Opinion filed June 25, 2020

In The

Eleventh Court of Appeals

No. 11-18-00149-CR

GEORGE ALFARO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 70th District Court
Ector County, Texas
Trial Court Cause No. A-16-1330-CR

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

The grand jury indicted Appellant, George Alfaro, on one count of aggravated assault of a public servant and one count of evading arrest or detention with a vehicle. Appellant pleaded guilty to both counts. In two enhancement paragraphs, the State sought to enhance Appellant's punishment. Appellant pleaded true to those enhancement paragraphs. After the jury found Appellant guilty on each count in the indictment and after it found "true" as to each enhancement paragraph, it assessed

his punishment on the charge for aggravated assault of a public servant at confinement for life. The jury assessed Appellant's punishment on the charge for evading arrest or detention with a vehicle at confinement for twenty-five years. The trial court sentenced him accordingly and ordered that the sentences would run concurrently. We affirm.

Appellant presents two issues on appeal. In those issues, Appellant maintains that the trial court abused its discretion when it admitted, over Appellant's objection, gang-related evidence. Because the issues are interrelated, we will discuss them together.

There is no challenge to the sufficiency of the evidence. However, we will discuss those facts as are necessary to provide context.

Shortly before midnight on the date of this offense, Investigator Joshua Pool (then a patrol deputy) with the Ector County Sheriff's Office was dispatched to the location where a stolen F-250 flatbed pickup might be located. The location had been determined by virtue of a GPS monitor that was on the stolen pickup. Investigator Pool noticed what he believed to be the stolen pickup and began to follow it. Other deputies joined him. Ultimately, the deputies were involved in a high-speed chase with Appellant, the driver of the pickup. The vehicles traveled at speeds of over 100 miles per hour during the chase; the deputies had activated their red and blue lights, and Appellant tried to evade them.

Appellant testified that a friend had stolen the pickup in Andrews. According to Appellant, he was with his friend and his friend's girlfriend when the friend stole the pickup. But when Appellant was involved in the high-speed chase, he was the only one in the pickup.

Appellant maintained that, when he saw that the deputies wanted to pull him over, he panicked. Appellant testified that the friend who had stolen the pickup had

left a gun in the pickup. Appellant was an "ex-convict" and did not want to get caught with the gun; he was trying to get rid of the gun before he "pulled over."

The high-speed chase took the vehicles through the streets of Odessa. Eventually, Appellant drove down FM 1936 in Ector County. The chase concluded when FM 1936 came to a dead end; the road dead ends into the Halliburton yard. The chase ended when Appellant drove into Halliburton's fence and into two Haliburton vehicles that were in the yard.

Investigator Pool testified that, after Appellant wrecked the stolen pickup, Appellant "jumped" out of the pickup. Investigator Pool saw something black in Appellant's right hand, saw him point it in the direction of the deputies, and heard a shot. Investigator Pool testified that, when he heard the shot, he fired four shots at Appellant and Appellant fell to the ground. State's Exhibit No. 47 was the weapon that Appellant had that night. Law enforcement personnel found a spent shell lying on the ground and one shell fired but not fully ejected from the weapon that Appellant had. A firearms and toolmark examiner testified that the spent shell was fired from the pistol that Appellant had.

After the law enforcement officers at the scene treated Appellant for his gunshot wounds, emergency personnel took him to the hospital, where he received further treatment for his wounds. Appellant suffered gunshot wounds to his right hand, left hand, heel, calf, and leg.

Phillip Breeding, a Texas Ranger, went to the hospital where Appellant was being treated for his wounds. In addition to other photographs, Ranger Breeding photographed Appellant's right arm. The letters "TS" were tattooed on Appellant's right forearm. Ranger Breeding testified that he was familiar with gang tattoos. The "TS" tattooed on Appellant's right forearm stood for "Texas Syndicate" and was indicative of membership in the Texas Syndicate, a Texas prison gang. Ranger Breeding also testified that, once a person is a member of the Texas

Syndicate, he is always a member of the Texas Syndicate. "You're basically in for life. Even when you get out, you still are loyal to the Texas Syndicate." Ranger Breeding explained that the activities of the Texas Syndicate involve "narcotics trafficking, to murder, to a whole array of criminal activity."

Appellant testified that he had been a member of the Texas Syndicate at one time but that he had not been a member for twenty years. Appellant further testified that the Texas Syndicate had tried to kill him in 2010 because he had left the gang and because he had helped convict two members in a case that arose from a shooting incident. Appellant admits that, at the time of the chase, he was high on illegal drugs. Appellant had used Xanax, methamphetamine, cocaine, and marihuana and had also consumed "some beer."

We will not reverse a trial court's decision to admit or exclude evidence unless the trial court abuses its discretion. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). The trial court's decision will be upheld if the decision was within the "zone of reasonable disagreement." *Id.*

Section 3(a)(1) of Article 37.07 of the Texas Code of Criminal Procedure provides, in relevant part:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. . . .

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2019).

Rule 401 of the Texas Rules of Evidence provides: "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.

In its determination of whether the evidence is relevant, a trial court engages its own experiences and observations, "as exemplary of common observation and experience." *Beham*, 559 S.W.3d at 478. "Inevitably, '[d]eciding what punishment to assess is a normative process, not intrinsically factbound.'" *Id.* (alteration in original) (quoting *Murphy v. State*, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988) (plurality op. on reh'g)). In other words, the process relates to common standards or norms. That concept "has been incorporated into Article 37.07, Section 3(a) of the Code of Criminal Procedure." *Id.* Generally, "evidence is 'relative to sentencing,' within the meaning of the statute, if it is 'helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.'" *Id.* (quoting *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007)).

