Opinion issued October 7, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00263-CR

KENNETH DWAYNE SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1141968

MEMORANDUM OPINION

A jury found appellant, Kenneth Dwayne Smith, guilty of aggravated robbery. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2003). After appellant pleaded guilty to two enhancement paragraphs, the trial court assessed his punishment at 25 years' confinement. In his first issue, appellant contends that

the trial court erred by overruling his objection to a question asked by the State during cross-examination, which appellant contends was phrased in a manner contravening a prior ruling by the trial court. In his second and third issues, appellant argues that the State's same action constituted prosecutorial misconduct—depriving him of Due Process and Due Course of Law under the federal and state constitutions, respectively—and urges us to vacate the judgment "in a manner to impress upon the state that it should obey the orders of the trial courts." In his fourth issue, appellant argues that the trial court erred by admitting the testimony of his pretrial interviewer, which introduced appellant's admission of certain basic information in the absence of *Miranda* warnings.

We affirm.

BACKGROUND

In November 2007, appellant approached Gary Spring, who was sitting in his car outside of a Taco Cabana, and demanded Spring's wallet at gunpoint. Spring complied. After appellant drove away from the parking lot, Spring followed him and noted the license plate number on appellant's car. Later, the police tracked the number to appellant's address. At appellant's address, the police found the car used in the robbery. The police then briefly interviewed appellant. Two days later, the police arrested appellant after Spring identified him in a photo spread.

Prior to trial, Christy Richard, of the Harris County pretrial services agency, interviewed appellant.[1] During the interview, appellant told Richard that he had resided at the address where the police found the car and that he was married to owner of the car. At trial, the State introduced Richard's testimony regarding appellant's pretrial statements. Appellant objected to the admission of Richard's testimony. In his objection, appellant asserted the testimony was not admissible because the pretrial questioning by Richard constituted a custodial interrogation that required *Miranda*[2] warnings, which he had not yet been given. The trial court overruled appellant's objection in part, permitting Richard to provide information establishing the basic facts of appellant's residence and his marriage to the car's owner, but disallowed any testimony that would be "incriminating in nature."

At a bench conference in advance of his testimony, appellant submitted a motion in limine to limit impeachment on cross-examination.[3] Appellant requested that "the State not be allowed to use particularly" his prior conviction for

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[1] This agency gathers basic personal information from arrestees who have been booked and fingerprinted. This data is later generated into a report and sent to a magistrate to ascertain the present charges for the trial court and to set an appropriate bond amount.

[2] *See Miranda v. Arizona*, 384 U.S. 436, 468–70, 86 S. Ct. 1602, 1624–25 (1966).

[3] *See* TEX. R. EVID. 609(a) (allowing evidence of prior felony or other crime involving "moral turpitude" for limited purpose of attacking witness credibility); *Theus v. State*, 845 S.W.2d 874, 880–82 (Tex. Crim. App. 1992) (setting forth factors to consider under Rule 609 balancing test, which weighs probative value of evidence of prior conviction against its probable prejudicial effect).

aggravated robbery for the purpose of impeachment, or, in the alternative, that the State "only be able to refer to it as a felony conviction and not be able to name it [as] aggravated robbery." The court acceded to the extent of disallowing a specific reference to aggravated robbery, because

> if you're on trial for aggravated robbery and you've got an aggravated robbery prior conviction . . . the prejudicial far outweighs the probativeness of what . . . you can use for impeachment purposes.

Noting, however, that a mere reference to a "felony conviction" would not adequately convey the "moral turpitude" associated with the prior offense, the court ruled that it would

> limit the questioning to the fact that [appellant] was convicted of a felony that involved the unlawful taking of property with nothing more . . . I will permit you to say that he's been convicted on this day for whatever you want and it involves the unlawful taking of property. *It's a form of theft*.

(emphasis added). The court repeatedly emphasized that the goal of its ruling was to avoid the prejudice that could result from the use of the specific term "aggravated robbery," while preserving a level of specificity sufficient to reveal the moral turpitude of appellant's prior felony:

> I'm just trying to limit the aggravated robbery nomenclature of a particular conviction as opposed to it involved the illegal taking of property. That's all . . . I'm trying to figure out how to do it without saying aggravated robbery.

During cross-examination, the following exchange occurred:

STATE: You're the same Kenneth Dwayne Smith who was previously convicted of a felony involving theft, taking of property—

APPELLANT: I object. I object. That's not what we discussed, Judge. And I object to the language the prosecutor is using.

COURT: Well, okay. Come up and I'll tell you what my understanding was . . .

[Bench conference on the record]:

COURT: Here's what I wrote on my thing: You can put felony . . . involving the unlawful taking of someone else's property.

STATE: That's what I have written down.

APPELLANT: That's not what you said.

COURT: No, she said theft.

STATE: I'll rephrase it.

COURT: Okay.

APPELLANT: And Judge, I would just ask that the jury be asked to disregard.

COURT: Well, I can't do that because it means the same thing. I'm just telling you right now, if you look at what I said, what she said was not necessarily incorrect. I mean, you know—

APPELLANT: I believe it was, Judge. You gave very specific language . . .

Following this bench conference, the State rephrased its question:

STATE: You're the same Kenneth Dwayne Smith who was convicted of a felony involving the unlawful taking of property, are you not?

APPELLANT: Yes, ma'am.

The trial concluded and the jury found appellant guilty of aggravated robbery. This appeal followed.

