In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00411-CR
NO. 09-16-00412-CR

ANTHONY DWAYNE RIDEAU, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 15-08-08833-CR (Counts 1 and 2)

MEMORANDUM OPINION

Anthony Dwayne Rideau appeals his convictions for the murder of Aaron McMahan and for the aggravated assault of Michael McMahan, Aaron's father. The jury found Rideau guilty of both counts as alleged in the indictment, and assessed

punishment at life imprisonment for the murder and two years of imprisonment for the aggravated assault. Rideau raises five issues on appeal.[1] We affirm.

Evidence at Trial

Clint Cook testified that he was fishing at a lake in Magnolia when he noticed two white males who appeared to be teenagers carrying fishing gear. According to Cook, one of the males began cussing and screaming at the "other one[]" who was sitting and fishing. Cook testified that after a while, the two became more belligerent and aggressive toward each other. At some point the two males had an altercation with each other and the "other boy just sort of kicked [the other one] in his back with his flat foot on him." Cook testified that he saw the younger man hold the other man down while fighting.

Cook testified that during the altercation, he walked up on the males and realized that the older male was "in his late 50's, maybe[,]" and "the young one, probably almost 30." According to Cook, as he left, the older male began walking away and the younger male continued yelling. As Cook proceeded to his house on the lake, he saw the two males leaving the lake. Cook testified that the younger male

[1] We note that the issues stated in Rideau's table of contents do not match the issues stated in the body of his appellate brief. Because there is no briefing to support any of the issues as stated in the table of contents, we consider only the issues that are included in the argument of Rideau's appellate brief.

was hitting a car and yelling at the female driver, and the older male was ahead of him telling him "come on. Leave them alone." Cook testified he did not see the males drinking.

Cook testified that his son later left the house, called Cook, and told him that "the boy is laying in the middle of the road down here." Cook drove his truck down the road and saw the younger male that had been at the lake yelling and hollering lying in the road, and CPR was being administered on him. Cook explained at trial that he did not know Rideau but that he knew that he lived in the neighborhood. Cook testified that he did not know Aaron or Michael, but Cook had learned they also lived in the neighborhood. Cook testified that he gave a statement to two officers at the scene as well as to "news cameras" at the scene. Cook remembered telling them that he thought the men had killed each other because they had been fighting all day.

Avery Head testified that she was with her boyfriend in his truck and they were on their way to the lake when she saw two men walking with bags down the middle of the road and "acting pretty drunk[.]" She explained that her boyfriend had to swerve to miss them and, although her boyfriend was driving under the speed limit, the younger of the two men aggressively yelled for her boyfriend to slow down, and the younger man hit the windshield with his fishing pole. She testified

that her boyfriend wanted to stop the truck but she “didn’t want anything to happen[]” so she told him to ignore the man. She testified that after spending about twenty minutes at the lake she and her boyfriend drove back and saw the two men injured and lying in the road, and “their bags were on the ground and you could see that there was alcohol there.” Head provided a statement to the police.

Anna Devaudour testified that she lived near the incident and heard “yelling and screaming . . . and a man saying, ‘why did you do this?’” She testified she “heard a car screeching, coming to a stop in the ditch” and she looked out the window. According to Devaudour, she saw a car in the ditch and a black man walk out of the car “yelling and screaming and upset[,]” and saying “Why did you do it, why did you do it?” She testified she called 911. She did not see anyone else until she moved to the front of her house and then saw a body in the road. Devaudour testified that she saw the black man get a “crowbar[]” or “something long and steel[]” out of the back of the vehicle. According to Devaudour, the black man approached the body on the ground, was yelling, and hit the person lying on the ground several times. As police arrived, Devaudour and her son approached the scene and saw another body lying in the road. Devaudour testified that she provided written and audio recorded statements to law enforcement.

Charles Ritter testified that he was driving home from work and entering his neighborhood when he noticed a vehicle parked over the culvert with the back hatch open. Ritter testified that he saw Rideau distraught, walking around the vehicle, and pacing in the street, and Ritter saw two bodies lying in the road. According to Ritter, he heard Rideau say at least once, "Why did you make me do this? I didn't want to do this." Ritter testified that at some point he saw Rideau pick up a four-way lug wrench from the street and put it in his vehicle. Ritter testified he also saw Rideau pick up two more items – a small bat similar to a police "billy club" and something "like a telescoping baton" – and put them in the back of his vehicle and close the hatch. Ritter explained that he gave a statement when law enforcement arrived.

