Affirmed and Majority and Concurring and Dissenting Opinions filed January 31, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01530-CR

LESTER MURRAY MUSTERMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 185th District Court
Harris County, Texas
Trial Court Cause No. 829,212

M A J O R I T Y O P I N I O N

Lester Murray Musterman appeals a conviction for aggravated assault with a deadly weapon[1] on the grounds that the trial court erred in: (1) refusing to allow extrinsic evidence to impeach the State's witnesses; and (2) admitting evidence of appellant's prior conviction for aggravated assault during the guilt phase of trial. We affirm.

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[1] A jury found appellant guilty and the court imposed punishment of six years confinement.

Impeachment

Appellant's first issue argues that the trial court erred by refusing to allow him to introduce testimony that would have impeached the State's witnesses and supported his claim of self-defense. In particular, appellant complains that his cousin, Henry Musterman, was not allowed to testify that the State's witnesses met the morning after the assault to collaborate on their stories and "get their lies straight."

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). When examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, *the witness must be told the contents of the statement* and the time, place, and person to whom it was made, and must be afforded an opportunity to explain or deny such statement. TEX. R. EVID. 613(a). If the witness unequivocally admits having made such statement, extrinsic evidence of it shall not be admitted. *Id*.

In this case, appellant asked the State's witnesses at trial whether they *had a meeting* a few days after the assault to get their stories and lies straight. All three witnesses denied having such a meeting but testified that they all happened to be at a particular bar the next day for other reasons and not to get their stories straight. Jeanette Marie Mason further testified that a friend showed up there and wanted to know what had happened but that nobody had to "get together" because they all knew what had happened.

On direct examination by appellant, Henry Musterman testified that on the day after the offense he had a conversation at the bar with the State's witnesses regarding what had happened the night of the offense. However, Musterman was not allowed to then testify as to what the witnesses had said during the conversation because the trial court sustained the State's hearsay objection. After both parties rested and closed, appellant made an offer of proof in which his attorney stated that Musterman would have testified that the State's witnesses said that they needed to "get their stories together, in the sense of getting their lies together so they would all be consistent."

Rule 613(a) allows impeachment of a statement with a prior inconsistent *statement*, not prior *conduct or motives*. Appellant asked the State's witnesses whether they had a *meeting* to get their stories straight but did not ask any of them whether they had made a specific statement, *i.e.*, that could be shown to be inconsistent with a statement they allegedly made to Musterman. Without such a predicate, the trial court did not err in refusing to allow Musterman to provide extrinsic evidence of an inconsistent statement made by the State's witnesses, and his first issue is overruled.

Prior Conviction

Appellant's second issue asserts that the trial court erred in admitting appellant's prior conviction for aggravated assault because its prejudicial effect in casting appellant as having a pattern of committing aggravated assaults far outweighed its probative value for impeaching his credibility.

A defendant who preemptively introduces evidence of a prior conviction on direct examination may not claim on appeal that the admission of such evidence was error even though the trial court had previously ruled that it would allow the State to admit the evidence. *Ohler v. United States*, 120 S.Ct. 1851, 1855 (2000). In this case, appellant preemptively testified on direct examination that he had a felony conviction in 1994, but provided no further information about it. On cross-examination, the State elicited from him that the prior conviction was for aggravated assault. Because appellant waived any complaint on the portion of the evidence he introduced, we will address the admissibility of only the evidence identifying the offense of which he was previously convicted.

When attacking the credibility of a witness, evidence elicited from the witness that the witness has been convicted of a crime shall be admitted only if the crime was a felony and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party. TEX. R. EVID. 609(a). A non-exclusive list of factors to be considered in weighing the probative value of a prior conviction against its prejudicial effect includes: (1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history of running afoul of the law, (3)

the similarity between the past crime and the offense being prosecuted, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue. *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992) (finding error in admission of prior arson conviction at trial for drug offense, even though four of five *Theus* factors favored admission, because of its lack of impeachment value).

In *Norris*, the appellant was on trial for capital murder and testified on direct examination that he had been previously convicted of a felony and sentenced to eight years. *Norris v. State*, 902 S.W.2d 428, 440 (Tex. Crim. App. 1995). Over appellant's objection, the trial court allowed the State to elicit on cross-examination that the prior conviction was for murder. *Id*. The Court concluded that the probative value of the prior conviction outweighed its prejudicial effect because: (1) the appellant made an issue of his intent to kill and thus his credibility; (2) the jury could have used the prior conviction to conclude that the appellant had a motive to lie in order to escape the death penalty; (3) the trial court instructed the jury to use the prior conviction only on the issue of credibility; and (4) it could have been less prejudicial to the appellant for the jury to know the nature of the prior conviction than to speculate about it. *Id*. at 441. The Court further concluded that any error in admitting the evidence was harmless because the prosecutor elicited it at the beginning of his cross-examination and did not mention it in closing, and the appellant's own testimony was incredible in light of overwhelming evidence to the contrary. *Id*.

