**Affirmed and Opinion filed August 23, 2001.**

**In The**

# Fourteenth Court of Appeals

---

**NO. 14-00-00166-CR**

---

**ODIS LEE DAVIS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the 183rd District Court**
**Harris County, Texas**
**Trial Court Cause No. 824,961**

---

## O P I N I O N

This is an appeal from a murder conviction.[1] At issue is whether the trial court erred

---

[1] As part of the court's regular practices, the clerk advised the parties by letter that the case had been set for submission and oral argument and that:

> "No motion to reschedule, whether agreed or otherwise, will be granted without a showing of good cause. Counsel's participation in trial will not be sufficient grounds to reschedule oral argument. Counsel are encouraged to arrange in advance with the trial court or alternate counsel as necessary to overcome potential scheduling conflicts."

Appellant's counsel apparently misunderstood this letter to mean that he must hire substitute counsel if he could not appear for oral argument and that, upon doing so, he must also file a motion to substitute counsel. Responding to the clerk's letter via motion, appellant's counsel stated:

in (1) admitting photographs which were more prejudicial then probative and (2) excluding evidence that would have supported appellant's theory of self-defense. We affirm.

## I. FACTUAL BACKGROUND

Appellant hitchhiked from Mississippi to Houston looking for work unloading trucks. When he arrived in the Houston area, appellant spent the night in the movie theater of Trans American Truck Stop. The next day, when appellant failed to find work, he returned again to the movie theater. There, he met Robert Jackson, a 71-year old retiree, who sat next to him in the theater. Recounting the events that followed, appellant testified at trial to the following:

Jackson told appellant he might be able to help him find work and offered to give him a ride into Houston. Jackson said he needed to stop by his house before driving into Houston. When they arrived at Jackson's house, Jackson made a phone call and then told appellant that he would not be able to take him to Houston until the next day. Jackson invited appellant to sleep on his couch that night, and appellant accepted.

Later that evening, Jackson came into the living room, where appellant was

---

> In light of the Court's Order requiring that appointed counsel make certain that somebody appear for oral argument, this Motion is nothing but a complete waste of time, effort and energy not to mention a total waste of paper. If the Court's posture is that appointed counsel needs to make certain that someone appear for oral argument, and trial or illness excuses will not be acceptable to the Court, then it seems to me that if I have made arrangements for a very competent lawyer to appear, it should be as easy as pie.

As professionals and advocates, lawyers "should demonstrate respect for the legal system and for those who serve it . . . ." TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01, 3.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9). Counsel's remarks fall short of this standard by demonstrating a lack of professionalism and respect for the court. Whatever personal disdain counsel may harbor for the court's practices and procedures, he nevertheless must observe basic standards of professional conduct and rules of decorum in his dealings and communications with the court. Those standards require counsel to be "civil and respectful in all communications with the judges and staff." TEXAS STANDARDS OF APPELLATE CONDUCT, Lawyer's Duties to the Court 8. This court strongly urges counsel to conduct himself in a professional manner in future dealings with this court.

sleeping, and asked appellant if he would have sex with him for $200.00. Appellant agreed. The next morning, appellant asked Jackson several times to take him into Houston, but Jackson made excuses, at one point stating that he had to wait until his brother explained to him, over the phone, how to light his water heater. Appellant offered to light the heater hoping it would help him get to Houston faster. While appellant was adjusting the gauge on the water heater, located in a storage area, Jackson came up behind him and groped his buttocks. Jackson continued toward him, and a struggle ensued. Appellant reached for a nearby "stick," which later turned out to be a pickax. Appellant hit Jackson with the pickax until he stopped advancing. The evidence showed Jackson suffered 43 wounds. After the struggle, appellant took Jackson's car keys and fled the scene in Jackson's automobile. Police later arrested him in Vinton, Louisiana, after a high-speed chase that ended with a collision.

Charged by indictment with the felony offense of murder, appellant entered a plea of not guilty. A jury found him guilty as charged and assessed punishment at fifty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges his conviction raising two points of error.

## II. ISSUES PRESENTED FOR REVIEW

In his first point of error, appellant contends the trial court erred in admitting photographs of the crime scene and autopsy because the photographs were prejudicial and cumulative. In his second point of error, appellant claims the trial court improperly excluded evidence that would have supported his theory of self-defense.

