Affirmed as Modified, and Memorandum Opinion filed July 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00068-CR

CARINO RATCLIFF, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1482872

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

Appellant Carino Ratcliff pleaded guilty to murder in exchange for a maximum sentence of 40 years' imprisonment. After a sentencing hearing at which punishment evidence was presented, the trial court assessed appellant's punishment at the maximum agreed-to sentence. On appeal, appellant contends that the trial court erred by (1) admitting postmortem photographs of the

complainant that were more prejudicial than probative; and (2) considering evidence outside of the record. We conclude that appellant did not preserve an objection to the photograph's admission on the basis that their probative value was substantially outweighed by the danger of unfair prejudice. We further conclude that appellant did not object below to the trial court's consideration of evidence outside of the record; furthermore, the trial court's consideration of that evidence was invited by appellant and appellant cannot now complain of its consideration.

In a cross-issue, the State contends that there is a clerical error in the judgment regarding appellant's right to appeal. We agree and affirm the trial court's judgment as modified.

BACKGROUND

Appellant, appellant's sister, and the sister's boyfriend were charged with the capital murder of appellant's step-grandfather, complainant Jimmy Ray Boyd. Appellant admitted to participating in complainant's murder and directed police to complainant's body, which was found wrapped in a tarp in a bayou. In exchange for a plea agreement that limited appellant's potential punishment to 40 years, appellant pleaded guilty to the lesser-included offense of murder. *See* Tex. Penal Code Ann. § 19.02(b)(1) (Vernon 2011).

After considering a pre-sentence investigation report (which is not included in the appellate record), receiving testimony and evidence from prosecution and defense witnesses, and hearing closing arguments from counsel, the trial court assessed appellant's punishment at 40 years' imprisonment. The trial court granted appellant permission to appeal and appellant timely appealed.

ANALYSIS

Appellant contends that the trial court erred by (1) admitting and considering postmortem photographs of the complainant that were more prejudicial than probative; and (2) considering evidence outside of the record.

I. Postmortem Photographs

During appellant's pre-sentence investigation and sentencing hearing, the State sought to admit into evidence complainant's autopsy photographs. The following exchange took place:

> [THE STATE]: Tendering [State's Exhibits] 1, 3, 4, and 5 to the Defense Counsel for inspection, Your Honor.
>
> [APPELLANT'S COUNSEL]: Your Honor, we would object on the basis that this is not germane to punishment, it goes more to the cause of the death. And that was covered by the plea of this defendant to the offense.
>
> [THE STATE]: My response, Your Honor, is that in the PSI report the defendant has stated he merely — and I don't want to get it wrong, but merely tapped [complainant] with a hammer.
>
> Frightened, I lightly tapped his head with it.
>
> And, Your Honor, the point of these pictures is showing that the defendant had his cheekbone crushed in. This was not simply a tap that the defendant would like the Court to believe, but perhaps a crushing blow. He was a willing participant, and a full-on participant as opposed to just lightly tapping the complainant.
>
> THE COURT: Overruled. They're admitted.

Appellant made no further objections to the photographs.

On appeal, appellant contends that the trial court should not have admitted and considered the autopsy photographs, which depict complainant's body after several days of decomposition in the bayou. Appellant contends that the probative value of the photographs was substantially outweighed by the danger of unfair

prejudice. *See* Tex. R. Evid. 403 (court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice).

Reviewing appellant's objection during the hearing, we conclude that appellant raised a challenge to the relevancy of the proffered photographs — not an objection that the photographs were unfairly prejudicial. Appellant did not refer to Texas Rule of Evidence 403 or any language that would have informed the trial court that appellant's objection to the admission of the photographs was based on their prejudicial nature.

"A rule 403 objection is not implicitly contained in relevancy or 404(b) objections; rather, a specific rule 403 objection must be raised to preserve error." *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (citing *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990)). Because appellant's relevancy objection during the hearing did not preserve for appeal a challenge that the photographs were more prejudicial than probative, we overrule appellant's first issue. *See* Tex. R. App. P. 33.1(a); *Lopez*, 200 S.W.3d at 251; *see also Orellana v. State*, 489 S.W.3d 537, 547 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (when appellant objected on Rule 403 grounds during trial but argued on appeal that evidence was not relevant under Rule 401, issue on appeal did not correspond to objection made at trial and was not preserved for review).

II. Trial Court's Consideration of Evidence Outside the Record

In his second issue, appellant contends the trial court improperly considered evidence outside the record when determining appellant's punishment.

