Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-14-00678-CR

Ronjee **MIDDLETON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR0666
Honorable Philip A. Kazen, Jr., Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Jason Pulliam, Justice

Delivered and Filed: March 30, 2016

AFFIRMED

Ronjee Middleton was found guilty by a jury of committing the offense of aggravated assault with a deadly weapon and was sentenced to twenty-seven years of imprisonment. On appeal, he brings three issues: (1) the trial court erred when it overruled his objection to the jury shuffle requested by the State because the shuffle violated his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) the trial court erred in denying his motion for mistrial; and (3) the trial court erred in excluding testimony of a witness. We affirm.

BACKGROUND

At trial, Danielle Barron testified that at about midnight on Saturday, October 27, 2012, she and her boyfriend, Joey Gonzalez, went to a party at a home near Ray Ellison Drive in San Antonio. She had been told about the party by one of her friends and did not know the person who was hosting the party. When she and Gonzalez arrived at the party, there were about thirty people already present. According to Barron, she was not drinking that night because she was driving. Gonzalez, however, had begun drinking before they arrived at the party and continued to drink a "good amount" at the party. At some point during the party, Barron heard what sounded like a gunshot coming from upstairs.

Barron testified that she saw Middleton at the party that night. She did not know Middleton, but he was at the party with her high school friend, Noel Smith. According to Barron, at the time she heard what sounded like a gunshot, Middleton was sitting in a chair in the corner of the living room. "And when the gun—when the loud noise happened, he kind of stood up, picked up his pants." Barron testified that she saw a "shiny gun in his pants." The woman who was hosting the party went to see what the noise was. Barron testified that the woman came back to the living room "and clarified that it was a party shot and that no one needed to worry. But, if they felt uncomfortable, they could leave." Barron testified that she did not know what the woman meant by the term "party shot." Barron then saw Middleton sit back down in his chair.

Barron testified that after she heard the loud sound, she and Gonzalez decided to leave the party. According to Barron, Gonzalez looked very intoxicated; his speech was slurred and his eyes were droopy. When Barron and Gonzalez were walking out the front door, accompanied by two other friends, Barron saw Middleton across the street. Middleton asked, "Where is the party going?" Barron testified that Gonzalez replied, "The south side." Middleton asked Gonzalez, "Where in the south side?" Gonzalez said, "The south side." Barron testified that Middleton

became angry and "aggravated." Barron testified that Middleton then told Gonzalez to stop being sarcastic. According to Barron, Middleton then pulled out a gun. Barron asked Middleton to calm down and said that they were "just trying to leave." Middleton then shoved Gonzalez "in the face with the gun," busting Gonzalez's lip and causing it to bleed. Barron testified that Noel Smith was standing behind Middleton, and her two friends were standing behind her and Gonzalez. Barron then approached Smith and asked him to talk to his friend Middleton and calm him down. Barron testified that she was "scared" and was "begging" Smith. According to Barron, Smith did not reply and appeared to be "spaced out." Barron testified that she then heard multiple gunshots behind her. She turned and saw Middleton shooting in Gonzalez's direction. Middleton then ran away in the opposite direction as he shot. Barron testified that the gunshots hit the hood of the car Gonzalez was standing in front of. Gonzalez was not injured by the gunshots.

The police were then called and arrived ten minutes later. Barron testified that about an hour to an hour and a half after the shooting, police officers took her to a convenience store nearby and asked for her to identify Middleton. When she arrived at the store, Middleton was standing in a well-lit area about fifteen feet away. Barron told the police that Middleton was the person who had shot the gun. She then went to the police station to make a statement. Barron testified at trial that she recognized Middleton because of his clothing and his face. Barron testified that Middleton had been wearing a red jacket, a gray shirt, and a red and white bandanna.

