Affirmed and Memorandum Opinion filed September 20, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00696-CR

REGINALD MILTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 1659998

MEMORANDUM OPINION

Appellant Reginald Milton was convicted on one count of perjury. On appeal, he raises four points of error: (1) that the evidence is legally and factually insufficient to support his conviction; (2) that the trial court abused its discretion by admitting a CD of a prerecorded statement, in violation of the Best Evidence Rule; (3) that the trial court abused its discretion by denying his motion for mistrial; and (4) that the trial court abused its discretion by admitting evidence of extraneous bad acts. We affirm.

BACKGROUND

Appellant served as an officer with the Texas Southern University Police Department. During his tenure, one of his responsibilities was to be a custodian of evidence. Under standard protocol within the department, evidence is normally secured in a locked storage room apart from appellant's office in order to protect the chain of custody.

In March 2005, appellant was transferred within the department from the Criminal Investigations Division to the Dormitory Patrol Division. As part of the transfer, appellant was expected to vacate his office by April 1, 2005, for its newly designated occupant, Lieutenant Preston Fontenot. When Lieutenant Fontenot moved into the office, he uncovered a small-caliber handgun lying on the floor next to a bookshelf, together with live ammunition. Believing the items to be unsecured evidence, Lieutenant Fontenot placed the objects in a locked file cabinet and then brought the matter to the attention of appellant's superior, Captain Remon Green.

On April 20, 2005, appellant met with Captain Green and Lieutenant Fontenot to discuss the items found in his former office. The meeting was recorded on a minicassette player. The meeting was not part of an official investigation, and Captain Green did not preface it as such. Instead, Lieutenant Fontenot indicated that he merely wanted to "get together on the evidence," and come to an understanding as to what the items were, why they were left behind, and whether the chain of custody had been violated. To that extent, Captain Green asked the following questions: (a) whether the items recovered were objects used for training purposes or whether they were items of evidence collected from actual criminal investigations; (b) whether a log was kept of the evidence; (c) why the items were being stored in appellant's office; (d) whether appellant's office contained any illicit drugs or other traces of evidence; and (e) whether appellant informed anyone, prior to vacating his office, that he had evidence stored in there.

Appellant answered that the items did constitute actual evidence, and that they were properly checked out to him. Appellant also emphasized that he felt "pressured" to vacate his office by April 1, 2005, and that he told Captain Green about the items being stored in there before the interoffice transfer was complete. Captain Green stated that he did not recall any such discussion. After the meeting concluded, an inventory was taken of appellant's former office, where additional unsecured evidence was recovered, including crack cocaine, a number of sexual assault kits, a video, a dry wall cut-out, a red bandana, bullet fragments, a Texas identification card, a BB rifle, and counterfeit currency.

More than four years after that meeting, in September 2009, appellant testified under oath before an administrative law judge. The purpose of the hearing was to dispute certain claims regarding appellant's licensure in Texas as a certified peace officer. During the hearing, Cheryl Cash, acting as general counsel for Texas Southern University, conducted the following examination of appellant:

> Q. And, so, it's your testimony that Captain Green never met with you in 2005 regarding an unsecured evidence investigation?
>
> A. No, ma'am.
>
> Q. So, looking at Respondent's Exhibit 10, page 20 -- will you turn to that?[1]
>
> A. Yes, ma'am.
>
> Q. This office that you said you vacated in August, 2005 --
>
> A. No. It was --
>
> Q. Well, that was your testimony.

[1] This exhibit included a memorandum report prepared by Captain Green following his meeting with appellant on April 20, 2005. All passages recited by Cash during her examination are from the Green memorandum.

A. I believe it was earlier because -- I know it was before the summer because I was working dorms during the summer.

Q. Well, okay. Let's look at the second paragraph. "On April 20th, 2005, Lieutenant Fontenot and I met with Sergeant Milton and requested that he provide details about the items that were left in the office."

Are you saying this has never happened?

