Opinion issued July 19, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00139-CR

LATURE ROBERT IRVIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1282104

MEMORANDUM OPINION

Appellant, Lature Robert Irvin, was charged with sexual assault.[1] Appellant pleaded not guilty. The jury found him guilty. The trial court found an enhancement paragraph true and assessed punishment at life imprisonment. In two issues,

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1 *See* TEX. PENAL CODE ANN. § 22.011(a)(1)(A) (Vernon 2011).

Appellant argues (1) the trial court abused its discretion by admitting evidence of an extraneous offense during the guilt-innocence phase at trial and (2) he received ineffective assistance of counsel.

We affirm.

Background

Appellant was a promoter in the music industry. In 2009, he met Brian Andrews, a recording artist. Appellant would send Andrews to events in various cities. The two became friends along with their spouses. On November 22, 2009, Andrews was out of town. Appellant and his wife invited Andrews's wife, Trina Guerrero, over to their house. Appellant gave Guerrero a couple of mixed drinks. After a while, the three decided to go to a club. Appellant drove the three of them in his car. At the club, Guerrero had a couple more mixed drinks.

Later, Appellant and his wife decided to leave. They had to help Guerrero get to the car. After they left, Appellant and his wife decided to go to a strip club. Guerrero fell asleep on the way and did not want to go in once they arrived. So Guerrero stayed in the car while Appellant and his wife went inside.

Some time later, Guerrero heard the rear car door open. She felt someone moving her legs and get into the car. The person lifted her legs up in the air and leaned in to look at her. Guerrero then saw it was Appellant. Appellant opened her pants and pulled her pants and underwear down to her thighs. Guerrero was too

drunk to respond. She felt Appellant penetrate her vagina with his penis. After a short period, Appellant stopped abruptly. He pulled Guerrero's pants back up and left the car.

Eventually, Appellant and his wife returned to the car, and they returned to Appellant's house. Guerrero slept on a couch in their house that night. Guerrero stayed for a while the next day until she felt well enough to drive.

Some days later, Guerrero reported the offense to the police. She had kept the underwear and pants she wore that night. On one of her visits to the police, she turned these articles of clothing over to the police. Appellant's semen was found on Guerrero's underwear.

After the complaint was filed, Appellant agreed to talk to the police. He flatly denied ever having sex with Guerrero and signed a statement to that effect.

At trial, Appellant's counsel acknowledged that Appellant had told the police that he never had sex with Guerrero. She continued, "And you're going to hear that, yes, he did lie about having sex with her; but you're also going to hear that he's married."

During cross examination of Guerrero, Appellant's counsel repeatedly sought to have Guerrero admit that no sexual assault occurred and questioned her about why she stayed with Appellant for so long after the assault. Appellant's counsel repeatedly used the phrase "your rapist" while discussing all the interactions

Guerrero had with Appellant following the incident. For example, she questioned Guerrero why she stayed at her rapist's house and why she had a civil conversation with her rapist the next morning. After asking Guerrero whether she was afraid to fall asleep at Appellant's house after the incident, Appellant's counsel asked, "You weren't afraid because he didn't rape you then; isn't that why you weren't afraid?" While developing why Guerrero didn't tell Appellant's wife about the incident the next day, Appellant's counsel asked, "Because the reason you didn't tell [her] is because it didn't happen?"

Later in the trial during a bench conference, the State argued it should be allowed to present evidence of an extraneous sexual-assault offense committed by Appellant in 2004. The State argued that Appellant had challenged the issue of intent and had claimed that Guerrero was fabricating the incident. The State argued the evidence was relevant under "the doctrine of chances." Appellant argued that the facts of the extraneous offense were too dissimilar from the facts of the underling case to be admissible and that the offense was too remote to be relevant. The trial court overruled the objections and allowed the evidence.

