Opinion issued October 12, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00485-CR

LT LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law Number 7
Harris County, Texas
Trial Court Case No. 2079919

MEMORANDUM OPINION

After he pleaded not guilty, a jury found appellant, LT Lewis, guilty of the offense of assault of a family member, causing bodily injury, and assessed punishment at 365 days' confinement and a $2,000 fine. The trial court sentenced appellant in accordance with the jury's verdict. Appellant appeals, contending that

the trial court erred in: (1) failing to reopen evidence at punishment, (2) admitting prior misdemeanor adjudications at punishment, and (3) omitting the reasonable-doubt instruction during the punishment phase. We affirm.

BACKGROUND

Appellant and Nerissa Elder have one child together—a baby girl who was born weeks before the incident that led to appellant's arrest. Elder also has two older children.

On March 13, 2016, Edna Rodriguez drove to a Family Dollar Store and saw appellant and Elder with three kids and a dog in the parking lot next door. Rodriguez saw appellant and Elder arguing beside a car, and, as Elder tried to enter the passenger side of the car, appellant grabbed her by the hair and struck her across the face multiple times. Rodriguez testified that the children and the dog were running around screaming as appellant struck Elder. She further testified that she believed the children were in danger because they were running and chasing the dog towards a busy street.

Rodriguez called 911 to report the altercation and stated over the phone that she saw a man "beating up" a lady. Houston Police Officers J. Memeth and J. Garza responded to the scene and detained appellant. Officer Memeth testified that Elder "appeared to be scared" as she recounted what had happened. The officers noted that Elder had multiple injuries, including a red bruise and raised knot in the middle of

her forehead and a red scratch over her eyes. The officers concluded appellant had assaulted Elder and arrested him for that offense.

Before trial, the State filed a motion in limine to prevent the defense from mentioning that Elder had been investigated for endangering a child, and that the Department of Family and Protective Services ["DFPS"] had removed the children from her custody since the time of appellant's arrest. The issue was not raised during the guilt-innocence portion of the trial, and the jury found appellant guilty of assault of a family member.

During the punishment phase of the trial, defense counsel asked appellant about his daughter and whether he knew who had custody of the child. The prosecution objected to the line of inquiry—whether the child was in DFPS custody and whether Elder had been investigated by DFPS—arguing that the evidence was irrelevant and violated the motion in limine. The trial court sustained the objection and mentioned that appellant could make a bill of proof on the issue.

After both sides rested, defense counsel made such a bill. During his testimony on the bill, appellant testified about the DFPS investigation of Elder, but he also testified for the first time that, on the day of the offense, he was concerned about the health and safety of his child because Elder had several dogs in her car and he "didn't want the dogs jumping all over [his] child." Appellant then asked the trial court to reopen the testimony to allow him to testify about why he committed the act, i.e.,

that he was concerned that Elder would allow the dogs to jump all over his newborn child. He further argued that the DFPS evidence would be relevant to appellant's state of mind regarding Elder's behavior in allowing the dogs in the car.

The State pointed out that its objection had been to the DFPS investigation after the offense, and not to why appellant may have committed the assault on the day of the offense. The prosecutor stated, "[Defense counsel] could have asked those questions while the defendant was on the stand. I would not have objected." The State opposed reopening the evidence to allow questions that appellant could have, but did not ask during trial.

Thereafter, the trial court denied appellant's request to reopen the evidence. The jury assessed punishment at 365 days' confinement and a $2,000 fine.

REQUEST TO REOPEN TESTIMONY

In his first point of error, appellant contends that the trial court erred in refusing to reopen the evidence during the punishment phase at trial. Article 36.02 of the Texas Code of Criminal Procedure provides that the trial court "shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice." TEX. CODE CRIM. PROC. ANN. art. 36.02 (West 2017). "Due administration of justice" means a judge should reopen the case if the evidence would materially change the case in the proponent's favor. *Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003). The

evidence in question must bear directly to the central issue of the case and actually make a difference. *See Birkholz v. State*, 278 S.W.3d 463, 464 (Tex. App.—San Antonio 2009, no pet.). Thus, the relevant inquiry becomes whether appellant's testimony would have materially changed the punishment phase of the trial. Essentially, appellant argues that if his testimony as to why he committed the assault had been introduced, the jury would have felt more sympathetic towards him and would not have assessed the same punishment.

