COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00141-CR

ARTURO ACUNA APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1442288D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Arturo Acuna appeals his conviction for arson and using a combustible fluid as a deadly weapon. In one point, Acuna argues that the trial court reversibly erred by allowing a witness, over his objection, to testify that Acuna had used a racial epithet toward him. We will affirm.

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

II. Background

Ronald Phillips testified that on the night of December 23, 2015, after consuming a few beers, he fell asleep in his car in Ken Sanders's backyard. Phillips averred that he was awakened by a man walking around the corner near the side of Truitt Layne's house with a gas can in his hand. Phillips said that the man was wearing a black hoodie.

According to Phillips, the man walked away but returned shortly to the side of Layne's house with what appeared to be a water bottle in his hand. Phillips said that the man then made a motion with his arms and that Phillips then immediately saw the side of Layne's house on fire. Phillips averred that after that, the man in the hoodie walked over to the corner and stood watching the fire.

By Phillips's account, he woke up Sanders and then he and Sanders began to put out the fire and attempted to wake Layne. Sanders eventually retrieved a fire extinguisher and put the fire out. Phillips averred that as he and Sanders attempted to put out the fire, the man in the hoodie stood nearby and told them to "let it burn." Shortly after the fire was extinguished, firemen arrived.

Phillips said that as the firemen were interviewing him, the man in the hoodie was standing in Sanders's driveway watching everything but that then the man left and went "[t]o his house," which Phillips averred was two or three houses up from Layne's house. In open court, Phillips identified the man in the hoodie as Acuna. Phillips also said that he told his account of what happened, including Acuna's actions, to the firemen.

Phillips said that he spoke with detectives a few days later and identified Acuna from a photo-array. Phillips admitted that he had seen Acuna in the neighborhood prior to the fire.

Layne testified that he was awakened that night when Phillips banged on his bedroom window. Layne said that at that time, his mother's room was filled with smoke but that by the time he got outside, he could see only the remaining smoke from the fire that Sanders and Phillips, who were standing in his yard, had extinguished. Layne also averred that Acuna was standing in his yard.

Using pictures that had been published for the jury, Layne described how fire had damaged the outer wall just below his mother's bedroom window, how the curtain in her room was burned, and how part of the air-conditioning unit from her window had been damaged by fire. Fortunately, Layne's mother was staying over at his sister's house that night.

By Layne's account, he had encountered Acuna a few times prior to the fire. Layne recalled how one day Acuna was walking "down the street cussing like he was all drugged up." Layne said that he told Acuna that his behavior was unacceptable and to leave his neighborhood. Allegedly, Acuna's response was to threaten Layne, even going as far as to threaten to sexually assault him. Furthermore, and over defense's objection, Layne testified that Acuna angrily called him a "nigger." Layne also averred that he had another encounter with Acuna wherein the same racial epithet was used. According to Layne, Acuna used the racial epithet "a lot" during both encounters.

On cross-examination, Layne admitted that Acuna had shaken his hand that night in his front yard and that he was not surprised to see Acuna there. But he also averred that Acuna "did all the talking" that night and that the subject of his conversation was that "niggers had just beat[en] him up."

Erica Maldonado testified that she lived across the street from Acuna's house and a few houses down from Layne's. By Maldonado's account, she and a friend were sitting on her porch on the night of the fire when she overheard Acuna and his wife arguing. Specifically, Maldonado averred that she overheard Acuna yell multiple times at his wife to unlock her car and give him "the gas can." She stated that she also heard him yell at his wife that if she was not going to give him the gas can, he could get "more at the store," and she said that Acuna then hastily got into his car, sped away, and then sped back to the house a short time later. Maldonado averred that shortly after Acuna returned, she and her friend retreated back into her house. After that, Maldonado said that she heard her dogs barking. As she went to check on her dogs, she said that she could smell something akin to plastic burning. Immediately after that, Maldonado recalled that she saw that the police and firemen had arrived. Maldonado reported the argument between Acuna and his wife to the police that night.

Lieutenant Mike Jones of the City of Fort Worth Fire Department testified that he arrived at the scene a few minutes before midnight. Jones said that upon his arrival, the fire had already been extinguished but that he and other firefighters conducted a thermal imaging of the house to ensure that the fire had

not extended to the interior of the house. After conducting the imaging, Jones averred that he went outside to examine the burned air-conditioner unit and wall. Jones said that because he could smell the odor of gasoline, he called an arson investigator. From there, Jones averred that he spoke with neighbors about the fire and learned that Acuna had dropped a water bottle across the street. Jones went and found the plastic bottle but left it in place for the arson investigator.

Captain Kathryn Rowell of the Fort Worth Police Department testified that she was the first police officer to arrive on the scene. After learning that Acuna was the person neighbors suspected had started the fire, she and another officer went to his house and knocked on the door. By Rowell's account, Acuna answered the door and she "noticed immediately that he had a strong odor of gasoline about his person." Rowell said that she asked Acuna to step outside and that as he got closer, the smell of gasoline got stronger, so she arrested him and placed him in the back of her cruiser. Rowell averred that she then asked Acuna's permission to find his hoodie at his house and that Acuna consented. Rowell said that she then went back to Acuna's house and asked his wife for the hoodie, which his wife handed to her. Rowell stated that the hoodie had a strong smell of gasoline and was wet. Rowell also recalled that the area near the fire reeked of gasoline.

