Opinion issued March 27, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00741-CR

MAURICIO HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case No. 1426482

MEMORANDUM OPINION

A jury convicted appellant Mauricio Hernandez of aggravated assault with a deadly weapon. *See* TEX. PENAL CODE § 22.02. Pursuant to a plea agreement, he was sentenced to a suspended term of five years in prison and placed on community supervision for five years. Hernandez asserts one issue on appeal,

claiming that the trial court erred by admitting testimony about an extraneous offense. *See* TEX. R. EVID. 403 & 404.

We conclude that the extraneous-offense evidence was admissible and the trial court did not err by admitting it. Accordingly, we affirm.

Background

Appellant Mauricio Hernandez and his wife, Mayla Carolina Nunez, lived together in the same apartment complex as the complainant Wilian Trujillo. Trujillo and Nunez started an intimate relationship with one another, which Hernandez later discovered. Hernandez confronted Trujillo twice before the indicted assault. In the first incident, Hernandez approached Trujillo while he was parked at their apartment complex. Hernandez pulled on the door handles of Trujillo's car and shouted vulgarities at him. Trujillo remained in his car, waited for Hernandez to leave, then drove away. In a second incident, Hernandez again approached Trujillo in his car while parked at their apartment complex. This time Hernandez had a large piece of wood. Again, Trujillo remained in his car, and eventually he left the parking lot.

The hostility between the two men escalated to physical violence. Hernandez and another individual approached Trujillo in the parking lot while yelling loudly. Trujillo saw that Hernandez was holding a metal steering-wheel lock, and he ran

away. Hernandez ran after Trujillo and threw the object at him, hitting his left arm and breaking it.

At trial, defense counsel gave an opening statement describing the affair between Nunez and Trujillo and Hernandez's discovery of it. Counsel described several occasions when Trujillo allegedly threatened physical and even deadly violence, causing Hernandez to be concerned about his own safety and the safety of his wife. Specifically, counsel alleged that Trujillo had been watching Hernandez very closely, and that he had told Nunez he owned a gun. He also suggested that Trujillo had told both Nunez and a neighbor that he wanted to kill Hernandez. Counsel urged that given the numerous past threats, it was Trujillo, rather than Hernandez, who instigated the altercation on the night of the assault by "approaching him in the parking lot for no reason." Counsel claimed that Hernandez grabbed the steering-wheel lock which "he used to defend himself and hit Trujillo one time."

The State called Trujillo to testify. During direct examination the prosecutor asked if ever he had been confronted by Hernandez prior to the indicted assault. Trujillo described the prior incident when Hernandez pulled on his car-door handles and yelled at him. He also testified that he remained in his car out of fear that Hernandez would assault him if he got out. He waited for Hernandez to leave before pulling out of the parking lot and leaving the complex. He began to describe

the second incident when Hernandez approached him with a piece of wood. Defense counsel objected pursuant to Rule 404(b), arguing that the incident was an unadjudicated extraneous offense. The State argued the incident was admissible as an exception to the rule, as it showed Hernandez's motive, intent, preparation, and plan to assault Trujillo. The State further argued that it should have the right to rebut the self-defense argument presented in defense counsel's opening statement. The trial court overruled the objection, specifically noting the "very detailed opening that was made" by defense counsel. When Trujillo continued his testimony on the second incident, he explained that he was afraid, and he pulled out of the parking lot before Hernandez made it to his car.

The trial court ultimately instructed the jury that they could not consider, for any purpose, evidence of the commission of an offense by Hernandez other than that alleged in the indictment, unless they believed, beyond a reasonable doubt, that he had committed the unindicted offense. If the jury found Hernandez to have committed an unindicted offense, the instruction further directed that the jury could consider evidence of it only in "determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the defendant." After deliberating, the jury convicted Hernandez of aggravated assault with a deadly weapon.

Analysis

Hernandez contends that the trial court erred by admitting testimony about extraneous offenses because the evidence was used for the impermissible purpose of showing conformity with character. *See* TEX. R. EVID. 404(b)(1). Even if the evidence was relevant for a permissible purpose, Hernandez further argues that the probative value of the evidence was outweighed by its prejudicial effect. *See* TEX. R. EVID. 403. The State responds that by presenting a theory of self-defense during the opening statement, defense counsel opened the door to evidence of the extraneous offense as rebuttal evidence to show Hernandez's intent to assault Trujillo.

We review the trial court's ruling on admissibility of evidence under an abuse-of-discretion standard. The trial court's ruling on the admissibility of evidence must be upheld as long as it is not outside the zone of reasonable disagreement. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001).

