Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00805-CR

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REGINALD KEITH NIX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 751,207

O P I N I O N

Over his plea of not guilty, a jury found Reginald Keith Nix guilty of theft of property valued between $1,500 and $20,000. *See* TEX. PEN. CODE ANN. § 31.03 (Vernon 1994 & Supp. 1999). The jury assessed punishment at two years imprisonment in the Texas Department of Criminal Justice, State Jail Division. The trial court probated Nix's sentence for five years. He appeals on eight points of error. We affirm the trial court judgment.

THE CONTROVERSY

On January 14, 1997, John Michael Love left his laptop computer unattended in a second floor room, in the library, at the South Texas College of Law. When Love returned to retrieve his computer, he could not find it. That same day, Nix signed into the school's guest book in order to visit the library. On January 15, Nix pawned Love's laptop computer at a Houston pawn shop. Nix told the pawn shop that the laptop computer belonged to his law firm. Nix received a receipt from the pawn shop.

On January 25, 1997, Simon Purnell left his laptop computer unattended, as Love had one, in the same second floor room, in the library, at the South Texas College of Law as Love. When he returned to the room, Purnell could not find his computer. On that same day, Nix again signed the law school's guest book to visit the library. Also on that same day, Nix pawned Purnell's laptop computer to the same pawn shop where he had taken Love's laptop computer. Again, Nix told the pawn shop that the computer belonged to his law firm and received a receipt from the pawn shop.

On January 31, 1997, Officer John J. Hoffman of the Harris County Sheriff's Department was working as a security guard at South Texas College of Law. On that day, Nix arrived and signed the guest book located in the law school foyer in order to visit the law school library. When he signed into the guest book, Hoffman learned that Nix was an attorney. After Nix signed the guest book, he walked in the direction of the law school library. Later that same day, Hoffman went up to the second floor of the library and saw Nix. Hoffman asked Nix what he was doing. Nix informed Hoffman that he was checking on some information about continuing legal education classes. Hoffman told Nix that the continuing legal information was located on the first floor. Hoffman escorted Nix back to the first floor and told him to check with the front desk to find out where things were located in the law school.

On February 11, 1997, Hoffman learned that there was a warrant out for Nix's arrest. Hoffman asked another Harris County Sheriff, Joe Ruffino, about the warrant. Ruffino confirmed that there was a warrant out for Nix's arrest. Ruffino, a process server for the 176th District Court of Harris County, arrested Nix when he arrived at the 176th District Court. An

inventory of Nix's possessions at the time of arrest revealed that he was in the possession of a lady's watch. Nix told Ruffino to throw the watch away because it did not work. Ruffino also found several pawn shop receipts in Nix's wallet. Nix told Ruffino that the tickets could also be thrown away. Ruffino did not dispose of the watch or the tickets.

On February 12, 1997, Houston Police Department Officer Paul Dermody, the officer investigating the theft of property from South Texas College of Law, took the watch and pawn tickets from Nix's property. Dermody went to the pawn shop and learned that the tickets corresponded to a desk lamp, a brown leather jacket, an electric typewriter, an equalizer for a stereo, a portable compact disc player, and a computer. At the pawn shop, Dermody observed both Purnell and Love's laptop computers. The pawn slips for the two laptop computers revealed that they had been pawned by Nix.

On July 3, 1997, a jury convicted Nix of the theft of Purnell's laptop computer. He appeals this conviction on eight points of error.

DISCUSSION AND HOLDINGS

In his first point of error, Nix contends the District Court abused its discretion in admitting the extraneous offense involving the theft of Love's computer. Nix argues that the admission of the theft of Love's computer was a violation of Rule 404(b) of the Texas Rules of Evidence. We disagree. The Texas Penal Code provides that in trials for theft "evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty." TEX. PEN. CODE ANN. § 31.03(c)(1) (Vernon Supp. 1999). In cases of theft, this statute controls over the general rule of evidence. *See Ballard v. State*, 945 S.W.2d 902, 904 (Tex. App.—Beaumont 1997, no pet.).

In this cause, appellant pleaded not guilty to committing this offense. He, thus, raised the issue of intent. The testimony about the theft of Love's computer was sufficiently similar

to be admissible on this issue. The evidence was introduced to show that appellant had the intent to deprive Purnell of his property. Thus, the theft of Love's computer was admissible to show intent. We overrule appellant's first point of error.

In his second point of error, Nix contends the district court abused its discretion in admitting the extraneous offense involving the theft of Love's computer pursuant to Rule 403 of the Texas Rules of Evidence. Once the trial court finds extraneous offense evidence relevant under rule 404(b), it has ruled on the full extent of rule 404(b) objection. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997); *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990). If the appellant wishes the trial court to weigh the probative and prejudicial value of the evidence under rule 403, he must so object. *See Santellan*, 939 S.W.2d at 169. Appellant made this objection.

