Affirmed and Memorandum Opinion filed March 10, 2009.

In The

Fourteenth Court of Appeals

NO. 14-08-00153-CR

RONALD JAMES WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1019349

MEMORANDUM OPINION

Appellant Ronald James Williams challenges his conviction for felony murder following a jury trial. The jury assessed punishment as confinement for 22 years. Appellant contends that the trial court erred in admitting evidence of an extraneous offense. We affirm.

Background

On March 2, 2005, Lederic Berry was at home with his two brothers, Bruce and Roger Walker; his mother; his girlfriend, Tawana, and their young daughter; and three friends,

Terence Williams, Cedric Ross, and a man named Jarrell. Bruce Walker, Terence Williams, and Cedric Ross were playing video games in the adjoining garage.

At approximately 10:00 p.m., Tawana got a phone call from her friend, Erica Baptiste. After their conversation, Baptiste called back and spoke with Berry. Baptiste's boyfriend, Kelton St. Cyr, got on the phone during this conversation and began a heated conversation with Berry.

St. Cyr, Baptiste, and Baptiste's baby arrived at Berry's residence about 30 minutes later. When Berry walked outside, he and St. Cyr got into an argument. Bruce Walker, Terence Williams, and Cedric Ross opened the garage door after hearing the argument. St. Cyr "backed down" when he saw the men in the garage. St. Cyr then got into his car, joined by Baptiste, Tawana, and the children. As he left, St. Cyr yelled that he was a "Crip" and promised to return.

Berry received another phone call later that evening from Baptiste and St. Cyr, during which St. Cyr demanded that Berry meet him at a nearby gas station to settle their argument. Berry stayed at home.

Less than an hour later, Berry, while lying in bed, heard two sets of gunshots with a short pause between them. Berry ran into the living room and saw Bruce Walker, Terence Williams, and Cedric Ross running in from the garage. Berry's mother and Jarrell also were in the living room. No one in the house or garage saw who fired the shots. The garage door was closed at the time of the shooting and had no windows.

Cedric Ross collapsed in the living room from a gunshot wound suffered as he was running in from the garage; he died shortly thereafter. An autopsy later revealed that Cedric Ross was killed by a single bullet that pierced both lungs, his esophagus, and his heart.

Baptiste called Berry's home again about 20 minutes after the shooting and asked what had happened. Baptiste called because she had been unable to reach St. Cyr on his cell phone. Berry told Baptiste that someone had been shot inside his house.

At trial, Berry testified consistent with the summary above. Berry also testified that appellant was not the man with whom he had argued on the evening of March 2, 2005. Bruce Walker's and Terence Williams's testimony was consistent with Berry's testimony. Bruce Walker also testified that appellant was not the man whom he had seen arguing with Berry on the evening of March 2, 2005.

A friend of St. Cyr's named Christian Timberlake testified that St. Cyr called him on March 2, 2005 and asked him to come to St. Cyr's house. When Timberlake arrived at St. Cyr's house, St. Cyr said that he had been "jumped" earlier in the evening by some men at Berry's house. Timberlake testified that he and others accompanied appellant and St. Cyr to Berry's house because St. Cyr feared returning there alone.

Timberlake testified that the group drove to Berry's subdivision in three cars owned by appellant, St. Cyr, and Greg Washington. Timberlake drove Washington's car. Once inside the subdivision, St. Cyr parked his car and got into Washington's car with Washington and Timberlake. Appellant continued driving his own car.

Timberlake testified that when the two remaining cars arrived in front of Berry's house, St. Cyr got out of Washington's car and spoke to appellant. Timberlake heard St. Cyr say while holding a cell phone: "Well, if y'all not going to come outside, I'm going to make you come outside." Timberlake watched appellant pull in front of Berry's driveway and fire multiple shots out of the driver's side window before driving away. St. Cyr ordered Timberlake to stop in front of Berry's house, and then St. Cyr fired multiple shots out of the rear driver's side window before the group left and returned St. Cyr to his car.

While being questioned about witnessing appellant and St. Cyr firing at Berry's house, Timberlake stated, "I've seen people shoot at the club before, but I never seen them shoot up a house." Appellant did not object to this testimony. Timberlake also testified that appellant admitted firing shots at Berry's house from appellant's car.

