In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00198-CR
NO. 09-15-00199-CR

JEREMY KNEELAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 12-14156 (Counts 1 and 2)

MEMORANDUM OPINION

In four issues, Jeremy Kneeland appeals from two judgments, one for manslaughter and one for murder, following his trial before a jury that considered both indictments. On appeal, Kneeland contends that (1) the trial court should have excluded the testimony of a forensic biologist and the biologist's report from evidence because the State failed to disclose the biologist's identity and report to the defendant's attorney prior to Kneeland's trial; (2) the trial court abused its discretion

when it refused Kneeland's motion to continue, filed on the morning of the trial, because the State failed to disclose the forensic biologist's identity and report prior to the trial; (3) the trial court abused its discretion when it refused the attempt made by Kneeland's attorney during cross-examination of the State's witnesses to impeach the witness with evidence showing that the witness had been previously convicted on a charge of evading arrest; and (4) the trial court should not have allowed one of the investigating officers, who had participated in the investigation at the house where the homicides occurred, to express the opinion that the bullet holes in a window of the house had been created by bullets that were fired by someone who was outside the home. We conclude Kneeland has not shown in his appeal that the trial court abused its discretion with respect to its rulings on admitting and excluding evidence during Kneeland's trial or with respect to the court's decision to deny his motion seeking a continuance of the trial. We affirm the trial court's judgments.

Violation of Discovery Order

In his first issue, Kneeland argues the trial court erred by failing to exclude the testimony and report of Adam Vinson, a forensic biologist who worked for the Department of Public Safety in one of its crime labs. Before Kneeland's trial, the trial court ordered the State to provide Kneeland's attorney with the names of any witnesses that it intended to call at trial and to produce any written reports that the

witnesses it intended to call had created.[1] When the State attempted to call Vinson, the defendant's attorney objected on the grounds that the State had violated the trial court's discovery order.

Generally, a court should exclude evidence that is willfully not disclosed in violation of a discovery order. *Francis v. State*, 428 S.W.3d 850, 854-55 (Tex. Crim. App. 2014) (citing *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. 1978)). According to the Court of Criminal Appeals, excluding evidence from a trial based on the State's willful failure to disclose the evidence is akin to a "court-fashioned sanction for prosecutorial misconduct[.]"*Id.* at 855 (citing *Oprean v. State*, 201 S.W.3d 724, 727 (Tex. Crim. App. 2006)). In resolving whether a trial court should have excluded evidence as a sanction for abusing a discovery order, the Court of Criminal Appeals has indicated that a trial court must decide "'whether the

[1] The trial court's order is not in the record that is before us. Nevertheless, in its brief, the State does not dispute Kneeland's claim that the trial court, prior to the beginning of Kneeland's trial, had ordered the State to provide Kneeland with the names of its witnesses and the reports of any of its witnesses who had written reports before the date the trial began. We note that Kneeland's convictions were for crimes that occurred on March 18, 2012; consequently, the discovery procedures outlined by the Michael Morton Act did not apply to his trial. *See* Act of May 14, 2013, 83rd Leg., R.S., ch. 49, §§ 1, 3, 4, 2013 Tex. Sess. Law Serv. 106, 106, 108 (West) (to be codified at Tex. Code Crim. Proc. Ann. art. 39.14) (explaining that Michal Morton Act applies to offenses that are committed after January 1, 2014).

prosecutor acted with the specific intent to willfully disobey the discovery order[.]'" *Id*. (quoting *Oprean*, 201 S.W.3d at 727).

Generally, negligence or recklessness offers an insufficient justification for an appeals court to reverse a trial court's decision to admit relevant evidence that a party did not produce in a criminal trial based on a party's violation of a trial court's discovery order. *Id.* In Kneeland's case, before the trial court ruled on Kneeland's request to exclude Vinson's testimony and report from the evidence, it found that the prosecutor's failure to disclose Vinson's identity and his report had not been willful. Based on that ruling, the trial court allowed the State to use Vinson's testimony and his report during the trial.

