Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00994-CR

CANDELARIO JUAREZ NAJERA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 29,764-A

O P I N I O N

Candelario Juarez Najera appeals his conviction by a jury for burglary. The jury assessed his punishment at seven years imprisonment. In one point of error, appellant contends the trial court erred in admitting extraneous misconduct evidence at the punishment stage. We affirm.

The jury found appellant guilty of burglary of a habitation owned by Bennie Joe Sbrusch that occurred on November 2, 1997. Prior to the commencement of the punishment phase, the trial court heard appellant's argument on anticipated extraneous offense evidence to be presented by the State. The record first shows an unrecorded bench conference between appellant's counsel and the trial judge. After the conference, the trial judge excused the jury and appellant's counsel made a rule 403 objection to the

admissibility of any extraneous offenses to be presented by the State. TEX. R. EVID. 403. Without specifying the nature of the extraneous evidence, appellant's counsel directed his argument to all extraneous offenses to be presented by the State. Appellant's counsel asked the court to conduct a "balancing hearing" out of the presence of the jury to determine whether the "prejudicial value is outweighed by the probative value." The trial judge denied appellant's request for "that balancing hearing."

The trial judge explained to appellant's counsel he was not a "fact finder" and could not conduct a hearing to determine if the State had proved the extraneous offense beyond a reasonable doubt. The trial judge explained further that an instruction would be given to the jury that they were not to consider any extraneous offenses unless they believed appellant committed them beyond a reasonable doubt. Appellant's counsel explained that the State was bringing in "innocuous acts to prove character in conformity with what he has done on this occasion." The trial judge told counsel: "If they are innocuous, then they are not prejudicial to him." Appellant's counsel did not attempt to explain the nature of the "innocuous" extraneous acts or why these "innocuous" acts were unfairly prejudicial. Apparently, the trial judge construed appellant's unclear argument as a request for a hearing out of the presence of the jury to determine if appellant actually committed any "innocuous" extraneous offenses beyond a reasonable doubt. The judge again explained to counsel that he would not act as a fact finder. Appellant's counsel then stated:

> But Judge, I believe that the Court is permitted – actually, in many instances – and I don't know whether this would be one of them – to have a balancing test. To perform a balancing test after having heard the evidence, and to make the determination whether the Court in its infinite wisdom feels that this – that the probative value far outweighs the prejudicial value. And that can be done, actually, at this point in time, Judge, or later on by a findings of facts and conclusions of law that can be included with the appellate record, if so be or if it is necessary.
>
> An that's what I'm requesting, Judge. I'm requesting that you give us that balancing hearing.

After the trial court denied appellant's motion, the State presented testimony by Jay Davis as to a burglary of his house on August 24, 1997, two months prior to the burglary of Sbrusch's home in this case. The State then presented testimony by two pawnbrokers that appellant had pawned items with them

from the Jay Davis burglary. At the time of this trial, no arrests had been made in the Jay Davis burglary. Appellant made no objections to this testimony. The jury was instructed not to consider any extraneous evidence unless the State had proved the acts beyond a reasonable doubt.

On appeal, appellant complains, for the first time, that the trial court erred in "refusing to entertain appellant's objection to the admissibility of extraneous misconduct evidence, premised upon the State's inability to produce evidence from which a jury could find, beyond a reasonable doubt, that appellant committed the act. Specifically, appellant asserts that the trial court heard no evidence that the State could prove that appellant committed the alleged burglary." At the motion hearing, appellant asked only for a hearing on a rule 403 balancing test for unspecified extraneous acts. His complaint on appeal is that the trial court erred by admitting evidence of extraneous acts that the State could not prove beyond a reasonable doubt.

Appellant's motion for a "balancing hearing" is essentially a motion in limine. To preserve error if a motion in limine is denied, the party must object when the evidence is offered at trial. *Hatchett v. State*, 930 S.W.2d 844, 848(Tex.App.–Houston[14th Dist.] 1996, pet. ref'd); *Snellen v. State*, 923 S.W.2d 238, 242 (Tex.App.-Texarkana 1996, pet. ref'd); *Rawlings v. State,* 874 S.W.2d 740, 742-744 (Tex.App.-Fort Worth 1994, no pet.) By failing to object to the extraneous act testimony, appellant has not preserved any error for review.

Moreover, appellant's motion at trial appeared to be a request for a hearing under the rule 403 balancing test; on appeal, he contends the trial court erred in admitting extraneous acts evidence by not requiring the State to prove the acts beyond a reasonable doubt. Appellant has waived review because an objection stating one legal basis may not be used to support a different legal theory on appeal. *Bell v. State,* 938 S.W.2d 35, 54(Tex.Crim.App.1996), *cert. denied*, 118 S.Ct. 90 (1997).

For these reasons, appellant's sole point of error is overruled.

We affirm the judgment of the trial court.

/s/ Bill Cannon

Justice

Judgment rendered and Opinion filed April 27, 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.