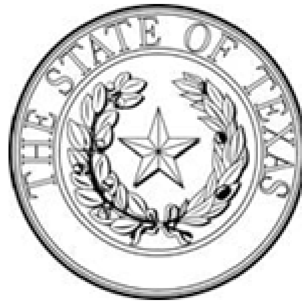
Affirmed and Memorandum Opinion filed June 16, 2020.



In The

Fourteenth Court of Appeals

NO. 14-18-01080-CR

DANIEL ARMANDO MENA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1561699

MEMORANDUM OPINION

Appellant Daniel Armando Mena appeals his conviction for intoxication manslaughter. *See* Tex. Penal Code Ann. § 49.08. In six issues, appellant challenges the trial court's rulings on objections to evidence during the guilt-innocence phase of trial. Concluding that any erroneous admission of victim-impact evidence did not substantially affect appellant's rights, evidence of photographs to identify the complainant were admissible, and appellant did not preserve error with regard to admission of the complainant's husband's testimony, we affirm.

BACKGROUND

Vanessa Balleza[1] testified that on the night of the offense she and her husband went to dinner with her husband's best friend and the friend's wife. After dinner, around 11:30 p.m., the couples went to a bar called Diablo Loco. They ordered a bucket of five beers and shared it. Vanessa and her husband Ricardo left the bar shortly before 2:00 a.m. and went home using the Loop 610 freeway; Ricardo was driving. As they were traveling south on 610, Vanessa saw a vehicle traveling the wrong way on the freeway heading straight toward them. Ricardo steered out of the path of the oncoming truck and pulled over to the shoulder. In "a matter of seconds" Vanessa heard the truck that was traveling the wrong way crash into another truck that was behind the Ballezas. The impact immediately killed the complainant, the driver of the truck behind the Ballezas.

Vanessa testified that all the other cars on the freeway were swerving to avoid the pick-up truck going the wrong way. The complainant had no time to get out of the way. Vanessa called 911 and ran to the complainant to check on her. The 911 operator instructed Vanessa to check on the driver of the pick-up truck that had hit the complainant. Vanessa identified appellant as the driver of the white pick-up truck that was traveling the wrong way on the freeway. Vanessa testified she could tell appellant was drunk and did not realize what had happened.

Ricardo Balleza testified that he had seen appellant in the Diablo Loco before they left the bar. Ricardo described appellant as "lost, confused, drunk." In the aftermath of the accident, Ricardo recognized appellant from the bar and pointed out that he was wearing a wristband from the bar. Ricardo described the accident much

[1] Both Vanessa and Ricardo Balleza testified. Because they share a surname we will refer to them by their first names in this opinion.

as Vanessa did.

Alex Proctor, a Bellaire Police Department officer, was the first police officer on the scene. Proctor testified that when he first encountered appellant, he noticed the odor of an alcoholic beverage coming from him and that he had bloodshot eyes. Proctor also noticed that appellant seemed confused, as if he did not know he had been in an accident. Proctor conducted field sobriety tests and took appellant to the Bellaire police station. While at the police station appellant gave consent to have his blood drawn for blood alcohol concentration testing. Appellant's blood was initially drawn at 3:55 a.m., almost two hours after the accident occurred. While appellant's blood was being drawn, he had difficulty maintaining awareness. Appellant fell asleep and started to slide out of the chair. Proctor also obtained a search warrant for a second blood draw later in the morning. Officer Juan Trujillo performed the second blood draw at 9:00 a.m.

The blood alcohol concentration results from the first blood draw were 0.195 grams per 100 milliliters. The later blood sample taken at 9:00 a.m. contained 0.133 grams per 100 milliliters. Appellant's alcohol level at both blood draws exceeded the legal limit of .08 grams per 100 milliliters. *See* Tex. Pen. Code § 49.01. The difference between the samples was because alcohol was being eliminated from the body between 3:55 and 9:00 a.m.

Considering appellant's demeanor at the scene, his performance on the field sobriety tests, witness statements, and appellant's demeanor at the blood draw, Proctor formed the opinion that appellant was driving while intoxicated at the time of the accident. Officer Timothy Quimby of the Bellaire Police Department testified to several statements appellant made to law enforcement officers at the scene that later were shown to be false. Appellant told officers he had only been drinking at the Saltgrass Steakhouse from 5:00 to 7:00 that evening and that he had only had beer.

Surveillance video, however, showed appellant drinking two margaritas with beer known as “Coronaritas” during a one-hour time period. Surveillance video also showed appellant drinking several drinks at Diablo Loco between midnight and 1:55 a.m. when appellant left the bar. Appellant also told officers he was following his friends while driving home but only one vehicle was traveling the wrong way on the freeway that night. Quimby was unable to take a statement from appellant because appellant was “passed out” when Quimby arrived at the jail at 6:00 the next morning.

