Affirmed and Opinion filed February 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00500-CR

EDGAR ALBERTO LAZCANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 850, 574

O P I N I O N

Appellant Edgar Alberto Lazcano challenges his conviction for burglary of a habitation with the intent to commit aggravated assault. In seven points of error, appellant complains the trial court erred in permitting references implicating gang membership. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 11, 2000, as the complainant, Tameez Dapar and his wife were returning to their apartment from dinner, Dapar noticed appellant and three other men sitting in appellant's car in the parking lot. Dapar recognized appellant and appellant's car because appellant was a regular customer of the gas station where Dapar worked. Moments after

Dapar and his wife entered their apartment, they heard a knock at the door. When Dapar opened the door, appellant and the three other men pushed their way into the apartment. Appellant, who was holding a black semiautomatic gun, punched Dapar in the face and broke his nose. The intruders threw Dapar on the dining room table and knocked over several pieces of furniture. They also tried to take Dapar's television, but found that it was too large to move.

The intruders then took Dapar outside, grabbed him by the neck, and dragged him into the parking lot. As the men continued to hit him, Dapar heard appellant scream an obscenity and accuse Dapar of towing appellant's car. Dapar replied that he did not know anything about the car, to which appellant responded: "*Next time you tow my car, I kill you and your family*." The men then left together. Dapar went to the hospital to seek medical treatment for his injuries.

At trial, Najma Dapar confirmed her husband's account of these events. She further testified that after the incident she called her cousin, Ali Pathan, the owner of the gas station. Pathan arrived immediately and called the police. Officer Wilkins arrived on the scene, observed Dapar's broken nose and other wounds. He saw that the Dapar's apartment had been ransacked. Officer Wilkins took descriptions of the four suspects.

Two days after the incident, Officer Beauchamp, an investigator in the divisional gang unit, questioned Dapar about the incident. Officer Beauchamp observed a trail of blood that began at a sidewalk by the parking lot and went to Dapar's apartment. Officer Beauchamp presented a photospread, which included appellant, for Dapar to view. Dapar positively identified appellant as his attacker.

When appellant testified in his own defense, he admitted that he went to the gas station with his brother and nephew and angrily confronted Pathan after his car was towed. But he stated that he never touched Dapar or entered Dapar's apartment with a gun. In addition, he stated that Dapar was at the station when he confronted the owner and in fact, Dapar was the one who provided him with the number of the wrecker service. Appellant admitted to being at Dapar's apartment complex on the night of June 11, 2000, but only to pick up his friend, Albert Ballesderos. Appellant stated that he, Ballesderos, and two other

men saw Dapar in the parking lot and exchanged heated words with him because appellant was angry about his car being towed. Dapar told appellant that he did not have anything to do with his car getting towed. When Dapar went up to his apartment, appellant claims that his friend, Jose Andrade, got out of the car, went to Dapar's apartment by himself, and hit Dapar in the face two or three times. Appellant states that after Dapar's wife came out of the apartment and yelled at them, he and the others left.

Appellant was indicted for burglary of a habitation with the intent to commit aggravated assault. Appellant pleaded not guilty. Appellant filed a motion in limine to prohibit the State from referring to, among other things, "any possible gang membership or affiliation." The trial court granted this motion. A jury convicted appellant as charged and the court assessed punishment at 15 years' confinement in the Texas Department of Criminal Justice, Institutional Division.

II. ADMISSION OF OFFICER BEAUCHAMP'S TESTIMONY

In his first three points of error, appellant argues the trial court erred in overruling his objection to Officer Beauchamp's testimony – that he was assigned to investigate gang-related crimes – in violation of Texas Rules of Evidence 402, 403, and 404(b).

Appellant conceded at oral argument that the error, if any, was not properly preserved. Nonetheless, we will briefly address the preservation problem.

Before appellant's counsel objected, Officer Beauchamp testified as follows:

> Q: [By Prosecutor]: And how are you employed, sir?
>
> A:[Officer Beauchamp]: As an investigator with the Houston Police Department.
>
> Q: And how long have you been working for the police department?
>
> A: With the Houston Police Department, since October of '95, so just over five years.
>
> Q: Did you work anywhere in any law enforcement capacity before that?
>
> A: Yes, sir. I was employed in January, '93, with the Port Arthur Police Department and worked there until I was hired with Houston.

> Q: What are your typical jobs? What's your duties right now?
>
> A: Currently I am assigned as an investigator to the divisional gang unit. Our responsibilities include investigations of cases which appear to be gang related and investigations in gathering of intelligence on individuals that we believe to be gang members.

