TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00659-CR

Mark Alan Norwood, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 390TH JUDICIAL DISTRICT
NO. D-1-DC-12-900254, HONORABLE JULIE H. KOCUREK, JUDGE PRESIDING

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

Mark Alan Norwood was charged with murdering Debra Baker while he was "in the course of committing or attempting to commit the offense of burglary." *See* Tex. Penal Code § 19.03(a)(2), (b) (setting out elements of offense and providing that offense "is a capital felony"). At the end of the guilt-or-innocence phase of the trial, the jury found Norwood guilty of the charged offense. Norwood's punishment was automatically assessed at life imprisonment. *See id.* § 12.31 (setting out mandatory punishments for individuals convicted of capital felonies). In two issues on appeal, Norwood contends that the district court erred by admitting extraneous-offense evidence regarding three burglaries and one murder purportedly committed by him. We will affirm the district court's judgment of conviction.

BACKGROUND

As set out above, Norwood was charged with the capital murder of Baker. The offense was alleged to have occurred in January 1988, but Norwood was not charged with the offense until more than two decades later. During the nine-day trial, many witnesses were called to the stand, and the following summary comes from the testimony presented at trial.

At the time of the offense, Baker was in her thirties and was married to Phillip Baker, but the two were separated.[1] Although they were separated, Philip and Baker continued to have an amicable friendship and shared custody of their children. On the day of the offense, Phillip arrived at Baker's house to take their children to his house for the night. Prior to Phillip's arrival, the children had been watching videos on a VCR. After Phillip left, Baker went with her mother, Gertrude Masters, and her sister, Lisa Conn, to a party. Once they left the party, the women returned to Baker's home and continued to socialize for a while, and then Masters and Conn went home. Conn was the last person to leave, and she left Baker's home at around midnight. Earlier that evening, one of Baker's neighbors, Mary Huffstutler, noticed that her dogs started "barking really viciously." In addition, Huffstutler saw a "light-skinned" guy who was six feet tall walking as if he were "coming from" the direction of Baker's house. Around midnight, Huffstutler heard the dogs make the unusual barking again.

On the following day, Masters received a call from Baker's employer indicating that Baker had not arrived at work. Becoming concerned, Masters drove over to Baker's home to check on her. When Masters arrived at the home, she found Baker naked in her bed lying "on her stomach

[1] Several of the individuals in this case share identical last names. For ease of reading, we will refer to some of those people by their first names.

or on her face," and there was a pillow over Baker's head. After Masters moved the pillow to check on Baker, she noticed that there was blood on Baker's head. Following that discovery, Masters called the police and family members to report what she saw.

In response to Masters's call, several police officers responded to the scene and investigated the offense. Although no specific point of entry was identified, there was a glass sliding door on the back of Baker's house, and she did not always lock that door. In addition, according to testimony presented at trial, it was possible to open locked glass sliding doors installed around the time of the offense by pulling the door off of the track from the outside. When investigating the scene of the offense, the lead investigator on the case determined that Baker had been posed face down with a pillow "placed underneath her abdomen that . . . raise[d] her buttocks into the air." Photos taken of the scene show that Baker was Caucasian and had brown hair.

During their investigation, the police recovered hairs from Baker's bed and from a towel in her bathroom and discovered that the VCR had been taken during the offense. An examination of the recovered hairs by a forensic scientist at the time revealed that the hairs recovered from the bed and towel differed from Baker's hair and appeared to be "Caucasian pubic hair[s]." The medical examiner concluded that Baker died from blunt force trauma to her head, that she sustained "a total of six blows" to the head, and that she had defensive injuries on her hand and wrist. Testing performed on Baker's body indicated that she had not been sexually assaulted.

The hairs recovered from the scene were subjected to various types of testing as technology improved over the years. The most recent tests were performed more than twenty years after the offense, and the testing performed on one of the hairs produced a DNA profile that was

consistent with the profile obtained from a DNA sample that Norwood provided during the investigation of a separate offense. Norwood is Caucasian, and according to the forensic scientist who performed the testing, "the probability of selecting an unrelated person at random who could be the source of this DNA profile is approximately one in 377.2 billion for Caucasians."

During the trial, conflicting testimony was given regarding where Norwood was living at the time of the offense because Norwood was either in the process of moving or had recently moved when the offense occurred. The prior home was approximately two-tenths of a mile from Baker's home. The new home was in the same part of the city but was approximately 1.7 miles from Norwood's prior home. In addition, witnesses testified that Norwood remodeled homes around the time of the offense, that he installed carpet in houses, that he held garage sales at his home, that the owner of Baker's home had carpet installed in the home before Baker moved in, and that Baker worked at a laundromat. During his defense, Norwood called to the stand a forensic scientist who testified that it was easy for hairs to transfer locations, that it was possible for Norwood's hair to have been transferred to property that he sold at a garage sale, that it was possible for hairs to transfer to other clothing in a washing machine, and that Norwood's hairs could have remained in the house if he had worked in the home.

