W.2d at 515. We overrule appellant's third issue.

Conclusion

We affirm the trial court's judgment.

Veronica Rivas-Molloy
Justice

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

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