TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00129-CR

Felix Antonio Pina, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. B-16-0820-SB, THE HONORABLE BRAD GOODWIN, JUDGE PRESIDING

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

A jury found appellant Felix Antonio Pina guilty of firearm smuggling, *see* Tex. Penal Code § 46.14(a) (defining offense of firearm smuggling), and assessed his punishment at confinement for seven years in the Texas Department of Criminal Justice and a $2,500 fine, *see id.* §§ 46.14(b) (classifying offense as third degree felony), 12.34 (establishing punishment range for third degree felony). In four points of error on appeal, appellant asserts that the trial court abused its discretion by admitting gang related evidence during the guilt-innocence phase of trial. We find no error in the admission of the evidence. However, through our own review of the record, we have found non-reversible clerical error in the written judgment of conviction. We will modify the judgment to correct the error and, as modified, affirm the trial court's judgment of conviction.

BACKGROUND[1]

The evidence at trial showed that Douglas Crumine and Justin Dickey, both residents of San Angelo, Texas, had their Glock handguns stolen when their cars were burglarized in June of 2014 and March of 2016, respectively. The evidence further showed that in April of 2016, appellant traded the two stolen handguns to Nathan Carrasco, a resident of Midland, Texas, for an AK-47 rifle. The weapons trade was discovered when police responded to appellant's apartment to investigate an accidental discharge of the AK-47. During the investigation that followed, the police contacted Carrasco.

Carrasco told police, and testified at trial, that he met appellant on Facebook, and appellant told him that the two handguns were a gift from his girlfriend. Carrasco also testified that when police contacted him after the accidental discharge of the AK-47, he had already traded the handguns that he had received from appellant. However, he had a record of the serial numbers of the handguns, and the police asked him to provide them. According to Carrasco, appellant contacted him and offered him $100 to change the serial numbers that he gave to the police.

At some point during the investigation, appellant met with Detective Adrian Castro, an investigator with the San Angelo Police Department, and agreed to an interview, which was recorded. In the interview, appellant denied knowing that the handguns were stolen. He indicated

[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

that he had bought them from a seller on Facebook before the trade with Carrasco.[2] Detective Castro testified, however, that appellant could not provide the name of the individual from whom he had purchased the guns or give any details of the transaction. Also during the interview, appellant admitted that he was a member of Darkside 26, although at some points he claimed that he was no longer a member. Testimony at trial established that Darkside 26 is a criminal street gang in San Angelo, Texas, known to law enforcement for engaging in criminal activities, including trafficking stolen guns. After discussing the fact that the two handguns that appellant had traded for the AK-47 rifle were stolen, Detective Castro confronted appellant with his membership in the gang and the gang's criminal activities—including its involvement in trafficking stolen guns—in an attempt to refute appellant's claim that he did not know that the two Glock handguns were stolen. Over appellant's objections, a copy of the audio recording of appellant's interview with Detective Castro was admitted at trial.

When appellant testified at trial, he persisted in his claim that he had no knowledge that the Glock handguns were stolen. He also denied membership in Darkside 26.

DISCUSSION

Standard of Review

We review a trial court's evidentiary ruling for an abuse of discretion. *Jenkins v. State*, 493 S.W.3d 583, 607 (Tex. Crim. App. 2016); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *see Dabney v. State*, 492 S.W.3d 309, 316 (Tex. Crim. App. 2016) ("[B]ecause

[2] Appellant's various statements reflected a time frame of anywhere from two months prior to four or six months prior.

trial courts are in the best position to decide admissibility questions, appellate courts must review a trial court's decision under an abuse-of-discretion standard."). A trial court abuses its discretion only if its determination "falls outside the zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)); *see Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016) ("Before a reviewing court may reverse the trial court's decision, 'it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree.'" (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008))). A trial court's decision to admit evidence of an extraneous offense is generally within this zone if the evidence shows that (1) an extraneous transaction is relevant to a material, non-propensity issue, and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

We consider the trial court's ruling in light of what was before the trial court at the time the ruling was made. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009); *see Rodgers v. State*, 205 S.W.3d 525, 529 (Tex. Crim. App. 2006); *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). If the trial court's evidentiary ruling is correct on any applicable theory of law, we will uphold it, *Jenkins*, 493 S.W.3d at 607; *Henley*, 493 S.W.3d at 93; *De La Paz*, 279 S.W.3d at 344, even if the trial court failed to give any reason or gave a wrong reason for the ruling, *Jenkins*, 493 S.W.3d at 607; *Bowley v. State*, 310 S.W.3d 431, 434 (Tex. Crim. App. 2010); *De La Paz*, 279 S.W.3d at 344.