In addition to presenting evidence regarding the charged offense, the State also presented evidence regarding three prior burglaries that Norwood committed,[2] regarding the murder of Christine Morton, and regarding how the investigation of the murder of Christine

[2] Initially, the State sought to admit evidence that someone had stolen items out of a vehicle belonging to the victims of one of the burglaries approximately one month after the burglary occurred, but the district court determined that the offense involving the vehicle was not relevant.

ultimately linked Norwood to the murder of Baker. *See Norwood v. State*, No. 03-13-00230-CR, 2014 WL 4058820, at *1, *7 (Tex. App.—Austin Aug. 15, 2014, pet. ref'd) (mem. op., not designated for publication) (affirming Norwood's conviction for "the 1986 murder of Christine Morton, then the wife of Michael Morton"). The three burglaries occurred approximately six months before Baker was murdered, and all three burglaries occurred at homes that were within a half mile of Norwood's home. Norwood was charged with the offenses and ultimately agreed to plead guilty to the lesser charge of theft in each case.

During the first burglary, Norwood broke into the house through the back door and stole several items, including a radio, an iron, a VCR, some clothes, and some personal hygiene products. That offense occurred during the daytime while the victims were at work. In the second burglary, Norwood entered the home through the back window and took nearly all of the items from the house, including the furniture. That offense occurred after the victims had gone out of town. In the final burglary, Norwood entered the home through the back door, which he managed to unlock from the outside, and took several items, including a computer, a printer, a power control center, a telephone, mattresses, and some towels. That offense also occurred when the victims had gone out of town. When the police searched Norwood's home while investigating these crimes, the police found property in Norwood's home belonging to the victims and found "numerous . . . electronic devices," including several VCRs. In addition, testimony was presented establishing that Norwood had been released from jail on bond for those offenses at the time that Baker was killed.

As set out above, the State also presented evidence regarding the murder of Christine. That offense occurred in August 1986 when Christine was 30 years old. On the day of the offense,

a neighbor of Christine's went into Christine's home to check on her after seeing her young child outside alone. The neighbor found Christine dead in her bed and called the police. When the police arrived, they found Christine in her bed covered up by a comforter with a pillow on her head, and a wicker basket and a suitcase had been placed on top of the comforter where Christine's head was located. In addition, there was blood present on the wall behind the bed and on the ceiling. After removing the items covering the body, the police found Christine in a nightgown, which had been lifted up to expose her genitals. An autopsy performed on Christine revealed that she died from a "massive blunt injury" to the head, that she sustained eight blows to the head, that she had defensive injuries, and that there was no evidence that Christine had been involved in any recent sexual activity. During the trial, photos of the crime scene, including some of Christine's body, and some autopsy photos of Christine were admitted into evidence. The photos show that Christine was Caucasian and had brown hair.

In addition, testimony presented at trial demonstrated that there was a glass sliding door from the deck to the master bedroom where Christine was found. Further, although the Mortons' closet was usually kept neat and tidy, the contents of drawers in the closet had been emptied out and scattered. Moreover, a gun belonging to the Mortons had been taken from the master bedroom closet. That gun was later found in the possession of a man who informed the police that Norwood sold the gun to him.

Shortly after the police finished their physical investigation of the house, Christine's brother and sister-in-law searched behind the house, found a bandana that appeared to have blood on it, informed the police, and handed the bandana to an officer who drove out to the Mortons'

home. DNA testing performed on the bandana years later revealed that the blood present on the bandana was consistent with Christine's DNA profile. In addition, testing revealed the presence of a second DNA profile, and Christine's husband, Michael Morton, was excluded as the secondary source of DNA. Moreover, the secondary DNA profile matched the DNA profile obtained from a voluntary sample taken from Norwood to such a degree that the probability of selecting a person other than Norwood as the source of the DNA recovered from the bandana was "1 in 179.9 trillion" for Caucasians and that, in the absence of an identical twin, Norwood was the contributor of the DNA. Furthermore, testing on the DNA recovered from the bandana showed that the DNA profile matched the profile obtained from the hair recovered during the investigation of the Baker murder.[3]

After hearing all of the evidence presented at trial, the jury found Norwood guilty of the murder of Baker, and the district court rendered its judgment of conviction in accordance with the jury's verdict.

GOVERNING LAW

In this case, Norwood contends that the district court erred by admitting evidence of the extraneous offenses, including photos pertaining to those offenses, during the trial.

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[3] Near the end of the trial and after the evidence of the extraneous offenses had been presented, the State called Samuel Hill to the stand. Hill testified that he met Norwood in jail after Norwood was arrested for the instant offense and before the trial started, and Hill also explained that Norwood stated that the bandana belonged to him, "that he would never forget the look on" the victims' faces, that he knew that Baker's husband was not going to be in the home at the time of the offense, and that the police found his hair in Baker's bathroom. During his cross-examination of the inmate, Norwood questioned Hill about whether he received any benefit for testifying in the case and about whether he was released from jail on the same day that he informed the police about what Norwood allegedly told him.

Appellate courts review a trial court's ruling regarding the admission or exclusion of evidence for an abuse of discretion. *See Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside "the zone of reasonable disagreement," *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is "arbitrary or unreasonable," *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Moreover, the ruling will be upheld provided that the trial court's decision "is reasonably supported by the record and is correct under any theory of law applicable to the case." *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005). In addition, an appellate court reviews the trial court's ruling in light of the record before the court "at the time the ruling was made." *Khoshayand v. State*, 179 S.W.3d 779, 784 (Tex. App.—Dallas 2005, no pet.).