"As a general matter, testimony regarding a defendant's affiliation with a gang may be relevant and admissible at the punishment phase to show the defendant's character." *Mitchell v. State*, 546 S.W.3d 780, 789 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (quoting *Garcia v. State*, 239 S.W.3d 682, 866–67 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd)). In *Garcia*, the court held that the defendant's tattoos were relevant and admissible evidence of gang membership, despite the defendant's denial of membership. *Garcia*, 239 S.W.3d at 867. Furthermore, "[p]resent or past gang affiliation is evidence of [the defendant's] character, and he need not still be affiliated with the gang for the evidence to be relevant and admissible during the punishment phase." *Mitchell*, 546 S.W.3d at 789 (citing *Ho v. State*, 171 S.W.3d 295, 305 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd)).

We do not believe that *Beham* changed the results of those cases insofar as their application to this case. Together, evidence of Appellant's membership in a gang and evidence that the gang engages in the activities described by Ranger Breeding "directly impact 'the factfinder's normative response to [Appellant].'" *Beham*, 599 S.W.3d at 480 (quoting *Mendiola v. State*, 21 S.W.3d 282, 285–86 (Tex. Crim. App. 2000) (Keller, J., dissenting)).

We hold that evidence of the gang tattoo and evidence as to gang activity were, under these circumstances, relevant to Appellant's character for purposes of punishment. The evidence informs "a legitimate area of normative inquiry," and the trial court did not abuse its discretion when it found the evidence to be relevant to sentencing. *See id.* at 480.

Even so, Appellant argues on appeal that he also objected to the introduction of the gang-related evidence under Rule 403 of the Texas Rules of Evidence and that the trial court abused its discretion when it overruled that objection.

Under Rule 403, the trial court may exclude relevant evidence if the probative value of the evidence "is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. When a trial court rules on a Rule 403 objection, it must balance:

> (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest 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 repeat evidence already admitted.

Casey v. State, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007).

Although, upon a proper Rule 403 objection, a trial court is required to balance the probative value of the evidence against any prejudicial effect, it is not required to sua sponte state, on the record, its findings or conclusions that result from that balancing test. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997); *Poole v. State*, 974 S.W.2d 892, 897 (Tex. App.—Austin 1998, pet. ref'd). If a trial court overrules a Rule 403 objection, we will assume that the trial court properly performed the balancing test and found in favor of the admission of the evidence. *Williams*, 958 S.W.2d at 195–96; *Poole*, 974 S.W.2d at 897. We will not assume, upon a silent record, that the trial court failed to perform the balancing test properly. *Williams*, 958 S.W.2d at 195–96.

"Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Williams*, 958 S.W.2d at 196. "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." *Casey*, 215 S.W.3d at 879. The term "unfair prejudice" suggests a tendency to invite a decision founded on an improper emotional or other basis. *Id.* at 879–80. It is the nature of things that testimony and physical evidence most often will be prejudicial to one side or the other. *See Jones v. State*, 944 S.W.2d 642, 653 (Tex. Crim. App. 1996). "It is only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value that Rule 403 is applicable." *Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010).

There is nothing in this record to show that the trial court did not perform the balancing test, and we will assume that it did. The prejudice against which Rule 403 speaks is not all prejudice but, rather, unfair prejudice. We do not believe that Appellant has shown any such unfair prejudice from the presentation of evidence of

gang membership. Further, Appellant has not shown how, in any way, the trial court failed to properly perform its duty to balance the admissibility of the evidence against the factors that we have set forth above and as outlined in *Casey*.

Appellant argues that the State did not need to introduce the gang-related evidence because it had introduced evidence of four prior convictions against Appellant. The State introduced judgments of convictions that had been entered against Appellant: in 2010 for "Engaging in Organized Criminal Activity, To-Wit: Assault with a Deadly Weapon" (five years' imprisonment); in 2005 for "Assault Causing Bodily Injury to a Family Member" (two years' imprisonment); in 1995 for "Possession with Intent to Deliver a Controlled Substance, namely: Cocaine of More Than 4 Grams but Less Than 200 grams" (five years' imprisonment); and in 1992 for "Attempt to Commit Murder" (affirmative deadly weapon finding) (two years' imprisonment).

During the current episode, Appellant had used Xanax, methamphetamine, cocaine, and marihuana and had also consumed "some beer." He tried to elude law enforcement officers when he led them on a high-speed chase while driving a stolen pickup that was purportedly stolen by a friend and that, according to Appellant, he had basically been forced to drive. When he finally wrecked and stopped, Appellant got out of the pickup, pointed a gun at one or more deputies, and fired it.

The State reminds us that the purpose of a punishment hearing is merely to allow the jury to assess punishment in accordance with the objectives of the Texas Penal Code. *See Rogers v. State*, 991 S.W.2d 263, 265–66 (Tex. Crim. App. 1999). Those objectives are, in relevant part: "(1) to insure the public safety through: (A) the deterrent influence of the penalties hereinafter provided; (B) the rehabilitation of those convicted of violations of this code; and (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior." TEX. PENAL CODE ANN. § 1.02 (West 2011). We believe that the gang-related evidence was admissible

as evidence of Appellant's character. Appellant has not shown that the probative value of the evidence pertaining to Appellant's membership in the Texas Syndicate was substantially outweighed by the danger of unfair prejudice.

Appellant maintains that the State offered the gang-related evidence for a stated reason other than to show Appellant's character. Even if that were so, we will not find error if the trial court's decision was correct under any theory of the law. *De la Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). Because we have found that the evidence was properly admissible, Appellant's argument that the State gave the wrong reason for its position on admissibility of the gang-related evidence is not well taken.

The trial court did not abuse its discretion when it admitted the gang-related evidence. We overrule Appellant's first and second issues on appeal.

We affirm the judgments of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

June 25, 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.[1]

Willson, J., not participating.

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