Affirmed and Memorandum Opinion filed June 29, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00408-CR

KOREY LEWILLIE MAGEE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1392085

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

Appellant Korey Magee appeals his conviction for capital murder. In two issues, he argues that the trial court abused its discretion by (1) failing to include in the jury charge, sua sponte, an instruction that out-of-court statements made by an accomplice could not be used to corroborate the accomplice's in-court testimony, and (2) admitting evidence of appellant's other crimes or wrongs because the

danger of unfair prejudice substantially outweighed the probative value of the evidence.

We affirm.

Background

In the early morning hours of April 24, 2013, Houston Police Department ("HPD") officers responded to an aggravated robbery call at a Phillips 66 gas station and convenience store. When the officers arrived, paramedics were already on the scene, treating Eugene Nnaji, the station's clerk, for wounds.

According to Nnaji, a regular customer nicknamed Charlie and a second man approached the store's locked doors around 3:30 a.m. Charlie passed a ten-dollar bill through a narrow opening between the doors and requested cigarettes. When Nnaji unlocked the doors to hand Charlie the cigarettes, Charlie grabbed the door to pull it open. A third man joined Charlie and the other unidentified man, and all three forced their way into the store. One of the men had a white t-shirt covering the bottom half of his face and carried an assault rifle. The men ordered Nnaji to lay on the floor while they took cash and property from the store, including Nnaji's wallet. After the three robbers exited, Nnaji arose and entered an area enclosed by bulletproof glass to call police. One of the robbers—the man who half-covered his face with a t-shirt and carried the assault rifle—returned and shot at Nnaji, breaking the glass, which cut Nnaji's head and hand.

HPD officers collected surveillance videos from the scene, which showed the vehicle used in the robbery, as well as the men entering the store, unmasked, prior to the robbery. An officer who viewed the videos isolated and printed still shots of the faces of all three men. After looking at two photo arrays, Nnaji identified Charlie and appellant as two of the three robbers. Though appellant's

face had been partially masked during the robbery, Nnaji identified appellant because he recognized a mark or tattoo on appellant's face. According to Nnaji, appellant was the man who returned to the store and shot at Nnaji with the assault rifle. By investigating known associates of Charlie, police were able to verify appellant's name. HPD officers also recovered two spent shell casings and two packs of cigarettes. Testing revealed appellant's fingerprints on one package of cigarettes.

Four days after the robbery, police officers stopped a car that resembled the vehicle used in the robbery. The car's driver was Le Duy Nguyen. Nguyen did not match the description of any of the robbers, but when police attempted to question him about his car and its suspected use in the Phillips 66 robbery, he refused to give them any information.[1]

Nguyen visited appellant's house on May 10th, allegedly to buy narcotics; a short time later that day, police arrested appellant on outstanding warrants unrelated to the Phillips 66 robbery. At trial, the State offered two recordings (and written transcriptions) of appellant's telephone calls made during jail intake processing on May 11th. On the first recording, appellant said he thought Nguyen had "snitched" on appellant; in other words, appellant believed Nguyen was responsible for appellant's arrest. On the second recording, appellant asked the other person on the call, Lynell Jordan, to "take care of business." Jordan assured appellant that Nguyen would be "baptized."[2]

[1] Nguyen, a drug addict, would often loan his car to appellant, a drug dealer, in return for drugs. This transaction, according to several witnesses, is known as a "rock rental" or "crack rental."

[2] On appellant's objection, the trial court prohibited the investigating officer from opining as to the street meaning of the term "baptized." The officer testified, in general terms, that he believed the recordings were relevant to the investigation of Nguyen's murder.

A few days after appellant's arrest, Nguyen was found shot to death in the doorway of his home. His car—the one used by the three men in the Phillips 66 robbery—was abandoned nearby and set ablaze. Ballistics testing revealed that one of the shell casings from the Phillips 66 robbery was fired from the same assault rifle that was used to kill Nguyen.

Khaundrica Williams testified for the State against appellant while under indictment for her role in Nguyen's murder. According to Williams's trial testimony, she drove Jordan and her boyfriend, Arthur Holloway, who was appellant's best friend, to Nguyen's residence on the night Nguyen was killed. Jordan was armed with an AK-47, which is an assault rifle. Jordan and Holloway exited the vehicle with the rifle, while Williams remained in the vehicle. Shortly thereafter, Williams heard two gunshots, and Jordan and Holloway returned to the car. There is no dispute that Holloway shot and killed Nguyen.

