COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DAVID CHAVIRA,	§	No. 08-15-00128-CR
Appellant,	§	Appeal from
v.	§	41st District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20120)

O P I N I O N

Following a traffic stop, a police officer found two bags of cocaine in the vehicle David Chavira was driving. Appellant claimed he had borrowed the vehicle from a friend. To rebut Appellant's defensive theory that he was unaware of cocaine in the borrowed vehicle, the trial court allowed the State to present evidence of a subsequent extraneous arrest during which the arresting officer also found cocaine in Appellant's car. Appellant contends the trial court abused its discretion in admitting the extraneous-offense evidence. Finding no error, we affirm.

FACTUAL SUMMARY

On the night of July 12, 2012, El Paso Police Officer Alberto Gloria stopped a black Volkswagen Jetta speeding on Interstate 10. Appellant was the driver and sole occupant. He could not produce a driver's license or proof of insurance. Appellant told the officer he had

borrowed the vehicle from a friend, but was unable to provide the friend's name. He informed the officer he was coming from a bar, was headed to a gas station, and was then going to another bar. Suspecting Appellant was intoxicated, Officer Gloria conducted field-sobriety tests, which Appellant passed. In an attempt to determine if the vehicle was stolen, the officer asked Appellant if he had any registration papers for the vehicle.[1] Because Appellant was unable to provide any, Officer Gloria obtained his consent to search the glove compartment. As he approached the passenger door, he saw a clear plastic bag containing a white substance between the passenger seat and the center console. The officer suspected the substance was cocaine and arrested Appellant. When he searched the vehicle incident to the arrest, the officer found a second clear plastic bag containing a white substance underneath the driver's seat. He testified that both bags were within Appellant's reach. The State presented evidence demonstrating the first bag contained three grams of cocaine, while the second bag contained 124 grams.

On cross-examination, Officer Gloria acknowledged that when he first approached Appellant from the driver's side of the car, he was not able to see the bag of cocaine that was located between the console and the passenger seat and conceded a driver could not have seen it unless he leaned over. He also conceded the driver could not have seen the cocaine located underneath the driver's seat and he could not say for sure that Appellant knew the cocaine was in the car.

After the State rested, Appellant moved for directed verdict arguing the State had failed to produce evidence of knowledge or intent because there was no evidence he knew there was cocaine in the borrowed vehicle. The trial court denied the motion. The next morning the State

[1] Officer Gloria was unable to determine ownership by running the plates because the vehicle had Mexican license plates.

moved to reopen to the evidence to rebut Appellant's defensive theory that he lacked knowledge and intent because he did not know the drugs were in the vehicle. In part, the State proposed to submit evidence of a similar incident that occurred on November 2, 2012, four months after Appellant's stop and arrest in the present case, in which he was also stopped for a speeding violation and cocaine was found on the driver's side floorboard of the car. After a bench hearing, the court allowed the State to reopen and introduce evidence regarding the November 2, 2012 incident.[2]

The State called Officer Victor Abascal who testified that on the evening of November 2, 2012, he stopped Appellant for speeding in a white Toyota Corolla. Appellant was the only person in the vehicle, and Abascal observed Appellant making movements toward the driver's side floorboard. The officer arrested Appellant after discovering he had two outstanding traffic warrants. In conducting an inventory search of the vehicle, the officer found a clear plastic bag on the driver's side floorboard containing a white powdery substance he believed was cocaine. Subsequent testing confirmed that the substance was slightly less than one gram of cocaine. After the State rested, Appellant again moved for directed verdict on the lack of evidence of knowledge or intent, which the trial denied.