## III. STANDARD OF REVIEW

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996). Where the trial court's evidentiary ruling is within the "zone of reasonable disagreement," there is no abuse of discretion and the reviewing court will uphold the trial court's ruling. *Santellan v. State*, 939 S.W.2d 155, 168–69 (Tex. Crim. App. 1997).

## IV. ADMISSION OF PHOTOGRAPHS

In support of his first point of error, appellant contends that all of the 58 crime scene and autopsy photographs admitted at trial are "gruesome and somewhat detailed" and that the State could have presented fewer photographs. Appellant claims he objected to ten of the 58 photographs. The record shows that appellant objected to at least thirty photographs at trial. However, we are unable to determine from appellant's brief which photographs he claims were admitted improperly because he has failed to provide exhibit numbers for the photographs he claims the trial court erred in admitting. Moreover, he has failed to provide record citations to his trial objections. Because we are unable to determine which photographs appellant claims the trial court erred in admitting, we find that appellant has waived his complaint by failing to adequately brief this point of error. *See* TEX. R. APP. P. 38.1(h); *see also Woods v. State*, 14 S.W.3d 445, 452 (Tex. App.–Fort Worth 2000, no pet.) (addressing contention regarding cumulative photographs but noting that appellant's point could be dismissed under Rule 38.1(h) for failing to identify photographs by exhibit number).

Accordingly, appellant's first point of error is overruled.

## V. CLAIMED EXCLUSION OF TESTIMONY

In appellant's second point of error, he contends the trial court improperly excluded evidence which supported his theory of self-defense. According to appellant, Jackson was a homosexual with a history of picking up hitchhikers and taking them home with him to engage in sexual activity. Appellant's theory of the case was that appellant defended himself with the pickax after Jackson attempted a sexual assault. Appellant contends the trial court erred in granting the State's motion in limine to preclude defense counsel from making reference to (1) Jackson's alleged history of picking up hitchhikers; (2) an alleged past encounter between Jackson and a hitchhiker, whom Jackson purportedly may have picked up for the purpose of sexual activity, which resulted in Jackson being robbed at knife point and having his vehicle stolen; (3) whether Jackson was homosexual or

bisexual; and (4) Jackson as a "sex offender," "pervert," etc." Appellant contends the trial court erroneously excluded this evidence, during his cross-examination of Baytown Police Officer, James Kerr, and that this adverse ruling hindered appellant's defense.

The exchange between appellant's counsel and the trial court, immediately before Officer Kerr testified for the bill of exceptions, is as follows:

> DEFENSE: Judge, at this time, I'd like the record to reflect that we're speaking to an officer from the Baytown Police Department. And the issue is whether or not he can testify to what we would regard from the defense's theory as a pattern of the complaining witness in this case [Jackson], picking up young boys or picking up young men and taking them to his house to work and then filing charges afterwards regarding something that they have done.
>
> And we would ask that he be able to allow the testimony to show a pattern of picking up – to substantiate the Defendant's story of how he was picked up. And it would deal with homosexual activity and picking up kids at the bus stop.
>
> . . . .
>
> STATE: Judge, my objections as to that will be 403, relevancy, 404, character, and hearsay.
>
> COURT: Well, I believe that it – we had a question about who the aggressor is and another party was in here and the person testifying that he was assaulted by the deceased.
>
> I think the main issue who the aggressor was [sic]. But *if* this police officer is *only* testifying about [Jackson's] alleged homosexual activity with other men and we don't know what happened and he's testifying *just about to what was told him,* I think there lies the problem of admissibility.[2]
>
> DEFENSE: Judge, at this time, I would like to make a bill of exceptions and ask questions that we would have asked the Court to allow us to ask during the trial, outside the presence of the jury.
>
> COURT: All right, well, go ahead if you want to ask him some questions.

[2] Emphasis added.

