



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-16-00094-CR

RODERICK BEHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 14 F 0004-005

Before Morriss, C.J., Moseley and Carter,* JJ.
Memorandum Opinion by Justice Carter

*Jack Carter, Justice, Retired, Sitting by Assignment

MEMORANDUM OPINION

In his first trial, Roderick Beham was convicted of aggravated robbery and sentenced to twenty-five years' imprisonment. On appeal, this Court reversed and remanded the case for a new trial on punishment only. *Beham v. State*, 476 S.W.3d 724, 742 (Tex. App.—Texarkana 2015, no pet.). On remand, the jury assessed Beham a sentence of forty years in prison, and the trial court sentenced Beham accordingly.

On appeal, Beham contends that the trial court erred by admitting gang-related evidence during the trial on punishment because it was (1) irrelevant and inadmissible and (2) inadmissible under Rule 403 of the Texas Rules of Evidence.

Because the gang testimony was irrelevant and harmful, we reverse Beham's sentence and remand the case for a new punishment trial.

I. Background

A detailed discussion of the facts of this case is included in our previous opinion. *See id.* at 728–29. For purposes of this opinion, we will confine our discussion of the facts to those pertinent to this issue before us.

During the punishment phase of the trial, the State called Detective Shane Kirkland of the Texarkana, Arkansas, Police Department, to testify regarding gangs in general and that Beham held himself out to be a gang member. Beham objected to the testimony arguing that it was inadmissible and irrelevant because the State could not prove that he was a gang member and that it was inadmissible under Rule 403 because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

The trial court conducted a hearing outside the presence of the jury to evaluate Kirkland's proposed testimony. Kirkland had spent five years as a gang unit investigator in the Texarkana area. He was trained to look for characteristics of those holding themselves out to be gang members. He testified that gang members generally dress in a similar manner, wear certain colors or symbols, or wear apparel from certain sports teams. Kirkland testified that when investigating someone for possible gang activity, he would examine their prior criminal activity and whether they associate with known gang members or others "holding themselves out to be a gang member." He stated that officers would also examine posts on social media to see how someone dressed, "their manner, how they make a living or how they make money, and do they boast about that process and enterprise in the gang."

Kirkland was shown five photographs¹ taken from Beham's Facebook page and asked, as a gang investigator, what stood out to him in each photograph. He testified that Beham was making "gang signs" with his hand(s) in all of the photographs, and that one photograph depicted the words "money, power, respect," which is a catchphrase or a statement of "what the gang is all about." He further noted that Beham was wearing red clothing in three of the photographs, "which is a big identifier for affiliate [sic] with Crips or their associated gang."² Kirkland testified that Exhibit 11, showing Beham sitting at a table that is covered with cash and several baggies of a "distribution

¹Exhibits 8–12.

²The testimony of gang experts uniformly indicates that the color red is associated with the Bloods street gang and its affiliates, while the colors blue and purple are associated with the Crips street gang and its affiliates. See *Beasley v. State*, 902 S.W.2d 452, 454 (Tex. Crim. App. 1995); *Beham*, 476 S.W.3d at 739; *Armstead v. State*, 977 S.W.2d 791, 798 (Tex. App.—Fort Worth 1998, pet. ref'd); *Stern v. State*, 922 S.W.2d 282, 285 (Tex. App.—Fort Worth 1996, pet. ref'd). In fact, during Beham's previous trial, Kirkland testified that red was "a color associated with the Bloods street gang." *Beham*, 476 S.W.3d at 739.

amount” of marihuana, is the kind of boasting associated with gang members, broadcasting that “this is what I’m making by selling drugs.” In Exhibit 12, a photograph of Beham and two other men posing near a car, Beham is making a gang sign with one hand and pointing a pistol at the camera with the other, and according to Kirkland, “That would be characteristic of a, you know, I’ve got a gun and I’m a gangster.”

