Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-00972-CR

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SAMUEL M. MOUTON, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 18,800

O P I N I O N

A jury convicted appellant of the offense of retaliation, and set his punishment at twenty years in prison. In two points of error, appellant contends the trial court erred in permitting Mary Denzell to testify at the punishment phase of trial in violation of TEX. R. EVID. 614, and, that the trial court erred in permitting her testimony because she was not on the state's witness list. We affirm. [1]

Appellant was an inmate at the Estelle Unit and the complainant, Teresa Bainbridge, was a nurse with the Texas prison system at the time the incident occurred. Testimony at trial

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[1] Appellant filed a pro se brief six months after his attorney filed a brief. We will consider only the timely-filed brief of appellant's attorney.

established that appellant threatened Bainbridge because she had reported him for a rules violation. When Bainbridge was making her rounds, checking on prisoners, appellant threw two cups containing body waste and blood on her. Testimony also showed appellant was HIV-positive.

Denzell, Bainbridge's mother, testified at punishment as to the effect of the assault on the victim. The victim's mother is not among the witnesses listed in TEX. R. EVID. 614 which may be present in the courtroom once "the rule" has been invoked, and Denzell was not on the state's witness list.

The state contends Mouton waived the objection by failing to object specifically enough. We disagree. In a conference at the bench, appellant's counsel clearly objects to Denzell's testimony, both on the basis of "surprise" and because she remained in the courtroom after invocation of "the Rule."

We review the trial court's decision in permitting Denzell's testimony under an abuse of discretion standard. *Webb v. State*, 766 S.W.2d 236, 239-240 (Tex. Crim. App. 1989). When considering whether a trial court has abused its discretion, we consider whether the witness actually heard the testimony of other witnesses, and whether the witness's testimony contradicted the testimony of a witness from the opposing side, or corroborated the testimony of another witness he had conferred with or had otherwise actually heard. *Id*. at 240; *see also Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996). Additionally, if the witness is one who had no connection to the party proffering the testimony and was not likely to be called because of a lack of personal knowledge of the offense, no abuse of discretion will be shown. *Webb*, 766 S.W.2d at 241 fn. 2.

Here, Denzell did not testify at the guilt-innocence phase, and neither contradicted one of appellant's witnesses nor corroborated a witness testifying for the state. We find that the trial court did not abuse its discretion in permitting Denzell to testify at the punishment phase and overrule appellant's first point of error.

Appellant's second point of error deals with the trial court's permitting Denzell to testify, despite the fact that she was not on the witness list furnished appellant. Notice of the

state's witnesses shall be given upon request. *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977). 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. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993); *Stoker v. State*, 788 S.W.2d 1, 15 (Tex. Crim. App. 1989). Review is under the abuse of discretion standard. *Bridge v. State*, 726 S.W.2d 558, 566 (Tex. Crim. App. 1986). To determine whether the trial court abused its discretion, we may consider whether the witness testifies as to the arrest which is central to the state's case, *see Lincoln v. State*, 508 S.W.2d 635, 637 (Tex. Crim. App. 1974), and whether the testimony covers a disputed fact issue. *Clay v. State*, 505 S.W.2d 882, 885 (Tex. Crim. App. 1974). Also, any error in permitting an undisclosed witness to testify is rendered harmless when the trial court permits a defendant to interview the witness or otherwise review the evidence. *Mock v. State*, 848 S.W.2d 215, 222 (Tex. App.–El Paso 1992, pet. ref'd).

Appellant's counsel was offered a continuance, which he declined. He was also offered a thirty-minute recess to talk to the witness. He again declined. We therefore find that Mouton waived his complaint and overrule point of error number two.

The judgment of the trial court is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed February 10, 2000.
Panel consists of Justices Robertson, Sears, and Cannon.[**]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[**] Senior Justices Sam H. Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.