Affirmed and Opinion filed January 31, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01485-CR

SHELTON KERRY JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 839,522

O P I N I O N

A jury convicted appellant, Shelton Kerry Johnson, of aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). The jury assessed punishment at twenty-eight years' confinement, enhanced by one prior felony conviction. In two points of error, appellant claims the trial court erred by (1) not allowing appellant the opportunity to explain the underlying facts of his prior felony conviction and (2) overruling appellant's objection to leading questions by the State. We affirm.

The complainant, Toan Van Doan, opened his liquor store around 10:00 a.m. on March 20, 2000. Mr. Doan testified that a black male, later identified as appellant, entered

the store a few minutes later and that they began discussing prices for a bottle of cognac. Doan turned to get a bottle. When Doan turned back around, appellant pointed a gun at him and instructed him to open the cash register. Fearing for his life, Doan complied, placing the cash from the register into a paper bag. Not satisfied with the amount of money from the register, appellant instructed Doan to put two bottles of liquor in the bag. He then instructed Doan to sit in a chair facing the wall and stated that if Doan did not tell him where more money was hidden, he would take him back to the restroom and kill him. Appellant reached into Doan's pocket for his wallet and took some money and his driver's license. He grabbed the bag of cash and packages of cigarettes before noticing a box containing rolls of change on the floor. Doan testified that he ran for help when appellant reached down to pick up the box of coins.

Deputies Robert Spurgeon and Daniel Garcia of the Harris County Sheriff's Department stopped appellant for driving with an expired inspection sticker. When the deputies approached appellant's car, they did not know that an aggravated robbery had just occurred at another location. Deputy Spurgeon testified that as they approached the car, appellant was fidgeting as if trying to hide something. For safety precautions, Deputy Spurgeon asked appellant to exit the vehicle and began to conduct a safety frisk. Appellant ran. After a 500-yard chase, appellant was caught and arrested for evading detention. When the officers searched appellant, they found Doan's driver's license and a large amount of cash. In appellant's car were two bottles of cognac, several packs of cigarettes, rolls of coins in a coin box and a loaded, chrome colored, semi-automatic pistol.

The officers then learned of a dispatch regarding an aggravated robbery of a nearby liquor store. Based on appellant's flight, subsequent arrest, and recovery of the above items, they believed they had caught the robbery suspect. Deputy Spurgeon testified that as they approached the location of the reported aggravated robbery, appellant made the unsolicited statement, "There it is," referring to the location of the liquor store. In an on-scene identification, Doan identified the items recovered from appellant as his property and

positively identified appellant as the robber.

Appellant was taken into custody, and Detective Demitrios Lemonitsakis gave him his Miranda warnings. Appellant then confessed to the robbery. The trial court held a pre-trial hearing and determined appellant's statements were made in accordance with Texas law. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon Supp. 2002). Appellant was tried and found guilty of aggravated robbery. Appellant pleaded "not true" to the enhancement paragraph of his indictment. The jury assessed punishment at twenty-eight years' confinement. This appeal followed.

In his first point of error, appellant argues that the trial court erred in not allowing appellant to produce evidence regarding his prior conviction during the punishment phase of trial.

Evidence may be offered by both the State and the defendant as to any matter the court deems relevant to sentencing, including but not limited to, the prior criminal record of the defendant. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2002); *see also Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999). Specifically, extrinsic evidence concerning a prior conviction is now admissible by both the State and the defense. *Davis v. State*, 968 S.W.2d 368, 373 (Tex. Crim. App. 1998) (holding either party may introduce the underlying facts of a prior deferred adjudication during the penalty phase).

In this case, appellant entered a plea of "not true" to the prior conviction. During the punishment phase, the State sought to prove appellant had previously pleaded guilty to that underlying offense. Appellant's trial counsel later attempted to question appellant about the facts surrounding that prior conviction. However, the trial court sustained the State's objection to "going behind the conviction." If the State is allowed to use the underlying facts surrounding a prior conviction for aggravating factors, then clearly it would be unfair to prohibit the defendant from using the underlying facts for mitigation. *See Hambrick v. State*, 11 S.W.3d 241, 243 (Tex. App.—Texarkana 1999, no pet.) (holding defendant may

introduce evidence about the circumstances surrounding a prior conviction for aggravated assault on a peace officer). Because appellant should have been permitted to discuss the underlying facts of his prior conviction, the trial court erred.

However, to adequately preserve error and demonstrate harm, the defendant must make an offer of proof or a bill of exception. *See* TEX. R. EVID. 103 (a)(2); *see also Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999) (finding error in the exclusion of evidence may not be urged on appeal unless the proponent perfects an offer of proof or a bill of exception). In this case, appellant failed to make such an offer, and as a result, nothing is preserved for our review. *Guidry*, 9 S.W.3d at 153. Accordingly, appellant's first point of error is overruled.

In his second point of error, appellant argues that the trial court erred in overruling appellant's objection to a leading question from the State to Detective Lemonitsakis. We review a trial court's rulings on objections and its decision to admit evidence under an abuse of discretion standard. *See Wyatt v. State*, 23 S.W.3d 18, 28 (Tex. Crim. App. 2000).

Texas Rule of Evidence 610(c) does not forbid the asking of leading questions; it states that leading questions "should not be used on the direct examination of a witness except as may be necessary to develop his testimony." TEX. R. EVID. 610(c). The rule clearly contemplates that the trial court has the discretion to allow some leading questions. *Wyatt*, 23 S.W.3d at 28. Further, unless appellant was unduly prejudiced by virtue of such questions, no abuse of discretion can be shown. *Id.* (citing *Hernandez v. State*, 643 S.W.2d 397, 400 (Tex. Crim. App. 1982)).

In this case, appellant's counsel objected that the following question by the State's attorney to Detective Lemonitsakis was leading: "Well, did the defendant just act like he had been busted cold and he might as well tell you what happened?" The trial court overruled this objection. However, appellant has failed to show how this leading question unduly prejudiced his conviction in light of the other evidence and testimony presented to the jury,

including the fact that appellant was caught with Doan's property minutes after the crime and was positively identified by Doan as the armed robber soon after the crime. Accordingly, appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.[1]

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

[1] Senior Justice Don Wittig sitting by assignment.