The next day, Williams visited appellant in jail. Williams testified that she told appellant that Nguyen was dead. According to Williams, appellant was very excited by the news and told Williams to tell Holloway that appellant loved him. Appellant also spoke to Jordan on the phone, a recording of which was admitted during trial, and appellant told Jordan he loved him; Jordan told appellant, "I told, I promised you . . . I ain't gonna go on my word, man."[3]

Appellant was charged by indictment with capital murder for intentionally causing the death of Nguyen, while in the course of committing and attempting to commit retaliation against Nguyen. Appellant entered a plea of not guilty and proceeded to a jury trial.

[3] On this third call, appellant, Jordan, and possibly an unknown third man, also spoke about another robbery, appellant's concern about "somebody on the block" talking to police about appellant's involvement in that robbery, and the three men's intention to "find out who this person is" who gave appellant's "whole name" to the police.

After being instructed on the law of parties,[4] the jury found appellant guilty of capital murder as charged in the indictment, and the trial court sentenced appellant to a mandatory punishment of life imprisonment.

Appellant timely appeals.

Analysis

A. Jury Charge

Before trial, Williams made several statements to the police and others concerning Nguyen's murder. Appellant identifies two voluntary statements and one custodial statement Williams gave to police, conversations Williams had with friends, and Williams's testimony from Holloway's murder trial—all concerning her role in driving Holloway and Jordan to Nguyen's house on the night of Nguyen's murder and her visit to jail when she claimed she told appellant about Nguyen's death. These out-of-court statements, admitted into evidence, form the basis of appellant's first issue, which pertains to the jury charge instructions during the guilt-innocence phase of trial. Specifically, appellant argues that the trial court erroneously failed to instruct the jury that out-of-court statements made by Williams, who was an accomplice to the charged crime, could not be used to corroborate her in-court testimony. Although the jury charge contained accomplice witness instructions consistent with Texas Code of Criminal Procedure article 38.14, and though appellant did not object to the jury charge or request any additional instructions during the charge conference, appellant contends on appeal that the trial court should have, sua sponte, included an additional instruction that

[4] As relevant here, under the law of parties, a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, the person solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Tex. Penal Code § 7.02(a)(2).

specifically "inform[ed] the members of the jury that an accomplice witness cannot corroborate herself by her previous declarations or statements about the crime."

1. *Standard of review and governing law*

Evaluating alleged jury charge errors in the criminal context involves a two-step process. We first determine whether the charge was erroneous. *See Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). If error occurred to which the defendant objected, reversal is required if the error was "'calculated to injure the rights of the defendant,'" which the Court of Criminal Appeals has defined to mean "some" actual harm. *Id.* (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)). If, on the other hand, the defendant did not object to the error, we will reverse only if the error was so egregious and created such harm that the defendant was deprived of "a fair and impartial trial." *Id.* (internal quotation omitted). Jury charge errors that meet the "high and difficult standard" of causing egregious harm are those that "affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory." *See State v. Ambrose*, 487 S.W.3d 587, 597 (Tex. Crim. App. 2016); *Ngo v. State*, 175 S.W.3d 738, 750 (Tex. Crim. App. 2005).

Appellant complains about the charge instructions regarding accomplice witness testimony. In cases like appellant's, an accomplice's testimony is not sufficient evidence to support a conviction unless that testimony is corroborated. The Texas Code of Criminal Procedure provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

Tex. Code Crim. Proc. art. 38.14; *see also Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007) (testimony of an accomplice "must be corroborated by independent evidence tending to connect the accused with the crime").

Independent corroboration of accomplice witness testimony "has been a part of Texas law since at least 1925, and reflects 'a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person.'" *Zamora v. State*, 411 S.W.3d 504, 509-10 (Tex. Crim. App. 2013) (quoting *Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998)). That concern is present here with respect to Williams's testimony because she was indicted for her role in Nguyen's murder. But although article 38.14 appropriately limits the circumstances under which accomplice witness testimony may support a conviction, "it does not define the terms in which an instruction to the jury shall be framed." *Holladay v. State*, 709 S.W.2d 194, 198 (Tex. Crim. App. 1986). The evidence in each case will dictate the wording of an accomplice witness instruction, if any, that a court should include in the charge. *See Zamora*, 411 S.W.3d at 510.

