# NO. 12-11-00028-CR

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

| | | |
|---|---|---|
| ***DAVID LEON MUNSINGER, APPELLANT*** | ***§*** | ***APPEAL FROM THE THIRD*** |
| ***V.*** | ***§*** | ***JUDICIAL DISTRICT COURT*** |
| ***THE STATE OF TEXAS, APPELLEE*** | ***§*** | ***ANDERSON COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

David Leon Munsinger appeals his conviction for aggravated assault, aggravated kidnapping, and aggravated sexual assault. In four issues, Appellant argues that the trial court erred in admitting certain pieces of evidence, in overruling his request for a mistrial, and in allowing certain cross examination of a witness. We affirm.

## BACKGROUND

Appellant and Torri Bautista had a volatile dating relationship that Torri had been trying to end. Torri worked at a pizza shop, and she was frustrated with Appellant because he kept coming by the shop and, she felt, harassing her. One night, she left work and went to find Appellant. They argued when she found him, and Appellant hit her and pushed her into the back seat of her car. Then he, along with his friend Michael Fitzgerald, drove Torri's car and went to a "bootlegger" to buy beer. Torri began drinking with the men as they drove around and made other stops. Finally, the three ended up at a lake where Fitzgerald and Appellant beat Torri, and Appellant sexually assaulted her. They drove back to town, and Torri was able to escape by running from the car, hiding on the back porch of a house, and asking the residents for help.

An Anderson County grand jury indicted Appellant for the felony offenses of aggravated

assault, aggravated kidnapping, and aggravated sexual assault. Appellant pleaded not guilty. At his trial, the State offered numerous letters written from Appellant to Torri while he was in jail awaiting trial. The two had continued their tumultuous relationship after the assault in May.[1] Appellant had initially made bail on these charges, and he and Torri had a daughter together following the assault. He was later jailed, and Appellant wrote letters to Torri that were in turns supplicating and condemning, threatening and conciliatory. In the letters, Appellant asked Torri not to cooperate with the authorities and wrote out affidavits of nonprosecution for her to sign. The State also offered a protective order that had been issued in Torri's favor. And the jury also heard from Torri, from a disinterested eyewitness, and from police officers and medical personnel. Numerous photographs of Torri's injuries were admitted. The jury found Appellant guilty as charged and assessed punishment of imprisonment for fifty years on the kidnapping and sexual assault charges and fifteen years on the aggravated assault charge with a fine of $10,000 on each charge. This appeal followed.

## ADMISSION OF EVIDENCE

In his first and second issues, Appellant argues that the trial court erred in allowing into evidence letters written to Torri and a protective order granted by another court. Specifically, Appellant argues that some of the exhibits are irrelevant, others contain references to extraneous offenses, and others are more prejudicial than probative.

### Standard of Review

Generally, we review a trial court's decision to admit evidence under an abuse of discretion standard. *See* ***Martin v. State***, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005); ***Willover v. State***, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. ***Id***. We will not reverse a trial court's ruling admitting evidence unless that ruling falls outside the zone of reasonable disagreement. *See* ***Burden v. State***, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001).

To determine whether evidence is admissible, a trial court must first determine whether the evidence is relevant. *See* ***Montgomery v. State***, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990)

[1] Appellant bonded out of jail in May 2009 following his arrest. The indictment was returned in July 2009. Appellant's bondsman filed an affidavit for release of surety in December 2009, and Appellant was arrested on an alias capias in April 2010. The trial was held in October 2010.

(op. on reh'g). Evidence is relevant if it has 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. TEX. R. EVID. 401. Evidence that is not relevant is inadmissible. TEX. R. EVID. 402.

Rule 404(b) of the Texas Rules of Evidence bars "evidence of other crimes, wrongs, or acts" when that evidence is admitted to "prove the character of a person in order to show that he acted in conformity therewith." Such evidence may, however, be admissible for other purposes, such as "proof of motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." TEX. R. EVID. 404(b). Evidence is relevant for Rule 404(b) purposes if it tends to (1) establish an elemental fact, (2) establish an evidentiary fact leading inferentially to an elemental fact, or (3) rebut a defensive theory. *See* ***Montgomery***, 810 S.W.2d at 387. An evidentiary fact that stands wholly unconnected to an elemental fact is not a fact of consequence and thus is not relevant. *See* ***Rankin v. State***, 974 S.W.2d 707, 710 (Tex. Crim. App. 1996).