Like Barron, Gonzalez testified that they had gone to a party and arrived around midnight. Gonzalez estimated that he drank fifteen to twenty beers that entire night. Gonzalez agreed that he was intoxicated when they left the party. Gonzalez testified that when he was outside with Barron and two other friends, a man approached and asked where the party was. Gonzalez testified that he replied, "To the south side." Gonzalez admitted that he was being sarcastic when he kept repeating the answer and that the man became angry and aggressive. Gonzalez testified that the

man "flashe[d] his gun" and pointed it at him. The man was only about three steps away. Gonzalez backed away. The man then reached toward Gonzalez and "butted" him with the gun on his lip. Gonzalez's lip was cut and began to swell. Gonzalez then stumbled back and fell. Gonzalez testified that he turned to cover his face "and then that's when [he] hear[d] a gunshot." Gonzalez saw one of the gunshots hit the car he had fallen against. Gonzalez heard four more gunshots and tried to run away. According to Gonzalez, he did not know Middleton before the party.

Both Barron and Gonzalez testified that Gonzalez did not have a weapon that night and that Gonzalez did not talk or act in a threating manner toward Middleton.

Noel Smith, who was called by the State to testify, had been Middleton's best friend since sixth grade. He was a hostile witness for the State. Smith testified that on October 27, 2012, he went to a party with Middleton in the neighborhood they grew up in. Smith testified that he did not see Middleton with a gun that night. Smith testified that when the gunshot went off inside the house, the hostess of the party told them to leave. Smith testified he did not go outside with Middleton and only saw Middleton outside when he heard the gunshots and saw everyone scattering. Smith testified that he did not see Middleton standing with Barron and Gonzalez. Smith claimed that he did not know whether Middleton pulled out a gun. When the prosecutor reminded Smith that he had told the prosecutor last week that Middleton had pulled out a gun and "was tripping over some trivial silly thing, like north side and south side parties," Smith replied that he had never said that to the prosecutor. Smith testified, "No, I told you, I said, if I had s[een] him with a gun pointed [at] him, I would not have let that gone down like that." Smith repeated that he never saw Middleton with a gun that night.

Smith testified that he then left in a friend's car and Middleton left in a different friend's car, riding in the passenger seat. They all then went to a convenience store nearby. Smith testified that when they arrived, there were police officers standing in line to buy something. According to

Smith, Middleton was in the store talking to the officers. Smith testified that those officers eventually detained all of them and searched both cars. The officers found a gun on the floorboard of the passenger side of the car where Middleton had been sitting. When shown a picture, taken the night of the incident, of the passenger side of the car in which Middleton had been riding, Smith agreed that in the picture on the floorboard was a red and white bandanna and a handgun.

Kayla Edgmon testified that she was the hostess of the party. According to Edgmon, there was a loud sound from upstairs and when she went to investigate, her boyfriend said that a firework had gone off. Edgmon testified that a lot of people whom she did not know began to arrive and so she started to tell people, one by one, that they had to leave. As she was making her rounds, she saw a man with a gun "in his pocket," "tucked in his pant where his belt would go." Edgmon identified the man as Middleton. After Middleton and his group left, Edgmon heard gunshots from outside. She later was taken by police to a convenience store where she identified Middleton as the man carrying the gun in his pants. Edgmon testified that Middleton had been wearing a red and white bandanna on the night of the incident.

Angela Salvatierra, a crime scene investigator with the police department, testified that at the crime scene she collected shell casings and a live round from the roadway. She also testified that a preliminary swabbing of the hands of three individuals, including Middleton, was conducted to test for gunshot residue. She personally swabbed Middleton's hands. Salvatierra also testified that she searched the car Middleton had been riding in and found a red and white bandanna next to a handgun. Salvatierra took a picture of both the handgun, and the red and white bandanna.

Tammi Sligh, a fire and tool mark examiner in the Bexar County Crime Lab, testified that with regard to this case, she received a handgun and "some unfired and fired cartridge cases" and was asked to see if she could determine whether the cartridge cases were fired from that particular

weapon. Sligh testified that all five fired cartridge cases were fired from the handgun. Further, the unfired cartridges she received were suitable for use in that particular handgun.

Glenn Michalek, a detective with the San Antonio Police Department, testified that on October 27, 2012, he was assigned as "a UEDI, which stands for Uniform Evidence Detective Investigator." Michalek testified that he swabbed Noel Smith's and Brandon Linson's hands to test for gunshot residue.

