In The Court of Appeals Seventh District of Texas at Amarillo

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No. 07-19-00117-CR

MICHAEL EUGENE SHUBERT, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 350th District Court
Taylor County, Texas
Trial Court No. 12558-D; Honorable Thomas Wheeler, Presiding

June 19, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Following a plea of not guilty, Appellant, Michael Eugene Shubert, was convicted by a jury of capital murder and sentenced to life in prison without the possibility of parole.[1] By a single issue, he asserts the trial court abused its discretion by allowing the admission

[1] TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2019), § 12.31(a)(2) (West 2019).

of evidence of extraneous misconduct.[2] We find the trial court did not abuse its discretion by admitting the complained-of evidence and we affirm the judgment of the trial court.

BACKGROUND

The deceased was a petite woman with a small frame compared to Appellant's frame of over six feet and his weight of approximately 220 pounds. According to the deputy medical examiner, the deceased was stabbed ten times in the face, neck, chest, and upper abdomen. Two of the wounds were so aggressive that they reached the deceased's spine.

A forensic biologist testified that she tested the deceased's fingernail clippings for DNA. Clippings from her right hand contained DNA from a male contributor of Appellant's lineage and although the results were inconclusive, Appellant could not be excluded as a contributor.

The events leading to the murder began a decade earlier in 2007. That year, Appellant and the deceased's daughter, Kristina, met while she was a high school senior. Appellant was more than ten years older and had three children. Appellant and Kristina's relationship began as roommates but later developed into a romantic relationship. Over the next decade, they had an on-again/off-again, tumultuous relationship. During their separations, Kristina would move in with her mother.

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[2] Originally appealed to the Eleventh Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Eleventh Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

Kristina's mother and Appellant had an acrimonious relationship. According to Kristina, her mother was concerned about the age difference, Appellant's attitude, and his use of marihuana. In the nine years that Kristina and Appellant were together, Kristina could recall her mother visiting Appellant's house only once.

Kristina described Appellant as manipulative and controlling. On February 15, 2016, during one of their separations, Appellant entered Kristina's mother's home and took Kristina's cell phone in order to check her calls and texts. The next day, he returned to the deceased's home and kicked in the door because he was upset over the contents of Kristina's phone. Kristina's mother called 9-1-1 and the recording of the call was admitted over Appellant's objection. As a result of that incident, Appellant was arrested for criminal mischief and criminal trespass.[3]

Despite the pending charges against Appellant, in March 2016, Kristina moved back in with him. She testified that she was "brainwashed." The reconciliation was short-lived, and Kristina soon returned to her mother's home. At that time, most of her belongings and her dogs remained at Appellant's house.

In early May 2016, while Kristina was out of town for work, Appellant sent her text messages threatening to throw out her belongings and put her dogs out on the street. She was worried about her dogs and asked her mother to go to Appellant's house and check on them and collect her belongings. Her mother agreed but asked some of her co-workers to accompany her in case Appellant gave her trouble. When they arrived, they

[3] At the time of the capital murder trial, the charges from the February 2016 incidents were still pending.

realized that Appellant had not actually thrown out Kristina's belongings or her dogs. Appellant was angry that Kristina's mother had gone to his house and sent Kristina a threatening text message. Appellant's threat was a breaking point for Kristina. She claimed "she was done" with him and sought and was granted an emergency protection order. She then completely moved out of his house.

Shortly thereafter, a mutual friend introduced Appellant to Mandy Hill. Mandy had been evicted and needed a place to rent for her and her daughter and Appellant needed financial assistance with expenses. She and Appellant entered into an arrangement and became roommates. Mandy became entangled in the drama between Appellant and Kristina's mother. Just two weeks before the murder, on October 11 and 12, Appellant sent Mandy text messages that would become significant to the prosecution's case against him.

On October 24, 2016, Kristina sought to have the prior protection order extended. During a hearing on that matter, both she and her mother testified.[4] Kristina's mother testified only because she was called as a witness by Appellant. Based on the testimony presented, the trial court granted a two-year extension. When asked how Appellant reacted to the extension of the protective order, Kristina testified "[h]e got very upset and stormed out of the courtroom." Kristina believed that Appellant was jealous of her relationship with her mother because she always returned to her home when she and Appellant separated.

[4] None of the parties were represented by counsel at the protection order hearing.

Kristina's mother was a well-respected employee at a Goodwill facility and had a reputation of never being late for work. On October 28, 2016, four days after the trial court granted the extension on the protective order, she did not show up for work and did not respond to telephone calls or texts from co-workers. They were aware of the history among Kristina's mother, Kristina, and Appellant and became concerned. They drove to her home and knocked on the door but she did not answer. One of the co-workers went to the back of the home and observed signs of a break-in.[5] The police were called. When they arrived, they also observed a suspicious scene and entered the home. The officers found Kristina's mother in her bedroom with multiple stab wounds.

