Affirmed and Memorandum Opinion filed April 11, 2017.

In the

Fourteenth Court of Appeals

NO. 14-15-00624-CR

RONNIE JOE GREGORY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 506th District Court
Waller County, Texas
Trial Court Cause No. 13-07-14457

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

A jury convicted appellant Ronnie Joe Gregory of murder and sentenced him to 55 years' confinement. Appellant challenges his conviction in a single issue, arguing that the trial court erred in the admission of extraneous conduct. Because the extraneous acts were relevant and more probative than prejudicial, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The complainant, Kenneth Herring, had been dating Karen Gregory, the estranged wife of Ronnie Joe Gregory. Although estranged, Karen had maintained

an intimate relationship with Ronnie as well. On May 20, 2013, Ronnie went to Karen's residence. Karen was sitting on the front porch of the residence with the complainant. Ronnie walked towards the porch and shot the complainant with a rifle, grazing him in the neck. Ronnie shot the complainant a second time, striking him in the back. The second shot proved fatal. Ronnie then left the location.

Subsequently, Ronnie called his brother Randy and admitted to shooting the complainant. Randy told Ronnie to meet him at their mother's house. When Randy arrived, he removed a rifle from Ronnie's car. Ultimately, Ronnie surrendered to the police. Randy turned over the rifle to the police as well. Ballistics testing matched the rifle to a fired bullet recovered from the body of the complainant.

Appellant was indicted for the offense of murder. The case was tried to a jury. Over appellant's objection, the trial court permitted the State to elicit testimony from Karen that approximately one week before the shooting, someone had entered her residence without her consent and taken a television and a jewelry box. Karen testified that she asked Ronnie about the missing items and Ronnie returned the jewelry. The jury convicted appellant and sentenced him to 55 years in the Institutional Division of the Texas Department of Criminal Justice. Appellant timely appealed.

II. ANALYSIS

Appellant raises a sole issue on appeal. Appellant complains that the trial court abused its discretion under Texas Rule of Evidence 403 in allowing the State to introduce extraneous acts during the guilt/innocence phase of the trial.[1] We disagree.

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[1] At trial, appellant objected under Rules 402 and 403. On appeal, he complains only under Rule 403.

A. Rule 403 Balancing Test

1. Standard of Review

The admissibility of evidence is within the discretion of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We uphold the trial court's evidentiary ruling as long as it was within the zone of reasonable disagreement. *Id.* (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). We cannot simply substitute our own decision for the trial court's and should reverse only for a clear abuse of discretion. *See id.*

The trial court may properly exclude relevant evidence under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *See id.* "When Rule 403 provides that evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,' it simply means that trial courts should favor admission in close cases, in keeping with the presumption of admissibility of relevant evidence." *Montgomery*, 810 S.W.2d at 389.

2. Probative Value versus Prejudice

When conducting a Rule 403 analysis, courts must balance: (1) the inherent probative force of the proffered item of evidence, along with (2) the proponent's need for that evidence, against (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) (citing, amongst others, *Montgomery*, 810 S.W.2d at 389–90).

In ascertaining need, the trial court considers the availability of other evidence to establish the particular fact of consequence, the strength of that other evidence, and whether the fact of consequence is related to an issue in dispute. *Meadows v. State*, 998 S.W.2d 318, 322 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (citing *Montgomery*, 810 S.W.2d at 389–90). We begin with the presumption that the probative value of relevant evidence outweighs any danger of unfair prejudice. *See Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

a. Inherent probative force

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). Here, the evidence presented illustrated the state of the relationship between appellant and Karen near the time of the offense. Karen testified that her attitude towards appellant changed following the ransacking of her home. Because appellant's extraneous conduct occurred approximately one week prior to the charged offense, the trial court reasonably could have found that its inherent probative force was strengthened. Accordingly, the first factor favors admission.

b. State's need for evidence

The second factor addresses the State's need for the extraneous evidence. At trial, the State sought to show that appellant's relationship with Karen deteriorated significantly prior to appellant shooting her boyfriend, Kenneth. The State offered the extraneous evidence against appellant to "show his escalating state of -- it goes

to the state of mind of the defendant regarding his relationship ultimately culminating in the offense we're here for." In murder prosecutions, both the State and the defendant are allowed to offer relevant testimony of the previous relationship between the defendant and deceased. *See* Tex. Code Crim. Proc. Ann. art. 38.36(a). Here, the relationship to which the State referred was not between appellant and the complainant, but rather between appellant and Karen. This would seem to favor exclusion.

