NO. 12-11-00222-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MOSES AARON TORRES, APPELLANT	***§***	***APPEAL FROM THE THIRD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Moses Aaron Torres was convicted of evading arrest with a vehicle with a previous conviction. Appellant raises four issues on appeal. We affirm.

BACKGROUND

An Anderson County grand jury indicted Appellant for the third degree felony offense of evading arrest with a vehicle with two previous convictions for evading arrest. The State filed a notice of enhancement prior to trial, increasing the punishment range from a third degree felony to habitual offender status. After the jury found Appellant guilty, he pleaded true to the enhancement paragraphs, and the jury assessed punishment at fifty-five years of imprisonment.

ADMISSIBILITY OF EVIDENCE

In his first, second, and third issues, Appellant contends that the trial court erred in admitting State's exhibits 6, 7, and 9. Exhibits 6 and 7 were judgments of two prior evading arrest convictions, and exhibit 9 was the last page of a judgment of conviction for the offense of assault. All of these exhibits were introduced during the guilt-innocence phase of the trial because the prior

evading arrest conviction was an element of the offense.[1] Appellant reasons in his argument that State's exhibit 9 was inadmissible, and therefore State's exhibits 6 and 7 were also inadmissible. Thus, in his fourth issue, Appellant challenges the sufficiency of the evidence, contending that the State failed to prove the prior convictions for evading arrest. Appellant argues his first three issues together. We will address the first and second issues together and the third and fourth issues separately.

Standard of Review

We review a trial court's decision to overrule an objection to the admission of evidence for an abuse of discretion. *See* ***Mozon v. State***, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999). A trial court's decision will be upheld on appeal if it is correct on any theory of law applicable to the case. ***Romero v. State***, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). A trial court judge is given the limited right to be wrong, so long as the result is not reached in an arbitrary or capricious manner. ***Montgomery v. State***, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). An abuse of discretion occurs when a trial court's decision is so clearly wrong that it lies outside the zone of reasonable disagreement. *See* ***Gonzalez v. State***, 117 S.W.3d 831, 839 (Tex. Crim. App. 2003).

Proving Prior Convictions

To establish that a defendant has been convicted of a prior offense, the state must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. ***Flowers v. State***, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). No specific document or mode of proof is required to prove these two elements. ***Id.*** There are a number of ways to prove a prior conviction, including (1) the defendant's admission or stipulation, (2) testimony by a person who was present when the person was convicted of the specified crime and can identify the defendant as that person, or (3) documentary proof (such as a judgment) that contains sufficient information to establish both the existence of the prior conviction and the identity as the person convicted. ***Id.*** at 921-22.

Certified copies of a judgment and sentence are admissible, but these documents, standing alone, are not sufficient to prove a prior conviction. *See* TEX. R. EVID. 902(4); ***Menefee v. State***, 928 S.W.2d 274, 278 (Tex. App.—Tyler 1996, no pet.). The state must go forward with independent evidence that the defendant is the same person named in the previous conviction. ***Id.***; *see also* ***Griffin v. State***, 866 S.W.2d 754, 756 (Tex. App.—Tyler 1993, no pet.). Proof that the

[1] *See* Acts of June 16, 2001, 77th Leg., R.S., ch. 1334, 2001 Tex. Gen. Laws 1334 (amended September 1, 2011) (current version at TEX. PENAL CODE ANN. § 38.04(b)(2)(A) (West 2011).

defendant merely has the same name as the person previously convicted is not sufficient to satisfy the prosecutor's burden. ***Benton v. State***, 336 S.W.3d 355, 357 (Tex. App.—Texarkana 2011, pet. ref'd). Without evidence linking the defendant to the prior conviction, evidence of the prior conviction is simply not relevant. ***Id.***; *see also* ***Garcia v. State***, 930 S.W.2d 621, 624 (Tex. App.—Tyler 1996, no pet.).

