



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

No. 07-16-00170-CR

JOEL ALLEN MORGAN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 70,183-E, Honorable Douglas Woodburn, Presiding

March 16, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

A jury found appellant Joel Allen Morgan guilty of the second-degree felony offense of possession of more than four grams but less than two-hundred grams of a controlled substance, methamphetamine.¹ Punishment was enhanced to a first-degree felony based on appellant's prior conviction for the felony offense of burglary of a

¹ TEX. HEALTH & SAFETY CODE ANN. § 481.115(a),(d) (West 2010).

habitation.² The jury assessed appellant's punishment at twenty-five years' confinement in prison and a fine of \$5,000. Through three issues appellant challenges the admission of extraneous-act evidence. We will overrule appellant's issues and affirm the judgment of the trial court.

Background

The State's evidence showed that during the evening of March 3, 2015, two Amarillo police officers responded in separate vehicles to reports of a suspicious person. According to a caller, a white male with a "scruffy beard" wearing a gray jacket, blue jeans, a baseball cap, and a red backpack tried to break into an apartment. One report suggested the person was looking into a car. When one of the officers saw an individual fitting the description enter an alley, he followed in his patrol car. There he observed the person cross the muddy alley and toss a "black object" by hand into a dumpster.

The officer tried to contact the person but he refused to comply with the officer's commands. At that point the second officer arrived. The person, later identified as appellant, was handcuffed.

The black item was photographed in place in the dumpster before it was retrieved. An officer testified the item was a sock in which several items were wrapped. The sock contained a "glass meth pipe." It also contained a credit card, a debit card and a driver's license bearing the name K.S. and a driver's license of another person, H.M. Also rolled in the sock were two plastic baggies containing a substance that later

² TEX. PENAL CODE ANN. § 12.42(b) (West Supp. 2016).

proved to be methamphetamine. After the officers found the items in the sock, appellant was arrested.

Consistent with the caller's description, appellant was carrying a red backpack. Attached to the backpack, officers found a computer thumb drive. Later testimony established the thumb drive also belonged to K.S. There was testimony also that K.S. reported her car was burglarized on March 2 or 3. K.S.'s identification, and that of her friend, H.M., a credit card and a debit card were taken.

The backpack contained a laptop computer, a solar panel, a face mask, an infrared-type camera, an LED flashlight, a speaker, a set of headphones, USB and power cables, an unidentified "electronic device," a pair of gloves, and a window punch tool. These items were each depicted in photographs admitted at trial. Some were also admitted into evidence.

An officer testified that possession of some items found in the backpack, that is, the window punch, the gloves, the mask and the flashlight, suggested to him "that somebody is committing auto burglaries." He agreed the items were "basically a burglary kit." The window punch, he explained, was usually used for breaking windows.

Later in trial another officer testified to his investigation of the burglary of K.S.'s vehicle. Entry was gained through a shattered window. The officer agreed with the prosecutor that this breakage was consistent with the use of a window punch. While investigating the burglary of K.S.'s vehicle, the officer concluded appellant was responsible. That officer also testified regarding telephone calls appellant made from

jail after his arrest, telling the jury that appellant made statements admitting to methamphetamine use.

In his opening statement, counsel for appellant asked the jury to consider, as it heard the evidence, whether officers conducted themselves with “professionalism, objectivity, [and] thoroughness” in the encounter with appellant. He informed the jury that it would be asked to convict appellant on one officer’s testimony. And that, in his opinion, the evidence did not connect appellant with the offense. In closing argument the prosecutor stated the “thing that ties this all together; my backpack, my black mask.” Counsel for appellant strongly questioned the first officer’s integrity in his encounter with appellant.

Analysis

Through three issues, which we will discuss jointly, appellant argues the trial court improperly admitted “burglary evidence” in violation of Texas Rules of Evidence 401, 403, and 404(b). Based on the arguments in appellant’s brief we understand “burglary evidence” as a shorthand reference for evidence linking him to the burglary of K.S.’s car. It consists of the items found on and in his backpack, including the tools an officer labeled a “burglary kit,” photographs of the backpack items, and supporting officer testimony including that of the investigation of the burglary of K.S.’s car.

Preservation of Error

Appellant did not object under Rule 403. A specific Rule 403 objection must be asserted to preserve error because a Rule 403 objection is not subsumed in relevancy or 404(b) objections. *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th

Dist.] 2006, pet. refused). Appellant’s complaint on appeal under Rule 403 was not first properly presented to the trial court and an adverse ruling obtained. TEX. R. APP. P. 33.1(a). Nothing is therefore preserved for our review on this ground. We think, however, appellant sufficiently apprised the trial court of his Rule 404(b) and relevancy complaints and will address those points.

