Affirmed and Memorandum Opinion filed July 26, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00886-CR

ANTHONY OSARINMWIA IMADE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1017101

M E M O R A N D U M O P I N I O N

A jury found appellant Anthony Osarinmwia Imade guilty of unlawfully delivering a controlled substance, Dihydrocodeinone, commonly known as Hydrocodone. The jury sentenced appellant to 20 years' imprisonment and assessed a fine of $100,000. Appellant argues on appeal that the trial court erred by admitting evidence in violation of Texas Rule of Evidence 404(b) at trial. We affirm.

BACKGROUND

Officer Elizabeth Mihalco of the Houston Police Department Major Offenders Division began conducting an undercover investigation of appellant and his chiropractic

clinic in 2004. Officer Mihalco established a relationship with appellant over the course of the investigation, which lasted more than four months. Officer Mihalco's meetings with appellant were secretly recorded. Officer Mihalco testified that she purchased 500 tablets of Hydrocodone from appellant without a prescription on December 15, 2004.[1]

Appellant testified at trial and disputed Officer Mihalco's version of the events. Appellant testified that Officer Mihalco told him she was a pharmaceutical representative visiting Houston to purchase medication for a pharmacy. Appellant testified that Officer Mihalco gave him a list of prescription drugs to procure for her, but appellant put the list in his drawer and "did not look for nothing for her." He testified that he informed Officer Mihalco: "We don't have doctors here, only therapeutic prescription[s]." Appellant testified that he did not give Officer Mihalco any prescription drugs at that time. He testified that neither he nor his employee, chiropractor Stephen Chapman, were authorized to prescribe drugs.

The jury found appellant "guilty of delivery of a controlled substance, namely, a material compound mixture of preparation containing limited quantities of the following narcotic drug: not more than 15 milligrams of dihydrocodeinone per dosage unit, with one or more active, non[-]narcotic ingredients in recognized the therapeutic amounts, weighing by aggregate weight, including any adulterants or dilutants, at least 400 grams as charged in the indictment." The jury sentenced appellant to 20 years' confinement and assessed a fine of $100,000.

ANALYSIS

Appellant argues in his only issue on appeal that the trial court erred in admitting extraneous offense evidence showing that appellant (1) unlawfully delivered Valium and Viagra to Officer Mihalco in addition to Hydrocodone on December 15, 2004; and (2) engaged in transactions with Officer Mihalco on other occasions to unlawfully deliver

[1] Houston Police Department Crime Lab chemist Kari Adams testified that each tablet from the December 15, 2004 transaction contained 15 milligrams of the controlled substance Dihydrocodeinone.

prescription drugs.[2]

I. Valium and Viagra

Appellant argues that, in addition to admitting evidence of the offense for which he was indicted, the trial court improperly admitted evidence that he unlawfully delivered Valium and Viagra to Officer Mihalco during the same transaction. Appellant argues that the evidence regarding the Valium and Viagra was inadmissible because it constitutes evidence of "other crimes, wrongs or acts" barred by Texas Rule of Evidence 404(b). *See* Tex. R. Evid. 404(b) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

The State first introduced evidence of the Valium and Viagra through the direct examination of Investigator Douglas Osterberg, who testified:

> Q. What else did [Officer Mihalco] have instead of the money [when she returned from purchasing Hydrocodone from appellant on December 15, 2004]?
>
> A. She had a large bottle of pills. I think it was "Hydrocodone" was the name on the pills. [Plus] 47 other pills and 11 other pills.

[2] Appellate counsel was appointed to represent appellant on October 16, 2009. Appellant made several general requests for counsel to be appointed thereafter and informed the court on October 21, 2010: "[Appointed counsel] is no longer my appallet [sic] counsel, and from now on send every information concern [sic] my appeal to the address above." We denied appellant's requests because he already was represented by appointed counsel. Counsel timely filed a brief on appellant's behalf on December 8, 2010. Appellant filed an untimely pro se brief on January 10, 2011. A defendant may not manipulate the right to counsel so as to obstruct the orderly procedure in the court or interfere with the fair administration of justice and must, in some circumstances, yield to the general interest of prompt and efficient justice. *Carroll v. State*, 176 S.W.3d 249, 256 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). A defendant is not entitled to his personal choice of appointed counsel; he is required to accept the attorney appointed by the trial court unless the defendant (1) waived his right to counsel and chose to represent himself or (2) adequately demonstrated why appointment of new counsel was necessary. *Id*. Appellant has not clearly and unequivocally waived his right to counsel and chosen to represent himself; even if he had, his pro se brief was not timely filed. *See Webb v. State*, 533 S.W.2d 780, 786 (Tex. Crim. App. 1976) ("It is incumbent upon an accused to clearly and unequivocally inform the trial court of his desire to prosecute his appeal without the aid of counsel."). Additionally, appellant has not demonstrated why appointment of new counsel is necessary. *See Carroll*, 176 S.W.3d at 256. Appellant is not entitled to hybrid representation on appeal. *Marshall v. State*, 210 S.W.3d 618, 620 n.1 (Tex. Crim. App. 2006). Accordingly, we do not consider appellant's pro se brief in addition to the one filed by his appointed counsel.

