COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00207-CR

MICHAEL OSHEA WHITE APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1451976R

MEMORANDUM OPINION[1]

Appellant Michael Oshea White appeals from his convictions and concurrent, seventy-five-year sentences for two counts of aggravated sexual assault and for aggravated assault on a family member. *See* Tex. Penal Code Ann. § 22.02 (West 2011), § 22.021 (West Supp. 2016). He asserts that the trial court erred by denying his requested continuance in order to conduct further

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

DNA testing, by admitting extraneous misconduct evidence, and by allowing a witness to bolster the complainant's testimony. Because we conclude that the trial court did not abuse its discretion, we affirm the trial court's judgments.

White does not attack the sufficiency of the evidence to support his convictions; therefore, we will recount the facts only as necessary for each issue raised. For now, it is enough to state that White violently and sexually attacked his former paramour, Pepper Anderson,[2] after she dropped off their daughter at White's house. The attack left Anderson with broken arms, broken fingers, a stab wound in her shoulder, and a large wound on her head from blunt-force trauma.

I. CONTINUANCE

White first argues that the trial court violated his constitutional rights by denying his requested continuance of the trial date, which was his second such request and was filed six days before the trial was scheduled to start, because it denied him the opportunity to present a complete defense. He bases this argument on the fact that three hairs found under Anderson's right thumbnail were not tested for mitochondrial DNA, which could have excluded White as the perpetrator. He alternatively asserts that the trial court's continuance denial was an abuse of its discretion.

[2]We refer to the complainant by the alias used by the State in White's indictment. *See* 2d Tex. App. (Fort Worth) Loc. R. 7.

We decline White's invitation to review the trial court's continuance denial de novo as an alleged denial of a constitutional right—the opportunity to present a complete defense. Continuance motions are matters that fall squarely within a trial court's broad discretion, even when the denial potentially operates to curtail the defense's presentation of its case. *See, e.g.*, *Gonzales v. State*, 304 S.W.3d 838, 843–44 (Tex. Crim. App. 2010); *Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009); *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007), *cert. denied*, 553 U.S. 1080 (2008); *Campbell v. State*, 138 S.W.2d 1091, 1092 (Tex. Crim. App. 1940); *Nichols v. State*, No. 02-13-00566-CR, 2014 WL 7779272, at *1 (Tex. App.—Fort Worth June 17, 2015, pet. ref'd) (mem. op., not designated for publication). To establish an abuse of that discretion, White must show that the trial court erred and that he was actually prejudiced—harmed—by the denial of his second continuance motion. *See Gonzales*, 304 S.W.3d at 843; *Gallo*, 239 S.W.3d at 764.

The trial originally was scheduled to begin on January 25, 2016. On January 13, 2016, White's trial counsel filed an unopposed, verified motion for continuance of that date to conduct "further forensic testing." *See* Tex. Code Crim. Proc. Ann. arts. 29.02, 29.08 (West 2006). Specifically, White's counsel asserted that this testing included, but was not limited to, "fingernail scrapings." The trial court granted the motion on January 14, 2016, and the trial eventually was rescheduled for May 16, 2016.

Around January 20, 2016, White's counsel received the medical examiner's trace-evidence report showing that "three [black] hairs . . . were found under the thumbnail of [Anderson]" but that the hairs had no root. The State requested that the nail scrapings and the three hairs be tested. The resulting report, which White's counsel received on April 14, 2016, showed that the nail scrapings were inconclusive and that the hairs could not be tested for nuclear DNA[3] because they did not have a root. On May 10, 2016, six days before the start of trial, White's counsel filed a second verified motion for continuance, contending that "the DNA testing of the fingernail scrapings was not completed," which should be pursued as "evidence crucial to his defense." White's counsel attached White's affidavit in which White specified that he was requesting the appointment of an expert to "identify and compare the tissue, hair, and other matter found under the fingernails of [Anderson] . . . to [his] own DNA."