Standard of Review

We review the trial court's decision on a motion to reopen for an abuse of discretion. *Peek*, 106 S.W.3d at 79. There is an abuse of discretion if the trial court denies a timely motion to reopen and the proffered evidence would have materially changed the case in the proponent's favor. *See id*. at 78. We will not disturb the trial court's ruling unless such ruling falls outside the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). Further, no reversible error exists in the refusal to reopen unless a substantial right of a party is affected. TEX. R. APP. P. 44.2(b)*; Rodriguez v. State*, 974 S.W.2d 364, 370 (Tex. App.—Amarillo 1998, pet. ref d).

Analysis

Appellant contends that that the trial court erred by refusing to allow him to reopen the evidence to present testimony that he was acting on behalf of his

mistreated child when he assaulted Elder. Appellant relies on *Reeves v. State* to show that article 36.02 mandated the reopening of the evidence. 113 S.W.3d 791, 792 (Tex. App.—Dallas 2003, no pet.) In *Reeves*, the defendant was charged with possession with intent to deliver cocaine. *Id.* Photographs of a toilet bowl with cocaine inside it were admitted into evidence against the defendant. *Id.* at 793. The defendant denied that the photographs of the toilet and sink offered by the State were pictures of his bathroom. *Id.* Before submission of the charge to the jury and final arguments, appellant moved to reopen evidence to introduce photographs of his bathroom, which he claimed were different from the evidence submitted by the State. *Id.* The trial court denied the request. *Id.*

The Dallas Court of Appeals reversed, holding that the proffered evidence by the defendant of his bathroom bore directly on a central issue to the case and would have materially changed the case in his favor. *Id.* at 797. The court reasoned that had the jury had been allowed to consider the photographs and believed the toilet was not his, there would not be enough evidence to support the defendant's conviction for possession with intent to deliver cocaine. *Id.* The court added that the motion to reopen was timely, the introduction of the photographs would not have impeded the progress of the trial, and that the defendant was present and ready to testify about the proffered photographs. *Id.* at 795.

Another case appellant relies on to argue that the trial court erred by refusing to reopen evidence is *Birkholz v. State*. In *Birkholz*, the defendant was convicted of intoxication manslaughter after a jury determined that he was the driver of a car involved in an accident that held three other passengers. 278 S.W.3d at 467. During the trial, the defendant sought to reopen and offer evidence that included photographs of new and used cars of the same model as the car involved in the accident and a replacement belt for the car in the accident. *Id.* The defendant argued that this evidence showed that the seatbelt in the car had only one belt stop, which was unequivocal, physical proof of his innocence. *Id.* The trial court denied the request to reopen the evidence. *Id.*

The San Antonio Court of Appeals reversed, holding that the evidence was material because it bore directly to the central issue of the case, i.e., whether or not the defendant was the driver. *Id.* at 469. The court reasoned that if the jury could construe that the evidence indicated that the defendant was not the driver, he could not have been convicted of three counts of intoxication manslaughter. *Id.* The court added that the motion to reopen the evidence was made in a timely fashion and the trial court was clearly informed of the evidence. *Id.* The court also reasoned that the defendant's substantial rights were affected because he was denied the opportunity to defend himself with such evidence. *Id.*

Appellant argues that, as in *Reeves* and *Birkholz*, reopening the evidence would not have been inconvenient for the trial court because it was timely and immediately ready for presentation. Appellant also argues that the evidence would have materially changed the case in his favor because, during voir dire, several members of the panel responded to a hypothetical situation that they would assess no punishment for a man assaulting someone for molesting his child and "acting on behalf of his kid." Appellant also argues that the mitigation evidence should have been admitted because it was relevant to punishment as one of "the circumstances of the offense for which he [was] being tried." TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(l) (West 2017). Appellant contends that the proposed testimony would have assisted the jury in deciding the appropriate punishment.

