In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00428-CR

DAVID MARK GAYLOR, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 69,532-E, Honorable Douglas Woodburn, Presiding

August 31, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, David Mark Gaylor, appeals the trial court's judgment by which he was convicted of theft of property valued at less than $1,500—elevated to a state jail felony based on his having been convicted of theft twice before—and his two-year sentence and $10,000 fine.[1] On appeal from his conviction, he contends that the trial court abused its discretion by admitting two items of evidence. We will affirm.

[1] *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(D) (West Supp. 2016). The 84th Texas Legislature amended Section 31.03(e), effective as of September 1, 2015. *See* Act of May 31, 2015, 84th Leg., R.S.,

Factual and Procedural History

On September 14, 2014, appellant and a friend went to The Home Depot on Georgia Street in Amarillo. The two men went to the plumbing supplies aisle and put a number of items in their shared basket. Thinking that appellant resembled a man who had stolen from this store on a previous occasion, store employees Devon Mogilnicki and James Butler watched the two men carefully. As Mogilnicki and Butler watched, appellant took some of the items that had been placed in the basket and placed them instead inside his jacket pockets. The two shoppers proceeded to the checkout counter and paid for the items left in the basket. Neither of the men paid for the items that remained in appellant's jacket. When the two men passed the final point of sale, Mogilnicki and Butler stopped them and brought them back inside the store. Leaving the items on appellant's person for the time being, Mogilnicki called the Amarillo Police Department, and Officer Ricky Gattis was dispatched to the store. Gattis removed the items from appellant's jacket pocket, and Mogilnicki took the items and appellant to a cash register where a cashier scanned the recovered items and printed a "training receipt" to distinguish the receipt from a valid receipt for the merchandise. The total value of the plumbing supplies appellant had taken from the store was $83.46.

Appellant was charged and convicted of theft of property with a value under $1,500, and, because appellant had twice been convicted of theft in the past, his offense was elevated to a state jail felony. The jury assessed punishment at two years

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ch. 1251, § 10, 2015 Tex. Gen. Laws 4209, 4213 (current version at TEX. PENAL CODE ANN. § 31.03(e)). The amended version of this section criminalizes theft of property valued at $750 or more but less than $2,500. The prior version of this statute criminalized theft of property valued at $500 or more but less than $1,500. Appellant was indicted in October 2014 under the prior version of the statute. Because appellant was tried and convicted under the prior version of the statute, we refer, in this opinion, to the prior version of the statute.

in a state jail facility and a $10,000.00 fine. On appeal from that conviction, appellant challenges the trial court's admission of two items of evidence.

Standard of Review

We review the trial court's decision to exclude or admit evidence for an abuse of discretion. *See Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990) (en banc) (citing *Marras v. State*, 741 S.W.2d 395, 404 (Tex. Crim. App. 1987) (en banc)). The test for abuse of discretion is a question of whether the trial court acted without reference to any guiding rules and principles. *See id.* at 380. We will uphold the trial court's ruling "so long as the result is not reached in an arbitrary or capricious manner." *See id.* Further, we will sustain the trial court's decision if that decision is correct on any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990) (en banc).

Admission of Receipt

Appellant argues on appeal that the receipt showing the value of the stolen merchandise was inadmissible hearsay because the State failed to establish that the receipt would qualify as a business-record exception to the rule excluding hearsay. *See* TEX. R. EVID. 803(6). At trial, however, appellant objected to the admission of the receipt on the general basis of improper predicate. Appellant's contention on appeal does not comport with his trial objection; his general objection did not preserve this issue for our review. *See* TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1(a); *see also Kipperman v. State*, 626 S.W.2d 507, 513 (Tex. Crim. App. 1981) (en banc) (holding that objection to improper predicate was not sufficiently specific to preserve the error

advanced on appeal); *Paige v. State*, 573 S.W.2d 16, 19 (Tex. Crim. App. [Panel Op.] 1978) (holding that appellant's general objections at trial that a proper predicate was not laid were insufficient to preserve error regarding business-record exception to exclusion of hearsay), *overruled on other grounds by Bradley v. State*, 688 S.W.2d 847, 850 (Tex. Crim. App. 1985) (en banc). Because appellant's contention was not preserved for our review, we overrule his first point of error.

