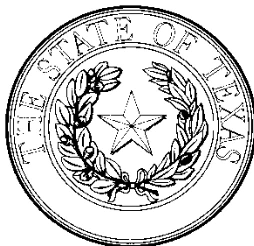
Opinion issued October 28, 2010



In The

Court of Appeals

For The

First District of Texas

Nos. 01-08-00463-CR & 01-08-00464-CR

JOHN DOUGLAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case Nos. 1158727 & 1158728

MEMORANDUM OPINION

Following John Douglas's guilty plea to two offenses of aggravated assault[1] and his plea of true to a prior felony enhancement paragraph in each indictment,

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1 TEX. PENAL CODE ANN. § 22.02(b)(1) (Vernon Supp. 2010) (assault against family member) (trial court cause number 1158727, appellate cause number 01-08-

the jury heard evidence on punishment. After finding the enhancement paragraph true, the jury assessed punishment at life in one offense and forty years' incarceration on the other offense.[2] In two issues, Douglas complains that, during the punishment phase of his trial, he was deprived of his constitutional right to confrontation and hearsay was improperly admitted. We affirm.

Background

Douglas dated Stacy Blackmon for about eighteen months. According to Blackmon, she left Douglas in March 2007 because of his abuse toward her,[3] but Douglas continued trying to contact her, calling her frequently, and physically confronting her once, forcing her into a car with him. In September 2007, Blackmon began dating Leo Price. On the night of October 18, 2007, Douglas called Blackmon repeatedly at her job and then followed her home from her job after Price picked up Blackmon from work. Douglas pulled into the space next to them at Blackmon's apartment complex parking lot, went up to the parked car, and starting yelling through the window, demanding that Blackmon get out of the car.

00463-CR) (complainant Stacy Blackmon); *id.* § 22.02 (a)(2) (trial court cause number 1158728, appellate cause number 01-08-00464-CR) (complainant Leo Price); TEX. PENAL CODE ANN. § 12.42 (b) (Vernon Supp. 2009).

2 The jury sentenced Douglas to life in trial court cause number 1158727 (appellate cause number 01-08-00463-CR) and forty years' incarceration in trial court cause number 1158728 (appellate cause number 01-08-00464-CR).

3 Douglas maintained that they were still dating at the time of the incident.

Douglas then pulled out a gun, and, when Blackmon would not leave the car, Douglas fired numerous times, seriously wounding both Blackmon and Price. According to Price, Douglas then grabbed Blackmon, and dragged her to his car, forced her in, and drove away.[4] Police caught up with Douglas when he crashed into a fence.

Both complainants testified at the punishment phase of trial, along with several other witnesses for the State, including Michelle Eaglin, a woman who lived at the apartment complex where the shooting occurred. Appellant also testified at punishment, along with three other witnesses on his behalf.

Discussion

In his first issue, appellant complains that he was deprived of his constitutional right to confrontation under the Sixth Amendment of the United States Constitution and Article 1, Section 10 of the Texas Constitution, by not being permitted to cross-examine Price about his criminal history during the punishment phase of the trial.

In his second issue, appellant asserts that the trial court improperly admitted a certain hearsay statement made by Blackmon, testified to by Michelle Eaglin in violation of the Texas Rules of Evidence and appellant's right to confrontation under article I, section 10 of the Texas Constitution.

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[4] Douglas maintained he was taking Blackmon to a hospital.

I. Confrontation of Leo Price

A. Factual background

During Price's direct testimony, Price admitted to (1) a federal felony conviction for felon in possession of a firearm, for which he was given seven years in prison; (2) a state jail felony drug conviction for which he received six months in state jail; and (3) a conviction for robbery by threat for which he was also sentenced to incarceration. The prosecutor asked Price, "Have you been convicted of any other felonies outside of these three," and Price responded "not felonies." Price also testified that he was on federal parole at the time of trial, that he had been released "from jail" in January of that year, and that he had not been released from "the halfway house" until that July.

In cross-examination, appellant asked Price questions about his three felony convictions and then reminded him of his response of "not felonies." Price responded that he had had misdemeanor conviction for possession of marijuana in 2000. Counsel asked Price several questions about that misdemeanor conviction and then the following exchange occurred:

[Defense]: And then you got another misdemeanor conviction?

[State]: Objection, relevance.

[Court]: Sustained.

[Defense]: Do you have another other convictions?

[State]: Objection, Your Honor, relevance.

[Court]: May be relevant. It's not a proper question.

[Defense]: Have you ever been convicted of anything else?

[State]: Objection, Your Honor.

[Court]: Sustained. Sustain the objection. Improper question.

[Defense]: What other felonies have you had?

[State]: Objection, Your Honor.

[Court]: Improper.

[Defense]: May I approach?

[Court]: Yes.

(*At the bench*)

[Defense]: Judge, she opened the door when she was asking about his other convictions. I went through the record. She asked the question.

[Court]: Improper question. He answered it properly, not a felony. That was an honest answer. It does not open the door. If he had said no, it would, but it does not open the door.