Under the Rules of Evidence, "[r]elevant evidence is admissible unless" provided otherwise by "the United States or Texas Constitution," "a statute," the Rules of Evidence, or "other rules prescribed under statutory authority," and "[i]rrelevant evidence is not admissible." Tex. R. Evid. 402. Moreover, "[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and if "the fact is of consequence in determining the action." *Id.* R. 401. However, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." *Id.* R. 403. Furthermore, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but this type of "evidence may be admissible for another purpose, such as proving

motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* R. 404(b). In addition, courts have explained that "extraneous-offense evidence, under Rule 404(b), is admissible to rebut a defensive theory raised in an opening statement or raised by the State's witnesses during cross-examination." *Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.—Houston [14th Dist.] 2008, no pet.). "When identity is a material issue, there is a great need to establish the degree of similarity in the extraneous matters to prove *modus operandi*," which means that "the pattern and characteristics of the charged crime and the extraneous offenses are so distinctively similar that they constitute a 'signature.'" *Chaparro v. State*, 505 S.W.3d 111, 116 (Tex. App.—Amarillo 2016, no pet.) (quoting *Segundo v. State*, 270 S.W.3d 79, 88 (Tex. Crim. App. 2008)). Common characteristics that may make a charged offense similar to an extraneous offense include the "proximity in time and place, mode of commission of the crimes, the person's dress, or any other elements which mark both crimes as having been committed by the same person." *Segundo*, 270 S.W.3d at 88.

Regarding the admissibility of evidence under Rule 403, courts performing a Rule 403 analysis should balance the following factors:

> (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006) (footnote omitted); *see Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) (explaining that "probative value" refers to how

strongly evidence makes existence of fact more or less probable and to how much proponent needs evidence and that "unfair prejudice" considers how likely it is that evidence might result in decision made on improper basis, including emotional one). When determining the probative value of past criminal behavior, courts should consider "the closeness in time between the extraneous offense and the charged offense" as well as "the similarities between the extraneous offense and the charged offense." *Kiser v. State*, 893 S.W.2d 277, 281 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *see Morrow v. State*, 735 S.W.2d 907, 909-12 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

When setting out how to review a ruling regarding the admission of photographs, the court of criminal appeals has instructed that courts should also consider, among other things, "the number of photographs, the size of the photograph, whether it is in color or black and white, the detail shown in the photograph, whether the photograph is gruesome, whether the body is naked or clothed, and whether the body has been altered since the crime in some way that might enhance the gruesomeness of the photograph to the appellant's detriment." *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). Moreover, reviewing courts should bear in mind that trial courts are given "an especially high level of deference" regarding a determination that evidence should be admitted under Rule 403. *See United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007). "Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Shuffield*, 189 S.W.3d at 787. "Generally, photographs are admissible if verbal testimony about the matters depicted in the photographs would be admissible and their probative value is not substantially outweighed by any of the Rule 403 counter-factors." *Threadgill v. State*, 146 S.W.3d 654, 671 (Tex. Crim. App. 2004).

DISCUSSION

Extraneous Burglary Offenses

In his first issue on appeal, Norwood contends that the district court erred by allowing the State to admit evidence regarding the three extraneous burglary offenses under Rules of Evidence 403 and 404. When challenging the district court's ruling, Norwood contends that the evidence was impermissibly offered to prove character conformity, that the probative value of the evidence and the State's need for the evidence were minimal because the State had DNA evidence linking him to Baker's home and because the offenses differed significantly from the charged offense both in terms of the additional violent act that he was alleged to have performed at Baker's house and in terms of the items stolen during the offenses, that the evidence could not establish the opportunity for Norwood to commit the charged offense because he had moved out of the neighborhood by the time that Baker was killed, that the evidence carried a high risk of influencing the jury in an irrational way, and that the amount of time devoted to developing the extraneous offenses was excessive.

As an initial matter, we note that it is not entirely clear that Norwood has presented an appellate issue regarding Rule 404. Although Norwood objected during trial to the admission of the evidence under Rule 404 and Rule 403 and although Norwood mentions Rule 404 in his appellate brief, the argument section of Norwood's brief does not independently analyze the admission under Rule 404 and instead, as conceded by Norwood, "focus[es] primarily on Rule 403." *See* Tex. R. App. P. 38.1(i) (requiring brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *see also Allen v. State*, No. 12-01-00079-CR, 2003 WL 1090366, at *3 (Tex. App.—Tyler Mar. 12, 2003, no pet.) (mem.

op., not designated for publication) (explaining that "[f]ailure to cite authority in support of an issue waives the complaint"). Consistent with that concession, the primary focus of Norwood's first issue on appeal is that "[t]he trial court erred in admitting three extraneous burglaries because the probative value was outweighed by the danger of unfair prejudice" under Rule 403.

