NO. 12-09-00190-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

R.B. ETHRIDGE, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

R.B. Ethridge appeals his convictions for forgery of a financial instrument and fraudulent use or possession of identifying information. He raises nine issues on appeal. We affirm.

BACKGROUND

Appellant was arrested and indicted for forgery of a financial instrument and fraudulent use or possession of identifying information. At trial, the evidence showed that Appellant, who lived in Temple, Texas, drove Paul Davis, another Temple resident, to Palestine, Texas. While in Palestine, the pair went to a Walmart. Video surveillance images, and testimony from the cashier, Stephanie Watson, showed that Davis, with Appellant standing next to him, purchased a gift card and requested that Watson credit it with $2,500.00. Davis handed Watson a check that was written before he approached Watson. After consummating the purchase, Appellant and Davis drove to a Walmart in Mexia, Texas. Davis remained in Appellant's vehicle and did not enter the Mexia Walmart.

Appellant presented the gift card to the cashier to determine how much money was on the card and to see if he could divide the balance between two separate cards. Based on these circumstances, the cashier called her supervisor, who in turn called the Mexia Police Department.

Detective Sanford of the Mexia Police Department arrived and was told of the circumstances by the supervisor and Tex Wilburn, the loss prevention specialist at the Mexia Walmart. Detective Sanford approached Appellant about the card and asked how he obtained it. Appellant told the detective that he purchased the gift card containing $2,500.00 in exchange for $600.00 in cash from a man named Matt Sweden. The evidence at trial showed that no person named Matt Sweden was located.

Detective Sanford and Wilburn testified that criminals, using a technique called "structuring," commonly attempt to break down gift cards into cards of smaller amounts to launder the proceeds of illegal activity. According to Wilburn, Walmart has the ability to track the purchase of gift cards and logs their purchase through store surveillance equipment. Wilburn testified that he traced the card to the Walmart in Palestine. He, along with Detective Sanford, immediately received photos and video surveillance images that showed Appellant and Davis purchasing the card.

Detective Sanford asked Appellant about the inconsistencies between his story of how he obtained the card and what the video surveillance images showed. Appellant admitted that Davis was the other person in the picture, and altered his version of how he acquired the card. He told Detective Sanford that he drove Davis to Palestine to pick up Davis's car, which had mechanical trouble. He stated that while in Palestine, Davis obtained the gift card and offered it as payment to Matt Sweden. Appellant said that Sweden was the mechanic who repaired Davis's car and that he wanted cash. Appellant claimed that he offered Sweden $600.00 in exchange for the $2,500.00 gift card, and that Sweden accepted.

The evidence obtained through Walmart's check tracking system, Solutran, showed that Appellant and Davis had purchased the gift card with a check from an account held by John Borders. Detective Sanford testified that during his investigation at the Mexia Walmart, he called Borders, who was unavailable at the time. The purpose of the call was to determine whether the check was authorized or a forgery. The check also contained Borders's handwritten driver's license number and birth date.

Detective Sanford contacted the district attorney for Limestone County, Texas, who informed him that Appellant had not committed any act in Limestone County that constituted a criminal offense.[1] The card was not returned to Appellant, and he left the premises.[2]

[1] Mexia is located in Limestone County, Texas.

Approximately two hours had elapsed between Detective Sanford's arrival and departure from the Mexia Walmart. Appellant was never restrained or placed under arrest. Although the timing is not entirely clear from the record, Appellant left of his own free will sometime before the detective left.[3]

Detective Sanford testified that he turned the investigation over to Detective Steen at the Palestine Police Department. Borders later told police that the transaction was not authorized, and that someone must have created a "self-generated" fake check and forged his signature.

The jury found Appellant guilty of both charged offenses, sentenced him to ten years of imprisonment for each offense, to be served concurrently, and assessed a $10,000.00 fine for each offense. Appellant declined the appointment of appellate counsel, and this pro se appeal followed.

ACCOMPLICE WITNESS TESTIMONY

In his first issue, Appellant argues that the evidence is insufficient to support Paul Davis's testimony as his accomplice witness.

Standard of Review and Applicable Law

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). The testimony of an accomplice witness is considered to be inherently untrustworthy and should be received and acted on with caution because it is "evidence from a corrupt source." ***Walker v. State***, 615 S.W.2d 728, 731 (Tex. Crim. App. 1981). A witness who is indicted for the same offense or a lesser included offense as the accused is an accomplice as a matter of law. ***Smith v. State***, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011).

The accomplice witness rule creates a statutorily imposed review and is not derived from federal or state constitutional principles that define the legal sufficiency standard. ***Druery v. State***, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). Appellant raises this issue as a challenge to

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[2] Detective Sanford stated that he never seized the gift card, and that a Walmart employee must have retained it. Appellant contended at trial that Detective Sanford seized the card. The card was never introduced as evidence.

[3] Detective Sanford stated that he did not create a report because no offense occurred in his jurisdiction.

the sufficiency of the accomplice testimony to support his conviction.[4] Consequently, to weigh the sufficiency of the corroborative evidence, we apply a statutory standard by which we disregard the accomplice's testimony and examine the remaining portions of the record to ascertain whether there is any evidence tending to connect the accused to the commission of the crime. ***Solomon v. State***, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001). Because the standard is "tending to connect," the corroborating evidence need not be sufficient by itself to establish guilt beyond a reasonable doubt. ***Maynard v. State***, 166 S.W.3d 403, 410 (Tex. App.—Austin 2005, pet. ref'd).

When reviewing a claim that accomplice witness testimony is insufficiently corroborated, we review the nonaccomplice evidence in the light most favorable to the verdict. *See* ***Hernandez v. State***, 939 S.W.2d 173, 176 (Tex. Crim. App. 1997). "[W]hen there are conflicting views of the evidence—one that tends to connect the accused to the offense and one that does not—we will defer to the factfinder's resolution of the evidence. ***Smith***, 332 S.W.3d at 442. "Therefore, it is not appropriate for appellate courts to independently construe the non-accomplice evidence." ***Id.*** The nonaccomplice evidence is sufficiently corroborated if rational jurors could find that it tends to connect the accused to the crime. ***Id.***

Discussion

Davis testified at Appellant's trial in exchange for a negotiated plea of six months of imprisonment. He testified that Appellant was not merely present during the incidents in question and that they both agreed to commit the crimes with which Appellant is charged. Appellant contends that the only evidence other than Davis's accomplice testimony is the store video. He also points to other evidence that tends to favor him, and presents the evidence in a light favorable to himself, or makes inferences from the evidence in his favor. But this is contrary to our standard of review. Appellant also fails to acknowledge other evidence that demonstrates his active involvement in the offenses in question.

