



NUMBER 13-16-00182-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

REGINALD SIMPSON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On appeal from the County Criminal Court at Law No. 4
of Harris County, Texas.

MEMORANDUM OPINION

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

Appellant Reginald Simpson challenges his conviction for indecent exposure. See TEX. PENAL CODE ANN. § 21.08 (West, Westlaw through Ch. 49, 2017 R.S.). By one issue, Simpson asserts that the trial court erred by denying his motion for continuance. We affirm.

I. BACKGROUND¹

On January 14, 2016, Simpson rode in a Houston Metro bus alongside other passengers Tracy Carter and Tamika Wooten. Wooten was seated behind Simpson, near the rear doors of the bus. Carter was seated at the rear of the bus. Carter testified that Simpson appeared to be using his cellphone camera to take video of a woman who was seated at the front of the bus, immediately behind the driver. Carter took a photo of Simpson taping the woman, and that picture was admitted into evidence as State's Exhibit 1. Carter testified that he saw Simpson moving his shoulder and arm while Simpson videotaped the woman. Carter testified that he believed that Simpson was "ejaculating."² At that point, Carter walked up to the bus driver and reported the incident. Upon returning to his seat, Carter called the police to report the incident. That dispatch call was also admitted into evidence. According to Carter, Simpson continued to masturbate until police arrived approximately thirty minutes later.

Wooten similarly testified to observing Simpson using his phone to view a woman sitting in the front of the bus. Further, Wooten stated that she saw Simpson's right hand moving up and down along his erect penis while his left hand held his backpack up in an apparent attempt to "hide himself with the backpack."

Metro Police Department Officer Corey Castro testified that he responded to the incident along with his trainee at the time, Officer Raul Perez. Both officers spoke to Simpson after asking him to exit the bus. Officer Castro testified that he observed

¹ Pursuant to a docket-equalization order issued by the Supreme Court of Texas, this appeal was transferred to this Court from the First Court of Appeals in Houston. See TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through Ch. 49, 2017 R.S.)

² The State clarified that when Carter used the term "ejaculating," he meant masturbating.

Simpson's pants buttoned but unzipped. Simpson explained to the officers that he was not exposing himself to the other passengers but rather was scratching a rash. After speaking with witnesses, the officers placed Simpson under arrest for indecent exposure. See TEX. PENAL CODE ANN. § 21. *Id.*

The case was tried to a jury, and Simpson was found guilty as charged. Simpson was sentenced to 158 days of confinement in the Harris County Jail and ordered to register as a sex offender. This appeal followed.

II. MOTION FOR CONTINUANCE

By his sole issue, Simpson argues that the trial court erred in denying his motion for continuance and that the denial of the continuance had a substantial and injurious effect on the jury's verdict.

A. Standard of Review and Applicable Law

A trial court's ruling on a motion for continuance is reviewed for an abuse of discretion. *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996). To establish reversible error based on the denial of a motion for continuance, "a defendant must demonstrate both that the trial court erred in denying the motion and that the lack of a continuance harmed him." *Gonzales v. State*, 304 S.W.3d 838, 840 (Tex. Crim. App. 2010). In order to show that the trial judge's ruling on the motion was error, the appellant must demonstrate "that the case made for delay was so convincing that no reasonable trial judge could conclude that scheduling and other considerations as well as fairness to the State outweighed the defendant's interest in delay of the trial." *Id.*

B. Discussion

1. The appellant failed to demonstrate that the trial court's ruling on the motion for continuance was error.

In the present case, Simpson requested a continuance to secure the presence at trial of the bus driver, Paula Pittman. When a defendant files a motion for continuance due to an absent witness, he must necessarily show: (1) that he has exercised diligence to procure the witness's attendance; (2) that the witness is not absent by the procurement or consent of the defense; (3) that the motion is not made for delay; and (4) the facts expected to be proved by the witness. *Harrison v. State*, 187 S.W.3d 429, 434 (Tex. Crim. App. 2005). Further, it must appear to the trial court that the facts are material. See TEX. CODE CRIM. PROC. ANN. art. 29.06 (West, Westlaw through Ch. 49, 2017 R.S.). Mere conclusions and general averments are not sufficient for the court to determine their materiality, and the motion for continuance must show on its face the materiality of the absent testimony. *See id.*

Simpson's motion states that Pittman was undergoing surgery on February 29, 2016, the day trial was to begin, and was, therefore, unable to attend the trial. Additionally, Simpson argued that Pittman was an essential witness due to the State's notification the weekend before trial of its intent to admit two dispatch calls related to the incident. According to the defense counsel, the only fact expected to be proved by the absent Pittman was that she did not see Simpson masturbating. Nothing in the record suggests that Pittman either saw Simpson masturbating or could contradict that the event took place. Pittman's dispatch call had already been deemed inadmissible by the trial court because it was "hearsay within hearsay." See TEX. R. EVID. 403. The admissible

dispatch call merely stated that “someone’s already called it in.” The ambiguity of that second call clearly does not necessitate calling Pittman as a witness, and in light of two witnesses similarly testifying that Simpson was masturbating, the trial court could have concluded that Pittman’s testimony would not be material.

2. Simpson failed to demonstrate how denial of a continuance harmed him.

Even assuming arguendo that Simpson met all four elements listed above, we would not find that the trial court abused its discretion in denying his motion for continuance because he has not established harm. See *Gonzales*, 304 S.W.3d at 843. Rule 44.2(b) of the Texas Rules of Appellate Procedure provides that an appellate court must disregard a non-constitutional error that does not affect a criminal defendant’s substantial rights. TEX. R. APP. P. 44.2(b). The error affects a substantial right of the defendant when the error has a substantial and injurious effect or influence in determining the jury’s verdict. See *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

Simpson argues that the admitted dispatch call from Carter created a “misimpression” [sic] that augmented the weight of the two witness accounts and substantially affected him because it “suggests that someone else saw it and that we’re unable to rebut that the bus driver didn’t in fact see it, without having her here to testify.” Stated another way, Simpson is arguing that, had his motion for continuance been granted in order to secure Pittman as a witness, had she testified that she in fact did not see Simpson masturbating, the two witness accounts describing the same event would not have been enough to convict Simpson. This argument is flawed because it implies that Pittman’s absent testimony that Simpson was not masturbating potentially would have sufficiently undermined both witness accounts and would have resulted in a different

verdict. Given the record before us, we are able to say with fair assurance that the denial of the continuance did not have a substantial and injurious effect on the jury's verdict.

The trial court properly exercised its discretion in denying Simpson's motion for continuance because of Simpson's inability to show with specificity how he was harmed by the denial. See *Janecka*, 937 S.W.2d at 468; *Gonzales*, 304 S.W.3d at 840. Simpson's sole issue is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

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

Delivered and filed the
13th day of July, 2017.