For the sake of argument, we will assume that Norwood is contending on appeal that the admission of the evidence of the extraneous burglary offenses was improper under Rule 404(b) as well as under Rule 403. Prior to the admission of the extraneous-offense evidence, the State contended that the evidence was relevant to the case because it helped to establish, among other things, a motive for Norwood to kill Baker. When making its ruling, the district court explained that the evidence was relevant to establishing that Norwood had a motive to kill Baker because he had already been arrested and released on bond for the three burglaries and would not have wanted to have a witness to an additional burglary.[4]

"[E]vidence of motive is one kind of evidence aiding in establishing proof of an alleged offense," and "the prosecution may always offer evidence to show motive for the commission of an offense because it is relevant as a circumstance to prove the commission of the offense." *Porter v. State*, 623 S.W.2d 374, 385-86 (Tex. Crim. App. 1981). Moreover, "[a] trial court does not abuse its discretion by admitting extraneous offense evidence for the limited purpose of proving motive or in order to contextualize what would otherwise appear to be a senseless

[4] Although we need not reach the alternative rulings here, we note that the district court also concluded that the evidence was relevant to proving Norwood's identity as the killer and to rebutting the "defensive theories of contamination and other explanations as to why . . . the defendant's DNA [was] present" at Baker's home.

murder." *Henderson v. State*, No. 02-15-00397-CR, 2017 WL 4172591, at *7 (Tex. App.—Fort Worth Sept. 21, 2017, no pet. h.) (mem. op., not designated for publication).

During the trial, no evidence was presented establishing that Baker knew Norwood, that she had any type of relationship with him, or that some event had transpired between the two individuals that might have motivated Norwood to murder Baker. In light of the preceding, the district court could have reasonably determined that evidence that Norwood had been arrested and released on bond for burglaries occurring in the same neighborhood in which Baker lived was relevant to establishing Norwood's motive for killing a stranger. Specifically, the district court could have inferred that Norwood was motivated by a desire to stop Baker from reporting the burglary of her home after he discovered Baker in the house in order to prevent further legal entanglements in the burglary cases and in order to prevent his bond from being revoked. *See Crane v. State*, 786 S.W.2d 338, 342, 349, 350 (Tex. Crim. App. 1990) (concluding that trial court did not err in admitting evidence for purpose of showing motive to avoid apprehension where evidence established that defendant shot and killed police officer responding to call regarding "a domestic dispute between the [defendant] and his wife," that defendant had previously been placed on community supervision for unlawful possession of controlled substance and assault, and that defendant "had been warned that any future violations of the conditions of his probation would result in its revocation and his serving of time in the penitentiary"); *Porter*, 623 S.W.2d at 386 (determining that trial court did not err by admitting evidence of commission of armed robbery days before shooting at issue because "the evidence of the extraneous offense creates an inference that the appellant's motive in shooting the deceased was to avoid apprehension"); *Henderson*, 2017 WL

4172591, at *8 (deciding that trial court did not abuse its discretion by admitting evidence of defendant's sexual abuse of his daughter in capital-murder case where evidence established that motive for killing victim was to stage defendant's "own death[]" using victim's body "and flee the country" in order "to avoid incarceration for the sexual assault charge" and where evidence helped explain "what otherwise would have been an inexplicable, seemingly senseless murder by a stranger"); *Booker v. State*, 929 S.W.2d 57, 63 (Tex. App.—Beaumont 1996, pet. ref'd) (explaining that trial court did not err in admitting evidence of extraneous offense of aggravated robbery occurring few hours before charged offense of attempted murder of police officer because evidence helped establish motive for trying to kill police officer in order to avoid being "arrested or apprehended" for prior offense). Accordingly, we cannot conclude that the district court abused its discretion by determining that the evidence was admissible as evidence of Norwood's motive under Rule 404(b). *See* Tex. R. Evid. 404(b).

Turning to Norwood's assertion that the evidence should not have been admitted under Rule 403, we note, as discussed above, that the evidence was relevant to establishing Norwood's motive to kill Baker. Moreover, although the prior offenses occurred approximately six months before Baker was killed, *cf. Robinson v. State*, 701 S.W.2d 895, 898 (Tex. Crim. App. 1985) (concluding that four-to-six-month lapse in time was sufficiently small for extraneous offense to have probative value); *Reyes v. State*, 69 S.W.3d 725, 740 (Tex. App.—Corpus Christi 2002, pet. ref'd) (noting that remoteness of prior offenses affects their probative value), the potential motivator in this case stemmed from the possibility that Norwood's release on bond for those prior offenses might be revoked or that the State's willingness to consider reducing the charges might be reduced

by his being caught engaging in subsequent criminal activity. Accordingly, the district court could have determined that the probative value of the extraneous-offense evidence was high and weighed in favor of admission.

Regarding the State's need for the evidence, we note that in deciding whether the evidence was needed, courts should consider whether the proponent had other evidence to establish the fact of consequence, how strong the other evidence was, and whether the "fact of consequence related to an issue that is in dispute." *See Erazo v. State*, 144 S.W.3d 487, 495-96 (Tex. Crim. App. 2004). As discussed previously, at the time that the district court made its ruling, no evidence had been introduced establishing a relationship between Norwood and Baker or otherwise establishing a motive for Norwood to kill Baker. For these reasons, the district court could have determined that the State's need for this evidence was high and also weighed in favor of admission.