Timberlake testified that he told appellant's counsel before trial that appellant was elsewhere at the time of the shooting; Timberlake asserted he had been pressured into fabricating that alibi by St. Cyr. Timberlake also testified that he told defense counsel and people in his neighborhood that St. Cyr's brother — who owned a car similar to appellant's, and was known to have killed someone before — fired the shots at Berry's house on March 2, 2005.

Greg Washington also testified against appellant, and his testimony about what happened on March 2, 2005 tracked that of Timberlake. Washington testified that two other men also were in appellant's car during the shooting. Washington testified that appellant drove a Buick and Timberlake drove Washington's blue Oldsmobile Cutlass Sierra to Berry's house. When asked about giving conflicting accounts to appellant's counsel, Washington denied having met with appellant's counsel.

Mark Aguilar testified that he lived seven blocks away from Berry, and that he saw an unfamiliar four-door gray Lincoln Continental parked in front of his house late on March 2, 2005. Aguilar testified that he heard gunshots that night; shortly thereafter, a maroon car similar to an older model Oldsmobile turned down his street. Aguilar further testified that two men got out of that car and into the car parked in front of his house, at which point both cars drove away.

The trial testimony also addressed a separate incident that occurred after the shooting at Berry's house. Houston Police Officer Dong Hoang testified about an incident that occurred at a nightclub shortly after 2:00 a.m. on March 6, 2005. Before Officer Hoang testified, appellant objected to challenge the relevance and probative value of testimony about the March 6, 2005 nightclub incident. The trial court overruled this objection. Appellant then requested and was granted a running objection on the same grounds. The State admonished its witnesses to refrain from mentioning that the March 6 nightclub incident involved a shooting during the State's case-in-chief, instead referring to the incident as a "weapons incident."

Officer Hoang testified that he was responding to a disturbance call on March 6, 2005 when the complainant in the disturbance flagged him down and pointed out appellant's car — a four-door maroon 1993 Buick — while claiming appellant had a gun in his hand during the disturbance. Based on this disturbance, appellant's vehicle was stopped and searched.

During this traffic stop, Officer Hoang found a silver .380 handgun underneath the rear driver's side seat cushion and a box of ammunition for the handgun. Anthony Manuel, who was sitting in the back seat of appellant's car during the March 6 traffic stop, was charged with possession of the handgun. Witness Corrion Chatmon testified that he saw appellant at the same nightclub on March 6 with a silver gun in his hand similar to the .380 handgun found in appellant's car. No testimony was offered at this point in the trial about any criminal charges against appellant in connection with the March 6 nightclub incident.

Mike Lyons, a firearms examiner for the Houston Police Department, testified that the bullet recovered from Cedric Ross's body after the March 2 shooting at Berry's home was fired from the same silver .380 handgun recovered from appellant's car during the March 6 traffic stop.

During the defense portion of the trial, appellant offered alibi testimony from multiple witnesses. Harry Nelson, Jr., testified that appellant arrived at church on March 2, 2005 at approximately 7:30 p.m. and left between 9:30 p.m. and 10:00 p.m. Terrence Gore testified that appellant picked him up from a recording studio between 9:30 p.m. and 10:00 p.m. on March 2, 2005 and spent more than an hour at Gore's apartment listening to music until appellant left at approximately 12:15 a.m. Gore's girlfriend — who also is appellant's cousin — testified that appellant was with Gore during this time frame.

Gore also testified he was at the meeting between appellant's counsel and Timberlake; that Washington also was at the meeting; and that Washington maintained at the meeting that appellant was not involved in the March 2 shooting.

After the defense rested, the State sought to proffer additional evidence about the March 6 nightclub incident to rebut appellant's alibi testimony. The State argued that appellant's alibi defense raised the issue of identity, and that the March 6 nightclub incident had similar distinguishing characteristics upon which the jury could rely in determining who fired the fatal shots at Berry's house on March 2.

Appellant contended that the evidence he proffered did not put identity at issue to the degree necessary to allow admission of evidence about the March 6 nightclub incident because Timberlake and Washington were not uncertain about appellant's identity. Appellant also contended that any similarities between the March 2 and March 6 incidents were typical of any drive-by shooting, and that any probative value from evidence about the March 6 nightclub incident was substantially outweighed by the danger of unfair prejudice.

