

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-09-00205-CR**

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**SHAWN DONELL JONES a/ka/ SHAWN DONNELL JONES**  
**a/k/a SHAWN D. JONES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 252nd District Court**  
**Jefferson County, Texas**  
**Trial Cause No. 07-00667**

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**MEMORANDUM OPINION**

Shawn Donell Jones appeals from a jury conviction of aggravated assault as a habitual felony offender. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon Supp. 2009).<sup>1</sup> The jury convicted Jones, found the enhancement allegations in the indictment to be true, and assessed punishment at seventy years' confinement in the State Jail Division of the Texas

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<sup>1</sup> Because the applicable sections of section 22.02 have not substantively changed since the date of Jones's offense, we cite the current version.

Department of Criminal Justice. In six issues, Jones contends that the trial court erred by failing to conduct a balancing test in accordance with Rule 403 of the Texas Rules of Evidence as to State's Exhibits 52, 53, 54A<sup>2</sup>, 55, 59, and 60. *See* TEX. R. EVID. 403. We affirm the judgment of the trial court.

### **Background**

On or about April 19, 2006, the victims attended a rap video-shoot in Port Arthur, Texas. Jones also attended the video-shoot. On leaving the video-shoot, the victims testified that Jones started shooting at their vehicle. They testified that they saw Jones hanging outside a white Ford Explorer sports utility vehicle ("SUV") with an SKS rifle shooting at them. The victims testified that the SUV chased them for several city blocks until the victims collided with a silver Bentley, which was being accompanied by a police escort.

Upon exiting his vehicle, one of the victims explained to an officer that they were being chased and shot at by the occupants of the SUV. The officer immediately initiated pursuit and called for backup. The officer testified that during his pursuit, the SUV stopped twice while traveling on West 17th Street. During each stop, various doors of the SUV were opened and then shut prior to the vehicle's reacceleration. The officer testified

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<sup>2</sup> Appellant erroneously complains of the admission of State's Exhibit 54. State's Exhibit 54 was not admitted. As a result of a hearsay objection, Exhibit 54 was modified and labeled State's Exhibit 54A. We interpret Jones's issue as challenging the admission of State's Exhibit 54A.

it was possible items could have been discarded during these stops.

Various law enforcement officers responded to the request for backup and pursued the SUV until it ran into a pole and was forced to stop. One officer in pursuit of the SUV activated his mobile video recorder, which captured the chase on video. As reflected in the video, an officer removed Jones from the back seat of the SUV. The SUV also had two other occupants. An officer removed another occupant from the front passenger seat of the SUV. The driver exited the vehicle and attempted to evade police further, but was caught. Officers found two spent shell casings inside the SUV, one from a rifle and the other from a handgun.

Thereafter, officers searched the route the SUV had taken. During the route search, officers found an SKS rifle on West 17th Street and a black magazine/clip for an automatic rifle. Officers also recovered two 7.62 shell casings on Kansas and 7th Street. Officers recovered some boxes of ammunition in a plastic bag at West 17th Street and Joe Louis Street. The ammunition recovered could fit an SKS rifle.

Latent prints were developed from the two boxes of ammunition recovered as well as the SKS magazine/clip. The forensic specialist matched the latent prints to Jones. A gunshot residue (GSR) trace evidence kit was also taken from Jones and the other two occupants of the SUV. A forensic scientist examined the GSR kit from these three men and testified that all three had results that were consistent with someone that had just recently fired a weapon, or had been in the immediate proximity to weapon's fire, or had

contact with a surface tainted with gunshot primer residue. The test reflected that of the three subjects, Jones had the highest amount of residue on his hands.

The trial court admitted into evidence over Jones's objections the SKS rifle, the black magazine/clip, the shell casings, the DVD of the in-car video, the plastic bag with two ammunition boxes, and the GSR kit from Jones.

### **Standard of Review**

We review the trial court's ruling on a Rule 403 objection under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). We will reverse the trial court's judgment "rarely and only after a clear abuse of discretion." *Id.* at 392 (quoting *United States v. Maggitt*, 784 F.2d 590, 597 (5th Cir. 1986)). "[T]he trial court's determination must be reasonable in view of all relevant facts." *Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996).

### **Applicable Law and Analysis**

Rule 403 allows for the exclusion of otherwise relevant evidence when its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. "Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." *Montgomery*, 810 S.W.2d at 389. "[P]robative value' refers to the inherent probative force of an item of evidence--that is, how strongly it serves to make

more or less probable the existence of a fact of consequence to the litigation--coupled with the proponent's need for that item of evidence." *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). "Unfair prejudice' refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* at 879-80. The prosecutor almost exclusively offers evidence that will be prejudicial to the defendant. As such, the trial court will exclude only evidence which is unfairly prejudicial. *Caballero v. State*, 919 S.W.2d 919, 922 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd).

Once a party objects to evidence under Rule 403, the trial court must engage in the balancing process to weigh the probativeness of the evidence against its potential for unfair prejudice. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997). "[A] trial judge is not required to *sua sponte* place any findings he makes or conclusions he draws when engaging in this test into the record . . . . [A] judge is presumed to engage in the required balancing test once Rule 403 is invoked[.]" *Id.* (citations omitted). The judge is not required to announce for the record that he or she has conducted and completed the balancing test. *Id.* at 195-96; *see also Nolen v. State*, 872 S.W.2d 807, 812 (Tex. App.--Fort Worth 1994, pet. ref'd).

