Opinion issued July 12, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00391-CR

DANIEL AGUSTA RICE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Case No. 13-DCR-062931A

MEMORANDUM OPINION

Daniel Agusta Rice was convicted by a jury for aggravated assault with a deadly weapon, and the trial court assessed his punishment at thirteen years' imprisonment. Rice contends on appeal that (1)(a) comments made by the trial court before the venire about Rice's counsel deprived Rice of his constitutional

right to a fair trial, (1)(b) the same comments deprived Rice of his constitutional right to effective assistance of counsel, and (2) testimony from his brother's girlfriend about Rice's altercation with her earlier on the day of the shooting was inadmissible. We affirm.

Background

Rice was convicted of aggravated assault for shooting his brother with a shotgun. Earlier that same day, Rice's brother's girlfriend was in the trailer where she and the brother lived with Rice's and his brother's mother. Rice's brother was away at work. While the girlfriend and the mother were home, Rice kicked in the girlfriend's bedroom door. Rice argued with the girlfriend, spat in her face, and pushed her over. Rice then left the trailer, and the girlfriend called Rice's brother. He became upset and told his girlfriend that he would come home from work.

When Rice's brother and their two sisters arrived, they phoned Rice about the altercation. Despite not being on the call herself, the girlfriend could hear Rice's voice—he was very loud and aggravated. He and his brother argued over the phone about his altercation with the girlfriend. After the call, the girlfriend, the brother, and the sisters went out to eat. The brother and Rice continued their argument by exchanging heated text messages.

The brother and girlfriend had returned to the trailer that evening when they heard a firecracker-like sound outside, which turned out to be a gunshot. After a

second "bang," the girlfriend heard Rice's voice, screaming and cursing outside the trailer, whereupon the girlfriend called 9-1-1.

There was a "jiggling" sound at the door to the outside, so the brother moved to the door. The girlfriend stayed farther back and heard an argument and another "bang." The brother came back, holding his stomach.

Rice later admitted to investigators that he shot his brother. He admitted that he returned to the trailer that evening and fired four shots—one in the trailer's porch, another into the trailer's bedroom from outside, a third at his brother's dog while it was locked in its cage, and the fourth at his brother. When the brother got to the trailer door and saw Rice trying to enter, the brother grabbed Rice's shotgun, and Rice shot him. Rice was charged with aggravated assault with a deadly weapon. He pleaded "not guilty" and proceeded to a jury trial.

During jury selection, the trial court began with instructions to the jury and voir dire on several topics, including the presumption of innocence, the requirement that the State prove its case beyond a reasonable doubt, and the lack of any evidentiary burden on the defense. The court then invited questions from the venire. This exchange occurred:

> A Prospective Juror: Do we have a right as far as the defense if they have a public defender or not?
>
> The Court: No, I don't think that's any business of -- and it's totally up to the defense. I do know [Rice's counsel] from Harris County. He is from Fort Bend County, but I do know him from appearing in my

> court and I can tell you that I would have to dig deep to have him represent me. Not cheap, that's for sure.
>
> A Prospective Juror: Oh, dig deep in your pocket?
>
> The Court: Dig deep in my pocket. But that shouldn't make any difference whether somebody was court appointed or whether they were private, hired from their office. I will tell you this, that this Court as well as the other courts in Fort Bend County take a great deal of pride in having only extremely qualified lawyers represent defendants. So, you are not talking about somebody that is fresh out of law school. You are talking about someone with a vast knowledge. Did you get that? Vast knowledge.
>
> [Rice's counsel]: Use big words, enormous.
>
> The Court: Enormous. Any other questions? Yes.

After the State rested, the defense called no witnesses of its own. The jury returned a guilty verdict, and the trial court assessed punishment. Rice then appealed.

Comments by the Trial Court During Voir Dire

Rice contends that the trial court's comments about his counsel before the venire denied him his constitutional right to a fair trial.[1] Rice concedes that he failed to object to the comments in the trial court. Therefore, he concedes that we must review this issue for "fundamental error."

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[1] Rice contends that the court's comments violated his rights under each of the Fifth Amendment; the Fourteenth Amendment; and Article I, §§ 10, 15, and 19 of the Texas Constitution. Because Rice does not provide separate authority or argument for each constitutional claim, we decline to address them as separate claims but instead treat this as one contention. *See* TEX. R. APP. P. 38.1(i); *Francois v. State*, No. AP-74,984, 2006 WL 2615306, at *5 n.26 (Tex. Crim. App. Sept. 13, 2006) (not designated for publication).