A "proper accomplice-witness instruction" informs the jury either that a witness is an accomplice as a matter of law or that she may be an accomplice as a matter of fact. *Id.* (citing *Cocke v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006)). A witness is an accomplice as a matter of law when the witness has been charged with the same offense as the defendant or a lesser-included offense, or "when the evidence clearly shows that the witness could have been so charged." *Druery*, 225 S.W.3d at 498; *see also Cocke*, 201 S.W.3d at 747-48.[5] In this case,

[5] Unless the evidence clearly shows that the witness is an accomplice as a matter of law, a question about whether a particular witness is an accomplice is properly left to the jury, with an instruction defining the term "accomplice." *See Cocke*, 201 S.W.3d at 747-48. The trial court is

Williams was an accomplice as a matter of law because she was charged with the same offense as appellant. *Druery*, 225 S.W.3d at 498.

When a witness is an accomplice as a matter of law, the trial court's accomplice witness jury instructions must (1) inform the jury of that fact, (2) explain the definition of an accomplice, and (3) convey the statutory accomplice witness corroboration requirement. *See Zamora*, 411 S.W.3d at 510; *see also Druery*, 225 S.W.3d at 498-99; *Williams v. State*, No. 14-13-00708-CR, 2015 WL 5935660, at *8 (Tex. App.—Houston [14th Dist.] Oct. 13, 2015, pet. ref'd) (mem. op., not designated for publication).[6]

Further, under the Code of Criminal Procedure, and Court of Criminal Appeals precedent, a trial court must sua sponte submit a charge setting forth the law "applicable to the case." *Zamora*, 411 S.W.3d at 513 (citing *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998); *Almanza*, 686 S.W.2d at 160-74); Tex. Code Crim. Proc. art. 36.14 ("judge shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case"). An accomplice witness instruction is the law "applicable to the case." *Zamora*, 411 S.W.3d at 513.

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not required to instruct the jury on accomplice witness testimony when the evidence is clear that the witness is neither an accomplice as a matter of law nor as a matter of fact. *Id.* at 748.

[6] While "accomplice" should be defined in the charge, "the jury need not be given a definition for the phrase 'corroborating evidence.'" *Holladay*, 709 S.W.2d at 198.

2. *Application*

a. Error

Here, the court's charge contained an abstract accomplice-witness instruction, which appellant does not challenge, as well as a paragraph applying the law to this case.[7] The jury charge provided, in pertinent part:

> An accomplice, as the term is here used, means anyone connected with the crime charged, as a party thereto, and includes all persons who are connected with the crime by unlawful act or omission on their part transpiring either before or during the time of the commission of the offense, and whether or not they were present and participated in the commission of the crime. . . .
>
> **You are instructed that a conviction cannot be had upon the testimony of an accomplice unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged,** and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission.
>
> The witness, **Khaundrica Williams, is an accomplice, if an offense was committed, and you cannot convict the defendant upon her testimony unless you further believe that there is other evidence in the case, outside of the testimony of Khaundrica Williams** tending to connect the defendant with the offense committed, if you find that an offense was committed, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission, and then from all the evidence you must believe beyond a reasonable doubt that the defendant is guilty of the offense charged against him. (Emphases added).

Whether Williams's testimony was sufficiently corroborated is a question not before us, because appellant expressly "does not challenge the sufficiency of

[7] Under certain circumstances, a proper accomplice-witness instruction should include not only a statement of law relative to accomplices, but it must also include language applying the law to the facts of the case. *See Doyle v. State*, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939).

the evidence." *See Holladay*, 709 S.W.2d at 198 (noting that appellant did not challenge the sufficiency of the evidence to corroborate accomplice's testimony in discussing whether jury charge was erroneous). Rather, we are tasked solely "to judge whether the instruction on the accomplice witness [Williams] sufficiently protected the rights of the appellant as guaranteed under the law." *Id.* at 199.