The most common method of proving that the defendant is the same person previously convicted in a judgment is by identifying known fingerprints of the defendant with those of the person named in the judgment evidencing a prior conviction. ***Griffin***, 866 S.W.2d at 756. Prior convictions may also be linked to defendants by means of a photograph. *See* ***Littles v. State***, 726 S.W.2d 26, 32 (Tex. Crim. App. 1987) (op. on reh'g).

Admissibility of Exhibits 6 and 7

Exhibits 6 and 7 were certified judgments of conviction for the offense of evading arrest from Dawson County, Texas, in cause numbers 6345A and 6600A. Each exhibit included the name, Moses Aaron Torres, as well as a date of birth, a "DL number," and a physical description. At trial, the arresting officer for this case testified that Appellant gave him his "Texas ID" card. The identification card included Appellant's name, "Moses Torres," his date of birth, and his identification card number. The arresting officer testified that the man he placed under arrest matched the photograph on the identification card, and that Appellant was the same person he arrested for evading arrest that night. The in-car video of the offense and arrest was also played for the jury. The video showed Appellant, and the radio dispatcher could be heard informing the arresting officer that Appellant had two prior evading arrest convictions. At trial, the arresting officer testified that Appellant had four prior convictions for evading arrest. Appellant did not object to the statement of the extraneous offenses by the dispatcher contained in the video or the officer's testimony.

The name, date of birth, and identification card number given by the arresting officer matched the name, date of birth, and "DL number" contained in State's exhibits 6 and 7. Furthermore, the jury could compare the physical descriptions contained in exhibits 6 and 7 to Appellant's appearance on the in-car video as well as his appearance during trial.[2] Accordingly,

[2] Our decision does not conflict with the ***Littles*** holding because the State's links in the current case consisted of more than a physical description of the accused. ***Littles***, 726 S.W.2d at 31-32 (juror's interpretation of written description less dependable than identifying by means of photograph). The State marked an exhibit purporting to contain copies of Appellant's social security card and driver's license, but the testifying officer could not recall whether he made the copies. As a result, the State never introduced the social security card or driver's license into evidence.

we hold that the State satisfied its burden to link Appellant to exhibits 6 and 7, and the trial court did not abuse its discretion in admitting these exhibits into evidence. Appellant's first and second issues are overruled.

Admission of Extraneous Offense

An extraneous offense is any act of misconduct, whether resulting in prosecution or not, which is not shown in the charging instrument and which was shown to have been committed by the accused. ***Hernandez v. State***, 817 S.W.2d 744, 746 (Tex. App.—Houston [1st Dist.] 1991, no pet.). Generally, evidence of extraneous offenses or prior bad acts is not admissible in order to show action in conformity therewith. *See* TEX. R. EVID. 404(b). Rule 404(b) provides that extraneous offense evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" ***Id.***; *see also* ***Johnston v. State***, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). Extraneous offense evidence may be admissible to show identity only when identity is raised as an issue in the case. ***Lane v. State***, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996); ***Moore v. State***, 700 S.W.2d 193, 199 (Tex. Crim. App. 1985). Thus, if the defendant does not raise identity as an issue, the introduction of an extraneous offense to show identity is nonconstitutional error. *See* ***Phillips v. State***, 193 S.W.3d 904, 915 (Tex. Crim. App. 2006) (Keller, J. concurring).

Nonconstitutional error is reversible only if it affects the substantial rights of the accused. TEX. R. APP. P. 44.2(b). We will not overturn a criminal conviction if, after examining the record as a whole, there is a fair assurance that the error did not influence the jury, or influenced the jury only slightly. ***Barshaw v. State***, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). Our focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict. ***Id.*** at 93-94. If there is grave doubt[3] that the result of the trial was free from the substantial effect of the error, the conviction must be reversed. ***Id.*** at 94.

In determining whether the error affected the substantial rights of the defendant, we consider everything in the record, including 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, the jury instruction, the State's theory, the defensive theories, closing arguments, voir dire, and whether the State emphasized the error. ***Id.***

[3] "Grave doubt" means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." ***Barshaw***, 342 S.W.3d at 94.

