In the Court of Criminal Appeals of Texas

No. PD-1089-20

CHARLES LYNCH,

Appellant,

v.

THE STATE OF TEXAS

On State's Petition for Discretionary Review
From the First Court of Appeals
Galveston County

YEARY, J., filed a concurring opinion.

The court of appeals reversed Appellant's conviction for possession with intent to deliver between 4 and 200 grams of cocaine, holding that the trial court erred to admit extraneous offense evidence

under Rule 403 of the Texas Rules of Evidence. *Lynch v. State*, 612 S.W.3d 602, 611, 614, 616 (Tex. App.—Houston [1st. Dist.] 2020); TEX. R. EVID. 403. Today the Court rightly reverses the court of appeals' judgment, but it does so while addressing an issue the court of appeals did not purport to address. Specifically, the Court today holds that the extraneous offense evidence was admissible under Rule 404(b) of the Rules of Evidence. TEX. R. EVID. 404(b). *See* Majority Opinion at 15–17. But the court of appeals assumed, without deciding, that Rule 404(b) was satisfied, so—strictly speaking—that precise issue is not in the case as it comes before this Court.

I. BACKGROUND

A. At Trial

Appellant was charged with the first-degree felony offense of possession of cocaine with intent to deliver. TEX. HEALTH & SAFETY CODE § 481.112(d). The evidence at trial showed that the police, in executing a search warrant, discovered a deliverable quantity of crack cocaine on the dresser in the only bedroom of Appellant's small, converted garage apartment, and some of it was on top of his cell phone on the dresser. Thus, the evidence was plainly sufficient to affirmatively link him to the contraband.

But during the presentation of defensive evidence after the State had rested its case, Appellant's part-time live-in companion, Tina Moreno, testified that it was she who had brought the cocaine into the apartment, unbeknownst to Appellant. She claimed that she had placed the cocaine on the dresser while Appellant was out, that Appellant had not arrived home until shortly before the police executed their search

warrant, and that he had not been back in the bedroom before the search revealed the presence of the cocaine. In this way, Appellant presented evidence that he did not knowingly possess the cocaine—that, indeed, he did not really "possess" the cocaine at all, having been unaware that it was even there. *See* TEX. PENAL CODE § 1.07(39) ("'Possession' means actual care, custody, control, or management.").

In rebuttal of this defensive evidence, the State offered two penitentiary packets that showed Appellant had been twice convicted in the past for possession of cocaine with intent to deliver. Both convictions occurred in 2006, for one offense that was committed in 2004, and then another committed in 2006. The State's theory of relevance was simple: As between Appellant and his companion, Moreno, Appellant's prior history of trafficking in cocaine made it more likely than it would otherwise be that the deliverable amount of cocaine found in his bedroom on the charged occasion was *his* rather than *hers*. Stripped down, this is plainly an inference that does not rely on character conformity for its probative value.[1]

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[1] Moreno was called to testify by the defense. On direct examination by defense counsel, in addition to testifying that the cocaine found in Appellant's house belonged to her and not to Appellant, she agreed that she was a crack addict and that, behind Appellant's back, she was "using and possibly selling drugs[.]" This claim presented a powerful reason for the jury to reject the State's position that the cocaine—which was found in Appellant's own bedroom—belonged to him and to conclude instead that, as between the two of them, the drugs likely belonged to, and were brought into the house by, Moreno. The State's need to rebut this suggestion was strong.

During the State's cross-examination of Moreno, she admitted to having a number of prior convictions, which themselves had a tendency to reflect poorly on her character for truthfulness. *See* TEX. R. EVID. 609(a)(1) (prior convictions for felony offenses or crimes of moral turpitude are admissible to impeach a witness's character for truthfulness). But those convictions were for

B. On Appeal

Nevertheless, the court of appeals held that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice—as a matter of law—under Rule 403. *Lynch*, 612 S.W.3d at 614. It reasoned that, because the penitentiary packets gave no *details* of the prior possession-with-intent-to-deliver cases, there was no showing of similarity between the charged offense and the prior offenses. *Id*. at 611–12. Moreover, according to that court, the prior offenses were committed in 2004 and 2006, whereas the charged offense occurred in 2015; so, in the court of appeals' view, the prior offenses were too remote in time to have been of much probative value. *Id*. at 611.