The State subsequently called Lena Ellis to testify. Ellis testified that, in September 2004, she was 19 and attending Michigan State University. A friend of hers had turned 21, and a group went to a club to celebrate. Appellant was there, and bought drinks for the group. Ellis became very intoxicated.

When she returned to her apartment, she went to the bathroom to throw up and remained on the floor afterwards. Appellant came into the bathroom, picked her up, took her to her room, closed the door, removed her pants and underwear, and began having sex with her. Ellis attempted to stop Appellant, but he blocked her attempts, put his hand over her mouth, and said, "It will be all right." A friend of Elllis's came into the room, saw what was happening, and made Appellant get off of her.

During closing argument the State argued,

> That man has a system. You know what his system is now. That's why you heard that evidence. You heard it because what are the odds that two women, roughly the same age, on opposite sides of the country come up with the exact same thing down to the littlest details?
> . . . .
> He takes advantage of people that he believes are too intoxicated to remember or too intoxicated to resist. That's his system. That's why you heard that evidence. The law says that you have to believe this crime beyond a reasonable [doubt], this one. But when you're thinking, well, maybe this is just a fluke, you know it's not because you know that this is his MO. It's something you all heard. It's his modus operandi. It's his system, it's what he does.

Extraneous Offense

In his first issue, Appellant argues the trial court abused its discretion by admitting evidence of an extraneous offense during the guilt-innocence phase at trial.

A. Standard of Review

We review a trial court's ruling on the admission of extraneous offense evidence for an abuse of discretion. *Dennis v. State*, 178 S.W.3d 172, 177 (Tex.

App.—Houston [1st Dist.] 2005, pet. ref'd). "We will affirm a trial court's ruling that an extraneous offense has relevance apart from proving conformity with the defendant's character if the ruling is within the zone of reasonable disagreement." *Id.* "A trial court's 404(b) ruling admitting evidence is generally within this zone if there is evidence supporting that an extraneous transaction is relevant to a material, non-propensity issue." *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). We must affirm the trial court's evidentiary ruling if it "is correct on any theory of law applicable to that ruling." *Id.*

B. Analysis

Evidence of an extraneous offense is not admissible to show character conformity. TEX. R. EVID. 404(b)(1). It may, however, "be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). This is a rule of inclusion, not exclusion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). "The rule excludes only that evidence that is offered (or will be used) solely for the purpose of proving bad character and hence conduct in conformity with that bad character." *Id.*

Appellant was charged with sexual assault. As it applied to Appellant, "[a] person commits an offense if the person intentionally or knowingly causes the

penetration of the anus or sexual organ of another person by any means, without that person's consent." TEX. PENAL CODE ANN. § 22.011(a)(1)(A) (Vernon 2011).

During the trial, Appellant developed two themes to challenge the State's proof that he had committed sexual assault. The first theme was that any sex was consensual. The second theme was that Guerrero and Appellant never had any sex and that Guerrero was fabricating the incident.

For the theme of consensual sex, Appellant's counsel acknowledged during opening argument that, at his meeting with Officer McMurtry, Appellant had flatly denied having sex with Guerrero. His counsel further acknowledged during opening statements that this was a lie. Specifically, she said, "And you're going to hear that, yes, he did lie about having sex with her; but you're also going to hear that he's married." Accordingly, at the start of trial, Appellant conceded that he had had sex with Guerrero at some point.

For both themes, Appellant's counsel repeatedly sought to have Guerrero admit that no sexual assault occurred and questioned her about why she stayed with Appellant for so long after the assault. For example, after asking Guerrero if she was afraid to fall asleep at Appellant's house after the incident, Appellant's counsel asked, "You weren't afraid because he didn't rape you then; isn't that why you weren't afraid?" Likewise, while developing why Guerrero didn't tell Appellant's wife about the incident the next day, Appellant's counsel asked, "Because the reason

you didn't tell [her] is because it didn't happen?" Finally, Appellant's counsel repeatedly used the phrase "your rapist" while discussing all the interactions Guerrero had with Appellant following the incident, highlighting the perceived incongruity of not trying to get away from Appellant sooner after the incident.

