Opinion issued August 18, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00563-CR

DAVID LEWIS ROWELL, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Court Case No. 20648

MEMORANDUM OPINION

A jury found David Lewis Rowell guilty of the sexual assault of a child and, after finding the State's allegations of his four prior felony convictions true, assessed Rowell's punishment at life imprisonment. On appeal, Rowell contends

that the trial court erred in admitting as evidence (1) a portion of the recording of Rowell's police station interview, in which he confessed to the sexual assault and (2) documentation of his prior felony convictions. We find that the trial court properly denied Rowell's motion to suppress, and that, with respect to the challenged evidentiary rulings, Rowell either waived or failed to show that the trial court abused its discretion. We therefore affirm.

Background

The Polk County Sheriff's Office received a complaint from a mother and her sixteen-year-old daughter that Rowell, a neighbor, had sexually assaulted the daughter. Detective C. Allen was assigned to investigate the complaint. At the suppression hearing, Allen testified that she explained to Rowell that allegations of a sexual nature had been made against him. Rowell acknowledged that he knew H. and that her mother had made the allegations against him. Detective Allen asked Rowell to come to the police station for an interview, and Rowell said he would.

Allen enlisted Lieutenant C. Finegan to assist in the investigation. Finegan testified that when Rowell arrived at the station, he and Allen discussed with Rowell his rights and warnings consistent with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Rowell signed a form acknowledging that he understood his rights, but Finegan conceded that the form did not comply with the Texas Code of Criminal Procedure because it lacked the statement that "anything you say can

and will be used against you at your trial." In a recorded interview, which lasted a little over half an hour, Rowell admitted to sexual contact with H. Finegan testified that he did not observe Rowell speaking or behaving in any way that indicated he was not aware of what he was doing or that his judgment was impaired. Rowell left the station.

In contrast, Rowell testified that, when he appeared at the station, he spoke with Allen for about ten minutes, then with Finegan. Rowell testified:

> I told him, "Look, you know this is all baloney. My wife is at home dying as we speak." And he pretty much let me know that unless I gave him what he wanted I wasn't going nowhere and regardless of what he said. And here I am mentally distraught. I'm on medication. I'm almost starved to death. I just gave in and gave him whatever he wanted to get out of there. It's wrong. I wanted to be with my wife if she died. That was all that was on my mind. . . .

Also before the jury, Rowell denied having any sexual contact with the child, claiming that Allen had instructed him not to bring an attorney with him to the interview and that he was coerced into the admission.

Discussion

I. Admissibility of recorded interview

Our standard for reviewing a trial court's ruling on a motion to suppress evidence is bifurcated; we defer to a trial court's determination of historical facts and review de novo the trial court's application of the law. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). In reviewing a ruling on a question of

the application of law to facts, we review the evidence in the light most favorable to the trial court's ruling. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). At a suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility. *Maxwell*, 73 S.W.3d at 281. Accordingly, the trial court may choose to believe or to disbelieve all or any part of a witness's testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

Appellate courts generally limit their review of the trial court's ruling to an examination of the evidence produced at the suppression hearing, because that ruling was based on it rather than evidence introduced later at trial. *Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007). This general rule, however, does not apply when, as here, the parties consensually re-litigate the suppression issue during the trial on the merits. *Id.*; *Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996). We therefore consider both the pretrial evidence and the trial testimony in our review.

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. Article 38.22 of the Texas Code of Criminal Procedure prohibits the use of oral statements made as a result of custodial interrogation unless the statement is electronically recorded, *Miranda* warnings are given, and the accused knowingly,

intelligently, and voluntarily waives any rights set out in the warnings. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(1), (2) (West 2005). The State concedes that the police officer did not inform Rowell that "any statement he makes may be used against him at his trial," and thus, the warnings he received do not satisfy article 38.22's requirements for custodial interrogation. *See id.* § 3(a)(1). Article 38.22, however, does not prohibit the admission of a voluntary statement, whether or not it results from custodial interrogation, or a statement taken when a suspect is not in police custody. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 5 (West 2005).

The determination of custody is entirely objective, and the subjective intent of law-enforcement officials is not relevant unless communicated through their words or actions to the suspect. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1966). Stationhouse questioning, as occurred here, does not alone constitute custodial interrogation. *Id.* at 255. Simply being the focus of a criminal investigation does not amount to being in custody. *Martinez v. State*, 131 S.W.3d 22, 32 (Tex. App.—San Antonio 2003, no pet.) When a person voluntarily accompanies officers to an interview, and he is not "restrained of his freedom of movement" and is not in custody, even though he knows or should know that the police officers suspect he may be implicated in the crime under investigation. *Shiftlet v. State*, 732 S.W.2d 622, 630 (Tex. Crim. App. 1985).

