Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00032-CR

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WILLIE HAROLD WASHINGTON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No.1
Harris County, Texas
Trial Court Cause No. 99-03130

O P I N I O N

A jury found appellant, Willie Harold Washington, Jr., guilty of intentionally and knowingly possessing a motor vehicle which a reasonable person in the position of the appellant would have known contained a vehicle identification number ("VIN") that had been removed, altered, or obliterated. The court assessed his punishment at one year in jail, probated over the period of one year, a $600.00 fine, and 90 hours of community service. Appellant appeals his conviction on five issues for review: (1) that the evidence was legally insufficient to sustain his conviction; (2) that the evidence was factually insufficient to sustain his conviction; (3) that the trial court erred in overruling appellant's objection to being impeached with hearsay testimony from a prior trial; (4) that the trial court erred in limiting

appellant's voir dire examination of the panel; and (5) that the trial court erred in denying appellant's pre-trial motion to inspect and have a defense expert analyze the State's physical evidence. We affirm.

FACTUAL BACKGROUND

The facts of this case revolve around two Ford Mustangs. One is a red, 1985 Mustang ("the red car") and the other is a black, 1986 Mustang ("the black car"). Appellant, who owns an automotive repair and body shop, possessed both of these cars. At some point in time, the VIN from the black car was removed from the black car and placed on the red car.

Pursuant to Chapter 8 of the City of Houston Code of Ordinance, Officer Malek, a Houston Police Officer working in the Auto Theft Division, conducted an inspection of appellant's automotive business to check into a possible illegal salvage yard there. During the inspection, Officer Malek noticed that the VIN on the red car had been tampered with. Officer Malek had a title search performed on the VIN found in the red car. The title search revealed a chain of title to the black car, not the red car. It appeared that Jerrel Butler owned the vehicle just before appellant, but Butler's name had been scratched out, with appellant's name written in its place. Officer Malek contacted Butler. Butler testified that he had left the black car with appellant. He further testified that he never owned the red car. Both Malek and Butler testified that they saw both cars on Washington's lot. Officer Malex expressed his opinion that the red car had always been red and had never been black; he based this conclusion on the fact that the metal under the carpet in the red car was also red.

Malek also testified about certain facts which made him believe that appellant knew the VIN originally was not on the red car. He removed the VIN plate from the red car, slightly damaging it in the process. However, as to the condition of the VIN plate despite the mark he made on it, the rivets on the plate did not look like rivets that had not been tampered with or removed. They looked as though they had been removed and replaced and were dented when replaced. He further testified that he found a sticker on the door with the full VIN number. It appeared that this sticker had been removed, which he stated would be done to conceal the

true identity of the vehicle. Officer Malek also testified that a tab on the right front fender of the vehicle, providing a secondary source of identification, was abnormally easy for him to remove.

Butler, who has worked with Mustangs since 1978, testified that, in his opinion, the VIN plate had been tampered with.

Ultimately, both Butler and Officer Malek testified that, in their opinions, a person, such as appellant, with over thirty-five years of experience in working with Ford Mustangs would know that the VIN plate had been tampered with or altered.

PROCEDURAL HISTORY

Appellant was charged by information with intentionally and knowingly possessing a motor vehicle which a reasonable person in his position would have known had a serial number that had been removed, altered, or obliterated. *See* TEX. PEN. CODE ANN. § 31.11(a)(2)(B) (Vernon Supp. 2000). The first trial of this case ended in a hung jury. On the subsequent trial of this case, appellant was found guilty as charged in the indictment. Punishment was set by the trial court and appellant timely appealed.

DISCUSSION AND HOLDINGS

I. Sufficiency of the Evidence

In his first two issues for review, appellant complains that the evidence was legally and factually insufficient to support his conviction. Specifically, he argues that it is an affirmative defense to a violation of article 31.11 that the person in violation owns the vehicle or acts with consent of the owner of the vehicle. Appellant contends that the State and appellant presented evidence that appellant owned the red vehicle. He concludes that, as a matter of law, the court should have granted appellant's motion for an instructed verdict at the close of the State's case. Unfortunately, appellant did not request that the affirmative defense be submitted to the jury, much less make any mention of this affirmative defense during the trial.

