**Affirmed and Opinion filed February 10, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-00768-CR**

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**MARCUS STEPHEN FLECK, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 176th District Court**
**Harris County, Texas**
**Trial Court Cause No. 753,570**

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## O P I N I O N

Marcus Stephen Fleck appeals his conviction by a jury for the offense of aggravated assault. TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). The jury assessed his punishment at ten years probation. In five points of error, appellant complains that (1) the trial court erred in precluding appellant from impeaching the complainant with his 1978 conviction for aggravated robbery, (2) the trial court erred in precluding appellant from testifying that he was aware that complainant had been convicted of aggravated robbery in 1978, (3) the trial court erred in precluding appellant from eliciting from a witness that he saw the complainant arm himself and threaten to do harm to another individual, (4) appellant was denied a fair and

impartial trial after the trial court failed to define reasonable doubt during the punishment stage of the trial, and (5) the trial court erred in overruling appellant's objection after the prosecutor argued matters outside the record during her final argument in the guilt-innocence stage of trial. For the reasons set forth below, we affirm.

## BACKGROUND

Appellant lived across the street from the complainant, Glen Baker. Appellant had formerly been employed by the Harris County Sheriff's Department. Because of various alleged acts of misconduct, the two neighbors grew to dislike one another. Baker contends that on several occasions appellant threatened him with a firearm and even told neighbors that appellant could kill him and get away with it.

On the afternoon of May 21, 1997, Baker and his son were barbecuing. During this time, appellant climbed onto his roof and shined a mirror into the Bakers' residence in an attempt to get Baker's attention. After a while, Baker and his son decided to run some errands. Baker put the handle of a pellet pistol in his pants, apparently to dissuade appellant from bothering him. As Baker was closing the gate to his residence, appellant pulled out a gun and stated, "I've been waiting for you to have a gun on you so I can kill you." Appellant then shot Baker in the shoulder. Baker's son ran to his grandmother's house down the street to summon help.

Appellant got down from his roof, ran over to Baker, and began to pistol whip and kick him. At this time appellant discovered that Baker carried only the handle of a pistol and not the whole pistol. Meanwhile, much of what had transpired was witnessed by Baker's relatives who lived nearby. Baker's uncle, Kenneth Wayne Latham, interceded and broke up the altercation between Baker and appellant. An officer from the Harris County Sheriff's Department arrived shortly thereafter and arrested appellant.

## POINT OF ERROR ONE

In his first point of error, appellant contends that the trial court erred in precluding appellant from impeaching the complainant with a prior felony conviction. Out of the jury's presence, appellant established that Baker had been convicted for armed robbery in 1978. While the release date was more than ten years prior to the date of this trial, Baker had subsequently been convicted of a felony in July of 1997. This second conviction was for possession of heroin. The trial court allowed the use of the possession convictions for the purpose of impeachment, but prohibited the use of the armed robbery conviction.

The Rules of Evidence provides a standard of admissibility if the conviction is more than ten years old. *See* TEX. R. EVID. 609(b). Such a conviction is not admissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." TEX. R. EVID. 609(b). The drafters of these rules provided heightened protection against prejudice when a conviction is statutorily deemed remote (more than ten years old). The presumptive exclusion of remote convictions is grounded on a belief in an individual's ability to reform. *See Kizart v. State*, 811 S.W.2d 137, 141 (Tex. App.–Dallas 1991, no pet.). The impeaching party must demonstrate that the probative value "substantially outweighs," not merely "outweighs," the prejudicial effect. Thus, Rule 609(b) mandates a more stringent balancing test for such older convictions than is employed for more recent convictions. *See* TEX. R. EVID. 609(a). Both standards place the burden of proof upon the impeaching party. *See Kizart*, 811 S.W.2d at 141.

Evidence of subsequent and more recent convictions involving felonies or moral turpitude tends to refute the idea of reformation by demonstrating that the older conviction was not merely an isolated incident. *See McClendon v. State*, 509 S.W.2d 851, 855-57 (Tex. Crim. App. 1974); *see also Allen v. State*, 740 S.W.2d 81, 83 (Tex. App.–Dallas 1987, pet. ref'd) (where the defendant was twice convicted of a felony following his remote convictions, and one intervening conviction was for the same type of offense as one remote conviction,

there is evidence of a lack of reformation, and thus, the trial court did not abuse its discretion in allowing the remote convictions in evidence).

