Affirmed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00955-CR

RICHARD ANTHONY OEFFNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 753,813

O P I N I O N

Appellant, Richard Anthony Oeffner, was convicted by the jury of capital murder and sentenced to life imprisonment in the Texas Department of Corrections. On appeal, he complains of error by the trial court in failing to suppress his California and Texas in-custody statements; in failing to exclude evidence of appellant's "bad acts" surrounding the offense, and in failing to allow him to impeach one of the State's witnesses regarding pending criminal prosecutions. Sufficiency of the evidence is not attacked. We affirm.

Early in the evening of May 10, 1997, appellant and two of his friends went to Trevor Osborne's house and borrowed Osborne's gun. Appellant took the gun from its hiding place under Osborne's bed.

When they returned a while later, they appeared nervous and scared. Appellant told Osborne he had shot someone in the head with the gun during a robbery, and instructed Osborne to get rid of the gun. Osborne, however, cleaned the gun and returned it to its hiding place under his bed.

Later that evening, local television stations ran a news report of a man being fatally shot in the head outside a Houston convenience store. Appellant called his girlfriend and asked if she saw the report, and told her he and his friends had robbed a man and shot him in the head. A few days later, appellant dropped by Osborne's house for a short visit; after the visit, Osborne discovered the gun was missing from under his bed.

A few weeks later, appellant drove to Louisiana to stay with his half-sister, Shannon. He told Shannon he was wanted in Texas for capital murder because he had shot a man in the head during a robbery. Appellant and three of his friends then drove out to California; during a brief stop in Houston, appellant showed one of his friends the parking lot where he had shot the man.

Shannon contacted Houston police authorities to report what appellant had told her, speaking with Officer Larry Ware on May 22, 1997. An arrest warrant was obtained. Police spoke with appellant in California by telephone, and he was subsequently arrested at a bus station by California police officers who had been informed of the arrest warrant. Appellant made two recorded confessions, one in California and one in Texas.

By his first and second points of error, appellant contends that the affidavit supporting the Texas arrest warrant failed to state probable cause, and that his custody in California violated the Uniform Criminal Extradition Act and thus the federal constitution. We summarily overrule the latter argument correlating to appellant's second point of error, as it was not raised below and has been waived. TEX. R. APP. P. 33.1.

According to appellant, the arrest warrant specifically failed to state probable cause due to its failure to state the circumstances surrounding his alleged admission that he had been involved in the Texas murder. We disagree with his argument. The affidavit clearly set forth the information provided to police by appellant's half-sister, Shannon, which information had been given to Shannon by appellant himself. It provided the magistrate with sufficient information to support an independent judgment that probable cause

existed for the warrant. *McFarland v. State*, 928 S.W.2d 482, 509 (Tex. Crim. App. 1996). The information may be based on personal observation of the affiant or on hearsay information. *Belton v. State*, 900 S.W.2d 886, 893 (Tex. App.–El Paso 1995, pet. ref'd). Hearsay-within-hearsay will support issuance of the warrant where the underlying circumstances indicate there is a substantial basis for crediting the hearsay at each level. *State v. Martin*, 833 S.W.2d 129, 132 (Tex. Crim. App. 1992). We find that the affidavit provided probable cause for the arrest warrant and there was no error. The first and second points of error are overruled.

Appellant's third point of error complains that his confessions were coerced and involuntary, as one of the investigating police officers had promised that if appellant cooperated, the homicide would be filed as a parole violation and not as a capital murder. Appellant directs our attention to a comment made by an investigating officer, who, during a telephone conversation with appellant in California, stated "And if you will come and cooperate on this thing maybe it will wind with a violation and not a capital murder at this point." According to appellant, this was a promise not to file capital murder charges against him, which he relied on in giving his written confession. The police officers, on the other hand, testified to being "dumbstruck" that appellant thought they were agreeing to file only parole violation charges and not capital murder charges if he confessed.

We have reviewed the entirety of the telephone conversation upon which appellant relies, and note that it was appellant himself, and not the officers, who first mentioned the possibility of receiving only a parole violation. Putting the officer's statement back in context of the entire conversation, it is clear that no promise was made by the police officers, and nothing substantiates appellant's claim that his statement was coerced or involuntary due to any promises by police officers. Appellant's third point of error is overruled.

Under his fourth and fifth points of error, appellant claims error by the trial court in failing to suppress his written and tape-recorded California statement, as it violated TEX. CODE CRIM. PROC. ANN. Art. 38.22 (Vernon Supp. 1999) in failing to admonish appellant of his right to terminate the interview at any time. This specific warning is not required under applicable California law, and appellant does not argue that his *Miranda* rights were violated. Appellant fails, however, to present authority for his position

that California police officers, located in California and proceeding under California law, were required to follow the Texas Code of Criminal Procedure in obtaining appellant's statement. Indeed, several Texas Court of Criminal Appeals decisions would suggest to the contrary. In *White v. State*, 779 S.W.2d 809 (Tex. Crim. App. 1989), the court held that an out-of-state law enforcement officer's substantial compliance with the warning requirements of Art. 38.22 was sufficient to make the defendant's written confession admissible. In appellant's case, we find that the California police officers substantially complied with Art. 38.22. In *Perillo v. State*, 758 S.W.2d 567, 574-75 (Tex. Crim. App. 1988), the court upheld the admission of a Colorado confession despite the fact that the Denver police failed to warn the defendant she had the right to terminate the interview at any time. *See also Alvarado v. State*, 853 S.W.2d 17 (Tex. Crim. App. 1993) and *Laird v. State*, 933 S.W.2d 707 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd). Appellant's fourth and fifth points of error are overruled.