The State called Ignacio Moreno, the complainant’s widower, to the stand. Appellant objected to Moreno giving any testimony “because we feel the only reason he’s being called up is for identification.” The trial court overruled appellant’s objection. Moreno testified that he and the complainant dated for approximately seven months before they were married in 2010. Moreno further testified that he and the complainant had two sons, ages six and four.

Moreno testified that, on the day of the accident, the last time he saw the complainant was when they left for work that morning. The night of the offense Moreno put his children to bed and waited for the complainant to come home. When the complainant did not return home, Moreno called her “at least 15 times,” but she did not respond. Moreno went out in his car to look for the complainant heading toward the Bellaire area because that was the last place she told him she was going. Moreno eventually arrived at the scene of the accident and learned that his wife had been killed in the accident.

The jury convicted appellant of intoxication manslaughter and assessed punishment at 15 years confinement in prison and a $10,000 fine.

ANALYSIS

In six issues, appellant argues the trial court abused its discretion in admitting

certain victim-impact evidence at the guilt-innocence stage of trial and in admitting a photograph of the complainant.

I. Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard and will not reverse the decision if it is within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). We must uphold the trial court's decision if it is reasonably supported by the record and correct under any theory of law applicable to the case. *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

Evidence is relevant if it has a tendency to make the existence of any consequential fact more or less probable than it would be without the evidence. *See* Tex. R. Evid. 401; *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). To be relevant, evidence must be both material—that is, it must be offered for a proposition that is of consequence to the determination of the case—and probative, such that it makes the existence of the fact more or less probable than it would otherwise be without the evidence. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016).

Even if evidence is relevant, the trial court may properly exclude it under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *See Hedrick v. State*, 473 S.W.3d 824, 830 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The term "probative value" refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). Evidence might be unfairly prejudicial if, for example,

it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007).

II. The trial court's erroneous admission of victim-impact evidence did not affect appellant's substantial rights.

In appellant's first issue he argues that the following testimony of Vanessa Balleza was inadmissible under Rules 401 and 402 of the Texas Rules of Evidence as inappropriate victim-impact evidence. In appellant's second issue he argues the testimony was inadmissible under Rule 403 of the Texas Rules of Evidence:

> Q. And did you meet the victim's family?
>
> A. Yes, I did. I posted a little about it because it was a sad situation. So, I posted a little about it on Facebook, and they shared it.
>
> [Defense counsel]: We object to hearsay and 403, 404, relevance.
>
> THE COURT: Overruled.
>
> A. I was invited to her funeral.
>
> Q. (By [the prosecutor) Did you go to her funeral?
>
> A. Yes, I did.
>
> [Defense counsel]: We object to relevance at this time, 403, 402, 401.
>
> THE COURT: Overruled.
>
> *****
>
> Q. (By [the prosecutor]) How has this evening, this night, August 12th, 2017, affected your life?
>
> [Defense counsel]: Your Honor, we object to relevance under 403.
>
> THE COURT: Overruled. I will allow it.
>
> A. A lot. We used to go out at least twice every two months, and I think we've gone out one time. It's hard. I'm always thinking about her. I'm always thinking about her kids, her husband.
>
> Q. (By [the prosecutor]) Could you and your husband have died that night?

A. Yeah, yeah. The reason I went to her funeral was because I wouldn't want somebody to kill my family, to give that closure.

[Defense counsel]: Your Honor, we object to 403, relevance.

THE COURT: Sustained.

A relevancy objection specifically pinpoints the rule of evidence that forbids victim-impact evidence during the guilt-innocence phase and preserves the issue for review. *Miller–El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990). Victim-impact evidence consists of "two distinct, but related, types [of evidence]: victim character evidence and victim impact evidence." *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002). Victim-impact evidence is generally recognized as evidence concerning the effect of the appellant's crime on others, particularly the victim's family members. *See id*. (describing impact evidence as that which is designed to remind the jury that defendant's criminal conduct has foreseeable consequences to the community and victim's family). Victim-character evidence is a subset of victim-impact evidence and is defined as evidence concerning the good qualities of the victim; it is "designed to give the jury 'a quick glimpse of the life that the [defendant] chose to extinguish, to remind the jury that the person whose life was taken was a unique human being.'" *Salazar*, 90 S.W.3d at 335 (quoting *Payne v. Tennessee*, 501 U.S. 808, 830–31 (1991) (O'Connor, J., concurring)).

Victim-impact and victim-character evidence typically are irrelevant at the guilt-innocence phase of a trial because such evidence does not tend to make more or less probable the existence of any fact of consequence with respect to guilt or innocence. *See Love v. State*, 199 S.W.3d 447, 456–57 (Tex. App.–Houston [1st Dist.] 2006, pet. ref'd) (citing *Miller–El*, 782 S.W.2d at 895).

