NO. 12-15-00302-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

NICHOLAS SANCHEZ, JR., APPELLANT	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Nicholas Sanchez, Jr., appeals his conviction for sexual assault of a child. Appellant raises two issues on appeal. We affirm.

BACKGROUND

While conducting a theft investigation alleged against the victim at a high school, the school resource officer discovered that the victim, a fourteen year old female, was pregnant. Upon further investigation, the authorities learned that Appellant was the father. Appellant was arrested and indicted for sexual assault of a child. The indictment alleged that Appellant caused the penetration of the victim's sexual organ, enhanced to the punishment level of a first degree felony due to Appellant's prior conviction of engaging in organized criminal activity.[1]

Appellant pleaded "guilty" to the offense and "true" to the enhancement allegation, but elected to have a jury trial on punishment. At the conclusion of voir dire, Appellant filed a ***Batson*** motion, alleging that the State exercised its peremptory strikes on the basis of ethnic discrimination.[2] After a hearing, the trial court overruled Appellant's motion. During the punishment trial, the trial court admitted evidence of Appellant's gang affiliation over his

[1] *See* TEX. PENAL CODE ANN. §§ 12.42(b) (West Supp. 2016); 22.011(a)(2)(A), (e)(2)(A) (West 2011).

[2] *See* ***Batson v. Kentucky***, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986).

objection. After the trial, the jury sentenced Appellant to imprisonment for fifty years. This appeal followed.

BATSON MOTION

In his first issue, Appellant argues that the trial court erred in overruling his ***Batson*** motion.

Standard of Review and Applicable Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids a party from challenging potential jurors on the basis of their race. U.S. CONST. amend. XIV; ***Batson v. Kentucky***, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986). It also prohibits exclusion of Hispanics based on their ethnicity. *See* ***Hernandez v. Texas***, 347 U.S. 475, 477–78, 74 S. Ct. 667, 670, 98 L. Ed. 866 (1954); ***Wamget v. State***, 67 S.W.3d 851, 854 (Tex. Crim. App. 2001).

A trial court follows a three step process to evaluate a claim that a litigant has made a peremptory strike based on ethnicity. ***Snyder v. Louisiana***, 552 U.S. 472, 476, 128 S. Ct. 1203, 1207, 170 L. Ed. 2d 175 (2008). First, a defendant must make a prima facie showing that the state has used a peremptory challenge to remove a potential juror on account of ethnicity. ***Id.***; ***Purkett v. Elem***, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834 (1995). A defendant may establish a prima facie case solely on evidence concerning the state's exercise of peremptory challenges at trial. ***Batson***, 476 U.S. at 96, 106 S. Ct. at 1723. He also must show that these facts and any other relevant circumstances raise an inference that the state has excluded potential jurors from the petit jury based on ethnicity. *See* ***id.***

Once the defendant has made this prima facie showing, the burden shifts to the state to come forward with an ethnically neutral explanation for challenging the jurors. ***Snyder***, 552 U.S. at 476–77, 128 S. Ct. at 1207; ***Batson***, 476 U.S. at 97–98, 106 S. Ct. at 1723–24. If the state offers ethnic neutral reasons for the strikes, the burden shifts back to the defendant to show that the state's explanations for the strikes are contrived or a pretext to conceal an ethnically discriminatory intent. *See* ***Shuffield v. State***, 189 S.W.3d 782, 785 (Tex. Crim. App. 2006); ***Jasper v. State***, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). The credibility of a prosecutor who offers ethnically neutral explanations for disparate striking of jurors can be measured by (1) the prosecutor's demeanor, (2) how reasonable or how improbable the explanations are, and (3)

whether the proffered rationale has some basis in accepted trial strategy. *See* ***Miller–El v. Cockrell***, 537 U.S. 322, 339, 123 S. Ct. 1029, 1040, 154 L. Ed. 2d 931 (2003). But those factors are not exclusive, and we examine all relevant factors when evaluating the prosecutor's explanations for strikes that are alleged to be pretextual. *See* ***Miller–El v. Dretke***, 545 U.S. 231, 253, 125 S. Ct. 2317, 2332, 162 L. Ed. 2d 196 (2005) (examining actual strikes, use of jury shuffle, disparity in questioning, and history of excluding racial minorities from juries).

