**Opinion issued November 29, 2018**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-18-00061-CR**

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**ZIDNEY KIRK ZUNIGA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 207th District Court**
**Comal County,[1] Texas**
**Trial Court Case No. CR2016-284**

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## MEMORANDUM OPINION

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Third District of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases).

A jury convicted Zidney Kirk Zuniga of the third-degree felony offense of theft in an amount greater than $20,000 and less than $100,000 and assessed his punishment at nine years' confinement.[2] In two issues, Zuniga contends the trial court abused its discretion by refusing to grant a mistrial after one of the State's witnesses gave allegedly false testimony and by admitting extraneous-offense evidence. We affirm.

## Background

On June 18, 2015, Zuniga and his girlfriend Crystal Ritchie visited Bluebonnet Chrysler Dodge in Comal County, Texas. They shopped the preowned inventory with a salesperson, selected a 2010 truck, and signed a purchase order for the truck. Regarding the truck's $21,000 price tag, Zuniga told Bluebonnet's finance manager, Bradley Jorgensen, that he had secured a loan from an outside lender and provided a fax number for drafting instructions. On Zuniga's pledge of independent financing, Bluebonnet handed over the keys and Zuniga drove the truck off the lot. When Jorgensen contacted the purported lender to fund the sale, he discovered that Zuniga had not made any arrangements to pay for the truck. Bluebonnet's preowned sales director, Taylor Atkins, mailed letters to Zuniga and Ritchie demanding the

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[2] *See* TEX. PENAL CODE § 31.03(a), (e)(5); *see also* Act of June 20, 2015, 84th Leg., R.S., ch. 1251, § 5, 2015 Tex. Sess. Law Serv. 4208, 4210 (changing amount of theft in this provision from greater than $20,000 and less than $100,000 to greater than $30,000 and less than $150,000). Zuniga was indicted under the old provision for theft of property valued at more than $20,000.

truck's return. He sent the demand letters to the address Zuniga and Ritchie listed on the purchase order, but those letters were undeliverable. Atkins ultimately reported the stolen truck to police.

Around the same time, Detective R. Wagner of the Selma Police Department was investigating a similar car theft at Gillman Honda in Guadalupe County, Texas. In that incident, which occurred only six days before the Bluebonnet theft, a man took a Gillman car after misrepresenting that he had a credit-union loan. Zuniga had been identified as a suspect.

As part of his investigation, Wagner ran a criminal-history search using Zuniga's name and discovered that Zuniga also was connected to the Bluebonnet theft. So Wagner ran another search—this time using the Bluebonnet truck's description and license-plate and vehicle-identification numbers—and found the truck registered to a man named Ramon Recio. Wagner contacted Recio, who stated that he had paid a Craigslist seller $9,800 for the truck. After confirming that Recio's truck and the Bluebonnet truck were indeed the same truck, Wagner took custody of the truck. The truck eventually was returned to Bluebonnet after a hearing to determine ownership.

Wagner also succeeded in locating the Gillman car, which he found by using the telephone number Zuniga listed on Craigslist. A car-theft task force in Corpus Christi—where the Gillman car was posted for sale—recovered the car and executed

a warrant for Zuniga's arrest. Both Zuniga and Ritchie were indicted for theft in connection with the Bluebonnet incident.

The case proceeded to trial against Zuniga on his "not guilty" plea. Before trial, however, Zuniga moved in limine to exclude evidence of his conduct relating to the Gillman car theft and other subsequent car thefts the State alleged he had committed. After extensive pretrial discussions, the trial court determined that Texas Penal Code section 31.03(c)(1) authorized admission of only the Gillman-car-theft evidence because that transaction was similar to and occurred only days before the Bluebonnet truck theft.[3] Zuniga's counsel stated his agreement with the trial court's conclusion on the record. And when the State's direct examination of Detective Wagner, Ritchie, and Vernon Quesnot (Gillman's finance director) telegraphed that the Gillman car theft was about to be discussed, Zuniga objected, but only under Texas Rules of Evidence 402 (relevance), 403 (unfair prejudice), and 404(b) (crimes, wrongs, or other acts). The trial court overruled those objections and allowed the testimony, and Zuniga did not renew his objections or obtain running objections to any further testimony about the Gillman car theft from those witnesses.