The objected-to portion of Vanessa's testimony fell within the category of victim-impact evidence. *See Espinosa v. State*, 194 S.W.3d 703, 711 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (victim-impact evidence may include physical,

psychological, or economic effects of crime on victim or victim's family). Although victim-impact evidence may be admissible during the punishment stage if it "has some bearing on the defendant's personal responsibility and moral guilt," *Stavinoha v. State*, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991), such evidence is generally inadmissible during the guilt-innocence phase because it does not have the tendency to make more or less probable the existence of any fact of consequence with respect to guilt or innocence. *See Miller–El*, 782 S.W.2d at 895 (victim's testimony about future hardship as paraplegic was irrelevant on guilt-innocence issue and thus inadmissible over objection); *see also* Tex. R. Evid. 402 (evidence that is not relevant is inadmissible). The victim-impact evidence admitted through Vanessa's testimony was irrelevant and inadmissible because it did not tend to prove a contested issue, i.e., whether appellant caused the complainant's death by driving while intoxicated. Thus, we hold the trial court abused its discretion by admitting victim-impact evidence at the guilt-innocence stage of trial.

Having found error, we consider the harm, if any, caused by admission of the evidence. Complaints of erroneous evidentiary rulings are not constitutional and, therefore, are reviewed under the "substantial rights" standard set out in Texas Rule of Appellate Procedure 44.2(b). *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). We will disregard any error that does not affect a substantial right of the defendant. Tex. R. App. P. 44.2(b); *Gray v. State*, 233 S.W.3d 295, 299 (Tex. Crim. App. 2007). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King*, 953 S.W.2d at 271 (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We do not reverse if, "after examining the record as [a] whole, [we have] fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *see also Schutz v. State*, 63 S.W.3d 442, 444 (Tex.

Crim. App. 2001). The reviewing court should consider everything in the record, including all the evidence admitted, the arguments, and voir dire. *Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002). The strength of the evidence of guilt, especially if it is overwhelming, is a factor to be considered. *Id*. at 357–58.

After examining the evidence as a whole, we conclude that the admission of the victim-impact evidence had only a slight effect on the jury. The jury heard evidence that appellant left a bar at 1:55 a.m. and drove the wrong direction on a major freeway. Despite several oncoming cars swerving and honking, appellant did not slow down or attempt to either pull over to the side of the freeway or move his vehicle to the right side of the freeway. Witnesses at the scene of the head-on collision testified that appellant appeared intoxicated and did not seem to know where he was or what had happened. Subsequent blood draws showed appellant was intoxicated beyond the legal limit. The State did not develop the complained-of testimony and did not mention it again, either during the presentation of its case or during closing argument. *See Atnipp v. State*, 517 S.W.3d 379, 395 (Tex. App.—Eastland 2017, pet. ref'd) (stating that if the State does not further mention or pursue allegedly inadmissible evidence, error may be harmless). Appellant has not established that the victim-impact evidence from Vanessa, without more, had a substantial and injurious effect or influence upon the jury's verdict. We overrule appellant's first two issues.

III. The trial court did not abuse its discretion in admitting State's Exhibit 50, photographs of the complainant, and allowing the husband of the complainant to identify her.

In his third and fourth issues appellant argues the trial court abused its discretion in permitting Ignacio Moreno to testify for purposes of identification and in admitting State's Exhibit 50, two photographs of the complainant, one of the complainant on a beach, and another of the complainant sitting in front of a birthday

cake. When the State introduced State's Exhibit 50, appellant objected to the photographs on the grounds that they were inadmissible under Texas Rules of Evidence 401, 402, and 403. Appellant argued that he stipulated to the identity of the complainant and that her photographs were irrelevant because he had stipulated to identification. The trial court overruled appellant's objection.

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. Tex. R. Evid. 401. "The identity of the victim and the manner and means of death are certainly facts that are of consequence to the determination of the action." *Penry v. State*, 903 S.W.2d 715, 751 (Tex. Crim. App. 1995); *Dawkins v. State*, 557 S.W.3d 592, 605 (Tex. App.—El Paso 2016, no pet.).

Rule 403 favors admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (op. on reh'g) (discussing former Texas Rules of Criminal Evidence 403). A proper Rule 403 analysis by either the trial court or a reviewing court includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). In the context of the admission of photographs, we also consider the number of photographs, their size, whether they are in color or are black and white, whether they are gruesome, whether any bodies are clothed or naked, and, where applicable, whether the body has been altered by autopsy. *Id.*; *Owolabi v. State*, 448 S.W.3d 148, 154 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The photographs in our record are in black and white, are normal size, are not gruesome, or altered by autopsy. The photographs were introduced into evidence to

identify the complainant. Appellant argues the photographs should not have been admitted because he stipulated to the complainant's identity.

