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

MAJORITY MEMORANDUM OPINION

Appellant Leandrew Cordell Hicks was convicted by a jury of manslaughter and assessed punishment at 18 years' confinement. Appellant raises two issues on appeal, asserting the trial court erred by: (1) by admitting into evidence an extraneous offense; and (2) by failing to include a limiting instruction concerning the use of extraneous offense evidence in the charge to the jury. We affirm.

I. BACKGROUND

On February 8, 2017, officers with the Houston Police Department were dispatched at 11:45 a.m. to a shooting at residence on Wuthering Heights Drive, in Southwest Houston. The complainant was dead in the driveway from a gunshot wound. Witnesses quickly identified appellant as the shooter, and described the situation for police. Witnesses Elliott Doze (the complainant's uncle) and Elton Taylor (the complainant's neighbor), were present when the complainant was shot and told the police what happened. In May 2017, appellant was indicted for the felony offense of murder of the complainant.

At trial in August 2018, Doze testified that on the day of the offense, appellant drove to his mother's home on Wuthering Heights and parked in the driveway.[1] Doze and Taylor got into the car with appellant; Doze was in the front passenger seat while Taylor sat in the back. When Doze got in the car, he observed .38 bullets in the middle console cup holder. Doze asked appellant what was going on and appellant replied that he had a lot on his mind. Appellant then showed Doze a .38 revolver that he had in the driver's side door of the car. Doze testified the gun was loaded because he could see the bullets in the revolver.

Doze testified that he, Taylor, and appellant "had just finished smoking a blunt [marijuana cigarette]" and were talking when the complainant arrived home and began talking to appellant at the driver's side of the car. The conversation between appellant and the complainant was not stressful or strained. Doze and Taylor testified that appellant and the complainant grew up together and were close friends. At some point, the complainant left the car only to return shortly later. As the complainant returned to the car, Doze stated that appellant took his firearm from the

[1]Patricia Harris owned the home on Wuthering Heights. Her son, Doze, and her nephew, the complainant, were living in the residence with her.

driver's side door in his left hand, cocked it, and pointed it out the window at the complainant.[2] Doze told appellant to "put the gun down before it go[sic] off."

Taylor, who was playing a game on his phone in the backseat, heard the complainant say in a laughing manner to appellant "you ain't going to do nothing with that." Both Doze and Taylor heard the gun discharge. Taylor testified that he heard appellant exclaim, "Oh, shit." Taylor further testified that he heard Doze state, "You shot your cousin."

The complainant fell to the ground. Appellant turned and pointed the gun at Doze. At that time, Doze testified that appellant's "eyes were just big . . . just bugged out like he was just spaced out." Doze and Taylor both jumped out of the car and went to check on the complainant. Appellant fled the scene in the green Honda Accord he was driving. Taylor testified that he yelled at appellant, "Why is you leaving?" Doze called 911 and requested paramedics; the complainant died in Doze's arms. The paramedics and police arrived shortly thereafter.

Doze met with HPD homicide detective Ernest Aguilera the day of the incident and gave a statement that appellant had shot the complainant; he identified the color, make and model of the car appellant was driving; and he advised the detective of the caliber gun that appellant used to shoot the complainant. Taylor met with detective Aguilera the following day.

Police were able to locate and arrest appellant without incident at his aunt's apartment. Officer Gerald Robertson took the following statement from appellant at the time of arrest: "What was I supposed to do? I was sitting in my car with the

[2] Appellant disagreed with Doze's testimony as to how the gun went off. According to appellant, around thirty-five days prior to the offense, appellant had been shot in his left arm and abdomen, requiring a reconstructed elbow. Appellant testified that, at that time, he could only bend his left elbow thirty-percent. Appellant testified that when the gun went off he had most of the possession of the gun.

windows halfway rolled up when he came at me." Appellant then told police that the gun just went off. Appellant did not reveal to the police the location of the gun. Appellant testified at trial that the statement Officer Robertson took down in his offense report was a "false quote."