By his sixth through eleventh points of error, appellant alleges error by the trial court in overruling his objections to evidence that he and his friends had intended to buy cocaine at the time of the offense, that they had been drinking prior to the offense, and that they purchased cocaine after the offense. These, he argues, constitute inadmissible extraneous offenses or "bad acts" that were not relevant for any purpose, and whose probative value was substantially outweighed by the prejudicial effect of their admission.

An accused may not be tried for a collateral offense or for being a criminal generally. *Castillo v. State*, 739 S.W.2d 280, 289 (Tex. Crim. App. 1987), cert. denied, 487 U.S. 1228 (1988). However, evidence of an extraneous offense may be admissible if it is relevant apart from its tendency to prove character of a person to show that he acted in conformity therewith, and its probative effect is not substantially outweighed by unfair prejudice. *Montgomery v. State*, 810 S.W.2d 372, 386-87 (Tex. Crim. App. 1990) (opinion on rehearing); TEX. R. EVID. 404(b).

Testimony that appellant and his friends had been drinking prior to the offense is not evidence of a crime or bad act. To constitute an extraneous offense, the evidence must show a crime or a bad act, and that the accused was connected to it. *Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993). There was no evidence showing or suggesting that appellant's drinking had violated any laws, nor can it be said that drinking constitutes an inherently "bad" act. Regardless, we note that this same evidence came

in through testimony from Osborne, who testified, without objection by appellant, that appellant and others had gathered at his house for a party on May 10, 1997 and were all drinking beer. By not objecting to this testimony, appellant waived his complaint as to such evidence. *Narvaiz v. State*, 840 S.W.2d 415, 430 (Tex. Crim. App. 1992).

Buying, possessing and consuming cocaine, on the other hand, is generally regarded as a criminal offense. In his recorded statements, appellant stated that on May 10, 1997, he and his friends had decided to rob someone to get money to buy cocaine. They saw the complainant as he walked across the parking lot from a convenience store, and robbed him. Appellant shot the man in the head, killing him. Although appellant said the complainant had no money, appellant admitted that they bought and used cocaine later that night. The State asserts that this testimony was admissible under Rule 404(b) to show appellant's motive for the robbery and ensuing murder. The admissibility of evidence of extraneous offenses as to motive is usually required to relate or pertain to other acts by the accused against the victim of the crime for which the accused is presently being prosecuted. *Foy v. State*, 593 S.W.2d 707, 708-09 (Tex. Crim. App.1980); *Lazcano v. State*, 836 S.W.2d 654, 660 (Tex. App. – El Paso 1992, pet. ref'd). In addition, it must fairly tend to raise an inference in favor of the existence of the motive on the part of the accused to commit the offense for which he is being tried. *Massey v. State*, 826 S.W.2d 655, 658 (Tex. App. – Waco 1992, no pet.).

The determination of whether evidence is relevant to any issue in the case lies within the sound discretion of the trial court. *Johnson v. State*, 698 S.W.2d 154, 160 (Tex. Crim. App. 1985), *cert. denied*, 479 U.S. 871 (1986). In reviewing a determination of relevance, we determine only whether the trial judge clearly abused his or her discretion. *Id*. at 160.

We find that the trial court did not abuse her discretion in admitting this evidence, as it was relevant to show that appellant's motive for the robbery and ensuing murder was to obtain money to buy cocaine, and that he did obtain cocaine that evening. *Massey* (testimony that defendant was smoking cocaine prior to robbery and purchased more cocaine after the robbery was admissible to show defendant's motive.) Appellant's sixth through eleventh points of error are overruled.

Under his twelfth and final point of error, appellant complains that the trial court erred in not allowing him to cross-examine State's witness Osborne as to his two pending criminal charges. Appellant argues he should have been allowed to bring out all possible areas for Osborne's motivation in testifying for the State against appellant. Appellant was, of course, entitled to pursue all avenues of cross examination reasonably calculated to expose a motive for the witness to testify falsely. *Hurd v. State*, 725 S.W.2d 249, 252 (Tex. Crim. App.1987); *Chvojka v. State*, 582 S.W.2d 828, 831 (Tex. Crim. App.1979). Such avenues necessarily included inquiry concerning criminal charges pending against the witness and over which those in need of his testimony might be empowered to exercise control. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Spain v. State*, 585 S.W.2d 705 (Tex. Crim. App.1979) (panel opinion). Plainly, these included criminal charges pending against Osborne, and appellant was thus free to elicit before the jury testimony regarding any promise of benefit Osborne might have expected to receive in that case from prosecuting authorities on account of his testimony against appellant. The trial court, however, precluded appellant from informing the jury of the existence of these pending charges.

Be that as it may, if any rights of confrontation assured appellant by the Sixth Amendment to the United States Constitution or Article I, Section 10 of the Texas Constitution were curtailed, such error is to be reviewed under the "harmless error" rule. We must reverse appellant's conviction unless such error can be characterized as harmless beyond a reasonable doubt. TEX. R. APP. P. 44.2(a); *Turner v. State*, 754 S.W.2d 668 (Tex. Crim. App. 1988).

Appellant argues he was harmed by Osborne's testimony because Osborne was the only person whose direct testimony placed a firearm in appellant's hands. However, we note that there were actually three other witnesses who testified that appellant admitted to them that he had shot a man in the head during a robbery: appellant's girlfriend; his half-sister, Shannon, and one of his friends who drove to California with him. We are persuaded that any error in denying cross examination of Osborne as to his pending criminal charges "made no contribution to the conviction or to the punishment" in this case. *See Mallory v. State*, 752 S.W.2d 566, 568-570 (Tex. Crim .App.1988). Appellant's twelfth point of error is overruled.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Sears, Cannon and Draughn. *

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

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