> Q. And your training and experience as a police officer, specifically in this area, did you recognize what the 47 other pills were?
>
> A. We believed at the time the 47 pills was going to be [sic] Valium and 11 pills, I believe, was [sic] Viagra.

Appellant did not object to this testimony. Appellant first objected to evidence regarding extraneous offenses when the State called Officer Mihalco to testify that she "was going to attempt to purchase some Viagra pills from the defendant" during the December 15, 2004 transaction. Officer Mihalco testified that appellant met her at the Auto Zone parking lot located a block from his clinic to make the delivery. She testified: "[Appellant] handed me [two] napkins and told me that the pills were in the napkins. And he told me . . . that the other pills, the bottle, was in the front driver's seat. And so, I walked over to his vehicle and I noticed a large bottle . . . on the front seat of the driver's seat." The sealed bottle was labeled "Hydrocodone." The other pills from the napkins were admitted into evidence over appellant's Rule 404(b) objections.[3]

"To preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection." *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003); *see* Tex. R. App. P. 33.1(a). Overruling an objection to the admission of evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. *See Lane v. State*, 151 S.W.3d 188, 192-93 (Tex. Crim. App. 2004) (citing *Valle*, 109 S.W.3d at 509, and *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998)); *see also Crocker v. State*, 573 S.W.2d 190, 201 (Tex. Crim. App. 1978) (declining to address admissibility of psychiatrist's testimony of patient's truthfulness after a psychologist gave similar opinion earlier without objection).

[3] Chemist Kari Adams testified regarding the two types of pills delivered in the napkins during the December 15, 2004 transaction. She identified the 47 tablets as Valium based on their appearance and a substance confirmation test. She performed a pharmaceutical identification of the logo on the 11 Viagra tablets, but did not perform a substance confirmation test "because this is considered a dangerous drug [requiring a prescription, but not a controlled substance,] and at the time it was not in the charges."

Appellant's objection to Officer Mihalco's testimony and the State's evidence regarding her purchase of Valium and Viagra during the December 15, 2004 transaction did not preserve this issue for review because the jury had already heard other evidence of the same fact without objection. *See Lane*, 151 S.W.3d at 192-93. We overrule appellant's issue as it relates to the evidence of Valium and Viagra purchased by Officer Mihalco on December 15, 2004.

II. Other Transactions

Appellant next argues that the trial court erred by allowing the State to cross-examine him and admitting extraneous offense evidence showing that he transacted with Officer Mihalco on other occasions to unlawfully deliver prescription drugs. Appellant argues that these acts were improperly admitted to show character conformity. *See* Tex. R. Evid. 404(b).[4]

The State asked appellant on cross-examination if he met with Officer Mihalco to deliver 50 tablets of Vicodin (also called Hydrocodone) and 50 tablets of Xanax or Acetaminophen on November 10, 2004; 50 tablets of Vicodin on November 15, 2004; 250 tablets of Vicodin on December 7, 2004; three bottles of Insulin, 90.5 tablets of Lipitor, and three tablets of Levitra on January 13, 2005; or 1,002 tablets of Hydrocodone on February 16, 2005. Appellant denied any knowledge of such transactions and denied selling prescription drugs to Officer Mihalco at any point.[5]

[4] Appellant also argues for the first time on appeal that the evidence was inadmissible because the State failed to give notice of its intent to offer this extraneous offense evidence pursuant to Rule 404(b). *See* Tex. R. Evid. 404(b) (Evidence of other crimes may "be admissible . . . provided that . . . reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction."). Because appellant failed to raise this argument at trial, he waived the issue for appellate review. *See* Tex. R. App. P. 33.1(a).

[5] When asked to respond to Officer Mihalco's testimony that he discussed selling prescription drugs to her on multiple occasions, appellant stated: "She's lying." Appellant testified that the transcripts of recordings taken during Officer Mihalco's meetings with appellant had been "cut and paste[d]" to manufacture evidence against him. When asked if he wished to "[tell] the members of the jury [that] the D.A.'s office is now conspiring in the creation and manufacturing of the evidence in this case," appellant answered affirmatively.