The trial court admitted evidence during rebuttal that appellant fired a handgun during the March 6 nightclub incident. The trial court issued a limiting instruction directing the jury to consider this evidence only to help it decide "whether the Defendant committed the offense that he is charged with. And you may not consider it for any other purpose." The jury charge contained a similar instruction.

During rebuttal, the State recalled Officer Hoang to give more details about the March 6 nightclub incident. Officer Hoang testified that appellant was arrested on March 6 and charged with the felony offense of deadly conduct. Officer Hoang did not testify that the March 6 incident involved a shooting.

The State also recalled Chatmon to give rebuttal testimony about the March 6 nightclub incident. Chatmon testified that an argument erupted between Chatmon's friends and another group when a member of the other group attempted to persuade Chatmon's female friend to leave the club with him. Later, as Chatmon got to his car in the nightclub parking lot, another car pulled up carrying appellant and others including the man who had spoken with Chatmon's friend. Chatmon testified that one occupant of the other car pointed

a shotgun at him out of the car window, and appellant fired a handgun out of the driver's side window while sitting in the passenger seat. Chatmon further testified appellant had switched to the driver's seat of the car by the time he identified appellant to Officer Hoang as the person who shot at him.

The jury convicted appellant of felony murder based on his commission of an act causing Ross's death in the course of committing felony deadly conduct. Appellant contends the trial court abused its discretion by admitting evidence of the March 6 nightclub incident. Appellant asserts evidence of this extraneous offense should have been excluded because (1) it was too remote in time to refute appellant's alibi defense; (2) it was not sufficiently similar to the charged offense to establish appellant's identity; and (3) any probative value was substantially outweighed by the danger of unfair prejudice. Appellant further contends his defensive theories did not raise identity as an issue so as to allow an extraneous offense to be used to establish appellant's identity.

Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Id.* We cannot reverse a trial court's admissibility decision solely because we disagree with it. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). We must affirm a trial court's ruling if it is correct on any theory of law applicable to the case. *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005).

Analysis

I. Preservation of Error

The State contends appellant failed to preserve his complaint regarding admission of extraneous offense evidence before rebuttal because appellant did not object based on the

inadmissibility of character evidence under Rule 404(b) or based on its probative value being substantially outweighed by the danger of unfair prejudice under Rule 403.

An appellant's issue on appeal must comport with the objection made at trial; otherwise, the appellant has preserved nothing for review. *See* Tex. R. App. P. 33.1(a); *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999). During the State's case-in-chief, appellant requested and was granted a running objection to admission of evidence regarding the March 6 nightclub incident based on lack of relevance and probative value. Appellant does not argue relevance on appeal; instead, he argues the evidence was inadmissible character evidence under Rule 404(b) and that its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403.

A relevance objection does not necessarily preserve a complaint under Rule 403 or Rule 404. *See Medina v. State*, 7 S.W.3d 633, 643 (Tex. Crim. App. 1999) (en banc); *Bell v. State*, 938 S.W.2d 35, 49 (Tex. Crim. App. 1996) (en banc, per curiam); *see also Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). Appellant did not articulate an objection on Rule 403 or Rule 404(b) grounds until the State requested permission to offer rebuttal testimony. Because appellant did not raise any objection under Rules 403 or 404(b) during the State's case-in-chief, he cannot invoke these rules to complain about admission of this evidence during the State's case-in-chief.

Therefore, we do not address admissibility of the following evidence about the March 6 incident presented during the State's case-in-chief: (1) Officer Hoang's testimony that (i) a weapons incident occurred at a nightclub on March 6, 2005; (ii) the complainant in that incident flagged him down and pointed out appellant's four-door maroon Buick; (iii) the complainant claimed appellant had a gun in his hand during the incident; (iv) appellant's car was stopped and searched on March 6; (v) a silver .380 handgun and a box of ammunition for the gun were found underneath the rear driver's side seat cushion; and (vi) a passenger in appellant's car was charged with possession of the handgun; (2) Chatmon's testimony that he saw appellant at the same nightclub on March 6 with a silver gun in his hand similar to

the .380 handgun found in appellant's car; and (3) Lyons's testimony that the bullet recovered from Ross's body after the March 2 shooting at Berry's house was fired from the same silver .380 handgun recovered from appellant's car during the March 6 traffic stop.