Michael Martinez, a forensic scientist supervisor for the Bexar County Criminal Investigation Laboratory, performed the tests for gunshot residue using the samples taken in this case. Martinez testified that Brandon Linson did not have gunshot residue on either his right or left hand. Similarly, Noel Smith's hands did not have gunshot residue on them. According to Martinez, Middleton did have gunshot residue on both hands. Martinez testified that a person who tests positive under the gunshot residue test (1) could have handled a weapon that had been recently fired by another individual; (2) could have recently been in close proximity when another individual fired a weapon; or (3) could have recently discharged a weapon.

After hearing all the testimony, the jury found Middleton guilty of aggravated assault with a deadly weapon and assessed him a sentence of twenty-seven years. Middleton then appealed.

BATSON

In his first issue, Middleton argues the trial court erred in overruling his objection to the State's request to shuffle the venire panel because the shuffle violated his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). "Under *Batson*, a defendant may be entitled to 'a new array' if he can demonstrate, by a preponderance of the evidence, that the prosecutor indulged in purposeful discrimination against a member of a constitutionally protected class in exercising his peremptory challenges during jury selection." *Blackman v. State*, 414 S.W.3d 757, 764 (Tex. Crim. App. 2013). "To establish such a case, the defendant must first show that he is a member of a cognizable

racial group," and "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96. "Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Id.* (internal quotation omitted). "Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* "This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." *Id.*

Once the defendant makes a prima facie showing of purposeful discrimination by the State, the burden shifts to the State to come forward with a neutral explanation for challenging venire members of the defendant's racial group. *Id.* at 97. If the State provides a race-neutral explanation for its use of peremptory challenges, the defendant must then rebut the State's explanation by showing that the explanation was a sham or pretext, or show that the State has exercised its peremptory challenges in a racially disparate manner. *See Blackman*, 414 S.W.3d at 765.

Batson applies to the State's use of peremptory challenges. Middleton concedes in his brief that "[n]o Texas appellate court has yet ruled that *Batson* applies to jury shuffles." *See Ladd v. State*, 3 S.W.3d 547, 563 n.9 (Tex. Crim. App. 1999) ("One scholar has argued that, logically, *Batson* should extend to jury shuffles . . . . We wish to make it clear, however, that we do not endorse such a view."). As an intermediate appellate court, it is not our role to extend the law in this regard. Indeed, our sister courts have also declined to extend *Batson* to jury shuffles. *See Urbano v. State*, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.) ("As an intermediate appellate court, we are not inclined to make the type of broad expansion of law appellant seeks."); *see also Williams v. State*, No. 02-13-00040-CR, 2014 WL 584892, at *3 (Tex.

App.—Fort Worth Feb. 13, 2014, no pet.) (not designated for publication); *Reynolds v. State*, No. 03-10-00215-CR, 2010 WL 4670209, at *2 (Tex. App.—Austin Nov. 17, 2010, pet. dism'd) (not designated for publication); *Garrett v. State*, No. 05-94-01144-CR, 1996 WL 283271, at *3 (Tex. App.—Dallas May 29, 1996, pet. ref'd) (not designated for publication). We therefore overrule Middleton's first issue.

MOTION FOR MISTRIAL

In his second issue, Middleton argues that the trial court erred in denying his motion for mistrial. We review a trial court's ruling on a motion for mistrial for abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). Thus, we must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Id.* "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Id.* (quoting *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)).

At trial, the State called Noel Smith, Middleton's best friend, to testify about the night in question. According to Smith, after he and Middleton left the party, they went to a convenience store where they saw police officers waiting in line for the cash register:

Q: Okay. What do you mean [the police officers] were already there?
A: Well, we didn't see them. But when we walked in the store, we saw them.
Q: Like they were just – what were they doing in there?
A: They were in line.
Q: Okay. Do you remember what they were buying?
A: No.
Q: Okay. They were just buying something?
A: I was buying some chips.
Q: Okay. What was Ronjee [Middleton] doing at this point?
A: Well, he was in the store. He was in there talking to them.
Q: He was talking to the police?
A: It was the same cops that arrested us to [sic] our prior – our prior charge. That's how we remembered them. But, you know –

Prosecutor: Judge, can we approach?

