

Opinion issued June 16, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00064-CR

GERVIN ODIR BENITES-VIJIL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Case No. 1187656

MEMORANDUM OPINION

A jury convicted appellant Gervin Odir Benites-Vijil of aggravated assault of a public servant and assessed punishment at 45 years in prison. *See* TEX. PENAL CODE ANN. §§ 22.01–.02 (West Supp. 2010). In three issues on appeal Benites-

Vijil argues that the evidence was legally and factually insufficient to support his conviction and that the trial court abused its discretion in admitting evidence of an extraneous offense. We affirm.

Background

On October 14, 2008, Officer R. Wilson of the Houston Police Department was dispatched to an apartment complex in southwest Houston in response to a reported aggravated robbery with a deadly weapon. When she arrived at the scene, she identified Mr. Ochoa, the alleged robbery victim, who did not speak any English. H. Tabares and L. Tabares, two bystanders who had witnessed the robbery, offered to translate. Ochoa described his attacker, who was later identified as Benites-Vijil, as a Hispanic male with a thin build and curly hair, who was wearing a white-and-red striped shirt and blue jeans. The bystanders also provided a description of the attacker and described the weapon he used as a black gun. Both Ochoa and the bystander witnesses told Wilson that Benites-Vijil was headed north.

Wilson returned to her vehicle, called for back-up, and put out a general broadcast over police radio for units in the area to be on the lookout for a possible suspect matching the description. She drove north in search of the suspect. A group of men standing in front of a nearby convenience store flagged her down and pointed out Benites-Vijil, who was walking back toward the apartment complex

carrying a 12-pack of beer. Wilson called in her position, got out of her vehicle, and followed Benites-Vijil on foot. She testified that Benites-Vijil turned around, saw her following him, and took off running. Wilson chased him. Benites-Vijil ran into the apartment complex through a pedestrian gate and dropped his beer. Wilson testified that she saw him “fiddling . . . with his waistband.” Believing he was armed, Wilson drew her weapon and commanded him to stop and put his hands in the air. But Benites-Vijil ran through the apartment complex. Wilson testified that in a breezeway between two apartment buildings, Benites-Vijil pulled a black gun from his waistband, turned around, and began shooting at her. Wilson returned fire. She testified that Benites-Vijil fired approximately four rounds. During the exchange, Benites-Vijil tripped and fell, but before Wilson could apprehend him, he got up and ran away. Wilson testified that Benites-Vijil gained a tactical advantage over her when he ran around a utility building and out of her sight. She took cover and waited for back-up to arrive.

Within minutes of Wilson’s radio dispatch, Officers A. Castillo and V. Gonzalez arrived separately at the apartment complex. Castillo was the first to spot Benites-Vijil walking toward a parking lot. He testified that Benites-Vijil spotted him, turned around, and ran in the opposite direction. Castillo chased him through the complex but was unable to catch him.

When Gonzalez arrived, several bystanders directed him to where Benites-Vijil was last seen, wearing blue jeans and no shirt. Gonzalez and two other officers initially detained a person matching the description of Wilson's attacker but were told by onlookers that they had the wrong person. Gonzalez testified that he approached another group of people and asked if anyone had seen a Hispanic man walking around wearing blue jeans and no shirt. One bystander indicated that Benites-Vijil was sitting to the right of the group. Gonzalez arrested him.

Gonzalez searched Benites-Vijil for weapons but did not find any firearms. He located a white and red striped shirt hidden under a car, and a bullet was recovered from the pocket of Benites-Vijil's blue jeans. Wilson identified Benites-Vijil as the person who shot at her and the shirt as the one he wore during the attack.

After Benites-Vijil was in custody, H. Tabares, an eyewitness to the robbery, approached the investigating officers and identified Benites-Vijil as the person who had committed the robbery. Over defense counsel's objection, H. Tabares testified that Benites-Vijil was the man he had described to Wilson. Tabares's daughter, L. Tabares, similarly testified that Benites-Vijil was the man she had seen robbing Ochoa in the parking lot of the apartment complex. She described his clothing to Wilson and testified that the clothing collected at the scene was the clothing she saw Benites-Vijil wearing during the robbery. Behind some bicycles

on her neighbor's porch, L. Tabares found a gun that looked like the one used during the robbery.

Officers M. Perez and D. Nunez of the crime scene unit collected shell casings from the scene. They recovered a 9-mm unfired cartridge in the bushes near the place that Wilson testified she saw Benites-Vijil fall during the fire fight. Perez also collected a 9-mm Ruger pistol. Nunez tested Benites-Vijil's hands for gunshot residue. The physical evidence was taken to the Harris County Medical Examiner's office, as well as to the forensic firearms laboratory.

S. Houck analyzed the gunshot residue samples collected at the scene. He testified that he did not find particles consistent with the composition characteristics of gunshot residue, but he did find individual elements of lead, barium, and antimony particles. He testified that the presence of these individual elements was some evidence that Benites-Vijil had fired a gun.