I. Standard of Review

Ordinarily, an appellant must have objected timely in the trial court to preserve error. *See* TEX. R. APP. P. 33.1(a)(1); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). This requirement applies to many alleged constitutional errors. *See Clark*, 365 S.W.3d at 339. Without a timely objection or other action complying with Rule of Appellate Procedure 33.1, the appellant has forfeited appellate review of the alleged error. *See Clark*, 365 S.W.3d at 339 & n.1.

However, in a criminal case a reviewing court "may take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX. R. EVID. 103(e); *see also Hajjar v. State*, 176 S.W.3d 554, 559 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). "It is an unresolved issue whether and when a trial court's comments constitute fundamental constitutional due process error that may be reviewed in the absence of a proper objection." *McLean v. State*, 312 S.W.3d 912, 916 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The Court of Criminal Appeals has held that a trial court's comments before the venire do not constitute fundamental error when the comments do not "rise to 'such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury.'" *Id.* at 916 (quoting *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001)); *see also Escobar v. State*, No.

01-13-00496-CR, 2015 WL 1735244, at *2 (Tex. App.—Houston [1st Dist.] Sept. 16, 2015, pet. ref'd) (mem. op.); *Hajjar*, 176 S.W.3d at 559.

II. The court's comments about Rice's counsel were not fundamental error.

The trial court's comments do not constitute fundamental error because they did not bear on the presumption of innocence and did not vitiate the impartiality of the jury. The comments implied that the services of Rice's counsel were expensive. The court immediately instructed the jury that "that shouldn't make any difference whether somebody was court appointed or whether they were private, hired from their office." The court continued, explaining that "only extremely qualified lawyers represent defendants" in that court and that Rice's counsel was "someone with a vast knowledge," not simply "fresh out of law school." If anything, the trial court's comments emphasized the competence of Rice's counsel. Such comments, especially when followed by the court's instruction, do not undermine the venire's presumption of Rice's innocence or vitiate their impartiality towards him. *See, e.g.*, *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987) (describing "appellate presumption that an instruction to disregard the evidence will be obeyed by the jury" in context of curing effect of irrelevant argument or evidence that potentially prejudices defendant).

Rice responds that the comments "unintentionally planted the seed in the minds of the prospective jurors that defense counsel is the slick, high-priced

defense attorney with whom they are familiar from watching television" and that it is therefore "inescapable" that "the jurors could build a bridge between the Court's comments and the conclusion Appellant is guilty." This is pure speculation, unsupported by the record. Rice also ignores the trial court's earlier instructions and voir dire about the presumption of innocence, the requirement that the State prove all elements of the offense beyond a reasonable doubt, and the lack of any evidentiary burden on the defense. Given the totality of the voir dire, the comments about Rice's counsel's services did not undermine the presumption of innocence or vitiate the venire's impartiality toward Rice.

Rice also responds that we should apply the judicial-bias framework from *Markowitz v. Markowitz*, 118 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). We decline to do so because that divorce case did not purport to apply the Court of Criminal Appeals' fundamental-error precedents that are required for resolving this case. Even if we did apply *Markowitz*, Rice's claim of judicial bias is even weaker than the judicial-bias claim that the court in *Markowitz* overruled. The court there held that the appellant's claim of "some thirty different rulings [that] reflect[ed] the trial court's antagonism toward him" failed because, after a review of the record, "the trial judge did not exhibit deep-seated favoritism or antagonism that would make fair judgment impossible." *Markowitz*, 118 S.W.3d at 88. By contrast here, Rice complains of only one improper judicial comment, and that

lone comment does not reflect any judicial bias that made fair judgment impossible.

Finally, Rice asks that we "perform an analysis consistent with" the plurality opinion in *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000). However, *Blue* "has no precedential value." *Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013). Even applying the *Blue* plurality opinion, Rice's contention fails because the court's comments here do not suggest "exasperation and impatience with how [Rice] was exercising his rights" and do not "fault[] [Rice] for failing to quickly give up his right to a jury trial and accept a plea offer." *Id.* (applying *Blue*). The court's comments also "did not convey any information about the case." *Id.* (same); *see also Evans v. Cockrell*, 285 F.3d 370, 376 (5th Cir. 2002) (holding that state-trial-court comments about jury service did not deny defendant a fair trial in part because the comments "had nothing to do with the case about to be tried" and did not discuss the defendant "or the specifics of his accused crime"). Further, the court "instructed jurors about what the law required," including the presumption of innocence and the unimportance of whether Rice's counsel was appointed or hired. *See Unkart*, 400 S.W.3d at 102 (applying *Blue*); *see also Evans*, 285 F.3d at 376 ("presence of curative instructions" makes prejudice from trial-court comments less likely). Rice's contention would fail under *Blue*. We overrule the first portion of Rice's first issue.

