Affirmed and Memorandum Majority and Concurring Opinions filed May 16, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00870-CR

MICHAEL L. PHILLIPS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1431290

M E M O R A N D U M M A J O R I T Y O P I N I O N

A jury convicted Michael Lamont Phillips of murder and assessed his punishment at thirty years' confinement. On appeal, appellant contends the trial court erred by excluding evidence of a prior conviction of the complainant. We affirm.

I. Background

In 2014, appellant lived in the same neighborhood with complainant Delwynn Davis and Davis' brother, "Yogi." Appellant drank beer and smoked marijuana with them as well as sold them illegal prescription medication.

Appellant's girlfriend, Nadine Schryer, bought a handgun in 2014 for personal protection. She kept the gun in the glovebox of her car. When appellant drove her car, he stored his phone and wallet in the glovebox of the car. The last time Schryer saw appellant was on his birthday, late-May 2014. During this time period, Schryer would leave her car parked at her apartment complex with the doors unlocked. Also, around this same time, cars in the apartment complex were frequently being broken into and items stolen from them. At some point in late-May or early-June 2014, Shryer noticed the handgun was gone; however, she did not report it missing.

On the morning of June 7, appellant ran into Yogi while at a neighborhood corner store. Yogi asked to buy some pills from appellant so they went back to appellant's house to get the pills.[1] Thereafter, appellant went with Yogi to his house to drink a beer and smoke marijuana. Davis was at home, "half asleep, half aw[a]ke" on the couch, demanding appellant give him Xanax. Davis did not have money, and appellant returned home.

Around noon that same day, appellant's cousin, Brian Phillips ("Kiki"), was outside of their house cleaning the inside of his car when Davis drove up and began arguing with appellant about missing marijuana. Appellant and Davis fought, swinging fists, wrestling, and tussling with each other. After the fight was over, Davis drove away. Appellant went inside the house to clean a cut above his

[1] Appellant lived in a house with several relatives, including his cousin and their children.

eye from Davis punching him, and Kiki left for the grocery store with his three–year–old daughter and ten–year–old cousin, Rashad.

Later that afternoon, as Kiki was returning from the store with the kids, he saw appellant walking in the street. Kiki offered appellant a ride in the car. Appellant asked Kiki to drop him off at a house. Kiki drove appellant to Davis' house and stopped his car in front of the house.[2] He saw appellant walk to the front door and Davis come outside. Kiki was texting on his IPad when he heard a shot. Kiki looked up and saw appellant with his arm fully extended and pointing a gun below Davis' chest. Kiki saw Davis going backwards as appellant shot him. Davis fell to the ground. Appellant stuck the gun in his pocket and ran back to Kiki's car, telling Kiki to "get out of here." Rashad, who was playing a game on Kiki's cell phone, heard a "boom boom," and saw appellant return to the car with a gun. Kiki drove appellant to their house. Kiki returned to the scene and told police he was a witness and assisted with their investigation.

Around the same time as Kiki's car arrived at Davis' house, Martha Bryant, a neighbor of Davis, was cut–off by a car, forcing her to stop in front of Davis' house. She saw two men get out of the car and move towards Davis. Bryant claimed that when Davis got to the car, he stopped, threw his hands up, and started running backwards towards his front door. According to Bryant, Davis did not have anything in his hands. She saw the passenger lift his hand, facing the house, and a blast of fire. Bryant said her kids began screaming and she laid on top of them until the car left. Bryant then got out of the car and began trying to help Davis, who had been shot. She asked him who shot him and he said "my cousin, my cousin." Bryant recognized Davis from a month prior when her house was

[2] Davis lived at 23014 Banquo Drive, Spring, Harris County, Texas. He shared the house with his mother (Patricia), her husband (Reginald), and his brother (Yogi).

broken into and she saw Davis carrying a large television with a blanket over it, which she assumed to be her television, into his house. Bryant identified the clothing worn by the person she saw shoot Davis. It was the same description of clothing Kiki provided police of appellant's clothing.

