DISSENT and Opinion Filed August 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01394-CR

LARRY JEAN HART, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F19-00575-W

DISSENTING OPINION

Opinion by Justice Reichek

At trial, the court admitted (1) two music videos featuring appellant singing or lip-syncing rap lyrics, and (2) appellant's Facebook posts containing rap lyrics written by other artists. I believe that this evidence's risk of unfair prejudice substantially outweighs its probative value, so I disagree with the majority's decision to affirm the trial court's judgment.[1] I would instead find the trial court abused its discretion by admitting this evidence and that this error affected appellant's

[1] I agree with the majority opinion in all other respects.

substantial rights, so I would reverse the trial court's judgment and remand for a new trial.

The majority opinion sets forth the background facts in this case at length, and I will not repeat those facts other than to note the following. It is undisputed that on June 21, 2017, appellant drove three or four people to Michael Gardner's apartment, and his passengers robbed and killed Gardner while appellant waited in the car. Appellant's intent in driving these individuals to Gardner's apartment was the primary disputed issue at trial. Appellant's defensive theory was that he was too naïve or slow to appreciate the nature of the situation, and his attorney elicited testimony to support this theory when appellant testified during the guilt–innocence phase of trial. Before it began its cross-examination, the State argued that appellant opened the door to character evidence pertaining to his level of sophistication and comprehension, and that the State "know[s] him to be a rapper where he does fluently form sentences and phrases and frequently writes rap [and this] directly relates to his ability to understand what people are communicating to him and form his own opinions about things." The court agreed, and during its cross-examination the State introduced two different rap videos over appellant's Rule 403 objection—appellant's segment of a collaboration with other rappers entitled "Off Days" and a video entitled "I Won't Tell"—and four posts appellant made on Facebook—the words "You know I draw down you draw attention slime"; a picture of appellant with the caption "Pull-up with them straps on me like Steve Urkel!!"; a picture of

appellant with a backpack and the comment "gotta hide the blicky"; and the words "Best advice i kan give my lil niggaz dont get kaught."

The subject matter of the videos is, as the State put it, "guns, drugs, dirty money, and jail." In appellant's segment of "Off Days" he can be seen swinging one or two bottles with white labels and smoking what looks like a marijuana joint as he raps about "pouring drink," having "two glocks," and being a "trap king." Appellant is not visible in "I Won't Tell" but can be heard rapping about various bad acts that he wouldn't admit to, including being "caught with dirty money" and "killing someone over a bill." A cartoon image is visible throughout the video depicting three bottles of promethazine, which is sometimes used as a recreational drug.

Although the State attempted to draw a connection between the lyrics of "Off Days" to the events of June 21,[2] appellant maintained that "Off Days" was nothing more than a song. During his redirect he also testified that he didn't write the lyrics to his segment of the video, and that he was just lip-syncing in the video. Appellant likewise explained that "I Won't Tell" was "just rap" and did not relate to the events of June 21.[3] Appellant explained his Facebook posts were merely lyrics by popular rap artists like Young Thug. This testimony was uncontroverted.

[2] There was no evidence at trial that appellant used drugs, was a drug dealer (i.e. a "trap king"), or owned a gun or had one in his possession on June 21.

[3] There was no evidence at trial that appellant drank promethazine on June 21 or that he received any money for participating in Gardner's robbery (i.e. "dirty money").

The majority concludes that the two videos and the Facebook posts were admissible under Texas Rule of Evidence 404(a)(2)(A), and I agree. Appellant's intent in driving the others to Gardner's apartment was key to his defense; to explain how he couldn't have understood that the group intended to rob Gardner even after he was told they planned on breaking into his apartment, appellant testified he had "trouble … comprehending things," such as "things people are saying." At one point his attorney asked appellant if he had any "conditions" and asked him if he recalled the detective asking him if he had any head injuries. Appellant wrote the lyrics to "I Won't Tell" and performed the song in the video.[4] Although the lyrics of "I Won't Tell" aren't profound, his ability to write and perform them "provides a small nudge toward . . . disproving some fact of consequence," in this case, his ability to comprehend what people tell him. *See Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004). I therefore agree with the majority that "I Won't Tell" was relevant to character traits that appellant placed into evidence, and the trial court did not abuse its discretion in admitting it under Rule 404(a)(2)(A).