The trial court conducted a hearing on the motion, and White's counsel clarified that he sought only mitochondrial DNA testing of the three hairs, which would take four to six weeks. The prosecutor responded that because the mitochondrial-DNA test was expensive, he had informed White's counsel in

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[3]Mitochondrial DNA, unlike nuclear DNA, is passed only from a person's biological mother and does not require a hair root for testing. *See Wilson v. State*, 185 S.W.3d 481, 490 n.13 (Tex. Crim. App. 2006) (op. on reh'g). Mitochondrial DNA is not particular to a person because more than one person can share mitochondrial DNA if they share a matrilineal ancestor; therefore, it cannot be used to identify a suspect as the perpetrator. *See id.* Mitochondrial DNA, however, can exclude a suspect if his mitochondrial DNA does not match the perpetrator's. *See id.*

January 2016, after the trace-evidence report noted that the three hairs did not have roots, that White would have to request the test from the trial court or pay for it at his own expense. Until his May 2016 second continuance motion, White's counsel did neither. The trial court denied White's motion.

We conclude that White has failed to show that the trial court abused its discretion by denying his second continuance motion. White made no attempt in his motion or at the hearing to explain why he could not have requested the mitochondrial-DNA test on the hairs sooner than six days before trial. Shortly after his first continuance was granted in January 2016, White was aware that the three hairs did not have roots and that the State would not test the hairs for mitochondrial DNA. The trial court could reasonably have rejected White's second motion because he failed to show his diligence in trying to get the testing earlier or why he was prevented from realizing any earlier that he needed such testing. *See Gonzales*, 304 S.W.3d at 843–44; 43 George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 33:20 (3d ed. 2011). We overrule White's first issue.

II. EVIDENTIARY ISSUES

A. ADMISSION OF WHITE'S EXTRANEOUS MISCONDUCT

In his second issue, White argues that the trial court abused its discretion by allowing the admission of three prior instances of his physical abuse of Anderson. At trial, the State sought to introduce evidence of three instances of White's past abuse of Anderson:

1. During an argument at a car wash, White hit Anderson, pulled her hair and neck, and destroyed her cell phone;

2. White pushed and shoved Anderson until she "worked [her] way to get out" of the house;

3. White barricaded Anderson inside her car and threw her cell phone in the gutter.

The State argued at trial that this evidence was admissible because White opened the door to it in his opening statement by arguing "that identity is an issue and that [White] did not commit this offense." White objected to its admission because the instances were too dissimilar, were too remote in time, and were more prejudicial than probative. The trial court concluded that White had opened the door to such evidence during his opening argument. The trial court further noted that White had questioned Anderson on cross-examination about whether a prior miscarriage had been the result of her husband's abuse, which Anderson denied. These two facts led the trial court to rule that the State could question Anderson about the three prior incidents because White had opened the door to such evidence. White objected to this ruling and now argues on appeal the same grounds he urged in the trial court.[4]

We review the trial court's admission of this evidence for an abuse of discretion. *See Dabney v. State*, 492 S.W.3d 309, 318 (Tex. Crim. App. 2016).

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[4]White appropriately addresses his remoteness argument not as a separate argument but as part of his analysis of the prejudicial effect of the admission of the three incidents under rule 403. *See Newton v. State*, 301 S.W.3d 315, 318 (Tex. App.—Waco 2009, pet. ref'd).

Under this standard, we will uphold admission of extraneous misconduct evidence offered to rebut a defensive theory if it is within the zone of reasonable disagreement. *See id.* Ordinarily, evidence of "a crime, wrong, or other act" is inadmissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Tex. R. Evid. 404(b)(1). But such evidence is 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)(2). Such a theory justifying admission may be triggered by the defendant in his opening statement, allowing the State to rebut that theory with extraneous misconduct evidence in its case-in-chief. *See Dabney*, 492 S.W.3d at 317–18. If a defendant opens the door to such rebuttal evidence, the State may introduce extraneous misconduct evidence if the evidence shares common characteristics with the charged offense. *See Richardson v. State*, 328 S.W.3d 61, 71 (Tex. App.—Fort Worth 2010, pet. ref'd).

Here, White argued in his opening statement to the jury that the only evidence tying him to the attack on Anderson was "the words of [Anderson]," which were "not necessarily reliable." During his cross-examination of Anderson, White attempted to get her to admit that her husband was angry with her the day of the assault, implying that her husband was her attacker, because she had been "talking softly and sweetly to [White] on the phone"; however, Anderson denied this. And as the trial court recognized, White had questioned Anderson

about her prior miscarriage while she was still in a relationship with White, which she affirmed had not been the result of domestic violence by her husband. Finally, during his closing jury arguments, White highlighted his theory that he was not Anderson's attacker:

> As I told you from the beginning, most of the evidence says Michael White didn't do this. The only evidence that says Michael White did this are the words of [Anderson]. And the question you got to ask yourself is, can you rely on those words? Are those words trustworthy enough to say, let's send a man to the penitentiary? The answer is no, and I want to tell you why.
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> She lies. It is her way of life. For six years she's lied to [her husband] saying there wasn't an intimate relationship between her and Michael White. But we know that there was, and she's told us that. [Her husband] said . . . [White is] just the baby's daddy, that's what she tells me. . . . We all know absolutely she has lied for six years [about her ongoing affair with White] and been fairly convincing to [her husband]. But we also know [her husband] began to suspect.

