Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00740-CR
NO. 14-98-00741-CR
NO. 14-98-00742-CR
NO. 14-98-00759-CR

———————————

JAVIER SAUCEDA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 732,778 & 732,779 & 732,780 & 732,781

O P I N I O N

A jury found Sauceda guilty of intoxicated manslaughter and assessed punishment at fifteen years' imprisonment. In seven points of error, Sauceda appeals that: 1) the trial court erred in limiting voir dire on the issue of concurrent cause; 2) the trial court erred in failing to hold a hearing regarding proof of extraneous offenses; 3) his trial counsel was ineffective in failing to object to details of a prior conviction; 4) the trial court erred in admitting a photograph of the victims' bodies; 5) his trial counsel was ineffective for failing to object to

part of the State's jury argument; 6) imposition of consecutive sentences is cruel and unusual punishment; and 7) the jury's affirmative finding of use of a deadly weapon should be illegal. We overrule his points of error and affirm the judgments of the trial court.

I. BACKGROUND

Sauceda, with his friends and family, spent the day at the beach, fishing and drinking beer. That night, Sauceda drove home to Pasadena with his girlfriend and two-year-old son in the front seat of his pickup truck, two adults in the backseat, and three adults in the bed of the truck. Driving faster than the speed limit on a residential street, Sauceda ran a stop sign and broadsided a car in the intersection of a larger, four-lane road. After the collision, the police found many beer bottles and beer cartons in the truck, in its bed, and on the road. An open bottle of beer sat in the floorboard in front of the driver's seat. Sauceda's blood alcohol content was .147, well over the legal limit. He was swaying, slurring, and smelled of alcohol.

In the car that he broadsided, Hattie Mochman, her fiancé Frank Azzarello, his daughter, Janet Welch, and Janet's five and two-year-old daughters, Brittany and Lindsey, were driving to dinner. Upon impact, their car flipped over and landed on a fire hydrant. Only Lindsey survived. The other four died immediately of massive injuries. The jury convicted Sauceda for all four of their deaths and assessed fifteen years' imprisonment for each death. The trial court then ordered that the four fifteen-year sentences run consecutively instead of concurrently. Sauceda appeals.

II. VOIR DIRE

In his first issue, Sauceda claims that the trial court erred in limiting voir dire on the issue of concurrent cause. His theory at trial was that engine problems with his truck, the design of the street, and a partially blocked stop sign were concurrent causes of the wreck. He argues that the trial court wrongfully prevented him from questioning the venire whether it could consider evidence of a concurrent cause. However, the record from voir dire more accurately reflects that Sauceda's attorney questioned the venire about the weight the panelists could give such evidence: "And what I'm asking now is, would you be able to give the same

weight to other evidence presented if there was already evidence of intoxication." The trial court asked him to rephrase his question, specifying that questions about the weight of evidence were improper.

Where there is no absolute limitation placed on the underlying substance of the defense's voir dire question, it is incumbent upon counsel to rephrase an improperly phrased query or waive the voir dire restriction. *See Guerra v. State*, 771 S.W.2d 453, 468 (Tex. Crim. App. 1988); *Tate v. State*, 939 S.W.2d 738, 748 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd). In this case, the trial court did not preclude questions about the venire's ability to consider evidence of concurrent cause. The trial court simply asked Sauceda to rephrase his questions to omit the "equal weight" portion. Sauceda's attorney finally asked, "Would you be able to consider other evidence if there was evidence of intoxication?" He returned to the topic on several other occasions during voir dire. Clearly, there was no restriction on asking the venire panelists whether they could consider evidence of concurrent cause.

