TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00578-CR

Daniel Raymond Vadnais, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 22ND JUDICIAL DISTRICT
NO. CR-13-0651, HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Daniel Raymond Vadnais guilty of fraudulent use or possession of identifying information, 10 or more items but less than 50 items, and the trial court assessed a sentence of 10 years in prison. *See* Tex. Penal Code § 32.51(b)(1), (c)(3). Vadnais contends that he was denied a speedy trial, that the trial court erred by admitting evidence of an extraneous offense and by not conducting a balancing test when considering the admissibility of that evidence, and that there was insufficient evidence supporting his conviction. We will affirm the judgment.

BACKGROUND

Deputy Shaun Booth of the Hays County Sheriff's Office testified at trial that he was dispatched to a residential neighborhood to investigate a report of a verbal disturbance involving a man later identified as Daniel Vadnais. Deputy Booth stated that when he arrived at the scene, he

met with the neighbor who reported the disturbance, and the neighbor pointed out Vadnais as the person who had been standing in the street yelling. Deputy Booth stated that the neighbor then directed him down the street to where two people were standing—neighborhood resident James Griffin and Vadnais. Deputy Booth testified that he spoke with Vadnais, who denied anything had happened and refused to answer Deputy Booth's questions.

Deputy Booth recalled that shortly afterward, Deputy Ronnie Torres arrived to provide backup assistance. Deputy Booth testified that he spoke to Griffin in the doorway of Griffin's open garage, while Deputy Torres spoke to Vadnais in the driveway of Griffin's house. Deputy Booth stated that during his conversation with Griffin, he noticed a black, courier-style bag in a corner where the garage tracks were located. The bag seemed out of place to Deputy Booth, and he asked Griffin if it belonged to him. Griffin denied the bag was his and pointed to Vadnais. Deputy Booth testified that when he walked over to Vadnais and asked him if the bag was his, Vadnais initially gave no response, then later denied the bag was his. But according to Deputy Booth, after stating that the bag would be taken and inventoried as found property, Vadnais appeared to become nervous and admitted his ownership of the bag.

Both Deputy Booth and Deputy Torres testified that they asked Vadnais for consent to search his bag. Deputy Booth stated that instead of responding, Vadnais made grunting sounds, looked down, shuffled his feet, and "hemmed and hawed," but eventually, Vadnais gave the deputies consent to search his bag. Deputy Booth recalled that before the search began, Vadnais stated that there were "some knives and things" in the bag. Deputy Booth testified that he found knives inside the bag, along with wallets, a walkie-talkie (portable two-way radio), a "Magic Wand" hand-held

scanner, a garage-door opener, hotel receipts, drug paraphernalia, receipts with Vadnais's name, and several items of identifying information that did not bear Vadnais's name, including driver's licenses, copies of driver's licenses, social security cards, copies of social security cards, checks, a birth certificate, a passport, an employee identification badge, a library card, an immunization record, and a notebook with a list of names, social security numbers, dates of birth, addresses, phone numbers, and driver's license numbers for fifteen different individuals. Deputy Booth also testified that the bag contained a "to-do list" stating, among other things: "TxDOT, public data, optometrist, storage unit, Mercedes, lawyer, house, job, collect $, hotel room, file box, locals, superglue, flashlight, whiteout, car insurance, online banking . . . safe deposit box, Bluetooth headset, surveillance cameras, PayPal, Bluebird, Green Dot, NetSpend . . . mailbox." Deputy Booth further testified that a small black book inside the bag had another handwritten list stating: "separate IDs/socials, run background checks, run credit checks, EIN numbers."

Based on this evidence, Vadnais was arrested for misdemeanor theft on November 25, 2012. A warrant against Vadnais for the separate felony offense of fraudulent use or possession of identifying information was not served. Vadnais subsequently obtained a personal-recognizance bond from a Hays County magistrate on the misdemeanor theft charge.

However, Vadnais served more time in pretrial custody because of other offenses. On November 30, 2012 Vadnais was released to the custody of Williamson County, which had pending warrants against him unrelated to the felony offense in this appeal. Four days later, Vadnais posted bond and was released from Williamson County custody. His bonds were revoked on December 28, 2012, and he remained in Williamson County custody from that date until

October 10, 2013, when he pled guilty to felony burglary of a building and was sentenced to 14 months in state jail with credit for time served.

