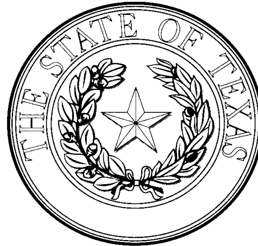
Opinion issued August 17, 2017



In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00730-CR

KELVIN KING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Case No. 1462294

MEMORANDUM OPINION

A jury convicted appellant, Kelvin King, of aggravated robbery and assessed his punishment at 45 years' confinement. In two issues on appeal, appellant contends that (1) the evidence is legally insufficient to show that appellant was the

perpetrator, and (2) the trial court erred by admitting unadjudicated, extraneous offenses during the punishment phase of trial. We affirm.

BACKGROUND

At around 1:23 a.m. on March 18, 2015, Juan “Jordy” Vasquez returned to his apartment complex where he lived with his mother, brother, and sisters. As he walked towards the front door of his apartment, he felt that he was being followed, and turned around to see a man pointing a gun at him. The man struck him with the gun on the forehead, knocking him to the ground.

The assailant leaned over Vasquez’s body and searched for his wallet. Vasquez fell near the window of his apartment and was able to see the assailant’s face with the door light. Vasquez claimed that the man had a dark face, long arms, and a black hoodie. Vasquez pushed him, and the assailant struck him again with the gun. When Vasquez pushed the assailant again, Vasquez’s mother, Rosa Mejia, opened the apartment door. The assailant shot Vasquez, leaving him unable to stand up. Vasquez’s brother, Jose Edgar, came out and threw a knife at the assailant to scare him off. The assailant pulled his gun from under Vasquez’s body and began to walk away. Mejia screamed, and the assailant turned around to point the gun at her. Mejia closed the door, called 911, and hid inside with Edgar, as the assailant fumbled through Vasquez’s pockets and took his wallet and $3 in cash. When the assailant was gone, Edgar dragged Vasquez inside and contacted the

police. Vasquez was transferred to Ben Taub Hospital. During emergency surgery, the surgeons discovered that the bullet was lodged in Vasquez's spine and was, therefore, inoperable. Vasquez would be paralyzed from the waist down for life.

Mejia told the Houston Police Department Robbery Investigator E. DeJesus, that she could not identify the shooter because the light was not bright enough to see his face, but she had heard that the shooter might go by the street name, "Memphis." Based on this information, police developed appellant as a suspect because he went by the name "Memphis," and also had the name tattooed on his back. Appellant matched Mejia's general description of the assailant's height, build, and clothing.

Houston Police Department Sergeant Mora interviewed Vasquez at the hospital and got a description of the assailant. Vasquez claimed that he had a clear view of the assailant's face as he rifled through Vasquez's pockets. Based on the nickname and Vasquez's description, DeJesus created a photo lineup including appellant and several other men with similar physical characteristics. Vasquez's brother, Edgar, was shown the photo array on March 20, and identified the photo of appellant as the shooter. Officer E. Attebury and Sergeant Ponder met Vasquez at the hospital to show him the photo lineup. Vasquez immediately recognized appellant's picture, and the vital-sign monitor indicated that his blood-pressure spiked. Unable to move, he verbally identified appellant's picture. Vasquez also

identified appellant at trial. When asked whether anything led him to believe that appellant was the man who shot him, Vasquez replied, "His face. . . I recall it well."

SUFFICIENCY OF THE EVIDENCE

In his first issue on appeal, appellant contends that "[t]he evidence was insufficient to prove beyond a reasonable doubt that it was Appellant who robbed Vasquez and caused him bodily injury." Specifically, appellant argues that Vasquez had "only minutes to observe the attacker in poor light and under extreme stress."

Standard of Review and Applicable Law

When a defendant challenges the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)). The jury is the exclusive judge of the credibility of the witnesses and the weight to be given to the evidence. *See Isassi v.*

State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Further, we defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* This standard applies to both circumstantial and direct evidence. *Id.* We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

The State must prove beyond a reasonable doubt that the accused is the person who committed the offense charged. *See Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). "[T]he state may prove the defendant's identity and criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence." *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). Circumstantial evidence is as probative as direct evidence to establish the guilt of a defendant, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Lack of DNA or fingerprint evidence does not affect the sufficiency of the proof. *Pena v. State*, 441 S.W.3d 635, 641 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). The testimony of a single witness can be sufficient evidence to support a conviction. *Shah v. State*, 414 S.W.3d 808, 812 (Tex. App.—Houston

