COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

| | | |
|---|---|---|
| PETER SALVADOR OLMEDO, | § | |
| | | No. 08-18-00114-CR |
| Appellant, | § | |
| | | Appeal from the |
| v. | § | |
| | | 34th District Court |
| | § | |
| THE STATE OF TEXAS, | | of El Paso County, Texas |
| | § | |
| Appellee. | | (TC# 20170D04873) |
| | § | |

**O P I N I O N**

A jury convicted Peter Salvador Olmedo, Appellant here, of assault on his wife by impeding her breath or circulation. TEX.PENAL CODE ANN. § 22.01(b)(2)(B)(felony offense for impeding the normal breathing or circulation of a person connected to defendant under specified sections of the Family Code). In accordance with the jury's recommendation, he was sentenced to confinement for nine years, six months and assessed a $5,000 fine. On appeal, he complains that the trial court erred in admitting evidence of other assaultive conduct during the guilt or innocence phase of the trial. We conclude the trial court did not abuse its discretion in admitting that evidence and affirm the conviction below.

## BACKGROUND

Appellant faced a two-count indictment at trial. Under Count One, the State charged him with intentionally, knowingly, or recklessly impeding the normal breath or circulation of Viviana

Olmedo (his spouse and hence a member of his household) by applying pressure to her throat or neck. The second count alleged that he threatened Viviana with imminent bodily injury by using a deadly weapon, here a blanket, during the commission of an assault. The jury found Appellant guilty of the first count, but not the second.

Like many assault cases, the resulting trial presented the jury with a "he said" and "she said" version of events. But this jury also had the benefit of some "they said" testimony that frames the events. We start there.

**The "They Said" Testimony**

Police officer James Jones and his partner were dispatched to the intersection of Frankfort and Copia streets at 4:30 a.m. on June 4, 2017. When they were two blocks away, Officer Jones could see a vehicle parked in the middle of the roadway covering both the right and left lanes of traffic. He could also see a "couple of people laying" on the ground "like there was a tussle." When the officers arrived, Appellant got up and ran to the car, so the officers parked their vehicle to block him from leaving. The other person, later identified as Viviana, was laying on the ground, crying, and holding her ribs. She said, however, "I'm fine" and would not give much information other than she and Appellant (her husband) had had a verbal argument.

Appellant also claimed that the couple had a verbal argument over personal issues in their marriage. Because Appellant demonstrated signs of intoxication (smell of alcohol on his breath, bloodshot red eyes, and slurred speech), the officers insisted that someone come to the scene to drive him home. Because of Viviana's physical condition, an ambulance was dispatched to transport her to a hospital.

The officers then cleared the call and were in route back to the police station when they heard that a person at Sierra Medical Center was reporting an assault. They recognized the

complainant as Viviana, and they went to the hospital to speak with her. At the hospital, Viviana was calm and much more cooperative. The officers photographed a large knot on her forehead. They also saw and photographed red marks around her throat. The State introduced the hospital's medical records that reflect Viviana was diagnosed with abdominal trauma, acute head trauma, a cervical sprain, facial trauma, a rib contusion, and a rib fracture. A State expert testified that the injuries depicted on the police photographs and hospital record are consistent with strangulation.

Based on what the officers were told at the hospital, they arrested Appellant.

**The "She Said" Testimony**

The complaining witness, Viviana Olmedo, testified at trial. She married Appellant when she was almost fifteen years old. The couple had one child together. The couple would have been together about seventeen years at the time of the charged crime.

Viviana worked at a day care, and on June 3, 2017, she had finished a 12-hour shift. Appellant picked her up from work and took her to their residence. Sometime in the early morning of the next day, she testified that Appellant kicked her in the ribs, hit her in the face, squeezed her neck until she was unable to breathe, and tried to smother her with a blanket. She did not explain what lead to these actions, other than she denied provoking Appellant in any way. She did testify that Appellant told her that if the police showed up, he was going put her head on a "stick" and plant it at a well-known hillside in nearby Juarez, Mexico.[1]

She freed herself and ran out of the house. Appellant followed in a car. When he caught up to her at an intersection about two blocks away, she wrapped herself around a sign-pole. Appellant exited the car and began striking Viviana, telling her to go home. He also told her, "If

[1] She identified the hillside by the message painted on it. Visible to most of Juarez, Mexico, and parts of El Paso, Texas, the rocks on the hillside are painted white with the words, "*La biblia es la verdad*. *Leela*" which translated means, "The Bible is the truth. Read it."

the cops show up, I'm going to kill you." He continued to strike her and pulled her off the pole. She recalled little after that, other than when the police arrived at the scene, she did not tell them what happened "[b]ecause [she] was scared he was going to kill [her] and [her] son." She was taken to the hospital by ambulance. The police officers went to the hospital, and she then told them what had actually transpired.