I. Admission of extraneous-offense evidence for rebuttal purposes

In the guilt-innocence phase of a criminal trial, evidence of an extraneous offense committed by the defendant is not admissible to prove his character in order to show that in committing the charged offense he acted in accordance with the character. TEX. R. EVID. 404(b)(1); *Ex parte Varelas*, 45 S.W.3d 627, 630 (Tex. Crim. App. 2001). However, the evidence may be admitted for another purpose,

such as to prove the defendant's motive, intent, plan, preparation, or other state of mind. TEX. R. EVID. 404(b)(2). Further, admitting evidence of extraneous offenses is permissible "to rebut a defensive issue that negates one of the elements of the offense." *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

Hernandez argues that he did not open the door to rebuttal evidence of an extraneous offense, as the opening statement was not evidence, and he had not yet presented or elicited evidence of the theory of self-defense. However, even though an opening statement is not evidence to be considered by the jury, defensive theories presented in the defendant's opening statement can open the door for admission of evidence of an extraneous offense as rebuttal evidence during the State's case-in-chief. *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008). "When the accused claims self-defense or accident, the State, in order to show the accused's intent, may show other violent acts where the defendant was an aggressor." *Franks v. State*, No. 01-12-01073-CR, 2013 WL 6199573, at *4 (Tex. App.—Houston [1st Dist.] Nov. 26, 2013, pet. ref'd) (mem. op., not designated for publication) (quoting *Lemmons v. State*, 75 S.W.3d 513, 523 (Tex. App.—San Antonio, pet. ref'd)); *see also Robins v. State*, No. 01-99-00451-CR, 2002 WL 1980887, at *2 (Tex. App.—Houston [1st Dist.] Aug. 29, 2002, pet. ref'd) (not designated for publication) (holding that, to rebut a claim of self-defense, extraneous-offense evidence of defendant's prior aggressive behavior was

admissible to show intent). Further, such rebuttal evidence is not subject to the Rule 404(b) notice requirement. *See Dabney v. State*, 492 S.W.3d 309, 317 (Tex. Crim. App. 2016).

In his opening statement, in support of his claim of self-defense, Hernandez's attorney described various incidents in which he alleged that Trujillo had threatened Hernandez. Counsel argued that Trujillo watched Hernandez closely, told Nunez he owned a gun, and told Nunez and a neighbor that he wanted to kill Hernandez. Counsel also argued that Hernandez grabbed the steering-wheel lock which "to defend himself." Counsel's opening argument asserting self-defense therefore opened the door to extraneous-offense evidence to rebut the defensive theory. *See, e.g.*, *Bass*, 270 S.W.3d at 562–63. Trujillo's testimony describing previous incidents when Hernandez had been the aggressor was responsive to the self-defense argument. We thus conclude that the trial court did not abuse its discretion in admitting the evidence. *See Franks*, 2013 WL 6199573 at *4.

II. Probative value of extraneous-offense evidence

Hernandez also argues that the admission of the extraneous-offense evidence violated Rule 403, which provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

There are four factors the trial court should consider in deciding whether extraneous-offense evidence is inadmissible under Rule 403:

> (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable—a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;
>
> (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way;"
>
> (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; [and]
>
> (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

Wyatt v. State, 23 S.W.3d 18, 26 (Tex. Crim. App. 2000) (citing *Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1991) (op. on reh'g)). The trial court's decision only should be reversed upon finding an abuse of discretion. *Id*.

Trujillo testified that Hernandez previously had approached him yelling, using vulgarities, and carrying a weapon. This evidence suggested that Hernandez previously had acted as the initial aggressor. Considering defense counsel's opening statement assigning Trujillo the role of the first aggressor, the State was entitled to rebut the suggestion that Hernandez was not the aggressor. Further,

Trujillo's testimony describing Hernandez's previous behavior and his own reaction of fear and retreat on those occasions was probative on the issue of intent, and it tended to rebut a claim of self-defense.

The potential risk of the jury making an improper inference that the extraneous offense was evidence of Hernandez's conformity with that behavior or character was minimized by the limiting instruction read to the jury prior to deliberations. *See Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (holding that a limiting instruction can minimize the risk of the jury making an impermissible inference as to character conformity). Further, the time it took the State to develop the evidence was not so long as to distract from the jury's consideration of the indicted offense—the extraneous-offense testimony constituted two pages of the approximately 110 pages of direct testimony in the State's case-in-chief. In its case-in-chief, the State only called Trujillo to testify about the incident involving the piece of wood, and it only briefly questioned Hernandez about the incident during cross-examination. The total time spent discussing the extraneous offense was minimal when compared to the entire trial. By comparison, the Court of Criminal Appeals has found that extraneous-offense testimony was not excessive when it constituted less than one-fifth of the testimony in the State's case-in-chief. *Id.*

Finally, there was no additional evidence presented by the State of the extraneous offense involving the piece of wood, as Trujillo and Hernandez were the only witnesses and the only ones who testified about the event. Hernandez relies upon the State's presentation of other evidence including testimony by an officer at the scene, the apartment manager, and the complainant, as well as medical records, a 911 call, and photographs, as indication that the testimony about the extraneous offense was cumulative. However, other than Trujillo's testimony, this other evidence did not provide any information about a previous incident in which Hernandez possessed a weapon and had been an aggressor. Although the State did present testimony of two witnesses to the incident when Hernandez pulled on Trujillo's car-door handles, that incident did not involve a weapon, and thus it did not demonstrate the same intent to harm as the incident when Hernandez approached Trujillo with a large piece of wood.

We conclude that the trial court reasonably could have concluded that the probative value of Hernandez's extraneous offenses was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. The trial court thus did not abuse its discretion when it overruled Hernandez's objection.

Conclusion

We affirm the trial court's judgment.

Michael Massengale
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

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