Opinion filed June 4, 2020

In The

Eleventh Court of Appeals

No. 11-18-00122-CR

DAVID ELIAN LEYVA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 244th District Court
Ector County, Texas
Trial Court Cause No. C-16-0656-CR

M E M O R A N D U M O P I N I O N

The jury convicted Appellant, David Elian Leyva, of failure to stop and render aid in an accident that resulted in death, *see* TEX. TRANSP. CODE ANN. § 550.021(a) (West Supp. 2019), and assessed his punishment at thirteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $10,000. The trial court sentenced him accordingly. In three issues, Appellant asserts that the trial court erred when it admitted evidence of an extraneous offense in the guilt/innocence phase of the trial, when it denied Appellant's motion for new

trial, and when it refused to instruct the jury on the defense of necessity. We affirm the trial court's judgment.

Background

Early on February 14, 2016, Joseph Cervantes's car stalled in the right lane of Highway 385. Cervantes and his nephew were in the car. The car probably did not have operational lights and was very close to, or even slightly over, the line that divided the lanes of the highway. Cervantes, who had a blood alcohol level of 0.188, called his mother to bring "cables." He then got out of the car and proceeded to urinate in the middle of the highway.

Appellant and his wife, Crystal Leyva, had been to a Valentine's Day dance sponsored by their church. Appellant and Crystal left the dance between midnight and 1:00 a.m. and proceeded to "ride around." At approximately 2:30 a.m., Appellant and Crystal were in Appellant's pickup in the right lane of Highway 385. Appellant had set the cruise control of the pickup at seventy-five miles per hour.

Appellant attempted to swerve when he saw the stalled car, but struck both the car and Cervantes. Appellant then ran over Cervantes. Appellant's pickup hit Cervantes with such force that the hood of the pickup was creased and blood and other bodily fluids were splattered on the hood, the windshield, and the bumper of the pickup. Cervantes died from his injuries. Cervantes's body was found 190 feet from the point of impact, and Appellant's pickup stopped 430 feet from Cervantes's body.

Both the driver's side and passenger's side airbags in Appellant's pickup deployed. Appellant was not wearing a seatbelt, and his face impacted the airbag. According to Crystal, Appellant was bleeding, appeared dazed, and did not respond to her questions.

Crystal called her brother, Danny Silvas, who lived close to the scene of the accident. Silvas came to the scene in shorts and boots and without a shirt. Crystal

and Silvas were concerned that Appellant was injured and needed medical treatment. However, neither Crystal nor Silvas thought that Appellant's injuries were immediately life-threatening.

Without any investigation into whether a person was in the car or was injured by the accident and without calling 9-1-1, Crystal, Silvas, and Appellant left in Silvas's vehicle. Both Crystal and Silvas testified that they intended to take Appellant to the hospital but that they first went to Silvas's house so that Silvas could get dressed. After Silvas changed clothes, Appellant refused to go to the hospital. Appellant spent the night on Silvas's couch.

Two or three days after the accident, David Luna, a friend of Cervantes, visited the site of the accident and found a license plate that he thought might be from the vehicle that hit Cervantes. Luna used his connections in the car industry to obtain a report on the registration information for the license plate. Luna went to the address listed in the report and saw Appellant in the front yard.

Luna asked Appellant who owned the pickup listed in the report, and Appellant said that it had been sold. Appellant said that his name was "Alfredo" and asked why Luna was interested in who owned the pickup. Luna told Appellant that the pickup might have been involved in the accident that killed Cervantes. Appellant said that "he had no idea about it" and that he thought that the pickup was "probably stolen." Luna noticed that Appellant had injuries on his face and asked Appellant if he had been the driver of the pickup. Appellant denied that he had been the driver of the pickup.

Appellant's and Crystal's driver's licenses were found in the pickup. Nine days after the accident, Department of Public Safety Trooper Rachel Cummings interviewed Crystal. Trooper Cummings asked Crystal about a false report that the pickup was stolen, which Crystal had filed with the Odessa Police Department. Crystal said that she had reported the pickup as stolen so that the insurance company

would repair the damage to the vehicle. After the interview, Trooper Cummings understood that Appellant was the driver of the pickup at the time of the accident.