The majority also determined that appellant affirmatively placed his character for credulity into evidence by testifying that he's a "friendly person" with an "open heart" who gives people rides, consistent with his small-town upbringing. When

[4] This is an inference based on the fact that appellant's attorney did not seek to clarify whether appellant wrote the lyrics or sang "I Won't Tell," while his attorney did establish that appellant did neither of these things with respect to "Off Days."

asked if it occurred to him that giving people rides could lead to problems, and whether things might be different in Dallas than they were in the small neighborhood in Greenville where he grew up, appellant responded that he "never knew" because he "never just roamed," sticking to a few spots in Dallas. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. TEX. R. EVID. 401. Although appellant didn't write the lyrics to "Off Days" and his Facebook posts were lyrics written by other artists, he was at least made aware of guns, trap houses, marijuana, and evading detection when committing crimes via this music, and his knowledge of these things rebutted his testimony that he was not hip to big city life. Given the low bar for determining relevance, the importance of intent in this case, and appellant's position that it was inconceivable to him that his passengers intended to break into Gardner's apartment and rob him, I agree with the majority that the court did not abuse its discretion by admitting this evidence under Rule 404(a)(2)(A).

Although this evidence was admissible under Rule 404(a)(2)(A), I believe it should have been excluded under Rule 403 because it was more prejudicial than probative. TEX. R. EVID. 403. Gangsta rap like that at issue in this case is characterized by "lyric formulas," a key one of which involves fictionalized bragging about the performer's "badness" vis-à-vis criminal behavior. Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse*

Rap Lyrics in Criminal Cases, 46 AM. J. CRIM. L. 77, 84 (2019). The genre often emphasizes violence in inner cities albeit not necessarily in an accurate manner. Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE & JUST. 300, 330–34 (2018). As one commentator put it:

> It is true that these artists used their experiences to "keep it real," but the Gangster Rapper – the persona that drew the ire of a nation – was less a portrait of any real person and more a product of artistic hyperbole. It is a professional identity that artists continue to adopt today. Therein lies the first persistent myth about rap: the assumption that the events detailed in the music are wholly factual. When Ice-T released his single "6 'N the Mornin," he woke the music world up to gangster rap. . . . Regardless of what one thinks about the art, the song was only semiautobiographical. Ice-T later called his music "faction" – a blend between fact and fiction. The pure truth of the story was less important than the gravity of it. The shocking lyrics and perceived authenticity of it all brought attention to the harsh realities of people living in "the hood."

Reyna Araibi, *"Every Rhyme I Write": Rap Music As Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 815 (2020) (footnotes omitted). In other words, gangsta rap is not autobiographical. The dilemma is that listeners often believe that it is:

> The mass appeal of hip-hop culture, combined with the success of packaged rap acts that cultivate fashionable images, has no doubt fueled many popular conceptions about the character of certain rap artists. Today, we as a society have come to expect the content of rap lyrics to accurately depict the true lifestyle of the artists who profess them, and our views of particular rappers' mental states and dispositions have been molded accordingly.

Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics As Evidence at Criminal Trials*, 12 UCLA ENT.