A ballistics analyst from the Houston Police Department forensic firearms laboratory received the firearms and ballistics evidence collected at the scene. He testified that Wilson's 22-mm Glock, a number of 22-mm shell casings and bullets, a 9-mm Ruger, and eleven 9-mm cartridges were submitted to his lab. None of the recovered 9-mm cartridges had been fired from the 9-mm gun found at the scene, but based on a comparison of the gun and the markings on the cartridges, he

concluded that the cartridges recovered from the breezeway and the pocket of Benites-Vijil's pants had been chambered in the 9-mm gun.

The jury convicted Benites-Vijil of aggravated assault on a public servant and assessed punishment at forty-five years' imprisonment. Benites-Vijil filed a timely notice of appeal.

Analysis

I. Sufficiency of the evidence

In his first and second issues, Benites-Vijil challenges the legal and factual sufficiency of the evidence to support his conviction. He argues specifically that the State failed to present sufficient evidence that he possessed a firearm and that there was no forensic evidence connecting the handgun to the cartridges collected at the scene. Benites-Vijil does not present separate arguments to support his claims of legal and factual sufficiency. In light of the decision in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), we likewise will review the sufficiency of the evidence in a unified analysis.

We review the sufficiency of evidence to support a criminal conviction to determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Brooks v. State*, 323 S.W.3d 893, 894–95 (plurality op.),

926 (Cochran, J., concurring) (Tex. Crim. App. 2010). Evidence is insufficient under this standard when: (1) the record contains no evidence, or merely a “modicum” of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318, 320, 99 S. Ct. at 2786. We presume that the fact finder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *See id.* at 326, 99 S. Ct. at 2793; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). On appeal we may not re-evaluate the weight and credibility of the record evidence and thereby substitute our own judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The jury is the exclusive judge of the facts. TEX. CODE CRIM. PROC. ANN. arts. 36.13, 38.04 (West 2007 & 1979); *Brooks*, 323 S.W.3d at 899. Because “[t]he jury is in the best position to judge the credibility of a witness,” we “afford almost complete deference to a jury’s decision when that decision is based upon an evaluation of credibility.” *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

A person commits aggravated assault if he intentionally or knowingly threatens another with imminent bodily injury and uses or exhibits a deadly weapon during the commission of the assault. TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(a)(2). An offense under section 22.02 is a first degree felony

if it is committed against a person the defendant knows is a public servant while the public servant is lawfully discharging an official duty. *Id.* § 22.02(b)(2)(B).

In this case, Benites-Vijil was charged with “unlawfully, intentionally and knowingly threaten[ing] [Wilson] with imminent bodily injury . . . while [she] was lawfully discharging an official duty, by using and exhibiting a deadly weapon, namely a firearm” He argues that the evidence at trial was insufficient because he was not in possession of a firearm at the time of his arrest and the forensic evidence did not conclusively link the 9-mm cartridges found in the breezeway and in the pocket of his jeans to the 9-mm handgun collected at the scene. But Wilson positively identified Benites-Vijil at the scene and at trial as the man who threatened her. She testified that she saw Benites-Vijil pull a gun out of the waistband of his pants, point it at her, and fire four rounds in her direction. Her testimony alone is sufficient to support the jury’s verdict. *See, e.g., Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971) (holding testimony of eyewitness alone sufficient to support conviction); *Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (same).

Wilson’s testimony is corroborated by the physical and forensic evidence. Officers Perez and Nunez testified that a 9-mm cartridge was recovered in the breezeway near where Wilson indicated Benites-Vijil fell down during the shooting. The ballistics analyst testified that marking on the cartridge found on the

ground, as well as the one found in the pocket of Benites-Vijil's pants indicated that they were both chambered in the 9-mm handgun found at the scene. Houlck, who analyzed the trace evidence submitted by the investigating officers, testified that he identified individual elements of lead, barium, and antimony particles in the samples collected from Benites-Vijil's hands. Although he did not find gunshot residue on the samples, he testified that the presence of these individual elements was some evidence that Benites-Vijil had fired a gun. Considering all of the evidence in the light most favorable to the prosecution, we hold that the State presented sufficient evidence to support the jury's verdict. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks*, 323 S.W.3d at 894–95 (plurality op.), 926 (Cochran, J., concurring). We overrule Benites-Vijil's first and second issues.

II. Admissibility of extraneous offense evidence

In his third issue, Benites-Vijil complains that the trial court erred in admitting testimony concerning the aggravated robbery that occurred immediately prior to the aggravated assault on Wilson. Over defense counsel's objection, the trial court admitted evidence of the aggravated robbery subject to a limiting instruction. Benites-Vijil argues that the testimony of Wilson, H. Tabares, and L. Tabares regarding the robbery investigation was inadmissible character evidence. Alternatively, he argues that the trial court abused its discretion in admitting the

testimony because its probative value was substantially outweighed by the danger of unfair prejudice.