Scott St. John, a deputy with the Montgomery County Sheriff's Office, lived in the neighborhood and heard males yelling outside his residence. St. John explained at trial that when he believed the incident was escalating into a physical altercation he went outside. According to St. John, he saw a black male pacing in the street and a white male in need of medical attention lying in the street. St. John testified that he noticed a second male lying in the street about twenty feet from the other male lying in the street. St. John testified that he asked his wife to call 911. St. John explained at trial that when he checked the male that was in the worse condition of the two, the male initially had a very weak pulse and, after St. John checked on

him again, the male had no pulse. St. John testified that at the scene he noted the "smell of alcoholic beverage[,]" a couple of cans of alcoholic beverage, and a fishing pole lying off the side of the road. St. John testified that he and EMS had trouble administering CPR to the male in the worse condition because they had difficulty securing the mask to his face because of his injuries. By the time that male, identified as Aaron McMahon, was transported to the hospital, he was already deceased.

Deputy Cody Lowery with the Montgomery County Sheriff's Office testified that he responded to the scene around 8:30 p.m. and two officers were already at the scene. He testified that he found both Aaron and Michael lying in the southbound lanes of the road. According to Deputy Lowery, Michael was talking but appeared to have blood coming from his head, and there was an extensive amount of blood around Aaron who was surrounded by medical staff. Deputy Lowery testified that he found a switchblade knife, that was "half open" with about a three inch blade, resting on the ground in close proximity to Michael.

Deputy Lowery testified that Rideau was standing by his vehicle and waiting on law enforcement, and the vehicle's engine was running and the headlights were on. Although Rideau's vehicle was parked partially on the road and partially in a grassy ditch, it did not appear to be stuck. Deputy Lowery explained at trial that Rideau was placed in the back of a patrol car and was cooperative. According to

Deputy Lowery, he photographed "a little bit" of a laceration on one of Rideau's hands, but otherwise Lowery did not note any significant injuries on Rideau's face or body. Deputy Lowery testified that EMS and fire personnel attempted CPR on Aaron and that Aaron and Michael were transported to a hospital.

Michael McMahan testified that at the time of trial he was sixty years old, and that his son, Aaron, was thirty-one years old at the time of his death. He explained that on August 25, 2015, he was off of work and he and Aaron had made plans to go fishing at the lake. According to Michael, Aaron arrived at his house about noon. Michael testified that after watching some television, they went to the store to get worms and beer and it began to rain. Michael explained at trial that they decided to watch a movie and drink alcohol until it stopped raining about 5:15 that evening.

According to Michael, they left the house for the lake about 5:30 or 6:00 with their fishing equipment and stayed at the lake for "maybe an hour-and-a-half." Michael testified they had fun at the lake and did not fight. Michael admitted at trial that on the day of the incident he was intoxicated and believed that Aaron was also intoxicated. Michael testified that around dusk they started walking home. According to Michael, they were walking down the road and Aaron began hollering at people going by in cars, "tapping on the windshield or . . . waving [his fishing pole, and] telling them to slow down[.]" Michael testified that after Aaron yelled at

a truck, Aaron and the driver of the truck "had a few words[,]" and then the driver of the truck drove off.

Michael testified that about fifty feet from his house, a car drove up behind him, stopped, and Rideau got out of the vehicle. According to Michael, Rideau said that Michael and Aaron had broken his windshield and Michael responded, "Show it to me." Michael testified that he had been walking in front of Aaron and did not see Aaron hit Rideau's vehicle, but acknowledged that "[i]t could have happened." Michael explained that once the car stopped, Aaron had walked ahead of Michael and Aaron told Michael, "Dad, don't go back there." Michael testified that he and Rideau walked around to the passenger side of the car and Rideau showed him a "little bitty rock chip" in the windshield and Rideau was angry. According to Michael he started to walk off and the next thing he remembers is waking up in the ambulance. Michael testified that he was carrying a pocket knife in his pocket and it was hooked on the inside of the pocket, and that it was the knife that had been entered into evidence. Photographs of Michael's injuries taken the night of the incident by law enforcement were admitted into evidence. Michael received stitches over his left eye and on the back of his head, and he had some broken ribs. Michael provided a written statement to law enforcement at the hospital.