**The "He Said" Testimony**

We also recount Appellant's version of events. Appellant testified in his own defense and agreed that he picked his wife up from work on June 3rd. Sometime after they got home, they decided to engage in sexual relations. But Viviana got upset when Appellant insisted on using a condom because he claimed Viviana had hepatitis (something she denied at trial). He denied ever assaulting her.[2] When she ran out of the house and down the street, he followed her in the car. He claimed she ran into the sign-pole, wrapping herself around it, and later "threw herself" onto the pavement, which may have explained her injuries. He tried to no avail to talk her into going home. He had just gotten back into his car when the police arrived. He also denied having anything to drink that evening.

**The Contested Testimony**

On appeal, Appellant complains that the trial court erred in admitting testimony about prior assaultive conduct. The challenged testimony was addressed pretrial after the State's prosecutor alerted the trial court that the State would admit testimony about the nature of the relationship between Appellant and Viviana, to include that she was initially uncooperative because she was in

[2] He testified as follows:

> [Defense Counsel]: So you are telling the jury you did not assault her?
> [Appellant]: I did not assault her.
> [Defense Counsel]: And she is making this up?
> [Appellant]: She is making this up.

fear for her and her son's life. According to the State, that fear was justified based on the couple's past relationship and the fact that Appellant owned weapons.[3] After a lengthy discussion, the trial court overruled Appellant's objections and admitted the following testimony at trial:

> [Prosecutor]: During your relationship with Mr. Olmedo, did he become abusive early on?
>
> [Viviana]: Yes, ma'am.
>
> [Prosecutor]: Was he abusive even before you got married?
>
> [Viviana]: Yes, ma'am.
>
> [Prosecutor]: While you were pregnant with your son?
>
> [Viviana]: Yes, ma'am.
>
> …
>
> [Prosecutor]: Did you think he was capable of following through with that threat?
>
> [Viviana]: Yes, ma'am. He owned a lot of guns.
>
> . . .
>
> [Prosecutor]: Did you ever seek medical treatment before this for injuries that your husband had caused you?
>
> [Viviana]: Yes, ma'am.
>
> [Prosecutor]: What sort of injuries?
>
> [Viviana]: Torn ligaments. That's all I can remember.

The testimony also included Viviana's claim that Appellant had a controlling personality. He had her sleep on an air mattress while he slept on a nearby couch, so he could keep an eye on her. He took her paychecks and managed the couple's finances. One of Appellant's "rules" was that Viviana's mother-in-law would have to stay with her whenever Appellant was not around. Viviana

[3] The prosecutor informed the trial court as follows:

> [Prosecutor]: Further, Your Honor, I don't intend on getting into any specific acts in the notice of extraneous. That was filed mostly for punishment, if we get there. But I do want her to be able to testify, you know, 'I was scared. You know, I had been subjected to abuse for many years, and I knew what he was capable of. He had weapons that he told me he was going to use if he -- if we ever got in a situation like this.'
>
> THE COURT: That's not character evidence.

would be hit if she did not follow his rules.[4]

Appellant raises two issues for our consideration. The first claims that the trial court erred in admitting the above referenced testimony, and his second issue claims the admission is reversible harmful error.

**CONTROLLING LAW**

"In a criminal case, the general rule is that evidence of a person's character is not admissible to prove conforming conduct." *Harrison v. State*, 241 S.W.3d 23, 25 (Tex.Crim.App. 2007); TEX.R.EVID. 404(a)(1). But a trial court may allow extraneous offense evidence if it: (1) is relevant to a material, non-character conformity issue; and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex.Crim.App. 2009). The first requirement follows from TEX.R.EVID. 404(b) and the second from Rule 403.

Evidence Rule 404(b) specifically provides that "[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). However, extraneous acts evidence may be admissible if it has relevance beyond character conformity, such as showing motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. TEX.R.EVID. 404(b)(2). The enumerated exceptions to Rule 404(b) are illustrative and not exhaustive. *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex.Crim.App. 1990)(op. on reh'g); *Iglesias v. State*, 564 S.W.3d 461, 468 (Tex.App.--El Paso 2018, no pet.). For example, though

[4] Appellant contested this claim by calling his mother to the stand. She testified that Viviana and Appellant lived with her for several years and during that time Viviana had her own money and went to the store when she wanted. She denied that there was anything unusual about her son's relationship with Viviana, to include any claim he was controlling or abusive.

not specifically mentioned in the rule, extraneous offense evidence may also be admitted to rebut a defensive theory. *See Crank v. State*, 761 S.W.2d 328, 341 (Tex.Crim.App. 1988)("Probably the most common situation which gives rise to the admission of extraneous offenses is in rebuttal of a defensive theory."), *disapproved on other grounds by Alford v. State,* 866 S.W.2d 619 (Tex.Crim.App. 1993).

