

Opinion issued January 25, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00204-CR

SANTOS BOTELLO, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 17CR1874

MEMORANDUM OPINION

A jury convicted appellant Santos Botello of murder and assessed a life sentence.¹ In a single issue on appeal, appellant contends the trial court erred in the

¹ See TEX. PENAL CODE § 19.02.

guilt-innocence phase of trial by admitting evidence of an extraneous offense—specifically, evidence tending to show that appellant stabbed the complainant’s son about two weeks before he shot and killed the complainant.

We affirm.

Background

A grand jury indicted appellant for the murder of Francisco Esparza (“Francisco”). The two-paragraph indictment alleged that, on or about May 23, 2017, appellant (1) “intentionally or knowingly” caused Francisco’s death by “shooting Francisco . . . with a handgun,” and (2) “commit[ted] an act clearly dangerous to human life” that caused Francisco’s death “by pointing and shooting a handgun at Francisco[.]” Appellant pleaded not guilty, and the case proceeded to a jury trial.

During the guilt-innocence phase of trial, over appellant’s objections, the trial court allowed the State to present evidence tending to show that on May 6—about two weeks before Francisco’s death—appellant stabbed Francisco’s son Juan Esparza (“Juan”).² The State argued the evidence was relevant to show that appellant conspired with Jose Leyva (“Leyva”), a man claiming to be a spiritual or religious

² Appellant objected before and throughout trial that the evidence was unfairly prejudicial and would be used impermissibly to show actions in conformity with a bad character. *See* TEX. R. EVID. 403, 404(b). The trial court overruled his objections.

healer, first to stab Juan and later to shoot Francisco as part of a scheme to convince Juan bad things would happen unless he allowed Leyva to “cleanse him” through oral intercourse.

Juan’s stabbing and interactions with Leyva

Juan testified about the stabbing and his interactions with Leyva. He explained that he met Leyva in late April or early May 2017 through his aunt, Maria Guadalupe Esparza (“Guadalupe”). Leyva had expressed to Guadalupe an interest in helping Juan with school.³ Juan thought Leyva wanted to pay for “some books” or “something like that.” In their initial visits, Juan and Leyva talked, shopped for Juan’s high school graduation ring, and went out to eat. Leyva also visited the restaurant where Juan worked as a waiter and once left a \$100 tip, an amount Juan found to be unusually generous.

On May 6, Juan was working a restaurant shift when he was stabbed. Leyva was also at the restaurant. Juan noticed another man—whom he described as bald, Hispanic, and having tattoos on his neck—sitting one booth over from Leyva. Although Juan did not know the man, he recognized him as having been in the restaurant the day before at the same time as Leyva. As Juan talked to Leyva, the

³ Guadalupe testified that she had known Leyva for five or six years before introducing him to Juan. Guadalupe was referred to Leyva when her husband became sick, and she believed Leyva had helped to heal her husband. Leyva asked Guadalupe about Juan after he noticed Guadalupe and her husband picking Juan up from school.

man stood up, approached Juan, and stabbed Juan in the back. Surveillance video and photos showing the stabbing were admitted into the evidence.

Another restaurant employee, Jorge Romo (“Romo”), witnessed the stabbing. He testified that he had seated the man who stabbed Juan—along with the man’s two companions—at a table toward the back of the restaurant. Romo described the man as Hispanic, in his “late 30s, early 40s,” with “lightish skin” and a tattoo that looked like Christ the Redeemer on the back of his head. Later, as Romo attended to another table, he saw the man standing behind Juan and moving his fist in a stabbing motion. The man and his two companions then moved toward the exit, near Romo. At the exit, the man pointed a chrome handgun at Romo, told Romo to get “the f*ck out of his way,” cocked the gun, and fired it toward the ceiling.⁴ From photos of appellant taken at the time of his subsequent arrest in connection with Francisco’s murder, Romo identified appellant as the man who stabbed Juan and fired the handgun in the restaurant.

Detective G. White of the Alvin Police Department investigated the stabbing. He testified that no one at the scene knew the identity of Juan’s assailant; however, a .40 caliber Winchester brand casing was recovered. Detective White found it odd

⁴ Another restaurant patron witnessed the handgun discharge at the restaurant exit. He described the man who fired the handgun as Hispanic, with a heavier frame than his male companion, a bald head, and tattoos on the “back of [his] head, neck area.”

that Leyva, who had a good view of the stabbing, did not give a detailed statement.⁵ Detective White did not have a stabbing suspect until appellant was detained in connection with Francisco's murder, at which point Juan recognized appellant as the man who had stabbed him.