Appellant did object under Rules 403 and 404(b) to the following testimony from Officer Hoang and Chatmon during rebuttal: (1) appellant was arrested on March 6, 2005 and charged with the felony offense of deadly conduct; (2) appellant was with a group of people who engaged in an argument with Chatmon's group of friends over one of the women in Chatmon's group; (3) appellant was seated in the passenger seat of his car — which pulled up near the car Chatmon was walking toward — and fired a handgun out of the driver's side window of the car while another man pointed a shotgun out of appellant's car window; (4) appellant switched to the driver's seat of his car sometime between the shooting and the time officers stopped his car; and (5) Chatmon identified appellant to Officer Hoang on March 6 as the person who shot at him. We now consider the admissibility of this evidence under Rules 403 and 404(b).

II. Admissibility Under Rule 404(b)

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. Tex. R. Evid. 404(b). Such evidence may be admissible for other purposes such as proving identity. *Id.*

The first step in determining whether evidence of an extraneous offense is admissible is to determine whether the evidence is relevant to a material issue other than the defendant's character under Rule 404(b). *Prieto v. State*, 879 S.W.2d 295, 297 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). Once an appropriate objection has been lodged, the proponent of the evidence must demonstrate to the court that the evidence has relevance apart from proving character conformity. *Lopez*, 200 S.W.3d at 252.

Extraneous offense evidence cannot be admitted to prove identity until identity has been made an issue in the case. *Page v. State*, 137 S.W.3d 75, 78 (Tex. Crim. App. 2004).

Challenging the credibility of witnesses on a material detail of the identification sufficiently raises the issue of identity to permit admission of extraneous offense evidence. *Id.* (citing *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996)). An alibi defense also raises the issue of identity and permits admission of extraneous offense evidence. *Booker v. State*, 103 S.W.3d 521, 530 (Tex. App.—Fort Worth 2003, pet. ref'd).

Appellant concedes his defensive theory of alibi raised identity as an issue in this case, but contends it did not do so to the extent necessary to permit admission of extraneous offense evidence. Through his alibi defense, however, appellant sufficiently raised identity as an issue to permit the trial court to admit evidence of the March 6 nightclub incident involving appellant. *See Page*, 137 S.W.3d at 78; *Booker*, 103 S.W.3d at 530.

Merely raising the issue of identity does not render evidence of an extraneous offense admissible unless the offenses are sufficiently similar by (1) proximity in time and place, or (2) a common mode of committing the offenses. *Dickson v. State*, 246 S.W.3d 733, 742 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (citing *Ransom v. State*, 503 S.W.2d 810, 813 (Tex. Crim. App. 1974)). Immaterial dissimilarities between the charged crime and the extraneous offense do not automatically make the extraneous offense inadmissible. *Dickson*, 246 S.W.3d at 743 (citing *Ransom*, 503 S.W.2d at 813-14).

Appellant contends the March 6 nightclub incident was not sufficiently similar to the charged offense to make evidence about that incident admissible. Appellant further contends that any similarities between the two offenses do not constitute a common mode of committing the offense because those similarities are common to ***all*** drive-by shootings. *Dickson* is instructive in addressing appellant's arguments.

In *Dickson*, three separate robberies were committed one evening at a particular Houston apartment complex. *Dickson*, 246 S.W.3d at 736. In the robbery with which the defendant was charged, the assailant was running and repeating the phrase "come get me" as he approached the victim. *Id.* The victim was walking his two dogs and accompanying

his wife to her car. *Id.* The victim's dogs began barking at the assailant as he ran past, at which point he turned around and pointed a handgun at the dogs. *Id.* The assailant threatened to shoot the dogs if the victim did not make them stop barking. *Id.* The assailant then threatened to shoot the victim and his wife if they did not give him their money. *Id.* at 736-37. The assailant ran away without taking anything once a neighbor turned on his porch light and opened his front door. *Id.* at 737.

