Opinion issued July 16, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00741-CR

REGINALD DWAYNE BOND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case No. 1496163

MEMORANDUM OPINION

A jury convicted appellant, Reginald Dwayne Bond, of the felony offense of burglary of a habitation. Following the punishment phase, the jury assessed appellant's punishment at life imprisonment and a $10,000 fine. In two points of

error, appellant contends that (1) the evidence is insufficient to sustain his conviction and (2) the trial court erred in allowing the State to introduce evidence of an extraneous offense of sexual assault. We affirm.

Background

In 2014, Yolanda Morales lived at The Promenade apartment complex in Jersey Village with her three children. She worked as a floor manager at an HEB supermarket.

On the evening of June 21, 2014, Morales went out with friends while her children stayed at the home of her longtime boyfriend, Eric Roldan. Morales returned home around 2:00 a.m. After locking the front door, Morales went to sleep.

Sometime later, Morales was awakened by a noise. She looked around her bedroom and saw the shadow of a man standing in the corner. He was covering his face with a small white towel. The man told Morales to be quiet, lay back, and turn around. He told her that he had a .45 caliber gun.

The man instructed Morales to cover her face with the blanket. He then got into bed with her. The man told Morales that he had been watching her and that she had returned home at 2:00 that morning. He asked her to hug him and kiss him. Morales smelled cigarettes on the man's breath and felt his facial hair. When Morales began crying, he told her not to cry and that he was more nervous than she was.

The man grabbed Morales's breasts and began kissing them. He then asked her to perform oral sex on him. Afterwards, he penetrated her vagina with his penis from behind and ejaculated on a white towel. The man told Morales that he was going to leave and ordered her not to move. As he was leaving, the man told her, "This is some good pussy. I'm going to come back."

Morales waited until it was quiet and then got up to make sure the man was no longer in her apartment. The front door was locked but the back patio door was unlocked. Morales discovered that the televisions in the living room and her children's room were gone, as well as an iPad Air, Xbox, PlayStation, jewelry, a Louis Vuitton purse, and other purses. The man had removed Morales's cell phone from its charger on her nightstand and kicked it underneath her bed.

Morales called 911. She described her assailant as a black male with a beard, approximately six feet tall, and wearing dark shorts and a polo shirt. An ambulance transported Morales to Memorial Hermann Hospital where she underwent a sexual assault examination. The sexual assault nurse examiner ("SANE") took swabs of Morales's vagina, perineum, anus, and breasts which were submitted to the Harris County Institute of Forensic Science ("IFS") for testing.

Lieutenant Ron Dooley with the Jersey Village Police Department testified about how appellant became a suspect in the case. He stated that he received a tip to look for an individual from the St. Louis, Missouri area. Lieutenant Dooley

received information from the Houston Police Department ("HPD") that the suspect might be in possession of a laptop that could be located using a "find-my-laptop" iPhone application. Using the tracking application, HPD initially developed Benjamin Williams as a suspect. Lieutenant Dooley testified that, based on information obtained from Williams, the police developed appellant as a suspect in December 2015.

Lieutenant Dooley interviewed appellant on January 23, 2016. In a videotaped statement, appellant said that he spent several nights at The Promenade apartment complex with his friend, Yefet Harris, who lived there in 2014. Harris's apartment was situated directly across the parking lot from Morales's apartment. In June 2014, appellant visited Harris's son who lived in another apartment in the same complex. Appellant stated that he went outside to smoke a cigarette in the parking lot around 1:00 a.m. where he met a short Hispanic female who had just returned home. Appellant stated that the female worked at HEB and had a boyfriend and three kids. Appellant said that the female went into her apartment but left the door unlocked for him. Appellant stated that he entered her apartment later that morning and got into bed with her. Appellant said that he had intercourse with the female and that she performed oral sex on him, and that it was a consensual one-night stand. Appellant stated that he ejaculated in a towel. He denied stealing anything from Morales's apartment or threatening her with a weapon. Appellant's videotaped

statement was admitted at trial. Lieutenant Dooley obtained a buccal swab from appellant and took it to IFS for DNA testing.

At trial, and outside the presence of the jury, the trial court held a hearing to consider whether to allow the State to introduce evidence of an extraneous offense. The State argued that defense counsel had placed identity at issue through his cross-examination of Morales. Defense counsel objected to admission of the extraneous offense evidence under Texas Rules of Evidence 401, 403, and 404(b). The trial court ruled that it would allow the State to introduce the extraneous offense evidence, with a limiting instruction, to rebut the defense of identity, and that the extraneous offense evidence was more probative than prejudicial.

