Affirmed and Memorandum Opinion filed April 5, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00917-CR

ANDREW GREGORY EALY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1385088

M E M O R A N D U M O P I N I O N

Andrew Ealy appeals his murder conviction. *See* Tex. Penal Code § 19.02(b) (Vernon 2011). In two issues, appellant claims the trial court erred in admitting testimony from a jailhouse informant because it was not relevant and was more prejudicial than probative. We affirm.

BACKGROUND

Appellant and his friend, the complainant Robert Deberry, were homeless.

On April 23, 2013, they were living in downtown Houston in the vicinity of a storage facility used for a construction site. Also present at that location were Travis Johnson, Jonathan Urbina, and appellant's girlfriend. Deberry was intoxicated and smoking a joint of synthetic marijuana, which he shared with the group. Urbina testified that Deberry became angry and accused appellant of finishing the last of the joint. Deberry began pushing appellant and yelling, and the two friends began to grapple on the floor. No punches were exchanged as the two grappled; neither combatant sustained significant injuries. Appellant and his girlfriend then left the storage facility and went to sleep in a nearby park. Johnson and Urbina remained at the storage facility with Deberry.

Appellant returned to the storage facility shortly after the fight to retrieve a pillow and other belongings. Urbina testified that Deberry became angry when appellant reappeared; stated that he "wanted to fight fair and square" with appellant this time; and pushed appellant. Appellant stated he wanted to collect his property and did not want to fight Deberry.

Deberry pushed appellant into a hallway leading to the storage facility exit. Deberry continued yelling and attempted to pick up a wooden pallet and throw it at appellant. Deberry and appellant were standing approximately six feet from each other. Appellant testified that Deberry continued to antagonize appellant as appellant tried to leave the area. Nothing blocked his exit. Appellant testified that in response to Deberry's conduct, he picked up a brick and threw it at Deberry as appellant left the area. The brick struck Deberry in the head causing him to fall to the ground. Johnson and Urbina witnessed the incident.

Johnson left to find emergency assistance while Urbina stayed and attempted to help Deberry. Paramedics arrived shortly after Deberry was struck with the brick, but he died without regaining consciousness. The medical examiner

determined Deberry died from blunt force trauma resulting in a depressed skull fracture and brain laceration.

Detective Rexroad of the Houston Police Department's homicide division arrived on the scene and identified two witnesses, Urbina and Johnson. They were transported to the homicide division for interviews. Appellant was arrested a few hours later and brought in for questioning.

In his videotaped interview with police, appellant stated he did not know if the brick struck Deberry because appellant threw it as appellant was leaving the storage facility. Appellant stated he threw the brick in an effort to make Deberry leave him alone, and also stated: "I didn't throw it that hard, I know I didn't." He further stated he was unaware of Deberry's death until a construction worker told him about a "guy dead in the park." Appellant expressed dismay, shock, and confusion as he talked about learning of Deberry's death and his role in it. Appellant said "I love [Deberry] to death" and "that is why I am so flustered and crazy about [Deberry's death] because we are . . . friends." Appellant stated this was the first time he and Deberry had a physical altercation, and expressed astonishment and confusion about Deberry's death.

Appellant was placed in the Harris County Jail, where he remained until he was able to post bond on March 26, 2014. While in custody at the Harris County Jail, appellant spoke with inmate Noland Gates regarding the incident.

Appellant was indicted by the Grand Jury as follows:

> ANDREW GREGORY EALY, hereafter styled the Defendant, heretofore on or about APRIL 23, 2013, did then and there unlawfully, intentionally and knowingly cause the death of ROBERT DEBERRY, hereinafter called the Complainant, by STRIKING THE COMPLAINANT WITH A BRICK.
>
> It is further presented that in Harris County, Texas, ANDREW

> GREGORY EALY, hereinafter styled the Defendant, heretofore on or about APRIL 23, 2013, did then and there unlawfully intend to cause serious bodily injury to ROBERT DEBERRY, hereinafter called the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely BY STRIKING THE COMPLAINANT WITH A BRICK.

At trial, the State sought to introduce testimony from Gates regarding appellant's statements to Gates while they both were in custody.