Admissibility of Evidence of Extraneous Crimes, Wrongs, or Other Acts, Rule 404(b)

The decision of a trial court to admit or exclude extraneous-offense evidence is reviewed for abuse of discretion. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). There is no abuse of discretion unless the court “acted arbitrarily and unreasonably, without reference to any guiding rules and principles.” *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1991) (op. on reh’g); see also *Breeding v. State*, 809 S.W.2d 661, 663 (Tex. App.—Amarillo 1991, pet. refused). A trial court’s ruling will be upheld if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008).

Evidence of other crimes, wrongs, or acts is not admissible to prove character conformity, but may be admissible for other purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.” TEX. R. EVID. 404(b)(2). “[A] party may introduce evidence of other crimes, wrongs, or acts if such evidence logically serves to make more or less probable an

elemental fact, an evidentiary fact that inferentially leads to an elemental fact, or defensive evidence that undermines an elemental fact.” *Martin v. State*, 173 S.W.3d 463, 466 (Tex. Crim. App. 2005). Extraneous-offense evidence may be admitted under both Rule 404(b) and Rule 403, if the evidence is “relevant to a fact of consequence in the case apart from its tendency to prove conduct in conformity with character” and its probative value is “sufficiently strong so that it is not substantially outweighed by unfair prejudice.” *Johnston v. State*, 145 S.W.3d 215, 220 (Tex. Crim. App. 2004). Rule 404(b) is a rule of inclusion rather than exclusion and the exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). Thus, for example, evidence of extraneous offenses may also be admissible to rebut defensive theories. *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008).

The State must always prove the accused is the person who committed the charged offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). To prove an accused unlawfully possessed a controlled substance, the State must establish that the accused exercised control, management or care over the substance, and knew what he possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). Whether evidence is direct or circumstantial, it must establish that the accused’s connection with the drug was more than just fortuitous. *Id.* at 406. For that reason, when the accused is not exclusively in possession of the place where the drug was found, our courts require additional independent facts and circumstances linking him to the contraband. *Id.* The requirement is “designed to

protect the innocent bystander from conviction based solely upon his fortuitous proximity to someone else's drugs." *Id.*

Appellant asserts the State had no lawful need for the burglary evidence because of the strength of its case. We disagree. In his opening statement, appellant challenged the veracity of the first officer and in so doing the State's ability to identify him as possessing the methamphetamine found in the dumpster. He pursued these theories throughout trial. Cross-examination showed the first officer was the only known witness to appellant's act of tossing the black object in the dumpster. And the officer, although a department veteran and fully familiar with operation of his vehicle's video recording system, chose not to record his encounter with appellant until after appellant was detained. The defensive theory that the officer falsely accused appellant of possessing the methamphetamine was argued in closing.

Evidence showing appellant's connection with items also contained within the black sock thus properly formed a part of the State's case to link him with the methamphetamine. K.S.'s vehicle was burglarized near the time of appellant's arrest. Vehicle entry was gained through a broken window. Some of the items taken from the vehicle were found in the black sock retrieved from the dumpster. K.S.'s thumb drive was attached to appellant's backpack. The backpack also contained burglary tools including a window punch. The car burglary evidence and thumb drive tended to connect appellant to the other items stolen from K.S.'s vehicle which the sock contained. This in turn connected appellant to the methamphetamine also contained in the sock. Apart from proof of character conformity, such evidence was relevant to link

appellant with the methamphetamine found in the dumpster, and to counter his defense attacking the officer's credibility.

The charge contained an instruction limiting the jury's consideration of appellant's participation in transactions or acts other than alleged by the indictment. The instruction concluded with an admonition that consideration of appellant's extraneous conduct was solely for "determining intent or knowledge or motive or opportunity or preparation or plan or identity or absence of mistake or accident or state of mind or rebuttal of a defense theory"

Relevance

"Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." TEX. R. EVID. 401(a),(b). "Relevant evidence is admissible unless any of the following provides otherwise: the United States or Texas Constitution; a statute; these rules; or other rules prescribed under statutory authority. Irrelevant evidence is not admissible." TEX. R. EVID. 402. A trial court's relevancy determination is reviewed for abuse of discretion. *Ramos v. State*, No. 03-12-00302-CR, 2014 Tex. App. LEXIS 6818, at *5-6 (Tex. App.—Austin June 26, 2014, no pet.) (mem. op., not designated for publication) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)).

For the reasons already discussed, we find no merit to appellant's argument the questioned evidence was not relevant. The burglary evidence was relevant to identify appellant as the possessor of the methamphetamine concealed in the sock, and to

respond to appellant's attack on the officer's credibility. Appellant did not preserve a complaint under Rule 403, so that rule's balancing test is not a part of our analysis. See *Gigliobianco v. State*, 210 S.W.3d 637 (Tex. Crim. App. 2006).

Conclusion

For the reasons stated, appellant's three issues are overruled and the judgment of the trial court is affirmed.

James T. Campbell
Justice

Do not publish.