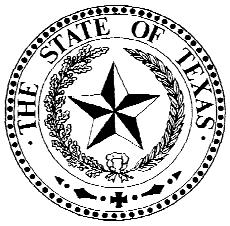
Affirmed and Opinion filed January 31, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00477-CR

DENNIS VALDIVIA DELROSARIO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 1047163

O P I N I O N

Dennis Valdivia Delrosario appeals a conviction for theft of an automobile[1] on the grounds that: (1) the trial court erred by denying his pretrial motion to disclose documents used to refresh a witness's memory; and (2) his trial counsel's failure to object to testimony regarding a document which had been used to refresh his memory, but not produced, denied him effective assistance of counsel. We affirm.

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[1] A jury found appellant guilty and sentenced him to 365 days confinement, probated for one year, and a $1,750 fine. However, the trial court suspended appellant's sentence and placed him on community supervision for two years.

Appellant filed a pretrial motion for the disclosure of documents used to refresh any witness's memory.[2] The judge limited the discovery of such documents to those that had been subpoenaed or were available in the courtroom. During trial, Houston Police Officer Urban testified on direct examination that, before appellant was arrested, Urban compared the handwriting on an application for a certified copy of the title to the stolen automobile with an employment application appellant had previously filed with the Houston Police Department and determined that the handwriting on the two documents matched.

Appellant's first point of error complains that the trial court's ruling on his motion severely harmed his defense in that he did not receive the employment application, which he needed to cross-examine Urban. When a writing is used by a witness to refresh his memory, either while or before testifying in criminal cases, the opposing party is entitled to inspect it, cross-examine the witness on it, and introduce it into evidence. TEX. R. EVID. 612 (1, 3); *see Robertson v. State*, 871 S.W.2d 701, 708 (Tex. Crim. App. 1993). However, where there is no evidence in the record to establish that the witness did, in fact, use the document to refresh his memory before giving his testimony,[3] Rule 612 does not apply.[4]

In this case, appellant cites no evidence in the record that Urban ever refreshed his memory with the employment application (which was not in evidence). Instead, Urban was merely asked what he had done with it before appellant was arrested. Therefore, Rule 612 does not apply, and appellant's first point of error is overruled.

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2 Appellant's motion requested: "[t]he following documents to be produced for inspection by Defense at the proper time: . . . any document . . . used by a witness to refresh his memory concerning the facts in this cause either as he was giving direct testimony in this cause before the trier of fact or in the witness' preparation to give testimony in this cause before the trier of fact."

3 Evidence that a witness refreshed his memory before testifying might include the witness's testimony that in preparation for testifying, he reviewed the document. *See Young v. State*, 891 S.W.2d 945, 946 (Tex. Crim. App. 1994) (stating that witness reviewed her books before testifying); *Robertson v. State*, 871 S.W.2d 701, 708 (Tex. Crim. App. 1993) (stating that witness testified that in preparation for testifying, he had read the materials).

4 *See Pondexter v. State*, 942 S.W.2d 577, 582 (Tex. Crim. App. 1996); *Saldivar v. State*, 980 S.W.2d 475, 497 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

Appellant's second point of error argues that he was denied effective assistance of counsel by his trial attorney's failure to object to Urban's testimony regarding the employment application which Urban used to refresh his memory, but was not produced to appellant. However, the failure to object to admissible evidence is not ineffective assistance of counsel. *McFarland v. State*, 845 S.W.2d 845, 846 (Tex. Crim. App. 1992). Because appellant has cited no evidence showing that Urban ever used the employment application to refresh his memory, and thus that his testimony about it was inadmissible, his counsel's failure to object to that testimony was not ineffective assistance. Therefore, appellant's second point of error 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 Guzman.

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