Affirmed and Memorandum Opinion filed August 3, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00592-CR
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EDWARD LOUIS THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause Nos. 1101865, 1101866

MEMORANDUM OPINION

A jury found appellant Edward Louis Thomas guilty of two counts of aggravated assault against a public servant. The trial court assessed his punishment at forty years' confinement for one count and thirty-five years' confinement for the other, both sentences to run concurrently. Appellant challenges his two felony convictions on the grounds that the trial court erroneously admitted extraneous offense evidence and the State made improper jury argument. We affirm.

Background

The facts of this case are largely uncontested. In January 2007, Houston Police Department ("HPD") officers Michael Hamby and Tim Butler stopped for lunch at a restaurant in Humble. They were both in plain clothes. Officer Hamby had his police identification on a chain around his neck and his badge on his belt. Officer Butler was wearing a jacket with the word "POLICE" written in large print on the back. Both officers were armed with their service weapons. After they finished their lunch, they exited the restaurant and saw appellant sitting in the front seat of their unmarked police vehicle with the driver's door open. The officers immediately drew their weapons, identified themselves as police officers, and ordered appellant out of the vehicle.

Appellant did not surrender to the officers; instead, he exited the vehicle and slipped into the front seat of another vehicle parked next to the officers' unmarked vehicle. This car had been parked, with the engine running, so that the driver's door was next to the driver's door of the officers' vehicle. The officers moved to flank the car, with Officer Hamby on the passenger side of appellant's car and Officer Butler on the driver's side. Both officers continued to demand that appellant exit his vehicle. Officer Hamby could see only one of appellant's hands, so he was concerned that appellant could be reaching for a weapon on the vehicle's floorboard. Appellant accelerated forward, hitting Officer Hamby on the right leg. Appellant's car also hit Officer Butler, throwing him onto the hood of the vehicle. Officer Butler shot at appellant through the windshield of the vehicle; Officer Hamby also discharged his weapon at the vehicle several times.

The car veered to the right, throwing Officer Butler off the hood. Officer Butler continued to fire at the vehicle. Appellant drove the car over a curb and came to a stop in some bushes. Appellant did not immediately get out of the car; instead, he fumbled with something inside the car. He emerged from the vehicle and kneeled on one knee. The officers continued to order him to the ground. Officer Hamby called 911 for assistance and an ambulance. While Officer Hamby was on the phone with the 911 dispatcher,

appellant stood up and appeared to reach for something under his sweatshirt. Officer Butler fired at appellant several more times. Appellant then fell to the ground. Humble Police Department ("Humble PD") officers arrived at the scene shortly thereafter. Although this offense involved HPD officers, because it occurred in Humble, Humble PD officers were in charge of the investigation. Various other agency officials also arrived, including an official from the Harris County District Attorney's office.[1] Appellant was transported to the hospital.

Appellant was charged with two counts of aggravated assault against a public servant. He pleaded not guilty and was tried by a jury. Officers Hamby and Butler testified at trial, along with numerous other witnesses. Appellant's defense centered on the theory that officers Hamby and Butler overreacted because they were angry appellant had broken into their car, and concocted the story that appellant had intentionally tried to hit them with his vehicle to justify the shooting. After hearing the evidence and argument of the attorneys, the jury found appellant guilty as charged in the indictments. After a punishment hearing, the trial court assessed appellant's punishment at forty years' confinement for cause number 1101865 and thirty-five years' confinement for cause number 1101866, with the sentences to be served concurrently. Appellant timely appealed the trial court's judgments.

Analysis

Appellant presents three issues on appeal. In his first issue, he contends that the trial court erroneously admitted extraneous offense evidence. In his second and third issues, he complains about allegedly improper jury argument by the State. We address each issue in turn.

[1] A grand jury concluded that the shooting was justified and refused to indict the officers involved.

I. Extraneous Offense Evidence

In his first issue, appellant asserts that the trial court erred by admitting evidence of an extraneous offense during the guilt-innocence phase of appellant's trial. He asserts this evidence was prejudicial to the defense and not probative of any issue in the trial. We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Id.* We cannot reverse a trial court's admission decision solely because we disagree with it. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). We must affirm a trial court's ruling if it is correct on any theory of law applicable to the case. *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005).