**Analysis**

The State offered and the trial court admitted twenty-one letters written by Appellant and mailed to Torri. Appellant advanced a number of objections to the letters. Specifically, although not all objections were raised to each exhibit, Appellant objected on the basis that he had not been provided the exhibits prior to trial, that the exhibits included references to extraneous acts, that the exhibits referenced plea negotiations, that the exhibits were irrelevant, or that the exhibits were unduly prejudicial. The trial court gave Appellant time to review the exhibits before they were admitted, and the court sustained objections to exhibits that contained references to other charges Appellant faced. Also, the State agreed to remove references to plea offers or plea negotiations.

On appeal, Appellant makes a broad argument that the exhibits were "an attempt to attack the character of Appellant contrary to [Texas Rule of Evidence] 404." He also argues, again broadly, that the exhibits were irrelevant or unduly prejudicial. We disagree.

Rule of Evidence 404(b) forbids the introduction of evidence of other crimes, wrongs, or acts for the purpose of showing that a person acted in conformity with a particular character trait. *See* TEX. R. EVID. 404(b); ***Tate v. State***, 981 S.W.2d 189, 192 (Tex. Crim. App. 1998) ("In general, evidence of a person's character may not be used to prove that she behaved in a particular way at a given time."). But these letters from Appellant to Torri were not admitted to show, and did not tend to show, that he acted in conformity with his character when he assaulted her. Indeed, the

letters do not show that he is generally a bad person or that he is a violent person. Rather, they show that he was trying, by alternately threatening and cajoling her, to convince Torri not to testify against him.

Some of the correspondence is actually consistent with his not being guilty of the offense because he denies that anything untoward occurred. Some of the correspondence serves, arguably, as a partial admission of the offense inasmuch as Appellant's entreaties focus on persuading Torri to have the charges dropped and do not forcefully suggest that the truth is helpful to his defense. *Cf.* ***Simmons v. State***, 282 S.W.3d 504, 509 (Tex. Crim. App. 2009) (letter to accomplice could be understood as a threat to witness or as an expression of frustration that witness had unjustly implicated the defendant in the offense) Furthermore, Appellant, in his letters, only specifically denies a sexual assault or that a gun was involved.

The State had a need to explain the relationship between Torri and Appellant. The two had a tumultuous relationship and had a child together after the offense. Torri explained how it came to be that she resumed the relationship after the assault. The letters helped explain the dynamics of their relationship and were relevant for that reason. Appellant has not identified specific instances of prior misconduct contained in the letters that were introduced or any circumstances that would lead to the suggestion that he acted in conformity with his character in committing this offense. Nor has Appellant shown that the letters were more prejudicial than probative. Accordingly, the trial court did not err in allowing Appellant's letters to be admitted. We overrule Appellant's first issue.

Appellant argues that the protective order admitted by the trial court was irrelevant and that "a more specific and proper objection [to raise in the trial court] would have been to the [hearsay] nature of the exhibit." He also argues that it is evidence of an extraneous offense and that its probative value is outweighed by its prejudicial nature. Of course, Appellant may only advance appellate arguments that are preserved by a contemporaneous objection in the trial court. *See* TEX. R. APP. P. 33.1. The objections to the protective order at trial were that it was not sworn to by the applicant, that it was an extraneous matter, and that Appellant did not receive notice of the State's intent to offer it.

The State responds that the protective order does not reference an extraneous event at all, but that it was sought on the basis of the very acts for which Appellant was on trial. The protective order was granted a month after the assault, and so it seems reasonable to conclude that

it was granted because of the assault. The State certainly did not argue to the jury that it represented additional misconduct by Appellant. And we do not understand the State to be arguing that it may introduce a collateral finding by another court as evidence of the substantive charges for which a defendant is on trial. Appellant did not oppose the entry of the protective order. In fact, the exhibit shows that he agreed to the "entry of the foregoing Protective Order and approve[d] all terms stated in the order."

The only objection raised at trial that is raised on appeal is that the protective order pertained to an extraneous matter. As we explained above, evidence of extraneous wrongs is not admissible to show that a defendant acted in conformity with his previously demonstrated character. This protective order is not evidence of a prior bad act and did not have the tendency to show that Appellant acted in conformity with a character trait. Rather, it was an agreed order entered after the alleged assault. It was not strictly germane to any contested issue, but it was not an extraneous offense, and so the trial court did not err in overruling Appellant's objection that it was inadmissible pursuant to Rule 404(b). We overrule Appellant's second issue.

## MOTION FOR MISTRIAL

In his third issue, Appellant argues that the trial court erred in overruling his motion for mistrial when the State did not redact information from an exhibit regarding plea negotiations.

### Standard of Review and Applicable Law

We review the denial of a motion for mistrial under the standard of abuse of discretion. ***Simpson v. State***, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). A trial court does not abuse its discretion if its decision is within a zone of reasonable disagreement. *See* ***Montgomery***, 810 S.W.2d at 391. Furthermore, mistrial is appropriate only for "highly prejudicial and incurable errors." *See* ***Wood v. State***, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000).

