Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01081-CR

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JOHNNY ALVIN COOK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174TH District Court
Harris County, Texas
Trial Court Cause No. 741,131

O P I N I O N

Johnny Alvin Cook appeals a conviction for murder on the grounds that the trial court erred in: (1) allowing the State to impeach him with two prior convictions; (2) admitting extraneous offense evidence; and (3) excluding evidence of the criminal record of the complainant. We affirm.

Standard of Review

A trial court's evidentiary rulings are reviewed on appeal for abuse of discretion. *See Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998). A trial court abuses its discretion where its decision is outside the zone of reasonable disagreement. *See, e.g., Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998), *cert. denied*, ___ S.Ct. ___ (1999).

If the record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *See* TEX. R. APP. P. 44.2. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. *See id.*; TEX. R. EVID. 103(a). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

Prior Convictions

The first of appellant's three points of error argues that his two prior convictions for unlawfully carrying a weapon could not be used to impeach him because they were neither felonies nor crimes of moral turpitude.

In order to preserve a complaint for appellate review, a party must make a timely request, objection, or motion stating specific grounds for the ruling he desires the trial judge to make, unless the specific grounds were apparent from the context. *See* TEX. R. APP. P. 33.1; TEX. R. EVID. 103(a). In addition, to be preserved, a complaint on appeal must comport with the objection made at trial. *See Trevino v. State*, 991 S.W.2d 849, 854-55 (Tex. Crim. App. 1999).

In this case, when the State began questioning appellant at trial concerning his prior convictions, appellant's counsel objected: "I object under 609(b). It's not impeachable. 1974." This objection was sustained. As the State continued questioning appellant about more recent convictions, appellant's counsel merely objected, if at all, "Objection, your honor." After three such objections were overruled, appellant's counsel asked, "May I have a running objection to all of these under 609?" The trial

court replied, "You may," and appellant made no further objections to questions concerning his prior convictions.

Under rule 609, evidence that a witness has been convicted of a crime is admissible to attack his credibility if the crime was a felony or involved moral turpitude, and the court determines the probative value of admitting this evidence outweighs it prejudicial effect to a party. *See* TEX. R. EVID. 609(a). However, evidence of such a conviction is generally not admissible if: (a) more than 10 years has elapsed from the later of the date of conviction or release of the witness from confinement for it; (b) the conviction has been the subject of a pardon or the like; (c) the witness has successfully completed probation for the crime; (d) the conviction was for a juvenile adjudication; (e) an appeal of the conviction is pending; or (f) the proponent failed, upon proper request, to provide advance written notice of intent to use the evidence. *See id*. 609(b)-(f). Therefore, an objection can potentially be made under rule 609 for any of the following reasons: (1) the crime was not a felony or one involving moral turpitude; (2) the probative value of admitting the conviction does not outweigh its prejudicial effect; (3) the conviction is more than ten years old; (4) the conviction was the subject of a pardon or the like; (5) the witness has successfully completed probation for the conviction; (6) the conviction was for a juvenile adjudication; (7) an appeal of the conviction is pending; or (8) the proponent, upon request, did not provide the required notice of his intent to use the prior conviction. *See id*.

In this case, three of appellant's four overruled objections stated no ground, and the remaining one referred only to rule 609 generally. Even if, based on the context, rule 609 were regarded to be the basis for all four objections, the objections would still not have advised the trial court of which of the foregoing rule 609 grounds were specifically being relied upon. This would have left the trial court to attempt to recall all of the potential grounds under rule 609, speculate as to which were intended, and, if any but not all were meritorious, to give one side the benefit of the doubt as to whether a valid ground would be deemed to have been invoked. Contrary to the rules requiring the specific grounds for an objection to be stated, such an objection does not fairly present a particular ground to the trial court or enable us to determine whether its ruling thereon was correct or erroneous. Therefore, this point of error presents nothing for our review.

Even if a complaint had been preserved, any error would be reversible only if it affected a substantial right. *See* TEX. R. APP. P. 44.2(b); TEX. R. EVID. 103(a). In this case, besides the weapons convictions, appellant admitted to having several other prior felony convictions for robbery, aggravated robbery, unauthorized use of a motor vehicle, forgery, credit card abuse, possession of a controlled substance, and possession of cocaine.[1] In addition, appellant admitted other convictions for non-felonies, including burglary of a habitation and burglary of a building, neither of which has been held to involve moral turpitude.[2] In light of the impeachment effect of the numerous other prior convictions, any error from admission of the two weapons convictions would not have affected a substantial right.[3] Accordingly, appellant's first point of error is overruled.