After the trial court gave a limiting instruction to the jury, the State called Mariam Keita to testify about the extraneous offense. In 2015, Keita and her cousin lived in an apartment on the ground floor of the Madison Park Apartments complex. On the evening of December 24, 2015, Keita went out with her cousin and some friends. They returned to Keita's apartment around midnight. Keita's cousin went back out with a friend around 3:00 a.m., and Keita stayed home. Keita checked that the front door was locked, locked her bedroom door, and went to sleep. Her cell phone was in its charger on the floor near her bed.

Sometime later, Keita awoke to find a man in her bed, touching her breasts. The man was covering his face with her bedsheet. When he tried to kiss Keita, she

told him twice to "stop it." The man grabbed Keita and pushed her close to his face. When Keita asked the man to let her go to the bathroom, he told her to stay there and "don't make me shoot you." Keita pushed the man against the wall, jumped out of bed, and ran out through the open front door.

After speaking with police, Keita returned to the apartment. Her cousin's laptop was missing, and Keita's cell phone was on the kitchen floor near the refrigerator. Using an iPhone application, Keita and her cousin tracked the missing laptop to an apartment complex located approximately five miles away. They called the police and were told to wait. After an hour passed, Keita and her cousin left.

Officer Kimberly Miller, formerly with HPD, assisted Lieutenant Dooley in his investigation. Officer Miller testified that after she received a tip that the suspect had ties to the St. Louis, Missouri area, she and Lieutenant Dooley began trying to develop suspects who had ties to both Houston and St. Louis. In December 2015, an analyst in HPD's Adult Sex Crimes division contacted Officer Miller with information about the burglary of Keita's apartment. Officer Miller learned that the laptop stolen from Keita's apartment had been tracked to an apartment complex located at 301 Wilcrest, and that the strongest signals came from the area of Buildings 30, 31, and 32. When Officer Miller canvassed the area, she observed a vehicle near Building 30 with Missouri license plates. She learned that the vehicle belonged to Benjamin Williams, an individual with ties to the St. Louis, Missouri

area. Officer Miller obtained a DNA sample from Williams. Williams was subsequently excluded as a contributor to the DNA profiles obtained from Morales's sexual assault examination.

Based on information from Williams, Officer Miller obtained a search warrant for appellant's apartment in Houston. Inside appellant's apartment, Officer Miller found Louis Vuitton bags, a pellet gun in a sock, and what appeared to be lock-picking tools. The stolen laptop was not found.

Williams lived with his two sons in apartment 3301 at the Lakeside Apartments complex, located at 301 Wilcrest, in December 2015. Williams testified that he met appellant through a mutual friend in St. Louis and considered appellant to be a good friend. That year, Williams spent Christmas in Missouri and gave appellant a key to his apartment so that he could stay there while he was gone. When Williams returned home, he noticed a gallon of water and a gray laptop on his computer desk. Williams contacted appellant to let him know that he was back so that appellant could return the key. Williams testified that appellant dropped off the key and took the laptop with him. On cross-examination, Williams testified that he knew appellant used a laptop for work, but he did not know whether it resembled the one he saw in his apartment.

Kacie Waiters, a DNA analyst at IFS, testified that based on an analysis of the DNA results from the swab taken from Morales's left breast, appellant could not be

excluded as a possible major contributor to the DNA mixture. Waiters testified that the combination of STR alleles from the major component of the swab is expected to occur approximately 1 in 65 sextillion, 320 quintillion Caucasians; 1 in 792 quintillion, 200 quadrillion African Americans; and 1 in 162 sextillion, 300 quintillion Hispanics.

Waiters testified that based on the DNA results from the swab of Morales's right breast, appellant could not be excluded as a possible major contributor to that DNA mixture. Waiters testified that the combination of STR alleles from the major contributor of the swab is expected to occur approximately 1 in 2 sextillion, 458 quintillion Caucasians; 1 in 9 quintillion, 245 quadrillion African Americans; and 1 in 3 sextillion, 58 quintillion Hispanics.

Waiters testified that the DNA results from the non-sperm fraction of the anal swab obtained from Morales indicated that appellant and Morales could not be excluded as possible contributors to the DNA mixture. Waiters testified that the frequency of occurrence of an unrelated, randomly selected individual who could be a contributor to the DNA mixture is approximately 1 in 7 Caucasians; 1 in 9 African Americans; and 1 in 5 Hispanics.

