Opinion issued June 7, 2012.

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00453-CR

EMANUELL GLENN RANDOLPH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court of
Fort Bend County, Texas
Trial Court Cause No. 46241

MEMORANDUM OPINION ON REMAND FROM THE TEXAS COURT OF CRIMINAL APPEALS

A jury convicted appellant, Emanuell Randolph, of aggravated robbery and assessed punishment at nine years' confinement. This Court reversed and remanded

for a new punishment hearing, holding that the State impermissibly commented on appellant's failure to testify at the punishment hearing. *See Randolph v. State*, No. 01-08-00453-CR, 2009 WL 4436333 (Tex. App.—Houston [1st Dist.] Dec. 3, 2009), *rev'd*, 353 S.W.3d 887 (Tex. Crim. App. 2011). The Texas Court of Criminal Appeals reversed, holding that a prosecutor's punishment-stage argument on the defendant's failure to accept responsibility is permitted if the defendant, in his guilt-stage testimony, denies any criminal responsibility. 353 S.W.3d at 893–94. The court then remanded the case to this Court to address appellant's remaining points of error. *Id.* at 896.

FACTS

When Jose Ventura arrived at his home in Fort Bend County, Texas, on February 10, 2007, he and his seven-year-old son got out of the car and started toward the house. Ventura was then confronted by a gunman who demanded money from him while pointing a gun at his face. The man was tall, slender, black, and was wearing a dark-colored hooded jacked, dark pants, and a bandana over the lower part of his face. When Ventura stated that he did not have a wallet, the gunman fled, passing Cynthia Ventura, the wife of Jose Ventura, who was still in the car with her twelve-year-old daughter. The Venturas then called the police, giving them the description of the gunman. Approximately 45 minutes later, police saw appellant, who matched the description of the robber, standing at a Burger King restaurant

inside a Shell gas station near the Venturas' home. The police detained appellant, then brought him to a well-lit area near the Ventura home. Cynthia and Jose Ventura each separately identified appellant as the gunman. During trial, Cynthia and Jose Ventura both again identified appellant as the gunman.

Deputy Keith Pikett of the Fort Bend County Sheriff's Office, an expert in the field of bloodhound scent discrimination, testified that he was called to the scene of the crime that evening to attempt to have two of his dogs run a scent trail in the neighborhood. Each bloodhound, separately, tracked appellant's scent from the Venturas' driveway to the Shell station, where appellant had been arrested. The only dog allowed to go in the Shell station became highly excited when she approached an ATM inside the station.

Officer Bill Nix testified that he, along with the manager of the Shell station/Burger King, viewed the surveillance videotape from the store for the night of February 10, 2007. The jury was shown the videotape, which showed appellant entering the store, using an ATM, buying food, and being arrested by the police officer. Overruling appellant's motion, the court refused to show the jury additional video footage that showed there was another person at the gas station wearing a hooded jacket, and that appellant had not entered the station prior to his entrance that was shown on the admitted video. Instead, the trial court allowed appellant to elicit Officer B. Nix's testimony to establish those points, which appellant did.

Appellant then attempted to introduce the testimony of Rudy Vargas, a private investigator, about evidence that there had been reports of similar incidents within a few miles of the Venturas' home—one prior to the charged incident and another following appellant's arrest. Neither had been investigated by the Meadows Place Police Department to determine whether they were connected, and appellant was not permitted to present the testimony to the jury.

Appellant testified during the guilt-innocence stage of trial that he was not the perpetrator of the crime, and that he had walked to the Shell station from his home shortly before his arrest. He presented several family members' testimony to corroborate his account, although none of their testimony was consistent regarding the time that appellant left his home.

The jury convicted appellant at the end of the guilt-innocence stage of trial. During the punishment stage, appellant argued that the trial court should instruct the jury in writing that they were not to consider his silence at the punishment hearing. The trial court refused to give the instruction in writing, but instead verbally instructed the jury not to consider the silence of appellant in their deliberations. The trial court had previously included the written instruction in the jury charge during the guilt-innocence stage of trial.

Appellant also objected to the inclusion of language required by Article 37.07 of the Code of Criminal Procedure regarding the prospect that a person sentenced to

a term of confinement can "earn time off his sentence through the award of good conduct time," on the grounds that a person convicted of aggravated robbery with a deadly weapon is not eligible for mandatory supervision to require his release, nor may his good conduct time be included in determining his parole eligibility date. The trial court overruled his objection.

The jury assessed appellant's punishment at 9 years' confinement.

ANALYSIS

1. Exclusion of Additional Surveillance Video Footage

In his first point of error, appellant contends that the trial court erred in refusing to show the jury additional surveillance footage from the scene of appellant's arrest. Appellant claims that the footage shows a different person who matched the description of the gunman and who was dressed similarly to appellant. Further, appellant argues that the footage should have been admitted to demonstrate that, consistent with the defense's theory, appellant did not enter the store prior to his appearance in the video that was shown.

