

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00426-CR

BRENDA SUE HERRING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 15-304682

MEMORANDUM OPINION

Brenda Sue Herring appeals from a jury trial that resulted in her conviction of a Class A misdemeanor for assaulting R.H.,¹ a member of her family. *See* Tex. Penal Code Ann. § 22.01(a)(1), (b) (West Supp. 2016). Herring elected to have the trial court assess her punishment. The trial court, finding that the offense was committed

¹To protect the privacy of the witnesses that testified to Herring's assault, they are identified by their initials.

against a family member, assessed a \$200 fine against Herring, sentenced Herring to one year in county jail, suspended imposition of the jail sentence, and probated the sentence for 180 days. In one issue on appeal, Herring complains that the trial court erred by excluding evidence of the victim's character for violence. We affirm the trial court's judgment.

BACKGROUND

The information charging Herring with the offense of assault family violence, alleges that on or about March 7, 2015, Herring "did then and there intentionally, knowingly, or recklessly cause bodily injury to [R.H.], the complainant, by striking [R.H.] with Defendant's hand[.]" R.H., Herring's husband, testified that on March 6, 2015, he and Herring attended a birthday party and then went to a dance club where they drank beer and danced. According to R.H., when they left the dance club in the early morning hours of March 7, Herring urinated in the parking lot. R.H. testified that Herring became very upset when R.H. told her to "[a]ct like a woman. Not like an animal."

R.H. explained that while he was driving home, Herring began yelling at R.H. and telling him that she wished she had never married him and that she had planned for him to go to jail that night. According to R.H., at one point, Herring lunged over at him and threw her fist in R.H.'s face while R.H. was driving. R.H., who began

bleeding, asked Herring to stop, and he used his hands to cover his face and to push Herring's hands away. R.H. explained that Herring was in a rage, and he just wanted to get out of the vehicle and get away from the situation. When they arrived home, Herring's son let R.H. inside the house, and R.H. went to the bathroom and took photographs of his injuries. R.H. then went to his neighbor's (M.C.) house, and while R.H. was sitting in the garage with his neighbor, Herring came running over screaming and struck R.H., knocking R.H. out of his chair. At that point, the police arrived and paramedics treated R.H.'s injuries. R.H. testified that he did not want to press charges against Herring because she was his wife and he still loved her.

M.C. testified that in the early morning of March 7, 2015, R.H. appeared at his front door, and M.C. described R.H. as bloody and shaken up. M.C. testified that R.H. told him that Herring had beaten him, and M.C. could tell, based on R.H.'s appearance, that R.H. had been in an altercation. After a short time, Herring ran into the garage screaming, slapped R.H. in the side of the head with an open palm, and knocked R.H. out of his chair. According to M.C, when Herring slapped R.H., R.H. "wasn't saying anything[]" and was "[j]ust trying to defend himself." R.H. then told Herring that she was crazy and to get out of his face, and M.C. told Herring to get out of his garage.

Deputy John Lawless of the Montgomery County Sheriff's Office testified that on March 7, 2015, he was dispatched to a call for service in reference to a family violence assault, and he investigated whether or not an arrest was warranted. Lawless explained that R.H. was bleeding from the nose and mouth and had scratch marks on his neck. Lawless testified that Herring had dried blood at the corner of her mouth, blood spatter on her forehead and nose, and blood on the palms of her hands, knuckles, and in her bracelet. After talking with Herring and R.H., Lawless determined that Herring, who was intoxicated, had been the primary aggressor in the assault, so he arrested Herring for assault family violence. Lawless further testified that R.H. did not want to press charges, but Lawless believed the violence would have continued if he had not taken Herring to jail.

Herring testified in her defense. Herring denied urinating in the parking lot of the dance club. According to Herring, as they were leaving the club, R.H. started acting aggressively and calling her names. Herring testified that during the drive home, she tried to distract R.H. from the situation because she knew how angry R.H. could get. Herring testified that when they got close to the house, R.H. stopped the truck, backhanded her on the lip, and said mean things to her. Herring also testified that R.H. came over the console and punched her on the leg. Herring explained that at that point, she became "so afraid that I was like fearing for my life[,]” so she went

over the console and started hitting R.H. to defend herself. According to Herring, after she hit R.H. about three or four times, he stopped attacking her. Upon arriving home, Herring called the police, and Herring claimed that she did not tell the police that R.H. punched her on the leg because she was so upset and shaken up. Herring denied hitting R.H. in M.C.'s garage, claiming that she just grabbed R.H.'s chair and that R.H. did not fall. The jury found Herring guilty of assaulting R.H. as charged in the information.