Generally, extraneous offense evidence is not admissible to prove the character of a person or to show action in conformity therewith. *See* Tex. R. Evid. 404(b); *Daggett v. State*, 187 S.W.3d 444, 450-51 (Tex. Crim. App. 2005). However, "[e]vidence that is otherwise inadmissible may become admissible when a party opens the door to such evidence." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Jensen v. State*, 66 S.W.3d 528, 538 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

Here, appellant filed a pre-trial motion in limine seeking to prevent the State from introducing evidence regarding weapons found in his vehicle after his arrest. After appellant's vehicle was towed from the crime scene and processed by the Humble PD's Crime Scene Unit, one of the officers discovered a loaded magazine for a Glock handgun in the center armrest of the vehicle. This discovery led him to search further, and he found a loaded Glock handgun in a hidden compartment located on the lower driver's side of the console area, near the floorboard. With help from another officer, he also located a 9-millimeter Smith and Wesson handgun with hollow-point bullets behind the glove compartment of the vehicle.

On direct examination, Officer Hamby testified that he could see only one of appellant's hands when appellant was driving the vehicle toward him and Officer Butler. Officer Hamby testified he was concerned that appellant might be reaching for something on the floorboard. Officer Hamby also explained that, once appellant got out of the vehicle, he appeared to reach for something under his sweatshirt. Officer Hamby further testified that he believed appellant was reaching for a weapon at that time because "[h]e had just tried to hit two police officers with a motor vehicle, [was] still noncompliant with [their] commands, and at that point [they] had still not done a pat-down search to find out if he had any weapons on him."

On cross, the following exchange occurred:

> Q. Detective Hamby, are you aware of whether or not there was a weapon ever found on the defendant at the time of the arrest?
>
> [Prosecutor]: May we approach?
>
> The Court: I think so.
>
> (The following proceedings were had at the bench:)
>
> The Court: You're confusing him because he didn't know how to answer it because he's been told not to mention the guns found in the car.
>
> [Appellant]: I didn't ask him about the guns in the car.
>
> The Court: But he's unclear as to --
>
> [Appellant]: He could have said that. I just want to know if he found any on his person.
>
> The Court: I know, but you went dangerously into territory. That's why he's not answering you. He's not sure what he's allowed to say.
>
> [Appellant]: [The prosecutor] can counsel him right now.
>
> . . .
>
> (The following proceedings were had in open court:)

Q. All right. Sorry, Detective Hamby, but did you ever, or to the best of your knowledge was there any weapons ever found on the person of the defendant at the time when he was arrested and searched?

A. Not on his person, no, sir.

Q. *No weapons, right?*

A. No, sir.

[Prosecutor]: Judge, may we approach?

The Court: Yes.

(The following proceedings were had at the bench:)

[Prosecutor]: *That just opened the door, Judge.*

[Appellant]: I don't think so, your Honor. I think the --

The Court: *Well, I do*.

(emphasis added).

Relying on *Carter v. State*, 145 S.W.3d 702, 708 (Tex. App.—Dallas 2004, pet. ref'd), appellant contends that trial counsel's questioning did not open the door to this evidence. In *Carter*, the defendant sold crack cocaine to an undercover officer at a suspected drug house; at least one other individual was present at the house when the sale occurred. *Id.* at 705. About two weeks later, the undercover officer returned to the house and went inside to get "a better layout in order to prepare to execute a search warrant." *Id.* at 706. A few days later, the officer and several others entered the house to execute the search warrant. *Id.* The defendant was discovered in the living room of the house and his briefcase and some documents belonging to him were found in the bedroom, although none of these documents included the address of the house where the drug-bust occurred. *Id.* The officers found cocaine in a back room and marijuana in the den of the house; a runaway juvenile was also present in the house during the drug-bust. *Id.* At his trial, his counsel confirmed with the undercover officer that no narcotics had been

discovered on "the person" of the appellant. *Id.* Over appellant's Rule 404 objection,[2] the trial court subsequently admitted the cocaine evidence as "res gestae" of the offense. *Id.* at 707. The Fifth Court of Appeals determined that the trial court erred in admitting this evidence. As is pertinent here, the court explained that the defendant's questioning of the officer regarding any drugs found on his person did not

> "open the door" to allowing testimony that cocaine was found in a different room than the room in which appellant was arrested, in a house that was not proven to belong to appellant, and where another person was present, and others had been present, every time the officer had been there. Consequently, the evidence strayed "beyond the scope of the invitation."

Id. at 708.

In this case, appellant was the driver and only occupant of the vehicle used to hit the officers. A loaded gun was found in a compartment near appellant's right foot, and Officer Hamby testified that he was concerned that appellant might be reaching for something on the floorboard when appellant accelerated toward him and Officer Butler. Additionally, although appellant was arrested once he exited the vehicle, it was his use of the vehicle itself that resulted in the charges filed against him. We thus find the analysis in *Carter* inapposite to appellant's case.

