In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00182-CR

TRISTIN MIGUEL SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 18-0007X

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

A Harrison County jury convicted Tristin Miguel Smith of burglary of a habitation and assessed a sentence of nineteen years' imprisonment. On appeal, Smith argues that (1) evidence of his extraneous methamphetamine use was erroneously admitted during guilt/innocence and (2) the State's closing during punishment contained improper jury argument. We find that Smith was not harmed by the admission of the extraneous-offense evidence and that Smith has failed to preserve his second point of error. As a result, we affirm the trial court's judgment.

I. Smith Was Not Harmed by the Admission of the Extraneous-Offense Evidence

The evidence at trial showed that Smith left behind cigarette butts at the scene of a burglarized home. None of the items stolen from the home were ever recovered. Smith was interviewed about the burglary after the DNA profile from the cigarette butts was determined to be "consistent with [his] DNA profile . . . and the probability of finding that same DNA profile, if it ha[d] come from some other individual other than Tristin Smith, was approximately one in Eight Hundred and Sixteen sextillion."

Captain Floyd Duncan, an investigator with the Harrison County Sheriff's Office, interviewed Smith, who initially denied knowledge of the burglary. The interview was recorded by Duncan. Before Duncan's testimony, the trial court held a hearing outside the presence of the jury regarding the admissibility of a portion of the recording. Smith objected to the admission of a portion of the recording that referenced Smith's extraneous methamphetamine use, which is shown in the following transcript:

> [BY THE DEFENSE]: . . . . There is a mention during the course of this interview of my client stating that he smoked, I think, Ice with a couple of white dudes down at the lake and I have an objection to that specific piece of portion of

> the tape being played for the reason that I believe there is no probative value to that statement. The prejudicial effect is not substantially outweighed by the probative conduct. My client puts himself particularly at the scene in some form and fashion and that is . . . admissible and those are his statements and the jury can consider them for what they are, but Mr. Smith does not say I committed this crime because I was smoking methamphetamine. . . . I believe what [the State] truly wants the jury to hear is that this man smoked Meth with some people at some time. That is purely prejudicial as it has no probative value to this case. . . .
>
> THE COURT: Any response?
>
> [BY THE STATE]: . . . . [D]uring the course of this interview Tristin Smith denies knowing anything about this place, denies knowing anything about these people, never goes down to the end of the road, but then we know at some point, immediately during or before this burglary, he is smoking Ice with them because in the video he talks about he saw [a stolen item] in the back of the truck. That places him there and involved in this crime. So that is why it is relevant. He will also say some things he did not remember because of his ingestion of methamphetamine, so it is relevant.[1]
>
> THE COURT: The objection will be overruled. . . .

A. Standard of Review

"We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Flowers v. State*, 438 S.W.3d 96, 103 (Tex. App.—Texarkana 2014, pet. ref'd) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)). "Abuse of discretion occurs only if the decision is 'so clearly wrong as to lie outside the zone within which reasonable people might disagree.'" *Id*. (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g))). "We may not substitute our own decision for that of the trial court." *Id*. (citing *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)). "We will uphold an evidentiary ruling if it was correct on any

[1]The State did not address the Rule 403 argument.

theory of law applicable to the case." *Id.* (citing *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009)).

B. Analysis

"An accused must be tried only for the offense with which he or she is charged. The accused may not be tried for a collateral crime or for being a criminal generally." *Jackson v. State*, 320 S.W.3d 873, 882 (Tex. App.—Texarkana 2010, pet. ref'd) (citing *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991)). For this reason, "[g]enerally, evidence of extraneous offenses may not be used against the accused in a criminal trial." *Daggett v. State*, 187 S.W.3d 444, 450 (Tex. Crim. App. 2005). "While such evidence will almost always have probative value, it forces the defendant to defend himself against uncharged crimes as well as the charged offense, and encourages the jury to convict a defendant based upon his bad character, rather than proof of the specific crime charged." *Id.* at 450–51. "However, the general prohibition against the admission of extraneous offenses to prove a defendant's character or propensity to commit the crime carries with it numerous exceptions." *Id.* at 451.

