



NUMBERS 13-13-00382-CR and 13-13-00383-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

STEVEN ERIC BREED,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 292nd District Court
of Dallas County, Texas.**

MEMORANDUM OPINION

**Before Justices Benavides, Perkes, and Longoria
Memorandum Opinion by Justice Perkes**

Appellant Steven Eric Breed was indicted for two separate second-degree felony offenses of burglary of a habitation.¹ See TEX. PENAL CODE ANN. § 30.02 (West, Westlaw

¹ Pursuant to a docket-equalization order issued by the Supreme Court of Texas, the two appeals were transferred to this Court from the Fifth Court of Appeals in Dallas. See TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2013 3d C.S.). Appellate Cause No. 13-13-00382-CR is the appeal from trial court cause number F-1200533-V. Appellate Cause No. 13-13-00383-CR is the appeal from trial court cause number F-1251946-V.

through 2013 3d C.S.). After a jury found appellant guilty for each offense, the trial court assessed punishment at sixteen years' imprisonment for each offense and ordered the sentences to run concurrently. By four issues, appellant contends: (1) the evidence is insufficient to support appellant's conviction for burglary of a habitation in Cause No. F-1251946-V; (2) the trial court erred by admitting evidence of two unindicted, extraneous offenses during the guilt/innocence phase of the joint trial; (3) the limiting instruction regarding the use of extraneous offense testimony is defective; and (4) the evidence is insufficient to support the trial court's order for appellant to pay court costs in Cause No. F-1251946-V.² We affirm.

I. BACKGROUND

The State alleged that appellant, while posing as a homebuyer, stole jewelry from two different homes in the Dallas area.

To accomplish the first burglary, appellant contacted a realtor and represented to her that he was relocating from Houston to Dallas. He then made appointments to view several homes, the first of which was owned by Rebecca Bell. Appellant and the realtor entered Bell's home and toured the house with Bell accompanying. After the initial showing, appellant excused himself from Bell and the realtor to revisit parts of the house alone. Appellant was gone for several minutes and returned with his hands in his pockets. Several days later, as Bell was preparing for church, she noticed that some of her jewelry was missing and that the contents of her jewelry box was in disarray. Bell

² Inasmuch as both convictions arose from a single trial, we consolidated the two appeals for purposes of this opinion.

contacted the police, who later recovered one piece of the missing jewelry, a ring, from a pawnshop. The police subsequently learned that appellant had pawned the ring. Appellant was indicted for this offense under cause number F-1200533-V.

The second burglary occurred nine days later at Kathy Lock's open house. Lock left her home shortly after the commencement of the open house and she saw appellant enter her home and begin looking at it with her realtor. Appellant told Lock's realtor that he was from Houston, was recently widowed, and was in the market for a house in Dallas for himself and his five children. The realtor walked appellant through the house and suggested that appellant tour another house that she knew was open in the area. The realtor saw nothing unusual occur as she walked through the home with appellant; however, as she was showing the house to another group of people, she thought she heard the front door open. When the realtor went to investigate, she did not see anyone. The next day, Lock noticed that she was missing her wedding ring, a Rolex watch, a gold necklace with an emerald pendant, and some costume jewelry, all of which had been placed in a built-in shelf in her closet. Lock reported the theft to the police, who later obtained a surveillance video purporting to show appellant pawning Lock's wedding ring at a pawnshop in Gainesville, Texas. Appellant was indicted for this offense under cause number F-1251946-V.

Appellant was tried on both indictments in a single trial. During the guilt/innocence phase of the trial, the jury heard about two additional "offenses" appellant committed that were similar to the offenses for which he was being tried.

The first offense occurred early in 2012 when appellant was touring a home that was listed for sale. The seller testified that she gave appellant an overview of the home and afterwards appellant toured the house by himself. The seller observed appellant in the master bedroom appearing to rummage through her jewelry armoire. Interrupted by the seller, appellant quickly left the home. No jewelry was reported missing.