L. REV. 345, 355 (2005). There is empirical evidence that people react negatively to gangsta rap, and these negative perceptions impact jury verdicts. In 1996 psychologist Carrie Fried conducted a study whereby she gave participants identical lyrics from the folk song "Bad Man's Blunder" by the Kingston Trio. Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCHOL. 2135 (1996). She told each set of participants that the lyrics came from either folk, country, or rap music and asked them to gauge how likely the lyrics were to incite violence. The results showed that people judged the song "significantly more negative on all measures" when told it was rap. Dr. Fried repeated the experiment but instead tied the lyrics to the race of the artist rather than the genre. Participants received the same lyrics but half of them were told a black man wrote the song while the other half were told a white man wrote the song. When participants believed that the musician was black, they found the lyrics more offensive and potentially violent. Fried concluded that genre and race significantly impact how people react to music lyrics, even when they are asked to judge them solely on the words. As she observed, "[e]ven a Kingston Trio song would be threatening if it were a rap song." *Id.* at 2141. Fried repeated the study in 1999 and reached the same result: people expressed instinctive bias towards rap, believing that its offensive lyrics were likely to promote "violence, riots, and civil unrest." Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999). Fried posited that "the lyrics of rap music are judged

more harshly because rap is music associated with Black artists or Black culture. Rap lyrics may be rated as more hostile or aggressive or dangerous because of negative culturally held stereotypes." *Id.* at 708. More recently researchers replicated Fried's studies and found that negative reaction to lyrics increased when participants believed they were reviewing rap lyrics. Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCHOL. PUB. POL'Y & L. 280 (2016). Participants also believed rap lyrics were "more literal" than lyrics from other genres. *Id*. at 288.

Psychologist Stuart Fischoff studied how rap lyrics negatively impact the impartiality of criminal proceedings. Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCHOL. 795 (1999). For his study Fischoff created a sample group of potential jurors, and each participant was assigned one of four conditions, each of which corresponded to a specific "target male." For each condition the target male was a black male. Condition 1 was only that the target was a black male; it did not mention his being accused of murder or that he wrote rap lyrics. Condition 2 stated the target male had been accused of murder, but made no mention of his writing rap lyrics. The target male in condition 3 was not accused of murder, but each participant in this group reviewed a set of violent rap lyrics purportedly written by the target male. The target male in condition 4 was both accused of murder and alleged to have written the same rap lyrics as the target male in condition 3. Not only was the target male who was accused of murder and wrote

gangsta rap lyrics seen as more likely to have committed murder than a target male accused of murder who had not written such lyrics, but potential jurors were "significantly inclined" to judge a gangsta rap lyricist *not* accused of murder more harshly and with more disdain than a non-gangsta rapper who *was* accused of murder. Wilson summarized Fischoff's findings:

> We may infer from the unambiguous results of these findings that people who write inflammatory gangsta lyrics invite a strong association with inferences about other negative traits. Indeed, it appears that – at least when it comes to gangsta rappers – the public firmly believes that the artist's "creative" expression is actually an authentic expression of their personality. After reading Fischoff's study, one could even argue that authoring rap lyrics vies with being charged with murder in terms of how a person perceives the target individual's personality traits. The results of the study clearly indicate that showing rap lyrics at a trial has the distinct potential of exerting a "significant prejudicial impact" on a juror's evaluation.

Wilson, 12 UCLA ENT. L. REV. at 373. In short, this connection between "rhyme and punishment"[5] counsels restraint when it comes to admission of rap music in criminal trials.

In considering a challenge under Rule 403, courts must balance what are known as the *Montgomery* factors: (1) how compellingly the evidence serves to make a fact of consequence more or less probable; (2) the potential the evidence has

[5] This phrase was coined by the creators of the podcast "Louder than a Riot," which explores the "interconnected rise of hip-hop and mass incarceration." Sidney Madden, *Louder than a Riot*, NPR (2022), https://www.npr.org/podcasts/510357/louder-than-a-riot (last visited Aug. 30, 2022).

to impress the jury "in some irrational but nevertheless indelible way"; (3) the time the proponent used developing the evidence; and (4) the proponent's need for this evidence. *Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1991) (op. on reh'g).