DPS Sergeant Chad Matlock interviewed Appellant. Appellant admitted that he was the driver of the pickup. Appellant stated that he knew that he had hit a stalled car but did not know that he had hit a person. Appellant admitted that he left the scene of the accident. Appellant claimed that he wanted to stay at the scene of the accident but that his brother-in-law convinced him to leave. Appellant spent the night at Silvas's house, and Crystal went to Appellant's mother's house.

Appellant told Sergeant Matlock that Crystal reported that the pickup was stolen because that was the easiest way to get it fixed. Appellant then admitted that he was involved in the decision to report that the pickup was stolen.

At the charge conference, Appellant requested a jury instruction on the defense of necessity. The trial court denied the request. The jury found Appellant guilty of failure to stop and render aid in an accident that resulted in death and assessed punishment at thirteen years' confinement and a $10,000 fine.

Analysis

An operator of a vehicle that is involved in an accident that results or is reasonably likely to result in the death of a person is required (1) to immediately stop his vehicle at the scene of the accident or as close to the scene as possible; (2) to immediately return to the scene of the accident if the vehicle is not stopped at the scene; (3) to immediately determine whether another person is involved in the accident and, if so, whether that individual requires aid; and (4) to remain at the scene of the accident until he provides his name and address, the registration number of his vehicle, and the name of his motor vehicle liability insurer and until he provides any person injured in the accident reasonable assistance. TRANSP. §§ 550.021, .023 (West 2011 & Supp. 2019); *Curry v. State*, No. PD-0577-18, 2019

WL 5587330, at *5 (Tex. Crim. App. Oct. 30, 2019).[1] It is undisputed that Appellant did not comply with any of the statutory requirements following the accident.

In his first issue, Appellant contends that the trial court erred when it admitted evidence of an extraneous offense in the guilt/innocence phase of the trial. Appellant objected under Rules 403 and 404(b) of the Texas Rules of Evidence that the admission of the portion of his interview with Sergeant Matlock in which he admitted that he was involved in the decision to report that the pickup was stolen involved an extraneous offense and that the probative value of the evidence was substantially outweighed by its prejudicial effect. The trial court overruled the objection.

We review a trial court's decision on the admission of evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). The trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). We will uphold the trial court's evidentiary ruling if it is correct on any theory of law applicable to the case. *Henley v. State*, 493 S.W.3d 77, 93 (Tex. Crim. App. 2016).

To preserve error based on the erroneous admission of evidence, a party must make a timely and specific objection in the trial court. TEX. R. APP. P. 33.1(a); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). "[A] party must object each time the inadmissible evidence is offered or obtain a running objection." *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003)). "An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection." *Valle*, 109 S.W.3d at 509.

[1]The Texas Court of Criminal Appeals recently held that "a driver must stop and render aid not only if the driver knows that he was involved in an accident and another person was injured or killed, but also if he knows that he was involved in an accident that was reasonably likely to result in injury to or death of a person." *Curry*, 2019 WL 5587330, at *5 (internal citations omitted).

Before the recording of Appellant's interview with Sergeant Matlock was played for the jury, Trooper Cummings testified that Crystal admitted that she reported the pickup as stolen so that the insurance company would repair the damage to the pickup.[2] Luna later testified, without objection, that Appellant said that the pickup was probably stolen. Therefore, even without Appellant's statements to Sergeant Matlock, the jury was apprised that Crystal had falsely reported that the pickup was stolen and that Appellant had, at the very least, also claimed that the pickup was stolen. Therefore, we question whether Appellant preserved this issue for appellate review.

However, even if Appellant preserved his complaint, we cannot conclude that the trial court erred when it determined that Rule 403 did not preclude the admission of Appellant's statements to Sergeant Matlock about his involvement in the decision to report that the pickup was stolen. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. TEX. R. EVID. 401. Relevant evidence is generally admissible. TEX. R. EVID. 402; *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). A trial court, however, may exclude relevant evidence if its probative value is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403.

