IN THE
TENTH COURT OF APPEALS

No. 10-16-00277-CR

RAY DONALD WASHINGTON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 272nd District Court
Brazos County, Texas
Trial Court No. 11-00946-CRF-272

MEMORANDUM OPINION

In three issues, appellant, Ray Donald Washington, challenges his conviction for theft of property of a value greater than $1,500 but less than $20,000. *See* TEX. PENAL CODE ANN. § 31.03 (West Supp. 2016). Specifically, Washington contends that the trial court erred by: (1) including an instruction on the law of parties in the jury charge; (2) admitting evidence of an extraneous offense; and (3) permitting the State to argue the

jury should consider extraneous-offense evidence for an impermissible purpose. Because we overrule all of Washington's issues on appeal, we affirm.

I. Background

Here, Washington was charged by indictment with:

> unlawfully appropriat[ing], by acquiring or otherwise exercising control over, property, to wit: tires and rims of the value of $1,500 or more but less than $20,000, from Cheryl Staples or Bryan Freightliner, the owner thereof, without the effective consent of the owner, and with intent to deprive the owner of the property.

Also included in the indictment were two enhancement paragraphs referencing Washington's prior felony convictions.

At the conclusion of the evidence, the jury found Washington guilty of the charged offense. After finding the enhancement paragraphs to be "true," the jury assessed punishment at thirteen and one-half years' incarceration in the Institutional Division of the Texas Department of Criminal Justice. The trial court certified Washington's right of appeal, and this appeal followed.

II. The Jury Charge

In his first issue, Washington argues that the trial court erred by instructing the jury on the law of parties when there was no evidence in the record that he could be liable as a party. We disagree.

We review charge error on appeal by determining whether error occurred, and if so, whether that error caused sufficient harm to require reversal. *Ngo v. State*, 175 S.W.3d

738, 743-44 (Tex. Crim. App. 2005). In deciding whether or not to include an instruction on the law of parties in the jury charge, the trial court's task is not to determine whether the State is correct that the defendant is liable under the law of parties. *In re State ex rel. Weeks*, 391 S.W.3d 117, 125 (Tex. Crim. App. 2013). Instead, the trial court's task is simply to determine whether the evidence raises the issue. *Id.* From there, it is within the province of the jury to resolve conflicts in the evidence. *See id.*; *see also Borden v. State*, No. 10-14-00117-CR, 2016 Tex. App. LEXIS 627, at *9 (Tex. App.—Waco Jan. 21, 2016, pet. ref'd) (mem. op., not designated for publication).

Here, the evidence showed that Washington was in possession of tractor-trailer tires stolen from Lone Star Trucking, commonly referred to as the Bryan Freightliner Dealership, when he was pulled over by Deputy Mike Bewley of the Grimes County Sheriff's Office. At the time of the stop, Washington was driving a pickup truck with a trailer that was determined to be stolen from Fort Smith, Arkansas. The stolen tractor-trailer tires were found inside the trailer.

Additionally, the record includes documentation pertaining to Washington's prior federal conviction for "Conspiracy to Transport Stolen Vehicles and Goods in Interstate Commerce."[1] The factual recitals pertaining to the conviction stated the following facts to which Washington stipulated:

> 1. I am one of the coconspirators named in the Indictment. I conspired with other individuals named in the Indictment to steal box trucks,

[1] Washington received a thirty-month sentence as a result of his conviction in federal court.

> tractor trailer trucks, wheels and tires. I joined with those individuals and knowingly agreed and planned with them to accomplish that goal and unlawful purpose.
>
> 2. I have read the indictment and agree that I and my co-conspirators committed the offenses described therein. In summary, we would generally travel from the Houston area to various cities in Texas and also other states and steal vehicles, wheels and tires. We would remove the wheels and tires from 18 wheeler trucks, which were usually in lots at night and then transport them across state lines back to the Houston area, where they were sold to fences who then sold the goods.

Moreover, Detective Mike Fiaschetti of the Grimes County Sheriff's Office testified that he had investigated more than thirty cases involving the theft of tires and wheels and that those thefts usually involve more than one individual. Specifically, Detective Fiaschetti mentioned that:

> Basically what they do is usually it's a two-man or three-man or more operation, and these are big, heavy tires; and usually what happens is they're going to go ahead—they'll either steal the whole 18-wheeler and bring it somewhere and then strip the rims and tires off it or whatever else they want; or they'll strip it right there.

Furthermore, Chris Williams of Lone Star Trucking and Samuel Davis Jr., appellant's expert witness, explained the amount of time and effort required to remove the lug nuts from each tire. They noted that it would take several hours for one person to remove the lug nuts off one tire, especially if one was using a cheater bar, rather than tools powered by an air compressor. Davis further noted that the process of removing tires with a single cheater bar and a battery-operated impact wrench could not be done

in a couple of hours because the 18-volt battery on a DeWalt impact wrench would not last that long.

