



NUMBER 13-14-00718-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

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JOSE MARTINEZ,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

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On appeal from the 94th District Court  
of Nueces County, Texas.

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## MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Perkes  
Memorandum Opinion by Chief Justice Valdez**

The jury found appellant Jose Martinez guilty in a two-count indictment of sexual assault of a child and attempted sexual assault of a child. See TEX. PENAL CODE ANN. §§ 22.01(a)(2)(A), 15.01(a) (West, Westlaw through 2015 R.S.). The trial court sentenced Martinez to twenty years in prison for sexual assault of a child and ten years in prison for attempted sexual assault of a child. The trial court ran the sentences in both counts

concurrently and assessed a \$10,000 fine for each count. By one issue, Martinez contends that the trial court erred in admitting evidence that he physically abused his wife under Texas Rule of Evidence 404(b). We affirm.

### **I. PERTINENT FACTS<sup>1</sup>**

Martinez was accused of sexually assaulting a minor on February 25, 2006 in Corpus Christi, Texas. The disputed issue at trial concerned the identity of the perpetrator. Although the complainant identified Martinez as the perpetrator at trial, Martinez's alibi theory was that he was living in Mexico by February 25, 2006 and therefore could not have committed a sexual assault in Corpus Christi on that day. To rebut Martinez's alibi, the State called Martinez's estranged wife, Natalie Lara, to testify that Martinez was living in Corpus Christi with another woman between 2006 and 2007. On cross examination, Martinez established that Lara "hated" him for cheating on her during their marriage and that his marital infidelity was the reason for their separation, suggesting that Lara was a biased witness for the State. Over Martinez's objection under rule of evidence 404(b), the State elicited testimony from Lara on redirect examination that she separated from Martinez not only because he cheated on her, but also because he physically abused her.

### **II. DISCUSSION**

On appeal, Martinez contends that Lara's testimony concerning physical abuse constitutes an inadmissible extraneous offense under rule 404(b).

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<sup>1</sup> Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. See TEX. R. APP. P. 47.4.

## **A. Applicable Law and Standard of Review**

To ensure that a defendant is tried only for the crime alleged in the State's indictment, uncharged extraneous offenses committed by the defendant are normally inadmissible at trial. See *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003).

This protection is reflected in the provision of rule 404(b), which states:

**Prohibited Uses.** Evidence 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.

TEX. R. EVID. 404(b).

One evidentiary caveat to this rule is that an otherwise inadmissible extraneous offense may become admissible if the defendant "opens the door" to such evidence. See *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). A defendant opens the door when his cross examination of a State's witness creates a false impression as to some fact, which the extraneous offense is meant to clarify. See *Houston v. State*, 208 S.W.3d 585, 591 (Tex. App.—Austin 2006, no pet.). We review a trial court's ruling concerning the admissibility of evidence challenged under rule 404(b) for an abuse of discretion. See *Moses*, 105 S.W.3d at 627.

## **B. Analysis**

### **1. No Error Occurred**

For purposes of our discussion, we assume without deciding that Martinez's physical abuse of Lara is extraneous to whether he sexually abused the complainant on February 25, 2006. See TEX. R. EVID. 404(b). However, as set out above, the trial court had discretion to admit the extraneous offense if Martinez opened the door to such evidence in cross examining Lara. See *Houston*, 208 S.W.3d at 591.

