



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-09-00137-CR

ANTHONY F. TOMASHESKI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th Judicial District Court
Bowie County, Texas
Trial Court No. 07F0235-005

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Anthony F. Tomasheski paid Andrew Stokes a visit, but this was not a cordial house call. Angered by an outstanding debt, Tomasheski greeted Stokes by punching him in the face. Stokes reached for his black baseball bat to protect himself. The unsuccessful maneuver allegedly led to Tomasheski's possession of the bat and resulting blows to Stokes' shoulder and head. Tomasheski left after Stokes produced a hundred dollar bill. Neighbor Richard Knight heard the noise from the fight and left his house, finding Stokes "pretty beat up." He was "bleeding from his scalp" "and in his face," "wasn't completely conscious," and was "grabbing on his shoulder . . . like he was hurting." Stokes required a craniotomy and fell into a coma for two days as a result of his injuries.

Tomasheski was charged with two counts of aggravated assault. Count one alleged he "intentionally, knowingly, or recklessly cause[d] serious bodily injury to Andrew Stokes by striking [him] with a baseball bat" and with his fists. Count two alleged he intentionally or knowingly caused bodily injury to Stokes in the manner described in count one, and also used or exhibited a baseball bat as a deadly weapon during the alleged assault. The jury found Tomasheski guilty of only count one of the State's indictment. It assessed a \$5,000.00 fine and five years' confinement and recommended the trial court suspend Tomasheski's sentence and place him on community supervision.

We affirm the trial court's judgment, because (1) the amended judgments resolve Tomasheski's judgment complaints and (2) the exclusion of extraneous-offense evidence was harmless.

(1) The Amended Judgments Resolve Tomasheski's Judgment Complaints

Initially, the trial court issued two judgments, both reflecting guilt for aggravated assault with a finding that Tomasheski exhibited a deadly weapon during the commission of the crime. Each judgment suspended a five-year sentence and placed Tomasheski on community supervision for a period of ten years. Because the jury found Tomasheski guilty of only count one of the State's indictment, the first point of error on appeal complained that the trial court erroneously entered a judgment of conviction on count two. Realizing this mistake, the trial court issued amended judgments of conviction. The first amended judgment finds Tomasheski guilty of aggravated assault, removes the deadly weapon finding, imposes the jury-assessed \$5,000.00 fine, and suspends the sentence with imposition of community supervision for a period of ten years. The second judgment reflects that the jury found Tomasheski "not guilty." We find that the trial court's amended judgments resolve the complaint raised in Tomasheski's first point of error. It is overruled.

Next, Tomasheski argues that the trial court erred in making him pay the jury's assessed fine of \$5,000.00 as a condition of community supervision. Because the trial court's amended condition of community supervision removes the requirement that Tomasheski pay the \$5,000.00

as restitution, we overrule this point of error as well.

(2) *The Exclusion of Extraneous-Offense Evidence Was Harmless*

Tomasheski asserted the issue of self-defense. Outside of the presence of the jury, he told the trial court he punched Stokes once because Stokes was “rushing” him, trying to hit him first. When Stokes retrieved the baseball bat and “tried to whack” his opponent, Tomasheski “grabbed him and the bat.” Tomasheski wanted to introduce testimony of extraneous offenses describing Stokes’ violent character to establish a reasonable belief that his use of force against Stokes was “immediately necessary to protect [himself] against [Stokes’] use or attempted use of unlawful force.” *See* TEX. PENAL CODE ANN. § 9.31 (Vernon Supp. 2009). He wanted to demonstrate that “his perception he was in danger was justified.” Specifically, Stokes’ ex-wife and Skip Dewberry were prepared to testify that Stokes had previously assaulted them, as well as others, with his baseball bat. The State objected that the evidence was irrelevant, and alternatively, violated Rules 403 and 404 of the Texas Rules of Evidence. The trial court excluded this evidence under Rule 403, a decision Tomasheski complains was erroneous.

In excluding evidence of the extraneous offenses, the trial court stated, “It’s evidence that’s offered essentially to show that the victim’s a bad person. It’s the old-son-of-a-gun had it coming defense.” The court pointed to the fact that only Tomasheski and Stokes were present during the assault and ruled “that this is essentially a swearing match between the defendant and the victim, the offer of extraneous evidence creates a danger of unfair prejudice.” Tomasheski argues that

the trial court's reasoning in excluding the proffered evidence denied him his "constitutional right to present a meaningful defense" and suggests that the trial court acted as the fact-finder on the question of self-defense.

One unusual twist that colors our entire analysis of this issue is that, while Tomasheski admitted to the initial punch, he denied hitting Stokes with the bat. Thus, it appears that his self-defense claim can apply only to the initial punch, not to any assault with the bat. Therefore, we examine this issue in light of the question of whether the evidence of the extraneous offenses would help establish his reasonable belief that punching Stokes was "immediately necessary to protect [him] against [Stokes'] use or attempted use of unlawful force." Because, here, the self-defense claim legitimately addressed only the initial punch, not the assault with Stokes' bat, the essential force of the proffered testimony about Stokes' prior use of his bat was a general tendency toward violence, rather than a particular danger from Stokes' bat.