Article 38.14 requires that the testimony of an accomplice be "corroborated by other evidence tending to connect the defendant with the offense committed." Tex. Code Crim. Proc. art. 38.14. The charge tracked the statutory language. It informed the jury that Williams testified as an accomplice, it provided a definition of "accomplice," and it conveyed the statutory accomplice witness corroboration requirement by telling the jury that it could not convict appellant upon Williams's testimony unless it further believed that there is "other evidence in the case, outside of the testimony of Khaundrica Williams" tending to connect appellant with the offense. *See Zamora*, 411 S.W.3d at 510; Tex. Code Crim. Proc. art. 38.14. The charge therefore was consistent with article 38.14, as interpreted by recent precedent discussing the accomplice-witness instructions in the abstract. *See id.*; *see also Williams*, 2015 WL 5935660, at *8; *Batts v. State*, No. 11-10-00156-CR, 2012 WL 2469546, at *8 (Tex. App.—Eastland June 28, 2012, pet. ref'd) (mem. op., not designated for publication) (no error in the charge when the charge "generally track[s] Article 38.14"). The charge also contained language applying accomplice-witness law to the present facts.

Appellant argues on appeal, however, that the instruction "was not as full as required" under Texas law because it should have included a further instruction that "an accomplice cannot corroborate herself by her previous declarations or statements about the crime." Citing several cases for support, appellant represents that "[f]or over a century Texas case law has . . . require[d] that the jury be charged

that statements of the accomplice made out of court cannot be used to corroborate the accomplice." *See Thompson v. State*, 78 S.W. 691 (Tex. Crim. App. 1904); *Barnard v. State*, 76 S.W. 475 (Tex. Crim. App. 1903); *Poyner v. State*, 51 S.W. 376 (Tex. Crim. App. 1899); *Clay v. State*, 51 S.W. 212 (Tex. Crim. App. 1899).[8] We agree these cases correctly state Texas law prohibiting an accomplice from corroborating her in-court testimony with out-of-court statements. *See McDuff v. State*, 939 S.W.2d 607, 612 (Tex. Crim. App. 1997) ("[H]earsay from an accomplice cannot corroborate the accomplice's trial testimony, i.e., an accomplice cannot corroborate himself by his own statements made to third persons."); *accord, e.g.*, *Maynard v. State*, 166 S.W.3d 403, 414 n.6 (Tex. App.—Austin 2005, pet. ref'd) ("To avoid the corroboration of [the accomplice's] in-court testimony by his out-of-court statement . . . we will disregard [his] testimony in evaluating the sufficiency of the evidence.").

However, as to whether a trial court is required, sua sponte, to add such a specific statement of the law to otherwise correct instructions under section 38.14, appellant's cited authority does not so hold. In *Thompson*, to be sure, the court remanded the case with instructions to charge the jury that, among other things, an accomplice's "statements out of court could not corroborate her statements in court." *Thompson*, 78 S.W. at 692. But *Thompson*'s result does not suggest a sua sponte duty to give the additional instruction appellant says should have been given here. The opinion in *Thompson* neither elucidates the circumstances giving

[8] Appellant also cites *Hanks v. State*, 117 S.W. 149 (Tex. Crim. App. 1909), in which the court held that the trial court erred in "charg[ing] the jury in a general way in regard to accomplice's testimony but fail[ing] to instruct the jury that they must believe the testimony of said accomplice in order to convict." 117 S.W. at 149-50. In discussing this error, the court noted that "it is also a correct proposition that no statement or declaration made by [an accomplice] can corroborate his testimony." *Id.* at 150. Again, the issue confronting this court is whether the charge as given was erroneous, not whether an accomplice's testimony is sufficiently corroborated, so we do not find *Hanks* instructive.

rise to its disposition on that issue, nor details the nature of the appellant's complaint. In *Barnard*, the court held it was error to refuse the defendant's requested instruction prohibiting the jury from considering an accomplice's other statements as corroboration for her court testimony. *See Barnard*, 76 S.W. at 476. But there the jury charge omitted an instruction on accomplice-witness testimony entirely. Here, in contrast, the trial court included extensive accomplice-witness instructions consistent with the applicable statute. Additionally, we consider both *Clay* and *Poyner* inapplicable, as they, respectively, reversed an instruction that the trial court submitted to the jury, and concerned an instruction on the impeachment and credibility of accomplices. *See Clay*, 51 S.W. at 212-13; *Poyner*, 51 S.W. at 377.

