Affirmed and Memorandum Opinion filed May 19, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00011-CR
NO. 14-15-00012-CR

HENRY TOBAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause Nos. 13CR2981 and 13CR2982

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

A jury found appellant Henry Tobar guilty of robbery and violation of a protective order by assault. In two issues, appellant contends the trial court erred by (1) excluding police reports concerning appellant and the complainant Michelle Moreno and a complaint against Moreno for making a false report to a police officer; and (2) admitting expert testimony from a police officer due to a lack of qualifications and the unreliability of his methods. We affirm.

I. BACKGROUND

Appellant and Moreno were in a dating relationship. After the relationship ended, Moreno obtained a protective order because of appellant's stalking, harassment, abuse, and violence. Less than a month after Moreno obtained the protective order, appellant asked to watch Moreno's son while Moreno went to work.[1] Moreno agreed. When she returned from work, appellant left.

But appellant returned that night after 1:00 a.m. while Moreno was sitting outside her house. Moreno attempted to get inside her house, but appellant held the door open and went inside as well. They talked for thirty minutes to an hour. He wanted to get back together with her although he knew she was seeing someone else at the time. She told him "no." He was on his knees, begging and crying.

Moreno's cell phone vibrated, and appellant said something to the effect of "that must be him." Then appellant looked up and saw Moreno's necklace. He didn't recognize it and said something like "I bet you that he gave it to you." Appellant pulled the necklace off Moreno's neck, breaking the chain. Appellant also tried to take a ring off Moreno's finger.[2] She was clenching her fist so appellant could not take the ring.

"Things really got out of hand very quickly," Moreno testified. He hit her several times in the head, pulled out her hair, and threw a beer bottle at her. Moreno blacked out, and she awoke to appellant dragging her by one of her legs into the kitchen. She kicked and screamed, trying to break free. But he was too strong. He picked her up and dropped her on her head "up and down, up and down, up and down on the floor." He jabbed his knee in between her legs repeatedly and tried to take off her panties. She resisted, but he struck her in the

[1] Moreno had adopted her son by the time of trial. He is appellant's nephew's son.

[2] Moreno's new boyfriend had given her the ring.

eye. She felt a lot of pain like her eye was going to pop out. She asked him to stop and told him to "just take the ring and go." He took the ring and left. She called the police.

Appellant was in possession of the ring and necklace when he was arrested. Police officers interrogated him. He acknowledged that he was aware of the protective order and knew he was not supposed to be around Moreno. He claimed that Moreno voluntarily gave him the ring and necklace. He claimed that Moreno was the aggressor and was punching him. He denied punching Moreno. He claimed the injury to her eye occurred when he struck her with his arm or elbow while he was trying to leave the house and taking a chain lock off a door. He claimed that she broke a beer bottle on a computer, and a piece ricocheted and hit her in the head. He claimed that Moreno's lip became "busted" when they were wrestling on the ground.

At trial, the jury acquitted appellant of aggravated robbery but found him guilty of the lesser-included offense of robbery and the separate offense of violating a protective order by assault.[3] The robbery charge required the jury to find that appellant caused bodily injury to Moreno. The protective order charge required the jury to find that appellant committed family violence against Moreno, "to wit: assault."

Appellant pleaded true to two enhancements, and the trial court sentenced appellant to thirty years' confinement for the robbery and twenty years' confinement for the violation of a protective order.

[3] For the aggravated robbery charge, the jury was instructed to find appellant guilty if appellant "did then and there use or exhibit a deadly weapon, to-wit: a glass beer bottle." *See* Tex. Penal Code Ann. § 29.03(a)(2).

II. STANDARD OF REVIEW

Appellant's issues concern the admission and exclusion of evidence. We review both of these issues under the same standard of review: abuse of discretion. *See 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.*

III. EXTRINSIC EVIDENCE TO PROVE INTENT OR PLAN

In his first issue, appellant contends the trial court erred by excluding two police reports concerning Moreno (Defendant's Exhibits 2 and 3) and a complaint against Moreno for making a false report to a police officer (Defendant's Exhibit 4). Appellant contends this evidence was admissible to show Moreno's state of mind, intent, and plan to get appellant in trouble, citing Rule 404(b)(2) of the Texas Rules of Evidence. The State contends, among other things, that the trial court did not abuse its discretion because appellant did not comply with Rule 613 for the admission of extrinsic evidence to prove a witness's bias or interest. We agree with the State.[4]

