COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00014-CR

GEORGE LEON GUNTER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1466024D

MEMORANDUM OPINION[1]

Appellant George Leon Gunter appeals the trial court's judgment sentencing him to four years' confinement for attempted arson.[2] In two points, he asserts that the trial court abused its discretion by sustaining the State's

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

[2]*See* Tex. Penal Code Ann. §§ 15.01, 28.02 (West 2011). Appellant asks us to reverse the trial court's judgment and remand the case to the trial court for a new sentencing hearing.

objection to two exhibits and by overruling his objection to the State's closing argument. We disagree with each assertion and affirm the trial court's judgment.

Background Facts

A grand jury indicted appellant for attempted arson. He entered an open plea of guilt and pled true to a sentence-enhancement allegation concerning a prior felony conviction from Oklahoma. The trial court accepted the plea and ordered a presentence investigation. The presentence investigation report (PSI) revealed that appellant had two arrests and one conviction for violating protective orders and that three women—appellant's mother and two ex-wives—had obtained protective orders against him in Oklahoma over the course of approximately ten years. When reciting "[f]actors [a]gainst community supervision," the PSI stated, "The defendant has a history of violence directed at his romantic partners and protective orders against the defendant were granted for several of his romantic partners."

After the preparation of the PSI, at a hearing on punishment, appellant introduced two exhibits that listed legal actions involving his mother and one of his ex-wives. The following exchange occurred:

> [DEFENSE COUNSEL]: [Defense exhibits] 5 and 6 are simply printouts . . . concerning these protective orders that . . . have been alleged to have been issued against [appellant].
>
> I checked that out with some of these people . . . . I just wanted to point out to the Court, I thought it was relevant because if you just read the PSI it looks like these protective -- it's a civil matter. And I was interested because typically people who do pursue protective orders oftentimes do them multiple times, and quite

> honestly, have some history themselves. And I wanted to give the Court a little clearer picture about the people we are dealing with.
>
> Particularly with [one of appellant's ex-wives], she has been the defendant herself in a protective order. . . . And . . . his mother, she has been . . . the defendant in a protective order herself. She's been the plaintiff in two protective orders against two different people. . . .
>
> THE COURT: Does the State have any objections to these exhibits?
>
> [THE STATE]: . . . [W]hile it is interesting that these things have been produced, we do not see the relevance of that because [appellant's ex-wife and mother] are not the defendants in this case. And without knowing any of the specifics we feel that it is just an attempt to disparage and impeach a non-witness on a collateral matter.

The trial court sustained the State's objection and excluded the exhibits.

The State referred to the protective orders against appellant in its closing argument. While appellant had asserted in his closing argument that he had no prior "assaultive convictions" or "that sort of stuff," the State argued that the protective orders were indicative of appellant's past:

> [THE STATE:] The fact that he does not have any assaultive convictions is one thing, but we would point . . . to the notation that that is a permanent protective order from the State of Oklahoma, and that is not just issued because a judge in Oklahoma feels that it would be a good thing for that day. There had to have been something else behind that --
>
> [DEFENSE COUNSEL]: I'm going to object to the relevancy of that, Judge. We have no evidence about what occurred in that situation. I don't think that's relevant at all.
>
> . . . .
>
> THE COURT: [Y]our objection's overruled. Go ahead.

At the end of the punishment hearing, the trial court found appellant guilty and sentenced him to four years' confinement. He brought this appeal.

The Resolution of Appellant's Points

Appellant presents two points. First, he asserts that the trial court abused its discretion by excluding his proffered evidence about the legal history (including the protective order history) of his ex-wife and mother. Second, he asserts that the trial court erred by overruling his objection to the State's closing argument. In response, the State contends that the trial court properly excluded appellant's exhibits because they were unauthenticated and irrelevant. Second, the State contends that the trial court properly overruled appellant's objection to the State's closing argument because the argument was a reasonable deduction from the evidence and was made in response to opposing counsel's argument.

Exclusion of evidence

We review a trial court's exclusion of evidence under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. An abuse of discretion does not occur unless the trial court's decision is arbitrary or unreasonable. *Reyes v. State*, 480 S.W.3d 70, 78 (Tex. App.—Fort Worth 2015, pet. ref'd). We will affirm the trial court's ruling excluding evidence if it is correct under any theory of law applicable to the case. *Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008).

The State objected to Defendant's Exhibit 5 and Defendant's Exhibit 6 on the basis that they were irrelevant. Evidence may be offered by the State and the defendant as "to any matter the court deems relevant to sentencing," including the defendant's character and bad acts. Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (West Supp. 2016). Determining what evidence should be admitted at a punishment hearing "is a function of policy rather than a question of logical relevance." *Sunbury v. State*, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002). "Some of the policy reasons that should be considered when determining whether to admit punishment evidence include, but are not limited to: giving complete information for the [factfinder] to tailor an appropriate sentence for a defendant; the policy of optional completeness; and admitting the truth in sentencing." *Id.* at 233–34. Mitigating evidence is relevant if it is helpful to a factfinder in determining an appropriate sentence. *See Hayden v. State*, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009); *Draheim v. State*, 916 S.W.2d 593, 600 (Tex. App.—San Antonio 1996, pet. ref'd) ("The focus of the punishment phase is . . . the personal responsibility and moral blameworthiness of the defendant for the crime of which he has been convicted.").

