AFFIRM; and Opinion Filed November 29, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01157-CR

WILLIE RENARD ANDERSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F16-00644-V

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

A jury convicted Willie Renard Anderson of aggravated assault with a deadly weapon, causing serious bodily injury and involving family violence; found the alleged enhancement true; and assessed punishment of life imprisonment and a $10,000 fine. In three points of error, Anderson contends the evidence is insufficient to prove he committed the offense, and the trial court erred by denying his motions for mistrial and by determining that, if Anderson offered evidence he contended was relevant to the complainant's motive to lie about the identity of her assailant, it would open the door to evidence of Anderson's prior assault of the complainant. We affirm the trial court's judgment.

Background[1]

Katherine Dunn was assaulted on December 6, 2014, in the trailer she lived in on Murdock Road. Following the assault, Dunn knocked on the door of a house down the street from the trailer, and the neighbor called 911. The neighbor relayed to Dunn questions posed by the 911 operator about what had occurred, and Dunn responded that she had been stabbed and "some black guy" beat her with a baseball bat. The neighbor also reported to the operator that Dunn knew her assailant, but would not provide his name.

After Dunn was transported to Baylor University Medical Center, she told the police and her boyfriend, Jackie Wheeler, that Anderson had assaulted her. Dr. Brandon Rabeler, a trauma surgeon at the hospital who treated Dunn, testified Dunn was "completely covered in blood," was cold and clammy, and had lost so much blood that they could not obtain a blood pressure reading. Dunn's forearms were covered with multiple deep gashes. Dr. Rabeler testified that, although he generally tried "not to make speculations about the mechanism of the injury," he had written in his record of Dunn's treatment that the gashes looked like defensive wounds. Multiple tendons in Dunn's left hand had been transected, preventing Dunn from moving three of the fingers in that hand. Dunn also had a paraorbital laceration and bruising around her right eye. In Dr. Rabeler's opinion, without treatment, Dunn "certainly would have died."

Dunn testified she and Anderson had been in a dating relationship for approximately three weeks in September 2014. After the relationship ended, Dunn started dating Wheeler. Dunn next saw Anderson on December 3, 2014, when he came to her trailer and started beating her. According to Dunn, over the next few days, Anderson repeatedly came by her trailer and asked her to resume their relationship, but she refused to do so because of her relationship with Wheeler.

[1] We recite only those facts necessary to address Anderson's complaints on appeal.

During the morning of December 6, 2014, Dunn smoked "about five cents worth" of methamphetamine. Later in the day, she went "out riding" with a friend. When she returned to her trailer, she found Anderson and Margarito Leon-Hernandez waiting. Prior to Dunn's relationship with Anderson, Dunn and Leon-Hernandez had a romantic relationship that lasted approximately seven months. Dunn and Leon-Hernandez's relationship ended after Dunn was arrested for assaulting Leon-Hernandez in a hotel room. Dunn and Leon-Hernandez remained friends following the end of their relationship, and Leon-Hernandez visited Anderson almost every weekend. Dunn, however, did not expect Anderson to be at the trailer.

Dunn testified Anderson threw her into the trailer, and then picked up Leon-Hernandez and placed him on a stepstool in the back of the trailer. Anderson began beating Dunn with a mirror and saying he was going to kill her and Leon-Hernandez. The mirror broke, and Anderson continued to beat her with his fists and pieces of the mirror. At one point, Anderson went into the kitchen of the trailer to find a knife. Anderson also picked up the television set several times, and hit Leon-Hernandez with it. Anderson left the trailer when somebody knocked on the door. Dunn held the door closed, and would not let Anderson reenter the trailer.

According to Dunn, she was cut while attempting to block Anderson's blows. Three tendons in her hand were cut, and she did not have any feeling in them. Her arms were "all cut up," and the side of her face was "black and blue." She also had impaired vision in one eye after the assault.

Dunn testified she was diagnosed in 2004 with paranoid schizophrenia and severe anxiety. Although she took the medication prescribed for her anxiety, she did not take the other prescribed medications. She admitted she had been convicted of prostitution and of the assault of Leon-Hernandez.