Karen Ross, M.D., formerly a forensic pathologist with the Montgomery County Sheriff's Office, testified that she performed an autopsy on Aaron and determined his cause of death as "[m]ultiple blunt force injuries." According to Ross, Aaron had sustained lacerations, contusions, and abrasions from blunt force to his head, similar injuries to other parts of his body, and internal bleeding, and there were no defensive wounds on his hands. Ross testified that urine and blood tests for Aaron revealed that Aaron had a blood alcohol content of .255 and also revealed the presence of Naloxone, which is used to treat people with opiate abuse problems; Diazepam which is Valium; Meprobamate, which is a muscle relaxer; and the antidepressant Norfluoxetine.

Investigators retrieved three tire tools from Rideau's vehicle: a four-way lug wrench, a blue tire tool, and a black metal tool. The DNA profiles of Aaron and Michael were found on the black metal tool, and Aaron's profile was consistent with the profile of the contributor of DNA found on all three tools. There was a chip in Rideau's vehicle's windshield.

Detective Paul Hahs with the Montgomery County Sheriff's Office testified that he interviewed Rideau at the Sherriff's Office, informed Rideau of his legal rights, and observed no indication that Rideau had been assaulted. The recording of

Hahs's interview of Rideau was admitted into evidence and a transcript of the recording was provided to the jurors at trial.

According to the transcript of the recorded interview, Rideau told Hahs that Rideau was driving out of his neighborhood, saw two males walking in the street, and heard a pop. Rideau stopped his car and told the younger male that he hit his car. The younger male became aggressive with Rideau, Rideau went to open his car door to get his phone to call the police, the men "rushed up on" Rideau, and the younger male punched Rideau and "almost knocked [Rideau] out." Then the younger male kicked Rideau and Rideau hit him "one good time[]" and the younger male "almost fell and [Rideau] hit him one more time." Rideau drove ahead, parked with the car running, saw the older male coming towards him with a knife, and Rideau got a tire iron out of his car "to defend [him]self[.]" Rideau hit the older man in the face once but Rideau denied hitting him with the tire iron. Rideau said he was "[a]mped up[,]" he hit the younger male, the younger male tried to get up a few times, Rideau hit the younger male with the tire iron on his legs so he could not get up. Rideau testified he hit the younger male "one good time . . . [b]ut [he] kind of went gorilla on him . . . so . . . he wouldn't get up[,]" but did not believe he hit him in the head with the tire iron. Rideau told Hahs that when he pulled his car up and got back out he did not want to just drive off because he did not want to seem like he was running away

and then they would be looking for his car. Rideau told Hahs that he believed "[t]hese dudes were tryin' to kill [him]" and that he did not intend to kill them but that he wanted to "make sure they wouldn't mess with [him] again[]" because he was the "only brother back there[]" and they could "shoot up [his] house."

Rule 614 Objection

In issue one, Rideau contends the trial court erred in allowing one of the witnesses to testify in violation of Rule 614 of the Texas Rules of Evidence. Prior to opening statements, the trial court swore in witnesses and invoked the Rule. The trial court instructed the witnesses that "after opening statements are done, you have to remain outside until it is your turn to be called as a witness. And you can't discuss your testimony with anybody. You can only discuss it with either one of the attorneys, if you so choose." Rideau complains of the following testimony during the direct examination of Michael McMahan:

> Q. Okay. And how were things between you-all when you were fishing?
>
> A. It was great. We was having fun.
>
> Q. Do you remember either of you-all getting in a fight or --
>
> A. No, ma'am. We never got in a fight.
>
> Q. So, you know, Michael, there was a witness that testified that the two of you -- at one point, he was fighting with you. Do you remember that?

> [Defense counsel]: Objection, Your Honor. Violation of --
>
> A. No, ma'am, because that didn't happen.
>
> THE COURT: Hold on a minute. . . . What is your objection?
>
> [Defense counsel]: That is a violation of the Rule. She just told him what another witness testified to.
>
> [Prosecutor]: Judge, he is testifying now.
>
> THE COURT: Overruled as to that objection.