### Analysis

Evidence about plea negotiation is generally inadmissible because such evidence is irrelevant or because the prejudicial effect of the evidence is greater than any probative value. *See* ***Bowley v. State***, 310 S.W.3d 431, 435 (Tex. Crim. App. 2010) (citing ***Prystash v. State***, 3 S.W.3d 522, 527–28 (Tex. Crim. App. 1999) and ***Smith v. State***, 898 S.W.2d 838, 843-44 (Tex. Crim. App. 1995)); *see also* TEX. R. EVID. 410 (prohibiting admission of statements made during plea negotiations). In response to Appellant's objections to the introduction of the letters he had

written, the State agreed that it would redact statements in the letters about plea negotiations.

One of the statements was not redacted before it was provided to Torri to read to the jury. She read the following passage:

> As soon as you get this letter, baby, call my lawyer and ask him what is going to - - what is he gonna do? Did you turn both of them affidavits in? He told me you gave him some papers. Always, he half a** bullsh*ting cuz he ain't done sh*t. Tell him I need a court date quick. On Protective Order, they offered me 25 years.

Appellant's counsel objected, asked that the testimony about the plea offer be stricken, asked for the jury to be admonished not to consider the statement, and asked for a mistrial. The trial court granted all the relief sought but denied Appellant's motion for a mistrial.

In his brief argument, Appellant asserts that the trial court's admonishment "does not remove the prejudicial effect of the matter being read to that jury." Generally, a swift admonishment is sufficient to remove the taint of improperly admitted evidence unless the evidence was "clearly calculated to inflame the minds of the jury" or "it would be impossible to remove the harmful impression from the jury's mind." *See* ***Young v. State***, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009).

We hold that the trial court did not abuse its discretion in overruling Appellant's motion for mistrial. This evidence was admitted inadvertently. We do not think it would be a surprise to the jury that the State had offered to resolve the case if Appellant would plead guilty. The short statement about a plea offer is not an indication that Appellant had agreed to accept a plea or that he had conceded that he was guilty of the charged offenses. This is not the kind of evidence that would inflame the jury or that jurors would find impossible to remove from their mind. In sum, while the evidence should not have been placed before the jury, the trial court acted within its discretion when it concluded that an admonishment was sufficient to remove any improper suggestion. We overrule Appellant's third issue.

## CROSS EXAMINATION

In his fourth issue, Appellant argues that the trial court erred in allowing the State to ask a defense witness whether his brother was in jail and about the specific charges his brother faced. Specifically, he argues that Texas Rule of Evidence 608(b) excludes evidence of specific instances of conduct for the purpose of attacking or supporting the credibility of a witness.

Texas Rule of Evidence 608(b) allows the credibility of a witness to be attacked or supported by evidence in the form of opinion testimony but does not, generally, permit inquiry into specific instances of conduct for the purpose of cross examination of a witness. *See* TEX. R. EVID. 608(b); ***Hammer v. State***, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009). As the court discussed in ***Hammer***, the limitation imposed by Rule 608(b) is less than an impermeable barrier, and Rule 608(b) must be read along with other rules of evidence when considering if prior misconduct of the witness could be inquired into on cross examination. *See* ***Hammer***, 296 S.W.3d at 564–67; *see also* TEX. R. EVID. 613(b) (creates exception to Rule 608(b)); ***Billodeau v. State***, 277 S.W.3d 34, 40 (Tex. Crim. App. 2009).

In this case, the State asked a defense witness if his brother was in jail. Appellant objected on the basis that such evidence was irrelevant. The State argued that the evidence was admissible because "it goes to bias." Specifically, the State argued that the witness could be biased because his "little brother is facing charges from the State." The trial court overruled the objection, and the witness testified that his brother was facing "gang rape, and possession" charges.

The only argument Appellant made in the trial court was that this evidence was irrelevant. The only argument advanced on appeal is that the evidence is forbidden by Rule 608(b) because it was an attack on a witness on the basis of specific misconduct by another. The complaint on appeal is not preserved for our consideration because Appellant did not make a contemporaneous objection based on Rule 608(b). *See* TEX. R. APP. P. 33.1(a)(1)(A); ***Mosley v. State***, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) (op. on reh'g); ***Loredo v. State***, 32 S.W.3d 348, 352 (Tex. App.–Waco 2000, pet. ref'd). We overrule Appellant's fourth issue.

## DISPOSITION

Having overruled Appellant's four issues, we ***affirm*** the judgment of the trial court.

**BRIAN HOYLE**
Justice

Opinion delivered September 7, 2011.
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(DO NOT PUBLISH)