Leon-Hernandez testified he had been in a romantic relationship with Dunn. The relationship ended after Dunn "went crazy" at the hotel where they were staying, broke a window, kicked him, beat him with a clothes hanger, and spit on him. Dunn and Leon-Hernandez remained friends after the relationship ended, and he would visit Dunn on the weekends. He was with Dunn at her trailer on December 6, 2014, when "that guy came." Dunn let the man into the trailer, and both Leon-Hernandez and the man drank some beers. Dunn and the man talked for a period of time, and then began arguing. Because they were speaking in English, Leon-Hernandez could not understand all of what they were saying.

According to Leon-Hernandez, the man began hitting Dunn with his fists. Leon-Hernandez also saw the man using pieces of mirror and a knife to cut Dunn. The man used his hands and feet to strike Leon-Hernandez, and said he was going to kill both Dunn and Leon-Hernandez. Leon-Hernandez had bruises on his face from the blows, and a cut on his head from being hit with a plate. Leon-Hernandez denied the man hit him with a television set.

After the man left, Leon-Hernandez walked to a Texaco station in an attempt to find a police officer. When Leon-Hernandez returned to the trailer, the police were there. Leon-Hernandez provided a police officer with a description of the man and, in a subsequent telephone conversation, told a detective the assailant was Dunn's ex-boyfriend.

The jury convicted Anderson of aggravated assault with a deadly weapon, causing serious bodily injury and involving family violence; found the alleged enhancement true; and assessed punishment of life imprisonment and a $10,000 fine.

Sufficiency of the Evidence

In his first point of error, Anderson argues the evidence was insufficient to support the jury's finding that he committed the assault because (1) Dunn was unable to identify him during trial and, although she identified him as the person depicted in a photograph, she never testified

the person in the photograph assaulted her; (2) Leon-Hernandez was never asked to identify Anderson; and (3) there was no physical evidence linking Anderson to the assault.

Relevant Facts

While she was in the hospital, Dunn told both the police and Wheeler that Anderson was the person who assaulted her. At trial, Dunn testified repeatedly that Anderson was the person who assaulted her. However, when asked whether she saw Anderson in the courtroom, Dunn responded she could not see, had only "20 percent seeing in my eye," and had not brought her glasses. The trial court allowed Dunn to leave the witness stand to "take a look around."

Dunn said, "I think that's him over there in the white." The prosecutor then instructed Dunn "to take a look where you can see." Anderson objected to the prosecutor coaching Dunn. Dunn then stated, "I mean, that's him over there." After being instructed to "keep her voice up," Dunn repeated, "I'm thinking that's him right there." The trial court indicated Dunn was "pointing over in some direction." Dunn responded, "[r]ight there." The prosecutor asked Dunn to describe an item of clothing the person she had identified was wearing, and Dunn stated the person was wearing a "black shirt." The prosecutor then asked what chair the person Dunn had identified was sitting in, and Dunn responded, "[t]hird one on the right-hand side." The prosecutor then showed Dunn State's Exhibit 115, and asked Dunn if she recognized the person depicted in the photograph. Dunn responded the person was "Willie Anderson."

Wheeler testified he began dating Dunn prior to the assault. He saw Anderson in the vicinity of Dunn's trailer on several occasions. One day shortly before the assault, Wheeler was at Dunn's trailer and saw Anderson walking down the sidewalk. Wheeler asked Dunn about Anderson, and learned she had been in a relationship with him. On one occasion, Anderson approached Wheeler at a Chevron station and said he was "good if a relationship you and I and Kathy." Wheeler responded there could only be a relationship between him and Dunn or

between Anderson and Dunn, and indicated he would meet Anderson at Dunn's trailer. Anderson told Dunn about what he had discussed with Wheeler, and Dunn responded she had already told Anderson she wanted to be with Wheeler. The expression on Anderson's face made Wheeler think that Anderson "didn't take it too well." Wheeler identified Anderson in court.

