Opinion issued March 15, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01041-CR

HOWARD RANDALL WEBB, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Case No. 15,794 Ct. V

MEMORANDUM OPINION

The jury convicted appellant Howard Randall Webb of burglary and found two enhancement paragraphs "true" for prior burglary convictions. *See* TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2011) (burglary of habitation). The jury assessed punishment at 99 years' imprisonment. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2011). Webb brings three issues, contending the trial court erred in admitting evidence of extraneous offenses (issues one and two) and allowing venire members to see Webb being escorted outside the courtroom in the custody of law enforcement personnel (issue three). We affirm.

Background

Washington County deputy sheriffs stopped Webb's car because it matched the description of a vehicle thought to be connected with a number of recent burglaries. When the deputies asked Webb for identification, he sped away and was eventually arrested after a high-speed chase. The deputies searched Webb's car and found a large amount of jewelry and a walkie-talkie radio. A subsequent arrest of Ian Gallegos by a Brenham police officer also discovered stolen jewelry and a radio that matched the one found in Webb's car.

Indicted for five burglaries and evading arrest, the State tried Webb under the law of parties for only the burglary of a habitation owned by Gary Wayne Merkel.

Discussion

Webb's first issue contends the trial court erred in admitting evidence of an unrelated burglary. Webb objected under Texas Rule of Evidence 404(b), and the State responded initially that the unrelated burglary was offered as proof of a common plan or scheme. However, before the court ruled, the State said the evidence was offered as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake." The trial court overruled Webb's objection but granted his request for limiting instructions that the jury (1) consider the evidence only if it found that Webb committed the extraneous offense and (2) not consider the evidence to prove Webb's character. Thereafter, the State asked a victim of a separate burglary if she recognized photos of two rings that were found in Webb's car, and she acknowledged that the rings were hers and were taken from her house without her permission.

On appeal, Webb challenges the admission of this extraneous burglary on the basis of the State's original argument for admissibility—that the evidence was a part of a common plan or scheme. Webb does not substantively address in his appellate brief why none of the later reasons given by the State—on which the trial court explicitly based its ruling before allowing the victim's testimony—is an insufficient basis to uphold the admission of the extraneous offense. *See* TEX. R. APP. P. 38.1(i) (requiring brief to contain clear and concise argument for contentions made, with appropriate citations to authorities and record). In particular, on appeal the State maintains the evidence was admissible to prove Webb's intent to commit theft. Webb has not contested all the possible bases for the trial court's ruling and therefore has not demonstrated that it erred in admitting the evidence.

We overrule issue one.

In issue two, Webb contends the trial court erred in admitting evidence of an unrelated burglary because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. Assuming—without deciding—that the extraneous-offense evidence posed some danger of unfair prejudice, we must consider the trial court's limiting instructions. An "impermissible inference of character conformity can be minimized through a limiting instruction." *Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996). On appeal, Webb's argument on issue two neither addresses the fact that the trial court granted his request for limiting instructions to the jury, nor explains why the limiting instructions were ineffective.

We overrule issue two.

In his final issue, Webb contends the trial court erred in denying his motions for dismissal of the venire panel and for a mistrial after he was seen by venire members being escorted by a deputy sheriff after a lunch break. At that time Webb was neither restrained nor in "jail garb," and the deputy was walking three or four paces behind him.

Webb identified two venire members who saw him, neither of whom was seated as a juror. The trial court examined both venire members, and each said he or she was not influenced by observing Webb with the deputy and did not discuss the matter with any other venire member. Webb claims that other venire members saw him, but he did not attempt to question any other members[1] and did not otherwise object to the jury that was seated. We hold that the appellate record does not demonstrate any harm to Webb.

We overrule issue three.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Keyes, Bland, and Sharp.

Do not publish. TEX. R. APP. P. 47.2(b).

[1] On appeal Webb states that "the trial court made no attempt to find out who all the additional panel members were who saw this incident, and what effect this event may have had on their ability to be fair and impartial." This was Webb's burden, not the trial court's.