Affirmed and Opinion filed May 31, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00912-CR

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EARL RAY BEASLEY, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 797,047

O P I N I O N

Appellant, Earl Ray Beasley, was convicted by a jury of robbery and sentenced to twenty-five years imprisonment and a $5,000.00 fine. In two points of error, he complains that the trial court erred in allowing the State to cross-examine him concerning an unadjudicated, extraneous offense and that the evidence was factually insufficient. We affirm.

I. Background Facts

On November 2, 1998, Hai Van Huynh went to his bank to make a deposit and to get change for a fifty dollar bill. As he was leaving the bank, he noticed appellant approaching him from behind. Huynh tried to re-enter the bank but was prevented from doing so by appellant. Appellant then grabbed Huynh, pushed him around the corner, and told Huynh to give him his money. When Huynh refused, appellant pushed him to the ground and took ten five dollar bills from Huynh's pocket. Appellant began to leave, but then turned around and hold Huynh, "If you move, you cause me any problems, I'm going to kill you." He then took Huynh's wallet and left, heading towards a pickup truck in the parking lot that had two other people waiting inside.

This attack was witnessed by Maricruz Hernandez, who testified at trial and corroborated Huynh's version of events. She also testified that, when she first saw what was happening, she went inside the bank and yelled out that someone was being robbed. Houston Police Officer Keith Dwayne Franklin, working security at the bank that day, went outside with Hernandez. Both testified they saw appellant heading towards the pickup in the parking lot, but when appellant saw Franklin running towards him, he fled on foot. Although Franklin yelled, "Stop, police," appellant refused to do so. After Franklin caught up with appellant and returned him to the crime scene, Huynh and Hernandez identified appellant as the person who robbed Huynh. When appellant was apprehended, he had sixty-six dollars on his person, consisting of ten five dollar bills, a ten, and six ones. In addition, appellant was carrying an altered money order at the time of his arrest.[1]

Appellant testified in his own behalf. During his direct, he testified that three men tried to rob him after he had gone to the bank that day to open an account. Appellant falsely told the

[1] At a pre-trial motion in limine, the trial court ruled that no evidence of the money order could come in during the guilt/innocence phase of the trial.

men he was not carrying any money,[2] whereupon they displayed a firearm to him and told him he had to rob Huynh. Appellant then approached Huynh, explained somebody was trying to rob him, pushed Huynh, and fled. Appellant testified he did not take Huynh's wallet and did not rob Huynh. Appellant testified that he ran away because he was trying to get away from the men who tried to rob him and that he did not realize Officer Franklin was behind him. Appellant further testified that Officer Franklin lied about the amount of money appellant had on his person when he was arrested.

II. Extraneous Offense

In his first point of error, appellant claims the trial court erred by allowing the State to question him about the money order because it amounts to evidence of an extraneous offense. The trial court found appellant "opened the door" to the State's questions by testifying on direct that his "only business" at the bank that day was to open an account. Because we find appellant failed to preserve this error for our review, we overrule appellant's first point of error.

It is fundamental to our jurisprudence that, subject to certain exceptions not relevant here, before one may complain on appeal, he is required to have first preserved that error by the appropriate means at the trial level. When it comes to the admission of extraneous offense evidence, two steps are required. First, the opponent of the evidence should object that the evidence is inadmissible under Rule 404(b), although an objection that the "evidence is not 'relevant,' or that it constitutes an 'extraneous offense' . . . ought ordinarily to be sufficient under the circumstances to apprise the trial court of the nature of the complaint." *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990) (citing *Zillender v. State*, 557 S.W.2d 515 (Tex. Crim. App. 1977)). Second, he must object that, under Rule 403, the probative value of the evidence is substantially outweighed by its unfair prejudice. *Id.* at 388.

[2] Appellant testified he was actually carrying fifty-six dollars on him at the time of his encounter with the three men.

"[A]n objection that proffered evidence amounts to proof of an 'extraneous offense' will no longer suffice, by itself, to invoke a ruling from the trial court whether the evidence, assuming it has relevance apart from character conformity, is nevertheless subject to exclusion on the ground of unfair prejudice. *Further objection based upon Rule 403 is now required*." *Id.* (emphasis added).

Here, appellant failed to preserve error, as the record does not reflect that he made a 403 objection at the time the State questioned appellant about the money order. Instead, appellant's counsel made only a 404(b) objection:

> So I object to [questions about the altered money order] being put in basically since there were no forgery charges. [A neighbor] told him she had given him the money order. She told the police officer she gave him that and she refused to file charges on the money order.