Admissibility of Exhibit 9

Exhibit 9 was the last page of a judgment of conviction for an assault dated January 16, 1998. The page included the statement, "The Court finds that a fingerprint of the Defendant's right thumb, along with a Defendant's physical description, and Social Security Number, appears below." The Description section of the page appeared as follows:

> DESCRIPTION OF MOSES ARRON TORRES
> SEX: Male
> RACE: Hispanic
> HEIGHT: 505
> WEIGHT: 160
> HAIR: Brown
> D.O.B.: xx-xx-xx
> S.S.# xxx-xx-xxxx
> D.L.# xxxxxxxx[4]

To the right of the description was an area for the "right thumb print" in which a clearly defined fingerprint appeared. On the last line of the document appeared the statement, "I, MOSES ARRON TORRES, on this the 16th day of January, 1998, received from the Clerk of this Court a copy of the foregoing Order." Below the statement was a signature, "Moses Torres."

Defense counsel objected, contending, "Just because they can't prove up the two they've alleged does not mean they get to bring in a bunch of others to try to prove it up." Defense counsel continued his objection as follows:

> [T]he fact that they can't prove the element of the offense the way they want to does not open the door to prior extraneous matters, prior convictions during the guilt and innocence phase. . . . [Exhibit 9] is exactly the same as the back page on [exhibits 6 and 7 that] they are trying to get in evidence. It says[,] "The Court finds the fingerprint of defendant's right thumb." We're going to object to any portion of it.

We construe Appellant's objection at trial as an objection pursuant to Rule 404(b).

The State argued at trial and argues on appeal that exhibit 9 was relevant to its case because it was necessary to prove Appellant's identity as the person named in the two prior evading arrest convictions shown by exhibits 6 and 7. State's exhibit 9 had a readable fingerprint in addition to other identifiers, but exhibits 6 and 7 did not. But like exhibit 9, exhibits 6 and 7 contained

[4] The date of birth, social security number, and driver's license number have been edited for privacy purposes.

Appellant's name, signature, and description. Thus, the State intended to use its fingerprint expert to link Appellant to exhibit 9 containing his fingerprint, identifiers, and signature. Then, State's exhibit 9 would be used to link exhibits 6 and 7 to Appellant.

The trial court overruled counsel's objection and admitted exhibit 9 into evidence. But Appellant had not raised identity as an issue. Therefore, exhibit 9 was inadmissible, and the trial court erred in ruling otherwise. *See* ***Lane***, 933 S.W.2d at 519. But our analysis does not end here. The erroneous admission of exhibit 9 was nonconstitutional error. *See* ***Phillips***, 193 S.W.3d at 915 (Keller, J. concurring). Consequently, we must conduct a harm analysis to determine whether the error affected Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b).

Harm Analysis

In this case, the State had to prove beyond a reasonable doubt that Appellant, while using a vehicle, intentionally fled from Mark Harcrow, a person he knew was a peace officer who was attempting to lawfully arrest or detain him, and that prior to the commission of the offense, Appellant was convicted of evading arrest or detention in cause numbers 6345A and 6600A.[5]

The evidence supporting Appellant's conviction included the arresting officer's testimony recounting the events of the arrest and Appellant's date of birth and state identification number; the in-car video of the offense, which also included views of Appellant and the dispatcher's confirmation that Appellant had two prior evading arrest convictions; exhibits 6 and 7 containing Appellant's physical description, date of birth, state identification number (mislabeled as "D.L.#"), name, and signature; and finally, the officer's testimony that he learned Appellant had four prior evading arrest convictions.

The only other evidence admitted to prove Appellant's guilt was exhibit 9. Despite the trial court's and prosecutor's attempts to minimize the prejudicial effect of the exhibit by removing the first page of the judgment showing the offense, the exhibit still constituted evidence of an inadmissible extraneous offense. Exhibit 9 was in the same form as the signature pages of exhibits 6 and 7. The only differences were that exhibit 9 showed a different weight for "Moses Torres" and a different date. Thus, the jury could easily determine that exhibit 9 was the signature page to an additional judgment of conviction.

