Affirmed; Opinion Filed June 4, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01527-CR

JOSE RAMON CRUZ, Jr. Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1224443-Q

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Stoddart

A jury convicted appellant Jose Ramon Cruz, Jr. of murder and sentenced him to thirty-five years' confinement. In two issues, appellant argues the trial court erred by charging the jury on provocation because the evidence did not raise the issue and by admitting testimony regarding his internet search history. We affirm the trial court's judgment.

FACTUAL BACKGROUND

Dinh Ngo ("Danny") invited friends to eat, drink beer, and socialize in his driveway. Around midnight, a man, later identified as appellant, "came out of nowhere" and approached the group in Danny's driveway. Appellant asked to buy two beers and had $5 in his hand. Although the friends declined, appellant did not leave. Danny's brother, known as "Q," approached appellant by the sidewalk and away from the group to talk because appellant continued trying to

buy beers and would not leave. A witness described the conversation as friendly, stating: "No one was really hostile to one another. Nothing like that." Q did not touch appellant.

Danny inserted himself into the conversation saying: "Dude, you need to get the [f–] out of here" or "You need to [f–ing] leave." Appellant drew a gun and pointed it at Danny as Q moved behind a nearby car. Danny grabbed appellant's arm, wrist, or hand and the men struggled for control of the gun. "Then there was a pop and a flash" and feathers from Danny's jacket flew into the air. Danny continued to struggle with appellant for a few seconds before falling to the ground. Q forced appellant to the ground and disarmed him. Two of Danny's friends punched appellant several times while he was on the ground.

Randy Pope, one of the friends who witnessed the events, testified no one other than Danny touched appellant before appellant fired the gun. He stated that when appellant pulled out the gun, he wondered "How the hell did we end up here? [Appellant] [c]ame asking for two beers, and now you're drawing a weapon at somebody's house." None of the friends gathered in the driveway had any weapons or were hostile. Once appellant was on the ground, Pope found a loaded clip on appellant's belt, which he threw into the street.

Appellant testified that at the time of the incident he owned two guns, including the Baretta pistol found at the scene. He carried a gun for personal safety because he lived in a neighborhood where he had been a victim of gun crime within the preceding year.

Appellant testified he walked to Frank's Food Mart around 7:00 p.m. to buy beers, which he drank at home. Approximately four hours later, he walked to a nearby restaurant but, upon arriving, did not go inside and continued his walk. He then saw some people drinking beer in a driveway and asked if they would sell a couple of beers to him. A man, later identified as Danny, told appellant he could buy beer at the gas station across the street and appellant continued walking to Frank's Food Mart. However, because the food mart was closed, he returned to Danny's house.

Standing in the driveway where it meets the sidewalk, appellant asked again to buy beer and showed them his money. Appellant testified Danny, who was "in a rage," stood up and said: "I'm going to kill you, mother f-er. . . Don't you know I can kill you and get away with it? You're on my property." Appellant immediately stepped back and told Danny he was not looking for any trouble. One of Danny's friends tried to hold him back. Q, who was calm and cordial, told appellant they did not want to sell beer to him because they did not know him or whether he was underage. Appellant replied that was fine and was going to leave until Danny broke away from the person trying to hold him and began running toward appellant yelling "I'm going to kill you." At that point, appellant lifted his shirt to show his weapon and put his hand on the gun. Although appellant intended to diffuse the situation, Danny continued coming toward him. Appellant pulled his gun and Danny lunged for it. The men struggled to control the gun. Someone hit appellant in his left temple, which caused him to lose his glasses and become disoriented and panicked. He fired the gun and then Danny's friends threw him to the ground and continued hitting him.

Appellant testified he intentionally and knowingly shot the gun, but it was not his intention to kill Danny. He testified it was a "quick reaction" and he was desperate.