A. The Evidence and Trial Proceedings

Defendant's Exhibit 2 purports to be an incident report prepared by Officer Jimmie Reynolds. It includes a narrative by Reynolds where the officer states, among other things, that Moreno said appellant approached her outside her house

[4] The State also contends that appellant failed to preserve error because appellant referred only to Rules 608 and 613 at trial and did not refer to Rule 404(b). Appellant did argue at trial, however, that the excluded evidence showed Moreo's "intent" and "scheme" to get appellant in trouble with the police and that the evidence was admissible even if it showed prior bad acts. For purposes of this opinion, we assume without deciding that appellant preserved error for this issue.

and attempted to prevent Moreno from leaving, so she threw hot coffee on him. Moreno wanted to press charges for criminal trespass.

Defendant's Exhibit 3 purports to be an incident report prepared by Officer J.R. Waggoner. It includes a narrative by Waggoner where the officer states, among other things, that he was attending court for a charge of assault for which Moreno was the offender and appellant was the victim.[5] The prosecutor dropped the assault charge because appellant did not show up to court. However, a warrant had been issued for Moreno's "false report," and Moreno was arrested that day.

Defendant's Exhibit 4 is a certified copy of an original complaint against Moreno for the offense of false report to a police officer. The complaint alleges that Moreno "did then and there, with intent to deceive, knowingly make to Officer J.R. Waggoner, a peace officer conducting a criminal investigation, a false statement, to-wit: that she had been assaulted by Henry Tobar, and the statement was material to the investigation in that Mr. Tobar was arrested for [assault causing bodily injury—family violence]."

At trial, Reynolds and Waggoner did not testify. Appellant sought to admit these documents through Detective Ernest Robles, the officer assigned to investigate the instant case.[6] As authority for admission, appellant cited Rule 613 of the Texas Rules of Evidence. The State argued, among other things, that an offense report was not the proper way to introduce evidence of specific instances of bad acts. The trial court sustained the State's objections, ruling that "[p]rior instances, parts of those reports are not admissible as direct questions of this witness at this time."

[5] Defendant's Exhibit 3 does not discuss the underlying facts of the assault charge against Moreno.

[6] Robles, however, testified outside the jury's presence that he did not look at other police reports from instances involving Moreno and appellant.

Appellant did not attempt to introduce any of these documents during Moreno's testimony, and appellant does not complain about the trial court preventing him from cross-examining Moreno on these topics.

B. Analysis

Generally, evidence of Moreno's false report against appellant and other statements that might indicate her bias against appellant or an intent to falsely accuse him would be admissible. The Texas Rules of Evidence do not contain a specific rule allowing for the admission of evidence concerning a witness's bias or motive to make a false accusation "maybe because the right to impeach a witness on these bases is so obvious." *Hammer v. State*, 296 S.W.3d 555, 567 (Tex. Crim. App. 2009). To the extent a rule governs, the Court of Criminal Appeals suggests we might "call this modus operandi evidence admissible under Rule 404(b)," which makes admissible evidence of other acts or wrongs to prove such matters as motive, intent, or scheme. *Id.* at 565. The chain of logic is as follows:

- The victim makes false accusations in certain circumstances and for certain reasons;
- Those circumstances and reasons are present in this case;
- Therefore, the victim made a false accusation in this case.

Id. Accordingly, "the rules of evidence do permit a witness to be cross-examined on specific instances of conduct when they are used to establish his specific bias, self-interest, or motive for testifying." *Id.* at 563.

Rule 613(b), however, "deals with *how* the witness may be examined concerning bias or interest and *when* extrinsic evidence of that bias or interest may

be admitted." *Id.* at 567; *see also* Tex. R. Evid. 613(b) (amended 2015).[7] Under Rule 613(b), "the opponent must first cross-examine the witness with the circumstances surrounding the bias, interest, or motive, and, if the witness denies the circumstances or the motive, the opponent may introduce extrinsic evidence to prove the motive or bias." *Hammer*, 296 S.W.3d at 563.

Contrary to Rule 613(b)'s requirements, appellant did not question Moreno about the potential bias or intent that appellant argued to the trial court was shown by the police reports and criminal complaint. Specifically, appellant did not cross-examine Moreno about her prior arrests for assaulting appellant or falsely reporting to a police officer that appellant had assaulted her.