Admission of Gang Related Evidence

During its case in chief in the guilt-innocence phase of trial, the State offered the audio recording of appellant's interview with Detective Castro. Appellant objected to the admission of the portions of the audio recording that referenced "gang affiliation and membership involving [appellant], gang related activities, specifically whether [appellant] is a gang member of a group known as Darkside 26," "a drive-by shooting on April 18th of a dog," and "what all gang members of Darkside 26 do, steal guns and selling them all the time."[3] Appellant asserted that the gang related evidence was not relevant, that it had no relevance apart from character conformity, and that its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needlessly presenting cumulative evidence.[4] The trial court overruled all of appellant's objections.

In four points of error on appeal, appellant challenges the trial court's admission of evidence of his gang affiliation and the gang's criminal activities during the guilt-innocence phase

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[3] In their briefing, neither of the parties use time stamps to cite to the specific portions of the audio recording that appellant found objectionable, but instead refer only to the exhibit in its entirety (a 37-minute-long recording). At trial, the parties and the trial court referred to a transcript of the audio recording, but that transcript is not included in the record.

[4] The record contains several discussions concerning the audio recording, including several addressing appellant's motion in limine, which the parties and the court appeared to treat as a motion to exclude evidence. During one earlier discussion, in response to the State's contention that appellant's counsel had "opened the door" to the gang related evidence on the audio recording by asserting in voir dire that appellant had denied knowing the guns were stolen, appellant maintained that, "[i]n terms of opening the door to permitting the State to rebut, this goes way too far." At that time, the court overruled appellant's objections and overruled the motion in limine. The objections noted above were made when the State offered the audio recording during Detective Castro's testimony. Appellant did not again raise his concern regarding how far the door had been opened at the time of the offer.

of trial. In his first point of error, appellant argues that the trial court erred in admitting the entirety of the audio recording of his police interview because his counsel's assertions during voir dire and opening statement, which indicated that appellant had no knowledge that the guns he traded were stolen, did not "open the door" to the admission of the gang related evidence. In the remaining three points of error, appellant maintains that the trial court erred by admitting the evidence of his gang affiliation and the gang's criminal activities because such evidence was not relevant, *see* Tex. R. Evid. 401 (defining relevant evidence), because it was inadmissible character conformity evidence, *see* Tex. R. Evid. 404(b)(1) (prohibiting admission of evidence of extraneous conduct to prove conformity with bad character), and because it was more prejudicial than probative, *see* Tex. R. Evid. 403 (allowing for exclusion of otherwise relevant evidence when probative value is substantially outweighed by danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence").

As an initial matter, we note that it is somewhat unclear what specific gang related evidence admitted at trial appellant complains about on appeal. In his brief, appellant refers globally to evidence of his gang membership in Darkside 26 and "the crimes and bad acts of other members" while citing only to portions of the record that involve discussions about the audio recording. In his argument, while he does not identify objected-to portions of the audio recording, he mentions the detective's comments during the interview and cites to the exhibit of the audio recording. However, though appellant mentions Detective Castro's comments from the interview, he does not reference the detective's testimony at trial, which included testimony about the gang's criminal activities, including its involvement in trafficking stolen firearms. Most likely this omission is because

appellant did not object to Detective Castro's testimony at trial, and therefore any complaint related to this testimony is not preserved. *See* Tex. R. App. P. 33.1(a)(1)(A) (requiring party to raise timely objection to preserve complaint for appellate review). Yet, appellant also refers to portions of the testimony of Sergeant Craig Thomason, the State's gang expert who testified in rebuttal. However, appellant did not properly preserve any complaint as to Sergeant Thomason's testimony as he only made one objection to his testimony and that objection was untimely.[5] *See id.* Based on the record citations provided, the contentions made, the discussions at trial, and the application of the rules of procedural default, we limit our discussion to the gang related evidence on the audio recording of appellant's interview with Detective Castro, admitted over appellant's Rule 401, 404(b), and 403 objections.