Without considering Davis's testimony, the evidence shows that Appellant drove Davis to the Palestine Walmart. The video surveillance images and tapes also show that Appellant stood next to Davis at the Palestine Walmart while Davis obtained the card. Appellant then drove Davis to the Mexia Walmart. Davis stayed in the car while Appellant went inside the Mexia Walmart, where he handed the card to a cashier and asked her to tell him the balance on the card. He also

[4] The trial court provided the jury with an Article 38.14 instruction, along with instructions on the law of parties.

asked whether he could divide the balance equally between two separate cards. Wilburn and Detective Sanford testified that this was a common technique to launder money, which is why a manager and Wilburn were called to investigate while Appellant waited. Appellant was asked by Walmart personnel to wait while they verified the card's authenticity.

The Walmart supervisor then called the Mexia Police Department, and Detective Sanford arrived. The detective asked Appellant about the card, and Appellant said he bought it off the street from a man named Matt Sweden. During this conversation, Wilburn and Detective Sanford discovered that the card was purchased at the Palestine Walmart shortly before it was presented in Mexia and that Appellant was present during its purchase. This information was inconsistent with Appellant's version of the incident. Wilburn and Detective Sanford also discovered that the check was on Borders's account.

Stephanie Watson, the cashier at the Palestine Walmart, testified that she remembered the transaction, and that both Davis and Appellant were trying to obtain the gift card together. Appellant testified at trial that he left the counter to talk to another female customer in whom he was romantically interested. Watson testified that although Appellant was slightly out of the camera's view part of the time, he was next to Davis at the register the entire time. She testified further that Appellant and Davis were conversing together, although she could not hear the details of their conversation.

The video was inconsistent with Appellant's version of how he obtained the card. He was the person who presented the card in Mexia and asked to divide the balance of the card between two cards of smaller amounts, a common money laundering technique. Appellant also testified that no one knew him in Mexia and very few people knew him in Palestine. The jury could have inferred from the evidence that the distance he drove from his home made it unlikely that anyone knew him and he could more easily conceal his illegal activity. The jury also could have inferred from the evidence that by going to two different Walmarts, Appellant and Davis could more easily launder the proceeds of their illegal activity. All of this evidence, taken together, tends to connect Appellant to the offenses. Consequently, a reasonable jury could have found that he was an active participant in the offenses, and he could have been convicted under the law of parties, irrespective of Davis's testimony.

Appellant's first issue is overruled.

JURY SHUFFLE

In his second issue, Appellant asserts that the trial court erred when it denied his request for a jury reshuffle. In his third issue, Appellant contends that the trial court "erred when it ruled that no inquiry could be made to determine whether the State was using the procedure of a jury shuffle for purposeful discrimination." Because these issues are related, we address them together.

Standard of Review and Applicable Law

In order to assure that the jury selection process is fair to both sides, the code of criminal procedure provides for a random reseating of the panelists, commonly referred to as a jury shuffle, at the request of either the defendant or the state. TEX. CODE CRIM. PROC. ANN. art. 35.11 (West 2006). The statute is complied with when the parties are allowed to view the venire seated in the courtroom in proper sequence and then given an opportunity to have the names of the panelists shuffled. ***Davis v. State***, 782 S.W.2d 211, 214 (Tex. Crim. App. 1989). Defense counsel has the right to see the jury panel seated in the original sequence before deciding whether to request a shuffle. ***Scott v. State***, 805 S.W.2d 612, 614 (Tex. App.—Austin 1991, no pet.). A jury shuffle conducted before the panel is seated for voir dire does not disentitle defense counsel from requesting a shuffle after seeing the seated panel. ***Id***. at 613.

Article 35.11 guarantees only a single jury shuffle, however, and absent a showing of misconduct, neither the defendant nor the state is entitled to a second shuffle after the panel is properly shuffled at the request of the other party. ***Chappell v. State***, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993); ***Jones v. State***, 833 S.W.2d 146, 148–49 (Tex. Crim. App. 1992). Although a jury shuffle may sometimes be used as a tactical tool, the purpose of Article 35.11 is to ensure that the members of the venire are listed in random order. ***Roberts v. State***, 77 S.W.3d 837, 838 (Tex. Crim. App. 2002).

Appellant argues that Article 35.11 notwithstanding, he was entitled to another shuffle of the jury under ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The court of criminal appeals has expressed its disapproval of the argument that ***Batson*** extends to jury shuffles. *See* ***Ladd v. State***, 3 S.W.3d 547, 563 n.9 (Tex. Crim. App. 1999); *see also* ***Blanton v. State***, No. 74,214, 2004 WL 3093219, at *10 n.17 (Tex. Crim. App. June 30, 2004) (not designated for publication). In addition, Article 35.11 does not require the side requesting the shuffle to explain its reasons for doing so. *See* ***Blanton v. Quarterman***, 543 F.3d 230, 242 (5th Cir. 2008); ***Densey v. State***, 191 S.W.3d 296, 304 n.10 (Tex. App.—Waco 2006, no pet.). The denial of a

jury shuffle is trial error that must be evaluated for harm under the standard for nonconstitutional errors. *See* TEX. R. APP. P. 44.2(b); ***Roberts***, 77 S.W.3d at 838 (Tex. Crim. App. 2002); ***Ford v. State***, 73 S.W.3d 923, 924 (Tex. Crim. App. 2002).

Discussion

Appellant claims in his second issue that he was entitled to a jury shuffle because the shuffle requested and obtained by the State was completed before Appellant appeared in the trial court. However, the record reflects that Appellant was present at all relevant times. The court reporter noted at the outset in the record that Appellant was present. The record also reflects that Appellant spoke to the trial court requesting that his counsel be disqualified. After the panel was seated, Appellant's counsel stated that Appellant was present in the courtroom, and the State immediately requested a jury shuffle. Therefore, the record does not support Appellant's contention. Thus, the State requested the shuffle at the appropriate time, and Appellant had no right to a reshuffle absent a showing of misconduct.

Appellant, in his third issue, asserts that the misconduct was the State's discriminatory reason for shuffling the panel in violation of ***Batson***. Appellant's counsel stated on the record that prior to the State's shuffle, the first two rows contained at least seven African Americans. Counsel stated further that after the shuffle, the first two rows had four African Americans. However, the circumstances under which a jury shuffle is exercised is only one factor in the overall ***Batson*** analysis. *See* ***Watkins v. State***, 245 S.W.3d 444, 448-49 (Tex. Crim. App. 2008) (summarizing ***Miller–El v. Dretke***, 545 U.S. 231, 260-64, 125 S. Ct. 2317, 2325–39, 162 L. Ed. 2d 196 (2005)). Currently, the reason for exercising a jury shuffle does not demonstrate a ***Batson*** violation in and of itself, because the jury shuffle does not involve the use of peremptory strikes. *See* ***Miller-El v. Cockrell***, 537 U.S. 322, 346, 123 S. Ct. 1029, 1044, 154 L. Ed. 2d 931 (2003). In other words, how a jury shuffle is conducted is a factor in a traditional ***Batson*** analysis involving the use of peremptory strikes. ***Watkins***, 245 S.W.3d at 448. The Texas Court of Criminal Appeals has never held that ***Batson*** applies to jury shuffles directly, and has in fact signaled that it does not apply. *See* ***Ladd***, 3 S.W.3d at 563 n.9.

