Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00596-CR

Isidro Espinosa **SOLIS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR2691
Honorable Mary Román, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 8, 2017

AFFIRMED

The sole issue presented in this appeal is whether the trial court abused its discretion in granting the State's motion to quash appellant's subpoena for a witness. We overrule the issue and affirm the trial court's judgment.

BACKGROUND

Appellant Isidro Espinosa Solis was charged with failure to stop and render aid resulting in death. At trial, Solis admitted that he hit the nine-year-old deceased complainant with his truck and fled the scene.

Solis subpoenaed a city councilman with the City of San Antonio, Texas to testify at trial. The State filed a motion to quash the subpoena asserting the councilman was not a material witness or a fact witness to the case; therefore, his testimony was not relevant.

During trial, after the State presented its witnesses and rested, the trial court held a hearing on the State's motion to quash. Noting the State's argument was that the councilman's testimony was not relevant, Solis's attorney explained one of Solis's defenses related to the lighting at the scene, particularly with regard to whether he could have seen the girl after the accident.[1] Solis's attorney informed the trial court that the councilman he subpoenaed had investigated the lighting in the area after the accident and obtained over $90,000 from the City to install new lighting and increase safety in the area. Solis's attorney also asserted the jurors stated during voir dire that the circumstances surrounding the accident would be important to them when they considered punishment. Therefore, Solis's attorney argued the councilman's testimony would be relevant at least during punishment. The State continued to argue the testimony was not relevant and that the jury had testimony from fact witnesses at the scene regarding the lighting. After hearing the argument, the trial court granted the State's motion to quash. Solis challenges that ruling on appeal.

PRESERVATION OF ERROR

The State contends Solis did not preserve his complaint for our review because he did not make a formal bill of exceptions or offer of proof.

In order to preserve a complaint regarding the trial court's exclusion of evidence for appellate review, the party must inform the trial court of the substance of the evidence "by an offer

[1] At trial, Solis testified he knew he hit something and thought he must have hit a deer. Solis further testified he stopped after the accident, but the area was too dark to see what he hit from inside his truck. Solis explained he did not exit his truck after the accident because he saw other cars approaching behind him on the road.

of proof, unless the substance was apparent from the context." TEX. R. EVID. 103(a)(2); *see also* TEX. R. APP. P. 33.1 (providing error preserved if record shows complaint was made "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context"). "The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful." *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009) (internal quotation omitted). Where defense counsel explains the substance of the testimony to the trial court, error is preserved even absent a formal offer of proof. *See Gonzalez v. State*, 764 S.W.2d 796, 798 (Tex. Crim. App. 1989) (holding attorney's concise statement as to the witness's expected testimony was sufficient to preserve error); *Jones v. State*, No. 01-15-00717-CR, 2017 WL 3261352, at *4 (Tex. App.—Houston [1st Dist.] Aug. 1, 2017, no pet.) ("An offer of proof may consist of a concise statement by counsel that includes a reasonably specific summary of the evidence and the relevance of the evidence …."); *Roderick v. State*, 494 S.W.3d 868, 880 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (holding error preserved where defense counsel explained substance of testimony to trial court in response to State's objection).

In the instant case, the record establishes that Solis's counsel concisely explained to the trial court both the substance of the councilman's testimony and the reasons he believed the testimony was relevant. Accordingly, we hold Solis's complaint is preserved for our review.

RIGHT OF COMPULSORY PROCESS AND STANDARD OF REVIEW

"The Sixth Amendment right to compulsory process 'is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" *Coleman v. State*, 966 S.W.2d 525, 527 (Tex. Crim. App. 1998) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). The Sixth Amendment does not, however, guarantee a defendant the right to secure the attendance and testimony of any

and all witnesses. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Coleman*, 966 S.W.2d at 527. Instead, it guarantees a defendant compulsory process for obtaining witnesses whose testimony would be both material and favorable to the defense. *Valenzuela-Bernal*, 458 U.S. at 867; *Coleman*, 966 S.W.2d at 527-28; *Torres v. State*, 424 S.W.3d 245, 262 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). To be entitled to compulsory process, the defendant bears the burden to make a "plausible showing of how [the witness's] testimony would have been both material and favorable to his defense, … in ways not merely cumulative to the testimony of available witnesses." *Valenzuela-Bernal*, 458 U.S. at 867, 873; *see also Coleman*, 966 S.W.2d at 528 (noting burden of showing materiality and favorableness is placed on the defendant); *Torres*, 424 S.W.3d at 262 (noting defendant carries the burden to show testimony would be material and favorable); *Wyatt v. State*, No. 03-10-00012-CR, 2012 WL 512654, at *5 (Tex. App.—Austin Feb. 16, 2012, no pet.) (not designated for publication) ("In this context, 'material' means relevant and important and not merely cumulative.") (internal quotation omitted); *cf. Lowery v. State*, 469 S.W.3d 318, 325 (Tex. App.—Texarkana 2015, pet. ref'd) (holding testimony that is cumulative is not materially relevant to defense for purposes of determining whether an attachment should issue for a witness who was subpoenaed by the defendant but failed to appear at trial); *Smith v. State*, 789 S.W.2d 350, 357-58 (Tex. App.—Amarillo 1990, pet. ref'd) (concluding testimony that is cumulative is not material in analyzing the right to compulsory process in the context of a motion for new trial). We review a trial court's ruling on a motion to quash, including its determination of whether the defendant met his burden of showing the testimony he sought to compel was material and favorable, under an abuse of discretion standard. *See Drew v. State*, 743 S.W.2d 207, 225 n. 11 (Tex. Crim. App. 1987); *Torres*, 424 S.W.3d at 261.

