NUMBER 13-15-00526-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ROGER DALE BEENE JR., Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 25th District Court of Gonzales County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Perkes
Memorandum Opinion by Justice Rodriguez

A jury convicted appellant Roger Dale Beene Jr. of three counts of theft. By one issue on appeal, Beene contends that the trial court erred by admitting the testimony of a witness who was not disclosed by the State until the morning of the punishment hearing. We affirm.

I. BACKGROUND

It is undisputed that in October 2013, Deputy Scott Rhodes of the Gonzales County Sheriff's Department was dispatched to a local work site to investigate a reported theft. Three pieces of rented equipment had been taken from the site: a flatbed trailer and the two pressure washers it carried. On January 26, 2014, Beene contacted Pedro Garcia Jr., who was employed with the company that operated the work site. Beene offered to sell Garcia a pressure washer and a flatbed trailer, which Garcia was certain were the same ones which had been taken in October. Garcia photographed the equipment and the gray truck Beene used to haul them, and he forwarded the images to the sheriff's department.

On January 31, 2014, Rhodes observed a gray truck hauling a flatbed trailer and a power washer at an intersection in Belmont, Texas. Rhodes stopped the vehicle and confirmed that Beene, the driver, was the same man who had attempted to sell equipment to Garcia. Rhodes observed that the power washer had a "poor," newly applied paint job and that the serial number had been ground off. Rhodes arrested Beene for theft, and the following day, the second power washer was recovered from an acquaintance of Beene.

Beene was indicted on three counts of theft. *See* TEX. PENAL CODE ANN. § 31.03 (West, Westlaw through 2015 R.S.). He filed a pre-trial discovery motion seeking the State's witness list, which the State generally obliged. The State also notified Beene that it intended to prove four prior convictions for the purposes of any punishment proceedings. At trial, the jury convicted Beene of all three counts of theft. The jury found that Beene took the three items pursuant to one scheme or continuing course of

conduct, and that their total value was between $20,000 and $100,000. *See* TEX. PENAL CODE ANN. §§ 31.03, .09 (West, Westlaw through 2015 R.S.). The base value for this offense was a felony of the third degree under the then-governing statute. *See* Act of June 17, 2011, 82nd Leg., R.S., ch. 1234, 2011 Tex. Sess. Law Serv. Ch. 1234 (S.B. 694) (Vernon's) (current version at TEX. PENAL CODE ANN. § 31.03). Beene's offense was later enhanced to a second-degree felony based on his plea of "true" to a prior felony conviction for burglary. *See* TEX. PENAL CODE ANN. § 12.42 (West, Westlaw through 2015 R.S.).

On October 19, 2015, Beene elected to have punishment tried to a jury. Punishment proceedings were set for October 23. On the morning of the punishment hearing, the State disclosed for the first time that it intended to call Captain Gayle Autry of the Gonzales County Police Department, as well as four character witnesses. Autry was to testify as to Beene's prior conviction on narcotics charges in federal court. Beene objected to the offer of Autry and the character witnesses, arguing that the State's untimely disclosure required their exclusion. The State responded that it was unable to anticipate the need for these witnesses, given that Beene had elected to try punishment to the jury only five days prior. The State asserted that it had previously planned to rely on a pre-sentence investigation report (PSI), anticipating that the case would be tried to the bench. The trial court excluded the four character witnesses and prevented Autry from testifying as to any details of the narcotics investigation. However, the trial court allowed Autry to testify as to the bare facts of the federal conviction. The trial court also admitted a certified copy of Beene's prior conviction for burglary in Texas state court, for which he had been assessed twelve years' confinement.

Beene pleaded true to a felony enhancement based on the burglary conviction. After hearing the evidence related to Beene's prior convictions, the jury sentenced him to eighteen years' confinement out of a maximum sentence of twenty years, and also assessed a $10,000 fine. This appeal followed.

II. ADMISSIBILITY OF UNDISCLOSED WITNESS

Upon request, the State must give notice of whom it intends to call as a witness. *Depena v. State*, 148 S.W.3d 461, 465 (Tex. App.—Corpus Christi 2004, no pet.); *see* TEX. CODE CRIM. PROC. ANN. art. 39.14(b) (West, Westlaw through 2015 R.S.). If the trial court allows an undisclosed witness to testify, we review the decision for an abuse of discretion. *Castaneda v. State*, 28 S.W.3d 216, 223 (Tex. App.—El Paso 2000, pet. ref'd). "If the trial judge allows a witness to testify who does not appear on the State's witness list, we consider whether the prosecutor's actions constitute 'bad faith' and whether the defendant could have reasonably anticipated the witness's testimony." *Wood v. State,* 18 S.W.3d 642, 649 (Tex. Crim. App. 2000).

In considering whether the State acted in bad faith, reviewing courts have considered the following areas of inquiry: (1) whether the State intended to deceive; (2) whether the State's notice left the defense with adequate time to prepare; and (3) whether the State freely provided the defense with information (e.g., by maintaining an open files policy, by providing updated witness lists, or by promptly notifying the defense of new witnesses). *Horner v. State*, 129 S.W.3d 210, 214 (Tex. App.—Corpus Christi 2004, pet. ref'd); *Hardin v. State*, 20 S.W.3d 84, 88 (Tex. App.—Texarkana 2000, pet. ref'd).