Relevance

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Henley*, 493 S.W.3d at 83; *see* Tex. R. Evid. 401 ("Evidence is relevant

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[5] After establishing his expertise in the area of criminal street gangs and discussing the statutory criteria for documenting street gangs, the sergeant testified that he became familiar with Darkside 26 when several members of the gang were arrested for an aggravated robbery that occurred at a convenience store. Appellant did not object to this testimony. When the prosecutor then asked if "there have been some other incidents with Darkside 26 members," appellant did not object until after the question had been answered and the prosecutor responded with "Okay." *See Lackey v. State*, 364 S.W.3d 837, 843 (Tex. Crim. App. 2012) ("The requirement of a timely trial-level complaint is satisfied 'if the party makes the complaint as soon as the grounds for it become apparent[.]'" (quoting *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex. Crim. App. 2006))); *Luna v. State*, 268 S.W.3d 594, 604 (Tex. Crim. App. 2008) ("If a defendant fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely, and any claim of error is forfeited.").

if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). To be relevant, evidence must be both material and probative. *Henley*, 493 S.W.3d at 83; *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001). Evidence is material if it is "shown to be addressed to the proof of a material proposition," which is "any fact that is of consequence to the determination of the action." *Henley*, 493 S.W.3d at 83 (quoting *Miller*, 36 S.W.3d at 507, quoting 1 Steven Goode et al., *Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal* § 401.1 (2d ed. 1993 & Supp. 1995)). Evidence is probative if it tends to make the existence of the fact more or less probable than it would be without the evidence. *Henley*, 493 S.W.3d at 83–84; *Miller*, 36 S.W.3d at 507. Thus, proffered evidence is relevant if it has been shown to be material to a fact in issue and if it makes that fact more probable than it would be without the evidence. *Miller*, 36 S.W.3d at 507; *see Henley*, 493 S.W.3d at 83–84.

"Evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence." *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004); *see Ex parte Smith*, 309 S.W.3d 53, 61 (Tex. Crim. App. 2010); *see also Mendiola v. State*, 21 S.W.3d 282, 284 (Tex. Crim. App. 2000) ("The evidence in question is relevant even if it only provides a 'small nudge' in proving or disproving a fact of consequence to the trial."). "'[E]vidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant.'" *Mendiola*, 21 S.W.3d at 284 (quoting *Montgomery v. State*, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990)). Even "marginally probative" evidence should be admitted if "it has any tendency at all, even potentially,

to make a fact of consequence more or less likely." *Fuller v. State*, 829 S.W.2d 191, 198 (Tex. Crim. App. 1992); *see San German-Reyes v. State*, No. 03-15-00432-CR, 2017 WL 2229873, at *6 (Tex. App.—Austin May 17, 2017, no pet.) (mem. op., not designated for publication). "There is no purely legal test to determine whether evidence will tend to prove or disprove a proposition—it is a test of logic and common sense." *Miller*, 36 S.W.3d at 507; *see San German-Reyes*, 2017 WL 2229873, at *6; *Brown v. State*, No. 14-07-00184-CR, 2008 WL 516783, at *2 (Tex. App.—Houston [14th Dist.] Feb. 28, 2008, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, 191 S.W.3d 370, 373 (Tex. App.—Waco 2006, no pet.); *Davis v. State*, No. 06-05-00132-CR, 2006 WL 483228, at *1 (Tex. App.—Texarkana Mar. 2, 2006, no pet.) (mem. op., not designated for publication). Relevancy is determined by whether "a reasonable person, with some experience in the real world, [would] believe that the particular piece of evidence is helpful in determining the truth or falsity" of any fact of consequence. *Montgomery*, 810 S.W.2d at 376 (internal quotations omitted); *see San German-Reyes*, 2017 WL 2229873, at *6.