Juan was treated for his injuries at a hospital and released the same day. The next day, Leyva spoke with Juan and Juan's parents. Given what had happened at the restaurant, Leyva convinced Juan there was "something wrong" with him, and Juan became fearful and unable to sleep. Leyva offered to help, and it was decided that Juan would go to Leyva's house for prayers of protection.

Juan went to Leyva for healing three or four times. The first time Leyva prayed for Juan and applied oil around Juan's stab wound. The next time, after telling Juan there was a sickness in Juan's penis and testicles, Leyva said a prayer and touched those areas of Juan's body. Because he believed something was wrong, Juan went back to Leyva a third time. He testified that, even though he felt strange about the previous visit with Leyva, he had been "brainwashed."

The third meeting took place in Juan's house. According to Juan, Leyva touched his "private parts" again and "insinuated" that Juan could be healed or

⁵ According to Detective White, Leyva's statement was "[j]ust one line" and did not provide any helpful information.

“cleansed” by having a man “give [him] oral sex.” Juan was skeptical and refused. He told his parents about the touching and that he no longer wanted to see Leyva.

Despite Juan refusing to answer his calls, Leyva continued attempting to communicate with Juan and eventually contacted Juan’s aunt Guadalupe. Juan testified that Guadalupe and his mother talked with Leyva about what had happened and were persuaded by Leyva that Juan had “misinterpreted things.” Juan saw Leyva a final time when his mother was present. Leyva asked if Juan had thought of someone to perform oral sex and, if he had not, whether he wanted Leyva to do it. Juan again refused, and his parents supported his request that Leyva leave him alone.

Leyva still attempted to contact Juan, even though Juan and his parents had asked Leyva to stop. Juan testified that Leyva called “several times a day” and, on the day before Francisco was shot and killed, came by their house several times. Juan never went outside to see Leyva, but his parents spoke to Leyva. And on the day of the murder, before Juan left for school, Francisco asked Juan for Leyva’s number so that Francisco could call Leyva and tell him to leave Juan alone. After Francisco’s death, Leyva did not attempt to contact Juan.

Francisco’s murder and the testimony of the Esparza family

Over the course of the multi-day trial, the State presented evidence of the circumstances of Francisco’s death. Juan explained that he and his immediate family shared property with their extended family (the “Esparza family property”). Juan

lived with his parents and siblings in one home on the Esparza family property; and his cousin, his cousin's wife Anaid Islas ("Anaid"), and their children lived in another home there. Francisco worked at the nursery next to the Esparza family property, and Juan's aunt Guadalupe and her husband lived across the street. More than one of the Esparza family members testified.

Maria Octavia Jimenez-Esparza ("Octavia"), Juan's mother and Francisco's wife, testified that Leyva came to the family home four times on the day before Francisco's death. The first time, after 7 a.m., Juan had gone to school and Francisco was at work. Leyva returned around 9 a.m. and asked Octavia to bring Juan to his house. Octavia responded that she would not take Juan if he did not want to go. Leyva came back a third time around 3 p.m., after Juan was home from school. Octavia rebuffed Leyva, telling him that she would take Juan to the doctor for any sickness and that he should not come back to the house. Leyva called Octavia an "incredulous woman" and claimed a doctor could not "cure" Juan. Before he left, Leyva mentioned "La Negra" and told Octavia that not to call if anything happened because "the evil" was already in her home. Leyva returned a final time after 6 p.m., when Francisco was home. Francisco, like Octavia, told Leyva to leave.

The next day, Octavia began to feel something was wrong around 9:30 a.m., when Francisco came home for lunch. Francisco preferred to eat early, so his timing was not unusual. But he told Octavia he had learned some information that prompted

him to secure the property gate. Later in the morning, after Francisco had gone, Octavia heard multiple gunshots. Because it was not uncommon to hear gunshots in the area, she was not alarmed initially. That changed when a family member, Anaid, knocked on the door and asked to call 9-1-1 because someone in a black vehicle had fired shots at the gate.

Anaid testified that she had dropped her children off at school that morning. When she returned home around 9:00 a.m., a black truck was blocking the entrance to the Esparza family property. Anaid, who drives a white Toyota Tundra, waited for the black truck to leave. Back at home, she noticed the black truck a second time when she looked out a window. The black truck was leaving the Esparza family property as another family member, Guadalupe, entered the property in her maroon Suburban. When Anaid later spotted the black truck for a third time passing by the Esparza family property, she called her husband. Not long after that call, Francisco called Anaid and asked if the people in the black truck had come to see her. When she answered “no,” Francisco came home to shut the gate and then walked back in the direction of the nursery where he worked.