During its case-in-chief, the State presented evidence of another robbery at the same apartment complex the same evening. *Id.* In this second robbery, the assailant walked up to the victim as he was stepping out of his van, put a gun to the victim's throat, and asked how much money he had. *Id.* Before the victim could retrieve his wallet, the assailant struck him twice in the head with the gun. *Id.* After obtaining the victim's wallet, the assailant demanded the victim's cell phone and struck him three times with the gun before the victim relinquished the phone. *Id.* The assailant also kicked the victim in the ribs before leaving. *Id.*

The State also called the victim of a third robbery at the apartment complex that evening to testify regarding the assailant's identity. *Id.* This third victim was walking toward his apartment when his assailant addressed him and asked "if he needed a woman." *Id.* When the victim declined this offer, the assailant walked past him and turned around brandishing a handgun. *Id.* The assailant demanded the victim's money, then struck him multiple times with the handgun before the victim could turn over his wallet. *Id.* The assailant ran away after taking the victim's wallet and cell phone. *Id.*

The defendant in *Dickson* contended that evidence of the extraneous offenses was inadmissible to prove identity because the modes of commission of the offenses differed. *Id.* at 741. Recognizing that extraneous offense evidence may be admissible under Texas Rule of Evidence 404(b) to prove identity, *Dickson* noted that extraneous offenses may be sufficiently similar to prove identity when there is ***either*** proximity in time and place ***or*** a

common mode of committing the offenses. *Id.* at 742. We held that the offenses in question in *Dickson* satisfied both requirements. *Id.*

Regarding common mode of commission, we noted that in each offense "the robber approached his victims as they walked to or from their apartments and threatened them with a gun." *Id.* at 743. We acknowledged that the robber did not strike anyone or take anything during the first robbery — the charged offense — but concluded these differences were immaterial. *Id.* We then concluded that the offenses were sufficiently similar to authorize admission of evidence of the extraneous offenses to prove the issue of identity. *Id.*

Appellant in this case similarly argues that the modes of commission of the two offenses were not similar enough to deem evidence of the March 6 nightclub shooting admissible. Specifically, appellant contends the following testimony from Officer Hoang and Chatmon was inadmissible during rebuttal: (1) appellant was arrested on March 6, 2005 and charged with the felony offense of deadly conduct; (2) appellant was with a group of people who engaged in an argument with Chatmon's group of friends about one of the women in Chatmon's group; (3) appellant was seated in the passenger seat of his car — which pulled up near the car Chatmon was approaching — and fired a handgun out the driver's side window of the car while another man pointed a shotgun out of appellant's car window; (4) appellant switched to the driver's seat of his car between the time of the shooting and the time officers stopped his car; and (5) Chatmon identified appellant to Officer Hoang that night as the person who shot at him. Having already determined that appellant made identity an issue in this case, we address the similarities between the charged offense of March 2 and the March 6 nightclub incident to determine whether the rebuttal evidence at issue was admissible.

The most obvious commonality between the shootings of March 2 and March 6 is that both resulted in allegations by the State that appellant engaged in felony deadly conduct, and both shootings involved the same silver .380 handgun. Additionally, appellant is alleged to have fired the gun from the driver's side window of a maroon Buick in each instance, even

when he was sitting on the passenger side of the car on March 6. Both incidents occurred during or near the early morning hours, with the charged offense occurring at approximately midnight and the March 6 offense shortly after 2:00 a.m. Furthermore, in each instance appellant was responding to a perceived slight to one of his friends — rather than to himself — by conducting a drive-by shooting. In light of *Dickson*, we conclude that these similarities are sufficient to indicate a common mode of commission and therefore hold that the trial court did not abuse its discretion by admitting evidence of the March 6 shooting.[1] *See Torres*, 71 S.W.3d at 760; *Dickson*, 246 S.W.3d at 742.

Appellant contends that the similarities between the offenses in this case are not distinctive enough to act as appellant's "signature," and that they are fairly common of most drive-by shootings. Assuming appellant is correct that unrelated similar factual scenarios do exist in case law with regard to drive-by shootings, the same also could be said of the aggravated robberies at issue in *Dickson*. *See*, *e.g.*, *Williams v. State*, No. 14-07-01070-CR, 2008 WL 4735226 (Tex. App.—Houston [14th Dist.] Oct. 30, 2008, pet. ref'd) (mem. op., not designated for publication) (robber approached victim as he walked to cousin's apartment and held gun to his back); *Carson v. State*, Nos. 02-07-00158-CR, 02-07-00159-CR, 2008 WL 1867148 (Tex. App.—Fort Worth Apr. 24, 2008, no pet.) (mem. op., not designated for publication) (two women robbed at gunpoint five hours apart exiting their cars in apartment complex parking lots); *Taylor v. State*, No. 08-05-00377-CR, 2007 WL 1219148 (Tex. App.—El Paso Apr. 26, 2007, no pet.) (not designated for publication) (robber exited car with gun and approached victim exiting car at her apartment complex).