Even if ***Batson*** directly applied to the exercise of a jury shuffle, the trial court stated on the record that the State always requests a shuffle in every case before it. Thus, the State's reason for a jury shuffle appears to be unrelated to the racial and ethnic composition of the panel. Appellant has not shown a ***Batson*** violation simply by virtue of the State's exercise of its right to shuffle the

jury.

Appellant's second and third issues are overruled.

***BATSON* CHALLENGE**

In his fourth issue, Appellant argues that the trial court "reversibly erred in failing to grant Appellant[']s ***Batson*** challenge to the State[']s striking of venire member number 14."

Standard of Review and Applicable Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids a party from challenging potential jurors on the basis of their race. U.S. CONST. amend. XIV; ***Batson***, 476 U.S. at 89, 106 S. Ct. at 1719. A trial court follows a three step process to evaluate a claim that a litigant has made a peremptory strike based on race. ***Snyder v. Louisiana***, 552 U.S. 472, 476, 128 S. Ct. 1203, 1207, 170 L. Ed. 2d 175 (2008). First, a defendant must make a prima facie showing that the state has used a peremptory challenge to remove a potential juror on account of race. ***Id.***; ***Purkett v. Elem***, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834 (1995). A defendant may establish a prima facie case solely on evidence concerning the state's exercise of peremptory challenges at trial. ***Batson***, 476 U.S. at 96, 106 S. Ct. at 1723. He must also show that these facts and any other relevant circumstances raise an inference that the state has excluded potential jurors from the petit jury on account of their race. ***Id.***

Once the defendant has made a prima facie showing, the burden shifts to the state to come forward with a race neutral explanation for challenging the jurors. ***Snyder***, 552 U.S. at 476–77, 128 S. Ct. at 1207; ***Batson***, 476 U.S. at 97–98, 106 S. Ct. 1723–24. If the state offers race neutral reasons for the strikes, the burden shifts again to the defendant to show that the state's race neutral explanations for the strikes are contrived or a pretext to conceal a racially discriminatory intent. ***Shuffield v. State***, 189 S.W.3d 782, 785 (Tex. Crim. App. 2006); ***Jasper v. State***, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). The credibility of the prosecutor who offers race neutral explanations for disparate striking of jurors can be measured by "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." ***Miller–El***, 537 U.S. at 339, 123 S. Ct. at 1040.

We will disturb a trial court's ruling on a ***Batson*** motion only if it is "clearly erroneous." ***Snyder***, 552 U.S. at 477, 128 S. Ct. at 1207; ***Guzman v. State***, 85 S.W.3d 242, 254 (Tex. Crim.

App. 2002). Generally, a fact finder's decision is clearly erroneous when it leaves an appellate court with a "definite and firm conviction that a mistake has been committed." ***Guzman***, 85 S.W.3d at 254. We review the evidence in the light most favorable to the trial court's ruling and afford great deference to that ruling. ***Jasper***, 61 S.W.3d at 422. Furthermore, a claim that the proffered race neutral reasons for strikes are pretextual presents a question of fact, not law, and the trial court is in the best position to evaluate such claims. ***Watkins v. State***, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 846, 129 S. Ct. 92, 172 L. Ed. 2d 78 (2008); ***Gibson v. State***, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004). The ultimate plausibility of a race neutral explanation is to be considered in the context of whether the defendant has satisfied his burden to show that the strike was the product of the prosecutor's purposeful discrimination. ***Watkins***, 245 S.W.3d at 447.

Discussion

At trial, there were sixty-four panel members, forty of whom were determined to be in the strike zone after all challenges for cause were made. Prior to the State's jury shuffle, there were seven African Americans in the strike zone. After the shuffle, there were five African Americans in the strike zone.

Appellant spoke to two of the remaining five African Americans during a break, leading to successful challenges for cause as to both of them. Specifically, the State offered testimony of Meagan Muniz, the district attorney's paralegal, who overheard Appellant talking to the two African American panel members. Appellant explained to the trial court that he told those two panel members that they would not make it on the jury, indirectly insinuating that the reason was because they were African American. The trial judge expressed that he was highly displeased with Appellant for approaching the panel members and carrying on conversations with them. Appellant then launched a tirade towards the trial court in open court. The State informed the trial court that it felt trapped because it appeared that Appellant was trying to set up his own ***Batson*** challenge, but it felt nonetheless compelled to challenge those two panel members for cause. After discussing the issue with counsel, Appellant instructed his counsel to withdraw his objections to the State's challenge for cause as to those two panel members. Consequently, the trial court granted the State's challenges for cause, and both were dismissed from further service.

Of the remaining three African Americans in the strike zone, the State struck two, panel members six and fourteen. The final African American in the strike zone was selected for the

jury, and as mentioned above, the State did not exercise all of its strikes. Thereafter, Appellant objected that the State had struck panel members six and fourteen on the basis of their race. The State contended that Appellant did not make a prima facie showing of discrimination because the State did not exercise all of its strikes and the remaining African American was selected for the jury. Without making an express finding on the prima facie challenge, the trial court required the State to provide its race neutral explanation for exercising its strikes as to panel members six and fourteen.

Before addressing that component of the ***Batson*** analysis, we note that the fact that members of the allegedly targeted group sat on the jury does not necessarily defeat the showing of a prima facie case, although it is relevant in the ultimate finding of racially discriminatory practices. *See* ***Linscomb v. State***, 829 S.W.2d 164, 167 (Tex. Crim. App. 1992); ***Dewberry v. State***, 776 S.W.2d 589, 591 (Tex. Crim. App. 1989). Also, the fact that the State retained some of its strikes does not defeat a prima facie case. *See* ***Turner v. State***, 827 S.W.2d 333, 334 (Tex. Crim. App. 1992). In any event, when the trial court proceeds directly to a ***Batson*** hearing on the State's race neutral reasons for exercising its strikes without making a finding on the prima facie question, the question of whether a prima facie case has been made becomes moot if a full ***Batson*** hearing was conducted by the trial court. *See* ***Hernandez v. New York***, 500 U.S. 352, 358–59, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991); ***Dewberry***, 776 S.W.2d at 591 n.2; *see also* ***Malone v. State***, 919 S.W.2d 410, 412 (Tex. Crim. App. 1996).