On appeal, a trial court's decision to admit evidence over a defendant's objection that the evidence was not disclosed pursuant to a discovery order is reviewed using an abuse-of-discretion standard. *Oprean*, 201 S.W.3d at 726. In evaluating the trial court's ruling, the trial court enjoys almost total deference with respect to its determination of matters of historical facts when resolving disputes involving the credibility or demeanor of the witnesses. *See id*. In this case, the court heard evidence explaining why the State had not produced Vinson's name and report prior to trial in response to the trial court's discovery order. *Id.*

Several days after Kneeland's trial began, the State informed Kneeland's attorney that it intended to call Vinson as a witness. After the State provided Kneeland's attorney with Vinson's report, which essentially addressed how Vinson labelled various items from a box delivered by another law enforcement agency to the crime lab, Kneeland's attorney requested that the trial court conduct a hearing to determine whether Vinson could testify as an expert witness. Later that morning, the trial court allowed Kneeland's attorney to question Vinson outside the presence of the jury regarding his qualifications as a forensic biologist. After the hearing was completed, Kneeland's attorney objected to Vinson testifying or to his report being admitted because the State had failed to disclose Vinson's identity and report as required by the trial court's discovery order. While explaining his objections to the testimony and evidence that pertained to Vinson, Kneeland's attorney told the court: "I don't have any reason to believe that [the State] did this willfully, meaning that there was some specific intent to hide the evidence."

In response to the objection, the prosecutor suggested that the State's failure to comply with the trial court's discovery had been an "oversight," and that the State's failure to comply with the trial court's order had not been willful. Additionally, the State asserted that it did not intend to use Vinson as an expert, and that instead, it intended to use Vinson as a chain-of-custody witness to tie the various

items of evidence placed in the box that was delivered to the crime lab to the items that Vinson removed from the box, labelled, and then sent to others who tested the material for DNA. The trial court expressly found that the violation of its order had not been willful, that Vinson would be allowed "to testify with regard to chain of custody matters[,]"and that Vinson would not be allowed to "testify as to anything that would be considered an expert in regards to serology or forensic science or anything like that[.]"

In response to the ruling, Kneeland's attorney asked the trial court to continue the trial. The trial court denied the request, indicating that the court would give Kneeland's attorney some time to prepare the questions he wanted to use to cross-examine Vinson when he testified. After the trial court ruled, Kneeland's attorney advised the court that he could "proceed with [the] presentation of the witnesses[,]" and that he was "comfortable making that decision."

When Vinson testified before the jury, Vinson's attorney never objected to any of Vinson's testimony on the basis that the State was attempting to use Vinson as an expert witness. Generally, Vinson's testimony and report reflects that he collected, sealed, and labeled various items of evidence that were delivered in a box to the crime lab. On this record, and given the statements made by the attorneys who represented the parties that the State's failure to disclose Vinson and his report had

not been willful, the trial court did not abuse its discretion by allowing Vinson to testify during the trial. *See State v. LaRue*, 152 S.W.3d 95, 99-100 (Tex. Crim. App. 2004); *Oprean*, 201 S.W.3d at 726. We overrule issue one.

Motion for Continuance

In issue two, Kneeland argues the trial court abused its discretion when it denied his oral motion to continue the trial, which he made after the State informed him that it intended to call Vinson as a witness during Kneeland's trial. On appeal, we review a trial court's ruling on a motion for continuance using an abuse-of-discretion standard. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). To show the trial court's ruling on a motion to continue constituted an abuse of discretion, the appellant must show that the trial court wrongly decided the motion and that the appellant was prejudiced because the motion was denied. *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010). If the trial court's ruling falls within the zone of reasonable disagreement, an appeals court should not reverse the trial court's ruling on the motion. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

Although Kneeland's attorney requested a continuance, the record shows that he also indicated that he was comfortable with proceeding with the trial after the State represented that the scope of Vinson's testimony would be limited to chain-of-

custody matters regarding the materials in the box that had been delivered to the crime lab. Kneeland did not re-urge his motion to continue after Vinson testified, and he never claimed that he was surprised by Vinson's testimony about how he removed materials from the box, placed that material in bags, and then labelled the bags and sent them to others for further testing. The record does not support Kneeland's claim that the trial court abused its discretion by denying his motion for continuance. *See Gonzales*, 304 S.W.3d at 843. We overrule issue two.