Evidentiary Rule 614, commonly known as "the Rule," provides for the exclusion of witnesses from the courtroom during trial. Tex. R. Evid. 614. The purpose of Rule 614 is to prevent the testimony of one witness from influencing the testimony of another. *Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005). Once Rule 614 is invoked, witnesses are instructed by the court that they cannot converse with one another or with any other person about the case, except by permission from the court. Tex. Code Crim. Proc. Ann. art. 36.06 (West 2007); *Russell*, 155 S.W.3d at 179. Upon a party's request, the trial court must exclude witnesses from the courtroom during the testimony of other witnesses. Tex. R. Evid. 614.

> "A violation of the Rule occurs when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony."

State v. Saylor, 319 S.W.3d 704, 710 (Tex. App.—Dallas 2009, pet. ref'd) (quoting *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 117 (Tex. 1999)).

However, if a witness violates this rule, the trial court still has discretion to allow testimony from the witness. *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996). On appeal, the trial court's decision to admit testimony will not be disturbed absent an abuse of discretion. *Id.* A violation of the Rule is not, in itself, reversible error. *Webb v. State*, 766 S.W.2d 236, 240 (Tex. Crim. App. 1989). The defendant must also show that he was harmed by the violation. *See Archer v. State*, 703 S.W.2d 664, 666 (Tex. Crim. App. 1986).

Under the facts before us, we cannot say that the trial court abused its discretion in overruling the objection. The trial court could have reasonably concluded that the question presented by the attorney was not a violation of Rule 614. The trial court had properly instructed the witnesses when the Rule was invoked that the witnesses could talk to the attorneys on the case. Rideau has not demonstrated that Michael McMahan remained in the courtroom during the testimony of another witness or that Michael learned about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony. *See Drilex*, 1 S.W.3d at 117; *Saylor*, 319 S.W.3d at 710; *see also* Tex. R. Evid. 614. Michael was testifying at trial and the

State merely asked a question that referred to another unnamed witness's purported testimony. Moreover, even assuming without deciding that the question was a violation of the Rule and the trial court abused its discretion in allowing the testimony, we find that any error in the admission of the complained-of testimony was cured by the witness's identical and unobjected-to testimony immediately prior to the complained-of question and answer. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (Any error in the admission of evidence is cured where the same evidence is admitted elsewhere without objection.). We overrule the first issue.

Admission of Interview Video

In his second issue, Rideau argues that the trial court erred by allowing into evidence a video recording of Detective Hahs interviewing Rideau in violation of Texas Rule of Evidence 701. Rule 701 states that "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." Tex. R. Evid. 701. Specifically, Rideau asserts that in the video Detective Hahs gave his opinion that Rideau had not acted in self-defense, which was an opinion on something about which Hahs did not have personal knowledge and was not helpful to clearly understanding the witness's testimony or determining a fact in issue.

We review a trial court's ruling admitting or excluding evidence for an abuse of discretion. *Ramos v. State*, 245 S.W.3d 410, 417-18 (Tex. Crim. App. 2008). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Id.* at 418.

Outside the presence of the jury, the parties agreed to redact the interview and the transcript of the interview to delete conversations between Detective Hahs and Rideau regarding any duty to retreat. Defense counsel also objected to two additional questions in the interview and the trial court overruled the objections:

> [Defense counsel]: And where I had an issue was, it seemed still duty-to-retreatish. And I just want to draw the Court's attention to it. . . .[W]e will start with Page 16, line 713 through 716. Is it Detective Hahs?
>
> [Prosecutor]: Yes.
>
> [Defense counsel]: Detective Hahs says, "Man, I mean, when you -- when you drive off and you just stop now, you have gone from being in survival mode to being in combat mode like you described. You are meeting your aggressors head-on" and he is making it sound like he had to drive off. So I would object to that being included.
>
> THE COURT: Okay. That objection will be overruled.
>
> [Defense counsel]: And the last one, Judge, is on Page 44, line number 1967 and 68. Detective Hahs says, "But when you parked the car, you became -- then you became the aggressor. It stopped being self-defense." I don't believe that is an accurate statement. I believe that he is giving his opinion. Let's say that there was no statement given by the Defendant. [The prosecutor] would not be allowed to ask him, what -- do you think this was self-defense? Because that invades the province

> of the jury. And I object to that still being included. He is giving his opinion.
>
> THE COURT: I know. But the difference between a statement, as we all know, is that, I mean, they can say incorrect things, they can say untruths. They can pretend to have evidence they don't have.
>
> . . . .
>
> THE COURT: They can say a lot of things, but --
>
> . . . .
>
> THE COURT: -- it doesn't make it true. So I will let it stay in. Your objection is overruled.

