Affirmed and Memorandum Opinion filed October 18, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00406-CR
NO. 14-21-00407-CR

LAVONIE DEMON LAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause Nos. 1633146 & 1633147

MEMORANDUM OPINION

Appellant Lavonie Demon Land appeals his convictions for murder and aggravated assault with a deadly weapon. In four issues appellant asserts the trial court erred in admitting certain exhibits during the punishment phase of trial and in overruling his objection to the State's closing argument. We affirm.

BACKGROUND

On the date of the offenses two brothers, Jose Juvenal Gonzales (Juvenal) and

Jose Miguel Gonzales (Miguel) went to a corner store near Juvenal's home. Juvenal stayed in the car while Miguel went into the store to make a purchase. While in line in the store Miguel was confronted by another customer, later identified as appellant. Appellant followed Miguel out of the store and continued to harass him outside. As Miguel walked toward his car appellant pulled out a gun and pointed the gun at Miguel. Juvenal stepped out of the car and tried to defuse the situation. At that moment, appellant shot both brothers, first Miguel, then Juvenal.

Miguel testified he was shot two or three times in the back. After appellant shot Miguel, he shot Juvenal, and, according to Miguel, "he kept shooting at us while we was [sic] on the ground." Miguel and Juvenal were able to stand up and run away, and appellant ran the opposite direction. The brothers ran to Juvenal's house where Juvenal collapsed in the front yard. Both brothers were transported to the hospital. Miguel recovered from his wounds after surgery, but Juvenal died three days later.

Because appellant raised self defense, on rebuttal, the State introduced the testimony of Paul Garcia about an extraneous offense. Garcia testified that he was walking to a convenience store in the same neighborhood where the Gonzales brothers were shot. As Garcia was leaving the store appellant approached him on the sidewalk and the two men exchanged "aggressive words." Garcia became upset and tossed his coconut water at appellant who then pulled a gun and pointed it at Garcia. Appellant shot Garcia in the back as Garcia turned and began to run away.

After closing arguments the jury found appellant guilty of aggravated assault and murder as charged in the indictments.

During the punishment phase of trial, the State introduced evidence of appellant's conviction for aggravated assault with a deadly weapon in 2015. The State further introduced evidence of a 2018 conviction for trespass, and a 2016 conviction for evading arrest or detention.

Sergeant Joseph Babineaux testified that he responded to a shooting incident approximately five days before the Gonzales brothers were shot. Babineaux made contact with appellant who was the suspect in that case. Babineaux's partner that day was an officer named Roberto Gonzalez. Gonzalez began speaking with appellant, but appellant requested to speak with Babineaux because appellant did not want to speak with what he called, "stringy hairs," described by Babineaux as anyone who was not African American. Appellant told Babineaux he was a rapper and used the screenname "Von Knyledge." Babineaux subsequently reviewed the Facebook page of Von Knyledge.

At the punishment phase, when the State offered pictures from the Facebook page, appellant objected to all of the exhibits on grounds that the exhibits violated the Confrontation Clause, were not relevant, were hearsay, and that their probative value was outweighed by their prejudicial effect under Texas Rule of Evidence 403. Appellant further challenged the authenticity of the Facebook pages because the State had not shown that appellant made the posts on the pages. The trial court overruled appellant's authenticity and Rule 403 objections to State's Exhibits 162, 168, 169, 172, 173, 174, 176, and 179. The trial court also overruled appellant's Confrontation Clause and hearsay objections.

Before the Facebook photographs were admitted, Sergeant Clint Ponder of the Houston Police Department gang division testified. Ponder took several photographs of appellant's tattoos. Appellant objected to Ponder testifying that the photographs represented a gang member's tattoos. The trial court overruled appellant's objection but invited appellant to further object in the event Ponder testified that the tattoos were representative of a gang. On cross-examination Ponder testified that the photographs and tattoos were not gang related.

The jury assessed punishment at life in prison for each offense. The trial court

sentenced appellant accordingly with the sentences to run concurrently.

ANALYSIS

In four issues appellant challenges his conviction on the grounds that the trial court erred in admitting certain exhibits at the punishment phase and in overruling his objections to the prosecutor's closing argument during guilt-innocence.

I. The trial court did not abuse its discretion in overruling appellant's Rule 403 objections.

In appellant's first and third issues he challenges the trial court's admission of certain Facebook posts because the probative value of the exhibits was outweighed by their prejudicial effect. *See* Tex. R. Evid. 403.