Generally, a court is not required to instruct the jury on every conceivable statement or nuance of law potentially applicable to the case. *See Land v. State*, 943 S.W.2d 144, 151 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (Taft, J., concurring) ("There is a difference between a charge that is erroneous on its face, and a charge which, though correct on its face, may not contain every instruction on law conceivably applicable to the case."). We have not located any Texas authority addressing whether a trial court has a duty to specifically instruct a jury that an accomplice's in-court testimony cannot be corroborated by the accomplice's out-of-court statements, *in addition to* instructing the jury regarding the accomplice-witness law required by article 38.14 and applying that law to the facts. Nor have we found a case discussing whether the instructions given here, which tracked the statutory text, insufficiently guided the jury such that the trial court erred by not including the additional degree of specificity appellant now argues the court should have included. One unpublished decision found no error in a trial court's refusal to provide more specific instructions beyond those called for

by section 38.14. *See Trevino v. State*, No. 07-15-00171-CR, 2017 WL 1090611, at *1 (Tex. App.—Amarillo Mar. 22, 2017, pet. filed) (mem. op., not designated for publication). In *Trevino*, the charge included the "requisite abstract paragraph" concerning accomplice-witness testimony, but the appellant argued the "application paragraph" was incomplete because it failed to "list the specific conditions under which a jury is authorized to acquit." *Id*. The court overruled the appellant's argument, stating "[a]ppellant does not cite authority requiring that an accomplice-witness instruction describe for the jury circumstances or conditions under which it must acquit the defendant if the accomplice's testimony is not corroborated." *Id*.

Assuming without deciding that appellant would have been entitled to the additional instruction had he requested it, the record shows he did not request it and we have found no authority requiring the trial court to increase the instruction's specificity on its own. *Cf. Campbell v. State*, 910 S.W.2d 475, 477 n.3 (Tex. Crim. App. 1995) (holding that defendant who objects to general reference to law of parties in application paragraph is entitled to increased specificity and to have law of parties applied to facts of case). Moreover, we need not decide whether the trial court had a duty to give the instruction sua sponte because, even if it had such a duty, any error in failing to do so did not rise to the level of egregious harm on this record, as we next explain.

b. Any error was harmless

Conducting an egregious harm analysis requires us to consider (1) the entirety of the jury charge, (2) the state of the evidence, (3) counsel's arguments, and (4) any other relevant information revealed by the entire trial record. *See Ambrose*, 487 S.W.3d at 598. We examine the entire record to determine whether the charge error alleged "affects the very basis of the case, deprives the defendant

of a valuable right, or vitally affects a defensive theory." *See Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016).

Assuming the charge should have specifically identified and singled out Williams's out-of-court statements as a particular category of "other evidence . . . outside of the testimony of [Williams]" upon which the jury could not rely to corroborate Williams's in-court testimony, we conclude such an omission was not so egregiously harmful as to deprive appellant of a fair and impartial trial. *See Crump v. State*, No. 14-10-00437-CR, 2011 WL 3667846, at *11 (Tex. App.—Houston [14th Dist.] Aug. 23, 2011, pet. ref'd) (mem. op., not designated for publication); *see also Barrios*, 283 S.W.3d at 350 (appellant must show egregious harm when no objection made in trial court). Even without the other witnesses' testimony recounting Williams's out-of-court statements, there exists other evidence corroborating Williams's in-court testimony. *Crump*, 2011 WL 3667846, at *11.