[Defense]: For the purpose of the record, I would like to ask about his other misdemeanor cases, trespassing and the Court's not allowing me?

[Court]: That's correct.

(*Conclusion at the bench*).

Appellant made no other argument regarding the admission of any evidence regarding Price's convictions nor did he make an offer of proof as to any specific conviction that he wished to have admitted.

B. Argument on appeal

On appeal, appellant complains that he was denied his Sixth Amendment right under the United States Constitution, and his right under Article I, Section 10 of the Texas Constitution, to confront and cross-examine Price "about his credibility," specifically by asking Price about "his prior felony and misdemeanor convictions."

We first note that appellant never made an offer of proof of the evidence that he sought to have admitted. This alone makes it impossible for us to review this issue. The record is not even clear as to what conviction appellant sought to have admitted. While appellant now asserts that he sought to question Price about unspecified prior felony and misdemeanor convictions, his actual complaint at trial was that he was not allowed to ask about a misdemeanor conviction for trespassing. Without an offer of proof, we cannot evaluate this complaint and error may not be predicated on this ruling. *See* TEX. R. APP. P. 103(a)(2), (b).

Moreover, appellant's argument on appeal does not comport with his argument at trial. At trial, appellant did not complain that his rights to confrontation were being denied or that either the State or Federal Confrontation

clause required the admission of the sought evidence. Instead, the only argument advanced at trial was that the State had "opened the door" by asking "about his other convictions."

The "opened the door" or "false impression" legal theory for admission of prior convictions is a well-known legal principle that provides that, when a witness, during direct examination, unambiguously leaves a false impression that suggests that he has not been arrested, charged, or convicted of an offense, the opposing party is permitted, in cross-examination of that witness, to correct this false impression. *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). The trial court clearly understood appellant's objection and properly rejected it, noting that the witness's statement that he had "no [other] felonies" did not leave a false impression in response to the State's question whether he had other "felony convictions," and that this answer did not open the door to evidence of a misdemeanor conviction. *See Hammett v. State*, 713 S.W.2d 102, 106–07 (Tex. Crim. App. 1986) (holding that extent to which question "opened the door" depends on specific question asked and statement that witness had one arrest does not leave false impression that witness had no other arrests or open door to evidence of other arrests).

However, appellant does not complain of the trial court's rejection of the "opened door"/"false impression" legal theory advanced at trial for the admission

of the evidence. Appellant complains instead that the trial court did not admit evidence under a different legal theory that was not advanced at trial and on which the trial court was not asked to rule.

Arguments on appeal must comport with the arguments made at trial and must bring to the trial court's attention the very complaint that it is now making on appeal. *See Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). This is true even when the complaint on appeal is that a party's right to confrontation has been denied. *Id.* at 179–80. In order to preserve a complaint that the Confrontation Clause required admission of certain evidence, the proponent of this evidence must clearly articulate this basis for admission to the trial court so that the trial court has the opportunity to rule on this rationale.[5] *Id.* at 179. Because appellant did not do so, he has failed to preserve this issue for our review. *See id.*

We overrule appellant's first issue.

II. Testimony of Michelle Eaglin

During her testimony, Eaglin described running up to Price, who was bleeding on the ground, taking his cell phone to call for help, and calling the last

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[5] We have also so held in a prior unpublished opinion with facts similar to this case. *See Fortunato v. State*, No. 01-07-00066-CR, 2008 WL 1827910 at *3 (Tex. App.—Houston [1st Dist.] April 24, 2008, pet. ref'd) (mem. op., not designated for publication) (argument at trial that charge was admissible to impeach credibility did not put trial court on notice of violation of confrontation clause and so did not preserve complaint of denial of confrontation clause for appellate review).

number on his cell phone. The number was for Blackmon's cell phone, and appellant answered the phone. Appellant told Eaglin that Blackmon was with him, that he had done something wrong and was sorry, and handed the phone to Blackmon. Eaglin testified that Blackmon sounded very afraid, scared, weak, and was crying. Over appellant's objection of "hearsay," Eaglin testified that Blackmon told her to "please tell [appellant] something because I'm not going to be—I don't think I'm going to see my kids again." Appellant made no other objections to this testimony. The testimony was admitted under the excited utterance exception to hearsay. *See* TEX. R. EVID. 803 (2).

In his second issue on appeal, appellant complains that the admission of this statement violated his confrontation rights under the Texas Constitution and also was an improper admission of hearsay evidence. For the same reasons discussed under appellant's first issue, we hold that, because there was no specific argument tendered to the trial court regarding the violation of any constitutional confrontation right as to this evidence, appellant failed to preserve his constitutional complaint for appellate review. *See Reyna*, 168 S.W.3d at 179. We furthermore hold that, in light of the evidence in this record regarding the condition of Blackmon at the time (weak, scared, bleeding, seriously injured from two gunshots to the abdomen, being driven away against her will by her assailant who had abused and abducted her on other occasions and threatened to kill her), the

complained-of evidence was admissible under the excited utterance exception to hearsay. *See* TEX. R. EVID. 803(2).

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court in each cause.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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