VIOLATION OF PRIOR RULING

Appellant's first three issues arise out of the State's cross-examination of appellant, in which the prosecutor asked appellant whether he had been convicted of "a felony involving theft, taking of property."

A. Improper Question

In his first issue, appellant contends that the court erred in overruling his objection to the State's use of the word "theft" in its questioning of appellant. Appellant asserts the use of the word "theft" during cross-examination violated the trial court's limine order limiting the description of his prior convictions for impeachment purposes.

Appellant does not assert that the question or evidence regarding the prior conviction should have been disregarded as a violation of the Rules of Evidence. Thus, we do not apply the analysis outlined in *Theus v. State*, 845 S.W.2d 874, 880–82 (Tex. Crim. App. 1992) (interpreting TEX. R. CRIM. EVID. 609(a)), in which the Court of Criminal Appeals set forth the relevant factors to consider in balancing the probative value of evidence of a prior conviction against its prejudicial effect on a party.

Instead, appellant's complaint regards the alleged violation by the State of the trial court's ruling on appellant's motion in limine. A motion in limine is a method of raising objection to an area of inquiry prior to the matter reaching the ears of the jury through a posed question, jury argument, or other means. *Thierry v. State*, 288 S.W.3d 80, 86 (Tex. App.—Houston [1st Dist.] 2009, pet ref'd). By its nature, it is also subject to reconsideration by the court throughout the course of the trial. *Id.* This is because parties may not enforce it to exclude properly admissible evidence. *Id.* A motion in limine is not a ruling that excludes evidence; rather, it merely requires parties to approach the trial court for a definitive ruling before attempting to put on evidence within the scope of the motion. *Id.* at 86–87. It is axiomatic that a motion in limine does not preserve error. *Id.* at 87. Additionally, a ruling on a motion in limine may entitle a party to relief, but any remedy for such violation lies within the trial court. *Id.* Because appellant does not complain on appeal about the actual admission of the prior conviction evidence, and the remedy regarding any alleged violation of a ruling on a motion in limine lies with the trial court, he has preserved nothing for our review. *Id.* (holding that when appellant objected to violation of order granting motion in limine, and not to admission of evidence itself, no error is preserved); *Harnett v. State*, 38 S.W.3d 650, 655 (Tex. App.—Austin 2000, pet ref'd) (same).

We overrule appellant's first issue.

B. Prosecutorial Misconduct

In his second and third issues, appellant asserts that the State's same action constituted prosecutorial misconduct, denying him Due Process and Due Course of law under the federal and state constitutions, respectively. The record shows that appellant failed to make an objection regarding prosecutorial conduct at trial. Because appellant failed to object on that basis at trial, he has not preserved error on the issue of prosecutorial misconduct. *See* TEX. R. APP. P. 33.1 (general rule is that party must make timely and specific objection at trial to preserve issue for appellate review); *Hajjar v. State*, 176 S.W.3d 554, 566 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (holding that failure to object on basis of prosecutorial misconduct waived error) (citing *Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995)).

We overrule appellant's second and third issues.

PRETRIAL INTERVIEWER'S TESTIMONY

In his fourth issue, appellant argues that the trial court erred in allowing an interviewer with the Harris County pretrial services agency to testify regarding statements that appellant had made after his arrest. We review a trial court's evidentiary rulings under an abuse-of-discretion standard. *Klein v. State*, 273 S.W.2d 297, 304–05 (Tex. Crim. App. 2008). To constitute an abuse of discretion,

the trial court's decision must fall outside the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004).

Appellant argues that the interviewer's questions adduced the primary basis for his conviction—information linking him to the address at which the car involved in the aggravated robbery was found, and establishing his relationship with the car's owner—and, therefore, constituted custodial interrogation requiring *Miranda* warnings. Under both the federal and state constitutions, questioning attendant to an administrative "booking" procedure does not generally require *Miranda* warnings. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S. Ct. 2638, 2650 (1990) (holding that officer asking arrestee for his name, his address, and similar basic information had not triggered *Miranda* requirements because such questions "fall within a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the biographical data necessary to complete booking or pretrial services") (internal quotation omitted); *Cross v. State*, 144 S.W.3d 521, 524 n.5 (Tex. Crim. App. 2004) (holding that administrative questions do not constitute "interrogation" because they are not normally expected to elicit incriminating responses). We conclude the information adduced was produced from administrative questioning, and we hold, therefore, that the trial court did not abuse its discretion by concluding that appellant's post-arrest interview had not required *Miranda* warnings to be admissible.

Further, we find the testimony caused no harm to appellant because his connection to the car involved in the crime—which was the import of all testimony establishing his residence and marital status—had been substantially established by other evidence to which appellant did not object. For example, appellant's wife separately testified to his place of residence and to her ownership of the car, and the police testified that they had found appellant in bed inside the residence. Appellant himself testified that Spring's description of the car involved in the crime, including its license plate number, precisely matched that of his wife's car and its license plate number. He also admitted that he had been inside the residence outside which the car was parked and that the police had questioned him there briefly on the morning of the crime. Because appellant did not contest the admission of any of this evidence, any possible error in admitting the complained-of testimony was rendered harmless.

We overrule appellant's fourth issue.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack, and Justices Massengale and Mirabal.[4]

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

[4] The Honorable Margaret Garner Mirabal, Senior Justice, Court of Appeals for the First District of Texas, participating by assignment.