Mary Lynn Anzalone, an assistant medical examiner from the Harris County Institute of Forensic Sciences, testified that the complainant died from a .38 revolver shot in his lower left chest. Anzalone testified that, in gunshot cases, she looks for the presence of "stippling" or "gunshot residue."[3] If stippling is present on an injury it can provide an idea of the distance of the range of fire. On complainant's body, Anzalone found no evidence of "stippling."

At trial, appellant testified that the gun just went off, but added that it was the result of the complainant grabbing for the gun. In this respect, appellant testified that while appellant was "trying to hit the blunt," the complainant saw the gun in the side driver's door and reached in the car to grab it. Appellant claimed that he and the complainant "wrestled" over the gun while the complainant was pulling it up; appellant grabbed the handle and "somehow the trigger ended up being pulled." Appellant testified that Doze "didn't tell the full story." According to appellant, Doze made up his story because he was mad that appellant killed the complainant.

Appellant repeatedly stated that the complainant's death was an accident, and that he did not intend to kill the complainant. Appellant also described how he felt after killing the complainant, stating:

> It's undescribable (sic). It's a feeling I ain't never felt before. Well it's a feeling I ain't ever felt since I was a kid. It's one of them feelings where you know that something that happened that you can't explain to

[3] Anzalone explained that "[s]tippling is basically small injuries or searing of the body, little kind of punctate or pinpoint that result from impact with partially burned, unburned gunpowder that's deposited from the muzzle of the weapon."

> your mother and them. And, you know, like, how can I explain this? No one will never believe me. It felt like I had got shocked or something. I didn't know what to do.

In response to this statement, the State presented rebuttal evidence of an extraneous offense where appellant had assaulted Morales, in 2014. Morales met appellant through mutual drinking partners; a few years later, in the summer of 2014, appellant began working for Morales' lawn service business. Morales testified that one night in June 2014, Morales woke up to find his truck on fire. When he went outside to check on it, appellant struck him in the head repeatedly with a hard pipe or pole, while cursing him and saying that he was going to kill Morales. Morales denied pulling out a knife during the fight with appellant. Morales denied owing appellant money for past work or ever threatening appellant. Morales testified he did not know why appellant assaulted him. Morales was taken to the hospital and treated from his injuries.

Appellant testified that Morales "made up false information against him." According to appellant, Morales owed him money from past work and had threatened appellant. Appellant testified that he went to confront Morales about the money Morales owed him for past work and they had a mutual fight. Appellant testified that Morales pulled out a box cutter so appellant grabbed a fireplace poker from the barbecue pit to defend himself. Appellant admitted he fled the scene. Appellant pled guilty to misdemeanor assault of Morales.

Appellant claimed he was the only person telling the truth at trial. When asked to tell the truth about the location of the murder weapon, appellant responded that he did not know where the gun was located. He testified he did not know what he did with it because he was "in emotional distress."

A jury found appellant guilty of the lesser-included felony offense of manslaughter, and on August 24, 2018, assessed his punishment at 18 years' confinement. This appeal timely followed.

II. ANALYSIS

A. Extraneous Offense Evidence

In his first issue, appellant argues that "the trial court abused its discretion by holding that Appellant opened the door to extremely prejudicial extraneous offense evidence and allowing it into evidence during the guilt-innocence phase of trial."

1. Standard of Review

When reviewing a trial court's decision to admit extraneous offense evidence under Rule 404(b), or over a Rule 403 objection, an appellate court applies an abuse-of-discretion standard. *See De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App .2009); *see also Henley v. State* , 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial court abuses its discretion only when its decision lies outside "the 'zone of reasonable disagreement.'" *De La Paz v. State*, 279 S.W.3d at 343–44. The erroneous admission of extraneous-offense evidence constitutes non-constitutional error, reviewable for harm under Texas Rule of Appellate Procedure 44.2(b). *Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005). This rule provides that we must disregard "any [non-constitutional] error, defect, irregularity, or variance that does not affect [an appellant's] substantial rights[.]" TEX. R. APP. P. 44.2.

