Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00513-CR

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CEDRIC ANTHONY JONES, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 742,204

O P I N I O N

A jury convicted Cedric Anthony Jones of aggravated sexual assault in an incident involving inmates at the Harris County Jail. The trial court sentenced him to forty years in prison. In two points of error Jones contends the trial court erred in not granting a mistrial after the complainant testified that his codefendant had pleaded guilty to the offense and in permitting testimony about an aggravated robbery conviction which was not final. We affirm.

In his first point of error Jones complains that the trial court erred in not granting his motion for a mistrial after the complainant testified that Jones' codefendant, Robert Quintanilla, had pleaded guilty. He

contends the trial court's instruction to disregard was insufficient in this case and that he should be granted a new trial.

The testimony at issue came on redirect examination of the complainant. During cross-examination, Jones's lawyer sought to impeach the complainant with his testimony in a previous trial of the cause.[1] In that testimony, the complainant said Jones was the first inmate to assault him; in the instant case the complainant testified Quintanilla assaulted him first. At that point the prosecutor objected, stating he had instructed the complainant not to testify in the earlier trial as to anything done by Quintanilla at the request of the trial court.

On redirect the prosecutor sought to reinforce this:

> [PROSECUTOR]: Why didn't you talk about Robert Quintanilla in previous statements?
>
> [COMPLAINANT]: You had told me when you came to visit me –
>
> [DEFENSE COUNSEL]: I object to hearsay, as to what –
>
> THE COURT: Overruled.
>
> I'm going to let him explain.
>
> [COMPLAINANT]: You had told me that we weren't allowed, we weren't supposed to bring up the Quintanilla deal because it was a totally separate occurrence, that we were just discussing what had occurred with Cedric.
>
> [PROSECUTOR]: Right.
>
> And, in fact - - well, maybe you don't - -
>
> Do you know the reason why we weren't going to talk about Quintanilla?
>
> [COMPLAINANT]: Probably because he had already pled guilty to this.

At this point defense counsel objected, moved to instruct the jury to disregard and asked for a mistrial. The trial court sustained the objection and instructed the jury to disregard the complainant's answer but denied the motion for mistrial.

Texas courts have constructed what amounts to an appellate presumption that juries obey instructions to disregard. *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). In extreme cases where it appears the evidence is clearly calculated to inflame the minds of the jury and is of such

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[1] That trial ended in a mistrial after jurors could not reach a verdict.

character as to suggest the impossibility of withdrawing the impression produced on their minds, this presumption is overcome. *Harris v. State*, 375 S.W.2d 310, 311 (Tex. Crim. App. 1964). When considering whether admittedly improper testimony can be cured by a curative instruction, Texas courts consider whether the blame for the remark can be fairly attributed to the prosecutor; whether the prosecutor capitalized on the improperly admitted evidence; the weight and quality of the evidence otherwise adduced against the accused; and, finally, whether the erroneously admitted evidence was so material that it likely could not be removed from the jury's mind, even with the curative instruction. *Waldo v. State*, 746 S.W.2d 750, 752 (Tex. Crim. App. 1988).

We find the facts in *Waldo* to be instructive. In that murder case, a police officer was instructed not to make any remark pertaining to Waldo's post-arrest silence. Immediately thereafter, while the State was asking the officer about Waldo's arrest, the officer said that while reading the defendant his rights, Waldo was asked "if [he has] any statements to make, to which there was no response." *Id*. at 752. Waldo objected, asked for a limiting instruction, and sought a mistrial; the trial court instructed the jury but denied the motion for mistrial. The court of criminal appeals first declined to attribute the officer's transgression to the State, noting that the prosecutors did not repeat the statement or use it in closing argument. *Id*. at 755. Second, the court noted that Waldo admitted to being involved in the cover-up of the murder, that his girlfriend testified differently, and that "silence in this case is not particularly compelling evidence of appellant's involvement in 'aiding' commission of the offense." *Id*. Finally, the court concluded that in the context of the state's case against Waldo, his failure to make a statement after arrest "was not so detrimental to his defensive posture as to suggest the impossibility of removing it from the jurors' minds." *Id*. at 757.