[1st Dist.] 2013, pet. ref'd); *Santiago v. State*, 425 S.W.3d 437, 443 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

Analysis

Here, Vasquez positively identified appellant as the shooter not once, but twice. He testified that appellant pointed a gun at him for about 30 seconds before appellant struck him in the forehead with the gun. Although appellant was wearing a hoodie at the time, it was on his forehead and Vasquez was able to get a good look at his face. After appellant hit Vasquez in the head with the gun, Vasquez was able to see appellant's face for 20 to 25 seconds as appellant leaned over his body and rummaged through his pockets; this opportunity to view appellant occurred before appellant hit Vasquez in the head a second time and then shot him.

When officers came to the hospital and showed Vasquez a photo line-up that included appellant's picture, Vasquez identified appellant in about six seconds. He testified that he recognized appellant and "recalled [his face] well." Vasquez also identified appellant while testifying at trial. Vasquez's testimony alone is sufficient to support the conviction. *See Shah*, 414 S.W.3d at 812. The jury had before it sufficient evidence to reach a rational conclusion that appellant was the perpetrator. *See Muniz*, 851 S.W.2d at 246 ("[W]e do reevaluate the weight and credibility of the evidence, but act only to ensure that the jury reached a rational decision.").

We overrule appellant's first issue on appeal.

UNADJUDICATED, EXTRANEOUS OFFENSES AT PUNISHMENT

In his second issue on appeal, appellant contents that "[t]he trial court erred in admitting evidence of multiple unadjudicated extraneous offenses during the punishment phase of Appellant's trial." Appellant contends that the admission of the extraneous offenses violated Rule 403 of the Texas Rules of Evidence because the relevance of the extraneous offenses was substantially outweighed by the risk of unfair prejudice. *See* TEX. R. EVID. 403. Specifically, appellant argues that "the State's obvious motive for offering the extraneous-offense evidence was to establish that Appellant had a propensity to commit violent crimes and should receive a lengthy sentence."

Background

During the punishment phase of the trial, the State presented three un-adjudicated robberies committed by appellant. First, the State introduced evidence that appellant committed a robbery on April 23, 2015 of Mirna Lemos. Appellant approached Lemos after she exited her car one evening, put a gun to her head, and took her purse. Lemos was able to see appellant's face, and remembered it well. Lemos later identified appellant in a photo lineup, and immediately recognized appellant as the person who robbed her. Investigator Carmona retrieved

surveillance video of the April 23, 2015 robbery, and was the sponsoring witness for the video's introduction.

Second, Blanca Gonzalez was the victim of a robbery in December 2013. She testified to the details of the robbery and identified appellant as the person who robbed her. Officer J. Bruzas received a Crime Stopper's tip that appellant was the person who committed the December robbery, allowing her to create a photospread lineup to show to Gonzalez, who identified appellant.

Third, Annalise Palkovitz was the victim of a robbery committed by appellant on April 11, 2015. She testified to the circumstances of the robbery and identified appellant as the perpetrator. Palkovitz, who testified from a hospital where she was awaiting spinal surgery, testified that she was paralyzed from the chest down after appellant shot her during the robbery. Officer E. Hernandez was the sponsoring witness for scene photographs of that incident. Robert Hutchinson witnessed the robbery and provided sketch artist Lois Gibson with details of appellant that allowed her to create an accurate sketch for Crime Stoppers. Officer Ledet sent the sketch to Crime Stoppers and received the tip that led him to develop appellant as a suspect and create a photospread for Palkovitz. Palkovitz identified appellant as the man who robbed and shot her.

Standard of Review and Applicable Law

We review a trial court's decision to admit evidence during the punishment phase of an extraneous offense or bad act under an abuse-of-discretion standard. *Lamb v. State*, 186 S.W.3d 136, 141 (Tex. App.—Houston [1st Dist.] 2005, no pet.). As long as the trial court's ruling was within the "zone of reasonable disagreement," we will uphold its ruling. *Id.*

Article 37.07 of the Code of Criminal Procedure governs the admissibility of evidence at the punishment phase of a trial, *see Henderson v. State*, 29 S.W.3d 616, 626 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd), and provides as follows:

> [E]vidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2015). The trial court has wide discretion in determining the admissibility of evidence presented at the punishment phase. *Henderson*, 29 S.W.3d at 626; *Lamb*, 186 S.W.3d at 141. "[R]elevance during the punishment phase of a non-capital trial is determined by

what is *helpful* to the jury." *Erazo v. State*, 144 S.W.3d 487, 491 (Tex. Crim. App. 2004).