The trial court conducted a hearing outside the jury's presence to determine the admissibility of Gates's testimony. *See Jackson v. Denno*, 378 U.S. 368, 393 (1964).

The following colloquy occurred between the State and Gates during the hearing.

> Q. Did he ever indicate to you that he was in fear that he was acting in self-defense?
>
> A. No. He wasn't [sic] in self-defense. He went back to do what he done, you know.
>
> Q. Did he ever show any kind of remorse or regret for what he had done?
>
> A. No.
>
> Q. Did he ever say anything else about the individual that he hit with the brick?
>
> A. Just that he know his mother was an attorney and his daddy was I think a police at the jail and that his dad was messing with him or something like that.
>
> Q. Did he seem proud of the fact that the person he hit was the son of a police officer?
>
> A. It was more of a laughing matter.

During the hearing, appellant objected to this testimony under Texas Rules of

Evidence 401 and 403. The trial court overruled the objection, having determined the testimony was relevant and more probative than prejudicial.

Gates testified as follows in the jury's presence during the trial's guilt-innocence phase.

> Q. Did he ever indicate to you that he was acting in self-defense?
>
> A. More or less he was just angry.
>
> Q. Did he ever show any kind of regret or remorse about it?
>
> A. He acted like he didn't give a damn. He laughed about it.
>
> Q. He laughed about it?
>
> A. Yeah. He laughed about it.
>
> Q. Did he say anything to you, anything else about this victim?
>
> A. The only thing that he said that the guy's mother was, if I'm not mistaken, a white lady that was an attorney. And that the dad was black and he was an officer at the jail that he had seen him in the hallway sometime.
>
> Q. What was his thoughts and feelings about that?
>
> A. Just didn't give a damn. Act like they think he was something special because his daddy was a cop.

The jury convicted appellant of the charged offense. At the punishment phase, appellant testified he told Gates he was charged with murder but never discussed the incident with Gates in detail. Appellant was sentenced to 20 years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

ANALYSIS

Appellant contends on appeal the trial court erred in overruling his objection to Gates's testimony during the guilt-innocence phase of trial addressing (1) appellant's perceived lack of remorse over Deberry's death; and (2) whether

appellant was acting in self-defense.

I. Relevance

A. Standard of Review

We review challenges to the admission of evidence under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990); *McNeil v. State*, 398 S.W.3d 747, 756 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). A trial court acts within its discretion if the challenged ruling falls within the "zone of reasonable disagreement." *Montgomery*, 810 S.W.2d at 391-92.

Generally, all relevant evidence is admissible. *See* Tex. R. Evid. 402. Evidence need not by itself prove or disprove a particular fact to be relevant. *Ex parte Smith*, 309 S.W.3d 53, 61 (Tex. Crim. App. 2010); *see also Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004). Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. *See* Tex. R. Evid. 401. Questions of relevance should be left to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion. *Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993) (citing *Montgomery*, 810 S.W.2d at 391).

B. Relevance of Remorse Testimony During Guilt-Innocence Phase

The main focus of appellant's complaint is the admission of testimony from Gates during the guilt-innocence phase regarding appellant's lack of remorse. Appellant argues this testimony was admissible, if at all, only during the punishment phase.[1] The State argues that Gates's testimony is relevant in

[1] The cases relied on by appellant to support his argument are distinguishable. These cases

determining appellant's intent and in assessing the credibility of his recorded statement.

The elements of the charged offenses are as follows: a person commits an offense under section 19.02(b)(1) if he (1) intentionally, or (2) knowingly, (3) causes the death of an individual. *See* Tex. Penal Code § 19.02(b)(1). A person commits an offense under section 19.02(b)(2) if he (1) intends to cause serious bodily harm, and (2) commits an act clearly dangerous to human life (3) that causes the death of an individual. *See* Tex. Penal Code § 19.02(b)(2).

Appellant challenges the admission of Gates's testimony at trial that appellant "acted like he didn't give a damn" and "laughed about it." In all murder prosecutions, both the state and the defendant shall be permitted to offer testimony regarding "all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." Tex. Code Crim. Proc. Ann. art. 38.36(a) (Vernon 2005). Evidence admissible under Article 38.36 still must satisfy the rules of evidence. *See Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999).