Once the trial court rules that the evidence has relevance apart from character conformity, the proponent has cleared the relevance hurdle. *Montgomery*, 810 S.W.2d at 388. The party opposing admission of the evidence *may* then raise the related Rule 403 objection: relevant evidence may nevertheless be excluded because its probative value is substantially outweighed by the danger of unfair prejudice. *Id*. at 388; TEX.R.EVID. 403. Of course, "[v]irtually all evidence that a party offers will be prejudicial to the opponent's case, or the party would not offer it. Evidence is unfairly prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justifies its admission into evidence." *Casey v. State*, 215 S.W.3d 870, 883 (Tex.Crim.App 2007) [citations omitted]. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence is more probative that prejudicial. *Martinez v. State*, 327 S.W.3d 727, 737 (Tex.Crim.App. 2010). 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).

Overlaid on all these general rules is Article 38.371(a) of the Texas Code of Criminal Procedure that specifically governs family involved assault cases. TEX.CODE CRIM.PROC.ANN. art. 38.371(a).[5] That statute provides that "subject to the Texas Rules of Evidence or other

[5] The 86th Legislature recently amended Section 38.371(a) to broaden the kind of crimes that are governed by the provision. *See* Act of May 22, 2019, 86th Leg., R.S., ch. 679, § 2, 2019 TEX.GEN.LAWS. 1956 (to be codified at TEX.CODE CRIM.PROC.ANN. art. 38.371(a)); Senate Comm. Criminal Justice, Bill Analysis, S.B. 2136, 86th Leg. R.S. (2019).

applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense . . . including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim." *Id.* at § 38.371(b). But the next subsection also states: "This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law." *Id.* at § 38.371(c).

**STANDARD OF REVIEW**

Generally, we review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Martinez*, 327 S.W.3d at 736. This same standard specifically applies to a trial court's decision to admit extraneous-offense evidence under Rule 404(b) and Rule 403. *Knight v. State*, 457 S.W.3d 192, 201 (Tex.App.--El Paso 2015, pet. ref'd)(Rule 404(b)); *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex.Crim.App. 2013)(Rule 403). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex.Crim.App. 2003). Moreover, "[i]f the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment." *Page v. State*, 213 S.W.3d 332, 337 (Tex.Crim.App. 2006), *quoting Sauceda v. State*, 129 S.W.3d 116, 120 (Tex.Crim.App. 2004).

Even if the admission or exclusion of evidence was erroneous, we still must assess harm. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex.Crim.App. 2018). Evidentiary errors generally constitute non-constitutional error which we review under TEX.R.APP.P. 44.2(b). *Gonzalez*, 544 S.W.3d at 373; *Walters v. State*, 247 S.W.3d 204, 219 (Tex.Crim.App. 2007). An appellate court must disregard a non-constitutional error that does not affect a criminal defendant's "substantial

rights." TEX.R.APP.P. 44.2(b); *Casey*, 215 S.W.3d at 884-85. Under that rule, an appellate court may not reverse for a non-constitutional error if the court, after examining the entire record, has a fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Id*. at 884-85. In doing so, we consider (1) the character of the alleged error and how it might be connected to other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4) whether the State emphasized the complained of error. *Gonzalez*, 544 S.W.3d at 373, *citing Motilla v. State*, 78 S.W.3d 352, 358 (Tex.Crim.App. 2002).

**APPLICATION**

Appellant contended below that while Article 38.371 would allow testimony that the couple was married (i.e. the *relationship* between the two), it does not allow admission of the prior assaultive conduct. According to Appellant, that evidence was either improper character evidence or was "inflammatory and prejudicial[.]" We treat these as Rule 404(b) and Rule 403 objections. Even as such, we conclude the trial court did not abuse its discretion in admitting the evidence, nor would the admission amount to harmful error.