2. Objection at Trial

The trial court made its decision based on testimony elicited from appellant during his case in chief.

> Q: . . .What was going through your mind when the shot went off?
>
> A: When the shot went off, it was like I see myself on the ground. It was a situation that I never thought that would happen. So, I was in emotional distress. I was very erratical [sic] at the time. I didn't know what to do. It was like the whole world had came [sic] down upon me. I knew that it was too hard to explain. So, I figured that my world and the things that I just had accomplished was going to come to an end.
>
> * * *
>
> Q: . . .You know, what were you feeling after the shooting?
>
> A: It's undescribable (sic). It's a feeling I ain't never felt before. Well it's a feeling I ain't ever felt since I was a kid. It's one of them feelings where you know that something that happened that you can't explain to your mother and them. And, you know, like, how can I explain this? No one will never believe me. It felt like I had got shocked or something. I didn't know what to do. . . .

After defense counsel passed appellant as a witness, the State argued that the defendant had opened the door to extraneous offense testimony regarding an assault appellant committed in 2014 against Morales, a friend and former employer. Specifically, the State alleged this testimony opened the door to the issue of intent.

> [The State]: I believe the Defendant opened the door when he stated he thought something like this would never happen to him. It's too hard to explain that the world had come to an end. He further explained what feeling it was, it was undescribable [sic] and he'd never felt like this before. Nothing -- something you can't explain to your mom and no one would believe me. When he did this situation with another individual, as he was meeting Mr. Morales, he was telling Mr. Morales, "I'm going to kill you." So, someone pulled him off and then he left, I believe. I'm entitled to go into that.
>
> [Defense counsel]: First of all, he hasn't opened the door, okay, unless he killed somebody else. We'd object --
>
> [The State]: No --
>
> THE COURT: It doesn't --
>
> [Defense counsel]: -- the prejudicial effect outweighs --
>
> THE COURT: It's all extraneous -- prejudicial, Mr. Gonzalez. That's

the danger when the door's opened.

[Defense counsel]: Okay. And if you let it in, then I can explore that whole episode, right?

THE COURT: It -- yeah.

MR. RICK GONZALEZ: All right.

MS. WILLIFORD: You specifically addressed the issue of intent, that there was no intent.

MR. RICK GONZALEZ: As long as you're aware that I am entitled to --

THE COURT: Yeah, of course you are.

3. Preservation of Error

Appellant claims the trial court erred under Rules 404(b) and 403 of the Texas Rules of Evidence and that appellant did not leave the jury with a false impression.

a. Rule 404(b)

Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible "to prove the character of a person in order to show action in conformity therewith"; however, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. TEX. R. EVID. 404(b). Rebuttal of a defensive theory is also one of the permissible purposes for which evidence may be admitted under Rule 404(b). *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (citing *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003)).

In order to preserve a ground for review, a party must make a timely and sufficiently specific objection on the ground and obtain an adverse ruling from the trial court. TEX. R. APP. P. 33.1(a). A defendant's appellate contention must comport with the specific objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). An objection stating one legal theory may not be used

to support a different legal theory on appeal. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).

Here, appellant's Rule 404(b) contention on appeal does not comport with his objection at trial. As set forth above, appellant's objection at trial was that his testimony did not "open the door" – not that it violated Rule 404(b). Trial counsel did not object to the introduction of the Morales assault under Rule 404(b). Trial counsel's statements to the court were: (1) "First of all, he hasn't opened the door, okay, unless he killed somebody else. We'd object --", and, (2) "-- the prejudicial effect outweighs --." Appellant's objection that his testimony "hasn't opened the door" was too vague and imprecise to preserve error. *See Daniels v. State*, 25 S.W.3d 893, 897 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding error not preserved by non-specific objection that evidence did not satisfy "the requirements of the Constitution and the Code of Criminal Procedure"); *Najera v. State*, 955 S.W.2d 698, 702 (Tex. App.—Austin 1997, no pet.) (concluding that objection to prosecutor's opening statement as "wholly improper" was not sufficiently specific to preserve error).[4] The purpose of requiring parties to lodge a timely and specific objection is to inform the trial court of the basis for the objection, and to give the court an opportunity to rule on the specific objection when the evidence is