Thus, White challenged his identity as Anderson's attacker by implying that her husband had caused her previous miscarriage, that her husband had overheard her talking "sweetly" to White the day of the attack, and that Anderson's allegations were an attempt to hide her relationship with White from her husband, which she had consistently denied. White's defensive strategy was aimed at undermining Anderson's identification, which he tied up in his closing jury arguments. We conclude that White sufficiently attacked Anderson's credibility at trial to put White's identity as Anderson's attacker at issue. *See Siqueiros v. State*, 685 S.W.2d 68, 71–72 (Tex. Crim. App. 1985); *Leassear v. State*, 465 S.W.3d 293, 303–04 (Tex. App.—Houston [14th Dist.] 2015, no pet.);

see also Halliburton v. State, 528 S.W.2d 216, 219 (Tex. Crim. App. 1975) (op. on reh'g); *Box v. State*, No. 05-12-00421-CR, 2013 WL 1319359, at *8–10 (Tex. App.—Dallas Mar. 28, 2013, pet. ref'd) (mem. op., not designated for publication). *See generally Thomas v. State*, 126 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (explaining three ways defendant can put identity at issue by impeaching the identifying witness).

But to gain admission of the prior acts, the State was required to show that these prior instances shared common characteristics with the charged offenses. *See Banks v. State*, 494 S.W.3d 883, 893 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The first two instances involved White's physical violence against Anderson, showing his propensity for unprovoked attacks on Anderson, and arguably were sufficiently common to the charged offenses to justify admission. *See id.* The third instance is more tenuous because it does not involve any physical violence to Anderson other than her assertion that White would not let her get out of the car. But it arguably was sufficiently similar such that we would not be able to conclude that the trial court abused its discretion through its admission. *See Cortez-Balleza v. State*, No. 04-03-00818-CR, 2004 WL 2945680, at *9 (Tex. App.—San Antonio Dec. 22, 2004, pet. ref'd) (mem. op., not designated for publication); *Grider v. State*, 69 S.W.3d 681, 687–89 (Tex. App.—Texarkana 2002, no pet.). And although domestic violence against women does carry a negative connotation, as asserted by White in his brief, it does not outweigh the probative value of this evidence given that White questioned

Anderson's credibility and, thus, his identity as her attacker. *See* Tex. R. Evid. 403; *Swarb v. State*, 125 S.W.3d 672, 683–84 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd); *see also Hadamek v. State*, No. 13-02-552-CR, 2004 WL 1416213, at *1 (Tex. App.—Corpus Christi June 24, 2004, pet. ref'd) (mem. op., not designated for publication).

But even if one or all of these prior bad acts were not sufficiently common to the charged offenses to justify admission or if their prejudicial effect outweighed any probative value, the admission of these prior bad acts did not affect White's substantial rights. *See* Tex. R. App. P. 44.2(b); *see also Hankins v. State*, 180 S.W.3d 177, 182 (Tex. App.—Austin 2005, pet. ref'd) (recognizing erroneous admission of prior offense was nonconstitutional error analyzed under Rule 44.2(b)). The evidence supporting White's convictions was strong, Anderson's testimony regarding the three extraneous acts took up five minutes in a four-day trial, and the State did not emphasize this testimony during the presentation of its case or during its closing jury arguments. *See, e.g.*, *Hampton v. State*, No. 03-14-00700-CR, 2017 WL 1315336, at *3–4 (Tex. App.—Austin Apr. 6, 2017, no pet. h.) (mem. op., not designated for publication); *Hankins*, 180 S.W.3d at 182–83; *Roberts v. State*, No. 14-14-00874-CR, 2016 WL 3364898, at *2–3 (Tex. App.—Houston [14th Dist.] June 16, 2016, no pet.) (mem. op., not designated for publication); *cf. Graff v. State*, 65 S.W.3d 730, 741–42 (Tex. App.—Waco 2001, pet. ref'd). We overrule White's second issue.

