

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-19-00054-CR
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ADAM LEE THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause Nos. 17-09-10759-CR, 17-09-10760-CR

MEMORANDUM OPINION

A jury convicted appellant Adam Lee Thomas of two charges of injury to a child, and the trial judge assessed punishment in both cases at confinement for life and ordered that the sentences would run consecutively. In his sole appellate issue, Thomas challenges the trial court's admission of evidence of extraneous offenses or acts of misconduct. We affirm the trial court's judgment of conviction in both cases.

PERTINENT BACKGROUND

Before the trial began, the trial judge noted that the State had submitted a bench brief regarding the admissibility of evidence of extraneous offenses. Defense counsel stated that he did not have a written response but did have an oral response. The prosecutor argued that Thomas is the boyfriend of the child victims' mother, and the prosecutor pointed out that a few months before the victims were injured, the children of Thomas's former girlfriend were seen at the hospital for similar injuries. According to the prosecutor, both sets of children had been in Thomas's care. The prosecutor asserted that the type of lighter used to burn the children constituted a signature. The trial judge noted that the State's bench brief had "laid out the argument . . . as to identity, . . . intent, motive, knowledge, opportunity, absence of . . . mistake[,] or lack of accident." According to the prosecutor, the children involved in the extraneous offense evidence were not as severely injured as the victims in the case *sub judice*.

In response, defense counsel argued that "the State may be somewhat premature . . . because the Court has not heard the facts supporting any of the things they have said and . . . the probative value is substantially outweighed by the prejudicial [effect]." Defense counsel asked that the Court not admit the extraneous offense evidence "until we first see whether or not [the State] can prove the burn marks." Defense counsel asked that the State present its case outside of the presence

of the jury before offering testimony regarding extraneous offenses. According to defense counsel, “logging in two more cases is going to inflame the jury[.]” Defense counsel maintained that the prejudicial effect of the extraneous offense evidence would deny Thomas a fair trial. The trial court ruled that the extraneous offense evidence would be admitted.

Detective Fadi Rizk of the Montgomery County Sheriff’s Office testified that when he was called to Texas Children’s Hospital, he observed that three-year-old A.S. had a bite mark, scratch marks, bruising, and an abrasion on her face. A.S. had bruises and abrasions “all along her body[.]” and she required surgery for internal bleeding. When Rizk saw two-year-old T.S., T.S. was intubated and “hooked up to all kinds of machines.” Rizk explained that doctors “were not optimistic that [T.S.] would live based on his injuries.” According to Rizk, medical personnel at the hospital believed that the children’s injuries were clearly caused by abuse.

Rizk testified that he learned that Thomas, who was in a romantic relationship with the children’s mother (“Mother”) was one of the children’s caregivers. Rizk explained that cell phones belonging to Mother and Thomas were searched, and the phones contained text messages between Mother and Thomas about a story they could tell hospital personnel regarding how the children were injured. Rizk testified that he learned that Thomas was the primary suspect in another child abuse case, and he consulted with Detective Craig Favorat of the Montgomery County Sheriff’s

Office on that case. Rizk testified that he eventually charged Thomas with injuring A.S. and T.S.

Favorat testified that he received a call regarding a child abuse case involving two male child victims, C.F. and D.F., and he went to St. Luke's Hospital in The Woodlands to investigate. According to Favorat, C.F. and D.F. had extensive injuries that were concerning for abuse. Favorat explained that both children had bruises, abrasions, and burn marks on various parts of their bodies, and C.F. had a bruise on his penis. During the course of his investigation, Favorat learned that the burns had been caused by a lighter, the top metal portion of which "had the exact same pattern as what was present on their bodies." Favorat explained that S.N., the mother of C.F. and D.F.¹, indicated that she had given such a lighter, which was from a package of three identical lighters, to Thomas. Favorat suspected that Thomas had caused the children's injuries because they had been in Thomas's care on two dates, but he did not have enough evidence to arrest Thomas.

Favorat explained that Detective Rizk subsequently informed him that Thomas was suspected of causing injuries to A.S. and T.S., who had also been in Thomas's care. Favorat testified that the injuries A.S. and T.S. sustained were consistent with the injuries C.F. and D.F. had sustained, but the injuries to A.S. and

¹S.N. is Thomas's former girlfriend.

T.S. were more severe. Favorat testified that he then charged Thomas with injuring C.F. and D.F.

Mother testified that she met Thomas in 2017, and Thomas had access to her children beginning in July 2017. Mother testified that she began noticing injuries on the children after she and the children had started spending time with Thomas. Mother explained that she noticed T.S.'s testicles were swollen and bruised, and T.S. appeared to be in pain. Mother explained that Thomas had been changing the children's diapers. Mother also saw a burn on T.S.'s wrist after he had been alone in a room with Thomas. In addition, Mother began noticing bruises on the children's stomachs and backs, and she observed that the children appeared to be "scared and uneasy when [Thomas] came around." Mother testified that she also sometimes heard the children crying and screaming "[l]ike they were getting hurt[]" while she was in the shower. According to Mother, on another occasion, Thomas had T.S. in the bathroom with the door locked, and Mother heard T.S. screaming, and T.S. groaned and cried after coming out of the bathroom. Mother explained that she subsequently noticed a bite mark and scratch on A.S.'s cheek.

Mother testified that she noticed T.S. was not active, was not making any sounds, and was not acting like himself. Mother explained that she put T.S. to sleep and told Thomas she wanted to take T.S. to the hospital if he did not improve by the next day. According to Mother, T.S. became incoherent, his eyes were hazy, and he

was not moving his arms or legs. In addition, Mother explained that A.S. began vomiting. Mother testified that, in hindsight, she knew that Thomas was abusing the children, but she did not want to believe it. Mother testified that she received a text message from Thomas, in which he told her he would drop her and the children off at the hospital and instructed Mother to “tell them he fell off the porch and something fell on him and they won’t take them from you.” Mother testified that T.S. cannot walk or eat.