The court of appeals perceived that, under these circumstances, there was too great a danger that the jury would consider the evidence of Appellant's prior offenses for the impermissible character-driven inference that he committed the instant offense only because it is squarely within his character to commit such offenses. *Id*. at 612–13. It

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a number of thefts and a robbery. While she admitted to also having been arrested once for possession of marijuana, that charge was dropped, and she had no drug-related convictions. She also later claimed that she sometimes purchased cocaine in quantities greater than she needed for her own personal use so that she could "make some of my money back. That's what I do."

In this light, Appellant's prior convictions for possession of cocaine was strong rebuttal evidence. It tended powerfully to rebut the implication left by Moreno's testimony that, as between Appellant and Moreno, the cocaine found in Appellant's home likely belonged to her. In the absence of that rebuttal evidence, there was a high risk that the jury would choose to find Moreno culpable and to remain unpersuaded of Appellant's guilt. But with the knowledge that, while Moreno had many convictions suggesting moral turpitude, none of them were for drug related offenses, and that, in contrast, Appellant had his own—actually cocaine-related—drug convictions, the jury was much better equipped to evaluate the veracity of Moreno's claims.

concluded that to admit evidence of the prior convictions under these circumstances was "a clear abuse of discretion." And it reached that conclusion even while purporting to apply the highly deferential standard for reviewing trial court determinations of admissibility under Rule 403, which prohibits appellate courts from overturning trial court rulings that are "within the zone of reasonable disagreement." *Id*. at 610, 614.

Here is what the court of appeals did *not* say in its opinion: The court of appeals offered no opinion about whether the extraneous prior offense evidence was admissible under Rule 404(b); it instead assumed—for the sake of argument—that the evidence was relevant for some non-character-conformity purpose in order to address the admissibility of the evidence under Rule 403. *Id*. at 611; TEX. R. EVID. 403.[2] It did not, as the Court does today, undertake any analysis of whether Rule 404(b) was satisfied.[3]

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[2] That Rules 404(b) and 403 present distinct appellate issues was underscored in *Montgomery v. State*, 810 S.W.3d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g on Court's own motion). There the Court observed that, once a Rule 404(b) objection has been leveled and overruled, it is incumbent upon the opponent of the evidence, "in view of the presumption of admissibility of relevant evidence, to ask the trial court to exclude the evidence by its authority under Rule 403, on the ground that the probative value of the evidence, assuming it is relevant apart from character conformity, is nevertheless substantially outweighed by, e.g., the danger of unfair prejudice." *Id*.

[3] The court of appeals did not render a decision with respect to the Rule 404(b) issue. In petitions for discretionary review, this Court should ordinarily limit its review to the "decisions" of the courts of appeals. *E.g.*, *Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014) ("As a general proposition, this Court will review only the 'decisions' of the courts of appeals."). I will only briefly address that issue in this concurring opinion because the Court does.

II. ANALYSIS

A. Rules 401 and 404(b)

The State's theory of logical, non-character-conformity relevance for the extraneous offenses in this case was to rebut the testimony of Moreno that the deliverable amount of cocaine found on the dresser in the bedroom of the small apartment belonged exclusively to her, and that Appellant was unaware it was even there. Evidence of Appellant's history of convictions for possession of deliverable quantities of cocaine in the past makes this defensive testimony less "probable" than it would be absent that evidence. It is therefore *relevant* under Rule 401. *See* TEX. R. EVID. 401(a) ("Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence[.]").

Moreover, the logic of this inference derives independently from any inference of action in conformity with *character*. And while it may incidentally *also* support a character-conformity inference, its tendency to do so is a matter for consideration in the Rule 403 analysis, not the Rule 404(b) analysis. It is no surprise, then, that the court of appeals in this case was more disposed to *assume* that the evidence was relevant under Rule 401, and that it was relevant for a purpose beyond its character-conformity value, under Rule 404(b), and *then* to proceed, based on that assumption, to determine its admissibility under Rule 403. *Lynch*, 612 S.W.3d at 611. That should define and circumscribe the scope of our discretionary review here.

