Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00806-CR

Michael Wilfred **LAFLAMME**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 406th Judicial District Court, Webb County, Texas
Trial Court No. 2013CRW160-D4
Honorable Oscar J. Hale, Jr., Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Irene Rios, Justice

Delivered and Filed: June 14, 2017

AFFIRMED

BACKGROUND

This appeal arises from Michael LaFlamme's jury conviction of intoxication assault with a deadly weapon. The underlying incident occurred on November 3, 2011, when LaFlamme struck Edna Gonzalez with his vehicle as she took her morning walk. Although LaFlamme was detained at the scene, he was not arrested until a few days later when a toxicology test returned positive for the presence of morphine and benzoylecgonine, a cocaine metabolite. Following a jury trial in

which LaFlamme elected to represent himself, he was convicted and sentenced to sixteen years' imprisonment.[1]

ANALYSIS

Issue One: Admission of Emergency Room Photographs into Evidence During Punishment

LaFlamme asserts the trial court erred by admitting Exhibits 37 and 38 during sentencing because the photographs in these exhibits were not relevant and were unduly prejudicial.

Gonzalez's sister, Diana Escamilla, testified during the sentencing phase. During her testimony, the State admitted Exhibits 37 and 38, which were photographs of Gonzalez while in the hospital after receiving medical treatment and surgery. LaFlamme did not object to admission of these photographs. He asserts on appeal the trial court should have "sua sponte rejected the photographs as irrelevant and highly prejudicial."

To preserve error regarding the admission of evidence, a defendant must present a timely and specific objection even if any erroneous admission implicates a constitutional right. TEX. R. APP. P. 33.1; *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002); *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000).

Because LaFlamme did not object to admission of Exhibits 37 and 38, he has not preserved for appellate review any complaint that the trial court erroneously admitted these exhibits. We, therefore, overrule LaFlamme's first issue.

Issue Two: Judicial Notice of Prior Convictions During Punishment

In his second issue on appeal, LaFlamme challenges the trial court's decision during sentencing to take judicial notice of two documents. His challenge is twofold. First, LaFlamme contends the trial court erred by taking judicial notice of two documents as certified judgments of

[1] LaFlamme's sentence was enhanced because of prior convictions.

two prior convictions because his prior criminal history is not a fact of which a court may take judicial notice and because the trial court lacked the power to take judicial notice of the conviction records of other courts. Second, LaFlamme contends that because the trial court erred by taking judicial notice of his prior convictions, the judgments were erroneously admitted and improperly used to enhance his sentence.

Standard of Review

A trial court may take judicial notice of an adjudicative fact that is not subject to reasonable dispute "because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." TEX. R. EVID. 201; *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012). Upon taking judicial notice of adjudicative facts, the trial court authorizes the fact-finder to accept the truth or existence of those specific facts without requiring formal proof. *Watts v. State*, 99 S.W.3d 604, 609–10 (Tex. Crim. App. 2003). Adjudicative facts which may be judicially noticed are those relevant to the ultimate issue in dispute, but are not themselves the subject of any controversy. *Id*. at 610. "Under this standard, a court will take judicial notice of another court's records if a party provides proof of the records," such as proper authentication or certification. *Ex parte Wilson*, 224 S.W.3d 860, 863 (Tex. App.—Texarkana 2007, no pet.) ("Judicial records ... from a domestic court other than the court being asked to take judicial notice ... are to be established by introducing into evidence authenticated or certified copies ... of those records."); *Perez v. Williams*, 474 S.W.3d 408, 419 (Tex. App.—Houston [1st Dist.] 2015, no pet.). A trial court's action in taking judicial notice is reviewed for an abuse of discretion. *In Matter of Estate of Downing*, 461 S.W.3d 231, 239 (Tex. App.—El Paso 2015, no pet.); *Keller v. Walker*, 652 S.W.2d 542, 543 (Tex. App.—Dallas 1983, no writ).

During the sentencing phase of trial, the State requested the trial court "take judicial notice of two certified judgments." Over LaFlamme's objection, the trial court took judicial notice and admitted State's Exhibits 35 and 36. The trial court specifically limited its judicial notice to the fact that the exhibits were "certified documents", thereby obviating the State's need to authenticate them. *See Ex parte Wilson*, 224 S.W.3d at 863; *Perez*, 474 S.W.3d at 419. Although the trial court did not preside over the prior convictions, it did have the discretion to take judicial notice the documents presented were certified documents. *See Ex parte Wilson*, 224 S.W.3d at 863; *Perez*, 474 S.W.3d at 419. The State elicited testimony from Officer San Miguel of the Laredo Police Department that each of the certified documents were judgments of conviction of a Michael Wilfred LaFlamme. Thereby, the State presented evidence from which the jury could link the two certified judgments of the previous convictions with Michael Wilfred LaFlamme, the defendant in the case before them.