Court: Come on up.

[At the Bench, on the record]

Defense: Your Honor, at this time, I'd like to object to this State's witness referring to a prior arrest on the part of my client. It was nonresponsive, in violation of the motion in limine.

Prosecutor: Judge, if I may respond, I, in no way, asked for that as a response. This witness has shown severe hostility towards the State and offered that upon his own admission. And on the other side of that coin, I would now request the Court acknowledge that the door is open to discuss that, as the witness did give a nonresponsive answer, but opened the door to the subject matter.

Court: No, but as to the latter, no. As to the former, I – If there's an objection, I guess, I can sustain and ask them to disregard, but I'm not sure that that –

Defense: Well, Your Honor, furthermore –

Court: It's just going to highlight the comment. Let me do this.

[End of bench conference]
[Jury exits the courtroom]

Court: Back on the record. Okay, suggestions?

Defense: I guess it wouldn't hurt to have the last question read back if we could do that. . . .

Court: "He was talking to the police?" "It was the same cop that arrested us to our prior – prior charge. That's how we remember them." "Judge, may we approach?"

Defense: Yes.

Court: And, frankly, that went by so fast I almost didn't catch it but –

Defense: Well, nevertheless, it's a violation of the motion in limine by the State's witness, and it makes reference to a prior charge that has no relevancy to the offense in question.

Court: Actually, I think the motion in limine I was referring to was his prior criminal record, his conviction for whatever.

Defense: This may very well by the same thing.

Court: Well, arguably, because we don't know. Maybe it violated; maybe it didn't. But clearly it was sort of a gratuitous comment, but it does not appear to have been occasioned by the State's question so –

Defense: But it was volunteered by the State's witness.

Prosecutor: Judge, he's – Although the State –

Court: Albeit a hostile one.

Prosecutor: Hardly the State's witness at this point.

Defense: Well, he's not the defense witness certainly.

Prosecutor: We just ask that the Court look at the spirit of the testimony in making its ruling to the State –

Court: Well, it is what it is. But the question is: What are you asking me to do? What ruling do you want me to make?

Defense: I'd like the Court to sustain my objection, that it constitutes a violation of the motion in limine and an inadmissible extraneous offense on the part of my client or extraneous act of misconduct on the part of my client. And I'd like the jury – I need a ruling on that. That's the objection. And the objection was made at the earliest opportunity. I had no reason to believe he'd blurt this out.

Court: Well, if you're objecting to testimony about extraneous conduct, the objection is sustained.

Defense: All right. And I'm going to need the jury to be instructed to disregard it.

Court: And you would like me to phrase it as, "Ladies and gentlemen of the jury, please disregard any testimony that may have been about any particular arrest – any arrests prior to the arrest of this particular incident"?

Defense: That will probably work.

Court: Okay. That will be granted.

After the jury reentered the courtroom, the trial court instructed the jury the following:

Court: You may be seated. If you will remember from the initial instructions that I read to you, ladies and gentlemen, there will be – or might be times when I would ask you to consider – either to consider testimony only

> for a limited purpose or there might be times when I would instruct you to disregard certain things that happened in the courtroom. This is going to be one of those times, and I will tell you, ladies and gentlemen, regarding what I just said, please disregard any testimony there may have been about any prior arrests occurring before the arrest for the conduct which is the subject of this trial. All right.
>
> Defense: Your Honor, at this time, I move for a mistrial on the basis of the testimony that was elicited from this witness earlier.
>
> Prosecutor: Based on prior arguments made outside the presence of the jury, we'd ask the Court to find that to be an inappropriate remedy.
>
> Court: All right, denied.