An interview that begins as noncustodial, however, can escalate into a custodial interrogation because of police conduct during the encounter. *Dowthitt*, 931 S.W.2d at 255. In determining whether a noncustodial encounter has escalated into custodial interrogation, we examine whether the four factors discussed in *Dowthitt* are present: (1) whether the suspect is physically deprived of his freedom of action; (2) whether law enforcement officers tell a suspect that he cannot leave; (3) whether law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and (4) whether probable cause exists to arrest the suspect and law enforcement officers do not tell the suspect that he is free to leave. *Id.*

In its recent decision in *Estrada v. State*, the Court of Criminal Appeals held that a station-house interrogation that lasted approximately five hours was non-custodial, noting "that the police told appellant several times that he was free to leave, that appellant also acknowledged that he came to the station voluntarily and did not 'have to be [t]here anymore,' and that appellant stated several times that he wanted to leave and go home." 313 S.W.3d 274, 294 (Tex. Crim. App. 2010). In reaching its holding, the Court of Criminal Appeals drew factual similarities between the case before it and two decisions in which the United States Supreme Court determined that the interviews were noncustodial. *See id.* In the first, *California v. Beheler*, the defendant voluntarily accompanied the police to the

station house, talked for less than thirty minutes, and was permitted to return home. 463 U.S. 1121, 1123–24, 103 S. Ct. 3517, 3519–20 (1983). In the second, *Oregon v. Mathiason*, the defendant voluntarily went to the police station, was told he was not under arrest, received his *Miranda* warnings, was told that he could terminate the interview, and was allowed to leave after a twenty- to thirty-minute interview. 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977).

Viewing the evidence in a light favorable to the trial court's ruling, the conditions of Rowell's interview were less onerous than those in *Estrada* and substantially similar to those in *Beheler* and *Mathiason*. After Rowell received most, but not all, of the warnings required by section 38.22, Rowell participated in a thirty-minute interview with Finegan, and then he freely left the police station. The trial court was not required to credit Rowell's self-serving trial testimony concerning the officers' behavior. *See Ross*, 32 S.W.3d at 855. The evidence supports the conclusion that Rowell was not in custody when he made the statement admitting to the sexual assault.

The fact that Rowell felt coerced in the interview, without more, does not change its character from noncustodial to custodial. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Mathiason*, 429

U.S. at 495, 97 S. Ct. at 713, *quoted in Estrada*, 313 S.W.3d at 294. We therefore hold that the trial court did not err in admitting the recording.

II. Admission of Proof of Prior Felony Convictions to Enhance Punishment

A. Standard of review and preservation of error

Rowell also contends that the trial court erred in admitting evidence of his prior criminal convictions during the sentencing phase of his trial. A trial court has broad discretion in determining the admissibility of evidence presented at the punishment phase. *See Henderson v. State*, 29 S.W.3d 616, 626 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). "[E]vidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to . . . any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2010); *Flores v. State*, 125 S.W.3d 744, 746 n.1 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Evidence is relevant if it has 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. *See* TEX. R. EVID. 401.

In order to preserve a complaint for appellate review, the record must show that the appellant made a specific and timely complaint to the trial judge, and that the trial judge ruled on the complaint. TEX. R. APP. P. 33.1. "The specificity requirement is met if the complaint made at trial was clear enough to the trial judge so as to permit the trial judge to take corrective action when the complaint was made." *Lovill v. State*, 319 S.W.3d 687, 691 (Tex. Crim. App. 2009). The complaining party must have informed the trial judge what was wanted and why the party was entitled to it. *Id.* A complaint will not be preserved if the legal basis of the complaint raised on appeal varies from the complaint made at trial. *Id.* A complaint is timely when it was "made as soon as the ground for complaint is apparent or should be apparent." *Aguilar v. State*, 26 S.W.3d 901, 905 (Tex. Crim. App. 2000).

A. Timeliness of notice

Rowell first contends that the trial court erred in admitting evidence of his prior criminal convictions because the State gave untimely notice of its intent to use them as an enhancement to punishment. This notice requirement stems from the right to due process protected by the federal constitution. *Villescas v. State*, 189 S.W.3d 290, 293 (Tex. Crim. App. 2006). Even a constitutional claim, however, may be waived by a failure to raise a timely objection at trial. *Pipkin v. State*, 329 S.W.3d 65, 68–69 (Tex. App.—Houston [14th Dist.] 2010, pet. denied);

TEX. R. APP. P. 33.1. Rowell raises this issue for the first time on appeal; because Rowell failed to timely object in the trial court, we may not consider its merit here. *See Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002).

