In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00463-CR

DAVID BRADLEY BYRD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 128th District Court
Orange County, Texas
Trial Cause No. A-060496-R

MEMORANDUM OPINION

A jury convicted David Bradley Byrd of indecency with a child by contact. On punishment, the jury found the enhancement allegations to be true and assessed a seventy-year sentence as punishment for the offense. On appeal, Byrd raises eight issues that relate to alleged improper communications with the jury during deliberations, the failure to give a parole law instruction, and the admissibility of prior convictions for purposes of impeachment. We affirm the trial court's judgment.

Byrd groups issues one through five into a single argument.[1] During its deliberations on guilt or innocence, the jury sent out a note that asked, "What are the elements the State has to prove for reasonable doubt?" During its deliberations on punishment, the jury sent out a note that asked, "What is the difference between 99 years and Life in Prison?" The clerk's record includes the jury's notes but not the trial court's responses to the notes. The trial court's verbal responses to other questions sent out by the jury during its deliberations appear in the reporter's record.[2]

We requested that the record be supplemented with the court's responses to the questions. *See* Tex. R. App. P. 34.5(c)(1), 34.6(d). The trial court determined that the original responses to the jury's questions could not be located, but the trial court, the prosecutor, and Byrd's defense counsel from trial agreed that the trial court did respond in writing to both questions. Defense counsel could not recall verbatim the exact words used by the trial court in its written responses, but he did recall that in both instances the

[1] These issues contend: (1) "Appellant is entitled to a new trial as a significant portion of the reporter's record has been lost or destroyed and such portion is necessary to the resolution of this appeal[;]" (2) "Appellant is entitled to a new trial as there are no responses recorded to multiple notes from the jury during their deliberation[;]" (3) "The trial court failed to properly or correctly respond to the first jury note[;]" (4) " The trial court failed to properly or correctly respond to the second jury note[;]" and (5) "The trial court gave a harmful and erroneous instruction during the punishment phase regarding the parole law."

[2] Deliberations commenced at 4:15 p.m. The first question at issue here was received at 4:30 p.m. At 5:12 p.m. the jury requested access to written statements and asked to recess for the day. Punishment deliberations commenced at 11:55 a.m. The jury immediately asked for lunch. The jury returned from lunch at 1:30 p.m. The second question at issue was received at 1:50 p.m. The jury reached a verdict at 2:38 p.m.

written responses referred the jury to the charge. The trial court and the prosecutor recalled that the responses informed the jury that it was bound by the charge as given to them. Defense counsel did not disagree that the responses informed the jury that the jury was bound by the charge, and he agreed that the responses instructed the jury "to go look back at the charge."

Byrd argues that he is entitled to a new trial because the trial court's responses to the jury's questions have been lost or destroyed. He relies upon Texas Rule of Appellate Procedure 34.6, which applies to a lost reporter's record.[3] *See* Tex. R. App. P. 34.6(f). Other communications with the jury were recorded in the reporter's record, but there is no indication that the trial court brought the jury into the courtroom to tell the jury to refer to the charge. The court reporter certified that the particular communications at issue were not recorded. The jury's notes appear in the clerk's record, but the trial court's written responses were evidently discarded. "When the complaining party cannot show that the court reporter ever *recorded* the missing proceedings, he is not entitled to a new trial" under Rule 34.6(f). *Williams v. State*, 937 S.W.2d 479, 486 (Tex. Crim. App. 1996) (applying former Rule 50(e)).

[3] An appellant is entitled to a new trial if (1) appellant timely requested a reporter's record; (2) without appellant's fault, a significant exhibit or a significant portion of the court reporter's notes are lost or destroyed; (3) the lost portion of the reporter's record is necessary to the appeal's resolution; and (4) the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit. Tex. R. App. P. 34.6(f).

