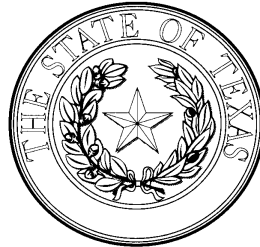


Opinion issued May 10, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-15-00593-CR

TROY XAVIER EVANS, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1423548**

MEMORANDUM OPINION

A jury found Troy Xavier Evans guilty of burglary of a habitation. *See* TEX. PENAL CODE ANN. § 30.02(a)(3) (West 2011). Evans pleaded true to the State's allegation of an earlier conviction for aggravated robbery, and the jury found that allegation to be true. The jury assessed Evans's punishment at 25 years'

confinement and a \$10,000 fine. On appeal, Evans contends that the trial court erred in admitting evidence that he pawned other stolen property the day before the offense. He further requests that we modify the judgment to reflect his plea and the jury's finding of true to the enhancement paragraph. We hold that the trial court acted within its discretion in admitting evidence of the extraneous offense. We affirm the judgment as modified.

Background

On the day of the burglary, Nellie Martinez left her house between 10 a.m. and noon to go to the bank. When she returned from the bank at about 3:15 p.m., she noticed that the door leading from her garage to the laundry room was unlocked. Martinez had locked the laundry room door before she left. Upon entering her house, she realized that it had been ransacked. Several items were missing, including her television, her laptop computer, and a tablet computer.

Martinez provided serial numbers for the stolen devices to the police. Deputy A. Sustaita entered these numbers into an electronic database where pawn shops post information about items brought into their shops. Sustaita discovered that after the burglary, Evans had pawned Martinez's missing items at different locations. Sustaita's investigation revealed that Evans sold the television first, at 12:38 p.m. on the day of the burglary, and sold the laptop and the tablet in separate transactions in the days following the burglary. The investigation further revealed

that Evans had sold property stolen in another reported burglary the day before at different pawn shops around Houston.

Before trial, Evans moved in limine to exclude the evidence of his conduct relating to the other burglary. Opposing the motion, the State argued that the evidence was admissible under Section 31.03(c)(1) of the Penal Code. TEX. PENAL CODE ANN. § 31.03(c) (West 2011 & Supp. 2015). In the alternative, the State argued that the evidence was relevant to intent, knowledge, and identity under Rule 404(b) of the Rules of Evidence. TEX. R. EVID. 404(b). In support of his motion, Evans argued that Section 31.03(c)(1) applied only in theft prosecutions, and asserted that the evidence was unfairly prejudicial. *See* TEX. R. EVID. 403. The trial court denied Evans's motion. When the State introduced evidence of the other burglary, Evans objected, but only on the ground that the penal statute did not apply. The trial court again overruled Evans's objection and admitted the evidence.

At punishment, Evans pleaded true to the enhancement paragraph. The jury charge at punishment informed the jury of Evans's plea of true to the enhancement paragraph, and the jury found the enhancement paragraph true. The judgment, however, reads "N/A" where Evans's plea and the jury's finding should be.

Discussion

I. Evidence of Extraneous Offense

Evans contends that the trial court erred in admitting evidence that the day before the burglary he had pawned several items under similar circumstances. Evans disputes that the evidence was admissible under Section 31.03(c)(1) of the Penal Code, arguing that that statute applies only to theft prosecutions. TEX. PENAL CODE ANN. § 31.03(c)(1). He further disputes that the evidence was relevant and admissible under Rule 404(b). TEX. R. EVID. 404(b). Evans finally contends that the evidence should have been excluded under Rule 403 because it was unfairly prejudicial. TEX. R. EVID. 403.