The black truck returned. Because she thought it was strange to see the black truck so many times, Anaid again spoke with her husband and Francisco by phone. While she was on the phone with Francisco, Anaid saw Guadalupe pull behind the black truck on the road and talk with someone in the black truck. A man was standing

near the truck. She ended her call with Francisco, and both the black truck and Guadalupe's maroon Suburban drove away. A couple of minutes later, Anaid noticed that a man had come around the gate and was walking up the driveway carrying an object she later learned was a rifle. She described the man as Hispanic, thin, "not too tall," and having a beard on his chin. Anaid called Francisco again, and he said he would come home.

Anaid went outside to confront the man, but she stopped when she saw Francisco drive up to the property gate on a cart he used at the nursery and motion to her. Francisco opened the gate and drove through. At that time, the black truck returned. Anaid lost sight of the man with the beard on his chin, but she saw Francisco walk back toward the black truck's passenger-side window. Anaid did not get a good look at the person in the passenger's seat before she heard five or more shots, saw Francisco fall, and noticed the man with the beard on his chin running toward the neighbor's house down the road. Anaid ran to Francisco and Octavia's house, called 9-1-1, and after police arrived, ran to check on Francisco. Francisco died from his gunshot wounds.⁶

Guadalupe also testified to what she observed and experienced on the day of Francisco's death. That morning, Guadalupe noticed a black or dark-colored truck

⁶ A medical examiner testified that Francisco's cause of death was multiple gunshot wounds. She explained that Francisco suffered eight gunshot wounds—two of which were "graze wounds"—to the left side of his torso.

enter the Esparza family property through the open gate. At first, she thought the truck belonged to her nephew, but she realized she was wrong when she drove across the street to Octavia's house in her maroon Suburban about 25 minutes later. The black truck blocked her from entering the Esparza family property. She was forced to back her vehicle up the driveway to allow the black truck to leave, giving her an opportunity to see two Hispanic men in the black truck. When asked to describe the two men, she stated: "One [had] whiter skin color and another, darker." The man with the lighter complexion was in the driver's seat and stood out because "[h]e had a bunch of tattoos" in the chest area and appeared to have a dirty face. The man with the darker complexion was in the passenger seat. After maneuvering around the black truck, Guadalupe visited with Octavia in Octavia's home for about 20 minutes and then returned to her own home across the street.

Sometime later, back at home, Guadalupe saw the black truck return and stop at the mailbox near the Esparza family property line and then leave. But the black truck returned and stopped again near the mailbox. This time, the gate was closed, and she noticed a man standing near the property. She stated that he was skinny, Hispanic, and had a dark complexion. She noticed he was carrying a rifle. Guadalupe drove her Suburban back to the Esparza family property and checked the mail as an excuse to see what was going on. The black truck reversed into a position parallel to Guadalupe's Suburban, and the man with the dirty face and tattoos spoke to her. She

responded that she did not speak English, and both she and the black truck pulled away from the Esparza family property. Guadalupe called Francisco and told him to close the property gate because the black truck and its occupants were suspicious.⁷

The next time Guadalupe saw the black truck, it was again stopped near the mailbox. This time, she saw Francisco approach the black truck, appear to “ask[] someone something,” and then fall. She heard two gunshots and noticed a man running from the Esparza family property on the opposite side of the driveway from where the black truck had been parked. She described the man who was running as having a dark complexion and a beard on his chin.

Accomplice testimony from the Posado brothers

During its case in chief, the State presented the testimony of two men alleged to be accomplices to Francisco’s murder—brothers Ricardo Posada (“Ricardo”) and Jaime Posada (“Jaime”). Ricardo and Jaime admitted going to the Esparza family property with appellant on the day Francisco died.⁸

⁷ The record does not make clear the timing of Guadalupe’s call to Francisco.

⁸ In exchange for his testimony against appellant and Leyva, Ricardo secured an agreement with the State for a 15-year sentence for aggravated robbery. Jaime secured a similar agreement for a 20-year sentence for aggravated robbery in exchange for his testimony against appellant and Leyva.

Ricardo and Jaime knew Leyva. According to Ricardo, Leyva asked Jaime to help another man, whom Ricardo identified as appellant, “roughen someone up.”⁹ Ricardo agreed to drive Jaime, using his black Ford F-150 pickup truck. After Jaime discussed the plan with Leyva at Leyva’s house, Ricardo and Jaime followed Leyva to appellant’s house. Neither he nor Jamie had met appellant before.

Ricardo and Jaime stayed in appellant’s house the night before Francisco’s murder. Leyva called appellant the next morning and told appellant to carry out the assault. Appellant retrieved a “big gun”—like an “AK”—from his garage or shed and gave Ricardo a “clip” to load the weapon, which Ricardo did. Ricardo gave the loaded gun to Jaime to use as a “scare tactic.” Appellant also carried a weapon in his waistband—a gun Ricardo described as a chrome .40 or .45 caliber handgun. All three men left the house in Ricardo’s truck. Ricardo sat in the driver’s seat, appellant sat in the front passenger seat, and Jaime sat in the middle of the backseat.