Here, the State argues that, during his interview, Smith "set up a defensive theory that he was using Ice with strangers" and "did not remember certain things due to his ingestion of methamphetamine" and that the evidence was necessary to rebut Smith's defensive theory. *See Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). While it is true that "[e]xtraneous-offense evidence may be admitted to rebut a defensive theory raised in opening statement, cross-examination of State's witnesses, or the defense's case-in-chief," a review of the record reveals that no defensive theory was introduced at trial before the admission of the recording. *Gullatt v.*

State, 590 S.W.3d 20, 25 (Tex. App.—Texarkana 2019, pet. ref'd) (footnote omitted) (citation omitted).

Smith's opening did not argue that he was with others during the commission of the offense or that he did not remember the event. The opening simply explained the burden of proof, recited facts showing that stolen property was never recovered, and urged the jury to pay attention to the evidence presented by the State. Smith's opening statement did not rise to the level of justifying the admission of the methamphetamine use because a "mere denial of commission of an offense generally does not open the door to extraneous offenses." *De La Paz*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). Also, while "[e]xtraneous-offense evidence may become admissible where the State's uncontradicted direct evidence 'is completely undermined by defense cross-examination,"' cross-examination of witnesses in this case did not raise any defensive theory supporting the admission of methamphetamine use. *Gullatt*, 590 S.W.3d at 25 (quoting *Albrecht v. State*, 486 S.W.2d 97, 102 (Tex. Crim. App. 1972)).[2]

Next, the State argues that the evidence was admissible under Rule 404(b) because statements that Smith was around the scene of the burglary smoking methamphetamine "place[d]

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[2]If

> "the defensive theory is just to point out the lack of direct evidence of the accused's guilt, and '[t]he cross-examination only suggests the possibility that appellant did not commit the offense because no one saw her commit it, thus tangentially challenging the issue of identity,' such strategy may 'fail[] to undermine the State's case' where the 'appellant left the State's circumstantial identification evidence largely untouched.'"

Gullatt, 590 S.W.3d at 25 (alterations in original) (quoting *Clark v. State*, 726 S.W.2d 120, 123 (Tex. Crim. App. 1986)). "Where the testimony of a witness remains unimpeached after cross-examination, the mere fact that the witness was cross-examined does not authorize the state to introduce testimony of extraneous offenses." *Id.* (citing *Albrecht*, 486 S.W.2d at 102).

him there and involved [him] in this crime." "[M]erely introducing evidence for 'a purpose other than character conformity, or any of the other enumerated purposes in Rule 404(b), does not, in itself, make that evidence admissible."' *Id.* (citing *Rankin v. State*, 974 S.W.2d 707, 709 (Tex. Crim. App. 1996)). "The extraneous offense must also be relevant to a 'fact of consequence' in the case, and it must be relevant beyond its tendency to prove the character of a person in order to prove conformity therewith." *Id.* (citing *Rankin*, 974 S.W.2d at 709; *Owens v. State*, 827 S.W.2d 911, 914 (Tex. Crim. App. 1992); *Montgomery*, 810 S.W.2d at 387). While Smith's statements that he was at the scene of the offense could be admitted to show identity or absence of mistake or accident, the fact that he smoked methamphetamine at some point had no relevance to any fact of consequence in this burglary of a habitation trial.

As a result, we find that the State's arguments did not support the admission of the extraneous-offense evidence. Also, Smith argued that the trial court erred in overruling his Rule 403 objection.[3] Assuming, arguendo, that the trial court erred and the methamphetamine's slight, if any, probative value was substantially outweighed by the danger of unfair prejudice, the erroneous admission of extraneous-offense evidence does not constitute constitutional error. *Higginbotham v. State*, 356 S.W.3d 584, 592 (Tex. App.—Texarkana 2011, pet. ref'd) (citing

[3]When an appellant challenges a trial court's Rule 403 ruling, we balance the following considerations:

> (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. Of course, these factors may well blend together in practice.

