COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DAVID RODRIGUEZ,		§	
	Appellant,		No. 08-16-00113-CR
		§	
v.			Appeal from the
		§	
THE STATE OF TEXAS,			120th District Court
	Appellee.	§	
			of El Paso County, Texas
		§	
			(TC#20150D03170)
		§	

O P I N I O N

David Rodriguez appeals his conviction for assault family violence, enhanced by a prior felony. In two issues, Appellant asserts: (1) the trial court erred in allowing the State's expert witness to testify because she was not properly qualified as an expert in family violence; and (2) the trial court erred in allowing the State to introduce evidence of extraneous offenses to rebut Appellant's claim that a booking photograph depicting him with a black eye was taken on the night of the offense. We affirm.

BACKGROUND

The assault took place during a late-night barbecue. Yvette Talamantes picked up Appellant, her boyfriend, late in the evening and the couple drove to a friend's house for a cookout. Once at the barbecue, Appellant began socializing with another guest, Ruben Estrada, the cousin

of the hostess. As the evening progressed, Yvette began to worry Appellant would attempt to buy methamphetamine from Estrada, and so she tried to get Appellant to leave the cookout and go home with her. Appellant refused, and began to suspect Yvette was having an affair with Estrada. He became aggressive with Estrada, and when Yvette started pulling on his arm and urging him to leave with her, he turned around and slapped her hard in the face, knocking her to the floor. Yvette got back up and continued pulling Appellant to the exit, urging him to leave with her. She managed to get him to her truck in the front yard. Once out front, Appellant threw Yvette down on a pile of landscaping rocks and began striking her, pulling her hair, and kicking her in the head, back, and legs. Appellant relented once Estrada and the hostess told him they were calling the police, and he walked off in the direction of the home he and Yvette shared a few blocks away. The police eventually arrived and escorted Yvette back to the couple's home, where Appellant was arrested.

DISCUSSION

Expert Witness Testimony

In his first issue, Appellant asserts the trial court abused its discretion in admitting testimony from the State's expert witness. Specifically, he asserts the State was only able to establish the witness had previously testified in other cases as an expert on family violence, which he claims is insufficient on its own to qualify as an expert witness.

Standard of Review

We review a trial court's decisions to admit or exclude evidence for abuse of discretion. *Torres v. State*, 71 S.W.3d 758, 760 (Tex.Crim.App. 2002); *Green v. State*, 934 S.W.2d 92, 101-02 (Tex.Crim.App. 1996). A reviewing court should not reverse a trial court's ruling that falls

within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990)(op. on reh'g).

Analysis

A witness may give an opinion on a matter if they are properly qualified to do so and if it will assist the trier of fact in understanding evidence or in determining a fact in issue in the case. TEX.R.EVID. 702. Specifically, Rule 702 of the Texas Rules of Evidence provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

TEX.R.EVID. 702. Based on this rule, the trial court must make three separate determinations before admitting expert testimony: "(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case." *Rodgers v. State*, 205 S.W.3d 525, 527 (Tex.Crim.App. 2006). These conditions are commonly known as (1) qualification, (2) reliability, and (3) relevance. *Vela v. State*, 209 S.W.3d 128, 131 (Tex.Crim.App. 2006).

Qualification is a two-step inquiry into whether: (1) the witness has sufficient background in a particular field; and (2) the trial court is satisfied that background goes to the matter on which the witness is to give an opinion. *Davis v. State*, 329 S.W.3d 798, 813 (Tex.Crim.App. 2010). The burden is on the proponent to establish the expert has knowledge, skill, experience, training, or education regarding the specific issue before the court that qualifies the expert to give an opinion on the subject. *Id*. The emphasis is on the fit between the subject matter at issue and the expert's familiarity with it. *Vela*, 209 S.W.3d at 133. "Because the possible spectrum of education, skill,

and training is so wide, a trial court has great discretion in determining whether a witness possesses sufficient qualifications to assist the jury as an expert on a specific topic in a particular case." *Rodgers*, 205 S.W.3d at 527-28. Sufficient qualifications may be derived entirely from a study of technical works, specialized education, practical experience, or some combination thereof. *Holloway v. State*, 613 S.W.2d 497, 501 (Tex.Crim.App. 1981).

In his brief, Appellant asserts the State's witness, Stephanie Carr, was not qualified to give expert testimony on family violence because her lack of "education in any significant field, skill, and training precluded her from giving expert testimony." To support his claim, Appellant points out Carr lacked a scientific degree or membership in a scientific organization, and claims the State was only able to establish Carr had previously testified as an expert witness in other cases. Because prior testimony as an expert witness, standing alone, is insufficient to qualify a witness as an expert, Appellant argues the State failed to carry its burden to establish Carr's qualifications.

