Affirmed as Modified and Opinion Filed June 11, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00795-CR

FRANCISCO JAVIER BALDERAS CHAVEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1654249-Q

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Whitehill
Opinion by Justice Whitehill

Appellant was charged with aggravated robbery, and a jury convicted him of robbery. Appellant pled true to an enhancement paragraph and the jury assessed punishment at twenty-nine years imprisonment.

In four issues appellant argues that the trial court erred by (i) denying a mistrial because a juror was prejudiced against him; (ii) refusing to dismiss another juror he claims was biased against him; (iii) admitting his prior convictions into evidence; and (iv) failing to give a midtrial limiting instruction. In a cross-point, the State requests that we modify the judgment to accurately reflect appellant's plea and the jury's finding regarding the enhancement paragraph.

We conclude that the trial court did not err in refusing a mistrial or dismissal of a juror. There was no reason to dismiss one of the jurors because he was not biased, and there was no

reason to declare a mistrial because the other juror was dismissed. Admitting appellant's prior convictions into evidence was not outside the zone of reasonable disagreement because several factors favored admission, and the limiting instruction was not timely requested.

We modify the judgment to reflect that appellant pled true to the enhancement paragraph and the jury found it true. As modified, the judgment is affirmed.

I. BACKGROUND

Appellant broke down Fransico Valdez's apartment door, hit him in the face and knocked him to the ground, took his television, and left the apartment. Valdez was still on the ground when appellant returned, beat him some more, and took money from Valdez's pants pocket, a bicycle, and a cell phone.

Appellant was spotted coming out of a nearby apartment with Valdez's television three to five minutes after the police arrived. When he was searched after his arrest, the police recovered a cell phone matching the description of the one taken from Valdez. Appellant had stains that appeared to be blood on the bottom of his pants, and the subsequent investigation matched the soles of appellant's shoes to the impression left on Valdez's front door.

At trial, appellant testified that he had gone to an apartment to buy drugs, and traded the drugs he had for a cell phone and a television so he could buy more drugs. He claimed he had not seen Valdez, gone to his apartment, or assaulted him.

The jury was charged on aggravated robbery and the lesser-included offense of robbery, and convicted appellant of the lesser-included offense. Appellant pled true to a prior felony conviction, and the jury assessed punishment at twenty-nine years imprisonment.

II. ANALYSIS

A. First and Second Issues: Was it error to deny appellant's request to dismiss juror Williams and for a mistrial?

After voir dire, the court empaneled thirteen jurors. Before leaving for the day, one of the jurors, Eddie Givens, told the bailiff that he drove a bus and might recognize appellant as someone with whom he had a dispute over a bus fare or a bottle.

Givens was sworn in and both sides were allowed to question him. Givens was not entirely sure that he recognized appellant, and did not think he mentioned that possibility to any other jurors. He thought that one other juror may have overheard his conversation with the bailiff.

Appellant's counsel initially asked to voir dire the entire jury, but first the bailiff was called to testify. According to the bailiff, one other juror, juror Williams, overheard his conversation with Givens.

Juror Williams was then questioned. Williams said he heard Givens say that he may have seen appellant before and had a confrontation with him. Williams said that he would not consider the conversation in rendering a verdict, and he could be fair and impartial. He also said he had not discussed what he heard with any other jurors.

Appellant's counsel moved to dismiss both jurors and for a mistrial. The court dismissed Givens, but allowed Williams to remain because "he clearly testified that he could set that aside and not hold it against [appellant]." The court also reminded counsel that both parties had an opportunity to ask if anyone knew appellant during voir dire, but neither side had done so. Appellant's request for a mistrial was denied.

In his first two issues, appellant contends that the trial court reversibly erred by failing to grant a mistrial because (i) he would have challenged Givens for cause had he known about him and (ii) Williams was biased after he overheard the conversation between Givens and the bailiff. He further argues that the trial court should have dismissed juror Williams.

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). Under this standard, we will not disturb the trial court's ruling if it was within the zone of reasonable disagreement. *Id.* Likewise, we review a trial court's determination concerning juror bias for an abuse of discretion. *Granados v. State*, 85 S.W.3d 217, 236 (Tex. Crim. App. 2002).

Appellant relies on *Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004) (*Franklin IV)* to argue that the requested mistrial was erroneously denied. This reliance is misplaced.

In *Franklin IV*, the trial court refused to allow defense counsel to question a juror who did not respond in voir dire that she knew the complainant when the juror was revealed to be an assistant leader for complainant's Girl Scout troop. *Id*. at 353–354. The court held that when a juror "withholds material information during the voir dire process, the parties are denied the opportunity to exercise their challenges, thus hampering the selection of a disinterested and impartial jury." *Id*. at 354. But it must be established that the juror withheld information despite the defendant's exercise of due diligence. *Id.* at 355–56. Thus, it is incumbent upon the parties to ask all pertinent questions to reveal bias. *See Webb v. State*, 232 S.W.3d 109, See 113 (Tex. Crim. App. 2007).