A. No, ma'am.

Q. Never happened? Captain Green made this up in May, 2005?

A. I did not meet with him on this.

Q. "During our meeting, Lieutenant Fontenot and I asked Sergeant Milton if the items were actually evidence; and Sergeant Milton indicated that the items were items of evidence collected by members of this department."

You never made that statement to him?

A. I don't recall this meeting, no, ma'am.

Q. "Sergeant Milton was also asked if the items had been logged in and out of the evidence locker to protect the chain of custody. He again indicated that the items were properly documented, checked out to be in his office, and all evidence could be accounted for."

You never made that statement?

A. No, ma'am.

Q. You were never in a meeting with Captain Green regarding unsecured crack cocaine evidence lying about in your office?

A. No, ma'am.

Q. So, this whole investigation and document, he just simply made it up, signed his name to it?

A. As evidence custodian, I didn't keep any evidence in my office. The evidence --

Q. Okay. My question to you is not about the facts. I'm simply asking you about an investigation in 2005.

A. I did not have a meeting with Captain Green on this particular item.

Q. So, that report where it says he did is -- you're characterizing it as a lie. Is that correct?

A. That's correct, ma'am. They had written me up for everything else previous. Why didn't they write me up for this?

Following the hearing, appellant was charged by information with perjury. A jury found him guilty as charged, and punishment was assessed at one year of confinement in the Harris County jail. The trial court suspended the sentence and placed appellant on community supervision for a period of two years. Appellant timely appealed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant argues that the evidence is legally and factually insufficient to support his conviction.

When deciding whether the evidence is sufficient to support findings that must be proven beyond a reasonable doubt, the Court of Criminal Appeals has held that we may only employ a single standard of review: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion); *see also Howard v. State*, 333 S.W.3d 137, 138 n.2 (Tex. Crim. App. 2011). Accordingly, we evaluate appellant's first issue under a rigorous and proper application of *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

When reviewing the legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence and substitute our judgment for that

of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.*

To obtain a conviction for perjury, the State was required to prove that appellant made a false statement under oath with intent to deceive and with knowledge of the statement's meaning. *See* Tex. Penal Code Ann. § 37.02 (West 2010). In a prosecution for perjury, intent to deceive may be inferred from the circumstances. *See Mitchell v. State*, 608 S.W.2d 226, 229 (Tex. Crim. App. 1980).

After parsing his testimony from the administrative hearing, appellant claims that the evidence is insufficient to show that he ever made a false statement under oath. During his criminal trial, appellant explained that he never denied having a meeting with Captain Green; rather, he only denied having a meeting with regards to an internal investigation of which he was the subject. According to appellant, he was unable to testify to an internal investigation during his administrative hearing because he was never placed on notice of an investigation at the time of his meeting in April 2005. Appellant claimed that Captain Green and Lieutenant Fontenot never mentioned an official internal investigation before they questioned him. Appellant also claimed that his rights were never read to him at the beginning of their meeting, which is customary with internal investigations. As he testified, the meeting in April 2005 only concerned "evidence and some investigations that [appellant] had conducted" on behalf of his coworkers.

Appellant also claimed that he did not perjure himself when he denied meeting with Captain Green to discuss "unsecured crack cocaine evidence." Appellant argues that the words "crack cocaine" were never used during the meeting, and that no illicit drugs

had been uncovered in his office prior to it. To this extent, appellant argues that the State has misconstrued his statements from the administrative hearing.

Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient to support the conviction. During the administrative hearing, appellant testified under oath that he did not meet with Captain Green to discuss items of evidence left behind in his office. Captain Green testified that this statement was false and that appellant was made aware of the subject of their meeting before it occurred. A recording of this meeting was published in its entirety for the jury's consideration. Captain Green also opined that appellant had a motive to testify untruthfully during the administrative hearing because he was in danger of losing his peace officer's license. Based on this evidence, a rational juror could have found every essential element of the offense beyond a reasonable doubt. We overruled appellant's first issue.