"We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard." *Seidule v. State*, 622 S.W.3d 480, 489 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (quoting *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018)). Code of Criminal Procedure article 37.07 § 3(a) is one of the guiding principles governing the admissibility of evidence at the punishment phase of a trial. Article 37.07 § 3(a) states in relevant part:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried[.]

Tex. Code Crim. Proc. art. 37.07 § 3(a).

Evidence is relevant to punishment where it is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case."

Rodriguez v. State, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006). The evidence that may be admitted in punishment "is a function of policy rather than a question of logical relevance," because "[d]eciding what punishment to assess is a normative process, not intrinsically factbound." *Sunbury v. State*, 88 S.W.3d 229, 233–34 (Tex. Crim. App. 2002) (adding that one of the policy goals is to provide "complete information for the jury to tailor an appropriate sentence").

Under Rule 403, however, otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403; *see Woodward v. State*, 170 S.W.3d 726, 729 (Tex. App.—Waco 2005, pet. ref'd) (noting that "unfair prejudice" does not exist where the evidence merely "injures the opponent's case"). We presume that the probative value of relevant evidence substantially outweighs the danger of unfair prejudice from admission of that evidence. *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990). It is therefore the defendant's burden to demonstrate that the danger of unfair prejudice substantially outweighs the probative value. *Kappel v. State*, 402 S.W.3d 490, 494 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Under Rule 403, we reverse a trial court's decision to admit evidence rarely and only after a clear abuse of discretion. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). Factors considered in our analysis of an issue regarding rule 403 are (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *See Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004).

Three of the exhibits admitted at trial were copies of Facebook posts in which appellant is pictured with friends. The other objected-to exhibits were "memes" posted on appellant's Facebook page, which contained negative depictions of Caucasians. In appellant's first issue he complains that the allegedly racist Facebook

posts were "of such an inflammatory nature that their sole purpose could have only been to unfairly prejudice the jury against Appellant as they considered a punishment verdict."

At the punishment phase of a criminal trial, evidence may be presented as to any matter that the court deems relevant to sentencing, including evidence of the defendant's background or character. Tex. Code Crim. Proc. Art. 37.071 § 2(a). A defendant's choice of "memes" and posts on Facebook, like his personal drawings, can reflect his character and/or demonstrate a motive for his crime. *See King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000) (appellant's tattoos and drawings were evidence of appellant's hatred for African-Americans and his motive in committing the murder); *Corwin v. State*, 870 S.W.2d 23, 35 (Tex. Crim. App. 1993) (recognizing that defendant's drawing had "an inferential bearing on his character for violence, which relates in turn to the question of future dangerousness").

The probative value of the Facebook posts was compelling in that they rebutted appellant's claim of self defense. Facebook memes such as those admitted in the punishment phase of appellant's trial could very well be considered the modern-day equivalent of drawings that, like those in *Corwin* and *King*, had an inferential bearing on appellant's character for violence and were evidence of his hatred for non-African-Americans. The trial court, therefore, did not abuse its discretion in admitting the evidence over appellant's Rule 403 objections. We overrule appellant's first issue.

In appellant's third issue he challenges admission of the Facebook posts that depicted pictures of appellant and friends "raising their hands as if intending to demonstrate their gang affiliations[.]" The pictures of appellant from the Facebook posts were admitted to authenticate that appellant was associated with the Facebook account of "Von Knyledge." The exhibits were admitted with no testimony about

the hand gestures or any other evidence of gang affiliation. The trial court excluded several of the photos the State introduced as potentially containing depictions of "gang signs," but admitted State's Exhibits 162, 169, and 172 to show that the Facebook page was associated with appellant. Appellant objected to State's Exhibits 162, 169, and 172 on grounds of relevance because it "looks like . . . some other gentleman making what probably would be considered gang signs."

On appeal, appellant vaguely asserts that the photographs of "unknown individuals, raising their hands as if intending to demonstrate their gang affiliations, unfairly implicate Appellant and portray him as a gang member as well." There is room to discuss whether the objected-to photographs showed appellant or others demonstrating gang affiliations.[1] The police officer from the gang unit specifically testified that the photographs of appellant's tattoos were not gang-related, and there was no testimony to accompany admission of the photos showing appellant and other unknown individuals purportedly displaying gang symbols. The photos were admitted for the limited purpose of authenticating the Facebook page. *See Tienda v. State*, 358 S.W.3d 633, 634–36 (Tex. Crim. App. 2012) (addressing authentication of computer printouts of the contents of social-networking websites).