Based on the foregoing, we conclude that there was some evidence to support the inclusion of the instruction on the law of parties in the jury charge. *See In re State ex rel. Weeks*, 391 S.W.3d at 125. As such, we cannot say that the trial court erred by including the instruction. *See id.*; *Ngo*, 175 S.W.3d at 743-44; *see also Borden*, 2016 Tex. App. LEXIS 627, at *9. We overrule Washington's first issue.

III. Extraneous-Offense Evidence

In his second issue, Washington contends that the trial court erred by admitting evidence of an extraneous offense—namely, his federal conviction for "Conspiracy to Transport Stolen Vehicles and Goods in Interstate Commerce." Washington asserts that this evidence should have been excluded from evidence under Texas Rules of Evidence 403 and 404(b). *See* TEX. R. EVID. 403, 404(b).

A. Texas Rule of Evidence 403

Texas Rule of Evidence 403 provides that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. A review of the record, however, reveals that Washington did not object to the aforementioned extraneous-

offense evidence under Rule 403; rather, he objected to the complained-of evidence under Texas Rule of Evidence 404(b).

To preserve error for appellate review, a complaining party must make a timely and specific objection. *See* TEX. R. APP. P. 33.1(a)(1); *Luna v. State*, 268 S.W.3d 594, 604 (Tex. Crim. App. 2008). Because Washington failed to object to the complained-of extraneous-offense evidence under Rule 403, we conclude that he did not properly preserve this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *see also Luna*, 268 S.W.3d at 604.

B. Texas Rule of Evidence 404(b)

We review the trial court's admission of extraneous-offense evidence for an abuse of discretion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). If the trial court's ruling is within the zone of reasonable disagreement, there is no abuse of discretion. *Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005). A trial court's ruling on the admissibility of an extraneous offense is generally within this zone if the evidence shows that: (1) an extraneous transaction is relevant to a material, non-propensity issue; and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *De La Paz*, 279 S.W.3d at 344. "Furthermore, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial judge gave the wrong reason for his right ruling." *Id.*

Texas Rule of Evidence 404(b)(1) expressly provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of the defendant in order to show he acted in conformity therewith. TEX. R. EVID. 404(b)(1). This rule codifies the common-law principle that a defendant should be tried only for the offense for which he is charged and not for being a criminal generally. *See Rogers v. State*, 853 S.W.2d 29, 32 n.3 (Tex. Crim. App. 1993); *see also Segundo v. State*, 270 S.W.3d 79, 87 (Tex. Crim. App. 2008) (explaining that a defendant is generally to be tried only for the offense charged, not for any other crimes).

Extraneous-offense evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX. R. EVID. 404(b)(2). The list of examples in Rule 404(b)(2) is not exhaustive. *See Prible*, 175 S.W.3d at 731. For example, extraneous-offense evidence may be admissible to demonstrate conduct by a defendant that indicates a consciousness of guilt. *See Torres v. State*, 794 S.W.2d 596, 598 (Tex. App.—Austin 1990, no pet.); *see also Urtado v. State*, 605 S.W.2d 907, 915 (Tex. Crim. App. 1980). An extraneous offense may also be admissible to show identity when identity is at issue in the case, or when the defense cross examines witnesses or alleges that someone else committed the crime. *See Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006); *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). "Whether extraneous[-]offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for

the trial court." *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). The trial court's Rule 404(b) ruling admitting evidence is generally within the zone of reasonable disagreement "if there is evidence supporting that an extraneous transaction is relevant to a material, non-propensity issue." *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011).

C. Discussion

In a prosecution for theft, extraneous-offense evidence may be admissible under section 31.03(c) of the Penal Code, which provides that,

> evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty . . . .

TEX. PENAL CODE ANN. § 31.03(c) (West Supp. 2016). In the instant case, Washington pleaded "not guilty" to the charged offense, thereby putting the issue of intent at issue. *See Tanash v. State*, 468 S.W.3d 772, 775 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("But, section 31.03(c) specifically provides that in cases of theft the defendant puts his intent at issue by pleading 'not guilty.").

At trial and on appeal, Washington contended that the offense for which he was convicted in federal court is distinct from the charged offense in this case. Specifically, in his brief, Washington asserted that:

> Appellant . . . argued the extraneous[-]offense evidence was not admissible because the facts of those offenses were distinct from those of the present case. In those cases[,] the conspirators, working together, would steal the

> entire vehicle and move it to another location where they used air-powered tools to remove the wheels and tires. The tires and wheels were moved in commercial box trucks[,] rather than trailers. Here[,] there was no evidence of air tool use, and the tires were not transported in a box truck.