At the bench conference discussing the admission of the other offense, the State argued that Appellant had challenged the issue of intent and had claimed that Guerrero was fabricating the incident. The State argued the evidence was relevant under "the doctrine of chances."[2] Appellant argued that the facts of the extraneous offense were too dissimilar from the facts of the underling case to be admissible.

"It is the lack of consent on the part of the [complainant] that is the essence of the offense of rape." *Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980). Claims that the sexual encounter was consensual places the element of intent in issue. *Id.* Intent to act without the other person's consent "cannot be inferred from the mere act of intercourse." *Id.* Accordingly, the State must rely on other evidence to establish it. *See id.* By presenting arguments that the encounter between Appellant and Guerrero was consensual, Appellant challenged the State's proof of

[2] The State also sought to have the evidence introduced to rebut a defensive theory that it claimed Appellant had raised. Because we affirm the admission of the evidence on other grounds, we do not need to reach whether Appellant raised a defensive theory that also would have permitted the introduction of the extraneous offense.

intent. By presenting arguments that the encounter did not happen at all, Appellant challenged the State's proof of all of the elements, including intent.

To establish intent, the State can "introduce other transactions involving the appellant in its case-in-chief." *Plante v. State*, 692 S.W.2d 487, 490 (Tex. Crim. App. 1985). "Where the material issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extraneous offense derives purely from: 'the point of view of the doctrine of chances.'" *Id.* at 491 (quoting WIGMORE, EVIDENCE § 302 (Chadbourne rev. ed. 1979)). The doctrine of chances represents the instinctive recognition that each repeated occurrence of a similar act by the same party increases the likelihood that the act was intentional and not chance or accidental. *See id.*; *De La Paz*, 279 S.W.3d at 347 ("The 'doctrine of chances' tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance."). "*Modus operandi* may also encompass the 'doctrine of chances' theory to show lack of consent, motive, and the manner of committing an offense." *Casey v. State*, 215 S.W.3d 870, 881 (Tex. Crim. App. 2007).

Admissibility of an extraneous offense as circumstantial evidence of intent is a case-specific determination. *See Cantrell v. State*, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987). The relevance of the extraneous offense "must be analyzed . . . within the contexts of facts and circumstances of the individual case in order to determine admissibility." *Id.* For the determination of relevancy, "[t]he factors of remoteness

and similarity are important, not in and of themselves, but only as they bear on the relevancy and probative value of the offered extraneous offenses." *Plante*, 692 S.W.2d at 491. Appellant argues that these factors weigh against admissibility. We disagree.

For the underlying offense, Guerrero testified that Appellant provided her with drinks. Later in the night, Guerrero became so intoxicated that she was incapacitated. When she was alone in the car, Appellant came into the car, pulled down her pants and underwear, and began having sex with her. For the extraneous offense, Ellis testified that Appellant provided her with drinks. By the time she returned to her apartment, she was so intoxicated that she had to lie on the floor in the bathroom. Appellant picked her up, took her to her room, closed the door, removed her pants and underwear, and began having sex with her. Ellis attempted to stop Appellant, but he blocked her attempts, put his hand over her mouth, and said, "It will be all right."

Appellant argues that, despite the strong similarities between the two offenses, the offenses are not similar enough. Appellant points to differences in the surrounding facts of the offenses to argue that the offenses are dissimilar. For example, Appellant points out that one offense took place in a car, while the other took place in an apartment; that he had known Guerrero for about four months, but

had only met Ellis that night; and that "Guerrero did not appear to be awake during her assault, while Ellis was awake during her assault."

