Affirmed and Opinion filed July 14, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00239-CR

MATTHEW CHRISTOPHER FISH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 81506-CR

OPINION

A jury acquitted appellant of murder, convicted him of manslaughter, and assessed punishment at seventeen years' confinement and a fine. In nine issues, appellant contends that his trial counsel rendered ineffective assistance of counsel and that the trial court erred by excluding the decedent's specific acts of violence, admitting evidence of appellant's extraneous bad act, and denying a requested jury instruction about apparent danger. We affirm.

I. BACKGROUND

By the time appellant killed his mother in February 2017, their relationship had been souring for several years. In December 2016, for example, appellant and his girlfriend, Brittany Smith, had a criminal trespass warrant issued against the decedent.

One evening in February 2017, the decedent showed up at the house appellant shared with Smith while appellant was driving home from work. The decedent brought a birthday card for appellant and his W-2 tax forms. The decedent and Smith argued about how the decedent should not be there, but the decedent did not leave. The decedent stood at the threshold of the garage, near a brick pillar on the left side of the garage.

When appellant pulled up to the driveway in his Dodge Ram 1500 truck, he saw the decedent. He later told police that he "snapped." He was "mad" and "seeing red." He was "overcome with rage." So, he "gunned it" and accelerated. He was "trying to bump her." He "wanted to hit her."

He succeeded. Not only did he hit her, but he also hit the brick pillar behind her, pinning her between the pillar and the truck. She suffered fatal injuries and died soon after.

At trial, the jury rejected appellant's claims of self-defense and defense of Smith, acquitted him of murder, and convicted him of manslaughter. The trial court denied appellant's motion for new trial, and he appeals.

II. EXCLUSION OF EVIDENCE

In his first issue, appellant contends that the trial court erred by excluding relevant evidence of the decedent's prior acts of violence and aggression because the evidence was relevant to appellant's defenses of self-defense and defense of a

third person. Appellant contends that the evidence was relevant to show that the decedent was the initial aggressor, to show the reasonableness of appellant's apprehension of danger, and to rebut a false impression left by the State that the decedent was a non-violent person.

A. Evidence

At trial, appellant sought to introduce evidence from two witnesses regarding the decedent's acts of violence against her ex-husband and boyfriend. The first witness, Ronald Fisher, was the decedent's boyfriend. He testified during an offer of proof that, about four months before her death, the decedent slammed a door on his hand and was trying to swing at him, so he grabbed her by the throat. He was charged with assault for the incident, but she recanted. Appellant knew about the incident because Fisher told appellant about it.

The second witness, Phyllis Crawford, was the decedent's friend. She testified during an offer of proof that she was aware of the decedent assaulting the decedent's ex-husband. The friend saw the decedent hit her ex-husband and knock the glasses off his face about seven years before the trial (about six years before the decedent's death). On another occasion, the decedent sprayed spray paint on the ex-husband's face. One evening when the decedent was newly married, she broke the window of her car with a bat to retrieve the keys that had been locked inside. The decedent told her insurance company that somebody else had broken into the car. Crawford was also aware that the decedent was the initial aggressor against Fisher when he was charged with an assault. Crawford did not testify that appellant was aware of any of these acts of violence.[1]

[1] During the recording of appellant's interrogation by police, State's Exhibit 7, appellant referred to the decedent spraying "cleaner detergent" in the ex-husband's eyes and other facts similar to the spray-paint incident described by Crawford.

B. Standard of Review and Legal Principles

We review a trial court's decision to exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion only if the court's ruling is so clearly wrong as to lie outside the zone within which reasonable people might disagree. *Id.*

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Tex. R. Evid. 401. Generally, evidence of a person's character is not admissible to prove that on a particular occasion the person acted in accordance with the character. Tex. R. Evid. 404(a)(1). But, a defendant in a homicide prosecution who raises the issue of self-defense may introduce evidence of the decedent's violent character. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). Specific violent acts of misconduct by the decedent may be admitted to show (1) the reasonableness of the defendant's fear of danger, or (2) that the deceased was the first aggressor. *Id.* Under both theories for admission, specific acts are admissible only to the extent that they are relevant for a purpose other than character conformity. *Id.*

In the context of proving the reasonableness of the defendant's apprehension of danger, the decedent's specific violent acts may be relevant to show the defendant's state of mind. *See id.* at 760 n.4. The defendant must show that he or she was aware of the decedent's acts of violence. *Id.* To be admissible, the specific violent acts must be probative of the reasonableness of the defendant's apprehension of danger. *See Allen v. State*, 473 S.W.3d 426, 448–49 (Tex. App.—Houston [14th Dist.] 2015, *pet. dism'd*, 517 S.W.3d 111 (Tex. Crim. App. 2017); *see also Thompson v. State*, 659 S.W.2d 649, 654 (Tex. Crim. App. 1983).