Vadnais was indicted on the felony offense in this case (fraudulent use or possession of identifying information) on August 7, 2013. A capias for his arrest was executed when he was released from state jail on February 4, 2014. On that day, he was released to the custody of Hays County, and he remained in the Hays County Jail to await trial. Vadnais obtained court-appointed counsel on March 26, 2014. On April 22, 2014, Vadnais rejected the State's plea offer, requested a jury trial, and the case was reset by agreement. On May 22, 2014, the case was again reset by agreement. On June 26, 2014 Vadnais filed a motion to dismiss for speedy-trial violation and announced ready for trial. The trial court heard and denied the motion at a pretrial hearing on August 11, 2014.

Jury selection and the trial on guilt/innocence occurred on August 11-13, 2014, concluding with Vadnais's conviction. The punishment phase occurred on August 13, 2014, resulting in Vadnais's 10-year sentence.

DISCUSSION

No showing of speedy-trial violation

Vadnais contends that he was denied a speedy trial. The constitutional right to speedy trial protects defendants from oppressive pretrial incarceration, mitigates the anxiety and concern from public accusations, and ensures that the defendant can mount a defense. *See* U.S. Const. amend. VI; *Henson v. State*, 407 S.W.3d 764, 766 (Tex. Crim. App. 2013). There is no fixed period in which a trial must be held, however, and the right is unusual in that its "deprivation" can

sometimes work to a defendant's advantage if, for example, prosecution witnesses become unavailable or forget important facts. *Henson*, 407 S.W.3d at 766-67. The right to a speedy trial attaches when a person "becomes an accused," i.e., when he is arrested or when he is charged. *Id.* at 767. We analyze speedy-trial claims on an ad-hoc basis by applying the fact-specific balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), based on four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and any prejudice inflicted by the delay. *Henson*, 407 S.W.3d at 767. If the delay is unreasonable enough to be presumptively prejudicial, the first factor is satisfied and consideration of the remaining three factors is triggered. *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008). The State bears the burden of justifying the length of the delay while appellant must meet his burden of proving his assertion of the right and showing prejudice. *Id*. at 280. We review fact-intensive elements of this test for an abuse of discretion, and review legal determinations de novo. *Id*. at 281-82 (noting that four-month delay is insufficient to establish speedy-trial violation but seventeen-month delay is sufficient to raise issue). Generally, delays "approaching one year" will trigger a speedy-trial inquiry. *Balderas v. State*, No. AP-77,036, — S.W.3d —, 2016 Tex. Crim. App. LEXIS 1329, at *15 (Tex. Crim. App. Nov. 2, 2016); *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003).

1. Length of delay

Here, Vadnais contends that the delay should be measured from November 25, 2012, the date of his arrest on the misdemeanor theft charge. However, Vadnais's speedy-trial motion sought to dismiss his indictment for the felony offense of fraudulent use or possession of identifying information (not the misdemeanor theft). Vadnais was not charged with that felony offense until his

indictment on August 7, 2013—the applicable trigger date for his speedy-trial claim. *See Ex parte Cathcart*, 13 S.W.3d 414, 416-17 (Tex. Crim. App. 2000) (concluding that appellant's DWI and intoxication assault offenses arose from same facts but appellant was arrested only for DWI, and never arrested for, charged with, or held to bail on intoxication assault until subsequent indictment). One year passed between when Vadnais was indicted for the felony offense in this appeal and when he went to trial. However, he has acknowledged that the time attributable to his agreed court resets (on April 22, 2014, May 22, 2014, and June 26, 2014) would not figure into calculation of the delay. *See Celestine v. State*, 356 S.W.3d 502, 507 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("[T]ime covered by agreed resets is to be excluded from speedy trial consideration."); *Lopez v. State*, 478 S.W.3d 936, 942-43 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)*, cert. denied* (2016) (citing *Celestine*).

Excluding the three months attributable to Vadnais's agreed resets of the trial date results in a nine-month delay between his indictment and trial. Although the delay between the date of Vadnais's indictment for the felony offense of fraudulent use or possession of identifying information and the date of his trial is not dispositive of whether Vadnais was deprived of a constitutional right, it is a delay that "approach[es] one year" and requires that we assess the remaining *Barker* factors. *See Balderas*, 2016 Tex. Crim. App. LEXIS 1329, at *15.

