

**Affirmed and Memorandum Opinion filed July 6, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-08-01031-CR**

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**LAMANUEL JAMES FLETCHER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 400th District Court  
Fort Bend County, Texas  
Trial Court Cause No. 46,073A**

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**MEMORANDUM OPINION**

A jury convicted appellant Lamanuel James Fletcher of robbery. The jury found true an enhancement paragraph alleging a prior conviction for robbery and assessed punishment at sixty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. In two issues, appellant contends the trial court erred by allowing the State (1) to question its witness on direct examination regarding appellant's

statements related to alibi witnesses and (2) to introduce evidence of an extraneous offense. We affirm.

## **BACKGROUND**

On the morning of November 14, 2006, Veniece Griffin, the forty-nine year old complainant in this case, left her home to run errands at the Fountains Shopping Center in Stafford, Texas. After Griffin made a bank deposit in the shopping center, she parked her car in front of an adjacent pet store.

As Griffin walked toward the store, a car approached and stopped in front of her. When she tried to walk around the back of the vehicle to enter the store, the driver got out of the car and ran toward her. As Griffin attempted to run away, the driver yelled “give me that purse” three times and threw her to the ground, causing her to scrape her arm. The assailant grabbed Griffin’s purse, ran back to his car, and drove away. Before the car sped away, Griffin noted the license plate number.

Zeljka Gusinjac, a bystander, witnessed the robbery. She testified that upon exiting the pet store, she saw an African-American male holding onto Griffin’s purse and dragging Griffin on the pavement. She also testified that after he took Griffin’s purse, the assailant ran back to his car, a silver four-door Chrysler sedan, and drove off. After the incident, Griffin asked Gusinjac to enter the vehicle’s license plate number into her cell phone. At trial, Gusinjac positively identified appellant as Griffin’s assailant.

Houston Police Department (“HPD”) Officer James Leedom testified that when he arrived at the scene, Griffin was extremely upset and told him that she had been robbed. After he determined that she did not have any life-threatening injuries, Officer Leedom interviewed Griffin, who described her assailant as a young African-American male and the vehicle as a gray Chrysler Sebring with license plate number 732 PVC. Officer Leedom also spoke with Gusinjac, whose description of the assailant and the vehicle was

nearly identical to Griffin's. Officer Leedom broadcast the license plate number and a description of the suspect and the vehicle.

After she spoke to Officer Leedom, Griffin went to the police station and spoke to HPD Detective Rosa Linda Roman. Griffin described the assailant as an African-American male, between nineteen and twenty-four years old, approximately 5'7" and 180 pounds, with short, dark hair. Detective Roman testified that she mistakenly stated in her offense report that Griffin had described the suspect as light-skinned. Detective Roman also testified that she showed a photographic array to Griffin and Gusinjac, which included a photo of the vehicle owner's son but not appellant, and that neither woman identified Griffin's assailant among the photos.

At Detective Roman's request, HPD Detective Alfonso Ceballos interviewed Chris Craft, the vehicle's registered owner, as part of the investigation. Based on the information he received from Craft, Detective Ceballos determined that appellant had been in possession of the vehicle on the day of the robbery. During a videotaped interview, appellant admitted to Detective Ceballos that he had been in possession of the Chrysler Sebring on November 14, 2006, but denied that he had committed the robbery. Detective Ceballos testified that appellant also identified two alibi witnesses—a female whom appellant identified by first name only and Vince Young.<sup>1</sup>

Ceballos accompanied Griffin to a live line-up where she positively identified appellant. At Griffin's request, each of the individuals in the line-up then said "give me that purse" three times. Griffin testified that after hearing appellant's voice, she was absolutely certain that appellant was the person who had robbed her.

Following an evidentiary hearing, and over defense counsel's objections, the court determined that evidence related to appellant's prior conviction for theft of a person was

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<sup>1</sup> Detective Ceballos testified that it was absolutely clear that appellant was referring to Vince Young, the quarterback for the Tennessee Titans.

admissible to establish identity. Vanessa Golden, a fifty-two year old woman, testified that on the morning of November 14, 2006, she was entering an office building when she was hit from behind and knocked down.<sup>2</sup> She testified that her assailant had driven his car to the front of the building and, after knocking her down, grabbed her purse and sped away. Golden chased him and was able to note the license plate number of the car.<sup>3</sup> Appellant was indicted for robbery and subsequently entered a guilty plea to the reduced charge of theft from a person.

## ANALYSIS

### A. Appellant's Statements Regarding Alibi Witnesses

In his first issue, appellant contends the trial court erred in allowing the State to question Detective Ceballos on direct examination regarding appellant's statements pertaining to alibi witnesses. He argues that the State's questions constituted a comment on appellant's failure to testify and, thus, impermissibly shifted the State's burden of proof to appellant.