Extraneous Offense Evidence

Appellant's second point of error argues that the trial court erroneously admitted the following extraneous offense evidence:

> THE STATE: How do you know the defendant Johnny Cook?
>
> HARDAGE: By – by getting dope from him, selling cocaine and stuff.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.

During the bench conference that followed this objection, the following exchange occurred:

> [DEFENSE COUNSEL]: This is improper extraneous 404(b) material. The State has talked with this witness before and should have admonished him not to testify about any extraneous.
>
> THE STATE: The evidence is going to be he had smoked crack with the defendant prior to the defendant using the truck and I think that's evidence with the same transaction. It goes to his state of mind –

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1 *See* TEX. PEN. CODE ANN. §§ 29.02, 29.03, 31.07 (Vernon 1994) (robbery, aggravated robbery, and unauthorized use of a motor vehicle), § 32.21 (Vernon 1994 Supp. 1999) (forgery), § 32.31 (Vernon 1994) (credit card abuse); TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon Supp. 1999) (possession of a controlled substance and cocaine).

2 *See* TEX. PEN. CODE ANN. § 30.02 (Vernon Supp. 1998) (burglary of a habitation and building).

3 *See Graham v. State*, 546 S.W.2d 605, 609 (Tex. Crim. App. 1977) (finding that improper question concerning an arrest was not reversible error where defendant had already been impeached by a number of other prior convictions).

[DEFENSE COUNSEL]: Still say prior –

THE STATE: – as far as any priors.

THE COURT: Let's get to the point. And if you're opening up the door they're going to do it, too. Let's get to the questions and get on down the road.

To preserve an issue for appellate review, the complaining party must not only make a timely request, objection, or motion, but must also obtain a ruling on it, either expressly or impliedly, or a refusal to rule, and then object to such refusal. *See* TEX. R. APP. P. 33.1(a)(2). In this case, after objecting to the complained of extraneous offense, appellant failed to obtain either an express or implied ruling or a refusal to rule from the trial court.

In addition, a complaint regarding the admission of evidence is not preserved if the same evidence is introduced elsewhere without objection. *See, e.g., Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999). In this case, after the complained of evidence was admitted, the following evidence of appellant's involvement in drug activities with Hardage was admitted without objection:

THE STATE: Sometime that day, did you let him borrow your truck?

HARDAGE: Yes, ma'am. He was using my truck. He was giving me cocaine for using my truck.

THE STATE: You would allow him to use your truck, in exchange he would give you cocaine?

HARDAGE: Yes, ma'am.

* * * *

THE STATE: You said you smoked cocaine with [appellant]?

HARDAGE: [Appellant] and girl Hollywood.

Finally, the admission of the complained of extraneous offense evidence did not affect a substantial right in light of the abundant evidence, discussed above, concerning appellant's prior convictions. Therefore, appellant's second point of error is overruled.

Criminal Record of Complainant

Appellant's third point of error argues that the trial court erred in excluding an exhibit listing the complainant's criminal record. Appellant contends that the offenses reflected in this exhibit for carrying a

weapon, assault, aggravated assault on a police officer, and aggravated robbery showed the complainant's violent character and thereby supported appellant's claim of self-defense in showing: (a) the reasonableness of his apprehension of danger, and (b) the likelihood that the complainant was the first aggressor.

Where an exhibit contains both admissible and inadmissible evidence, its exclusion from evidence is not error unless the offering party separated the inadmissible portion and offered only the admissible portion. *See Garcia v. State*, 887 S.W.2d 862, 874 n.6 (Tex. Crim. App. 1994); *Jones v. State*, 843 S.W.2d 487, 493 (Tex. Crim. App. 1992). In this case, the excluded exhibit listed seventeen offenses of which seven were for prostitution, three were for evading arrest, and two were for reckless conduct. Appellant offered the exhibit in its entirety, the State objected to it on relevance grounds, appellant made no attempt to limit its offer of the exhibit, and the trial court sustained the State's objection. On appeal, appellant does not explain how the convictions reflected in the exhibit for prostitution, evading arrest, or reckless conduct were probative of the violent character of the complainant or otherwise. Because the exhibit was offered in its entirety but contains portions that appellant has not shown to be admissible, this point of error fails to demonstrate that exclusion of the entire exhibit was error. Accordingly, point of error three is overruled, and

the judgment of the trial court is affirmed.

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Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig (Justice Wittig concurs in result only).

Do not publish — TEX. R. APP. P. 47.3(b).