In this case, appellant was charged with firearm smuggling in violation of section 46.14 of the Texas Penal Code, which provides that "[a] person commits an offense if the person knowingly engages in the business of transporting or transferring a firearm that the person knows was acquired in violation of the laws of any state or of the United States." Tex. Penal Code § 46.14(a). For purposes of this offense, "a person is considered to engage in the business of transporting or transferring a firearm if the person engages in that conduct: (1) on more than one occasion; or (2) for profit or any other form of remuneration." *Id.* Thus, appellant's knowledge that the two guns that he traded were stolen—that is, that they were "acquired in violation of the

laws"—is an element of the offense. Also, in order to demonstrate that appellant was "engage[d] in the business of transferring" the stolen firearms, the State needed to show that the transfer of the stolen handguns was done "for profit or any other form of remuneration."

At trial, Detective Castro explained, based on his experience with Darkside 26 and his knowledge of its activities, that the street gang was engaged in criminal activities, including illegal gun trafficking. The fact that appellant is a member of a criminal street gang that routinely engages in the illegal transfer of stolen firearms tends to make it more probable that appellant knew that the Glock handguns that he traded were stolen. Further, his membership in that gang—known for trading stolen guns for profit—tends to make it more probable that appellant exchanged the stolen handguns for the AK-47 for profit.[6] Consequently, the trial court would not have been outside the zone of reasonable disagreement to conclude that evidence tending to show that appellant was a member of a street gang that routinely engaged in illegal gun trafficking for profit had at least some tendency to prove two key elements of this offense—appellant's knowledge that the guns were "acquired in violation of the laws" and that he was "engag[ing] in the business" of transferring a

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[6] During his testimony at trial, Detective Castro explained that he considered profit a motive for the gang's transactions involving weapons:

> Because I have done several investigations involving that gang specifically, and another gang that works closely with that gang, and during the interviews with other criminals, during those investigations, I learned that there is a lot of burglary of motor vehicle that happens where they are specifically targeting firearms and then selling them for profit, getting rid of them very quickly, so I have learned how a lot of those gangs operate to make a profit.

Further testimony at trial indicated that the two Glock handguns that appellant traded were collectively valued at $1000 while the AK-47 rifle was valued at only $600 to $700.

firearm because he traded the stolen guns for profit—and thus would be relevant for those reasons. Therefore, the trial court's decision to admit the gang related evidence over appellant's relevance objection was not an abuse of discretion. We overrule appellant's second point of error.

Character Conformity

Texas Rule of Evidence 404(b) prohibits the admission of extraneous conduct ("crimes, wrongs, or other acts") to prove a person's character in order to show that the person acted in accordance with that bad character on a particular occasion. *See* Tex. R. Evid. 404(b)(1). However, extraneous conduct evidence may be admissible when it has relevance apart from character conformity. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011); *Martinez v. State*, No. 03-14-00106-CR, 2016 WL 806718, at *2 (Tex. App.—Austin Feb. 24, 2016, no pet.) (mem. op., not designated for publication). Evidence of extraneous conduct may be admissible for some other purpose, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* Tex. R. Evid. 404(b)(2); *Montgomery v. State*, 810 S.W.2d 372, 387–88 (Tex. Crim. App. 1991) (op. on reh'g). This list is illustrative—the exceptions are neither mutually exclusive nor collectively exhaustive. *See De La Paz*, 279 S.W.3d at 343.

Evidence of extraneous conduct evidence may also be admissible to rebut defensive theories raised by the defense. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (rebuttal of defensive theory is "one of the permissible purposes for which [relevant] evidence may be admitted under Rule 404(b)"); *see also Dabney*, 492 S.W.3d at 318 (defensive theory raised in voir dire and opening statements opened door to extraneous offense evidence); *Bass v. State*,

270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (defense opening statement opens door to admission of extraneous offense evidence to rebut defensive theory raised in opening statement).

Further, "Rule 404(b) is a rule of inclusion rather than exclusion—it excludes only evidence that is offered *solely* for proving bad character and conduct in conformity with that bad character." *Dabney*, 492 S.W.3d at 317 (citing *De La Paz*, 279 S.W.3d at 343) (emphasis added). "'Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court.'" *De La Paz*, 279 S.W.3d at 343 (quoting *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)).

