Affirmed and Opinion filed May 11, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00696-CR

ADRIAN CHAVEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 757,192

O P I N I O N

Appellant, Adrian Chavez, appeals his conviction for aggravated robbery. TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). The State charged appellant by indictment with the offense of capital murder. A jury found appellant guilty of the lesser included offense of aggravated robbery and assessed his punishment at fifty five years confinement. In four points of error, appellant contends that the trial court erred by: (1) denying his motion for a mistrial after the State improperly impeached a defense witness, (2) denying a witness his Fifth Amendment privilege, (2) overruling his objection to improper impeachment of a State's rebuttal witness, and (4) finding the punishment evidence sufficient to sustain the jury's verdict. We affirm the judgment of the trial court.

Background

A group of five men kicked in the door to Alex Parisi's home to steal money and marijuana. Parisi and several of his friends were in the home at the time of the robbery. Vernon Cameron, a friend of Parisi, was hiding in the bedroom closet. He drew the robbers attention when he pumped his shotgun inside the closet. The robber ordered Cameron to come out of the closet. While the two engaged in a stand-off, Parisi charged out of the bathroom and knocked down the robber. Parisi and Cameron hit the robber with a gun. During this fight, another one of the robbers entered the bedroom and shot Parisi eight times. Parisi died from the gunshots. Cameron testified that the shooter's face was not covered with a bandana. He recognized the person to be the appellant.

Impeachment

In his first point of error, appellant contends that the trial court erred in denying his motion for mistrial. He argues that the State improperly impeached Alfred Cordova, a defense witness, with questions about appellant's pending criminal charge for drugs and for counterfeiting.

During cross-examination, the prosecutor asked Cordova about appellant's pending drug charge. Cordova claimed responsibility for the drugs and said that appellant should not have been charged. The prosecutor then asked Cordova about appellant's pending counterfeit case. Before Cordova had an opportunity to respond, appellant's trial counsel objected to the question and asked for a mistrial. The trial judge sustained the objection and instructed the jury to disregard the question. The judge overruled appellant's request for a mistrial.

Generally, specific instances of conduct may not be inquired into on cross-examination of a witness nor proved by extrinsic evidence for purposes of attacking or supporting a witness's credibility. TEX. R. EVID. 608(b). After reviewing the record, we find no applicable exception to Rule 608(b) that would allow the State to impeach Cordova with

this information. We agree with appellant that the prosecutor's questions were improper; however, (1) appellant failed to preserve his complaint on the drug charge and (2) the judge's instruction to disregard the question on the counterfeiting charge cured any error.

First, appellant failed to preserve his complaint about his pending drug charge. Appellant's trial counsel did not object to the question until after testimony was elicited from the State concerning appellant's drug use, dealing, and arrest. The objection was not timely. *See* TEX. R. APP. P. 33.1(a)(1). Furthermore, overruling an objection to evidence will generally not result in reversal when other evidence of the same fact was received, either before or after the complained of ruling. *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).

Second, the trial judge's instruction to the jury to disregard the question about appellant's pending counterfeiting charge cured any error. Testimony referring to or implying the existence of extraneous offenses may be rendered harmless by the trial court's instruction to disregard. *See Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998). Generally, any error is cured by a prompt instruction to disregard. *See Kipp v. State*, 876 S.W.2d 330, 339 (Tex. Crim. App. 1994).

After trial counsel objected to the question, the trial judge promptly sustained the objection and instructed the jury to disregard the question. Cordova never answered the question and was prevented from expanding on the factual circumstances of the charge. Nothing in the record indicates that the question inflamed the minds of the jury to such an extent so that it would have been impossible for them to remove the harmful impression from their minds. *See Rojas*, 986 S.W.2d at 250. We presume that the jurors followed the trial judge's instruction.

We hold that the trial court did not abuse its discretion in overruling appellant's motion for mistrial. We overrule appellant's first point of error.

Fifth Amendment

In his second point of error, appellant contends that the trial court erred by denying a State's witness to assert his Fifth Amendment privilege.

The State called Jessie Arispe as a rebuttal witness. Before the State attempted to impeach Arispe with a prior statement, he asserted his Fifth Amendment privilege. *See* U.S. CONST. amend. V. The trial judge denied his request. Arispe then testified that he had no memory of making the statement.