We will disturb a trial court's ruling on a ***Batson*** motion only if it is "clearly erroneous." ***Snyder***, 552 U.S. at 477, 128 S. Ct. at 1207; ***Guzman v. State***, 85 S.W.3d 242, 254 (Tex. Crim. App. 2002). Generally, a fact finder's decision is clearly erroneous when it leaves an appellate court with a "definite and firm conviction that a mistake has been committed." ***Guzman***, 85 S.W.3d at 254. We review the evidence in the light most favorable to the trial court's ruling and afford great deference to that ruling. ***Jasper***, 61 S.W.3d at 422. Furthermore, a claim that the proffered ethnically neutral reasons for strikes are pretextual presents a question of fact, and the trial court is in the best position to evaluate such claims. *See* ***Watkins v. State***, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008); ***Gibson v. State***, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004). The ultimate plausibility of an ethnic neutral explanation is to be considered in the context of whether the defendant has satisfied his burden to show that the strike was the product of the prosecutor's purposeful discrimination. ***Watkins***, 245 S.W.3d at 447.

Discussion

Appellant challenged the use of the State's peremptory strikes on two potential jurors, Juror 5 and Juror 13, alleging that the strikes were based on their ethnicity.[3] Appellant and the two potential jurors are of Hispanic ethnicity. Appellant pointed out that, within the strike zone, only one of the three Hispanic potential jurors was not stricken or dismissed for cause. The trial court found that Appellant made a prima facie showing of ethnic discrimination, shifting the burden to the State to provide an ethnic-neutral explanation for striking those two potential jurors.

The prosecutor explained that he struck Juror 5 because of his age, he had no children, and he did not complete his juror card. The prosecutor stated that his card was "significantly incomplete." Our review of the card confirms that he failed to answer several questions on the

[3] Appellant initially included a third panel member as part of his ***Batson*** motion, who was a woman with a Hispanic surname. However, Appellant withdrew his challenge regarding that juror because she identified herself as "white" on her juror information card.

card, including simple questions such as his county of residence. As to Juror 13, the State contended that it struck him because of his age and apparent lack of children. The prosecutor specifically explained that the two jurors were young and did not have children, and in his experience, such jurors did not make good State's jurors in cases involving a child victim. The prosecutor also mentioned that he considered striking Juror 30, a Hispanic female, for being a "little young," but decided not to because she was a teacher assistant who had one child.

The State did not exercise strikes on three other individuals who were childless, Jurors 28, 33, and 34. The prosecutor indicated that he did not strike Juror 28 because he was in his forties and had no children, and if given a choice between a younger juror with no children and an older juror with no children, he would prefer that the older person served on the jury. Even though not challenged by Appellant as similarly situated, the prosecutor explained further that he did not strike Juror 33, because even though he had no children, he was sixty-eight years old. The prosecutor's reasons for not striking Juror 34, who also had no children, was that she was an accountant, who in his experience, are "rule-followers, so we typically like to leave bookkeeping and accounting-type people on juries."

Appellant's attorney then asked the prosecutor why he did not strike Juror 41, who actually served on the jury. The prosecutor indicated that although Juror 41 did not have children, she was fifty-eight years old, and consistent with the rationale provided as to Jurors 28 and 33, the State would prefer an older childless juror over a younger childless juror. The prosecutor also explained that he struck Jurors 10, 26, and 31, who are white males with no children and are in their twenties and early thirties.

After this questioning by Appellant's attorney, Appellant simply argued that the prosecutor failed to show that his reasons for striking the jurors were ethnically neutral. Appellant made no attempt to debunk the reasonableness of the explanations or explain how the State's reasons were not related to accepted trial strategy. Youth and the lack of children have been held to be ethnically neutral reasons for exercising a peremptory strike. *See* ***Moore v. State***, 265 S.W.3d 73, 87 (Tex. App.—Houston [1st Dist.] 2008), *pet. dism'd, improvidently granted*, 286 S.W.3d 371 (Tex. Crim. App. 2009) (per curiam) (lack of children); ***Moss v. State***, 790 S.W.2d 731, 732 (Tex. App.–Houston [14th Dist.] 1990, no pet.) (youth).

