Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00274-CR

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JOSEPH JAMES ELLIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 750,501

O P I N I O N

Appellant, Joseph James Ellis, was arrested and charged with delivery and possession of cocaine.[1] He was acquitted by a jury of delivery, but convicted of possession. Appellant's request for a new trial was granted. At a second trial, appellant was convicted of the state jail felony of possession of less than one ounce of cocaine. The jury found the enhancement

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[1] The record indicates appellant was arrested because he matched the description of an individual who, moments before, had participated in a narcotics transaction with an undercover police officer. Appellant does not contest the propriety of his arrest or the subsequent search of his person.

allegations to be true, and assessed his punishment at confinement in the state penitentiary for a term of forty years. We affirm.

Enhancement

In his first point of error appellant contends his forty-year sentence was improperly enhanced with a prior California conviction. Appellant was convicted of a state jail felony, which ordinarily carries a maximum penalty of "confinement in a state jail for any term of not more than two years or less than 180 days." TEX. PEN. CODE ANN. § 12.35(a) (Vernon 1994). However, a person convicted of a state jail felony:

> . . . shall be punished for a third degree felony if it is shown on the trial of the offense that . . . [he] has previously been finally convicted of any felony . . . for which the judgment contains an affirmative finding [that the defendant used or exhibited a deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited] under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure."

TEX. PEN. CODE ANN. § 12.35 (c)(2)(B)(Vernon1998).

The California judgment at issue declares that appellant was "found guilty in this court of the crime of assault with a deadly weapon (sec 245a PC)." The offense is defined under California law as "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury." CAL. PENAL CODE § 245(a)(1) (West 1998).[2]

In Texas, we define "deadly weapon" to mean "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07 (Vernon 1994).

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[2] The statute's firearm exception does not exempt a firearm from deadly weapon status; rather, the statute provides an enhanced punishment for the use of a firearm under § 245(a)(1).

We find the two definitions are formally equivalent. Both focus on the effect of the criminal act; Texas using the phrase "serious bodily injury" and California using "great bodily injury." If anything, the California statute is more restrictive in scope because it specifies that the use of the weapon must be "likely to" cause great bodily injury, while the Texas statute only requires that the use be "capable of" causing serious bodily injury. Thus, anything classified by its manner of use as a deadly weapon in California would also be properly classified as a deadly weapon in Texas under § 1.07 of the Texas Penal Code.

Where a defendant has been found guilty of a charge in which a deadly weapon has been specifically alleged, the verdict itself is an affirmative finding that the defendant used or exhibited a deadly weapon. *See Polk v. State*, 693 S.W.2d 391, 396 (Tex. Crim. App. 1985). Since Appellant has previously been finally convicted of a felony whose judgment contains an affirmative finding that the defendant used or exhibited a deadly weapon, he was properly sentenced under TEX. PEN. CODE ANN. § 12.35 (c)(2)(B). Appellant's first point of error is overruled.

Collateral Estoppel

In his second point of error, appellant contends the admission of his testimony from the first trial violated the doctrine of collateral estoppel. Appellant was previously charged with two counts of delivery of a controlled substance and one count of possession of a controlled substance. He was acquitted of both delivery charges, but convicted of possession. His motion for a new trial was granted. During the second trial, the State offered a transcript of a portion of appellant's testimony from the first trial in which he admitted being in possession of cocaine.

The former testimony proffered by the State was as follows:

> QUESTION: State your name.
>
> ANSWER: Joseph James Ellis

> QUESTION: Did you have some drugs on you before you ever went to the fourth Ward?
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> ANSWER: Yes, sir. I had two dime rocks.
>
> QUESTION: Are those the two dime rocks that you purchased approximately 10 to 15 minutes before they [the police] arrived?
>
> ANSWER: Yes, sir.

