

Affirmed and Memorandum Opinion filed August 22, 2017.



In The
Fourteenth Court of Appeals

NO. 14-15-00774-CR

TITO JUAREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1415564**

M E M O R A N D U M O P I N I O N

A jury found appellant Tito Juarez guilty of murder and sentenced him to thirty years in prison. Tex. Penal Code Ann. § 19.02(b) (West 2011). Appellant contends on appeal that the trial court abused its discretion when it refused to issue a writ of attachment for a witness and thereby denied him the ability to present a defense. Because the missing witness's testimony would have been cumulative of testimony offered by other witnesses during the trial, we conclude appellant has not

demonstrated that the trial court abused its discretion when it refused to issue the requested writ of attachment. We therefore affirm the trial court's judgment.

BACKGROUND

The complainant, Alexandra Rodriguez, and several of her friends attended a concert at the Big Texas Dance Hall and Saloon on the evening of January 24, 2014. Jenni Palomo, a member of the complainant's group and the group's driver, left the club early. She got in her car and fell asleep. When Jenni awoke about 2:15 a.m., she noticed a black Ford pick-up parked next to her car with its engine running and a load of wooden pallets in the back. Jenni then saw the rest of her group walking out of the club and toward her car. The black pick-up drove off before the group had reached Jenni's car. Some members of the group got into Jenni's car while two others, Mikey Kowis and Robert Guerra, walked away. Two members of the group, Jessica Binnion and the complainant, got back out of the car and the black pick-up approached them. Frightened by the pick-up, Jessica moved toward Mikey and Robert. The black pick-up parked next to Jenni's car again.

According to Mikey, he and Robert approached the pick-up's passenger side and a confrontation ensued. The pick-up sped forward away from the group. Thinking the confrontation was over, Mikey and Robert turned away from the pick-up and began walking back toward the group's car. Instead of driving away, however, the pick-up turned around and accelerated toward the group. The pick-up hit four people: Mikey, Robert, Jessica, and the complainant. The complainant was thrown under the pick-up, which then drove over her body. The pick-up sped away. The complainant was pronounced dead at the scene.

In addition to the complainant's group, several other people witnessed the incident. As he and his group walked out of the Big Texas club, Marcus Banks heard a verbal argument between two groups of people. One group was in a black pick-

up and the other group was standing outside. Banks heard an engine revving. He then saw the pick-up peel out and hit four people, with one girl going directly under the truck. The truck sped off to the right. According to Banks, the pick-up could have driven in a direction that avoided hitting anyone. Banks further testified that the pick-up driver made no attempt to go around the people.

Rebecca Budnik was walking with Marcus Banks. Budnik saw a girl go underneath the pick-up. According to Budnik, the pick-up accelerated toward the group of people before hitting them. Budnik then saw the truck stop at the end of the driveway, hesitate for a few seconds, and continue out of the parking lot.

Megan Phillips was in Banks's group. She heard tires squealing, saw a truck plow into a group of people, and then saw the truck speed off down the parking lot. Phillips saw both of the pick-up's driver's-side tires run over a girl. According to Phillips, the pick-up did not slow down. At the end of the parking lot, she saw the truck pull into a parking spot for a few seconds, reverse, and then drive out of the parking lot.

Brianna Leabo testified that appellant and Shawn Bingham arrived at her house about 9:30 p.m. on January 24. Appellant and Bingham left about 12:30 to go to Big Texas. Bingham woke her up at 2:24 a.m. tapping on her window. Leabo went outside, where she found Bingham nervous and "kind of freaking out." Leabo saw appellant unloading pallets from the back of his pick-up truck. According to Leabo, appellant was intoxicated and demonstrating no remorse. Appellant then got into his truck, where he fell asleep. When appellant woke up about an hour later, he and Bingham left.