Appellant contends in his third point of error, as he did at trial, that evidence of his gang membership constituted inadmissible character conformity evidence. However, "[g]ang membership evidence is admissible under Rule 404(b) . . . if it is relevant to show a noncharacter purpose that in turn tends to show the commission of the crime." *Ortiz v. State*, 93 S.W.3d 79, 94 (Tex. Crim. App. 2002). For example, "[e]vidence of gang membership is admissible during the guilt-innocence phase to show bias, motive, or intent, or to refute a defensive theory." *Rawlins v. State*, 521 S.W.3d 863, 868 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *see Vasquez v. State*, 67 S.W.3d 229, 239–40 (Tex. Crim. App. 2002) (evidence of defendant's gang affiliation was relevant and admissible over challenges under Rules 401, 402, 403, and 404 to show motive for gang related crime); *Medina v. State*, 7 S.W.3d 633, 643–44 (Tex. Crim. App. 1999) (gang related evidence was admissible to explain context in which offense occurred and because it had some tendency to show defendant's motive for committing offense); *Sanchez v. State*, 444 S.W.3d 215, 221–22 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (gang affiliation evidence admissible to

rebut defensive theories and to establish possible motive for committing offense); *McCallum v. State*, 311 S.W.3d 9, 15 (Tex. App.—San Antonio 2010, no pet.) (evidence of gang membership "went to the heart of the case" and was admissible to show motive); *Tibbs v. State*, 125 S.W.3d 84, 89 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (evidence of defendant's gang involvement was admissible to rebut defendant's theory that shooting was in self-defense).

Here, the gang related evidence was not offered to prove appellant's bad character and show conformity with it, but to show appellant's knowledge that the handguns were stolen, to establish appellant's motive and intent to trade the firearms, and to rebut the defensive theory of accident or mistake, all of which in turn tended to prove the charged allegation. *See Ortiz*, 93 S.W.3d at 94 (evidence of gang affiliation admissible under Rule 404(b) to show variety of non-character purposes relevant to showing defendant's guilt). Thus, the trial court would not have been outside the zone of reasonable disagreement in concluding that the gang related evidence was admissible for these non-character conformity purposes. Accordingly, the trial court's decision to admit the gang related evidence over appellant's 404(b) objection was not an abuse of discretion. We overrule appellant's third point of error.

Unfair Prejudice

Rule 403 of the Texas Rules of Evidence allows for the exclusion of otherwise relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010); *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App.

2007). "The term 'probative value' refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Davis*, 329 S.W.3d at 806; *see Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). "'Unfair prejudice' refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Davis*, 329 S.W.3d at 806.

All testimony and physical evidence are likely to be prejudicial to one party or the other. *Id.*; *Jessop v. State*, 368 S.W.3d 653, 694 (Tex. App.—Austin 2012, no pet.). Thus, "[t]o violate Rule 403, it is not enough that the evidence is 'prejudicial'—it must be unfairly prejudicial." *Vasquez*, 67 S.W.3d at 240. It is only when there exists a clear disparity between the degree of prejudice produced by the offered evidence and its probative value that Rule 403 is applicable. *Davis*, 329 S.W.3d at 806; *Gaytan v. State*, 331 S.W.3d 218, 227 (Tex. App.—Austin 2011, pet. ref'd); *see Johnson*, 490 S.W.3d at 911 ("Under Rule 403, the danger of unfair prejudice must *substantially* outweigh the probative value."). In determining whether such disparity exists, our analysis under Rule 403 includes, but is not limited to, the following factors: (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational yet indelible way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. *Jenkins*, 493 S.W.3d at 608; *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006).