With regard to panel member six, the State related that it challenged that member because it ran his criminal history and discovered a prior theft conviction that would disqualify him from serving on the jury. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(2) (West 2006); *see also* TEX. CODE CRIM. PROC. ANN. art. 35.12 (West 2006). Panel member six was a city councilman. The State said it used a strike rather than raising his theft conviction in open court to save him from being embarrassed in front of the other panel members or anyone else in the courtroom. Defense counsel conceded that the State's strike was appropriate and withdrew his ***Batson*** challenge to that panel member. Appellant does not specifically contend on appeal that the strike was improper.[5]

In his brief on appeal, Appellant specifically challenges only the striking of panel member

[5] Appellant mentions in his brief that the State's conduct in striking panel member six should be considered as a factor in the ***Batson*** analysis because it tends to show the general misconduct of the State in exercising its strikes. Appellant attached an affidavit to his motion for new trial allegedly made by panel member six disavowing that he was ever convicted of any theft conviction and stating that he had in fact served on juries in the past. But Appellant does not specifically challenge the exercise of the strike against panel member six in his brief.

fourteen. During voir dire, panel member fourteen indicated that "it would be hard for me to convict someone," but indicated to the trial court on further questioning that she could follow the law and could find a person guilty if she thought they were guilty. The trial court followed up reiterating that the standard was beyond a reasonable doubt, and she stated that she knew what that meant. Neither side challenged her for cause. During the ***Batson*** hearing, the State's race neutral reason for exercising its strike was that "she testified to the [c]ourt that she would have a hard time in convicting anyone." Appellant claims that white panel members who gave similar answers served on the jury, but we have searched the record and found no evidence to support his claim. Although panel member fourteen was not subject to a challenge for cause, the State's reason for striking her was race neutral, and there were no other panel members who answered similarly. Therefore, Appellant cannot show that other similarly situated panel members of a different race served on the jury. In addition, a review of the State's voir dire examination shows no contrasting voir dire questions posed respectively to minority and nonminority panel members. Moreover, there is no evidence offered in this case to show that, historically, the State systematically excluded African Americans from juries. Finally, the reasons provided by the State for the strikes are facially race neutral when measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *See* ***Miller–El***, 537 U.S. at 339, 123 S. Ct. at 1040.

Appellant's fourth issue is overruled.

ARTICLE 38.23 INSTRUCTION

In his fifth issue, Appellant argues that the trial court abused its discretion when it refused his requested instruction under Article 38.23 of the code of criminal procedure.

Standard of Review and Applicable Law

Article 38.23 provides in relevant part as follows:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue [regarding the legality of the State's acquisition of evidence], the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the [law], then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2008).

A defendant's right to the submission of jury instructions under Article 38.23(a) is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible. ***Madden v. State***, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007). Where no issue is raised by the evidence, the trial court acts properly in refusing a request to charge the jury. ***Id.*** at 510. A defendant must meet three requirements before he is entitled to the submission of a jury instruction under Article 38.23(a): (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. ***Id.*** Thus, there must be a genuine dispute about a material fact. ***Id.*** If there is no disputed factual issue, the legality of the conduct is determined by the trial court alone, as a question of law. ***Id.*** And if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. ***Id.*** The disputed fact must be an essential one in deciding the lawfulness of the challenged conduct. ***Id.*** at 511.

Discussion

The State presented testimony at trial that Walmart personnel kept the gift card. Appellant testified that Detective Sanford seized the card. Appellant contends on appeal that the seizure of the card was illegal and this conflicting testimony raised a fact issue warranting an Article 38.23 instruction.

Appellant and Davis executed a check from Borders's account without his consent with the intent to defraud him. In forging the check, they also wrote on the check Borders's date of birth and driver's license number. Whether or not the gift card was seized is immaterial to any element of these offenses. Rather, it is simply the proceeds from their illegal activity. The statutes punish based on the activity of forging the check and using the protected information, not the nature of the proceeds or a particular amount, as in the case of theft.

Particularly, a person commits the offense of forgery if he, with intent to defraud or harm another, alters, makes, completes, executes, or authenticates a writing so that it purports to be the act of another who did not authorize the act. *See* TEX. PENAL CODE ANN. § 32.21(a)(1)(A), (b) (West 2011). A person commits the offense of forgery by passing if he, with intent to defraud or

harm another, transfers or passes a check that has been altered, made, completed, executed, or authenticated so that it purports to be the act of another who did not authorize the act. *See* ***id.*** § 32.21(a)(1)(B), (b). A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. ***Id.*** § 6.03(a)(1) (West 2011). Forging a check is a state jail felony.[6] *See* ***id.*** § 32.21(d). In addition, Appellant was charged under Section 32.51 of the penal code, which states that a person commits an offense if he, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of identifying information of another person without the other person's consent. ***Id.*** § 32.51(b) (West Supp. 2011). Identifying information includes information that alone, or in conjunction with other information, identifies a person, including a person's name, date of birth, and social security number or other government issued identification number such as a driver's license number. ***Id.*** § 32.51(a)(1)(A), (E). Consequently, the seizure of the gift card is not a material fact, and no Article 38.23 instruction was required on that basis. Moreover, the gift card was never introduced into evidence.

Appellant also argues for the first time in his reply brief that his allegedly illegal detention and all the evidence obtained during that detention made an Article 38.23 instruction mandatory. Appellant did not raise this argument at the suppression hearing, at the time this testimony was offered at trial, or when he objected to the lack of an Article 38.23 instruction at the charge conference. Appellant complained generally at trial of his alleged detention, but never argued that his detention should serve as a basis for an Article 38.23 instruction. His only argument for such an instruction was that the gift card was seized illegally. Therefore, he cannot now raise this argument on appeal. *See* ***Hargrove v. State***, 162 S.W.3d 313, 324 (Tex. App.—Fort Worth 2005, pet. ref'd) (holding failure to raise issues clearly at suppression hearing preserves nothing for appellate review); ***Judd v. State***, 923 S.W.2d 135, 138 (Tex. App.—Fort Worth 1996, pet. ref'd) (emphasizing that any objection at trial that differs from complaint on appeal preserves nothing for review); ***McNairy v. State***, 777 S.W.2d 570, 573 (Tex. App.—Austin 1989), *aff'd on other grounds*, 835 S.W.2d 101 (Tex. Crim. App. 1991) (acknowledging contention presented on appeal must be same as that presented to trial court at hearing on motion to suppress evidence).

Furthermore, as we discuss in the next section, Appellant was not detained, but engaged in a consensual encounter with police at the relevant times. Without a detention, there is no fact

[6] Due to Appellant's prior convictions, his punishment was enhanced under the habitual offender statute.

issue and no need for an Article 38.23 instruction.

Appellant's fifth issue is overruled.

MOTION TO SUPPRESS

In his sixth issue, Appellant contends that the trial court abused its discretion when it denied his motion to suppress evidence, particularly the alleged seizure of the gift card and the evidence that flowed from that event. He also argues that the trial court failed to issue findings of fact and conclusions of law on his motion to suppress.

Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. ***Hubert v. State***, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010); ***Carmouche v. State***, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. ***Wiede v. State***, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007); ***State v. Ross***, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000), *modified on other grounds*, ***State v. Cullen***, 195 S.W.3d 696 (Tex. Crim. App. 2006). Therefore, we give almost total deference to the trial court's determination of (1) historical facts, especially when those fact findings are based on an evaluation of credibility and demeanor, and (2) application of law to fact questions that turn on an evaluation of credibility and demeanor. ***Amador v. State***, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); ***Montanez v. State***, 195 S.W.3d 101, 108–09 (Tex. Crim. App. 2006); ***Johnson v. State***, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). We review de novo all application of law to fact questions that do not turn on the credibility and demeanor of the witnesses. *See* ***Amador***, 221 S.W.3d at 673; ***Estrada v. State***, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); ***Johnson***, 68 S.W.3d at 652–53.

In reviewing the trial court's ruling on a motion to suppress, we must first view the evidence in the light most favorable to the trial court's ruling. ***State v. Kelly***, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). Here, the record is silent on the reasons for the trial court's ruling, there are no explicit fact findings, and neither party timely requested findings and conclusions from the trial court. Therefore, we imply the necessary fact findings that would support the trial court's ruling if the evidence, viewed in the light most favorable to the trial court's ruling, supports those findings. *See* ***Kelly***, 204 S.W.3d at 818–19; ***Amador***, 221 S.W.3d at 673; ***Wiede***, 214 S.W.3d at 25. We review the trial court's legal rulings de novo unless its implied fact findings

that are supported by the record are also dispositive of the legal rulings. ***Kelly***, 204 S.W.3d at 819. An appellate court will sustain the trial court's decision if it concludes the decision is correct on any theory of law applicable to the case. ***State v. Ross***, 32 S.W.3d at 855–56.

Applicable Law

There are three distinct types of interactions between a police officer and a citizen: (1) encounters, (2) investigative detentions, and (3) arrests. ***State v. Perez***, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002). In an encounter, an officer may ask the citizen if he is willing to answer questions or pose questions to him if he is willing to listen. ***Id***. During an encounter, the citizen can terminate the interaction with the officer and walk away at any time. ***Munera v. State***, 965 S.W.2d 523, 527 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). Consensual encounters do not trigger Fourth Amendment protection if a reasonable person would feel free to disregard the officer and end the encounter at his own will and at any time. ***Florida v. Bostick***, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991). Regardless of whether there has been any wrongdoing, in an encounter, officers may ask the individual general questions or ask to see and examine the individual's identification, so long as the officer does not indicate that compliance is required. ***Id***. at 434–35, 111 S. Ct. at 2386.

By comparison, during an investigative detention, an officer is authorized to temporarily detain an individual for investigative purposes when the officer has reasonable suspicion that the individual could be involved in some type of criminal activity. *See* ***Balentine v. State***, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002). Investigative detentions are justified when, after considering the totality of the circumstances, the detaining officer has specific articulable facts which, when taken together with rational inferences from those facts, lead to a reasonable suspicion that the person detained actually is, has been, or soon will be engaged in criminal activity. ***Id***. The controlling question is whether the actions of the officer would have made a reasonable person feel that he was not free to decline the officer's request or otherwise terminate the encounter. ***State v. Velasquez***, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999). Consensual encounters can become investigative detentions if the officer conveys an indication that compliance is mandatory. ***Id***. The existence of reasonable suspicion turns on an objective assessment of the detaining officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's state of mind. *See* ***United States v. Knights***, 534 U.S. 112, 122, 122 S. Ct. 587, 593, 151 L. Ed. 2d 497 (2001); ***Griffin v. State***, 215 S.W.3d 403, 409 (Tex. Crim. App. 2006). Absent reasonable

suspicion, an investigative detention violates the Fourth Amendment. *See* ***Francis v. State***, 922 S.W.2d 176, 178 (Tex. Crim. App. 1996).

The final level of interaction, an arrest, is also a seizure. ***Id.*** An arrest must be accompanied by probable cause to believe that a person has engaged in or is engaging in criminal activity. ***Id.*** This level of suspicion is meant to protect law abiding citizens from the high level of intrusion that accompanies an arrest. ***Id.*** Unlike an investigative detention, where the seizure may end within a brief period of time, the seizure involved in an arrest will not be brief. ***Id.***

Discussion

Most of the evidence against Appellant was discovered when he voluntarily asked the cashier at the Mexia Walmart to swipe the gift card to determine the amount on the card, and then asked whether the cashier could divide the balance on the card between two separate gift cards of equal amounts. The only evidence used against Appellant that he provided through his statements after the police arrived was a story that was inconsistent with what was already known and gathered by the Walmart cashier's swipe of the card. Swiping the card at Appellant's request retrieved where the card was purchased, that it was purchased with Borders's check, and that the balance on the card was $2,500.00. Wilburn then used that information to obtain video surveillance images of the transaction at the time the time the gift card was purchased. Those images showed that Appellant was present at the time of the crime and images of the parking lot showed that he drove Davis. As we have already stated in our discussion of Appellant's fifth issue, the gift card itself was not material to the case and was not offered or admitted into evidence.

After the police arrived to investigate, Detective Sanford stated that Appellant also wanted to "get to the bottom of it" and did not mind waiting around. Appellant also confirmed that he was not attempting to leave and that he wanted to "find out what was going on with that gift card." According to Appellant's testimony, he stood in the general customer service area of the store for an hour and fifteen or twenty minutes before he went back to the loss prevention room. After that, according to Appellant, two Walmart employees and a patrol officer accompanied him to the loss prevention room while Detective Sanford went back to the customer service area.

Importantly, Appellant also testified at trial on direct examination as follows:

> I never tried to leave the scene of the crime, I never tried to flee, I never tried to run away. You know, like [Detective Sanford] said, *I could have left at any time, but I wasn't trying to leave.* At that point right there, I was trying to find out what happened to cause me to have a police called on me for something that I hadn't purchased, that somebody named Paul [Davis] had purchased. And,

> you know, when I found out that possibly it had been got with a forged check, man, you know, I told him "I'm not trying to hide anything from you. I mean, I'm here till—till you say I can go." (Emphasis added).

By this testimony, Appellant first stated his own subjective belief was that he could leave at any time. We recognize that whether a person is detained is an objective question based on the circumstances of a particular case. However, that rule is typically invoked to counter a defendant's claim that he subjectively believed he was not free to leave. In the instant case, Appellant testified that he knew he was free to leave at any time. This statement prohibits him from successfully complaining on appeal that he was not in fact free to leave. Second, this testimony corroborated Detective Sanford's statements that Appellant wanted to cooperate and "find out what was going on with the card." Consequently, the entire interaction was a consensual citizen encounter, not a custodial detention or arrest. Therefore, none of the evidence collected at the time was subject to suppression. In fact, Appellant left on his own free will from the Walmart while Detective Sanford was conducting his investigation, and was not arrested until several months later.