In final argument, defense counsel emphasized the lack of evidence of intent or knowledge by pointing out that Appellant had recently borrowed the car and that the cocaine near the passenger seat was not readily visible from the driver's seat. He also pointed out that Appellant was not being tried for the extraneous offense and that the jury should consider the extraneous offense evidence only to assess the issue of knowledge. In its closing, the State

[2] The trial court did not allow the State to present evidence of a prior conviction or of Appellant's possible gang affiliation and incriminating statements Appellant had made to a gang officer.

argued in part that: (1) although Appellant claimed to have borrowed the vehicle from a friend, he did not provide the friend's name; (2) Appellant was traveling from one bar to another and was going to put gas in the car, showing he had possession of the vehicle; and (3) the jurors were allowed to make reasonable inferences from the extraneous-offense evidence and should use their common sense since both cases involved night-time traffic stops for speeding with cocaine being found on the floorboard.

Although Appellant was indicted for possession of cocaine with intent to deliver , the jury found him guilty of the lesser-included offense of possession of cocaine (4 grams or more but less than 200 grams). After Appellant pled true to the enhancement allegations, the jury assessed punishment at 90 years' confinement and a $5,000 fine. The trial court sentenced Appellant in accordance with the jury's verdict.

ADMISSION OF EXTRANEOUS OFFENSE

In two issues for review, Appellant contends the trial court abused its discretion and violated Rule 404(b) and Rule 403 of the Texas Rules of Evidence when it admitted testimonial evidence of the subsequent November 2, 2012 extraneous arrest to rebut his defensive theory that he was unaware the cocaine was in the borrowed vehicle. In Issue One, he argues the trial court violated Rule 404(b) because the extraneous-offense evidence had no relevance apart from its tendency to prove his character to show that he acted in conformity therewith. In Issue Two, he contends that even if the evidence has some "small vestige of relevance," the trial court violated Rule 403 because, based on the requisite balancing test, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The State responds that the

testimony was properly admitted under Rule 404(b) to rebut a defensive theory and that Appellant failed to show the prejudicial nature of the evidence outweighed its probative value.

Standard of Review

We review the admission of extraneous-offense evidence under Rule 404(b) for abuse of discretion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex.Crim.App. 2009); *Knight v. State*, 457 S.W.3d 192, 201 (Tex.App.--El Paso 2015, pet. ref'd). A trial court does not abuse its discretion if the decision to admit or exclude the evidence is within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990) (op. on reh'g); *Knight*, 457 S.W.3d at 201. A trial court's determination typically falls within the zone of reasonable disagreement if the evidence shows that the extraneous transaction is relevant to a material, non-propensity issue. *Montgomery*, 810 S.W.2d at 389. We also review a trial court's ruling under Rule 403 for an abuse of discretion. *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex.Crim.App. 2013); s*ee also Montgomery*, 810 S.W.2d at 391. That is, the ruling of the trial court must be upheld if it is within the zone of reasonable disagreement. *Pawlak*, 420 S.W.3d at 810; *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex.Crim.App. 2002). We should reverse a trial court's ruling under Rule 403 "rarely and only after a clear abuse of discretion." *Montgomery*, 810 S.W.2d at 392, *quoting United States v. Maggitt*, 784 F.2d 590, 597 (5th Cir. 1986).

Admissibility Under Rules 404(b) and 403

As a general rule, all relevant evidence is admissible. TEX.R.EVID. 402 (making all relevant evidence admissible unless otherwise provided). Evidence is generally admissible if has "any tendency" to make a fact of consequence to the case "more or less probable than it would be without the evidence." TEX.R.EVID. 401 (defining "relevant" evidence). Rule 404 provides

an exception to this general rule: although relevant, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX.R.EVID. 404(b)(1).

In a criminal case, evidence of a crime, wrong, or other act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX.R.EVID. 404(b)(2); *Johnston v. State,* 145 S.W.3d 215, 219 (Tex.Crim.App. 2004); *Moses v. State,* 105 S.W.3d 622, 626 (Tex.Crim.App. 2003); *Knight*, 457 S.W.3d at 202. A party may introduce extraneous-offense evidence that has relevance apart from its tendency to prove character conformity (1) where it logically serves to make more probable or less probable an elemental fact or an evidentiary fact that inferentially leads to an elemental fact, (2) where it serves to make more probable or less probable defensive evidence that undermines an elemental fact, or (3) where it rebuts a defensive theory. *Montgomery*, 810 S.W.2d at 387, 388.