In the context of proving that the decedent was the first aggressor, the decedent's specific violent acts may be relevant to show the decedent's intent, motive, or state of mind. *Torres*, 71 S.W.3d at 760. The defendant does not need to show that he or she was aware of the decedent's acts of violence. *See id.* at 761. To be admissible, the specific violent acts must "explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only." *Id.* at 762.

Furthermore, a witness in a homicide case may "open the door" to rebuttal character evidence by placing the decedent's peaceable character at issue. *Allen*, 473 S.W.3d at 454. The witness may be cross-examined about relevant specific instances of conduct to rebut the false impression. *Id.*

C. Preservation of Error

Preservation of error is a systemic requirement, and this court may not reverse a judgment of conviction without first addressing any issue of error preservation. *Darcy v. State*, 488 S.W.3d 325, 327–28 (Tex. Crim. App. 2016). As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling sought from the trial court with sufficient specificity to make the trial court aware of the complaint. *See* Tex. R. App. P. 33.1. A complaint on appeal must comport with the specific complaint that the appellant timely lodged in the trial court. *Penton v. State*, 489 S.W.3d 578, 580 (Tex. App.–Houston [14th Dist.] 2016, pet. ref'd); *see Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). The appellant must have conveyed to the trial court the particular complaint raised on appeal, including the precise and proper application of law as well as the underlying rationale. *Penton*, 489 S.W.3d at 580.

At trial, appellant preserved error for his complaint on appeal that all the evidence discussed above was admissible to show that the decedent was the first aggressor because it was relevant to the decedent's state of mind, intent, or motive. Appellant also argued that Fisher's testimony was relevant to prove the decedent's "tendency to be aggressive towards people which indicates what [appellant and his girlfriend] think or perceive as to the self-defense." We assume without deciding that this reference to what appellant thought regarding self-defense was sufficient to preserve error for appellant's complaint on appeal that Fisher's testimony was admissible to show the reasonableness of appellant's apprehension of danger. But appellant never made a similar argument regarding Crawford's testimony; he never argued that her testimony was relevant to appellant's apprehension of danger or what appellant "thought" or "perceived" as to self-defense.

Furthermore, appellant did not tell the trial court that any of the proffered evidence was admissible to rebut a false impression created by the State that the decedent was a nonviolent person. Therefore, this complaint on appeal was not preserved. *See Allen*, 473 S.W.3d at 448–49 (no error preserved for complaint that evidence of the decedent's physical abuse of the witness was admissible to rebut a false impression left by the witness regarding the decedent's peaceable character).

In sum, our review on appeal is limited to appellant's complaints that the trial court erred because (1) both witnesses' testimony was relevant to prove the decedent was the first aggressor; and (2) Fisher's testimony was also relevant to prove the reasonableness of appellant's apprehension of danger.

D. Analysis

The *Torres* case illustrates how a victim's prior act of violence may help explain the victim's conduct to prove that the victim was the first aggressor. *See Torres v. State*, 71 S.W.3d 758 (Tex. Crim. App. 2002). The defendant in *Torres*

killed the victim after the victim climbed a balcony and entered the bedroom of an apartment where the victim's ex-girlfriend, the girlfriend's aunt, and the defendant were staying. *Id.* at 759. The Court of Criminal Appeals held that the trial court improperly excluded evidence showing that the victim had, just a few days before, climbed through a window and threatened the aunt if the aunt did not tell the victim where the girlfriend was. *Id.* at 759–60. The court reasoned that the excluded evidence showed "a mind set of violence against those who might stand between" the victim and the girlfriend, helped explain the victim's entry into the apartment, and showed his intent to keep others away from the girlfriend with violence. *Id.* at 762. The evidence was probative of the victim's state of mind, intent, and motive and was relevant for reasons other than character conformity. *Id.*

Here, however, none of the decedent's acts of violence against her ex-husband or Fisher, or breaking her car window, help explain the decedent's conduct, state of mind, intent, or motive on the night of her death. Appellant does not explain how any of the excluded evidence was relevant, other than to show that the decedent's actions were in conformity with her character. Thus, the trial court did not abuse its discretion by not admitting the evidence for purposes of proving that the decedent was the first aggressor. *See Allen*, 473 S.W.3d at 446–47 (evidence that the victim physically abused his girlfriend was inadmissible because it did not help explain how or why the decedent was the first aggressor against the defendant apart from demonstrating conformity with a violent character).