The information that Jones had an accomplice in this crime, and that accomplice pleaded guilty, is prejudicial extraneous information. However, we conclude this evidence was not so prejudicial that it could not be cured by the trial judge's instruction to disregard. Accordingly, we find the trial court did not err in refusing to grant the mistrial.

The record demonstrates that the prosecutor can not be fairly blamed for the remark. *Cf. Waldo*, 746 S.W.2d at 752. While he was treading on uncertain ground, nothing indicates he was seeking such

an answer. While he got an answer he didn't expect, he did not attempt to exploit it, and no further use was made of this admission. Moreover, Jones's counsel came perilously close to laying the groundwork for this type of error. The record shows that Jones's counsel impeached the complainant in the previous trial, using statements he made to prison authorities which included references to Quintanilla. He then aggressively questioned complainant in this trial, using complainant's testimony from the first trial in an attempt to impeach him, which omitted direct references to Quintanilla by name. The state was entitled to rehabilitate its witness in the face of this aggressive defense. Unfortunately a nonresponsive, unanticipated answer surfaced.

Finally, Jones's defense was essentially that the sexual contact between the two was consensual. The key issue at trial was the credibility of the complainant and the credibility of Jones. We find that the previous instance of possible consensual contact between complainant and Quintanilla was not so prejudicial that it would transcend the judge's instruction to disregard. We find it does not warrant reversal under these circumstances.

Accordingly, we find the trial court did not abuse its discretion in refusing to grant a mistrial. We overrule Jones's first point of error.

In his second point of error Jones contends the trial court erred in admitting evidence of his aggravated robbery conviction because an appeal was pending at the time of trial. He contends the Texas Rules of Evidence mandate the exclusion of evidence of nonfinal convictions, and that this omission constitutes reversible error. The State contends that Jones opened the door to his aggravated robbery conviction because he told the jury that he was not an aggressive person.

Jones was accused of coercing the complainant, a 17-year-old first-time jail inmate, into oral sex; his defense was that the act was consensual. To buttress this claim, Jones took the stand in his own defense. His testimony started out with Jones acknowledging a trio of prior convictions, one for unauthorized use of a motor vehicle and two for delivery of a controlled substance. On cross-examination Jones said he did not threaten the complainant because "I am not an aggressive person:"

> [JONES]: * * * I have never had anyone attack anyone [sic] because I am not an aggressor, and I always do what is just, you see. I am never going to make – I am never going to let – hurt [sic]

> anyone else. I am not about hurting individuals. We are human beings, sir. I don't hurt individuals. You never seen any type of aggressive thing upon my record whatsoever. Why do you wish to place with me [sic] in aggression?

The trial court found that Jones opened the door to questioning about his aggravated robbery conviction. We agree.

Rule 609 of the Texas Rules of Evidence permits use of prior convictions to impeach the credibility of a witness if the crime was a felony or involved moral turpitude and if the trial judge determines that their probative value outweighs their prejudicial value. It also prohibits use of a conviction for this purpose if an appeal is pending. TEX. R. EVID. 609(e). We review the trial court's decision to admit into evidence a prior conviction under an abuse of discretion standard. *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

An exception to the general rule, however, arises when "the witness makes blanket statements concerning his exemplary conduct such as having never been arrested, charged or convicted of any offense, or having never been 'in trouble,' or purports to detail his convictions leaving the impression there are no others." *Ochoa v. State*, 481 S.W.2d 847, 850 (Tex.Crim.App. 1972). In that case, "it is legitimate to prove that the witness had been 'in trouble' on occasions other than those about which he offered direct testimony." *Nelson v. State*, 503 S.W.2d 543, 545 (Tex. Crim. App. 1974); *see also Davenport v. State*, 807 S.W.2d 635, 637 (Tex. App.–Houston [14th Dist.] 1991, no pet.); 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 609.1 (2d ed. 1993).

Here Jones testified not only to his criminal convictions, but then asserted that "[y]ou never seen any type of aggressive thing upon my record whatsoever." Aggravated robbery is by definition a crime of aggression. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). The state was then entitled to rebut the misleading impression which Jones' testimony left in the minds of jurors. We therefore overrule his second point of error and affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.*

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

* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.