The second offense stemmed from a “sting operation” conducted in July 2010 by the Frisco, Texas police department. Appellant was a suspect in a jewelry theft investigation. The realtor contacted the police detective and told him that appellant had made an appointment to tour a home listed for sale. The detective installed a remotely operated camera in the master bedroom closet of the home which recorded appellant stealing jewelry. Appellant was arrested as he left the home.

II. EVIDENTIARY CHALLENGES

By his first issue, appellant argues that the evidence is insufficient to support his conviction for burglary in cause number F-1251946-V. Specifically, appellant argues the State failed to prove that appellant’s entry into Kathy Lock’s home was non-consensual.

A. Standard of Review

“The standard for determining whether the evidence is legally sufficient to support a conviction is ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original); see *Brooks v. State*, 323 S.W.3d 893, 898–99 (Tex. Crim. App. 2010) (plurality op.).

“The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given testimony, and it is also the exclusive province of the jury to reconcile conflicts in the evidence.” *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (en banc) (citing *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996)). Juries are permitted to make reasonable inferences from the evidence presented at trial, and circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor. *Hooper v. State*, 214 S.W.3d 9, 14 (Tex. Crim. App. 2007).

B. Discussion

Appellant argues that by entering Lock’s home during an open house, he entered with the effective consent of the owner, thus negating an essential element of burglary. We disagree.

“A person commits the offense of burglary if, without the effective consent of the owner, the person enters a building or habitation, and commits or attempts to commit a felony, theft, or an assault.” TEX. PEN. CODE ANN. § 30.02(a)(3).³ “Consent” means assent in fact, whether express or apparent. *Id.* § 1.07(a)(9); see *Eppinger v. State*, 800 S.W.2d 652, 653 (Tex. App.—Austin 1990, pet ref’d).

It is undisputed appellant entered Lock’s home during an open house, introduced himself using an alias, and toured the home with Lock’s realtor. There is circumstantial evidence that he subsequently re-entered the home, without the realtor’s knowledge, presence, and consent, and stole property from Lock’s home.

³ Although the statute includes multiple manners of committing an offense, appellant was only indicted under the third manner of committing an offense. TEX. PEN. CODE ANN. § 30.02(a)(3).

In *Trevino v. State*, the defendant entered a church for the purpose of committing a theft. See 254 S.W.2d 788, 789 (Tex. Crim. App. 1952). The court, in affirming the conviction, stated that “we see no distinction, insofar as the law of burglary is concerned, between a church, into which the public has consent to enter for the purpose of meditation and prayer, and a place of business, into which the public has consent during business hours to enter for the purpose of transacting business.” *Id.* Where the State has other evidence of intent to commit a felony or the crime of theft, prior to entry, and an entry and breaking is shown, then the offense of burglary of a place of business during business hours or a church has been established, notwithstanding an express or implied consent to enter for lawful purposes. *Id.* An open house is similar to a church or business in that the public has consent to enter for the purpose of evaluating the home. See *Loera v. State*, 14 S.W.3d 464, 468 (Tex. App.—Dallas 2000, no pet.) (explaining that residential “open house” held for purposes of a sale makes residence publicly accessible).

The State produced evidence of appellant’s intent to commit theft prior to entering Lock’s home. A rational jury could deduce from the testimony that appellant entered Lock’s house twice. The first time was to tour the home with the realtor—or as a jury could rationally infer, to “case” the home. The second entry allowed appellant the opportunity to take Lock’s property. The realtor testified that after giving appellant a tour of the home, she heard the front door open, went to investigate, and inquired whether anyone had entered. A rational jury could infer that appellant did not re-enter the home for any purpose related to the sale of the home, and instead made a surreptitious entry for the express purpose of stealing Lock’s property.

As the Texas Supreme Court noted in *Trevino*, “[i]t would be an impeachment of the common sense of mankind to say that a thief who enters a store with intent to steal does so with the owner's consent or upon his invitation.” *Trevino*, 254 S.W.2d at 789. So too is it inconceivable that Lock would have extended appellant the invitation to enter her home during an open house so that he could steal from her. Consent given to enter for one purpose does not give consent to enter for all purposes. See *In re D.J.H.*, 186 S.W.3d 163, 165 (Tex. App.—Fort Worth 2006, pet. denied) (holding that juvenile did not have express or apparent consent to re-enter residence) (mem. op., not designated for publication); see also *Griego v. State*, No. 07-08-00130-CR, 2010 WL 1286464, *2 (Tex. App.—Amarillo Apr. 5, 2010, no pet.) (mem. op., not designated for publication) (holding that permission for appellant to enter on pretense of returning borrowed money did not create effective consent in burglary conviction). The evidence supports a rational jury inference sufficient to establish a lack of effective consent. We overrule appellant’s first issue.