Collateral estoppel is closely related to the Fifth Amendment guarantee against double jeopardy. The doctrine stands for an extremely important principle in our adversary system of justice – when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *See Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As a general rule, a defendant may assert the doctrine of collateral estoppel to preclude the relitigation of a particular fact in a criminal proceeding. *See State v. Aguilar*, 947 S.W.2d 257, 259 (Tex. Crim. App.1997); *Ex parte Gregerman*, 974 S.W.2d 800, 803 (Tex. App.–Houston [14th Dist.] 1998, no pet.). In *Ashe*, for example, the defendant had been acquitted of armed robbery of a poker player because there was not enough evidence to establish identity. The same defendant was prosecuted a second time for the armed robbery of a different poker player at the same game. Thus, the prosecution was precluded in the second case because an ultimate issue of fact, i.e., whether Ashe was one of the robbers at the poker game, had been previously litigated in the first and resolved against the prosecution.

Here, however, the State did not try to relitigate the issue of delivery; rather, the State litigated the issue of possession. To be guilty of delivery of a controlled substance, the jury must find the defendant intentionally and knowingly manufactured, delivered, or possessed *with the intent* to manufacture or deliver a controlled substance in Penalty Group 1 (such as cocaine) of less than one gram. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(b) (Vernon Supp.1998) (emphasis added). To be guilty of possession of a controlled substance, the jury must find the defendant intentionally and knowingly possessed a controlled substance

listed in Penalty Group 1 (such as cocaine) of less than one gram. *See* TEX.. HEALTH & SAFETY CODE ANN. § 481.115(b) (Vernon Supp.1998). Thus, the ultimate issues involved in the delivery charges are distinct from those involved in possession.

Appellant's acquittal of delivery charges in no way settles the issue of whether or not appellant possessed a controlled substance, it settles only the ultimate issue of whether or not appellant possessed a controlled substance *with the intent* to manufacture or deliver it. Since the issue of ultimate fact had not been previously determined against the State, collateral estoppel is not raised. Appellant's second point of error is overruled.

Optional Completeness

As we have previously noted, the State, over defense objections, had a portion of appellant's testimony from a prior trial on the same charge admitted into evidence. In his third point of error, appellant claims the trial court erred in refusing to admit the remainder of appellant's previous testimony under the rule of optional completeness.

Under the rule of optional completeness, if one party introduces part of a statement, the opposing party may introduce as much of the remainder as necessary to explain the first part.[3] The rule is based on two considerations: (1) the danger that material may be made misleading by being taken out of context, and (2) the inadequacy of delayed repair. *See Jones v. Colley*, 820 S.W.2d 863, 867 (Tex. App.–Texarkana 1991, writ denied) (citing Wellborn,

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[3] Rule 107 provides:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration, conversation, writing or recorded statement is given in evidence, any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence. "Writing or recorded statement" includes depositions.

TEX. R.CRIM. EVID. 107

Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence: Applicability of the Rules, Procedural Matters, and Preserving Error, 18 ST. MARY'S L.J. 1165, 1194-95 (1987).

Appellant objected to the *admission* of the testimony, going so far as to note the excerpt could be taken out of context. Appellant, after being overruled as to the admissibility of the excerpt, never offered the remainder of the prior testimony. Appellant cannot complain of not being allowed to admit evidence he never asked be introduced. *See Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (saying that all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it). Moreover, appellant has made no attempt to show the trial court or this court what the remainder of the prior testimony would have been, and what harm has flowed from its exclusion. Accordingly, appellant's third point of error is overruled.

Notice of Extraneous Offense Evidence

In his fourth point of error, appellant characterizes his testimony from the previous trial as evidence of an extraneous offense and contends the State failed to give proper notice, as required by TEX. R. EVID. 404(b), of its intent to offer evidence of an extraneous offense. The rule, however, plainly exempts evidence arising in the same transaction from the requirements of notice. *See* TEX. R. EVID. 404(b) (saying that "[e]vidence of *other* crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith") (emphasis added). The testimony that appellant had "two dime rocks" on him was a judicial admission of the offense for which he was on trial. The testimony did not relate to an extraneous offense. Appellant's fourth point of error is overruled.

Admission of Extraneous Offense Evidence

In his last point of error, appellant contends the trial court abused its discretion in admitting evidence of an extraneous offense. As we have noted in our discussion of the preceding point of error, the evidence did not relate to an extraneous offense. Appellant's final point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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