A. Solis's Burden

In his brief, Solis contends the standard for establishing an abuse of discretion in the quashing of a subpoena is different at the punishment phase of trial than at the guilt-innocence phase of trial. In support of this argument, Solis cites article 37.07, § 3(a)(1) of the Texas Code of Criminal Procedure which provides that during the punishment phase of trial, evidence may be offered as to any matter the trial court deems relevant to sentencing including the circumstances of the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2016).

In order to establish a right to compulsory process, the law clearly imposes a burden on the defendant to show the testimony he seeks to compel is material and favorable. *Valenzuela-Bernal*, 458 U.S. at 867; *Coleman*, 966 S.W.2d at 527-28; *Torres*, 424 S.W.3d at 262. Solis does not cite any authority to support his contention that a different burden is imposed during the punishment phase of trial, and we have found none. In deciding whether to grant the State's motion to quash, the issue before the trial court was whether Solis was entitled to compulsory process, not whether the evidence would have been admissible at the punishment phase of trial. Accordingly, we reject Solis's contention that he was not required to show the councilman's testimony was material and favorable in order to be entitled to compulsory process at the punishment phase of trial.

B. Was the Councilman's Testimony Material and Favorable?

Solis's attorney stated the councilman would testify regarding his investigation of the lighting in the area where the accident occurred and his request of over $90,000 in funding to upgrade the lighting and safety of the area. Solis sought to introduce the councilman's testimony to support his own testimony that the lighting prevented him from seeing what he hit when he stopped after the accident.

Before the hearing on the State's motion, several of the State's witnesses already testified regarding the lighting at the scene. Arnie Lepisto, one of the first witnesses at the scene, described the lighting at the scene as follows:

> The sun was just starting to come up, so it wasn't totally dark. The street light was still on. Like I said, you could see well enough in traffic and everything going down. You could see all the way down to the traffic light. So it wasn't totally dark. Like I said, the sun was coming up at that time
> .

When informed the sun rose at 7:29 a.m., Lepisto estimated the accident happened approximately forty minutes before the sun rose. With regard to changes made after the accident, Lepisto testified as follows:

> Q. I want to talk about the lighting in the area. Those are new lights that were there? There are new lights up there now, right?
> A. For the school zone?
> Q. Yeah. Well, before the school zone and in the school zone there are new lights there, right, that city council put in.
> A. I don't know about the new lights. There's always been street lights there.
> Q. So you haven't noticed how much better the lighting has gotten since the council spent $90,000 to upgrade the area?
> [Prosecutor]: Objection, counsel testifying.
> THE COURT: Rephrase your question.
> Q. (By [defense counsel]) Have you noticed upgrades to the area?
> A. The only upgrade that's for sure noticeable is the school where they put the flashing lights. And then they redid the crosswalk over there by the intersection.[2]
> Q. And that's the crosswalk that's at the end of the street?
> A. Right, they made it a little bit brighter.
> Q. It's been made wider, brighter, lights. There's another sign, lights on the sign, right?
> A. Yeah, there's one on Braesview and then as you go across Larkspur, there's another one.
> Q. And they added those things after the accident?
> A. Yes.

Photographs from a convenience store in the area where Solis stopped before the accident at approximately 6:59 a.m. also were introduced into evidence which showed how dark it was

[2] The evidence established the victim crossed the street several yards away from the intersection and crosswalk.

outside. A crime scene investigator testified the sun was just starting to come up when he arrived at the scene at 7:28 a.m. Megan Pate, who was walking her dogs and saw Solis's truck go down the street and back dragging its bumper, testified it was still dark outside. Finally, Detective Timothy O'Connell testified a video from the convenience store showed Solis arriving and leaving; however, the video had little value. Detective O'Connell explained the video only showed the outline of a vehicle and headlights because of how dark it was outside. In response to whether the sun was coming up at the time the video was taken, Detective O'Connell stated, "No, it was dark." Finally, Detective O'Connell testified as follows:

> Q. Okay. You also do note in your report that the lighting was very poor on Braesview, correct?
> A. Right. It is a lighted street, there are street lights, but it's dim, in my opinion.
> Q. Are you aware that those lights have been replaced since the accident?
> A. I believe I remember seeing that, yes.
> Q. 90,000 in repairs were made after this accident?
> [Prosecutor]: Objection, relevance.
> THE COURT: Sustained.

As previously noted, Solis had the burden to make a "plausible showing of how [the councilman's] testimony would have been both material and favorable to his defense, … in ways not merely cumulative to the testimony of available witnesses." *Valenzuela-Bernal*, 458 U.S. at 867, 873; *see also Lowery*, 469 S.W.3d at 325; *Wyatt*, 2012 WL 512654, at *5; *Smith*, 789 S.W.2d at 357-58. Based on the testimony of the State's witnesses regarding the lighting at the scene and the upgrades to the area after the accident, we cannot conclude the trial court abused its discretion in determining Solis failed to meet his burden to show the councilman's testimony would be material and favorable and not merely cumulative based on his attorney's summary of the testimony he sought to elicit from the councilman. Accordingly, we overrule Solis's issue.

CONCLUSION

The trial court's judgment is affirmed.

Karen Angelini, Justice

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