Evidence pertaining to the accused's intent is admissible. *See Morgan v. State*, 692 S.W.2d 877, 880 (Tex. Crim. App. 1985). Evidence of remorse is relevant because it goes to the element of intent. *Darby v. State*, 154 S.W.3d 714, 721 (Tex. App.—Fort Worth 2004, pet. ref'd) (citing *Hernandez v. State*, 819

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address a prosecutor's comments on the defendant's failure to testify at the guilt-innocence phase of trial and the exclusion of hearsay testimony regarding a defendant's remorse. *See Swallow v. State*, 829 S.W.2d 223, 225-26 (Tex. Crim. App. 1992), *overruled by Randolph v. State*, 353 S.W.3d 887 (Tex. Crim. App. 2011); *Owen v. State*, 656 S.W.2d 458, 460 (Tex. Crim. App. 1983); *Lewis v. State*, 815 S.W.2d 560, 567-68 (Tex. Crim. App. 1991).

S.W.2d 806, 810 (Tex. Crim. App. 1991). To determine culpability for an offense, the jury is entitled to consider events that occurred before, during, and after the commission of the offense. *Mouton v. State*, 923 S.W.2d 219, 223 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (citing *Henderson v. State*, 825 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1992, pet. denied)). A culpable mental state is almost always proven through circumstantial evidence. *Id.* (citing *Henderson*, 825 S.W.2d at 749). The jury must review all of the evidence and may reasonably conclude from the circumstantial evidence that the requisite mental state existed. *Id*.

The trial court acted within its discretion under Rule 401 in concluding that the challenged testimony was relevant and admissible during the trial's guilt-innocence phase because it tended to show the condition of appellant's mind when he threw the brick at Deberry. *See* Tex. Code Crim. Proc. Ann. art. 38.36(a). This evidence tended to show appellant's intent to cause bodily injury to Deberry; it also allowed the jury to assess appellant's statements during his videotaped interview that he did not throw the brick "that hard" and threw it only to make Deberry leave him alone. Gates's testimony reasonably could have been understood as rebutting appellant's statements that he lacked the intent to cause Deberry serious bodily injury because they were friends, and that he did not intend for the brick to strike Deberry. The trial court acted within its discretion in concluding that Gates's testimony addressed appellant's intent and tended to make appellant's version of events less probable. *See* Tex. R. Evid. 401. Therefore, the trial court did not abuse its discretion by finding Gates's testimony to be relevant and admissible. We overrule appellant's first issue. *See Moreno*, 858 S.W.2d at 463; *Montgomery*, 810 S.W.2d at 391.

II. Balance of Probative Value Versus Undue Prejudice Under Rule 403

In his second issue, appellant contends the trial court erred in overruling his Rule 403 objection to Gates's testimony. Appellant argues that this evidence regarding self-defense and lack of remorse was unfairly prejudicial because of its great potential to excite and distract the jury. Appellant also contends this evidence was unnecessarily cumulative.

A. Standard of Review

We review the trial court's decision to admit or exclude evidence under Texas Rule of Evidence 403 for abuse of discretion. *Rodriguez v. State*, 203 S.W.3d 837, 841 (Tex. Crim. App. 2006); *Burton v. State*, 230 S.W.3d 846, 849 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Rule 403 authorizes a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, tendency to mislead the jury, undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403.

The trial court is best situated to determine whether evidence should be admitted or excluded. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). The balance between probative value and the potential for prejudice "is always slanted toward admission, not exclusion, of otherwise relevant evidence." *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). Unless the trial court's determination is so clearly wrong as to lie outside the zone within which reasonable persons might disagree, we must uphold its ruling. *Id.* at 343-44; *Hartis v. State*, 183 S.W.3d 793, 801-02 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

B. Probative Value Versus Prejudice

Under Rule 403, the reviewing court must consider (1) the inherent probative force of the proffered item of evidence; (2) the proponent's need for that evidence; (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. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