Based on the totality of the circumstances present in the photographs, it was Kirkland’s opinion that Beham was “holding himself out” to be a member of an illegal street gang and that generally, if someone was not in a gang, he would not hold himself out as a gang member. Kirkland admitted that his opinion was based solely on the five photographs and that he had no knowledge or information that Beham was a member of any street gang or that he had ever participated in gang-related activity. Kirkland conceded that gang members generally have extensive criminal histories, while Beham does not, and he acknowledged that merely wearing red, using certain hand gestures, and/or being involved in criminal activity do not necessarily indicate gang membership.

After hearing Kirkland’s proposed testimony and the arguments of counsel, the trial court overruled Beham’s objections, stating,

The Court’s going to find that the evidence being offered does have probative value with regard to the character of the defendant and it is relevant. The Court’s going to find that the state is entitled to put on evidence of his character and that this evidence clearly goes to the character of the defendant. The Court’s going to find the probative value of this does not outweigh bias or prejudice and that, while there’s a risk of some prejudice here, that it is not so great as long as the -- as the state does not attempt to argue that the defendant is in a gang and that that is an extraneous bad act. As long as the state is limiting its offer of this evidence merely to the character of the defendant, the Court’s going to permit that.

The jury returned to the courtroom, and the trial court proceeded with the remainder of the trial on punishment. Kirkland's testimony before the jury was virtually identical to the testimony he gave during the evidentiary hearing. Alberto Cantu and Brandon Sumner, employees of LaSalle Corrections Center, testified that on two separate occasions while Beham was incarcerated awaiting trial, he had stolen food from the jail's kitchen and punched another inmate. Beham rested without calling any witnesses. At the conclusion of the testimony, the jury assessed Beham's punishment at forty years in the Institutional Division of the Texas Department of Criminal Justice and assessed him a fine of \$5,000.00.

II. Gang Evidence

A. Relevancy

In his first point of error, Beham contends that the trial court erred in admitting Kirkland's gang-related testimony because the State failed to show that the evidence was relevant and admissible.

"The trial court's decision to admit or exclude evidence at the punishment phase is subject to review for abuse of discretion." *Reed v. State*, 48 S.W.3d 856, 859–60 (Tex. App.—Texarkana 2001, pet. ref'd) (citing *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex. Crim. App. 1996)). "If the trial court's decision falls within the zone of reasonable disagreement, that decision will not be disturbed." *McClure v. State*, 269 S.W.3d 114, 119 (Tex. App.—Texarkana 2008, no pet.) (citing *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)). The trial court's discretion is limited by the

Texas Rules of Evidence,³ except as otherwise provided by Article 37.07, Section 3(a), of the Code of Criminal Procedure, which provides that

evidence 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. 2016). “[E]vidence is relevant if it is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.” *Reed*, 48 S.W.3d at 859–60 (citing *Rogers*, 991 S.W.2d at 265). Extraneous crimes or bad acts must be shown beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1).

The admissibility of gang-membership evidence during the punishment phase is specifically addressed in the Texas Court of Criminal Appeals’ decision in *Beasley*, 902 S.W.2d at 456. Under *Beasley*, evidence regarding a defendant’s membership in a gang is relevant and admissible even if it does not link the accused to the bad acts or misconduct generally engaged in by gang members, so long as the fact-finder is “1) provided with evidence of the defendant’s gang membership, 2) provided with evidence of [the] character and reputation of the gang,^[4] 3) not

³See *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999).

⁴“Evidence of gang affiliation alone is . . . meaningless to a jury which has no knowledge of the gang’s purpose or activities.” *Moseley v. State*, 223 S.W.3d 593, 599 (Tex. App.—Amarillo 2007), *aff’d*, 252 S.W.3d 398 (Tex. Crim. App. 2008); see *Anderson v. State*, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995).

required to determine if the defendant committed the bad acts or misconduct and 4) only asked to consider [the] reputation or character of the accused.” *Id.* at 457. Courts apply *Beasley* when the gang-related evidence is offered as relevant to the defendant’s character. *See Orellana v. State*, 489 S.W.3d 537, 541–43 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d); *Moseley v. State*, 223 S.W.3d 593, 599 (Tex. App.—Amarillo 2007, no pet.); *Aguilar v. State*, 29 S.W.3d 268, 270 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