The trial court has no discretion to admit extraneous-offense evidence only when it has no relevance apart from character conformity. *Id*. Extraneous-offense evidence is relevant and admissible when it logically serves as proof of intent or knowledge beyond its tendency to prove character conformity. *Id*. Admissibility is subject to the trial court's discretion to exclude it if its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403. *Id.* at 389; *Knight*, 457 S.W.3d at 204; TEX.R.EVID. 403 (allowing the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence).

Waiver

Before reaching the merits, we must explore whether Appellant preserved his complaints for appellate review or whether, as claimed by the State, his arguments on appeal have been waived. The State correctly points out that Appellant's only direct objection to admission of the extraneous-offense evidence focused on the differences between it and the charged conduct. In particular, defense counsel emphasized that the November 12, 2012 incident involved only a small amount of cocaine -- "a personal use amount" -- while he had been charged with possession of a large amount of cocaine with intent to deliver. In arguing the legal basis for the objection, counsel stated: "So really, the value or the probative value of that case is not relevant. But, you know, the fact that it's a traffic stop and all that, I just think that it's irrelevant, Judge."

The State appears to concede that Appellant's objection invoked Rule 404(b), but argues that it does not comport with Appellant's Rule 404(b) complaint on appeal. We disagree. In his brief, Appellant maintains that Officer Abascal's testimony was not admissible under Rule 404(b) because it was not relevant. And Appellant's objection at trial was expressly based on a lack of relevance. As the State concedes, the Court of Criminal Appeals has instructed that optimally, the opponent should object that extraneous-offense evidence is inadmissible under Rule 404(b), but an objection that the evidence is not "relevant" ordinarily will be sufficient under the circumstances to apprise the trial court of the nature of the complaint. *Montgomery*, 810 S.W.2d at 387. Those circumstances exist here. By raising a defensive theory, the defendant opens the door for the State to offer rebuttal testimony regarding an extraneous offense if the extraneous offense has characteristics in common with the offense for which the defendant was on trial. *Knight*, 457 S.W.3d at 202; s*ee Richardson v. State*, 328 S.W.3d 61, 71 (Tex.App.--

Fort Worth 2010, pet. ref'd), *citing Bell v. State,* 620 S.W.2d 116, 126 (Tex.Crim.App. 1980). Appellant's objection expressly contrasted the differences between the November 12, 2012 incident and the circumstances surrounding his charged conduct. As such, his objection mirrored his complaint on appeal, or at the very least was sufficient under the circumstances to properly complain on appeal that the admission of the admission of the extraneous-offense evidence was improper under Rule 404(b) because it was irrelevant.

The State also asserts that Appellant totally failed to invoke Rule 403. This argument has more traction. Indeed, the Texas Court of Criminal Appeals has consistently recognized that the "general requirement that a contemporaneous objection must be made to preserve error for appeal is firmly established in Rule of Appellate Procedure 33.1," and that even when an objection is made, the complaint on appeal must comport with the objection at trial. *Grado v. State*, 445 S.W.3d 736, 738-39 (Tex.Crim.App. 2014); *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex.Crim.App. 2014); *see* TEX.R.APP.P. 33.1(a)(1)(A)(to preserve error a timely request, objection, or motion must be made that states the grounds "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context"). The court has also made clear that an objection under Rule 404(b) is insufficient to invoke a ruling under Rule 403 whether the probative value of the evidence is outweighed by unfair prejudice. *Green v. State*, 934 S.W.2d 92, 102 (Tex.Crim.App. 1996), *quoting Montgomery,* 810 S.W.2d at 388).