Appellant objected based on his motion in limine forbidding reference to gang membership. Defense counsel asked to approach the bench and the following discussion took place outside the presence of the jury:

> [Defense Counsel]: Specifically the order in the motion in limine for 499 [sic], the State's witnesses are not to speak about any gang activity.
>
> [Prosecutor]: Your Honor, the motion in limine addresses whether or not this person was a gang member. I am asking this officer what he works in. If he works in the gang task force, you can't hide that from the jury. Homicide officers work assaults, too. It doesn't necessarily imply the victim is dead.
>
> Defense Counsel: Thank you. I think he is making a show about it. He probably noticed that gang member. I mean, he knows what he is doing.
>
> The Court: Are you making an objection?
>
> Defense Counsel: I make an objection and I think it is covered in the motion in limine, relates to this case.
>
> Prosecutor: While we are up here, so we are to avoid this, this case was investigated as if it was gang involved but, I mean, you can clearly–
>
> Defense Counsel: The motion in limine covers it and I don't think we have to–
>
> The Court: *I am aware of the motion in limine and respectfully overrule*.
>
> Prosecutor: Is it permitted that he can testify that they initially thought it to be gang related? There is nothing to tie this defendant to a gang.
>
> The Court: *Since you asked, no*.

The trial court considered its ruling on the motion in limine and allowed the officer to state his duties, but ruled that he could not testify that the crime was initially thought to be gang-related. Appellant's motion in limine requested the State refrain from making any references to gang membership. The motion in limine urged that such evidence was irrelevant under rule 402, inadmissible character evidence under 404(b), and more prejudicial than probative under 403. Appellant's complaint on appeal is based on the same grounds urged in the motion in limine. However, it is clear from the above exchange that appellant's objection was the violation of the motion in limine and not the admission of the evidence under rules 402, 403, or 404(b). *See Gutierrez v. State*, 36 S.W.3d 509, 510-511 (Tex. Crim. App. 2001) (finding appellant waived error by failing to make a specific 404(b) objection at trial). It is well-settled that motions in limine do not preserve error regardless of whether the motion is granted or denied. *See Webb v. State*, 760 S.W.2d 263, 275 (Tex. Crim. App. 1988); *Willis v. State*, 785 S.W.2d 378, 384 (Tex. Crim. App. 1989).

A ruling on a motion in limine does not purport to be one on the merits, but rather is one regarding the administration of the trial. *Id.*[1] The remedy for a violation of a ruling on a motion in limine rests with the trial court. *Brazzell v. State*, 481 S.W.2d 130, 131 (Tex. Crim. App. 1972); *Wade v. State*, 814 S.W.2d 763, 765 (Tex. App.—Waco 1991, no pet.). The trial court may hold the litigant or attorney in contempt or use other remedies or sanctions. *Brazzell*, 481 S.W.2d at 131. Even if there has been a violation of the order on the motion in limine, it is incumbent that a party object to the admission or exclusion of evidence or other action, on the proper grounds, in order to preserve error for appeal. *Harrington v. State*, 547 S.W.2d 616 (Tex. Crim. App. 1977); *Lopez v. State*, 535 S.W.2d 643 (Tex. Crim. App. 1976). The reason for this rule is that a judge is often not in a position

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[1] *See also Romo v. State*, 577 S.W.2d 251, 252 (Tex. Crim. App. 1979) (stating that the purpose of a motion in limine is to allow court to evaluate admissibility of evidence without risk of prejudicing jury); *Roise v. State*, 7 S.W.3d 225, 240 (Tex. App.—Austin 1999, pet. ref'd) (finding defendant waived error where State violated motion in limine, but his untimely objection at trial was only that State violated court's ruling); *Rawlings v. State*, 874 S.W.2d 740, 742 (Tex. App.—Fort Worth 1994, no pet.) (stating defendant waived error where he failed to state proper grounds for exclusion of evidence at time it was offered, even though defendant had sought exclusion by pre-trial motion in limine).

to decide on the admissibility of evidence prior to the beginning of trial. *Lopez*, 535 S.W.2d at 643.

Appellant objected to Officer Beauchamp's testimony as soon as he mentioned that he investigated gang activities. Appellant asked to approach the bench and thereafter claimed a violation of the motion in limine. Appellant did not make a specific objection to Officer Beauchamp's testimony under the grounds he now asserts, but relied solely on the court's granting of his motion in limine and the State's alleged violation of it. Because appellant did not make a specific objection under rules 402, 403, and 404(b), he has waived appellate review. Accordingly, we overrule appellant's first three points of error.