III. EXTRANEOUS OFFENSES

By his second issue, appellant complains that the trial court erred by admitting evidence of two unindicted, extraneous offenses during the guilt/innocence phase of the trial. Appellant argues the extraneous offense evidence was inadmissible under rules 403 and 404(b) of the Texas Rules of Evidence. See TEX. R. EVID. 403, 404(b).

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002) (citing *Burden v.*

State, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001)); see *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). We will not reverse the trial court's ruling unless the ruling falls outside the zone of reasonable disagreement. *Torres*, 71 S.W.3d at 760; see *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). In applying the abuse of discretion standard, we may not reverse a trial court's admissibility decision solely because we disagree with it. See *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). We will not disturb a trial court's evidentiary ruling if it is correct on any theory of law applicable to that ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Discussion

1. Rule 404(b)

Rule 404(b) of the Texas Rules of Evidence states that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. TEX. R. EVID. 404(b). The rule, however, allows such evidence to be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Under Rule 404(b), extraneous-offense evidence may be admissible only if it tends to prove a material fact in the State's case, apart from its tendency to demonstrate an accused's general propensity for committing criminal acts. *Owens v. State*, 827 S.W.2d 911, 914 (Tex. Crim. App. 1992) (en banc).

Appellant argues that he was charged under section 30.02(a)(3), which does not require a defendant to have entered a habitation with the intent of committing theft.

Appellant further argues that since neither the State's case, nor the defensive strategy, placed intent at issue, the State did not need to introduce the extraneous offenses to prove intent. We disagree with appellant.

Appellant argued during the trial that the Lock burglary was committed when the residence was open to the public thereby giving appellant consent to enter and thereby reducing the crime of burglary to theft. As we previously discussed, the State, in order to prove burglary, necessarily needed to prove entry without the effective consent of the owner. See TEX. PEN. CODE ANN. § 30.02. The material fact necessary to prove a lack of effective consent was intent to commit theft prior to entry. See *Trevino*, 254 S.W.2d at 789; see also *Thommen v. State*, 505 S.W.2d 900, 902–03 (Tex. Crim. App. 1974) (citing *Trevino*, 254 S.W.2d at 788 (holding defendant entered store for purpose of committing theft)); *Gonzales v. State*, 50 S.W. 1018 (Tex. Crim. App. 1899) (holding same). We agree with the trial court that the extraneous offenses were admissible under rule 404(b). See TEX. R. EVID. 404(b).

2. Rule 403

Rule 403 of the Texas Rules of Evidence states that evidence, although relevant, 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. In reviewing Rule 403 objections, we consider 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.

Erazo v. State, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004); *Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1990) (en banc). In evaluating the need for the evidence, we must consider: (1) whether the proponent has other available evidence to establish the fact of consequence that the evidence is relevant to show; (2) the strength of the other evidence; and (3) whether the fact of consequence is related to an issue that is in dispute. *Erazo*, 144 S.W.3d at 495–96; *Montgomery*, 810 S.W.2d at 390. “Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial.” *Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010); *Montgomery*, 810 S.W.2d at 389. “It is only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value that Rule 403 bars its admission.” *Young v. State*, 283 S.W.3d 854, 877 (Tex. Crim. App. 2009).

We consider the evidence highly probative of intent. See *Erazo*, 144 S.W.3d at 489 (identifying probative value as first factor of Rule 403 review); *Montgomery*, 810 S.W.2d at 389–90 (same). We appreciate the potential impact this particular evidence could have on the jury. “All testimony and physical evidence are likely [to] be prejudicial to one party or the other.” *Davis*, 329 S.W.3d at 806. Given the nature of this evidence, the potential for impact could not be minimized, and the State took significant time developing the evidence by presenting witnesses and exhibits. See *Erazo*, 144 S.W.3d at 489 (holding potential to impress jury and time needed to develop evidence are two necessary factors of Rule 403 analysis); *Montgomery*, 810 S.W.2d at 390 (same).