Dr. Reena Isaac, a pediatric physician with Texas Children’s Hospital’s Child Protection Medical Team, testified that the hospital’s intensive care unit asked her to consult regarding T.S. and A.S. Isaac explained that when she saw T.S., he was intubated and had a cervical collar. According to Isaac, T.S. had bilateral subdural brain hemorrhages, which “are consistent with what’s called acceleration/deceleration type of force.” Isaac agreed that T.S. suffered “abusive head trauma” that caused “permanent irreversible damage to his brain[.]” Isaac testified that T.S. also sustained a liver laceration due to blunt force abdominal trauma. In addition, Isaac testified that T.S. sustained a comminuted fracture of his right humerus due to blunt force trauma. Isaac further explained that, as a result of trauma, T.S. suffered from two ulnar fractures as well as additional fractures of his left foot and hand.

Isaac testified that A.S. had abdominal trauma, including a tear of her ureter from her kidney, due to abuse. Isaac explained that A.S. required two surgeries. Isaac also testified that A.S. had a facial injury that might have been a bite mark, a bruise on her labia, a fractured clavicle, and multiple pelvic fractures.

In both cases, the trial court instructed the jury that it could not consider testimony regarding crimes or acts other than the charged offense unless it found beyond a reasonable doubt that the defendant committed such other crimes. The trial court likewise instructed the jury that it could only consider extraneous offense evidence “in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the Defendant . . . and for no other purpose.

ISSUE ONE

In his sole appellate issue, Thomas argues that the trial court erroneously admitted evidence of extraneous offenses or acts of misconduct in violation of Rule 404(b) of the Texas Rules of Evidence. We review a trial court’s admission of extraneous offenses or acts under an abuse of discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh’g). We must uphold the trial court’s ruling if it is within the zone of reasonable disagreement. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002).

Rule 404(b) of the Texas Rules of Evidence provides that evidence of a crime, wrong, or other act is not admissible to prove a person's character to show that the person acted in accordance with the character on a particular occasion, but it may be admissible for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . ." Tex. R. Evid. 404(b). The list of enumerated purposes for which an extraneous offense may be admissible under Rule 404(b) is neither exclusive nor exhaustive. *Montgomery*, 810 S.W.2d at 388. Evidence of extraneous acts may be admissible if it has relevance apart from its tendency to prove a person's character to show that he acted in conformity therewith. *Id.* at 387. However, the fact that evidence extraneous acts is introduced for a purpose other than character conformity does not, standing alone, make the evidence admissible. *See Webb v. State*, 36 S.W.3d 164, 180 (Tex. App.—Houston [14th Dist.] 2000, pet, ref'd). Proffered evidence must also be relevant to a fact of consequence in the case. *Id.* Evidence is relevant if it tends to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. Tex. R. Evid. 401.

Rule 403 of the Texas Rules of Evidence provides as follows: "The court may exclude relevant evidence 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. “Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial.” *Montgomery*, 810 S.W.2d at 389. Once a trial court determines that extraneous offense evidence is admissible under Rule 404(b), the trial court must, upon proper objection by the opponent of the evidence, weigh the probative value of the evidence against its potential for unfair prejudice. *Id.*; *see* Tex. R. Evid. 403.

[A] Rule 403 analysis 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 merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006); *see also Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). However, if the only value of extraneous offense evidence is to show character conformity, the balancing test required by Rule 403 is obviated because the “rulemakers hav[e] deemed that the probativeness of such evidence is so slight as to be ‘substantially outweighed’ by the danger of unfair prejudice *as a matter of law*. *Montgomery*, 810 S.W.2d at 387 (quoting *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978)).

We will not overturn a conviction if, after an examination of the record as a whole, we have fair assurance that the erroneous admission of extraneous-offense

evidence either did not influence the jury or had but slight effect. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). When the trial court provides a limiting instruction regarding the jury's consideration of extraneous offense evidence, we presume that the jury followed the trial court's instructions. *See Renteria v. State*, 206 S.W.3d 689, 707 (Tex. Crim. App. 2006).

After hearing defense counsel's arguments regarding the admissibility of the extraneous offense evidence at the pretrial hearing and noting that the State had argued that the extraneous offense evidence would be relevant as to identity, motive, knowledge, opportunity absence of mistake, and lack of accident, the trial judge ruled that the extraneous offense evidence was admissible. Based on the record as a whole, we conclude that the extraneous offense evidence was relevant to show intent, identity, and absence of mistake or accident, and the trial court did not err by so concluding. *See* Tex. R. Evid. 404(b)(2); *Montgomery*, 810 S.W.2d at 387. In addition, we conclude that the trial court properly performed the balancing test required by Rule 403. *See* Tex. R. Evid. 403; *Gigliobianco*, 210 S.W.3d at 642-42. The trial court did not err by implicitly determining that the evidence did not tend to suggest deciding the case on an improper basis or confuse or distract the jury, and the evidence did not consume an inordinate amount of time or merely repeat previously admitted evidence. *See* *Gigliobianco*, 210 S.W.3d at 641-42. Furthermore, the trial court gave the jury a limiting instruction, and we presume that

the jury followed the trial court's instructions. *See Renteria*, 206 S.W.3d at 707. After examining the record as a whole, we have fair assurance that the admission of extraneous-offense evidence either did not influence the jury or had but slight effect. *See Taylor*, 268 S.W.3d at 592. Accordingly, we overrule Thomas's sole issue and affirm the trial court's judgment in both cases.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on May 6, 2020
Opinion Delivered July 15, 2020
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.