Waiters testified that semen was detected in Morales's pajama shorts. The DNA results from the non-sperm fraction were consistent with a mixture of at least three contributors: two major contributors and at least one minor contributor.

Neither appellant nor Morales could be excluded as possible major contributors to the DNA mixture. Waiters testified that the frequency of occurrence of an unrelated, randomly selected individual who could be a major contributor to the mixture is approximately 1 in 43 billion, 60 million Caucasians; 1 in 12 billion, 200 million African Americans; and 1 in 33 billion, 300 million Hispanics.

Waiters also testified that appellant could not be excluded as a possible source of the DNA from the sperm fraction from Morales's pajama shorts. Waiters testified that the combination of STR alleles on the pajama shorts is expected to occur approximately 1 in 65 sextillion, 320 quintillion Caucasians; 1 in 792 quintillion, 200 quadrillion African Americans; and 1 in 162 sextillion, 300 quintillion Hispanics.

Waiters testified that appellant was excluded as a source or possible contributor to the DNA found on several cigarettes butts discovered near Morales's apartment and on a white towel recovered from Morales's apartment.[1]

After both sides rested, the jury found appellant guilty of the charged offense.

During the punishment phase, the State introduced evidence that appellant had sexually assaulted five other women in Jersey Village, Houston, and the St. Louis,

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[1] Morales testified that Roldan, her boyfriend, had used a white towel to wipe himself after he and Morales had been intimate at her apartment several days before the assault. Roldan could not be excluded as a possible contributor or source of the DNA found on the white towel that police recovered from the corner of Morales's bedroom floor.

Missouri area between 2008 and 2016. The jury assessed appellant's punishment at life imprisonment and a $10,000 fine. This appeal followed.

Sufficiency of the Evidence

In his first point of error, appellant contends that the evidence is insufficient to sustain the jury's verdict.

A. Standard of Review

We review appellant's challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We examine all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318–19; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson*, 443 U.S. at 314, 318 n.11, 320; *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); *Gonzalez v. State*, 337 S.W.3d 473, 479 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Galvan-Cerna v. State*, 509 S.W.3d 398, 403 (Tex. App.—Houston [1st Dist.] 2014, no pet.). An appellate court determines "whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). In viewing the record, direct and circumstantial evidence are treated equally. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.* (quoting *Hooper* v. *State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). An appellate court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326.

B. Applicable Law

A person commits the offense of burglary if, without the effective consent of the owner, the person:

> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TEX. PENAL CODE § 30.02(a).

A person commits the offense of sexual assault if the person intentionally or knowingly:

(1) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;

(2) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(3) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor.

Id. § 22.011(a).

A sexual assault is without the consent of the other person if:

(1) the actor compels the other person to submit or participate by the use of physical force, violence, or coercion; or

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat.

Id. § 22.011(b)(1), (2).

C. Analysis

Appellant contends that the evidence is insufficient to prove that he intended to sexually assault Morales at the time he entered her apartment. This is so, he

argues, because Morales could not identify who raped her and the only evidence of intent is his own statement that he intended to engage in consensual sex.

Section 30.02 sets forth three distinct ways in which one may commit the offense of burglary. *See DeVaughn v. State*, 749 S.W.2d 62, 64 (Tex. Crim. App. 1988). Under subsection (a)(1), the State must establish that the accused intended to commit an assault at the moment of entry. *See id.* at 65; *see also Martinez v. State*, 269 S.W.3d 777, 781 (Tex. App.—Austin 2008, no pet.). Under subsection (a)(3), however, the State is not required to prove specific intent to commit assault at the time of entry. *Martinez*, 269 S.W.3d at 782–83. Rather, "the State can prove the defendant, after entry, proceeded to actually commit or attempt to commit a felony, theft, or assault." *Id.* (emphasis omitted); *see DeVaughn*, 749 S.W.2d at 65 ("[Subsection (a)(3)] dispenses with the need to prove intent at the time of the entry when the actor is caught in the act.") (quotation omitted).

Here, appellant was charged with the offense of burglary of a habitation under section 30.02(a)(3). The indictment alleged, in relevant part:

> REGINALD DWAYNE BOND, hereafter styled the Defendant, heretofore on or about June 22, 2014, did then and there unlawfully, without the effective consent of the owner, namely, without any consent of any kind, intentionally and knowingly enter a habitation owned by YOLANDA MORALES, a person having a greater right to possession of the habitation than the Defendant, and commit and attempt to commit the felony of SEXUAL ASSAULT.

