Opinion issued May 3, 2016.

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00976-CR

LARRY DWAYNE BRINKLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Case No. 17947

MEMORANDUM OPINION

A jury convicted appellant, Larry Dwayne Brinkley, of murder and assessed his punishment at twenty years' incarceration. In three points of error, appellant argues that the trial court erred by: (1) admitting evidence of extraneous bad acts during the guilt-innocence phase in violation of Texas Rules of Evidence 403 and

404; (2) refusing to submit a sudden passion instruction to the jury during the punishment phase; and (3) admitting evidence during the punishment phase of extraneous bad acts and offenses allegedly committed by appellant even though the State failed to provide him with notice that it intended to elicit testimony regarding these events. We affirm the trial court's judgment.

Background

The undisputed evidence in this case demonstrates that appellant was driving his fifteen-year old daughter, Ashlee, to his ex-wife's house around 9:30 p.m. on January 31, 2014, when appellant approached a slower moving vehicle from behind driven by Leslie Larrison. Although Larrison's left turn signal was on, appellant flashed his headlights and passed Larrison on the left. Appellant then turned left onto the next roadway, a dark country road leading to his ex-wife's house, unaware that he was being followed by Larrison.

When they arrived at his ex-wife's home, Ashlee jumped the fence and tried to climb in through a window because her mother was not home and Ashlee did not have a key. Appellant, who was parked in the driveway with his engine running and radio on, noticed headlights approaching after Ashlee exited the truck. Larrison, who was unarmed, parked near appellant's truck and walked over to appellant's vehicle. After appellant exited his vehicle with a loaded pistol, a scuffle ensued, and Larrison was fatally shot.

Appellant and two other eyewitnesses testified at trial about the circumstances of that encounter—appellant's daughter, Ashlee, and Larrison's ten-year old grandson who was sitting in the front passenger seat of Larrison's vehicle when the shooting occurred. These witnesses offered conflicting testimony on a number of points, including whether Larrison or appellant hit the other first and Larrison's demeanor during the encounter. In addition to their trial testimony, Ashlee, Larrison's grandson, and appellant all gave statements to police that were also admitted into evidence.

Appellant claimed at trial that he shot Larrison in self-defense. Specifically, appellant testified that he noticed headlights approaching after he dropped his daughter off at his ex-wife's home. He then saw a truck pull up on his left and park close to appellant's front driver-side tire in "an aggressive angle, like he was trying to . . . box [appellant] in." Appellant, who did not recognize the truck or its driver, retrieved his pistol from the truck's center console because he "didn't know who the man—or who the person was" and "[b]ecause of the angle that he was pulled in close to my truck." After he retrieved his pistol, appellant saw Larrison exit his vehicle. Appellant testified that although he could not hear what Larrison was saying, he could tell that Larrison was "pretty well upset about something" based on his facial expressions.

Appellant got out of his truck, holding his pistol at his side, and walked towards Larrison. Appellant testified that the pistol was not cocked and that he did not have his finger on the trigger because he "didn't know if [Larrison] was going to be a threat or not." Appellant claims that he told Larrison that he had a pistol, took two steps towards Larrison, and then Larrison lunged at him. According to appellant, the encounter happened so fast that he did not have time to think. Appellant claimed that he pulled the trigger out of fear and was in a state of shock after the shooting. Appellant also testified that he felt threatened by Larrison, who appeared to be "pissed off," and that he was scared that night because there were no street lights near his ex-wife's house, it was "pitch black," and almost 10:00 o'clock at night, and he "had no understanding of what [Larrison] was doing that close to [appellant's] truck," parked in that aggressive position.

At the close of evidence, the trial court instructed the jury on self-defense, as appellant requested, and included a jury instruction on provocation as a limitation upon appellant's self-defense claim. The jury found appellant guilty of Larrison's murder, implicitly rejecting appellant's self-defense claim.