According to Middleton, Smith's reference to an extraneous bad act, the "prior charge," could not be cured by the trial court's instruction to disregard; thus, Middleton argues the trial court abused its discretion in denying his motion for mistrial. *See Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009) (explaining that a mistrial is an extreme remedy and should only be granted when an error is highly prejudicial and incurable). We disagree with Middleton that the quick reference by the witness to the "prior charge" was incurable error. The court of criminal appeals has explained that "[o]rdinarily, a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses." *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). Thus, "unless consideration of the facts of the particular case 'suggest[s] the impossibility of withdrawing the impression produced on the minds of the jury,'" we presume a trial court's instruction to disregard was effective. *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988) (quoting *Hatcher v. State*, 43 Tex. Crim. 237, 65 S.W. 97, 98 (1901)). Here, the witness made a quick, spontaneous reference to a "prior charge." The State immediately asked to approach the bench, and the jury was removed from the courtroom. When the jury reentered the courtroom, it was promptly instructed by the court to disregard the comment. We presume that the jury followed the trial court's instruction to disregard and that the

instruction cured the error. *See id.* We do not find that the comment made by the witness was so "clearly calculated to inflame the minds of the jury, or [to be] of such damning character as to suggest that it would be impossible to remove the harmful impression from the jury's mind." *Kipp v. State*, 876 S.W.2d 330, 339 (Tex. Crim. App. 1994) (citation omitted). We therefore overrule Middleton's second issue.

EXCLUSION OF TESTIMONY

In his final issue, Middleton argues that the trial court erred in excluding the testimony of Misti Smith regarding Danielle Barron's possible intoxication. At the beginning of trial, defense counsel asked the trial court to invoke "the Rule." "The Rule," otherwise known at Texas Rule of Evidence 614, provides that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." TEX. R. EVID. 614. Rule 614 "is designed to prevent witnesses from altering their testimony, consciously or not, based on other witnesses' testimony." *Routier v. State*, 112 S.W.3d 554, 589 (Tex. Crim. App. 2003) (citations omitted).

The day after Rule 614 was invoked, the State rested its case. Defense counsel then told the trial court that he wished to present a witness named Misti Smith but he was concerned "there may be an issue as to whether or not a violation of the rule against sequestration was violated." According to defense counsel, during a break the previous day, Misti Smith had approached him and said she knew about what had happened at the party and wanted to discuss it with him. Defense counsel told the trial court that he had informed Misti Smith that she could not listen to testimony and should stay in the hallway. Defense counsel told the court that Misti Smith had been present during the testimony of Danielle Barron and during the testimony of her husband, Noel Smith. The State objected to the admissibility of Misti Smith's testimony pursuant to Texas Rules of Evidence 614 and 403. A court bailiff then testified that during the previous day's testimony, when Danielle Barron was testifying, he approached Misti Smith in the courtroom and asked her if she was going

to be a witness. According to the bailiff, Misti Smith replied that she was not going to be a witness and that she was present for her husband, Noel Smith. The bailiff confirmed that Misti Smith entered the courtroom after the trial court notified everyone he was invoking Rule 614. Misti Smith left the courtroom after her husband was finished with his testimony. The trial court noted that it instructs "every witness about the rule." The trial court reasoned that even if Misti Smith had not been present during the invocation of Rule 614, she was present during her husband's testimony when the trial court instructed her husband about Rule 614. The State then objected to the testimony under Rules of Evidence 614, 401, 402, 403, 404, and 608. The trial court sustained the State's objections and excluded Misti Smith's testimony.

Defense counsel then, outside the presence of the jury, put Misti Smith on the witness stand to make an offer of proof. Misti Smith stated that she saw Danielle Barron drink a lot of liquor at the party and that Barron appeared to be intoxicated. According to Misti Smith, she also saw Barron take two Ecstasy pills. When asked how she knew Barron had taken two Ecstasy pills, Misti Smith replied that at the party one of her girlfriends had been offered a pill by Barron and that her girlfriend had been told by Barron that the pill was Ecstasy.

On appeal, Middleton argues that the trial court abused its discretion in excluding Misti Smith's testimony regarding Barron's intoxication. When a trial court considers disqualifying a defense witness for violation of Rule 614, it must weigh both the interests of the State as well as the defendant's right to defend himself. *Routier*, 112 S.W.3d at 589. In reviewing a trial court's decision to disqualify a witness, we apply the test established in *Webb v. State*, 766 S.W.2d 236, 244 (Tex. Crim. App. 1989).