Appellant is correct that the proffered evidence was timely and proper. Appellant is also correct that the evidence was immediately ready for presentation. However, these are not the dispositive factors in whether the evidence should have been reopened under article 36.02. Even if reopening evidence would not have been inconvenient for the trial court, the evidence still must be necessary for the due administration of justice by materially changing the case in the appellant's favor.

Here, the proposed testimony would not have materially changed the case in appellant's favor, and, as such, appellant's case distinguishable from *Reeves* and *Birkholz*. Unlike the evidence in *Reeves* and *Birkholz*, which were photographs

rebutting the State's argument and exculpating the defendants, the evidence here does not play an important role. In *Reeves*, the photographs were tangible evidence that "played a major part in [the] case" by determining whether the defendant actually possessed the necessary amount of cocaine to be guilty. 113 S.W.3d at 797. In *Birkholz*, the proffered photographs would have proved that the defendant was not the driver of the car, and thus would not be guilty of intoxication manslaughter. 278 S.W.3d at 469.

Here, evidence proffered by appellant did not concern matters of the ultimate question at issue, nor was appellant denied the right to argue his innocence. The tangible evidence in *Reeves* and *Birkholz* carried substantial weight with the jury in determining sentencing. It is doubtful the testimony about why appellant claimed to have struck Elder would have made the jury more sympathetic to appellant during sentencing. As such, appellant's proffered testimony would not have "actually made a difference." *See Birkholz*, 278 S.W.3d at 464.

Likewise, appellant's reliance on the voir doir statements are not persuasive. The hypotheticals presented in voir dire were based on the circumstances of people "acting on behalf of their kids." The evidence in this trial did not indicate that this was the case for appellant. Appellant's concern had more to do with hurting Elder than it did with protecting the children. This is shown by evidence that, while the children were running around in a "dangerous" situation, appellant was consistently

striking Elder instead of ensuring their safety. And, there was no other evidence to support appellant's claim that he stuck Elder to protect his child; he was beating Elder, not taking care to secure his daughter from the dogs when confronted by witnesses and the police. Furthermore, the State presented evidence of 10 prior misdemeanor convictions, including an assault, and appellant testified to committing multiple felonies, including several burglaries and a possession of cocaine.

Given this evidence, the trial court did not abuse its discretion by concluding that appellant's testimony about the dogs being his reason for attacking Elder would not have materially changed the outcome in his favor, i.e., it would not have made a difference.

We overrule appellant's first point of error.

ADMISSION OF PRIOR ADJUDICATIONS

In his second point of error, appellant contends that the trial court erred in admitting remote prior misdemeanor adjudications at punishment.

Standard of Review

We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 104 (Tex. Crim. App. 1996). The trial court

does not abuse its discretion unless its determination lies outside the "zone of reasonable disagreement." *Id.*

Analysis

Article 37.07(a) of the Texas Code of Criminal Procedure states that "evidence may be offered by the state [as] to any matter the court deems relevant to sentencing, including the prior criminal record of the defendant." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1). During the punishment phase of the trial, the State admitted three exhibits as evidence of appellant's prior criminal record:[1]

(1) Exhibit 9, a DWI offense from 1992; (2) Exhibit 10, a misdemeanor resisting arrest offense from 1995; and (3) Exhibit 11, a misdemeanor resisting detention offense from 1995. Appellant contends that these admissions were in violation of article 37.07, section 3(i), which provides that:

> Evidence of an adjudication for conduct that is a violation of a penal law of the grade of misdemeanor punishable by confinement in jail is admissible only if the conduct upon which the adjudication is based on or after January 1, 1996.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § (3)(i) (West 2017).

This provision, however, applies to juvenile adjudications of delinquency; it does not apply to adult convictions. *Hooks v. State*, 73 S.W.3d 398, 402 (Tex.

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[1] Appellant's criminal record was extensive. The State had evidence of 10 prior misdemeanors. There was also a prior conviction for felony possession of cocaine, and appellant testified that he had several other felony convictions, including convictions for burglaries and unauthorized use of a vehicle.

