COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00310-CR

CHRISTOPHER RENE LOPEZ — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1371101D

MEMORANDUM OPINION[1]

A jury found appellant Christopher Rene Lopez guilty of murder and assessed his punishment at 50 years' imprisonment. The trial court sentenced him accordingly. His appeal comprises six points. In the first two, Lopez asserts that the trial court erred by excluding his recorded custodial interview because it was admissible to correct a false impression created by the State's evidence and

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

because excluding it abridged his constitutional due process right to present a defense. Had the trial court admitted his recorded custodial interview, Lopez further contends in his third and sixth points that the trial court erred by not including self-defense and sudden passion in the jury charge. In point four, Lopez maintains that the trial court abused its discretion by allowing the prosecutor to argue outside the record, and in point five, he argues that the trial court abused its discretion by admitting records of prior convictions because the State failed to prove that they were really his convictions. We affirm.

Evidence

Luis Osorio Chavez was the foreman for a landscaping work crew that included Lopez and Manual Duran. During a typical workday in May 2014, the three men climbed into a truck around 2:30 p.m. to leave a work site. Chavez was in the driver's seat, Lopez was in the passenger's seat, and Duran sat between them.

While in the truck, Chavez heard Lopez say something like, "[S]o you'll remember," to Duran and then heard Lopez strike Duran in the chest. Chavez stated that Duran had said and done nothing to provoke Lopez's attack, nor was Chavez aware of any hostility between the two men earlier that day that might have explained Lopez's behavior. Chavez, seeing Lopez holding a knife, stopped the truck, and all three climbed out. Almost immediately Duran fell to the pavement; Lopez climbed back into the truck and took off. Now stranded, Chavez asked bystanders to call 911.

Duran died of two stab wounds to the heart.

During the punishment trial, the jury learned that Lopez had been using methamphetamine for two or three days before the offense and was high and possibly hallucinating on that day. Lopez told the doctor who performed a psychological evaluation on him that he had been eating the meth, which the doctor thought increased the high's intensity.

Preliminary matter: preservation of error on Lopez's first two points

In his first point, Lopez argues that the custodial statement he gave to a detective was admissible under *Allridge v. State* because it was necessary to explain or contradict the State's evidence. 762 S.W.2d 146, 152 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989). In his second point, Lopez argues that the trial court violated his due-process rights because not admitting his statement precluded any self-defense and sudden-passion defenses.

The State maintains that Lopez's first two points do not comport with his objections at trial and are therefore waived. *See Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998). Initially, then, we address whether Lopez's appellate arguments match his trial objections.

At trial, defense counsel argued:

> We're asking that [Lopez's statement] be admitted before the jury. We're asking that this testimony be admitted before the jury to the extent that . . . *Al[l]ridge* keeps us from presenting—from presenting

> defensive information and exculpatory information. We believe the *Al[l]ridge* case is unconstitutional and violates due process.[2]

From this, Lopez did not appear to concede that *Allridge* kept out his proffered evidence, but if it did, he argued that his due-process rights were violated.

That is certainly how the prosecutor and the trial court understood Lopez's argument. In response to Lopez's objection, the State argued:

> [Prosecutor:] The statement itself is hearsay without exception. The defendant is not crying or overly emotional to make an excited utterance. It exactly falls within the lines of *Al[l]ridge*. And because of that, it should be excluded by party -- or it should not be something that can be proffered by the party opponent.
>
> THE COURT: Okay.
>
> [Prosecutor]: It does not violate due process in that the defense still has the opportunity to present their case and the defendant is not being prohibited from the opportunity to present testimony by the court.
>
> That is my legal response.
>
> THE COURT: All right. I'm going to agree with the [S]tate. I'll exclude that testimony as being self-serving. And I'm going to rely upon the *Al[l]ridge* case for the basis for my ruling.

We hold that Lopez's points on appeal comport with his objections at trial—or at least they comport with what the prosecutor and the trial court understood those objections to have been.

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[2]Earlier, defense counsel asserted, "I believe the [State's] *Al[l]ridge* motion violates due process . . . ." Later he repeated that he thought that *Allridge* violated due process but added that *Allridge* might not even apply: "Judge, . . . we've asked earlier to introduce the . . . videotape with the audio because we believe *Al[l]ridge* violates due process. We don't necessarily think this case falls squarely under *Al[l]ridge* because [it] sort of talks about time and time for reflection. And that obviously didn't take place in this case."