2. Reason for delay

As to the reason for the delay, Vadnais does not allege, and the record does not show, any deliberate effort by the State to delay his trial. *See Black v. State*, 505 S.W.2d 821, 824 (Tex. Crim. App. 1974). Vadnais was bench warranted to Hays County on the same day that he finished

serving his sentence for the unrelated burglary offense. Prosecution of a defendant on other charges is a valid reason for the delay in bringing him to trial. *Thompson v. State*, 983 S.W.2d 780, 783 (Tex. App.—El Paso 1998, pet. ref'd) (citing *Easley v. State*, 564 S.W.2d 742, 745 (Tex. Crim. App. 1978)); *see Black*, 505 S.W.2d at 824. Incarceration on an unrelated offense has also been held a valid reason for delay that does not weigh against the State. *Wisser v. State*, 350 S.W.3d 161, 165 (Tex. App.—San Antonio 2011, no pet.) (noting in discussion of appellant's speedy-trial claim that he was free on bond or incarcerated in another county for most of that time); *Garcia v. State*, No. 03-97-00346-CR, 1998 Tex. App. LEXIS 7182, at *5 (Tex. App.—Austin Nov. 19, 1998, no pet.) (not designated for publication) (noting that delay was not attributable to cause on appeal because during most of time between appellant's arrest and trial he was in prison on unrelated offense in another county). For six months of the nine months between his indictment and trial, Vadnais was being prosecuted or incarcerated in another county for the unrelated felony offense of burglary of a building. This factor does not weigh against the State. *See Wisser*, 350 S.W.3d at 165; *Thompson*, 983 S.W.2d at 783.

3. Assertion of the right

Vadnais was not quick to assert his right to speedy trial. He did not file his "Motion to Dismiss for Violation of Sixth Amendment Right to Speedy Trial" until three months after counsel was appointed, and after agreeing to reset the trial date twice. Vadnais did not seek a hearing on his motion until four days before trial.

Further, Vadnais's motion sought no trial setting, only dismissal of his indictment (based on his calculation of a nineteen-month delay running from the date of his arrest on the

misdemeanor theft charge). The Texas Court of Criminal Appeals has concluded that a defendant's motivation in asking for dismissal rather than a prompt trial may attenuate the strength of his speedy-trial claim. *Cantu*, 253 S.W.3d at 284 n.49; *see also id.* at 281 ("The constitutional right is that of a speedy trial, not dismissal of the charges."). Because Vadnais's motion did not request a speedy trial but sought only a dismissal, it is incumbent upon him to show that he tried to get his case into court to proceed to trial in a timely manner. *See id.* at 284. Vadnais notes that in April 2014 he asked for a trial. However, simply requesting the trial be held or announcing "ready" is not a demand for a speedy trial because this merely shows a defendant could go to trial if the State pushed for it. *Henson*, 407 S.W.3d at 769; *Smith v. State*, 436 S.W.3d 353, 368 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). A speedy trial demand must be unambiguous. *Henson*, 407 S.W.3d at 769. This factor weighs against Vadnais.

4. Prejudice from delay

Vadnais contends that the State had the burden to rebut a presumption of prejudice from the trial delay. He relies on cases addressing "excessive" trial delays of three years or more, which conclude that "[i]n certain instances, the length of delay may be so excessive that it 'presumptively compromises the reliability of a trial in ways that neither party can prove or identify'" and "[i]n such instances, the defendant is absolved from the requirement to demonstrate prejudice." *Gonzales v. State*, 435 S.W.3d 801, 812 (Tex. Crim. App. 2014) (quoting *Shaw*, 117 S.W.3d at 890, which addressed delay of over three years); *State v. Wei*, 447 S.W.3d 549, 556 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (addressing delay of over four years); *see Doggett v. United States*, 505 U.S. 647, 652 (1992) ("extraordinary" 8 1/2-year delay); *cf. State v. Tatom*,

No. 05-14-01246-CR, 2015 Tex. App. LEXIS 8656, at *11 (Tex. App.—Dallas Aug. 18, 2015, no pet.) (mem. op., not designated for publication) (concluding that delay of just over one year could not be characterized as excessive or extraordinary). However, no comparably "excessive" or "extraordinary" delay is shown on this record. *See Tatom*, 2015 Tex. App. LEXIS 8656, at *11. Thus, there is no basis for a presumption of prejudice.

Further, because Vadnais contends that the State had the burden to rebut a presumption of prejudice, he made no showing of prejudice from the nine-month delay at issue here. Prejudice to a defendant is assessed in light of the following interests: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *State v. Munoz*, 991 S.W.2d 818, 826 (Tex. Crim. App. 1999). Vadnais cannot demonstrate prejudice based on "oppressive pretrial incarceration" because during most of the nine-month delay he was incarcerated for his conviction on an unrelated felony offense. *See Robinson v. State*, No. 03-14-00407-CR, 2015 Tex. App. LEXIS 7492, at *12-13 (Tex. App.—Austin July 22, 2015, pet. ref'd) (mem. op., not designated for publication) (noting that appellant's claim of "oppressive pretrial incarceration" was undermined because he was free on bond or incarcerated in another county during most of time between his arrest and indictment); *Garcia*, 1998 Tex. App. LEXIS 7182, at *5. There was no evidence from Vadnais about any anxiety or concern he sustained concerning this felony charge. Finally, Vadnais made no demonstration that the trial delay impaired his presentation of his defense.