Turning to the potential for the evidence to suggest a decision on an improper basis, *see Gigliobianco*, 210 S.W.3d at 641 (stating that evidence might encourage decision on improper basis if it arouses jury's "hostility or sympathy . . . without regard to the logical probative force of the evidence"), we note that the evidence did concern three counts of prior criminal conduct by Norwood, but the prior offenses were less gruesome in nature than the violent offense that Norwood was charged with. *See Norwood*, 2014 WL 4058820, at *5 (explaining that "[w]hen the extraneous offense is no more heinous than the charged offense, evidence concerning the extraneous offense is unlikely to cause unfair prejudice"). Moreover, before the State introduced evidence of the extraneous burglaries and later in the jury charge, the district court gave a limiting instruction informing the jury that it could only consider the evidence for limited purposes, including determining Norwood's motive, and only if the jury determined beyond a reasonable doubt that Norwood committed the

prior offenses. *See id.* (noting that "any impermissible inference of character conformity can be minimized by the use of a limiting instruction"). Accordingly, the district court could have reasonably determined that this factor either weighed in favor of admission of the evidence or was neutral regarding the admission.[5]

In addition, the district court could have reasonably determined that the jury would not have given an undue weight to the testimony regarding the prior offenses because the testimony did not address a complex subject matter. *See Gigliobianco*, 210 S.W.3d at 641 (explaining that scientific evidence is type of evidence that might mislead jury not properly equipped to consider probative value). Accordingly, the district court could have reasonably determined that this factor weighed in favor of admission.

Turning to the potential for the evidence to confuse or distract the jury and the amount of time needed to develop the evidence, we note that before the district court made its ruling, the

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[5] In his brief, Norwood contends that "[t]he potential for unfair prejudice was high because the extraneous evidence is laced with descriptions of the fear felt by the victims" and then refers to various parts of the record in which several of the victims, including one who was a child at the time of the offense, stated that the events had scared them. However, those statements were not before the district court at the time that it made its ruling. *See Khoshayand v. State*, 179 S.W.3d 779, 784 (Tex. App.—Dallas 2005, no pet.). Moreover, we note that Norwood did not object to the statements by the witnesses.

Norwood also refers to a portion of the testimony of one of the investigators in which the investigator stated that "folks that do burglaries are just one confrontation away of becoming maybe murderers and rapists." As with the testimony discussed above, that statement was not before the district court at the time of its ruling. Perhaps more importantly, Norwood successfully objected to the testimony, and the district court instructed the jury to disregard the statement. *See Schirmer v. State*, No. 03-97-00822-CR, 1999 WL 331696, at *4 (Tex. App.—Austin May 27, 1999, no pet.) (not designated for publication) (stating that reviewing "court presumes that a trial court's instruction to disregard will be followed by the jury").

State estimated that it would take approximately half a day to present the evidence concerning the prior offenses, and consistent with that estimate, the presentation of the evidence actually constituted approximately 150 pages of testimony. The trial was held over nine days, and the reporter's record—excluding testimony that was previously recorded and played for the jury but not transcribed—constituted more than 1,500 pages. Moreover, although a not insignificant amount of time was spent developing this evidence, the evidence did pertain to self-contained acts that were distinct from the charged offense. In light of the amount of testimony dedicated to developing the extraneous offenses, the district court could have reasonably determined that these factors either weighed against the admission of the evidence or were neutral regarding the admission.

Given our standard of review, the presumption in favor of admissibility, and the resolution of the factors discussed above, we cannot conclude that the district court abused its discretion by overruling Norwood's Rule 403 objection. *Compare Schiele v. State*, No. 01-13-00299-CR, 2015 WL 730482, at *7, *8 (Tex. App.—Houston [1st Dist.] Feb. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (determining that fact that evidence in dispute spanned 50 pages of 118-page record and was also admitted through two recordings weighed against admissibility because evidence consumed "not insignificant" amount of time but still finding that trial court did not abuse its discretion where half of factors relevant to Rule 403 analysis weighed in favor of admissibility), *and McGregor v. State*, 394 S.W.3d 90, 121-22 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (concluding that fact that evidence of extraneous offenses constituted one-third of trial weighed against admissibility but upholding trial court's decision to admit evidence), *with Russell v. State*, 113 S.W.3d 530, 543-49 (Tex. App.—Fort Worth 2003, pet. ref'd)

(determining that trial court erred by admitting evidence of extraneous offenses where evidence was 30 percent of testimony, where State's need for evidence was low "because ample evidence" existed regarding intent, and where evidence of extraneous offense was "more heinous" than charged offense).

For all of these reasons, we overrule Norwood's first issue on appeal.

Extraneous Murder of Christine

In his second issue, Norwood contends that the district court erred by overruling his objection to the admission of evidence regarding the murder of Christine under Rule 403.[6] More specifically, Norwood contends that the State did not need the evidence because it had DNA evidence linking him to Baker's home and because the extraneous murder was not sufficiently similar to the charged one to justify a determination that the two are signature crimes.[7]

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[6] Unlike in the preceding issue, Norwood does not refer to or cite Rule 404 in the argument section of his second issue. Accordingly, no issue regarding the admission of the evidence under Rule 404 seems to have been presented on appeal. Although we need not further address the matter, we do note that in our analysis regarding the admission of the evidence under Rule 403 set out in the body of the opinion, we conclude that the district court did not abuse its discretion by determining that the evidence had probative value for determining the identity of the offender. As discussed earlier, Rule 404 permits the admission of extraneous-offense evidence for the purpose of establishing, among other things, identity. *See* Tex. R. Evid. 404(b); *see also Norwood v. State*, No. 03-13-00230-CR, 2014 WL 4058820, at *4 (Tex. App.—Austin Aug. 15, 2014, pet. ref'd) (mem. op., not designated for publication) (determining that trial court did not abuse its discretion by overruling Rule 404 objection and by admitting evidence regarding Baker homicide in trial for murder of Christine).