They drove by the Esparza family property, and then returned to appellant’s house. Leyva joined them at appellant’s house. After appellant and Jaime spoke with Leyva, Ricardo drove them back to the Esparza family property.

⁹ It was Ricardo’s understanding that the man whom Leyva directed should be “roughed up” had raped someone’s niece. Jaime later testified that the victim of the alleged rape was Leyva’s niece.

Again, appellant sat in the front passenger seat, and Jaime sat in the backseat. When they arrived at the Esparza family property, the gate was open, and Ricardo backed his truck down the driveway. As he did so, another vehicle driven by a woman pulled into the driveway. Ricardo testified that the female driver then pulled back out, allowing him to leave. As he was leaving, a second vehicle pulled in. He described one of the vehicles as a white Toyota truck and the other as a maroon Suburban. Ricardo drove Jaime and appellant back to appellant's house, where they waited for about 15 minutes.

Ricardo testified that the third time they went to the Esparza family property, he pulled the truck over to the shoulder of the road, near a mailbox. This time, the gate to the Esparza family property was closed, and Jaime and appellant got out of the truck with their guns. Jaime went around the gate and onto the property. In the truck's rearview mirror, Ricardo could see a man approaching on a lawn mower. He yelled to warn Jaime and appellant. Jaime did not hear Ricardo's warning, but appellant returned to the truck.

Ricardo claimed that he told appellant he "didn't want to do this anymore" and asked appellant to call Leyva, which appellant did. While appellant was on the phone with Leyva, Ricardo noticed the man who had been on the lawn mower walking up to the truck. Ricardo told appellant, "Hey, when he [the man on the lawn mower] walks up to my truck, don't tell him anything. I'm going to tell him I'm

looking for an address.” But appellant conveyed that Leyva had told him to shoot the man. Appellant and the man exchanged a few words through an open window before appellant reached into his waistband and shot the man seven or eight times from the passenger seat. Ricardo stated that he tried to grab appellant’s hand before the shooting occurred.¹⁰

After the shooting, Ricardo noticed a tow truck driver nearby and saw a flash, which indicated to Ricardo that the tow truck driver was taking a picture or making a recording. Appellant told Ricardo to drive away. They left Jaime, who never returned to the truck, behind. As they were driving away, the tow truck followed for a time but then backed off.¹¹

Ricardo and appellant returned to appellant’s house. According to Ricardo, Leyva told appellant to change the license plates on Ricardo’s truck. They removed the license plates from Ricardo’s truck, buried them in a field next to appellant’s

¹⁰ Ricardo acknowledged in further examination that he did not tell the police in a later videotaped interview that he grabbed appellant’s arm and tried to stop the shooting. He also acknowledged telling police in the same interview that appellant indicated he was only going to shoot at the man’s feet. Ricardo claimed that fear caused him to lie in the police interview.

¹¹ The tow truck driver, Daniel Bliss (“Bliss”), testified at trial. Bliss was working at the time of the shooting and noticed “a dark-colored F-150” truck parked on the side of the road. He saw the “barrel of a gun come out of the passenger’s side window” and “four or five muzzle shots come out” before “the guy [who] was standing . . . next to the truck ended up in the ditch.” Two Hispanic males were inside the truck. Bliss took a picture of the truck and called 9-1-1.

house, and then installed different plates appellant had taken from another vehicle on appellant's property.

Ricardo drove himself home. Later, he saw his truck on television news and learned the police were looking for it. He asked a friend to hide the truck. Soon, the police were knocking at his door, and Ricardo was arrested. Ricardo elected to give a statement to police after his arrest.¹² In his statement, he told police that he and Jaime were going to "hit a lick," or break in and steal something, while appellant "beat up this guy or whatever," even though he disputed at trial that he and Jaime agreed to commit a robbery. Ricardo also told the police that the night before Francisco's murder, appellant mentioned stabbing someone. The police showed Ricardo a photo from the stabbing at the restaurant, and Ricardo recognized appellant in the photo. Ricardo also identified photos of his truck fleeing the murder scene. And he consented to a DNA swab and a search of his truck.

Jaime testified that he had known Leyva for about ten years. Both Jaime and his mother had gone to Leyva for help and spiritual guidance. Because Jaime believed in Leyva, he agreed to help when Leyva asked him to go with appellant to beat up someone who had molested Leyva's niece. Jaime was to make sure that the man who was the target of the assault did not "get the best of" appellant. Like

¹² Ricardo testified that some of his statement may not have been truthful because he took "some X pills" and "snorted some cocaine" before his arrest.