Ineffective Assistance of Counsel

Rice also contends that the trial court's comments denied him his constitutional right to effective assistance of counsel.[2] To be clear, Rice's contention is not that his counsel was ineffective for failing to object to the trial court's comments. His contention is that "the trial court's comments . . . deprived him of the effective assistance of counsel" because of how the comments allegedly caused the venire to perceive Rice's counsel. Rice concedes that this contention "does not fit neatly into *Strickland*'s two-pronged analysis" and that "[a]ny prejudice which occurred in this case was due to the conduct of the trial judge and not the deficient conduct of trial counsel."

We review ineffective-assistance claims under the two-part test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Under that test, "[t]he defendant must first show that counsel's performance was deficient, i.e., that his assistance fell below an objective standard of reasonableness." *Thompson*, 9 S.W.3d at 812. Failure to make the showing under this first part of the test defeats the ineffectiveness claim. *See id.* at 813.

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[2] Rice again cites multiple sources of his allegedly infringed right—the Fifth Amendment, the Sixth Amendment, and Code of Criminal Procedure article 38.05—but he again fails to provide separate authority or argument for each claim. He cites only *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, as before, we treat this as one contention asserting ineffective assistance of counsel under *Strickland*.

The *Strickland* inquiry focuses on whether the defendant was given "a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S. Ct. 838, 842 (1993). The constitutional right to effective assistance of counsel "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* Therefore, an ineffective-assistance "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.*

Rice's ineffective-assistance contention fails for two reasons. First, he has not raised any conduct or performance by his counsel that allegedly fell below an objective standard of reasonableness. He has therefore failed to make the first required showing under *Strickland*. Second, we fail to see how the trial court's comments deprived Rice of a fair trial. The comments, in effect, complimented Rice's counsel, and any question about Rice's counsel being appointed rather than hired was answered by the court's instruction that it should not matter to the venire whether counsel had been appointed or hired. Rice's contention fails to demonstrate that his trial "was fundamentally unfair or unreliable." *Lockhart*, 506 U.S. at 369.

Rice points us to statements from two veniremembers that Rice contends resulted from the court's comments. He contends that a statement by veniremember number three showed that the veniremember "had paid no attention

to defense counsel's defining the burden of proof although it immediately preceded" the veniremember's statement. He also contends that a statement by veniremember number five suggested that that veniremember "seemed to take offense with defense counsel." Even if these concerns meant that those two veniremembers could not be fair, they were not selected for the jury. Rice has not made the required showing under *Strickland* part one, and Rice has not shown any fundamental unfairness in the trial process. We overrule the second portion of Rice's first issue.

Admissibility of Rice's Brother's Girlfriend's Altercation Testimony

In his second issue, Rice contends that the trial court erred by admitting testimony from his brother's girlfriend about Rice's altercation with her earlier on the day that Rice shot his brother. Rice challenges the testimony's admission under Rule of Evidence 404(b).[3]

[3] Rice forfeited his separate contentions under Rules of Evidence 401 and 403 by not specifically raising those first in the trial court. TEX. R. APP. P. 33.1(a)(1); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009); *Rezac v. State*, 782 S.W.2d 869, 870–71 (Tex. Crim. App. 1990). Though both the trial court and State's counsel discussed whether the testimony's probative value outweighed its danger for unfair prejudice, once the court indicated that the testimony would be admitted, Rice's counsel limited his objection to Rule of Evidence 404(b) grounds. A Rule 404(b) objection does not preserve a Rule 403 objection. *Montgomery v. State*, 810 S.W.2d 372, 388–89 (Tex. Crim. App. 1990) (op. on reh'g).

I. Standard of Review and Rule of Evidence 404(b)

We review the admission or exclusion of evidence for an abuse of discretion. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). A trial court abuses its discretion if its decision "lies outside the zone of reasonable disagreement." *Id.*

Otherwise inadmissible "[e]vidence of a crime, wrong, or other act . . . may 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)(1)–(2).

