Opinion issued July 14, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01098-CR

ROYCE KIMBROUGH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1534947

MEMORANDUM OPINION

A jury convicted appellant, Royce Kimbrough, of the felony offense of aggravated robbery and sentenced him to 42 years' imprisonment.[1] In one issue,

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1 *See* TEX. PENAL CODE ANN. § 29.03(a), (b).

appellant contends that the trial court erred by denying his request to impeach a State witness with a 21-year-old conviction for unlawful carrying of a weapon.

We affirm.

Background

On the morning of November 17, 2016, Donald McCray was driving past the May Food Store in Houston, and he saw his friend, Kenneth Norris, at the store, so McCray stopped to talk to him. After a short while, Norris went inside the store. While McCray waited outside, appellant, with whom McCray was acquainted, approached McCray and demanded money from him. McCray refused and he and appellant began arguing loudly, drawing Norris's attention from inside the store. Norris left the store to see about the commotion. When McCray refused to give appellant money, appellant reached for McCray's pocket to take the money, but McCray slapped appellant's hand away. Appellant pulled a handgun out of his pocket, cocked it, and pointed it at McCray. Norris intervened, stepping in between appellant and McCray and telling McCray to run. As McCray ran away from appellant, Norris attempted to calm appellant down, but appellant instead chased after McCray. As he ran, McCray took his cash out of his pocket and threw it on the ground, believing it would save his life. Appellant retrieved the money and left.

McCray also left the store but returned to speak to law enforcement officers, who had responded to the scene. By the time McCray returned, the officers had

already spoken to other witnesses and reviewed the store's video-surveillance footage. The footage showed appellant approaching McCray, an altercation between the two, Norris stepping in between them, appellant pulling a gun and pointing it at McCray, and McCray running away. McCray gave a statement to the officers and picked appellant out of a photo array. McCray also identified appellant in the courtroom at appellant's trial as the person who had robbed him.

At appellant's trial in December 2018, the State called four witnesses: (1) Houston Police Department (HPD) Officer T. McCurry, who responded to the May Food Store and interviewed witnesses; (2) Norris; (3) McCray; and (4) HPD Officer L.P. Gonzalez, who was assigned to HPD's robbery division and conducted the photo array from which McCray identified appellant.

During direct examination, the State asked McCray about his familiarity with guns:

> Q. After [appellant] pulled the gun out, what did [appellant] do next?
>
> A. Pulled it up towards me like this.
>
> Q. Okay. And at that point, could you see the gun?
>
> A. Yes, ma'am.
>
> Q. What do you remember about the gun?
>
> A. It was black and it was—you did it like this. That's the only thing I know. As far as what kind [of] gun it was, I don't know.
>
> Q. Okay. And are you familiar with guns and how they work?

A. Yes, ma'am, a little bit.

Q. And so, you just a [sic] motion with your hands. Could you put into words what that motion is when you—you're doing this with the gun?

A. You cock it back like that.

Q. And, you know, based on what you know, what does that—what does that mean?

A. You're putting a bullet in the chamber.

On cross-examination, outside of the jury's presence, appellant's counsel sought to impeach McCray with his 1997 conviction for unlawful carrying of a weapon, for which McCray had pleaded guilty and received an 18-day sentence:

Defense counsel: Back several—several years ago, [McCray] got—he has a conviction for unlawfully carrying a weapon. So—now that—

The court: No, sir.

Defense counsel: Okay.

On redirect examination, the State again mentioned McCray's familiarity with guns:

Q. Mr. McCray, I know you know a little bit about guns, right?

A. Yes, ma'am.

Q. When you testified earlier that the defendant actually cocked that gun back and put a bullet in the chamber, what did you fear could happen at that point?

A. I could be shot.

Q. So—and by being shot—this sounds silly to ask, but could you have died at that moment?

A. Yes, ma'am.

Q. Could you have been seriously hurt at that moment?

A. Yes, ma'am.

Q. And was that a fear or concern of yours?

A. Yes, ma'am.

On re-cross-examination, outside the presence of the jury, appellant's counsel again sought to impeach McCray with his 1997 conviction:

> Defense counsel: Your honor, on redirect, [the State] asked the question about whether [McCray] knew a little bit about guns, which I think opens the door about that gun conviction. That's why he knows a little bit about guns.
>
> The court: I disagree. I know a lot about guns and I've never been convicted.
>
> Defense counsel: I know, but—
>
> The court: Your request to impeach him on an admissible prior is denied again.
>
> Defense counsel: But did [sic] kind of leaves a question in the eyes of the jury.
>
> The court: Sorry. Not doing it.
>
> Defense counsel: Okay.

After both sides rested, the jury returned a verdict of guilty. This appeal followed.

Admissibility of Character Evidence

In his sole issue on appeal, appellant contends that the trial court erred by denying his request to impeach McCray with his prior conviction from 1997 for unlawful carrying of a weapon to correct any false impression that McCray acquired his familiarity with guns through law-abiding behavior.