Ricardo, Jaime testified that he stayed at appellant's house the night before Francisco's murder. Leyva was at appellant's house the next morning and bragged with appellant about "doing something a couple of weeks ago and getting away with it." Jaime did not know what the "something" was. Leyva told Jaime and the others to carry out the assault, and appellant provided weapons. Specifically, appellant gave Jaime a rifle and kept a .40 caliber chrome handgun for himself. Leyva said, "Don't worry about the guns since we're not going to use them."

Leyva left the property for about five minutes, and upon his return, told Jaime that the target of the assault was at home. Jaime did not know Francisco or where Francisco lived, but appellant gave Ricardo directions to the Esparza family property. Appellant was in the front passenger seat, and Jaime sat in the backseat. They passed by the Esparza family property once, and then pulled over at a store where appellant put something black on his face. According to Jaime, this made it look like appellant "had a bunch of dirt on him" and gave appellant a "darker" appearance.

Jaime testified that he, appellant, and Ricardo drove back to the Esparza family property. Because the gate was closed, he decided to get out of Ricardo's truck with the rifle and walk around the gate. Appellant was supposed to take the lead, but Jaime looked back and saw appellant still standing by Ricardo's truck. As Jaime continued toward the houses on the property, he saw a woman notice him on

the property. He ducked but could hear a tractor and chains. Then, “all of a sudden,” he heard “six or eight” gunshots. Because he thought someone was shooting at him, he placed the rifle under a trailer on the property, jumped the fence, crossed the street, and ran into a wooded area. He stayed in the wooded area for a couple of hours, where he heard sirens and a helicopter. The police eventually located and arrested him.

At trial, Jaime testified that he told police after his arrest that he was on the Esparza family property to “hit a lick,” rather than commit an assault. Initially, Jaime did not understand that the police were investigating a murder, but when they told him, he decided to cooperate because “a murder wasn’t supposed to happen.” Although Jaime told the police that he, Ricardo, and appellant were all present, he failed to disclose that he met appellant through Leyva. Jaime explained that this was because he was embarrassed about Leyva and “the spiritual things that he was doing.” Jaime also did not tell the police about the rifle at first. He consented to a DNA swab, and the police took photos of him. The photos showed that, at the time of Francisco’s murder, Jaime had a goatee. The police showed Jaime photos from the stabbing at the restaurant, and Jaime identified appellant in the photo even though appellant had less hair and was heavier at the time of trial than in the photo.

The investigation

The State presented additional evidence about the investigation of Francisco's murder. The testimony of forensic investigators regarded items recovered from the Esparza family property, including the rifle Jaime abandoned when he fled the scene and eight .40 caliber casings from the area around Francisco's body. No fingerprints were found on the rifle.

A former manager of the Harris County Institute of Forensic Science firearms laboratory examined the eight casings found at the murder scene and concluded they were all .40 S&W Remington Peters brand casings fired from "a single unknown firearm." He also examined a single casing recovered from the restaurant stabbing and concluded that it was .40 caliber S&W Winchester brand casing. He could not determine whether the eight casings recovered from the murder scene and the single casing from the stabbing scene were fired from the same weapon; however, he noted that the casings exhibited "similar class characteristics."

The State's evidence also included testimony that investigators found Ricardo's truck using a photograph taken by the tow truck driver Ricardo had spotted at the murder scene. From the photo, investigators obtained the truck's license plate number and discovered the truck was registered to Ricardo and Jaime. By the time investigators located Ricardo's truck, the license plates had been changed. However, the new license plates were registered to a truck found on appellant's property.

Forensic investigators processed Ricardo's truck and swabbed it for DNA. Aside from Ricardo's fingerprints on a glass in the center console, no fingerprints were collected. Several other items were collected from the truck, including two cell phones and a baseball bat wedged between the driver's seat and center console. In addition, the front passenger interior and passenger-side mirror were tested for gunshot residue.¹³ The lab technician who analyzed the test kit found residue was present. He testified that the results of his examination were consistent with someone firing several shots near the truck's passenger window, either from inside the truck or from a hand extended outside the truck.

Using information provided by Ricardo and Jaime, investigators obtained a search warrant for appellant's cell phone records and a trap-and-trace order that allowed them to use cell phone pings to track appellant's phone. Investigators also obtained a warrant to search appellant's house. They did not find a .40 caliber handgun during the search.