But the courts "are not hyper-technical in examination of whether error was preserved[.]" *Bekendam,* 441 S.W.3d at 300. Error can be preserved when "the specific grounds were apparent from the context." *See* TEX.R.APP.P. 33.1(a)(1)(A)(objection need not be specific to

preserve error for appeal when "the specific grounds were apparent from the context"). For a complaint to be apparent from the context without being explicitly stated and still be sufficient to preserve error, "there [must] have been statements or actions on the record that clearly indicate what the judge and opposing counsel understood the argument to be." *Clark v. State*, 365 S.W.3d 333, 339 (Tex.Crim.App. 2012). The record here clearly indicates that the trial court and the prosecution understood that Appellant was attacking the admissibility of the extraneous offense evidence not only because its admission violated Rule 404(b) but it also violated Rule 403 because its probative value was substantially outweighed by unfair prejudice.

First, the purpose of the State's motion to reopen was to introduce three separate instances of extraneous offenses, one of which was the November 2, 2012 traffic stop and arrest. Second, to support its motion, the State referred the trial court to three cases, all of which discussed the circumstances under which a court can properly admit extraneous-offense evidence under both Rule 404(b) and Rule 403.[3] Third, the trial court engaged the prosecutor in an extended discussion of this case law. While the discussion primarily concerned whether Appellant had actually raised a defensive theory and opened the door to admission of extraneous-offense evidence by merely cross-examining Officer Gloria, the prosecutor specifically informed the court that if it found the evidence relevant and admissible under Rule 404(b), it would be

[3] *See Swarb v. State*, 125 S.W.3d 672, 682-83 (Tex.App.--Houston [1st Dist.] 2003, pet. dism'd)(evidence of defendant's indictment and nolo plea to extraneous offense of possession of controlled substance while incarcerated was admissible under Rule 404(b) to show defendant had control of drugs found in his truck, and its probative value outweighed its prejudicial effect under Rule 403); *Moses v. State*, 105 SW.3d 622, 627 (Tex.Crim.App. 2003) (extraneous-offense evidence of two previous incidents of alleged attempts to bribe sheriff's deputies was relevant and admissible under Rule 404(b) in bribery trial to rebut defense theory that charge was brought in retaliation for a complaint made by defendant's wife against the sheriff's department); *Rios v. State*, 2014 WL 2466100, at *5-7 (Tex.App.--El Paso May 30, 2014, no pet.)(not designated for publication)(evidence of extraneous prior conviction for possession of cocaine was relevant and admissible under Rule 404(b) to rebut defendant's claim during trial for possession of cocaine that someone had placed the cocaine in his pocket without his knowledge while he was unconscious, and the probative value of the evidence was not outweighed by it prejudicial effect under Rule 403).

required to perform a balancing test under Rule 403 if there were an objection, which he anticipated. Fourth, subsequent discussion between the trial court and counsel indicated the court was concerned whether at least some of the evidence was extraneous and whether it was "more probative than prejudicial." Fifth, although defense counsel's argument primarily focused on whether the State should be allowed to reopen and whether Appellant had opened the door to extraneous-offense evidence, counsel also emphasized that even if it found the evidence probative on the issue of knowledge, he doubted the prejudicial effect could be remediated by a jury instruction not to consider the extraneous-offense evidence as evidence of guilt. And finally, the trial court ultimately ruled not only that the State would be allowed to reopen, but that the State would be allowed "to introduce evidence of an extraneous offense" of the November 2 incident. We conclude that these actions establish that the trial court and the prosecution understood that Appellant was attacking the admissibility of the extraneous offense evidence not only on the grounds it violated the requirements of Rule 404(b) as irrelevant but also violated Rule 403 because its probative value was substantially outweighed by unfair prejudice. We conclude Appellant's complaints were apparent from the context, and he has not forfeited his right to have those complaints addressed on appeal.