On the other hand, this evidence was necessary to establish intent. See *Erazo*, 144 S.W.3d at 489 (last factor is proponent's need for evidence); *Montgomery*, 810 S.W.2d at 390 (same). Since the defense argued that, in the Bell burglary, appellant purchased the stolen property from the realtor, appellant's intent prior to entry was an issue of dispute. See *Erazo*, 144 S.W.3d at 495–96 (discussing three factors for evaluating need for evidence); *Montgomery*, 810 S.W.2d at 390 (same).

We conclude that the State's need for the extraneous-act evidence was high and hold that the probative value of the evidence was not substantially outweighed by its prejudicial effect. See TEX. R. EVID. 403; *Young* 283 S.W.3d at 877 (only clear disparity between prejudice and probative value warrants exclusion under Rule 403). The trial court's ruling on the admissibility of the extraneous-act evidence fell within the zone of reasonable disagreement. See *De La Paz*, 279 S.W.3d at 343. We overrule appellant's second issue.

IV. LIMITING INSTRUCTION

By his third issue, appellant contends that the jury charge is so defective that it constitutes egregious harm. Appellant asserts that the limiting instruction on the extraneous offense evidence is defective because: (1) it did not condition the jury's consideration of the extraneous offense evidence on the jury's first deciding that appellant committed the extraneous offenses beyond a reasonable doubt; and (2) it failed to instruct the jury on how to consider the extraneous-offense evidence if the jury found, beyond a reasonable doubt, that appellant had committed the extraneous offenses.

Limiting instructions are governed by Rule 105 of the Texas Rules of Evidence.

Rule 105 states that:

“[i]f the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.”

TEX. R. EVID. 105. A request for a limiting instruction must be made at the admission of the evidence. *Hammock v. State*, 46 S.W.3d 889, 893 (Tex. Crim. App. 2001). If the jury is required to consider evidence in a limited manner, then it must do so from the moment the evidence is admitted. *Id.* at 894. Allowing the jury to consider evidence for all purposes and then telling them to consider that same evidence for a limited purpose only is asking a jury to do the impossible. *Id.* If a limiting instruction is to be given, it must be when the evidence is admitted to be effective. *Id.*

Although appellant properly objected to the introduction of the extraneous offense testimony, he did not request a limiting instruction. The first opportunity to request a limiting instruction on the extraneous offense testimony would have been during the hearing outside the presence of the jury where the trial court ruled on the admissibility of the extraneous offense evidence. Once the trial court overruled appellant's objections to the extraneous offense evidence and identified the purpose of admissibility, it was apparent that a limiting instruction was proper. Because appellant did not request a limiting instruction at the first opportunity, the evidence was admitted for all purposes. *Id.* at 895. Therefore, a limiting instruction on the evidence was not within the law applicable to the case, and the trial court was not required to include a limiting instruction in the

charge to the jury. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 36.14. Since the trial court was not required to include a limiting instruction, it follows that including such an instruction does not constitute error. See *id.*; *Irielle v. State*, 441 S.W.3d 868, 879–80 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (concluding trial court did not err by giving limiting instruction that failed to track language of Rule 404(b) when defendant never requested limiting instruction).

Even if the trial court erred in giving a limiting instruction in the jury charge, the trial court's error would be reviewed for a showing of egregious harm because appellant never objected to the limiting instruction. See *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). Egregious harm occurs when the error is so fundamental as to deprive the defendant of a fair and impartial trial. *Beam v. State*, 447 S.W.3d 401, 407 (Tex. App.—Houston [14th Dist.] 2014, no pet.). This is a difficult standard to prove, and such a determination must be done on a case-by-case basis. *Id.* When deciding whether appellant suffered egregious harm, we review the entire jury charge, the state of the evidence including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *Id.* The harm must be actual, not merely theoretical. *Id.* Egregiously harmful errors are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive. *Id.*