Using information from appellant's cell phone, investigators located appellant and planned to arrest him. They attempted to make the arrest while appellant was driving, but he did not yield to the officers and instead drove his vehicle toward them at high speed. Despite an officer firing his weapon multiple times, appellant

¹³ Investigators also collected gunshot residue kits from Ricardo and Jaime. But the kits were not processed because the time for processing—which crime lab policy dictated was four hours between the incident and collection—had expired.

continued to flee toward his house, where he was eventually arrested. DNA swabs were collected from appellant pursuant to a search warrant. According to the testimony of a forensic scientist, appellant was excluded as a contributor for the DNA extract on the samples taken from Ricardo's truck. Appellant was not tested for gunshot residue because too much time had passed after the shooting.

The State presented evidence of data obtained from various cell phones—including Ricardo's, appellant's, Leyva's, and Juan's cell phones—to corroborate Ricardo's and Jaime's testimony. An FBI special agent analyzed the data to determine the location from which certain calls and text messages were made, sent, or received. The agent plotted the data with reference to the addresses for the restaurant, the murder scene, Leyva's house, appellant's house, and Juan's school.

On the day Juan was stabbed, there were three calls between appellant's and Leyva's cell phones. At the time, Leyva's cell phone was in the coverage area near the restaurant. Appellant's cell phone first was in the coverage area for his house, later moved to the coverage area that included the restaurant, and then returned to the coverage area for his house. The agent testified that the cellphone data was consistent with other evidence indicating that (1) appellant and Leyva were at the restaurant at the same time and, (2) after appellant left the restaurant, Leyva stayed to give a statement.

The agent also testified about data collected from the night before Francisco's murder. After 10 p.m., all but one of Ricardo's calls used the cell tower covering appellant's house. Ricardo's cell phone called appellant's cell phone twice, and appellant's cell phone called Ricardo's cell phone once. The agent testified this data was consistent with evidence that Ricardo stayed at appellant's house the night before Francisco's murder.

On the morning of Francisco's murder, Ricardo's cell phone moved around. The data showed at least six calls between Leyva's and appellant's cell phones. Although appellant's cell phone was moving, it remained in the general area of the murder scene. The agent explained that the data was consistent with the evidence that appellant went back and forth between his house and the Esparza family property before the murder. In addition, the agent testified that data indicated there were three calls after 11 a.m. from Ricardo's cell phone to appellant's cell phone within three minutes, all using the cell tower covering appellant's house, and this data was consistent with Ricardo and appellant being together at appellant's house after Francisco's murder.

Finally, the agent testified that from the beginning of May until shortly after Francisco's murder, there were 79 calls from Leyva's cell phone to Juan's cell phone. In the same time frame, the data showed 78 calls from Leyva's cell phone to appellant's cell phone and 56 calls from appellant to Leyva. And there were 22 calls

from Ricardo's cell phone to Leyva's cell phone, and six calls from Leyva's cell phone to Ricardo's cell phone.

The jury charge and verdict

At the close of the evidence, the trial court submitted the case to the jury. The jury charge included the following instruction:

You are instructed that there may have been testimony before you in this case regarding the Defendant having committed acts other than the offense alleged against him in the indictment. These are called extraneous acts. You cannot consider testimony of extraneous acts for any purpose unless you first find and believe beyond a reasonable doubt that the defendant committed any such extraneous acts and even then, you may only consider the same in determining the motive, intent, preparation, plan, knowledge, or [to] rebut a defensive theory of the Defendant, if any, in connection with the offense alleged against the Defendant in the indictment and for no other purpose.

After deliberations, the jury returned a verdict finding appellant guilty of murder. And after a punishment hearing, the jury sentenced appellant to life in prison. The trial court entered a judgment in accordance with the jury's verdict.

Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). A trial court abuses its discretion when its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). Generally, the erroneous admission of

evidence is non-constitutional error. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010); *Robinson v. State*, 236 S.W.3d 260, 269 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Under Rule 44.2, we must disregard “[a]ny [non-constitutional] error . . . that does not affect substantial rights.” TEX. R. APP. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011). We will uphold a trial court’s evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Extraneous-Offense Evidence

In his sole issue, appellant contends the trial court abused its discretion by admitting extraneous-offense evidence—specifically, the evidence tending to show that he stabbed Juan about two weeks before he shot and killed Francisco. He argues the probative value of the stabbing evidence was substantially outweighed by its prejudicial effect, and thus its admission constitutes reversible error. We disagree.

A. Applicable Law

Rule of Evidence 404(b) generally excludes evidence of other crimes, wrongs, or acts offered to prove that a defendant committed the charged offense in conformity with his own bad character. TEX. R. EVID. 404(b)(1); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). But evidence of extraneous offenses may be admissible for other purposes. *See* TEX. R. EVID. 404(b)(2). The Rule’s

non-exhaustive list of permissible purposes includes motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Id.*; *Garcia v. State*, 201 S.W.3d 695, 703 (Tex. Crim. App. 2006); *Smith v. State*, 5 S.W.3d 673, 678 (Tex. Crim. App. 1999). Rebuttal of a defensive theory also is “one of the permissible purposes for which relevant evidence may be admitted under Rule 404(b).” *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003).