Lost documents are addressed in Rule 34.5(e). *See* Tex. R. App. P. 34.5(e). "If a filing designated for inclusion in the clerk's record has been lost or destroyed, the parties may, by written stipulation, deliver a copy of that item to the trial court clerk for inclusion in the clerk's record or a supplement." *Id.* "If the parties cannot agree, the trial court must--on any party's motion or at the appellate court's request--determine what constitutes an accurate copy of the missing item and order it to be included in the clerk's record or a supplement." *Id.* Byrd requested that written communications between the trial court and the jury be included in the clerk's record. In response to this Court's request to supplement the record, the trial court obtained the consensus of the attorneys who participated in the trial regarding the contents of the communication. The supplemental reporter's record establishes that the lost responses referred the jury to the charge. The trial court determined what constitutes an accurate copy of the lost or destroyed filings, as permitted by the applicable rule. *See id.*

Byrd contends that the responses to the jury's questions could not be replaced by agreement, but Byrd's agreement is not required. Both Rule 34.5(e) and Rule 34.6(f)(4) authorize the trial court to determine what the missing communication stated. *See* Tex. R. App. P. 34.5(e), 34.6(f)(4). In response to Byrd's motion to supplement the record, this Court requested that the record be supplemented with the responses to the two notes. Rule 34.5(e) authorized the trial court to determine what the notes said. Although the trial court did not reproduce a verbatim copy of the responses, the trial court determined

that the notes referred the parties to the charge, and the attorneys who participated in the trial agreed that the trial court's determination was accurate. The record has been supplemented with a copy that is sufficient for this Court to determine the issues that have been raised on appeal.

Byrd contends that the trial court committed reversible error by failing to comply with the statutory procedure for communicating with a deliberating jury. *See* Tex. Code. Crim. Proc. Ann. art. 36.27 (West 2006). Article 36.27 requires that any communications be made in writing. *Id.* Before giving the jury the response to a question, the trial court must use reasonable diligence to secure the presence of the defendant and his counsel, and submit the question and the court's answer to the defendant and his counsel before the trial court gives its answer to the jury. *Id.* "The written instruction or answer to the communication shall be read in open court unless expressly waived by the defendant." *Id.* In a felony case, the proceeding "shall be a part of the record and recorded by the court reporter." *Id.* Byrd argues that a violation of article 36.27 has been established by the lack of a reporter's record of the submission of the notes and responses to Byrd and his counsel, as well as the absence of Byrd's waiver in the record.

The trial court's failure to comply with article 36.27 must be preserved by a timely objection. *Word v. State*, 206 S.W.3d 646, 652 (Tex. Crim. App. 2006). No objection to the trial court's responses to the notes appears in the record. *Id.* Likewise, to preserve error for appeal, a party must object to the court reporter's failure to transcribe

proceedings that occur in open court. *See Williams*, 937 S.W.2d at 486. Byrd did not file a bill of exception to preserve error not otherwise shown of record. *See Word*, 206 S.W.3d at 649, n.7, 652 n.12; *see also* Tex. R. App. P. 33.2. Regarding the trial court's failure to comply with article 36.27 and the substance of the communications about the jury's notes, Byrd failed to preserve error.

Byrd also contends that the response provided by the trial court was an incorrect instruction on the law of parole that caused egregious harm. "A referral to the original charge is not considered an additional instruction." *Earnhart v. State*, 582 S.W.2d 444, 450 (Tex. Crim. App. 1979). Therefore, the holding in *Almanza* relating to errors in jury charges is inapplicable, and Byrd waived error by failing to object. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). We overrule issues one through four and that part of issue five that concerns the trial court's answer to the jury's question regarding the difference between ninety-nine years and life.

Byrd contends that an erroneous parole law instruction in the jury charge on punishment caused egregious harm. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 4 (West Supp. 2010); *see also Almanza*, 686 S.W.2d at 171. Defense counsel objected to the inclusion of the statutorily-required instruction on the law of parole. The trial court noted for the record that defense counsel's objection to the statutory parole law instruction had been sustained, and that the charge had been prepared "as the defense asked for it to be prepared." Defense counsel responded with an expression of

agreement. Byrd cannot complain on appeal of the omission of an instruction from the jury charge when the instruction was omitted from the charge at his request. *See Prystash v. State*, 3 S.W.3d 522, 532 (Tex. Crim. App. 1999). "[T]he law of invited error estops a party from making an appellate error of an action it induced." *Id.* at 531. We overrule issue five in its entirety.