Further, although appellant's first question was specific as to whether weapons were found on his person, his follow-up question was more general and asked Officer Hamby whether weapons were found. Officer Hamby's negative response to this question left the jury with the impression that appellant had no weapons either at the time he was in the officers' vehicle or in his own vehicle. But because a loaded weapon was found in the general vicinity of the driver's side floorboard, it is entirely possible that appellant was either armed when he was burglarizing the officers' vehicle or was attempting to arm himself when the officers ordered him to exit his own vehicle. We

[2] In *Carter*, the appellant did not make a rule 403 objection. *Id.* at 707. Although appellant made such an objection in the trial court here, he has not referenced Rule 403 in his brief. Thus, we conclude that he has waived his Rule 403 complaint on appeal.

thus agree with the trial court that this evidence was relevant and admissible to correct the false impression left by Officer Hamby's testimony. We overrule his first issue.

II. Improper Jury Argument

In his second issue, appellant contends that the trial court erred by failing to provide an instruction to disregard the State's closing argument that the lesser-included offense of deadly conduct is a misdemeanor. In his third issue, appellant asserts the trial court erred by not sustaining his objection to the State's argument that convicting appellant of deadly conduct would be an insult to the officers. Appellant points to the following exchange to support these issues:

> [The State]: The next thing you're going to find in here is a lesser included offense. You've probably heard that term before. Folks, what that means is any time someone, or the facts, even if they're small facts, even if they're not credible facts, any time it's raised, a lesser included offense, the defendant is entitled to have that in this jury charge. That doesn't mean you should consider it. It doesn't mean that the State or the Court or anybody is telling you that that's really what happened here, it's just he's entitled to it, okay. So it's another protection that he gets to make sure that this process is fair.
>
> Now, I crossed it out on mine because I'm telling you this was not a deadly conduct and it would be a slap in the face of these officers to convict Mr. Thomas of a Class A misdemeanor given the facts of what happened in this case. So my position is you don't need to consider that for any reason.
>
> [Defense Counsel]: Your Honor, I object on the -- her characterization. There's been absolutely no evidence of what that offense carries, and I think it's -- she's basically prejudiced the jury. I'd ask the jury be instructed to disregard her characterization of what deadly conduct is, and I move for a mistrial.
>
> THE COURT: Stay within the record with the argument. Motion for a mistrial is denied.

In his second issue, appellant contends that the trial court erred by failing to instruct the jury to disregard the State's comment that the lesser-included offense of deadly conduct was a misdemeanor. Proper jury argument falls within one of four

general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). Ordinarily, it is improper for the State to comment on punishment during the guilt-innocence stage of trial. *See McClure v. State*, 544 S.W.2d 390, 393 (Tex. Crim. App. 1976); *Wright v. State*, 178 S.W.3d 905, 930 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). However, the Court of Criminal Appeals in *McClure* explained that the harm from commenting on punishment during guilt-innocence arises from the State's suggestion that the defendant should be convicted of the greater offense because of the amount of punishment. *McClure*, 544 S.W.2d at 393. Moreover, the prosecutor in *McClure* repeatedly referred to the difference in the number of years the defendant could be confined if convicted of the lesser-included offense as opposed to the greater offense, despite repeated sustained objections and warnings from the trial court. *Id.* at 391-93.

Here, the State did not repeatedly attempt to inject punishment into the guilt-innocence stage and never referred to the range of punishment attached to the offense. Furthermore, the State's argument was not a plea to the jury to consider punishment as opposed to facts when determining guilt or innocence. *Cf. id.* at 393. Under these circumstances, the State's comment does not amount to reversible error, and the trial court's failure to instruct the jury to disregard is likewise not reversible error. *See, e.g.*, *Cifuentes v. State*, 983 S.W.2d 891, 892-93 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (concluding that the trial court's failure to instruct the jury to disregard a quite similar remark during the State's closing argument did not amount to reversible error). Accordingly, we overrule his second issue.

Turning to his third issue, we note that appellant did not object to the State's comment that a deadly conduct conviction would be an insult to the officers. Instead, as is clear from the section excerpted above, appellant objected only to the State's reference to the lesser-included offense as a misdemeanor. To preserve a complaint for review, a

party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. Tex. R. App. P. 33.1(a). In addition, a contention on appeal must comport with the objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Because appellant's argument under this issue does not comport with his objection at trial, he has failed to preserve this issue for our review. We overrule his third issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.
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