The State introduced a recording of appellant telling Jordan, "That [*deleted expletive*] Duy [Nguyen] set me up, son." Appellant also told Jordan that Nguyen had been by appellant's house right before appellant's arrest and then immediately said, "I swear to god . . . y'all better not let that dude make it to [*deleted expletive*] court." When appellant called Jordan from jail after Nguyen's death, appellant told Jordan, "I love ya . . . I love ya . . . I love ya . . . I swear to god . . . I love ya," to which Jordan responded, "I told, I promised you . . . I ain't gonna go on my word, man." Also, ballistics testing revealed that the assault rifle used by appellant in the Phillips 66 robbery was the same one used by Holloway to murder Nguyen. Given this evidence, any error in the charge did not rise to the level of egregious harm. *Accord, e.g.*, *Lewis v. State*, 448 S.W.3d 138, 144 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (improper omission of an accomplice witness

instruction is generally considered harmless unless the corroborating non-accomplice evidence is so unconvincing as to render the State's overall case for conviction clearly and significantly less persuasive).

For these reasons, we overrule appellant's first issue.

B. Evidence of Other Offenses

In his second issue, appellant argues that the trial court abused its discretion in admitting evidence of appellant's other offenses during the guilt-innocence phase of trial.

1. *Standard of review and governing law*

Evidence of a person's crime, wrong, or other act generally is not admissible to prove that person's character in order to show that he acted in conformity therewith when allegedly committing the charged crime. *See* Tex. R. Evid. 404(b); *see also Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001); *Montgomery v. State*, 810 S.W.2d 372, 386-88 (Tex. Crim. App. 1990) (op. on reh'g). Evidence of other offenses may, however, be admissible when it is relevant to a fact of consequence in the case. *See* Tex. R. Evid. 404(b)(2); *Montgomery*, 810 S.W.2d at 387-88. For instance, the evidence may be admissible if it tends to establish some elemental fact, such as identity or intent; tends to establish some evidentiary fact, such as motive, opportunity, or preparation, leading inferentially to an elemental fact; or rebuts a defensive theory by showing, e.g., absence of mistake or accident. *Montgomery*, 810 S.W.2d at 387-88; *see also* Tex. R. Evid. 404(b). If the trial court determines the offered evidence has relevance apart from or beyond character conformity, it may admit the evidence and instruct the jury the evidence is limited to the specific purpose the proponent advocated. *Prince v. State*, 192 S.W.3d 49,

54 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (citing *Montgomery*, 810 S.W.2d at 387-88).

But even if a trial court determines that evidence of other crimes or wrongs is not barred under Rule 404(b), the trial court must still conduct a Rule 403 balancing test upon proper objection or request before admitting the evidence. *Id.* at 56; *see also Belcher v. State*, 474 S.W.3d 840, 847 (Tex. App.—Tyler 2015, 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, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Tex. R. Evid. 403; *Belcher*, 474 S.W.3d at 847. Here, appellant raised a Rule 403 objection only on unfair-prejudice grounds. Appellant does not argue that the evidence should have been excluded under Rule 404(b); rather, he contends the trial court should have excluded otherwise admissible evidence because the danger of unfair prejudice substantially outweighed the evidence's probative value.

Courts should balance the following factors under a Rule 403 analysis: (1) the strength of the evidence in making a fact more or less probable; (2) the potential of the extraneous offense evidence to impress the jury in some irrational but indelible way; (3) the amount of time the proponent needed to develop the evidence; and (4) the strength of the proponent's need for this evidence to prove a fact of consequence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999); *Fuentes v. State*, No. 14-08-00613-CR, 2009 WL 997508, at *5 (Tex. App.—Houston [14th Dist.] Apr. 14, 2009, pet. ref'd) (mem. op., not designated for publication).

Because trial courts are best-suited to make the call on these substantive admissibility questions, an appellate court reviews admissibility rulings under an

abuse of discretion standard. *Powell*, 63 S.W.3d at 438. This standard requires an appellate court to uphold a trial court's admissibility ruling when that decision is within the zone of reasonable disagreement. *Id.*

2. *Application*

The evidence at issue here concerned references on the jail phone call recordings regarding appellant's apparent involvement in a robbery at a Pizza Hut restaurant, unrelated to the Phillips 66 robbery or Nguyen's murder. Both before and during trial, appellant objected to the admission of the recordings, in which appellant discussed not only the Phillips 66 robbery and Nguyen's potential "snitching" but which also "captured appellant expressing a keen interest in discovering the identity of any informant to the Pizza Hut incident," as appellant explains in his brief. The trial court overruled appellant's objections and admitted State's Exhibit 54, which were the three recordings, and State's Exhibit 128, which was a transcript of the telephone recordings.