Appellant separately argues as part of this issue that the trial court did not issue findings of fact and conclusions of law when it denied his motion to suppress. However, he was not entitled to findings of fact and conclusions of law because he did not timely request them. *See* ***State v. Cullen***, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006).

Appellant's sixth issue is overruled.

RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL

In his seventh issue, Appellant contends that "the cumulative effect of improper actions on [the] part of the trial court and the State created a coercive atmosphere which operated to violate [Appellant's] rights to a fair trial and effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution."

Standard of Review and Applicable Law

Every person accused of a crime is entitled to a fair trial. *See* ***Henley v. State***, 576 S.W.2d 66, 69 (Tex. Crim. App. 1978); ***Bethany v. State***, 814 S.W.2d 455, 456 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). As the Supreme Court and the Texas Court of Criminal Appeals

have noted, "[T]he atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." ***Estes v. Texas***, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543 (1965); ***Taylor v. State***, 420 S.W.2d 601, 607 (Tex. Crim. App. 1967). It is the duty of both the trial court and the prosecutors to conduct themselves so as to ensure that an accused receives a fair trial. TEX. CODE CRIM. PROC. ANN. art. 2.03(b) (Vernon 2005); ***Bethany***, 814 S.W.2d at 456. In addition, an accused is entitled to the assistance of an attorney who will play the critical role necessary in our adversarial system to ensure that the trial is fair. *See* ***Strickland v. Washington***, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 2063–64, 80 L. Ed. 2d 674 (1984).

In an appeal of this nature, it is the fundamental purpose of this court to ascertain whether the convicted defendant received a fair trial in the court below. *See* ***Ex parte Adams***, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989). In making this determination, any indication of prejudice or opinion of guilt on the part of the trial judge requires close scrutiny of his actions. *See, e.g.*, ***Zima v. State***, 553 S.W.2d 378, 380 (Tex. Crim. App. 1977). Likewise, although the character of a prosecutor does not necessarily dictate the fairness of a trial, the conduct and discretion of the prosecutors in this case will be necessarily involved in our analysis. *See* ***Ex parte Adams***, 768 S.W.2d at 293.

Discussion

The contours of Appellant's argument on this issue are far from precise. Rather, Appellant lodges a laundry list of eleven grounds for his complaints about actions by the trial court, the State, and his own counsel. He alleges that, taken together, these actions deprived him of a fair trial and therefore constitute reversible error.

Appellant contends in his first three grounds that the trial court acted as an advocate and prejudged his case. In the first ground, Appellant complains that the trial judge acted as an advocate when he mentioned that Appellant would likely go back to prison. First, the statements complained of by Appellant were made several months before his trial during a pretrial hearing by a judge who did not preside over his trial, in response to Appellant's complaints about his second lawyer who did not ultimately represent him at trial. Second, the trial judge's comment was in response to one of the many outbursts by Appellant that showed a total lack of respect for the court. Appellant has not shown how these statements could have affected the outcome of his trial.

His third ground is based on a similar accusation. Appellant asserts that the trial court

stated that he "was going back to T.D.C." and that the court allegedly interfered with his ability to present his case on the motion to suppress. But Appellant's citation to the record does not support his assertion. Moreover, we have no duty to search the record hoping to find the basis for Appellant's complaint. *See* ***Cook v. State***, 611 S.W.2d 83, 87 (Tex. Crim. App. [Panel Op.] 1981). Therefore, Appellant has waived this ground.

In his second ground, Appellant alleges that the trial court acted dishonestly and as an advocate when it recited that Appellant "was picking a jury, and that [Appellant] was granted a mistrial." The week before trial, another trial judge was conducting voir dire in this case, when Appellant spoke to the panel and told them that his counsel was intoxicated.[7] Counsel was immediately tested, and the test results showed that Appellant's allegation was false. From the trial court's statements in the record, it appears that a mistrial was granted. Without a record of the prior proceedings, however, we cannot determine whether the trial court's statements are false. Therefore, we cannot review this ground.

Appellant similarly alleges in his eighth ground that his counsel's performance was deficient when he failed to correct the allegedly false statements by the trial court that the prior judge had granted a mistrial due to Appellant's unmeritorious allegations of his lawyer's intoxication in front of the venire members. He argues that this is a violation of Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct requiring attorneys to refrain from dishonest acts. However, as we stated above, we cannot determine from the record before us whether the trial court's statements regarding the mistrial were false. Consequently, without a record, we cannot conclude that Appellant has met his burden under the first prong of ***Strickland***, and must presume counsel's decisions were made as a part of sound trial strategy. *See* ***Goodspeed v. State***, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

In his fourth ground, Appellant argues that the trial court accepted a bribe when it excused a panel member so that he could leave for a scheduled fishing vacation and asked that the panel member bring some fish back to the court after his trip. The record reflects, however, that the trial court made this statement to the panel member in jest, and did not insinuate that compliance was required in exchange for his release from further service on the panel.

[7] It is noteworthy that Appellant ultimately had three different lawyers represent him at different times. He filed grievances with the State Bar of Texas against the first two, who both withdrew from representing Appellant. It was Appellant's third lawyer, his actual trial counsel, whom Appellant claimed was intoxicated. He also claimed to have filed a grievance against that lawyer.

In the related fifth ground, Appellant contends that the trial court showed favoritism when it allowed the panel member discussed in the previous ground to be excused for his fishing trip, but later required another panel member to stay who stated he also had a planned vacation. But unlike the first panel member, this panel member did not inform the trial court about his planned vacation until voir dire was complete, and just prior to the ***Batson*** hearing. The trial court asked the panel member about his trip. The panel member stated that it was scheduled the following week and the trial might require him to miss a day or two. After initially stating he might be upset about serving on the jury, the trial judge asked him whether serving would impair his ability to be fair, to which the juror replied that he would be fair.

With regard to the first juror, whom the trial court excused to go on a fishing trip, it is apparent from the record that the trial court properly exercised its discretionary authority under Article 35.03. *See* ***Kemp v. State***, 846 S.W.2d 289, 293-94 (Tex. Crim. App. 1992); *see also* ***Moody v. State***, 827 S.W.2d 875, 879 (Tex. Crim. App. 1992) (court had discretion to excuse or retain panel member who had an out-of-town vacation scheduled during trial). With regard to the second panel member, given that voir dire was already complete, and based on the panel member's answer, the trial court decided to retain that juror on the panel. The trial court impliedly indicated that it might have allowed the second member to be dismissed had he brought his plans to the court's attention earlier in the voir dire process. The trial court had a reasonable basis to excuse the first panel member, and a reasonable basis not to excuse the second. *See* ***Wright v. State***, 28 S.W.3d 526, 533 (Tex. Crim. App. 2000) (stating trial court has broad discretion to excuse, or impliedly, to retain, a panel member for good reason, even up until entire jury is sworn, with or without the consent of parties and without need for hearing), *superseded by statute on other grounds as stated in* ***Coleman v. State***, No. AP-75,478, 2009 WL 4696064, at *11 (Tex. Crim. App. Dec. 9, 2009) (per curiam). Appellant has failed to show that the trial court abused its discretion in this regard.