Rule 403 is not intended to exclude all evidence that tends to prejudice the opponent's case. *See Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) ("All testimony and physical evidence are likely [to] be prejudicial to one party or the other. It is only where there exists a clear disparity between the degree of

[2]Appellant objected that Trooper Cummings's testimony about Crystal's statements was hearsay but did not object that the admission of those statements was precluded by Rule 403. TEX. R. EVID. 403. The trial court overruled the hearsay objection in part. Appellant has not complained on appeal about the trial court's ruling.

prejudice of the offered evidence and its probative value that Rule 403 is applicable." (internal citation omitted)). Rather, it prevents only the admission of evidence that promotes a jury decision on an improper basis. *See id.*; *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g). To determine whether evidence should be excluded under Rule 403, we balance the claimed probative force of the evidence along with the proponent's need for that evidence against (1) any tendency of the evidence to suggest that the case would be decided on an improper basis; (2) any tendency of the evidence to confuse or distract the jury from the main issues; (3) 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 (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Henley*, 493 S.W.3d at 93 (citing *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006)).

Appellant argues that, because he admitted in his interview with Sergeant Matlock that he was the driver of the pickup and that he left the scene of the accident, the State did not need evidence of his involvement in the false report that the pickup was stolen and that the evidence simply served to inflame the jury. The State responds that the evidence was probative of Appellant's intent to "cover up" his responsibility for the crime.

Appellant's position in his opening statement was that he did not leave the scene of the accident either knowingly or intentionally. Appellant also presented evidence that he was injured in the accident, that he was dazed and nonresponsive, and that Crystal and Silvas thought that he needed medical treatment. In closing arguments, Appellant told the jury that, due to his injuries, he did not knowingly choose to leave the scene of the accident. Appellant asked the jury to find him not guilty because he did not have the culpable mental state to commit the crime.

Evidence of an extraneous act is admissible to establish knowledge. TEX. R. EVID. 404(b)(2). Appellant's statements that he was involved in the decision to report the pickup stolen the day after the accident were probative to establish that Appellant knew that he had left the scene of the accident and wanted to avoid prosecution for his failure to stop and render aid after the accident. *See Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1994) (op. on reh'g) (holding that criminal acts that are designed to reduce the likelihood of prosecution, conviction, or incarceration for the offense on trial are admissible because they show a consciousness of guilt); *Torres v. State*, 794 S.W.2d 596, 598 (Tex. App.—Austin 1990, no pet.) ("A 'consciousness of guilt' is perhaps one of the strongest kinds of evidence of guilt."). Given Appellant's contention that he did not knowingly leave the scene of the accident, the State's need for this evidence was high.

Further, the factors related to the danger that the evidence might lead to a verdict on an improper basis did not require that the trial court exclude the evidence. The complained-about portion of the interview was less than two minutes in length. Given the overwhelming evidence of Appellant's guilt of the charge of failure to stop and render aid in an accident that resulted in death, the evidence of Appellant's involvement in the false report that the pickup was stolen had little tendency to either distract the jury or be given undue weight. Finally, nothing in the record reflects that the jury was not equipped to evaluate the probative force of the evidence.

We hold that the probative value of Appellant's statements about his involvement in the decision to falsely report that the pickup was stolen was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not abuse its discretion when it admitted the evidence. We overrule Appellant's first issue.

In his third issue, Appellant asserts that the trial court erred when it denied Appellant's request for an instruction on the defense of necessity because the defense

was raised by the evidence and its absence materially harmed his case. When we review alleged jury-charge error, we first determine whether error exists. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). If error occurred, then we analyze that error for harm. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

To determine whether a defensive instruction should have been given, we view the evidence in the light most favorable to the defendant's requested instruction. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006). The trial court must give a requested instruction on every defensive issue that is raised by the evidence regardless of whether that evidence is "strong, feeble, unimpeached, or contradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief." *Thomas v. State*, 678 S.W.2d 82, 84 (Tex. Crim. App. 1984); *see also Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). A defensive issue is raised by the evidence if there is some evidence on each element of the defense that, if believed by the jury, would support a rational inference that the element is true. *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007). "Whether a defense is supported by the evidence is a sufficiency question reviewable on appeal as a question of law." *Id.* at 658.