Impeachment Evidence

In Kneeland's third issue, Kneeland complains that the trial court abused its discretion by preventing his attorney from examining one of the State's witnesses, Jan Sharp, about whether he had been convicted of evading arrest. *See* Tex. R. Evid. 609. The record shows that during the trial, and in front of the jury, Kneeland's attorney asked: "You've been convicted before of the offense of evading arrest?" At that point, the State objected to the question, and argued that a conviction for evading arrest would not be admissible to impeach the witness's testimony. Outside the presence of the jury, Sharp indicated that in 2011, he had been convicted of evading arrest. The trial court ruled that evading arrest was not a crime of moral turpitude, and it sustained the State's objection.

We review a trial court's ruling on the admissibility of evidence under an abuse-of-discretion standard. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992). Trial courts are given wide discretion in ruling on the admissibility of evidence, and an appeals court will not overturn the ruling if the ruling is within the zone of reasonable disagreement. *Id.*

Rule 609 of the Texas Rules of Evidence provides that, among other requirements, evidence of a witness's prior conviction shall be admitted for purposes of impeachment if the crime was either a felony, or a crime of moral turpitude. Tex. R. Evid. 609. However, absent certain acts that may occur in some instances involving a defendant's attempt to evade arrest, committing the crime of evading arrest generally results in the defendant being convicted of a crime that is classified as a misdemeanor. Tex. Penal Code Ann. § 38.04 (West Supp. 2016).

No Texas courts have held that the crime of evading arrest, whether classified as a felony or a misdemeanor, is a crime of moral turpitude. However, in unpublished opinions, two of our sister courts have held that evading arrest is not a crime of moral turpitude. *Dominguez v. State*, No. 07-02-0264-CR, 2003 Tex. App. LEXIS 2002, **4-6 (Tex. App.—Amarillo Mar. 4, 2003, pet. ref'd) (not designated for publication) (explaining that the offense of evading arrest is not a crime involving moral turpitude under Rule 609); *see also Robinson v. State*, No. 01-06-01007-CR,

2007 Tex. App. LEXIS 9809, **19-22 (Tex. App.—Houston [1st Dist.] Dec. 13, 2007, pet. ref'd) (mem. op., not designated for publication) (agreeing with the holding in *Dominguez* that evading arrest is not a crime of moral turpitude). In a prior opinion of this court, which involved a habeas proceeding alleging a claim of ineffective assistance of counsel, we noted that whether evading arrest constitutes a crime of moral turpitude is unsettled. *See Ex parte Aguilar*, No. 09-14-00128-CR, 2014 Tex. App. LEXIS 10809, **12-14 (Tex. App.—Beaumont Sept. 24, 2014) (mem. op., not designated for publication); *see also Ex parte Owenga*, No. 02-13-00038-CR, 2014 Tex. App. LEXIS 7265, **13-14 (Tex. App.—Fort Worth July 3, 2014) (mem. op., not designated for publication) (citing *Pulido-Alatorre v. Holder*, 381 F. App'x 355 (5th Cir. 2010), stating that "[e]vading arrest can be a crime involving moral turpitude" in a habeas appeal regarding the ineffective assistance of counsel in an immigration matter). Nonetheless, in *Aguilar*, we were not required to decide whether or not evading arrest is a crime of moral turpitude.

