In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00137-CR

GUSTAVO WAHLENBERG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 15-08-08767-CR

MEMORANDUM OPINION

Gustavo Wahlenberg appeals his conviction for murder. In nine issues, Wahlenberg complains that the trial court erred by excluding various items of evidence that he asserts were essential to his defense. Finding no reversible error, we overrule each issue and affirm the trial court's judgment.

I. Background

Wahlenberg was charged by indictment for killing Patrick Kelly by shooting him with a firearm. Wahlenberg pleaded not guilty to the charge and the case was tried to a jury, where Wahlenberg asserted self-defense and defense of a third party.

Wahlenberg lived with his disabled long-term girlfriend, Brenda[1], in a mobile home on a large rural tract of property in Montgomery County. Wahlenberg also allowed Kelly to live on the property, in an RV parked behind a shed that sat directly behind Wahlenberg's mobile home.

The record indicates that on December 31, 2011, Wahlenberg, Brenda, and Kelly were all at their respective homes on Wahlenberg's property. A friend of Kelly's, James "Jimbo" Larson, was also present that day, and he testified at trial regarding the events leading up to Kelly's death.

Larson testified that over the course of the several hours he spent on Wahlenberg's property that day, he and Kelly shared a six-pack of beer and a marijuana cigarette, and each also drank several mixed drinks containing whiskey. He testified that later in the evening, as he stood outside next to Kelly's RV, he saw Wahlenberg and Kelly arguing, standing close together and slapping each other. He explained that as they argued, Wahlenberg was backing up toward his own mobile

[1] Brenda passed away before trial commenced.

home while Kelly advanced forward toward Wahlenberg, both swinging their arms. Larson testified that that lasted ten to fifteen seconds, then Wahlenberg turned and walked toward his mobile home with Kelly following "right on his heels." Larson heard Kelly tell Wahlenberg "I know how you treat that woman[,] and I'm going to call somebody to do something about it." Wahlenberg continued walking around to the front of his mobile home and went inside, and Larson heard the door of Wahlenberg's mobile home slam shut. At that point, Kelly came around Wahlenberg's mobile home, walking alone back toward his own RV. Kelly met up with Larson in the driveway near the RV and told Larson that the police were probably on their way and that Larson should leave. Larson then walked toward the driver's side of his car, intending to leave. He testified that as he was about to get in his car, he saw Wahlenberg walking back up the driveway toward them. According to Larson, Wahlenberg walked up to Kelly, who was standing at the back of the awning of his own porch, pulled out a gun and fired a shot without saying a word. Larson testified that Wahlenberg was holding the gun straight out in front of him, but Larson could not tell where the gun was pointed when the shot was fired. Kelly yelled out that the gun was a starter pistol. Larson told Kelly it was not a starter pistol, and Wahlenberg fired again. According to Larson, Kelly had been standing in place, but stepped forward just before the second shot was fired. Immediately after the second shot was fired, Kelly grabbed his belly, said he was shot, and fell over.

Larson ran and hid in the woods. After Wahlenberg walked back to his own home, Larson returned to his car and drove away, stopping at a store nearby to call his wife and have her come pick him up so that he would not have to drive. Larson did not call 911; however, Wahlenberg did.

Wahlenberg did not testify at trial, but his accounts of the events were presented to the jury through the recording of his 911 call, as well as his statements to the investigating officer as captured by the dashboard recorder of the officer's patrol car. According to those statements, Wahlenberg had walked to the shed between his mobile home and Kelly's RV in order to turn off the lights when Kelly, "drunk out of his head," confronted him and began cursing at him. Wahlenberg turned away from Kelly, but Kelly grabbed Wahlenberg's shirt, turning Wahlenberg around and ripping the shirt, and punched Wahlenberg in the chest. Wahlenberg turned again and walked back to his trailer, with Kelly following behind. When Wahlenberg went into his home to retrieve his gun, Kelly walked back to his own RV. Wahlenberg then exited his mobile home and walked over to Kelly's RV in order to confront Kelly about his behavior. When Wahlenberg reached the RV, standing within approximately four feet of Kelly, he showed Kelly the gun, to which Kelly responded that it was just a cap gun and that he did not believe Wahlenberg would do anything with it. There was some discrepancy in Wahlenberg's various

recitations regarding Kelly's precise actions upon being shown the gun,[2] but the statements indicate that after some movement by Kelly toward Wahlenberg, Wahlenberg shot him, then called 911. Kelly was deceased when paramedics and officers arrived. Officers detained Wahlenberg at the scene.