The *Thompson* case illustrates when a victim's prior act of violence is not probative of the reasonableness of the defendant's apprehension of danger. In *Thompson*, the defendant knew that the victim had been convicted five times for unlawfully carrying a weapon. *Thompson*, 659 S.W.2d at 654. The decedent testified that she was scared of the victim and shot him because he had his hands

outstretched as if he might grab and choke her. *Id.* She never testified that she thought the victim was armed, that he might use a weapon against her, or that he would kill her. *Id.* Under these circumstances, the victim's prior convictions for unlawful possession of a weapon were not probative of the reasonableness of the defendant's belief that her use of deadly force was necessary. *Id.*

Appellant did not testify at trial, and his recorded statement to police provides no insight into how the decedent's prior assault against Fisher affected appellant's state of mind regarding the reasonableness of his apprehension of danger. The assault against Fisher was dissimilar and unrelated to the events leading to the decedent's standing at the threshold of appellant's garage. There is no evidence that appellant's knowledge of this domestic assault contributed to his belief that it was immediately necessary for appellant to drive his truck into the decedent to protect himself or Smith from the decedent's use or attempted use of unlawful deadly force. Thus, the trial court did not abuse its discretion by not admitting the evidence for purposes of proving the reasonableness of appellant's apprehension of danger. *See id.*; *Allen*, 473 S.W.3d at 448–49 (evidence that the defendant knew the decedent had physically abused the decedent's girlfriend was inadmissible to show reasonableness of apprehension of danger because the physical abuse was dissimilar and unrelated to the events leading to the decedent's chokehold of the defendant); *see also* Tex. Penal Code §§ 9.32(a)(2)(A); 9.33.

Appellant's first issue is overruled.

III. JURY INSTRUCTION

In his second issue, appellant contends that the trial court erred by denying his requested jury instruction on "apparent danger" as part of his right to use deadly force.

Appellant requested a jury charge on apparent danger substantially similar to the one denied in *Bundy v. State*, 280 S.W.3d 425, 429 (Tex. App.—Fort Worth 2009, pet. ref'd), generally stating that the jurors should consider all facts and circumstances showing the condition of the mind of the defendant and the jurors should place themselves in the defendant's position at the time of the killing when considering the defense of self-defense. The *Bundy* court, and more recently the First Court of Appeals, have held that the concept of "apparent danger" is adequately presented to the jury if the charge (1) states that a defendant's conduct is justified if he reasonably believed that the deceased was using or attempting to use unlawful deadly force against the defendant, and (2) correctly defines "reasonable belief." *Buford v. State*, No. 01-18-01134-CR, 2020 WL 2069243, at *6–7 (Tex. App.—Houston [1st Dist.] Apr. 30, 2020, no pet. h.); *Bundy*, 280 S.W.3d at 429–31. The rationale is based on the Court of Criminal Appeals' holding in *Valentine v. State*, 587 S.W.2d 399, 401 (Tex. Crim. App. [Panel Op.] 1979) ("By defining the term 'reasonable belief' as it did, the court instructed the jury that a reasonable apprehension of danger, whether it be actual or apparent, is all that is required before one is entitled to exercise the right of self-defense against his adversary."). The court in *Valentine* distinguished its prior decision in *Jones v. State*, 544 S.W.2d 139, 142–43 (Tex. Crim. App. 1976), which held that a defendant was entitled to a separate instruction on apparent danger because the charge erroneously required the deceased to have been using or attempting to use unlawful deadly force in order for the jury to find for the defendant on the issue of self-defense. *See id.*; *see also Valentine*, 587 S.W.2d at 401 (noting that the instruction in *Jones* was inadequate because it required to the jury to find that the victim was "actually using or attempting to use unlawfully deadly force").

Relying on *Jones*, this court in *Torres v. State*, 7 S.W.3d 712, 715 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd), held that the "standard charge on

self-defense" did not encompass apparent danger. *See id.* However, the charge in that case only allowed the jury to consider self-defense if it found that the defendant was "under attack or attempted attack," and the charge did not contemplate apparent danger. *Id.*

Here, the jury charge did not require the jurors to find that appellant was "under attack or attempted attack"; rather, the charge (1) stated that appellant's conduct would be justified if he reasonably believed that the decedent was using or attempting to use unlawful deadly force against the decedent or his girlfriend, and (2) correctly defined "reasonable belief." Thus, the concept of apparent danger was adequately contained in the jury charge. *See Valentine*, 587 S.W.2d at 401; *Buford*, 2020 WL 2069243, at *6–7; *Bundy*, 280 S.W.3d at 429–31.

Appellant's second issue is overruled.