Weighing all the *Barker* factors together, we conclude that Vadnais failed to show that his right to a speedy trial was violated in any way that harmed him or his defense. We overrule Vadnais's complaint that he was denied a speedy trial.

No abuse of discretion shown in admission of extraneous-offense evidence

Vadnais also contends that the trial court erred by admitting evidence of an extraneous offense over his Rule 404(b) objection and by not conducting a balancing test when considering the admissibility of that evidence. Texas Rule of Evidence 404(b) is a rule of inclusion, not exclusion, that disallows only evidence offered solely for proving bad character and conduct in conformity with bad character. *Dabney v. State*, 492 S.W.3d 309, 317 (Tex. Crim. App. 2016); *see* Tex. R. Evid. 404(b). Extraneous-offense evidence may be admissible to prove motive, opportunity, preparation, plan, knowledge, identity, absence of mistake or accident, or intent. Tex. R. Evid. 404(b)(2); *Richardson v. State*, 328 S.W.3d 61, 71 (Tex. App.—Fort Worth 2010, pet. ref'd). We review a trial court's ruling on the admissibility of extraneous-offense evidence under an abuse of discretion standard and uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Dabney*, 492 S.W.3d at 318.

The extraneous offense evidence concerned Vadnais's forgery conviction, which the court admitted with a limiting instruction that the jury could consider such evidence only as to Vadnais's intent to commit the charged offense. *See* Tex. R. Evid. 404(b), 105(a). Vadnais's defensive theory—that the bag containing the identifying information was not his and that he had no possession of the bag or its contents—placed his intent at issue, and the extraneous-offense evidence was admissible to show his intent. *See id.* R. 404(b)(2); *Richardson*, 328 S.W.3d at 72

(extraneous-offense evidence of "dumpster diving"—searching through trash cans for identifying information—was admissible at defendant's trial for fraudulent use or possession of identifying information to prove his intent to commit that offense and to rebut his contention that he had no knowledge of identifying information contained in his car); *see also Sarabia v. State*, 227 S.W.3d 320, 325 (Tex. App.—Fort Worth 2007, pet. ref'd) (noting that when defendant contends some event did not occur, that denial puts every element of offense at issue). We conclude that the trial court's admission of the extraneous-offense evidence was within the zone of reasonable disagreement, *see Dabney*, 492 S.W.3d at 318, and we overrule Vadnais's complaint about the admission of that evidence.

Vadnais also contends that the trial court erred by not conducting a Rule 403 balancing test. Texas Rule of Evidence 403 provides that even relevant 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. Here, we note that Vadnais did not ask the trial court to conduct a Rule 403 balancing test on the record, and Vadnais "cannot exclude the possibility that the trial court conducted the balancing test in his mind." *See Wilson v. State*, 7 S.W.3d 136, 144 (Tex. Crim. App. 1999); *see also Cruz v. State*, 122 S.W.3d 309, 313 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (concluding that trial court "need not conduct a formal hearing or even announce on the record that it has mentally conducted this balancing test"). In light of the trial court's admission of the offense, we presume that the trial court conducted a Rule 403 balancing test, and a silent record does not imply otherwise. *Williams v. State*, 958 S.W.2d 186, 195-96 (Tex. Crim. App. 1997). Further, the trial court's ruling sustaining Vadnais's objections to the admission of

evidence of his prior convictions for burglary of a habitation, unauthorized use of a motor vehicle, and credit card abuse support an inference that the trial court did conduct a balancing test under Rule 403. We overrule Vadnais's complaint that the trial court did not conduct a Rule 403 balancing test.

Sufficient evidence supported Vadnais's conviction

Vadnais's final complaint is that the evidence at trial was insufficient to support his conviction. Under the legal-sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We may not substitute our judgment for that of the jury by reevaluating the weight or credibility of the evidence, but must defer to the jury's resolution of conflicts in the evidence, weighing of the testimony, and drawing of reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We apply the same standard to direct and circumstantial evidence. *Id*. Circumstantial evidence is as probative as direct evidence in establishing the guilt of a defendant, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id*.

Conviction for fraudulent use or possession of identifying information, 10 or more items but less than 50 items, requires proof that: (1) appellant possessed an item of identifying information belonging to another person, and the total number of items was 10 or more but less than

50; (2) appellant possessed each item without the other person's consent; and (3) appellant possessed each item with the intent to harm or defraud the other person. *See* Tex. Penal Code § 32.51(b)(1), (c)(3); *Grimm v. State*, 496 S.W.3d 817, 822 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Vadnais's challenge to the sufficiency of the evidence addresses only the first element, i.e., the number of items of identifying information presented by the State. In his view, only four (not ten or more) items of identifying information were entered as evidence by the State.