Patricia Davis, the complainant's mother, was in the backyard of their house when she heard what she thought were firecrackers. She went to the front door and saw a silver car leaving. She found her son lying down in the front yard. Davis told his mother, "mama, that . . . Mike shot me." Neighbors, police, and emergency personnel performed CPR on Davis; Davis was transported to the hospital where he died of a single gunshot wound to the abdomen.

Two days after the shooting, on June 9, 2014, appellant was arrested at a house about twenty miles from the neighborhood. During an interview, appellant initially told homicide investigators that he did not know where the gun was located; however, eventually, he led investigators to the handgun. It was located in a locked closet in the house in which appellant was arrested.[3] A firearms examiner confirmed that the bullet recovered from Davis's body was fired from the recovered handgun. Appellant could not be excluded as a contributor to the DNA, which made the DNA evidence inconclusive. Davis' DNA was not located on the gun, and Davis' hands were not tested for gunshot residue. No gunshot residue was found on Kiki's hands. Toxicology testing on Davis' blood for alcohol or drugs was not performed.

Appellant was indicted for murder. He pleaded "not guilty." On September 28, 2015, trial commenced. The State presented several witnesses, including Kiki,

[3] The handgun was found in a bag with a glove, a bottle of hand-sanitizer, and a sterile alcohol–swab packet.

Rashad, Patricia, several police officers, a chemist, a firearms expert, and a medical examiner.

Appellant testified on his own behalf, claiming he acted in self–defense. According to appellant, he had problems with Davis from time to time. Appellant described Davis as "spontaneous" and "you never knew what to expect." Two weeks before the shooting, appellant stated he and Davis argued about appellant selling pills at "his" (Davis') store, and that the confrontation almost became physical. After that, appellant claimed Davis tried to interfere with his pill sales.

About a week before the shooting, appellant asserted Davis leaned in the passenger window of Schryer's car to purchase some pills from appellant. Appellant opined Davis saw the handgun in the glove compartment of the car when appellant opened it to get the pills. At some point after this sale, appellant stated he went to Schryer's car to get some pills and noticed the gun was missing. Appellant claimed he spoke to Davis about stealing the gun, but Davis denied taking it. Appellant testified he knew Davis was lying and that he also was aware that Davis frequented the apartment complex where Schryer lived and kept her car unlocked.

Appellant claimed on June 7, after drinking beer and smoking marijuana at Davis' house with Yogi, appellant returned home. Davis drove to appellant's house and confronted appellant about not giving him pills. Davis also accused appellant of stealing his marijuana. Davis and appellant engaged in a fistfight in the street. Appellant asserts that as he began walking back to his garage, Davis struck him above the eye with an unknown object and threatened appellant and his family. Davis left and appellant went inside his house to clean up his wound.

Appellant stated that he tried to call Davis, but was unable to reach him. Appellant testified that he began walking to Davis' house "unarmed and had no

intentions of seeking revenge." Appellant's cousin, Kiki, saw him walking and gave him a ride to Davis' house. Kiki stayed in the car when appellant went to Davis' door. Davis answered the door and appellant spoke with him in the yard about stealing Schryer's gun and threatening his family. Appellant asked for the gun back and offered to trade pills for the gun. When Davis took his hand out of his pocket, appellant saw part of the gun and tried to grab it. As they fought over the gun, appellant asserts he heard "pop pop," and one shot grazed appellant. Appellant stated he did not know Davis had been shot. Appellant claimed he took control of the gun and ran back to Kiki's car. Kiki drove him home. Appellant was arrested two days later. Appellant admitted he lied initially to the police about not knowing where the gun was located. Appellant also admitted to having prior convictions for assault of a family member.

At the conclusion of the trial after both sides had rested, the trial court charged the jury and included instructions on the law of self-defense. The jury found appellant guilty of murder, as charged in the indictment. At the punishment phase, the jury found the enhancement paragraph (*i.e.*, felony assault of a family member 2nd) to be "true," made a negative finding to the special issue of sudden passion, and assessed punishment as thirty years' confinement. The trial court sentenced appellant accordingly on October 6, 2015. Appellant timely filed this appeal.