Further, a trial court has the authority to limit voir dire in certain circumstances, including when questions to the venire are not in proper form. *See Dinkins v. State*, 894 S.W.2d 330, 345 (Tex. Crim. App. 1995). In this case, counsel's question to the venire was in improper form because it asked panelists to assign equal weight to evidence of concurrent causation. Just as jurors should not be asked in advance whether they would give one type of evidence more weight than another, *Raby v. State*, 970 S.W.2d 1, 11 (Tex. Crim. App.) (Baird, J., concurring), *cert denied*, – U.S. –, 119 S. Ct. 515, 142 L. Ed.2d 427 (1998), they also should not be asked to give equal weight to different types of evidence. "Jurors are free to, in their discretion, give evidence any amount of weight without a previous pledge as to their predilections." *Id.*; *see also Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996) (jury is the exclusive judge of the weight to be given testimony). Thus, the trial court did not err in restricting questions about the weight the venire would give to evidence of concurrent cause.

Because Sauceda's question was improper and because the trial court did not preclude him from questioning the venire about its ability to consider evidence of concurrent cause, we overrule point of error one.

III. EXTRANEOUS OFFENSES

In his second issue, Sauceda complains that the trial court erred in failing to conduct a hearing outside the presence of the jury to determine whether the State could prove an extraneous offense beyond a reasonable doubt. Sauceda requested such a hearing before the punishment phase of trial, anticipating that the State planned to offer evidence of his guilty plea and federal conviction for conspiracy to possess cocaine with the intent to deliver. The trial court declined to conduct such a hearing, stating that it was the jury's role to determine whether the extraneous offense had been proved beyond a reasonable doubt.

At the punishment phase of trial, the State may offer evidence about any matter that the trial court deems relevant to sentencing, including extraneous offenses. *See* TEX. CODE CRIM. PROC. art. 37.07, § 3(a) (Vernon Supp. 1999). As a threshold issue, the trial court must decide that the evidence is relevant and admissible. *See Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996) (plurality op.). The standard to admit extraneous offense evidence in the punishment phase is whether the "jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994); *see Mitchell*, 931 S.W.2d at 954. The jury, however, is the exclusive judge of the facts, and it alone determines whether the State has proved an extraneous offense beyond a reasonable doubt. *See Mitchell*, 931 S.W.2d at 953.

Given the different roles of the trial court and jury, Sauceda needed to invoke the trial court's responsibility under article 37.07 as gatekeeper for relevancy and admissibility of the extraneous offense evidence. However, Sauceda requested:

> [T]he defense would request a hearing outside the presence of the jury for the Court to determine whether or not it's, in the Court's position, that the State has proved any extraneous offense beyond a reasonable doubt before the jury hears about it at this time.

This request confuses the role of the trial court with that of the jury. The trial court correctly responded that only the jury determines whether the State has proved an extraneous offense beyond a reasonable doubt. "To properly preserve error with regard to inadmissible extraneous offense evidence, [Appellant] must have made a timely request, objection, or motion stating the grounds for the ruling with sufficient specificity to make the trial court aware of the complaint and secure a ruling." *Thomas v. State*, 1 S.W.3d 138, 143 (Tex. App.–Texarkana 1999, pet. filed); TEX. R. APP. P. 33.1. Sauceda did not sufficiently apprise the trial court that he was objecting to the admissibility of extraneous offense evidence. Further, he did not object to admissibility when the State offered evidence through four witnesses about his guilty plea, conviction, and possession of roughly a kilogram of cocaine. For these reasons, Sauceda has not preserved error for appeal.

Even if Sauceda preserved error, he cites no authority that a trial court must conduct its threshold determination about the admissibility of extraneous offense evidence in a separate hearing outside the presence of the jury. The *Mitchell* plurality opinion is silent about the procedure necessary for the threshold determination in the punishment phase of trial. We note at least one court has held that a hearing is not required. *See Welch v. State*, 993 S.W.2d 690, 697 (Tex. App.–San Antonio, no pet.). We find that the trial court's refusal to hold a separate hearing is not tantamount to a failure to determine the admissibility of the extraneous offense evidence. Accordingly, we overrule point of error two.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue, Sauceda appeals that his trial counsel was ineffective in the punishment phase for failing to object to the details of his prior conviction. In his fifth issue, he claims that counsel was ineffective for failing to object to a portion of the State's jury argument. To determine whether counsel was ineffective, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). This standard has two components: (1) whether counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability

that the result of the proceeding would have been different. *Id.* at 688, 694. In applying this standard, we consider the totality of the evidence and focus on the fundamental fairness of the proceeding whose result is being challenged. *See id.* at 695.

