COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00199-CR

JIM HARVEY OPRY — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 1399102D

MEMORANDUM OPINION[1]

Appellant Jim Harvey Opry appeals from his conviction for manslaughter and eighty-five year sentence. Because the trial court did not err by admitting extraneous bad-act evidence at punishment or by denying Opry's motion for new trial, we affirm the trial court's judgment. *See* Tex. R. App. P. 43.2(a).

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

I. BACKGROUND

Opry and Britney Eylar were in a romantic relationship but frequently argued. During one such argument, Eylar was leaving their apartment after packing her belongings when Opry hit her in the back of her head with a caulk gun. Eylar died eight days later.

A. INDICTMENT, PLEA, AND PUNISHMENT TRIAL

A grand jury indicted Opry with one count of murder and one count of manslaughter. *See* Tex. Penal Code Ann. §§ 19.02, 19.04 (West 2011). The indictment included a deadly-weapon notice, a repeat-offender notice, and a habitual-offender notice. *See id.* §§ 1.07(a)(17), 12.42(b), (d) (West Supp. 2016); Tex. Code Crim. Proc. Ann. art. 42.12, § 3g(a)(2) (West Supp. 2016). As part of a plea-bargain agreement, Opry pleaded guilty to manslaughter with no punishment recommendation, Opry pleaded true to the deadly-weapon and repeat-offender notices, the State waived the habitual-offender notice, and Opry agreed to have a jury assess his punishment. The trial court accepted the guilty plea.

During Opry's testimony at the punishment trial—after he testified that he "felt responsible" for Eylar's death and that he ran from the crime scene because he was "scared"—the State questioned him about previously killing his childhood neighbor's pet with a compound bow and his attempts to light a girl's hair on fire on a school bus. Opry objected to these questions because he had not received notice of the State's intent to use these prior bad acts, but the trial court

overruled the objection. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), (g) (West Supp. 2016); Tex. R. Evid. 404(b)(2). After hearing this and other punishment evidence, the jury assessed Opry's punishment at eighty-five years' confinement. The trial court orally sentenced Opry to eighty-five years' confinement and informed him that he "ha[s] the right to appeal the decisions of this court to the Second Court of Appeals." The trial court signed a certification, specifying that "this criminal case . . . is not a plea-bargain case, and the defendant has the right of appeal." *See* Tex. Code Crim. Proc. Ann. art. 44.02 (West 2006); Tex. R. App. P. 25.2(d). The trial court also wrote on the certification that Opry "can only appeal punishment phase." Opry filed a notice of appeal from the trial court's resulting judgment.

B. MOTION FOR NEW TRIAL ON PUNISHMENT

Opry also filed a verified motion for new trial on punishment in which he argued "that there was improper jury contact made by interested parties . . . and . . . because of that improper contact, [he] was denied due process." *See* Tex. R. App. P. 21.3(f), (g). The trial court held a hearing on the motion.

Opry's friend, Amber Floyd, testified that during the trial, she saw a juror and one of Eylar's relatives in an elevator together while an unidentified man discussed Opry's prosecution. She also saw jurors and Eylar's relatives sitting together and "walking . . . laps in the hallway." Floyd believed the jurors and Eylar's relatives "seemed familiar with each other." Although she stated she saw jurors talking with Eylar's relatives, she could not hear their conversations

because she was too far away. Opry's brother, Stephen Opry, also saw jurors and Eylar's relatives sitting together and talking in the hallway for approximately twenty minutes, but he could not discern what they were saying. Both Floyd and Stephen testified that one of the trial court's bailiffs escorted family members from the hall into the courtroom.

One of the trial court's bailiffs testified that he did not see jurors and Eylar's relatives either sitting together or walking laps and that no family members were seated in the hallway that day at all. The bailiff testified that a victim's assistant escorted the family members into the courtroom from another floor of the courthouse, not the bailiff as Floyd and Stephen testified. The trial court orally denied Opry's new-trial motion at the conclusion of the hearing. *See* Tex. R. App. P. 21.8(b).

II. JURISDICTION

Although not raised by Opry or the State, we must address our jurisdiction over this appeal. Although Opry pleaded guilty and did not get a specific punishment recommendation in exchange, the State agreed to waive the habitual-offender notice. This resulted in a broader available range of punishment—"life or for any term of not more than 99 years or less than 5 years"—than would have been available if the habitual-offender notice had been considered—"life, or for any term of not more than 99 years or less than 25 years." Tex. Penal Code Ann. § 12.32 (West 2011), § 12.42(d); *see also id.*

§§ 12.42(b), 19.04(b). As such, this was a plea-bargain case—a charge bargain. *See Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003).

