



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-14-00070-CR
No. 07-14-00071-CR
No. 07-16-00059-CR

BYRON TYRONE COLE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court Number Two
Tarrant County, Texas
Trial Court Nos. 1342591R and 1342592R; Honorable Wayne Salvant, Presiding

February 11, 2016

MEMORANDUM OPINION

Before **CAMPBELL** and **HANCOCK** and **PIRTLE, JJ.**

Appellant, Byron Tyrone Cole, appeals a conviction for aggravated assault in retaliation¹ with an affirmative finding on use of a deadly weapon in cause number 1342591R, and two convictions for aggravated robbery² with an affirmative finding on

¹ TEX. PENAL CODE ANN. § 22.02(b)(2)(C) (West 2011).

² TEX. PENAL CODE ANN. § 29.03 (West 2011).

use of a deadly weapon in cause number 1342592R.³ Both convictions were enhanced by two prior felony convictions where the second previous felony conviction was for an offense that occurred subsequent to the first previous felony conviction having become final.⁴ Punishment was assessed at thirty-five years confinement in each cause, with the three sentences to run concurrently. Appellant gave timely notice of appeal.⁵ By two issues, he asserts the trial court violated Rules 404(b) and 403 of the Texas Rules of Evidence by admitting during the guilt/innocence phase of trial (1) evidence of three prior criminal convictions for aggravated robbery and (2) testimony elicited by the State about his being “on parole for robbery.” Specifically, he contends the evidence constituted inadmissible character-conformity evidence. The State agrees that evidence of Appellant’s prior convictions and parole status should not have been admitted but argues he waived his arguments and was not harmed by the errors. We affirm.

BACKGROUND

Late at night on September 7, 2012, Appellant entered a Subway restaurant where two employees, Naga Maturi and Quinn Hardy, were preparing to close.

³ The original indictment in trial court cause number 1342592R resulted in the entry of two separate judgments. Because an appellant appeals a judgment and not a trial court cause number, for purposes of clarity, it is the procedure of this court to docket separate judgments as separate appellate cause numbers. Therefore, the judgment designated “Case No. 1342592R Count ONE” shall relate to appellate cause number 07-14-00071-CR and the judgment designated “Case No. 1342592R Count TWO” shall relate to appellate cause number 07-16-00059-CR.

⁴ TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2015). As enhanced, each offense was punishable by imprisonment for life, or for any term of not more than 99 years or less than 25 years. Appellant entered a plea of true to the habitual offender notices.

⁵ Originally appealed to the Second Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV’T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Second Court of Appeals and that of this court on any relevant issue. TEX. R. APP. P. 41.3.

Appellant ordered a sandwich and then jumped the counter, brandished a knife approximately six inches long, and held it against one of the employees. Upon realizing there were surveillance cameras, Appellant covered his face with a rag. The other employee was in the back of the restaurant calling 911. After Appellant grabbed all the cash, he heard a noise which focused his attention to the back of the store where he saw the other employee. He charged toward him with the knife and the two struggled.⁶ The employee ran toward the back door and grabbed a ladder to fend off Appellant. Eventually, the struggle spilled into the alley where Appellant threatened to kill the employee. For whatever reason, at this point, Appellant ran away. The employee followed and jumped on a fence to see in what direction Appellant had fled. He saw Appellant go through a gate where he disappeared behind a building. The case was assigned to a detective. Both employees provided the detective with a physical description of the person who robbed them; however, Appellant was not immediately apprehended.

The employee who had followed Appellant down the alley testified he had seen him in the neighborhood before and sometimes Appellant was accompanied by a female. Sometime after the robbery, the employee was at a phone store when he realized a man was looking at him. The man looked familiar and he realized it was the person who had robbed the Subway restaurant on September 7th. The employee contacted the detective who had investigated the robbery and reported the incident.

⁶ The first employee fled to the lobby of the restaurant which is separated by a door, locked Appellant inside the restaurant, and also called 911. He hoped the other employee had escaped out the back door leaving Appellant trapped inside.

More than two months after the first robbery, Appellant returned to the same Subway restaurant. Quinn Hardy, one of the employees who had been there during the first robbery and who had seen Appellant in the neighborhood, was in the alley taking out the trash. Appellant was in the alley, his face covered with a child's Batman mask, wielding a knife and trying to force his way in the back door of the restaurant. He threatened to kill Hardy for reporting him to the police. In attempting to shut the back door, Hardy's hands were cut by Appellant's knife. During a struggle over the knife, Appellant's mask came off and he fled, leaving the Batman mask behind. At trial, evidence established the mask belonged to Appellant's girlfriend's son.

