COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00296-CR

DEAIRION JOHNSON A/K/A KEVIN KIMP — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1402171D

MEMORANDUM OPINION[1] ON REMAND

In this appeal on remand, we are asked whether a State's punishment witness was qualified to testify as an expert and whether the trial court's order authorizing the withdrawal of funds was supported by the judgment. We conclude that the witness was qualified as an expert and that the judgment must

[1]*See* Tex. R. App. P. 47.4.

be modified to comport with the oral pronouncement of sentence, rendering the order to withdraw funds supported by the modified judgment.

I. BACKGROUND FACTS

Appellant Deairion Johnson a/k/a Kevin Kimp[2] was convicted by a jury of aggravated robbery with a deadly weapon at a convenience store in Fort Worth. During the punishment phase of trial, the State presented the testimony of Fort Worth Police Officer Christopher Wells, who was a gang-intelligence officer. Over Johnson's objection to his lack of qualifications, Wells testified about gang activity in Fort Worth as well as the tattoos and signs associated with those gangs. Wells opined that Johnson's tattoos identified him as a member of a specific gang that operates in the area where the robbery took place. Further, Johnson was included in a police database as a "documented" gang member.

The jury assessed Johnson's punishment at eighteen years' confinement with a $10,000 fine. The trial court entered judgment, sentencing Johnson to eighteen years' confinement, and assessed $299 in court costs. Although the trial court orally pronounced the fine as part of the imposed sentence, it did not include the fine in the written judgment. Johnson filed a motion for new trial,

[2] The majority of the documents in the clerk's record refer to the appellant as Kevin Kimp. But the trial court signed an order noting that Deairion Johnson was the appellant's true name and entered this change into the minutes. Therefore, as we have before, we will refer to the appellant by his true name: Johnson. *See Johnson v. State*, No. 02-15-00296-CR, 2016 WL 3033495, at *1 n.2 (Tex. App.—Fort Worth May 26, 2016) (mem. op., not designated for publication), *rev'd*, 509 S.W.3d 320 (Tex. Crim. App. 2017).

contending that the evidence was insufficient to support his conviction, which was deemed denied. *See* Tex. R. App. P. 21.8(c).

On appeal, we concluded that the evidence was insufficient to support a finding that the butter knife Johnson exhibited during the robbery was a deadly weapon. *Johnson*, 2016 WL 3033495, at *3. The court of criminal appeals reversed this conclusion and remanded the appeal to this court for a consideration of Johnson's two remaining issues. *Johnson*, 509 S.W.3d at 324. In those issues, Johnson asserts that Wells was not qualified to testify as an expert and that the order to withdraw funds, which was an attachment to the judgment, was not supported by the judgment.

II. EXPERT TESTIMONY

At Johnson's request during the punishment trial but outside the presence of the jury, the trial court held a hearing regarding Wells's qualification to testify regarding "gang matters." Wells testified that he had eighteen years' experience as a police officer, including eight years in gang enforcement and six years in gang intelligence. He had been assigned to gang-crime task forces of the Federal Bureau of Investigation and the Department of Homeland Security. He had attended numerous gang conference and training sessions. Wells held a dual certificate from the National Gang Crime Research Center and had trained other law-enforcement officers. He had testified as an expert on gang intelligence and identification in federal and state courts in Tarrant County on "many occasions." Wells did not have a college degree and had not written "any

peer-reviewed articles regarding gangs and gang activities and gang membership." But Wells also had personal knowledge of Johnson as a gang member because he had arrested Johnson for possession of marijuana in 2007 while Wells was a "gang officer."

Johnson objected to Wells's expert testimony based on his "lack of peer-review publications or any type of undergraduate or higher-degree training," rendering him unqualified to testify as an expert on gangs. He also objected to the testimony because "this is not an actual science, and, therefore, [Wells] cannot be qualified as an expert." The trial court overruled the objections and allowed Wells to testify "in this area of expertise." Wells then testified that based on the meaning of Johnson's many tattoos and his inclusion in law enforcement's gang database, Johnson was a member of a specific gang that operated in the area where the robbery occurred.

Johnson now asserts on appeal that Wells was not qualified as an expert because his training and experience in gang matters was "little more than cop shop talk amongst other police officers." He further argues that because there was no evidence of "accepted practices, generalized standards, or training requirements" for gang experts, Wells's testimony was not on a subject amenable to expert opinion. We review the admission of Wells's testimony under an abuse-of-discretion standard. *See Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010), *cert. denied*, 564 U.S. 1020 (2011).

Under the rules of evidence, testimony requiring scientific, technical, or specialized knowledge is admissible if three conditions are met: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will assist the fact-finder in deciding the case. *See* Tex. R. Evid. 702; *Rodgers v. State*, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006). A shorthand version of these conditions to admissibility is (1) qualification, (2) reliability, and (3) assistance to the fact-finder. *See Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006). Expert testimony at punishment regarding gangs and gang activities is proper and commonly accepted as relevant character evidence by Texas courts. *See Beasley v. State*, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995); *Garcia v. State*, 239 S.W.3d 862, 865–66 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd), *cert. denied*, 555 U.S. 1002 (2008); *Jones v. State*, No. 08-01-00056-CR, 2002 WL 830861, at *3 (Tex. App.—El Paso May 2, 2002, pet. ref'd) (not designated for publication); *Stevenson v. State*, 963 S.W.2d 801, 803 (Tex. App.—Fort Worth 1998, pet. ref'd); *see also* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (West Supp. 2016).