IV. ADMISSION OF EVIDENCE

In his third, fourth, and fifth issues, appellant contends that the trial court erred by admitting evidence of his extraneous offense because the evidence was irrelevant, inadmissible under Rule 404, and inadmissible under Rule 403. Appellant contends further that the trial court erred by admitting the evidence because the State failed to prove the extraneous offense as fully alleged in its pretrial notice beyond a reasonable doubt and that Smith's testimony did not "open the door" to her examination about the extraneous offense.

A. The Evidence

After Smith testified on redirect examination by the State that the decedent had threatened her physically and hit her in December 2016,[2] the trial court

[2] Questioned by the State, she testified:

Q. But [the decedent] never threatened you physically with violence?
A. Yes, in December.

allowed the State to adduce evidence from Smith about appellant retrieving a handgun, waving it, and pointing at a door while telling the decedent to leave his house during the December 2016 incident. The State initially offered the evidence to show "the relationship of the parties" under Article 38.36 of the Code of Criminal Procedure, *see* Tex. Code Crim. Proc. art. 38.36(a), and because the December 2016 event was "central to [appellant's] self-defense claims." The trial court ultimately admitted the evidence because "the door's been opened to it" when Smith "volunteered some information."

B. Standard of Review and Legal Principles

We review a trial court's decision to admit evidence under the same abuse-of-discretion standard discussed above for a trial court's decision to exclude evidence. *See Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). This court must uphold the trial court's ruling if it is correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for the decision. *E.g.*, *Romero v. State*, 800 S.W.2d 539, 543–44 (Tex. Crim. App. 1990).

A defendant may not be tried for some collateral crime or for being a criminal generally. *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Thus, to be admissible under Rules 401 and 404, evidence of other crimes, wrongs, or acts (i.e., extraneous offense evidence) must have relevance apart from character conformity. *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). For example, extraneous offense evidence may be admissible to prove the

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. . . .

Q. Well, you had previously pressed charges on the December 11th incident, correct?

A. She physically hit me.

Before this testimony, the trial court had admitted State's Exhibit 7—the recording of appellant's interrogation. During the interrogation, appellant discussed the December 2016 incident and how the decedent "took a swing at" appellant, "forced the door open," "hit" the girlfriend, and "assaulted" the girlfriend.

defendant's intent or motive, or to rebut a defensive theory of accident or mistake. *Id.* Consistent with Rule 404, "[w]hen the accused claims self-defense or accident, the State, in order to show the accused's intent, may show other violent acts where the defendant was an aggressor." *Robinson v. State*, 844 S.W.2d 925, 929 (Tex. App.—Houston [1st Dist.] 1992, no pet.), *cited with approval in Rogers v. State*, 105 S.W.3d 630, 633 n.4 (Tex. Crim. App. 2003); *accord, e.g., Allen v. State*, No. 14-12-01086-CR, 2014 WL 3587372, at *7 (Tex. App.—Houston [14th Dist.] July 22, 2014, pet. ref'd) (mem. op., not designated for publication).

Evidence of an extraneous offense may be irrelevant if the State does not prove that the appellant committed the offense. *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994). For such evidence to be admissible, the trial court must make an initial determination under Rule 104(b) that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense. *Id.* at 160–61; *see also* Tex. R. Evid. 104(b).

Evidence of an extraneous offense may be inadmissible, however, under Rule 403 if the danger of unfair prejudice substantially outweighs the probative value of the evidence. *See Moses*, 105 S.W.3d at 626. The purpose of excluding relevant evidence of an extraneous offense under Rule 403 is to prevent a jury that has a reasonable doubt of the defendant's guilt in the charged offense from convicting him anyway based solely on his criminal character or because he is generally a bad person. *See Garcia v. State*, 201 S.W.3d 695, 704 (Tex. Crim. App. 2006). A Rule 403 analysis generally balances the following four factors, though they are not exclusive: "(1) how probative the evidence is; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." *Colone v. State*, 573 S.W.3d 249, 266 (Tex. Crim. App. 2019).

Article 38.36 generally makes admissible in murder prosecutions "all relevant facts and circumstances surrounding the killing and 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. art. 38.36(a). Evidence of the defendant's prior acts of violence against a murder victim may be admissible under Article 38.36 to illustrate the nature of their relationship. *See Garcia v. State*, 201 S.W.3d 695, 703–04 (Tex. Crim. App. 2006) (holding that evidence was admissible, in the prosecution for murder of the defendant's wife, that he had pushed her out of a car and left her stranded without purse and phone about two years before the murder). But, Rules 404 and 403 still apply to evidence offered under Article 38.36. *See Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999).