Rule 404(b) allows for admission of certain motive evidence. Because "the absence of an apparent motive may make proof of the essential elements of a crime less persuasive," Rule 404(b) allows motive evidence to explain what would otherwise be "incongruous and apparently inexplicable" conduct by the defendant. *See Austin v. State*, 222 S.W.3d 801, 807–08 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). Further, extraneous-act evidence that shows "ill will or hostility toward the victim is admissible as part of the State's case in chief as circumstantial evidence of the existence of a motive for committing the offense charged . . . ." *Page v. State*, 819 S.W.2d 883, 887 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (internal quotation omitted).

Motive evidence may be admissible despite not being contemporaneous with the alleged acts of the offense. For example, statements made by a defendant after

having been arrested and transported to jail that mirror the earlier alleged statements constituting the charged offense are admissible for Rule 404(b) motive purposes. *See, e.g.*, *Hickman v. State*, No. 01-00-00435-CR, 2001 WL 328083, at *2–3 (Tex. App.—Houston [1st Dist.] Apr. 5, 2001, pet. ref'd) (not designated for publication).

Rule 404(b) similarly allows for admission of certain "same transaction contextual evidence." *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Nguyen v. State*, 177 S.W.3d 659, 667–68 (Tex. App.—Houston [1st Dist.] 2005, pet ref'd). This kind of evidence is admissible to show the context in which the criminal acts occurred. *Wesbrook*, 29 S.W.3d at 115; *see also Lockhart v. State*, 847 S.W.2d 568, 571 (Tex. Crim. App. 1992). The fact-finder "is entitled to know all the relevant surrounding facts and circumstances of the charged offense; an offense is not tried in a vacuum." *Nguyen*, 177 S.W.3d at 666–67; *accord Austin*, 222 S.W.3d at 808. Extraneous acts are admissible when they are "so intertwined with the State's proof of the charged offense that avoiding reference to it would make the State's case incomplete or difficult to understand." *Smith v. State*, 316 S.W.3d 688, 699 (Tex. App.—Fort Worth 2010, pet. ref'd); *accord Austin*, 222 S.W.3d at 808. In other words, "evidence of extraneous offenses that are indivisibly connected to the charged offense and necessary to the State's case in proving the charged offense" may be admissible. *Lockhart*, 847 S.W.2d at 571.

Whether a certain extraneous act provides sufficient context to be admissible is judged on a case-by-case basis. *See Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972) ("The circumstances which justify the admission of evidence of extraneous offenses are as varied as the factual contexts of the cases in which the question of the admissibility of such evidence arises. Each case must be determined on its own merits."); *Mitchell v. State*, No. 14-09-00379-CR, 2010 WL 3418223, at *7–8 (Tex. App.—Houston [14th Dist.] Aug. 31, 2010, pet. ref'd) (mem. op.). Sometimes, the extraneous act does not give sufficient context because it is not "immediately prior to [or] subsequent to the commission" of the alleged acts of the offense. *See Wesbrook*, 29 S.W.3d at 115. Other times, the extraneous act gives sufficient context despite having occurred long before, even months before, the alleged acts of the offense:

- Evidence of theft of car in another state "at gunpoint about four months before" killing of peace officer and evidence of theft of license place "about two months before" offense was held admissible because the peace officer that the defendant later killed began following the defendant because of suspicions about the car, which the defendant was driving. *Lockhart*, 847 S.W.2d at 571.
- Thousands of pages of the defendant's children's medical records were held admissible because the records showed the context that the defendant's injection of her child with insulin "was not an isolated event but part of a larger pattern of conduct toward her children." *Austin*, 222 S.W.3d at 805–09.
- Evidence that a BMW was involved in an earlier homicide in Galveston was held admissible as "intertwined" with the allegation that the BMW's owner committed insurance fraud by reporting the BMW stolen when,

three days prior, the BMW was confirmed to be in Bastrop being dismantled. *Nguyen*, 177 S.W.3d at 662–63, 667–68.

- Evidence that the defendant had stolen a van "a few days before the aggravated sexual assault and aggravated kidnapping" was held admissible because it "clearly described the circumstances surrounding the offenses and was helpful to the jury's comprehension of the offenses." *Potts v. State*, Nos. 01-02-00919-CR, 01-02-00920-CR, 2003 WL 22916003, at *5 (Tex. App.—Houston [1st Dist.] Dec. 11, 2003, pet ref'd) (mem. op.).

With these principles in mind, we turn to Rice's Rule 404(b) contention.

II. The girlfriend's testimony was admissible under Rule of Evidence 404(b).

The State offered the girlfriend's testimony as either admissible motive evidence or admissible "same transaction contextual evidence."