Points One and Two: exclusion of Lopez's custodial interview

Lopez's first two points are sufficiently intertwined that we will discuss them somewhat together, noting as a backdrop that we review a trial court's evidentiary rulings under an abuse-of-discretion standard. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). Furthermore, if any theory of law applicable to the case supports the ruling, we will uphold it. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

A. The trial court properly excluded Lopez's interview under *Allridge.*

Under Texas law, "self-serving declarations are not admissible in evidence as proof of the facts asserted," although three exceptions exist that "permit introduction of such proof." *Allridge*, 762 S.W.2d at 152. One exception is if the statement is part of the res gestae of the offense or arrest, a second is if the State previously introduced a part of the defendant's statement or conversation, and the third is if the State previously offered acts or declarations and the defendant's statement is necessary to explain or contradict those acts or declarations. *Id.* "Unless appellant's statements fall under any of the enumerated exceptions, they are not admissible into evidence." *Id.* We are here concerned with only the third exception.

In discussing that final exception, the *Allridge* court relied specifically on *Reado v. State*. *Id.* (citing 690 S.W.2d 15, 17 (Tex. App.—Beaumont 1984, pet. ref'd)). *Reado* underscored that when a defendant does not take the stand, his self-serving statements are not admissible merely because they contradict some

evidence that the State proffered. 690 S.W.2d at 17. The *Reado* court identified the theory behind the third exception as being "to prevent the fact finder from being misled or perceiving a false, incorrect impression when hearing only a part of an act, declaration, conversation or, especially, a writing." *Id.* "This so-called rule of completeness" the court continued, "takes effect only when other evidence has already been introduced but is incomplete and misleading." *Id.* Most important for our purposes is this: "A practical test for the trial court would be that the trial judge should carefully ponder the testimony and evidence which is said to be incomplete and then assess if there has been a misleading or mistaken effect upon the minds of the jury or fact finder." *Id.* The proffered testimony would be admitted "only if necessary to prevent the jury from being misled or mistaken." *Id.*

Reado thus instructs that the first step is to identify the precise evidence that the State introduced and that the defendant wants to rebut; the second step is to determine whether that particular evidence was an incomplete portion of a larger act, declaration, or statement; and the third step is to determine whether that incompleteness is misleading. If so, the defendant may bring in that evidence's missing portion to prevent the jury from being misled.

The *Reado* defendant never testified but wanted to use his exculpatory statement to explain or contradict other evidence proffered by the State—precisely as Lopez seeks to do here. *See id.* The court said no: "To adopt [the defendant's] position would mean that all self-serving statements by an accused

would be admissible." *Id.* The court noted that because the defendant did not testify, the State could not have cross-examined him, further commenting that the defendant's statement did not fall under any of the rule-of-completeness exceptions. *Id.*

Four years after *Reado*, the *Allridge* court confirmed that "[t]he rule of 'completeness,' which takes effect only when other evidence has already been introduced but is incomplete and misleading," does not apply when the State has not introduced any part of the defendant's statements into evidence. *Allridge*, 762 S.W.2d at 153 (citing *Reado*); *see Jones v. State*, 963 S.W.2d 177, 182 (Tex. App.—Fort Worth 1998, pet. ref'd).

In *Allridge*, the defendant tried to get in two of his statements—the first in which he denied being the shooter and the second in which he admitted being the shooter but claimed that he had been startled into shooting. *See Allridge*, 762 S.W.2d at 151. Because the State had presented evidence that the defendant was the shooter and that the shooting was deliberate, *see id.* at 149–50, this effort was the defendant's attempt to use his self-serving out-of-court statements to rebut the State's evidence—evidence, however, that in no way relied on portions of the defendant's statements, much less in a misleading way. Unsurprisingly, the court of criminal appeals ruled that the trial court properly excluded the defendant's statements. *See id.* at 153; *see also Lawler v. State*, 110 Tex. Crim. 460, 464–71, 9 S.W.2d 259, 261–64 (1928) (op. on reh'g) (holding that statements the defendant made to his doctor while being treated

perhaps 45 minutes after the offense—that the complainant had accidentally shot himself while the complainant and the defendant scuffled—were not admissible to explain or contradict other witnesses' testimony regarding the defendant's res gestae statements that he had shot the complainant with the complainant's own gun).