C. Preservation of Error

As an initial matter, we must determine if any alleged error has been preserved for consideration on appeal. *See supra* Part II.C. Appellant contends that his general relevancy objection preserved error for his complaint that the State failed to prove beyond a reasonable doubt the extraneous offense for which the State had provided pretrial notice.[3] However, appellant never told the trial court that the evidence was irrelevant because of the State's failure to prove the extraneous offense beyond a reasonable doubt. Thus, appellant did not preserve this error. *See Brown v. State*, 212 S.W.3d 851, 869 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (no error preserved when appellant objected that testimony was irrelevant but did not argue in the trial court that the extraneous offense

[3] Appellant complains that the State's pretrial notice alleged that appellant committed an aggravated assault by pointing a gun at the decedent, but the evidence at trial showed only that appellant waved the gun and did not point it at the decedent.

evidence should have been excluded because the State failed to demonstrate the defendant's involvement in the offenses beyond a reasonable doubt). Moreover, appellant forfeited any error by failing to move to strike the evidence after the conclusion of the State's case. *See Fuller v. State*, 829 S.W.2d 191, 197–99 (Tex. Crim. App. 1992) (holding that when evidence is conditionally relevant under Rule 104 but then is never "connected up" before the end of the trial, "the objecting party must reurge his relevancy complaint after all the proof is in, ask that the offending evidence be stricken, and request that the jury be instructed to disregard it. Otherwise, his objection will be deemed forfeited on appeal."), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290, 301 (Tex. Crim. App. 1993).

We assume without deciding that the remainder of appellant's third issue was preserved.

D. Analysis

Appellant's defensive theories at trial included self-defense, defense of his girlfriend, and "accident" (i.e., lack of intent to hit the decedent). The evidence about the prior altercation between the decedent, appellant, and Smith, and appellant's waving of a gun in the process of ordering her out of his home, was relevant to show his intent on the night of the killing. *See Robinson*, 844 S.W.2d at 929. And it was relevant to show the nature of the relationship between appellant and the decedent—his mother. *See Garcia*, 201 S.W.3d at 703–04. The evidence was probative of whether appellant reasonably believed that his use of deadly force was immediately necessary. Indeed, the evidence may have even bolstered appellant's defense that he was in actual fear of the decedent because it showed that appellant had to brandish a gun to stop the decedent's prior trespass and assault against Smith. Accordingly, the evidence was relevant for a purpose other

than character conformity. *See Garcia*, 201 S.W.3d at 705; *Robinson*, 844 S.W.2d at 929.

Turning to the Rule 403 analysis, the evidence of appellant waving a gun at the decedent while attempting to get her to leave his house on a prior occasion was probative of his intent and other defensive issues in the case, such as whether he reasonably and actually believed that his use of deadly force was immediately necessary. *See Robinson*, 844 S.W.2d at 929. The testimony was relatively brief, and it was not highly inflammatory—i.e., did not involve actual violence or even an express threat of violence against the decedent. The State needed the evidence because the only direct evidence of appellant's intent was his statements to police during an interrogation. Appellant provided both inculpatory and exculpatory statements during the interrogation—stating he did not intend to kill the decedent, but he did intend to scare her and to "bump" her because he was afraid, scared, and "living in fear" of the decedent. Finally, it is unlikely the jury harbored a reasonable doubt on the manslaughter charge, but convicted him nonetheless based on any unfair prejudice from the extraneous offense evidence, because the jury acquitted appellant of the greater charge of murder. *Cf. Bean v. State*, No. 13-01-030-CR, 2001 WL 34394342, at *1–2 (Tex. App.—Corpus Christi Oct. 4, 2001, no pet.) (mem. op., not designated for publication) (no harm from admission of extraneous offense evidence offered to prove prior relationship, state of mind, and negate defense of mistake, because the defendant was acquitted of the greater offense of murder and convicted of the lesser offense of manslaughter; reasoning that the defendant was not harmed because the evidence had been offered to prove the defendant's specific intent to kill).

In sum, the trial court did not abuse its discretion by ruling that evidence was relevant and that the probative value was not substantially outweighed by the danger of unfair prejudice. Appellant's third, fourth, and fifth issues are overruled.

V. INEFFECTIVE ASSISTANCE

In his sixth, seventh, ninth, and tenth issues, appellant contends that the trial court erred by denying his motion for a new trial based on allegations of ineffective assistance of counsel.[4] Appellant contends that he was denied effective assistance of counsel because his trial counsel failed to investigate and present evidence regarding concurrent causation (Issue 7) and request a jury instruction on concurrent causation (Issue 6); and his trial counsel failed to request a mid-trial instruction limiting the jury's consideration of the extraneous offense evidence discussed above to the purposes for which it was admitted (Issue 9), or to object to the limiting instruction in the jury charge, which authorized jurors to consider the evidence for purposes for which the evidence was not admitted (Issue 10).