Each of the above aggravated robbery cases shared the same broad characteristics of a robber approaching his victims as they walked to or from their apartments and threatening them with a gun. *See Williams*, 2008 WL 4735226, at *1; *Carson*, 2008 WL 1867148, at *1;

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[1] Because we decide that evidence concerning the March 6 nightclub incident was admissible to prove appellant's identity based on a common mode of commission of the offenses, we do not address whether this evidence was too remote in time. *See Martin*, 173 S.W.3d at 467.

Taylor, 2007 WL 1219148, at *1. Despite the relative commonality of these broad characteristics, the *Dickson* court held that they were sufficiently similar to each other to be admissible. *See Dickson*, 246 S.W.3d at 743. Thus, we conclude this evidence is admissible under Rule 404(b).

III. Admissibility Under Rule 403

Appellant also contends the trial court erred in admitting the extraneous offense evidence because any probative value was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403; *see also Lane*, 933 S.W.2d at 520. It is the opponent's burden to demonstrate that the danger of unfair prejudice substantially outweighs probative value. *Sosa v. State*, 230 S.W.3d 192, 195 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

The trial court weighs four factors under Rule 403: (1) how compellingly the evidence serves to make more or less probable a fact of consequence; (2) the potential the extraneous offense has to irrationally yet indelibly impress the jury; (3) how much trial time the proponent needs to develop the evidence; and (4) how great the proponent's need is for the extraneous transaction. *Lane*, 933 S.W.2d at 520.

Where the two offenses in question are strikingly similar, the extraneous offense evidence is highly relevant and has strong probative value even when the offenses are a decade apart. *See id.* As we have already held that the March 6 shooting shared striking similarities with the charged offense in this case — including the same weapon and car and similar motive — the first of these factors weighs in favor of admitting the evidence. *See id.*

While evidence of an extremely similar extraneous offense always carries the potential to impress the jury of a defendant's conformity with bad character, this inference can be minimized through a limiting instruction. *See id.* In this case, the trial court issued a limiting instruction before evidence of the extraneous offense was offered on rebuttal. The jury charge also included a limiting instruction. We generally presume the jury follows the trial

court's instructions, including a limiting instruction regarding certain testimony. *Adams v. State*, 179 S.W.3d 161, 165 (Tex. App.—Amarillo 2005, no pet.) (citing *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988) (en banc)). We believe these safeguards adequately insulated appellant from conviction based on character evidence and therefore decide the second factor of the Rule 403 analysis weighs in favor of admitting the evidence. *See Lane*, 933 S.W.2d at 520.

The Court of Criminal Appeals has held that devoting nearly one full day of a five-day trial to extraneous offense evidence is not excessive and militates in favor of admitting the evidence. *See id.* During rebuttal, the State spent just over 22 pages of the trial record conducting direct and re-direct examinations of Officer Hoang and Chatmon developing evidence of the March 6 nightclub incident. Considering that the trial record in this case covers nearly 450 pages — not including closing arguments — we conclude that the third factor of the Rule 403 analysis weighs in favor of admitting the evidence. *See id.*

Finally, where identity is challenged by virtue of the accused's chosen defense, the State's need for extraneous offense evidence speaking to identity is strong. *See id.* at 520-21. As noted earlier, appellant's alibi defense and challenges to the credibility of Timberlake and Washington raised identity as an issue in this case; in fact, identity was arguably the ***only*** genuine issue. In light of the importance of proving the identity of the perpetrator in this case, the State had a strong need for the challenged evidence, and this fourth factor therefore also weighs in favor of its admission. *See id.*

Under the circumstances of this case, we cannot say that the trial court abused its discretion in deciding the probative value of the evidence of the March 6 nightclub shooting was not substantially outweighed by any prejudicial impact it may have had. *See Torres*, 71 S.W.3d at 760; *Lane*, 933 S.W.2d at 520-21.

We overrule appellant's issue regarding admission of evidence of an extraneous offense.

Conclusion

The trial court's judgment is affirmed.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Brown, and Boyce.

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