In this case, as in *Norris*, appellant's prior conviction for aggravated assault was for the same type of offense as appellant was charged in this case, was not recent, and had little impeachment value. However, also similar to *Norris*, appellant here put his intent and credibility in issue with his claim of self-defense, and it could have been less prejudicial to him for the jury not to speculate about the nature of the unspecified prior conviction which he introduced into evidence. It can thus be concluded from *Norris* that the trial court was within its discretion in admitting evidence of the offense for which appellant had testified that he had a prior conviction.

Moreover, even if evidence is admitted in error, we are to disregard it if it did not affect appellant's substantial rights. TEX. R. APP. P. 42.2(b) An appellant's substantial rights are affected when the error had a substantial and injurious effect or influence on the jury's determination of its verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Conversely, a conviction will not be overturned for non-constitutional error if, after reviewing the record as whole, we have fair assurance that the error did not influence the jury, or had but a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

Here again, as similar to *Norris*, (1) the State elicited that appellant's prior conviction was for aggravated assault only after appellant testified on direct examination that he had a prior felony conviction; (2) the State made no further mention of this prior conviction during the remainder of the guilt phase of trial; and (3) the jury charge specifically instructed the jury that the prior conviction could not be considered as evidence of guilt but only in passing upon appellant's credibility, if at all.[2] Under these circumstances, fair assurance exists that the admission of the offense for which appellant had previously been convicted had no more than a slight effect on the jury's determination of guilt. Accordingly, appellant's second issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.[3] (Wittig, J. concurring and dissenting.)

Do Not Publish — TEX. R. APP. P. 47.3(b).

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[2] We must presume that the jury followed this instruction. *See, e.g., Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

[3] Senior Justice Don Wittig sitting by assignment.

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CONCURRING AND DISSENTING OPINION

This is a trailer-park fight. The only issue at trial was whether the appellant acted in self-defense. Four eye-witnesses testified for the State in its case-in-chief that the appellant was the aggressor. One person, the appellant's cousin, attempted to testify that the State's four witnesses met in a bar the day after the fight to agree to identify appellant as the aggressor and get "their stories, their lies, together." Because the majority finds no error in disallowing this impeachment, I dissent. I concur with the remainder of their opinion.

I. Error

According to the majority opinion, defense counsel failed to elicit statements from the State's four witnesses that could be impeached under Texas Rule of Evidence 613. Lacking a prior inconsistent statement, the majority holds that the offer of the appellant's witness was properly excluded as hearsay under Texas Rules of Evidence 802.

I disagree with the majority's conclusion that no impeachable statement occurred. The States witnesses were hardly clear and free from contradiction about what was said at the bar. Some testified there was a conversation, but that no decision to reach agreement occurred. One witness clearly stated that he told the operator of the bar what had happened in the fight. Another witness said that a conversation occurred, but that "nobody had to get nothing together" because they "all know what happened." Still another denied that any conversation at all took place. With this kind of contrary and conflicting evidence, one reasonably could (and should) interpret the testimony of the State's witnesses to be statements that no conversation about an agreement to lie occurred. Thus, the defense should have been permitted to offer proof that the State's witnesses conspired to perjure themselves against appellant. As such, I would hold that cross-examination was not properly prohibited under Texas Rule of Evidence 613 and that the testimony of appellant's witness was not hearsay pursuant to Texas Rule of Evidence 801(e)(1)(A).

II. Harm

Excluding the testimony harmed appellant. *See* TEX. R. APP. P. 42.2(b) (harmless error standard). The testimony from appellant's cousin was the only independent evidence controverting that given by the State's witnesses.[1] This trial consisted of a swearing match.

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[1] Appellant's trial theory was that he had been beat-up by the gang of State's witnesses in retaliation for kicking his then girlfriend out of his trailer. The girlfriend was a also friend of the State's witnesses.

Sadly, only one side was permitted to swear, whilst the other sat in silence. For these reasons, I respectfully dissent.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.[2] (Edelman, J. majority.)

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[2] Senior Justice Don Wittig sitting by assignment.