COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00448-CR
NO. 02-15-00449-CR

DONALD GENE WALTON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 271ST DISTRICT COURT OF WISE COUNTY
TRIAL COURT NOS. CR17459, CR17461

MEMORANDUM OPINION[1]

Appellant Donald Gene Walton appeals from his convictions for burglary of a habitation and aggravated robbery of an elderly individual and from his concurrent twenty-year and forty-year sentences, respectively. He argues that the trial court abused its discretion by considering at punishment unsubstantiated

[1]*See* Tex. R. App. P. 47.4.

evidence of two prior bad acts. Because Appellant did not preserve this alleged error for our review, we affirm the trial court's judgments.

Appellant, along with two accomplices, overpowered an elderly man and robbed his home while Appellant held him down. Appellant was indicted for burglary of a habitation and aggravated robbery of an elderly individual. *See* Tex. Penal Code Ann. §§ 29.03(a)(3), 30.02(a) (West 2011). Appellant pleaded guilty without benefit of a plea-bargain agreement with the State, judicially confessing to each element of the offenses. At the punishment hearing, which was before the trial court, the State called six witnesses, including two law-enforcement officers who testified to two prior instances where Appellant consented to a search of his car and was arrested after each officer found drug paraphernalia and methamphetamine. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (West Supp. 2016). After the State rested its punishment evidence, Appellant objected to any consideration of these two prior bad acts in sentencing, arguing that the State "has failed to prove even a bad act on the part of [Appellant]." The trial court stated that it would "consider all of those matters for what they are." When Appellant asked whether his objection had been overruled, the trial court responded, "Well, not necessarily."

On appeal, Appellant argues that because the methamphetamine was not properly tested and identified as such, the State failed to prove beyond a reasonable doubt that he, in fact, previously possessed methamphetamine; thus, Appellant asserts that the prior bad acts were irrelevant and inadmissible at

punishment. To preserve an error for this court's review, a defendant must make a timely and specific objection at the time the evidence is offered. *See* Tex. R. App. P. 33.1(a)(1); Tex. R. Evid. 103(a)(1). An objection to the admissibility of evidence that is made after that evidence is heard and after the State has rested its case-in-chief is untimely and does not preserve anything for our review. *See Nelson v. State*, 626 S.W.2d 535, 535–36 (Tex. Crim. App. [Panel Op.] 1981); *Ross v. State*, No. 06-14-00157-CR, 2015 WL 4594130, at *8 (Tex. App.—Texarkana July 31, 2015, no pet.) (mem. op., not designated for publication); *Peters v. State*, 997 S.W.2d 377, 383–84 (Tex. App.—Beaumont 1999, no pet.); *Couch v. State*, No. 05-96-01502-CR, 1998 WL 117885, *2 (Tex. App.—Dallas Mar. 18, 1998, no pet.) (not designated for publication); *Short v. State*, 681 S.W.2d 652, 655–56 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd). Appellant appears to argue that the basis for his objection—the State failed to connect Appellant to the prior bad acts beyond a reasonable doubt—was not apparent until after the State had presented all of its punishment evidence. But the basis of Appellant's objection was apparent at the time the State began questioning the officers about the prior bad acts. Appellant cannot wait until the State rests to be absolutely assured that the State through subsequent witnesses did not connect Appellant to those prior bad acts beyond a reasonable doubt. *See Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999) (noting that timely objection required to preserve error and stating "[t]hat subsequent events

may cause a ground for complaint to become *more apparent* does not render timely an otherwise untimely complaint").

We conclude that Appellant procedurally defaulted any error arising from the trial court's consideration of the two prior bad acts attributed to Appellant by failing to object to such evidence at the time it was offered.[2] We overrule Appellant's issue and affirm the trial court's judgments. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: May 4, 2017

[2]Even if this complaint were preserved, it would afford Appellant no relief. Appellant does not dispute that he was in possession of drug paraphernalia at the time of both arrests, rendering these prior bad acts admissible at punishment. *See Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005) (holding proponent of extraneous bad-act evidence at punishment need show only "a defendant's involvement in the act itself, instead of the elements of a crime necessary for a finding of guilt").