In its certification of Opry's right of appeal, the trial court checked that there was no plea bargain but noted that Opry had the right to appeal punishment issues. The trial court also orally told Opry that he had the right to appeal. Because the trial court counseled Opry that he had the right to appeal and because the certification showed that he had the right to appeal punishment issues, we conclude that the trial court gave Opry the right to appeal punishment issues regarding his manslaughter conviction, which was the subject of a charge bargain. *See, e.g.*, *Hale v. State*, Nos. 02-13-00224-CR, 02-13-00225-CR, 2014 WL 3398344, at *1 (Tex. App.—Fort Worth July 10, 2014, no pet.) (mem. op., not designated for publication). The trial court's certification read in tandem with the record from the sentencing hearing reveals our jurisdiction over Opry's appeal raising punishment issues. *See* Tex. Code Crim. Proc. Ann. art. 44.02; Tex. R. App. P. 25.2(a)(2).

III. OPRY'S ISSUES ON APPEAL

On appeal, Opry argues that the trial court abused its discretion by allowing the State to question him about his prior bad acts because the State failed to give him the required notification. He also asserts that the trial court's denial of his new-trial motion was an abuse of discretion because "there may have been improper ex parte communication between a juror or jurors and a person or persons interested in the outcome of the trial."

A. Evidence of Prior Bad Acts

We review a trial court's admission of evidence for an abuse of discretion, which occurs if its decision fell outside the zone of reasonable disagreement. *See Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). The State is required to give a defendant notice that it intends to introduce evidence at punishment of the defendant's crimes, wrongs, or other acts during its case-in-chief. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), (g); Tex. R. Evid. 404(b)(2).

Here, the State notified Opry before trial that it intended to introduce evidence of several extraneous offenses and evidence of Opry's general character; however, it did not include a notification that it intended to introduce evidence that he killed his neighbor's pet or that he had tried to set a girl's hair on fire. But the State did not question Opry about these prior bad acts during its case-in-chief. These questions occurred during Opry's case-in-chief after the State had rested and during the State's cross-examination of Opry. The State was not required to give Opry notice of these prior bad acts. Accordingly, the trial court did not abuse its discretion by allowing their admission. *See Jaubert v. State*, 74 S.W.3d 1, 2–3 (Tex. Crim. App.), *cert. denied*, 537 U.S. 1005 (2002).

B. Denial of Motion for New Trial on Punishment

We review the trial court's denial of Opry's motion for new trial on punishment for an abuse of discretion. *See Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). Such an abuse occurs if "no reasonable view of the

record could support [the trial court's] ruling." *Id.* We view the evidence proffered at the hearing in the light most favorable to the ruling and presume that all reasonable fact findings that could have been made against the losing party were so made. *See id.* The trial court is the sole determiner of witness credibility and may disbelieve even uncontroverted testimony. *See id.*

Of course, communication with jurors outside the courtroom is prohibited. *See* Tex. Code Crim. Proc. Ann. art. 36.22 (West 2006). If such communication occurs, injury is presumed and a new trial may be warranted. *See Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997). This presumption does not arise if the State shows that the case was not discussed or that nothing prejudicial to the accused was said. *See Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016); *Alba v. State*, 905 S.W.2d 581, 587 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 1077 (1996); *Cosio v. State*, 358 S.W.3d 762, 765 (Tex. App.—Corpus Christi 2011, no pet.) (en banc). Thus, Opry had the initial burden to prove his juror-misconduct allegation at the hearing on his motion for new trial on punishment to trigger the presumption. *See Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Patrick v. State*, 906 S.W.2d 481, 498 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1106 (1996).

Conflicting evidence was admitted at the hearing regarding whether there was any juror contact with Eylar's relatives. Although Stephen and Floyd testified that they saw jurors sitting and talking with Eylar's relatives, the bailiff testified that Eylar's relatives were not in the hallway with the jurors and had been

escorted from a different area of the courthouse into the courtroom. Further, there was no evidence as to the content of the conversations, if they occurred, because neither Stephen nor Floyd heard what was said. The trial court was the sole arbiter of these witnesses' credibility. We cannot conclude that the trial court abused its discretion by denying Opry's motion for new trial on punishment given that the evidence conflicted regarding whether any conversations in fact took place and Opry's failure to introduce any evidence regarding the content of the alleged conversations. *See Patrick*, 906 S.W.2d at 498; *Cosio*, 358 S.W.3d at 765. Opry failed to trigger the presumption of harm, and the trial court did not abuse its discretion by denying Opry's new-trial motion. We overrule issue two.

IV. CONCLUSION

Having overruled Opry's issues, we affirm the trial court's judgment.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

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

DELIVERED: February 23, 2017