ANALYSIS

In one issue on appeal, Herring argues that the trial court erred by excluding evidence of R.H.'s character for violence. Herring complains that the trial court limited her testimony concerning her knowledge of R.H.'s assaultive history, which included knowledge of R.H.'s prior assaults against his ex-wives. Herring further complains that the trial court limited her testimony concerning R.H.'s character by ruling that Herring's testimony had to be tied to what she was thinking when she determined that she needed to use force against R.H. According to Herring, although the trial court allowed some evidence of R.H.'s assaultive character, the trial court's ruling limiting testimony concerning R.H.'s violent character resulted in "leaving the extent of [her] fear out of the record." Herring concludes that the trial court's

error prevented her from presenting evidence which supported her theory of self-defense.

This court reviews the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id.* The Texas Penal Code provides that "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code Ann. § 9.31(a) (West 2011). "The rules of evidence permit the defendant to offer evidence concerning the victim's character for violence or aggression on two separate theories when the defendant is charged with an assaultive offense[.]" *Ex parte Miller*, 330 S.W.3d 610, 618 (Tex. Crim. App. 2009). First, the defendant may offer reputation or opinion testimony or evidence of specific prior acts of violence by the victim to demonstrate the reasonableness of the defendant's claim of apprehension of danger from the victim. *Id.* "Second, a defendant may offer evidence of the victim's character trait for violence to demonstrate that the victim was, in fact, the first aggressor." *Id.* at 619. Herring contends that both theories on the admissibility of character evidence are at issue in this case because she testified that her acts were in

self-defense and that she feared violence at the hands of R.H. when the incident occurred.

The record shows that Herring admitted that she hit R.H., but claimed she was acting in self-defense, because R.H. attacked her first. Herring testified regarding her state of mind at the point when R.H. allegedly backhanded her on the mouth; according to Herring, she thought R.H. was going to kill her. When Herring's counsel asked Herring if there was any other reason why she believed R.H. was going to attack her, the prosecutor objected based on improper character evidence. The trial court overruled the objection, and allowed Herring to testify that "[t]here were several occasions where [R.H.] had hit his other wives[.]" At that point, the prosecutor renewed her character objection, and Herring's counsel explained that the testimony was relevant to the apparent danger and that Herring was going to testify concerning what she knew about R.H. After hearing the parties' arguments during a bench conference, the trial court allowed Herring to testify outside the presence of the jury concerning her knowledge of R.H.'s assaultive history.

Herring testified that R.H. had been married three times prior to marrying her, and Herring believed that R.H. had been arrested for or charged with assaulting two or three of his prior wives. Herring knew that R.H. had at least one prior conviction for assaulting a family member, but she did not know which wife to which the

conviction pertained. The trial court, noting that Herring had already testified before the jury that she was aware of an assaultive background and that R.H. had testified concerning an assault that was filed against him, sustained the State's objection and ruled that it was not going to allow the defense to go into any further characterization of the alleged victim. The record further shows that when defense counsel asked Herring about what led her to believe R.H. was dangerous, the trial court again sustained the State's objection that the testimony was improper character evidence under Texas Rule of Evidence 404(b). At that point, the trial court explained that the testimony had to be tied to what Herring was thinking when she determined that she needed to use force against R.H.