**Rule 404(b)**

The evidence at issue was relevant to a non-conformity issue and consequently was admissible under Rule 404(b). In deciding whether a particular piece of evidence is relevant, a trial court judge should ask "would a reasonable person, with some experience in the real world believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit." *Montgomery*, 810 S.W.2d at 376, *quoting United States v. Brashier*, 548 F.2d 1315, 1325 (9th Cir.1976). If the trial court believes that a reasonable juror

would conclude that the evidence alters the probabilities of contested events to any degree, the evidence is relevant. *Id.*

The contested evidence here described the couple's relationship so as to explain why Viviana did not report any physical assault when the police first talked to her. The jury would have naturally wondered why Viviana did not make an immediate outcry when the police arrived. At trial, she testified she did not because Appellant threatened to kill her. And that fear would be more credible if she had some reason to believe that Appellant was capable of doing so.

An analogous issue arose in *Gonzalez v. State*, 541 S.W.3d 306 (Tex.App.--Houston [14th Dist.] 2017, no pet.). In that case, the defendant's girlfriend first claimed that he assaulted her, but she soon recanted the claim. *Id*. at 309. She also did not testify at trial. *Id*. The State admitted a prior complaint and the defendant's prior conviction for an assault involving the same girlfriend. *Id.* at 310. Acknowledging the application of Article 38.371(a), the court concluded the evidence was relevant given the victim's reluctance to testify and recanting the assault claim:

> The nature of the relationship between the actor and alleged victim may be relevant to, among other things, confirm the alleged victim's initial—and later recanted—statements to police, or to explain the alleged victim's unwillingness to cooperate with law enforcement or prosecution. Neither use contravenes Rule 404(b)'s prohibition against use of character-conformity or propensity evidence because the State is not relying on the evidence to convince the jury of appellant's guilt on the basis that appellant was acting 'in accordance with [his] character.' TEX.R.EVID. 404(b)(1). We conclude that it is at least within the zone of reasonable disagreement that the prior complaint was admissible for the non-character-conformity purposes of (1) explaining [the victim's] recantation and (2) rebutting appellant's defensive theory that [the victim] initially fabricated her allegations against him.

*Id.* at 312-13; *see also Williams v. State*, No. 02-18-00382-CR, 2019 WL 2223214, at *3 (Tex.App.--Fort Worth May 23, 2019, no pet. h.)("The trial court could have reasonably concluded that evidence of Williams's past assaultive behavior toward Mother was necessary for the jury to

understand why she did not want to testify at trial and why the prosecutor had to subpoena her to do so.").

Appellant responds in several ways. First, he claims that unlike *Gonzalez*, Viviana never denied that an assault occurred. We read the record differently. Her initial statement of "I'm fine" to the police officers, and her refusal to give much other information at the scene is tantamount to a denial of the assault. The officers made no arrests and let Appellant go back home in the absence of any claim of a crime. Once away from Appellant, and in the safe confines of the hospital, she reported the assault. This was a classic delayed outcry, which Appellant's background of prior abusive conduct helped to explain.

Appellant also attempts to distinguish *Gonzalez* by claiming that he did not open the door to the evidence's admission because he never claimed a late outcry. Again, we read the record differently. In his opening statement, Appellant asked the jury to carefully consider Viviana's credibility, further noting, "We have an officer who came on the scene after the fact who, at first, said he saw no injuries and she described no abuse. Then we have the same officer who went and talked to her at the hospital." During Appellant's cross-examination of Viviana, her counsel developed that at the scene, Viviana made no outcry, and the police made no arrests. And in his own case, he flatly denied that any assault took place and claimed that Viviana "is making this up." Rebutting a defensive claim is one the classic "other reasons" which Rule 404(b) contemplates. *See Dabney v. State*, 492 S.W.3d 309, 317 (Tex.Crim.App. 2016)(the door to the admission of extraneous-offense evidence can be opened to rebut a defensive theory presented at least as early as in the opening statement); *Bass v. State*, 270 S.W.3d 557, 563 (Tex.Crim.App. 2008)(holding extraneous offense was admissible to rebut defense claim of fabrication made during opening statement); *Gonzalez*, 541 S.W.3d at 312; *Bargas v. State*, 252 S.W.3d 876, 890

(Tex.App.--Houston [14th Dist.] 2008, no pet.)("extraneous-offense evidence, under Rule 404(b), is admissible to rebut a defensive theory raised in an opening statement or raised by the State's witnesses during cross-examination[.]").