Dr. Sparks Veasey, III, the forensic pathologist that performed an autopsy on Kelly, testified that the bullet that struck Kelly penetrated the small bowel and perforated the aorta, causing Kelly's death. He also noted that toxicology tests had determined Kelly's blood alcohol content was .137 at the time of the autopsy. Forensic examination of Kelly's shirt and test-fires of Wahlenberg's gun indicated that the weapon was not in contact with Kelly's shirt when it was fired, but was within thirty-six inches of the shirt.

A grand jury indicted Wahlenberg for the offense of murder, specifically alleging that Wahlenberg did, with intent to cause serious bodily injury, cause the death of Patrick Kelly by shooting him with a firearm. *See* Tex. Penal Code Ann. § 19.02(b)(1) (West 2011). After several days of trial, the jury found Wahlenberg guilty as charged in the indictment. Following a pre-sentence investigation report

[2] In his 911 call, Wahlenberg stated that after he showed Kelly the gun, Kelly pushed him, and that was when Wahlenberg shot Kelly. In his statement to the investigating officer, Wahlenberg first stated "I showed him the gun and then he punched me in the chest again. So I shot him." Later in the statement to the officer, however, Wahlenberg indicated he fired the shot when Kelly had merely made a movement toward Wahlenberg as though Kelly were going to hit him again.

and hearing, the trial Court assessed punishment at twenty-five years of confinement. The trial court certified Wahlenberg's right to appeal, and this appeal timely followed.

II. Exclusion of Evidence

Each of Wahlenberg's nine issues on appeal complain of the exclusion of a specific topic or item of evidence, and the excluded items are grouped and argued in two categories. In his first three issues, Wahlenberg complains that the trial court abused its discretion by excluding (1) evidence that Kelly was bipolar, (2) evidence regarding medications that were prescribed to Kelly and were found in his RV, and (3) evidence regarding the possible interaction between the medications found in the RV and alcohol and/or marijuana. In his remaining six issues, Wahlenberg complains that the trial court abused its discretion by excluding what Wahlenberg characterizes as evidence of Kelly's previous violent acts. Wahlenberg argues that reversal is warranted because the evidence excluded by the trial court diminished his ability to fully present the justification of self-defense or defense of a third party.

We review a trial court's ruling on the admission or exclusion of evidence under an abuse of discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling absent a clear abuse of discretion. *Wyatt v. State,* 23 S.W.3d 18, 27 (Tex. Crim. App. 2000). There is no abuse of discretion as long as the court's ruling is within the zone of reasonable

disagreement. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). Moreover, error in the admission or exclusion of evidence will not support reversal unless such error affected a substantial right of the complaining party. Tex. R. Evid. 103(a); 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." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the record as a whole provides fair assurance that the error in evidentiary rulings did not influence the jury, or influenced the jury only slightly, reversal is neither required nor appropriate. *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001).

A. Evidence of Mental Illness and Medication

At trial, Wahlenberg sought to introduce evidence of Kelly's mental health through testimony from Larson that Kelly was on disability for bipolar disorder, as well as medical records containing references to Kelly suffering from bipolar disorder and being prescribed Lithium for that disorder. Wahlenberg also sought to introduce two photographs depicting four bottles of medication which Wahlenberg asserts on appeal had been prescribed to Kelly "for his [b]ipolar illness and other significant physical disabilities." Finally, Wahlenberg sought to elicit testimony from Dr. Veasey regarding "the synergistic effects of the prescribed medication mixed with alcohol."