A trial court's decision to admit or exclude evidence is reviewed only for an abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005); *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We do not disturb a trial court's ruling if the decision to admit evidence is within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). If the trial court's decision on the admission of evidence is supported by the record, the

trial court will not be reversed. *Osborn v. State*, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002); *Montgomery*, 810 S.W.2d at 379.

Although the trial court ruled that the extraneous offenses were admissible under Rule 404, it excluded the evidence after conducting a Rule 403 balancing test. “Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” TEX. R. EVID. 403. The following relevant criteria are used in determining whether the prejudice of Stokes’ extraneous offenses substantially outweighed its probative value:

- (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable—a factor which is related to the strength of the evidence presented by the proponent . . .;
- (2) the potential the other offense evidence has to impress the jury “in some irrational but nevertheless indelible way”;
- (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;
- (4) the force of the proponent’s need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

Mozon v. State, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999) (citing *Montgomery*, 810 S.W.2d at 388–90). We must give appropriate deference to the trial court’s determination that the probative value of the evidence in question was substantially outweighed by the danger of unfair prejudice.

Dudzik v. State, 276 S.W.3d 554, 561 (Tex. App.—Waco 2008, pet. ref'd) (citing *Moses*, 105 S.W.3d at 627).

A. *The Extraneous-Offense Evidence Was Relevant*

Would Stokes' extraneous offenses, in which he used a baseball bat to assault others, aid in establishing the reasonableness of a belief by Tomasheski that the initial punch was "immediately necessary to protect [him] against [Stokes'] use or attempted use of unlawful force?" Because Tomasheski was "aware of Mr. Stokes' history," we find the extraneous offenses make Tomasheski's self-defense claim, as to the punch, more probable.¹ This factor weighs in favor of admission.

B. *The Evidence Would Not Impress the Jury in Some Irrational Way*

One question is the potential of Stokes' extraneous-offense evidence to impress the jury "in some irrational but nevertheless indelible way." The State points to the trial court's suggestion that the evidence would "essentially show that the victim is a bad person deserving of his injuries" and argues this was proof that the jury would be impressed in some irrational, but nevertheless indelible way. We consider Rule 404 in analyzing this Rule-403 factor, due to the trial court's employed reasoning. The Texas Court of Criminal Appeals recently explained:

The defendant may offer reputation or opinion testimony or evidence of specific prior acts of violence by the victim to show the "reasonableness of defendant's

¹The general rule is that all evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable, is admissible. TEX. R. EVID. 401, 402. The trial court agreed that evidence of Stokes' character was relevant.

claim of apprehension of danger” from the victim. This is called “communicated character” because the defendant is aware of the victim’s violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not. This theory does not invoke Rule 404(a)(2) because Rule 404 bars character evidence only when offered to prove conduct in conformity, i.e., that the victim acted in conformity with his violent character. Here, the defendant is not trying to prove that the victim actually is violent; rather, he is proving his own self-defensive state of mind and the reasonableness of that state of mind.

Ex parte Miller, No. AP-76,167, 2009 WL 3446468, at *4 (Tex. Crim. App. Oct. 28, 2009) (citations omitted). Rule 404(a)(2) provides that “[i]n a criminal case . . . evidence of a pertinent character trait of the victim of the crime offered by an accused is allowed” to prove action in conformity therewith. “[I]n cases where a person’s character or character trait is an essential element of a . . . defense, proof may also be made of specific instance of that person’s conduct.” TEX. R. EVID. 405; *Mozon*, 991 S.W.2d at 846; *Dudzik*, 276 S.W.3d at 561.

The purpose of Rule 404, which allows inclusion of a victim’s extraneous offenses, is to develop a propensity for violence that can support a theory of self-defense. Excluding evidence of a type the Legislature intended to be before a jury, by concluding that a fact-finder might conclude a victim deserved his or her injuries, should be rarely done.

Instead, here we ask whether the evidence tends to tempt the jury into making a finding on grounds apart from proof relating to the offenses or defenses charged. *Morales v. State*, 293 S.W.3d 901, 912 (Tex. App.—Texarkana 2009, pet. ref’d). This factor seeks to limit a jury’s finding based on emotional response. See *Ex parte Lane*, 303 S.W.3d 702, 715 (Tex. Crim. App. 2009). The extraneous offenses were probative of Tomasheski’s belief that punching Stokes was

reasonable, a matter the jury was charged with deciding. It does not appear from the record why knowledge of Stokes' extraneous offenses would tempt the jury into a verdict, decided on irrelevant grounds, that Tomasheski acted in self-defense in punching Stokes. *See id.* Thus, we do not believe that the jury would be improperly impressed by the extraneous offenses given the facts of this case. The second factor also favors admission of the excluded evidence.

C. Length of Time to Present Extraneous Offenses Would Likely Be Short

Next, the proffered evidence would be established by Stokes' ex-wife and Dewberry, who would testify that Stokes assaulted them with a baseball bat. It would likely take little time to present these witnesses. The third factor also favors admission of the extraneous offenses.