In our case, Lopez contends that by introducing certain data from Duran's cell phone, which revealed no antagonism towards Lopez, the State opened the door to the third exception—that is, that his custodial statement was necessary to explain or contradict those contents of Duran's phone that the State introduced into evidence. We disagree. When applying the optional-completeness rule, the first inquiry is into precisely what evidence the defendant wants to rebut. *See Reado*, 690 S.W.2d at 17. Critically, Lopez is not arguing here that the State used Duran's phone data incompletely and in a misleading fashion.[3] Using Lopez's exculpatory statements to directly contradict or explain Duran's phone data is exactly what *Allridge* and *Reado* prohibit. *See Allridge*, 762 S.W.2d at 153; *Reado*, 690 S.W.2d at 17; *see also Jones*, 963 S.W.2d at 182. Put simply, there was no misleading incompleteness to correct.

[3]We also note that the State did not characterize the benign contents of Duran's phone, which included photographs and videos of Duran playing the guitar, as in some way delimiting the universe of the two men's relationship; Lopez was free to show, using *admissible* evidence, that animosity existed between them.

Further, we disagree that either *Walters* or *Renteria* supports Lopez's position, as he argues. *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007); *Renteria v. State*, 206 S.W.3d 689 (Tex. Crim. App. 2006).

In *Walters*, a murder case, the defendant made a 911 call, and the 911 operator called the defendant back. 247 S.W.3d at 214–15. The State introduced the first call but only a portion of the second call. *Id.* The State stopped the 911 operator from testifying precisely at the point in the second call where the operator had asked the defendant if he wanted to talk about what had happened, and, in the process, the State prevented the operator from testifying that according to the defendant, the complainant (the defendant's brother) had threatened him several times, including one threat to kill him. *Id.* at 215. The court held that the trial court abused its discretion by preventing the admission of the second call's remaining portion. *Id.* at 220–21.

But because the defendant testified at trial and spoke of the longstanding strife between him and his brother, the court held that the error was not constitutional as it did not prevent the defendant from presenting his defensive theory. *Id.* at 221–22. Ultimately, the court remanded the case to the court of appeals for further proceedings. *Id.* at 222.[4]

[4]On remand, the court of appeals found harmful error under rule 44.2(b)—the rule governing the harm analysis for non-constitutional error. *See Walters v. State*, 275 S.W.3d 568, 574 (Tex. App.—Texarkana 2008, no pet.).

Unlike the prosecutor in *Walters*, here the State did not introduce a portion of Lopez's statement and prevent some remaining part from being considered by the jury. Nor is this a case where the State introduced a portion of Duran's telephone data and suppressed some allegedly exculpatory portions of that data.

In *Renteria*, Lopez's other case, during the punishment phase of a capital-murder trial, the State's expert witness testified that a hypothetical defendant who was unremorseful about killing a five-year-old girl would be a future danger to society. 206 S.W.3d at 693–94. During final arguments, the State affirmatively asserted that the defendant had not expressed any remorse about killing the five-year old complainant. *Id.* at 696–97.

But that was not true—the defendant had, in fact, expressed remorse. *Id.* at 694. The State successfully kept this information from the jury.

Among other appellate complaints the defendant argued due-process violations, complaining that the State's questioning left a false impression that thereby opened the door to the remorse evidence and that the evidence was relevant as a matter of constitutional law and admissible without regard to any evidentiary rule. *Id.* at 694–97. The defendant thus presented a constitutional argument for admissibility that transcended any evidentiary rule, which is comparable to Lopez's second point. For its part, the State argued that the remorse evidence was inadmissible hearsay regardless of any constitutional relevance and denied having opened any doors. *Id.* at 697.

The court began by noting that the constitution does not require admitting a defendant's self-serving, out-of-court declarations simply because they are relevant, if they are otherwise inadmissible under state law. *Id.* The starting point is thus whether the proffered evidence is admissible under the evidentiary rules.[5]

From there, the *Renteria* court went on to determine that the defendant's remorseful declarations were in fact otherwise admissible. *Id.* at 697 (citing *Wheeler v. State*, 67 S.W.3d 879, 880–85 (Tex. Crim. App. 2002) (noting a party's entitlement to cross-examine an expert about information the expert knew but did not rely on)). The court held that the defendant's remorseful statements were not "otherwise objectionable" because the defendant was entitled to cross-examine the State's expert about whether he was even aware that the defendant had, in fact, expressed remorse.[6] *Id.* at 698. Consequently, the trial court committed an evidentiary error.

After so finding, the *Renteria* court held that the error rose to a constitutional due-process level and was harmful because (1) the State opened the door to whether the defendant was remorseful, (2) the State affirmatively represented that the defendant was not remorseful, (3) the State prevented the

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[5]As we note in the next section, a defendant can challenge an evidentiary rule as being constitutionally infirm in and of itself, but Lopez raises no such challenge.