Jones was charged with aggravated assault under section 22.02 of the Texas Penal Code. *See* TEX. PEN. CODE ANN. § 22.02. To prove an aggravated assault, the State must prove that Jones intentionally or knowingly threatened his victims with imminent bodily

injury and exhibited a deadly weapon during the commission of the assault. *See id.*; *see also* TEX. PEN. CODE ANN. § 22.01(a)(2) (Vernon Supp. 2009).

***State's Exhibits 52, 53, 54A and 59***

State's Exhibit 52 is the SKS rifle; Exhibit 53 is a magazine clip; Exhibit 54A is a plastic bag with two ammunition boxes; and Exhibit 59 is two shell casings. Jones objected to these exhibits on Rule 403 grounds. The trial court overruled Jones's Rule 403 objections to State's Exhibits 52, 53, 54A, and 59. Thereafter, the trial court admitted these exhibits into evidence. Jones argues that the trial court failed to conduct the required Rule 403 balancing test.

While the trial court did not announce for the record that it had conducted and completed the required balancing test, the trial court was not required to affirmatively state on the record that it has conducted the test or the reasons for the ruling. *See Williams*, 958 S.W.2d at 195; *Nolen*, 872 S.W.2d at 812.

Jones requests that we ignore well established law creating the presumption that the trial court engaged in this required Rule 403 analysis and instead asks us to require the trial court to place its analysis on the record. *Id.* We decline to do so.

Although the trial court did not state for the record it had conducted a balancing test prior to admitting this evidence, we can infer from the record that it did. The State introduced these exhibits to establish one of the elements of the offense of aggravated assault. The use of a deadly weapon is a key element of the State's case, not an extraneous

matter. Jones vigorously contested his possession and use of the SKS rifle throughout the trial. State witnesses identified Jones with an SKS rifle. The fingerprints on the magazine/clip that fit an SKS rifle and the boxes that contained ammunition for an SKS rifle matched Jones's fingerprints. Testimony indicated that the SUV's occupants could have thrown objects out of the vehicle while running from police officers. Moreover, various officers testified that they found the SKS, ammunition, casings, and magazine clip on the route taken by the SUV during the chase. The evidence also supports that the SKS rifle is a deadly weapon capable of causing serious bodily injury or death. The black magazine/clip, ammunition, and shell casings were capable of being used with an SKS rifle. The admission of each of these items makes Jones's use of a deadly weapon in the commission of an assault more probable.

Jones has not suggested, and we do not find, any inflammatory attributes of State's Exhibits 52 (SKS rifle), 53 (magazine/clip), 54A (plastic bag with two ammo boxes), or 59 (shell casings). Jones has not shown that such evidence taken together was cumulative in nature or would confuse the jury. The trial court did not abuse its discretion by finding that the probative value of these exhibits was not substantially outweighed by any danger of unfair prejudice. *See* TEX. R. EVID. 403. We overrule issues one, two, three, and five.

#### ***State's Exhibit 60-DVD of In-Car Video***

State's Exhibit 60 is a DVD of an in-car video from one of the officers that pursued the SUV. The trial court admitted Exhibit 60 into evidence over Jones's Rule 403

objection. The trial court did not state its reasons for overruling the Rule 403 objection on the record, but we infer from the record that the trial court did perform the required test and reached a reasonable conclusion. The State offered the video to help prove its case-in-chief—specifically, the identity and location of Jones. The video and the officer’s testimony confirmed that Jones was a rear passenger in the SUV. Two witnesses testified that the shooter was in the backseat of the SUV. Jones disputed that he was the shooter and argued to the jury that another man in the SUV was the shooter. The video and testimony clearly show that the man Jones accused of being the shooter was the driver of the SUV. The video shows Jones in the backseat of the SUV. The in-car video makes the fact that this other man was not the shooter, but rather the driver, more probable. Moreover, the video corroborates State’s witnesses’ testimony as to what the shooter was wearing. Finally, Jones has not suggested any unfair prejudicial effect this video presented to the jury. The trial court did not abuse its discretion by finding the probative value of the DVD of the in-car video was not substantially outweighed by any danger of unfair prejudice. *See id.* Issue four is overruled.

***State’s Exhibit 55- Gun Shot Residue Kit***

State’s Exhibit 55 is the GSR kit from Jones. The State offered testimony regarding the analysis performed on this kit that indicated Jones had recently fired a weapon, or had been in the immediate proximity to weapon’s fire, or had contact with a surface tainted with gunshot primer residue. As previously discussed, Jones seriously



contested the issue of whether he was the shooter of the SKS rifle. The results of the GSR test make it more probable that Jones was in fact not only around gunfire, but also the shooter. The trial court admitted Exhibit 55 over Jones's Rule 403 objections. Jones has not suggested that the admission of this test had any specific unfair prejudicial effect on the jury, and we find none. The trial court did not abuse its discretion by finding that the probative value of the GSR kit was not substantially outweighed by any danger of unfair prejudice. *See id.* We overrule Jones's issue six. Having overruled all of Jones's issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER  
Justice

Submitted on July 19, 2010  
Opinion Delivered August 4, 2010  
Do not publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.