D. Tomasheski's Need for the Evidence Was Slim

The next factor is Tomasheski's need for this evidence to prove a fact of consequence. After the hearing on the State's motion in limine, Tomasheski took the stand during guilt/innocence and testified Stokes was "coming at [him]" with his fists clenched. Tomasheski "decked him . . . right on the mouth." Stokes got up, quickly walked four or five feet to another room, and came out swinging the baseball bat at Tomasheski. Tomasheski then testified he took the bat from Stokes, pushed him to the ground, and left without taking the bat.² As stated, Tomasheski denied hitting Stokes with the bat. Although Tomasheski might have wanted the jury to hear evidence of extraneous offenses to help establish his reasonable belief that punching

²In addition to this evidence, Tomasheski introduced reputation testimony that Stokes did not have a good reputation for truthfulness. The State argues this reduced Tomasheski's need for the evidence. However, Stokes' reputation for truthfulness, as opposed to his propensity for violence, was not a fact of consequence in the case.

Stokes was necessary for his self-defense, the trial court was within its discretion to find the actual need for the evidence was minimal. This factor weighs against admission.

Rule 403 “creates a presumption of admissibility of all relevant evidence and authorizes a trial judge to exclude such evidence only when there is a ‘clear disparity between the degree of prejudice of the offered evidence and its probative value.’” *Mozon*, 991 S.W.2d 841 (citation omitted). Evidence will be considered “unfairly prejudicial” only when it has an undue tendency to suggest that a decision be made on an improper basis, commonly an emotional one. *Id.* (citing *Montgomery*, 810 S.W.2d at 389). Only one of the four factors in this case weighs against the admission of the extraneous offenses to support Tomasheski’s belief that immediate force was necessary. In balancing the Rule-403 factors, we find that the probative value of the extraneous offenses was not *substantially*³ outweighed by the danger of unfair prejudice. The evidence of Stokes’ extraneous offenses should have been allowed. But that error is not reversible unless it was also harmful to Tomasheski.

Tomasheski argues in his brief that exclusion of extraneous offenses violated his

³We note that the trial court’s finding did not expressly include the word “substantially” in its ruling excluding the evidence.

Now, considering that there’s two episodes here and considering the fact that the defendant was in the victim’s house, considering the fact that the defendant had an opportunity to leave the house before the victim brought the baseball bat back, then it seems to me under the *Mozon* case, even though the evidence of extraneous acts is admissible under 404, it is not admissible under 403 because the danger of unfair prejudice outweighs the probative value. It’s essentially as the dissent stated in the *Mozon* case.

Missing from that finding is the key term used in Rule 403—that danger of unfair prejudice *substantially* outweighs the probative value.

constitutional right to due process and that, therefore, we are to evaluate harm under a constitutional harm analysis. Points of error on appeal must correspond or comport with objections and arguments made at trial. *Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref’d) (citing *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998)). “Where a trial objection does not comport with the issue raised on appeal, the appellant has preserved nothing for review.” *Id.*; see TEX. R. APP. P. 33.1; *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999). Tomasheski “did not fairly and specifically object to the exclusion of this evidence on the constitutional due process basis he now urges on appeal.” *See id.* We will not address Tomasheski’s nonpreserved due process claim.

We examine the record as a whole when evaluating harm from nonconstitutional error flowing from the exclusion of relevant evidence, “and if we are fairly assured that the error did not influence the jury or had but a slight effect, we conclude that the error was harmless.” *Walters v. State*, 275 S.W.3d 568, 571 (Tex. App.—Texarkana 2008, no pet.) (citing *Ray v. State*, 178 S.W.3d 833, 836 (Tex. Crim. App. 2005); *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)).

Because Tomasheski denied hitting Stokes with the baseball bat, he could not have employed the theory of self-defense for that part of the alleged assault. Thus, admission of the extraneous-offense evidence would have no bearing on the question of Tomasheski’s motivation when he struck Stokes with a baseball bat as the State alleged in count one of the indictment. In this case, Stokes told the jury Tomasheski hit him with the baseball bat, Knight testified to Stokes’

“bleeding from his scalp” and shoulder injury, and the jury heard Stokes required a craniotomy and fell into a coma. Assessing the credibility of the testimony is within the province of the jury. *Stubblefield v. State*, 79 S.W.3d 171, 176 (Tex. App.—Texarkana 2002, pet. ref’d). Considering the evidence presented in this record, the trial court was free to disbelieve Tomasheski’s assertion that he only punched Stokes once and that he did not hit him with the baseball bat. The indictment also alleged Tomasheski hit Stokes with his hands, a fact he confirmed, but testified was done in self-defense. Again, the jury was free to believe Stokes’ testimony that Tomasheski was the first aggressor. Therefore, because we are fairly assured that exclusion of the extraneous offenses did not influence the jury or had but a slight effect—in its finding against Tomasheski on his claim that his initial punch was in self-defense—we conclude that there was no harm.

We affirm the judgment of the trial court.

Josh R. Morriss, III
Chief Justice

Date Submitted: June 3, 2010
Date Decided: June 23, 2010

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