[7] As a preliminary matter, we note that the State asserts that Norwood did not preserve this issue for appeal. Although the State acknowledges that Norwood objected to the admission of this evidence in a hearing outside the presence of the jury, that Norwood was therefore not required to renew his objection during the trial in order "to preserve [the] claim of error for appeal," *see* Tex. R. Evid. 103(b), and that the district court stated at the end of the hearing that his "objection will run throughout the entire testimony," the State argues that Norwood waived this issue by repeatedly stating, "no objection," to the admission of numerous exhibits pertaining to the murder of Christine

Regarding the probative value of the evidence of Christine's murder, we note that the evidence of the extraneous offense concerned a homicide that occurred a year and a half before the offense at issue. However, "remoteness is but one aspect of an offense's probativeness," *Gaytan v. State*, 331 S.W.3d 218, 228 (Tex. App.—Austin 2011, pet. ref'd) (determining that trial court did not abuse its discretion by admitting evidence of extraneous offenses occurring approximately twenty years before offense at issue), and courts must also consider the similarities between the charged offense and the extraneous offenses, *Kiser*, 893 S.W.2d at 281.

Previously, this Court was called on to review an analogous issue regarding the admission of evidence pertaining to the murder of Baker during the trial concerning the murder of Christine. *See Norwood*, 2014 WL 4058820. As an initial matter, this Court determined "that it was within the zone of reasonable disagreement for the district court to find that the Baker murder was sufficiently similar to Christine's murder that evidence of the Baker murder was admissible to prove identity in Christine's case." *Id.* at *4. Like in the prior case, the evidence presented in the current case showed that the victims were both Caucasian women in their thirties with long brown hair, were attacked and killed in their beds, died from blunt force trauma to their heads after being hit six or eight times, had defensive wounds, were covered with pillows and comforters after the assault,

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and that courts have explained that in certain circumstances an affirmative statement of "no objection" to the admission of evidence can waive an appellate issue that was previously preserved. *See Stairhime v. State*, 463 S.W.3d 902, 906, 907 (Tex. Crim. App. 2015) (applying "the 'no-objection' waiver rule" in context of error objected to during voir dire); *Thomas v. State*, 408 S.W.3d 877, 881 (Tex. Crim. App. 2013) (discussing effect of "no objection" statement during trial after ruling on motion to suppress). For the purposes of addressing this issue, we will assume without deciding that Norwood preserved this issue for appellate consideration.

and were found with pillows on their heads.[8] In addition, the evidence indicated that the assailant entered through a glass sliding door, that neither victim was sexually assaulted but was found after the assault either fully nude or with their genitals exposed, and that in both cases a single item of value (other than possibly some money) was stolen (a handgun in Christine's case, and a VCR in Baker's case), and nothing in the record indicates that the victims knew Norwood. In light of our prior analysis regarding the similarity of these offenses, we conclude that the district court could have reasonably determined that the probative value of the extraneous murder was high and weighed in favor of admission. *See Segundo*, 270 S.W.3d at 88 (explaining that one rationale for admitting

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[8] When asserting that the evidence regarding Christine's murder should not have been admitted in this case, Norwood argues that although this Court found that there was a pattern justifying admission of the evidence of Baker's murder in the Christine case, this Court should not reach a similar conclusion in the present case because the analysis from the prior case "does not fit with the prosecution's clearly articulated theory in the instant prosecution, *i.e.*, that [Norwood] committed the killing to eliminate any witnesses." However, we fail to see how presenting evidence regarding Norwood's potential motivation in this case would be somehow inconsistent with an assertion that the manner in which Baker was killed was sufficiently similar to the manner in which Christine was killed to warrant admission of evidence of the murder of Christine.

In addition, Norwood contends that the evidence pertaining to Christine's death should not have been admitted in this case because there were many significant differences between the two offenses. Specifically, Norwood points to the following differences: (1) the DNA evidence was found in Baker's bedroom but was found outside of the house in the Christine case; (2) "[t]he Baker offense occurred in winter," but the Christine offense occurred "in summer"; (3) Baker was found naked, but Christine was found in a nightgown; (4) Baker was separated from her husband, but Christine lived with her husband and child; (5) Norwood had a connection to Baker's neighborhood but no known connection to Christine's neighborhood; (6) the victims were killed by different objects; (7) Baker was punched in the mouth, but Christine was not; (7) Baker lived in an older home, but Christine lived in a new one; (8) a more valuable item was taken in the Christine case; and (9) a pubic hair was found in the Baker case but not in the Christine case. Many of those differences were mentioned in our prior opinion concerning the murder of Christine and affirming the trial court's decision to admit evidence of the extraneous Baker offense, and we can see nothing in this list of differences that would compel this Court to rule differently regarding the admission of the Christine evidence in the present case.

