**Affirmed and Opinion filed July 13, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-00744-CR**

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**TYRONE EUGENE CAMPBELL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 208th District Court**
**Harris County, Texas**
**Trial Court Cause No. 775,674**

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## O P I N I O N

Tyrone Eugene Campbell appeals his conviction by jury for the offense of unlawful possession of a firearm by a felon. *See* TEX. PEN. CODE ANN. § 46.04 (Vernon 1994). The jury found two enhancement paragraphs to be true and assessed punishment at fifty years in the Texas Department of Criminal Justice, Institutional Division. In seven points of error, appellant contends (1) the trial court erred in admitting evidence of extraneous misconduct of appellant in violation of TEX. R. EVID. 404(b); (2) the trial court erred in admitting immaterial evidence in violation of TEX. R. EVID. 402; (3) the trial court erred in admitting evidence in

violation of TEX. R. EVID. 403; (4) the trial court erred in denying appellant's request pursuant to TEX. CODE CRIM. PROC. ANN. Art. 38.23 to instruct the jury that if it believes, or has a reasonable doubt, that evidence was obtained illegally, that it shall disregard such evidence; (5) the trial court erred by denying appellant's request to exclude the State's exhibits because they were not properly authenticated; (6) appellant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States; (7) appellant was denied effective assistance of counsel at trial in violation of Article 1, Section 10 of the Constitution of the State of Texas. For the reasons stated below, we affirm the judgment of the trial court.

## BACKGROUND

On the night of September 22, 1997, Houston Police Officers Carson and Shipp were dispatched to a disturbance involving a weapon. The complainant, Mr. Edmond Godfrey, informed the officers that someone had shot at him while he was driving his car. The officers drove Godfrey to the scene of the shooting, and Godfrey indicated that the shots came from a Chevrolet pickup truck parked nearby. Being conscious of the possibility that the truck's occupants were armed, the officers ordered everyone out of the truck at gunpoint. There were three males and one female in the truck, including the appellant. The officers proceeded to conduct a pat down search of the occupants of the truck. The search revealed a pistol in appellant's boot. Subsequently, Godfrey identified one of the other passengers as the man who shot at him. While searching the truck, the officers found another gun on the rear floorboard.

Evidence given at trial showed that appellant had been previously convicted of the felony offense of burglary of a habitation.

## POINTS OF ERROR ONE THROUGH THREE

Appellant's first three points of error are premised on the same underlying argument – that the trial court should not have admitted evidence regarding the shooting that precipitated

the search of appellant and the other occupants of the pickup truck. Accordingly, we will address these points together.

We review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). A trial court's ruling on the admissibility of evidence will be overturned only if the ruling is so clearly wrong that it lies outside the zone of reasonable disagreement. *See id.*

In the instant case, the State offered evidence that the police officers were investigating a shooting and that this investigation led to the search of appellant. Appellant contends that this constitutes inadmissible evidence of an extraneous offense under TEX. R. EVID. 404. Appellant's contention lacks merit. Rule 404 provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *See* TEX. R. EVID. 404(b). The State did not attempt to identify appellant as the man who shot at complainant. Rather, testimony established that complainant positively identified one of the other passengers of the truck as the shooter. To constitute an extraneous offense, the evidence must show a crime or bad act, and that the defendant was connected to it. *See Lockhart v. State*, 847 S.W.2d 568, 573 (Tex. Crim. App. 1992); *Alto v. State*, 739 S.W.2d 614, 619 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd). Because the State did not attempt to implicate appellant in the shooting, evidence of an extraneous offense was not established for the purposes of Rule 404(b).