The State was not required to prove that appellant intended to assault Morales at the time he entered her apartment. Instead, it could prove that appellant, after entering Morales's apartment, proceeded to actually commit or attempt to commit sexual assault.

The State presented evidence showing that appellant entered Morales's apartment without her consent and sexually assaulted her. Morales testified that when she returned to her apartment at 2:00 a.m., she locked her front door and had not given permission to anyone to enter her apartment. She was awakened later that morning by a man who had entered her apartment and told her that he had a gun. Morales testified that she was scared that she was going to die and pleaded with the assailant not to assault her. The man forced her to engage in oral and vaginal intercourse. The complainant's testimony, standing alone, is sufficient to support a conviction for sexual assault. *See Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990); *Cruz v. State*, 238 S.W.3d 389, 395 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

The DNA evidence demonstrated that appellant engaged in sexual activity with the complainant. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986) (noting identity can be proved by direct or circumstantial evidence). Waiters, the IFS analyst, testified that the DNA results revealed that appellant could not be excluded as a contributor to DNA mixtures obtained from swabs of Morales's

breasts. The statistical probability that an unrelated, randomly selected individual could have been the source of the major contributor to the DNA mixture was infinitesimal. Appellant could not be excluded as a possible major contributor to either the DNA mixture obtained from the non-sperm fraction of the sample taken from Morales's pajama shorts or the single-source DNA profile obtained from the sperm fraction of the sample. And, the statistical probabilities associated with these DNA mixtures showed that it was extremely unlikely that someone other than appellant was the source of both the sperm and non-sperm fractions of DNA obtained from Morales's pajama shorts. In light of the DNA evidence and Morales's testimony, a rational juror could have reasonably inferred that appellant sexually assaulted Morales. *See Hooper*, 214 S.W.3d at 16–17.

In addition to Morales's testimony and the DNA evidence, the jury also heard appellant's recorded statement to police that he entered Morales's apartment and engaged in sexual activity with her. As the sole judge of the weight and credibility of the evidence, the jury was free to reject appellant's assertion that he and Morales engaged in consensual sex in favor of Morales's testimony that appellant sexually assaulted her. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (noting jury may accept one version of facts and reject another).

Viewing the evidence in the light most favorable to the verdict, the evidence is sufficient to support the jury's finding that appellant entered Morales's apartment without her consent and committed the felony offense of sexual assault. *See Jackson*, 443 U.S. at 318–19; *Williams*, 235 S.W.3d at 750. We overrule appellant's first point of error.

Extraneous Offense Evidence

In his second point of error, appellant contends that the trial court reversibly erred by admitting evidence of an extraneous offense. Specifically, he argues that the State failed to prove beyond a reasonable doubt that he committed the extraneous offense. He also argues that the extraneous offense was not sufficiently similar to the charged offense for purposes of establishing identity.

A. Standard of Review

We review a trial court's ruling to admit or exclude evidence for abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *Tristan v. State*, 393 S.W.3d 806, 810 (Tex. App.—Houston [1st Dist.] 2012, no pet.). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). A trial court does not abuse its discretion if some evidence supports its decision. *See Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002). We uphold a trial court's evidentiary ruling if it

was correct on any theory of law applicable to the case. *See De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Applicable Law

Under Texas Rule of Evidence 404(b), evidence of other crimes, wrongs, or acts is not admissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1); *see Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. Relevant evidence means evidence having "any tendency to make a fact more or less probable than it would be without the evidence." TEX. R. EVID. 401. However, Rule 404(b)(2) provides that extraneous offense evidence 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)(2). "Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court." *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

"Evidence of a defendant's particular modus operandi is a recognized exception to the general rule precluding extraneous offense evidence, if the modus

operandi evidence tends to prove a material fact at issue, other than propensity." *Martin v. State*, 173 S.W.3d 463, 468 (Tex. Crim. App. 2005) (quoting *Owens*, 827 S.W.2d 911, 915 (Tex. Crim. App. 1992)). When the extraneous offense is introduced to prove identity by comparing common characteristics, it must be so similar to the charged offense that the offenses illustrate the defendant's "distinctive and idiosyncratic manner of committing criminal acts." *Id.* (quoting *Owens*, 827 S.W.2d at 915). "Such extraneous-offense evidence is admissible to prove identity when the common characteristics of each offense are so unusual as to act as the defendant's 'signature.'" *Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006) (citing *Taylor v. State*, 920 S.W.2d 319, 322 (Tex. Crim. App. 1996)). The signature must be apparent from a comparison of the circumstances in both cases. *Id.* (citing *Bishop v. State*, 869 S.W.2d 342, 346 (Tex. Crim. App. 1993)).