evidence of extraneous offenses "is to prove the identity of the offender" and that "[n]o rigid rules dictate what constitutes sufficient similarities").[9]

Turning to the State's need for the evidence, we note that there were no witnesses to Baker's murder, and the case was more than twenty-five years old by the time that it was tried. Moreover, even though the State introduced evidence regarding Norwood burglarizing homes near Baker's home six months before the offense at issue and involving similar manners of entering the victims' homes through the back door, there were significant differences between those prior offenses and the charged offense. The prior offenses all involved situations in which the occupants of the homes were not present at the time of the offense, and at least one of those prior offenses occurred during the daytime. In addition, unlike the Baker murder in which the assailant only took one item of value (Baker's VCR), Norwood took many items from the other victims, including

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[9] Norwood contends on appeal that the reliance that the district court placed on *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008), for its ruling was misplaced. Specifically, Norwood contends that the signature act at issue in *Segundo* was the defendant's decision to sign "his victims by carving a 'Z' on their foreheads" and that the court of criminal appeals found that repeated action sufficiently similar to warrant admission of extraneous offenses. Further, Norwood asserts that there was no similarly distinctive act in the Baker and Christine cases to warrant admission of the evidence of Christine's murder. However, the defendant in *Segundo* did not actually mark his victims with a "Z"; instead, the court analogized finding DNA "in both murder victims" that matched the defendant's "DNA profile" to the defendant leaving "his calling card in both Vanessa and Maria or carv[ing] a 'Z' upon their foreheads as his unique signature." *Id.* at 89. Moreover, the court of criminal appeals did not suggest that a signature as distinctive as marking victims with a "Z" is necessary before extraneous-offense evidence may be admitted; on the contrary, the court explained that evidence regarding extraneous offenses more often helps to establish identity through "the accretion of small, sometimes individually insignificant, details that marks each crime as the handiwork or *modus operandi* of a single individual." *Id.* at 88. As set out in the body of the opinion, we believe that the district court did not abuse its discretion by determining that the accretion of small details in this case made the Christine and Baker murders sufficiently similar to warrant admission of the evidence regarding the murder of Christine.

nearly all of the property from one of the homes. Moreover, although DNA testing performed decades after the offense linked Norwood to hairs recovered from the Baker crime scene, Norwood attempted to undermine the credibility of that evidence by cross-examining the State's witnesses regarding how evidence collection techniques have improved since the time of the offense and how the individuals collecting evidence did not use gloves or other protective clothing to prevent contamination of the samples obtained; by questioning the officers regarding the use of a vacuum cleaner to collect the hairs, regarding whether that vacuum had been used to collect evidence in other cases, and regarding whether the filter was cleaned; and by suggesting that Norwood's hairs could have been deposited in the home if he installed carpet in the house or through the use of a washing machine at the laundromat where Baker worked. In addition, although the DNA evidence might be compelling circumstantial evidence of guilt and may have helped establish that Norwood was in Baker's bedroom, it "does not directly identify [Norwood] as [Baker's] attacker." *See Jabari v. State*, 273 S.W.3d 745, 753 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Accordingly, the district court could have determined that the State's need for the extraneous-offense evidence was high and weighed in favor of admission. *See Norwood*, 2014 WL 4058820, at *6 (explaining that district court could have determined that State "had a considerable need to present evidence related to the Baker murder" during trial addressing Christine's murder because there were no witnesses to offense, because offense was cold case, and because "all of the evidence connecting Norwood to the murder was circumstantial").

Concerning the potential for the evidence to suggest a decision on an improper basis, we note that the State informed the district court during the hearing that it was attempting to

minimize the potential prejudicial impact by "limiting the number of autopsy pictures" and by limiting the testimony regarding "the goriness of the crime," and the State also explained that much of the evidence will concern "DNA and forensic evidence." We also note, as we did in the prior appeal pertaining to Christine's murder, that "[w]hen the extraneous offense is no more heinous than the charged offense, evidence concerning the extraneous offense is unlikely to cause unfair prejudice" and that "any impermissible inference of character conformity can be minimized by the use of a limiting instruction." *Id.* at *5. Although the extraneous offense was unquestionably heinous in nature, it was no more heinous than the charged offense. Moreover, the district court provided an instruction before the evidence was admitted and in the jury charge that the jury could only consider the evidence for limited purposes, including determining the identity of the assailant, and only after determining beyond a reasonable doubt that Norwood committed the prior murder.

In addition, when asking witnesses about Christine's murder, the State's questions did not unduly emphasize the gruesome nature of the extraneous offense; on the contrary, the majority of the testimony focused on describing the investigative efforts that were taken to discover the identity of Christine's killer, presenting the results of DNA testing, and linking the Christine offense to the Baker case. Moreover, although the State did introduce several photos of the crime scene from Christine's case and of the autopsy performed on Christine, those photos were used to demonstrate the similarities in the two murders, including the unique act of placing pillows over the victims' heads, and the similarities in the injuries that the victims sustained. In addition, only six autopsy photos depicted injuries that Christine sustained in the attack. Similarly, although the State admitted into evidence approximately 40 photos taken from the crime scene, most of those photos

simply showed the disheveled state of the room when Christine was found, the blood stains and other tissue residue that were present on the walls and floor, and the objects that had been placed on the bed, and only ten of the photos showed any type of injury to Christine's body. The autopsy photos and crime-scene photos depicting close-up shots of the injuries are in color, and some of them do show Christine to be either naked or partially naked; however, the photos are not any more gruesome than would be expected given the savagery of the attack. For these reasons, the district court could have reasonably determined that the potential for the jury to render a verdict on an improper basis was minimal and that this factor weighed in favor of admission or was neutral regarding the admission of the evidence.