Later, when the State offered the videotape into evidence, defense counsel responded, "No objections[,]" and the trial court admitted the videotape as redacted.

Even assuming that defense counsel's assertion of "no objections" was not an abandonment of his prior objections to the complained-of portions of the video recording, we cannot say that the trial court abused its discretion in overruling the earlier objections or in allowing the complained-of portions to be shown to the jury. The trial court could have reasonably concluded that the complained-of segments were propounded in response to Rideau's position that the McMahans were the aggressors during the confrontation, and that the questions were to give context to Rideau's responses and were not offered for the truth of the matter asserted. *See Kirk v. State*, 199 S.W.3d 467, 479 (Tex. App.—Fort Worth 2006, pet. ref'd). The trial

court did not abuse its discretion in allowing the evidence. We overrule the second issue.

Admission of Prior Bad Acts Evidence

In his third issue, Rideau contends the trial court erred by allowing the State to introduce, in violation of Rules 403 and 404 of the Texas Rules of Evidence, Rideau's prior bad acts. According to Rideau, the trial court erred in allowing the State to introduce by way of testimony evidence of Rideau's prior conviction for assault, a Class A misdemeanor, because intent in the present case was never at issue because Rideau had already conceded criminal conduct in order to assert his justification defense. Rideau also argues that the evidence had no probative value, the admission of the evidence was inherently prejudicial, and the State failed to prove beyond a reasonable doubt that the alleged error did not contribute to Rideau's conviction or punishment.

Upon timely objection to evidence of other crimes, wrongs, or acts, the proponent of the evidence must persuade the trial court that (1) the extraneous evidence is admissible under Rule 404(b), and (2) the probative value of the evidence substantially outweighs the danger of unfair prejudice to the defendant under Rule 403. *Montgomery v. State*, 810 S.W.2d 372, 387-90 (Tex. Crim. App. 1991) (op. on

reh'g).[2] We review the trial court's admission of an extraneous offense for an abuse of discretion. The trial court does not abuse its discretion as long as its ruling is within the zone of reasonable disagreement. *Id.* at 391.

Although admissible under Rule 404(b), the same evidence may be inadmissible under Rule 403 if the probative value of such evidence is substantially outweighed by unfair prejudice. *Prince v. State*, 192 S.W.3d 49, 56 (Tex. App—Houston [14th Dist.] 2006, pet. ref'd). In performing a Rule 403 analysis, trial courts are required to engage in a balancing test by considering:

> (1) the inherent probative force of the proffered 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.

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[2] On appeal, Rideau also argues that the trial court's admission of the prior bad act violated Rule 404(b). Consistent with Rule 404(b), the State introduced extraneous-acts evidence that rebutted Rideau's defense of self-defense. A former co-worker testified that in 2003, after he had informed a supervisor that Rideau had broken an important piece of equipment at work and the co-worker had to issue another piece of equipment, Rideau confronted the co-worker and punched him in the face, fracturing his cheekbone and the orbital bone of his left eye. Accordingly, the complained-of evidence had a purpose apart from character conformity: it was relevant to show that Rideau acted intentionally and knowingly to the instant crime and to rebut his defensive issue of self-defense. *See Lemmons v. State*, 75 S.W.3d 513, 522-23 (Tex. App.—San Antonio 2002, pet. ref'd) (holding that extraneous offense offered by the State to show murder defendant was aggressor in the past was relevant to rebut his self-defense claim).

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006); *see* Tex. R. Evid. 403.

The trial court could have reasonably concluded that the evidence of Rideau's attack on his co-worker was admissible because it demonstrated Rideau was violent and aggressive on a prior occasion and it rebutted Rideau's claim of self-defense. The trial court could have reasonably concluded that the evidence would not unfairly prejudice the jury because it only comprised a small portion of the testimony in a lengthy trial, and the proportion of time spent detailing and proving up the extraneous offense was not significant. In balancing the probative value of the extraneous-acts evidence and the State's need for the evidence against Rule 403's counter-factors, the trial court could have reasonable concluded that the evidence was not unfairly prejudicial and it would not have a tendency to suggest a decision on an improper basis or confuse or mislead the jury. We overrule Rideau's third issue.