Appellant also suggests that the trial court's application of Article 38.371 would effectively swallow Rule 404(b). He contends that nothing would be excluded. But like the *Gonzalez* court, we conclude the two provisions are not incompatible. *Gonzalez*, 541 S.W.3d at 312 ("We disagree that article 38.371 conflicts with Rule 404(b), or that the State's reliance on article 38.371 to support the complaint's admission is an end-run around Rule 404(b)."). We could envision several bad acts that would not be relevant for the delayed outcry and would thus be excludable. For instance, if Appellant had a prior conviction for theft, or tax evasion (or most property crimes), the State would be hard pressed to explain how that kind of bad act is relevant to explain a delayed outcry. Of course, those issues are not before us, and we do not decide them here. Yet the point is that Article 38.371 would not justify the admission of every bad act that would otherwise be inadmissible under Rule 404(b).

**Rule 403**

We next turn to Appellant's Rule 403 argument. He contends the evidence of prior assaults and his firearm ownership was highly prejudicial. In applying Rule 403, 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). These factors may well blend together in practice. *Id.; Iglesias v. State*, 564 S.W.3d 461, 468 (Tex.App.--El Paso 2018, no pet.).[6]

Looking to the first part of the balance, the State needed this evidence. Viviana did not make an immediate outcry when the police arrived on scene. The State had to explain that omission or else simply not put on evidence of the police's initial encounter with Viviana and Appellant. But had they done so, the jury would not have heard important details about Appellant's actions when the police arrived at the scene. Moreover, Viviana's story would have contained an unexplained gap from the time of the assault inside her house until the time when she was seen at the hospital. The evidence of the nature of their prior relationship was also highly probative. Viviana's claim of fear became more credible in light of Appellant's past actions. The fact he possessed weapons gave him a means of carrying out the threat.

On the flipside of the balance, Appellant has not convinced us that the negative tendencies of the evidence substantially outweigh its probative value. As the trial court alluded to, a Texas jury would be unlikely to convict Appellant simply because he owned firearms. Additionally, we have set out the sum of the extraneous offense testimony offered in the guilt innocence phase of the trial. There was but a single mention of gun ownership, a single mention of the prior "abusive" behavior and a reference to "torn ligaments." There is no suggestion the jury would be ill-equipped to evaluate this kind of evidence, and its brevity belies any argument that it consumed an inordinate amount of time or was needlessly cumulative. In sum, under Rule 403 we presume that the probative value of relevant evidence exceeds any danger of unfair prejudice. *Hammer v. State*,

[6] Appellant folds into this issue a claim that at the time of the pretrial hearing when Appellant's objection was heard, the trial court was unaware of the nature of the evidence that the State was going to admit. Hence, the trial court could not have conducted a true balancing analysis. We reject this claim because at two points in the pretrial discussion the State's attorney generally described the nature of the testimony the State would offer, and the testimony actually admitted was consistent with the prosecutor's description.

296 S.W.3d 555, 568 (Tex.Crim.App. 2009); *Montgomery*, 810 S.W.2d at 388; *Iglesias*, 564 S.W.3d at 468. Based on this presumption, as well as our review of the record and the relevant Rule 403 criteria, we conclude the trial court did not abuse its discretion in concluding the probative value of the extraneous-offense evidence was not substantially outweighed by any prejudicial impact. We accordingly overrule Appellant's first issue.

**Harm**

And even if we are mistaken on that count, Appellant fails to convince us that the admission of the evidence caused him substantial harm. TEX.R.APP.P. 44.2(b). Appellant properly sets out the factors that we must consider in a harm analysis, but focuses only on the question of Appellant's credibility, and two aspects of closing argument. Witness credibility was indeed an important question, but this was not only a "he said" "she said" case. Appellant was convicted of impeding Viviana's breath or circulation by applying pressure to her throat or neck. The State admitted photographs showing markings on her neck. The medical records noted ecchymosis (bruising) on the neck. The State's expert testified the physical findings noted in the medical record were consistent with a strangulation injury. Appellant's claim that Viviana injured herself by running into a sign post or throwing herself to the ground was not shown to explain those same injuries. Moreover, the State's attorney mentioned the other assaults and the weapons in a single paragraph of her closing argument and made clear that evidence was only presented to explain why Viviana did not make an immediate outcry and to give context of her mental state at the time. Based on this evidence, and the record as whole, we have a fair assurance that any error did not have a substantial and injurious effect or influence in determining the jury's verdict. Issue Two is overruled.

For the reasons noted, the conviction below is affirmed.

ANN CRAWFORD McCLURE, Senior Judge

November 25, 2019

Before Rodriguez, J. Palafox, J., and McClure, Senior Judge
McClure, Senior Judge (Sitting by Assignment)

(Do Not Publish)