By asserting that Wells did not have a sufficient background or education in gangs and that there was no barometer for the level of qualification required for such an expert, Johnson challenges the qualification condition. In determining whether the trial court abused its discretion in determining an

expert's qualifications to testify, we consider three factors. First, we determine whether the field is complex. *See Rodgers*, 205 S.W.3d at 528. The degree of training, education, or experience has a direct correlation to the complexity of the field. *See id.* Second is the conclusiveness of the expert's opinion. *See id.* This factor involves a direct relationship as well: The more conclusive the opinion, the more important the expert's degree of expertise. *See id.* Third, we look to the centrality of the area of expertise to the resolution of the lawsuit. *See id.* In other words, the importance of the expert's qualifications is directly proportional to the degree to which the area of expertise is dispositive of the disputed issues. *See id.*

Here, the trial court did not abuse its discretion by concluding that Wells was qualified as an expert based on the evidence before it at the time of the ruling. *See id.* at 528–29 (holding qualification determination is reviewed in light of what was before the trial court at the time the ruling was made). First, the field of gang membership and the meanings of Johnson's tattoos are not scientifically complex. *See id.*; *Hopes v. State*, No. 14-14-00403-CR, 2015 WL 6759450, at *2 (Tex. App.—Houston [14th Dist.] Apr. 6, 2016, pet. ref'd) (mem. op., not designated for publication). Even so, Wells had extensive experience working with gangs, had received training in gang investigation and identification, and had trained other law-enforcement officers in gang matters. We do not agree that the absence of specific testimony regarding the particular required certifications or seminars in gang affiliation is fatal to Wells's expert testimony. *See Hopes*,

2015 WL 6759450, at *3. Second, Wells identified Johnson as a member of the gang operating in the area of the convenience store based on the police database[3] but also based on his personal knowledge of Johnson. *See* Tex. R. Evid. 602. The conclusiveness of Wells's opinion that Johnson was a gang member was relatively low. *Cf. Rodgers*, 205 S.W.3d at 528 (explaining a high level of conclusiveness requiring a high degree of expertise would be DNA profiling because it is scientifically complex, but shoe-print comparison would not be conclusive). Even so, Wells's level of expertise in the area of street gangs was high. He had eight years' specific experience in gang intelligence, working with state and federal law-enforcement agencies, and had testified as an expert on gangs many times. Wells was knowledgeable about gang practices and alliances based on his police work. Finally, Wells's testimony was not central to a disputed issue. A jury had already found Johnson guilty of aggravated robbery, and Wells's testimony was offered at punishment. This relevant character testimony was not a dispositive consideration in assessing Johnson's sentence. *See Hopes*, 2015 WL 6759450, at *3; *cf. Bryant v. State*, 340 S.W.3d 1, 9–10 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding expert's "grooming"

[3]Wells was able to testify to the technicalities of the database and how a person would be included as a gang member. *Cf. Hopes*, 2015 WL 6759450, at *3 & n.3 (declining to find officer not qualified to testify as expert regarding gang activity simply because he could identify only seven of the eight criteria for inclusion in database).

testimony in aggravated-sexual-assault trial was not central to determining guilt or innocence).

We conclude that the trial court did not abuse its discretion by admitting Wells's testimony over Johnson's objection. *See, e.g.*, *Hernandez v. State*, No. 01-06-00779-CR, 2013 WL 1804436, at *18 (Tex. App.—Houston [1st Dist.] Apr. 30, 2013, no pet.) (mem. op., not designated for publication); *Burleson v. State*, Nos. 2-09-178-CR, 2-09-179-CR, 2-09-180-CR, 2010 WL 1730822, at *5 (Tex. App.—Fort Worth Apr. 29, 2010, no pet.) (mem. op., not designated for publication). We overrule issue two.

III. ORDER TO WITHDRAW FUNDS

In his third issue, Johnson argues that because the judgment did not include the fine assessed by the jury, the fine could not be included in the attached order to withdraw funds. The State responds that this court should modify the judgment to reflect the $10,000 fine assessed by the jury.

The jury assessed Johnson's punishment at eighteen years' confinement and a $10,000 fine. The trial court then orally sentenced Johnson in accordance with the jury's verdict: "It is, therefore, the order, judgment, and decree of this Court that the Defendant . . . is hereby sentenced to 18 years' confinement, with a $10,000 fine, in the Texas Department of Criminal Justice." The written judgment did not include the fine that had been assessed by the jury and orally imposed by the trial court, but it did include court costs of $299. The attached

withdrawal order authorized the Department of Criminal Justice to withdraw funds from Johnson's inmate account to satisfy the fine and costs totaling $10,299.

Generally, when the oral pronouncement of sentence conflicts with the written judgment, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004); *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). We have the authority to correct and modify the judgment of the trial court to conform to what occurred at trial if we have the necessary information to do so. *See Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd); *see also* Tex. R. App. P. 43.6. We are able to do so in this case and, therefore, modify the judgment to conform to the trial court's oral pronouncement of sentence. Because the judgment should have included the fine component of Johnson's sentence, which was orally pronounced, and because we so modify the judgment, the order to withdraw funds was authorized by the judgment. We overrule issue three.

IV. CONCLUSION

We conclude that the State's punishment witness was qualified to testify as an expert on gang affiliation and practices. Further, we modify the trial court's judgment to include the $10,000 fine as assessed by the jury and orally pronounced by the trial court. Because these are Johnson's only remaining issues on remand, we affirm the trial court's judgment as modified. *See* Tex. R. App. P. 43.2(b).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: May 11, 2017