"Identifying information" is defined in section 32.51 of the Texas Penal Code as:

> [I]nformation that alone or in conjunction with other information identifies a person, including a person's:
>
> (A) name and date of birth;
>
> (B) unique biometric data, including the person's fingerprint, voice print, or retina or iris image;
>
> (C) unique electronic identification number, address, routing code, or financial institution account number;
>
> (D) telecommunication identifying information or access device; and
>
> (E) social security number or other government-issued identification number.

Tex. Penal Code § 32.51(a)(1).

The Texas Court of Criminal Appeals has held that an "item of identifying information" refers not to the individual record where the information appears—such as a license, credit card or document—but rather to any single piece of personal, identifying information that alone or in conjunction with other information identifies a person. *Cortez v. State*, 469 S.W.3d 593, 602 (Tex. Crim. App. 2015); *Grimm*, 496 S.W.3d at 822. Thus, an individual record such as a

personal check could contain two items of identifying information if it contained (1) a person's name and driver's license number, and (2) a bank account number and bank routing number. *Cortez*, 469 S.W.3d at 603 (noting that under section 32.51(a)(1), a person's name and driver's license number together would count as single "item" of identifying information and similarly, a bank-account number and bank-routing number would count as single "item" because only by combining those two numbers do they become information identifying a person).

Here, Deputy Booth testified about a finding a notepad—admitted as part of State's Exhibit 3, which consisted of items found inside the black bag admitted as State's Exhibit 1—listing the names, dates of birth, social security numbers, addresses, and some phone numbers for eight individuals. He testified that the bag also contained a list of the names and social security numbers for nine other individuals, including Clay H. Snodgrass, Sunny H. Rathore, and Janet J. Brown. Deputy Booth further found in the bag another individual's birth certificate. Additionally, Deputy Booth found in the bag a brown wallet, admitted as State's Exhibit 5, containing a driver's license, employee ID, library card, and a couple of checks for Christopher White.

Four witnesses testified at trial about their personal, identifying information that Deputy Booth had previously testified to finding in the black bag. Christopher White testified that he had lost his wallet, and that a driver's license recovered from the bag was the one he had lost. White also stated that the checks recovered from the bag were from a financial institution that he did not bank with, but the checks did have his name, address, and former landline phone number on them. Clay Snodgrass, one of the individuals identified on a list found in the bag, testified that the address, date of birth, Texas driver's license number, and social security numbers were his but the handwriting was not. He denied giving anyone consent to use or possess that information, and he

had no idea how it had been obtained. Two others identified on a list found in the bag, Janet Brown and Sunny Rathore, testified that the addresses, dates of birth, phone numbers, and social security numbers were theirs but that the handwriting was not. Both Brown and Rathore denied giving anyone consent to have that information.

Based on the evidence from these four witnesses alone, the State presented the jury with fourteen items of identifying information, all of which had been discovered in the black bag that Vadnais told police was his. *See* Tex. Penal Code § 32.51(a)(1). There were four items of identifying information belonging to Christopher White: (1) his name and date of birth; (2) his name and address; (3) his government-issued driver's license number; and (4) his social security number. *See id.*; *Cortez*, 469 S.W.3d at 607 (concurring opinion; counting items of identifying information). There were an additional four items of identifying information belonging to Clay Snodgrass: (1) his name and date of birth; (2) his name and address; (3) his government-issued driver's license number; and (4) his social security number. *See* Tex. Penal Code § 32.51(a)(1); *Cortez*, 469 S.W.3d at 607. Further, there was evidence of another six pieces of identifying information belonging to Janet Brown and Sunny Rathore, consisting of the: (1) name and date of birth; (2) name and address; and (3) social security number for each of them. *See* Tex. Penal Code § 32.51(a)(1); *Cortez*, 469 S.W.3d at 607. The evidence at trial, viewed in the light most favorable to the verdict, was sufficient to allow a rational jury to find beyond a reasonable doubt that Vadnais possessed more than ten items of identifying information. *See Brooks*, 323 S.W.3d at 899. Accordingly, we overrule Vadnais's complaint about the sufficiency of the evidence supporting his conviction for fraudulent use or possession of identifying information, 10 or more items but less than 50 items.

CONCLUSION

We affirm the judgment of conviction.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed

Filed: January 31, 2017

Do Not Publish