The State recalled Officer Mihalco, who testified that appellant sold her $200 worth of Xanax and Loricets on November 10, 2004; 50 tablets of Hydrocodone on November 15, 2004; 250 tablets of Hydrocodone on December 7, 2004; three bottles of Insulin, a container of Lipitor, and a pack of Levitra pills on January 13, 2005; and two bottles of Hydrocodone containing approximately 1,000 tablets on February 16, 2005.[6] Officer Mihalco also testified that she recorded numerous conversations and meetings with appellant at which they discussed the purchase of more drugs without prescriptions.[7]

We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See Rodriguez v. State*, 203 S.W.3d 837, 841 (Tex. Crim. App. 2006). Because the trial court usually is in the best position to decide whether evidence should be admitted or excluded, we must uphold its ruling unless its determination was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007); *Hartis v. State*, 183 S.W.3d 793, 801-02 (Tex. App.—Houston [14th Dist.] 2005, no pet.). We must uphold the trial court's evidentiary ruling if it is reasonably supported by the record and is correct under any applicable theory of law. *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002); *Carter v. State*, 145 S.W.3d 702, 707 (Tex. App.—Dallas 2004, pet. ref'd) (citing *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999)).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Tex. R. Evid. 404(b); *Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Though evidence of extraneous offenses, wrongs, or acts may have a tendency to show character conformity, extraneous offense evidence that has independent relevance may be

[6] Chemists Kari Adams and James Miller confirmed that the tablets from the transactions on November 10 and 15, December 7, January 13, and February 16 tested positive as controlled substances or "dangerous drug[s]" requiring a prescription.

[7] When questioned, Officer Mihalco confirmed that CDs and transcripts of the recorded conversations, which were admitted into evidence, were copies of the original tapes and that they were "fair and accurate representations of the conversations that [she] had with the defendant on each one of those dates . . . ."

admissible to impeach a defendant. *See* Tex. R. Evid. 404(b); *Daggett v. State*, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005) (citing *Prescott v. State*, 744 S.W.2d 128, 130-31 (Tex. Crim. App. 1988) (en banc) (trial court held that defendant's testimony that this was his "first time going through this" gave a false impression to the jury that he had no criminal record thereby "open[ing] the door" to an inquiry by the State as to the validity of his testimony)).

When a witness, on direct examination, makes a blanket assertion of fact and thereby leaves a false impression with respect to his prior behavior or encounters with the law, he opens the door on otherwise irrelevant criminal history and he may be impeached by exposing the falsehood. *Winegarner*, 235 S.W.3d at 790; *Daggett*, 187 S.W.3d at 453 n.23. When a witness's blanket assertion of exemplary conduct "is directly relevant to the offense charged," the opponent "may both cross-examine the [witness] and offer extrinsic evidence rebutting the statement." *Winegarner*, 235 S.W.3d at 790-91 (brackets in original); *see Daggett*, 187 S.W.3d at 453 n.23, 24 (defendant's statements relating to charged offense, "I've never done anything of the sort with a sixteen year old girl period," and "I absolutely would not do something like this," opened the door for the State to present testimony of another sixteen year old witness regarding appellant's sexual misconduct toward her); *Metts v. State*, 22 S.W.3d 544, 548-49 (Tex. App.—Fort Worth 2000, pet. ref'd) (trial court properly allowed State to present testimony of witness during indecent exposure case; witness's testimony that defendant exposed himself on two prior occasions was admissible to impeach defendant's testimony on direct examination that he had "not ever been in anything remotely close to [indecent exposure] in my life").[8]

[8] The jury may consider this type of extraneous evidence only as evidence that the defendant misrepresented himself, not as substantive evidence of the charged offense. *Daggett*, 187 S.W.3d at 452. Upon request, the judge must provide a limiting instruction informing the jury that they may use the evidence only to gauge the defendant's credibility, not as any proof of defendant's guilt of the charged offense. *Id*. at 452-53. Appellant did not request such an instruction.

The State cross-examined appellant and presented Officer Mihalco's testimony regarding additional drug transactions after appellant opened the door by testifying as follows:

> Q. Did you give [Officer Mihalco] any medication [on December 15, 2004]?
>
> A. No, ma'am. . . .
>
> * * *
>
> Q. Did you ever offer to sell [Officer Mihalco] medication?
>
> A. No. . . .

Appellant's testimony on direct examination that he never offered to sell prescription drugs to Officer Mihalco is directly relevant to the charged offense and opened the door for the State to impeach his testimony by cross-examining appellant and offering evidence of the other transactions. *See Winegarner*, 235 S.W.3d at 790-91; *Daggett*, 187 S.W.3d at 453 n.23, 24. Accordingly, the trial judge acted within its discretion in overruling appellant's objection, and we will not disturb the ruling on appeal. *See Winegarner*, 235 S.W.3d at 790; *Hartis*, 183 S.W.3d at 801-02. We overrule appellant's issue as it relates to the admissibility of the extraneous offense evidence.

CONCLUSION

Because we overrule appellant's only issue on appeal, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Boyce.

Do Not Publish — Tex. R. App. P. 47.2(b).