BEST EVIDENCE RULE

In his second issue, appellant complains that the trial court abused its discretion by admitting into evidence a duplicate recording of the April 2005 meeting, rather than the original. The meeting between appellant, Captain Green, and Lieutenant Fontenot was originally recorded on a minicassette player. Because the trial court was not equipped to play minicassettes, the State transferred the recording to a CD, and offered the duplicate into evidence instead. Citing the Best Evidence Rule, appellant insists that if the recording was to be played, it must have been from the minicassette player, and not the CD.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001); *Shaw v. State*, 329 S.W.3d 645, 651 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). The trial court abuses its discretion when its decision is arbitrary, unreasonable, or without reference to guiding rules or principles. *Makeig v. State*, 802 S.W.2d 59, 62 (Tex. Crim. App. 1990). Because the trial court has no discretion in determining the applicable law, the trial court

also abuses its discretion when it fails to analyze the law correctly and apply it to the facts of the case. *State v. Kurtz*, 152 S.W.3d 72, 81 (Tex. Crim. App. 2004). Under this standard, the trial court's ruling will be upheld if it falls within the zone of reasonable disagreement. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005).

Under Rule 1003 of the Texas Rules of Evidence, a duplicate is admissible to the same extent as an original unless a question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original. Tex. R. Evid. 1003. Stated another way, a duplicate is inadmissible if reasonable jurors might differ as to whether the original is what it is claimed to be. *Narvaiz v. State*, 840 S.W.2d 415, 431 (Tex. Crim. App. 1992).

Appellant primarily challenges the authenticity of the CD, rather than the original. He claims that the CD was created in 1994, and thus, "[t]he properties of the CD do not coincide with the date stated at the beginning of the recording." He also claims that the recording may have been altered because a fourth person can be heard on the CD. Finally, he objects that the chain of custody was never documented between Captain Green's possession of the minicassette to its transfer onto a CD.

The trial court questioned Captain Green about the recording outside the presence of the jury. Captain Green testified that the CD was an exact duplicate of the minicassette. He also said that he could only hear three voices on the recording: his own, appellant's, and Lieutenant Fontenot's. Appellant never questioned the authenticity of the original recording at trial, and defense counsel conceded that she never compared the original to the CD, even though the original was made available to her. We find that the trial court did not abuse its discretion in admitting the duplicate in lieu of the original. *See Hall v. State*, 67 S.W.3d 870, 876 (Tex. Crim. App.) (finding no abuse of discretion where maker of recording was not present when original was duplicated), *vacated on other grounds*, 537 U.S. 802 (2002); *Ballard v. State*, 23 S.W.3d 178, 181 (Tex. App.—Waco 2000, no pet.) (finding no abuse of discretion where defendant did not challenge

the authenticity of the original recording at trial or on appeal). Appellant's second issue is overruled.

MOTION FOR MISTRIAL

In his third issue, appellant contends the trial court abused its discretion by denying his motion for mistrial, which arose out of an alleged violation of "the Rule," or more formally, the witness sequestration rule.

Appellant invoked the Rule at the beginning of his trial. If a party invokes the Rule, the trial court must order witnesses excluded from the courtroom so they cannot hear the testimony of other witnesses. *See* Tex. R. Evid. 614. When placed under the Rule, witnesses must also be instructed that they are not to converse with each other or with any other person about the case, except by permission of the court. *See* Tex. Code Crim. Proc. Ann. art. 36.06 (West 2010). The Rule is designed to prevent witnesses from altering their testimony, consciously or not, based on the testimony of other witnesses. *Routier v. State*, 112 S.W.3d 554, 590 (Tex. Crim. App. 2003).