The limiting instruction stated that “you may not consider such evidence, for any purpose other than to determine 'intent,' if any, unless you find and believe beyond a

reasonable doubt that the defendant committed such offenses or bad acts, if any." Appellant argues the limiting instruction failed to tell the jury how to use the extraneous offense evidence if the jury found, beyond a reasonable doubt, that appellant committed the extraneous offenses. We disagree with appellant's contention. The plain language of the instruction conditions the jury's consideration of the extraneous offense evidence on the jury's finding beyond a reasonable doubt that appellant committed the extraneous acts. Moreover, the extraneous offense evidence was admitted for all purposes. See *Hammock*, 46 S.W.3d at 895.

The trial court's error, if any, did not vitally affect appellant's defensive theory or make the State's case clearly and significantly more persuasive. As the State pointed out during closing arguments, there were reasons outside of the extraneous offense evidence to disbelieve appellant's theory. With respect to Bell, although appellant claims he purchased the stolen jewelry from the realtor who showed Bell's home, the realtor testified that the only face-to-face contact he had with appellant was the approximately four-hour period which included the showing. Moreover, the jury could have reasonably concluded that since appellant left Bell and the realtor to take another look at the home and later pawned Bell's property, appellant was the person who removed Bell's property from her home. With respect to Lock, the jury could have relied on Lock's realtor's testimony regarding the open house, the entry by an unknown person, and the inferences drawn from appellant's pawning of Lock's property in concluding that appellant committed the burglary of Lock's home.

We conclude that the charge, even if erroneous, did not deprive appellant of a fair trial or make the prosecution's case clearly and significantly more persuasive. Appellant's third issue is overruled.

V. COURT COSTS

By his fourth issue, appellant complains that the evidence is insufficient to support the trial court's order for appellant to pay \$244.00 in court costs included in the judgment in cause number F-1251946-V. Appellant argues that the clerk's record filed in this case does not include a proper bill of costs and that there is no indication that the bill of costs were ever filed in the trial court or brought to the attention of the trial court. In response, the State argues that the bill of costs, provided and signed by the district clerk, meets the requirements of the Texas Code of Criminal Procedure.

The Court of Criminal Appeals recently issued a "roadmap" for criminal cases regarding questions of court costs.⁴ See *Johnson v. State*, 423 S.W.3d 385, 388 (Tex. Crim. App. 2014). The court held, in relevant part: (1) a claim with respect to the basis of court costs need not be preserved at trial to be raised for the first time on appeal; (2) a record on appeal can be supplemented with a bill of costs; (3) a bill of costs need not be in the record to support a particular amount of court costs; and (4) the fact that most court costs are mandated by statute dispenses with the need for an ordinary sufficiency review. On appeal, we review the assessment of court costs to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost. *Id.* at 390.

⁴ Appellant concedes in his reply brief that *Johnson* is likely dispositive of the court costs issue. See *Johnson v. State*, 423 S.W.3d 385, 388 (Tex. Crim. App. 2014).

The clerk's record contains a document titled "bill of costs certification" and is comprised of four pages. The first page contains the seal of the District Clerk of Dallas County certifying that the document is a true and correct copy. It is signed by the deputy clerk. The next two pages list the itemized court costs that accrued in appellant's case and the payments received. The fourth page explains the abbreviations used throughout the document. Thus, the document contains the items of cost, is signed by an officer who is entitled to receive payment for the cost—the Dallas County District Clerk—and is certified by an officer of the court.

The document contained in the record is a bill of costs for the purposes of chapter 103 of the Texas Code of Criminal Procedure. See TEX. CODE CRIM. PROC. ART. 103.001–.006; *Johnson*, 423 S.W.3d at 393. The amount reflected in the "bill of costs certification" is the same amount the trial court ordered in the judgment. See *Johnson*, 423 S.W.3d at 395–96 (observing that although bill of costs is not required to sustain statutorily authorized and assessed court costs, it is the most expedient, and therefore, preferable method). We overrule appellant's fourth issue.

VI. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
11th day of June, 2015.