Affirmed and Opinion filed June 28, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-98-01126-CR
14-98-01127-CR

CHARLIE LEE BENJAMIN a/k/a WILLIE EARL WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause Nos. 779732 and 782731

O P I N I O N

Charlie Lee Benjamin[1] was indicted on robbery and aggravated robbery charges from two separate incidents. A jury convicted him on both counts and, after appellant pleaded true to two enhancement paragraphs, the trial court sentenced him to fifty years in prison. In three points of error appellant contends the trial court erred by admitting hearsay over his objection and by failing to grant his motion for a mistrial. We affirm.

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[1] The indictment read "Willie Earl Williams." On the day of trial, Benjamin filed a request that defendant's name be changed to "Charlie Lee Benjamin," which is the name on the judgment of conviction.

All of appellant's complaints pertain to his conviction for an April 15, 1998 aggravated robbery at a fried chicken restaurant. Tamara Thomas, the employee working the counter there, said a man walked into the restaurant that morning and ordered a meal. She said the man then displayed a shiny object, resembling a gun, and ordered her to give him the money in the store's cash registers. Thomas said that when she saw that the shiny object was not a gun, she fled to another restaurant across the street, taking two other employees with her, and called police.

The store manager, Shermona Whitmire, testified that she looked out of her office and saw the man standing behind the counter near the cash registers. When she saw this, Whitmire said, she activated a silent alarm in her office. The man burst into her office, beat her, and forced her to open the store's three cash registers. Whitmire said that when she saw that the man was preoccupied with cleaning out the cash registers, she also fled out the back door. Both Thomas and Whitmire positively identified appellant from a photo spread.

Appellant's first point of error complains that the trial court erred by permitting hearsay testimony about why he was included in a photo line-up to be shown to the victims of his robberies. The complained-of testimony came from Houston Police Officer Calvin Bradford:

Q. At some point, did you receive a tip regarding the defendant in this case?

A. Yes, sir, I did.

Q. What did you do after you received that tip?

A. After receiving the tip, I obtained —

[DEFENSE COUNSEL]: Judge, all this relates to hearsay.

THE COURT: Overruled. You may state what you did.

A. After receiving the tip, I obtained his name on the computer.

Bradford went on to say that he placed appellant's photo in a photo line-up, from which two witnesses identified appellant as their assailant.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). A "statement" is defined as either an oral or written expression, or nonverbal conduct

of a person if it is intended by the person as a substitute for verbal expression. TEX. R. EVID. 801(a). Appellant's contention is that the implication of Officer Bradford's testimony of a "tip" was that he was identified by the "tip," and that this hearsay statement constituted reversible error. We review the trial court's rulings on hearsay for abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 390-391 (Tex. Crim. App. 1990)(op. on reh'g).

Appellant contends the admission of this testimony runs afoul of the indirect hearsay rule announced in *Schaffer v. State*, 777 S.W.2d 111 (Tex. Crim. App. 1989). We disagree, for several reasons.

In *Schaffer*, a defendant in a drug possession case claimed to have been working as an informant for a certain police officer. *Id.* at 114. The State called to the stand an investigator who said he had talked to that officer, and asked the investigator if his conversation had caused him to ask the State to drop the charges. *Id.* at 113. The investigator replied, "No, sir." *Id.* The court of criminal appeals held that permitting this statement was error:

> [W]here there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly. In short, "statement" as defined in [Rule 801] necessarily includes proof of the statement whether the proof is direct or indirect.

Id. However, the *Schaffer* court went on to note that a limited hearsay exception should be allowed, enabling testifying officers to place their investigative actions in context:

> Almost always it will be relevant for a testifying officer to relate how she happened upon the scene of a crime or accident; thus, it is permissible for her to testify that she was acting in response to "information received." "[A]n arresting officer should not be put in the false position of seeming just to have happened on the scene, he should be allowed some explanation of his presence and conduct."

Id. (citing MCCORMICK ON EVIDENCE § 249 (Cleary Rev., 3rd Ed. 1984)).

The *Schaffer* court also noted that it would be improper for a trial court to permit an officer to testify that the information came from a "reliable source." *Id.* at 115 n.3.