After reviewing the record, we conclude the trial court did not err by taking judicial notice that the documents were certified and admitting the documents into evidence.

We overrule LaFlamme's second issue.

Issue Three: Notice of State's Attempt to Introduce Evidence of Unadjudicated Arrests During the Punishment Phase

In his third issue, LaFlamme does not challenge specific trial court error but instead contends *the State* committed error by neglecting "a continuous duty to provide the necessary notice to [LaFlamme]" of its intent to use "extraneous bad acts" during the punishment phase. Construing LaFlamme's brief broadly, it appears LaFlamme argues his due process rights were

violated because the State failed to provide him with notice required under Texas Rule of Evidence 404(b) of its intent to present evidence of unadjudicated arrests during the punishment phase.[2]

The record reflects that during the punishment phase of trial, the State attempted to introduce evidence of LaFlamme's previous unadjudicated arrests. LaFlamme objected and discussion ensued whether the State had provided LaFlamme the notice required by Rule of Evidence 404(b). The trial court determined notice had been given to previous attorneys who represented LaFlamme in a prior trial and during the present litigation; however, the notice was not provided to LaFlamme when he waived representation and elected to proceed *pro se*. The trial court sustained LaFlamme's objection and excluded evidence of unadjudicated arrests.

Because the trial court sustained LaFlamme's objection to the State's failure to provide any notice of its intent to introduce evidence of prior unadjudicated arrests and excluded the evidence, LaFlamme presents no trial-court error for this court's review. *See Badall v. State*, 216 S.W.3d 865, 872 (Tex. App.—Beaumont, pet. ref'd) (holding appellant failed to preserve issue for review when his objections were sustained, and he requested no further relief).

We overrule LaFlamme's third issue.

Issue Four: Assistance of Stand-By Counsel During Trial

It is undisputed that prior to trial LaFlamme waived counsel and was allowed to proceed *pro se*. It is also undisputed the trial court dismissed court-appointed counsel Eduardo Castillo but required him to remain in the courtroom for the sole purpose of being ready should LaFlamme

[2] Article 37.07(3)(g) of the Code of Criminal Procedure—rather than Rule of Evidence 404(b)—governs the admissibility of extraneous-offense evidence during the punishment phase of trial. *Compare* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (West Supp. 2016) (relating to evidence introduced during punishment phase of trial); TEX. R. EVID. 404(b) (relating to evidence introduced during guilt phase of trial); *see also Ramirez v. State*, 967 S.W.2d 919, 923 (Tex. App.—Beaumont 1998, no pet.) (Rule 404(b) does not apply to evidence that State intends to introduce only during punishment). Because article 37.07, § (3)(g) requires notice in the same manner as Rule 404(b), we will liberally construe LaFlamme's brief as reference to article 37.07. *See Francis v. State*, 445 S.W.3d 307, 318 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 428 S.W.3d 850 (Tex. Crim. App. 2014).

decide to proceed with counsel. The trial court designated Mr. Castillo as "stand-by counsel." LaFlamme concedes the trial court provided adequate admonitory instructions about proceeding *pro se* and unequivocally and clearly expressed the purpose of standby counsel's presence at trial — to represent Mr. LaFlamme should he choose to no longer represent himself.

In this issue on appeal, LaFlamme contends that after these instructions, the trial court then questioned Mr. Castillo regarding the Rule 404(b) notice he received from the State and also "allowed Mr. Castillo to aid [LaFlamme] by calling defense witnesses," yet prevented Mr. Castillo from assisting LaFlamme during trial. LaFlamme argues "[t]his inconsistency of the presence and purpose of stand-by counsel, created confusion and inadequacy on the part of Mr. LaFlamme, and interfered with both his right to counsel and the right to represent himself, resulting in a denial of due process. Indeed, by allowing and then disallowing assistance of stand-by counsel, the trial court undermined the efficacy of the entire trial itself." Finally, LaFlamme asserts "[t]his scenario denied [him] due process and his right to a fair trial by conflagrating his right to counsel and his right to represent himself."

With regard to the two incidents that LaFlamme contends created inconsistency and confusion, review of the record reveals that during LaFlamme's case in chief, he requested to call as a witness the emergency room nurse; however, he was not able to ascertain whether she had been served to appear. Because LaFlamme was in custody and was not allowed to leave the courtroom, the trial court requested Mr. Castillo's assistance to go into the hall to see if the witness was waiting or to call her to ascertain whether she had been served to appear as a witness. At that time, the trial court stated, "I'm not asking you to take an active role other than looking into the whereabouts of Ms. Viridiana Garza and informing her that there's a subpoena that she has not been served yet. But if you can see about her availability today, if you could look into that for us."