In his brief, Kneeland relies on an opinion of the United States Fifth Circuit Court of Appeals to support his argument that evading arrest can be a crime of moral turpitude. *See Pulido-Alatorre*, 381 F. App'x at 358-59. However, we are not bound by a ruling of a federal court in this matter. *See State v. Hill*, 499 S.W.3d 853, 872 n.67 (Tex. Crim. App. 2016). Additionally, in *Pulido-Alatorre*, the court indicated

that Pulido-Alatorre evaded arrest by using a vehicle. *Pulido-Alatorre*, 38 F. App'x at 359. Under Texas law, a conviction for evading arrest that involves the use of a vehicle to flee officers who are seeking to arrest a defendant is a state jail felony. *See* Tex. Penal Code. Ann. § 38.04(b)(1). Thus, for the purposes of impeachment under Rule 609 of the Texas Rules of Evidence, a felony conviction for evading arrest could be used to impeach a witness because it is a felony, but not because it is a crime of moral turpitude. *See* Tex. R. Evid. 609.

In Kneeland's case, the record before us does not show that Sharp's conviction for evading arrest was a felony conviction, nor has Kneeland argued in his appeal that Sharp was convicted of a felony. In our opinion, *Pulido-Alatorre* is *sui generis* immigration law, and is also factually distinguishable, given that the evading arrest conviction in *Pulido-Alatorre* apparently involved a felony conviction that involved the use of a vehicle. *See Pulido-Alatorre*, 38 F. App'x at 359. Kneeland failed to show that Sharp had used a vehicle when he committed the acts that resulted in his conviction for evading arrest.

On appeal, Kneeland argues that Sharp's conviction for evading arrest resulted in Sharp being convicted of a crime that is a crime of moral turpitude. We disagree, as we agree with the reasoning of the Amarillo Court of Appeals in *Dominguez*, in which that court explained:

> A crime of moral turpitude is one involving 1) grave infringement of the moral sentiment of the community, 2) conduct that is base, vile, or depraved, and 3) something inherently immoral and dishonest. *Arnold v. State*, 36 S.W.3d 542, 546 (Tex. App.—Tyler 2000, pet. ref'd). Appellant cites no Texas cases, and we have found none, holding that evading arrest is a crime of moral turpitude.
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> Furthermore, a person commits the offense of evading arrest if he intentionally flees from a person he knows is a peace officer attempting to lawfully arrest or detain him. Tex. [Penal] Code Ann. § 38.04(a) []. Fleeing a police officer, though improper, does not necessarily involve moral depravity or dishonesty, as do crimes like theft, swindling, making a false report, or assault upon a woman by a man (which crimes have been held as involving moral turpitude). *See e.g.*, *Bensaw v. State*, [] 88 S.W.2d 495 ([Tex. Crim. App.] 1935) (involving theft); *Sherman v. State*, [] 62 S.W.2d 146, 150 ([Tex. Crim. App.] 1933) (involving swindling); *Lape v. State*, 893 S.W.2d 949, 958 (Tex. Civ. App.—Houston [14th Dist.] 1994, pet. ref'd) (involving a false report); *Hardeman v. State*, 868 S.W.2d 404, 407 (Tex. App.—Austin 1993, pet. dism'd) (involving assault by a man upon a woman). Nor do we view it as striking at the moral sentiment of the community. It is wrong, but it does not evince a morally bad person having a defective character.

Dominguez, 2003 Tex. App. LEXIS at **5-6.

In our opinion, a misdemeanor conviction for evading arrest cannot be used as impeachment evidence under Rule 609 because it is not a crime of moral turpitude. Given the wide latitude that trial courts are given in deciding whether a witness is impeachable based on a conviction of a prior crime, the trial court's ruling that prevented Kneeland's attorney from using Sharp's conviction as impeachment

evidence did not constitute an abuse of discretion. *See Theus*, 845 S.W.2d at 881. We overrule Kneeland's third issue.