Even were we to assume, *arguendo*, that the trial court understood appellant's general improper-predicate objection as one specifically complaining of the State's failure to meet the business-record exception to the rule excluding hearsay, we note that appellant's complaint on appeal focuses on the fact that Mogilnicki was not the custodian of records or the individual who prepared the receipt and therefore could not establish the trustworthiness and reliability of the receipt. Such an argument would fail, even if it had been specifically preserved.

While it is true that Mogilnicki was not the custodian of records for The Home Depot and was not the cashier who operated the cash register to scan the items recovered, Mogilnicki, whose specific job it was to protect assets from theft, was familiar with the process of printing a receipt from the cash register in training mode so as to distinguish it from a valid receipt. He explained that The Home Depot takes the stolen items to get a training receipt in order to determine the value of the merchandise and have an identifying descriptor of the items. He testified that he was present when the cashier, whose name appears on the receipt, rang up the items. Mogilnicki testified that he recognized the receipt as a true and correct copy of the training receipt printed immediately after the items were removed from appellant's person on September 14,

2014. He testified as to the amount of merchandise and excluded the sales tax and the fictional training tax used to further designate the receipt as a training receipt. On voir dire, Mogilnicki testified that he knew the receipt was true and accurate "[b]ecause [he] transported the merchandise [himself] to the cashier and [he] watched her make the receipt."

The predicate for the business-records exception to the hearsay rule may be established either by the custodian of records or *another qualified witness*. *Melendez v. State*, 194 S.W.3d 641, 644 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (citing TEX. R. EVID. 803(6)). A "qualified witness" under Rule 803(6) need not be the person who prepared the record. *Id.* Here, Mogilnicki did not personally scan the items to create the receipt. He did, however, bring the items to the cashier, supervise the cashier making the receipt, and recognized the receipt as accurately reflecting the descriptions and value of the items taken from appellant's jacket. Had the trial court been called upon to resolve a specific objection on this matter, it would not have abused its discretion by determining from Mogilnicki's testimony that he was a qualified witness within the meaning of Rule 803(6). *See id.*

Admission of Recorded Calls

Appellant next contends that the trial court abused its discretion when it admitted, over his objection, a statement by appellant in one of the recorded phone calls from the Potter County Detention Center in which he seems to admit having committed theft on two prior occasions. Defense counsel objected that admission of this portion of the recording of appellant's own reference to these nonspecific instances of theft ran afoul

of Rule 404(b)'s general prohibition of evidence of extraneous offenses. *See* TEX. R. EVID. 404(b).

Applicable Law

A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of the property. TEX. PENAL CODE. ANN. § 31.03(a). Appropriation of property is unlawful if it is without the owner's effective consent. *Id.* § 31.03(b)(1). The offense is a state jail felony if the value of the property stolen is less than $1,500 and the defendant has been previously convicted two or more times of any grade of theft. *Id.* § 31.03(e)(4)(D). The requirement that the State prove at least two prior theft convictions under Section 31.03(e)(4)(D) is a jurisdictional element, and the State must prove both the underlying theft and the two prior theft convictions. *See Barnes v. State*, 103 S.W.3d 494, 497 (Tex. App.—San Antonio 2003, no pet.).

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *See* TEX. R. EVID. 404(b)(1). However, Rule 404(b) also provides that extraneous offense evidence may be admissible for other purposes. *See* TEX. R. EVID. 404(b)(2); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). The exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). Subject, of course, to limitations imposed by other evidentiary rules, Rule 404(b) permits a party to introduce evidence of other crimes, wrongs, or acts if such evidence logically serves to make more or less probable an elemental fact, an evidentiary fact that inferentially leads to an elemental fact, or

defensive evidence that undermines an elemental fact. *See Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1991) (en banc) (op. on reh'g). More specifically, evidence of extraneous offenses is not inadmissible under Rule 404(b) if the proponent of the evidence persuades the trial court that the evidence "rebuts a defensive theory by showing, e.g., absence of mistake or accident." *See id.* at 387–88; *see Santellan v. State*, 939 S.W.2d 155, 168–69 (Tex. Crim. App. 1997) (en banc).