Appellant became a suspect and officers were provided with a description of his vehicles. An officer observed one of the vehicles and stopped it; however, Appellant was not driving it. Appellant's roommate, Mandy, was driving the vehicle and she explained that he had loaned it to her because the brakes in her vehicle needed repair. The officers soon were advised that Appellant had been located and arrested at a local restaurant where he worked.

In a two-count indictment, Appellant was charged with capital murder and murder. The jury returned a guilty verdict on the capital murder count and the trial court sentenced him to confinement for life without the possibility of parole. On appeal, by a single issue, Appellant maintains the trial court abused its discretion in admitting evidence of extraneous misconduct, over objection, during Mandy's testimony. We disagree.

[5] The co-worker had law enforcement experience from his military service.

STANDARD OF REVIEW

We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Id.*

APPLICABLE LAW

Article 38.36(a) of the Texas Code of Criminal Procedure provides that in a murder prosecution, the State or the defendant "shall be permitted to offer testimony as to . . . the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (West 2018). The evidence, however, must meet the requirements of the Texas Rules of Evidence. *See Calvert v. State*, No. AP-77,063, 2019 Tex. Crim. App. Unpub. LEXIS 584, at *140 (Tex. Crim. App. Oct. 9, 2019).

Rule 404(b) of the Texas Rules of Evidence is a rule of inclusion rather than exclusion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). On its face, the rule excludes extraneous offenses offered solely to show that a defendant acted in conformity with bad character by committing the charged offense. *Id.* However, the rule further provides that extraneous offenses are admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004).

Article 38.36(a) operates congruently with Rule 404(b) of the Texas Rules of Evidence, and the two do not conflict with each other. *See Dudley v. State*, No. 08-17-00125-CR, 2019 Tex. App. LEXIS 3287, at *12 (Tex. App.—El Paso April 24, 2019, no pet.) (mem. op., not designated for publication) (citing *Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006)). This is so because article 38.36(a) allows the use of a defendant's prior bad acts to establish the defendant's prior relationship with the deceased, which is a proper non-character conformity purpose admissible under Rule 404(b). *See Dudley*, 2019 Tex. App. LEXIS 3287, at *12. In *Dudley*, the State was entitled to present evidence pertaining to the defendant's motive and intent to commit the offense since the evidence of his prior violent relationship with the deceased was relevant as a circumstance tending to prove the commission of the charged offense. *See id.* at *12-13.

Whether extraneous offense evidence has relevance apart from character conformity is a question for the trial court to decide. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). The trial court first determines whether the evidence is relevant to a material issue in the case and then it must determine whether the evidence should be admitted as an exception to Rule 404(b). *Rogers v. State*, 853 S.W.2d 29, 32-33 (Tex. Crim. App. 1993).

Rule 403 of the Texas Rules of Evidence favors admission of relevant evidence and carries with it a presumption that relevant evidence will be more probative than prejudicial. *Martinez*, 327 S.W.3d at 737. Although admissible under Rule 404(b), evidence may still be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. In a Rule 403

analysis, the probative value of the proffered evidence must substantially outweigh the danger of any prejudice that is considered to be "unfair"—that is, the evidence must have the "potential to impress the jury in an irrational way." *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005).

Under Rule 403, the trial court must balance (1) the inherent probative force of the proffered evidence along with (2) the proponent's need for that particular evidence against (3) any tendency of the evidence to suggest a 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). These factors "may well blend together in practice." *Id.* at 642.

ANALYSIS

Here, Appellant maintains that Mandy's testimony and the admission of the October 11 and 12 text messages he sent her were more prejudicial than probative and should have been excluded under Rule 403. He asserts the State had no compelling need for the objected-to evidence to show intent. The evidence, he argues, is character propensity evidence specifically prohibited by Rule 404(b). For the reasons expressed herein, we disagree.

Generally, a defendant is to be tried only for the offense charged, not for any other crimes or for being a criminal generally. *Segundo v. State*, 270 S.W.3d 79, 87 (Tex. Crim.

App. 2008). However, prior extraneous conduct may be admitted into evidence to prove motive and intent. *See Garza v. State*, No. 11-17-00335-CR, 2020 Tex. App. LEXIS 444, at *21 (Tex. App.—Eastland Jan. 16, 2020, no pet.) (mem. op., not designated for publication).