Numerous witnesses testified during the punishment phase, including appellant's ex-wife and Ashlee's mother, Jane. During the charge conference, appellant's counsel objected to the omission of an instruction on sudden passion and

submitted a proposed instruction. The trial court overruled the objection and refused to submit the proposed instruction.

The jury assessed appellant's punishment at twenty years' confinement. This appeal followed.

Extraneous Bad Acts

In his first point of error, appellant argues that the trial court erred by admitting Ashlee's testimony regarding racist and derogatory statements that appellant allegedly made to her in violation of Rules of Evidence 403 and 404.

The record reflects that these statements were testified to by multiple witnesses at trial, including Ashlee, and came into evidence through at least two other sources. In particular, a copy of Ashlee's interview with Sergeant Arredondo from the night of the shooting was admitted into evidence (State's Ex. 12A), along with a transcript of the interview (State's Ex. 12). Both of these exhibits contained the same racist and derogatory statements testified to by Ashlee. Defense counsel did not object to the admission of either exhibit based on the inclusion of these statements. Therefore, any error in the admission of this portion of Ashlee's testimony was cured by the admission of other unobjected-to evidence at appellant's trial. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) ("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection."); *see also Mitchell v. State*, 68 S.W.3d 640, 643 (Tex.

Crim. App. 2002) (explaining that if objected-to evidence is introduced from another source without objection, defendant may not challenge admission on appeal).

We overrule appellant's first point of error.

Sudden Passion

In his second point of error, appellant argues that the trial court erred by refusing to submit a sudden passion instruction to the jury.

A. Standard of Review and Applicable Law

We use a two-step process in reviewing jury charge error. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013) (citing *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005)). If we first determine that error exists in the charge, we then review the record to determine whether the error caused sufficient harm to require reversal of the conviction. *Wooten*, 400 S.W.3d at 606.

At the punishment stage of a murder trial, a defendant may argue that he caused the death while under the immediate influence of sudden passion arising from an adequate cause. *Trevino v. State*, 100 S.W.3d 232, 237 (Tex. Crim. App. 2003). Sudden passion is a mitigating circumstance that, if found by the jury to have been proven by a preponderance of the evidence, reduces the offense from a first-degree felony with a punishment range of five to ninety-nine years' imprisonment to a second-degree felony with a punishment range of two to twenty years. TEX. PENAL CODE ANN. §§ 19.02(d), 12.32(a), 12.33(a) (West 2011). A defendant is entitled to

a jury instruction on the issue of sudden passion if the record, at a minimum, supports an inference: (1) that the defendant in fact acted under the immediate influence of a passion such as terror, anger, rage, or resentment; (2) that his sudden passion was in fact induced by some provocation by the deceased or another acting with him, which provocation would commonly produce such a passion in a person of ordinary temper; (3) that he committed the murder before regaining his capacity for cool reflection; and (4) that a causal connection existed "between the provocation, passion, and homicide." *Wooten*, 400 S.W.3d at 606 (quoting *McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005)); *see also* TEX. PENAL CODE ANN. § 19.02(a)(1)–(2) (West 2011) (defining sudden passion and adequate cause).[1]

In considering whether any evidence was raised on this punishment issue, we review the record from both the guilt-innocence and punishment phases of the trial. *Trevino*, 100 S.W.3d at 238. We review evidence offered in support of a defensive issue in the light most favorable to the defense. *See Griffin v. State*, 461 S.W.3d 188, 192 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999)). Although a defendant is entitled to the

[1] Sudden passion is defined as "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." TEX. PENAL CODE ANN. § 19.02(a)(2) (West 2011). Adequate cause means "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *Id.* § 19.02(a)(1).

instruction even if "the evidence supporting the submission of a sudden passion instruction [is] weak, impeached, contradicted, or unbelievable," *Wooten*, 400 S.W.3d at 605, the evidence may not be so weak, contested, or incredible that it could not support such a finding by a rational jury. *See McKinney*, 179 S.W.3d at 569. "The mere fact that a defendant acts in response to the provocation of another is not sufficient to warrant a charge on sudden passion. Instead, there must be some evidence that the defendant was under the immediate influence of sudden passion." *Trevino*, 100 S.W.3d at 241.