III. CROSS-EXAMINATION OF APPELLANT

In issues four through seven, appellant contends the trial court erred in allowing the State, during cross-examination, to ask him whether he was a member of a gang. Appellant claims this evidence was inadmissible under Texas Rules of Evidence 403, 404(a) and (b), and 405(b). Again, it is debatable as to whether appellant has preserved appellate review for the arguments he has raised. Before the State asked any questions regarding gang membership, appellant objected and the following discussion was held outside the presence of the jury:

> [Defense Counsel]: Your Honor, may we approach?
>
> The Court: Yes, ma'am.
>
> *{At the Bench, on the Record}*
>
> Defense Counsel: I have a feeling we are about to get to the stuff we talked about in the motion in limine.
>
> [Prosecutor]: The gang stuff, I am getting into that area, Judge. I think I am entitled to ask about all the people being members with the gang and being violent, and I think I am entitled to ask him if he is [sic] one at all.
>
> Defense Counsel: You don't have any evidence.
>
> Prosecutor: People that he is riding with. He is holding himself out.

. . . .

The Court: With the Jury out and the door closed, you have approached the bench and said—that the prosecutor has approached the bench and said that he would like to rediscuss the question that was covered in the motion in limine about gang activities. Either one of you just can expand on that.

Defense Counsel: I'll be happy to. There has been no evidence and there is no evidence that my client is in a gang. And it's absolutely highly prejudicial to bring in any kind of gang activity of his friends. I mean, his friends aren't on trial, he is.

Prosecutor: Just part and parcel in this that he is riding around with at least one documented gang member, another person who is serving time in the pen, based on his own testimony. I think, absolutely, I am free and clear to go into the people that he his riding around with.

Now, under the law of the parties, he is going to be kind of responsible for what is going on as well and since I have to prove more than mere presence, I also have to show that he knew kind of what he was getting into and who he was riding with, I think I am entitled to ask him whether or not he is in a gang and he is free to say yes or no. It's a question, Judge. This trial isn't happening in a bubble.

Defense Counsel: Mr. Newman knows he is not in a gang.

Prosecutor: I do not know. I know it is not documented up to this point. I don't know if he has–I know he has tattoos.

The Court: Evidently you know something that I didn't. You evidently, both of you all, know that somebody–there is evidence that somebody is in a gang. Who is the somebody?

Defense Counsel: One of the people that he [appellant] went with, his nephew [sic] that he went to the store, Cuevas.

The Court: Sal Cuevas.

Prosecutor: – is a documented member of the Fourth Ward gang.

The Court: And you are saying you have a witness that can testify to that?

Prosecutor: Yes, sir. I'm saying it is not relevant to this case at all. It goes back to, you know, we talked about other evidence of bad acts. Now just what he said he wasn't going to do yesterday is showing that he is with a gang member to intimidate someone in the store, which I never had notice of any other bad acts.

Prosecutor: *He has opened himself up. It's rebuttal at this point.*

Defense Counsel: It's not relevant. It's highly prejudice [sic] when he is not, even for no evidence, that he is in the gang.

Prosecutor: Judge, he is riding around with thugs and going out, getting revenge for a car towed, and I think that is something that the jury needs to know. He wasn't going to choir practice with the church buddies. He is going around with a group of thugs.

The Court: You don't need to use colorful language. Anything else you want to add for your objection?

Defense Counsel: I think I covered it all, Judge.

The Court: Your objection is overruled.

Defense Counsel: You are going to let him talk about the gang–mention it and no evidence?

The Court: You are saying that the–I'm not saying that.

Defense Counsel: I want to make sure I understand the ruling.

The Court: The ruling is your objection is overruled.

A. Preservation of Error

To preserve error for appellate review, counsel must object every time allegedly inadmissible testimony is offered. *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984). The law in Texas requires a party to continue to object each time inadmissible evidence is offered . . . "[d]espite the improper form and content of the question, it is well settled that an error in admission of evidence is cured where the same evidence comes in

elsewhere without objection; defense counsel must object every time allegedly inadmissible evidence is offered." *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) (en banc).[2] Although an occasional objection may have been made to references of gang membership, there were many times when no objection was uttered. In fact, defense counsel raised the question of whether appellant was involved in a gang or associated with gang members. After the defense called appellant's brothers, sister, and mother to testify that appellant was a peaceful man and did not associate with bad people, the State asked each witness if appellant was a member of a gang. Each witness responded in the negative. Appellant failed to lodge an objection during any of the witnesses' testimony nor did appellant seek a running objection.