Given that appellant failed to raise the issue of an affirmative defense at trial, his

argument that his instructed verdict should have been granted based on that affirmative defense is not persuasive. His motion at trial does not comport with his argument on appeal. Appellant urged the trial court, throughout the trial, that in order for the State to prevail, it had to prove that appellant knew that the VIN had been altered without the permission of the owner. In support of this argument, appellant cited the trial court and cites this Court to article 31.11(a)(2)(A) of the Penal Code and to *Dill v. State*. 697 S.W.2d 702 (Tex. App.—Corpus Christi 1985, pet. ref'd). In *Dill*, the appellant was arrested for theft of a television set from a motel room. *Id*. at 706. The police discovered that the motel room was not missing its television, but the officers continued to hold appellant under arrest for tampering with the television serial numbers. *Id*. The Corpus Christi Court of Appeals held that the officers did not have probable cause to believe that Dill had tampered with the serial number, so the arrest and resulting seizure of the television were illegal. *Id*. at 708.

Dill is applicable to the provision of the Penal Code to which appellant cited us, but has no application to the provision of the Penal Code under which appellant, in this case, was prosecuted. In the instant case, appellant could be found guilty if the State proved that he possessed the red vehicle and that a reasonable person in the position of appellant would have known that the VIN on that vehicle had been removed, altered, or obliterated. TEX. PEN. CODE ANN. § 31.11(a)(2)(B) (Vernon Supp. 2000). Through an apparent mistake, appellant argued to the trial court, as grounds to support his motion for instructed verdict, law that had no relevance to the offense for which he was charged. Now he argues for the first time on appeal that his motion for instructed verdict should have been granted because of an affirmative defense. We hold that because his argument at trial fails to comport with his argument on appeal, he has not preserved error for our review. TEX. R. APP. P. 33.1(a); *see State v. Aguirre*, 5 S.W.3d 911, 915 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Appellant's first two points of error are overruled.

II. Hearsay and Former Testimony

Appellant, in his third issue for review, contends that the trial court erred in allowing

what he deems to be "hearsay" testimony of a witness that appellant had called during the first trial of this matter. As we explain below, appellant did not timely object to this testimony as hearsay, and has waived error, if any.

The State wanted to use Kenneth Burrell's testimony from the prior trial of this case. In this case and the prior one, a tow slip that purportedly was issued by Burrell to appellant in 1992 was discussed. In the prior trial, Burrell first stated that he made the slip in 1992, but then explained that while it was dated as "1992" he actually made it at a later date, but dated it back to 1992.

At the second trial, appellant testified again that this tow slip had been made in 1992. The State discussed at length with appellant the fact that Burrell, a witness appellant had sponsored at the former trial, testified that the tow slip was not made on the date purported on the slip itself, but at a later date.

Appellant's hearsay objection was not made in a timely manner. After Burrell's former testimony had been discussed at length, the prosecutor took the appellant on a brief voir dire out of the presence of the jury. At this time, the prosecutor stated that she intended to use the former testimony for impeachment purposes only. Appellant then made an objection to the use of Burrell's testimony on the grounds of hearsay.

Appellant's complaint to the use of this former testimony is waived because his hearsay objection was not timely made. TEX. R. APP. P. 33.1(a)(1)(A); TEX. R. EVID. 103(a)(1); *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). He has not demonstrated to this court a legitimate reason to justify the delay. Where, as here, the defendant fails to object until after an objectionable question is asked and answered, and is unable to demonstrate a legitimate reason to justify the delay, the objection is untimely and any error is waived. *Lagrone*, 942 S.W.2d at 618; *Dinkins v. State*, 894 S.W.2d 330, 355-36 (Tex. Crim. App. 1995); *DeJesus v. State*, 889 S.W.2d 373, 378 (Tex. App.—Houston [14th Dist.] 1994, no pet.). Accordingly, appellant's third issue is waived.

III. Limitations on Voir Dire

In his fourth issue for review, appellant complains that the trial court erred in not allowing him to voir dire the venire on his allegation that, before the jury could convict, the State had to prove that appellant knew the VIN was altered on the vehicle, and then to voir dire the venire on whether they would be able to follow that law.