Darren Hodge, an investigator for the Dallas County District Attorney's Office, identified Anderson in court as the person he had taken fingerprints from during the trial. According to Hodge, when a person is arrested and brought to the Dallas County Jail, a "blue-back" is prepared. The "blue-back" contains information on the individual's name, race, sex, and date of birth, and contains fingerprints and a photograph taken of the individual at the time of the arrest. Hodge compared the fingerprints he took from Anderson during trial to those contained in the "blue-back" following Anderson's arrest. The fingerprints matched and, in Hodge's opinion, Anderson was the person arrested. Further, the photograph taken when Anderson was arrested was the same photograph Dunn had identified during her testimony as depicting Anderson.

Standard of Review

We review the sufficiency of the evidence under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Fernandez v. State*, 479 S.W.3d 835, 837 (Tex. Crim. App. 2016). We examine all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Balderas v. State*, 517 S.W.3d 756, 765–66 (Tex. Crim. App. 2016), *cert. denied*, 137 S.Ct. 1207 (2017). This standard recognizes "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319; s*ee also Balderas*, 517 S.W.3d at 766. The factfinder is entitled to judge the credibility of the witnesses, and can choose to believe all,

some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *see also Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) ("The factfinder exclusively determines the weight and credibility of the evidence.").

We defer to the factfinder's determinations of credibility, and may not substitute our judgment for that of the factfinder. *Jackson*, 443 U.S. at 319; *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (in conducting legal sufficiency analysis, appellate court "may not re-weigh the evidence and substitute our judgment for that of the jury"). When there is conflicting evidence, we must presume the factfinder resolved the conflict in favor of the verdict, and defer to that resolution. *Jackson*, 443 U.S. at 326; *Balderas*, 517 S.W.3d at 766. Circumstantial evidence is as probative as direct evidence and, alone, can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Evidence is sufficient if "the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict." *Wise*, 364 S.W.3d at 903; *see also Balderas*, 517 S.W.3d at 766.

Analysis

The State has the burden of proving the defendant is the person who committed the charged offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). However, it may prove a defendant's identity and criminal culpability by either direct or circumstantial evidence, along with all reasonable inferences from that evidence. *Balderas*, 517 S.W.3d at 766. Evidence of identification is sufficient to support a conviction if "from a totality of the circumstances the jury was adequately apprised that the witnesses were referring" to the defendant. *Rohlfing v. State*, 612 S.W.2d 598, 601 (Tex. Crim. App. [Panel Op.] 1981); *see also Miller*, 667 S.W.2d at 775–76.

In this case, the jury heard evidence that Dunn had a personal relationship with Anderson and consistently identified him as her assailant. The jurors also saw the person Dunn pointed at in court and described as wearing a black shirt and sitting in the third seat on the right-hand side. Anderson does not contend Dunn identified some person other than him, did not object to this identification, and did not make a bill of exception concerning any possible confusion or misidentification. *See Rohlfing*, 612 S.W.2d at 601 (noting that if defendant's contention is another person was identified by the State's witnesses, it is incumbent upon him to object to the identification procedure employed or make a bill of exception).[2] Further, there is nothing in the record indicating the jury may have been misled by the in-court identification and, under these circumstances, we will not presume some person other than Anderson was identified and the jury nevertheless chose to convict Anderson. *See id.*

In addition, the jury saw the photograph that Dunn testified depicted Anderson, and was able to compare the person depicted in that photograph to Anderson. Wheeler identified Anderson as Dunn's ex-boyfriend, and described how Anderson did not take Dunn's rejection well. Hodges compared fingerprints he had taken from Anderson with those in the "blue-back" created after Anderson was arrested, and testified the fingerprints matched, Anderson was the person arrested, and the photograph in the "blue-back" was the photograph shown to Dunn. Finally, the record shows that Anderson, and no other person, was on trial for the assault, and the jury verdict reflects the jury found Anderson guilty of the charged offense. *See id*.

Under these circumstances, we conclude the evidence was sufficient for a rational jury to find beyond a reasonable doubt that Anderson was the person who assaulted Dunn. *See id.*; *Adams v. State*, 418 S.W.3d 803, 813 (Tex. App.—Texarkana 2013, pet. ref'd); *Purkey v. State*,

[2] *See also Salinas-Beas v. State*, No. 14-16-00344-CR, 2017 WL 2125651, at *3 (Tex. App.—Houston [14th Dist.] May 16, 2017, no pet.) (mem. op., not designated for publication).