[4] The objection that the testimony did not "open the door" has been held to not sufficiently preserve Rules 403 and 404(b) objections. *See Moore v. State*, No. 03-06-00530-CR, 2007 WL 2274888, at *4 (Tex. App.—Austin Aug. 09, 2007, pet. ref'd) (mem. op., not designated for publication) (holding that counsel's argument that testimony did not "open the door" did not preserve objections under Rules 403 or 404(b)); *see also Roundtree v. State*, No. 14-07-00876-CR, 2009 WL 433218, at *2 n.2 (Tex. App.—Houston [14th Dist.] Feb. 19, 2009, pet. ref'd) (mem. op., not designated for publication) ("inadmissible" objection was too vague but citing to *Moore*'s Rules 403 & 404(b) conclusion with approval); *Perez v. State*, No. 07-10-00147-CR, 2011 WL 3112061, at *4 (Tex. App.—Amarillo July 26, 2011, pet. dism'd) (mem. op., not designated for publication) (objection that testimony did not open the door did not sufficiently preserve Rule 403 objection for appeal); *Benitez v. State*, No. 01-10-00684-CR, 2011 WL 6306643, at *5 (Tex. App.—Houston [1st Dist.] Dec. 15, 2011, no pet.) (mem. op., not designated for publication) (objection that evidence was too prejudicial did not preserve an objection under Rule 404(b)).

introduced. *Aguilar v. State*, 26 S.W.3d 901, 906 (Tex. Crim. App. 2000). Under the facts of this case, we conclude that appellant's objection that his testimony "hasn't opened the door" did not properly advise the trial court of the specific basis for the objection. He made no objection based on Rule 404, and he did not assert that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *See* TEX. R. EVID. 404(b).

We conclude appellant's Rule 404(b) complaint was not preserved for our review.

b. Rule 403(b)

Appellant also contends that the trial court abused its discretion in admitting the Morales assault evidence because it was unfairly prejudicial. Trial counsel stated, "the prejudicial effect outweighs—." Assuming without deciding that appellant did preserve his 403 complaint, we conclude the trial court did not abuse its discretion in admitting the extraneous evidence because it was more probative than prejudicial.

Rule 403 of the Texas Rules of Evidence provides that relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." TEX. R. EVID. 403. The Rule favors admissibility of relevant evidence, and there is a presumption that relevant evidence will be more probative than prejudicial. *See Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991)*; Martinez v. State*, 468 S.W.3d 711, 718 (Tex. App.—Houston [14th Dist.] 2015, no pet.). It is therefore the opponent's burden to demonstrate that the danger of unfair prejudice substantially outweighs the probative value. *Kappel v. State*, 402 S.W.3d 490, 494 (Tex. App.—Houston [14th Dist.] 2013, no pet.). In reviewing the trial court's balancing determination under Rule 403, we are to "reverse the trial

court's judgment rarely and only after a clear abuse of discretion." *Id*. We consider the following factors when analyzing 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); *West v. State*, 554 S.W.3d 234, 239 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Beginning with the first factor, the Court of Criminal Appeals has stated that the probative value of extraneous offense evidence is low when the evidence supports only noncompelling or undisputed evidence that has already been submitted. *See Montgomery*, 810 S.W.2d at 390. In this case, evidence of the extraneous offense was offered to support a highly disputed fact: whether appellant intentionally murdered the complainant. First, by showing that he had previously attempted to kill one of his friends, Morales, it rebutted appellant's claim that the complainant's death was an accident. More specifically, it addressed the defensive theory that, because the complainant and appellant were friendly, appellant did not intend to kill the complainant. Also, in both cases, appellant fled from the scene and claimed self-defense. We conclude that the evidence was probative to rebut appellant's theory that killing his "blood brother," his friend, was an accident. The first factor weighs in favor of admissibility.