Outside the presence of the jury, the trial court conducted an evidentiary hearing to determine the admissibility of, among other things, appellant's statements regarding alibi witnesses that he made during a videotaped interview with police. Following a lengthy discussion, and over defense counsel's objections, the trial court ruled that the evidence regarding alibi witnesses was admissible under Texas Code of Criminal Procedure article 38.22, section 3, except as it may relate to extraneous offense evidence.<sup>4</sup>

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<sup>2</sup> Golden was fifty years old at the time of the incident.

<sup>3</sup> At the evidentiary hearing, Officer Colleen Guidry, an HPD robbery investigator assigned to investigate Golden's case, testified that Golden reported the vehicle as light-colored, silver or gray, with the license plate number 732 PVC.

<sup>4</sup> Article 38.22, section 3, provides, in relevant part:

....

(a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

During the State's direct examination of Detective Ceballos, the following exchange took place:

[State]: Okay. Now, did the Defendant identify alibi witnesses for him?

[Ceballos]: He identified by first name a female. I don't recall the first name.

[State]: Did you ask him her last name?

[Ceballos]: Not that I remember, no, sir. And then he also identified Vince Young.

[State]: Okay. Now, the name Vince Young could be a common name, but I think it's also a well-known name. Did you clarify that was he talking about "the Vince Young"?

[Ceballos]: To us, it was my opinion he was talking about Vince Young, the quarterback for the Tennessee Titans.

[State]: Okay. So, him and this female that he didn't fully identify could say that he wasn't there at this date and time?

[Ceballos]: Yes, sir.

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(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

TEX. CODE CRIM. PROC. ANN. Art. 38.22, § 3 (Vernon 2005).

[State]: Now, did you have any way of figuring out who this alleged female is?

[Ceballos]: I did—we didn't pursue it at the time. He didn't offer up any other information. I didn't pursue it. To me, it appeared it was just something he just threw out there at that time. He just said some female. So ...

[State]: Okay. What about Vince Young? Did you contact Vince Young?

[Ceballos]: No, sir, I didn't contact Vince Young.

[State]: Okay. Have you ever been contacted by any people in regards to that?

[Ceballos]: No, sir.

Appellant argues that the State's questions constituted a comment on appellant's failure to testify because only appellant through his testimony could refute the State's assertion that the alibi witnesses did not exist. We disagree. For a statement to constitute a comment on a defendant's failure to testify, the language of the statement must be either manifestly intended, or of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify. *Livingston v. State*, 739 S.W.2d 311, 337 (Tex. Crim. App. 1987). For an indirect comment to constitute reversible error, it must call for a denial of an assertion of fact or contradictory evidence that only the defendant is in a position to offer. *Id.* It is not sufficient that the language might be construed as an implicit or indirect allusion to the defendant's failure to testify. *Id.* at 338. If the language used can be reasonably construed as referring to the appellant's failure to produce testimony or evidence from sources other than himself, reversal is not required. *Id.* Here, the prosecutor's questions were not intended to be a comment on the defendant's failure to testify, nor would the jury naturally or necessarily take them as such. Rather, the questions could reasonably be construed as referring to appellant's failure to produce testimony or evidence from sources other than himself, *i.e.*, the alibi witnesses.

Notwithstanding, even if the trial court erred in permitting Detective Ceballos to testify regarding appellant's statements, any error was harmless. Error in the admission of evidence is non-constitutional error subject to a harm analysis under rule 44.2(b) of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 44.2(b); *Rivera-Reyes v. State*, 252 S.W.3d 781, 786 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Under that analysis, we disregard any non-constitutional error that does not affect substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). Appellate courts should not overturn a criminal conviction for non-constitutional error if the court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but slight effect. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In assessing the likelihood that the jury's decision was adversely affected by the error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error, and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). Evidence of a defendant's guilt is one factor to consider in performing a harm analysis under rule 44.2(b). *See id.* at 358. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, whether the State emphasized the error, and even voir dire, if applicable. *See id.* at 355.

Here, the evidence included Griffin's positive identification of appellant in a live line-up and at trial; Gusinjac's in-court identification of appellant; Detective Ceballos's testimony that appellant admitted being in possession of the getaway vehicle on the date of the offense; and Golden's testimony that appellant robbed her on the same day and in a nearly identical manner as Griffin and in-court identification of appellant. Further, the State's questioning of Detective Ceballos regarding appellant's statements about alibi

witnesses was relatively brief, and the State did not emphasize that portion of Detective Ceballos's testimony or even refer to it in its closing argument. Considering the record as a whole, including the evidence of appellant's guilt set forth above, any trial court error in allowing that portion of Detective Ceballos's testimony did not influence the jury's verdict. *See* TEX. R. APP. P. 44.2(b); *Johnson*, 967 S.W.2d at 417. Thus, under the non-constitutional harm analysis, any error in permitting the State to question Detective Ceballos regarding appellant's statements related to alibi witnesses was harmless. *See* TEX. R. APP. P. 44.2(b). Issue one is overruled.