During the middle of trial, defense counsel was informed by her assistant that some of the State's witnesses may have been discussing the case in a holding area outside the courtroom. Counsel alleged that the witnesses were Lieutenant Fontenot, who had already testified previously that day, and Sergeant Jemal Starks, who had also testified earlier that he had taken photographs of unsecured evidence collected from appellant's office. Counsel's assistant did not present any sworn testimony as to what he heard. Counsel, nonetheless, moved for a mistrial, which the trial court denied based on the "[p]resent state of the record."

After the trial court made its ruling, counsel petitioned the court to reinstruct the witnesses of their obligations under the Rule. The witnesses having been so instructed, counsel moved to "amend" her objection to also include Investigator Mark Hamilton, who would later testify that he collected evidence against appellant and presented a case

to the District Attorney's Office. Counsel did not suggest or allege that Investigator Hamilton had violated the Rule. The trial court did not rule on the objection, observing instead that all of the witnesses had been reminded of the Rule.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). A mistrial is only required in extreme circumstances, where prejudice is incurable. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). A mistrial is a serious remedy, intended for conduct so improper and prejudicial that "expenditure of further time and expense would be wasteful and futile." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

A violation of the Rule is not, in itself, cause for reversible error. *Webb v. State*, 766 S.W.2d 236, 239–40 (Tex. Crim. App. 1989). The defendant must also show that he was harmed by the violation. *See Archer v. State*, 703 S.W.2d 664, 666 (Tex. Crim. App. 1986). To that extent, the Court of Criminal Appeals has determined that injury or prejudice to the defendant is dependent upon the showing of two criteria: (1) whether a witness actually conferred with or heard the testimony of another witness; and (2) whether the witness's testimony contradicted the testimony of a witness from the opposing party, or whether it corroborated the testimony of a witness he had conferred with or actually heard. *Webb*, 766 S.W.2d at 240.

The record does not establish that the Rule was ever violated. Defense counsel alleged that witnesses had been conversing about the case, but her allegations were purely secondhand. The only person to claim that witnesses were violating the Rule was counsel's assistant, but he never personally identified the witnesses to the trial court, nor did he testify as to the specific subject of their discussion. Moreover, counsel never asked to question the witnesses to see if the Rule had been violated.

Even if we were to assume that the Rule had been violated, appellant cannot demonstrate that he was harmed by one witness being influenced by the testimony of another. Counsel only identified three witnesses by name who may have been discussing

the case outside the courtroom. Two of those witnesses, Lieutenant Fontenot and Sergeant Starks, had already testified and would not testify again during the guilt-innocence phase of the proceeding. The only other witness identified was Investigator Hamilton, but his testimony proved to have a limited impact on the proceeding. Investigator Hamilton would later testify that he reviewed the audio recording in 2009, interviewed the persons involved in the April 2005 meeting, and presented a case to the Harris County District Attorney's Office. Investigator Hamilton was not present during the April 2005 meeting, nor did he attend the administrative hearing in which the perjury charge arose. The record does not contain any evidence to suggest that his testimony was influenced. Without any showing of harm, we conclude the trial court did not abuse its discretion in denying appellant's motion for mistrial. *See id.*; *Potter v. State*, 74 S.W.3d 105, 111 (Tex. App.—Waco 2002, no pet.) (finding no abuse of discretion, despite a violation of the Rule, where the record did not show that the witnesses' testimony was influenced or that the defendant was harmed or prejudiced by the violation). We overrule appellant's third issue.

EXTRANEOUS BAD ACTS

In his fourth issue, appellant argues that the trial court abused its discretion by admitting a disciplinary record containing inadmissible evidence of extraneous bad acts.

Before trial, appellant filed a motion in limine, which required the State to approach the bench before introducing evidence of appellant's disciplinary record. During appellant's direct examination, defense counsel questioned appellant about a statement made during his administrative hearing:

Q. Now look at line 20. Your response? Read that for us.

A. "That's correct, ma'am. They had written me up for everything else previous, why didn't they write me up for this?"

Q. Now, why did you make that response?

A. Because at that particular time, as much as I could remember, anything I had done with the department, I was being written up for or disciplined for.