Evidence does not become irrelevant merely because it could be proved some other way, such as by an admission or stipulation by the defendant. *Old Chief v. United States*, 519 U.S. 172, 179 (1997).[2] Nor does it become irrelevant just because it is undisputed. *Id*. A defendant may force the State to stipulate to jurisdictional facts unrelated to the facts of the alleged crime if the probative value is outweighed by potential prejudice. *Old Chief*, 519 U.S. at 190 (holding that in prosecution of felon for possessing a firearm, government was required to accept stipulation of felon's status rather than offer proof of nature of prior felony); *Robles v. State*, 85 S.W.3d 211 (Tex. Crim. App. 2002) (holding that in prosecution for third or subsequent DWI, State was required to accept stipulation that defendant had two prior convictions rather than offer proof of prior convictions). But in this case, the photographs were not offered to establish jurisdictional facts.

Despite a defendant's admission of various elemental facts when he pleads "not guilty," the State retains the right to prove the essential elements of the offense, including the victim's identity and cause of death beyond a reasonable doubt. *See Old Chief*, 519 U.S. at 186–87; *see also* Rodriguez v. State, No. AP-74,399, 2006 WL 827833, at *16 (Tex. Crim. App. Mar. 29, 2006) (not designated for publication)

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[2] Since the Texas Rules of Evidence are patterned after the Federal Rules of Evidence, cases interpreting Federal Rules should be consulted for guidance as to the scope and applicability of the rule unless the Texas Rule clearly departs from the Federal Rule. *See Cole v. State*, 839 S.W.2d 798, 801 (Tex. Crim. App. 1990); *see also Montgomery v. State*, 810 S.W.2d 372, 376 n. 2 (Tex. Crim. App. 1990) (stating that although the Texas courts are not bound by lower federal court rulings, when the Texas Rule duplicates the Federal Rule, greater than usual deference should be given to the federal court's interpretations); *Dickerson v. State*, 745 S.W.2d 401, 403 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (stating that the Texas Court of Criminal Appeals has approved the practice of interpreting Texas Rules in accordance with Federal Rules where the wording is the same). Federal Rule of Evidence 403, like its Texas counterpart Rule 403, excludes evidence if its probative value is substantially outweighed by a danger of unfair prejudice.

("[T]he prosecution is entitled to prove its case by evidence of its own choice, and a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the State chooses to present it."); *Peters v. State*, 93 S.W.3d 347, 356 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (Brister, J. concurring) ("The prosecution must prove its case, and may do so even if the defendant would prefer a more antiseptic version."). In this case the trial court did not abuse its discretion in admitting photographs of the complainant to prove identity. We overrule appellant's third and fourth issues.

IV. Appellant did not preserve error with regard to Moreno's alleged victim-impact evidence.

In appellant's fifth and sixth issues, he argues the trial court abused its discretion in allowing the complainant's husband, Ignacio Moreno, to "give impact evidence" and unduly prejudicial testimony during the guilt-innocence phase of trial. Moreno testified as follows:

> Q. What did you think when you saw the flashing lights?
>
> A. I was just hoping it wasn't her.
>
> [Defense counsel]: Your Honor, we renew our same objection 401, 402, 403.
>
> THE COURT: Overruled.
>
> *****
>
> Q. (By [the prosecutor]) Did you ever see your wife again after that evening, August 12th, 2017?
>
> A. Yeah, in a casket.

To preserve error based on the erroneous admission of evidence, an appellant must make a timely and specific objection in the trial court. Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). Additionally, an objection must be made each time inadmissible evidence is offered

unless the complaining party obtains a running objection or obtains a ruling on his complaint in a hearing outside the presence of the jury. *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008); *Merrit v. State*, 529 S.W.3d 549, 556 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

On appeal, appellant argues in his fifth issue that Moreno's testimony was inadmissible victim-impact evidence. The only testimony appellant cites in his brief as inadmissible is the testimony that the last time Moreno saw the complainant she was in a casket. Appellant, however, did not object to that portion of Moreno's testimony. Appellant only objected to the admission of State's Exhibit 50, which appellant complains of in his sixth issue, and which we have addressed above, and to Moreno's testimony when he came upon the accident scene. The point of error on appeal must comport with the objection made at trial. *Clark*, 365 S.W.2d at 339. Appellant did not object to the testimony he now complains of; appellant's subsequent objection was not to Moreno's testimony but to the photographs of the complainant, which we have addressed above. Appellant objected to prior testimony of Moreno about his feelings when coming upon the accident scene, but appellant does not complain of that testimony on appeal. Because appellant did not preserve error for review, we overrule his fifth and sixth issues.

CONCLUSION

Having overruled each of appellant's issues on appeal we affirm the judgment of conviction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Zimmerer, Spain, and Hassan.

Do Not Publish — Tex. R. App. P. 47.2(b).