Contrary to Washington's assertions, the facts in the extraneous offenses are similar to those in this case. Specifically, the federal government charged Washington and another co-conspirator with, among other things, removing tires and wheels from two tractor-trailers located at a Penske Truck Dealership on one occasion. The federal indictment further alleged that Washington and another co-conspirator "loaded the wheels and tires from the two tractor-trailers on a Ford F-350 pickup" that Washington was operating. Additionally, the federal indictment stated that, at a later date, "Defendant RAY WASHINGTON and the other unindicted co-conspirator removed ten tractor-trailer wheels and tires, valued at $6,027.81, from a tractor-trailer truck at Fleet Pride, Corpus Christi, Texas, without permission or authority to do so." Washington and others also stole sixteen additional tractor-trailer tires from a storage facility at Coastal Transport Truck Firm in Corpus Christi. The tires stolen from Coastal Transport and Fleet Pride were later found in a trailer.

As shown above, the facts in Washington's federal case mirror those in this case—that Washington was stopped with stolen tractor-trailer tires from Bryan Freightliner inside a trailer that he was pulling with his pickup truck. Based on the foregoing, we conclude that the extraneous-offense evidence and the charged offense exhibit a high degree of similarity that satisfies the standards for admission under both Texas Rule of

Evidence 404(b) and section 31.03(c) of the Penal Code to show intent. *See* TEX. R. EVID. 404(b); TEX. PENAL CODE ANN. § 31.03(c); *see also Lopez v. State*, 316 S.W.3d 669, 678-79 (Tex. App.—Eastland 2010, no pet.) (concluding that, under section 31.03(c) and Rule 404(b), the trial court did not err in admitting evidence in a theft case arising from a construction contract from other customers showing that appellant took money for work that he never intended to complete). As such, we are not persuaded by Washington's contention that the failure to use air-powered tools and box trucks in the instant case somehow made the evidence in this case so distinct as to be inadmissible. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the complained-of extraneous-offense evidence. *See De La Paz*, 279 S.W.3d at 343. We overrule Washington's second issue.

IV. CLOSING ARGUMENTS

In his third issue, Washington complains about the State's closing argument. Specifically, Washington contends that the State improperly asked the jury to consider his federal conviction for the purpose of showing character conformity.

A. Applicable Law

We review a trial court's rulings on objections to argument for abuse of discretion. *York v. State*, 258 S.W.3d 712, 717 (Tex. App.—Waco 2008, pet. ref'd). Jury argument is limited to: (1) summations of the evidence; (2) reasonable deductions from the evidence; (3) answers to argument of opposing counsel; and (4) a plea for law enforcement. *Guidry*

v. State, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999); *see Cosino v. State*, 503 S.W.3d 592, 603 (Tex. App.—Waco 2016, pet. ref'd). To determine if the prosecutor made an improper jury argument, we must consider the entire argument in context—not merely isolated instances. *See Rodriguez v. State*, 90 S.W.3d 340, 364 (Tex. App.—El Paso 2001, pet. ref'd). An argument that exceeds these bounds is error, but only reversible error if, in light of the record as a whole, the argument is extreme or manifestly improper, violates a mandatory statute, or injects into the trial new facts that are harmful to the accused. *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992).

B. Discussion

During closing argument, the following exchange took place:

[The State]: Now, what the Defense is going to argue to you is just because he had those tires doesn't make him guilty; and that's where you look at all of the other evidence. This isn't a mere presence, and I use that word because that's what's in your jury charge.

Mere presence alone does not constitute one a party to the offense. Absolutely right. The Defendant was not merely present. The Defendant was an active participant in this theft. The Defendant was involved in stealing those tires from Bryan Freightliner, and his goal was to get them to Houston, which you know is true because that's what he does.

[Defense counsel]: Objection to improper argument.

THE COURT: Overruled.

[The State]: You know that he's done this before, and that gives him the knowledge of what he was doing. So he's not

> merely present. He was acting with others who just didn't happen to get caught. . . .

On appeal, Washington's complaint about the State's closing argument is premised on a favorable finding in issue two—that evidence of his prior federal conviction was inadmissible. We have rejected this contention and, thus, concluded that the complained-of extraneous-offense evidence was admissible. *See* TEX. R. EVID. 404(b); *see also* TEX. PENAL CODE ANN. § 31.03(c). Therefore, based on our review of the record, we conclude that the complained-of closing argument by the State was a reasonable deduction from the evidence and a summation of the evidence. *See Guidry*, 9 S.W.3d at 154; *see also Cosino*, 503 S.W.3d at 603. Indeed, throughout the trial, the State used Washington's prior federal conviction to show that he had previously committed a similar offense and, thus, had knowledge that the tractor-tires in the trailer were stolen. *See* TEX. R. EVID. 404(b); TEX. PENAL CODE ANN. § 31.03(c); *see also Rodriguez*, 90 S.W.3d at 64 (noting that we must consider the entire argument in context to determine if the argument is improper). Accordingly, we cannot say that the trial court abused its discretion in denying Washington's objection to the State's closing argument. *See York*, 258 S.W.3d at 717; *see also Guidry*, 9 S.W.3d at 154; *Cosino*, 503 S.W.3d at 603. We overrule his third issue.

V. CONCLUSION

Having overruled all of Washington's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed September 13, 2017
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