Before extraneous-offense evidence can be admitted, it must also satisfy the balancing test established in Rule of Evidence 403, which provides that such evidence is admissible only if its probative value is not substantially outweighed by its unfair prejudicial effect. TEX. R. EVID. 403; *see Gigliobianco v. State*, 210 S.W.3d 637, 640 (Tex. Crim. App. 2006); *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990). In other words, Rule 403 requires a court to balance the probative force of and the proponent’s need for the evidence against the risk of unfair prejudicial effect. TEX. R. EVID. 403; *see Gonzalez v. State*, 544 S.W.3d 363, 372 (Tex. Crim. App. 2018) (noting probative force of evidence refers to how strongly it serves to make existence of consequential fact more or less probable).

Relevant evidence is presumed to be more probative than prejudicial. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997); *Smith v. State*, 355 S.W.3d 138, 153 (Tex. App.—Houston [1st Dist.] 2011, pet. ref’d). Evidence is unfairly prejudicial if it has the capacity to lure the factfinder into

declaring guilt on a ground other than proof specific to the offense charged. *Manning v. State*, 114 S.W.3d 922, 928 (Tex. Crim. App. 2003); *see Montgomery*, 810 S.W.2d at 395 (“Evidence of ‘other crimes, wrongs, or acts’ may . . . create ‘unfair prejudice’ if under the circumstances a jury would be more likely to draw an impermissible character conformity inference than the permissible inference for which the evidence is relevant[.]”). In a Rule 403 analysis, the court should consider:

(1) the inherent probative force of the proffered item of evidence along with (2) the proponent’s need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gonzalez, 544 S.W.3d at 372 (quoting *Gigliobianco*, 210 S.W.3d at 641–42).

B. Analysis

On appeal, appellant has not challenged whether the stabbing evidence served a permissible purpose under Rule 404(b). *See* TEX. R. EVID. 404(b). Instead, he argues that the stabbing evidence did not satisfy the admissibility requirements of Rule 403. *See* TEX. R. EVID. 403. Accordingly, we turn to a Rule 403 balancing analysis. *See id.*; *see also Gonzalez*, 544 S.W.3d at 372.

We first consider the inherent probative force of the stabbing evidence. *See Gonzalez*, 544 S.W.3d at 372. “The probative force of evidence refers to how

strongly it serves to make the existence of a fact of consequence more or less probable.” *Id.* Here, the indictment alleged that appellant committed the offense of murder by shooting Francisco, making appellant’s participation in the crime as the shooter a fact of consequence. The State presented evidence during its case-in-chief that .40 caliber casings were recovered from both the murder scene and the restaurant where Juan was stabbed. Although the State’s firearms expert did not determine that the same gun fired the casings recovered at the two scenes, he concluded all were .40 caliber casings and shared similar characteristics. The stabbing evidence therefore made the existence of a fact of consequence—appellant’s status as the shooter—more probable by showing that appellant had access to a .40 caliber chrome handgun capable of causing Francisco’s injury.

Appellant asserts that the probative value of the stabbing evidence was reduced by the lack of fingerprint or DNA evidence placing him in the restaurant and by Juan’s late identification of him as the restaurant assailant, i.e., an identification Juan made only after appellant was detained in connection with Francisco’s murder. But Juan was not the only witness to identify appellant. Appellant was placed at the restaurant by Romo, who identified appellant from arrest photos as the man who had stabbed Juan and fired a gun while fleeing the scene. Jaime and Ricardo, referencing a photo from the stabbing at the restaurant, also identified appellant as the restaurant assailant. In addition, because the stabbing

occurred close in time to the murder, the trial court reasonably could have found that its inherent probative force was bolstered to some extent. Thus, this factor weighs in favor of admissibility.

Next, we consider the State's need for the stabbing evidence. *See id.* Appellant argues that the State had only a slight need for the stabbing evidence because its "theory of the case could have been told equally well with or without the extraneous evidence," and he points to the cell phone data tending to show that appellant was in the area on the morning of the shooting. But it was not outside the zone of reasonable disagreement to conclude the defensive theory that appellant did not participate in the murder and the lack of physical evidence placing appellant at the murder scene heightened the State's need for the evidence. *See Gigliobianco*, 210 S.W.3d at 642; *Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet. ref'd) (State's need for extraneous offense evidence was considerable because State had no physical evidence or eyewitness testimony). In addition, the State demonstrated that it needed the stabbing evidence both to rebut appellant's claim he did not participate in the murder and to establish its own theory of the case. Thus, this factor weighs in favor of admissibility.

