NUMBER 13-15-00004-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ALICIA ESQUIVEL DELGADO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 139th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

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

In what began as a trial for murder, the jury found appellant Alicia Delgado guilty of manslaughter in connection with the beating death of her sixty-one year old father, Rudy Delgado. *See* TEX. PENAL CODE ANN. § 19.04(a) (West, Westlaw through 2015 R.S.). The trial court sentenced appellant to ten years in prison. By seven issues,

appellant contends that the trial court made several erroneous evidentiary rulings throughout the trial. We affirm.

I. BACKGROUND

The jury heard evidence that in November 2012, appellant moved from California to McAllen, Texas with her two children to permanently live with Rudy and Zulema Delgado, Rudy's wife of twenty years. Appellant, who was thirty-one years old at the time, had not seen her father in ten years; however, the seed of their estrangement began twenty years earlier, when Rudy divorced appellant's mother and remarried Zulema.

The jury heard evidence that Rudy was not the same person, health-wise, since appellant last saw him. Between 2009 and 2012, Rudy survived nine strokes and two motorcycle accidents that required him to be hospitalized for significant intervals of time. Rudy experienced weakness and tremors from the strokes, and he carried a limp from the motorcycle accidents. His hands occasionally shook, and his mouth was crooked.

The jury heard evidence from various sources that in early January 2013, Zulema moved out of the house because she and appellant were not getting along. Shortly after Zulema moved out, Rudy became suicidal and had to be briefly committed to a mental institution to address his depression and anxiety.

Against this backdrop, the State presented evidence that, on July 28, 2013, appellant physically fought with Rudy during a night of drinking. The police officer who responded to the scene of the fight testified that he found Rudy on the floor, still alive but requesting medical attention. The officer provided the following description of Rudy's physical appearance:

> He had small cuts on his face. His—both his eyes were very swollen, massive swelling. He also had blood all over his face. He was also bleeding from the back of the head. Like I said, he had sustained severe injuries to his face.

Photographs admitted into evidence corroborated the officer's observation regarding Rudy's appearance. In contrast, photographs admitted into evidence showed that appellant walked away from the fight relatively unscathed, with minor scratches and a bruise on her left cheek. Rudy was taken to the hospital and died shortly thereafter from complications related to blunt-force abdominal trauma.

In an interview with the police after the fight, appellant stated that the fight started abruptly when Rudy allegedly hit her after she verbally goaded him to hit her. According to appellant, after Rudy hit her, a fight ensued throughout the house until Rudy fell to the floor. Appellant admitted that after Rudy fell, she stomped and kicked him repeatedly in the head and stomach area. Appellant stated that while Rudy was on the floor, he complained that he had lost feeling in his legs and was unable to get up.[1] The jury heard evidence that although Rudy repeatedly pleaded with appellant to call for medical help, appellant waited two hours before making the call.

At trial, appellant did not dispute that a fight occurred and that Rudy died as a result of the fight. Instead, the issue for the jury was whether appellant acted in self-defense. Appellant claimed that Rudy was the first aggressor and that she was simply defending herself. To support this claim, appellant offered into evidence Rudy's medical records, which showed, among other things, that Rudy had a history of alcohol and drug abuse and suffered from depression, anxiety, and post-traumatic stress from his years of service

[1] Medical testimony showed that the abdominal trauma probably caused a blood clot, which affected the flow of blood to Rudy's legs.

in the Navy. According to appellant, these factors coalesced, transforming Rudy into a violent and aggressive person on July 28, 2013. In response to appellant's claim of self-defense, the State argued that there was no evidence that Rudy had displayed physical violence toward anyone, much less his family, in the years since he remarried Zulema.

After both sides closed, the jury rejected the State's charge of murder, rejected appellant's claim of self-defense, and instead found her guilty of the lesser-included offense of manslaughter. This appeal followed.

II. DISCUSSION

On appeal, appellant contends that the trial court erred in admitting seven pieces of evidence. Appellant's brief assigns each piece of evidence its own issue. We address each of the seven issues below in the order it appears in her appellant brief.