Regarding the probative value of the evidence and the State's need for it, the jury repeatedly heard from defense counsel that appellant had no knowledge that the handguns that he

traded were stolen. The evidence of appellant's gang membership in a gang known to law enforcement for trafficking stolen guns for profit helped show appellant's knowledge that guns were stolen, establish a possible motive for trading the stolen guns, and rebut appellant's defense theory of accident or mistake. *See Beltran v. State*, 99 S.W.3d 807, 811 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (finding admission of evidence regarding appellant's gang affiliation was necessary to show motive for crime). Thus, it would not have been outside the zone of reasonable disagreement for the trial court to have found that the evidence was highly probative of several critical issues in the case, and, consequently, that the State's need for the evidence was great.

As for whether the evidence had a strong potential to impress the jury in an irrational and indelible way such that it would find guilt on grounds other than proof of the charged offense, the gang related evidence directly concerned the circumstances surrounding the gun trade at issue. Further, the evidence was used by the State for relevant non-character conformity purposes to show appellant's knowledge, establish a possible motive, and rebut his defensive theory. For these reasons, it would not be outside the zone of reasonable disagreement for the trial court to conclude that the gang related evidence did not have a strong potential to impress the jury in such a way that it would irrationally find guilt on an improper basis. *See Vasquez*, 67 S.W.3d at 239–40 (evidence of defendant's gang membership was directly relevant to case because it was used to show motive and therefore did not have tendency to suggest decision on improper basis). Furthermore, because the highly probative value of the evidence derived from relevant non-character conformity purposes, it would not be outside the zone of reasonable disagreement for the trial court to have further found that whatever prejudicial effect the gang related evidence might have would not "substantially

outweigh" the probative force of that evidence. *See id.* at 240. Thus, the trial court's decision to admit the gang related evidence over appellant's 403 objection was not an abuse of discretion. We overrule appellant's fourth point of error.

Given our conclusion that the gang related evidence was admissible for relevant non-character conformity purposes over appellant's Rule 401, 404(b), and 403 objections, we need not decide whether the evidence was admissible because appellant's voir dire and opening statement "opened the door" to the admission of the gang related evidence.[7] Thus, we do not address appellant's first point of error. *See* Tex. R. App. P. 47.1, 47.4.

Clerical Error in Judgment

On review of the record, we observe that the written judgment of conviction in this case contains non-reversible clerical error. The judgment of conviction reflects a fine of "N/A" and

[7] In his first point of error, as support for his contention that the trial court erred by admitting the entirety of the audio recording of his police interview, appellant argues that the requirements of Rule 107 of the Texas Rules of Evidence were not met. Rule 107, the "Rule of Optional Completeness," is an exception to the hearsay rule that "permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by the adverse party." *Walters v. State*, 247 S.W.3d 204, 217–18 (Tex. Crim. App. 2007). It appears that appellant conflates the concept of "opening the door" to the admission of otherwise inadmissible evidence with the rule of optional completeness, which allows the admission of "any other act, declaration, writing or recorded statement" that is necessary to make a matter fully understood when "part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party." *See* Tex. R. Evid. 107. To the extent that appellant complains that the trial court erred by admitting the entirety of the audio recording because it erroneously applied the rule of optional completeness, we observe that such complaint was not preserved for appellate review as it was not presented to the trial court. *See* Tex. R. App. P. 33.1(a)(1)(A) (requiring party to raise timely objection to preserve complaint for appellate review); *see also Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016) (if argument on appeal does not comport with trial objection, error has not been preserved).

restitution in the amount of $2,500. However, the jury assessed a $2,500 fine in addition to appellant's seven-year prison sentence, and the trial court sentenced appellant in accordance with the jury's verdict. Furthermore, the record does not reflect any restitution in this case.

This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 43.2(b) (authorizing court of appeals to modify trial court's judgment and affirm it as modified); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (concluding that Texas Rules of Appellate Procedure empower courts of appeals to reform judgments). According, we modify the judgment of conviction to reflect a fine in the amount of $2,500 and to delete the $2,500 restitution amount.

CONCLUSION

Having concluded that the trial court did not abuse its discretion by admitting evidence of appellant's gang affiliation and the gang's criminal activities during the guilt-innocence phase of trial, but having found non-reversible clerical error in the written judgment of conviction, we modify the judgment as noted above to correct the error and affirm the trial court's judgment of conviction as modified.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Modified and, as Modified, Affirmed

Filed: March 30, 2018

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