Rule 404(b) "excludes only that evidence that is offered (or will be used) *solely* for the purpose of proving bad character and hence conduct in conformity with that bad character." *De La Paz*, 279 S.W.3d at 343 (emphasis added). Whether evidence of "other crimes, wrongs, or acts" has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court. *Montgomery*, 810 S.W.2d at 391. And, so long as the trial court's determination of that question is within the "zone of reasonable disagreement," we will not conclude on review of that determination that the trial court abused its discretion. *See De La Paz*, 279 S.W.3d at 343–44. With these principles in mind, we look to the challenged evidence.

Analysis

State's Exhibit 4 consists of five recorded phone calls appellant made from the Potter County Detention Center. Appellant challenges the trial court's admission of a certain statement appellant made during one of the five recorded phone calls. The record is not entirely clear as to (1) which phone call and which reference is the subject of appellant's objection and (2) the precise statement appellant made during the challenged statement. In fact, during the exchange regarding admission of this exhibit,

it appears that the parties and the trial court were unable to understand exactly what appellant had said during the challenged portion of the recording.

What is clear, however, is that appellant refers to his two prior theft convictions several other times during the five recorded calls. In each audible reference to his two prior convictions, he is in the process of explaining to the person on the line that those two prior theft convictions elevated the instant offense to a felony. The additional references are important to our disposition of this issue in at least two ways.

First, appellant is correct: the instant offense was elevated to a state jail felony offense due to his having been twice convicted of theft in the past. That being so, the prior convictions become jurisdictional offenses and are considered elements of the felony offense as alleged. The State is required to prove those elemental offenses at the guilt-innocence phase of trial. *See Barnes*, 103 S.W.3d at 497. Assuming, as we must, in light of a record that is unclear on the precise wording being challenged, that the complained of statement generically refers to two past thefts, the substance of the challenged reference was elemental and, therefore, quite relevant to the State's case. Because these two prior convictions were elements of the offense—elements the State was required to prove—the trial court could have quite reasonably found that evidence of the two prior convictions was relevant beyond its tendency to show character conformity.[2] *See Montgomery*, 810 S.W.2d at 391; *see also De La Paz*, 279 S.W.3d at 343–44

[2] We pause to note that, in one of those phone calls, appellant also clearly announces a defensive theory that he intended to advance at trial: he put the stolen merchandise in his pocket because his hands were full and mistakenly forgot to pay for the merchandise when he checked out. Appellant is also heard advancing that theory during a recorded phone conversations with a bail bond

In that same vein, we add that, from voir dire onward, the jury had heard references to appellant's two prior felony convictions such that we could not conclude that appellant would be harmed by admission of such evidence through this one particular and unclear statement. Indeed, appellant was charged with theft of property valued at less than $1,500, having twice been convicted of theft. So, by having heard and considered the charges pending against him, all those present at the proceeding were aware that the State had alleged that appellant had two prior theft convictions.

That fact leads us to our second observation: appellant did not lodge an objection to the several other references in the recorded phone calls to his having two prior theft convictions. And, because the State was required to prove as part of its case that appellant had twice been convicted of theft previously, evidence of appellant's two prior theft convictions was also later admitted without objection as State's Exhibits 6 and 7. Because the same or similar evidence came into evidence without objection, any error in admission of this evidence would have been harmless. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) (en banc).

Because it was within the zone of reasonable disagreement for the trial court to conclude that appellant's own reference to two prior theft convictions had relevance apart from its tendency to show appellant's conformity therewith, we conclude that the trial court did not abuse its discretion when it admitted the evidence over appellant's

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company, even though we also hear in an another phone call his admission that he took some of the merchandise in an attempt to save some money. Consistent with appellant's defensive theory, appellant unsuccessfully sought a jury instruction on the mistake-of-fact theory. The State argued at trial and on appeal that appellant's statements referring to prior theft convictions was relevant to rebut appellant's defensive theory—albeit a rather paltry one. Indeed, evidence relating to extraneous offenses may be admissible for the purpose of rebutting a defensive theory in similar circumstances. *See De La Paz*, 279 S.W.3d at 343; *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007).

objection. *See De La Paz*, 279 S.W.3d at 343–44; *Santellan*, 939 S.W.3d at 169. Even if the trial court would have erred by admitting said evidence in this particular instance, the same or similar evidence of appellant's two prior theft convictions was admitted elsewhere without objection; any error would be rendered harmless. *See Brooks*, 990 S.W.2d at 287. We overrule appellant's second point of error.

Conclusion

Having overruled appellant's points of error, we affirm the trial court's judgment of conviction. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Justice

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