In determining whether the similarity between the offenses is sufficient, the court should consider both the specific characteristics of the offenses and the time interval between them. *Johnson v. State*, 68 S.W.3d 644, 651 (Tex. Crim. App. 2002). Sufficient similarity between the offenses may be shown by proximity in time and place or by a common mode of committing the offenses. *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). Remoteness or dissimilarity does not per se render an extraneous offense irrelevant on the issue of identity. *Thomas v. State*, 126 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2003, pet ref'd).

"[I]n deciding whether to admit extraneous offense evidence in the guilt/innocence phase of trial, the trial court must, under rule 104(b), make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Fischer v. State*, 268 S.W.3d 552, 556 (Tex. Crim. App. 2008) (quoting *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994)). If the defendant did not commit the extraneous offense, it follows that the evidence is irrelevant and therefore inadmissible. *See Harrell*, 884 S.W.2d at 160. In making this determination, the trial court is not limited to the State's initial proffer but can consider evidence subsequently introduced during the State's case-in-chief. *See Fisher*, 268 S.W.3d at 557.

C. Analysis

Appellant contends that the extraneous offense evidence was inadmissible because Keita did not identify him as her assailant and the stolen laptop was never recovered and, therefore, the State failed to prove beyond a reasonable doubt that he committed the extraneous offense. He also argues that the extraneous offense was not sufficiently similar to the charged offense to be probative of the issue of identity.

An extraneous offense may be admissible to show identity only when identity is at issue in the case. *Page*, 213 S.W.3d at 336. Here, the issue of identity was placed in dispute by trial counsel's remarks during his opening statement that no

one, including Morales, could identify appellant as the assailant. The record also reflects that trial counsel cross-examined Morales about her inability to see her assailant and emphasized discrepancies between her description of the assailant and appellant's appearance in court. In particular, trial counsel instructed appellant to lift his shirt to show Morales and the jurors that he had a recessed belly button in order to impeach Morales's statement to police that her assailant had an "outie" belly button. *See Segundo v. State*, 270 S.W.3d 79, 86 (Tex. Crim. App. 2008) (stating issue of identity can be placed in dispute by defendant's opening statement or by cross-examination).

The State presented evidence that a gray and silver MacBook laptop was stolen from Keita's apartment and that Keita and her cousin tracked it to an apartment complex where appellant was residing at the time of the offense. The jury heard William's testimony that when he returned home, he noticed a gray laptop in his apartment, and that appellant took the laptop with him when he left.

The State also presented evidence showing the following similarities between the charged offense and the extraneous offense: (1) both occurred on the ground floor units of apartment complexes on the west side of Houston; (2) these apartment complexes were near where appellant was living at the time the offenses occurred; (3) both victims were women who did not live alone but were home alone at the time the offenses occurred; (4) both women had returned home late at night; (5) the

assailant entered their apartments during the early morning hours when both victims were asleep; (6) the assailant was able to gain access to both apartments despite the fact that the victims had locked their doors, and with no apparent forced entry; (7) the assailant did not wear a mask but instead used a towel and the victim's bedsheet to conceal his face; (8) the assailant climbed into bed with the victims and got underneath the covers; (9) the assailant told both victims that he had a gun; (10) in the charged offense the assailant kissed the victim, grabbed her breasts, and sexually assaulted her, and in the extraneous offense the assailant grabbed the victim's breasts and tried to kiss her but she was able to escape before he could sexually assault her; (11) the assailant removed the victims' cell phones from a charging device near their beds and placed them in a location not readily accessible to the victim; and (12) the assailant stole electronic devices from the victims' homes.

Appellant contends that the details surrounding the attempted rape of Keita are "so general that nothing about it could possibly qualify as bearing appellant's "signature." He further argues that the extraneous offense was not a "signature" crime because "jumping into bed and threatening the use of force is intrinsic evidence in all rape cases."