Byrd groups issues six through eight into a single argument.[4] After the State rested, Byrd requested a ruling on whether Byrd's prior convictions would be admissible for purposes of impeachment in the event Byrd testified. The State stipulated that more than ten years had elapsed since Byrd's release from the confinement imposed for his prior convictions, but argued that the probative value of the convictions outweighed their prejudicial effect. *See* Tex. R. Evid. 609(b). Referring to the State's notice of intent to enhance the punishment range, the trial court noted that they might have some impeachment value if Byrd testified and denied committing the offense because credibility would be an issue. The trial court noted that there was some suggestion that Byrd might have been confined in another jail, but the prosecutor did not know if Byrd had been confined in another county. The trial court also noted that one of the convictions

[4] These issues contend: (1) "The trial court's ruling that predicated the admission of prior convictions solely on whether Appellant testified constitutes harmful error[;]" (2) "The trial court's method and conclusion regarding the admissibility of prior convictions was flawed and, further, constitutes an abuse of discretion[;]" and (3) "The trial court harmfully erred as it essentially denied Appellant his right to testify. This denial further violated Appellant's fundamental and Constitutional rights."

might fall within the ten-year window and that the other conviction was for a crime involving dishonesty.[5]

Defense counsel argued that Rule 609 required that probative value be established by specific facts and circumstances that the prosecution had not yet shown. *See* Tex. R. Evid. 609(b). The trial court stated that "in all likelihood the Court . . . would allow these convictions to come in[.]" The prosecutor asked if he would be required to approach the bench for a ruling before cross-examining Byrd about his prior convictions, and the trial court indicated that he would. The trial court clarified that he "could see those coming in" if Byrd controverted the testimony of other witnesses. Defense counsel referred to Byrd's custodial statement, which had previously been admitted into evidence, and stated that his proffer was "if my client had testified, that is basically what his testimony would have consisted of." Byrd did not testify, and the defense rested.

Generally, to preserve such error for appellate review, the accused must testify and be subjected to cross-examination concerning extraneous offenses. *See Jackson v. State*, 992 S.W.2d 469, 479-80 (Tex. Crim. App. 1999). Otherwise, the reviewing court would have to speculate about

> (1) the precise nature of the defendant's testimony, (2) whether the trial court's ruling would have remained the same or would have changed as the case unfolded, (3) whether the government would have sought to impeach the defendant with the prior conviction, (4) whether the accused would

[5] A ten-year sentence for felony theft was imposed in September 1989. A six-year sentence for aggravated assault with a deadly weapon was imposed in April 1992. Byrd was indicted for indecency with a child in August 2006. He was arrested in March 2008, and the trial occurred in September 2009.

> have testified in any event, and (5) whether any resulting error in permitting impeachment would have been harmless.

Id. at 479 (citing *Luce v. United States*, 469 U.S. 38, 41-42, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984)).

Byrd contends that *Sauceda v. State* supports his argument that he did not need to testify to preserve the Rule 609 issue for appellate review. *See* 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). *Sauceda* concerned the rule of optional completeness, and the Court of Criminal Appeals distinguished *Jackson* on the ground that *Jackson* concerned impeachment and *Sauceda* did not. *Id.* ("None of these concerns would be applicable in this case, because the State did not seek to introduce the video tape to impeach Ms. Stephenson's proposed testimony, but argued instead that the mere fact of her limited testimony in response to the proffered question would trigger the automatic admission of the video in its entirety.")