A. Relationship Between Appellant and Zulema

By her first issue, appellant contends the trial court erred in admitting Zulema's testimony that she and appellant did not get along. Appellant argues that her relationship with Zulema was irrelevant to any material issue in the case. However, appellant's relationship with Zulema is referenced in Rudy's medical records, which appellant introduced into evidence at trial. A complaint about the admission of evidence is waived on appeal when the same evidence is introduced from another source without objection—here, Rudy's medical records. *See Womble v. State*, 618 S.W.2d 59, 62 (Tex. Crim. App. 1981). We overrule appellant's first issue.

B. Motorcycle

By her second issue, appellant contends that the trial court erred in admitting evidence that she attempted to claim ownership of Rudy's motorcycle after he died.

Specifically, appellant argues that this evidence constitutes inadmissible character evidence under rule of evidence 404(b). *See* TEX. R. EVID. 404(b). However, at trial, appellant did not object to the evidence made the basis of her second issue under rule 404(b); instead, appellant's trial objection was under rule 401. *See* TEX. R. EVID. 401. A point of error on appeal must comport with the objection made at trial or it is waived. *Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *Lampkin v. State*, 470 S.W.3d 876, 896 (Tex. App.—Texarkana 2015, pet. ref'd). Because appellant's complaint on appeal does not comport with the objection she made at trial, we overrule appellant's second issue as waived.[2]

C. Rudy's Relationship with Appellant's Children

By her third issue, appellant contends that the trial court erred in admitting testimony that Rudy loved his grandchildren. Appellant argues that Rudy's positive relationship with his grandchildren was irrelevant to any material issue in the case. However, Rudy's positive relationship with his grandchildren is referenced in his medical records, which appellant admitted into evidence at trial. As with appellant's first issue, a complaint about the admission of evidence is waived on appeal when the same evidence is introduced from another source without objection—here, Rudy's medical records. *See Womble*, 618 S.W.2d at 62. We overrule appellant's third issue.

[2] To the extent that appellant's contention on appeal is that the complained-of evidence is irrelevant under rule 401, we disagree. Evidence that appellant attempted to assert ownership of her father's motorcycle days after he died might tend to show her motive to cause her father's death. *See* TEX. R. EVID. 401 (providing that evidence is relevant 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"); *see also Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991) (observing that "[e]vidence which demonstrates the presence of a motive on the part of the accused is admissible if it is relevant as a circumstance tending to prove the commission of the offense").

D. Appellant's Relationship with Her Stepsister, Zulema's Daughter

By her fourth issue, appellant contends that the trial court erred in admitting evidence that she did not get along with her stepsister, Zulema's adult daughter. According to appellant, evidence that she and her stepsister were not "buddy-buddy" injected an "inflammatory" and "irrelevant" matter into the trial. As we understand her fourth issue, appellant appears to be arguing that this evidence was inadmissible under rules 401 and 403 of the Texas rules of evidence. *See* TEX. R. EVID. 401, 403. However, even if we were to assume that the trial court erred in admitting this evidence, the remedy for the trial court's error is a new trial only if the evidence had more than a slight effect or influence on the jury. *See* TEX. R. APP. P. 44.2(b); *see also Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007); *Solomon v. State,* 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). In making this determination, we consider "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). We also consider other factors, including closing arguments. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

In this case, appellant requests a new trial because the jury heard evidence that she did not get along with Zulema's daughter. However, by admitting Rudy's medical records into evidence, appellant had already invited the jury to consider that she did not get along with Zulema. In view of what the jury already heard regarding appellant's relationship with Zulema, we fail to see how the jury could have been unduly influenced to reject self defense and convict simply because she did not get along with Zulema's

daughter. *See Morales*, 32 S.W.3d at 867 (directing reviewing courts to consider the character of the alleged error and how it might be considered in connection with other evidence in the case). Furthermore, in closing argument, the State made no mention of appellant's relationship with Zulema's daughter, which indicates that the State did not emphasize the alleged error or make it a focal point of the case. *See Motilla,* 78 S.W.3d at 356 (observing that the State's emphasis of the error at trial is a factor to be considered in a harm analysis); *King v. State*, 953 S.W.2d 266, 272 (Tex. Crim. App. 1997) (same). After reviewing the entire record, we are fairly assured that the trial court's error, if any, did not influence the jury's verdict to such extent that it merits a new trial. *See* TEX. R. APP. P. 44.2(b). We overrule appellant's fourth issue.