First Argument not Preserved for Review

With regard to the first point of error, appellant first argues that the footage should be admitted because it displayed another person at the Shell station who matched appellant's description on the night of the crime. However, appellant made no such argument at trial. Because appellant's argument at trial does not comport

with his claim on appeal, he has waived error with respect to this portion of his claim. *See* TEX. R. APP. P. 33.1. Further, the evidence would have been cumulative because Officer Nix testified that there was another person in the gas station that night who also matched the description of the perpetrator.

Exclusion of the Additional Video Footage Caused No Harm

Appellant also contends that the footage should nevertheless be admitted under Texas Rule of Evidence 107 for optional completeness in order to compliment what was shown by the State. Appellant attempted to establish, by showing the additional footage, that he did not set foot on the property from the time of robbery until he appeared on the admitted portion of the video, and that he entered the gas station from the southern entrance nearest his home.

Assuming, *arguendo*, the trial court erred in excluding the evidence, we shall conduct a harm analysis under Texas Rule of Appellate Procedure 44.2(b). The Court of Criminal Appeals held that, in such an analysis, "an appellate court need only determine whether or not the error affected a substantial right of the defendant. To make this determination, appellate courts must decide whether the error had a substantial or injurious effect on the jury verdict." *Llamas v. State*, 12 S.W.3d 469, 471 n.2 (Tex. Crim. App. 2000). Substantial rights are not affected by the erroneous exclusion of evidence if, after examining the record as a whole, we have a fair assurance that the error did not influence the jury, or had only a slight effect. *See*

Motilla v. State, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Here, appellant suffered no harm because his objectives were accomplished through his cross-examination of Officer Nix. Officer Nix testified to and confirmed both that appellant did not enter the gas station at any other time during the night and the appellant entered from the direction of his house. Officer Nix also testified that there was another black male wearing a hooded jacket in the gas station that night.

Accordingly, we overrule appellant's first point of error.

2. Exclusion of Testimony of Similar Incidents in Nearby Areas

In his second point of error, appellant argues that the trial court should not have refused to admit the testimony that in nearby areas, similar incidents had occurred and were not investigated by police.

Applicable Law

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Kelly v. State*, 824 S.W.2d 568, 573–74 (Tex. Crim. App. 1992). The trial court has broad discretion in determining the admissibility of evidence, and its ruling to admit or exclude evidence will be overturned only if it is so clearly wrong that the ruling lies outside the zone of reasonable disagreement. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990).

Further, the Court of Criminal Appeals held that "evidence of offenses

committed by parties other than the accused is inadmissible"; this is especially true when the proffered evidence is not inconsistent with appellant's guilt. *Ferrell v. State*, 429 S.W.2d 901, 903 (Tex. Crim. App. 1968) (proof of similar robbery committed while appellant was in jail by robbers using the same type of disguise, weapon and modus operandi ruled to be irrelevant); *Florio v. State*, 532 S.W.2d 614, 618–19 (Tex. Crim. App. 1976) (evidence that 19 days prior to the offense, someone other than the appellant attempted to gain entrance to an apartment in the same manner in which appellant was charged with entering prosecutrix's apartment was properly excluded by the trial court).

In *Brem v. State*, the court held that the trial court did not err in denying the defendant's request to require prosecutors to investigate evidence regarding similar incidents that happened after the defendant's incarceration. 571 S.W.2d 314, 321 (Tex. Crim. App. 1978). The court stated that even if appellant had evidence that crimes similar to the one for which he was on trial had been committed after he was in custody, this would not be inconsistent with his guilt of the offense, in light of the victim's positive identification of him as her assailant and other circumstantial evidence of his guilt. *Id.* at 322.

Discussion

In the present case, the first robbery appellant alluded to was committed by a black male wearing an outfit similar what appellant was wearing when he was

arrested. This robbery occurred more than two weeks before appellant was incarcerated. This is similar to the *Florio* case, because both appellants sought to use occurrences of similar incidents *before* their incarceration to establish mistake of identity. We similarly hold that the trial court did not err in ruling the first robbery to be irrelevant to the case at hand. Because appellant was not incarcerated at the time, the evidence is not inconsistent with his guilt and does not necessarily suggest that someone other than he committed the offense. In fact, arguably, it could be inadmissible evidence of an extraneous offense by appellant.

Similarly, the second robbery, which occurred after appellant's incarceration, cannot be admitted as evidence tending to suggest appellant's innocence. There was no description of the perpetrator of the second robbery. And, in the present case, like in the *Brem* case, there is both direct and circumstantial evidence of appellant's guilt. The complainants identified appellant as the perpetrator both after appellant's arrest and in court, and the police bloodhounds traced his scent from the gas station to the scene of the crime. We, therefore, hold that the trial court did not err by excluding evidence of the second robbery as irrelevant.

