

**Affirmed and Opinion filed September 6, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-00-00036-CR**

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**MICHAEL LEE WILLIAMS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 813,610**

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**OPINION**

A jury found appellant, Michael Lee Williams, guilty of the felony offense of delivery of a controlled substance and assessed his punishment at seven years confinement in the Institutional Division of the Texas Department of Criminal Justice. In three issues, appellant contends: (1) the trial court erred in failing to grant his motion for mistrial; (2) the State violated his Fifth Amendment right to remain silent; and (3) he was denied the effective assistance of counsel. We affirm.

On the evening of May 20, 1999, two undercover narcotics officers with the Houston Police Department, Officers Larry West and Kenneth Echols, drove into the

parking lot of a motel in an unmarked police car to investigate repeated complaints of narcotics trafficking in the area. Appellant approached the officers' vehicle as they pulled into the parking lot. Appellant then initiated a drug transaction with Officer Echols. Appellant sold Officer Echols a "twenty" rock of crack cocaine. Immediately after completing the transaction, Officer Echols notified an arrest team of officers who were awaiting his signal in a raid van outside the motel's parking lot. According to the officers' testimony at trial, the arresting officers placed appellant in custody within seconds of appellant's delivery of the crack cocaine to Officer Echols.

In his first issue, appellant contends the trial court committed reversible error when it denied appellant's motion for mistrial raised in response to "the bad faith attempt of the prosecutor to admit appellant's prior convictions at the guilt stage of the trial." Appellant complains specifically about a question asked by the prosecutor during cross-examination of a defense witness, appellant's sister Kim Halliburton. The prosecutor asked the witness about a conversation she had with appellant's counsel in the hallway outside the courtroom prior to her testimony. Specifically, the prosecutor asked the witness to state what appellant's attorneys were instructing her not to say during the State's cross-examination. Appellant's counsel raised a hearsay objection after the witness began to respond. The trial court sustained the objection and instructed the jury to disregard the witness's response. Appellant's counsel subsequently moved for a mistrial, but not until after she conducted a re-direct examination of the witness and both parties rested. The trial court denied the motion.

To preserve error in cases of prosecutorial misconduct, a defendant must: (1) make a timely and specific objection; (2) request an instruction to disregard; and (3) move for a mistrial. TEX. R. APP. P. 52(a); *Williams v. State*, 916 S.W.2d 53, 57 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1996, no pet.). While the record shows appellant's trial counsel raised an objection to the prosecutor's complained of conduct, the objection did not address appellant's current allegation of prosecutorial misconduct. Accordingly, because appellant's trial objection does not comport with the issue raised on appeal, he has

preserved nothing for review. TEX. R. APP. PROC. 33.1(a); *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999). We overrule appellant's first issue.

In his second issue, appellant contends that his Fifth Amendment right to remain silent was violated when the prosecutor asked the trial court, in the presence of the jury, if she would be permitted to cross-examine appellant before the State had rested its case-in-chief. The prosecutor posed the question to the trial court during appellant's cross-examination of Officer West. During the cross-examination, appellant's trial counsel asked Officer West if appellant had been wearing a short-sleeved shirt during the alleged transaction and if West had seen appellant's arms and hands. When Officer West answered affirmatively, counsel asked appellant to roll up his sleeves and display some distinguishing marks. While West was being cross-examined regarding the visibility of the marks, the State's attorney interrupted and asked the trial court if she would be given the opportunity to cross-examine appellant about the marks on his arms. Appellant asserts the prosecutor's request constituted an impermissible comment on appellant's failure to testify in violation of his Fifth Amendment right to remain silent.

A prosecutor's comment on a defendant's failure to testify may constitute a violation of the self-incrimination clause of the Fifth Amendment to the United States Constitution. *Montoya v. State*, 744 S.W.2d 15, 34 (Tex. Crim. App. 1987) (op. on reh'g). Here, however, appellant did not object to the prosecutor's question. To preserve a complaint for appeal, a defendant must raise a timely and specific objection at trial. TEX. R. APP. P. 33.1(a). Moreover, the prosecutor's remark was made during the State's case-in-chief at a time when it was unknown whether appellant would testify. Thus, the prosecutor's question was not a direct allusion to appellant's decision not to testify. *See Jackson v. State*, 501 S.W.2d 660, 662 (Tex. Crim. App. 1973). Accordingly, we overrule appellant's second issue.

Appellant's third issue asserts he was denied the effective assistance of counsel when his trial counsel failed to object to the request made by the prosecutor that is the

focus of appellant's second issue. Appellant's ineffective assistance of counsel claim is based solely upon his trial counsel's failure to object to the prosecutor's request to cross-examine him. Appellant contends there is no "reasonable strategic reason" for his counsel's decision not to object to the State's "blatant attack" on appellant's right to remain silent. However, as aforementioned, the request made by the prosecutor did not constitute an impermissible comment on appellant's decision not to testify. Accordingly, we overrule appellant's third issue.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson  
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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