656 S.W.2d 519, 520 (Tex. App.—Beaumont 1983, pet. ref'd). We resolve Anderson's first point of error against him.

Motions for Mistrial

In his second point of error, Anderson asserts the trial court erred by denying two motions for mistrial made after Dunn violated a motion in limine by testifying Anderson had been released from jail.

Relevant Facts

Prior to trial, Anderson filed a motion in limine requesting, as relevant to this appeal, that the State and its witnesses be precluded from mentioning or alluding to any convictions, alleged violations of the law, or extraneous conduct of Anderson until the trial court had determined, outside the presence of the jury, that such evidence was relevant. The trial court granted the motion.

During direct examination, the prosecutor asked Dunn if her relationship with Anderson ended after three weeks. After Dunn responded affirmatively, the prosecutor asked Dunn when she next saw Anderson. Dunn responded, "[t]hree days after he got out of jail." Anderson objected and requested the trial court instruct the jury to disregard the answer. The trial court instructed the jury to "disregard the last statement and last answer by the witness," but denied Anderson's motion for mistrial.

Dunn then testified the next time she saw Anderson was on December 3, 2014, three days before the assault. She was living by herself in the trailer, and had begun a relationship with Wheeler. When asked when Wheeler became her boyfriend, Dunn responded, "Willie was at one end. He was at the other end. I chose him over Willie." She clarified that she dated Anderson for approximately three weeks in September 2014, and after the relationship ended, did not see him again until December 3, 2014. When asked how she had happened to see

Anderson on December 3, 2014, Dunn again stated, "[h]e had just got out of jail." At Anderson's request, the trial court instructed the jury to "disregard the last answer by the witness." The trial court denied Anderson's motion for mistrial.

Analysis

A trial court's grant or denial of a motion in limine is a preliminary ruling and generally preserves nothing for appellate review. *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). Rather, to preserve error as to the subject of a motion in limine, a party must object at the time the subject is raised during trial. *Id.* The preferred procedure for preserving error is (1) a timely, specific objection, (2) a request for an instruction to disregard, and (3) a motion for mistrial. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). When, as here, the trial court sustains a defense objection and instructs the jury to disregard improper questioning, the issue is whether the trial court abused its discretion by denying the motion for mistrial. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *see also Balderas*, 517 S.W.3d at 783. We will uphold the trial court's ruling if was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

"[W]hether a mistrial should have been granted involves most, if not all, of the same considerations that attend a harm analysis." *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007) (quoting *Hawkins*, 135 S.W.3d at 77). These factors include: (1) the severity of the misconduct (magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure any harm from the misconduct (efficacy of any cautionary instruction by the trial court); and (3) the certainty of conviction absent the misconduct (strength of the evidence supporting the conviction). *Id.* at 700 (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)). In balancing these factors, we examine the particular facts and circumstances of the case. *See Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016); *Ladd v. State*, 3

S.W.3d 547, 567 (Tex. Crim. App. 1999). "A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd*, 3 S.W.3d at 567); *see also Hawkins*, 135 S.W.3d at 77. "Only in extreme circumstances, where the prejudice is incurable, will mistrial be required." *Hawkins*, 135 S.W.3d at 77; *see also Jenkins*, 493 S.W.3d at 612 ("A mistrial is an extreme remedy that should be granted only if residual prejudice remains after less drastic alternatives have been explored.").[3]

A mistrial due to an improper question is required only when the question is "clearly prejudicial" to the defendant and "of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." *Ladd*, 3 S.W.3d at 567.[4] "Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses." *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000) (per curiam); *see also Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009) (per curiam).[5] We generally presume the jury followed the trial court's instructions in the absence of evidence it did not. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). The presumption is refutable, but the appellant must rebut the presumption by pointing to evidence in the record indicating the jury failed to follow the trial court's instructions. *Id.*[6]

In this case, the prosecutor did not violate the motion in limine by asking questions intended to elicit evidence that Anderson had been in jail. Rather, he asked Dunn when and why

[3] *See also Ricks v. State*, No. AP-77,040, 2017 WL 4401589, at *13 (Tex. Crim. App. Oct. 4, 2017) (not designated for publication).