1. Mental Health Diagnosis

Wahlenberg argues on appeal that it was error for the trial court to exclude evidence of Kelly's bipolar disorder because an essential part of whether Wahlenberg acted reasonably in defending himself or Brenda "is that he was being attacked by a mentally ill person who was highly intoxicated." To the extent that Wahlenberg's position on appeal is that Kelly's alleged mental illness was admissible to show that he was an inherently dangerous person, justifying the use of deadly force by Wahlenberg, we hold that the argument was not properly preserved in the trial court. *See* Tex. R. App. P. 33.1 (providing that a complaint must generally be properly preserved before it can be presented on appeal).

When Wahlenberg sought to elicit testimony from Larson about Kelly receiving disability for a bipolar diagnosis and the trial court questioned the relevance of the alleged diagnosis, Wahlenberg's trial counsel advised the court that "[t]he relevance is not so much the [b]ipolar [disorder]," rather it was being offered to show that any disability Kelly had was not physical, in order to rebut what Wahlenberg asserted was the State's insinuation that Kelly's physical condition rendered him no threat to Wahlenberg. This basis of admissibility was reiterated by Wahlenberg's counsel during her bill of exception, when the medical records referencing bipolar disorder and Lithium were offered. Therefore, to the extent that Wahlenberg's argument on appeal does not comport with the complaint made at

trial, we hold that the argument is waived. *See Pena v. State,* 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial.").

On the other hand, to the extent that Wahlenberg argues on appeal, as he did in the trial court, that Kelly's mental health diagnosis was admissible in relation to Kelly potentially taking medications for his conditions that, in conjunction with alcohol and drugs like marijuana, had side effects, we find that such argument was properly preserved, but without merit. Specifically, the medical records that referenced bipolar disorder and Kelly taking Lithium for that condition were from March 2006, almost six years before this incident. Wahlenberg offered no evidence that Kelly still carried an active bipolar diagnosis at the time of his death. Further, the latest medical records Wahlenberg did offer, which were from July of 2010, indicate in multiple instances that Kelly was no longer prescribed lithium. Lithium was not among the medications found in Kelly's RV after his death, and there is no evidence that any of the medications that were found had been prescribed for bipolar disorder.

2. Medications and Expert Testimony

Related to the mental health issue, Wahlenberg sought to introduce at trial photographs of four bottles of medications that had been prescribed to Kelly, which

were found in his RV, as well as expert testimony regarding the synergistic effects of the prescribed medication mixed with alcohol. However, after Wahlenberg conceded that there was no evidence Kelly had taken any of the medication, the trial court excluded all evidence relating to the medications.

On appeal, Wahlenberg argues that he should have been permitted to introduce evidence of Kelly's mental health diagnosis and the medications without proving the medication had been taken. In support, he relies exclusively on *Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011) (upholding appellant's DWI conviction and holding that, although there was no direct evidence that the appellant consumed any of the drugs found in her car, there was evidence from which a rational juror could have found that she did so). We find reliance on *Ouellette* to be misplaced, as the defendant in that case did not object to, nor seek to exclude, the evidence concerning drugs found in her vehicle, therefore the appellate court never addressed the admissibility of the drug evidence. *See Ouellette v. State*, No. 03-08-00566-CR, 2010 WL 3377774, at *3 n.1 (Tex. App.—Austin Aug. 27, 2010) (mem. op., not designated for publication), aff'd 353 S.W. 3d at 870. Indeed, the dissenting opinion in the Court of Criminal Appeals specifically addressed that fact:

> The problem in this case boils down to one thing: evidence regarding the pill bottle should never have been entered in the first place. Because the defendant said she had not taken the medication within the last month, it was not relevant to the DWI charge. The prescription pill bottle found in Appellant's car is no more admissible to show that she

> was driving while intoxicated than Alcoholics Anonymous literature found in the car would be. The defense should have filed a motion to suppress this evidence and objected to its admission at trial.