Although the trial court has wide latitude in determining the admissibility of punishment-phase evidence, the evidence must still satisfy Texas Rule of Evidence 403. *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999); *see also Lamb*, 186 S.W.3d at 143. Evidence may be excluded pursuant to Rule 403 "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403; *see also Lamb*, 186 S.W.3d at 143. Thus, relevant evidence that is otherwise admissible under article 37.07 is inadmissible if it does not satisfy Rule 403. *Lamb*, 186 S.W.3d at 144.

When a party objects under Rule 403, a reviewing court looks at several factors including: "(1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence." *Erazo*, 144 S.W.3d at 489; *see also Sunbury v. State*, 88 S.W.3d 229, 235 (Tex. Crim. App. 2002) (suggesting in dicta that these factors also apply to Rule 403 decisions on punishment evidence). Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than

prejudicial. *Jones v. State*, 944 S.W.2d 642, 652 (Tex. Crim. App. 1996). The rule requires exclusion of evidence only when there exists a clear disparity between the danger of unfair prejudice and the probative value of the evidence. *Id.*

Analysis

The probative value of the extraneous offenses was high in this case. All three extraneous offenses, like the offense for which appellant was convicted, were aggravated robberies and demonstrate a pattern of conduct by appellant. *See Fowler v. State*, 126 S.W.3d 307, 311 (Tex. App.—Beaumont 2004, no pet.) ("Evidence of defendant's prior assaults certainly had a tendency to cause a jury to increase his punishment. But that was its legitimate purpose. The value of the extraneous offense evidence was in permitting the jury to tailor the sentence to the defendant.").

The jury's consideration of the extraneous offenses, though certainly not favorable to appellant, would not have impressed the jury in "some *irrational*, yet indelible way." *Erazo*, 144 S.W.3d at 489 (emphasis added). As noted by the court in *Fowler*, the evidence's "legitimate purpose" was to allow the jury to properly consider appellant's punishment in light of appellant's pattern of conduct as shown by the State. *Fowler*, 126 S.W.3d at 311. Appellant argues that Palkovitz's testimony, particularly, was prejudicial because she testified via video from the hospital, where she was preparing to receive spinal surgery to address issues

caused when appellant shot her during the robbery. The fact that Palkovitz was paralyzed when appellant shot her, and that she had to testify from her hospital room, would not impress the jury in some irrational way; it "depict[s] nothing more than the reality of the brutal crime committed." *See Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995) (holding that admission of photographs showing "nothing more than what the defendant has himself done" does not violate Rule 403).

Appellant further argues that the time needed to develop the extraneous-offense evidence—77 pages of testimony—is a factor weighing against the State in a Rule 403 analysis. However, as the State points out, it had the responsibility to present sufficient evidence for the jury to find that the extraneous offenses were proved beyond a reasonable doubt, which necessitated multiple witnesses for each offense. For each of the extraneous offenses, the State presented the testimony of the victim and a police officer. And, for the third extraneous offense, the robbery of Annalise Palkovitz, the State also presented the testimony of an eyewitness who was crucial to creating a sketch for Crime Stoppers that led to the development of appellant as a suspect. Appellant points out that Vasquez's own punishment testimony was only eight pages and that the time spent on the extraneous offenses was, thus, disproportionate. We cannot agree with appellant that the time spent on the extraneous offenses was disproportionate to the time spent on the charged

offense, especially since the jury had already heard from Vasquez about the charged offense during the guilt-innocence phase of trial.

Finally, we consider the State's need for the evidence. As mentioned above, the legitimate purpose of the extraneous offenses was to show a pattern of conduct by appellant, so that the jury could tailor an appropriate punishment accordingly.

We hold that the trial court reasonably could have concluded that the extraneous offenses were more probative than prejudicial on the issue of the appropriate punishment for appellant, and the trial court acted within its discretion by admitting them into evidence. *See Erazo*, 144 S.W.3d at 489; *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004).

We overrule appellant's second issue on appeal.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.

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