In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-15-00170-CR

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BRANDON AHMAD JULUN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 14-19867

MEMORANDUM OPINION

A jury convicted appellant Brandon Ahmad Julun of burglary of a habitation and assessed punishment at twenty years of confinement. In five appellate issues, Julun challenges the admission of extraneous offense evidence and a recording of a telephone call Julun made from the jail. We affirm the trial court's judgment of conviction.

BACKGROUND

The indictment charged Julun with committing the offense of burglary of a

habitation on April 3, 2014. Officer Tomie Gipson of the Port Arthur Police Department testified that on March 16, 2014, he responded to a call regarding a disturbance at a residence. Upon arriving at the residence, Julun's mother, who had called the authorities, met Gipson outside. Gipson testified that Julun emerged from the residence loudly shouting profanities. Gipson eventually saw the victim, who he testified was wearing dark sunglasses, had a scarf wrapped around her neck, and was "shaky." Gipson explained that when he asked the victim to remove her sunglasses and scarf, he saw multiple injuries, including a cut, scratches, and bite marks. Based upon his encounter with the victim, Gipson determined that Julun was the perpetrator. According to Gipson, Julun was "not cooperative" and was "[s]creaming and yelling the whole time."

On April 3, 2014, Gipson was dispatched to the same location, as well as to the victim's residence. Upon arriving at the victim's residence, Gipson saw broken glass and "[r]oughed-up blinds" at one window, and he observed that the victim's forehead, leg, and knee were injured. Gipson testified that Julun entered the house through the window.

Detective Tommy Savoie of the Port Arthur Police Department testified that on March 17, 2014, he filed an application for emergency protective order against Julun, and the judge signed an emergency protective order. Savoie testified that the

order prohibits Julun from going within two hundred feet of the victim's residence in Port Arthur and ordered Julun not to commit any acts of family violence or assault against any person named in the order.

Officer Lawrence Myers of the Port Arthur Police Department testified that between 8:00 and 9:00 a.m. on April 3, 2014, he was dispatched to a residence regarding a disturbance, and he found the victim when he arrived. Myers learned that the victim had been involved in a disturbance with her ex-boyfriend, Julun, and that "there was an active protective order restraining Mr. Julun from her property or near her." Myers explained that Julun had broken a window in front of the victim's house. Myers testified that the authorities subsequently received a second call pertaining to an assault, and upon arriving at the residence, he saw that the victim had a swollen area on her forehead, as well as injuries to her right knee and chin. Upon investigating, Myers learned that Julun had "broken in the window he had previously busted and assaulted [the victim]."

Detective Mickey Sterling of the Port Arthur Police Department testified that he was assigned to investigate the case against Julun. Sterling went to the scene, spoke with the victim, and observed that the victim's bedroom was in considerable disarray and looked like a fight had occurred there. Sterling explained that the glass at the broken window had been cleaned up, and he testified that he

observed blood smears as he proceeded into the hallway. Sterling observed that the victim had knots, scrapes, and abrasions on her head and legs.

The victim, J.J., testified that she had been involved in an on-and-off romantic relationship with Julun for four or five years. J.J. testified that on March 16, 2014, and April 3, 2014, she was injured during altercations with Julun, and she explained that the second altercation occurred when Julun broke in through a window of the residence where she was staying and assaulted her. The victim's aunt, C.T., testified that on April 3, 2014, the victim asked her to come over to help her, and C.T. saw that the window was broken and "stuff was in disarray a little bit." C.T. helped the victim cover and secure the broken window.

Jim Eiselstein of the Jefferson County Sheriff's Department and Captain of the Jefferson County Correctional Facility, testified that the county regularly screens calls made by inmates, and one of his duties as Captain involves retrieving recorded phone calls. Eiselstein explained that jail telephone calls are controlled by an outside company called Global Telelinks, which provides equipment that is under the jail's care, custody, and control, and is operated by the jail. Eiselstein explained that when an inmate makes a call, he picks up the phone, selects English or Spanish, and then the system asks the inmate to say "my voice is my password" three times so the system can recognize the inmate's voice. The system then asks

the inmate to enter a password, which will either be his jail identification number or his date of birth.

According to Eiselstein, during every call, the system informs inmates via a recording that calls may be monitored or recorded. Eiselstein testified that he can identify which inmate made a recorded call because the inmate must give his password, and the inmate must say his name when making the call. Eiselstein testified that State's Exhibit 9C was a recording of a telephone call made by Julun on September 17, 2014. Eiselstein explained that he is personally familiar with Julun's voice from listening to recordings, and he opined that the voice on State's Exhibit 9C was Julun's.