The cases upon which Appellant relies to argue that such minor discrepancies defeat a determination of relevance are cases where the extraneous offense was offered to prove identity, not intent. *See, e.g.*, *Ford v. State*, 484 S.W.2d 727, 729 (Tex. Crim. App. 1972) ("Evidence of another crime is admissible to prove identity, when identity is in issue, only if there is some distinguishing characteristic common to both the extraneous offense and the offense for which the accused is on trial."); *Reyes v. State*, 69 S.W.3d 725, 738 (Tex. App.—Corpus Christi 2002, pet. ref'd) ("The traditional rule regarding the admission of such evidence for the purpose of showing identity is that the extraneous offense must be so similar to the offense charged that the accused's acts are marked as his handiwork.").

"Clearly, such a high degree of similarity is not required when the purpose of the proof is to show intent. We have only required such a high degree of similarity in our prior cases when identity was the issue at bar." *Plante*, 692 S.W.2d at 493; *accord Cantrell*, 731 S.W.2d at 90 ("[T]he degree of similarity required is not so great where intent is the material issue as when identity is the material issue."). In *Cantrell*, the Court of Criminal Appeals held that two offenses of aggravated robbery were sufficiently similar because both offenses were committed at private residences at the same time in the morning and both were committed at gunpoint. 731 S.W.2d

at 90. We hold the extraneous offense offered by the State in this case was sufficiently similar to establish relevance for the element of intent.

For the factor of remoteness, the two offenses took place five years apart. Given the similarities of the offenses and that identity of the assailant was not at issue in either case, we hold that Appellant has failed to establish that the trial court abused its discretion by admitting the evidence. *See Linder v. State*, 828 S.W.2d 290, 296–98 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (upholding admission of sexual assault occurring seven years prior).

Next, Appellant complains that the State sought to introduce the evidence for the purpose of identity under the doctrine of chances but changed the reason during closing argument, asserting its relevance as proof of *modus operandi*. Appellant argues this was improper. We disagree.

During closing argument the State argued,

> That man has a system. You know what his system is now. That's why you heard that evidence. You heard it because what are the odds that two women, roughly the same age, on opposite sides of the country come up with the exact same thing down to the littlest details?
> . . . .
> He takes advantage of people that he believes are too intoxicated to remember or too intoxicated to resist. That's his system. That's why you heard that evidence. The law says that you have to believe this crime beyond a reasonable [doubt], this one. But when you're thinking, well, maybe this is just a fluke, you know it's not because you know that this is his MO. It's something you all heard. It's his modus operandi. It's his system, it's what he does.

The thrust of the State's argument encapsulates the doctrine of chances to show intent. In this circumstance, modus operandi overlaps with doctrine of chances to show intent. *See Casey*, 215 S.W.3d at 881 ("*Modus operandi* may also encompass the 'doctrine of chances' theory to show lack of consent, motive, and the manner of committing an offense."). Thus, the State's purpose for offering the evidence remained the same throughout trial.

Finally, Appellant argues the prejudicial effect of the evidence substantially outweighed its probative value. Evidence that is otherwise admissible can still be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." TEX. R. EVID. 403. Appellant did not raise an objection to the evidence on this ground, however.[3] To preserve an issue for appeal, there must be a timely, specific objection and a ruling from the trial court. TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1. The issue raised on appeal must comport with the objection raised at trial. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). Raising a Rule 404 objection does not preserve a Rule 403 complaint for appeal. *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1991) (op. on reh'g); *Martin v. State*, 173 S.W.3d 463, 468 n.3 (Tex. Crim. App. 2005).

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[3] At the bench conference on the admissibility of the extraneous offense, the parties also discussed whether the State could elicit testimony that Appellant had been convicted of the offense against Ellis. Appellant raised a Rule 403 objection to this evidence, and the trial court sustained it. There was no Rule 403 objection to the admissibility of the facts of the underlying offense, however.

We overrule Appellant's first issue.

Ineffective Assistance of Counsel

In his second issue, Appellant argues he received ineffective assistance of counsel.