The second factor addresses the proponent's need for the extraneous offense evidence. Here, the prosecution's need was strong because both sides hotly contested the issue of appellant's intent. *See Lane v. State*, 933 S.W.2d 504, 521 (Tex. Crim.

App. 1996) (holding that the need for extraneous offense evidence is greatest when the evidence supports an element of a "hotly contested issue"); *see also Sorto v. State*, 173 S.W.3d 469, 491 (Tex. Crim. App. 2005). Appellant denied he meant to harm the complainant. He claimed the shooting was in self-defense and/or was an accident. Moreover, admission of the extraneous offense corrected the false impression that appellant left with the jury. Appellant's statement that the feeling after the homicide was one he "ain't never felt before" and that "[i]t's one of them feelings when you know that something that happened that you can't explain to your mother and them" indicated to the jury that he had never previously attacked another person. This impression was false, and the Morales assault proved that.

The third factor evaluates the tendency of the evidence to suggest decision on an improper basis. Here, the extraneous offense was similar to the charged offense in that both offenses contained allegations that appellant had assaulted (and in this case murdered) a friend. 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. *See Lane,* 933 S.W.2d at 520. Left on its own, appellant's statement could leave the jury with the incorrect belief that appellant had never previously committed a violent act. Appellant made it necessary for the State to correct this false impression. This factor weighs in favor of admissibility.

The fourth factor evaluates any tendency of the evidence to confuse or distract the jury from the main issues. The admission of extraneous offense evidence always presents the possibility of unfair prejudice. While this factor may weigh in favor of exclusion, it should not weigh heavily. The Morales assault, though an aggravated assault, was less serious of a crime than murder. Where the extraneous offense is no more serious than the allegations forming the basis for the indictment the danger of a decision on an improper basis is ameliorated. *Ryder v. State*, 581 S.W.3d 439, 454

(Tex. App.—Houston [14th Dist.] 2019, no pet.) (citing *Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet. ref'd)); *West v. State*, 554 S.W.3d 234, 241 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (same).

The fifth factor weighs 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. Here, the type of evidence presented did not require expertise or specialized consideration to judge. It was not scientific or technical in nature. It was the same sort of issue of credibility that juries are equipped to judge. This factor weighs in favor of admission. *See Buxton*, 526 S.W.3d at 692 (noting that non-scientific, non-technical testimony of extraneous abuse victim weighed in favor of admission).

For the sixth factor, courts evaluate the time during trial that the proponent required to develop the evidence of the extraneous offense. Here, testimony of the Morales assault was only presented during the afternoon of the second day and the morning of the third day and did not consume the entirety of either. Testimony of the Morales assault through direct, cross, re-direct and re-cross took approximately 57 pages of testimony. The trial took three days and consumed approximately 399 pages. The approximate 57 pages of the record is only a fraction compared to the 399 pages of complete testimony with 14 different witnesses; *compare Buxton*, 526 S.W.3d at 692 (21 pages out of 201 pages was not unduly time consuming) *with Newton v. State*, 301 S.W.3d 315, 322 (Tex. App.—Waco 2009, pet. ref'd) (116 pages of testimony out of 426 pages, over three-and-a-half days, weighed in favor of exclusion). Moreover, the presentation of the Morales assault was not cumulative of other evidence and did not present through any other witnesses. This factor weighs in favor of admission.

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. Even assuming the fifth factor weighs in favor of exclusion, the remaining balance indicate that the trial court did not abuse its discretion. *See Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (Rule 403 requires "clear disparity" between unfair prejudice and probative value for exclusion); *see also Distefano v. State*, 532 S.W.3d 25, 35 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (same).