As to "whether the State intended to deceive," it is perhaps more accurate to say that we assess the State's degree of fault in causing the omission, with particular attention

to any signs that the State acted inadvertently, negligently, or with intent to deceive or disadvantage the defense. *See Hardin*, 20 S.W.3d at 88. To this end, Texas courts have considered any direct evidence or explanation of the State's intentions, *see*, *e.g.*, *Gowin v. State*, 760 S.W.2d 672, 674 (Tex. App.—Tyler 1988, no pet.) (emphasizing a prosecutor's explanation, in open court, that the omission was inadvertent); the timing of the State's discovery of the witness or the need for the witness, as well as the timing of the State's disclosure, *see*, *e.g.*, *Wood*, 18 S.W.3d at 650 (crediting the State for disclosing the witness "as soon as it anticipated calling" him); whether there are any mitigating circumstances that make a failure to disclose more excusable, *see*, *e.g.*, *Campbell v. State*, 900 S.W.2d 763, 772 (Tex. App.—Waco 1995, no pet.); and the State's "due diligence" in securing the witness's testimony and disclosing it to the defense. *See*, *e.g.*, *Depena*, 148 S.W.3d at 467; *Campbell*, 900 S.W.2d at 772.

Beene points out that the State's primary justification for the late disclosure of Autry was that the State did not know until four days before the punishment phase was set to begin that Beene would elect to try punishment to the jury. The State argues that it reasonably believed it would be able to rely on a PSI report to show Beene's prior convictions. The record does not show, however, that the State had any reason to believe that punishment would be tried to the bench, that the State had actually arranged for a PSI report to be prepared, or that it was otherwise unnecessary to prove Beene's prior convictions. *See* TEX. CRIM. PROC. CODE ANN. art. 37.07(3)(d) (West, Westlaw through 2015 R.S.) ("When the judge assesses the punishment, he may order an investigative report . . . and after considering the report, *and after the hearing of the evidence hereinabove provided for*, he shall forthwith announce his decision . . . ."

(emphasis added)); *see also Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984) (en banc). A punishment election is a standard aspect of criminal cases, and all things being equal, it is not a genuine source of mitigating surprise. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07(2)(b). Instead, the State indicated from the beginning of the case that it intended to prove the convictions, and given the foreseeable value of Autry's testimony for this purpose, the State's late disclosure of Autry suggests at least some negligence on the State's part. *See Horner*, 129 S.W.3d at 214. The record bears no evidence of due diligence or any direct evidence of the State's intentions. The first inquiry favors a finding of bad faith.

However, under the second inquiry, it is evident that Beene had an "adequate time to prepare" for Autry's testimony. Even though the State disclosed Autry on the morning of punishment proceedings, Autry was offered only for his personal knowledge that Beene had been convicted of a narcotics offense. This limited purpose suggests that there would be little use in more extensive preparation. *Cf. Villescas v. State*, 189 S.W.3d 290, 294 (Tex. Crim. App. 2006) ("[W]hen a defendant has no defense to the enhancement allegation [of a prior burglary conviction] and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution."). Indeed, Beene acknowledged that the State could have proved the offense through a certified document, which would offer the same simple probative value. *See*, *e.g.*, *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). In total, the jury-presentation portion of the punishment phase lasted roughly five minutes. Beene was prepared to cross-examine this witness, to the limited extent that this basic fact could be effectively cross-examined: Beene elicited that the

punishment received on the narcotics conviction was minimal and that Autry had no further knowledge of the narcotics case. Finally, as the State points out, Beene had notice of the State's intention to prove the prior conviction. *See Stoker v. State*, 788 S.W.2d 1, 15 (Tex. Crim. App. 1989), *abrogated on other grounds*, *Horton v. California*, 496 U.S. 128 (1990); *Gowin*, 760 S.W.2d at 674. Given Beene's limited avenues for impeaching the fact of a prior conviction, this notice helps address any concerns over "adequate time to prepare."[1] The second inquiry disfavors a finding of bad faith.

As to the third inquiry, the record is generally undeveloped as to whether the State "freely provided the defense with information." The three areas of inquiry neither strongly favor nor disfavor a finding of bad faith. *See Horner*, 129 S.W.3d at 214. While there is some indication of blameworthiness on the State's part, the record shows that untimely disclosure had little or no impact on Beene's ability to challenge Autry's testimony. *See Wood,* 18 S.W.3d at 649.

Next, we assess whether Beene could have "reasonably anticipated" that the witness would testify despite the State's failure to disclose the name, considering: (1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise (e.g., 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 (e.g., by granting the defense a recess, postponement, or continuance, or by ordering the State to provide the witness's criminal history). *See Horner*, 129 S.W.3d at 214; *Hardin*, 20 S.W.3d at 88.

[1] Though the same logic does not apply to the late disclosure of, say, an eyewitness with rich potential for impeachment.

For the same reasons as stated in our "adequate time to prepare" inquiry, *supra*, we conclude that there is no indication of surprise from the State's untimely disclosure and no inherent disadvantage to Beene's ability to address this uncontested issue. *See Flowers*, 220 S.W.3d at 92; *Horner*, 129 S.W.3d at 214; *Gowin*, 760 S.W.2d at 674. Beene could have requested a recess or continuance had there been genuine concerns of surprise, but none was requested. *See Depena*, 148 S.W.3d at 468; *Dockins v. State*, 852 S.W.2d 50, 53 (Tex. App.—Texarkana 1993, pet. ref'd). Thus, we conclude that Beene could have reasonably anticipated Autry's testimony. *See Wood,* 18 S.W.3d at 649.

In sum, the record does not clearly show that the late disclosure was the product of the State's bad faith or the cause of any prejudice to Beene due to inability to anticipate Autry's testimony. *See id*. In the absence of a clear showing on either factor, we cannot conclude that the trial court abused its discretion in allowing Autry to testify. *See Castaneda*, 28 S.W.3d at 223. We overrule Beene's sole issue on appeal.

III. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

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

Delivered and filed the
28th day of July, 2016.