Contrary to Appellant's assertions, however, Carr testified to multiple bona fides relevant to establishing her expertise in the field of family violence: (1) she was then the executive director of the Center Against Sexual and Family Violence and had been for eight years; (2) she had previously been the executive director of the Child Crisis Center for thirteen years, where she worked with abused or neglected children; (3) she had attended and given presentations on domestic violence at state and national conferences; (4) she was an active member of the Texas Association Against Sexual Assault Primary Prevention Task Force; (5) she was previously a member of the Texas Council on Family Violence Public Policy Committee; and (6) based on the foregoing, she had a total of twenty-one years' of experience in the field of family violence. Appellant does not attack any of these qualifications; instead, he dismisses them outright and

focuses only on her statement that she had previously testified in other cases as an expert on family violence. Given the wide discretion afforded to trial courts to determine the witness' expertise and assistance to the jury, the trial court here did not abuse its discretion in finding Carr had sufficient background in family violence to satisfy the first qualification inquiry.[1] *Davis*, 329 S.W.3d at 813.

Appellant does not put forth any significant argument regarding the second inquiry of the qualifications test: whether Carr's background goes to the matter on which she gave her opinion. In her testimony, Carr explained why victims of family violence recant abuse allegations, bail their abusers out of jail, and sign non-prosecution statements: out of feelings of guilt or remorse; fear of retaliation; and fear the abuser will be unable to provide financial support to the victim and her dependents while in jail. The trial court did not abuse its discretion in determining Carr's background went to the matter on which she gave her opinion. *Davis*, 329 S.W.3d at 813. Accordingly, Appellant's first issue is overruled.

Extraneous Offenses

In his second issue, Appellant claims the trial court improperly admitted evidence of an extraneous offense in allowing the State to introduce a booking photograph from his arrest the night of the assault after defense counsel had introduced a booking photograph of Appellant from a different case. He also claims the trial court erred in allowing the State to elicit testimony from a witness about a prior arrest.

Standard of Review

[1] Further, Appellant's reliance on *Mata* is misplaced, as it does not stand for the proposition that prior testimony is an insufficient qualifying condition. The Court in *Mata* only held it was inappropriate for the court of appeals to rely solely on its own analysis in a prior opinion to qualify the same expert in a subsequent case. *Mata v. State*, 46 S.W.3d 902, 914 (Tex.Crim.App. 2001).

We review a trial court's decision to admit or exclude evidence of an extraneous offense for abuse of discretion. *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex.Crim.App. 1996)(citing *Saenz v. State*, 843 S.W.2d 24, 26 (Tex.Crim.App. 1992)).

Analysis

Generally, evidence of extraneous offenses is not admissible during the guilt or innocence phase to show a defendant would have been acting in conformity with his character by committing the charged offense. TEX.R.EVID. 404(b); *Knight v. State*, 457 S.W.3d 192, 202 (Tex.App.--El Paso 2015, pet. ref'd). But evidence of extraneous offenses may be admissible if it is logically relevant to prove some other fact. *Johnston v. State*, 145 S.W.3d 215, 219 (Tex.Crim.App. 2004). Rule 404(b) of the Texas Rules of Evidence allows evidence of an extraneous offense to be introduced to show proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX.R.EVID. 404(b). Otherwise inadmissible evidence may become admissible if a party "opens the door" to that evidence. *Coutta v. State*, 385 S.W.3d 641, 663 (Tex.App.--El Paso 2012, no pet.).

Here, to support a defensive theory that Yvette had been the initial aggressor, Appellant introduced a booking photograph of himself with a black eye. Both Yvette and Estrada denied having seen or given him the black eye. The State then admitted into evidence a different booking photograph in which Appellant had no visible injuries, along with a redacted booking sheet showing the booking time as June 29, 2015, the date of the charged offense. Appellant, however, continued to assert the booking photograph showing him with an injury was of him on the night of the assault, and called defense counsel and defense counsel's legal assistant to testify his proffered photograph was the one listed for the offense on the District Attorney's Case Portal. On

cross-examination, the State elicited testimony from defense legal counsel's legal assistant that the booking photograph depicting Appellant with a black eye appeared to actually be associated with four unrelated cases on the District Attorney's Case Portal. The State also introduced a redacted jail record showing the booking photograph depicting Appellant with a black eye was taken on October 6, 2011, nearly four years before the assault.

Appellant, by introducing the booking photograph showing him with a black eye and then insisting it depicted him on the night of the offense, opened the door to the admission of the State's booking photograph and thus evidence he had previously been arrested and charged on another occasion. *Coutta*, 385 S.W.3d at 663. Thus, the trial court did not abuse its discretion in admitting the State's alternate booking photograph and evidence of Appellant's prior arrests to rebut his assertions. *Id.*

Separately, but under the same issue heading, Appellant contends the State failed to provide notice of its intent to introduce these extraneous offenses as required by Rule 404(b) of the Texas Rules of Evidence. However, notice is not required when the defense opens the door by presenting a defensive theory the State may rebut by introducing evidence of extraneous offenses. *Dabney v. State*, 492 S.W.3d 309, 317 (Tex.Crim.App. 2016); *Coutta*, 385 S.W.3d at 663. As the Supreme Court elucidated in *Dabney*, "[t]o hold otherwise would impose upon the State the impossible task of anticipating, prior to the beginning of trial, any and all potential defenses that a defendant may raise." *Dabney*, 492 S.W.3d at 317. Accordingly, because the trial court did not abuse its discretion in admitting the evidence of his extraneous offenses, Appellant's second issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

April 30, 2018

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.

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