[5] At the time of this offense, the penal code required only one prior evading arrest conviction to enhance the offense of evading with a vehicle to a third degree felony. *See* Acts of June 16, 2001, 77th Leg., R.S., ch. 1334, 2001 Tex. Gen. Laws 1334 (amended September 1, 2011) (current version at TEX. PENAL CODE ANN. § 38.04(b)(2)(A) (West 2011).

The State's theory for exhibit 9's admissibility was based on the mistaken belief that it was necessary in order to prove the prior convictions alleged in the indictment. Defense counsel's theory for exhibit 9's inadmissibility was correct—evidence of an extraneous offense was not admissible to prove other extraneous offenses because identity was not an issue raised by Appellant at trial. *See* ***Lane***, 933 S.W.2d a 519; *see also* ***Perry v. State***, 933 S.W.2d 249, 253-54 (Tex. App.—Corpus Christi 1996, pet. ref'd). Despite defense counsel's objection, exhibit 9 was admitted but no limiting instruction was requested or given upon its admission.[6]

However, the charge of the court did include an extraneous offense instruction that advised jurors they were not to consider testimony regarding an extraneous offense unless they found beyond a reasonable doubt that Appellant committed the offense. The jurors were further instructed that if they made such a finding, they could only consider the evidence in determining "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident of the defendant, if any, in connection with the offense . . . and for no other purpose." We presume the jury followed the instructions in this case, and Appellant has not pointed to any evidence to rebut this presumption. *See* ***Thrift v. State***, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *see also* ***Walker v. State***, 300 S.W.3d 836, 850 (Tex. App.—Fort Worth 2009, pet. ref'd).

Defense counsel's closing argument regarding the prior convictions centered on the lack of fingerprint evidence to link Appellant to exhibits 6 and 7. The State's closing argument emphasized the similarities between exhibit 9 and exhibits 6 and 7. But despite these similarities, exhibits 6 and 7 were linked to Appellant based on the officer's testimony, the in-car video, and the jury's ability to compare the written description of Appellant to his appearance in the video and in court.

Based on our review of the entire record, we cannot conclude that exhibit 9 had a substantial effect or influence on the jury's verdict. ***Barshaw***, 342 S.W.3d at 93-94. Moreover, there is sufficient evidence, other than exhibit 9, that the jury could have considered in reaching its determination that Appellant had two prior convictions for evading arrest. Therefore, we conclude that the error did not affect Appellant's substantial rights. TEX. R. APP. P. 44.2(b). We overrule Appellant's third issue.

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[6] Appellant did not request a limiting instruction, even though the trial court and prosecutor discussed the appropriateness of a limiting instruction during the hearing outside the presence of the jury. Because no limiting instruction was requested, Appellant was not entitled to one. *See* ***Delgado v. State***, 235 S.W.3d 244, 253 (Tex. Crim. App. 2007).

LEGAL SUFFICIENCY

In his fourth issue, Appellant challenges the sufficiency of the evidence to prove the two prior evading arrest convictions. Appellant's sufficiency challenge presumes the inadmissibility of State's exhibits 6 and 7. However, we have held that exhibits 6 and 7 were properly linked to Appellant and therefore were properly admitted. Because exhibits 6 and 7 were properly admitted, the evidence is legally sufficient to establish Appellant's two prior convictions. Accordingly, we overrule Appellant's fourth issue.

DISPOSITION

The judgment of the trial court is ***affirmed.***

SAM GRIFFITH
Justice

Opinion delivered August 8, 2012.
Panel consisted of Worthen, C.J, Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

AUGUST 8, 2012

NO. 12-11-00222-CR

MOSES AARON TORRES,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 3rd Judicial District Court
of Anderson County, Texas. (Tr.Ct.No. 30358)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.