The trial court recognized that the extrinsic evidence of Moreno's bias or motive was not admissible through "this witness [Robles] at this time." Because appellant did not comply with Rule 613(b), the trial court did not abuse its discretion by excluding the extrinsic evidence of Moreno's potential state of mind, intent, or plan to get appellant in trouble.

Appellant's first issue is overruled.

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[7] At the time of appellant's trial, Rule 613(b) appeared as follows:

> In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. . . . If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted.

Tex. R. Evid. 613(b) (amended 2015).

IV. EXPERT TESTIMONY

In his second issue, appellant contends the trial court erred by admitting expert testimony from Detective Robles about how he thought Moreno received her injuries. Appellant argues that Robles was not qualified and his methods were not reliable. *See, e.g., Shaw v. State*, 329 S.W.3d 645, 655 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (noting that an expert must be qualified and his or her testimony must be reliable). Specifically, appellant complains of the following testimony:

1. "Detective Robles was asked to demonstrate Tobar's account of how the injury to Moreno's left eye occurred. He testified as to what he thought 'probably' would have happened to Moreno given Tobar's description of the events—that she would have been struck on her shoulder or right side of the face—and stated his conclusion that his account was not consistent with Moreno's injury." (citing Reporter's Record vol. 6, p. 87–88).
2. "He further stated that Tobar was right handed and that fact 'would have been consistent with being struck on the left side of your face' and that the area in the house that Tobar stated the injury occurred was too small for the events to have occurred the way he described." (citing Reporter's Record vol. 6, p. 88–90, 92–93).
3. "Detective Robles was also asked his opinion concerning Tobar's explanation for Moreno's injured lip and testified that Moreno's busted lip was not likely to have been inflicted during the 'wrestling' Moreno and Tobar engaged in." (citing Reporter's Record vol. 6, p. 97, 100).
4. "Detective Robles was also asked to speculate concerning the glass bottle and the computer monitor when he was asked hypothetically, '[s]o if someone were to throw or smash a bottle on this type of monitor, what would you expect to happen to the bottle.'" (citing Reporter's Record vol. 6, p. 84).

We refer to this evidence respectively as Evidence 1, 2, 3, and 4. The State contends, among other things, that appellant failed to preserve error and that the evidence was admissible as lay opinion testimony.

First, we address what alleged error was preserved. Then, we review the alleged error. We hold that the objected-to evidence was admissible as lay opinion testimony.

A. Preservation of Error

To preserve error, a party must make a timely, specific objection and obtain an adverse ruling. *See id.* at 654 (citing *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991)); *see also* Tex. R. App. 33.1(a). A party must object each time evidence is offered unless the trial court has granted the party a running objection or ruled on the admission of the evidence outside the jury's presence. *See Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003); *see also* Tex. R. Evid. 103(a)(1). A party's complaint on appeal must comport with the objection at trial. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012).

Regarding Evidence 1, appellant did not object on any basis. He never requested a hearing outside the jury's presence. And, he only requested a running objection (on the basis of "speculation") at a later time during Robles's testimony. Nor did appellant move to strike Robles's testimony. Appellant has not preserved error regarding Evidence 1. *See* Tex. R. App. P. 33.1(a); *see also Martinez v. State*, No. 14-01-01092-CR, 2002 WL 31890060, at *2 (Tex. App.—Houston [14th Dist.] Dec. 31, 2002, pet. ref'd) (not designated for publication) (holding that error was not preserved when the appellant obtained a running objection after the inadmissible testimony and did not move to strike the testimony).

Similarly, appellant did not preserve error regarding the first part of Evidence 2—testimony about a right-handed person striking another person on the left side of the face. Appellant did not object to this evidence on any basis. *See* Tex. R. App. P. 33.1(a); *see also Martinez*, 2002 WL 31890060, at *2.

Appellant objected to the second part of Evidence 2—testimony that the area of the house near the back door was small. When the State asked Robles to explain why he did not think appellant's version of events was consistent with the injury to Moreno, appellant objected because Robles was "not an expert as to recreating or re-enacting a scene and basically he can just say what he speculates and that's it." We assume without deciding that this objection preserved appellant's complaints on appeal that Robles was not qualified and his methods were unreliable.[8]

Regarding Evidence 3, appellant did not object at the time the testimony was admitted. However, he obtained a running objection before this testimony was admitted. The objection was that Robles's was "speculating":

> Again, Your Honor, this is all calling for speculation. He wasn't there. He's speculating as to how it actually happened and how he grabbed the door and what it did; and we're asking for a running objection, Your Honor.