A. Failure to Object to Details of Prior Conviction

Sauceda argues that his counsel was ineffective for failing to object to the details of his prior federal conviction for conspiracy to possess cocaine. In addition to evidence about his guilty plea, the State's witnesses testified that Sauceda was driving with a kilogram of cocaine in the backseat of the car. Sauceda argues that under article 37.07 of the Code of Criminal Procedure, such details about an adjudicated offense are inadmissible. We disagree. Under article 37.07, the State may present evidence in the punishment phase of trial about the details of adjudicated offenses. *See Haney v. State*, 951 S.W.2d 551, 554-55 (Tex. App.–Waco 1997, no pet.); *see also Barletta v. State*, 994 S.W.2d 708, 712-13 (Tex. App.–Texarkana 1999, pet. filed); *Standerford v. State*, 928 S.W.2d 688, 693 (Tex. App.–Fort Worth 1996, no pet.). Counsel is not ineffective for failing to object to nonobjectionable evidence. *See Yates v. State*, 917 S.W.2d 915, 921 (Tex. App.–Corpus Christi 1996, pet. ref'd). Accordingly, we overrule point of error three.

B. Failure to Object to State's Jury Argument

In his fifth issue, Sauceda claims that his counsel was ineffective for failing to object to the following jury argument:

> You know . . . that defendant was speeding. . . . You also know that the defendant had swerved across the center line, at least at one point, as he was traveling down Knob Hill. And you know the defendant ran a Stop sign.
>
> Never even attempted to stop his vehicle. You know, based on all the evidence, as a result of his conduct, as a result of the fact that alcohol inhibits your ability to react accordingly, that's why we have this law. . . .
>
> And basically what the law says is that if you believe, based on the evidence that you've heard in this case, that the defendant caused this accident, that he was intoxicated, and as a result he caused this accident, then his conduct alone makes him guilty of the offense of intoxication manslaughter. That action alone. And we know that what the defendant's conduct was was being intoxicated, speeding,

> and running a stop sign. That's the defendant's own conduct. And as a result of that, he's guilty.

Sauceda claims this misstates the elements of intoxication manslaughter by implicitly telling the jury that it could find him guilty for conduct in addition to his intoxication, i.e., speeding and running a stop sign.

Proper jury argument must fall within one of four areas: (1) summation of evidence; (2) reasonable deductions drawn from the evidence; (3) answer to opposing counsel's argument; or (4) a plea for law enforcement. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). The State may draw inferences from the evidence if the inferences are reasonable, fair, legitimate, and offered in good faith. *Denison v. State*, 651 S.W.2d 754, 761-62 (Tex. Crim. App. 1983). We find that the State's jury argument was a proper summation of and deduction from the evidence. One of the defense witnesses in guilt/innocence was John Lipscomb, a traffic engineer. On cross-examination, Mr. Lipscomb conceded that an intoxicated person has a longer reaction time. When reviewed in full context, the State's jury argument was a deduction from the evidence: an intoxicated person's longer reaction time could result in a missed stop sign and erratic driving. Because this argument was proper, Sauceda's counsel was not ineffective for failing to object to it. We thus overrule issue five.

V. PHOTOGRAPH OF VICTIMS

In his fourth issue, Sauceda appeals that the trial court erred in admitting a gruesome photograph of the victims taken at the crime scene. He claims that the danger of unfair prejudice substantially outweighed its probative value. TEX. R. EVID. 403. The 8x10 photograph shows the four dead victims lying on stretchers after the accident. Sauceda claims that the photograph had no probative value because the identity of the victims had been established and the manner of the victims' death was uncontested.