Even if we consider that the photos showed evidence of gang affiliation, evidence of membership in a gang comes under the category of the type of "bad acts" relevant to sentencing that article 37.07 explicitly allows. *See Sierra v. State*, 266 S.W.3d 72, 76 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Thus, we conclude that the photographs of appellant with other unknown individuals were relevant to appellant's punishment and that the probative value of the evidence was

[1] "Many non-gang-affiliated people display gang-related hand signs in an unfortunate attempt to appear 'cool,' to be trendy, to fit in—and perhaps without any knowledge of what these symbols actually mean." *Beham v. State*, 559 S.W.3d 474, 482 (Tex. Crim. App. 2018).

not substantially outweighed by the danger of unfair prejudice. We overrule appellant's third issue.

II. The trial court did not abuse its discretion in overruling appellant's Confrontation Clause objections.

In appellant's second issue he asserts that admission of the posts and photos from Facebook violated his right to confront the witnesses against him pursuant to the Confrontation Clause of the United States Constitution. U.S. Const. amend. VI.[2]

The Sixth Amendment provides that in all criminal prosecutions, the accused shall have the right to be confronted by the witnesses against him. U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 51, (2004), the Supreme Court of the United States held that the Sixth Amendment right of confrontation applies not only to in-court testimony, but also to out-of-court statements that are testimonial in nature. *See Langham v. State*, 305 S.W.3d 568, 575 (Tex. Crim. App. 2010). The Confrontation Clause forbids the admission of testimonial hearsay unless the declarant is unavailable to testify, and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68. This "provides a simple yet unforgiving rule: the State may not introduce a testimonial hearsay statement unless (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant." *Lee v. State*, 418 S.W.3d 892, 895 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

The threshold question in any Confrontation Clause analysis is whether the statements at issue are testimonial or nontestimonial in nature. *See id*. Whether a

[2] On appeal appellant also asserts that admission of the photos violated his right of confrontation under the Texas Constitution. Because appellant specifically referenced the Sixth Amendment to the United States Constitution at trial and did not object under the Texas Constitution, we limit our analysis to appellant's right to confront the witnesses against him pursuant to the United States Constitution.

particular out-of-court statement is testimonial is a question of law that we review de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution. *See Crawford*, 541 U.S. at 51–52. "Testimonial" statements are typically solemn declarations made for the purpose of establishing some fact. *See Russeau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005).

In this case, there is no indication anyone made a social-media post or sent a message with the expectation the post or message would be used in a future prosecution. Appellant's Facebook posts bore none of the indicia of testimony—they were not similar to "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact[.]" *Crawford*, 541 U.S. at 51 (noting that testimonial statements are typically "formalized" materials that "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as opposed to informal social-media posts).

Because the Facebook posts and photos were not testimonial in nature the trial court did not abuse its discretion in concluding that the Confrontation Clause was not violated. We overrule appellant's second issue.

III. The trial court did not abuse its discretion in overruling appellant's objections to the prosecutor's closing argument.

In appellant's fourth issue he asserts the trial court erred in overruling his objections to the prosecutor's closing argument.

The law provides for, and presumes a fair trial, free from improper argument by the prosecuting attorney. *Borjan v. State*, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990). The approved areas of jury argument are (1) summation of the evidence, (2)

reasonable deduction from the evidence, (3) answer to the argument of opposing counsel, and (4) plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).

Appellant asserts that the prosecutor improperly injected matters outside the record during the following two portions of closing argument at the guilt-innocence phase of trial:

> And another thing, if there was any evidence in that statement that I didn't play and — we talked about that. We talked about that on voir dire. I prepared you for the fact that even if there was a statement, we might not play it. You can be damn sure if there was any evidence in his statement that there was any kind of weapon involved that that defense attorney would've asked that question.
>
> [Defense counsel]: That's objectionable, Your Honor. I wouldn't be allowed to ask questions from a hearsay statement.
>
> THE COURT: Overruled.