We assume without deciding that this objection preserved appellant's complaint on appeal that Robles was not qualified and his methods were unreliable.[9]

[8] *But see Dominguez v. State*, 474 S.W.3d 688, 700 (Tex. App.—Eastland 2013, no pet.) (holding that the appellant's arguments on appeal concerning Rule 702 were not preserved by an objection to testimony as "speculative"); *S.E.A. Leasing, Inc. v. Steele*, No. 01-05-00189-CV, 2007 WL 529931, at *4 (Tex. App.—Houston [1st Dist.] Feb. 22, 2007, pet. abated) (mem. op.) (holding that the appellant's objection regarding the expert's "personal knowledge and speculation" did not relate to the expert's "qualifications or the reliability of his testimony"); *Kroger Co. v. Betancourt*, 996 S.W.2d 353, 361 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (holding that objections based on reliability and speculation did not preserve complaint about qualifications); *Taylor v. State*, No. 14-03-00966-CR, 2004 WL 2340255, at *1 (Tex. App.—Houston [14th Dist.] Oct. 19, 2004, pet. ref'd) (mem. op., not designated for publication) (citing *In re M.D.S.*, 1 S.W.3d 190, 202 (Tex. App.—Amarillo 1999, no pet.)) (holding that "an objection based on speculation does not preserve a challenge to a witness's qualifications to testify as an expert").

[9] *But see supra* note 8.

Regarding Evidence 4, appellant objected on the basis of "speculation," and the trial court sustained the objection. Thus, appellant did not receive an adverse ruling. No error is preserved regarding Evidence 4. *See Shaw*, 329 S.W.3d at 654.

B. No Error to Admit Part of Evidence 2

Robles opined, both on direct and redirect without objection, that Moreno's injuries did not result from events as appellant had described them during his recorded interrogation.[10] One of the bases for this opinion was part of Evidence 2: the back door area of the house was "confined and small," so appellant and Moreno "would have to be in very close proximity for that to happen."[11] We hold that this evidence was admissible as lay opinion testimony under Rule 701.

Generally, we should affirm a trial court's decision admitting evidence if it is correct on any theory of law applicable to the case. *See Osbourn v. State*, 92 S.W.3d 531, 538–39 (Tex. Crim. App. 2002) (affirming the admission of testimony as lay opinion testimony under Rule 701 even though the trial court specifically ruled the evidence was admissible as expert testimony under Rule 702). Rule 701 provides that a witness who testifies in the form of opinions or inferences and who

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[10] On direct, Robles testified:

> From my experience, I just did not believe that his explanation of how Ms. Moreno sustained the injuries could have related to those injuries. They were quite significant. The injuries were very severe, in my opinion; and his explanation of them just did not make sense to me.

On redirect, Robles testified further, "I don't believe it was reasonable that his explanation resulted in the injury advised or sustained by Ms. Moreno."

[11] Specifically, Robles testified that the rear door was "very similar" to the front door, and:

> There were some discrepancies on height and where the strike would have landed on Ms. Moreno; and also there were some issues with space at that particular area. There's a refrigerator, and that area of the house is confined and small. They would have to be in very close proximity for that to happen.

is not testifying as an expert is limited to those opinions or inferences that are "rationally based on the perception of the witness." Tex. R. Evid. 701 (amended 2015). Rule 701 incorporates Rule 602's personal knowledge requirement, "which states that a witness may not testify to a matter unless he or she has personal knowledge of the matter." *Osbourn*, 92 S.W.3d at 535 (citing Tex. R. Evid. 602). Rule 701 requires the testimony to be based on the witness's perception, so it is "necessary that the witness personally observed or experienced the events about which he or she is testifying." *Id.* "[A]s a general rule, observations which do not require significant expertise to interpret and which are not based on a scientific theory can be admitted as lay opinions if the requirements of Rule 701 are met." *Id.* at 537.