Ouellette, 353 S.W.3d at 871 (Tex. Crim. App. 2011) (Meyer, J., dissenting). The trial court could have reasonably concluded that any evidence of medication found in Kelly's home, offered without proof of when or if such medication had been consumed by Kelly, would be wholly irrelevant. *See Layton v. State*, 280 S.W.3d 235, 241 (Tex. Crim. App. 2009) (holding that evidence of Appellant's ingestion of drugs was not relevant and should not have been admitted in the absence of evidence of the dosage taken, the exact times of ingestion, and the half-life of the drug in the human body). Likewise, any proffered expert opinions regarding Kelly's mental health diagnosis, "especially as it might be impacted by the synergistic effect of alcohol and marijuana with the drugs prescribed," are inadmissible due to the inability to link such opinions to evidentiary facts of the case. *See Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996) (noting that to be relevant, an expert's proffered testimony must be sufficiently tied to the pertinent facts of the case).

Wahlenberg further, or alternatively, argues on appeal that evidence regarding the medication was also admissible because "[c]ommon sense says that a highly intoxicated, mentally ill person who is off his medication poses a greater real or apparent threat than someone who is not mentally ill." However, at no point during the trial did Wahlenberg make any proffer or argument about the effect of Kelly *not*

taking prescribed medications. Accordingly, because this basis for admissibility was never presented to the trial court, we find that it was not properly preserved for appeal. *See Pena*, 285 S.W.3d at 464; Tex. R. App. P. 33.1.

We hold that the trial court's decision to exclude evidence of Kelly's mental health diagnosis, his medications, and the possible interactions between medications and alcohol or marijuana were all within the zone of reasonable disagreement, and as such, were not an abuse of the court's discretion. We therefore overrule issues one through three.

B. Evidence of Prior "Violent Acts"

In his remaining six issues, Wahlenberg complains that the trial court abused its discretion by excluding evidence of what he characterizes as Kelly's "previous violent acts."[3] Specifically, in issues four through nine respectively, Wahlenberg argues that it was error to exclude evidence regarding Kelly's (1) 1998 robbery conviction, (2) disciplinary reports from prison, (3) 2007 arrest for robbery, reduced to theft from person, (4) 1995 arrest for public intoxication involving a physical altercation with the booking officer, (5) 1994 arrest for a DWI, during which Kelly

[3] By referring to the prior acts described in the excluded exhibits as violent, we are only conveying Wahlenberg's characterization of the evidence, and not making any affirmative findings that the exhibits do, in fact, evidence violent acts. Such an analysis of the evidence is not pertinent to our findings or holdings on this issue.

was belligerent, and (6) threat to "get his gun and take care of" a former employer during an altercation.

Rule 404(a) of the Texas Rules of Evidence allow a defendant who raises the issue of self-defense to offer evidence of a pertinent character trait of a victim. *See* Tex. R. Evid. 404(a)(3)(A). However, Rule 405(a) limits the type of such admissible character evidence to reputation or opinion testimony. *Tate v. State,* 981 S.W.2d 189, 192 (Tex. Crim. App. 1998). Accordingly, evidence of a victim's specific crimes or wrongdoing is not admissible as character evidence, but may be admissible if the defendant can demonstrate such evidence is relevant for a purpose other than to prove character conformity. *See* Tex. R. Evid. 404(b); *Torres*, 71 S.W.3d at 760. For example, evidence of a victim's prior specific, violent acts may be admissible to show the victim's state of mind, plan, or motive.[4] *See* Tex. R. Evid. 404(b)(2); *Torres,* 71 S.W.3d at 761.

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[4] Evidence of a victim's character for violence may also be admissible to show the reasonableness of a defendant's belief that the use of force was necessary; however, to qualify as such "communicated character" evidence, the defendant must show that he was "aware of the victim's violent tendencies and perceive[d] a danger posed by the victim, regardless of whether the danger [was] real or not." *Ex parte Miller*, 330 S.W.3d 610, 618 (Tex. Crim. App. 2009) This theory of admissibility is inapplicable herein, as Wahlenberg conceded at trial that all of the excluded exhibits were "uncommunicated character" evidence, meaning he had no knowledge of the prior acts at the time of the shooting.

