Affirmed and Memorandum Opinion filed June 21, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00161-CR

JUAN CARLOS ULLOA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1201535

MEMORANDUM OPINION

A jury convicted appellant, Juan Carlos Ulloa, of aggravated robbery and assessed punishment at seventy-five years' confinement. In four issues, appellant contends the trial court erred by admitting extraneous-offense evidence during the punishment phase of trial. We affirm.

I. BACKGROUND

The State presented evidence that in January 2009, appellant and several other men entered a hair salon owned by complainant, Ana Rubio. Appellant exhibited a handgun

and demanded money from complainant and her employee, identified as Maria. According to the complainant, appellant informed her that he and the other men belonged to "Mara Salvatrucha," a dangerous street gang. Appellant and his accomplices took money, electronic equipment and several personal items from the women, and fled the scene.

Subsequently, appellant was arrested and charged with aggravated robbery. A jury found appellant guilty. During the punishment phase, the State introduced evidence pertaining to several extraneous offenses or bad acts. First, the State presented evidence that appellant committed burglary, theft, driving without a license, and failure to provide proof of financial responsibility. Second, the State presented evidence that appellant was a member of Mara Salvatrucha and, at the time of his arrest, was preparing to commit a burglary (the State focused on a blue bandana found in appellant's vehicle when he was arrested; blue is a color often worn by members of Mara Salvatrucha). Third, the State presented evidence that appellant participated in a "drive-by shooting" at the complainant's hair salon shortly after he committed the robbery.

II. EXTRANEOUS OFFENSES AND BAD ACTS

A. Admission of extraneous offenses and bad acts

In his first issue, appellant contends the trial court erred by admitting evidence of the extraneous offenses and bad acts without first determining whether the State could prove beyond a reasonable doubt that appellant committed the offenses and bad acts. Section 3 of Article 37.07 of the Code of Criminal Procedure governs admission of extraneous-offense evidence during the punishment phase:

> [E]vidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown

> beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (West Supp. 2009); *see also Smith v. State*, 227 S.W.3d 753, 759–60 (Tex. Crim. App. 2007) ("Unless the extraneous misconduct evidence is such that the [jury] can rationally find the defendant criminally responsible for the extraneous misconduct, the trial court is not permitted to admit it at a punishment hearing."). However, appellant waived this complaint by failing to timely object to admission of the extraneous-offense evidence. *See* Tex. R. App. P. 33.1(a); *Malpica v. State*, 108 S.W.3d 374, 379 (Tex. App.—Tyler 2003, pet. ref'd) (concluding defendant failed to preserve any argument regarding trial court's threshold ruling on admissibility).

Further, collateral to his first issue, appellant contends the trial court erred by failing to define the law-of-parties in the extraneous-offense section of the punishment charge. The trial court instructed the jury to consider evidence of an extraneous crime or bad act if the crime or bad act was "shown by the State beyond a reasonable doubt to have been committed by the defendant *or is one for which the defendant could be held criminally responsible*." (emphasis added). According to appellant, the jury could have improperly found he was responsible for the extraneous offenses because the phrase "criminally responsible" was not defined in the charge. The phrase "criminally responsible" is specifically defined in sections 7.01 and 7.02 of the Penal Code. Tex. Penal Code Ann. §§ 7.01, 7.02 (West 2011).

In *Haley v. State*, the court of appeals determined that the trial court erred by failing to define the law-of-parties in the extraneous-offense section of the punishment charge. 113 S.W.3d 801, 810–14 (Tex. App.—Austin 2003), *aff'd*, 173 S.W.3d 510 (Tex. Crim. App. 2005). The Court of Criminal Appeals did not consider whether the court of appeals erred by holding that the trial court should have included an instruction or definition

regarding the law of parties. *Haley v. State*, 173 S.W.3d 510, 514–15 (Tex. Crim. App. 2005). However, the court did determine that an extraneous bad act, proved beyond a reasonable doubt to be attributable to the defendant, is admissible, regardless of whether the act amounts to an offense under the Penal Code:

> [S]everal principles are apparent from article 37.07 § 3(a)'s text. First, § 3(a) does not contemplate any significant distinction between the terms "bad act" or "extraneous offense." The statute expressly states "evidence of an extraneous crime or bad act . . . to have been committed by the defendant or for which he could be held criminally responsible." Under this statute, it is irrelevant whether the conduct the offering party is attempting to prove is, or can be characterized, as an offense under the Texas Penal Code. *The inclusion of acts rising to the level of criminal responsibility and acts appropriately labeled "bad" in the statute's language make it clear that the act's nomenclature does not place each on a separate path towards admissibility*.
>
> Second, the statutorily imposed burden of proof beyond a reasonable doubt does not require the offering party to necessarily prove that the act was a criminal act or that the defendant committed a crime. Before the jury can consider this evidence in assessing punishment, *it must be satisfied beyond a reasonable doubt that the acts are attributable to the defendant*. We interpret the statute to require the burden of proof to be applied to a defendant's involvement in the act itself, instead of the elements of a crime necessary for a finding of guilt.
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> Third, the statute's plain language is in harmony with the nature and general characteristics of punishment evidence. By holding that a jury must find [the defendant] guilty of murder as a party to the offense, the Court of Appeals equates the role of punishment evidence with evidence proffered in the guilt-innocence phase. Unlike the guilt-innocence phase, the question at punishment is not whether the defendant has committed a crime, but instead what sentence should be assessed. Whereas the guilt-innocence stage requires the jury to find the defendant guilty beyond a reasonable doubt of each element of the offense, the punishment phase requires the jury only find that these prior acts are attributable to the defendant beyond a reasonable doubt.