However, in *Sierra v. State*, the First Court of Appeals held that *Beasley* is not the only means through which gang-membership evidence may be introduced during the punishment phase. *Sierra v. State*, 266 S.W.3d 72, 78 (Tex. App.—Houston [1st Dist.] 2008, pet. ref’d). Noting that the *Beasley* decision relied upon a prior version⁵ of the Texas Code of Criminal Procedure, which prohibited the admission of unadjudicated extraneous bad acts at the punishment phase, the court reviewed the State’s evidence of gang affiliation using both *Beasley* and the current version of Article 37.07, Section 3(a)(1). *Id.* at 77–80. The court concluded that even though the State failed to meet the third and fourth prongs of *Beasley*, the evidence that the defendant was a member of the Texas Syndicate gang was admissible under the current version of Article 37.07, Section 3(a), because such membership is a bad act and the trial court had instructed the jury not to consider extraneous crimes or bad-act evidence if there was a reasonable doubt that the defendant committed the crime or act. *Id.* at 78–80.

⁵In 1993, the Texas Legislature amended the Texas Code of Criminal Procedure to make evidence of extraneous bad acts admissible during the punishment phase if shown by evidence beyond a reasonable doubt. *See State v. Vasilas*, 187 S.W.3d 486, 489 n.5 (Tex. Crim. App. 2006); *see also Sierra*, 266 S.W.3d at 78.

Therefore, punishment evidence regarding gang membership can be properly admitted for different purposes under Article 37.07, Section 3(a)(1). If the gang membership evidence is offered for or tends to show a defendant's extraneous bad act, it is admissible if the jury is instructed that it cannot consider evidence of the alleged bad act unless it is satisfied beyond a reasonable doubt that the act is attributable to the defendant. *Sierra*, 266 S.W.3d at 79. However, if the evidence is offered as to the defendant's character, the evidence must meet the first two prongs of *Beasley* in order to be relevant and admissible, and the jury must be given instructions consistent with the third and fourth prongs of *Beasley*. *See Beasley*, 902 S.W.2d at 457; *see also Orellana*, 489 S.W.3d at 543; *Moseley*, 223 S.W.3d at 599.

Here, the State argued that the evidence was admissible because "the character of the defendant is of the utmost relevance at this point," and in admitting the gang evidence, the trial court held that the "evidence clearly [went] to the character of the defendant." Because the State offered the gang evidence as relevant to Beham's character, the State was required to present evidence that Beham was a gang member and evidence of that gang's character and reputation. *See Beasley*, 902 S.W.2d at 457; *see also Orellana*, 489 S.W.3d at 543. Kirkland testified that based on the photographs, Beham was holding himself out to be a gang member, but he did not testify that Beham was ever actually in a particular gang. Though he testified that the red color of Beham's clothing was associated with the Crips street gang, he did not testify that Beham was a member of that gang. Furthermore, there was no evidence presented of the character and reputation of a particular gang of which Beham was a member. Accordingly, the evidence does

not meet the *Beasley* test as articulated by the Texas Court of Criminal Appeals, and the trial court erred in finding the gang evidence admissible.

We are aware of the rule that even when the trial court gives the wrong reason for its decision if the decision is correct on any theory of law applicable to the case, it will be sustained. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Calloway v. State*, 743 S.W.2d 645, 651–52 (Tex. Crim. App. 1988); *Moreno v. State*, 341 S.W.2d 455, 456 (Tex. Crim. App. 1961); *Salas v. State*, 629 S.W.2d 796, 799 (Tex. App.—Houston [14th Dist.] 1981, no pet.). This is especially true with regard to the admission of evidence. *Dugard v. State*, 688 S.W.2d 524 (Tex. Crim. App. 1985), *overruled by Williams v. State*, 780 S.W.2d 802 (Tex. Crim. App. 1989) (per curiam); *Sewell v. State*, 629 S.W.2d 42, 45 (Tex. Crim. App. [Panel Op.] 1982). Even if it could be argued that the State’s gang-related evidence was admissible as “bad act” evidence following the *Sierra* line of cases, it would be to no avail. We have previously addressed the fact that the State failed to prove either that Beham was a member of a particular gang or the violent and unlawful activities of such a gang. Therefore, the gang evidence failed to meet the requirements for admissibility under the alternate theory as announced in the *Sierra* line of cases.