Defendant's Exhibit 5 and Defendant's Exhibit 6 are each one-page printouts from "On Demand Court Records" of information about Oklahoma cases relating to, apparently, one of appellant's ex-wives and his mother.[3] The

[3]The printouts contain the names of one of appellant's ex-wives and of his mother, but they do not contain other identifying information (such as a birthdates

printouts show the dates those cases were filed, the cause numbers, and the general subject matter of the cases but do not show the cases' dispositions. The printouts show that appellant's ex-wife was involved in criminal matters along with two protective order cases, and they establish that appellant's mother was involved in three protective order proceedings along with other proceedings. None of the records purport to have any connection to appellant except for one case described only as "MARRIAGE LICENSE W/ COUNSELING."

On appeal, appellant contends that the exhibits were relevant because they provided "context to the prior protective orders [against him] and tended to mitigate the harmful effect that the protective orders had on the trial court's determination of punishment and reduce [his] moral blameworthiness." He reasons that "evidence shedding light on why those close to him had sought protective orders against him in the past (because they seek them with regularity) was very important defensive evidence on the issue of punishment."[4]

We cannot agree that the exhibits provided context to the protective orders against appellant or reduced his moral blameworthiness. The exhibits showed only that appellant's mother and his ex-wife were involved in other protective

---

or social security numbers) to confirm that the records relate to the people to whom appellant proposed they related.

[4]The PSI's focus was not merely that appellant "has been the defendant to three protective orders," as he argues. Rather, the PSI explained that courts granted protective orders against appellant and that he was once assessed a year's confinement for violating a protective order.

order proceedings; they did not show the results of those proceedings. Thus, the exhibits did not indicate whether appellant's mother and ex-wife were culpable in the protective order proceedings in which they were defendants or were needlessly litigious (by filing for protective orders without proper grounds and therefore not prevailing) in the proceedings in which they were plaintiffs.

Even if the exhibits did show dispositions, the trial court could have reasonably rejected the proposition that proceedings involving nonparties somehow affected appellant's moral blameworthiness for acts resulting in the *issuance* of—not merely the *seeking* of—protective orders against him. The evidence concerning those proceedings did not, as appellant argues, "explain" why courts issued protective orders *against him*. Thus, the trial court could have reasonably rejected as unreasonable the inference that because appellant's mother and his ex-wife may have been litigious in that they were parties to protective order proceedings involving other people on other occasions, he is less culpable for the protective orders that courts actually imposed against him.

This case is akin to *Alvarado v. State*, 912 S.W.2d 199, 217 (Tex. Crim. App. 1995). There, during the punishment phase of a capital murder trial, the appellant sought to introduce, for mitigation purposes, evidence that a victim had previously assaulted a police officer. *Id.* The court of criminal appeals held that the trial court did not abuse its discretion by excluding that evidence and reasoned that the victim's prior bad act did not "lessen the defendant's moral blameworthiness for the murder of that victim." *Id.*; *see also Hayden*, 296

S.W.3d at 553–54 (explaining that character evidence of a victim is relevant when it relates to the circumstances of a crime or informs the factfinder about the defendant's background and character). Similarly here, we conclude that the alleged bad acts of appellant's mother and his ex-wife of seeking multiple protective orders or having protective orders sought against them does not lessen appellant's moral blameworthiness for the imposition of protective orders against him.

For these reasons, we conclude that the trial court did not abuse its discretion by excluding Defendant's Exhibit 5 and Defendant's Exhibit 6 on the ground that the exhibits were not relevant to assessing appellant's punishment. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1); *Henley*, 493 S.W.3d at 82–83. We overrule appellant's first point.

Proper closing argument

We review the trial court's ruling on an objection to closing argument for an abuse of discretion. *Whitney v. State*, 396 S.W.3d 696, 705 (Tex. App.—Fort Worth 2013, pet. ref'd). To be permissible, the State's argument must fall within one of the following four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement. *Fielder v. State*, 848 S.W.2d 85, 94–95 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 829 (1993); *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). To determine whether the State's argument falls within one of the four categories of permissible argument, we must

consider the argument in the context in which it appears. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). "Counsel is allowed wide latitude without limitation in drawing inferences from the evidence so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith." *Id.*

Appellant contends that the State's closing argument that there "had to have been something . . . behind" appellant's protective orders was improper because the argument "speculat[ed] on the reasons" for the protective orders. We disagree.

The gist of the State's argument was that violent acts of appellant caused the issuance of protective orders against him, which responded to appellant's argument that he had "no assaultive convictions" or "that sort of stuff." It was not unreasonable for the State to deduce appellant's history of violence from the PSI's revelations that he had been subject to protective orders protecting his mother and two ex-wives, had been arrested for violating protective orders twice, and had been convicted in 2010 of violating a protective order. In fact, the community supervision officer who wrote the PSI drew the same inference, stating as a factor against community supervision that appellant "has a history of violence directed at his romantic partners and protective orders against [appellant] were granted for several of his romantic partners." As the State contends, "[T]he fact that three . . . courts, at three different times, found that three different females in [a]ppellant's life needed to be protected from him implies a violent past."

We conclude that the trial court could have reasonably found that the State's closing argument was permissibly based on a reasonable deduction from facts in the PSI and permissibly answered the argument of appellant's counsel. *See Fielder*, 848 S.W.2d at 94–95; *see also Price v. State*, 245 S.W.3d 532, 537 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (explaining that the issuance of a protective order against a defendant permitted an inference that the defendant engaged in prior misconduct). Thus, we hold that the trial court did not abuse its discretion by overruling appellant's objection to the argument. *See Whitney*, 396 S.W.3d at 705. We overrule appellant's second point.

Conclusion

Having overruled appellant's two points, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; SUDDERTH and KERR, JJ.

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

DELIVERED: August 31, 2017