Appellant also contends that the evidence of the shooting lacked relevance and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 402, 403. Evidence is relevant when it has any tendency to make the existence of any fact more probable or less probable than it would have been without the evidence. *See* TEX. R. EVID. 401. If the trial court determines that evidence is irrelevant, then the evidence is absolutely inadmissible and the trial court has no discretion to admit it. *See*

*Montgomery*, 810 S.W.2d at 387; TEX. R. EVID. 402. On the other hand, if the trial court determines that the evidence is relevant, the evidence should be admitted unless the record plainly shows that its potential for unfair prejudice substantially outweighs its probative value. *See Fuller v. State*, 829 S.W.2d 191, 198 (Tex. Crim. App. 1992); *Montgomery*, 810 S.W.2d at 389; TEX. R. EVID. 403. The trial court is afforded the discretion to exclude or admit evidence, and the appellate court should not set aside the trial court's ruling absent a showing in the record that the trial court abused its discretion by acting in an arbitrary and capricious manner. *See Montgomery*, 810 S.W.2d at 379-80; *Rankin v. State*, 821 S.W.2d 230, 233 (Tex.App.--Houston [14th Dist.] 1991, no pet.). Background evidence is relevant evidence. *See Mayes v. State*, 816 S.W.2d 79, 85 (Tex. Crim. App. 1991).

This testimony concerning the shooting investigation set in motion the foundation of facts which initiated the law enforcement officers' attention toward appellant. This collective testimony provided the trier of fact the context for the pat down search of appellant. It is well settled that where one offense or transaction is one continuous episode, or another offense or transaction is part of the case on trial, or blended or closely interwoven therewith, proof of all the facts is proper. *See Mock v. State*, 848 S.W.2d 215, 223 (Tex. App.–El Paso 1992, pet. ref'd), *citing Maynard v. State*, 685 S.W.2d 60, 66 (Tex. Crim. App.1985). Under these circumstances, the prejudicial nature of same-transaction contextual evidence rarely renders such evidence inadmissible so long as it sets the stage for the jury's comprehension of the whole criminal transaction. *See Sparks v. State*, 935 S.W.2d 462, 466 (Tex. App.–Tyler 1996, no pet.); *see also Lockhart v. State*, 847 S.W.2d 568 (Tex. Crim. App. 1992).

We find that the testimony concerning the shooting investigation was relevant to provide the trier of fact with contextual information for the subsequent police action. We therefore conclude that the trial court did not abuse its discretion in admitting this evidence because the prejudicial effect of this evidence did not substantially outweigh its probative value. We overrule points of error one, two, and three.

## POINT OF ERROR FOUR

In his fourth point of error, appellant maintains that the trial court erred in refusing to instruct the jury about illegally obtained evidence pursuant to article 38.23(a) of the Texas Code of Criminal Procedure.[1] Appellant claims that he was entitled to such a charge because the evidence presented raised an issue of fact as to the legality of the search of appellant and the seizure of the firearm. Because the record shows no factual disputes, we disagree.

Appellant is entitled to an article 38.23 instruction only if the trial evidence raised a factual issue concerning whether the evidence was obtained in violation of the federal constitution or the Texas Constitution or any of its laws. *See Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996); *Hamilton v. State*, 831 S.W.2d 326, 331 (Tex. Crim. App. 1992). Because there was no dispute regarding the facts surrounding appellant's arrest and confession, he was not entitled to the instruction. *See Hamilton*, 831 S.W.2d at 331; *Thomas v. State*, 723 S.W.2d 696, 707 (Tex. Crim. App. 1986) (defendant only entitled to article 38.23 instruction if there is fact dispute regarding how evidence was obtained); *Kercho v. State*, 948 S.W.2d 34, 36 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd) (trial court did not err in refusing instruction because there was no genuine fact issue about how the evidence was obtained).

Appellant argues that the testimony raised questions of fact concerning the legality of the search. First, appellant contends that none of the officers were certain that the shooter was in the truck at the time of the search. Second, appellant points out that the description of the shooter did not match appellant. Third, appellant argues that the lack of a warrant and the

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[1] TEX. CODE CRIM. PROC. ANN. Art. 38.23(a) (Vernon Supp. 1999) states:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

failure to obtain consent raised a fact issue about the legality of the search. Fourth, appellant contends that testimony concerning where the truck was parked raised the issue of appellant's reasonable expectation of privacy. While appellant correctly summarizes the testimony of the officers, the record reveals that none of these issues were in dispute at trial. Each officer consistently testified that they were not certain whether the shooter was in the truck, that they were looking for a man other than appellant, that they did not obtain a warrant or consent, and that the truck was parked in a private yard. Thus, appellant raises questions of law, not questions of fact. As such, there was nothing for the jury to decide regarding the legality of the search and the seizure of the firearm. The trial court correctly refused appellant's requested instruction.