Exclusion of Evidence of Witness's Felony Probation

In his fourth issue, Rideau argues that the trial court abused its discretion in preventing the defense from introducing evidence regarding Aaron McMahan's prior criminal history and his status as a probationer. According to Rideau, the evidence is relevant because it provided a motive for Aaron's aggressive behavior

towards him and would help indicate Aaron's mental state. Rideau asserts that he was harmed by the trial court's exclusion of this evidence because it supported the defensive theory that Aaron did not want the police to be called to the scene because he would be found in violation of probation and have to go back to prison.

In the State's motion in limine, the State requested that the trial court order the defendant, defense counsel, or the witnesses to, among other things, refrain from mentioning or referring to any evidence regarding Aaron McMahan's criminal history or bad acts. At the pre-trial conference, the State acknowledged Aaron's "fairly extensive criminal history[]" but argued that because the offenses were not violent they were not relevant. Defense counsel argued that "we have case law that says that we are allowed to get into these prior bad acts because they go to show the deceased's state of mind at the time of the offense[,]" and that the felony DWI that he was on probation for at the time of the confrontation with Rideau "goes to his state of mind, as it would explain why he would go after Anthony Rideau when Anthony was going to try to call 911." The trial court granted the State's motion in limine as to that evidence, declined to make a ruling on the admissibility of such evidence, and instructed "You have to approach before you get into it, and then I will send the jury out and have a hearing before I make my decision."

During trial, the defense never offered into evidence a judgment of conviction against Aaron for driving while intoxicated. During defense counsel's cross-examination, Deputy Erickson testified that public intoxication, criminal mischief, and interfering with an emergency telephone call were crimes, and on re-direct examination he explained they were usually misdemeanor offenses. Defense counsel subsequently approached the bench for a discussion outside the jury's presence:

> [Defense counsel]: We were supposed to approach.
>
> THE COURT: Oh, okay.
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> (Discussion at the Bench)
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> [Defense counsel]: I believe that based upon her questioning of the degree of offense, i.e. being misdemeanor only, she has opened the door to Aaron's -- the fact that Aaron was on a felony probation.
>
> If you recall earlier before the trial started, I was asking permission to get into that as a basis for the reason he did not want the police to be called for a number of reasons -- he was publicly intoxicated while on felony probation for DWI, he was committing the offenses of criminal mischief while on probation for felony DWI, and --
>
> THE COURT: That would be about seven cases. I am denying your cases.
>
> (On the record in presence of the jury)
>
> THE COURT: Any further questions from the Defense?
>
> [Defense counsel]: No, Your Honor.

Rule 33.1(a) of the Texas Rules of Appellate Procedure provides the basic rule for preservation of error:

> (a) *In General.* As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that;
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. R. App. P. 33.1(a). Error may not be predicated upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked. *Resendez v. State*, 306 S.W.3d 308, 312 (Tex. Crim. App. 2009); *see also* Tex. R. Evid. 103(a)(2). The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009). Error in the exclusion of evidence may also be preserved by a bill of exception. Tex.

R. App. P. 33.2; *see Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999) ("Error in the exclusion of evidence may not be urged unless the proponent perfected an offer of proof or a bill of exceptions.").

A ruling on a motion in limine is not a ruling on the merits, but rather one regarding the administration of the trial. *Harnett v. State*, 38 S.W.3d 650, 655 (Tex. App.—Austin 2000, pet ref'd). The motion in limine merely requires that before a party may introduce evidence relating to a particular matter, a hearing must be held outside the presence of the jury to determine its admissibility. *Geuder v. State*, 115 S.W.3d 11, 14 (Tex. Crim. App. 2003). An objection to the ruling on the motion in limine does not preserve error with respect to the admissibility of the particular evidence. *See Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998); *see also Webb v. State*, 760 S.W.2d 263, 275 (Tex. Crim. App. 1988) (stating that it is axiomatic that motions in limine do not preserve error). The party must offer the evidence during trial and, if the judge refuses to admit the evidence, the party must object. *See Norman v. State*, 523 S.W.2d 669, 671 (Tex. Crim. App. 1975). The record would then provide the reviewing court the necessary information to determine whether reversible error may exist. *See Basham v. State*, 608 S.W.2d 677, 679 (Tex. Crim. App. [Panel Op.] 1980).