In his sixth ground, Appellant contends that the trial court tried to "bully [him] into answering a question after the defendant had pleaded the Fifth Amendment" during the suppression hearing. During that hearing, the State asked Appellant whether he had a criminal history. He declined to answer the question, invoking his Fifth Amendment rights. The trial court ultimately did not require him to answer the question and allowed him to invoke his Fifth Amendment rights. We see nothing in the record that demonstrates the trial court engaged in

"bullying."

In his seventh ground, Appellant merely rehashes his ***Batson*** challenge as evidence that he did not receive a fair trial. In his eleventh ground, Appellant similarly contends the State's counsel exhibited racist behavior in exercising the jury shuffle and in exercising its peremptory strikes to exclude African American panel members. We have already overruled these issues elsewhere, and need not repeat our analysis here.

In his ninth ground, Appellant contends the State acted unfairly when it allowed Watson to testify that Appellant was at or near the register during the entire transaction at the Palestine Walmart. Her testimony was brought forth specifically to rebut Appellant's claim that he was not in the vicinity when Davis presented the check at the Palestine Walmart. Appellant asserts no cognizable issue here, because Watson's credibility was a factual question in the case for the jury to decide. *See* ***Wesbrook v. State***, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). In his tenth ground, Appellant argues that the trial court improperly allowed a witness to violate the court order not to speak about the case with others when Wilburn asked Watson if she would be willing to testify the final day of trial. Appellant did not object to Watson's testimony or otherwise make the trial court aware of this complaint. Therefore, this complaint is not preserved for our review. *See* TEX. R. APP. P. 33.1.

In conclusion, a review of the record reveals that Appellant engaged in frequent outbursts, even in front of the jury, and often showed a lack of respect for the tribunal. Nevertheless, the trial court showed admirable restraint in allowing Appellant to present his case. Appellant had three different lawyers, filed complaints with the State Bar of Texas concerning two of them, and even falsely accused the third, his trial counsel, of being intoxicated during pretrial hearings. Yet, his counsel maintained his professionalism and put forth a vigorous defense despite Appellant's hostile behavior. Based upon our review of the record, we are satisfied that Appellant received a fair trial and effective assistance of counsel. The outcome of the trial is the result of Appellant's own actions.

Appellant's seventh issue is overruled.

REPUTATION EVIDENCE

In his eighth issue, Appellant argues that "the trial court reversibly erred in allowing the prosecution to cross-examine [a] defense witness as a reputation witness with '[h]ave you heard'

questions about [Appellant's] prior convictions during the guilt/innocence phase of [t]rial. . . ."

Standard of Review and Applicable Law

Evidence of a pertinent character trait is admissible to rebut evidence of a character trait offered by the accused. TEX. R. EVID. 404(a). If the defendant elicits testimony to prove his own reputation through another witness, the State may, on cross examination, inquire into relevant specific instances of misconduct. TEX. R. EVID. 405. Thus, a witness who testifies to another's good character may be cross examined to test the witness's awareness of relevant specific instances of conduct. TEX. R. EVID. 405(a); ***Wilson v. State***, 71 S.W.3d 346, 350 (Tex. Crim. App. 2002).

However, this right of cross examination has two limitations: (1) the prior instances must be relevant to a character trait at issue; and (2) the prior instances must have a basis in fact. ***Wilson***, 71 S.W.3d at 350. This right of cross examination is also limited by Rule 403. *See* ***Mozon v. State***, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999) (evidence admissible under Rule 404 may still be excluded under Rule 403); *see also* ***McCoy v. State***, 10 S.W.3d 50, 53 (Tex. App.—Amarillo 1999, no pet.) ("Rule 405 merely delineates the manner by which admissible character or character trait evidence may be proven.").

Before the questions are asked, the foundation for inquiring into the specific instances of conduct should be laid outside the jury's presence so that the trial court will have an opportunity to rule on the propriety of asking them. ***Wilson***, 71 S.W.3d at 351. Specific instances should not, however, be proven before the jury. ***Id***. The traditional method of accomplishing this is to ask opinion witnesses "did you know" questions and reputation witnesses "have you heard" questions." ***Id***. at 350 n.4.

Discussion

At trial, the defense called Cody Keen, an inmate in the county jail. His testimony was offered to rebut Paul Davis's testimony concerning Appellant's involvement in the crimes at issue. During direct examination, Keen testified that he was familiar with Appellant because they bunked together while in the county jail. Defense counsel asked him, "Can you briefly give us your assessment of his character?" Keen replied, "He seems like a pretty honest man to me." Counsel then asked, "Does he come across like someone who would be involved in just a really stupid, stupid crime?" Keen replied, "No." On cross examination, the State asked Keen whether he had heard that Appellant had been convicted of various offenses, including burglary of a habitation,

aggravated robbery, felony theft, and burglary of a vehicle, among other offenses.[8]

Appellant contends it was error to allow such questions because (1) the prosecutor added the word "convicted" prior to identifying each crime, and (2) the crimes were too remote under Texas Rule of Evidence 609. As we have already stated, since defense counsel asked Keen about Appellant's character for truthfulness and whether he was the type of person to commit the crimes, the State was allowed to rebut this testimony by asking about specific instances of conduct. ***Id.*** at 350. Appellant does not contend that the prior instances are irrelevant to a character trait at issue or that they lack a basis in fact. Indeed, the alleged prior instances share many similarities to the crimes for which Appellant is charged: dishonesty, deception, and theft.

Appellant has cited no legitimate authority, and we are aware of none, that restricts the State from asking whether the witness had heard that the defendant was *convicted* of a particular crime. On the contrary, the court of criminal appeals approved a question asking whether the reputation witness knew of a particular conviction, although the addition of the word "conviction" was not an issue in the case. *See* ***Evans v. State***, 757 S.W.2d 759, 760, 762 n.2 (Tex. Crim. App. 1988) (per curiam) (impliedly approving the following form of the question: "Do you have knowledge or did you know that he had been convicted of murder here in Tarrant County?").

Moreover, Rule 609(b) of the Texas Rules of Evidence does not apply, as the specific instance of misconduct at issue is not that of Keen, the witness, but of the person for whose reputation he vouched—Appellant. Rule 609 governs attempts to prove actual convictions of the witness testifying at the time, and not specific instances of conduct of the defendant asked as "have you heard" questions to rebut an attempt to bolster the defendant's character through a third-party witness. *See* TEX. R. EVID. 609.