Next, appellant points to two inconsistencies in the officers' testimony as support for the proposition that there was a genuine issue of fact as to how the evidence was obtained. Specifically, the officers variously described the truck as green, greenish-blue, and blue. Also, one officer testified that it took less than two minutes to arrive at the scene after hearing the call for backup, while another officer claimed it took from two to four minutes. Appellant argues that based of these inconsistencies, the jury could have disregarded all or part of the officers' testimony. It is a correct statement of law that the jury is entitled to judge the credibility of the witnesses and may choose to believe all, some, or none of the testimony of the parties. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). However, these slight variances do not bear upon the legality of the search. Because the evidence would have been admissible regardless of how these inconsistencies are resolved, appellants is not entitled to an instruction under article 38.23. *See Crunk v. State*, 943 S.W.2d 788 (Tex. App.–Houston [14th Dist.] 1996, no pet.).

Appellant has not demonstrated that there was any relevant fact in dispute which the jury could decide under article 38.23. Because the trial court did not err in refusing the instruction, we overrule appellant's point of error four.

## POINT OF ERROR FIVE

In his fifth point of error, appellant complains that the trial court erred by denying appellant's request to exclude copies of a pen packet. The State offered the pen packet during the guilt stage of the trial to show appellant's status as a convicted felon and during the punishment stage to show that appellant was a habitual criminal. Appellant contends that the affirmation contained in the pen packet did not state how many pages were included in the certification, and that, therefore, the packet was not authenticated as required by Texas Rules of Evidence 901 and 902. We find no basis for this contention either in the Rules of Evidence or in case law. Because the copies were self-authenticated, we find no merit in this point of error.

The penitentiary packets admitted against appellant contain an affirmation by the custodian of records for the Institutional Division of the Texas Department of Criminal Justice. This affirmation certifies that the documents are true and complete copies of the documents on file with the institution. The affirmation expressly certifies the authenticity of the fingerprints, photographs, judgments, and sentences contained in the packets. In addition, the judgments themselves are certified. We find that the pen packet in the instant case was sufficiently authenticated in accordance with Rules 901 and 902(4) of the Texas Rules of Evidence and properly admitted into evidence. *See* TEX. R. EVID. 901, 902; *Reed v. State*, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991); *Washington v. State*, 905 S.W.2d 665, 668 (Tex. App.–Houston [14th Dist.] 1995, pet. ref'd). Appellant's fifth point of error is overruled.

## POINTS OF ERROR SIX AND SEVEN

In point of error six, appellant complains that he was denied effective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. In point of error seven, appellant states that he was denied effective assistance of counsel at trial in violation of Article One, Section Ten of the Constitution of the State of Texas. *Strickland v. Washington* is the seminal case with regard to ineffective assistance

claims under the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668 (1984). Because Texas' constitutional and statutory provisions regarding ineffective assistance cases are not more protective of a defendant's rights than the standard set forth under the United States Constitution, we will address both of appellant's points of error concerning ineffective assistance of counsel together. *See Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986).

As a basis for his argument, appellant cites several examples of allegedly ineffective assistance by his trial counsel, among which are the following: (1) Counsel accepted the State's theory of the case when counsel stated, "I'm saying – I'm not saying he didn't have the gun. I'm not saying that. I'm saying when you look at the totality of the circumstances they didn't have a right to arrest him." (2) Counsel conceded defendant's guilt by making the above statement. (3) Counsel failed to object to testimony concerning the Godfrey shooting incident. (4) Counsel failed to object to the prosecutor's argument at the punishment stage. (5) Counsel's representation of Paul Davis, the shooter referred to at appellant's trial, may be an irreconcilable conflict of interest.

