AFFIRM; and Opinion Filed May 9, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00201-CR

CHADRIC LUPER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 59th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 063686

MEMORANDUM OPINION

Before Justices Lang, Brown, and O'Neill[1]
Opinion by Justice Brown

Following a jury trial, Chadric Luper appeals his conviction for assault on a public servant. In four issues, appellant complains of alleged jury charge error, exclusion of evidence, destruction of evidence, and a jury shuffle granted to the State. We affirm the trial court's judgment.

BACKGROUND

Appellant was indicted for assault on a public servant, Denison Police Sergeant Jackie Thomas. The offense occurred after Sergeant Thomas and other officers responded in uniform to calls regarding a fight between two women at a Denison bar. When Thomas arrived at the bar, Officers Jose Reyna and Wesley Bounds had a female in custody. While the officers were

[1] The Hon. Michael J. O'Neill, Justice, Assigned

talking in the parking lot, two women reported another fight inside the bar. Sergeant Thomas went inside and saw a crowd of people around a fight. As he was trying to pull people away to get to the fighters, someone grabbed him from behind by the shoulder and started pulling him. Thomas yelled, "Let go of me," but the person continued to pull. Sergeant Thomas turned around and saw that the person was appellant. The officer pushed appellant back and told him to let go and to get away. Appellant swung and hit Sergeant Thomas in the right side of his face causing the officer to fall backwards. After appellant hit Sergeant Thomas, appellant's friend Anthony Henderson hit Thomas in the face too. Henderson also struck Officer Reyna.

Officer Bounds witnessed the incident and testified that he saw appellant punch Sergeant Thomas in the face. Officer Reyna saw appellant grab Sergeant Thomas and saw Thomas push appellant back. Reyna turned away for a moment so he did not see appellant punch Thomas. Reyna did see appellant's arms come down and Thomas fall. Officer Reyna shot appellant with his taser. Officer Tom Unerfusser arrived at the bar after the other officers. As he was attempting to handcuff one of the parties to the second bar fight, appellant came towards them. Unerfusser pointed his taser at appellant and instructed him to get back. Appellant complied. The other officers identified appellant as the person who assaulted Sergeant Thomas, and appellant was arrested.

The defense called appellant, Anthony Henderson, and four other witnesses who were at the bar on the night in question to testify. Jamie Hines, Brittany Spencer, Delvin Briscoe, and Jackie Johnson each testified that he or she did not see appellant fighting with any officer. Henderson testified that he was standing behind the officer who tased appellant and did not see appellant hit or grab any officer. Henderson acknowledged that he pleaded guilty to assault on a peace officer based on his conduct that night. Appellant denied striking Sergeant Thomas. He testified that he offered to help Sergeant Thomas apprehend the instigator of the fight.

According to appellant, he complied with Thomas's request to back up and never grabbed him. Appellant was just standing there when police tased him.

The jury found appellant guilty. Appellant and his girlfriend testified on his behalf during the punishment phase. The jury assessed appellant's punishment at ten years' confinement and a $500 fine. This appeal followed.

MITIGATION INSTRUCTION

In his first issue, appellant contends the trial court erred in refusing to include his requested jury instruction regarding mitigation in the punishment charge. Appellant requested the following instruction: "You may consider any evidence introduced by the Defendant in mitigation of punishment to include, his general reputation, his character or an opinion about his character in mitigation of punishment." The trial court rejected the request.

Appellate review of purported jury charge error involves a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether error occurred. *Id.* Second, if error occurred, we analyze that error for harm. *Id.* We review a trial court's decision not to submit an instruction for an abuse of discretion. *See Wesbrook v. State*, 29 S.W.3d 103, 122 (Tex. Crim. App. 2000).

Appellant contends the requested instruction was necessary to assist the jury in "deliberating regarding the evidence he presented in mitigation of his culpability, including the steps he has taken both in prison and since release to improve himself and to become a productive member of society." Appellant relies on the general proposition that an accused is entitled to an instruction on every defensive or mitigating issue raised by the evidence. *See Arnold v. State*, 742 S.W.2d 10, 13 (Tex. Crim. App. 1987). The cases he cites involve instructions on defensive issues such as self-defense. *See, e.g.*, *Williamson v. State*, 672 S.W.2d 484, 486 (Tex. Crim. App. 1984), *abrogated by Smith v. State*, 965 S.W.2d 509 (Tex. Crim. App.

