

Affirmed and Memorandum Opinion filed June 29, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00171-CR

KRISTIEN JAMARLE CAREY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1131861**

M E M O R A N D U M O P I N I O N

Appellant Kristien Jamarle Carey appeals his conviction for aggravated robbery claiming the trial court erred in admitting irrelevant evidence. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 30, 2006, Jon Tong and Ryan Stanhope were working at a convenience store. Tong was outside draining a cooler and followed two men into the store. When he walked into the store Tong saw the same two men robbing Stanhope; one man was pointing a gun at Stanhope while the other held a bag. Stanhope opened the cash register and gave the men the contents. The man holding the bag repeatedly told the

man holding the gun to shoot Stanhope. Tong identified appellant as the man who held the bag.

Tong and Stanhope called the police, who responded and began searching for the robbers. The police officers apprehended two men matching the description of the robbers and brought them back to the store to be identified. Tong positively identified appellant, both in the store and later in court, as the man who was holding the bag during the robbery. Stanhope was initially unable to identify appellant at the store, but after hearing appellant speak, Stanhope identified him because he had an unusually high-pitched voice.

Sergeant Darrell DeFee of the Houston Police Department testified that he interviewed appellant after the arrest. Appellant was wearing the same clothes in which he had been arrested, which Sergeant DeFee described as dark jean trousers and “a dark T-shirt with some distinctive pictures and writings on the front of the T-shirt.” Sergeant DeFee reviewed the videotape of the robbery and talked with several witnesses to the robbery. From his review of the video plus the witnesses’ statements, Sergeant DeFee believed appellant to be one of the persons who committed the convenience store robbery. On cross-examination, defense counsel asked Sergeant DeFee whether he considered the shirt appellant was wearing to be distinctive. On redirect examination, Sergeant DeFee testified as follows:

Q. Was the clothing Mr. Carey was wearing when he was arrested consistent with the clothing he was wearing in the video?

MR. DOUGLAS [defense counsel]: Objection, leading.

THE COURT: Overruled.

A. Yes, ma’am.

Q. Now, earlier on direct — I’m sorry — on cross, defense counsel asked you about the T-shirt that Mr. Carey was wearing. You mentioned there was a photograph on it. What was the photograph of?

A. Stanley Tookie Williams.

MR. DOUGLAS: I object to that, Judge, as just being unduly prejudicial.

MS. BYROM [prosecutor]: Your Honor, I believe defense counsel opened the door by asking what was written on the shirt.

THE COURT: Overruled.

Q. You can answer the question

A. Stanley Tookie Williams.

Q. And who is that?

MR. DOUGLAS: Objection, irrelevant.

THE COURT: Overruled.

A. Stanley Tookie Williams was the co-founder of the CRIPS criminal street gang organization in Los Angeles, California, in the 1970s. Was responsible personally for four shotgun murders committed, which he was executed for. It was a convenience store murder.

Appellant presented an alibi defense through the testimony of his mother. Appellant's mother testified that when she paid appellant's bail and picked him up from jail he was wearing a black shirt with a picture of Stanley Tookie Williams. Appellant's mother testified that she did not care for the shirt and would not have bought it for him. Appellant was subsequently convicted of aggravated robbery.

II. ISSUES AND ANALYSIS

In two issues appellant claims, “[T]he trial court erred by overruling appellant’s objection to testimony that appellant was wearing a shirt depicting the photograph of Stanley Tookie Williams, founder of the CRIPS criminal street gang, and the malevolent character of Stanley Tookie Williams[.]” In his first issue, appellant claims the evidence was irrelevant under Texas Rule of Evidence 401. In his second issue, appellant claims the probative value of the evidence was outweighed by its prejudicial effect. Appellant’s arguments on appeal address the propriety of admitting two discrete pieces of evidence: (1) testimony that the image on appellant’s shirt depicted Williams; and (2) testimony that Williams founded a criminal street gang and was executed for committing murders at a convenience store with a shotgun. We will address each issue individually.

A. Did the trial court err in overruling appellant’s objection to testimony identifying the image on appellant’s shirt as a depiction of Stanley Tookie Williams?

Appellant initially claims the trial court erred in overruling his objection to testimony identifying the image on appellant’s shirt as a depiction of Stanley Tookie Williams. When the prosecutor asked what was depicted on the shirt, appellant objected that the evidence was “unduly prejudicial.”

To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a). A defendant’s appellate contention must comport with the specific objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). An objection stating one legal theory may not be used to support a different legal theory on appeal. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).