A. Standard of Review and Governing Law

We review a trial court's decision to exclude evidence for abuse of discretion. *Roderick v. State*, 494 S.W.3d 868, 880 n.4 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992)). We accord "wide discretion" to the trial court's decision to exclude evidence of a prior conviction. *See Theus*, 845 S.W.2d at 881 (citation omitted). We will not disturb a trial court's exclusion of evidence so long as it lies within the zone of reasonable disagreement. *Roderick*, 494 S.W.3d at 880 n.4 (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)). We also will not disturb the trial court's decision if it is correct on any theory of law applicable to the case. *E.g.*, *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002) (citations omitted).

Texas Rule of Evidence 609 provides

> Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if: (1) the crime was a felony or involved moral turpitude, regardless of punishment; (2) the probative value of the evidence outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record.

TEX. R. EVID. 609(a); *see Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993), *overruled on other grounds by Ex parte Moreno*, 245 S.W.3d 419, 425 & n.18 (Tex. Crim. App. 2008). However, even where a prior conviction does not meet the requirements of Rule 609, the prior conviction is nevertheless admissible "when a witness, during direct examination, leaves a false impression as to the extent of either his prior (1) arrests[,] (2) convictions[,] (3) charges[,] or (4) 'trouble' with the police." *Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988); *see Delk*, 855 S.W.2d at 704 (citations omitted) ("[A]n exception to Rule 609 applies when a witness makes statements concerning his past conduct that suggest he has never been arrested, charged, or convicted of any offense."). If a witness creates a false impression of law-abiding behavior, "he 'opens the door' on his otherwise irrelevant past criminal history and opposing counsel may expose the falsehood." *Delk*, 855 S.W.2d at 704 (citations omitted); *see Prescott*, 744 S.W.2d at 131.

B. Analysis

Appellant concedes that McCray's prior conviction is generally inadmissible to impeach McCray's character. Rather, appellant argues that McCray opened the door to the impeachment evidence because he left a false impression that he had learned about guns through legal means. The State responds that, for the false-impression exception to apply, the witness must have left an unambiguous false impression of law-abiding behavior. Furthermore, the State argues that a conviction

for unlawful carrying of a weapon does not imply knowledge of the weapon's operation, which can be gained from many legal sources.

We disagree that McCray's testimony left a false impression of law-abiding behavior. Both parties rely on *Delk v. State*, which reviewed a trial court's decision denying Delk's request to impeach a State witness, Phillip Johnson, with evidence of a prior conviction. 855 S.W.2d at 703. Delk was accused of murdering a man he had lured through a newspaper advertisement to buy a Camaro. *Id.* at 702–03. After the murder, Delk stole the Camaro and picked up Johnson, who drove with Delk to Louisiana. *Id.*

At Delk's murder trial, the State questioned Johnson on direct examination:

Q. Okay. Phillip, are you nervous?

A. Yes, sir.

Q. Is this the first time you've ever been in a courtroom—

A. Yes, sir.

Q. —as a witness?

A. Yes, sir . . .

Id. at 703–04. Delk's counsel objected that, because Johnson had two prior convictions, his "yes" response to the question, "Is this the first time you've ever been in a courtroom—" left a false impression that he had never been in a courtroom. *Id.* at 703. The trial court denied Delk's request to impeach Johnson with his prior convictions. *Id.*

Affirming Delk's judgment of conviction and death sentence, the court of criminal appeals explained "that when determining to what extent a colloquy 'opened the door', it is important to examine how broadly one would interpret the question that was asked." *Id.* at 704 (citing *Hammett v. State*, 713 S.W.2d 102, 106 (Tex. Crim. App. 1986)). The court reasoned that, when Johnson initially answered "yes," the State had not finished its question, so Johnson's response was non-responsive. *Id.* at 705. The State immediately completed its question with "—as a witness," and the record demonstrated the complete question was, "Is this the first time you've been in a courtroom as a witness," to which Johnson answered, "Yes, sir." *Id.* Thus, because Johnson's response did not leave a false impression or open the door to his prior convictions, the trial court properly excluded the evidence. *Id.*; *cf. Trippell v. State*, 535 S.W.2d 178, 179–80, 181 (Tex. Crim. App. 1976) (reversing trial court's refusal to allow impeachment of witness with prior convictions because witness's express statement, "I have never been convicted," opened door to evidence regarding witness's prior convictions for rape and aggravated assault).

In *Winegarner v. State*, the Court of Criminal Appeals affirmed a trial court's exclusion of witness testimony in the defendant's misdemeanor assault trial for pinning his wife against a washing machine and shaking her severely, causing her injuries. 235 S.W.3d 787, 788–89, 791 (Tex. Crim. App. 2007). On direct

examination by the State, the wife testified, "I'm not crazy enough to hit a man or start a fight. That's why I always leave." *Id.* at 789.

Defense counsel questioned the wife on voir dire about a 14-year-old assault conviction to which the wife had pleaded guilty after assaulting her then-husband. *Id.* Defense counsel argued that the wife's trial testimony—that she's "not crazy enough to hit a man or start a fight" and "[t]hat's why I always leave"—was not true, was contradicted by her prior assault conviction, and left a false impression of law-abiding behavior. *Id.* at 790. The trial court denied the impeachment evidence because the conviction was more than 10 years old and because its prejudicial effect outweighed its probative value. *Id.* at 789.