We conclude that the trial court, after balancing the various Rule 403 factors, could have reasonably concluded that the probative value of the evidence of the Morales assault was not substantially outweighed by the countervailing factors specified in the rule. *See Hammer*, 296 S.W.3d at 568 ("[Rule 403] envisions exclusion of evidence only when there is a 'clear disparity between the degree of prejudice of the offered evidence and its probative value.'") (quoting *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001)). Consequently, we reject the contention that the trial court erred by admitting the challenged evidence, and therefore appellant's first issue is overruled.

B. Jury Instruction

In his second issue, appellant argues that the trial court erred in failing to submit instructions limiting the jury's consideration of the extraneous offense evidence testimony.

In reviewing a jury charge, the court first determines whether error occurred. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. App. 2005); *Herrera v. State*, 367 S.W.3d 762, 775 (Tex. App.—Houston [14th Dist.] 2012, no pet.). If the court finds error, it then evaluates whether sufficient harm resulted from the error to require reversal. *See Ngo*, 175 S.W.3d at 743; *Herrera*, 367 S.W.3d at 775.

1. The Charge

Appellant did not object to the charge at trial. The relevant instruction on the extraneous offense read as follows:

> You are further instructed that if there is any evidence before you in this case regarding the defendant 's committing an alleged offense or offenses other than the offense alleged against him in the indictment in this case, you cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt, that the defendant committed such other offense or offenses.

Appellant does not argue what instruction should have been submitted by the trial court.

2. Rule 105

Limiting instructions are governed by Rule 105 of the Texas Rules of Evidence. The Rule provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." *See* TEX. R. EVID. 105(a). In the absence of a proper request, "the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal." *Id.*

The Court of Criminal Appeals has consistently construed Rule 105 as requiring a request for a limiting instruction at the time the evidence is admitted. *See Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007); *Hammock v. State*, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001); *Beam v. State*, 447 S.W.3d 401, 406 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "'A limiting instruction concerning the use of extraneous evidence should be requested, and given, in the guilt-stage jury charge only if the defendant requested a limiting instruction under

Rule of Evidence 105 when the evidence was first admitted.'" *Id*. (quoting *Grubbs v. State*, 440 S.W.3d 130, 137 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

If evidence is admitted without a request for a limiting instruction, the evidence becomes admitted for all purposes. *See Hammock*, 46 S.W.3d at 895. Once evidence is admitted for all purposes, a limiting instruction on the evidence is not "within the law applicable to the case," and the trial court has no duty to include the instruction in its charge to the jury. *See id.* (quoting TEX. CODE CRIM. PROC. art. 36.14).

Here, at the time that the extraneous evidence was admitted, appellant did not request a limiting instruction. The lack of Rule 105 request also meant that the trial court had no obligation to include a limiting instruction. Further, when the evidence was admitted without a limiting instruction at the time, it was admitted for all purposes; it was not admitted for a specific purpose, such as intent. *See Delgado*, 235 S.W.3d at 251 ("Once evidence has been admitted without a limiting instruction, it is part of the general evidence and may be used for all purposes"); *Grubbs*, 440 S.W.3d at 138 (same); *McGowan v. State*, 375 S.W.3d 585, 593 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (same). Additionally, appellant did not request during the charge conference that the court included a limiting instruction in the court's instructions to the jury. Instead, trial counsel affirmatively stated that he had no objection to the jury instructions.

Because trial counsel never requested a limiting instruction—either during the presentation of the extraneous evidence or during the charge conference—the trial court was under no obligation to include one. The trial court did not have a *sua*

sponte duty to include a limiting instruction in the charge.[5] The trial court did not err in delivering the charge to the jury. We overrule appellant's second issue.

III. CONCLUSION

Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Christopher, Spain, and Poissant (Spain, J., concurring).
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[5] Because we find the trial court did not err in submitting the limiting instruction contained in the charge, we do not reach appellant's contention that the failure to properly restrict the jury's consideration of the extraneous offense evidence caused him "egregious harm."