If the information a juror withholds has a tendency to show bias, an appropriate procedure is to hold a hearing at which evidence should be adduced regarding whether the juror is actually biased. *See Uranga v. State*, 330 S.W.3d 301, 306 (Tex. Crim. App. 2010). This is a fact issue. *Id*. If a trial judge finds that the juror is not actually biased and that finding is supported by the record, the trial court does not abuse its discretion by denying a mistrial. *See id*. at 307.

Here, no juror withheld information because neither party asked the venire whether they knew appellant. Thus, counsel was not diligent.[1]

Moreover, when Givens revealed that he might recognize appellant, the trial court conducted a hearing and allowed both parties to question Givens. Although Givens could not be sure he recognized appellant, he said that nothing would taint his ability to listen to the facts and give appellant a fair trial. Nonetheless, in an abundance of caution, the trial court dismissed him, stating, "I don't know whether they know each other or not, but I don't think its [sic] fair to [appellant] to even risk Mr. Givens being on this jury, if, in fact, they had some sort of confrontation about a fare or a drink or whatever it might have been." So even had counsel been diligent to discover potential bias during voir dire, unlike in *Franklin,* the court conducted a hearing to determine bias, counsel was not denied the opportunity to question the juror, and the potentially biased juror was not allowed to remain on the jury.

Appellant also seems to argue that he should have been allowed to question all of the jurors to ensure that he received a fair and impartial trial. During the hearing, appellant initially indicated that he wanted to question the entire panel, and the trial judge neither granted nor denied the request. But after both jurors and the bailiff testified, counsel did not renew the request or obtain a ruling. *See* TEX. R. APP. P. 33.1. Instead, he moved to dismiss both jurors and requested a mistrial.

But even had the issue been properly preserved for our review, nothing in the record establishes that the trial court would have abused its discretion by denying the request. Givens was dismissed from the jury. The bailiff confirmed that Williams was the only juror present when Givens approached him. Williams testified that he did not share what he overheard with other

[1] Defense counsel's general inquiry to the panel about whether there was anything else he needed to know was insufficient. *See Webb*, 232 S.W.3d at 113.

members of the jury. In short, nothing suggests a need to question the remaining members of the jury.

Appellant also argues that the trial court should have granted a mistrial because Williams overheard the Givens conversation. He also maintains that Williams should have been dismissed. Thus, the question is whether Williams was disabled from jury service because he was biased.

A juror can be disabled from sitting for "any condition that inhibits [the] juror from fully and fairly performing the functions of a juror." *Griffin v. State*, 486 S.W.2d 948, 951 (Tex. Crim. App. 1972) (citing TEX. CODE CRIM. PROC. art. 36.29). Bias constitutes such a disability if the effect of the bias "on a juror's mental condition or emotional state" inhibits the juror from "fully and fairly performing his functions as a juror." *Reyes v. State*, 30 S.W.3d 409, 412 (Tex. Crim. App. 2000). If the court finds that a juror is disabled, the court can remove the juror without the parties' consent and continue with fewer than twelve jurors. *Griffin*, 486 S.W.2d at 951. The decision to remove or retain a juror lies within the sound discretion of the trial court. *Uranga,* 330 S.W.3d at 307.

Appellant contends that Williams was biased because he used the word "confrontation" to describe Givens's encounter with appellant, rather than "misunderstanding" (the word that Givens used). But when questioned, Williams unequivocally confirmed that he could remain fair and impartial and would not consider the conversation he overheard when rendering a verdict. Nothing in the record contradicts this testimony or otherwise calls Williams's credibility into question. We therefore cannot conclude that the trial court abused its discretion by determining that Williams was not biased and allowing him to remain on the jury, or by denying a mistrial. We resolve appellant's first two issues against him.

B. Third Issue: Was it error to admit appellant's prior convictions?

The State moved to introduce impeachment evidence about appellant's prior convictions, which included convictions for:

- Evading arrest with a vehicle (2012);
- Burglary of a habitation (2012);
- Theft of person (2102);
- Burglary of a vehicle (2012); and
- Burglary of a vehicle (2008).

Appellant objected, arguing that the evidence was more prejudicial than probative and would cause the jury to convict him "generally, instead of specifically" for the offense being tried. The judge overruled appellant's objections, and but said she would give the jury a limiting instruction. Appellant's third issue argues the trial court's ruling was in error.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). We reverse only when the trial court's decision was so clearly wrong as to fall outside the zone of reasonable disagreement. *Id.*

Texas Rule of Evidence 609(a) allows a defendant's credibility to be impeached by evidence of a felony conviction or conviction for a crime of moral turpitude when the probative value of the evidence outweighs its prejudicial effect and it is elicited from the witness or established by public record. TEX. R. EVID. 609(a). The burden of demonstrating the admissibility of the evidence rests on the proponent. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. 1992).