B. Harm

We must now assess the error in admitting the evidence to determine whether it harmed Beham. “Generally, errors resulting from admission or exclusion of evidence are nonconstitutional.” *Gotcher v. State*, 435 S.W.3d 367, 375 (Tex. App.—Texarkana 2014, no pet.) (citing *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007)). We see nothing in this circumstance that would elevate the erroneous admission of the gang evidence to the level of a

constitutional violation of Beham's rights. See TEX. R. APP. P. 44.2(b). As nonconstitutional error, harm resulted if Beham's substantial rights were affected. See *Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002); see also 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)). The error is not harmful if we are assured that it did not influence the jury's decision or it had but a slight effect. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In making our assessment, we consider everything in the record, including the other evidence admitted, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. *Id.* We "may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire[,] and whether the State emphasized the error." *Haley v. State*, 173 S.W.3d 510, 518–19 (Tex. Crim. App. 2005); see also *Motilla*, 78 S.W.3d at 355–56 (citing *Morales*, 32 S.W.3d at 867).

Beham was found guilty of aggravated robbery, a first degree felony, and was sentenced to forty years in prison out of a possible five to ninety-nine years or life. The motel's video recording of the robbery was played for the jury. As shown in the recording and as testified to by Amanda Gardner, masked men entered the motel and one of them put a gun to Gardner's head, demanding the key to the safe or register. When she did not have the key, one of them entered a back office and took the wallet from Gardner's purse, containing her driver's license, social security card, and gift cards that she intended to give her parents as Christmas gifts. After the men

left, it took Gardner a little while to compose herself such that she could make the 9-1-1 call, which was played for the jury.

Gardner testified that she was the lone clerk working the night shift at the motel that night. She testified that the gun was real and she heard it cock, though Officer Billy Giddens testified that Beham had told him that the gun used in the robbery was fake, but he did not know it at the time, and that he later determined that the gun was “in fact either fake or not operating correctly.” She was “scared to death,” in definite fear for her life, thinking that “there’s a bullet and it’s coming my way, and that’s it.” After the robbery, she continued to work at the motel, but she could no longer work the graveyard shift because she developed obsessive compulsive disorder. Gardner had to move back home with her parents because she reached a point where she “would not sleep for days” and when she did sleep, she had nightmares. She testified that this event changed her life for the worse, and she had “to redo a lot of things” in her life.

Giddens testified that Beham was cooperative and that during his interview, Beham confessed to the crime, identified one of his codefendants, and went with Giddens to help him find her. He testified that Beham admitted to being the man who pointed the gun at Gardner during the robbery. Beham said that he was sorry about the robbery, that he did not mean for anyone to get hurt, claiming he was drunk at the time of the robbery, and that he did it to help his sister with bills and food. Giddens believed that this robbery was related to Beham’s dislike for people telling him what he could not do. On cross-examination, Giddens admitted that Beham had no felony convictions prior to this case.

The photographs from Beham's Facebook page were published to the jury. Beham is making gang sign hand gestures in several of the photographs. The first photograph shows Beham and the words "Money," "Power" and "Respect" on a red background. Another photograph showed Beham sitting at a table that is covered with cash and what appears to be a drug dealer's amount of marihuana. In the final photograph, two unidentified men are posing next to and on top of a car, with Beham standing next to the car pointing a gun at the camera. As described in detail hereinabove, Kirkland testified that in several of Beham's Facebook photographs, he is shown making known gang signs with his hands and wearing a lot of red, a color associated with the Crips gang. Based solely on the Facebook photographs, it was Kirkland's opinion that Beham was holding himself out as a gang member, though he admitted that he had no knowledge or information that Beham was then, or was ever, in a gang or that he participated in gang-related activity.

Spencer Price, a crime scene technician with the Texarkana Texas Police Department, confirmed that Beham is the same person who was convicted in Harris County of theft of over \$50.00, but less than \$500.00, a class B misdemeanor. Price testified that Beham was placed on deferred adjudication community supervision and that if he successfully completed and complied with the terms and conditions, the charge against him would be dismissed, but Beham failed to comply with the terms and conditions, and he was later adjudicated guilty and sentenced to ten days in jail.