II. Analysis

In his sole issue, appellant contends that the trial court erred by excluding evidence of a prior act of aggression by Davis. In a bench conference during the cross-examination of Sergeant Ferguson, after the State called Ferguson as a rebuttal witness, defense counsel requested to present evidence to the jury regarding Davis' 2009 conviction for assault of a family member. Defense counsel

argued this evidence demonstrated Davis' character as it pertained to "peacefulness" and was needed to correct "a misimpression that [Davis] has no such priors like [appellant], that [Davis] has no propensity for violence in the way that this jury could believe that [appellant] does based on [appellant's] prior that they've already heard about." He further asserted the failure to present such testimony would leave a false impression with the jury that Davis had no propensity for violence, which would negate appellant's claim of self–defense against a first aggressor.

The State objected, asserting this evidence was irrelevant and the proper predicate had not been established to use this evidence. Specifically, the State argued that it was not relevant because appellant had not put the reputation of Davis in as evidence. Further, the State maintained appellant had not testified that he knew Davis as a peaceful person. Finally, the State claimed that because it bears on the relationship that is known by appellant, or relationship between the appellant and Davis, appellant would have to have known about Davis' prior conviction and appellant never testified about that information.

The trial court agreed with the State and denied appellant's request to discuss Davis' criminal history. Below, we state the applicable standard of review and then address appellant's theories of admissibility.

A. Standard of review.

We review a trial court's evidentiary rulings to admit or exclude evidence under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *See id*. We uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of

law applicable to the case. *See Willover v. State*, 70 S.W.3d 841, 845 (Tex Crim. App. 2002).

B. Self-defense.

In general, evidence of a person's character may not be used to prove that the person "behaved in a particular way at a given time." *Tate v. State*, 981 S.W.2d 189, 192 (Tex. Crim. App. 1998); *see* Tex. R. Evid. 404(a). This limit on character evidence, however, is not absolute. When a defendant in a homicide prosecution raises the issue of self-defense, he may introduce evidence of the victim's violent character on two separate theories. Tex. R. Evid. 404(a)(2); *see Ex parte Miller*, 330 S.W.3d 610, 618 (Tex. Crim. App. 2009); *Torres v. State*, 117 S.W.3d 891, 894 (Tex. Crim. App. 2003).

First, a defendant may offer evidence of the victim's character trait for violence to demonstrate that the victim was, in fact, the first aggressor. *Ex parte Miller*, 330 S.W.3d at 619; *Fry*, 915 S.W.2d at 560. Rule 404(a)(2) is directly applicable to this theory. This is called "uncommunicated character" evidence because it does not matter if the defendant was aware of the victim's violent character. Under this theory, a witness testifies that the victim made an aggressive move against the defendant; another witness then testifies about the victim's character for violence, but he may do so only through reputation and opinion testimony under Rule 405(a). *See* Tex. R. Evid. 405(a); *see also Ex parte Miller*, 330 S.W.3d at 619.[4] The defendant may not offer, however, evidence of the victim's prior specific acts of violence to prove the victim's violent character and hence that the victim acted in conformity with that character trait at the time of the

[4] Texas common law was broader and allowed the admission of evidence of specific instances of behavior to show a victim's character trait for violence. *Ex parte Miller*, 330 S.W.3d at 619 n. 21. The Texas Rules of Evidence superseded the common law standard. *See Tate*, 981 S.W.2d at 192.

assault. *See id*. at 619–20 ("Under Rule 404(a)(2), defendant was not entitled to offer evidence of any specific acts of violence—including [victim's] 1982 assault [charge]—to show that the victim was the first aggressor," as "[t]hat use is an attempt to prove [the victim's] conduct in conformity with his violent character, and it is prohibited by Rules 404(a) and 405(a).").