"If the opponent makes the Rule 403 objection, the trial judge must weigh the probativeness of the evidence to see if it is *substantially* outweighed by its potential for *unfair* prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence." *Id*. Several factors the trial court should consider in making this determination are as follows:

> (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable—a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;
>
> (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way";
>
> (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

Id. An appellate court will only reverse the trial court's decision upon a clear abuse of discretion. *See id*. However, the trial court's decision must be reasonable in light of all the relevant facts. *See id*.

In this case, the trial court did not abuse its discretion by allowing this evidence to be admitted over an objection under rule 403. An analysis of the above factors proves as much. We have previously determined that the extraneous offense served to make a fact of consequence, namely appellant's intent, more probable. This evidence did not have the potential to impress the jury in an irrational way. The State did not take an undue amount of time in developing this evidence, thus the jury was not distracted from the consideration of the indicted offense. And, lastly due to the nature of the offense and the lack of eyewitness testimony, the State had to rely on circumstantial evidence to prove the offense. The State needed to prove appellant's intent as an element of the offense. The State did not appear to have another way to prove this offense or the elements of the offense. In light of these factors, the trial court did not abuse its discretion in allowing the extraneous offenses into evidence over appellant's rule 403 objection. We, therefore, overrule appellant's second point of error.

In his third point of error, appellant contends the district court erred in denying his motion to suppress in violation of Article One, Section Nine of the Texas Constitution, because he was illegally arrested under a defective capias. Nix argues the capias did not comply with the requirements of article 23.02 of the Texas Code of Criminal Procedure because it did not specify the offense of which he was accused and was not officially attested. We disagree.

Before trial, appellant filed a motion to suppress his arrest by alleging that the capias issued in connection with the State's motion to adjudicate guilt in cause # 722954 was "defective in that it did not comply with article 23.02 of the Texas Code of Criminal Procedure." Appellant argues that it did not specify the offense for which he was accused and it was not officially attested. A simple reading of the capias negates these arguments.

First, the capias stated that appellant should be arrested,

THEN AND THERE TO ANSWER THE STATE OF TEXAS UPON
MOTION TO ADJUDICATE GUILT
UPON ORDER FOR PROBATION AND DEFERMENT OF ADJUDICATION
OF GUILT FOR THE OFFENSE OF THEFT

Appellant argues that a motion to adjudicate guilt is not a violation of the penal code. While appellant's argument is true, he was not being arrested for that violation, he was being arrested for his previous offense of theft. The capias stated the offense for which appellant was being arrested—the offense of theft. Thus, we find the capias complied with the requirement of the article 23.02 of the Texas Code of Criminal Procedure. Second, an inspection of the capias reveals that it was attested. In short, the capias complied with the requirements of article 23.02, and we overrule appellant's third point of error.

In his fourth point of error, appellant contends the district court erred in denying his motion to suppress his oral statements in violation of the Texas Constitution and the Texas Code of Criminal Procedure. Appellant argues that his statement to Ruffino should have been suppressed as the result of an indirect custodial interrogation. We disagree.

In reviewing a trial court's ruling, an appellate court must determine the applicable standard of review. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). "The amount of deference a reviewing court affords to a trial court's ruling on a 'mixed question of law and fact' (such as the issue of probable cause) often is determined by which judicial actor is in a better position to decide the issue." *Id*. If the issue involves a witness' credibility and demeanor, compelling reasons exist for allowing the trial court to apply the law to the facts. *See id*. Thus, when the issue turns on the credibility and demeanor of a witness, the proper standard of review is the abuse of discretion standard. *See id*. at 89.

When Ruffino was inventorying appellant's property, appellant made several unsolicited comments.

> Q: Let me direct your attention to a point in time when you were placing him under arrest when you were inventorying his property and receiving some pawn slips, if you would.

You stated earlier that after you got those pawn slips you asked him a question; is that correct?

MR. HUGHES: We object to leading, Your Honor.

THE COURT: Your objection is overruled.

By MR. LAMBRIGHT:

Q: Without telling us what the question is, You asked him a question; is that correct?

A: I did.

Q: And did he respond to that question?

A: He did.

Q: And after he responded to that question did he make any unsolicited statement to you?

A: He did.

MR. HUGHES: Objection, asked and answered.

THE COURT: Overruled.

BY Mr. LAMBRIGHT:

Q: And would you tell us, if you would, what the unsolicited statement was that he made to you concerning the pawn tickets?

MR. HUGHES: Same objection, also Your Honor, and also custodial.

THE COURT: Your objection is overruled.

THE WITNESS: That the pawn tickets could be—

THE COURT: Okay, just answer only his question. Don't explain it or anything. I am sorry.