During her testimony, Mandy confirmed that she received text messages from Appellant on October 11 and 12 indicating he was going on a "killing spree."[6] One of the texts read "she's dead tonight." Mandy testified that Appellant had written a letter indicating that if anything happened to him, she was to receive all of his belongings. According to Mandy, he also asked her to provide him with an alibi—i.e., that they were watching Netflix together—if he was suspected of killing anyone.

Mandy further testified that two weeks later on October 27, Appellant was burning photos in his fireplace and destroying items in his house. She described him as "crazy," "very hyped up, very angry, upset, just out there, mad." According to Mandy, Appellant asked her to drive him and drop him off around the corner from the deceased's home and then pick him up around the block. She refused and he left. When asked what Appellant's intentions were, Mandy replied "[t]o kill her." Mandy clarified that Appellant was referring to "[Kristina's] mom."

Mandy continued that on the night in question, Appellant returned home approximately thirty to forty minutes later and, in her words, Appellant said, "I did it, she's dead, I killed her, get me a trash bag." She complied, and Appellant filled the trash bag

[6] Defense counsel reminded the trial court that the text messages were the subject of a motion in limine and he objected to their admission. However, the State argued they were relevant to Appellant's state of mind just two weeks before the murder. After the trial court conducted a balancing test under Rule 403 of the Texas Rules of Evidence, it ruled the text messages were admissible.

with the clothing he was wearing that night and other incriminating items. Mandy testified she wanted to get away from him. However, he made it clear he was not letting her out of his sight. After he cleaned up, he told her they were leaving town and they both got into her vehicle and began driving. Mandy testified she was in a panic and did not want to leave town with him. She was concerned for her daughter. Instead, she suggested they dispose of the trash bag in a dumpster at an apartment complex where she once resided. She also suggested that leaving town would look suspicious and was able to convince Appellant not to leave. After disposing of the trash bag, they returned to Appellant's house and he reminded Mandy to provide him with an alibi if the police came looking for him.

After Appellant was arrested, Mandy provided a preliminary statement to the police claiming to be asleep and unaware of Appellant's whereabouts on the night in question. However, after receiving a news alert that Kristina's mother had actually been killed, she revised her statement to include all the details of that night. She also told the police where they had disposed of the trash bag but the evidence was never found after it was taken to the landfill.

Mandy also told the police that four days before the murder, she had driven Appellant to the hearing on Kristina's protective order. During the hearing, she waited outside the courtroom. She described Appellant as "very, very angry" at "Kristina's mom" after the hearing. According to Mandy, between the date of the hearing on October 24 and the date of the murder on October 28, Appellant never calmed down. She testified that "killing her calmed him down. He seemed calm after that."

After the State presented its case-in-chief, the defense first presented testimony from Appellant's mother and his former stepfather. They testified that Mandy intended to remain in Appellant's house without paying them any rent. Defense counsel theorized that Mandy was the mastermind behind the murder and he wanted to discredit her testimony. The defense also sought to discredit Mandy with evidence of her drug use, which she admitted to during her testimony.

The final witness for the defense was Appellant. Outside the jury's presence and under oath, he admitted to defense counsel that he was aware of the risk of testifying and the possibility of "opening the door" to evidence that defense counsel may have otherwise kept from the jury.

During his testimony, Appellant denied killing Kristina's mother. He admitted that after May 10, 2016, the day the emergency protection order was granted, he and Kristina's relationship ended. However, contrary to Kristina's description of their relationship, he painted a rosy picture prior to May 10. He testified "[t]hings were great." They had just discovered that Kristina was pregnant and they both had good jobs.[7]

During direct examination, defense counsel reminded Appellant "[y]ou sent some ranting texts to Mandy on one occasion about, it's time to go on a killing spree, or something like that." Appellant confirmed that he did but claimed the text messages were directed at a "guy" who had beat him up and threatened him on Facebook. He also

[7] For medical reasons, Kristina lost the child.

testified that his text message reciting "she [sic] dead tonight" was referring to his "little chihuahua" named "Cookie Monster," but later claimed he would never hurt his dog.

Appellant explained that he rented Mandy accommodations to supplement his income but that after her first rent payment, she struggled financially, and they revised their arrangement to allow her to perform chores and run errands in exchange for rent. He portrayed her as a spiteful methamphetamine user and denied writing a letter leaving all of his belongings to her if anything happened to him. He claimed that she wanted a romantic relationship and his rejection of her advances resulted in a plot by her to frame him for the murder.

Still during direct examination, Appellant admitted that on October 27, he was taking photos out of frames and burning them and breaking things in his house. His explanation was that he was angry at his daughter and was burning her photos. On cross-examination, he again admitted to burning photos but attempted to take back his testimony that he was angry that night and destroying things.