Thus, having failed to object every time the same evidence was offered, appellant has waived error. *See Ethington*, 819 S.W.2d at 858; *see also Rodriguez v. State*, 955 S.W.2d 171, 175 (Tex. App.—Amarillo 1997, no pet.) (finding that appellant waived complaint about prosecutor referring to him as a gang member because he did not object every time a reference to his gang membership was made). Most significantly, because the questions asked of all the defense witnesses attempted to establish the same point sought to be established in appellant's cross-examination — that appellant was a gang member — any error in allowing the cross-examination of appellant on this issue was cured by the unobjected-to testimony of the defense witnesses after appellant testified. *See Gillum v. State*, 888 S.W.2d 281, 284–85 (Tex. App.—El Paso 1994, pet. ref'd).

Even if error had been properly preserved, the trial court did not abuse its discretion in permitting the State's cross-examination of appellant on this limited issue. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Mozon v. State*, 991 S.W.2d 841, 846–47 (Tex. Crim. App. 1999). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Montgomery v. State*, 810

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[2] The two exceptions discussed in *Ethington* are not relevant to our discussion. *See Ethington*, 819 S.W.2d at 858. These exceptions are the "running" or continuing objection and a procedure whereby counsel lodges an objection to all the testimony he deems objectionable on a given subject at one time out of the jury's presence. *See id*. at 858–59 (citations and footnotes omitted).

S.W.2d 372, 391 (Tex. Crim. App. 1991). In determining whether the trial court abused its discretion, we consider whether the court acted without reference to guiding rules and principles; that is, whether the court acted arbitrarily or unreasonably. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993). However, there is no abuse of discretion merely because a trial court may have decided a matter within its discretionary authority differently than a reviewing court in a similar circumstance. *Aguilar v. State*, 29 S.W.3d 268, 270 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We find no abuse of discretion.

B. Proper Impeachment Evidence

The mere asking of an improper question will not constitute reversible error unless the question results in obvious harm to the accused. *Brown v. State*, 692 S.W.2d 497, 501 (Tex. Crim. App. 1985). Convictions are rarely reversed because of an improper question propounded to a witness. *Sensabaugh v. State*, 426 S.W.2d 224, 227 (Tex. Crim. App. 1968). The general rule is that either party is entitled, subject to reasonable restrictions placed by the trial judge, to show any relevant fact which would or might tend to establish ill feeling, bias, motive, interest or animus on the part of any witness testifying against him. *London v. State*, 739 S.W.2d 842, 846 (Tex. Crim. App. 1987). A witness may be impeached by showing a bias or motive which tends to affect his credibility. *Bynum v. State*, 731 S.W.2d 661, 664 (Tex. App.—Houston [14th Dist.] 1987, no pet.); *McKnight v. State*, 874 S.W.2d 745, 747 (Tex. App.—Fort Worth 1994, no pet.) (holding that the evidence implying that defendant was affiliated with a gang was relevant for impeachment and bias). Trial courts have considerable discretion as to how and when the bias of a witness may be proved, and as to what collateral evidence is material for that purpose. *Rovinski v. State*, 605 S.W.2d 578, 580 (Tex. Crim. App. 1980); *Bynum*, 731 S.W.2d at 664. The probative value of the evidence must be balanced against the risk that its admission into evidence will result in undue prejudice, embarrassment or harassment to either a witness or a party, misleading or confusing the jury. *See Bynum*, 731 S.W.2d at 664.

We do not find the trial court abused its discretion in allowing the State to ask whether appellant was a member of a gang. This was proper rebuttal or impeachment evidence.

Appellant took the stand and testified as to his character. The State asked appellant if he was a member of a gang, and appellant answered in the negative. The State did not further pursue this matter. The State's attempt to cross- examine appellant concerning his credibility was proper. *See United States v. Abel,* 469 U.S. 45, 49 (1984) (holding that evidence of gang membership bears on the witnesses' veracity and bias); *see also Virts v. State*, 739 S.W.2d 25, 28 (Tex. Crim. App. 1987); *Koehler v. State*, 679 S.W.2d 6, 9 (Tex. Crim. App. 1984). Accordingly, we overrule appellant's points of error four through seven.

We affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed February 28, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
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