Affirmed and Memorandum Opinion filed March 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00437-CR

MALCOLM JAMAL ISLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1138409

MEMORANDUM OPINION

Appellant was indicted for capital murder. A jury convicted him of the lesser-included offense of aggravated robbery and assessed punishment at life in prison. In a single issue, appellant argues that the trial court erred in admitting evidence of canine identification of scents to identify appellant. We affirm.

Appellant and Richard Redd drove from Louisiana to Houston to purchase marijuana from Travis Connor. Connor did not have as much marijuana as appellant and Redd wanted, so they went to the complainant to provide the drugs. As Redd and appellant drove to the meeting with the complainant, they decided to steal the marijuana

instead of purchasing it. Redd and appellant met the complainant in a vehicle where the complainant was sitting in the front seat. During the robbery Redd shot and killed the complainant.

When the complainant's body was found, the Baytown Police Department called Fort Bend County Sheriff's Deputy Keith Pickett to help search for suspects using his trained dogs. Deputy Pickett testified that he trained and used bloodhounds to track scents and had testified in several cases involving scent identification. An investigation led police officers to believe that the complainant's assailants had been in the vehicle with him. Deputy Pickett used a "scent pad" to collect dead skin cells from various locations in the vehicle so that his dogs could trail any suspects. The dogs tracked the scent to the parking lot of an apartment complex where the vehicle was parked, but were unable to identify any suspects at the scene.

After the police department arrested several suspects, Deputy Pickett was asked to use his dogs to conduct a "scent line-up" to identify the suspects. Deputy Pickett conducted two scent line-ups — one with a known scent sample from Redd, and one with a scent sample taken from the passenger seat of Redd's vehicle. In each scent line-up, he placed the known scent pad in one quart-size paint can, and placed "scent filler" pads in five other cans. He placed the cans 10 feet apart so the scents would not be mixed by blowing wind. The "scent fillers" were collected by Deputy Pickett from individuals convicted in Fort Bend County. The scent fillers are kept by Deputy Pickett in plastic zip-top bags in which he testified that he did not know how long the scent would last, but it "will last for an extended—long period of time."

Deputy Pickett sent three bloodhounds, one at a time, to the paint cans containing the scents. To conduct the first line-up, he kept the dog 10 feet away from the six paint cans and permitted the dog to sniff the scent pad taken from the front passenger seat of the complainant's vehicle. He repeated this procedure with each dog. During the first line-up, each dog alerted on the known scent of Redd. During the second line-up, Deputy

Pickett permitted each dog to sniff the scent pad taken from the right rear passenger seat of the complainant's vehicle. Deputy Pickett first testified that each dog alerted on a known scent sample of appellant during the second line-up. Deputy Pickett then explained that the "known scent sample" of appellant was not taken from appellant's body, but was taken from the passenger seat of the vehicle in which Redd and appellant had driven to Houston. At that time, the prosecutor asked to approach the bench and stated to the court, "There's a thing that's just not right about what's being testified to and it needs to get straight because the jury is being misled and it's going to hurt [appellant]." Defense counsel agreed and the court broke for lunch.

After lunch, Deputy Pickett testified that the scent of Redd matched that of the individual who was in the front passenger seat of the complainant's vehicle. He further testified that the "known scent" of appellant was not taken from his body, but was taken from the passenger seat of Redd's vehicle in which appellant had ridden to Houston. Deputy Pickett, however, continued to refer to the sample taken from the passenger seat of Redd's vehicle as the known sample of appellant. Deputy Pickett concluded that the same persons that were in Redd's vehicle were also in the complainant's vehicle.

Appellant did not object to any of Deputy Pickett's testimony. He cross-examined Deputy Pickett on whether scents could mix if more than one person sat in the same car. He further clarified that Deputy Pickett did not have a known scent sample from appellant.

On appeal, appellant contends that the trial court erred in admitting evidence of a canine identification of scents to identify appellant. Appellant asks that this court abate the appeal for an evidentiary hearing on the predicate for that evidence, or, in the alternative, reverse and remand for a new trial. Appellant, however, failed to preserve this issue for review.

To preserve error for appellate review, a party must make a timely and specific objection or motion at trial, and there must be an adverse ruling by the trial court. Tex. R. App. P. 33.1(a); *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). Failure to

preserve error at trial forfeits the later assertion of that error on appeal. *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999). Most errors—even constitutional errors—may be forfeited if the appellant fails to object. *Aldrich v. State*, 104 S.W.3d 890, 894–95 (Tex. Crim. App. 2003). The failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. *See Fuller*, 253 S.W.3d at 232 (finding failure to object to qualifications of expert waived any error).

Appellant contends that this court should recognize an exception to preservation of error because the evidentiary basis for challenging Pickett's testimony was not "well-publicized at the time of the Appellant's trial." The purpose of requiring an objection at trial is to give to the trial court or the opposing party the opportunity to correct the error or remove the basis for the objection. *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000). "Although a trial judge, like an appellate judge, may not be a trained scientist, the trial judge at least has both parties and their witnesses before him. He may ask questions of the expert witnesses, request more information, ask for additional briefing, or seek clarification concerning the scientific state of the art and reliable sources in the particular field." *Hernandez v. State*, 116 S.W.3d 26, 31, n. 11 (Tex. Crim. App. 2003). While the issues regarding Deputy Pickett's testimony were not "well-publicized" until after appellant's trial, the law and procedure concerning admission of expert testimony has not changed since appellant's trial. If a party seeks to challenge the reliability of expert testimony, he must object in a timely manner. Tex. R. App. P. 33.1; *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006).

Appellant requests that we invoke Rule 2 of the Texas Rules of Appellate Procedure, abate the appeal and remand to the trial court for a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court of Criminal Appeals has held that Rule 2 does not authorize the retroactive suspension of rules governing events that have already occurred at the trial level before the record has been conveyed to the appellate court. *State v. Garza*, 931 S.W.2d 560, 563 (Tex. Crim. App.

1996). The rule "does not authorize courts of appeals to reach back, after appeal has been perfected and the record filed, and alter the course of events at the trial court level[.]" *Id.* However, even if Rule 2 permitted such a procedure, it does not obviate the requirement that appellant object at trial and give the trial court an opportunity to rule on the objection. *See Hernandez v. State*, 53 S.W.3d 742, 745 (Tex. Crim. App. 2001). Appellant's sole issue is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Yates, Seymore, and Brown.
Do Not Publish — Tex. R. App. P. 47.2(b).