[6]"The evidentiary caveat, however, is that the opponent must correct the 'false impression' through cross-examination of the witness who left the false impression, *not* by calling other witnesses to correct that false impression." *Wheeler*, 67 S.W.3d at 885.

defendant from rebutting its evidence and argument, and (4) the "State's claim that [the defendant] made no out-of-court statement of remorse was not an insignificant portion of its punishment case against [the defendant]." *See id.* (citing Tex. R. App. P. 44.2(a) (providing standard for harm for constitutional error)).

Renteria is distinguishable. The court first found error in excluding certain evidence as a matter of state evidentiary law and then determined that the error rose to constitutional levels when deciding whether to analyze harm under rule 44.2(b) (non-constitutional error) or under rule 44.2(a) (constitutional error). For *Renteria* to apply, Lopez first must show that the trial court abused its discretion by excluding his statement under state evidentiary law. The defendant in *Renteria* could; Lopez has not, so his reliance on *Renteria* is misplaced.

B. The trial court's exclusion of Lopez's interview did not deprive him of his constitutional right to present a defense.

Our discussion above presages our resolution of Lopez's second point, in which he contends that the trial court's evidentiary ruling prevented him from presenting his defense.

Erroneous evidentiary rulings rarely rise to the level of denying a defendant his fundamental constitutional right to present a meaningful defense. *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App.), *cert. denied*, 537 U.S. 949 (2002). Rulings excluding evidence might reach that level in either of two distinct instances: (1) when a state evidentiary rule categorically and arbitrarily prohibits

a defendant from offering otherwise relevant evidence, or (2) when a trial court's clearly erroneous ruling excluding otherwise relevant, reliable evidence that forms a vital portion of the defendant's case effectively precludes him from presenting a defense. *Id.* "In the first category, the constitutional infirmity is in the arbitrary rule of evidence itself." *Id.* "In the second category, the rule itself is appropriate, but the trial court erroneously applies the rule to exclude admissible evidence to such an extent that it effectively prevents the defendant from presenting his defensive theory. In other words, the erroneous ruling goes to the heart of the defense." *Id.* (footnote omitted). *See also Walters*, 247 S.W.3d at 219 (noting that mistaken evidentiary rulings are generally non-constitutional error except when "erroneously excluded evidence offered by the criminal defendant 'forms such a vital portion of the case that *exclusion* effectively precludes the defendant from presenting a defense.'" (quoting *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002))).

Because Lopez does not argue that the trial court excluded his proffered evidence under the first category (an arbitrary evidentiary rule), for him to show a constitutional violation falling within the second category he must initially demonstrate that the proposed evidence was not "otherwise objectionable." *See Renteria*, 206 S.W.3d at 697. The mere fact that evidence benefits the defendant does not, of course, give him a constitutional carte blanche to present it to the jury; it must be "'presented in a form acceptable to the law of evidence before he is entitled to insist that it be received over objection.'" *Id.* (quoting *Lewis v. State*,

815 S.W.2d 560, 568 (Tex. Crim. App. 1991), *cert. denied*, 503 U.S. 920 (1992)). As we explained in connection with Lopez's first point, he has not established any evidentiary error on the trial court's part. Had he done so, only then would we need to decide whether the error rose to a constitutional level. *See Walters*, 247 S.W.3d at 219.

C. Lopez's alternative request to present the video interview without sound was properly denied.

As part of his second issue, Lopez also discusses his alternative trial request to introduce the 52-minute-long video of his statement without the audio in order to impeach the detective's testimony that Lopez appeared "fine" during the interview. The trial court sustained the State's rule 403 objection that the prejudicial effect would substantially outweigh the probative value and that it would cause a "diffusion of the issues." Lopez did not raise an insanity or an involuntary-intoxication defense. *See* Tex. Penal Code Ann. § 8.04 (West 2011). Furthermore, some of the behavior that Lopez's counsel found peculiar—like Lopez's writing on a Kleenex box and pacing about the room—got before the jury anyway through defense counsel's cross-examining the detective. We hold that the trial court was within its discretion to exclude playing a 52-minute video for the sole purpose of impeaching the detective on a collateral issue. *See* Tex. R. Evid. 403; *Montgomery*, 810 S.W.2d at 391. Because the trial court did not abuse its discretion, we need not analyze whether the claimed error rose to

constitutional due-process dimensions. *Walters*, 247 S.W.3d at 219; *Renteria*, 206 S.W.3d at 697.

For the reasons set out above, we hold that the trial court acted within its discretion by excluding Lopez's statement and by excluding the video-only version of his statement. *See Montgomery*, 810 S.W.2d at 391. We overrule Lopez's first and second points.