B. ADMISSION OF ANDERSON'S STATEMENTS TO NURSE EXAMINER

At trial, Anderson testified to the details of White's attack, including that White initially overpowered her by hitting her on the head from behind and continued to hit her with "[p]aint cans, oak wood . . . real hard, sharp stuff" after she fell. The State later asked the sexual-assault nurse examiner, who had examined Anderson after the attack, what Anderson had told her about the attack. White objected to the "re-relation of [Anderson's] narrative" because it was "improper bolstering." The trial court overruled the objection, and the nurse examiner testified that Anderson recounted the specifics of her injuries and that White had overpowered her by hitting her "up side the head with his fist first" and that then "[h]e got stuff and started hitting me with it." On appeal, White argues that the nurse examiner's testimony was inadmissible because it improperly bolstered Anderson's credibility.[5] Again, we review the admission of this evidence for an abuse of the trial court's discretion. *See Flores v. State*, 513 S.W.3d 146, 161–62 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

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[5]We assume solely for the purposes of this appeal that White's general "bolstering" objection served to preserve his appellate argument for our review. *See generally Rivas v. State*, 275 S.W.3d 880, 887 (Tex. Crim. App. 2009) (recognizing many intermediate appellate courts have abandoned bolstering as a valid objection that sufficiently preserves error for review); *Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993) (Campbell, J., concurring) (arguing bolstering objection should no longer be recognized because "an objection that certain evidence is 'bolstering' in no way invokes the Rules [of evidence] or informs the trial court of the basis for exclusion under the Rules.").

Bolstering occurs when one item of evidence is improperly used by a party solely to add weight to earlier, unimpeached evidence offered by the same party. *See Cohn*, 849 S.W.2d at 819–20. A bolstering objection, as employed by White at trial, finds its roots in rule 613(c), which governs the admissibility of a witness's prior consistent statement. Tex. R. Evid. 613(c). But a bolstering objection is "merely redundant of the hearsay rule." *Cohn*, 849 S.W.2d at 820 n.8; *see Rivas*, 275 S.W.3d at 886–87 (indicating "bolstering" has ties to rule 613(c) and reiterates principles of hearsay); *Bosquez v. State*, 446 S.W.3d 581, 585 (Tex. App.—Fort Worth 2014, pet. ref'd) ("In general, a witness's prior statement that is consistent with the witness's trial testimony is inadmissible hearsay. Tex. R. Evid. 613(c)."). In this case, the nurse examiner's testimony regarding Anderson's statements to her fell squarely within an exception to the hearsay rule: a statement made for medical diagnosis or treatment. *See* Tex. R. Evid. 803(4). As required for admission under rule 803(4), the nurse examiner testified regarding the importance of obtaining medical-history information in order to medically treat Anderson and that she discussed this with Anderson. *See Taylor v. State*, 268 S.W.3d 571, 588–90 (Tex. Crim. App. 2008). Accordingly, the nurse examiner's testimony was admissible, and the trial court did not abuse its discretion by so ruling. *See Luttrell v. State*, No. 05-09-01036-CR, 2010 WL 3528531, at *3–4 (Tex. App.—Dallas Sept. 9, 2010, pet. ref'd) (op. on reconsideration, not designated for publication); *Little v. State*, No. 04-08-00723-CR, 2009 WL 2882932, at *2 (Tex. App.—San Antonio Sept. 9, 2009, no pet.)

(mem. op., not designated for publication); *Davidson v. State*, No. 05-05-00864-CR, 2006 WL 3020403, at *3 (Tex. App.—Dallas Oct. 25, 2006, pet. ref'd) (mem. op., not designated for publication); *Turner v. State*, 924 S.W.2d 180, 182 (Tex. App.—Eastland 1996, pet. ref'd). We overrule issue three.

III. CONCLUSION

The trial court did not abuse its discretion by denying White's second motion for a continuance of the trial date, by admitting evidence of extraneous misconduct, or by allowing the nurse examiner to testify to Anderson's statements made for the purposes of medical treatment or diagnosis. Thus, we affirm the trial court's judgments. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: GABRIEL, SUDDERTH, and KERR, JJ.

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

DELIVERED: May 25, 2017