### **B. Admission of Extraneous Offense Evidence**

In his second issue, appellant contends the trial court erred in allowing the State to admit evidence of an extraneous offense during the guilt-innocence phase of the trial. Specifically, appellant argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, thus making the evidence inadmissible under Texas Rule of Evidence 403.

After hearing testimony from Golden and Officer Guidry outside the presence of the jury, the court ruled that evidence related to appellant's prior offense of theft of a person was relevant to prove identity in the present case. Defense counsel objected under Rule 403 arguing that even if the evidence was relevant, it was outweighed by the danger of unfair prejudice.<sup>5</sup> The trial court overruled the objection.

Rule 403 provides, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." TEX. R. EVID. 403. Thus, Rule 403 recognizes that relevance alone does not ensure admissibility. *Gigliobianco v. State*, 210 S.W.3d 637, 640 (Tex. Crim. App. 2006). Even when evidence is found to be relevant, when the defendant makes a Rule 403 objection, the court has a

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<sup>5</sup> We note that although defense counsel objected at trial to the admission of the extraneous offense evidence under both Rules 403 and 404(b), on appeal he challenges only the trial court's ruling under Rule 403.



non-discretionary obligation to weigh the probative value of the evidence against the unfair prejudice of its admission. *See Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (op. on reh'g).

Factors to be considered in this balancing process include: (1) the strength of the evidence in making a fact more or less probable, (2) the potential of the extraneous offense evidence to impress the jury in some irrational but indelible way, (3) the amount of time the proponent needs to develop the evidence, and (4) the strength of the proponent's need for this evidence to prove a fact of consequence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). In overruling such an objection, the court is assumed to have applied a Rule 403 balancing test and determined the evidence was admissible. *Hinojosa v. State*, 995 S.W.2d 955, 957 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Appellate review on the admissibility of evidence is conducted under an abuse of discretion standard. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). An appellate court is bound to uphold the trial court's ruling regarding the admissibility of evidence if it was within the zone of reasonable disagreement. *Id.*

The first factor we consider is the strength of the evidence in making a fact—here, identity—more or less probable.<sup>6</sup> The State elicited testimony showing that on the morning of November 14, 2006, appellant approached Golden, a fifty-year-old woman, as she was entering a building, hit her from behind, knocked her down, grabbed her purse and then sped away in his car. The assailant's vehicle was identified as light-colored, silver or gray, with the license plate number 732 PVC. The extraneous offense evidence is strikingly similar to the evidence in the present case—the offenses were committed on the same date and within hours of each other, the victims were middle-aged women who were entering a building when they were knocked down, and the suspect grabbed their purses

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<sup>6</sup> Appellant argues that the issue of identity was not seriously contested at trial. To the contrary, defense counsel raised the issue of identity in his opening statement, attempted to discredit the witnesses' identification of appellant as the perpetrator on cross-examination, and argued the issue throughout his closing argument.

and sped away in a gray car with the license plate number 732 PVC. Thus, the charged and extraneous offenses were identical in a number of key respects and thus highly probative on the issue of identity. *See Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (finding many similarities between charged and extraneous offenses made extraneous offense evidence highly probative under Rule 403).

The second and third factors also weigh in favor of the trial court's decision to admit the extraneous offense evidence. Although extraneous offenses always possess the potential to influence the jury, any impermissible inference of character conformity can be minimized through a limiting instruction. *Id.* In this case, the trial court gave a limiting instruction in the jury charge which was also read to the jury before it began its deliberations. Further, our review of the record reveals that the State did not spend an unduly lengthy amount of time to develop evidence of the extraneous offense.

Finally, the strength of the State's need for this evidence also supports the trial court's decision to admit the evidence. Appellant argues that the State had other convincing evidence to establish the issue of identity and, thus, the State's need for the extraneous offense evidence was low. It is true that the State's other evidence was fairly strong. The State had Griffin's identification of appellant in a live line-up, Griffin and Gusinjac's in-court identification of appellant, a license plate number match, and appellant's admission in the police interview that he had been in possession of the suspect vehicle on the date in question. However, appellant challenged the probative value of much of this evidence. Despite the fact that the State had other evidence, the extraneous offense evidence was not unfairly prejudicial. *See Johnson v. State*, 68 S.W.3d 644, 651-52 (Tex. Crim. App. 2002) (concluding State's need for extraneous offense evidence to establish identity was strong, even though State had DNA evidence, fingerprints, appellant's written confession admitting guilt, and an oral confession, where defendant challenged probative value of evidence). Under these circumstances, the probative value of the extraneous offense evidence outweighs any unfair prejudicial effect. Because the evidence was properly admitted, we overrule appellant's second issue.

## CONCLUSION

We affirm the judgment of the trial court.

/s/ Leslie B. Yates  
Justice

Panel consists of Justices Yates, Seymore, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).