We analyze the closing argument in light of the entire record and not on the argument's isolated occurrence. *Smith v. State*, 483 S.W.3d 648, 657 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Appellant argues the prosecutor's argument impermissibly placed matters before the jury that were outside the record. We disagree. Wide latitude is allowed without limitation in drawing inferences from the evidence, so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988); *Thomas v. State*, 445 S.W.3d 201, 211 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

A. Appellant's Statement

We first address the prosecutor's argument about appellant's statement. The State asserts that its argument about appellant's statement and what might have been recovered from the car was in answer to opposing counsel's argument. Specifically, appellant's counsel argued that the State could be hiding evidence:

> I mean, are you kidding me? Not even a photograph of the interior of the car? What did Detective Turner tell you? It was released to the family. Was there a baseball bat in there, tire iron, a gun, a knife, anything? You should expect to know what was inside of that car. That is pathetic. You know from Detective Turner that he took a statement from the defendant, a 36-minute statement.
>
> *****
>
> What are they hiding from you? What are they hiding from you? That's in that 36 minutes of what somebody could have reached into that car and gotten.

When a prosecutor, on her own initiative, asks a jury to draw an adverse inference from a defendant's silence, the privilege against compulsory self-incrimination is violated, and the argument is improper. *United States v. Robinson*, 485 U.S. 25, 32 (1988). However, when a prosecutor's reference to the defendant's statement is a fair response to a claim made by the defendant or his counsel, there is no violation of the privilege. *Id*. Thus, in *Robinson*, after defense counsel argued that the government had denied the defendant an opportunity to explain his side of the story, the prosecutor's statement, that the defendant could have taken the stand and explained anything he wanted to, did not violate the defendant's Fifth Amendment rights. *Id*. at 31. Similarly, in *Allen v. State*, after defense counsel argued that the State was bringing the jury an incomplete picture by failing to produce evidence about stolen items, the appellant's rights were not violated when the State argued, "Show us the [stolen stereo] receiver and maybe we will get you some fingerprints. Somebody knows where it is, from the evidence you heard, [the appellant] knows what happened to it." *See Allen v. State*, 693 S.W.2d 380, 384, 385–86 (Tex. Crim. App. 1984) (argument not improper as a valid response to defense counsel's argument).

In this case, appellant's counsel argued that the State failed to develop or offer various items of evidence, and did so to deceive the jury. In *Allen*, however, the State

specifically blamed the appellant for the absence of the evidence he had complained about, and the court determined the trial court had not erred. *Id*. at 386. In this case the State acknowledged that unanswered questions, in the abstract, are normal in a criminal trial for various reasons. The prosecutor's argument in this case was a fair response to appellant's accusations and, if anything, a milder response to a harsher assertion than those made by the parties in *Allen*. Accordingly, the trial court did not err in overruling appellant's objection.

B. The Extraneous Offense

Appellant further complains of the prosecutor's argument that referenced the extraneous offense against Paul Garcia. Appellant objected to the following argument by the prosecutor:

> And defense wanted to make an issue about whether he was shot two times, three times. I invite you to look at the EMS records where it says there was controlled bleeding from three visible gunshot entrance and exit wounds. Okay. So Jose Miguel might not know the difference between an entrance and an exit wound. All he knows is he had three holes in his body. Okay. And guess where they were at? In his back. How do you claim self-defense and shoot somebody in the back? And not just Jose Miguel is he shooting in the back, he's doing the exact same thing two months later with Paul Garcia. Shooting people in the back. You don't get to just carry a —
>
> [Defense Counsel]: Objection, Your Honor. She's arguing that for conformity as opposed to what the charge requires.
>
> THE COURT: Overruled.

The State contends that its argument was in response to appellant's argument in which his counsel challenged the complainant's credibility:

> He told you yesterday he shot three times. I mean, you've got the medical records. Go through them. Take your time. He was shot twice. He told you yesterday that he was shot first three times, and then he shot the brother — to Turner and he shot the brother first. I mean,

> nothing's the same. I mean, why does he want to tell you he has three gunshot wounds? I mean, that's easy to prove.

On appeal appellant asserts the prosecutor's argument improperly interjected evidence outside the record. To the contrary, the extraneous offense against Garcia was admitted into evidence to rebut appellant's claim of self defense. Appellant has not challenged the admission of extraneous offense testimony on appeal. Therefore, the prosecutor's argument mentioning the extraneous offense falls within one of the areas of proper jury argument, i.e., summation of the evidence. *See Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011) (reiteration of testimony falls within the area of proper jury argument).

The trial court, therefore, did not err in overruling appellant's objections to the State's closing argument. We overrule appellant's fourth issue.

CONCLUSION

Having overruled appellant's issues, we affirm the judgments of conviction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer (Bourliot, J. concurring without opinion).
Do Not Publish — Tex. R. App. P. 47.2(b).