Id. (emphasis added) (citations omitted). Thus, extraneous offenses and bad acts should not be treated differently when a trial court determines admissibility or when a jury determines whether the conduct is attributable to the defendant. This principle means a

defendant may be found "criminally responsible" for an extraneous criminal offense or bad act if the State proves the criminal offense or bad act is attributable to the defendant beyond a reasonable doubt. Therefore, the trial court was not required to include the definition of "criminally responsible" from sections 7.01 and 7.02 when charging the jury on extraneous offenses and bad acts during the punishment phase. *Cf. Hanson v. State*, 269 S.W.3d 130, 133–34 (Tex. App.—Amarillo 2008, no pet.) ("When an extraneous bad act is admitted for consideration during the punishment phase, the jury is not required to assess whether a statutory crime occurred; rather, its obligation is to determine, beyond a reasonable doubt, whether that appellant was involved in the bad act being offered as evidence."). Accordingly, we overrule appellant's first issue.

B. Sufficiency of evidence supporting extraneous offenses and bad acts

In his second issue, appellant contends the State failed to prove the extraneous offenses and bad acts beyond a reasonable doubt. We construe this contention as a challenge to legal sufficiency of the evidence supporting extraneous offenses. Although courts of appeals review sufficiency of the evidence supporting a conviction, they do not review sufficiency of evidence supporting an extraneous offense presented during a punishment hearing; instead, courts of appeals construe such arguments as a challenge to admission of the extraneous-offense evidence. *See Malpica*, 108 S.W.3d at 379; *Thompson v. State*, 4 S.W.3d 884, 886 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).[1]

[1] Appellant argues that *Thompson* and *Malpica* conflict with the Court of Criminal Appeals's decision in *Haley*, 173 S.W.3d 510. According to appellant, in *Haley*, the court of appeals determined the evidence was insufficient to support a finding that the defendant was a party to an extraneous murder. Appellant contends the Court of Criminal Appeals implicitly approved of the court of appeals's review of the sufficiency of the evidence supporting the extraneous murder because the high court did not expressly disapprove of such review. Although we do not agree that lack of the Court of Criminal Appeals's disapproval of a court of appeals's action should be interpreted as implicit approval of the action, appellant's reliance on *Haley* is nevertheless misplaced: the court of appeals did not conduct a legal-sufficiency review of the evidence supporting the extraneous offense; instead, it determined that the evidence was insufficient to connect the defendant to the offense and, therefore, the trial court erred by admitting the evidence over the defendant's objection. *Haley*, 113 S.W.3d at 810–13.

Having determined appellant waived any error relative to the trial court's admission of extraneous-offense evidence, we overrule his second issue.

C. Notice of extraneous offenses

In his third issue, appellant contends the State failed to provide timely notice of its intent to present evidence pertaining to extraneous offenses appellant was allegedly planning to commit before he was arrested. "On timely request of the defendant, notice of intent to introduce evidence [of extraneous offenses or bad acts] shall be given in the same manner required by Rule 404(b)." Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g). Appellant timely requested notice of any extraneous-offense evidence the State it intended to present during the punishment hearing. However, appellant did not object on the basis of lack of notice when the State introduced evidence regarding the extraneous offenses in question. Accordingly, appellant waived any lack of notice relative to these extraneous offenses. *See* Tex. R. App. P. 33.1(a); *Wooden v. State*, 929 S.W.2d 77, 79 (Tex. App.—El Paso 1996, no pet.).

D. Assistance of counsel

In his final issue, appellant contends his counsel was ineffective because he failed to object to the trial court's admission of extraneous-offense evidence. To prevail on an ineffective-assistance claim, the appellant must prove by a preponderance of the evidence that his trial counsel's representation was deficient because it fell below the standard of prevailing professional norms. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We begin with the strong presumption that defense counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Cadoree v. State*, 331 S.W.3d 514, 527 (Tex. App.—Houston [14th Dist.] 2011, no pet.). To overcome the presumption, an "allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814 (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). When there

is no record relative to counsel's decisions and actions, an allegation of ineffective assistance often lies beyond effective appellate review. *Cadoree*, 331 S.W.3d at 527. However, counsel's performance may fall below an objective standard of reasonableness as a matter of law when his conduct is not justifiable as reasonable trial strategy. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). Our review of defense counsel's conduct, however, must be highly deferential, and we should avoid the deleterious effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). We should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

In the present case, appellant did not file a motion for a new trial, and there is nothing in the record that explains why counsel failed to object or request a preliminary hearing regarding whether extraneous-offense evidence was admissible. When the record is silent, we will not speculate about trial counsel's strategy or reasoning to find counsel ineffective. *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Additionally, this case does not present a situation in which no reasonable trial strategy would justify counsel's failure to object to the extraneous-offense evidence. We do not know whether counsel was aware of the extraneous offenses prior to trial, or whether he reasonably believed the State had sufficient evidence to prove, beyond a reasonable doubt, appellant committed the offenses. Further, counsel actually referred to the extraneous-offense evidence during the punishment hearing. Counsel argued (1) the torn bandana found in appellant's car at the time of his arrest supports a conclusion that he was gainfully employed as a construction worker, (2) no weapons or burglary tools were found in appellant's vehicle at the time of his arrest, and (3) the evidence did not connect appellant to the "drive-by shooting," but supports a conclusion that another person was the shooter. Accordingly, notwithstanding the severity of appellant's seventy-five-year sentence, we conclude the record does not affirmatively demonstrate counsel was

ineffective by failing to object to admission of extraneous-offense evidence during the punishment hearing. We overrule appellant's fourth issue.

The trial court's judgment is affirmed.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Anderson, Seymore, and McCally.
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