The prosecutor did not ask Juror 5 and Juror 13 any questions to address any concerns with either of them serving on the jury. Appellant argues that this fact, along with the fact the

that the State used its strikes to remove two out of three Hispanics within the strike zone, show that the State's reasons for striking them were pretextual. While a lack of meaningful questioning is a factor to consider in determining whether the trial court's ruling was clearly erroneous, it is not determinative. *See* ***Johnson v. State***, 959 S.W.2d 284, 290–91 (Tex. App.—Dallas 1997, pet. ref'd). The trial court was able to personally observe the proceedings. Therefore, we defer to the trial court's assessment of the prosecutor's credibility in explaining his reasoning. Likewise, we recognize that a statistical analysis of the State's strikes is relevant. *See* ***Dretke***, 545 U.S. at 241, 125 S. Ct. at 2325. Although the State struck two of the three Hispanic jurors within the strike zone, it also struck three young white males without children. The prosecutor did not ask questions of any of these jurors pertaining to their youth or lack of children, irrespective of their race or ethnicity. Finally, the State did not exercise a strike on the third Hispanic juror within the strike zone, a Hispanic woman with a child.

After reviewing the record, we conclude that Appellant failed to carry his burden to rebut the State's explanation or to establish that the reasons were merely a pretext for purposeful discrimination. *See* ***Ford v. State***, 1 S.W.3d 691, 694 (Tex. Crim. App. 1999). The facially plausible reasons articulated by the State were not contradicted. Accordingly, we are not left with a "definite and firm conviction that a mistake has been committed" and cannot conclude that the trial court's ruling was clearly erroneous. *See* ***Hill v. State***, 827 S.W.3d 860, 865 (Tex. Crim. App. 1992).

Appellant's first issue is overruled.

ERRONEOUS ADMISSION OF EVIDENCE

In his second issue, Appellant contends that the trial court abused its discretion in admitting evidence regarding Appellant's gang affiliation and related crimes.

Standard of Review and Applicable Law

Generally, we review a trial court's decision to admit evidence under an abuse of discretion standard. *See* ***Martin v. State***, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. ***Willover v. State***, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling admitting evidence unless that ruling

falls outside the zone of reasonable disagreement. *See* ***Burden v. State***, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001).

Under the Texas Rules of Evidence, relevant evidence is generally admissible. TEX. R. EVID. 402. Under article 37.07, section 3(a) of the Texas Code of Criminal Procedure, which governs the admissibility of evidence during the punishment phase of a noncapital trial, evidence may be offered by either party

> 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, and 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[.]

TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (West Supp. 2016).

Texas allows the admission of a defendant's gang ties and gang-related activity during punishment, as gang membership is relevant because it relates to his character. *See* ***Beasley v. State***, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995); ***Ho v. State***, 171 S.W.3d 295, 305 (Tex. App.–Houston [14th Dist.] 2005, pet. ref'd). The types of activities in which the gang is involved must be presented to the factfinder so that it may determine if the defendant's gang membership is a positive or negative trait. ***Beasley***, 902 S.W.2d at 456. If the gang is involved in misconduct or illegal activity, it is not necessary to link the defendant to bad acts so long as the factfinder is (1) provided with evidence of the defendant's gang membership, (2) provided with evidence of the gang's character and reputation, (3) not 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. Even if a defendant is no longer affiliated with the gang at the time of the offense, evidence that he was a gang member is relevant, and therefore admissible, because it relates to his character. ***Ho***, 171 S.W.3d at 305.

However, even relevant evidence otherwise admissible under article 37.07 is subject to exclusion if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. TEX. R. EVID. 403; ***Rogers v. State***, 991 S.W.2d 263, 266–67 (Tex. Crim. App. 1999). Rule 403 favors the admission of relevant evidence and presumes that relevant

evidence is more probative than prejudicial. ***Martinez v. State***, 327 S.W.3d 727, 737 (Tex. Crim. App. 2010). Rule 403 requires both trial and reviewing courts to analyze and balance (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational, yet indelible, way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. *See* ***Erazo v. State***, 144 S.W.3d 487, 491–92 (Tex. Crim. App. 2004).

In general, a claim is preserved for appellate review only if (1) the complaint was made to the trial court by a timely and specific request, objection, or motion, and (2) the trial court either ruled on the request, objection, or motion, or refused to rule, and the complaining party objected to that refusal. TEX. R. APP. P. 33.1(a); ***Geuder v. State***, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). An objection should be made as soon as the ground for objection becomes apparent. ***Dinkins v. State***, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995).