Gigliobianco v. State, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006) (footnote omitted) (citation omitted).

Casey v. State, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007)); s*ee Thomas v. State*, No. 06-17-00224-CR, 2018 WL 2027173, at *3 (Tex. App.—Texarkana May 2, 2018, pet. ref'd) (mem. op., not designated for publication) (finding no harm in the trial court's erroneous decision to admit defendant's extraneous methamphetamine use).[4]

Rule 44.2(b) of the Texas Rules of Appellate Procedure provides that an appellate court must disregard a nonconstitutional error that does not affect a criminal defendant's substantial rights. TEX. R. APP. P. 44.2(b). An error affects a substantial right of the defendant when the error has a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Nonconstitutional error is not grounds for reversal if, "after examining the record as a whole," there is "fair assurance that the error did not influence the jury, or had but a slight effect." *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). In assessing the likelihood that the jury's decision was adversely affected by the error, we "consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." *Motilla*, 78 S.W.3d at 355, 357 (quoting *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)).

[4]Although this unpublished case has no precedential value, we may take guidance from it "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

Here, Smith told Duncan that he was in the vicinity of the burglarized home. The homeowner testified that she had never invited Smith to her home, but the State admitted ample evidence showing that Smith's DNA was found on cigarette butts left at the burglarized home.[5] Due to this strong evidence of guilt, we find that any error in admission of evidence of Smith's extraneous methamphetamine use could not have had a substantial and injurious effect or influence in determining the jury's verdict.

Because we find that Smith was not harmed by the admission of extraneous-offense evidence, we overrule his first point of error.

II. Smith Failed to Preserve His Second Point of Error

In his second point of error, Smith refers to the following transcript of the State's closing argument during punishment:

> [BY THE STATE]: . . . . He has not learned. We look at all of those things. The jury, in that unlawful possession of a firearm case, I tried it. They did not hear everything that you have heard.
>
> [BY THE DEFENSE]: Objection, Your Honor, we are getting in to what those are, facts not in evidence, for any statement about that is totally inadmissible.
>
> THE COURT: That is sustained.
>
> [BY THE STATE]: They didn't get to hear everything that you heard.

[5]Katie Traweek, a forensic DNA analyst at the North Louisiana Crime Laboratory, testified:

> The DNA profile that I got from the cuttings and cigarette butts was consistent with the DNA profile I got from the reference of Tristin Smith and the probability of finding that same DNA profile, if it ha[d] come from some other individual other than Tristin Smith, was approximately one in Eight Hundred and Sixteen sextillion.

[BY THE DEFENSE]: Your Honor, same objection that you just sustained. He is alluding to it. I ask that he move on.

THE COURT: Move on, Mr. [Prosecutor].

On appeal, Smith argues that the State's jury argument was improper.

To preserve error, an objection must be "pursued to an adverse ruling." *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). "It is well settled that when an appellant has been given all the relief he or she requested at trial, there is nothing to complain of on appeal." *Kay v. State*, 340 S.W.3d 470, 473 (Tex. App.—Texarkana 2011, no pet.) (citing *Nethery v. State*, 692 S.W.2d 686, 701 (Tex. Crim. App. 1985); *Lasker v. State*, 573 S.W.2d 539, 543 (Tex. Crim. App. [Panel Op.] 1978)). "Failure to request additional relief after an objection is sustained preserves nothing for review." *Id*. (citing *Caron v. State*, 162 S.W.3d 614 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

The transcript shows that the trial court sustained Smith's objection and that Smith failed to secure an adverse ruling. As a result, we overrule Smith's second point of error.

III. Conclusion

We affirm the trial court's judgment.

Scott E. Stevens
Justice

Date Submitted: May 21, 2020
Date Decided: June 23, 2020

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