App.—Eastland 2002, no pet.); *Rodriguez v. State*, 975 S.W.2d 667, 687 (Tex. App.—Texarkana 1998, pet. ref'd); *see also Bailey v. State*, Nos. 05-14-00885/86-CR, 2015 WL 3488886, at *6 (Tex. App.—Dallas June 2, 1015, per. ref'd)(mem. op., not designated for publication) (holding article 37.07, § (3)(i) applies only to juvenile adjudications); *Barker v. State*, No. 05-03-01495-CR, 2004 WL 2404540, at *3 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem. op., not designated for publication) (section 3(i) of article 37.07 of the Code of Criminal Procedure "applies to juvenile adjudications; it does not apply to adult convictions"); *Cunningham v. State*, No. 06-05-00215-CR, 2006 WL 2671626, at *6 (Tex. App.—Texarkana Sept. 19, 2006, pet. ref'd) (mem. op., not designated for publication) (under section 3(i) or article 37.07 of code of criminal procedure, juvenile adjudication of delinquency which occurred before January 1, 1996 is not admissible as prior adjudication of delinquency unless adjudication was for felony-grade offense).

Appellant was not a juvenile when the crimes enumerated in Exhibits 9, 10, and 11 occurred, thus the trial court did not abuse its discretion by admitting those misdemeanor offenses during punishment.

We overrule point of error two.

JURY CHARGE

In his third point of error, the appellant contends that the trial court erred by omitting a reasonable-doubt instruction concerning extraneous offenses during the punishment phase of the trial.

Standard of Review

A review of jury-charge error involves a two-step analysis. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). First, we must determine whether error occurred. *Sakil v. State*, 287 S.W.3d 23, 25 (Tex. Crim. App. 2009). If error does exist, we then evaluate whether sufficient harm resulted so as to require reversal. *See id.* at 25–26. If the defendant preserved error by timely objecting to the charge, an appellate court will reverse if the defendant demonstrates that he suffered some harm as a result of the error. *Id.* If the defendant did not object at trial, we will reverse only if the error was so egregious and created such harm that the defendant did not receive a fair and impartial trial. *Id.* at 26. We look to the actual degree of harm in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

Analysis

During the punishment phase of the trial, the State introduced multiple extraneous offenses. Appellant contends that the trial court erred by omitting the instruction that the jurors were required to believe beyond a reasonable doubt that appellant committed an extraneous crime or bad act before they could consider it in assessing the appellant's punishment. Article 37.07, § 3(a) of the Texas Code of Criminal Procedure provides that:

> evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or which he may be held criminally responsible.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a).

The Court of Criminal Appeals has held that a trial court is required under article 37.07, section 3(a), to sua sponte instruct the jury that they may not consider extraneous offenses in assessing punishment until they are satisfied beyond a reasonable doubt that such extraneous offenses are attributable to the defendant. *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). The court reasoned that, absent such an instruction, the jury might apply a standard of proof less than reasonable doubt in its determination of the defendant's connection to such offenses and bad acts, contrary to Section 3(a). *Id.* Once this requirement is met, the jury may use the evidence however it chooses in assessing the punishment. *Id.* at 482. If a

court finds that the trial court erred in omitting the instruction, then the court must consider whether the defendant was egregiously harmed as a result. *Villareal v. State*, 453 S.W.3d 429, 430 (Tex. Crim. App. 2015).

However, *Huizar* applies only to extraneous, uandjudicated offenses, not to prior convictions. *Bluitt v. State*, 137 S.W.3d 51, 54 (Tex. Crim. App. 2004). In *Bluitt*, the Court of Criminal Appeals held that a trial court is not required to provide a reasonable-doubt instruction during the punishment phase when the State only offers evidence of prior convictions. *Id.* The court reasoned that "to require that prior convictions be re-proved beyond a reasonable doubt would be an absurd result, as the very fact of conviction is evidence that the burden of proving guilt beyond a reasonable doubt has already been met in a prior proceeding." *Id.*

There was no evidence that appellant committed any extraneous, unadjudicated offenses. Evidence was introduced only of appellant's prior convictions. Thus, following the holding and analysis in *Bluitt*, the trial court was not required to instruct the jury to be satisfied beyond a reasonable doubt that the appellant committed the extraneous offenses. Because the jury charge was correct, we overrule appellant third point of error.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

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

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