In deciding whether the probative value of a prior conviction substantially outweighs its prejudicial effect, courts weigh several non-exclusive factors: (i) the prior offense's impeachment value; (ii) the passage of time between the prior conviction and the date the defendant testifies;

(iii) the similarity between the prior conviction and any conduct of the defendant at issue in the present trial; (iv) the importance of the defendant's testimony; and (v) the importance of the credibility issue. *Id*. The trial court is afforded wide discretion in weighing these factors. *Id*. at 881.

Applying these factors to the present case, we conclude that the first factor, the impeachment value, favors admission. Four of the five offenses were crimes involving deception or moral turpitude, and such crimes have a higher impeachment value than crimes of violence. *See Theus*, 845 S.W.2d at 881.

The second factor, temporal proximity, also favors admission. Temporal proximity supports admission if the past crime is recent and the defendant has demonstrated a propensity for running afoul of the law. *Id.* The robbery at issue here occurred in 2016, and four of the five prior convictions occurred in 2012. Appellant was incarcerated for three of the four years between 2012 and 2016. Thus, these convictions are relatively close in time and, combined with the 2008 offense, the convictions demonstrate appellant's propensity to run afoul of the law.

The third factor, similarity between the past crime and the crime being prosecuted, disfavors admission. *See id*. This factor weighs against admission because admitting for impeachment purposes evidence of a crime similar to the one charged presents a situation for the jury to convict on the perception of a past pattern of conduct, instead of on the facts of the charged offense. *Id.* Appellant maintains that the charged offense, aggravated robbery, is similar to the offenses of burglary and theft because all involve taking property that did not belong to appellant.[2] On the other hand, the State argues that burglary of a vehicle and burglary of a habitation do not always require the commission of theft. *See* TEX. PENAL CODE ANN. §§ 30.02(a), 30.04(a).

[2] There is no dispute that evading arrest is not similar to the charged offense.

Nonetheless, while the elements may not be identical, we conclude that the offenses are sufficiently similar to weigh against admission in this case.

The fourth and fifth factors, the importance of defendant's testimony and credibility, are related and favor admission if the defendant's credibility is a critical issue. *Theus*, 845 S.W.2d at 881. Both were significant here. *See Woodall v. State*, 77 S.W.3d 388, 396 (Tex. App.—Fort Worth 2002, pet ref'd). Appellant's guilt/innocence testimony was that he was simply in the wrong place at the wrong time; he did not steal Valdez's property or assault him. Accordingly, appellant's credibility was at issue and the State's need to impeach him was heightened.

Overall, applying the *Theus* factors favors admission. Therefore, we cannot conclude that the trial court's decision to admit such evidence was outside the "zone of reasonable disagreement." We resolve appellant's third issue against him.

C. Fourth Issue: Was the court's limiting instruction untimely?

Appellant's fourth issue argues that the trial court's limiting instruction was untimely because it was not given immediately when his prior convictions were admitted. We disagree.

When appellant objected to the State's use of his prior convictions for impeachment, the trial judge ruled that the offenses would be allowed but that she would include a limiting instruction in the charge. Appellant did not request that the court also give a contemporaneous instruction.

Later, during the State's cross-examination, but before the prior offenses were mentioned, appellant renewed his objection and asked for a limiting instruction. The judge denied the instruction "at least so far."

When the State began its questioning about appellant's prior offenses, however, appellant did not request an instruction. Instead, when cross-examination was completed, the trial judge prompted counsel, stating, "You want your limiting instruction I presume." Appellant's counsel

replied affirmatively, and the instruction was given before the State called a rebuttal witness and before the jury was charged.

Rule 105(a) requires, upon proper request, that a limiting instruction be given at the time the evidence is admitted. *See* TEX. R. EVID. 105(a); *Hammock v. State*, 46 S.W.3d 889, 894 (Tex. Crim. App. 2001). The key is "upon proper request." But here, counsel did not request an instruction when the evidence was admitted. We therefore cannot conclude the trial court's instruction was untimely, and resolve appellant's fourth issue against him.

E. Reforming the Judgment

The State asks that we modify the judgment to reflect that appellant pled true to the enhancement paragraph and that the jury found the enhancement true. An appellate court has "the power to correct and reform a trial court judgment 'to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.'" *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd).

Here, the record supports the requested modifications. We therefore modify the judgment to reflect that appellant pled true to the enhancement and the jury subsequently found the enhancement true.

III. CONCLUSION

We resolve all of appellant's issues against him and modify the judgement to reflect that appellant pled true to the enhancement and the jury found the enhancement true.

As modified, the judgment is affirmed.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FRANCISCO JAVIER BALDERAS CHAVEZ, Appellant

No. 05-17-00795-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1654249-Q.
Opinion delivered by Justice Whitehill.
Justices Francis and Fillmore participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that appellant pled true to the enhancement paragraph and the jury found the enhancement paragraph to be true.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered June 11, 2018.