A number of the similarities in this case, e.g., the assailant threatened to use a weapon, the offenses occurred in the early morning hours while the victims were sleeping, and the assailant entered the apartments without the victims' consent, are

typical of violent crimes. *See Avila v. State*, 18 S.W.3d 736, 741 (Tex. App.—San Antonio 2000, no pet.) (concluding that similarities between sexual assaults—both rapes occurred within same city limits, during early morning hours, and while both victims were sleeping, and assailant entered premises without victims' consent and raped each victim in common sexual position—were not substantial enough to warrant admissibility of extraneous conduct testimony). There is also an eighteen-month period between the charged offense and the extraneous offense. However, certain details in both cases indicate a particular pattern of conduct. For instance, the assailant used a towel and bedsheet to cover his face. The assailant entered the victims' apartments without any apparent forced entry. He climbed into bed with the victims and got underneath the covers. He moved their cell phones and stole electronic devices from their apartments. *See, e.g.*, *Thomas*, 126 S.W.3d at 145-46 (finding sufficient similarities between charged offense of burglary of habitation with intent to commit sexual assault and extraneous offense of criminal trespass where both victims were in their late sixties or early seventies, they lived alone and half-mile apart, both had been harassed at night over approximately same period of time, intruder entered house by breaking back window, and defendant was apprehended while attempting to gain entry through second victim's patio door using bent wire).

However, we need not determine whether admission of the extraneous offense evidence was an abuse of discretion because we conclude that the possible error, if any, was harmless. The erroneous admission of extraneous act evidence is non-constitutional error that must be disregarded unless it affected appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). Erroneously admitted evidence does not affect substantial rights when the appellate court examines the record as a whole and can fairly assess that the error did not adversely influence the jury or had only a slight effect. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In making this assessment, evidence of the defendant's guilt is a factor in determining whether the erroneously admitted evidence was harmful. *See id*. at 357–58. Factors to be considered in weighing the defendant's guilt in the harm analysis include (1) the sufficiency of the evidence to support the conviction; (2) the character of the alleged error and its connection with other evidence; and (3) whether the State emphasized the error. *See id*. at 358–59.

Here, the State introduced significant evidence of appellant's guilt. The DNA evidence showed that appellant could not be excluded as a possible contributor to DNA mixtures obtained from swabs of Morales's breasts and her pajama shorts, and the statistical probability that an unrelated, randomly selected individual could have been the source of the major contributor to the DNA mixtures was insignificant. Although Morales was unable to identify her assailant, she testified that he entered

her apartment without her consent and sexually assaulted her. Further, in his videotaped statement, appellant admitted entering Morales's apartment and engaging in sexual activity with her. *See Dossett v. State*, 216 S.W.3d 7, 30 (Tex. App.—San Antonio 2006, pet. ref'd) (holding any error in admission of extraneous offense evidence was harmless in light of other incriminating evidence establishing identity, including DNA evidence and defendant's own statements).

The record shows that the prosecutor talked about the extraneous offense in her closing argument. She did so, however, after defense counsel discussed the extraneous offense in his closing argument, and ostensibly in response to trial counsel's statements questioning the State's decision to introduce the extraneous offense.[2]

The record also reflects that the trial court gave the jury instructions, both orally and in the written charge, limiting its consideration of the extraneous offense evidence. The trial court instructed the jury that it could not consider the extraneous offense evidence for any purpose unless it believed beyond a reasonable doubt that appellant committed the offense and, even then, it could only consider the evidence

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[2] In closing argument, trial counsel told the jury, "I have no clue why they brought that lady. I don't know if you do. Probably you're thinking the same." In her closing, the prosecutor stated, "And one of the reasons, ladies and gentlemen, that we brought you Mariam Keita was so that you could see how the identification in this case was made. . . . We brought you Mariam so that we could prove the identity in this case even though it spoke for itself."

for a purpose other than character conformity. It is generally presumed that the jury follows the trial court's instructions, and that a limiting instruction cures harm from the erroneous admission of evidence. *Moore v. State*, 882 S.W.2d 844, 847 (Tex. Crim. App. 1994) (en banc); *Bezerra v. State*, 485 S.W.3d 133, 143 (Tex. App.—Amarillo 2016, pet. ref'd).

Considering the entire record, we hold that the extraneous offense evidence would have had only a slight effect on the jury's verdict, if any. Thus, any error in its admission is harmless. *See Dossett*, 216 S.W.3d at 30. Accordingly, we overrule appellant's second point of error.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Lloyd, Kelly, and Countiss.

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