The same detective who investigated the first robbery was assigned to the second robbery. He began his investigation at an apartment complex where Appellant's girlfriend resided. The apartment complex was accessible through a gate in the alley near the Subway restaurant. Although Appellant was not a tenant, he occasionally stayed at her apartment.

The two Subway restaurant employees from the first robbery were asked to separately view a photo lineup. They each identified Appellant. One employee was ninety percent sure the person he identified was Appellant and the other employee was eighty to eight-five percent sure. Based on the identifications, the detective prepared an arrest warrant and went to Appellant's girlfriend's apartment to find Appellant. He was not there but she consented to a search of her apartment. Appellant was later taken into custody, charged with the two robberies, and convicted of both.

ISSUES ONE AND TWO

Appellant asserts the trial court violated Rules 404(b) and 403 of the Texas Rules of Evidence by admitting during the guilt/innocence phase of trial (1) evidence of three prior convictions for aggravated robbery and (2) testimony elicited by the State from his girlfriend about his being “on parole for robbery.” The State concedes the complained-of-evidence should not have been admitted during the guilt/innocence phase but argues any error was waived and Appellant was not harmed.

APPLICABLE LAW

The erroneous admission of evidence is reviewed under the test for non-constitutional error found in Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). Such errors are harmful only if they affect substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury’s verdict. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). An error is harmless if an appellate court has “fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect.” *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). However, “if the reviewing court has a ‘grave doubt’ that the result was free from the substantial influence of the error, it must treat the error as if it did.” *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002). Stated another way, “in cases of grave doubt as to harmlessness the [appellant] must win.” *Id.* at 637-38.

Under this standard, we “consider everything in the record, including any testimony or physical evidence admitted for the jury’s consideration, the nature of the

evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case.” *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). As additional factors, we may also consider “the jury instructions, the State’s theory and any defensive theories, closing arguments and even voir dire, if applicable.” *Id.* Additionally, we consider whether the State emphasized the error as a factor. *Id.*

ANALYSIS

At trial, the issue of identity was raised during Appellant’s girlfriend’s testimony. Among other defensive theories, the girlfriend gave Appellant an alibi for the second robbery, testified Appellant had a twin brother, and mentioned that numerous black males walk in the alley behind the Subway to access various businesses. At a bench conference, the State sought to introduce some of Appellant’s many prior convictions by arguing the defense had opened the door when it made identity an issue.⁷ Specifically, the State wanted to rebut the defensive theories with three prior aggravated robbery convictions, one for which Appellant had been paroled in 2010.

The jury was excused and the colloquy continued. Defense counsel’s position was that he had not opened the door to extraneous offenses by his mere cross-examination of witnesses. He argued the defense would be “hamstrung” if the extraneous offenses were admitted. The State countered that it wanted to introduce three aggravated robbery convictions similar to those for which Appellant was on trial—

⁷ One of the main rationales for admitting extraneous offenses is to prove identity of the offender. *Segundo v. State*, 270 S.W.3d 79, 88 (Tex. Crim. App. 2008). When identity is in issue, extraneous offenses may be inadmissible unless there are distinguishing characteristics common to the offenses—a “signature.” *Beets v. State*, 767 S.W.2d 711, 740 (Tex. Crim. App. 1988) (on reh’g).

late-night robberies of fast-food restaurants with a deadly weapon—to show a pattern and not just mere coincidence.

The defense requested the trial court to conduct a balancing test under Rule 404(b) and Rule 403 of the Texas Rules of Evidence. After doing so, the trial court agreed with the State and admitted a pen packet with three prior judgments for aggravated robberies. The pen packet reflected that the deadly weapon used in the prior offenses was a firearm. Appellant objected to the court's ruling.

After the jury returned, Appellant agreed to stipulate that he was the same person named in the three prior judgments to prevent the State from further delving into his criminal history. The State requested admission of the extraneous offenses for all purposes prompting defense counsel to request a limiting instruction, which the trial court granted. The jury was instructed as follows:

you cannot and will not consider said testimony or evidence for any purpose unless you find and believe beyond a reasonable doubt that the Defendant engaged in such conduct, if he did. And even then, you may only consider the same in determining the motive, the credibility and - - of the Defendant at the time, if any, in connection with this offense, if any, alleged against him in the indictment.