The first factor "asks how compellingly the evidence serves to make a fact of consequence more or less probable." *Manning v. State*, 114 S.W.3d 922, 927 (Tex. Crim. App. 2003). Appellant argues that Gates's testimony regarding remorse and self-defense was not probative of the charged offense. As previously stated, we conclude that Gates's testimony regarding appellant's lack of remorse was relevant and probative of his intent. Additionally, appellant raised the issue of self-defense at trial and the jury was instructed on self-defense in the jury charge. Therefore, the State was entitled to introduce evidence rebutting appellant's defensive theory. *Webb v. State*, 995 S.W.2d 295, 298-99 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding as a general rule, the State is entitled to present on rebuttal any evidence that tends to refute a defensive theory and the evidence introduced to support that theory). The trial court acted within its discretion in concluding that Gates's trial testimony served to make a fact of consequence — appellant's claim of self-defense — less probable than it would be without this evidence. The first factor weighs in favor of admitting the evidence.

The second and third factors address the State's need for the evidence and

any tendency of the evidence to suggest a decision on an improper basis. *Gigliobianco*, 210 S.W.3d at 641-42. Evidence having a tendency to suggest decision on an emotional or other improper basis is considered to be unfairly prejudicial. *Id.*

Appellant's state of mind, intent, and credibility were in issue at trial. Only Gates and appellant were able to offer testimony about appellant's state of mind at the time of the incident. Therefore, the trial court acted within its discretion in concluding that the State established a need for Gates's testimony.

This need must be balanced against any tendency of the evidence to suggest decision on an improper basis. *Id.* Appellant argues Gates's testimony was inflammatory and served only to inflame the jury's emotions. While this testimony had the potential to appeal to the jury's emotions, it was presented to challenge the truthfulness of appellant's statements to police and contradict appellant's claims regarding his lack of intent to cause bodily injury to Deberry. The trial court acted within its discretion in determining its probative force was not substantially outweighed by the danger of unfair prejudice. The trial court reasonably could have concluded that the evidence did not have a tendency to suggest decision on an improper basis because it related directly to an element of the charged offense — appellant's intent to cause bodily injury to Deberry. Therefore, the second and third factors weigh in favor of admitting the testimony. *See Distefano v. State*, No. 14-14-00375-CR, 2016 WL 514232, at *4 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet. h.) (trial court reasonably could have concluded evidence did not tend to suggest decision on an improper basis or distract the jury from main issues because the evidence related directly to an element of the charged offense — appellant's intent to induce complainant to engage in sexual conduct) (citing *Gigliobianco*, 210 S.W.3d at 642).

The fourth factor focuses on the evidence's tendency to confuse or distract the jury. *Gigliobianco*, 210 S.W.3d at 642. Gates's testimony regarding self-defense goes to the defensive theory appellant raised at trial. Appellant testified about his lack of intent to cause Deberry bodily injury, an element of the charged offense. Gates's testimony regarding appellant's lack of remorse goes to appellant's credibility as a witness, which in turn helps the jury determine the amount of weight to be given to his testimony. The trial court reasonably could have concluded the evidence did not have a tendency to confuse or distract the jury from the main issues in the case because the evidence relates to an element of the charged offense, and to a defensive theory presented by appellant. *See Distefano*, 2016 WL 514232, at *4 (citing *Gigliobianco*, 210 S.W.3d at 642). Because the trial court reasonably could have found the complained-of testimony did not have the potential to confuse or distract the jury from main issues, this factor weighs in favor of admission.

The fifth factor focuses on the tendency of the evidence to be given undue weight by a jury not equipped to evaluate the probative force of the evidence. *Gigliobianco*, 210 S.W.3d at 642. *Gigliobianco* emphasizes that "misleading the jury" refers to a tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds. *Id.* at 641. Appellant argues this testimony had great potential to impress the jury in an irrational way by exciting the jury's emotions against appellant. However, appellant does not argue that the testimony tends to mislead the jury on any non-emotional basis.

The nature of the complained-of evidence does not lend itself to artificial weight. The circumstances under which Gates met appellant were disclosed; his testimony was brief, and he was subject to cross-examination. Additionally, the jury requested several pieces of evidence during deliberations, including

appellant's videotaped interview with police and the audio recording of Johnson's interview with police, but it did not request Gates's testimony. Because there is no indication the jury was misled by Gates's testimony, this factor weighs in favor of admission.