Byrd argues that the factors that weigh toward requiring the accused to testify and be cross-examined about his prior convictions are not present here. The record here suggests that (1) if Byrd had testified he would have testified in a manner consistent with his custodial statement, (2) the prosecutor would probably have sought to impeach Byrd with his final convictions, (3) the trial court probably would have allowed the prior convictions to be admitted because the convictions were barely stale, the case would have been a swearing match between an adult and a child, and Byrd's credibility would have been at issue. Byrd does not identify any other evidence the State could have used to

impeach his credibility. Byrd argues that the trial court erred by predicating the admission of the evidence upon whether Byrd testified, but the State had no reason to develop this evidence other than to impeach Byrd's credibility in the event he were to testify. The evidence was never offered for any other purpose.

A conviction for a felony or a crime of moral turpitude is generally admissible for purposes of impeachment, provided that the court determines the probative value of admitting the evidence outweighs its prejudicial effect. Tex. R. Evid. 609(a). A conviction that is more than ten years old is generally inadmissible, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Tex. R. Evid. 609(b). On appeal, Byrd argues that the convictions were not admissible unless and until the State provided specific facts and circumstances demonstrating that the probative value of the convictions substantially outweighs their prejudicial effect. Byrd complains that the State presented only "bare bones" proof of the convictions and presented no specific facts and circumstances.

This argument undermines Byrd's assertion that he did not need to testify to preserve error on the admissibility of the convictions. It is difficult for the reviewing court to identify the specific facts and circumstances that made the probative value of the prior convictions substantially outweigh their prejudicial effect when the matter was not fully developed in the trial court and no evidence of the convictions was admitted into

evidence in the guilt phase of the trial. Whether the prior convictions would have been admissible necessarily depended upon the facts and circumstances that would have been developed by Byrd on direct examination and by the State on cross-examination. Because Byrd never testified and no evidence regarding Byrd's prior convictions was presented to the jury during the guilt phase of the trial, whether the probative value of the convictions supported by specific facts and circumstances would have substantially outweighed the prejudicial effect of the evidence is a matter that is necessarily open to speculation. *See Jackson*, 992 S.W.2d at 479.

Byrd also contends that the trial court denied Byrd his right to testify. We note that Byrd asked the trial court to address the Rule 609 issue before he decided whether he would testify. The trial court had no obligation to rule on the admissibility of evidence that had not yet been offered, and the trial court did no more than consider the limited information the trial court had before it at the time and give Byrd the court's impression that, based upon the anticipated evidence, it was likely that the court would find the prior convictions to be admissible under Rule 609. One court that considered a similar argument held that the claim that "appellant's assertion that the trial court made a misstatement that made his decision to testify involuntary is subject to procedural default." *Stokes v. State*, 221 S.W.3d 101, 106 (Tex. App.—Houston [14th Dist.] 2006), *vacated on other grounds*, 277 S.W.3d 20 (Tex. Crim. App. 2009).

Byrd argues that a true application of the *Theus* factors leads to the conclusion that the prior convictions are inadmissible. *See Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). *Theus* described a non-exclusive list of factors to be considered in weighing the probative value of a conviction against its prejudicial effect. *Id.* The *Theus* factors include "(1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the charged offense and the witness' subsequent history, (3) the similarity between the past crime and the offense being prosecuted, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue." *Id.* (citing *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976)).

Byrd concedes that his testimony was important and his credibility was likewise important, but he notes that both convictions were over ten years old and one of his crimes was a violent offense that lessened the probative value of the offense relative to its prejudicial effect. The State argues that because the prior crimes were in no way similar to the charged offense, they affected only the witnesses's credibility, and that because there were no witnesses to the alleged criminal act of indecency with a child, Byrd's credibility was of paramount importance. "As the importance of the defendant's credibility escalates, so will the need to allow the State an opportunity to impeach the defendant's credibility." *Theus*, 845 S.W.2d at 881. We cannot say that the trial court clearly abused its discretion by failing to rule—in advance of Byrd's taking the stand—

that Byrd would be allowed to testify free from impeachment with his prior felony convictions. We overrule issues six through eight and affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on August 4, 2011
Opinion Delivered August 24, 2011
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.