Wahlenberg argues that the various items of evidence of Kelly's prior violent acts were offered to show that Kelly was the first aggressor in the altercation. "Under Rule 404(b), a victim's prior acts of violence . . . may be admissible to clarify the issue of first aggressor if the proffered act explains the victim's ambiguously aggressive conduct." *Allen v. State*, 473 S.W.3d 426, 446 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd). Thus, as a condition precedent to the admissibility of an extraneous act of the victim, there must exist "some ambiguous or uncertain evidence of a violent or aggressive act by the victim." *Reyna v. State*, 99 S.W.3d 344, 347 (Tex. App.—Fort Worth 2003, pet. ref'd). "Because a victim's unambiguous, violent or aggressive act needs no explaining, evidence of the victim's extraneous conduct admitted in conjunction with his unambiguous act would have no relevance apart from its tendency to prove the victim's character conformity, and thus would be inadmissible." *Id*.

In excluding evidence of Kelly's prior acts, the trial court found that the entire altercation between Wahlenberg and Kelly was one continuous incident and that the evidence was consistent and unambiguous that Kelly was the first aggressor. The court then further found that any probative value of the evidence was outweighed by danger of unfair prejudice and would only be to convey the impression that Kelly was a criminal who perhaps got what he deserved.

We agree that the question of whether Kelly was the "first aggressor" was never in legitimate dispute. According to Wahlenberg's own statements to 911 and to the investigating officers, as well as Larson's testimony, Kelly's attack on Wahlenberg was unprovoked and his actions in punching Wahlenberg in the chest, ripping his shirt, and moving toward him again after Wahlenberg armed himself were all unambiguously aggressive actions that "need[] no explaining." *Reyna*, 99 S.W.3d at 347. In its closing argument, the State emphasized more than once Kelly's role and fault as the first aggressor in the encounter:

> Patrick Kelly was in the wrong when he hit [Wahlenberg] by the arm, when he started this altercation. He shouldn't have done that. There's no question about that. Everyone has acknowledged that.
>
> . . .
>
> Patrick Kelly deserved to be arrested that night. He deserved a pair of handcuffs. He deserved his Miranda Rights. He deserved a lawyer. He deserved a Judge. And he deserved a prosecutor. And he deserved a jury for what he did to Gustavo Wahlenberg that night, but he didn't get it. He didn't get the chance.

The record contains no evidence, nor has either party argued, that any of Kelly's actions on the evening in question could be construed as anything other than aggressive and violent. Rather, the disputed issue was whether Wahlenberg was justified in using deadly force against Kelly after going into his home obtaining a weapon, and returning to the encounter. Accordingly, without a genuine dispute as to the nature of Kelly's conduct, evidence of Kelly's prior acts were not admissible

under 404(a)(3)(A). *See Ex parte Miller*, 330 S.W.3d 610, 617 (Tex. Crim. App. 2009).

Moreover, even if any of Kelly's behavior or conduct that evening could fairly be characterized as ambiguous, Rule 404(b) only allows evidence of a victim's prior acts of violence to be admitted when the prior acts of violence are relevant to the ultimate confrontation such that they clarify or explain the victim's ambiguous conduct in some way other than showing he acted in accordance with a violent character. *See*, *e.g.*, *Tate*, 981 S.W.2d at 193 (evidence that victim stated, several months prior to his death, that he would kill defendant was admissible to show victim's intent or motive to cause the defendant harm on the night he arrived at defendant's home and defendant stabbed him); *Torres*, 71 S.W.3d at 761 (holding that the victim's previous threat made to third party in the victim's efforts to find his ex-girlfriend and her children were relevant to show the victim's intent to commit violence against anyone who might stand between him and the girlfriend). Neither the record in this case nor Wahlenberg's appellate brief contain any argument or explanation of how Kelly's specific prior acts of violence were relevant to the ultimate confrontation, nor what the acts were admissible to prove other than conformance with a violent character. To the contrary, Wahlenberg's appellate brief urges that the evidence "related to [Kelly's] reputation and tended to support appellant's defensive theory that [Kelly] had a propensity for violence." Such use of

evidence of prior acts is prohibited by Rule 404. *See* Tex. R. Evid. 404(b)(1). Accordingly, we hold that the trial court's decision to exclude the evidence of Kelly's prior acts was not an abuse of discretion. We therefore overrule issues four through nine.

Having overruled all of Wahlenberg's appellate issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on August 14, 2017
Opinion Delivered December 20, 2017
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Before Kreger, Horton, and Johnson, JJ