[4] *See also Clark v. State*, No. 05-15-00142-CR, 2016 WL 1733389, at *2 (Tex. App.—Dallas Apr. 28, 2016, no pet.) (mem. op., not designated for publication).

[5] *See also Ricks*, 2017 WL 4401589, at *13.

[6] *See also Ricks*, 2017 WL 4401589, at *13.

she next saw Anderson after their romantic relationship ended. In nonresponsive replies, Dunn disclosed Anderson had been in jail. Following Anderson's objections to Dunn's answers, the trial court immediately took curative measures by instructing the jury to disregard the answers. Further, in its charge, the trial court instructed the jury, "As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same." Nothing in the record reflects the jury disregarded the trial court's instructions.

Finally, Dunn was clear and consistent in identifying Anderson as the man who assaulted her. Anderson argues that because Dunn had numerous issues with her credibility, there was "some question" about her identification of Anderson as the assailant, and there was no physical evidence connecting him to the offense, the fact he had previously been in jail "may have been just enough to tip the scales." However, the jury heard evidence of Dunn's prior criminal history, mental health issues, and drug use on the day of the assault. The jury also heard the internal inconsistencies in Dunn's testimony as well as the inconsistencies between Dunn's testimony and Leon-Hernandez's testimony about the assault. Nevertheless, the jury found Anderson guilty of the assault. Based on this record, we are unable to conclude Dunn's unsolicited references to Anderson being release from jail were so clearly prejudicial or of such a character that it was impossible to withdraw the impression from the minds of the jury. *See Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992) ("We find the uninvited and unembellished reference to appellant's prior incarceration—although inadmissible—was no[t] so inflammatory as to undermine the efficacy of the trial court's instruction to disregard."); *Ballard v. State*, No. 01-15-00275-CR, 2017 WL 3140033, at *6 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet. h.) (concluding FBI agent's unintentionally elicited testimony about presence of gun and drugs in defendant's house was not so calculated to inflame minds of jury that mistrial was required).

We conclude the trial court did not err by denying Anderson's two motions for mistrial. We resolve Anderson's second point of error against him.

Admission of Evidence

In his third point of error, Anderson asserts the trial court erred by ruling that, if he chose to introduce evidence of Leon-Hernandez's immigration status, he would open the door to evidence of his prior assault of Dunn. Anderson specifically argues the prior assault had no relation to any motive Dunn had to lie about Leon-Hernandez's involvement in the December 6, 2014 assault.

Relevant Facts

Contending Leon-Hernandez was the actual assailant, Anderson sought to introduce evidence that Leon-Hernandez was in the United States illegally. Anderson asserted Dunn knew Leon-Hernandez would be deported if he was convicted of assaulting her and, therefore, falsely accused Anderson of assaulting her in order to protect Leon-Hernandez.[7]

The State responded that, if Anderson was allowed to use evidence of Leon-Hernandez's immigration status to establish a motive for Dunn to lie about the identity of the person who assaulted her, it should be allowed to introduce evidence that Anderson assaulted Dunn in September 2014. The State contended evidence of the prior assault would be admissible under section 38.371 of the code of criminal procedure[8] and rule of evidence 404(b)(2) "to prove motive, to prove identity, and also the nature of the relationship."[9]

[7] We note both Dunn and Leon-Hernandez testified outside the presence of the jury that Dunn did not know Leon-Hernandez's immigration status.

[8] Subject to the rules of evidence and other applicable law, section 38.371 of the code of criminal procedure allows the parties, in the prosecution of certain offenses involving family violence, to offer evidence "of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense," including evidence of the nature of the relationship between the parties. TEX. CODE CRIM. PROC. ANN. art. 38.371 (West Supp. 2016).

[9] Texas Rule of Evidence 404(b)(2) provides that evidence of extraneous acts, which is generally inadmissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character, "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).

The trial court ruled Anderson would be permitted to introduce evidence of Leon-Hernandez's immigration status, but the State would be allowed to rebut Anderson's defensive theory with evidence Anderson had previously assaulted Dunn. Based on the trial court's ruling, Anderson chose not to introduce evidence of Leon-Hernandez's immigration status.