Appellant argues, however, that trial counsel implicitly made a 403 objection in an oral motion in limine heard by the court before voir dire. However, a motion in limine by itself preserves nothing for appellate review. *Hatchett v. State*, 930 S.W.2d 844, 849 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). Thus, error is not preserved where a motion in limine advances one argument why evidence should be excluded and a trial objection advances another.[3] *See, e.g., Willis v. State*, 785 S.W.2d 378, 384 (Tex. Crim. App. 1989) (holding defendant waived error by not making a timely objection to witness's violation of motion in limine); *Romo v. State*, 577 S.W.2d 251, 252 (Tex. Crim. App. 1979) (stating that the purpose of a motion in limine is to allow court to evaluate admissibility of evidence without risk of prejudicing jury); *Roise v. State*, 7 S.W.3d 225, 240 (Tex. App.—Austin 1999, pet. ref'd) (finding defendant waived error where State violated motion in limine, but his untimely objection at trial was only that State violated court's ruling); *Rawlings v. State*, 874 S.W.2d

[3] Even if we were to find error was preserved, given the broad discretion the trial court has on the admission of evidence, we find no reversible error where the evidence was introduced for the purpose of correcting a false impression which bears on appellant's credibility.

740, 742 (Tex. App.—Fort Worth 1994, no pet.) (stating defendant waived error where he failed to state proper grounds for exclusion of evidence at time it was offered, even though defendant had sought exclusion by pre-trial motion in limine). Accordingly, we find appellant has not preserved this complaint for our review. Appellant's first point of error is overruled.

III. Sufficiency of the Evidence

In his second point of error, appellant argues that the evidence is factually insufficient. Specifically, he contends that because the complaining witness is Vietnamese and has difficulty communicating in the English language, the evidence was factually insufficient to support a finding that Huynh understood appellant when appellant threatened to kill Huynh. We disagree.

Evidence may be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)). Here, appellant maintains the former, *i.e.*, that the evidence is so weak as to be clearly wrong or manifestly unjust.

In considering a factual sufficiency challenge, "a complete and detailed examination of all the relevant evidence is required." *Johnson*, 23 S.W.3d at 12. The review must employ the appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder, and any evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *Jones v. State*, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996). If, however, the reviewing court has determined a manifest injustice has occurred, thereby making it improper to defer to the fact finder's decision, then it must provide a clearly detailed explanation of that determination that takes all of the relevant evidence into consideration. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). "This high degree of specificity acts as a check upon the reviewing court and prevents it from substituting its judgment for that of the jury." *Johnson*, 23 S.W.3d at 12

(citing *Clewis*, 922 S.W.2d at 135).

As noted previously, the only element of the offense appellant contends the State did not prove beyond a reasonable doubt was appellant's alleged threat.[4] Specifically, appellant argues Huynh did not understand appellant when he told Huynh, "I'm going to kill you," as the State alleged in the indictment. In support of this argument, appellant notes that Huynh testified (1) through an interpreter; (2) that he feels more comfortable speaking Vietnamese than English; and (3) that he does not understand very much English.

The evidence is not, however, so obviously "weak as to be clearly wrong and manifestly unjust . . . ." *See Johnson*, 23 S.W.3d at 11. Notwithstanding appellant's characterization of Huynh's testimony, Huynh also testified that he has lived in the United States for twenty-four years and understood some English. As to the fact that he spoke only "some" English, he was unimpeached as to the most important words on this point, *i.e.*, whether he understood the words appellant spoke to him.[5] Accordingly, the jury, as the judge of the credibility of the witness' testimony, was entitled to believe that Huynh understood these words. And, given the lack of evidence to the contrary, we find the evidence sufficient to sustain appellant's conviction. Appellant's second point of error is overruled.

Affirmed.

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[4] The indictment in the instant case alleged in pertinent part that:

> [Appellant] . . . while in the course of committing theft of property owned by Hai Huynh . . . and with intent to obtain and maintain control of the property, intentionally and knowingly threaten[ed] and place[ed Huynh] in fear of imminent bodily injury and death, by threatening to kill [Huynh].

[5] Appellant spends some time arguing that Huynh appeared coached, asserting that it seems unlikely a robbery would begin, as Huynh testified it did, by appellant asking Huynh how Huynh knew appellant was following him and that most of appellant's answers on direct are short, but that his answer concerning the threat was long. These suggestions, however, are quintessentially matters left to the jury. There is no way for this or any other court, looking at a cold record, to determine whether a witness appeared coached. *See, e.g., Stewart v. State*, 995 S.W.2d 187, 189 (Tex. App.—Fort Worth 1999, pet. ref'd) (stating whether a child witness appeared coached raised a question peculiarly situated for the jury to resolve).

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed May 31, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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