Appellant appears to argue that for Robles's testimony to be admissible under Rule 701, Robles would have had to have personally observed the assault. We disagree. In *Osbourn*, for example, the Court of Criminal Appeals cited with approval a case where a police officer who searched the defendant's residence testified as a lay witness about "the nexus between drug trafficking and the possession of the type of weapons found during the search." *Id.* at 536 (citing *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995)). Specifically, the police officer was allowed to testify as a lay witness on these topics: "(1) it was common for drug traffickers to possess and use weapons in order to protect their drugs and to intimidate buyers; (2) the MK-11, one of the guns found in VonWillie's bedroom, was a particularly intimidating gun and he knew of drug dealers who used that specific weapon; and (3) drug traffickers commonly kept a weapon near their drugs." *VonWillie*, 59 F.3d at 292.

Similarly, in *Osbourn*, a police officer testified as a lay witness that she smelled an odor of marihuana. 92 S.W.3d at 538. This testimony was relevant to

an ultimate fact in the case—whether the defendant was in possession of marihuana. *Id.* The officer also testified that she believed the substance she observed was marihuana based on facts she perceived, such as the green, leafy appearance and the odor. *See id.* The Court of Criminal Appeals held this testimony was proper lay witness testimony under Rule 701 and did not require significant expertise to interpret. *Id.*

Here, Robles testified that one of the bases for his opinion that Moreno did not sustain her injuries in the manner that appellant described was that the back door area of the house was "confined and small." Robles also testified that he had entered Moreno's house, took pictures inside, and searched it for additional evidence after interrogating appellant. This testimony shows that Robles's opinion or inference was "rationally based on [his] perception," and that he "perceived events and formed an opinion that a reasonable person could draw from the facts." *See id.* That is, he personally observed the area that he described for the jury as "confined and small." More so even than identifying marihuana by smell, Robles's purported opinion—that an area was too small for Moreno to sustain her injuries in the manner appellant described—"did not require significant expertise to interpret." *See id.*

Accordingly, it was within the zone of reasonable disagreement to conclude that this part of Evidence 2 was admissible lay opinion testimony under Rule 701. The trial court did not abuse its discretion by admitting this evidence.

C. No Error to Admit Evidence 3

After Robles opined multiple times without objection that the events did not occur in the manner appellant described, *see supra* note 10, Robles testified in further detail about one of the bases for his opinion: "Busted lips typically occur

after an impact, not during a wrestling match." We hold that this evidence was admissible as lay opinion testimony under Rule 701.

The Court of Criminal Appeals' opinion in *Davis v. State* is instructive. *See* 313 S.W.3d 317 (Tex. Crim. App. 2010). The court held that a police officer who personally observed a dead cat two days after a murder could testify under Rule 701 that the stab wounds were consistent with the size and shape of the knife blade used on the murder victim. *See id.* at 347, 349. The court held that the officer's opinion was based on "first-hand observation of the wounds themselves" and "did not require significant expertise to interpret and were not based on scientific theory." *Id.* at 349. Even though photos of the wounds had been admitted, the jurors were "not in a position to observe the cat's body first-hand." *Id.* Thus, the officer "had a superior vantage point in viewing these wounds." *Id.*

Here, Robles testified that he met with Moreno several times on the day of the assault. Thus, Robles was able to observe the injuries to Moreno first-hand. Although photos of Moreno's lip injury were admitted into evidence, the jury was not in the position to view the injury first-hand on the day the injury occurred. Thus, Robles had a superior vantage point in viewing Moreno's busted lip. His opinion or inference was "rationally based on [his] perception," and he "perceived events and formed an opinion that a reasonable person could draw from the facts." *See Osbourn*, 92 S.W.3d at 538. Robles's observations needed no interpretation based on scientific theory. *See id.*; *see also Hawkins v. State*, No. 06-08-00087-CR, 2009 WL 30255, *3–4 (Tex. App.—Texarkana Jan. 7, 2009, pet. ref'd) (mem. op., not designated for publication) (holding that a police officer could give lay opinion testimony that wounds on the victim's arms were consistent with the victim raising his arms in a defensive manner).

Accordingly, it was within the zone of reasonable disagreement to conclude that Evidence 3 was admissible lay opinion testimony under Rule 701. The trial court did not abuse its discretion.

Appellant's second issue is overruled.

V. CONCLUSION

Having overruled both of appellant's issues, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Justices Christopher, McCally, and Busby.
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