Herring went on to testify before the jury and explained that when she made the decision to defend herself against R.H., one of the things going through her mind was R.H.'s previous behavior. Herring testified that prior to the incident at issue, R.H. had put a pillow over her face on several occasions. Herring further testified that prior to the incident at issue and during a period when she and R.H. had been separated, R.H. had gone into a rage because Herring was dancing with another man at the dance club. Herring explained that during that prior incident, R.H. called her names, pushed her on the stomach, and pushed her against the bar. According to Herring, after R.H. pushed her, she then went into a rage and knocked R.H. down;

on cross-examination, Herring admitted that she had been kicked out of the dance club for assaulting R.H. Herring also testified that while she is afraid of R.H., she is not the kind of person who is going to just stand there and take it. Our review of the record shows that that trial court allowed Herring to introduce “communicated character” evidence to prove her own self-defensive state of mind and the reasonableness of that state of mind by offering reputation or opinion testimony as well as evidence of specific prior acts of violence by the victim. *See Ex parte Miller*, 330 S.W.3d at 618-19.

Additionally, the record shows that R.H. testified he had a prior conviction for assault and his prior conviction taught him that “no matter what, I will remove myself from any situation that will further cause any other problems. You can beat me to death, and there’s going to be no response.” During cross-examination, R.H. admitted that approximately twelve years prior to the incident at issue, he pleaded guilty to assaulting a woman he was dating. When defense counsel asked R.H. if he had ever assaulted his first wife, the State objected under Rule 404(b) and argued it was improper character evidence. *See Tex. R. Evid. 404(b)*. The trial court sustained the State’s objection, stating that the certified copy of R.H.’s conviction of assault against his first wife did not go to what Herring knew at the time she defended herself, because it did not come out during Herring’s testimony. Despite the trial

court's ruling, after R.H. testified that he had never physically put a hand on his first wife, defense counsel showed R.H. a certified copy of the conviction and the trial court admitted it into evidence. Concerning his second wife, R.H. testified that he was arrested for assault for putting his hand on her shoulder. R.H. also denied assaulting Herring on a prior occasion at the dance club, explaining that Herring hit him and that she was removed from the club.

Herring presented other witnesses who testified concerning R.H.'s character for violence. Herring called R.H.'s ex-wife, T.H., to testify in Herring's defense. The State objected to T.H.'s testimony as being improper character evidence, and the trial court sustained the State's objection. However, T.H. went on to testify that in 1998, R.H. assaulted her at their home, and a police officer, who is her current husband, stopped the assault. T.H. testified that was not the only thing that R.H. had done, and that when the assault occurred, she had been in fear for her life for awhile. T.H. further testified R.H. could not be trusted to tell the truth. T.H. admitted that she did not know anything about the incident that occurred between R.H. and Herring.

E.F., T.H.'s husband, testified that he had dealt with R.H. while E.F. was employed as a police officer, and E.F. met R.H. when R.H. assaulted T.H. E.F. explained how he stopped R.H. from assaulting T.H. According to E.F., he was

familiar with R.H.'s reputation after the assault occurred because the police department had to deal with R.H. and his next marriage on several occasions. According to E.F., R.H. had a reputation for lying and R.H. "always played the victim." E.F. agreed that he did not know anything about the assault at issue.

Herring's son, J.J., testified that he separated Herring and R.H. when they got home and that both denied being the first aggressor. At first, J.J. did not know who to believe, but he eventually believed Herring's account of what happened. J.J. testified that approximately eight years prior to the incident at issue, he had witnessed R.H. push Herring. According to J.J., Herring did not slap R.H. and knock R.H. out of a chair, but J.J. admitted that he did not tell the police that Herring did not assault R.H. in M.C.'s garage. J.J. also admitted that he did not know who started the fight and that he did not report that R.H. had been the first aggressor. We conclude that the record shows that the trial court allowed Herring to introduce "uncommunicated character" evidence in the form of reputation and opinion testimony concerning R.H.'s character for violence to demonstrate that R.H. was the first aggressor. *See Ex parte Miller*, 330 S.W.3d at 619; *see also* Tex. R. Evid. 404(a)(3)(A), 405(a)(1).

Because our review of the record shows that the trial court allowed Herring to introduce evidence concerning R.H.'s character for violence through her own

testimony and the testimony of several other witnesses, we cannot conclude that the trial court abused its discretion by excluding testimony that limited Herring's ability to present her claim of self-defense. *See Martinez*, 327 S.W.3d at 736. We overrule Herring's sole issue on appeal, and we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on December 15, 2016
Opinion Delivered March 15, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.