B. Analysis

Here, appellant argues that he was entitled to have a sudden passion instruction submitted to the jury because he produced some evidence that he was acting under the immediate influence of a passion such as terror or anger, which was caused by Larrison, when he fatally shot Larrison. Specifically, appellant contends that Larrison provoked appellant by following him down a "pitch black" country road late at night, parking his truck at an "aggressive angle," effectively boxing in appellant's truck which was parked in a private driveway, and then angrily approaching appellant and lunging at him, even though appellant had warned Larrison that he had a pistol. Appellant further contends that he did not recognize Larrison or Larrison's vehicle, and that he was scared of Larrison and felt threatened by him.

Although this evidence arguably supports an inference that appellant responded to some provocation by Larrison, this testimony does not support an inference that appellant acted under the immediate influence of a passion such as terror or anger. Although appellant argues on appeal that he acted under the immediate influence of a passion such as terror or anger, appellant argued at trial that he acted out of fear. Appellant also denied that he was angry when he shot Larrison. Nor does any other evidence in the record demonstrate that appellant acted under a passion such as terror, anger, rage, or resentment. Viewed in the light most favorable to appellant, appellant's testimony establishes, at most, that he feared that Larrison was going to assault him, but "a bare claim of 'fear'" does not demonstrate "sudden passion arising from adequate cause." *Daniels v. State*, 645 S.W.2d 459, 460 (Tex. Crim. App. 1983); *Griffin*, 461 S.W.3d at 194 (citing to *Daniels* and holding defendant's testimony that he shot his weapon out of fear when decedent "acted first" and "went for his pistol" did not support inference that defendant acted out of sudden passion because testimony "establishe[d] at most that [defendant] feared [decedent] drawing his pistol"); *see generally Smith v. State*, 721 S.W.2d 844, 854 (Tex. Crim. App. 1986) (explaining that evidence showing defendant was "scared to death" is insufficient to demonstrate sudden passion); *Gonzales v. State*, 717 S.W.2d 355, 356–57 (Tex. Crim. App. 1986) (concluding that defendant's claim that he was scared of decedent was insufficient to raise issue that he was enraged,

resentful, terrified or emotionally aroused immediately prior to shooting). Because no evidence demonstrates that appellant acted under the immediate influence of terror, anger, rage, or resentment, the trial court did not err by denying an instruction on sudden passion. *See Griffin*, 461 S.W.3d at 194.

We overrule appellant's second point of error.

Inadequate Notice

In his third point of error, appellant argues that the trial court erred by allowing his ex-wife, Jane, to testify that appellant had repeatedly abused her over the course of their almost twenty-year marriage because the State failed to provide him with notice that it would be eliciting testimony on this issue during the punishment phase of trial. Appellant argues that the State's inadequate notice was harmful because he was unfairly surprised by Jane's testimony about the additional instances of domestic abuse, and that the lack of notice prevented his trial counsel from mounting an adequate defense to the allegations.

A. Standard of Review and Applicable Law

We review the admission of extraneous offenses and bad acts for an abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). We will reverse the trial court's decision only when it is so clearly wrong that it is outside "the zone of reasonable disagreement." *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

Article 37.07, section 3(g) provides that, when the defendant timely requests notice of the State's intent to introduce at punishment an extraneous bad act that has not resulted in a final conviction, the State must give the defendant reasonable notice in advance of trial. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (incorporating Texas Rule of Evidence 404(b)'s reasonable notice requirement). Such notice is reasonable only if it includes the date on which the alleged crime or bad act occurred, the county in which it occurred, and the name of the alleged victim. *Id.* The purpose of article 37.07, section 3(g) is to avoid unfair surprise, that is, trial by ambush. *Nance v. State*, 946 S.W.2d 490, 493 (Tex. App.—Fort Worth 1997, pet. ref'd).