The jury was further instructed it could consider Appellant's prior offenses as evidence of identity because he had stipulated to it on the record. Defense counsel reurged his previous objection and the exhibits were published to the jury by way of summary. The three aggravated robberies were summarized for the jury, including the fact that Appellant was sentenced to fifty years confinement for each conviction.

The State resumed questioning of Appellant's girlfriend. In referencing a past conversation with her, the prosecutor reminded her that she had previously stated she

did not believe Appellant had committed the offenses “because he was on parole for robbery and was trying to do right by it.” After the State rested, Appellant did not testify nor present any witnesses.

We first address the State’s argument that Appellant waived error by eliciting testimony from the detective similar to that offered by the State and by stipulating that he was the person named in the three extraneous judgments. During recross-examination of the detective, defense counsel inquired whether the detective was aware of Appellant’s criminal history of aggravated robbery. No specifics were elicited by defense counsel.

The trial court had previously ruled on defense counsel’s objections to the extraneous offenses outside the jury’s presence. Under such circumstances, a subsequent objection is not needed to preserve the claim for review. TEX. R. EVID. 103(b). Even so, when the State offered exhibits of Appellant’s prior aggravated robberies, defense counsel stated “[j]ust my previous objections being noted” Referencing the defense’s stipulation to identity on the three judgments, defense counsel added, “I don’t want to waive any objections” We find Defense counsel was extremely cautious in preserving his complaints for appellate review. Accordingly, we disagree with the State that Appellant waived his complaint regarding the admission of extraneous offenses.

As to the analysis of various harmless error factors, we note the State presented testimony from both employees who were victims of the first robbery. Each employee had seen Appellant’s face and one employee had seen Appellant in the community with

his girlfriend in between the first and second robberies. Both employees identified Appellant from a photo lineup and one of the employees positively identified Appellant in the courtroom as the person who robbed him.⁸

DNA evidence established that the Batman mask used in the second robbery belonged to Appellant's girlfriend's son. However, the expert witness could not make a conclusion about Appellant's DNA because of the quality and quantity of the matter left on the mask.⁹

Appellant's defensive theory that he was not the person who committed the robberies was weakened when the investigating detective ruled out another suspect. Additionally, the alibi provided by Appellant's girlfriend for the second robbery that she was with him all night was called into question when she testified they retired to bed around nine on the night in question but the robbery was not committed until much later. In response to questioning, she could not unequivocally say that Appellant remained in bed with her all night.

Additionally, jurors were given a limited instruction not to consider the extraneous offenses for any purpose unless they found and believed beyond a reasonable doubt that Appellant committed the offenses. On appeal, it is presumed the jury followed the trial court's instructions in the manner presented. *Casanova v. State*, 383 S.W.3d 530, 544 n.56 (Tex. Crim. App. 2012).

⁸ During the photo lineup, neither employee was one-hundred percent sure of his identification because of the difficulty in judging height from a photo.

⁹ Results from DNA testing of the mask excluded Appellant as a contributor to the major mixture profile and no conclusions could be drawn from the minor mixture profile due to quality and quantity of the DNA.

As an additional factor, we note the wrongfully admitted extraneous offenses were not overly emphasized by the State. In fact, the only reference during final arguments was a statement that “this guy . . . happens to be the same person in State’s Exhibits 68, 69 and 70,” a fact stipulated to by Appellant.

Finally, the sentence imposed in each case was thirty-five years confinement, a term of years on the lower end of the punishment range of 25 to 99 years or life. This is particularly so in light of the fact that the State had summarized to the jury that Appellant’s prior convictions for aggravated robberies had gained him fifty-year sentences.

Based on a review of these factors and an examination of the entire record, we have a fair assurance that the errors conceded by the State did not influence the jury or had but a slight effect. *Taylor*, 268 S.W.3d at 592. Accordingly, we conclude the errors were harmless and did not affect Appellant’s substantial rights. Issues one and two are overruled.

CONCLUSION

The trial court’s judgments are affirmed.

Patrick A. Pirtle
Justice

Do not publish.