A. Procedural Background

The trial court held a hearing on appellant's motion for new trial, and the only evidence admitted were two affidavits attached to appellant's motion. In one of the affidavits, trial counsel fell on his sword, testifying that he had no strategic reason for (1) failing to request a jury charge on concurrent causation, (2) failing to investigate and elicit opinion testimony from Smith about whether the decedent's conduct was clearly sufficient to produce the result regardless of appellant's conduct, (3) failing to request a limiting instruction at the time the gun-waving evidence was admitted, and (4) failing to object to the limiting instruction in the jury charge, which authorized use of the extraneous offense to prove "motive, opportunity, intent, preparation, plan or absence of mistake," rather than limiting the jury's consideration of the evidence to the purposes for which it was admitted—rebutting an impression left by Smith and the Article 38.36(a) purposes.

[4] Appellant also alleged ineffective assistance in his eighth issue, but he withdrew that issue in a letter filed with this court before submission of the case.

In the second affidavit, Smith testified that she was "never asked" her opinion on the issue of concurrent causation:

> I was never asked by [trial counsel], whether, based on my rational perception of this event, including but not limited to the speed of Mr. Fish's vehicle, Ms. Fish's conduct in taking several steps towards his vehicle immediately before she was struck, not remaining where she was, or by not moving to her left, her right, or back into the garage, all of which was possible for her to do, I reasonably believed that Ms. Fish's conduct was clearly sufficient to result in her death regardless of Mr. Fish's conduct.

The trial court denied the motion without making findings of fact.

B. Standard of Review and General Legal Principles

To prevail on a claim of ineffective assistance, an appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness and (2) counsel's deficiency caused the appellant prejudice—there is a probability sufficient to undermine confidence in the outcome that but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010). An appellant must satisfy both prongs by a preponderance of the evidence. *Perez*, 310 S.W.3d at 893. Failure to demonstrate either deficient performance or prejudice will defeat the claim of ineffective assistance. *Id.*; *see also Strickland*, 466 U.S. at 697.

When reviewing a trial court's ruling on a motion for new trial alleging ineffective assistance, we view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that party. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could

support the trial court's ruling. *Id.* A deferential, rather than de novo, standard applies to the trial court's determination of historical facts when the determination is based, as here, solely on affidavits. *Id.* at 201. We review de novo mixed questions of law and fact that do not depend on an evaluation of credibility. *See Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003). Although we defer to the trial court's underlying factual determinations that are supported by the record, the ultimate question of prejudice under *Strickland* is reviewed de novo. *See Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005).

C. Concurrent Causation

Under Section 6.04(a) of the Penal Code, a defendant may be entitled to an instruction on concurrent causation "if the concurrent cause was clearly sufficient, operating alone, to produce the result *and* the accused's conduct alone was clearly insufficient to do so." *McFarland v. State*, 928 S.W.2d 482, 516 (Tex. Crim. App. 1996); *see also* Tex. Penal Code § 6.04(a).

During trial, Smith testified that the decedent took "[a]bout two" steps toward appellant's truck immediately before the collision. Although trial counsel faulted his failure to ask Smith about her opinion on concurrent causation, Smith did not give any such opinion in her affidavit. Smith testified that she was "never asked" her opinion. An appellant cannot show ineffective assistance based on failure to investigate and adduce evidence without showing what the investigation would have revealed that reasonably could have changed the result of the case. *See Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd); *see also Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986) (noting that counsel's failure to call witnesses would be irrelevant absent a showing that the defendant would benefit from their testimony). Thus, appellant has not shown

any ineffective assistance by trial counsel's failure to ask Smith about her opinion related to concurrent causation.

Trial counsel testified that he had no strategic reason for not requesting a jury charge on concurrent causation based on Smith's "two steps" testimony and State's Exhibit 1—a video of the killing that tended to corroborate Smith's testimony. A defendant is entitled to a jury instruction on concurrent causation if there is any evidence, weak or strong, that raises the issue of concurrent causation. *See, e.g.*, *Saenz v. State*, 474 S.W.3d 47, 52 (Tex. App.—Houston [14th Dist.] 2015, no pet.). But, counsel cannot be held ineffective for failing to request a jury instruction if the defendant was not entitled to it. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005).

