

Affirmed and Memorandum Opinion filed March 3, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00253-CR

DELEON ARB HORTON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1157888**

MEMORANDUM OPINION

Appellant Deleon Arb Horton challenges his sentence for aggravated robbery on the grounds that the trial court abused its discretion by admitting during the punishment phase of his trial (a) testimony regarding his membership in a gang and (b) photographs of tattoos indicating his membership in the gang. We affirm.

BACKGROUND

A jury convicted appellant of the aggravated robbery of a cell phone store. During the punishment phase of his trial, appellant stipulated to a lengthy criminal background:

State's Exhibit No. 11 is a Stipulation of Evidence that was signed by the defendant . . . stipulating to his prior criminal convictions.

First being he is the same person who was convicted of the misdemeanor offense of possession of marijuana on June 19th of 1995 in Harris County; that he is the same person who was convicted of the misdemeanor offense of evading arrest on June 19th of 1995 in Harris County, Texas; that he's the same person who was convicted of the misdemeanor offense of possession of marijuana in July 17th of 1995 in Fort Bend County, Texas; that he is the same person that was convicted of the felony offense of burglary of a habitation on November 6th of 1995 in Fort Bend County, Texas; that he is the same Deleon Horton who was convicted of the offense of evading arrest on November 13th, 1995, in Fort Bend County, Texas; that he is the same person that was convicted of the misdemeanor offense of evading detention on April 18th of 2002 in Harris County, Texas; that he is the same person that was convicted of the misdemeanor offense of possession of marijuana on April 18th of 2002 in Harris County, Texas; he's the same person that was convicted of the felony offense of delivery of a controlled substance on September 4th of 2002 in Harris County, Texas; the same person that was convicted of the misdemeanor offense of theft by check in March of 2003 in Harris County, Texas; the same person convicted of driving while license suspended on April 9th 2003, Harris County, Texas, the same person convicted of possession of a controlled substance on June 12, 2003 in Harris County, Texas; the same person convicted of the felony of delivery of a controlled substance on April 27th of 2004 in Harris County, Texas; the same person convicted of the felony offense of delivery of a controlled substance on July 19th, 2004 in Harris County, Texas; the same person convicted of the felony offense of delivery of a controlled substance on May 11th of 2005 in Harris County, Texas; the same person convicted of the felony offense of criminal mischief on May 11th, 2005 in Harris County, Texas; the same person convicted of the felony of possession of a controlled substance on November 17th, 2005 in Harris County, Texas; the same person convicted of the felony of possession of a controlled substance on June 13th, 2006 in Harris County, Texas; the same person convicted of the misdemeanor theft on April 3rd of 2007 in Harris County, Texas; and the same person convicted of the felony of possession of a controlled substance on June 29th of 2007 in Harris County, Texas.

Appellant's records from the Harris County Sheriff's Office Disciplinary Section were also introduced into evidence. These records reflected that appellant had refused to obey

orders and had been involved in fighting, stealing, assaults on other inmates, and other disruptive behavior during his time in jail. Further, several Houston Police Department officers described a drug purchase that they observed appellant commit in March 2008.

Harris County Sheriff's Department ("HCSD") Deputy Michael Squyres, a member of the HCSD's Gang Suppression Unit, testified over appellant's objection. Squyres described his duties in the Gang Suppression Unit, as well as his training and experience in investigating and documenting criminal street gangs. Squyres testified that he was familiar with a criminal street gang called the "Five Deuce Hoover Crips." He opined that the Five Deuce Hoover Crips is "a for-profit criminal street gang" with a purpose of "mak[ing] money for the people who are members of that gang." Squyres testified that he met with appellant and took several photographs of appellant and his tattoos. According to Squyres, several of appellant's tattoos indicated that he was a member of the Five Deuce Hoover Crips. Four photographs depicting specific tattoos on appellant's arms and hands were admitted over appellant's objection. Squyres described these tattoos as follows:

Thirty-seven is the top of the right hand. It has the word "Gorilla," another hat on top of a face of a gorilla with the number "5" surrounded by 4 dollar signs.

...

Five Deuce Hoover Crips sometimes refer to themselves as gorillas. We have a subset of them. They call themselves Suicidal Young Gorillas. So by looking at the tattoos you see "Gorilla 4 Real," and then you see, of course, the number "5" and "2" on the tops of the hand, so Five Deuce.