The girlfriend's testimony was admissible motive evidence. It explained why Rice would have shown up at his brother's trailer with a shotgun, firing shots near the trailer, into the trailer, and at his brother's dog. In a vacuum, that kind of behavior would likely be seen as "incongruous and apparently inexplicable," so the evidence was admissible to aid in the State's presentation of its case. *See Austin*, 222 S.W.3d at 808. The girlfriend's testimony established that there was ill will and hostility between Rice and his brother. Rice's arrival at the trailer and shooting occurred after Rice and his brother had exchanged heated messages, which in turn occurred after Rice had been in an altercation with the girlfriend. The testimony

served to establish Rice's motive and was therefore admissible. *See Page*, 819 S.W.2d at 887.

The testimony was also admissible as "same transaction contextual evidence." Rice's earlier altercation with the girlfriend was so intertwined and indivisibly connected with his and his brother's ensuing arguments and the shooting that the jury was entitled to hear these circumstances. *See Lockhart*, 847 S.W.2d at 571; *Smith*, 316 S.W.3d at 699; *Austin*, 222 S.W.3d at 808.

The following limiting instruction in the jury charge also supports the testimony's admissibility:

> The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of showing proof of motive, intent, plan or knowledge. You cannot consider this evidence for any purpose unless you first find beyond a reasonable doubt that the defendant committed such other acts, if any.

Cf. Bock v. State, Nos. 01-12-00595-CR, 01-12-00596-CR, 2013 WL 3786230, at *6 (Tex. App.—Houston [1st Dist.] July 16, 2013, no pet.) (mem. op.) (holding that defense counsel was not ineffective for not requesting contemporaneous limiting instruction on extraneous-act evidence because jury charge ultimately included extraneous-act limiting instruction); *Taylor v. State*, 263 S.W.3d 304, 313–15 (Tex. App.—Houston [1st Dist.] 2007) (holding that extraneous-act instruction was not needed in jury charge because extraneous act was contextual evidence that was intertwined with alleged offense and necessary to properly

explain alleged offense to jury such that offense would make sense), *aff'd*, 268 S.W.3d 571 (Tex. Crim. App. 2008).

Rice contends that the admissibility analysis should turn on the fact that the brother, girlfriend, and two sisters spent a couple of hours cooling down together at dinner, implying that Rice also must have cooled down during that passage of time. But extraneous-act evidence can be admissible even if it occurred long before, even months before, the alleged acts of the offense. *See Lockhart*, 847 S.W.2d at 571; *Austin*, 222 S.W.3d at 805–09; *Nguyen*, 177 S.W.3d at 662–63, 667–68; *Potts*, 2003 WL 22916003, at *5. Or even after the alleged acts of the offense altogether. *See, e.g.*, *Hickman*, 2001 WL 328083, at *2–3.

Rice also relies on *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990) (op. on reh'g), for this contention, but his reliance on it for Rule 404(b) purposes is misplaced. In *Montgomery*, the defendant was prosecuted for indecency with a child for acts he committed against his daughters. The State introduced testimony from the defendant's ex-wife that the defendant would "quite frequently walk around in the nude in front of his children [w]ith erections" and testimony from others that the defendant, when talking with his daughters, used inappropriate language about them. *Id.* at 393 (internal quotations omitted; alteration in original). The court held that Rule 404(b) did not require the exclusion of this evidence because the testimony about the defendant's past behavior showed

an "intent to arouse and gratify his sexual desire" with his daughters that the alleged acts of the offense were "a specific manifestation of." *Id.* at 394. The court's Rule 404(b) analysis did not turn on how long ago the "frequent" behavior by the defendant had gone on.

We overrule Rice's contention under Rule of Evidence 404(b).[4]

Conclusion

We affirm the judgment of the trial court.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.

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[4] Because we hold that the trial court did not abuse its discretion in admitting the girlfriend's testimony for other Rule 404(b) purposes, we need not address Rice's contention that the testimony was inadmissible as evidence necessary to rebut a defensive theory. *See* TEX. R. APP. P. 47.1; *De la Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009) ("The exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive. Rule 404(b) is a rule of inclusion rather than exclusion. 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. The proponent of uncharged misconduct evidence need not 'stuff' a given set of facts into one of the laundry-list exceptions set out in Rule 404(b), but he must be able to explain to the trial court, and to the opponent, the logical and legal rationales that support its admission on a basis other than 'bad character' or propensity purpose." (internal quotation omitted)).