Rule 404(b) Analysis

At trial, Appellant attempted to negate the knowledge and intent elements of the charged offense by arguing that he was driving a borrowed car and did not know the vehicle contained drugs since he could not see the bags of cocaine from the driver's seat.[4] But the evidence also

[4] A person commits an offense if he knowingly possesses, with intent to deliver, a controlled substance such as cocaine. *See* TEX.HEALTH&SAFETY CODE ANN. § 481.112(a); 481.102(3)(D)(West 2010). The Texas Health & Safety Code defines "possession" as "actual care, custody, control, or management." *Id.* § 481.002(38)(West Supp. 2016). In a case involving possession with intent to deliver, the State must prove that the defendant "(1) exercised

showed Appellant's control over the vehicle and that the cocaine was within his reach when he was stopped. Likewise, the extraneous-offense evidence showed a strikingly similar scenario where Appellant was stopped for speeding, was seen making furtive movements toward the floorboard, and cocaine was subsequently discovered within his reach on the driver's side floorboard. The State is allowed to offer rebuttal extraneous-offense evidence if the extraneous offense has characteristics in common with the offense for which the defendant was on trial. *Knight*, 457 S.W.3d at 202; s*ee Richardson,* 328 S.W.3d at 71. The extraneous-offense evidence was relevant and admissible because it shared common characteristics with the charged offense and logically made the elemental facts of intent and knowledge more or less probable, and further made Appellant's evidence, which attempted to undermine those elemental facts, more or less probable.

We conclude the trial court could have reasonably determined that Officer Abascal's testimony was relevant and admissible under Rule 404(b) to rebut Appellant's defensive theory that he had no knowledge of the cocaine's existence. *See, e.g.*, *Powell v. State*, 5 S.W.3d 369, 374, 383 (Tex.App.--Texarkana 1999, pet. ref'd)(subsequent extraneous-offense was admissible under Rule 404(b) where the defendant on trial for possession with intent to distribute cocaine claimed the car he was driving did not belong to him and a subsequent, almost identical offense, occurred a few weeks after the offense being tried on the same stretch of highway, because "the trial court could have reasonably concluded that this subsequent act tended to make more probable the allegation that [the defendant] intended to deliver the cocaine involved in the

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care, custody, control, or management over the controlled substance, (2) intended to deliver the controlled substance to another, and (3) knew that the substance in his possession was a controlled substance." *Cadoree v. State*, 331 S.W.3d 514, 524 (Tex.App.--Houston [14th Dist.] 2011, pet. ref'd); *see also Blackman v. State*, 350 S.W.3d 588, 594 (Tex.Crim.App. 2011).

present offense"); *see also Mason v. State*, 99 S.W.3d 652, 656 (Tex.App.--Eastland 2003, pet. ref'd)(trial court did not abuse its discretion in finding that extraneous-offense evidence that appellant sold crack cocaine in 2001 was admissible as circumstantial evidence of appellant's knowing possession of cocaine in 1999).

Further, the trial court included a jury instruction that it could only consider the extraneous-offense evidence in determining Appellant's knowledge and not to show that Appellant acted in conformity with past character.[5] *See Montgomery*, 810 S.W.2d at 388 (when the trial court admits extraneous offense evidence, it should upon timely request, instruct the jury that the evidence is limited to whatever purpose the proponent has persuaded him it serves); TEX.R.EVID. 105(a)(providing for a limiting instruction when evidence is admissible for one purpose but not another). The trial court's limiting instruction demonstrates the trial court did not admit the testimony for character conformity purposes, but rather to determine Appellant's knowledge and intent to commit the alleged offense. Because we conclude the trial court did not abuse its discretion under Rule 404(b), we overrule Issue One.

Rule 403 Analysis

Having determined that the extraneous-offense evidence had relevance apart from showing character conformity, we now determine whether the trial court conducted a proper Rule 403 analysis. Under Rule 403, even if evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. TEX.R.EVID. 403; *Montgomery*, 810 S.W.2d at 389; *Knight*, 457 S.W.3d at 204. In particular, Rule 403 provides

[5] "The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, in determining the defendant's knowledge in this case and it is not being given to you to show that the defendant acted in conformity with any past character. You cannot consider the testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other acts, if any were committed."

that the court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX.R.EVID. 403.