1998); *Warren v. State*, 565 S.W.2d 931, 934 (Tex. Crim. App. [Panel Op.] 1978); *see also Johnson v. State*, 452 S.W.3d 398, 407 (Tex. App.—Amarillo 2014, pet. ref'd) (discussing whether defendant was entitled to mitigating instruction under section 8.04 of penal code on insanity by intoxication during punishment phase). They do not stand for the proposition that appellant was entitled to the mitigation instruction he requested. The court of criminal appeals has stated that the law does not require a juror to consider any particular piece of evidence as mitigating. *See Raby v. State*, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998) (capital case). All the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating. *Id.* The court's charge did this by instructing the jury that "in fixing the defendant's punishment, you make take into consideration all the facts shown by the evidence admitted before you in the full trial of this case." We conclude the trial court did not abuse its discretion in refusing the requested instruction. We overrule appellant's first issue.

EXCLUSION OF CERTAIN TESTIMONY FROM ANTHONY HENDERSON

In his second issue, appellant contends the trial court erred in excluding testimony from Henderson during the punishment phase. At the start of the punishment phase, defense counsel told the court that during the State's closing argument, the prosecutor had alleged appellant and his witnesses had "concocted" their version of the events. Although the prosecutor denied making such an argument, defense counsel told the court he believed the argument opened the door to the issue of whether there was any "concoction, collaboration, or intimidation." Counsel wanted to call Henderson to testify on that subject and asserted that such evidence was relevant to sentencing. Counsel acknowledged the main reason he wanted Henderson to testify was to present evidence that Henderson received probation for his conviction for assault on a peace officer, but recognized that the law was contrary to that request. The trial court ruled that it was

not going to allow Henderson to testify on the requested subject matter because it was not relevant.

Defense counsel later questioned Henderson outside the presence of the jury to make the following offer of proof:

> Q. Did anybody from my side -- me, Mr. Luper, or anybody else -- try to get you to come in here and testify one way or another?
>
> A. No.
>
> Q. Okay. Was -- did you -- did anybody from their side try to intimidate you about testifying in this case, the State's side?
>
> A. I felt --
>
> Q. You felt intimidated. Is that what you're saying?
>
> A. Yes. I [sic] never was specifically said, do this or do that.
>
> Q. Okay.
>
> A. I just felt --
>
> Q. But did [the prosecutor], in accordance with your previous testimony, tell you that he could do more for you than I could?
>
> A. Yes.

Henderson also stated that he told appellant's counsel the State told him if he testified about appellant his probation would be revoked.

At the punishment phase of trial evidence may be offered "as to any matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (West Supp. 2015). Relevancy in the punishment phase is a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case. *Ellison v. State*, 201 S.W.3d 714, 719 (Tex. Crim. App. 2006). We review a complaint regarding the exclusion of evidence at the punishment phase under an abuse of discretion standard. *See Hayden v. State*, 296 S.W.3d 549, 553 (Tex. Crim. App. 2009).

Appellant maintains the trial court erred in excluding Henderson's testimony because it went directly to appellant's defensive theory. Appellant explains that his defensive theory was that the officers colluded after the fact to convict him of assaulting Sergeant Thomas. The excluded testimony, however, involved witness Henderson's conversations with the prosecutor. It did not show collusion among the officers. Further, appellant does not explain in his brief how the excluded testimony would have been helpful to the jury in determining the appropriate punishment for appellant's crime. The trial court properly determined that Henderson's testimony was not relevant to sentencing. The court did not abuse its discretion in excluding it. We overrule appellant's second issue.

DESTRUCTION OF AUDIO RECORDING

In his third issue, appellant contends he was denied due process of law under the United States Constitution because an audio recording of an interview with Henderson was destroyed. About a month before trial, appellant filed a motion to recuse the Grayson County District Attorney's Office. Several witnesses testified at a hearing on the motion. One of them was Dennis Michael, an investigator with the DA's office. Michael stated that he and one of the prosecutors conducted a ten to fifteen minute interview with Henderson at the jail. Michael took a recorder with him and recorded the conversation. He later erased the conversation because "you couldn't hear the voices on it." Michael described the recording as "[u]nintelligible and mumbling" and said no conversation was discernable. Appellant's motion to recuse asserted, among other things, that Michael and the prosecutor had become trial witnesses based on the destroyed audiotape. The trial court denied the motion to recuse, and appellant does not complain about that ruling. Appellant raised the issue of the State's destruction of the audiotape in his motion for new trial.

