Affirmed and Majority and Concurring Memorandum Opinions filed July 7, 2020.

In the

Fourteenth Court of Appeals

NO. 14-18-00794-CR

LEANDREW CORDELL HICKS, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1540203

CONCURRING MEMORANDUM OPINION

I respectfully concur.

First, I am troubled that this court holds that appellant did not preserve a complaint of error for appellate review, but in doing so cites no precedential cases discussing why appellant's objection that the testimony did not "open the door" fails to preserve an extraneous-offense complaint under Texas Rules of Evidence 403 and 404(b). *See* Tex. R. Evid. 103(a)(1) (preserving claim of error); Tex. R. App. P. 33.1(a)(1) (preservation of appellate complaints), 47.7(a) ("Opinions and

memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value."). Second, the court does not determine whether appellant's objection "the prejudicial effect outweighs" is sufficient to preserve a Texas Rule of Evidence Rule 403 objection, but instead goes directly to harm. It certainly seems that the specific ground, Rule 403, was apparent from the context. *See* Tex. R. Evid, 103(a)(1)(B); Tex. R. App. P. 33.1(a)(1)(A). I believe the parties, the trial court, and the public are better served by this court determining whether there was error before jumping to a harm analysis.

After assuming but not deciding the "the prejudicial effect outweighs" complaint is preserved, the court proceeds to analyze under Texas Rule of Evidence 403 whether relevant evidence may still be excluded "if its probative value 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. The court uses the *Gigliobianco* formulation of these factors to analyze the competing interests under Rule 403:

> (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 weigh 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).

I see the factors as being much less compelling than the majority, but I do

concur there was no abuse of discretion. First, I agree there is inherent probative force in the previous assault on a friend to counter appellant's statement that he would never hurt a friend. Second, I believe the court overplays the similarity between assault and homicide in questioning whether appellant's statement that he "never felt [that] before" was false. Third, the court accepts that the extraneous offense (assault) was "similar" to the charged offense (murder) and that whenever the extraneous offense is similar to the charged offense, there is always a potential that the jury may be unfairly prejudiced by the defendant's character conformity. However, the court concludes the factor weighs in favor or admissibility because appellant's statement that he "never felt [that] before" "could" leave the jury with the incorrect belief that appellant had never previously committed a violent act. Fourth, the court treats assault as similar to murder up to this point, but now it recognizes a difference ("The Morales assault, though an aggravated assault, was less serious of a crime than murder.") so the danger of a decision on an improper basis can be "ameliorated." Fifth, I agree the extraneous offense is the type of evidence that did not require expertise or specialized consideration to judge. Sixth and last, I agree that 14 percent of the record on noncumulative issues was not an inordinate amount of time.

This case presents a very close call. The standard of review is abuse of discretion. I believe the court's analysis is inaccurate: "In total, only one of the six factors weigh in favor of exclusion – and that factor does not weigh heavily in favor of exclusion. The remaining five weigh in favor of admission." This makes the analysis sound like a math problem, and it is not. To me, the question is whether the trial court went beyond what the Court of Criminal Appeals has bluntly and correctly described as the trial court's limited right to be wrong. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1991). I do not

believe that the trial court abused its discretion, but I also do not want to suggest that the trial court was correct in admitting the extraneous-offense evidence.

This court's role is to determine whether there is structural error in the trial court's judgment or properly preserved reversible error in the trial court's judgment as argued on appeal. I do not believe there is either type of error in this appeal. However, this court has unnecessarily bolstered the trial court's questionable ruling admitting extraneous-offense evidence. We do not have to do that, and I believe this court should not leave trial courts with the impression that these critical rulings can be reduced to a simplistic enumeration of factors.

I respectfully concur in the court's judgment.

/s/ Charles A. Spain
Justice

Panel consists of Justices Christopher, Spain, and Poissant (Poissant, J., majority).
Do Not Publish – Tex. R. App. P. 47.2(b).