Appellant "acknowledges that evidence of the extraneous offenses was relevant," but argues that it nevertheless "should have been excluded . . . because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice," citing Texas Rule of Evidence 403. Accordingly, we presume that the evidence pertaining to the Pizza Hut robbery and appellant's "keen interest in discovering the identity of any informant" were admissible under Rule 404, and we contain our analysis to the trial court's refusal to exclude the evidence under Rule 403. We turn to the relevant factors.

The strength of the evidence in making a fact more or less probable. The State argued that the tapes showed:

> . . .what [appellant] wants done with regard to -- he tells them on the front side, fix Duy and fix Pizza Hut. He finds out Duy is dead, and then he quits

> talking about Duy in the third phone call. And he says, "Now, we need to fix Pizza Hut." He knows what happened. He knows what they are doing. It shows his intent to have Duy killed and it shows that there's no mistake on his part about what has happened.

As mentioned above, appellant acknowledges that the evidence pertaining to the Pizza Hut robbery is relevant under Rule 404 and has therefore implicitly conceded that the evidence is probative of, e.g., motive, intent, plan, or absence of mistake. *See* Tex. R. Evid. 404(b)(2). We agree that the evidence of appellant's "keen interest" in discovering the identity of another potential informant is strong evidence tending to make appellant's intent to have Nguyen murdered as punishment for "snitching" or informing on appellant's role in the Phillips 66 robbery more probable.

The potential of the extraneous offense evidence to impress the jury in some irrational but indelible way. Appellant contends that the State recognized that the evidence could impress the jury in an irrational and indelible way, when the prosecutor urged the jury to consider the recordings as proof of "unfinished business" and appellant's intent to "move on to the next thing." The State does not respond to this contention. We are skeptical that the portions of the tape indicating appellant's interest in identifying a potential informant for the Pizza Hut robbery would impress the jury in an irrational way. Further, any chance that the jury would be impressed in an irrational way was minimized by the trial court's limiting instruction, given both orally and in the jury charge, to consider the extraneous offense only for determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See, e.g.*, *Carranza v. State*, No. 14-05-00807-CR, 2006 WL 3407836, at *2 (Tex. App.—Houston [14th Dist.] Nov. 28, 2006, no pet.) (mem. op., not designated for publication) (any prejudicial impact lessened by trial court's limiting instructions).

The amount of time the proponent needed to develop the evidence. Appellant admits that this third factor weighs in favor of admissibility, because the State "did not spend a great deal of time on the recordings." After reviewing the record, we agree with appellant.

The strength of the proponent's need for this evidence to prove a fact of consequence. The State offered the recordings to, inter alia, rebut appellant's defensive theory that he did not intend for Jordan and Holloway to murder Nguyen. Appellant argues that there was no need for the extraneous evidence to prove intent or motive because the State had the accomplice witness testimony from Williams, as well as appellant's recorded admissions concerning Nguyen. But this is not a case where the State's direct evidence clearly establishes the intent element and that evidence is not contradicted by appellant or undermined by appellant's cross-examination of the State's witnesses. *See De La Paz v. State*, 279 S.W.3d 336, 349 (Tex. Crim. App. 2009). Here, appellant denied any criminal intent, and the State needed the evidence of appellant's other threats against informants to explain to the jury why appellant intended for Jordan and Holloway to murder Nguyen; while perhaps this need was not overwhelming, given the State's other evidence, it was not so weak as to weigh against admission of the extraneous evidence. *Id.* at 350.

Based on these factors, the trial court could have reasonably concluded that the probative value of the recordings on which appellant and others discussed the Pizza Hut robbery was not substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403. The trial court did not abuse its discretion by refusing to exclude the evidence under Rule 403. *See, e.g.*, *Keith v. State*, 384 S.W.3d 452, 460 (Tex. App.—Eastland 2012, pet. ref'd) (trial court did not abuse its discretion by determining that the probative value of appellant's attempts to

deter others from reporting his involvement in the charged crime with threats of violence was not substantially outweighed by danger of unfair prejudice).

We overrule appellant's second issue.

Conclusion

Having overruled appellant's two issues, we affirm his conviction.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Busby, and Jewell.
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