Second, the defendant may offer reputation or opinion testimony or evidence of specific acts of violence by the victim to demonstrate the "reasonableness of the defendant's claim of apprehension of danger" from the victim. *Ex parte Miller*, 330 S.W. 3d at 618; *Fry v. State*, 915 S.W.2d 554, 560 (Tex. App.—Houston [14th Dist.] 1995, no pet.). "This is called 'communicated character' because the defendant is aware of the victim's violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not." *Ex parte Miller*, 330 S.W. 3d at 618. Because Texas Rule of Evidence 404 bars character evidence only when offered to prove conduct in conformity (*i.e.*, that the victim acted in conformity with his violent character), *this theory does not invoke Rule 404(a)(2)*. *Id*. (emphasis added). Under this theory, a defendant is not trying to prove that the victim actually is violent; rather, he is proving his own self-defensive state of mind and the reasonableness of that state of mind. *Id*.

A separate rationale supports the admission of evidence under 404(b) of a "victim's prior specific acts of violence when offered for a non-character purpose—such as his specific intent, motive for an attack on the defendant, or hostility—in the particular case." *Ex parte Miller*, 330 S.W.3d at 620; *see* Tex. R. Evid. 404(b). "As long as the proffered violent acts explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only, prior specific acts of violence may be admitted even though those acts were not directed against the defendant." *Torres*

v. State, 71 S.W.3d 758, 762 (Tex. Crim. App. 2002). "The proper predicate for the specific violent prior act by the deceased is some act of aggression that *tends* to raise the issue of self-defense, which the violent act may then help clarify." *Torres*, 117 S.W.3d at 895 (emphasis in the original).

In this case, appellant offered Davis' 2009 misdemeanor conviction for assault of a family member to show that Davis was the first aggressor and to prove Davis' intent, motive and state of mind just prior to the incident that resulted in his death. Under either theory, Rule 404(a) or 404(b), the trial court did not err in excluding it.

1. First aggressor —Tex. R. Evid. 404(a).

A defendant may offer uncommunicated evidence of the victim's character trait for violence pursuant to Rule 404(a) to show the victim was, in fact, the first aggressor, but defendant may do so "*only* through reputation and opinion testimony under Rule 405(a)." *Ex parte Miller*, 330 S.W.3d at 619 (emphasis in original); *Allen*, 473 S.W.3d at 445; *see* Tex. R. Evid. 405(a).

Here, appellant proffered evidence that Davis was convicted in 2009 of misdemeanor assault of a family member. It was proffered to show Davis' character trait for violence to demonstrate Davis was the first aggressor. Testimony regarding Davis' prior conviction for a specific act of violence constituted an attempt to show Davis' conformity with his violent character and was neither reputation nor opinion testimony. *See Allen*, 473 S.W.3d at 445-46. As such, the trial court did not abuse its discretion in excluding the proffered evidence. *Ex parte Miller*, 330 S.W.3d at 620; *Allen*, 473 S.W.3d at 445–46.

2. Specific intent, motive, or hostility—Tex. R. Evid. 404(b).

Under Texas Rule of Evidence 404(b), evidence of "a victim's prior acts of violence may be admissible to clarify the issue of first aggressor if the proffered act explains the victim's ambiguously aggressive conduct." *Allen*, 473 S.W.3d at 446 (citing *Torres*, 117 S.W.3d at 895; *Torres*, 71 S.W.3d at 762). "The victim's prior act may be admissible to explain, among other things, the victim's specific intent, motive, or hostility in a particular case." *Id*. (citing Tex. R. Evid. 404(b); *Ex parte Miller*, 330 S.W.3d at 620; *Torres*, 117 S.W.3d at 896–97).

Here, appellant has not explained how the proffered evidence of Davis' 2009 misdemeanor assault of a family member conviction explains Davis' aggressive conduct just prior to the shooting in 2014, and in a manner other than one that only demonstrates character conformity. During a bench conference prior to cross-examination of Sergeant Ferguson, appellant's trial counsel does not explain how the proffered evidence clarified Davis' allegedly aggressive conduct just prior to the shooting. Moreover, the proffered evidence was a conviction for misdemeanor assault of a family member five years earlier; hence, it was not probative of Davis' state of mind related to the confrontation with appellant because the offense giving rise to the 2009 conviction did not involve appellant in any way or reveal that Davis had some animus towards appellant. *See Allen*, 473 S.W.3d at 446–47; *Hayes v. State*, 124 S.W.3d 781, 786 (Tex. App.—Houston [1st Dist.] 2003), *aff'd*, 161 S.W.3d 507 (Tex. Crim. App. 2005).