The Court permitted the recording into evidence, and the recording was played before the jury. Eiselstein testified that on the recording, Julun stated, "They only got me for burglary of a habitation. What they [are] saying is I went to her house, and I did. I went to her house and beat . . . her." Eiselstein testified that he never spoke to Julun by telephone or face to face, and he does not have voice recognition training. The State rested at the conclusion of Eiselstein's testimony. Julun testified that it is his voice on State's Exhibit 9C, but Julun testified that he was referring to the March 16 incident rather than the April 3 incident. Julun denied breaking into the victim's house.

ISSUES ONE AND TWO

In issue one, Julun challenges the admission of extraneous offense evidence concerning the March 16 assault of the victim, and in issue two Julun challenges the admission of "the extraneous offense evidence of the protective order[.]" We address issues one and two together.

We review a trial court's admission of extraneous offense evidence under an abuse of discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). We must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002).

Rule 404(b) of the Texas Rules of Evidence provides as follows:

> (1) ***Prohibited Uses***. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) ***Permitted Uses***. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .

Tex. R. Evid. 404(b). The list of enumerated purposes for which extraneous offense evidence may be admissible under Rule 404(b) is neither exclusive nor exhaustive. *Montgomery*, 810 S.W.2d at 388. Extraneous offense evidence may be admissible if it has relevance apart from its tendency to prove a person's character

to show that he acted in conformity therewith. *Id.* at 387. However, the fact that extraneous offense evidence is introduced for a purpose other than character conformity does not, standing alone, make the evidence admissible. *See Webb v. State*, 36 S.W.3d 164, 180 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Proferred extraneous offense evidence must also be relevant to a fact of consequence in the case. *Id*. (citing *Rankin v. State*, 974 S.W.2d 707, 709 (Tex. Crim. App. 1996)). Evidence is relevant if it tends to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. Tex. R. Evid. 401.

Rule 403 of the Texas Rules of Evidence provides as follows: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting 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*, 801 S.W.2d at 389. Once a trial court determines that extraneous offense evidence is admissible under Rule 404(b), the trial court must, upon proper objection by the opponent of the evidence, weigh the probative value of the evidence against its potential for unfair prejudice. *Id*.; see Tex. R. Evid. 403.

> [A] Rule 403 analysis must balance (1) the inherent probative force of the proferred item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006); *see also Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). However, if the only value of extraneous offense evidence is to show character conformity, the balancing test required by Rule 403 is obviated because the "rulemakers hav[e] deemed that the probativeness of such evidence is so slight as to be 'substantially outweighed' by the danger of unfair prejudice *as a matter of law*." *Montgomery*, 810 S.W.2d at 387 (quoting *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978)).

At the pretrial hearing, the trial judge explained that she would allow evidence of the March 16 assault and the entry of a protective order under Rule 404(b) because she determined that the evidence was relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Because Julun's counsel properly objected to testimony regarding the March 16 assault and the protective order, the State had the burden to show that the

evidence was relevant apart from its tendency to prove Julun's character to show that he acted in conformity therewith. *See id.*; *see also* Tex. R. Evid. 404(b).

The indictment alleged that, without the effective consent of the owner, Julun entered the habitation "to commit and attempt to commit an assault" against the victim. *See* Tex. Penal Code Ann. § 30.02(a)(3) (West 2011). Evidence of the previous assault and the protective order were relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and the trial court did not err by so concluding. *See* Tex. R. Evid. 404(b)(2); *Montgomery*, 810 S.W.2d at 387. The evidence of the prior assault and the protective order were also relevant to the issue of whether Julun had consent to enter the habitation, since lack of consent is an element of the offense of burglary of a habitation. *See* Tex. Penal Code Ann. § 30.02. In addition, the trial court appropriately performed the balancing test required by Rule 403. *See* Tex. R. Evid. 403; *Gigliobianco*, 210 S.W.3d at 641-42. The trial court did not err by determining that the evidence did not tend to suggest making a decision on an improper basis or confuse or distract the jury, and the evidence did not consume an inordinate amount of time or merely repeat previously admitted evidence. *See Gigliobianco*, 210 S.W.3d at 641-42. Accordingly, we overrule issues one and two.