B. Admissibility of prior conviction records

Rowell contends that documents proving his prior felony convictions were improperly identified and thus erroneously admitted during the punishment hearing. Specifically, Rowell claims that Exhibits 3, 4, 8, 9, 10, 12, and 14 should be excluded from the evidence because they do not, in fact, prove his prior convictions for those felonies. We disagree.

Rowell contends that Exhibit 3, a certified copy of a 1998 federal judgment convicting Rowell of two felonies, should not have been admitted because it was not connected with him, other than by the fact it contained his name. At trial, Rowell objected that Exhibit 3 was "not properly authenticated. There is no showing it's the same David Lewis Rowell." Rowell's objection to Exhibit 3 as unauthenticated has no merit. The Texas Rules of Evidence allow the trial court to admit a certified copy of a public record as properly authenticated. TEX. R. EVID. 801, 902. With respect to the identity issue, the State pointed out at trial that the 1998 federal judgment contained Rowell's date of birth and his social security number, both of which were already in evidence through Rowell's own testimony. This evidence provided a sufficient basis for the jury to determine that Rowell is

the same person as the person convicted under the 1998 federal judgment. *See Flowers v. State*, 220 S.W.3d 919, 924–25 (Tex. Crim. App. 2007) (holding that sufficient evidence supported sentence where proof included certified copy of computer printout from county clerk setting out conviction for DWI in Dallas County on specific date showing that "Vincent Henry Flowers" in that numbered case was sentenced to 45 days in jail and printout contained date of birth, address, social security number, and other personal descriptors for that "Vincent Henry Flowers," as well as unobjected-to official Texas driver's license record for appellant, issued under same name, "Vincent Henry Flowers," with the same date of birth, address, personal descriptors, and matching information concerning DWI conviction and picture that trial court could use to compare to person standing before him); *Ruiz v. State*, No. 01-08-00011-CR, 2010 WL 1948305. at *5–*6 (Tex. App.—Houston [1st Dist. 2010, pet. ref'd) (mem. op., not designated for publication) (rejecting contention that absence of fingerprint on judgment and corresponding jail card prevented State from linking prior conviction to appellant; judgment contained appellant's name, sex, date of birth, social security number, handwritten address, and information was identical to that contained on jail cards for offenses committed in March 2002 and September 2004 with fingerprints that testifying officer identified as appellant's fingerprints).

Rowell's objections to the admission of Exhibits 8, 10, and 14 are likewise unavailing. Exhibit 8 is a state penitentiary pack showing a 1976 conviction of "David Rowell" for burglary of a habitation. It contains a photograph and other identifying information, including date of birth, height, weight, complexion, age, eye color, and hair color. The state penitentiary pack contained a set of fingerprints. An officer with expertise in fingerprint comparison and identification took a set of fingerprints from Rowell the same day he testified. The officer explained that the state fingerprint card contained in the penitentiary pack was of poor quality, but confirmed that Exhibit 9, a certified copy of a Gregg County fingerprint card, signed by "David L. Rowell Sr." two days after he began serving his sentence for the 1976 conviction, matched Rowell's fingerprints. Exhibit 10, a certified copy of an indictment of "David Rowell" for a November 1976 burglary of a habitation, contains the same case number as Exhibit 8. Through Rowell's fingerprint on documentation with the same case number, the officer also linked Exhibit 14, a certified copy of an indictment on a 1974 possession-of-cocaine charge, to Rowell. We hold that sufficient evidence links the evidence of these prior felony convictions to Rowell. *See Flowers*, 220 S.W.3d at 924–25.

When the State first tendered Exhibit 4, the trial court sustained the defense objection, and the State withdrew it, but Rowell failed to object when the State tendered it for admission later in the proceeding. Rowell thus waived any

challenge to the admission of Exhibit 4. *See Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003) (holding that appellant must object each time inadmissible evidence is offered unless he obtains running objection or makes an objection outside presence of jury to all testimony he deems objectionable). Rowell also waived his challenges to Exhibits 9 and 12 by failing to timely object to their admission. *See* TEX. R. APP. P. 33.1(a)(1)(A); TEX. R. EVID. 103(a)(1); *Layton v. State*, 280 S.W.3d 235, 238–39 (Tex. Crim. App. 2009).

Conclusion

We hold that the trial court did not err in denying Rowell's motion to suppress the portion of the recorded interview in which he admitted to the sexual assault. We further hold that Rowell either waived his complaint or failed to show that the trial court abused its discretion in admitting the challenged evidence. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Bland, and Massengale.

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