Admitting evidence of extraneous offenses when the State has not provided proper notice is non-constitutional error, subject to harm analysis under Texas Rule of Appellate Procedure 44.2(b). *McDonald*, 179 S.W.3d at 578; TEX. R. APP. P. 44.2(b). An appellate court may reverse a judgment of conviction or punishment based on non-constitutional error only if that error affected the defendant's substantial rights. TEX. R APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

When a defendant objects to the admissibility of extraneous acts based exclusively on the State's failure to give proper notice, as in this case, reviewing courts "look only at the harm that may have been caused by the lack of notice and

the effect the lack of notice had on the [defendant's] ability to mount an adequate defense." *McDonald*, 179 S.W.3d at 578; *see also Roethel v. State*, 80 S.W.3d 276, 281–82 (Tex. App.—Austin 2002, no pet.) (noting that purpose of article 37.07's notice requirement is to enable defendant to prepare to meet extraneous offense evidence, and that harm is assessed in view of whether statute's purpose was thwarted). Specifically, we consider whether the lack of reasonable notice surprised the defense. *Hernandez v. State*, 176 S.W.3d 821, 823–25 (Tex. Crim. App. 2005) (citing with approval *Roethel*, 80 S.W.3d at 281–82). "A defendant may demonstrate surprise by showing how his defense strategy might have been different had the State explicitly notified him that it intended to offer the extraneous-offense evidence." *Allen v. State*, 202 S.W.3d 364, 369 (Tex. App.—Fort Worth 2006, pet. ref'd) (discussing Rule 404(b) notice) (citing *Hernandez*, 176 S.W.3d at 826).

B. Analysis

The record reflects that appellant timely requested notice of the State's intent to introduce at punishment any extraneous bad acts that had not resulted in a final conviction. Prior to trial, the State notified appellant that it intended to elicit testimony regarding the offense of "Assault Family Violence by Occlusion" that occurred in Chambers County "on or about January 8, 2012."[2]

[2] The State also gave notice of its intent to elicit testimony regarding several other extraneous bad acts and offenses, including several DWIs and a 1991 arrest for battery of a police officer in Florida.

Jane testified at appellant's punishment hearing that she and appellant divorced in September 2013 after almost twenty years of marriage. When the State asked Jane if there was a time in her marriage when appellant became physically violent towards her, appellant objected to Jane testifying to "anything that goes beyond the notice," including "any specific instances of family violence" not set forth in the notice. After the court overruled the objection, Jane testified to one instance of abuse that she allegedly suffered early in the marriage, the January 8, 2012 noticed offense, and she made general references to other instances when appellant bruised her arms. The record reflects that the State did not give appellant reasonable notice that it intended to introduce evidence regarding the additional domestic abuse allegations testified to by Jane, including the dates of these alleged events. Accordingly, we hold that the trial court erred by allowing Jane to testify about these unnoticed bad acts and offenses. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g).

We cannot reverse the trial court's judgment based on this error, however, unless the error affected appellant's substantial rights. *See McDonald*, 179 S.W.3d at 578; TEX. R APP. P. 44.2(b). Because appellant is objecting to the admissibility of these extraneous bad acts and offenses based exclusively on the State's failure to give proper notice, we will limit our review to the harm "that may have been caused by the lack of notice and the effect the lack of notice had on the [defendant's] ability

to mount an adequate defense." *McDonald*, 179 S.W.3d at 578 (citing *Hernandez*, 176 S.W.3d at 823–25). In conducting such a review, courts look to a number of factors, including whether the defendant had an opportunity to cross-examine the source of the testimony concerning the uncharged misconduct, whether the defendant requested a continuance or recess in order to prepare for the cross-examination, and whether the defendant would have modified his trial strategy had he been provided reasonable notice of the State's intent to rely on the uncharged misconduct. *See id.*