Appellant's eighth issue is overruled.

SIXTH AMENDMENT CONFRONTATION RIGHTS

In his ninth issue, Appellant contends that the "trial court abused it[s] discretion and violated [Appellant's] right to confront his accuser under the Sixth Amendment . . . when it allowed the State . . . to enter into evidence a photocopied [check] not supported by the custodian of [ ] record or an affidavit as required by Rule of Evidence 902(10)(a)."

[8] The State laid the proper foundation for these questions outside the presence of the jury, and that issue is not before us.

Standard of Review

We review the admission of evidence by the trial court for an abuse of discretion. ***McDonald v. State***, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). If the trial court's decision is within the zone of reasonable disagreement, we will not disturb it on appeal. ***Montgomery v. State***, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991). "Furthermore, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial judge gave the wrong reason for his right ruling." ***De La Paz v. State***, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). But when deciding whether the admission of certain statements violated a defendant's right to confrontation, we review the trial court's ruling de novo. ***Wall v. State***, 184 S.W .3d 730, 742–43 (Tex. Crim. App. 2006).

Applicable Law

Rule 901 requires that evidence be authenticated to be admissible. TEX. R. EVID. 901(a). This requirement may be met by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." TEX. R. EVID. 901(a)(4). Also, some items of evidence are self-authenticating. *See generally* TEX. R. EVID. 902. As pertinent in the instant case, checks are self-authenticating commercial paper. *See* TEX. R. EVID. 902(9); TEX. BUS. & COM. CODE ANN. §§ 3.103, 3.104 (West Supp. 2011) (checks are negotiable instruments, which is the modern term for commercial paper); ***Adonai Commc'ns, Ltd. v. Awstin Invs., LLC***, No. 3:10-CV-2642-L, 2011 WL 4712246, at *4 (N.D. Tex. Oct. 07, 2011) (slip op.) (holding under identical federal rule that "[t]he objection is overruled as to the check because, as commercial paper, it is a self[-]authenticating document").

The admission of out of court statements violates the Confrontation Clause if the statements were made by an absent declarant and were testimonial in nature. ***Crawford v. Washington***, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004); ***King v. State***, 189 S.W.3d 347, 358 (Tex. App.—Fort Worth 2006, no pet.). In general, statements are testimonial only when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Davis v. Washington***, 547 U.S. 813, 822, 126 S. Ct. 2266, 2274, 165 L. Ed. 2d 224 (2006). Whether a statement is testimonial is determined on a case-by-case basis, using the perception of an objectively reasonable declarant. ***Wall v. State***, 184 S.W.3d 730, 742-43 (Tex. Crim. App. 2006). The Supreme Court stated in ***Crawford*** that testimonial hearsay includes "at a minimum . . . prior testimony at a preliminary hearing, before a

grand jury, or at a former trial; and [statements derived from] police interrogations." ***Crawford***, 541 U.S. at 68, 124 S. Ct. at 1374. The Court also noted, however, that the traditional hearsay exceptions, such as business records, are nontestimonial in nature. ***Id***. at 56, 124 S. Ct. at 1367.

Also, ***Crawford*** applies only when the declarant does not testify at trial. *See* ***id***. at 59 & n.9, 124 S. Ct. at 1369 & n.9. Therefore, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [a witness's] prior testimonial statements." ***Id***. at 59 n.9, 124 S. Ct. at 1369 n.9 (citing ***California v. Green***, 399 U.S. 149, 162, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) ("For where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.")).

Discussion

At trial, the State initially offered the check as a business record, authenticated by Tex Wilburn, the loss prevention manager at the Mexia Walmart. Even if the State failed to prove the check's authenticity through the business records exception, it secondarily contended at trial that the check was commercial paper. The check is classified as a negotiable instrument, also known as commercial paper, which is a self-authenticating document. *See* TEX. R. EVID. 902(9). It is immaterial in this case that the check was a photocopy, and that fact does not affect its admissibility, because the original was not available. *See* ***Cooper v. State***, 631 S.W.2d 508, 512 (Tex. Crim. App. 1982), *overruled on other grounds by* ***Bell v. State***, 994 S.W.2d 173 (Tex. Crim. App. 1999); *see also* ***Holloway v. Holloway***, 671 S.W.2d 51, 56 (Tex. App.—Dallas 1983, writ dism'd) (holding photocopy of check with which husband purchased stock alleged to be his separate property as opposed to community property was admissible over wife's objection that original had not been produced or accounted for where original was not available and there was no bona fide dispute as to its being accurate reproduction of original); ***Silva v. State***, 635 S.W.2d 775, 777 (Tex. App.—Corpus Christi 1982, pet. ref'd) (same). There was testimony that Walmart cashiers return the checks to those that present them. That is, Walmart does not keep the original check, but only a photocopy, which is logged into the Solutran database.

Appellant also argues that the admission of the check prevents him from confronting his accuser. His precise argument is not clear, but he contends that the check is an out of court

statement, and by admitting it, his Sixth Amendment rights under ***Crawford*** were violated.[9] As we have already stated, in order to trigger the protection provided by the Confrontation Clause, there must be an out-of-court statement made by an absent witness that is testimonial in nature. ***Crawford***, 541 U.S. at 68. But even if we were to hold that the writings on the check were testimonial, a question we do not reach, all the relevant actors were present in court and subject to cross examination concerning the circumstances of the check's execution and Appellant's involvement therein.

Borders testified that the check was a reprinted check and that he did not authorize its execution. Stephanie Watson, the cashier shown on the video, testified that Appellant and Davis presented the check to her. Wilburn testified that Appellant presented the card to the cashier at the Mexia Walmart, asking for the amount on the card and whether he could divide the balance between two cards. He also discovered through Walmart's surveillance systems where the card was purchased and obtained the video demonstrating the circumstances of its purchase, as well as the video of the parking lot showing Appellant driving and parking his vehicle in the lot with Davis as his passenger. Detective Sanford testified that Appellant told him a story inconsistent with the video as to how he obtained the card. Davis, Appellant's co-conspirator, also testified against him at trial. All of those witnesses' testimonies together form the basis of the allegations against Appellant pertaining to the forgery of Borders's check and the use of his identifying information in the process. Appellant had ample opportunity to cross examine these witnesses and fully exercised that right. Consequently, we conclude that Appellant's confrontation rights under ***Crawford*** were not violated.

Appellant's ninth issue is overruled.

DISPOSITION

Having overruled Appellant's nine issues, we ***affirm*** the judgment of the trial court. All pending motions are overruled as moot.

JAMES T. WORTHEN
Chief Justice

Opinion delivered April 18, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.
(DO NOT PUBLISH)

[9] Appellant does not challenge the check as hearsay generally.