Here, Martinez elicited testimony from Lara on cross examination that she “hated” him for cheating and that they separated for that reason. The obvious import of this line of questioning was to impeach the credibility of Lara, the State’s witness, whose testimony contradicted Martinez’s alibi theory. But in doing so, Martinez created the false impression that Lara separated from him for one reason only—i.e., marital infidelity. To correct this false impression, Lara was allowed to state the other reason why she separated from Martinez—i.e., physical abuse. See *id.* Therefore, we conclude that the trial court did not abuse its discretion in finding that Martinez’s cross examination of Lara opened the door to the evidence about which he complains. See *id.* (determining that a false impression left by defendant’s cross examination opened the door for the State to correct the misimpression with extraneous offense); see also *Coutta v. State*, 385 S.W.3d 641, 663 (Tex. App.—El Paso 2012, no pet.) (same); *Stanley v. State*, No. 03-10-00798-CR, 2012 WL 3871748, at \*4 (Tex. App.—Austin Aug. 14, 2012, no pet.) (mem. op., not designated for publication) (same); *Johns v. State*, No. 14-11-00420-CR, 2012 WL 1899195, at \*8 (Tex. App.—Houston [14th Dist.] May 24, 2012, no pet.) (mem. op., not designated for publication) (same); *Rudd v. State*, No. 05-07-00447-CR, 2008 WL 2955157, at \*4 (Tex. App.—Dallas Aug. 4, 2008, pet. ref’d) (mem. op., not designated for publication) (same); *Austad v. State*, No. 10-07-00314-CR, 2008 WL 4594355, at \*4 (Tex. App.—Waco Oct. 15, 2008, no pet.) (mem. op., not designated for publication).

## **2. If Error Occurred, the Error was Harmless**

Furthermore, even if the trial court erred in admitting evidence that Martinez physically abused Lara, Martinez would be entitled to a new trial only if reversible harm is shown on this record. See *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010).

The erroneous admission of evidence is nonconstitutional error. *See id.* A nonconstitutional error “that does not affect [an appellant’s] substantial rights must be disregarded.” TEX. R. APP. P. 44.2(b). “[S]ubstantial rights are not affected by the erroneous admission of evidence ‘if [we], after examining the record as a whole, [are] fair[ly] assur[ed] that the error did not influence the jury, or had but a slight effect.’” *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). Our harm analysis takes into account the entire record, including the character of the alleged error, how the error might be considered in connection with other evidence in the case, whether the State emphasized the error, and the evidence of the appellant’s guilt. *See id.*

Here, we acknowledge that the State arguably injected an unprovoked extraneous offense into Martinez’s trial—namely, that he physically abused his estranged wife. However, in determining how this evidence influenced the jury, we cannot overlook the fact that Martinez volunteered his marital infidelity—an extraneous matter—to establish that Lara’s hatred and resentment made her a biased witness for the State. Thus, Martinez’s own impeachment strategy brought an extraneous matter unrelated to physical abuse to the jury. In assessing harm, we also cannot ignore the fact that the evidence of physical abuse actually advanced Martinez’s alibi theory—because it provided another reason for the jury to believe that Lara’s hatred and resentment made her a biased witness for the State. Considering the context in which the jury received the extraneous offense, we are fairly assured that it reinforced Martinez’s alibi theory at least as much as it impugned his character. *See id.* (providing that a harm analysis should take into

account the nature of the alleged error and how the error might be considered in connection with other evidence).

Furthermore, the State did not emphasize the extraneous offense throughout the trial, for example, by introducing pictures of Lara's physical injuries from the abuse or by referencing it during closing argument. *See id.* at 356. (recognizing that whether the State emphasized the error can be a factor in assessing harm).

Finally, the evidence of Martinez's guilt was substantial. Most importantly, the complainant positively identified Martinez in court as the same person who sexually assaulted her on February 25, 2006, and the complainant recounted details about the sexual assault that were consistent with the allegations contained in the State's indictment. *See id.* at 359 (holding that erroneously admitted evidence was harmless, in part, because there was "substantial" evidence of the defendant's guilt).

### **3. Summary**

We find that the trial court did not abuse its discretion in admitting the extraneous offense because Martinez's cross examination of Lara opened the door to such evidence. *See Houston*, 208 S.W.3d at 591. Further, even if the trial court did err in admitting the extraneous offense, we are fairly assured that the error did not influence the jury, or had but a slight effect. *See Motilla*, 78 S.W.3d at 355. Therefore, the error, if any, was harmless. *See id.*

### **III. CONCLUSION**

We affirm the judgment of the trial court.

**/s/ Rogelio Valdez**  
ROGELIO VALDEZ  
Chief Justice

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

Delivered and filed the  
30th day of June, 2016.