Discussion

Detective Chris Miller, a gang expert, testified that Appellant has been identified as a member of the North Side Crips, also known as El Norte, a criminal street gang in Tyler, Texas. First, according to Detective Miller, Appellant was convicted of a gang-related offense, resulting in the entry of his name in a database of known gang members. Second, Appellant admitted to a police officer in another case, whose report was admitted into evidence, that he was a member of the North Side Crips. Third, the trial court admitted photographs of Appellant's tattoos, which according to Detective Miller, were associated with Appellant's gang membership. Detective Miller explained the meaning of each tattoo, at least one of which identified Appellant as a member of the North Side Crips. Detective Miller testified that the gang remains active in the Tyler area, and stated that it continues to conduct illegal activities such as murder, assault, drug trafficking, and burglary, among other offenses. This evidence satisfies the test articulated in ***Beasley***, and is therefore generally relevant evidence of Appellant's character in the punishment phase of his trial.[4] *See* ***Beasley***, 902 S.W.2d at 456.

Detective Miller also testified that Appellant was a member of a prison gang. Appellant appears to argue in his brief that Detective Miller is not qualified to testify as a prison gang expert. However, in his brief, he does not provide citations to relevant authorities or otherwise expound upon this allegation. Furthermore, Appellant did not object to Detective Miller's

[4] Appellant does not challenge the requirements in ***Beasley*** that the factfinder must not be asked to determine if the defendant committed the bad acts or misconduct, and is only asked to consider the reputation or character of the accused.

testimony on this ground in the trial court. Therefore, Appellant has waived our consideration of this complaint. *See* ***Martinez v. State***, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000).

Appellant also argues that Detective Miller was not able to testify as to when Appellant was first listed as a member of a Tyler criminal street gang, nor why he was not eliminated from the gang database after the passage of time. Appellant argues that this contradicted earlier testimony from the victim that Appellant was not in a gang during his relationship with her. However, our review of the record shows that Appellant's attorney asked the victim whether she knew if Appellant was involved in any gang activity while she knew him. She replied, "No." That exchange establishes only that the victim did not know whether he was in a gang, and does not necessarily negate Appellant's gang membership or activity. Moreover, the victim's own testimony was unclear, because earlier in her testimony, she testified that she knew Appellant was a member of a gang at the time she became involved with him. She also stated that Appellant encouraged her to get out of the gang lifestyle at some point. In any event, even if Appellant was no longer an active gang member, it is still relevant evidence of his character during the punishment phase of trial. *See* ***Ho***, 171 S.W.3d at 305.

Next, Appellant argues that even if relevant, the trial court should have excluded evidence of his gang membership under Texas Rule of Evidence 403. Specifically, Appellant argues that the State's need for the evidence was negligible, because he had already pleaded "guilty" to the offense and "true" to the enhancement. He also contends that this evidence likely caused confusion of the issues, because it distracted the jury from the main issues in the case by focusing on Appellant's actions during different, unrelated transactions. But Appellant's involvement in a criminal street gang provides relevant evidence of his character and the jury was entitled to know of Appellant's prior crimes and gang involvement when assessing his sentence. *See* ***Beasley***, 902 S.W.2d at 456. Also, as we described above, in order to prove the relevance of his gang involvement, the State must offer evidence that Appellant was a member of the gang and describe the illicit activities conducted by the gang. *See* ***id.*** Appellant's entry in the gang database, his tattoos, admissions of gang membership, and prior gang-related offenses provide probative evidence of his gang membership. Although this type of evidence is highly prejudicial, it is only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value that Rule 403 bars its admission. *See* ***Young v. State***, 283 S.W.3d 854, 877 (Tex. Crim. App. 2009).

We cannot say that the prejudice is unfair, especially since Appellant appeared to contest his gang membership, or at least establish that he was no longer a gang member. He likely employed this strategy in hopes of gaining sympathy from the jury, and consequently, a reduced sentence. The State was entitled to counter this defense with evidence of Appellant's gang membership for the relevant purpose of proving his character. *See* ***Villarreal v. State***, No. 04-13-00553-CR, 2015 WL 1939284, at *10 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op., not designated for publication) (holding evidence of defendant's gang membership was admissible over Rule 403 objection where defendant denied gang member status).

Appellant is correct that the evidence in the punishment phase likely negatively impacted the jury's view of him, but he has not shown how any of this evidence caused unfair prejudice, which is necessary for exclusion of evidence under Rule 403 of the Rules of Evidence. *See* TEX. R. EVID. 403. Therefore, we cannot conclude that the trial court abused its discretion in admitting evidence of Appellant's gang membership.

Appellant's second issue is overruled.

DISPOSITION

Having overruled Appellant's two issues, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered March 22, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 22, 2017

NO. 12-15-00302-CR

NICHOLAS SANCHEZ, JR.,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th District Court
of Smith County, Texas (Tr.Ct.No. 007-1302-15)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.