THE WITNESS: That the pawn tickets could be discarded.

The case law is clear that questioning that is normally attendant to an arrest and custody is not interrogation. *See McCambridge v. State*, 712 S.W.2d 499, 505 (Tex. Crim. App. 1986) (citing *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)); *Cruse v. State*, 882 S.W.2d 50, 51 (Tex. App.—Houston [14th Dist.] 1994, no pet.). At the time appellant made his comments, Ruffino had questioned him while inventorying his property. Ruffino's question and actions were not part of a custodial interrogation but rather were attendant to appellant's arrest. The Texas Code of Criminal Procedure states that appellant's comment was admissible. "A statement of an accused may be used in evidence

against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 1979). Additionally, section five of article 38.22 states:

> Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, . . . or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

TEX. CODE CRIM. P. ANN. art. 38.22, § 5 (Vernon 1979).

Thus, because appellant's comment was admissible as a voluntary statement that was not the result of a custodial interrogation, the trial court did not abuse its discretion when it denied appellant's motion to suppress. We, therefore, overrule appellant's fourth point of error.

In his fifth and sixth points of error, appellant contends the district court erred by denying his motion to suppress, in violation of both the United States and Texas Constitutions as well as the Texas Code of Criminal Procedure, as to the warrantless search and seizure of his property. Appellant argues that the search was not pursuant "to a valid impoundment and inventory." He also argues that "the search of the wallet was an improper search of a closed container." We disagree.

> Both under the Fourth Amendment to the United States Constitution and under Art. I, Section 9 of the Texas Constitution, searches of a person and the area within his immediate control are excepted from the requirement of a warrant when incident to the lawful arrest of such person and otherwise proper in scope.

Rogers v. State, 774 S.W.2d 247, 264 (Tex. Crim. App. 1989); *see Simpson v. State*, 886 S.W.2d 449, 454 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Wallets are an item that are in the person's immediate control and thus could be searched pursuant to this exception to the warrant requirement. *See Stewart v. State*, 611 S.W.2d 434, 437 (Tex. Crim. App. 1981). Thus, the trial court did not err when it denied appellant's motion to suppress. We, therefore, overrule appellant's fifth and sixth points of error.

In his seventh point of error, appellant contends the trial court erred in granting the State's motion to cumulate sentences. In the present case, appellant's punishment was assessed at two years confinement in a state jail, which was probated for five years. The trial court ordered that the sentence in this case would run once appellant had completed his punishment under a different cause number. In the different cause number, the trial court had revoked appellant's deferred adjudication probation and sentenced appellant to one year in the Harris County jail. According to the Texas Code of Criminal Procedure, the trial court could order one sentence to begin after the completion of the other sentence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 1999). Thus, the trial court's actions were proper. We, therefore, overrule appellant's seventh point of error.

In his eighth point of error, appellant contends that there is legally insufficient evidence to support his conviction as the State failed to rebut the appellant's explanation of his possession of recently stolen property. Appellant argues that since he presented an explanation for his possession of stolen property, it is incumbent on the State to refute his explanation. *See Smith v. State*, 518 S.W.2d 823, 824 (Tex. Crim. App. 1975). We disagree.

When reviewing the legal sufficiency of the evidence, this court must decide "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not re-evaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Appellant's reliance on *Smith* is misplaced. In *Smith*, the State's only evidence that appellant was guilty of theft was the fact that he possessed the stolen item. *See Smith*, 518 S.W.2d at 824. Thus, the Texas Court of Criminal Appeals concluded that the State needed to

show more than mere possession of the stolen property once appellant had offered a reasonable explanation for his possession of the stolen good. *See id.* at 824-25. In the present case, the State has refuted appellant's explanation with the other evidence in the record.

The evidence shows that appellant was at the South Texas College of Law at the time Purnell's computer was missing. Appellant pawned Purnell's laptop computer within hours of its disappearance. Appellant was also present at the law school when another laptop computer (Love's) was stolen. He also pawned that computer within hours of its disappearance. Six days later, appellant was found wandering around the second floor near the location where these two computers had been stolen. He claimed to be looking for some information that was available on the first floor at the entrance desk. However, appellant would argue that his explanation that he thought the laptop computer he pawned, within hours of its theft, belonged to his law firm was sufficient to negate the State's evidence. We disagree. The jury was free to believe this explanation or not believe it; obviously, it found the State's evidence more persuasive. After viewing the evidence in the light most favorable to the prosecution, we conclude that the State presented sufficient evidence, so that any rational trier of fact could have found the essential elements of the crime of theft beyond a reasonable doubt. We, therefore, overrule appellant's eighth point of error and affirm the judgment of the trial court.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 7, 1999.
Panel consists of Justices Yates, Fowler and Sears.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Ross Sears sitting by assignment.