Rule 403 favors the admissibility of relevant evidence. *Montgomery*, 810 S.W.2d at 389. Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. *Hammer v. State,* 296 S.W.3d 555, 568 (Tex.Crim.App. 2009). *Knight*, 457 S.W.3d at 204. Rule 403 envisions the exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value. *Hammer,* 296 S.W.3d at 568*; see also Casey v. State,* 215 S.W.3d 870, 879 (Tex.Crim.App. 2007)("In keeping with the presumption of admissibility of relevant evidence, trial courts should favor admission in close cases."). Evidence is unfairly prejudicial only when it has "an undue tendency to suggest that a decision be made on an improper basis." *Reese v. State*, 33 S.W.3d 238, 240 (Tex.Crim.App. 2000), *citing Montgomery*, 810 S.W.2d at 389.

Where a proper Rule 403 objection is made, the trial court must conduct a balancing test. *Rojas v. State,* 986 S.W.2d 241, 250 (Tex.Crim.App. 1998); *Williams v. State*, 958 S.W.2d 186, 195 (Tex.Crim.App. 1997)(holding trial court has no discretion whether to conduct balancing test under Rule 403); *Knight*, 457 S.W.3d at 204. The trial court must balance (1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be needlessly

cumulative. *See Gigliobianco v. State,* 210 S.W.3d 637, 641-42 (Tex.Crim.App. 2006) *Knight*, 457 S.W.3d at 204. In practice, these factors may well blend together. *Id.*

Appellant first argues the proffered evidence had little probative value and the State had no great need for it. The "probative value" of evidence means more than simply relevance. *Gigliobianco*, 210 S.W.3d at 641. Rather, it refers to how strongly the evidence serves to make more or less probable the existence of a fact of consequence to the litigation, coupled with the proponent's need for that item of evidence. *Id.* In other words, when the proponent of the evidence "has other compelling or undisputed evidence," the probative value of the evidence "will weigh far less than it otherwise might in the probative-versus-prejudicial balance." *Id*. *quoting Montgomery,* 810 S.W.2d at 390). As Appellant points out, there is "other" evidence in the record negating the State's need for the extraneous-offense evidence. For instance, the evidence was conflicting whether Appellant had borrowed the vehicle because he could not come up with the friend's name. There was some evidence of control since Appellant informed Officer Gloria he was coming from a bar, was headed to get gas, and was then going to another bar. But other than the bags of cocaine being within Appellant's reach, this was the only evidence from which the jury could infer care, custody, or control of the cocaine and thus infer knowledge or intent. This evidence was neither compelling nor undisputed. On cross-examination, Officer Gloria acknowledged that he was not able to see the bag of cocaine that was located between the console and the passenger seat from the driver's side of the vehicle and conceded a driver could not have seen it unless he leaned over. He also conceded the driver could not have seen the cocaine located underneath the driver's seat, and that he could not say for sure that Appellant knew the cocaine was in the vehicle. Further, the extraneous-offense

evidence had more than a "little" probative value. The striking similarities between the charged-offense and the extraneous-offense evidence made the extraneous-offense highly probative on the issues of intent and knowledge. We conclude the trial court could have reasonably determined the probative value of the proffered evidence versus the State's need for that evidence weighed in favor of admission.

Appellant next argues the evidence was unduly prejudicial, because extraneous-offense evidence is inherently prejudicial, citing to *Sims v. State*, 273 S.W.3d 291, 294-95 (Tex.Crim.App. 2008). *Sims* involved the analysis of evidence admitted at punishment, not guilt-innocence. *Id*. at 292-97. As the court in *Sims* recognized, what is admissible as relevant to the punishment determination is not constrained by considerations of what is patently inadmissible at the guilt phase of trial. *Id*. at 294. Nor did *Sims* involve any analysis under Rule 403. *Id.* It is the Rule 403 analysis that determines whether extraneous-offense evidence is unduly prejudicial.