In closing argument, appellant's trial counsel attempted to argue that appellant should receive a more lenient sentence because Juan Lopez — the boyfriend of appellant's sister — was more culpable than appellant:

> [APPELLANT'S COUNSEL]: . . . [Appellant], even though there may have been a defense of duress and decided [sic] to accept responsibility in this case for the actions that he took, he is very sorry for having participated in this. But there are some things that I've asked the Court to consider in this. The major circumstances, Juan Lopez, and I don't know if the Court tried the case of Mr. Lopez?
>
> THE COURT: I did.
>
> [APPELLANT'S COUNSEL]: But Juan Lopez, I know, admitted to the actions that caused the death of [complainant]. He's the instigator of the violence. He has been the instigator of violence that was perpetrated on Sierra Jacobs,[1] and on [appellant], Mariah, and other people that never tried the intervene [sic] to help anybody, especially Sierra. As the Court knows he's a tremendously intimidating person, physically intimidating, but also his, his character, his character for violence.

After closing arguments, the trial court briefly mentioned evidence from the trial of Juan Lopez before assessing appellant's sentence:

> THE COURT: After having heard the evidence in this case and the arguments of counsel, the Court is going to make a statement here that this is one of the most horrendous crimes I've seen. Not only in respect to the facts of this case as to how it all came about in this family, air quotes, situation, but the horrendous way in which the crime was carried out, and what happened after the murder. The mutilation, the callous disregard for human life or a body that has just been mutilated by having a skull crushed in, throwing the body in the bayou for six days, allowing the magots [sic] to eat it. And not only that, someone, and it could only be two people involved from the facts that I've heard in this case. And, yes, I did try Juan Lopez's case. Someone slit [the complainant's] throat after he was dead. And that

[1] Appellant's sister, who also was charged with complainant's murder.

> was from the testimony of the medical examiner. Now, how callous is that.

The trial court proceeded to sentence appellant to 40 years' imprisonment — the agreed upper limit of appellant's plea bargain.

Appellant did not object to the trial court's comments during the hearing or in any motion for new trial. Because appellant made no objection at the trial court level about the trial court's potential consideration of evidence outside the record, appellant did not preserve this issue for our review. *See* Tex. R. App. P. 33.1(a); *Harvey v. State*, 173 S.W.3d 841, 850 (Tex. App.—Texarkana 2005, no pet.) (appellant's failure to object waived complaint that trial court considered matters outside the record in assessing punishment).

Even if the objection had been preserved, we nevertheless would conclude that the trial court did not err by considering evidence outside the record because it was invited to do so by appellant.

"The law of invited error provides that a party cannot take advantage of an error that it invited or caused, even if such error is fundamental." *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011). Here, appellant's trial counsel specifically referenced the trial of Juan Lopez, asked the trial court whether it had also tried that case, and then stated that, "[a]s the Court knows[,] [Lopez is] a tremendously intimidating person, physically intimidating, but also his, his character, his character for violence."

Appellant's counsel attempted to use the trial court's familiarity with Lopez — obtained from trying Lopez's case — to appellant's benefit, hoping to secure a lesser sentence by showing Lopez's greater culpability. Appellant cannot now complain that the trial court considered evidence from Lopez's trial in assessing appellant's punishment. *See, e.g.*, *Druery v. State*, 225 S.W.3d 491, 505-06 (Tex.

Crim. App. 2007) ("We have noted, however, that '[i]f a party affirmatively seeks action by the trial court, that party cannot later contend that the action was error.' Indeed, 'the law of invited error estops a party from making an appellate error of an action it induced.'"); *Franks v. State*, 90 S.W.3d 771, 781 (Tex. App.—Fort Worth 2002, no pet.) (where appellant introduced trial judge's testimony from a prior recusal hearing during trial, invited error rule prevented appellant from claiming on appeal that trial court's admission of that testimony violated prohibition against a presiding judge testifying as a witness). Appellant's second issue is overruled.

III. Clerical Error in the Judgment

In a cross-issue, the State contends that the trial court's judgment incorrectly contains a notation that appellant waived his right to appeal and that no permission to appeal was granted. The State requests that we modify the trial court's judgment and delete the language in the judgment stating that appellant did not have the right to appeal.

The record reflects that, contrary to the statement in the judgment, the trial court granted appellant permission to appeal. Accordingly, we sustain the State's cross-issue, modify the trial court's judgment, and delete the special finding: "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." *See* Tex. R. App. P. 43.2(b) (court of appeals may modify the trial court's judgment and affirm as modified); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993) (court of appeals may reform judgment to correct clerical error).

CONCLUSION

Having overruled appellant's issues and sustained the State's cross-issue, the trial court's judgment is affirmed as modified.

/s/ William J. Boyce
Justice

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