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[3] Section 31.03(c)(1) provides that "evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty[.]" TEX. PENAL CODE § 31.03(c)(1).

The State presented its theft case against Zuniga through the testimony of six witnesses in all: Detective Wagner on the investigation, Jorgensen and Atkins on the Bluebonnet truck theft, Quesnot on the Gillman car theft, Ritchie on both thefts, and Recio on how he came to possess the Bluebonnet truck. Jorgensen explained that a car dealer generally will allow a buyer with independent financing to take a car home while the dealer and outside lender work to close the transaction within 48 hours. Jorgensen identified Zuniga in court as the man who took the Bluebonnet truck after representing that he had an outside loan when no such loan existed. And Atkins told the jury about his failed efforts to secure the truck's return when the transaction did not fund and his decision to turn the matter over to police.

Quesnot's testimony echoed Jorgensen's and Atkins's testimony. He explained that a decision was made to give Zuniga, whom Quesnot identified in court, keys to a car Zuniga contracted to buy with an outside loan. A woman introduced to Quesnot as Zuniga's wife also was present. Quesnot explained that, like Bluebonnet, Gillman never received payment for the car. But unlike Bluebonnet, Quesnot succeeded in reaching Zuniga by telephone two or three times after Zuniga took the car and encouraged Zuniga to either apply for financing or return the car. Zuniga did neither.

The trial court instructed the jury that it should not consider Quesnot's testimony regarding the Gillman car theft unless it first found "from the testimony

presented beyond a reasonable doubt that [Zuniga] committed these other crimes or acts, if any"; and if the jury so found, the trial court further instructed that testimony could be considered only for the limited purpose of determining "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and in rebuttal of a defensive theory of the defense in relation to the offenses on trial."

When Ritchie testified, she confirmed many of the circumstances described by Jorgensen, Atkins, and Quesnot. Although she had no agreement with the State regarding her own pending theft charge, she confessed that she and Zuniga developed a plan to avoid paying for a car by telling the dealer that Zuniga had independent financing. According to Ritchie, Zuniga knew their plan would work because he had worked at a car dealership. She testified that she and Zuniga executed the plan twice—once, at Gillman when they needed a car with a full tank of gas to get around and, then again, at Bluebonnet.

Ritchie also testified about what occurred after the Bluebonnet theft. Not long after she and Zuniga took the truck, Zuniga posted it for sale on Craigslist. Two men responded to the posting and, according to Ritchie, paid $1,500 cash for the truck. When shown a bill of sale that purported to memorialize the Craigslist transaction, Ritchie denied that the signature on the document was Zuniga's.

Given Ritchie's testimony suggesting that the bill of sale was fraudulent, the trial court informed Recio outside the jury's presence of his Fifth Amendment right against self-incrimination. Recio acknowledged his right and proceeded to tell the jury that he bought a truck off Craigslist that police later determined was stolen. When asked if he remembered the Craigslist seller's name, Recio responded that it "started with a Z, Zuniga or Zunia, I can't remember." But he recalled that there were four people at the sale: "the seller, a lady, and another person with the guy, and myself." Recio stated that he paid $9,800 in cash for the truck but did not receive a title from the seller.

On cross-examination, Recio reviewed documents purporting to prove up the sale and showing his attempt to register the car in his name only a few days after it was stolen, including the bill of sale about which Ritchie had testified, a surety bond, and a power of attorney. Recio denied that he created the bill of sale fraudulently after the fact. He recalled instead that the bill of sale was prepared contemporaneously with the sale and that Zuniga had signed it. This line of questioning was supported by Detective Wagner's testimony expressing doubts about the validity of the sale to Recio as well as Recio's own testimony that he did not attend the ownership hearing for the Bluebonnet truck after it was seized.

Before the State rested, the prosecutor informed the trial court and Zuniga that Ritchie had observed Recio outside the courtroom and disclosed to the State's

investigator that he was not the man who bought the Bluebonnet truck from Zuniga. She believed the two men who responded to Zuniga's Craigslist post were younger than Recio. Although Ritchie apparently was still in the courthouse and Recio was ordered by the trial court to return, neither of them was asked back into the courtroom to give sworn statements regarding Ritchie's disclosure. As a result, the only details in the record come from the State investigator's text message to the prosecutor, which reads: "Ritchie is saying that Recio was not the guy they sold the vehicle to that day."