Points Three and Six: the jury charge and the absence of a self-defense or sudden-passion defense

In his third and sixth points, Lopez contends that the trial court erred by not including self-defense and sudden passion in the charge. Relying on his custodial statement to the detective, he contends there was evidence supporting both.

It has long been settled that an accused has the "right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence." *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). But if the evidence—viewed in a light favorable to the defendant—does not establish a defense, then an instruction is not required. *See id.*

The only evidence to support submitting self-defense and sudden passion was Lopez's statement, which we have already found was properly excluded.

Without that statement, Lopez had no supporting evidence. *See id.* We overrule Lopez's third and sixth points.

Point Four: the propriety of the prosecutor's argument

In point four, Lopez maintains that the trial court erroneously allowed the prosecutor to argue outside the record. Lopez complains specifically that the prosecutor argued the following during the punishment trial: "Renee Green told you that [Lopez] was at that park, he was acting strange, and that little girl walked up to him. She was crying calling for her papi, and he said, 'Take her.'" Lopez argues that Green never testified that he said, "Take her," and that the prosecutor simply fabricated evidence.

Appellate courts review a trial court's ruling on an objection to the State's jury argument for an abuse of discretion. *See Whitney v. State*, 396 S.W.3d 696, 705 (Tex. App.—Fort Worth 2013, pet. ref'd); *Montgomery v. State*, 198 S.W.3d 67, 95 (Tex. App.—Fort Worth 2006, pet. ref'd). Permissible jury argument falls 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. *Felder v. State*, 848 S.W.2d 85, 94–95 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 829 (1993); *Whitney*, 396 S.W.3d at 704. When examining challenges to jury argument, appellate courts consider the remark's context. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). Counsel is allowed wide latitude in drawing inferences from the evidence, provided those inferences are reasonable, fair, legitimate, and offered

in good faith. *Id*. To constitute reversible error, a jury argument must be extreme or manifestly improper, or inject new and harmful facts into evidence. *Id*.

The State's punishment argument was based on the following testimony:

> [Green]: I took my group to the park which is off Riverside and Sylvania. And I remember seeing a guy in the park with a little girl. And he was walking around looking in the grass, and the baby came to me crying. And I was getting his attention to get his daughter, which he didn't never come get her. And –
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> [Prosecutor]: So the man who was in the park, what was he doing in the grass, if you saw?
>
> [Green]: Just like looking for something in the grass and in the rocks.
>
> [Prosecutor]: Was that behavior odd?
>
> [Green]: Yes, ma'am.
>
> [Prosecutor]: Did you think anything was wrong with him?
>
> [Green]: At first I didn't. But just watching him I did, because I didn't understand what he could be looking for.
>
> [Prosecutor]: And what happened with the little girl?
>
> [Green]: She was crying for him, and he just walked off like he was leaving her. And we got his attention to come back over where she was. And he came and he pushed the baby onto me. But I told him I couldn't take care her because I was at work.

Though Green did not testify that Lopez actually spoke the words, "Take her," Lopez's act of "push[ing] the baby onto" Green certainly communicated that message. We hold that the prosecutor's comment summarized the evidence. *See Felder*, 848 S.W.2d at 94–95. We overrule Lopez's fourth point.

Point Five: Lopez's prior convictions

In point five, Lopez argues that the trial court abused its discretion by admitting records of prior convictions—State's Exhibits 104 and 106—because the State did not prove them by fingerprint evidence. Deputy Joel Garcia, the State's witness, conceded that he could not identify a specific person from the fingerprints on those two exhibits.

As with the rulings challenged in Lopez's first two points, this is an evidentiary ruling that we review for abuse of discretion. *Montgomery*, 810 S.W.2d at 391. To show that a defendant had been previously convicted, the State must prove that a prior conviction exists and that the defendant was the person convicted. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007).

When proving a prior conviction, the State may use any type of evidence, documentary or testimonial. *Goode v. State*, No. 02–10–00465–CR, 2011 WL 4502333, at *2 (Tex. App.—Fort Worth Sept. 29, 2011, pet. ref'd) (mem. op., not designated for publication) (citing *Flowers,* 220 S.W.3d at 922). We have previously held that evidence of a unique CID (county identification number), a full name, and a birth date suffices to link a defendant to prior convictions. *Id.*

In this case, the State proved that the convictions were Lopez's by his unique CID, his full name, and his birth date. We overrule Lopez's fifth point. *See id.*

Conclusion

Having overruled Lopez's six points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

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

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

DELIVERED: January 11, 2018