Here the fact of consequence was appellant's intent in driving his passengers to and from Gardner's residence where burglary and murder occurred. The State argued the rap videos make culpable intent more probable:

> Appellant's only defense was that he did not *intentionally* assist in the commission of the capital murder because he was too naïve and slow to have understood what his little partner told him or to have appreciated the nature of the situation. The rap videos directly rebutted this theory by demonstrating appellant's ability to easily communicate with words and his familiarity with criminal subject matter. The videos, in other words, showed appellant was not as innocent and slow as he claimed, and the State's need for the videos was fairly high.

But appellant did not write the lyrics to "Off Days," and his Facebook posts were merely lyrics from popular rap music. This evidence shed no light on appellant's ability to communicate with words, because these weren't his words at all. Assuming appellant wrote "I Won't Tell," there was no evidence of the ease with which he wrote these lyrics, how long it took him to write them, or whether anyone assisted him with the lyrics. Instead of developing this evidence, the State sought, improperly and unsuccessfully, to establish a connection between the events of June 21 and the actual content of the song. The lyrics themselves were unsophisticated, and for the most part simply repeated the same refrain with slight variations. As set forth above, although gangsta rap typically explores criminal subject matter, and

these videos and Facebook posts are no exception, most gangsta rap is hyperbole. As appellant testified repeatedly, this was "just rap" and the State never proved otherwise. It also goes without saying that "familiarity" with criminal subject matter does not make someone more likely to participate in criminal activities.

We also consider the videos' potential to impress the jury "in some irrational but nevertheless indelible way." *See Montgomery*, 810 S.W.2d at 390. None of the subject matter of the videos was at issue at trial, yet as explained above, research demonstrates the jury could have concluded that appellant's knowledge of them through rapping made his guilt in this case more likely. The State spent a considerable portion of appellant's cross-examination on these videos and Facebook posts. *See id.* (considering time needed to develop the evidence). Regarding the State's need for the videos, the jury had both appellant's videotaped interview with police and appellant's live testimony at trial as evidence of appellant's credibility and demeanor, as well as video of appellant's admitted participation in the crime *and* his admission that he was told that the group intended to break into Gardner's home. The jury also heard testimony that appellant had graduated from high school, that he had graduated on time, and that he was working in home health. *See id.* (considering proponent's need for the evidence). In short, the jury had ample evidence with which to weigh appellant's purported lack of intelligence and the plausibility of his defense.

Few Texas cases address admission of rap videos during the guilt–innocence phase of trial.[6] In *Magee v. State*, the court held that some, but not all, questions about defendant's "work as a 'rap' musician" were permissible during the guilt–innocence phase of a murder trial. 994 S.W.2d 878, 887–89 (Tex. App.—Waco 1999, pet. ref'd). The defendant testified about his work history, and over objection, the trial court permitted questioning on the defendant's "musical career" as a "rap musician with the stage name 'Demize,'" including that "his record label was 'Killer Instinct'; he was on an album titled 'Sex, Drugs and Guns, The American Way'; and that detractors may refer to the music as 'gangsta rap.'" *Id.* at 887.

The court of appeals concluded that testimony about defendant's work as a rap musician and reference to the genre as "gangsta rap" was admissible because defendant "had testified as to part of his work history, and the State was entitled to complete that history." *Id.* at 888. But admitting the evidence of the "labels" such as "Demize," "Killer Instinct," and the album title was error. *Id.* at 888. The court explained that "[t]he inflammatory nature of these 'labels' does not compellingly serve to make a fact of consequence more or less probable, and it had the potential

[6] Appellant cites *Williams v. State*, 47 S.W.3d 626, 630 (Tex. App.—Waco 2001, pet. ref'd), and *Hughes v. State*, 962 S.W.2d 689, 695 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd), both of which contain some reference to the admission of rap music evidence at the guilt–innocence phase, but appellant does not argue that either case provides an applicable analysis. *See Williams*, 47 S.W.3d at 630 (when considering a complaint about a jury instruction, court noted without further discussion that an accomplice "wrote rap lyrics about the string of robberies committed by the group"); *Hughes*, 962 S.W.2d at 695 (any error in admitting "brief and unclear" evidence about appellant's rapping was harmless where other eyewitnesses identified appellant as perpetrator of aggravated robbery at issue).