Zuniga moved for a mistrial, arguing that Recio's potentially false testimony was so prejudicial that it could not be cured with an instruction. The trial court declined to grant a mistrial because neither party had rested and both Ritchie and Recio were available to give further, clarifying testimony. Zuniga, however, elected not to recall either Ritchie or Recio because, in his counsel's view, "there would be no real advantage" to doing so. When the jury returned to the courtroom, the parties rested.

In closing argument, the State asked the jury to consider all the evidence—including the Gillman-car-theft evidence and Recio's testimony—that Zuniga took the Bluebonnet truck without any intention of paying for it. Even though it argued that proof of Zuniga's sale of the Bluebonnet truck to Recio was not required, the State urged the jury to believe Recio because his testimony about police seizing the

truck was consistent with Detective Wagner's testimony. Zuniga responded that there were too many inconsistencies in Recio's story for the jury to find him credible. And Zuniga's counsel unequivocally stated his belief that Recio had forged the bill of sale to memorialize a transaction that did not occur as he described. After deliberation, the jury returned a guilty verdict.

**False Testimony**

In his first issue, Zuniga asserts that the trial court abused its discretion by not granting a mistrial after Recio falsely testified that he purchased the Bluebonnet truck from Zuniga. Zuniga argues that even if the State did not encourage the false testimony, the State was obligated to correct any false impression resulting from Recio's testimony.

**A. Standard of review**

A mistrial is the trial court's remedy for improper conduct that is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). It is a remedy appropriate only for a narrow class of highly prejudicial and incurable errors. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). We review a trial court's decision to deny a motion for mistrial for abuse of discretion. *Hawkins*, 135 S.W.3d at 77; *Browne v. State*, 483 S.W.3d 183, 203 (Tex. App.—Austin 2015, no pet.). An abuse of discretion exists only if the trial court's ruling is so "clearly wrong as to lie

outside the zone of reasonable disagreement" or is arbitrary or unreasonable. *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002); *see State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005).

**B. Analysis**

"[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice." *Ramirez v. State*, 96 S.W.3d 386, 393–94 (Tex. App.—Austin 2002, pet. ref'd) (quotation omitted). "[T]he same result obtains when the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 394 (quotation omitted). In considering Zuniga's complaint, we review the record to determine whether (1) the State "used" Recio's testimony, (2) the testimony was "false," (3) the testimony was "knowingly used," and, if these questions are affirmatively answered, (4) there is a reasonable likelihood that the false testimony could have affected the jury's judgment. *Id.* at 394–95.

Certainly the record supports a conclusion that the State "used" Recio's testimony. The State called Recio as a witness during its case-in-chief, elicited testimony that he purchased the Bluebonnet truck from Zuniga, and even after learning that Ritchie did not believe Zuniga was the buyer, urged the jury in closing argument to find Recio credible and consider his testimony in reaching its verdict.

But whether the record also supports a conclusion that Recio's testimony was false is not as clear. Neither Ritchie nor Recio was asked to give further, sworn testimony about their conflicting versions of events, although both apparently remained available to be recalled as witnesses before either party rested or the evidence was closed. Consequently, the only suggestion that Recio's testimony was potentially false is several steps removed from Ritchie, i.e., we are limited to the prosecutor's unsworn statement of what the State's investigator told her about what Ritchie told the State's investigator. Even if Ritchie had given a sworn statement contradicting Recio's testimony, however, the record presumably would contain competing testimony from Ritchie and Recio and, thus, would be a matter of judging witness credibility, which is not our function under the abuse-of-discretion standard of review. *See Mechler*, 153 S.W.3d at 439; *Lopez*, 86 S.W.3d at 230.

We are mindful of the authorities cited by Zuniga that observe that relief does not depend on the defendant's ability to prove that the witness's specific factual assertions are technically incorrect or false. *See, e.g.*, *Ramirez*, 96 S.W.3d at 395. But those same authorities require us to consider whether there is a reasonable likelihood that the false testimony could have affected the jury's judgment, i.e., whether it was material. *Id.* at 396; *Ex parte Castellano*, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993) (observing that finding of false testimony alone is not sufficient; false testimony must also be material); *see Archie v. State*, 221 S.W.3d 695, 700

(Tex. Crim. App. 2007) (noting that whether mistrial should have been granted involves most of same considerations that attend harm analysis). We conclude that there is no such likelihood here.