We review the trial court's decision to admit extraneous offense evidence for abuse of discretion. *Rankin v. State*, 974 S.W.2d 707, 718 (Tex. Crim. App. 1996); *Roberts v. State*, 29 S.W.3d 596, 600 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). A trial court does not abuse its discretion as long as its decision to admit evidence is within the “zone of reasonable disagreement.” *Montgomery v. State*, 810 S.W.2d 372, 391–92 (Tex. Crim. App. 1990); *Roberts*, 29 S.W.3d at 600. We will sustain the decision if it is correct on any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543–44 (Tex. Crim. App. 1990).

Evidence of extraneous offenses is not admissible at the guilt-innocence phase of a trial to prove that a defendant committed the charged offense in conformity with a bad character. TEX. R. EVID. 404(b); *see Nobles v. State*, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992). Extraneous offense evidence may be admissible, however, when it has relevance beyond character conformity, for example, to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). Contextual evidence is admissible under Rule 404(b) when it is part of the same transaction, particularly when “several crimes are intermixed, or blended with one another, or connected so that they form

an indivisible criminal transaction.” *Rogers v. State*, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993); *Garcia v. State*, 17 S.W.3d 1, 7 (Tex. App.—Houston [1st Dist.] 1999, pet. ref’d). “Only if the facts and circumstances of the instant offense would make little or no sense without also bringing in the same transaction contextual evidence, should the same transaction contextual evidence be admitted.” *Rogers*, 853 S.W.2d at 33.

Benites-Vijil argues that the testimony regarding that prior assault was inadmissible character evidence, but the State argued at the pretrial hearing and on appeal that the testimony of all three witnesses provides necessary context. On appeal, the State also argues that the evidence demonstrates motive. The trial court ruled that testimony regarding the prior aggravated assault was admissible subject to a limiting instruction. The trial court instructed the jury, as follows:

You are further instructed that if there is any evidence before you in this case regarding the defendant’s committing an alleged offense other than the offense alleged against him in the indictment in this case, you cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offense or offenses, if any, and even then you may only consider the same in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment and for no other purpose.

H. Tabares and L. Tabares both described Benites-Vijil’s clothing, the weapon he was carrying, and the direction in which he was heading. Wilson’s testimony regarding the prior aggravated assault explains her presence at the

apartment complex and her rationale for following Benites-Vijil, who matched the Tabareses' description. L. Tabares also led the investigating officers to the gun Benites-Vijil used in both the aggravated robbery and the assault on Wilson. She testified that the gun found after the assault on Wilson looked similar to the one she saw Benites-Vijil holding during the robbery. Because we conclude that this evidence provides necessary context and demonstrates Benites-Vijil's motive for shooting at Wilson, we hold that the trial court did not abuse its discretion in admitting the evidence under an exception to Rule 404(b). *See Moreno v. State*, 721 S.W.2d 295, 301 (Tex. Crim. App. 1986); *Garcia*, 17 S.W.3d at 6–7.

Evidence admissible under Rule 404(b) may still be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. *See* TEX. R. EVID. 403. In evaluating whether evidence is admissible under Rule 403, we consider several factors: (1) how compellingly evidence of the extraneous misconduct serves to make more or less probable a fact of consequence; (2) the potential for the evidence of an extraneous offense to impress the jury in some irrational but indelible way, (3) the time needed to develop the evidence of the extraneous offense, and (4) the proponent's need for the extraneous offense. *Jabari v. State*, 273 S.W.3d 745, 752–53 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996)). We will

uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Lane*, 933 S.W.2d at 520; *Jabari*, 273 S.W.3d at 753.

In this case, the proximity in time and Wilson's ongoing investigation of the aggravated robbery make her testimony and that of the Tabareses highly probative. Collectively, their testimony demonstrates Benites-Vijil's identity, motive, and intent. Given that the gun was not found on his person and that the crime scene investigators did not find any used 9-mm cartridges, the State needed the testimony to establish that Benites-Vijil had previously been seen holding a weapon similar to the one he used to threaten Wilson. The Tabareses' testimony about the size and appearance of the gun, as well as L. Tabares's statement that the gun recovered on her neighbor's porch was similar to the one Benites-Vijil used in the robbery, bolstered Wilson's credibility and tended to establish that Benites-Vijil had in fact used a gun to threaten her with imminent bodily injury.

While the admission of testimony related to the aggravated robbery carried a risk of irrationally impressing the jury of Benites-Vijil's character conformity, this impermissible inference was minimized by the trial court's limiting instruction. *See Lane*, 933 S.W.2d at 520. Moreover, the testimony did not take up a significant portion of the trial, and the amount of time used for the testimony was reasonable and not excessive.

Accordingly, we conclude that the trial court was within the zone of reasonable disagreement when it ruled that the probative value of the testimony about the prior aggravated assault was not substantially outweighed by the danger of unfair prejudice. We hold that the trial court did not abuse its discretion in declining to exclude the evidence under Rule 403, and we overrule Benites-Vijil's third issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Sharp, concurring.

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