The next factors consider the potential of the stabbing evidence to confuse or distract the jury from the main issues, suggest a decision on an improper basis, or be given an undue weight. *See Gonzalez*, 544 S.W.3d at 372. Appellant contends, under

a “theory of primacy,” that the presentation of the stabbing evidence at the beginning of trial heightened the risk that the evidence would irrationally impress the jury and color the lens through which the jury viewed the remainder of the evidence. It is true that an extraneous offense carries the potential to impress the jury of a defendant’s character conformity, an impression the law seeks to avoid. *See Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996). However, the impermissible inference of character conformity can be minimized through a limiting instruction. *See Montgomery*, 810 S.W.2d at 388, 393. Here, the jury charge properly instructed the jury that it could consider extraneous offenses only in “determining the motive, intent, preparation, plan, knowledge, or [to] rebut a defensive theory . . . , if any, in connection with the offense alleged . . . in the indictment and for no other purpose.” Nothing suggests this limiting instruction was not effective in minimizing the prejudicial effect of the stabbing evidence. *See id.*

In addition, the stabbing evidence was limited to the fact of its occurrence, was not overly graphic, did not involve specialized or technical evidence, and focused primarily on identification of appellant as a participant in Leyva’s scheme to influence Juan, first, by stabbing Juan and, second, by shooting Francisco. *See Buxton v. State*, 526 S.W.3d 666, 692 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d) (considering that extraneous-offense evidence was not confusing or technical in nature a factor weighing in favor of admission). Thus, taking the prejudicial effect

of the stabbing evidence into consideration and weighing it against the trial court's instruction in the jury charge, these factors weigh in favor of admissibility.

The final factor considers whether the development of the extraneous offense required an inordinate amount of time. *See Gonzalez*, 544 S.W.3d at 372. The stabbing evidence occupied a significant portion of day one of the State's case-in-chief and about one-fourth of day two. Primarily, the evidence consisted of testimony from four witnesses—Juan, two eyewitnesses, and the investigating officer—and several exhibits—including surveillance video and photographs. Appellant describes the time the State devoted to this evidence as “substantial.” When considered in the context of the entire guilt-innocence phase of trial, however, it is not. We find it instructive that the Court of Criminal Appeals has before concluded that the time needed to develop an extraneous offense was not excessive when it constituted less than one-fifth of the testimony in the State's case-in-chief. *See Lane*, 933 S.W.2d at 520. Here, the stabbing evidence occupied an even smaller portion of the State's case-in-chief, which included seven days of testimony, twenty-three witnesses, and more than 300 exhibits. Considering the ratio accepted by the Court of Criminal Appeals, we do not believe the stabbing evidence was too time consuming. *See id.* This factor weighs in favor of admissibility.

In sum, balancing the factors, the trial court reasonably could have concluded that the probative value of the stabbing evidence was not substantially outweighed

by its prejudicial effect. We therefore cannot say that the trial court abused its discretion by determining that the stabbing evidence met the admissibility requirements of Rule 403. *See Wilson v. State*, 473 S.W.3d 889, 900 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (trial court's decision not to exclude evidence under Rule 403 is entitled to deference); *see also* TEX. R. EVID. 403.

But even if we assume the trial court erred, appellant did not suffer harm. As stated above, error in the admission of an extraneous offense does not constitute constitutional error and should be disregarded unless it affected appellant's substantial rights. TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

Here, appellant's substantial rights were not affected by the admission of the stabbing evidence. The stabbing evidence was limited to testimony from Juan, two eyewitnesses, the investigating officer, and surveillance video and photos. The primary focus of the stabbing evidence was to establish appellant's unique physical traits, participation in a scheme with Leyva, and access to a weapon that could have been used to cause Francisco's death. The stabbing evidence was not graphic or overly emotive. The State presented other evidence that appellant caused Francisco's death by shooting Francisco through the testimony of Jaime and Ricardo, which was corroborated by (1) cell phone data indicating appellant's movement on the day of

Francisco's murder, (2) much of the testimony of the Esparza family on the events surrounding Francisco's murder, (3) the testimony of the tow truck driver who witnessed the shooting, and (4) the testimony that appellant attempted to flee when police sought to arrest him in connection with Francisco's murder.

Given this testimony, the relative brevity of the testimony about the extraneous offense when considered alongside the scope of the entirety of the guilt-innocence phase of trial, and the trial court's limiting instruction, we cannot conclude that the admission of the stabbing evidence had a substantial and injurious effect or influence in determining the jury's verdict. *See* TEX. R. APP. P. 44.2(b); *King*, 953 S.W.2d at 271.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Amparo Guerra
Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.

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