The admissibility of a photograph is within the discretion of the trial court. *Allridge v. State*, 850 S.W.2d 471, 494 (Tex. Crim. App. 1991). A photograph will usually be

admissible so long as a verbal description of what it depicts is also admissible. *Williams v. State*, 773 S.W.2d 525 (Tex. Crim. App. 1988); *Burdine v. State*, 719 S.W.2d 309, 316 (Tex. Crim. App. 1986). "Only where the probative value of the photograph is small, and the inflammatory potential great, will it be an abuse of discretion to admit the photograph." *Williams*, 773 S.W.2d at 539.

Factors to consider in determining the admissibility of a photograph include the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color, whether they are close-up, and the availability of other means of proof. *Emery v. State*, 881 S.W.2d 702, 710 (Tex. Crim. App. 1994); *Long v. State*, 823 S.W.2d 259 (Tex. Crim. App. 1991). In this case, the color photograph was the only photograph admitted which portrayed a frontal view of the victims at the crime scene. It accurately shows the effect of Sauceda's drunken driving on the victims, which is probative evidence. *See Allridge*, 850 S.W.2d at 494. Sauceda cannot "deprive the State of the duty and the function of presenting to the jury all relevant evidence, nor avoid facing the full facts of the crime." *Harrison v. State*, 501 S.W.2d 668, 669 (Tex. Crim. App. 1973). Further, although blood is shown, the photograph is not so horrifying that it would sway a juror from rationally deciding the issues of the case. *See Barnes v. State*, 876 S.W.2d 316, 326 (Tex. Crim. App. 1994). Accordingly, we hold that the trial court did not err in admitting the photograph in evidence. We overrule issue four.

VI. CRUEL AND UNUSUAL PUNISHMENT

In his sixth issue, Sauceda contends that the trial court's imposition of consecutive sentences is cruel and unusual punishment. However, Sauceda raised no objection to the constitutionality of the imposition of sentence, nor did he raise the issue in a post-verdict motion filed with the trial court. To preserve a complaint for appellate review, a party must present a timely complaint to the trial court, state the specific grounds for the desired ruling, if the specific grounds are not otherwise apparent, and obtain a ruling. TEX. R. APP. P. 33.1(a). Most constitutional errors are waived or forfeited by the failure to make a timely assertion of

that right. *Hawkins v. State*, 964 S.W.2d 767 (Tex. App.--Beaumont 1998, pet. ref'd). Sauceda waived any error by failing to object to the trial court that the consecutive sentences violated his state and constitutional rights. *See Keith v. State*, 975 S.W.2d 433, 433-34 (Tex. App.--Beaumont 1998, no pet.); *Cruz v. State*, 838 S.W.2d 682, 687 (Tex. App.--Houston [14th Dist.] 1992, pet. ref'd); *Quintana v. State*, 777 S.W.2d 474, 479 (Tex. App.--Corpus Christi 1989, pet. ref'd). Accordingly, we overrule issue six.

VII. DEADLY WEAPON FINDING

In his seventh issue, Sauceda contends that the jury's affirmative finding of use of a deadly weapon should be illegal. He argues that the purpose of the deadly weapon statute is to deter the use of deadly weapons in crimes.[1] In his case, Sauceda argues that the finding should be deleted because he had no intent or other necessary *mens rea* to use his pickup as a deadly weapon.

The Texas Penal Code defines a deadly weapon as: "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17) (Vernon 1994). A "motor vehicle, which is actually used to cause the death of a human being, is a deadly weapon." *Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995); *Schielack v. State*, 992 S.W.2d 639, 642 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). Further, intent to use the automobile as a weapon need not be shown in order to prove use of it as a deadly weapon. *See Tyra*, 897 S.W.2d at 798-99; *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995). As Sauceda's *mens rea* has no bearing upon the legality of the deadly weapon finding, we overrule his seventh issue.

Having overruled all seven points of error, we affirm the judgments of the trial court.

---

[1] The finding also prevents consideration of good time credit for parole eligibility. TEX. GOV'T CODE ANN. § 508.145(d) (Vernon 1998).

_____
Norman Lee
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Robertson, Cannon and Lee.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Sam Robertson, Bill Cannon, and Norman Lee sitting by assignment.