According to Zuniga, Recio's false testimony likely affected the jury's judgment in two ways: (1) it bolstered the State's proof of the element of intent, *see* TEX. PENAL CODE § 31.03(a) (defining theft as occurring when person "unlawfully appropriates property with intent to deprive the owner of property"), and (2) it gave the jury a false impression of Recio's credibility, *cf. Ramirez*, 96 S.W.3d at 394 (observing that "[w]hen the reliability of a given witness may well be determinative of the guilt or innocence of an accused, nondisclosure of evidence affecting credibility falls within the general rule discussed [above]"). We disagree. The record is replete with evidence of Zuniga's intention to deprive Bluebonnet of its truck, apart from Recio's complained-of testimony. Ritchie testified unequivocally that she and Zuniga went to Bluebonnet with a plan to "take a vehicle" without paying for it, that Zuniga knew the plan would work because of his experience working at a car dealership, and that the two of them had used the same plan to avoid paying for the Gillman car only six days before Zuniga drove the Bluebonnet truck off the lot. And, as the prosecutor argued to the trial court in response to Zuniga's mistrial motion and to the jury in closing, the testimony about the subsequent sale of the Bluebonnet truck to Recio was not essential proof of any element of theft.

The record also does not support Zuniga's assertion that the judgment was affected by the jury's inability to assess Recio's credibility. The record shows a concerted effort by the defense to persuade the jury that Recio was dishonest. For example, Zuniga used Ritchie's testimony that Zuniga's signature on Recio's bill of sale was not authentic as the foundation for extensive cross-examination about the circumstances under which the Bluebonnet truck came into Recio's possession, including a direct question to Recio about whether he forged the bill of sale. Zuniga strengthened his credibility challenge with Detective Wagner's testimony that supported at least an inference that Wagner found the sale suspicious. And in closing argument, Zuniga urged the jury to conclude that Recio was not credible by emphasizing the contradictions between his testimony and Ritchie's testimony about the sales price and other circumstances of the Craigslist sale. Zuniga's message to the jury was unambiguous—as his counsel stated, "I don't trust Mr. Recio any further than I can throw him. . . . [T]hat whole transaction, I think you have to discount to a great degree. I don't believe it occurred the way he [Recio] says it occurred. I think he forged that document [the bill of sale] . . . ." On this record, we cannot conclude that Recio's potentially false testimony was material because of a reasonable likelihood that it could have affected the jury's judgment. *See Ramirez*, 96 S.W.3d at 395.

Accordingly, we hold that the trial court did not abuse its discretion by denying Zuniga's motion for a mistrial.[4] *Cf. Frank v. State,* 183 S.W.3d 63, 71 (Tex. App.—Fort Worth 2005, pet. ref'd) (holding that trial court did not abuse its discretion by permitting new trial motion to be overruled by operation of law because record did not establish that newly discovered evidence "would probably bring about a different result"); *Sandoval v. State*, No. 10-08-00070-CR, 2008 WL 4816610, at *4–5 (Tex. App.—Waco Nov. 5, 2008, no pet.) (mem. op., not designated for publication) ("Even assuming that the State was aware of or should have been aware of the error and refused to correct it, . . . we cannot say that the trial court abused its discretion by denying Sandoval's motion for new trial."); *Crenshaw v. State,* No. 13-00-00692-CR, 2002 WL 34249771, at *6 (Tex. App.—Corpus Christi May 23, 2002, pet. ref'd) (mem. op., not designated for publication) (concluding that conflicting witness testimony was not "so serious" as to require new trial).

We overrule Zuniga's first issue.

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[4] We also note that this case is not one in which continuing with the trial after Recio's testimony was futile, thus making any error incurable and mandating a mistrial. *See Hawkins*, 135 S.W.3d at 77; *Wood*, 18 S.W.3d at 648. At the time Ritchie informed the State that she did not recognize Recio as the buyer, neither party had rested, the evidence remained open, and Zuniga could have recalled Ritchie or Recio or both to the stand for further cross-examination. Even if Zuniga did not want to question Ritchie or Recio in the jury's presence to avoid, as his counsel suggested, an additional layer of complexity, he could have asked the trial court to consider testimony taken outside the jury's presence.