All of the above witnesses gave recorded statements to detectives investigating the complainant's murder. Appellant had access to the witness interviews during his trial. With the exception of Banks, all testified during trial and

were subject to cross-examination by appellant. Banks, who is in the armed forces, was deposed prior to trial and was cross-examined by appellant during that deposition. Several detectives worked on the murder investigation, including Sergeants Matthew Ferguson, Abraham Alaniz, and Veronica Riojas of the Harris County Sheriff's Office. The investigators interviewed different witnesses during the investigation. Alaniz interviewed the three injured people—Mikey, Robert, and Jessica—at the hospital. Riojas interviewed three witnesses: Leabo, Banks, and Budnik. Alaniz was also present during Riojas's interview with Leabo. Of the three investigators, only Alaniz testified during trial. Riojas, who was subpoenaed, was unavailable to testify due to a family emergency. There is no indication in the record that either side attempted to call Ferguson to testify.

During trial, appellant sought to impeach the eyewitnesses by (1) asking the investigators to refresh their memories regarding the witness statements they had taken during the investigation; and (2) then asking the investigators if the eyewitnesses' trial testimony differed from their statements. The trial court prohibited appellant from questioning the investigators in that manner. Appellant then asked to make a bill of exception where he would be allowed to question Riojas as described above. Because Riojas had not appeared in response to the subpoena, appellant asked the trial court to issue a writ of attachment so that he could question her on the record as part of his bill of exception. The trial court, after observing that appellant had had the opportunity to cross-examine each eyewitness regarding the inconsistencies, if any, between their statements and their trial testimony, denied appellant's request.

At the conclusion of the evidence, the jury found appellant guilty of murder. This appeal followed.

ANALYSIS

Appellant argues in his single issue on appeal that the trial court abused its discretion when it refused to issue a writ of attachment for Sergeant Riojas. When a witness who has been properly subpoenaed fails to appear at trial, the State or the defendant “shall be entitled to have an attachment issued forthwith for such witness.” Tex. Code Crim. Proc. Ann. art. 24.12 (West 2009). The Texas Court of Criminal Appeals has established a three-step procedure for determining whether an appellant has preserved error when a subpoenaed witness fails to appear. *Sturgeon v. State*, 106 S.W.3d 81, 85 (Tex. Crim. App. 2003) (citing *Erwin v. State*, 729 S.W.2d 709, 714 (Tex. Crim. App. 1987), *overruled on other grounds*, *Burks v. State*, 876 S.W.2d 877 (Tex. Crim. App. 1994)). These steps are: (1) ask the trial court for a writ of attachment; (2) if the writ is denied, show the trial court what the witness’s testimony would have been if the witness had testified; and (3) demonstrate that the witness’s testimony would have been relevant and material. *Id.* If the party requesting the writ of attachment meets all three preservation requirements, then “reversible error will result unless the error made no contribution to the conviction or to the punishment.” *Id.* The court explained that “exclusion or denial of irrelevant or cumulative testimony does not amount to reversible error” *Id.* at 88. We review a trial court’s decision to deny a writ of attachment for an abuse of discretion. *Lowrey v. State*, 469 S.W.3d 318, 323 (Tex. App.—Texarkana 2015, pet. ref’d).

Assuming without deciding that appellant’s proposed method of impeaching the eyewitnesses is permitted by the Rules of Evidence, the trial court’s refusal to issue a writ of attachment for Sergeant Riojas does not constitute reversible error. We reach this conclusion because appellant had the opportunity during trial to cross-examine the eyewitnesses regarding their recorded statements and point out

any inconsistencies between the statements and their trial testimony. Any questions directed at Riojas or the other investigators regarding inconsistencies between the eyewitnesses' statements and their trial testimony would therefore have been cumulative. *See Clark v. State*, 305 S.W.3d 351, 356 (Tex. App.—Houston [14th Dist.] 2010), *aff'd* 365 S.W.3d 333 (Tex. Crim. App. 2012). Because a defendant is not entitled to a writ of attachment for a witness whose testimony would be cumulative, we conclude that the trial court did not abuse its discretion when it refused to issue a writ of attachment for Sergeant Riojas. *Sturgeon*, 106 S.W.3d at 88; *Lowrey*, 469 S.W.3d at 325; *Clark*, 305 S.W.3d at 356. We overrule appellant's issue on appeal.

CONCLUSION

Having overruled appellant's single issue on appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby
 Justice

Panel consists of Justices Christopher, Busby, and Jewell.
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