Lay Opinion Testimony

In issue four, Kneeland argues the trial court should have excluded a portion of the testimony of Detective Spikes, who expressed his opinion that bullets that struck a window in the house were fired from outside the home. Over objection, Detective Spikes testified during Kneeland's trial that he thought gunshots had been fired outside the house based on the direction of the deflection in the foil that someone had placed over a portion of the window in the home where the homicides for which Kneeland was tried occurred. According to Kneeland, Detective Spikes was not qualified as an expert to testify about the direction of the gunshots based on the deflection he noticed in the foil on the window of the home. In response, the State argues that Detective Spikes' opinion about the direction the bullets had been fired was an opinion the trial court had the discretion to admit as lay-opinion testimony under Rule 701 of the Texas Rules of Evidence. Tex. R. Evid. 701.

We review a trial court's evidentiary rulings under an abuse-of-discretion standard. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). If the trial court's decision to admit or exclude evidence falls within the zone of reasonable disagreement and was correct under any theory of law that applied to the

case, an appeals court is required to uphold the ruling. *Id.* Generally, trial courts are "in the best position to make the call on whether certain evidence should be admitted or excluded." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

The Rules of Evidence allow lay witnesses to express opinions when the opinion is based on the witness's perception and is helpful to the jury's understanding the witness's testimony or to the jury's determination of a fact at issue in the case. *See* Tex. R. Evid. 701, *see also Osbourn v. State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2002). The personal knowledge of the events which form the bases of the witness's opinion may come directly from what the witness sees, hears, or smells, or from the witness's experience. *Osbourn*, 92 S.W.3d at 538; *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997). An opinion is rationally based on a witness's perception if the opinion is one that a reasonable person could have drawn under the circumstances. *Fairow*, 943 S.W.2d at 900.

In this case, the State established that Detective Spikes had been with the Beaumont Police Department for thirteen years, and that he had been assigned to the detective division and involved in investigating crimes committed against individuals. In the course of Detective Spikes' investigation of the homicides in the home where they occurred, Detective Spikes testified that he saw holes present in a window at the front of the house in a room where one of the homicide victims had

been found. Detective Spikes indicated that the window was covered, in part, by foil, and the foil had holes in it. The State asked Spikes to tell the jury whether the bullet holes in the window indicated that the shots that struck the window came from inside or outside of the home. At that point, Kneeland's attorney objected because the State had not qualified Detective Spikes to testify as an expert. In response, the State explained that Spikes was testifying based on his experience as a police officer and handling firearms. The trial court overruled the objection, but instructed the State to make it clear that Detective Spikes was not offering an expert opinion.

After the State clarified that Spikes was not testifying as a ballistics expert, the State had Spikes explain that he had experience handling firearms. Then, the State asked Spikes whether, based on his experience, he could recognize the difference between whether the damage that a bullet caused resulted when the bullet entered or exited an object. Detective Spikes explained that he observed damage to the foil that had been placed over the window in the front room of the house. He also testified that the foil had been deflected into the room by the bullets that struck the foil. Detective Spikes explained that he believed the holes in the foil had been made by bullets that were fired from outside the home.

In our opinion, Detective Spikes' testimony—that the bullets came from outside the home—is an opinion that is rationally based on what Detective Spikes

indicated he noticed about the direction of the deflection of the foil around the holes that he saw while standing near the window inside the home. We agree with the trial court's view that Detective Spikes offered an opinion about the direction of the bullets that a reasonable person could draw based on the deflection in the foil that someone had placed over the window of the home. *See id*. We hold the trial court did not abuse its discretion by admitting Detective Spikes' testimony. *See* Tex. R. Evid. 701; *see also Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Montgomery*, 810 S.W.2d at 391. We overrule Kneeland's fourth issue.

Having overruled each of Kneeland's issues, we affirm the trial court's judgments.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on May 27, 2016
Opinion Delivered April 26, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.