## Extraneous-Offense Evidence

In his second issue, Zuniga complains that the Gillman-car-theft evidence was inadmissible extraneous-offense evidence under Texas Rules of Evidence 404(b) and should have been excluded under Rule 403 because it was unfairly prejudicial.

### A. Standard of review

We review the trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We will not reverse the trial court's ruling unless the decision falls outside the zone of reasonable disagreement. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). If the trial court's ruling can be justified on any theory of law applicable to the ruling, the ruling will not be disturbed. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009).

### B. Analysis

In a theft case, there are two bases for the admission of extraneous-offense testimony: Penal Code section 31.03(c)(1), which allows evidence that the defendant "has previously participated in recent transactions other than, but similar to, that which the prosecution is based" to show knowledge or intent, and Rule of Evidence 404(b)(2), which allows extraneous-offense evidence when it has relevance other than to show character conformity. TEX. PENAL CODE § 31.03(c)(1); TEX. R. EVID. 404(b)(2); *see Hegar v. State*, 11 S.W.3d 290, 297 (Tex. App.—Houston [1st Dist.]

1999, no pet.). At trial, however, Zuniga only objected under Rule 404(b)—he agreed with the trial court's ruling that the Gillman-car-theft evidence was admissible under Section 31.03(c)(1). And on appeal, he does not challenge admissibility under Section 31.03(c)(1). Because there is another, unchallenged, legal theory on which the trial court's ruling can be based, we do not reach Zuniga's Rule 404(b) argument. *See Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002) (stating appellate court may uphold trial court on any legal theory applicable to case); *Daugherty v. State*, 260 S.W.3d 161, 162 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (declining to consider Rule 404(b) challenge because admissibility of evidence under Section 31.03(c)(1) was unchallenged).

Zuniga also contends that the Gillman-car-theft evidence was inadmissible under Rule of Evidence 403 because it unfairly prejudiced him. The Court of Criminal Appeals has explained that to preserve a complaint for appeal a party must object each time the allegedly inadmissible evidence is offered or obtain a running objection. *Lane v. State*, 151 S.W.3d 188, 192–93 (Tex. Crim. App. 2004) (explaining that error, if any, was not preserved when record reflected that objectionable testimony came in eight times without objection); *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (explaining that "a party must object each time the inadmissible evidence is offered or obtain a running objection" in order to preserve error, otherwise any error "is cured where the same evidence comes in

elsewhere without objection"). Zuniga did not do this. When the prosecutor told Detective Wagner on direct examination that she wanted to discuss "an incident that occurred in June of 2015," Zuniga objected. When the prosecutor raised the "incident that occurred in Selma in Guadalupe County, Texas on June 12, 2015" in Ritchie's testimony, Zuniga objected. When Quesnot was asked whether he was "employed with Gillman Honda on June 12, 2015," Zuniga objected. But those were Zuniga's only Rule 403 objections. He did not object to the subsequent series of questions each of these witnesses was asked and answered about the Gillman car theft, and he did not obtain a running objection. Accordingly, Zuniga's complaint under Rule 403 is waived.[5] TEX. R. APP. P. 33.1; TEX. R. EVID. 103; *Martinez*, 91 S.W.3d at 335–36.

We overrule Zuniga's second issue.

[5] Because the allegedly objectionable testimony came in without objection through the testimony of multiple witnesses, even if we assume error, Zuniga cannot establish harm. *See Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999) ("It is well established that questions regarding the admission of evidence are rendered moot if the same evidence is elsewhere introduced without objection; any error in admitting evidence over a proper objection is harmless if the same evidence is subsequently admitted without objection."); *Brown v. State*, 692 S.W.2d 146, 151 (Tex. App.—Houston [1st Dist.] 1985) ("We are further of the view that any error in the admission of such testimony was waived and/or cured by defense counsel's failure to object to similar testimony later elicited."), *aff'd*, 757 S.W.2d 739 (Tex. Crim. App. 1988).

## Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

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

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