A. Standard of Review

We review the trial court's evidentiary rulings for an abuse of discretion. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). Unless the trial judge's decision was outside the "zone of reasonable disagreement," we will uphold the ruling. *Oprean*, 201 S.W.3d at 726; *Walker*, 321 S.W.3d at 22. Further, if the trial court's ruling on an evidentiary issue is correct on any theory, we will uphold it. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Analysis

Evidence of extraneous offenses is not admissible to show that the defendant acted in accordance with a propensity to commit bad acts. *See* TEX. R. EVID. 404(b); *DeVoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011); *Francis v. State*, 445 S.W.3d 307, 315 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 428 S.W.3d 850 (Tex. Crim. App. 2014). The Rules of Evidence, however, permit the admission of extraneous offense evidence when it has relevance other than to show character conformity. TEX. R. EVID. 404(b)(2); *Francis*, 445 S.W.3d at 315.

Evans, however, only objected under section 31.03(c)(1) at trial, not mentioning Rule 404(b). If an additional basis for admission of evidence is not challenged at trial, then evidence is admissible under the unchallenged ground. *Daugherty v. State*, 260 S.W.3d 161, 162 (Tex. App.—Houston [1st Dist.] 2008, *pet. ref'd*). Because Evans failed to preserve his objection to the admissibility of this evidence under Rule 404(b) in the trial court, he may not challenge its admissibility on appeal. *See Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003); *Daugherty*, 260 S.W.3d at 162.

Furthermore, because the indictment required the State to prove theft as an element of Evans's burglary conviction, evidence of his extraneous offense was admissible under section 31.03. That statute provides that "evidence that the [defendant] has previously participated in recent transactions other than, but

similar to, that which the prosecution is based [on] is admissible for the purpose of showing knowledge or intent and the issues of knowledge and intent are raised by the actor's plea of not guilty.” TEX. PENAL CODE ANN. § 31.03. Section 30.02 of the Penal Code provides that a person commits burglary by, without consent, (1) entering a habitation or building with intent to commit theft, (2) remaining concealed in a habitation or building with intent to commit theft, or (3) entering a habitation or building and committing or attempting to commit theft. TEX. PENAL CODE ANN. § 30.02. The indictment in this case alleged that Evans entered Nellie Martinez's house and committed a theft. Thus, the State was required to prove theft to convict Evans of burglary. *See id.* Because the State had to prove theft to convict Evans, section 31.03(c)'s provisions concerning proof of theft applied, and evidence that Evans sold stolen property under similar circumstances was admissible. *See id.* §§ 30.02, 31.03(c).

Evans contends that even if the extraneous offense evidence is relevant and admissible under Rule 404(b)(2) or section 31.03(c), the trial court should have excluded it as unfairly prejudicial under Rule 403. *See* TEX. R. EVID. 403. To preserve a complaint for appeal, however, a party must timely raise an objection in the trial court. TEX. R. APP. P. 33.1; TEX. R. EVID. 103; *Martinez v. State*, 91 S.W.3d 331, 335–36 (Tex. Crim. App. 2003). Though Evans objected that the offense was unfairly prejudicial in his motion in limine, he did not renew his

objection under Rule 403 at the time the offense was admitted at trial. A motion in limine does not preserve error. *Martinez*, 98 S.W.3d at 193. Thus, Evans' complaint under Rule 403 is waived. *See* TEX. R. APP. P. 33.1; TEX. R. EVID. 103; *Martinez*, 91 S.W.3d at 335–36.

II. Defective Judgment

Evans observes that the judgment in his case should be reformed to reflect that he pleaded true to an enhancement paragraph and that the jury found the enhancement paragraph to be true. The State agrees. We have the power to “correct and reform a trial court judgment ‘to make the record speak the truth when [we have] the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.’” *Nolan v. State*, 39 S.W.3d 697, 698–99 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd)). Accordingly, we reform the judgment to reflect that Evans pleaded true to the enhancement paragraph and that the jury found the enhancement paragraph true. *See id.*

Conclusion

We hold that the trial court correctly admitted evidence of Evans's extraneous offense. We modify the trial court's judgment to state that Evans pleaded true to the enhancement paragraph and the jury so found. We affirm the judgment of the trial court as modified.

Jane Bland
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

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