Necessity is a confession-and-avoidance defense that excuses otherwise criminal conduct. *Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018); *Villa v. State*, 417 S.W.3d 455, 462 (Tex. Crim. App. 2013). To be entitled to an instruction on the defense of necessity, the defendant must admit to both the act or omission and the requisite mental state.[3] *Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010). The jury may then excuse that conduct if it determines (1) that

[3]Given Appellant's position at trial that he did not knowingly leave the scene of the accident, we question whether he admitted to the requisite mental state. However, because Appellant did not produce evidence to support each element of the defense of necessity, we need not address this issue.

the defendant reasonably believed that his conduct was immediately necessary to avoid imminent harm; (2) that the desirability and urgency of avoiding the harm clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) that a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear. TEX. PENAL CODE ANN. § 9.22 (West 2019).

The Texas Court of Criminal Appeals has defined "imminent" as "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near." *Henley*, 493 S.W.3d at 89 (quoting *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989)). Conduct that is "immediately necessary" to avoid "imminent harm" is conduct that "is needed right now." *Id.* Therefore, "[t]he justification defense of necessity applies when action is needed 'immediately' (*i.e.*, now) to avoid 'imminent' harm (*i.e.*, harm that is near at hand)." *Id.* "For an 'imminent harm' to occur, there must be an emergency situation that requires a split-second decision without time to consider the law." *Humaran v. State*, 478 S.W.3d 890, 903 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

Appellant argues that there was evidence that he was injured in the accident, that he believed that he had hit only an abandoned vehicle, and that "an ordinary and prudent man in the same circumstances would have believed the most important matter was to leave and seek medical attention for his own injuries than to worry about the damage to a vehicle that had been abandoned in the middle of the highway in the early morning hours." However, although both Crystal and Silvas testified that Appellant was injured and that they left the scene to obtain medical help for him, neither was concerned that Appellant's injuries were immediately life-threatening. *See Chunn v. State*, 821 S.W.2d 718, 719 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (holding that the mere possibility or generalized fear of harm does not support an instruction on the defense of necessity). Appellant offered no

evidence that he, Crystal, or Silvas could not have called 9-1-1 and obtained medical treatment for Appellant while Appellant remained at the scene of the accident. Finally, Appellant did not seek medical help for his injuries, but chose to sleep on Silvas's couch that night. We conclude that Appellant produced no evidence of imminent harm that required him to make the split-second decision to leave the scene of the accident.

Appellant was also required to produce evidence that his conduct was reasonable. *See* PENAL § 9.22(2). A "'[r]easonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42) (West Supp. 2019). Appellant indicated that the cruise control on the pickup was set at seventy-five miles per hour when he hit the stalled car. Appellant hit Cervantes with such force that Cervantes's body caused a crease in the hood of Appellant's pickup, and blood and other bodily fluids were splattered on the hood, the windshield, and the bumper of the pickup. Appellant ran over Cervantes, and Cervantes's body was found 190 feet from the point of impact. Appellant produced no evidence that, given the severity of the accident, an ordinary and prudent man would have left the scene to seek medical treatment for non-life-threatening injuries without any investigation of whether a person needed assistance.

Because Appellant's evidence did not raise all elements of the defense of necessity, the trial court did not err when it failed to include an instruction on the defense in the jury charge. We overrule Appellant's third issue.

In his second issue, Appellant argues that the trial court erred when it denied Appellant's motion for new trial on the ground that the trial court failed to include an instruction on the defense of necessity in the charge. We review Appellant's complaint under the same standard of review as his complaint that the trial court erred when it failed to include an instruction on the defense of necessity in the charge. *See Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006). Because the

trial court did not err when it refused to give the requested instruction, it also did not err when it denied the motion for new trial based on the failure to give that instruction. *See id.* We overrule Appellant's second issue.

This Court's Ruling

We affirm the trial court's judgment.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

June 4, 2020

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

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[4]

Willson, J., not participating.

[4]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.