The trial court has wide discretion in deciding the question of admissibility, and its decision will not be reversed unless an appellant shows a clear abuse of that discretion. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992). Whether to admit remote convictions for purposes of impeachment lies largely within the trial court's discretion, and depends on the facts and circumstances of each case. *See Lucas v. State*, 791 S.W.2d 35, 51 (Tex. Crim. App. 1989); *Brown v. State*, 880 S.W.2d 249, 252 (Tex. App.–El Paso 1994, no pet.). Generally, prior remote felony convictions involving deceit, fraud, cheating, or stealing are considered more probative of an untrustworthy disposition than are crimes of violence. *See Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). In the present action, the complainant's prior conviction did not have much impeachment value in that it was presented as a crime of violence and not one of deception. Further, there was little conflict between the testimony of appellant and the testimony of complainant. The credibility issue involved that of the alleged victim of an aggravated assault whose testimony was largely undisputed. We conclude that the trial court did not abuse its discretion in excluding the felony conviction. The first point of error is overruled.

## POINT OF ERROR TWO

In his second point of error, appellant contends that the trial court erred in precluding appellant from testifying that he was aware that the complainant had been convicted of aggravated robbery in 1978. The appellant's trial attorney claimed that the testimony would have been admissible under TEX. CODE CRIM. PROC. ANN. art. 38.36 (Vernon Supp. 1999). Because article 38.36 applies only to homicide cases, the trial court acted appropriately in rejecting appellant's contention. *See id.* The appellant now claims in his brief that the testimony was admissible under TEX. R. EVID. 404(a)(2). An objection stating one legal basis may not be used to support a different legal theory on appeal. *See McGinn v. State*, 961 S.W.2d 161, 166 (Tex. Crim. App. 1998); *Bell v. State*, 938 S.W.2d 35, 54 (Tex. Crim. App.

1996); *Chambers v. State*, 903 S.W.2d 21, 32 (Tex. Crim. App. 1995). Appellant failed to make the same objection at trial that he made in his brief on appeal and, therefore, error was not properly preserved. Appellant's second point of error is overruled.

## POINT OF ERROR THREE

In his third point of error, appellant contends that the trial court erred in precluding appellant from eliciting testimony from a Mr. Gouge that he had witnessed complainant arm himself and threaten to do harm to another individual. Again, at trial appellant made a claim for admissibility under TEX. CODE CRIM. PROC. ANN. art. 38.36 (Vernon Supp. 1999) while on appeal appellant raises the issue under TEX. R. EVID. 404(a)(2). No error was preserved as to the claim that this testimony should have been admitted. Appellant's third point of error is overruled.

## POINT OF ERROR FOUR

In his fourth point of error, appellant asserts that he was denied a fair and impartial trial after the trial court failed to define reasonable doubt during the punishment stage of the trial. The record reflects that appellant neither requested a definition of reasonable doubt be included in the court's punishment charge, nor objected to the absence of the definition.

The Court of Criminal Appeals held that failure to define "reasonable doubt" in the charge at the guilt/innocence phase constitutes "automatic reversible error," whether requested or not. *See Reyes v. State*, 938 S.W.2d 718, 721 (Tex. Crim. App. 1996). However, the Court has also ruled that a reasonable doubt definition need not be given at the punishment phase, absent a request. *See Martinez v. State*, 4 S.W.3d 758 (Tex. Crim. App. 1999); *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999). Accordingly, point of error four is overruled.

## POINT OF ERROR FIVE

In his fifth point of error, appellant states that the court erred in overruling appellant's objection after the prosecutor argued matters outside the record during her final argument in the guilt-innocence stage of trial. The prosecutor's argument proceeded as follows:

> On the day that her husband shoots Glen Baker and she goes in the house to call 911, she decides to tell them she's at the kitchen sink washing dishes. What about all the other calls made to 911? If this horrible thing has happened, a shooting, somebody is bleeding outside and her call is "I'm in the house washing dishes." What about all the other calls to 911, what does that tell you –
>
> DEFENSE COUNSEL: Objection. There's no evidence about any other calls to 911 by Mrs. Fleck.
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> THE COURT: Overruled.

Both the trial counsel and the counsel on appeal misconstrue the statement made by the prosecutor. The record shows that the prosecutor had offered into evidence several 911 calls, one of which was a call made by appellant's wife after the shooting. In her argument leading up to this objection, the prosecutor referenced on several occasions these other 911 calls. It is clear upon a full reading of the record that the "other calls" referred to by the prosecutor were the calls from the tape already in evidence. The reference was not to other calls made by Mrs. Fleck. Because we have found appellant's contention to be without merit, we overrule the fifth point of error.

For the reasons stated in this opinion, the judgment of the trial court is AFFIRMED.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed February 10, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).