Also during cross-examination, the trial court excused the jury and ruled that Appellant opened the door to his relationship with the deceased and reversed an earlier ruling to exclude a text message which he had sent Kristina reciting the following: "[you] send your mom over here again, she's dead."[8] Appellant sent the text message after Kristina's mother had gone to his house with some of her co-workers believing that Appellant had thrown out Kristina's belongings and her dogs while she was working out

[8] The text had been sent in May during the period in which Kristina sought the emergency protection order. The trial court initially ruled that a text message sent in May, five months before the murder, was too remote to show Appellant's state of mind at the time of the murder.

of town. The prosecutor segued with the following: "[t]hen, in October, October the 11th, you sent a text message now to Mandy Hill going, '[y]ou need to find a new home. I'm done. It's killing spree time.'" Defense counsel did not object and Appellant confirmed that he sent the text message. Appellant also confirmed that he sent other text messages to Mandy on October 12 in which he expressed that he was going to kill someone and she would need to provide him with an alibi by claiming they were watching Netflix together at the time. Appellant claimed he was referring to killing "this one guy" who had beat him up in the past.

Appellant also disagreed with Mandy's testimony that he had asked her to drop him off around the corner from the deceased's house and then pick him up later. He claimed she was "trying to cover something up" and had been planning for months to frame him for the murder. He denied placing his clothes in a trash bag and suggesting that he and Mandy leave town. He claimed he went to sleep early that evening because he had to work the next day. This testimony was, however, in conflict with other text messages sent by Appellant showing he was still awake very late that night.

The final text message offered by the prosecutor which Appellant sent to Mandy indicated that Appellant wanted revenge. When the text was referenced, Appellant answered, "[y]es. That's what it says." However, on redirect examination, he testified the text message was referring to revenge against the person he claimed had beat him up.

"It is well established that questions that involve the admission of evidence are rendered moot if the same evidence is elsewhere introduced without objection; any error in admitting evidence over a proper objection is harmless if the same evidence is

subsequently admitted without objection." *Cuellar v. State*, Nos. 11-15-00078-CR, 11-15-00079-CR, 11-15-00080-CR, 2017 Tex. App. LEXIS 5261, at *9 (Tex. App.—Eastland June 8, 2017, no pet.) (mem. op., not designated for publication) (citing *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999)). The text messages containing unfavorable information that Appellant complains of on appeal were testified to by him, without objection, during direct and cross-examination. He also referenced Mandy's damaging testimony to explain the unfavorable text messages and deflect blame from his misconduct. Assuming, *arguendo*, that the complained-of evidence was erroneously admitted, its admission was cured by Appellant's own testimony about the same evidence without objection. *Edmondson v. State*, 399 S.W.3d 607, 612 (Tex. App.—Eastland 2013, no pet.).

Furthermore, even if the admission of the complained-of testimony was not rendered moot by Appellant's testimony regarding the same evidence, said testimony was admissible pursuant to the provisions of article 38.36(a) of the Texas Code of Criminal Procedure because, in this prosecution for the offense of murder, the testimony tended to enlighten the jury concerning the nature and extent of Appellant's hostility or ill will towards the victim and his desire to kill her. *See* TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (West 2018). The probative value of the complained-of testimony substantially outweighed any "potential to impress the jury in an irrational way," because the testimony primarily dealt with the condition of Appellant's state of mind at or around the time of the killing, as opposed to bad acts or similar misconduct. *See* TEX. R. EVID. 403. *See also Mechler*, 153 S.W.3d at 440. And, finally, the presentation of the testimony did not consume an inordinate amount of time or merely repeat evidence that had already been

admitted. *See also Gigliobianco*, 210 S.W.3d at 641-42. Consequently, Appellant's sole issue is overruled.

REFORMATION OF JUDGMENT

A review of the clerk's record reveals a clerical error in the summary portion of the judgment. In the space for "Punishment Assessed by," the judgment reflects the jury assessed punishment. Where, as here, the State did not seek the death penalty, a life sentence without parole was mandatory and the jury was not required to assess a punishment. *See* TEX. PENAL CODE ANN. § 12.31(a)(2) (West 2019).

This court has the power to modify a judgment of the court below to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). Appellate courts have the power to reform whatever the trial court could have corrected by a judgment *nunc pro tunc* where the evidence necessary to correct the judgment appears in the record. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd).

CONCLUSION

We reform the summary portion of the judgment to reflect "Mandatory Sentence" instead of "Jury" in the space provided for "Punishment Assessed by." As reformed, the trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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