Unfair prejudice under Rule 403 refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. *Gigliobianco*, 210 S.W.3d at 641; *Montgomery*, 810 S.W.2d at 389. For example, evidence might be unfairly prejudicial if it arouses jury hostility or sympathy for one side without regard to the logical probative force of the evidence. *Id.* The extraneous evidence here did not suggest a decision on an improper basis. Appellant directs us to *Saenz v. State*, 843 S.W.2d 24 (Tex.Crim.App. 1992), where the extraneous-offense evidence was admitted improperly because the State failed to show any connection between the defendant's possession of marked bills and any possession or sale of drugs. *Id.* at 27-28. No lack of connection existed in the present case. The extraneous-offense

evidence clearly connected Appellant to the cocaine found in the vehicle on November 2, 2012. Nor do we find, as Appellant argues, that the State's final argument unduly emphasized the factual elements of Officer Abascal's testimony in an attempt to influence the jury's impression of Appellant's character. Rather, the State's argument emphasized, in succinct fashion, the similarities between the charged offense and the extraneous-offense that would allow the jury to reasonably infer intent and knowledge.

Appellant also complains the extraneous-offense evidence distracted from the main issues due to a lack of context and lack of an immediate limiting instruction to the jury, that it was given undue weight because it was the last testimony the jury heard, that the State referred to it in closing before any limiting instruction was given to put it in context, and that its presentation took an inordinate amount of time. Confusion of the issues refers to a tendency to confuse or distract the jury from the main issues in the case. Evidence that consumes an inordinate amount of time to present or answer, for example, might tend to confuse or distract the jury from the main issues. *Gigliobianco*, 210 S.W.3d at 641. Misleading the jury refers to a tendency of evidence to be given undue weight by the jury on other than emotional grounds. For example, scientific evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence. *Id*. Undue delay and "needless presentation of cumulative evidence," concern the efficiency of the trial proceeding rather than the threat of an inaccurate decision. *Id.*

Appellant's arguments concerning lack of context and lack of a limiting instruction ring hollow. Defense counsel did not request that a limiting instruction be given to the jury either before or after Officer Abascal testified. A defendant is entitled to limiting instructions on the use of extraneous offenses during the guilt phase only if he timely requests those instructions

when the evidence is first introduced. *Delgado v. State*, 235 S.W.3d 244, 253 (Tex.Crim.App. 2007); TEX.R.EVID. 105(a) ("the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly"). And, contrary to Appellant's contention, the trial court orally instructed the jury before final argument that the extraneous-offense evidence could be considered only in determining defendant's knowledge and not to show defendant acted in conformity with any past character traits. Further, the jury had the same instruction before them in written form in the jury charge during their deliberations. Nor do we find that Officer Abascal's testimony, although detailed, resulted in "undue" delay or the "needless" presentation of cumulative evidence," since there is nothing in the record showing that its presentation impacted the efficiency of the trial proceeding.

Based on the presumption that the probative value of relevant evidence exceeds any danger of unfair prejudice, our review of the record, and the relevant Rule 403 criteria, we conclude the probative value of the extraneous-offense evidence was not substantially outweighed by any prejudicial impact. This evidence was not cumulative of other evidence, and its presentation was fairly concise. It had little, if any, tendency to mislead or confuse the jury, and any such tendency was substantially outweighed by its probative value to rebut Appellant's contention that he did not know the cocaine was in the vehicle. Finding no abuse of discretion, we overrule Issue Two.

We affirm the judgment of the trial court. The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a *pro se* petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX.R.APP.P. 25.2(d). The certification is defective, and

has not been corrected by Appellant's attorney or the trial court. To remedy this defect, we ORDER Appellant's attorney, pursuant to Rule 48.4, to send Appellant a copy of this opinion and this court's judgment, to notify Appellant of his right to file a *pro se* petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. Appellant's attorney is further ORDERED, to comply with all of the requirements of Rule 48.4.

May 16, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

(Do Not Publish)