B. Rule 403: Similarity

The court of appeals was mistaken to conclude that a high level of similarity must be shown for the State's non-character-conformity-

based theory of relevance in this case to be established. As Professor Imwinkelried has explained, at least as a general proposition when assessing the admissibility of extraneous offenses under Rule 404(b), "[t]he test should be logical relevance rather than similarity. The better view is that the judge should demand proof of similarity only if the proponent's theory of logical relevance assumes similarity." 1 Edward J. Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE § 2:13, at 2-100–2-101 (2015).

The inference that the cocaine in this case was more likely to have been Appellant's than Moreno's does not depend upon such a high level of similarity for its logical relevance. The question is simply this: As between Appellant and Moreno, which one is the more likely to have put the deliverable quantity of cocaine on his dresser? A high degree of similarity between the extraneous incidents of possession with intent to deliver and the present offense would not have enhanced their probative value to serve the State's purpose. All that was necessary in this case to make the inference work—that Appellant more likely possessed the cocaine than Moreno—was to show that Appellant was found to have possessed deliverable quantities of cocaine on past occasions.

Indeed, penitentiary packets were an optimal way to establish those prior convictions, devoid though they may have been of any details of the prior possession offenses. Details are not necessary to the inference, and unnecessary details might have raised the risk that the evidence would be substantially more prejudicial than probative for purposes of a Rule 403 admissibility determination. *See Old Chief v. United States*, 519 U.S. 172, 186, 191 (1997) (where evidentiary detail is

not strictly necessary to establish the relevance of extraneous misconduct evidence, for the Government to admit it anyway could render it substantially more prejudicial than probative for purposes of Federal Rule of Evidence 403) (citing FED. R. EVID. 403).

C. Rule 403: Remoteness

The court of appeals was also mistaken to think that the remoteness of Appellant's prior convictions necessarily supports a conclusion that they were substantially more prejudicial than probative under Rule 403. Even if the convictions were for offenses committed approximately ten years before the charged offense, they still stand as some evidence that would tend to lead a rational jury to prefer the theory that Appellant possessed the drugs on the charged occasion to the theory that Moreno exclusively possessed them, utterly unbeknownst to him. I agree with the State that the fact that Appellant was in prison for most of the time between the prior offenses and the charged offense ameliorates any adverse impact on the logic of the inference due to "remoteness." The fact that the pause in Appellant's demonstrated history for possessing deliverable amounts of cocaine can be attributed to his sojourn in the penitentiary serves to explain the temporal gap in a way that shores up the logic of the non-character-conformity inference. Under these circumstances, I cannot conclude that the trial court exceeded the "zone of reasonable disagreement" when it decided, in the exercise of its sound discretion, that the evidence at issue here should be admitted over Appellant's Rule 403 objection.

D. Rule 403: More Prejudicial Than Probative?

Because it believed Appellant's prior offenses were not shown to be sufficiently similar to the charged offense, and because of their remoteness, the court of appeals concluded that the prior offenses had too great a potential to lead the jury to the impermissible character-conformity inference instead of understanding the evidence to support its legitimate purpose: to rebut Appellant's defensive theory. *Lynch*, 612 S.W.3d at 612–13. It quoted part of the prosecutor's final argument to show that the State invited the jury to draw the impermissible inference. *Id*. at 612. But what the prosecutor urged the jury to draw from the evidence of Appellant's prior possession convictions was the precise non-character-conformity inference that it logically, and legitimately, supported: that Appellant's history of possessing deliverable amounts of cocaine makes it unlikely Moreno alone possessed the cocaine in this case.[4] This was not an invitation to draw an inference of guilt solely from

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[4] When, during the State's rebuttal, the trial court permitted the introduction of the penitentiary packets, it instructed the jury: "This evidence may not be considered as character evidence of the Defendant; and it may not be used as evidence that on this particular occasion, the Defendant acted in accordance with that alleged character trait, if any." During his summation, the prosecutor explained to the jury:

> . . . I'm sure you're asking yourself, "Well, if the Judge gave me those instructions on how I can't use it, why -- the previous convictions on [Appellant] -- why did the State bring me that?
>
> Well, the reason why I entered that was because Ms. Moreno gets on the stand and pretty much says, "Hey, I ran this whole operation under his nose. He had no knowledge, no intent. He wouldn't go for that. Pretty much, he's a saint. He doesn't want any of that in his house.
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> So to rebut that, I brought you: Well, he's not above having cocaine in his possession; and, in fact, cocaine, with possession and the intent to deliver. The same exact reason why we're here today.