Appellant's claim fails because he lacks standing. Some constitutional rights are personal and may not be vicariously asserted. *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). Among these is the right to self-incrimination. *Hall v. United States*, 413 F.2d 45, 47 (5th Cir. 1969). Appellant cannot assert in his own defense the denial of another's right against self-incrimination. We overrule appellant's second point of error.

Impeachment by Prior Written Statement

In his third point of error, appellant contends that the trial court erred by allowing the State to impeach Jesse Arispe with a prior written statement. During the State's rebuttal case, the prosecutor questioned Aripse about a prior written statement that he gave to police. In a hearing outside the presence of the jury, Arispe claimed that he was drunk at the time the statement was made and had no recollection of its contents. When the jury returned, the prosecutor impeached him with his statement.

The determination of the admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal unless the trial court clearly abused its discretion. *See Greenwood v. State*, 948 S.W.2d 542, 552 (Tex. App.–Fort Worth 1997, no pet.). An abuse of discretion will be found "only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App.1992).

A witness may be impeached when he either denies or states that he does not remember having made the prior inconsistent statement. *Johns v. State*, 626 S.W.2d 920, 922 (Tex.App.--Fort Worth 1982, writ ref'd). A party, however, may not call a witness primarily for the purpose of impeaching him with evidence that would otherwise be inadmissible. *See Barley v. State*, 906 S.W.2d 27, 37 n. 11 (Tex. Crim. App. 1995); *Armstead v. State*, 977 S.W.2d 791, 796 (Tex. App.–Fort Worth 1998, pet. denied). Prior to Arispe's impeachment, the State had notice that Arispe would testify that he did not remember making the statement during the hearing outside the jury's presence; therefore, we find that the State improperly impeached Arispe with his prior statement.

The State asked Aripse several questions about his prior statement. Appellant, however, only preserved three of the questions for our review. As to the other questions, appellant either failed to object to the question, did not obtain a ruling on his objection, or similar evidence came in later without objection. *See* TEX. R. APP. P. 33.1. Appellant preserved error when the prosecutor asked Arispe whether appellant told him about the murder. He also preserved error as to whether he told Arispe that he and Fredo participated in the murder. As to these questions, we must now determine whether the error warrants reversal.

Because the error before us is not constitutional, Rule 44.2(a) is inapplicable, so we are to disregard the error unless it affected appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App.1997) (*citing Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). Accordingly, we review the record as a whole to determine whether the error had a substantial influence on the jury's verdict. *See Mosley v. State*, 983 S.W.2d 249, 260 (Tex. Crim. App. 1998)(op. on reh'g).

Any error in allowing the prosecutor to ask these questions about the prior statement was harmless. Evidence of appellant's guilt in the robbery was overwhelming in this case.

Chris Lewis recognized appellant's voice as one of the men who broke into Parisi's house. Vernon Cameron identified appellant and heard him say, "see what you made me do to your homeboy, motherfucker," after Parisi was shot. Cameron saw appellant holding a .9 millimeter handgun. Five of the bullets recovered from the body were .9 millimeter bullets. James Hitchcock went to appellant's home the following day and saw a rifle that looked like Parisi's rifle. Hitchcock also testified that appellant had previously tried to do a "kick-in" on Parisi when he lived at another address. The impeachment testimony was merely cumulative of prior testimony. We find that the error did not affect appellant's substantial rights. Appellant's third point of error is overruled.

Punishment Evidence

In his fourth point of error, appellant contends that the punishment evidence was legally insufficient to sustain the jury verdict. Appellant claims that the evidence was insufficient because the prosecution did not re-offer any of the evidence admitted during the guilt/innocence phase of the trial.

There is no requirement, however, that evidence admitted during the guilt/innocence phase be re-offered to be considered at punishment. *See Buchanan v. State*, 911 S.W.2d 11, 13 (Tex. Crim. App. 1995). The jury could consider all of the evidence admitted during the guilt/innocence phase. Appellant received a fifty-five year sentence. The punishment assessed was within the range of punishment established by the legislature and will not be disturbed on appeal. *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). We overrule appellant's fourth point of error.

We affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed May 11, 2000.

Panel consists of Justices Sears, Draughn, and Cannon.[*]

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

[*] Senior Justices Ross A. Sears, Joe L. Draughn, and Bill Cannon sitting by assignment.