Assuming appellant’s “unduly prejudicial” objection can be construed as an objection under Texas Rule of Evidence 403, appellant failed to make a timely objection. Appellant failed to object until after the State asked what was depicted on the shirt and Sergeant DeFee answered. To preserve error, one must make a timely objection. TEX. R. APP. P. 33.1(a); *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). If one does not object until after an objectionable question has been answered, and he can show no legitimate reason to justify the delay, his objection is untimely, and any error is waived. *Lagrone*, 942 S.W.2d at 618; *Nino v. State*, 223 S.W.3d 749, 755 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Because appellant’s objection was untimely, he failed to preserve error with regard to testimony that the image on appellant’s shirt depicted Stanley Tookie Williams.¹ Therefore, we overrule appellant’s two issues insofar as appellant complains that the trial court erred by admitting testimony that the image on appellant’s shirt depicted Stanley Tookie Williams.

¹ Even if appellant’s objection were considered timely, the trial court would not have abused its discretion in overruling it.

B. Did the trial court err in overruling appellant's objection to testimony describing Stanley Tookie Williams?

Sergeant DeFee testified over objection that the person depicted on appellant's shirt, Stanley Tookie Williams, was a co-founder of the CRIPS criminal street gang who was responsible for four murders committed at a convenience store.

The determination of admissibility of evidence is within the trial court's sound discretion and will not be reversed on appeal absent a clear abuse of discretion. *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994). A trial court clearly abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g).

Texas Rule of Evidence 402 permits the admission of relevant evidence. TEX. R. EVID. 402. Rule 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. EVID. 401. To be included in the expansive definition of relevant evidence, proffered evidence must have influence over a consequential fact, *i.e.*, any fact that is of consequence to the determination of the action. *Mayer v. State*, 816 S.W.2d 79, 84 (Tex. Crim. App. 1991). Evidence need not, by itself, prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence. *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004).

On appeal, appellant argues that testimony describing Williams (1) was irrelevant; and (2) if relevant, its probative value was outweighed by its prejudicial effect. At trial, appellant objected only on relevance grounds. Appellant's relevance objection was overruled, and appellant did not object that the prejudicial effect of this testimony outweighed its probative value pursuant to Rule 403. Therefore, appellant failed to preserve his Rule 403 complaint and we address only the objection that testimony describing Stanley Tookie Williams was inadmissible because it was irrelevant. *See*

Wilson, 71 S.W.3d at 349.

The State contends that evidence describing Williams was relevant and admissible because it had influence over the consequential fact of appellant's motive. "[E]vidence of motive is always admissible because it is relevant as a circumstance tending to prove the commission of an offense." *Bush v. State*, 628 S.W.2d 441, 444 (Tex. Crim. App. 1982). Evidence of motive is always proper and relevant to assist in proving the defendant committed the charged offense. *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991). To be admissible as proof of motive, evidence must fairly tend to raise an inference in favor of the existence of a motive on the part of the accused to commit the offense for which he is on trial. *Bush*, 628 S.W.2d at 444.

Here, the trial court acted within its discretion in admitting the challenged testimony because evidence that the person depicted on appellant's shirt founded a criminal street gang and was executed for committing murders at a convenience store was relevant to establishing motive. *See Dunn v. State*, 979 S.W.2d 403, 409 (Tex. App.—Amarillo 1998, pet. ref'd); *see generally Montgomery*, 810 S.W.2d at 387 (providing that evidence is relevant beyond its tendency for character conformity if it seems to make a consequential fact more or less probable). Appellant chose to wear a shirt celebrating a gang founder with a violent history of murder at a convenience store, which would help to explain why the appellant, as bag man, would repeatedly urge his partner to shoot a compliant clerk who was not resisting the robbery in any way.

The trial testimony described a convenience store robbery during which one assailant, who was holding a pillowcase into which the cash register's contents were deposited, repeatedly urged his accomplice, who was holding a gun, to shoot the clerk behind the register. Evidence that the appellant wore a shirt commemorating a notorious gang founder with a violent history that included murder at a convenience store was relevant to explain appellant's motive for urging his accomplice to shoot a compliant clerk who was not resisting the robbery. This testimony fell within the broad range of relevance because it had influence over a consequential fact relating to appellant's

motive. *See Dunn*, 979 S.W.2d at 409 (evidence that appellant was wearing “Oklahoma Corrections” shirt when arrested was relevant and admissible at trial on charges of aggravated robbery, aggravated assault of a peace officer, and aggravated kidnapping arising from robbery of grocery store with a sawed-off .22 caliber rifle; shirt was relevant to motive “because appellant was an escaped convict, he was a desperate man on the run, without a job, and in need of cash”). Therefore, we overrule appellant’s two issues insofar as appellant complains that the trial court erred by admitting testimony describing the person depicted on appellant’s shirt.

The judgment of the trial court is affirmed.

/s/ **Kem Thompson Frost**
 Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

Do Not Publish — TEX. R. APP. P. 47.2(b).