The State maintains that appellant has not preserved this issue for appellate review because he did not object at trial to the destruction of the tape. We will assume, without deciding, that appellant preserved error. We nevertheless conclude appellant's due process rights were not violated.

In cases involving the State's failure to preserve evidence in a criminal trial, the United States Supreme Court has drawn a distinction between "material, exculpatory evidence" and "potentially useful evidence." *Ramirez v. State*, 301 S.W.3d 410, 420 (Tex. App.—Austin 2009, no pet.) (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)). A federal due process violation occurs if the State suppresses or fails to disclose material, exculpatory evidence, regardless of whether the State acted in bad faith. *Id.* If a defendant seeks to prove a federal due process violation based on the State's destruction of potentially useful evidence, he must show the State acted in bad faith in destroying the evidence. *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008); *Ramirez*, 301 S.W.3d at 420. When a defendant can assert only that the lost or destroyed evidence might have exonerated him, the evidence in question is "potentially useful," as opposed to material and exculpatory. *See Ramirez*, 301 S.W.3d at 420. Bad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful. *Rodriguez v. State*, No. 01-13-00447-CR, 2016 WL 921584, at *8 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet. h.) (citing *Ex parte Napper*, 322 S.W.3d 202, 238 (Tex. Crim. App. 2010)).

Appellant maintains that Henderson, who testified that appellant was not involved in the altercation and did not strike Sergeant Thomas, "may have made many more exculpatory or exonerative statements during the destroyed interview." The missing audio recording thus falls into the category of potentially useful evidence, and appellant must demonstrate that the State acted in bad faith. *See id.* Appellant does not even argue in his brief that the evidence shows

bad faith. Regarding the reason the recording was destroyed, the record reflects only that the investigator erased the tape because the conversation on it was unintelligible. Appellant has not demonstrated that the State acted in bad faith. We overrule appellant's third issue.

JURY SHUFFLE

In his fourth issue, appellant contends the trial court erred by granting the State's request for a jury shuffle. He asks us to extend the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), used to analyze whether a party has used a peremptory challenge to exclude a venireperson on account of race, to jury shuffle requests. Appellant recognizes that no court has expressly held that *Batson* applies to jury shuffles.

Before voir dire began, the State asked for a jury shuffle. Defense counsel noted that panel members five and seven were black and that there were only two other black members of the panel. Counsel asked that the State give a race-neutral reason for the shuffle. The State responded that it was not required to give a reason. Defense counsel objected to the judge's failure to ask the State to provide a reason for the shuffle. The judge overruled the objection. "Just for precaution," the prosecutor provided a race-neutral reason, stating he wanted a shuffle because "the majority of the law enforcement officials on this jury . . . are in the last few of my jurors . . . so I wanted them in the front." The judge then shuffled the jury panel.

Appellant got all the relief he requested in the trial court. After the prosecutor stated he did not need to provide a race-neutral reason for the shuffle, appellant objected to the trial judge's failure to require the State to provide a reason. The prosecutor then offered a race-neutral reason. Appellant made no further objections. Although he now argues that the State's discriminatory intent can be inferred from the "purportedly neutral" reason it gave for wanting the shuffle, appellant did not argue at trial that the stated reason was a sham or ask the judge to rule on whether he had proven purposeful discrimination. *See* TEX. R. APP. P. 33.1(a); *see also*

Leadon v. State, 332 S.W.3d 600, 611 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (after State gives race-neutral reason, final step in resolving *Batson* challenge is for court to determine whether defendant met burden to prove purposeful discrimination). There is nothing left for us to review. Even if there was, it is not our role as an intermediate appellate court to determine that *Batson* should apply to jury shuffles. *See Ladd v. State*, 3 S.W.3d 547, 563 n.9 (Tex. Crim. App. 1999) (noting that although one legal scholar had argued *Batson* should extend to jury shuffles, court of criminal appeals did not endorse that view). We overrule appellant's fourth issue.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHADRIC LUPER, Appellant	On Appeal from the 59th Judicial District Court, Grayson County, Texas
No. 05-15-00201-CR V.	Trial Court Cause No. 063686.
	Opinion delivered by Justice Brown, Justices
THE STATE OF TEXAS, Appellee	Lang and O'Neill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 9th day of May, 2016.