E. Appellant's Relationship with Rudy

By her fifth issue, appellant contends that the trial court erred in admitting Zulema's daughter's testimony that sometime before the fight, appellant called Rudy a "faggot" who lacked "balls" and, referring to Zulema, told him to "control his bitch."[3] We review the trial court's evidentiary ruling for an abuse of discretion, reversing only if the trial court's decision fell outside the zone of reasonable disagreement. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). Appellant's objection to this evidence at trial was made under rules 401 and 403 of the Texas rules of evidence. We address the trial court's ruling under each rule separately below.

1. Rule 401

Rule 401 defines relevant evidence as evidence that has a tendency to make a fact of consequence to the action more or less probable than it would be without the

[3] The record does not reveal when appellant made these remarks.

evidence. TEX. R. EVID. 401. The fact of consequence to appellant's trial was whether she acted in self-defense. Evidence that she insulted Rudy sometime before the fight occurred highlights the nature of their relationship and tends to make it more probable that she, as the State argued, did not act in self-defense but instead provoked the fight. *See id*.; *see also* TEX. CRIM. PROC. CODE ANN. § art. 38.36 (West, Westlaw through 2015 R.S.) (allowing the State in a murder prosecution to offer testimony concerning the previous relationship existing between the defendant and the deceased, together with all relevant facts and circumstances showing the defendant's state of mind at the time of the offense). We cannot say that the trial court's decision regarding the relevance of this evidence fell outside the zone of reasonable disagreement. *See Montgomery*, 810 S.W.2d at 391. Therefore, the trial court did not err in overruling appellant's objection under rule 401. TEX. R. EVID. 401.

2. Rule 403

Rule 403 authorizes a trial court to exclude evidence that is otherwise relevant if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403.

> [A] trial court, when undertaking a Rule 403 analysis, must balance (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). "[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.'" *Hammer v. State*, 296 S.W.3d 555, 568–69 (Tex. Crim. App. 2009) (quoting *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001)). We now turn to the *Gigliobianco* factors set out above.

In this case, the trial court could have reasonably concluded that appellant's remarks to Rudy carried considerable probative force, because each showed appellant's treatment of and attitude toward Rudy during the eight-month period preceding the fight. This evidence tended to make it more probable that appellant provoked the fight and provided the jury additional information to assess the credibility of her statement to the police regarding how the fight started. The trial court also could have reasonably concluded that the State's need for the evidence was considerable, because nobody, other than appellant's young children, actually witnessed the fight and only appellant survived to provide an account of what happened. While the language appellant used carried considerable probative force, we recognize the remarks were laced with derogatory references to homosexuals and women. Although the remarks were inflammatory, the trial court could have reasonably concluded that they were necessary for the jury to determine whether appellant's claim of self-defense was credible, given her thoughts about Rudy. Moreover, appellant's remarks did not have a tendency to confuse, mislead, or distract the jury; instead, the evidence highlighted the nature of appellant's relationship with Rudy and provided a context for the jury to assess the central issue of whether appellant acted in self-defense. *See Gigliobianco*, 210 S.W.3d at 641–42. Finally, the evidence concerning appellant's comments accounts for only a small portion

of Zulema's daughter's testimony and an even smaller portion of the entire trial record. Thus, the State did not consume an inordinate amount of time to develop the evidence. *See id.*

After considering all of the factors enumerated in *Gigliobianco*, we find no "clear disparity" between the degree of unfair prejudice arising from appellant's insults and their probative value. *See* 210 S.W.3d at 641–42*; Conner*, 67 S.W.3d at 202. Accordingly, we conclude that the trial court did not abuse its discretion in overruling appellant's objection to the admissibility of this evidence under rule 403. *See* TEX. R. EVID. 403; *see also Montgomery*, 810 S.W.2d at 391. We overrule appellant's fifth issue.

F. Facebook Posts

By her sixth issue, appellant contends that the trial court erred in admitting several messages that she posted on her Facebook page under rules 401 and 403. *See* TEX. R. EVID. 401, 403.

In one post, written before Rudy's death, appellant expressed happiness to be reunited with Rudy after ten years of separation.[4] In another post, written after Rudy's death, appellant expressed confidence that Rudy is an angel in heaven protecting her from evil.[5] We need not determine whether the trial court erred in admitting these Facebook messages because we fail to see, and appellant fails to explain, how they were

[4] The Facebook post reads as follows: "The day that I have been happening [sic] for has happened. I haven't seen or heard from my [sic] in over ten years. Thanks to Facebook[,] my cousin found me now I'm going to have my dad and my family back in my life."