to impress the jury in an 'irrational' way." *Id.* Accordingly, the unfair prejudicial effect of the testimony about the "labels" substantially outweighed any probative value. *Id.* Ultimately the court concluded that this error was harmless given the testimony of numerous witnesses and the physical evidence supporting a finding of defendant's guilt. *Id.* at 889.

The issue of unfair prejudice arising from admission of rap lyrics into evidence has been considered in many other jurisdictions in the previous three decades. As one court recently noted, there is "a converging analysis among various state appellate courts: the probative value of a defendant's rap lyrics spikes—and consequently, the danger of unfair prejudice decreases—when a strong nexus exists between specific details of the artistic composition and the circumstances for the offense for which the evidence is being adduced." *Montague v. State*, 243 A.3d 546, 559, 559–66 (Md. 2020) (internal quotation omitted) (collecting cases). Holding that the trial court did not err in admitting the lyrics in question, the court in *Montague* explained, "While rap lyric evidence often has a prejudicial effect as improper propensity evidence of a defendant's bad character, those concerns are diminished when the lyrics are so akin to the alleged crime that they serve as 'direct proof' of the defendant's involvement." *Id.* at 569–70. Conversely, where "the violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged,"

admission of the evidence "risked unduly prejudicing the jury without much, if any, probative value." *State v. Skinner*, 95 A.3d 236, 238, 253 (N.J. 2014).

I conclude that appellant's ability to lip sync or sing rap lyrics about criminal activity unrelated to the burglary and murder at issue was "highly prejudicial evidence" that "bore little or no probative value as to any motive or intent behind the . . . offense[s] with which he was charged." *See id.* at 238. As the court in *Magee* reasoned, the "inflammatory nature" of the rap lyrics in question "does not compellingly serve to make a fact of consequence more or less probable, and it had the potential to impress the jury in an 'irrational' way." *Magee*, 994 S.W.2d at 888. I would hold that the evidence was inadmissible under Rule 403.

Any error "that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). A substantial right is affected if an error has a substantial and injurious effect or influence in determining the jury's verdict. *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016). In assessing harm caused by a Rule 403 error, some factors the court considers are "whether other evidence of the accused's guilt is substantial or overwhelming; whether and to what extent the State placed emphasis on the error; and whether other extraneous-conduct evidence reflecting poorly on the accused's character was properly admitted or admitted without objection. *Magee*, 994 S.W.2d at 889. Here, the evidence erroneously admitted was used as primary evidence to rebut an essential element that had been placed in question, namely appellant's ability to form the requisite intent to assist in a capital

murder. While the State did not mention the videos or Facebook posts in closing, it dedicated a significant portion of appellant's cross-examination to this evidence. Moreover, rather than focusing on its justification for admission, i.e. its relevance to appellant's sophistication and ability to comprehend, the State's questions went entirely to the actual content of the videos and Facebook posts, emphasizing the inflammatory yet largely irrelevant nature of these materials. These inferences could and likely did influence the jury into thinking appellant had committed crimes in the past and to convict him not because he committed this crime but because he was a criminal in general. And in contrast to *Magee*, where there was other witness testimony and physical evidence to support a finding of guilt, *see id.*, appellant's own words and credibility were the primary sources for the jury's determination whether appellant conspired with others to commit the offense in question. Accordingly, I conclude that the trial court's decision to admit the evidence "falls outside the zone of reasonable disagreement," *see Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016), and I have far from a fair assurance that the error did not influence the jury or had but a slight effect. *See Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018).

Based on the foregoing, I would reverse appellant's conviction and remand for a new trial.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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