ISSUE THREE

In his third issue, Julun contends the State did not provide reasonable notice of its intent to use extraneous offense evidence of the prior assault and protective order during the guilt-innocence phase of the trial. The record reflects that the State filed its notice of intent to use extraneous offense evidence on March 13, 2015, the pretrial hearing was held on March 16, 2015, , and voir dire began on March 17, 2015. At the pretrial hearing, Julun's counsel asserted that the State's notice was untimely. The prosecutor responded that he included information regarding the extraneous offenses in discovery that was "uploaded into the discovery database on May 13 of 2014." Julun's counsel stated that he did receive said discovery, and the trial judge stated that she was overruling defense counsel's objection "because there was notice."

Rule 404(b)(2) provides that upon "timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence . . . in its case-in-chief." Tex. R. Evid. 404(b)(2); *see also* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) (West Supp. 2015).[1] We must disregard any error that does not affect substantial rights. Tex. R. App. 44.2(b). "The Rule 44.2(b) harm standard is whether the error in

[1]Because the amendments to section 37.07 do not affect § 3(g) of article 37.07, we cite to the current version of the statute.

admitting the evidence 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). "Rule 404(b) literally conditions the admissibility of other-crimes evidence on the State's compliance with the notice provision of Rule 404(b)." *Id*. Assuming without deciding that the State's notice was inadequate, we conclude that because the State provided notice of the extraneous offense evidence in discovery months before trial commenced, any such error did not affect Julun's substantial rights. *See* Tex. R. App. P. 44.2(b); *Hernandez*, 176 S.W.3d at 824. We therefore overrule issue three.

ISSUE FOUR

In issue four, Julun argues that the trial court abused its discretion by admitting a recording of a telephone call he made while confined in the Jefferson County jail. Julun argues that the evidence was "highly prejudicial and had not been properly authenticated." We review the trial court's admission of evidence for abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Hernandez v. State*, 53 S.W.3d 742, 750 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). To preserve an appellate

issue, the objection at trial must comport with the objection on appeal. *Ramirez v. State*, 815 S.W.2d 636, 645 (Tex. Crim. App. 1991).

Rule 901 of the Texas Rules of Evidence provides as follows, in pertinent part:

> **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> **(b) Examples.**
>
> (1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
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> **. . . .**
>
> (5) ***Opinion About a Voice.*** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording –based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
>
> . . . .
>
> (9) ***Evidence About a Process or System***. Evidence describing a process or system and showing that it produces an accurate result.

Tex. R. Evid. 901. The record reflects that Eiselstein described the equipment used by the jail to record and retrieve recorded phone calls. As previously discussed, Eiselstein explained that the system requires an inmate to state "my voice is my password" three times so the system then recognizes the inmate's voice. Eiselstein testified that the system also requires the inmate to enter a password, and he explained that he can identify which inmate made a particular recorded call because the inmate must state his name and provide his password when making the

call. Eiselstein identified the recording entered into evidence as State's Exhibit 9C as a recording of a telephone call made by Julun, and he explained that he is personally familiar with Julun's voice from listening to recordings.

We conclude that the recording of the telephone call was properly authenticated, and the trial court did not abuse its discretion by admitting the recording into evidence. *See* Tex. R. Evid. 901(a), (b)(1), (5), (9). In addition, we note that Julun's counsel did not object at trial that the recording was unduly prejudicial. We therefore conclude that the issue of whether the recording was unduly prejudicial was not preserved for appellate review. *See Ramirez*, 815 S.W.2d at 645. However, even if the issue of potential prejudice had been properly preserved, we conclude that admission of the recording did not affect Julun's substantial rights. *See* Tex. R. App. P. 44.2(b). Accordingly, we overrule issue four.

ISSUE FIVE

In issue five, Julun argues that his testimony at trial did not waive the trial court's error in admitting the extraneous offense evidence of the March 16 assault, protective order, and the recording of the telephone call Julun made from the jail. The State concedes that Julun did not waive error, and we agree that Julun's counsel made timely, proper objections. However, as discussed above, we

conclude that the trial court did not err in admitting the extraneous offense evidence and the recording of Julun's telephone call from the jail. Therefore, although Julun's objections were properly preserved and were not waived by his own testimony, no reversible error occurred. Accordingly, we overrule issue five and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on November 23, 2015
Opinion Delivered January 13, 2016
Do Not Publish

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