Two of the corrections officers at the LaSalle Correctional Facility where Beham was incarcerated awaiting trial testified regarding Beham's behavior while in jail. Cantu testified that

on August 7, 2014, Beham was caught stealing food from the kitchen. Cantu testified that the theft was not committed in a way that endangered persons or property and that while it was a minor offense, offenders having contraband can cause fights among prisoners, though this episode did not. Sumner testified that while another prisoner, Marquavis Finley, was on the telephone, Beham punched him in the face causing a swollen eye. A photograph of Finley taken after the incident was admitted into evidence and published to the jury. Sumner testified that this was a major infraction and that as a result of Beham's repeated behavioral problems, he was placed in administrative segregation, though this was the only time he was transferred into segregation. Sumner admitted that after the fight, Beham showed no resistance, readily admitted his role in the fight, approached prison officers, and placed his hands behind his back.

Beham argued for a five-year sentence, pointing out that he had cooperated with authorities, confessed to the crime, shown remorse, taken responsibility for his actions, and refused to take the stand in his own defense, and arguing that "a young man taking responsibility, admitting what he did to that police officer counts." Even though it was no excuse, Beham further noted that he had been drinking that night, that his sister was having money troubles, and that it was almost Christmas. Beham characterized the jail issues as minor, pointing out that just like in this case, Beham admitted what he did and was cooperative. Kirkland's opinion testimony that Beham was either a gang member or holding himself out to be one was characterized as "ridiculous" because it was based entirely on four "cherry-picked" photographs of a young man with no criminal record. Beham argued that the Facebook photographs were taken out of context, that young people who are not gang members wear certain clothing and mimic hand gestures all the time, and that

teenagers and their friends put all manner of “stupid” things on social media to look tougher or more important than they really are.

In its closing arguments, the State pointed out the harm suffered by Gardner and the seriousness of the offense, but its argument primarily focused on “the type of person Roderick Beham is.” The State argued that Beham did not respect the rules or respect authority, as evidenced by his behavior while in jail awaiting trial and his failure to fulfill the terms of his earlier community supervision, and the State spent about a quarter of its argument referencing the gang evidence, as follows:

And as far as the gang evidence, you heard from Shane Kirkland. Based on all that training and experience that he has in evaluating people and putting together whether or not someone is affiliated or holding themselves out to be in a gang, in his opinion, based on what Roderick Beham was putting out on social media that he is at least portraying himself that he is involved with a gang. That’s the type of person he is. That’s his character that he at least wants people to think he is. You know, the talk about, “Well, people flash signs like that in that hip-hop music. People that like hip-hop music don’t also go commit aggravated robbery. People that wear red don’t also commit aggravated robbery.” But he’s putting it out there and his actions are also showing the type of person he is. So don’t discount that evidence because there’s not definitive proof that we have him on the list of what gang he’s in. This is what he at least wants people to believe. People put stuff on social media that they want to know about them. You put your best pictures out there, you put your pictures of your family. He puts pictures of drugs and money and gang signs. That’s the type of person he is.

Even though he had no prior felony record, confessed to the crime, showed remorse, and cooperated with law enforcement, Beham received a sentence near the middle of the punishment range. As opposed to merely submitting the photographs alone and raising inferences therefrom, the addition of Kirkland’s expert testimony of what Beham held himself out to be gave significant credibility to the State’s attempt to paint Beham as a violent gang member deserving of a severe

sentence even though Kirkland admitted that he had no knowledge or information that Beham was ever actually in a gang. Based on the foregoing and having examined the record as a whole, we are unable to form a fair assurance that the error had a slight or no effect on the jury's punishment decision. *See Motilla*, 78 S.W.3d at 355. Therefore, we sustain this point of error and reverse and remand the case for a new trial on punishment. Due to the ruling on this issue, we need not reach Beham's remaining point of error.

Jack Carter
Justice

Date Submitted: February 22, 2017
Date Decided: May 19, 2017

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