This case does not involve an allegation that the defendant's intoxication caused the victim's death when the vehicle struck a pedestrian who was wearing dark clothes; walking in a lane of traffic on the wrong side of the road in the middle of the night; intoxicated; and may have been distracted by making phone calls. *See Saenz*, 474 S.W.3d at 55–56 (defendant was entitled to concurrent causation instruction). Rather, appellant accelerated into his driveway by "pushing on the gas all the way," struck the pillar of his garage, and pinned the decedent against the pillar. He admitted he was trying to "bump" her. His "accident" defense, according to closing argument, was that "accidentally hit the wrong pedal," not that the decedent darted in front of his truck. There was no evidence in this case that would enable a rational factfinder to have concluded that the decedent's taking "[a]bout two" steps toward appellant's truck, immediately before being hit and pinned against a brick pillar, was sufficient by itself to cause the decedent's death. *See Bell v. State*, 169 S.W.3d 384, 395 (Tex. App.—Fort Worth 2005, pet. ref'd) (holding that the defendant was not entitled to a concurrent causation instruction when the defendant claimed that he drove his vehicle next to

the victim and the passenger opened the car door, which struck the victim; there was no evidence that the passenger's act of opening the car door by itself was sufficient to cause death). Because no evidence supports a concurrent causation instruction, trial counsel could not be ineffective for failing to request it. *See Ex parte Chandler*, 182 S.W.3d at 356; *Remsburg v. State*, 219 S.W.3d 541, 546 (Tex. App.—Texarkana 2007, pet. ref'd).

Appellant's sixth and seventh issues are overruled.

D. Limiting Instructions

"Once an extraneous act has been ruled admissible, the jurors must be instructed about the limits on their use of that extraneous act if the defendant so requests." *Ex parte Varelas*, 45 S.W.3d 627, 631 (Tex. Crim. App. 2001). When the State is permitted to introduce evidence of a defendant's extraneous acts for a limited purpose, the defendant has the burden of requesting an instruction limiting consideration of those acts. *Id.* "[W]hen a limiting instruction is given, the trial judge, upon request, should instruct the jury that the evidence is limited to whatever specific purpose the proponent advocated." *Taylor v. State*, 920 S.W.2d 319, 323 (Tex. Crim. App. 1996).

If a defendant fails to request a limiting instruction at the time evidence is admitted, then the jury may consider the evidence for all purposes, including character conformity. *See Delgado v. State*, 235 S.W.3d 244, 251 & n.27 (Tex. Crim. App. 2007); *Hammock v. State*, 46 S.W.3d 889, 894–95 (Tex. Crim. App. 2001). Generally, the bell cannot be un-rung by an instruction in the jury charge:

> When an extraneous offense is admitted in the guilt phase of a trial, failing to give a limiting instruction at the time of admission may result in the jury drawing inferences about the defendant's guilt based upon character conformity, a use of the evidence not contemplated by

> the trial court. The danger then becomes that the improper inference drawn cannot later be erased by an instruction in the charge.
>
> Passage of time and accumulation of other evidence make it hard to accomplish the intended purpose [of a limiting instruction] at the end of the case. If the jury is required to consider evidence in a limited manner, then it must do so from the moment the evidence is admitted. Allowing the jury to consider evidence for all purposes and then telling them to consider that same evidence for a limited purpose only is asking a jury to do the impossible. If a limiting instruction is to be given, it must be when the evidence is admitted to be effective.

Hammock, 46 S.W.3d at 894 (alteration in original, quotation marks and citations omitted).

When the gun-waving evidence was admitted, trial counsel did not ask the court to instruct the jury to consider the evidence not for character conformity but only for the purposes for which it was admitted. In the written jury charge, the court instructed the jury:

> You are further instructed that there is evidence before you regarding actions that could be considered an extraneous offense and you are instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offenses alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in aiding you, if it does, in considering any motive, opportunity, intent, preparation, plan or absence of mistake, if any, in connection with the offenses, if any[,] alleged against him in the indictment in this case, and for no other purpose.

Trial counsel testified by affidavit that he had no trial strategy for his failure to request a mid-trial limiting instruction, to object to the trial court's instruction in the jury charge, or to request a limiting instruction in the charge for the evidence to be considered solely for the purposes for which it was admitted.

On appeal, appellant contends that the sole purpose for which the evidence was admitted was to rebut a false impression created by Smith. In the motion for new trial and attached affidavit from trial counsel, however, appellant and his trial counsel acknowledged that the evidence was admitted under Article 38.36. As we noted above in Part IV.A of this opinion, the State proffered the evidence because it showed the relationship of the parties under Article 38.36 and it was central to appellant's claim of self-defense. And as we noted in Part IV.D of this opinion, the trial court correctly admitted the evidence for those purposes.