The burden is on the complaining party to present a sufficient record to the appellate court to show error requiring reversal. TEX. R. APP. P. 33.1(a). A party satisfies only a part of this requirement by making a bill of exception containing excluded testimony. To preserve error for the exclusion of evidence, a party must show that he offered a timely objection to the trial court's refusal to allow certain testimony at trial and obtained a ruling by the court on the objection, or any error is waived. *Id.*; *see Giesberg v. State*, 945 S.W.2d 120, 128 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (holding no error preserved when there was no record of court ruling excluding evidence; even if existence of bill of exceptions could show court so ruled, it did not show nature of objection evoking that ruling); *Ites v. State*, 923 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (holding no error preserved despite existence of bill of exceptions when no indication of where in record proponent proffered evidence, opponent objected to it, or trial court ruled to exclude it); *Medina v. State*, 828 S.W.2d 268, 270 (Tex. App.—San Antonio 1992, no pet.) (finding appellant waived appellate consideration of the trial court's refusal of testimony by failing, during trial, to make the required offer of proof of the evidence included in the bill of exception); *Lewis v. State*, 814 S.W.2d 513, 516 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (finding error was not preserved where appellant failed to show trial court adversely ruled on objection); *Robinson v. State*, 728 S.W.2d 858, 860 (Tex. App.—Austin 1987, no pet.) (stating that to preserve any error for appeal, appellant has the burden to offer a timely objection at trial on specific grounds and to obtain a ruling by the court as to the objection, or any error is waived) (citing former TEX. R. APP. P. 52).

Appellant points to nothing in the record indicating the trial court granted the State's motion in limine. Moreover, even when a motion in limine is granted, an offer of the evidence which was the subject of the motion must be made at trial to preserve a claim of improper exclusion. *Fuller v. State*, 827 S.W.2d 919, 929 and 929 n.10 (Tex. Crim. App. 1992). The record shows that appellant did not cross-examine Officer Kerr. Neither the State nor appellant called Officer Kerr as a witness to testify. Appellant instead called Officer Kerr to testify only as to the bill of exceptions. Our review of the record further

reveals that, during the trial, appellant did not attempt to introduce the evidence he now claims the trial court improperly excluded. Moreover, appellant has not cited, nor has our review of the record revealed, that the trial court ruled or refused to rule on the admissibility of Officer Kerr's testimony. Instead, the trial court made statements, immediately before appellant made the bill of exceptions, indicating it was unsure what the evidence would show, but that *if* it did show "only" that Mr. Jackson was a homosexual or reveal "just" hearsay information told to the officer by others, there might be a problem with its admissibility.

By failing to demonstrate the trial court actually excluded Officer Kerr's testimony, and by failing to offer that testimony during trial or obtain a ruling from the trial court on whether that evidence was admissible, appellant failed to preserve his complaint for appellate review. *See* TEX. R. APP. P. 33.1(a); *Ites v. State*, 923 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (holding no error preserved, despite bill of exceptions, when no indication of where in record proponent proffered evidence, opponent objected to it, or trial court ruled to exclude it). This waiver notwithstanding, we find that even if the court had actually excluded Officer Kerr's testimony, it would not have abused its discretion in doing so.

Appellant vaguely argues the testimony was evidence of Jackson's prior bad acts, admissible to show that appellant had a reasonable apprehension of danger or to support evidence that Jackson was the aggressor in the struggle preceding his death. *See* TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (Vernon Supp. Pamph. 2001). In support, appellant cites article 38.36(a), which provides:

> (a) In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

*See also Thompson v. State*, 659 S.W.2d 649, 653 (Tex. Crim. App. 1983) (providing "the

deceased's reputation for violence and commission of prior specific acts of violence which are known to the defendant are probative of whether the defendant reasonably believed the force he used was immediately necessary to protect himself."). However, appellant has failed to show that Officer Kerr's testimony revealed any prior bad acts by Jackson, anything about the prior relationship between appellant and Jackson, Jackson's state of mind, or any reason why appellant had reason to fear Jackson. Officer Kerr's testimony provided no support for appellant's self-defense theory other than to show that Jackson had picked up hitchhikers in the past. It did not address Jackson's alleged homosexuality or any homosexual relationship he shared with appellant. It did not tend to show that Jackson was the aggressor in his encounter with appellant, and it did not indicate that Jackson was an aggressive person. If anything, the statements indicated that Jackson himself had been the victim of crimes perpetrated by hitchhikers he had befriended. Thus, even if the trial court had actually excluded the evidence, as appellant contends, that evidentiary ruling would not have been an abuse of discretion.

Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 23, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[3]

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

[3] Senior Chief Justice Paul C. Murphy sitting by assignment.