The court affirmed the trial court's exclusion of evidence, stating that "when a witness, on direct examination, makes a blanket assertion of fact and thereby leaves a false impression with respect to his prior behavior or the extent of his prior troubles with the law" or a "blanket assertion of exemplary conduct [that] 'is directly relevant to the offense charged,'" then the opponent may cross-examine the witness and offer extrinsic evidence rebutting the statement. *Id.* at 790–91. Due to the evidence of the nature and remoteness of the wife's prior assault conviction, the court concluded that the impeachment testimony offered by the defendant was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. *Id.* at 791.

Thus, the court held that the trial court's decision was not clearly outside the zone of reasonable disagreement. *Id.* at 791; *see* TEX. R. EVID. 403.

Here, appellant challenges the trial court's exclusion of McCray's prior conviction for unlawfully carrying a weapon after McCray testified that he knew "a little bit" about guns. McCray also testified that he saw appellant's gun but did not know what kind it was, and that he was "a little bit" familiar with guns and how they work, including that you cock a gun to put a bullet in the chamber.

McCray's testimony does not suggest that he has never been arrested, charged, convicted, or had trouble with the police for unlawfully carrying a weapon. *See Delk*, 855 S.W.2d at 704. As an initial matter, the record indicates only that McCray's conviction was for unlawful carrying of a *weapon*, not necessarily a gun or other firearm,[2] and neither the record nor the parties clarify the type of weapon McCray was convicted of unlawfully carrying. Moreover, McCray's testimony does not expressly state or imply that he did or did not have a criminal history.[3] *See Theus*,

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[2] In 1997, at the time of McCray's prior conviction, Texas Penal Code section 46.02(a), prohibited the carrying of a handgun, illegal knife, or club. Act of May 31, 1993, 73rd Leg., R.S., ch. 900, § 1.01, sec. 46.02(a), 1993 Tex. Gen. Laws 3586, 3686 (amended 2017) (current version at TEX. PENAL CODE ANN. § 46.02(a)).

[3] In response to the State's questioning on redirect examination, McCray testified about his prior convictions for assault, possession of marijuana or a controlled substance, and a ticket that he received the week before trial. Any false impression of law-abiding behavior created by McCray's testimony about his familiarity with guns was cured by McCray's admission of his prior criminal history.

845 S.W.2d at 879 ("[T]o 'open the door' to the evidence of prior crimes, the witness must do more than just imply that he abides by the law—he must in some way convey the impression that he has never committed a crime."). Nor does McCray's testimony expressly state or imply that his familiarity with guns was acquired through lawful means. McCray did not testify how he became familiar with guns or whether his familiarity was acquired through legal means.

A person need not be arrested, charged, or convicted with a gun-related offense to have familiarity with guns. Conversely, a person arrested, charged, or convicted with a gun-related offense does not necessarily have familiarity with guns. As the trial court explained to appellant's counsel when denying his request to impeach McCray with the prior conviction, "I know a lot about guns and I've never been convicted." Even under the broadest interpretation of the State's question, "[A]re you familiar with guns and how they work," McCray's response that he was "a little bit" familiar with guns does not falsely impress law-abiding behavior upon the jury.

Nor did McCray's additional testimony—that he could see the gun, that it was black, that he did not know what kind of gun it was, that the gun was cocked back, which meant putting a bullet in the chamber, and that he feared he could be shot or seriously hurt—leave a false impression of law-abiding behavior upon the jury that opened the door to impeachment. Much of the incident was captured on video, which

the jury saw, and the jury heard explanatory testimony from responding HPD Officer McCurry and McCray. McCray's testimony was not related to his prior conviction for unlawfully carrying a weapon.

Finally, the probative value of McCray's prior conviction for unlawful carrying of a firearm is substantially outweighed by a danger of unfair prejudice, confusing the issues, undue delay, and needlessly presenting cumulative evidence. TEX. R. EVID. 403; *see, e.g.*, *Osbourn*, 92 S.W.3d at 538 ("Even when the trial judge gives the wrong reason for his decision, if the decision is correct on any theory of law applicable to the case it will be sustained.") (citations omitted). McCray was the victim of appellant's aggravated robbery. Requiring him to testify about his 21-year old prior conviction for unlawful carrying of a weapon would have unfairly prejudiced the State's case because of the remoteness of the conviction and its irrelevance, and it would have confused the issues. In light of McCray's admission to other prior convictions, evidence about his prior conviction for unlawful carrying of a firearm also would have caused undue delay and needlessly presented cumulative evidence. Any probative value of McCray's testimony would have been substantially outweighed by these considerations.

The trial court's decision to exclude the evidence was within its "wide discretion" and is not outside the zone of reasonable disagreement. We therefore

hold that the trial court did not abuse its discretion by denying appellant's request to impeach McCray with his 1997 conviction.[4]

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).

[4] Because we find no error, we do not address the second part of appellant's issue, whether the error was harmful.