We overrule appellant's second point of error.

3. Written Instruction to Disregard Appellant's Silence Denied

In his third point of error, appellant asserts that the trial court erred in not including an instruction in writing at the punishment phase that the jury was not to

consider his silence at the punishment hearing.

Applicable Law

The Court of Criminal Appeals has held that upon timely request, a defendant is entitled to a "no adverse inference" instruction concerning his failure to testify in the punishment phase of a capital murder trial, notwithstanding his waiver of his privilege against self-incrimination in guilt/innocence stage. *Beathard v. State*, 767 S.W.2d 423, 432 (Tex. Crim. App. 1989). Because the trial court did not so charge the jury in this case, it erred. *See id.* Thus, we must decide whether such error was harmless.

Usually, in an instance of charging error with timely objection, we would apply the "some harm" test set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). However, when an error implicates rights flowing from the United States Constitution, we must apply the harmless-error rule enunciated by the Supreme Court. *Bethard*, 767 S.W.2d at 432 (citing *Chapman v. California*, 386 U.S. 18, 21 (1967)). The harmless-error rule states that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* This is the same standard imposed by our harmless-error rule for Constitutional error under TEX. R. APP. P. 44.2(a).

Discussion

In *Beathard*, the court concluded that even though the trial court erred in

refusing to give a "no-adverse inference" charge at punishment because appellant had testified at trial, the error was harmless beyond a reasonable doubt. *Id.* at 432–33. The court reasoned that the right to a "no-adverse-inference" instruction is rooted in a jury's natural tendency to assume that the decision not to testify stems from a defendant having something to hide, and that such a concern was not present because the defendant had testified at guilt-innocence. *Id.* The court also noted that because the State had presented no evidence at punishment, "appellant was not placed in a position where the jury would expect him to counter factual assertions made by the State." *Id.* Finally, the court noted that the defendant did call six witnesses to testify on his behalf at trial. *Id.* at 432–33.

Similarly, in the present case, appellant testified during the guilt/innocence stage regarding his family, his residence, his work history, the events of February 10, 2007, the fact that he has asthma, the fact that he had money at the time the offense was committed, and his assertion that he did not commit the offense in this case. It would be unlikely that the jury would infer appellant did not testify at punishment because he had something to hide. Additionally, the State put on no evidence in the punishment stage of trial, other than the complainant's testimony of how the incident affected her daily life. As in the *Beathard* case, the jury would not expect appellant to counter this evidence by the State because the testimony involved only the complainant's own trauma. Furthermore, appellant called his sister to testify on his

behalf during the punishment stage. And finally, and perhaps most importantly, in this case the trial court orally instructed the jury before reading the charge that it could make "no adverse inference" from appellant's failure to testify at the punishment phase of the trial.

Consistent with the decision in *Beathard,* we hold that the trial court's error in not charging the jury in writing that it could make "no adverse inference" from appellant's failure to testify at the punishment phase of the trial was harmless beyond reasonable doubt.

We overrule appellant's third point of error.

4. Jury Instruction Regarding Good Conduct Time

In his final point of error, appellant contends that the "the Trial Court Erred in instructing the jury that Appellant could 'earn' time off his sentence through the award of good conduct time." Specifically, appellant contends that the charge was not a correct statement of the law as applied to his case because he is not eligible for mandatory supervision to require his release, nor may his good conduct time be included in determining his parole eligibility date.

Consistent with the statutory language of Texas Code of Criminal Procedure Article 37.07, Section 4, the relevant portions of the jury charge provided as follows:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior,

> diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Appellant argues that, because he objected to the charge as being an incorrect statement of law as applied to his case, the trial court erred by including the "good conduct time" charge.

The Court of Criminal Appeals considered and rejected this exact argument in *Luquis v. State*, 72 S.W.3d 355, 363 (Tex. Crim. App. 2002). The court noted that the charge is legislatively mandated, and that "because the trial judge in this case instructed the jury according to the legislative dictate expressed in article 37.07,

section 4(a), he did not commit error." *Id.*

Following *Luquis*, we hold that the trial court did not err by including the statutorily mandated "good conduct time" instruction in the charge.[1]

We overrule appellant's final point of error.

CONCLUSION

Having addressed and overruled appellant's remaining points of error on remand, we affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).

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[1] In *Luquis*, the Court of Criminal Appeals further overruled the defendant's due process and due course of law challenges to article 37.07, section 4(a), holding that "appellant has failed to show that his due process rights were violated by the trial judge's action of instructing the jury in accordance with the statutory wording." 72 S.W.3d at 368; *see also Bui v. State*, 68 S.W.3d 830, 842 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (en banc) (holding that charge pursuant to article 37.07, section 4(a) did not violate due process). Appellant raises no constitutional challenge in this case.