Appellant's apparent character as a criminal in general. Rather, it refuted an affirmative defensive claim with precisely germane information about Appellant's criminal past.

E. Rule 403: Deference Owed to the Trial Court

The trial court was present to hear all of the evidence and was in a far better position than any appellate court to gauge the relative strength of the various facets of the State's case. And, from that perspective, the trial court apparently believed that the State's need to rebut the defensive theory with more than just cross-examination of the witness was compelling enough to justify its admission, whether the jury might have convicted without that evidence or not.[5] The court of appeals lacked the trial court's unique perspective on the issue.

That is precisely why appellate courts should not be in the business of triple-guessing a *trial court's* evaluation of a *prosecutor's*

The court of appeals was mistaken to describe this as an invitation to infer guilt purely as a function of consistency with Appellant's character. Rather, it was a description of the very inference for which the evidence was legitimately offered, *apart* from its tendency to support a character-conformity inference: that, from Appellant's past history of possession of cocaine in deliverable amounts, the jury could reject Moreno's account that Appellant had no awareness of a deliverable quantity of cocaine on the day of the charged offense.

[5] Moreno's testimony—taking sole responsibility for possessing the cocaine—constituted a classic statement against penal interest. Such statements, when they arise out of court, carry sufficient indicia of reliability that the Rules of Evidence regard them as potentially admissible even over a hearsay objection. TEX. R. EVID. 803(24). The State needed the evidence of Appellant's prior convictions, the trial court could have reasoned, among other things, to counteract whatever tendency there may have been for the jury to credit Moreno's self-damning claims.

assessment of how much evidence will be necessary to satisfy a particular jury *to a level of confidence beyond a reasonable doubt*. The court of appeals' reasons for declaring the evidence to be substantially more prejudicial than probative *might* have supported a decision on the trial court's part to *exclude* the evidence—had *that* been its decision. But the trial court decided otherwise, as was its prerogative.

Rule 403 "favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g on court's own motion). Moreover, "trial courts should favor admission in close cases," in keeping with this presumption. *Id*. As arbiter of such questions at the trial level, "the trial court must be given wide latitude to exclude, or, particularly in view of the presumption of admissibility of relevant evidence, *not* to exclude misconduct evidence as [it] sees fit." *Id*. at 390. Because of that wide latitude, appellate courts are only permitted to reverse a trial court's ruling—especially a ruling that *admits* such evidence—when it constitutes "a clear abuse of discretion." *Id*. at 391, 392. A trial court's ruling only constitutes a clear abuse of discretion, *Montgomery* insists, when it falls wholly outside the "zone of reasonable disagreement." *Id*.

Given the presumption in favor of admitting extraneous misconduct evidence that has relevance apart from impermissible character-conformity inferences, it seems to me that, when a trial court *admits* extraneous misconduct evidence after conducting a Rule 403 analysis, an appellate court's review should be circumscribed. It should conclude that evidence was improperly admitted *only* when the factors

that *disfavor* admissibility *collectively* and *compellingly* do so—such that a clear abuse of discretion has been shown—before declaring a trial court's Rule 403 ruling to be beyond the "zone of reasonable disagreement." *See id*. at 392 (appellate courts should not conduct *de novo* review of Rule 403 rulings, and they should reverse that ruling "rarely and only after a clear abuse of discretion") (citation omitted).

None of the *Montgomery* factors that go into determining whether the trial court's ruling was a clear abuse of discretion disfavor admission of the evidence in *this* case, much less collectively and compellingly so. *See* Majority Opinion at 14–15. This trial court did not even *arguably* abuse its discretion, much less clearly do so. The court of appeals was mistaken to conclude otherwise.

III. CONCLUSION

For all of these reasons, I respectfully concur in the Court's disposition to reverse the judgment of the court of appeals and remand the case for resolution of Appellant's remaining appellate points.

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