

Affirmed and Memorandum Opinion filed June 16, 2020.



In The
Fourteenth Court of Appeals

NO. 14-19-00035-CR

JERMAINE RODRICK BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1575380**

M E M O R A N D U M O P I N I O N

Jermaine Rodrick Brown appeals his conviction for aggravated robbery. In his sole issue on appeal, he complains of the trial court's partial denial of his motion under *Theus v. State*, 845 S.W.2d 874 (Tex. Crim. App. 1992), to testify free from impeachment by his prior convictions.

Evidence of prior convictions is admissible for the purpose of attacking the credibility of a witness under certain conditions. Tex. R. Evid. 609(a). However, evidence of a prior conviction after more than ten years has elapsed from the date of

the conviction or the release of the witness from confinement is not admissible unless the trial court determines that the probative value of the conviction is substantially outweighed by its prejudicial effect. Tex. R. Evid. 609(b).

To preserve error on a trial court's ruling allowing the State to impeach a defendant with prior convictions, the defendant must have testified. *Caballero v. State*, 919 S.W.2d 919, 923 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); see also *Jackson v. State*, 992 S.W.2d 469, 479–80 (Tex. Crim. App. 1999) (holding defendant failed to preserve error from the trial court's denial of his "request to foreclose cross-examination about extraneous offenses" during punishment because the defendant did not testify). One reason for this rule is that the "alleged harm would be speculative because the trial court could change the previous ruling and prohibit the impeachment, or the prosecutor may decide not to use the prior conviction." *Caballero*, 919 S.W.2d at 923. If the defendant does not testify, an appellate court would be required to speculate about whether any resulting error in permitting impeachment would have been harmless. *Jackson*, 992 S.W.2d at 479 (citing *Luce v. United States*, 469 U.S. 38, 41–42 (1984)).

Appellant did not testify at trial. As a result, he has not preserved error on the trial court's denial of his *Theus* motion.

Appellant acknowledges he did not preserve error but urges us to review the ruling anyway because rulings such as this one have a "chilling effect" on a defendant's decision to present evidence on his own behalf. We are bound to follow the decisions of the Court of Criminal Appeals. *Shalouei v. State*, 524 S.W.3d 766, 769 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). When, as here, that court has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation. *Mayer v. State*, 494 S.W.3d 844, 848 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Because the issue was not preserved for our

review, we do not address it. We overrule appellant's issue and affirm the trial court's judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.

Do Not Publish — Tex. R. App. P. 47.2(b).