Even assuming without deciding that Rideau made an adequate offer of proof regarding the prior bad acts of the victim or that the victim was on probation for felony DWI, and assuming without deciding that the trial court abused its discretion in refusing to allow Rideau to question the officer about Aaron's criminal history, we conclude that Rideau failed to show harm. *See id*. Even were we to assume that Aaron's prior conviction was admissible, we are unable to conclude on this record that the trial court's decision to exclude the evidence had a substantial and injurious effect or influence in determining the jury's verdict. *See id.*; *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). The jury heard Rideau's statement during his interview with law enforcement that he told Aaron that he needed to get his phone and then Aaron hit him, but there was no evidence presented that Rideau told Aaron he was going to call the police or that Aaron's actions were a result of his belief that Rideau was going to call the police. The jury heard Rideau explain during the interview with law enforcement that after this initial confrontation, Rideau got into his car, pulled up, got back out of the vehicle, got tools out of his vehicle and then "went gorilla" on Aaron and continued to beat Aaron as he was lying on the ground and attempting to get up. The trial court noted in discussing the motion in limine that Rideau's criminal history was of a "nonviolent" nature. The evidence presented to the jury included testimony that after Rideau initially got into his car and drove

ahead, he then exited his car to get tools and continue the confrontation. We have fair assurance that the excluded evidence would not have had a substantial effect or influence in determining the jury's verdict or on the jury's decision as to whether Rideau needed to use deadly force. *See* Tex. R. App. P. 44.2(b); *Johnson*, 967 S.W.2d at 417. We overrule issue four.

Alleged Jury Charge Error

In his fifth issue, Rideau argues that the trial court erred by failing to instruct the jury in its charge on the presumption of reasonableness in section 9.32(b) of the Texas Penal Code. According to Rideau, the evidence raised the presumption of reasonableness, he requested the instruction, and the trial court denied his request. Specifically, Rideau asserts that from his recorded interview it is clear that he "was in fear of potentially being the victim of murder, robbery, aggravated robbery, or aggravated kidnapping[.]"

We review claims of jury charge error under the two-pronged test set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). We first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, we then evaluate whether the error caused harm. *Id.* The degree of harm required for reversal depends on whether that error was preserved in the trial court. *Id.* When, as here, error was preserved in the trial court by a timely

written request for instructions, we must reverse if the error is "calculated to injure the rights of [the] defendant[.]" Tex. Code Crim. Proc. Ann. art. 36.19 (West 2006). In other words, we must determine whether there was some harm. *Trevino v. State*, 100 S.W.3d 232, 242 (Tex. Crim. App. 2003) (citing *Almanza*, 686 S.W.2d at 171). This standard requires the reviewing court to find that the defendant "'suffered some actual, rather than merely theoretical, harm from the error.'" *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (quoting *Warner v. State*, 245 S.W.3d 458, 462 (Tex. Crim. App. 2008)). In evaluating whether there was some harm, we consider "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel[,] and any other relevant information revealed by the record of the trial as a whole." *Barron v. State*, 353 S.W.3d 879, 883 (Tex. Crim. App. 2011) (quoting *Almanza*, 686 S.W.2d at 171).

The trial court must give the jury "a written charge distinctly setting forth the law applicable to the case[.]" Tex. Code Crim. Proc. Ann art. 36.14 (West 2007). The purpose of the jury charge is to instruct the jury on the law that applies to the case and to guide the jury in applying the law to the facts of the case. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996), *overruled on other grounds by Gelinas v. State*, 398 S.W.3d 703 (Tex. Crim. App. 2013). The purpose of the abstract or definitional portions of the charge is to help the jury to understand the

meaning of concepts and terms used in the application paragraphs of the charge. *Caldwell v. State*, 971 S.W.2d 663, 666 (Tex. App.—Dallas 1998, pet. ref'd). As the Court of Criminal Appeals has explained, a jury charge is adequate:

> if it either contains an application paragraph specifying all of the conditions to be met before a conviction under such theory is authorized, or contains an application paragraph authorizing a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers, or contains some logically consistent combination of such paragraphs.

Plata v. State, 926 S.W.2d 300, 304 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997).