Relying upon *James v. State*, 47 S.W.3d 710, 715 (Tex. App.—Texarkana 2001, no pet.), appellant contends that the type of extraneous evidence erroneously admitted here, i.e., evidence showing a lengthy pattern of abuse over almost twenty years, demonstrates that the error was harmful. *James*, however, is factually distinguishable and its holding was expressly limited to the "circumstances of th[at] case." *Id.* at 713, 715 (holding defendant convicted of aggravated sexual assault of his seven-year old daughter and sentenced to life imprisonment was harmed during punishment phase by admission of testimony from four other family members that defendant had "engaged in various forms of sexual activity with them when they were young children"). We further note that *James* was decided several years before the Court of Criminal Appeals's opinions in *Hernandez* and *McDonald*, in which the court held that when the defendant is only complaining about inadequate notice,

courts must evaluate the harmfulness of such evidence by "look[ing] only at the harm that may have been caused by the lack of notice and the effect the lack of notice had on the [defendant's] ability to mount an adequate defense." *McDonald*, 179 S.W.3d at 578 (citing *Hernandez*, 176 S.W.3d at 823–25).

In *McDonald*, the defendant was charged with indecency with a child based upon his encounter with a ten-year-old girl. 179 S.W.3d at 574. The State gave the defendant notice that it intended to elicit testimony regarding uncharged sexual misconduct involving the complainant's younger cousin, specifically that the defendant touched the younger child's breast. *Id.* at 577. The State, however, did not give notice that it also intended to introduce evidence that the defendant also pulled the cousin's pants down during the same encounter. *Id.*

The Court of Criminal Appeals determined that the trial court erred by allowing the complainant to testify that the defendant pulled the cousin's pants down because the defendant was not given adequate notice of the uncharged misconduct, but held that the error was harmless. *Id.* at 578–79. In particular, the Court noted that the defendant had an opportunity to cross-examine the complainant who was the source of the testimony concerning the uncharged misconduct, and that the record revealed that the defendant's strategy was to discredit the complainant's testimony and her recollection of events. *Id.* at 578. Because the defendant had notice that the State intended to introduce evidence concerning his conduct with the cousin, the

court noted that if the defendant "was surprised by the testimony concerning the cousin, it was only as to the additional allegation that [he] pulled down the cousin's pants." *Id.* The Court also observed: "It is hard to imagine that [McDonald's] defense would have been altered in any meaningful way. *Id.* Furthermore, had there been legitimate surprise that required a re-evaluation of trial strategy, the [defendant] could have requested a continuance." *Id.* The Court determined that the error would not have affected the defendant's trial strategy based on these factors and concluded that the error did not influence the jury or had but slight effect. *Id.* at 578–79.

Here, appellant's counsel had an opportunity to cross-examine Jane, the source of the testimony concerning the uncharged misconduct. Counsel did not question Jane about *any* of her domestic violence claims, not even the January 8, 2012 offense for which appellant was given notice. Instead, counsel elicited testimony tending to show that Jane had a motive to lie in order to secure a longer sentence for appellant. Thus, the record reflects that appellant's strategy was to discredit Jane and undermine her testimony without drawing the jury's attention to the domestic violence allegations. Notably, appellant does not argue on appeal that he would have modified his trial strategy if the State had given him reasonable notice of its intent to elicit testimony regarding the additional instances of domestic violence that Jane testified to during punishment. We further note that appellant's counsel did not request a continuance, or a short recess, in order to prepare for Jane's

cross-examination. *See McDonald*, 179 S.W.3d at 578 (noting that if defendant had been legitimately surprised by un-noticed offense, he could have requested a continuance).

Because it appears from the record that notice of the extraneous misconduct at issue would not have affected appellant's trial strategy, we conclude that the error did not influence the jury or had but slight effect. *See McDonald*, 179 S.W.3d at 578–59; *see also Martines v. State*, 371 S.W.3d 232, 250 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding defendant was not harmed by inadequate notice because record did not demonstrate that error affected defendant's trial strategy).

We overrule appellant's third point of error.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

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