Standard of Review

We review a trial court's ruling on the admissibility of extraneous-offense evidence for an abuse of discretion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). "The trial court's ruling on whether extraneous-offense evidence was admissible to rebut a defensive theory should be upheld if it is within the zone of reasonable disagreement." *Dabney v. State*, 492 S.W.3d 309, 318 (Tex. Crim. App. 2016).

Analysis

Ordinarily, a person is to be tried only for the offense charged, not for any other crimes or for being a criminal generally. *Segundo v. State*, 270 S.W.3d 79, 87 (Tex. Crim. App. 2008). Accordingly, "[r]elevant evidence of a person's bad character is generally not admissible for the purpose of showing that he acted in conformity therewith." *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001); *see also* TEX. R. EVID. 404(b)(1). It may, however, be admissible when it is relevant to a noncharacter-conformity fact of consequence, such as rebutting a defensive theory. *Powell*, 63 S.W.3d at 438; *see also* TEX. R. EVID. 404(b)(2). As the court of criminal appeals has observed:

> [T]he proponent of the evidence may persuade the trial court that the "other crime, wrong, or act" has relevance apart from character conformity; that it tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, e.g., absence of mistake or accident.

Id. (quoting *Montgomery v. State*, 810 S.W.2d 372, 387–88 (Tex. Crim. App. 1990) (op. on reh'g)); *see also Patterson v. State*, 496 S.W.3d 919, 929–30 (Tex. App.—Houston [1st Dist.]

2016, pet. ref'd) ("Instead, the salient question is whether the district court abused its discretion in deciding that Patterson's defensive theory made evidence of his participation in a gang-related robbery relevant."). If the defendant's defensive theory opens to door to such rebuttal evidence, the State may introduce evidence of extraneous conduct that shares common characteristics with the charged offense. *Siqueiros v. State*, 685 S.W.2d 68, 71 (Tex. Crim. App. 1985); *see also Powell*, 63 S.W.3d at 438; *Bell v. State*, 620 S.W.2d 116, 126 (Tex. Crim. App. 1980) (op. on reh'g); *Patterson*, 496 S.W.3d at 928–29.

Anderson's defensive theory was that Leon-Hernandez was the person who assaulted Dunn. In support of that theory, Anderson wanted to use evidence Leon-Hernandez was in the country illegally to establish Dunn had a motive to lie about the identity of her assailant in order to protect Leon-Hernandez from deportation. However, once the identity of the assailant was placed into issue, the trial court could have reasonably decided evidence Anderson had previously assaulted Dunn had noncharacter-conformity relevance to establish the prior relationship between Dunn and Anderson and to rebut the allegation Dunn had fabricated the complaint against Anderson. *See Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996) (concluding extraneous offense may be admissible to show identity after defendant has placed identity into issue); *Bargas v. State*, 252 S.W.3d 876, 892 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (concluding appellant opened door to extraneous offense evidence by eliciting testimony that complaint had motive to fabricate allegation and reason to lie). Given the fact both incidents involved Anderson assaulting Dunn, it is at least subject to reasonable disagreement whether the evidence of the prior assault made Anderson's defensive theory less probable. *See Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (It was "at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for

the noncharacter-conformity purpose of rebutting appellant's defensive theory that the complainant fabricated her allegations against him[.]"); *Powell,* 63 S.W.3d at 438.

Based on this record, we cannot conclude the trial court abused its discretion by determining that, if Anderson chose to elicit evidence that Dunn had a motive to lie about the identity of her assailant in order to protect Leon-Hernandez from deportation, the State would be allowed to rebut that defensive theory through evidence of Anderson's prior assault of Dunn. We resolve Anderson's third point of error against him.

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WILLIE RENARD ANDERSON, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas,
No. 05-16-01157-CR V.	Trial Court Cause No. F16-00644-V.
	Opinion delivered by Justice Fillmore,
THE STATE OF TEXAS, Appellee	Justices Bridges and Stoddart participating.

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

Judgment entered this 29th day of November, 2017.