[5] The Facebook post reads as follows: "Daddy be my angel to protect for the evil before me. You are my angel, dad. You are in heaven looking down at those who try to hurt me and speak lies of me. I came out here for you and nothing else. So those who try to fight me cause of greed, daddy, they can have it. In the end, we will be together and material things don't mean anything to us. All I want is you daddy. I promise dad that you live within me and I won't let those get away. Cuz I'm a Delgado. More they lie, the more I got us daddy. I have an army on standby for us—by us—for us."

anything but innocuous. Having reviewed the entire record, we are fairly assured that the Facebook posts did not influence the jury to reject appellant's claim of self-defense or convict her of manslaughter. *See* TEX. R. APP. P. 44.2(b). We overrule appellant's sixth issue.

G. Delayed 911 Call

By her seventh issue, appellant contends that the trial court erred in admitting evidence that she waited two hours to call 911 after fighting with Rudy. Appellant asserts that this evidence was extraneous to the charged offense and was therefore inadmissible under rule 404(b). *See* TEX. R. EVID. 404(b). We review the trial court's ruling for an abuse of discretion. *See Prible v. State,* 175 S.W.3d 724, 731–32 (Tex. Crim. App. 2005).

Rule 404 generally provides that evidence of a crime, wrong, or other act is not admissible to prove the defendant's propensity to commit the charged offense unless the evidence is offered for a non-propensity purpose. *See* TEX. R. EVID. 404(b). One relevant example of evidence that is not offered to show the defendant's propensity is "same-transaction contextual evidence." *Prible*, 175 S.W.3d at 731–32. This type of evidence is offered to show the relevant surrounding facts and circumstances of the charged offense, including the events occurring immediately before and after the crime. *See id.*; *see also* 24A TEX. JUR. 3D CRIMINAL PROCEDURE: TRIAL § 682 (citing *Williams v. State*, 161 S.W.3d 680 (Tex. App.—Beaumont 2005, no pet.)).

Here, the trial court could have reasonably determined that appellant's delayed 911 call was admissible to show the relevant circumstances occurring immediately after appellant's fight with Rudy. *See Prible*, 175 S.W.3d at 731. This evidence explained to the jury why there was a two-hour gap between the time of the fight and the time Rudy

was taken to the hospital where he died. To have excluded this evidence would have left an unexplained two-hour gap in the circumstances surrounding the offense. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (observing that "events do not occur in a vacuum, and the jury has a right to hear what occurred immediately" before and after the commission of the charged act so that it may properly evaluate the evidence); *LaPointe v. State*, 196 S.W.3d 831, 837–38 (Tex. App.—Austin 2006) (admitting defendant's extraneous acts as same-transaction contextual evidence because it was necessary to explain a twelve-hour gap in the circumstances surrounding the offense), *aff'd*, 225 S.W.3d 513 (Tex. Crim. App. 2007); *see also Johnson v. State*, No. AP-77,030, 2015 WL 7354609, at *34 (Tex. Crim. App. Nov. 18, 2015) (not designated for publication) (admitting the defendant's extraneous acts committed not more than two hours after the charged offense as same-transaction contextual evidence), *cert. denied*, 136 S. Ct. 2509 (2016). We conclude that the trial court did not abuse its discretion in admitting evidence that appellant called 911 two hours after fighting with Rudy as same-transaction contextual evidence.[6] *See* TEX. R. EVID. 404(b); *see also Prible*, 175 S.W.3d at 731–32. We overrule appellant's seventh issue.

III. CONCLUSION

We affirm the judgment of the trial court.

[6] Appellant also argues that the State did not provide her reasonable notice of its intent to use evidence of her delayed 911 call under rule 404(b)(2)'s notice provision. *See* TEX. R. EVID. 404(b)(2) (providing that upon timely request by the defendant, the prosecutor must provide "reasonable notice before trial that the prosecution intends to introduce [extraneous evidence]—*other than that arising in the same transaction*—in its case-in-chief") (emphasis added). However, as shown by the portion of the rule emphasized above, this notice provision does not apply to the same-transaction contextual evidence. Therefore, to the extent that appellant argues that the State failed to provide reasonable advance notice, such notice was not required in this case. *See id*.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

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

Delivered and filed the
29th day of September, 2016.