



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

PD-0669-14

THOMAS HENRY SINCLAIR, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE TENTH COURT OF APPEALS
NAVARRO COUNTY

Per curiam.

OPINION

Appellant struck a patron with a whip during an altercation at appellant's nightclub. The patron ultimately died. Appellant was charged with various offenses arising from the incident. The trial court granted appellant's pretrial request for notice of extraneous offense and bad act evidence. At a pretrial hearing on September 2, 2011, the State indicated that it would not be offering any such evidence. On October 17, 2011, the first day of voir dire, the State filed a written notice stating that it intended "to introduce evidence that Defendant has, on occasions other than the charged offense, assaulted people with a whip" at the club. No further details were provided. On October 21, 2011, the trial court held a hearing outside the presence of the jury to

address the issue. The State called Jeffery Ballew. Ballew, the D.J. at appellant's club, had become involved in the altercation between appellant and the patron, and was charged as a defendant in a separate case. As part of a plea bargain agreement, Ballew was slated to testify against appellant. At the hearing, Ballew testified that appellant had used his whip on another patron at the club a little more than a year before the instant offense. Appellant objected to the admission of Ballew's extraneous act testimony because it was untimely and highly prejudicial. The prosecutor stated that Ballew had informed them of the extraneous act the morning of voir dire and they provided notice immediately. The trial court overruled appellant's objections and Ballew testified at guilt/innocence, consistent with his pretrial testimony.

On appeal, appellant complained about the trial court's ruling on the ground that the State's notice of the extraneous act evidence was untimely under Rule of Evidence 404(b). After outlining the sequence of events, the court of appeals disposed of appellant's claim in a single conclusory paragraph:

Prior to Ballew's testimony on October 21, 2011, the trial court held a hearing outside the presence of the jury. Sinclair argued that the evidence was untimely and highly prejudicial. The State indicated that Ballew had informed them of the act on the morning of voir dire and that they provided notice at that time. Sinclair did not request a continuance. Ballew's testimony was admitted several days after the State provided notice. Sinclair testified at trial and denied committing the act, and he produced a photograph from the security camera concerning the prior act. The trial court did not abuse its discretion in allowing Ballew's testimony.

Sinclair v. State, No. 10-11-00424-CR slip op. at 6-7 (Tex. App.–Waco April 24, 2014)(not designated for publication).

Appellant has filed a petition for discretionary review and contends in part that the court

of appeals provided no analysis and did not cite any authority in overruling his issue. We agree.

We grant appellant's petition for discretionary review, vacate the judgment of the court of appeals, and remand this case to that court to reconsider the issue.

DELIVERED September 24, 2014

DO NOT PUBLISH