A trial judge may impose reasonable restrictions on the exercise of voir dire examinations. *McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992). We review a trial judge's decision to limit voir dire under an abuse of discretion standard. *Dinkins*, 894 S.W.2d at 345. A trial judge abuses his discretion when he limits a proper question concerning a proper area of inquiry. *Id*. Voir dire examination may be limited where a question commits a venire member to a specific answer given a specific set of facts, where the questions are duplicative, where the venire member has already stated his position clearly and unequivocally, and where the questions are in improper form. *Id*. No abuse of discretion occurs when a trial judge limits the voir dire examination because the issues the defendant seeks to explore are improper voir dire questions. *McCarter*, 837 S.W.2d at 121-22. When a question goes to issues that are not applicable to the case, that question is improper. *Id*.

As we explained in Section I, *supra*., under article 31.11, the state is not required to prove that appellant knew that the VIN had been altered. On the contrary, it must only prove that a reasonable person in the position of appellant would have known that the VIN had been altered, removed, or obliterated. TEX. PEN. CODE ANN. § 31.11(a)(2)(B) (Vernon Supp. 2000). As a result, the issue of whether the jury could follow a law that would require the State to prove that appellant knew the VIN had been altered is an issue not applicable to this case. Accordingly, the trial court did not abuse its discretion in limiting appellant's voir dire so as not to allow questions into this issue. *McCarter*, 837 S.W.2d at121-22. Appellant's fourth point of error is, therefore, overruled.

IV. Pre-Trial Motion to Inspect

In his final issue for review, appellant contends that the trial court erred by denying his pre-trial motion to inspect and have a defense expert analyze the physical evidence held by the

State. Specifically, he argues that his expert metallurgist, Dr. McClelland, needed access to the metal VIN plate in order to prepare for testimony because he needed to be able to determine how many times the VIN plate had been removed.

Dr. McClelland testified at trial, which commenced on November 17, 1999, that he had an occasion to examine the VIN plate on September 28, 1999. He also testified that he examined other pictures and exhibits in this case the morning of trial. These were examined in the building where the trial court is located. On cross-examination, Dr. McClelland testified that he examined the VIN plate, "the metal as well as the photographs" at a room in the building where the court was located and used his "hand-held microscope" in so doing. As to how many times the VIN plate had been removed, Dr. McClelland testified that the plate had possibly been removed more than once, but in all probability was removed only once.

The standard of review for a trial court's denial of discovery in criminal cases is abuse of discretion. *State v. Williams*, 846 S.W.2d 408, 410 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (citing TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1994)). Article 39.14 governs discovery of evidence in criminal cases. The defendant bears the burden thereunder to show "good cause" for inspection of the evidence sought. *Massey v. State*, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996); *McBride v. State*, 838 S.W.2d 248, 250 (Tex. Crim. App. 1992). The trial court must allow discovery of evidence that is shown to be material to the defense of the accused. *McBride*, 838 S.W.2d at 250. A defendant "has a right to inspect evidence indispensable to the State's case because that evidence is necessarily material to the defense of the accused." *Id*. at 251.

We reject appellant's fifth issue for the following two reasons. First, the motion for discovery was initially filed with the court on August 20, 1999. The record does not indicate a ruling on that motion. The next motion for discovery was filed with the court on November 16, 1999, one day prior to trial, and was denied on November 17, 1999, the day of trial. It is plainly clear from Dr. McClelland's testimony that he did see and inspect the VIN plate on September 28, 1999. While it is obvious that the VIN plate is material evidence, it does not appear that Dr. McClelland did not have an opportunity to examine this piece of evidence prior

to trial. As such, we cannot hold that the court abused its discretion in denying this motion for discovery. Secondly, Dr. McClelland was able to testify as to his opinion about how many times the plate had been removed. He stated that he *strongly* held the opinion that the plate had been removed only once, "[a]nd, for good reasons, too." For these reasons, appellant did not show good cause, as is required by 39.14, for the court to have allowed the discovery on November 16, 1999. Appellant's fifth issue for review is overruled.

CONCLUSION

Having overruled all five of appellant's issues for review, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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