The sixth factor in a Rule 403 analysis is the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *See id.* at 642. Gates's testimony was used to address appellant's credibility regarding his state of mind, establish his intent at the time of the incident and rebut his defensive theory. No other witnesses were able to testify on these matters, all of which were in issue at trial. Therefore, the trial court reasonably could have concluded that Gates's testimony was not cumulative. Additionally, we look at the amount of time which was dedicated to developing the complained of evidence. *See id*. Our review of the record shows that less than 11 percent of the time at trial was dedicated to establishing Gates's testimony.[2] This is a relatively small percentage of the total time spent developing testimony. *See Toliver v. State*, 279 S.W.3d 391, 398-99 (Tex. App.—Texarkana 2009, pet. ref'd) (sixth factor weighed against admission where about 23 percent of direct testimony concerned extraneous offenses). Because the testimony was not cumulative and an inordinate amount of time was not spent on developing the evidence, this factor weighs in favor of admission.

We conclude the trial court acted within its discretion in determining that the probative value of the complained of evidence was not substantially outweighed by its prejudicial effect. *See Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App.

[2] A total of 197 pages were dedicated to testimony, not including appellant's 40-minute video recording of his interview with police. Of these 197 pages, 22 were dedicated to developing Gates's testimony.

2009) ("[Rule 403] envisions exclusion of evidence only when there is a 'clear disparity between the degree of prejudice of the offered evidence and its probative value.'") (quoting *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001)). Consequently, we reject the contention that the trial court erred by admitting the challenged evidence.

Even assuming for argument's sake that admission of the challenged evidence was erroneous, as discussed below we conclude that any error was harmless.

C. Harmless Error

Appellant contends he was harmed by the trial court's erroneous admission of Gates's testimony. Specifically, appellant asserts the lack of self-defense evidence forced the jury to make a credibility determination between the testimony of Urbina and Johnson. Appellant argues that he was unfairly prejudiced by the admission of Gates's testimony because it undercut the credibility of Johnson, his primary witness. Assuming for argument's sake that the trial court erred by admitting Gates's testimony regarding lack of remorse and self-defense, we conclude that the asserted error was harmless.

Error in admitting irrelevant evidence is non-constitutional error and is reviewed under Texas Rule of Appellate Procedure 44.2(b). *See Casey v. State*, 215 S.W.3d 870, 884-85 (Tex. Crim. App. 2007). Rule 44.2(b) provides that an appellate court must disregard a non-constitutional error that does not affect a criminal defendant's "substantial rights." Tex. R. App. P. 44.2(b); *Casey*, 215 S.W.3d at 884-85 (citing *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004)). An error affects a defendant's substantial rights when the error has 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). A criminal conviction will

not be reversed for non-constitutional error if the appellate court, after examining the record as a whole, "has fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *see Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

The evidence introduced at trial included the testimony of Urbina along with Johnson's and appellant's recorded statements to the police. Urbina testified that Deberry was unarmed when appellant hit him with the brick. Urbina also testified that appellant took a step towards Deberry and then swung and hit Deberry with the brick. In his recorded statement to the police, appellant stated that Deberry had no weapons when appellant threw the brick and his exit was not blocked. Johnson testified at trial that Deberry had a weapon, a partial piece of pallet, at the time appellant threw the brick. The State impeached Johnson's testimony through his recorded statement to the police in which he stated Deberry did not have a weapon of any kind when Deberry was struck with the brick. Ample evidence outside of Gates's testimony supported the jury's verdict.

After reviewing the record as a whole, we cannot conclude Gates's testimony affected a substantial right of the appellant. *See Garcia*, 126 S.W.3d at 927 (holding an appellate court may not reverse for non-constitutional error if, after examining the record as a whole, the court has fair assurance the error did not have a substantial and injurious effect or influence in determining the jury's verdict). Therefore, the asserted error is not reversible under Rule 44.2(b). Accordingly, we overrule appellant's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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