To support a claim of ineffective assistance of counsel, an appellant must prove: (1) that counsel's performance was deficient, and (2) this deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687. Absent both showings, we cannot conclude that an appellant's conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id*. Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See id*. at 689.

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *See id*. Moreover, it is the appellant's burden to rebut

this presumption via evidence illustrating why trial counsel did what he did. *See id.* We note that because there was no hearing on appellant's motion for new trial, the record is silent as to why trial counsel engaged in the conduct of which appellant complains. When there is a lack of evidence in the record as to counsel's trial strategy, an appellate court may not speculate about why counsel acted as he did. *See Jackson v. State*, 877 S.W.2d at 771. Without testimony from trial counsel, an appellate court must presume that counsel had a plausible reason for his actions. *See Safari v. State*, 961 S.W.2d 437, 445 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd, untimely filed). In the absence of such testimony, an appellate court cannot meaningfully address claims of ineffectiveness. *See Davis v. State*, 930 S.W.2d 765, 769 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd). Accordingly, since there is no evidence in the record concerning trial counsel's explanation for his manner of representation, it is impossible to conclude that counsel's performance was deficient. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston [1st Dist.] 1996, no pet.). In the interest of justice, however, we shall address these points in the order presented.

Appellant's first two complaints concern trial counsel's strategy of conceding that appellant possessed the firearm. It is a legitimate practice for a trial attorney to effectively concede guilt as part of a larger trial strategy. *See, e.g., Butler v. State*, 872 S.W.2d 227 (Tex. Crim. App. 1994); *Jordan v. State*, 859 S.W.2d 418 (Tex. App.–Houston [1st Dist.] 1993, no pet.). The record clearly establishes that appellant had a gun hidden in his boot. Given the evidence against appellant, it is a reasonable trial strategy to concede what the State was obviously able to prove, and thus, hopefully hold the punishment to the low end of the punishment range.

Appellant's third contention is that trial counsel failed to object to testimony concerning the Godfrey shooting. As noted above, we find that this evidence was admissible. A defense attorney does not render ineffective assistance by failing to object to admissible evidence. *See McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992); *Gosch v. State*, 829 S.W.2d 775 (Tex. Crim. App. 1991).

Appellant's fourth complaint states that trial counsel should have objected to the State's closing argument at the punishment phase of the trial. During closing argument, the State characterized appellant as a habitual offender. The Texas Court of Criminal Appeals has identified four areas of permissible jury argument: summation of the evidence, reasonable deductions from the evidence, response to defendant's argument, or plea for law enforcement. *See Gomez v. State*, 704 S.W.2d 770, 771 (Tex. Crim. App. 1985). To determine the propriety of an argument, we must consider the entire argument, not just isolated statements. *See Mosley v. State*, 686 S.W.2d 180, 183 (Tex. Crim. App. 1985). Based on the evidence presented during the punishment stage of the trial, the State's characterization of appellant as a habitual criminal was both a summation of the evidence and a reasonable deduction from the evidence. The prosecutor's argument did not inject new or harmful facts into the trial proceedings, and, therefore, appellant's counsel had no obligation to object.

Appellant's fifth and final contention consists of allegations of an irreconcilable conflict of interest. Appellant's trial counsel also represented Paul Davis, the shooter identified by Godfrey. Based on this fact, appellant states that his trial counsel was precluded from exploring important defenses. Appellant does not elaborate as to what defenses could have been raised, nor can we discern any conflict from an examination of the record. Appellant does not brief, cite any authority, or specifically refer to any conflict that this joint representation created. If an appellant cites no authority in support of a point of error, the court should overrule the point of error. *See Dear v. City of Irving*, 902 S.W.2d 731, 739 (Tex. App.–Austin 1995, writ denied).

Accordingly, we fail to find that the actions of appellant's attorney amounted to ineffective assistance of counsel. We overrule points of error six and seven and affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed July 13, 2000.

Panel consists of Justices Edelman, Lee and Draughn.[2]

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

[2] Senior Justices Norman R. Lee and Joe L. Draughn sitting by assignment.