Q. Okay.

A. And if they had found any evidence in my vacated office, I'm sure they would have done something at that particular time rather than just meeting with me about the evidence protocol.

Following appellant's testimony, the State called Captain Green as a rebuttal witness to clarify the extent of appellant's disciplinary record. Captain Green testified that appellant was suspended for five days without pay as a result of the unsecured evidence discovered in his office. Captain Green also testified that when appellant returned to duty, he was placed on a six-week performance improvement plan, in which his performance was evaluated on a weekly basis. In addition to Captain Green's testimony, the prosecutor introduced a letter dated June 3, 2005 from the Interim Chief of Police, informing appellant of the terms of his suspension. The letter stated that the reasons for appellant's suspension were (1) insubordination, and (2) "[o]ther job related conduct or job performance that interferes with fulfilling job performance, standards, or the job performance of other personnel."

Appellant objected to the admission of the letter because Captain Green did not compose it, and his name was nowhere to be found on it. On appeal, appellant argues that the letter constitutes inadmissible evidence of extraneous bad acts because it does not specifically reference the unsecured evidence as a reason for appellant's suspension.

We review the trial court's decision regarding the admission of evidence for an abuse of discretion. *Powell*, 63 S.W.3d at 438.

Our rules of evidence make clear that evidence of extraneous bad acts is generally inadmissible. Tex. R. Evid. 404. Nevertheless, otherwise inadmissible evidence may be admitted if the party against whom the evidence is offered "opens the door." *Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997). A defendant can open the door with

testimony or questioning that creates a false impression of his past behavior. *See Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993); *House v. State*, 909 S.W.2d 214, 219 (Tex. App.—Houston [14th Dist.] 1995) (Lee, J., concurring), *aff'd*, 947 S.W.2d 251 (Tex. Crim. App. 1997). Once the door has been opened, the State may then present evidence to correct the mistaken impression. *See Weyandt v. State*, 35 S.W.3d 144, 154 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Appellant's testimony created a false impression that he had not been disciplined after the discovery of unsecured evidence in his office. While testifying as a rebuttal witness, Captain Green indicated that appellant had in fact been suspended, and that this disciplinary action was "taken as a result of the unsecured evidence investigation." The trial court did not abuse its discretion by allowing testimony to expose the falsehood. *Cf. Metts v. State*, 22 S.W.3d 544, 548–49 (Tex. App.—Fort Worth 2000, pet. ref'd).

Even where evidence of extraneous acts is admissible, the Court of Criminal Appeals has held that the evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999); *see also* Tex. R. Evid. 404(b). In evaluating the trial court's decision, we must therefore consider the following criteria:

> (1) how compellingly the extraneous offense serves to make a fact of consequence more or less probable—a factor which is related to the strength of the evidence presented by the proponent to show the defendant, in fact, committed the extraneous offense;
>
> (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way";
>
> (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute?

Jensen v. State, 66 S.W.3d 528, 541 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Relevant evidence is presumed admissible, and the trial court should only exclude such evidence when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Mozon*, 991 S.W.2d at 847.

Balancing these factors together, we find that any prejudice stemming from the extraneous evidence did not outweigh its probative value. The State questioned Captain Green about appellant's disciplinary record to prove that the items left in appellant's office were in fact items of unsecured evidence and that the meeting in April 2005 concerned more than just "evidence protocol." This discussion consumed only a small portion of the record, and was necessary to impeach appellant and to provide the jury with a complete and accurate understanding of the facts. The trial court was in a superior position to evaluate the impact of the evidence. *Jensen*, 66 S.W.3d at 541. We cannot conclude that the evidence was admitted arbitrarily or unreasonably. Appellant's fourth issue is overruled.

CONCLUSION

Having overruled each of appellant's four issues, we affirm the judgment of the trial court.

/s/ Tracy Christopher
Justice

Panel consists of Justices Anderson, Brown, and Christopher.
Do Not Publish — TEX. R. APP. P. 47.2(b).