We assume without deciding that trial counsel's performance was deficient for failing to request a limiting instruction at the time the evidence was admitted and to request that the instruction in the jury charge omit the impermissible uses of the evidence, such as to prove "opportunity," "preparation," or "plan." *See Ex parte Varelas*, 45 S.W.3d at 632 n.5 (holding that the trial court's finding that counsel's failure to request a limiting instruction regarding extraneous offenses was the result of trial strategy was "unsupported by the record, especially in light of the fact that trial counsel's affidavit states facts to the contrary and there was no other evidence in the record that counsel's failure was sound trial strategy"); *cf. Daggett v. State*, 187 S.W.3d 444, 450–55 (Tex. Crim. App. 2005) (although extraneous offense evidence was admissible because the appellant opened the door by leaving a false impression with the jury, the trial court's limiting instruction, which allowed the jury to consider the evidence as part of a "plan," improperly permitted the jury to consider the evidence for its substantive value rather than to impeach his credibility).

Turning to the prejudice prong of the *Strickland* test, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Strickland*, 466 U.S. at 696. This court must determine whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our

system counts on to produce just results." *Id.* In making this determination, we consider the totality of the evidence before the jury. *Id.* at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695–96. A verdict "only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

This case is dissimilar from *Ex parte Varelas*, 45 S.W.3d 627, where the court found prejudice from the failure to request a limiting instruction, for several reasons. The extraneous offense evidence did not permeate the entire trial, and the State had significant evidence linking appellant to the decedent's death. *See id.* at 634–35 (evidence of multiple extraneous offenses against the child victim were central to the State's case-in-chief in part because the State produced little evidence linking the defendant to the child's death other than the extraneous acts of violence against the child.). The written jury charge included at least one acceptable purpose for the jury's use of the extraneous offense—determining appellant's intent—and the jury was instructed that it had to find the extraneous offense beyond a reasonable doubt before considering it. *See id.* at 635 (no limiting instruction given at all, nor was jury instructed on the burden of proof; and jury charge authorized jury to consider "all relevant facts and circumstances" and the previous relationship existing between the accused and deceased under Article 38.36); *cf. Blackwell v. State*, 193 S.W.3d 1, 15–17 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that it was not error to admit, over Rule 403 objection, extraneous sexual offenses against other children in a prosecution for indecency with a child; reasoning that likelihood of impressing the jury in an irrational yet indelible way was lessened by jury instruction in the charge that instructed the jury to "only" consider the evidence for some permissible reasons—

motive and intent—although it also allowed jury to consider evidence for "surplusage" reasons, such as preparation, plan, opportunity, knowledge, identity, or absence of mistake or accident).

Although the State referred to the gun-waving incident during closing arguments, the State's argument primarily rebutted appellant's defensive theory of accident, which was relevant to appellant's intent—a permissible purpose for the admission of the evidence. The gun-waving evidence itself was not extremely prejudicial. Indeed, the evidence cut both ways. It could have had the effect of bolstering appellant's claims of self-defense and defense of Smith by demonstrating how appellant was afraid of the decedent in the past—so much that he felt the need to retrieve a gun when the decedent refused to leave his home after multiple requests. As trial counsel argued during closing arguments in favor of the justification defenses, "She got warned out of there with a gun. It doesn't get much more serious than that. . . . You don't get to assault people in their homes." The nature of the evidence and the other evidence of appellant's guilt in this case distinguishes it from the authority relied upon by appellant—it was not the "only evidence" of appellant's guilt. *See Ramirez v. State*, 987 S.W.2d 938, 946 (Tex. App.—Austin 1999, pet. ref'd) (prejudice shown by counsel's failure to object to hearsay or request a limiting instruction regarding the only evidence of guilt); *Owens v. State*, 916 S.W.2d 713, 719 (Tex. App.—Waco 1996, no pet.) (same).

Finally, appellant was acquitted of the greater offense of murder and convicted of the lesser offense of manslaughter. Thus, it is unlikely the jury viewed the gun-waving evidence improperly as character conformity evidence and convicted appellant merely because he was a bad person. *Cf. Bean*, 2001 WL 34394342, at *1–2. Similarly, it is unlikely the jury considered the evidence for any of the improper reasons listed in the jury charge—such as opportunity, preparation, or plan. Those purposes would have supported a finding that

appellant had a specific intent to kill, i.e., murder, rather than mere recklessness, i.e., manslaughter.

After considering the entire record in light of trial counsel's alleged deficiency, we conclude that appellant has not established prejudice by a preponderance of the evidence. There is no probability sufficient to undermine confidence in the outcome that but for counsel's errors, the jury would have acquitted appellant of manslaughter. The trial was fundamentally fair.

Appellant's ninth and tenth issues are overruled.

VI. CONCLUSION

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

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.
Publish — Tex. R. App. P. 47.2(b).