LAW & ANALYSIS

In his first issue, appellant argues the trial court erred by charging the jury on the law of provocation, as codified in section 9.31(b)(4) of the Texas Penal Code, because the evidence did not raise the issue. Subsection (b)(4) states in part that the use of force against another is not justified if the actor provoked the other's use or attempted use of unlawful force. *See id.* § 9.31(b)(4). After thoroughly reviewing the jury charge, we conclude no instruction based on

section 9.31(b)(4) was given to the jury.[1] It appears from the reporter's record of the charge conference that an earlier draft of the jury charge may have included such an instruction. However, the final charge considered by the jury did not. Therefore, we conclude appellant's first issue presents nothing for our review.

In his second issue, appellant asserts the trial court erred by admitting testimony regarding his internet search history relating to firearms, ammunition, and violent news stories because the evidence was irrelevant and more prejudicial than probative. Scott Saul, a computer forensics examiner with the Federal Bureau of Investigation, examined appellant's phone and extracted information from the SIM card. Saul found appellant's internet search history for the days before Danny was shot. Articles appellant accessed included: "Arizona Man Kills Himself on Live Television after Pursuit," "Border Patrol Agent Shoots, Kills Woman in California," "Masked Connecticut Teen Killed by Dad Called a Good Kid," and "Mississippi Office Gunman was Fired Day of Attack." He looked at a website called "Cheaper than Dirt, America's Ultimate Shooting Sports Discounter." Appellant also read about a movie titled "End of Watch," which Saul described as a "police movie in which an officer is killed" and another is wounded. Saul also found appellant accessed websites related to tactical military accessories, accessories for a Baretta CX4 storm rifle, and various pages for buying ammunition, including .40 caliber ammunition which was the type of ammunition used to shoot Danny.

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[1] Based on section 9.31 (b)(1) and (b)(5), the jury charge states:

Use of Force

A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The use of force against another is not justified:

• in response to verbal provocation alone; or

• if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was carrying a weapon in violation of Section 46.02.

Appellant does not challenge this instruction.

We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. *Gonzalez v. State*, PD-0181-17, 2018 WL 1736689, at *5 (Tex. Crim. App. Apr. 11, 2018) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id.* (citing *Martinez*, 327 S.W.3d at 736). The erroneous admission of evidence is non-constitutional error. *Gonzalez*, 2018 WL 1736689, at *8 (citing *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008)). Non-constitutional errors are harmful, and thus require reversal, only if they affect an appellant's substantial rights. TEX. R. APP. P. 44.2(b). The court of criminal appeals has construed this to mean that an error is reversible only when it has a substantial and injurious effect or influence in determine the jury's verdict. *Gonzalez*, 2018 WL 1736689, at *8 (citing *Taylor*, 268 S.W.3d at 592.44). If we have a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect, we will not overturn the conviction. *Gonzalez*, 2018 WL 1736689, at *8 (citing *Taylor*, 268 S.W.3d at 592.44).

If we assume without deciding that the trial court abused its discretion by admitting the complained-of evidence, we conclude any error was harmless. Given the evidence of guilt in this case, including appellant's testimony that he knowingly and intentionally shot Danny, we do not view this evidence as being of a nature to lead the jury to make its decision of guilt on an improper basis. Further, the evidence from Saul was consistent with appellant's own testimony that he is a "gun enthusiast" who enjoys going to the shooting range in his free time and has collected guns. Appellant had an opportunity to explain the articles from his phone, testifying they were not something unusual for him to be reading and agreed with his counsel's statement that the reading material did not reflect a plan to shoot someone. After examining this record as a whole, we have

fair assurances that Saul's evidence did not have a substantial and injurious effect or, if it did, that influence was slight. We overrule appellant's second issue.

CONCLUSION

We affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSE RAMON CRUZ, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas
No. 05-16-01527-CR V.	Trial Court Cause No. F-1224443-Q.
	Opinion delivered by Justice Stoddart.
THE STATE OF TEXAS, Appellee	Justices Lang and Myers participating.

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

Judgment entered this 4th day of June, 2018.