The self-defense statute provides that a defendant is justified in using deadly force if, among other things, he "reasonably believes the deadly force is immediately necessary . . . to protect [himself] against the other's use or attempted use of unlawful deadly force; or . . . to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." Tex. Penal Code Ann. § 9.32(a)(2) (West 2011). Section 9.32(b) states, in relevant part, that an actor's belief that the deadly force was immediately necessary is presumed to be reasonable if the actor:

> (1) knew or had reason to believe that the person against whom the deadly force was used:
>
> . . .

> (C) was committing or attempting to commit [aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery];
> (2) did not provoke the person against whom the force was used; and
> (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor . . . at the time the force was used.

Id. § 9.32(b); *see also Villarreal v. State*, 453 S.W.3d 429, 435 (Tex. Crim. App. 2015).

The Penal Code requires that a presumption that favors the defendant be submitted to the jury "'if there is sufficient evidence of the facts that give rise to the presumption . . . unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact.'" *Morales v. State*, 357 S.W.3d 1, 7 (Tex. Crim. App. 2011) (quoting Tex. Penal Code Ann. § 2.05(b)(1) (West 2011)). When a rule or statute requires an instruction under particular circumstances, that instruction is the law applicable to the case. *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008). "Such statutes and rules set out an implicit 'If-then' proposition: If the evidence raises an issue of [voluntariness, accomplice witness, confidential informant, etc.], then the trial court shall instruct the jury [as to whatever the statute or rule requires]." *Id.* (bracket in original).

During the guilt-innocence phase of the trial, the trial court instructed the jury as follows, in relevant part:

> Upon the law of self-defense, you are instructed that a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force.
>
> A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as set out above, and when he reasonably believes that such deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.
>
> By the term "reasonable belief" as used herein is meant a belief that would be held by an ordinary and prudent person in the same circumstances as the Defendant.
>
> By the term "deadly force" as used herein is meant force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing[] death[] or serious bodily injury.
>
> A person who has a right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is not required to retreat before using force.
>
> You are further instructed as part of the law of this case, and as a qualification of the law of self-defense, that the use of force against another is not justified in response to verbal provocation alone.

Generally, a defendant is entitled to an instruction on every defensive issue raised by the evidence regardless of the strength of the evidence. *Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). It is not the court's function to evaluate the credibility or weight to be given the evidence raising the defensive issue. *Gibson v. State*, 726 S.W.2d 129, 132-33 (Tex. Crim. App. 1987). The fact that the evidence raising the issue may conflict with or contradict other evidence is irrelevant in determining whether a charge on the defensive issue must be given, "we view the

evidence in the light most favorable to the defendant's requested submission." *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006). The question of whether a defense is raised by the evidence is a sufficiency question, which we review as a question of law. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007).

Even if we assume the trial court erred by not including an instruction regarding the "presumption of reasonableness" in the jury charge, a matter we need not decide, on this record we cannot conclude that Rideau suffered some actual, rather than theoretical, harm from the trial court's omission of the instruction. The jury received an instruction regarding self-defense and whether Rideau's exercise of deadly force was justified by self-defense. The trial court included an instruction that Rideau was justified in using self-defense if he reasonably believed that deadly force was immediately necessary to protect himself against the McMahons' use or attempted use of unlawful deadly force. The trial court also included an instruction regarding the duty to retreat as provided in section 9.32(c). The evidence before the jury included photographs of Aaron's and Michael's injuries and testimony by law enforcement regarding Rideau's lack of significant injuries. The jury heard testimony from a witness that testified she saw Rideau beating Aaron with the tire iron while Aaron was lying on the ground. Rideau's recorded interview was played

for the jury and the jury heard Rideau state that after the initial altercation he got in his car, drove ahead, exited the car again, retrieved tools, hit Michael, and then "went gorilla" on Aaron by hitting him with the tire iron so that he could not get up. According to the verdict, either the jury did not believe that Rideau was justified in using deadly force, or it concluded that Rideau had a duty to retreat, or it could have concluded that the McMahons were not committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery of Rideau when he used deadly force against them. Accordingly, the complained-of lack of an instruction pertaining to the presumption was not harmful. We overrule issue five.

Having overruled Rideau's appellate issues, we affirm the trial court's judgments.

AFFIRMED.

____
LEANNE JOHNSON
Justice

Submitted on September 14, 2017
Opinion Delivered January 31, 2018
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Before McKeithen, C.J., Horton and Johnson, JJ.