...

These are the backs of the arm, the left arm and the right arm. So if you saw the individual walking away from you, you would be reading from his left to his right. It's the Roman Number V and the Roman Number II.

...

The five, two, especially done in Roman numbers is very commonly used by Five Deuce Hoover Crips to show - - so other people can see it. And it's on the backs of the arm so as the person is walking away you will readily see the five and the two.

Squyres testified that, in his opinion, appellant is a member of the Five Deuce Hoover Crips.

Appellant's father testified regarding appellant's family; he explained that neither of his other two children had gotten into any trouble. According to appellant's father, appellant started having problems with drugs when he was younger. Appellant's father also testified that he had heard "people for the last few years talk about gangs[.]"

After hearing all the punishment evidence, the jury sentenced appellant to thirty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal timely followed.

ANALYSIS

A. Standard of Review

Evidence of a defendant's membership or association with a gang is admissible at the punishment phase of trial. *See* Tex. Code Crim. Pro. art. 37.07 § 3(a)(1) (West 2009); *Jones v. State*, 944 S.W.2d 642, 652–53 (Tex. Crim. App. 1996); *Garcia v. State*, 239 S.W.3d 862, 866–67 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Ho v. State*, 171 S.W.3d 295, 305 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). To present testimony of gang reputation there must be evidence of the defendant's gang membership. *Beasley v. State*, 902 S.W.2d 452, 457 (Tex. Crim. App. 1995) (en banc) (plurality op.). "For the jury to assess a defendant's character based on his gang membership, not only should the jury know of the defendant's gang membership, but also of the activities and purposes of the gang to which he belongs." *Anderson v. State*, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995) (en banc) (plurality op.).

Although evidence regarding a defendant's gang membership is relevant during the punishment phase, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Tex. R. Evid. 403. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Jones*, 944 S.W.2d at 652. Because all evidence is likely prejudicial to one party or another, this rule of evidence requires exclusion only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value. *Id.* at 652–53. Questions of the admissibility of evidence under Rule 403 are assigned to the trial court and are reviewable only for an abuse of discretion. *Id.* at 652.

B. Admission of Testimony and Photographs Reflecting Gang Involvement

In two issues, appellant asserts that the trial court abused its discretion by admitting Squyres' testimony and the photographs described above because the evidence failed to (a) sufficiently establish appellant's status as a present member of the Five Deuce Hoover Crips and (b) establish the specific illegal activities in which the gang participated. Appellant further complains that the probative value of this evidence was clearly outweighed by the danger of unfairly prejudicing and misleading the jury.

Squyres' expert testimony that certain of appellant's tattoos were common to members of the Five Deuce Hoover Crips provided sound evidence of appellant's gang membership. *See Beasley*, 902 S.W.2d at 454 (membership was established by defendant's wearing of gang colors and his association with gang members rather than by witness testimony that appellant was in gang); *Anderson*, 901 S.W.2d at 948 (police officer testified that he knew defendant was gang member because he was in company of gang members and wore gang tee shirt). The evidence presented by Squyres' testimony also established that the Five Deuce Hoover Crips is a *criminal* street gang with a purpose of engaging in activities to make money for its members. Although the type of

criminal activities was not specified, the jury could infer from Squyres' testimony the following three things: (1) appellant is or was a member of the Five Deuce Hoover Crips; (2) the Five Deuce Hoover Crips are a criminal street gang; and (3) the gang's purpose is to engage in criminal activities that would result in making money for its members. Thus, the evidence presented through Squyres, as an expert in criminal street gangs, meets the requirements set out in *Beasley* and *Anderson*. See *Beasley*, 902 S.W.2d at 457; *Anderson*, 901 S.W.2d at 950. And even if appellant were no longer affiliated with the gang at the time he committed this offense, evidence that he was at any time a gang member is relevant and admissible as character evidence during punishment. See *Ho*, 171 S.W.3d at 305. Accordingly, we cannot say this evidence was either irrelevant or unfairly prejudicial. Thus, the trial court did not abuse its discretion in admitting this evidence during the punishment phase. We overrule appellant's two issues.

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.

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