Mr. Castillo assisted the trial court as requested and eventually located the witness who agreed to come testify. LaFlamme did not object to the trial court's request for assistance.

Next, during the sentencing phase of trial, a bench conference ensued regarding whether LaFlamme received the State's notice of its intent to present testimony of unadjudicated arrests. The trial court called Mr. Castillo to the bench to inquire whether he had received the notice and whether it had been forwarded to LaFlamme. Based upon Mr. Castillo's answers, the trial court sustained LaFlamme's objection. LaFlamme did not object to the trial court's inquiry of Mr. Castillo.

We conclude LaFlamme's argument must fail because review of the record reveals Mr. Castillo did not represent LaFlamme at trial, but only assisted the trial court in the facilitation of the proceedings out of the presence of the jury. Mr. Castillo's discussion during a bench conference was to assist the trial court in understanding what occurred while Mr. Castillo was LaFlamme's counsel and to clarify confusion. Mr. Castillo's assistance in finding a witness was simply to facilitate the trial process and was done with the trial court's clear instruction that Mr. Castillo was not actively participating in the trial process. Because Mr. Castillo's assistance did not constitute representation of LaFlamme, his assistance could not have "denied Mr. LaFlamme due process and his right to fair trial by conflagrating his rights to counsel and his right to represent himself."

In any event, were it error for the trial court to request Castillo's assistance, LaFlamme failed to show harm. Following Mr. Castillo's explanation regarding the Rule 404(b) notice, the trial court sustained LaFlamme's objection. Following Mr. Castillo's assistance in locating LaFlamme's witness, she appeared in court and testified.

To the extent LaFlamme contends the trial court erred by refusing his request for Mr. Castillo's assistance during trial, a denial of his Fifth Amendment right to counsel, review of the record reveals LaFlamme never requested Mr. Castillo's assistance, nor did he ever indicate he no

longer wanted to represent himself. LaFlamme concedes he never withdrew his waiver of counsel and never invoked his right to have Mr. Castillo assume representation or assist in representation.

To the extent LaFlamme contends the trial court erred by denying his Sixth Amendment right to self representation by appointing stand by counsel or by requesting that Mr. Castillo assist LaFlamme, review of the record dispels this construed argument. Also, at no time did LaFlamme object to Mr. Castillo's assistance.

For these reasons, we overrule LaFlamme's fourth issue.

Issue Five: Trial Court's Failure to *Sua Sponte* Remove a Jury Member whom LaFlamme Neglected to Strike

LaFlamme contends the trial court erred by refusing to allow him to use one of his peremptory challenges to strike a jury member after the jury was seated and by failing to *sua sponte* remove the jury member. LaFlamme asserts he made clear to the judge that he intended to strike the subject juror; however, he mistakenly failed to do so. Therefore, LaFlamme contends the trial court committed harmful error by not allowing him to use a peremptory strike after he turned in his strike sheet.

The record reveals that after the voir dire examination, each side submitted to the court its list of peremptory strikes, and the court clerk announced the names of the twelve jurors. Once the jurors were seated in the jury box, but before they were sworn, LaFlamme objected to a specific juror's placement on the jury, stating he had stricken this juror. The trial court reviewed the peremptory strikes of both parties and proclaimed that LaFlamme had exercised only seven of his ten peremptory strikes and did not strike the subject juror. Because LaFlamme had not exercised a peremptory strike on the subject juror, the trial judge denied LaFlamme's request to utilize a peremptory strike after the strike sheets were turned in and the jury was seated.

Each party must assure that the jury does not include a juror that was stricken. *Truong v. State*, 782 S.W.2d 904, 905 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). If such error is called to the trial court's attention before the jury is sworn, and the error is not cured, automatic reversal is required. *Pogue v. State*, 553 S.W.2d 368, 370-71 (Tex. Crim. App. 1977). However, when a party presents no documentation or otherwise shows a mistake occurred, the party's mere assertion of mistake does not compel correction of the alleged error. *Jackson v. State*, 826 S.W.2d 751, 751–52 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). It is inequitable to allow a party to alter his peremptory strikes by merely making an assertion or claim of mistake, unsupported by anything in the record, after having seen the other party's strikes. *Id*.

As in *Jackson v. State*, the record before the trial court and before this Court presents no evidence of a mistake in the exercise of LaFlamme's peremptory challenges or in the trial court's seating of the jury members. Other than LaFlamme's mere assertions that he intended to strike, or made a mistake in failing to strike the subject juror, nothing in the record supports this claim. Therefore, the trial court did not err by failing to *sua sponte* remove the subject juror or by denying LaFlamme's request to exercise a peremptory strike on the subject juror after the jury was seated, but before it was sworn. *See Jackson*, 826 S.W.2d at 751–52.

We overrule LaFlamme's fifth issue.

CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Irene Rios, Justice

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