A. Applicable Legal Principles

To prevail on a claim of ineffective assistance of counsel, an appellant must show the following: (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for counsel's errors, the result would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). The first *Strickland* prong requires an appellant to overcome the strong presumption that counsel's performance falls within a wide range of reasonable professional assistance. *See Andrews*, 159 S.W.3d at 101. The second *Strickland* prong requires an appellant to show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 102. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*

An appellant has the burden to establish both prongs by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A failure to show either (1) deficient performance or (2) sufficient prejudice defeats

the ineffectiveness claim. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Carballo v. State*, 303 S.W.3d 742, 750 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

Allegations of ineffectiveness of counsel must be firmly rooted in the record. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999); *Bone v. State*, 77 S.W.3d 828, 833 & n.13 (Tex. Crim. App. 2002). When the record is silent, we may not speculate to find trial counsel ineffective. *See Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). In the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined and will not conclude that the challenged conduct constitutes deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

B. Preservation

In his appellate brief, Appellant relies on his motion for new trial filed in the trial court and the evidence later filed to support the motion. The State argues that, because the motion was not timely presented, the motion and accompanying evidence have not been preserved for appeal. We agree.

A motion for new trial is a prerequisite to raising an issue on appeal when the issue requires establishing facts that are not otherwise in the record. TEX. R. APP. P.

21.2. Appellant's ground for why he received ineffective assistance of counsel was that his trial counsel failed to call witnesses that could have established a viable defense. To establish ineffective assistance of counsel based on the failure to call witnesses, the defendant must show that the witnesses were available and that the defendant would have benefitted from their testimony. *Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986) (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)).

Appellant did file a motion for new trial and subsequently filed affidavits that Appellant argues support his issue on appeal. Another requirement to preserving the issue on appeal, however, is "[t]he defendant must present the motion for new trial to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court." TEX. R. APP. P. 21.6. "Merely filing the motion is not sufficient alone to show presentment." *Stokes v. State*, 277 S.W.3d 20, 21 (Tex. Crim. App. 2009). There are multiple ways to establish presentment, but it must be established in the record. *See id.* at 24.

Here, there is no indication in the record that Appellant presented his motion to the trial court within 10 days of filing his motion or that he presented the motion

with the trial court's permission within 75 days of his judgment.[4] Accordingly, this issue has not been preserved for appeal. *Carranza v. State*, 960 S.W.2d 76, 78 (Tex. Crim. App. 1998).

C. Analysis

To the degree Appellant was intending to raise this issue for the first time on appeal, Appellant's issue still fails. "Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony." *King*, 649 S.W.2d at 44. Appellant's only proof for his witnesses and their testimony is the evidence he submitted after he filed his motion to for new trial, which we have held has not been preserved for appeal.

Moreover, "[t]he decision whether to call a witness is clearly trial strategy and, as such, is a prerogative of trial counsel." *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). We assume a strategic motivation for counsel's strategy in the absence of evidence of counsel's reasons for the challenged conduct unless the record shows the conduct was so outrageous that no

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[4] In support of his motion for new trial, Appellant filed the affidavit of Abe Emerson. In the affidavit, Emerson asserted that he had been available for trial and that Appellant and Guerrero had been having an affair prior to the alleged incident. Even if the motion for new trial had been properly presented, this affidavit could not have been considered since it was filed over 75 days after the judgment had been imposed. *See* TEX. R. APP. P. 21.6 (requiring motion for new trial to be ruled on by the trial court within 75 days of judgment being imposed).

competent attorney would have engaged in it. *See Varelas*, 45 S.W.3d at 632. Given that the record does not establish that witnesses were available whose testimony would have benefitted Appellant and that there is no evidence of Appellant's trial counsel's strategy for not calling any witnesses during the guilt-innocence phase of trial, Appellant has failed to establish he received ineffective assistance of counsel. *See Jackson*, 973 S.W.2d at 956 (holding appellant has burden to establish both prongs of ineffective assistance of counsel).

We overrule Appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

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