Lieutenant Michael Lachman, an arson investigator and bomb technician for the City of Fort Worth Fire Department, testified that he investigated the fire. After speaking with Rowell and learning what she had determined, Lachman

began to photograph the area. The State published for the jury some of the photographs that Lachman had taken. According to Lachman, he also smelled the odor of gasoline near the window unit. He said further that he collected the plastic bottle, which he described as smelling "heavily of gasoline." Lachman averred that he retrieved the hoodie from Rowell and described the hoodie as being "very wet" and smelling of soap and gasoline. Lachman stated that he took samples of each of the items he retrieved and sent them for testing. He also said that he came to the conclusion that the fire had been set intentionally and that it appeared gasoline had been used as an accelerant.

Eric Steinberg of the Texas Department of Insurance State Fire Marshal's Office arson lab testified that the water bottle and debris from the fire tested positive for gasoline but that the hoodie did not.

A jury found Acuna guilty of arson and also found true that he had used a combustible or flammable liquid as a deadly weapon. After the trial court heard punishment evidence and Acuna pleaded true to an enhancement paragraph, the trial court assessed punishment at forty-five years' incarceration and entered judgment accordingly. This appeal followed.

III. Discussion

In one point, Acuna argues that the trial court reversibly erred when it allowed the State to elicit testimony from Layne—over defense's Rule 403 objection—that Acuna had called him a "nigger." The State counters that the trial court properly admitted the testimony because it was presented to refute a

defensive theory and to show that Acuna had a motive to commit the arson against Layne. We agree with the State.

A. Applicable Law and Standard of Review

Evidence is relevant if it has any tendency to make a fact that is of consequence in determining the action more or less probable than it would otherwise be. Tex. R. Evid. 401. Relevant evidence is generally admissible. *See* Tex. R. Evid. 402. But a trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. Tex. R. Evid. 403.

"Probative value" refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). "Unfair prejudice" refers to a tendency to suggest decision on an improper basis—commonly, though not necessarily, an emotional one. *Id.*

In determining whether probative value of evidence is substantially outweighed by the danger of unfair prejudice, we consider "(1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence." *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012), *cert. denied*, 134 S. Ct. 823 (2013); *Cox v. State*, 495 S.W.3d 898, 903 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). "Rule 403

favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." *Cox*, 495 S.W.3d at 903 (*quoting Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g)).

As a general rule, the State is entitled to present in rebuttal any evidence that tends to refute a defensive theory even if such evidence encompasses an extraneous offense. *Davis v. State*, 979 S.W.2d 863, 867 (Tex. App.—Beaumont 1998, no pet.). Moreover, when "the defense chooses to make its opening statement immediately after the State's opening statement, the State may reasonably rely on this defensive opening statement as to what evidence the defense intends to present and rebut this anticipated defensive evidence during its case-in-chief as opposed to waiting until rebuttal." *Bass v. State*, 270 S.W.3d 557, 563 n.7 (Tex. Crim. App. 2008). Furthermore, even though motive is not an essential element of a criminal offense, the prosecution is always entitled to offer evidence of motive to commit the charged offense because it is relevant when it fairly tends to raise an inference that the accused had a motive to commit the alleged crime. *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991), *cert. denied*, 509 U.S. 922 (1993). If evidence of motive also happens to involve an extraneous act of misconduct by the accused, it is nevertheless admissible if the relevancy value of the testimony outweighs its potential for undue prejudice. *Id.*; *see* Tex. R. Evid. 403.

We review a trial court's ruling under Rule 403 of the rules of evidence for an abuse of discretion. *Cox*, 495 S.W.3d at 902. The trial court's ruling must be upheld as long as it is within the zone of reasonable disagreement. *Id.* at 903.

B. The Trial Court Did Not Err by Admitting the Testimony

During opening, delivered immediately after the State's opening, defense counsel argued that Acuna had no motive to commit the arson: "The State doesn't have to prove motive. But why would somebody do that? It's his neighbor. He lives on the same street. Who burns down their neighbor's house and just stands there? Why would somebody do that?" Defense counsel also argued that Acuna was present to help at Layne's house during the fire and after. Thus it was both probative and necessary for the State to introduce evidence of Acuna's racial animosity toward Layne, and therefore it was proper for the trial court to allow the State to put on evidence that Acuna had a racial motive to set Layne's house on fire and to rebut the defensive theory that Acuna was there to assist. *See King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000) ("[T]he extensive evidence of appellant's hatred for African–Americans, including his graphic tattoos and drawings, is evidence that appellant had a motive to kill Byrd because of his race."); *see also Powell v. State*, 63 S.W.3d 435, 438–39 (Tex. Crim. App. 2001) (concluding trial court did not err by admitting evidence to rebut defensive theories raised in opening statement). Moreover, the time needed to develop the complained-of testimony was minimal. Indeed, the multiple-volume record in this case only contains a few paragraphs concerning this testimony.

And when considering the amount of evidence connecting Acuna to the fire and connecting him to the combustible liquid used to start the fire—gasoline—we cannot say that the testimony regarding Acuna's use of the racial epithet impressed the jury in any irrational or indelible way. *See Stefanoff v. State*, 78 S.W.3d 496, 503 (Tex. App.—Austin 2002, pet. ref'd) (reasoning that extraneous-offense evidence had only a slight, if any, influence on jury given large amount of evidence establishing defendant's guilt and the need of the State to present the extraneous-offense evidence to rebut defensive theory). Thus, the trial court did not abuse its discretion by allowing the State to illicit the complained-of testimony. *See Woodward v. State*, 170 S.W.3d 726, 729–30 (Tex. App.—Waco 2005, pet ref'd) (holding that trial court did not abuse discretion by allowing evidence of defendant's "White Pride" tattoo to rebut defensive theory that offense was not racially motivated). We overrule Acuna's sole point.

IV. CONCLUSION

Having overruled Acuna's sole point on appeal, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: SUDDERTH, C.J.; MEIER and BIRDWELL, JJ.

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

DELIVERED: May 24, 2018