Regarding the potential of the extraneous-offense evidence to be given undue weight by the jury, we note that the testimony regarding Christine's murder did not address subjects that were any more complex than the topics presented regarding the charged offense (e.g., evidence collection and DNA testing). Accordingly, the district court could have reasonably determined that this factor weighed in favor of admission.

Turning to the potential for the evidence to confuse or distract the jury and the amount of time needed to develop the evidence, we note that the State projected during the hearing that it would take two and a half days to present the evidence. As mentioned previously, the trial in this case lasted nine days, and the reporter's record in this case is over 1,500 pages in length. Estimating the amount of the record actually devoted to the murder of Christine is difficult because recorded testimony from several witnesses discussing the investigation was played for the jury but not transcribed and because some of the witnesses discussed both cases during their testimonies, but it

seems safe to say that more than one-third of the trial related to Christine's murder. But as discussed above, much of the testimony focused on developing chain of custody for the evidence collected and on scientific procedures employed to test the evidence at various points throughout the years as technology improved, and the State did not focus on the gruesome details of the murder. *See Segundo*, 270 S.W.3d at 90 (deciding that trial court did not abuse its discretion by allowing State to present great deal of evidence of extraneous offense and noting that "developing the chain of custody of vaginal swabs, the analysis for semen, and the identification of the DNA profile that was then matched with appellant's[] require[d] a long list of witnesses and a slow plod through the pertinent scientific procedures"). Moreover, the testimony presented at trial established that Christine's murder was a separate event that occurred more than a year before the charged offense. Regardless, more than one-third "of the trial testimony focused on an offense for which Norwood was not on trial," and the district court could have reasonably concluded that these factors "arguably weigh[ed] against the admissibility of the evidence." *See Norwood*, 2014 WL 4058820, at *6.

In light of our standard of review and the presumption in favor of the admission of evidence and given our resolution of the factors above, we cannot conclude that the district court abused its discretion by overruling Norwood's Rule 403 objection.[10] *See Gaytan*, 331 S.W.3d at 227

[10] As support for his assertion that evidence of Christine's murder should not have been admitted, Norwood points to an opinion by one of our sister courts of appeals. *See Reyes v. State*, 69 S.W.3d 725 (Tex. App.—Corpus Christi 2002, pet. ref'd). When discussing the case, Norwood notes that the victim in that case was able to identify her attacker as her neighbor and that the State also presented evidence showing that another woman in the same neighborhood had been attacked. *See id.* at 729, 731. In addition, Norwood argues that our sister court determined that the trial court abused its discretion by admitting evidence regarding the extraneous offense after the victim was able to identify the assailant because "[t]he State did not need the extraneous offense evidence to prove its case" and because "the strength of the identification evidence made the obvious danger of

(noting that "a few factors weighed against admitting" evidence and that "a few factors weighed in favor of admitting evidence" and explaining that "[i]n such a situation, especially bearing in mind that 'Rule 403' 'envisions exclusion of evidence only when there is a *clear disparity* between the degree of prejudice of the offered evidence and its probative value,' . . . the trial court could have reasonably concluded that" evidence "should be admitted under Rule 403" (emphasis added) (internal citation omitted) (quoting *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009))).

For all of these reasons, we overrule Norwood's second issue on appeal.

CONCLUSION

Having overruled both of Norwood's issues on appeal, we affirm the district court's judgment of conviction.

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unfair prejudice too great." Based on this premise, Norwood contends that the DNA evidence presented in the current case is similar to the identifying testimony from the victim in *Reyes* and that, therefore, the district court should not have admitted the evidence of the extraneous murder.

Having reviewed *Reyes*, we are not persuaded that the analysis from that case bears upon the circumstances present here. Rather than deciding that the identifying testimony by the victim nullified any need for admitting evidence of the extraneous offense, the appellate court explained that the extraneous offense was not "sufficiently similar" to warrant admission of evidence of the extraneous offense because the similarities between the two cases were that an "intruder, not wearing glasses, entered two residences in the same vicinity, in the early morning hours, fondled the complainants while they slept with a child, and fled when they awoke"; because "the similarities in the instant case are more in the nature of the similarities common to this type of crime itself, i.e., burglary of a habitation with intent to commit and committing sexual assault, rather than similarities peculiar to both offenses"; and because there were "a number of dissimilarities" between the cases. *Id.* at 739.

We believe that the similarities present in the Christine and the Baker murders distinguish this case from *Reyes* and, as set out above, allowed the district court to reasonably conclude that Norwood's Rule 403 objection should be overruled. In addition, to the extent that the analysis from *Reyes* could have any applicability here, we are not bound that the analysis from our sister court.

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David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: December 22, 2017

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