However, our inquiry cannot end there. The State also claims the objected-to testimony goes to show appellant's motive and intent, both of which were in issue at trial. Extraneous conduct has long been held to be admissible to show motive, intent, absence of mistake, identity or a common scheme. *Martin v. State*, 173 S.W.3d 463, 466 (Tex. Crim. App. 2005) (citing *Montgomery*, 810 S.W.2d at 387 ("[A] party may introduce evidence of other crimes, wrongs, or acts if such evidence logically serves to make more or less probable an elemental fact, an evidentiary fact that inferentially leads to an elemental fact, or defensive evidence that undermines an elemental fact.")). Here, the evidence indirectly showed intent on the part of appellant. Accordingly, this factor favors admission.

c. Tendency of evidence to suggest decision on an improper basis

Under the third factor, the State's need for the evidence must be balanced against any tendency of the evidence to suggest decision on an improper basis. *Gigliobianco*, 210 S.W.3d at 641–42. Here, the extraneous conduct evidence did not have the tendency to arouse hostility for one side and to suggest a verdict on an improper basis. Given the entire body of evidence at trial, the extraneous evidence was not inherently inflammatory and prejudicial. *See Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet. ref'd). Further, when a trial court gives a proper limiting instruction regarding extraneous conduct to the jury, it lessens the

prejudicial impact of this factor. *Id.* Here, the trial court gave a limiting instruction to the jury.[2] Accordingly, this factor favors admission.

d. Tendency of evidence to confuse or distract jury

The fourth factor refers to a tendency to confuse or distract the jury from the main issue in the case. *Gigliobianco*, 210 S.W.3d at 641. For example, evidence that consumes an inordinate amount of time to present or answer might tend to confuse or distract the jury from the main issues. *Casey v. State*, 215 S.W.3d 870, 880 (Tex Crim. App. 2007). Because the extraneous conduct evidence in this case was limited, direct, and relevant, this factor weights in favor of admission. *See id.*

e. Tendency of evidence to be given undue weight by jury

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. For example, "scientific" evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence. *Id.*

Here, the nature of the complained-of evidence does not lend itself to artificial weight. The extraneous conduct evidence in this case was straightforward and easily understood by the jury. *See Gayton v. State*, 331 S.W.3d 218, 228 (Tex.

[2] The trial court instructed the jury:

> You are further instructed that if there is any evidence before you in this case regarding the defendant's having engaged in conduct or acts other than the offense alleged against him in this indictment in this case, you cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant engaged in such conduct or acts of (sic) any, and even then you may only consider the same in determining the intent or plan of the defendant, if any, alleged against him in the indictment and for no other purpose.

App.—Austin 2011, pet. ref'd). Karen's testimony was limited in detail as to the "ransacking" of her residence one week prior to the murder. This factor weighs in favor of admission.

f. Likelihood that evidence will be too time-consuming or repetitive

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 Gigliobianco*, 210 S.W.3d at 642. Karen's testimony regarding the extraneous conduct was brief, and she was the only witness to testify regarding the conduct. Indeed, her testimony regarding the extraneous conduct comprised less than five pages of the approximately 23 volume record. *See Gayton*, 331 S.W.3d at 228 (citing *Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (factor weighed in favor of admission where extraneous-offense testimony amounted to "less than one-fifth" of trial testimony)); *see also 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.

g. All factors favor admission of the extraneous conduct evidence.

On our review of the record, we conclude that the trial court did not abuse its discretion by determining that the probative value of evidence of appellant's extraneous conduct was not substantially outweighed by the danger of unfair prejudice.

B. Harmless Error

Even assuming that the trial court erred in admitting the complained-of evidence, we will not reverse the judgment if the error was harmless. *See* Tex. R. App. P. 44.2. In this case, the jury heard details of the charged offense from Karen who was an eyewitness to the crime. Appellant's brother testified that appellant admitted to shooting the complainant. The jury heard evidence that the bullet recovered from the body of the complainant was consistent with having been fired from a rifle linked to appellant. Based on the record before us, we believe there is little risk that the jury would have convicted appellant based on the complained-of extraneous conduct evidence, rather than the evidence that supported the indictment. *See* Tex R. App. P. 44.2(b). We hold that even if it was error to admit extraneous conduct evidence, no substantial right of appellant was affected. *See Taylor v. State,* 268 S.W.3d 571, 592–93 (Tex. Crim. App. 2008).

We overrule appellant's sole issue.

III. Conclusion

Having overruled appellant's issue, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Busby, Donovan, and Brown.
Do Not Publish — Tex. R. App. P. 47.2(b).