The issue of indirect hearsay was further refined in *Head v. State*, 4 S.W.3d 258 (Tex. Crim. App. 1999). In *Head*, a child sexual assault case, the first witness related the outcry statements of the victim. The police investigator then took the stand; the trial court permitted him to testify, over objection, that he had taken a statement from the victim and the victim's mother and that these statements were consistent with the testimony of the outcry witness. *Id*. at 260. The court in *Head* held that permitting this testimony was not an abuse of discretion. It found that whether disputed testimony is impermissible hearsay depends on whether it compels an "inescapable conclusion" that the evidence is being offered to prove the substance of an out-of-court statement. *Id*. at 262. The court went on to note that "the focus of the inquiry should remain on whether or not the disputed testimony is being offered to *prove* an out-of-court statement." *Id*. at 262 n. 3.

The record here does not compel the inescapable conclusion that the reason for the testimony was to prove that appellant was the man who committed the robberies. There was no other mention of the tip in testimony or argument, leading us to the conclusion that this testimony was designed to set the officer's actions in context. We therefore find the trial court did not abuse its discretion in permitting this testimony. Appellant's first point of error is overruled.

Appellant's second and third points of error complain that Officer Bradford was allowed to testify about an out-of-court identification by another employee, Bryan Furlough. The prosecutor then asked whether Officer Bradford had showed the same line-up to Furlough. At that point appellant objected:

> [DEFENSE COUNSEL]: Excuse me, Your Honor. May I have an objection now as to any testimony about Mr. Bryan – what's his last name?
>
> [PROSECUTOR]: Furlough.
>
> [DEFENSE COUNSEL]: Mr. Bryan Furlough, Judge, inasmuch as he is a witness who is not here. We've not had a chance to see him, talk to him, cross-examine him as to his ability to identify anyone. We would object to it as improper bolstering.

[THE COURT]: That's overruled.

[PROSECUTOR]: Did you give him the same instructions you told us you gave Ms. Thomas and Ms. Whitmire?

[OFFICER BRADFORD]: That's correct.

Q. Did you tell him there was no need to pick anybody in particular if he didn't see anybody that was involved?

A. Yes.

Q. Did you try to influence him in any way as to who to pick?

A. No, sir.

Q. Was there anybody else around that may have influenced his selection?

A. Nobody else was around.

Q. Did it appear he understood all the instructions that you gave him?

A. Yes, sir.

Q. Did you hand him the photospread?

A. Yes.

Q. Did he look at the photospread?

A. Yes, sir, he did.

Q. Did he identify anybody in the photospread?

A. Yes. He made a tentative identification on number three.

Q. You said tentative. He was not positive; is that correct?

A. He was not positive.

Q. But I did not hear you say he made a tentative identification of which photograph?

A. Of position number three. Photo number three.

Q. Photograph of the defendant?

A. Yes.

Q. And you understand this to be tentative, not positive, not an absolute; is that correct?

A. Yes, sir. He stated that –

[DEFENSE COUNSEL] Objection, hearsay.

[THE COURT]: Members of the jury, disregard all the testimony of the witness, of this individual and his supposed identification. Don't consider it for

any purpose whatsoever in this trial. Objection is sustained to that entire line of testimony concerning supposed identification.

[DEFENSE COUNSEL]: Move for a mistrial.

[THE COURT]: Denied.

Appellant's second point of error complains that the trial court erred by overruling his original objection to this testimony. We need not consider this point because appellant was ultimately granted the relief he sought – the exclusion of this testimony by the trial court. Similarly, we need not consider the state's first contention that appellant's complaint on appeal does not comport with his objection at trial. Appellant obtained the relief he sought.

Appellant's third point of error is that the trial court abused its discretion in not granting appellant's motion for a mistrial. Because appellant received the relief requested, we will treat this as a complaint that the jury was so tainted by the momentary admission of this testimony that a mistrial should have been declared.

An instruction to disregard the improper testimony cures any error except in extreme cases where it appears the evidence is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds. *Franklin v. State*, 693 S.W.2d 420, 428 (Tex.Crim.App.1985); *Servin v. State*, 745 S.W.2d 40, 44 (Tex. App.—Houston [14th Dist.] 1989, no pet.). We find appellant has failed to meet that standard here. Appellant was positively identified by two other witnesses, employees of the restaurant which appellant was accused of robbing. These witnesses testified they had ample opportunity to observe the robber under good lighting conditions and at close range. They also testified that they picked appellant out of a photo line-up without hesitation. Appellant's second point of error is overruled and the judgment of the trial court is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed June 28, 2000.

Panel consists of Justices Sears, Draughn, and Amidei.*

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

* Senior Justices Sears and Draughn, and Former Justice Amidei sitting by assignment.