Because Davis' conviction was useful only to demonstrate that Davis had a violent character and that he acted in conformity with that violent character just before appellant shot him—which is expressly prohibited under Rule 404(b)—the trial court acted within its discretion in excluding the proffered evidence. *See Allen*, 473 S.W.3d at 446-47; *Hayes*, 124 S.W.3d at 786.

3. Harmless error.

The exclusion of character evidence tending to show the complainant was the first aggressor is non-constitutional error, and therefore subject to a harmless error analysis, unless "it effectively prevents the defendant from presenting his defensive theory." *Gonzalez v. State*, No. 14-13-00104-CR, 2014 WL 5089374, at *3 (Tex. App.—Houston [14th Dist.] Oct. 9, 2014, no pet.) (mem. op., not designated for publication) (citing Walters v. State, 247 S.W.3d 204, 221 (Tex. Crim. App. 2007); *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002)); *accord Milliff v. State*, No. 14-13-00052-CR, 2014 WL 1713897, at *3-4 (Tex. App.—Houston [14th Dist.] Apr. 29, 2014, no pet.) (mem. op., not designated for publication).

Here, the absence of Davis' 2009 misdemeanor assault conviction did not preclude appellant from presenting his theory of self-defense. Appellant testified he had past problems with Davis. He described Davis' demeanor as "spontaneous" and unpredictable. Appellant explained a confrontation with Davis occurring two weeks prior to the shooting. He further stated that one week before the shooting, appellant confronted Davis about stealing Schryer's gun from her car's glovebox. Appellant detailed the day of the shooting, including Davis demanding Xanax from appellant; Davis accusing appellant of stealing his marijuana; Davis and appellant fighting in front of appellant's house; Davis allegedly threatening appellant's family. Davis' hostility when appellant went to his house to ask for Schryer's gun, and the alleged struggle for the gun prior to the shooting. Even without eliciting testimony concerning Davis' specific prior assault conviction, appellant was able to establish Davis' propensity for violence for purposes of appellant's self-defense claim.

In addition, the record firmly establishes that appellant is guilty of murder and did not act in self-defense. Appellant's cousin, Kiki, and Bryant described how appellant held the gun outstretched in his hand and then shot Davis as Davis backed away from appellant. After the shooting, appellant admitted he did not turn himself in to police; instead they tracked him down. He also admitted under cross-examination that he initially lied to police about knowing the whereabouts of the gun used to kill Davis, but later led them to it. Given the sufficiency of the evidence demonstrating appellant's guilt, it is unlikely that the admission of evidence concerning Davis's 2009 misdemeanor assault of a family member conviction—unrelated to appellant and remote in time—would have had an impact upon the jury's consideration.

Finally, in his closing argument, defense counsel summarized the evidence and testimony admitted and emphasized that "Davis was an aggressor towards [appellant]" and that he was responsible for his own death. Defense counsel's jury argument minimized any effect the absence of appellant's desired evidence may have had on the jury.

In sum, we conclude the exclusion of Davis' 2009 misdemeanor assault of a family member conviction did not prevent appellant from presenting his defensive theory. Thus, the error was not constitutional. Because the error, if any, did not have a substantial and injurious effect or influence in the jury's rejection of appellant's self-defense claim, it must be disregarded. *Gonzalez*, 2014 WL 5089374, at *3-4; *Milliff*, No. 2014 WL 1713897, at *3-4; *see* Tex. R. App. P. 44.2(b). Appellant's issue is overruled.

III. Conclusion

We overrule appellant's issue and affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison, and Donovan. (Christopher, J., concurring).
Do Not Publish—Tex. R. App. P. 47.2(b).