First, under the *Webb* test, if Rule 614 was violated and the witness disqualified, we look to whether there were particular circumstances, other than the mere fact of the violation, that would tend to show the defendant or his counsel consented, procured, or otherwise had knowledge of the

witness's presence in the courtroom, together with knowledge of the content of that witness's testimony. *Id.* The State concedes that there is nothing in the record to support the defendant or his counsel had knowledge of the substance of Misti Smith's testimony or that the defendant or his counsel consented to or procured her presence in the courtroom in violation of Rule 614.

Second, under the *Webb* test, if no particular circumstances existed to justify disqualification of the witness, we consider whether the excluded testimony was "'extraordinary' in the sense that it was crucial to his defense." *Id.* Middleton argues that Misti Smith's testimony was crucial to his defense because her testimony would have impeached Barron's testimony by showing that Barron was intoxicated. Thus, according to Middleton, Misti Smith's testimony would have cast doubt upon Barron's ability to make the observations to which she testified. However, in reviewing the entire record, we cannot conclude that Misti Smith's testimony was crucial to the defense.

In *Webb*, 766 S.W.2d at 245, the court of criminal appeals held that the excluded testimony was crucial to the defense because it was probative of an accomplice witness's credibility and the defense's theory of the case. The court emphasized the excluded witness was the only witness who could corroborate the defendant's claim that another person had been involved in the offense. *Id.*; *see Routier*, 112 S.W.3d at 590-91 (discussing *Webb*).

In *Davis v. State*, 872 S.W.2d 743, 746 (Tex. Crim. App. 1994), the court of criminal appeals explained that "simply because the excluded testimony is not the only evidence supporting a defensive theory does not mean that it is not crucial to such defensive theory." The court held that "the testimony of an excluded witness was crucial because it corroborated other evidence favorable to the defense that the jury would have been more inclined to believe had the excluded testimony been admitted." *Routier*, 112 S.W.3d at 591 (discussing *Davis*).

In *Routier*, 112 S.W.3d at 591, the court of criminal appeals distinguished the facts it was presented with from those of both *Webb* and *Davis*. The court noted that the excluded witness's testimony "would not have been admissible as substantive evidence" and "was admissible for impeachment purposes only." *Id.* The court emphasized that it saw no exception to the hearsay rule that "would allow the jury to consider [the excluded witness's] testimony as substantive evidence of the appellant's innocence." *Id.* The court concluded the excluded witness's testimony "was not highly probative of the question of the appellant's guilt." *Id.* Therefore, the court held that it could not conclude that the trial court abused its discretion under Rule 614 in excluding the testimony. *Id.*

Similarly, here, Misti Smith's testimony was not crucial to a defensive theory and was not highly probative of the question of Middleton's guilt. Misti Smith's testimony was admissible only to impeach Barron. Any impeachment of Barron on the question of intoxication was not crucial because there was substantial evidence other than Barron's testimony of Middleton's guilt. The hostess of the party, Kayla Edgmon, testified that she had seen Middleton with a handgun in the waistband of his pants. She also testified that minutes after Middleton and his friends left the party, she heard multiple gunshots from outside. Angela Salvatierra, a crime scene investigator, collected five spent shell casings from the scene. She also collected from the car in which Middleton had been a passenger a handgun, and a red and white bandanna. Both Edgmon and Barron testified that Middleton had been wearing a red and white bandanna. Tammi Sligh, a fire and tool mark examiner with the crime lab, testified that the shell casings from the scene had been fired from the handgun collected by Salvatierra. Gunshot residue tests were conducted on Middleton and his two friends who had been with him at the convenience store. The results of the gunshot residue test for both of Middleton's friends were negative. However, the gunshot residue test was positive for Middleton, leading to the conclusion that Middleton had discharged a firearm, had handled a

discharged firearm, or had been in close proximity to a discharged firearm on the night in question. We therefore cannot conclude that Misti Smith's limited testimony regarding Barron was crucial to Middleton's defense.

We therefore find no abuse of discretion by the trial court in excluding Misti Smith's testimony under Rule 614 and overrule Middleton's third issue.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Karen Angelini, Justice

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