TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00489-CR

Roy Davila Flores, Appellant

v.

The State of Texas, Appellee

FROM THE 274TH DISTRICT COURT OF HAYS COUNTY
NO. CR-18-0762-D, THE HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Roy Davila Flores was charged with assault family violence. *See* Tex. Penal Code § 22.01(a)-(b). The indictment alleged that Flores had five prior felony convictions, including two for assault family violence. *See id.* §§ 12.42, 22.01(b). Flores was convicted of the charged offense, and the trial court sentenced him to thirty-eight years' imprisonment. *See id.* § 12.42. In one issue on appeal, Flores asserts that the trial court erred by overruling his objection to the admission of an extraneous offense. We will affirm the trial court's judgment of conviction.

BACKGROUND

Flores was charged with assaulting his wife Magdelena DeLaRosa in August 2017. At trial DeLaRosa testified that she and Flores began dating in February 2017 and got married in April 2017. Regarding the August 2017 incident, DeLaRosa related that Flores began arguing with her after she received an email regarding a job opportunity. DeLaRosa explained that the argument turned physical and that Flores hit, kicked, and punched her.

During DeLaRosa's testimony, a video recording of the alleged assault was admitted into evidence and played for the jury. On the recording, DeLaRosa states that her relationship with Flores was over and that Flores kicked her "like a dog" before the recording started, and Flores repeatedly restrains DeLaRosa and gets on top of her while they are on their bed. While on top of DeLaRosa, Flores tells her that she better "shut up," and she asks if he was "going to slap the shit out of [her]" and tells him to "go ahead." Next, Flores slaps DeLaRosa's face and covers her mouth with his hand. Then, DeLaRosa hits Flores's face while he is still restraining her. Finally, Flores punches DeLaRosa's face, and she screams out in pain.

After the recording was admitted, the State informed the trial court that it intended to offer into evidence prior acts of abuse by Flores against DeLaRosa, and Flores objected. After considering the parties' arguments, the trial court sustained Flores's objections to two of the prior acts but overruled the objections regarding the remaining prior acts. Following that ruling, DeLaRosa testified that Flores previously went to her work with a gun and threatened to "start shooting people until he found out who [she] was sleeping with," and DeLaRosa also testified regarding other abuse in which Flores threw her phone in the toilet, choked her, whipped her with a charging cord, threw coffee on her, hit her, and punched her in the face. During DeLaRosa's testimony, photographs of injuries that DeLaRosa sustained during the instant assault were admitted into evidence.

While DeLaRosa was testifying about her injuries, she asked for a break, and the trial court called a recess. Following that break, Flores decided to change his plea from not guilty to guilty, entered a non-negotiated guilty plea to the offense, and entered pleas of true to the enhancement allegations. The trial court accepted Flores's plea and sentenced him to thirty-eight years' imprisonment following a punishment hearing.

DISCUSSION

In one issue on appeal, Flores argues that the trial court erred by overruling his objection under Rule of Evidence 403 to the admission of the evidence regarding the incident at DeLaRosa's work. *See* Tex. R. Evid. 403.[1]

Under the Rules of Evidence, "[r]elevant evidence is admissible unless" provided otherwise by "the United States or Texas Constitution," "a statute," the Rules of Evidence, or "other rules prescribed under statutory authority," and evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and if "the

[1] In its appellee's brief, the State asserts that Flores waived his right to appeal the trial court's ruling when he entered his guilty plea because his conviction "was rendered independent of and not supported by the error." *See Monreal v. State*, 99 S.W.3d 615, 619 (Tex. Crim. App. 2003). However, none of the cases on which the State relies stand for the proposition that a defendant waives his right to appeal an evidentiary ruling admitting evidence of an extraneous offense under Rule of Evidence 403 by subsequently entering a guilty plea. *See id.* at 616 (addressing whether waiver of appellate rights signed as part of unnegotiated plea prevents defendant from appealing without consent of trial court); *Young v. State*, 8 S.W.3d 656, 667 (Tex. Crim. App. 2000) (concluding that defendant did not waive complaint regarding ruling on motion to suppress because "the judgment of guilt is not independent of the trial court's ruling on the motion to suppress the evidence of the offense, and the judgment would not be supported without that evidence"); *Lawler v. State*, No. 12-12-00276-CR, 2013 WL 3967162, at *1, *2 (Tex. App.—Tyler July 31, 2013, no pet.) (mem. op., not designated for publication) (holding that defendant waived issue challenging trial court's ruling on "motion to quash his subpoena duces tecum" because "there is no nexus between the information Appellant sought and the trial court's judgment of guilt"); *Reyes v. State*, 139 S.W.3d 448, 449-50 (Tex. App.—Austin 2004, no pet.) (determining that defendant did not waive double-jeopardy claim after pleading guilty); *Sanchez v. State*, 98 S.W.3d 349, 355 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (explaining that reviewing court could not "say that appellant's guilty plea was rendered independent of or was unsupported by the adverse ruling on" defendant's motion to disclose confidential informant); *Brink v. State*, 78 S.W.3d 478, 484 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (stating that defendant waived issues regarding removal of his trial counsel after pleading guilty because "the substitution of counsel has no direct nexus with the guilt or innocence of the defendant"); *Hargrove v. State*, 40 S.W.3d 556, 558-59 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (deciding that defendant did not waive appellate claim challenging ruling on suppression motion by pleading guilty after trial court denied motion). In any event, given our ultimate resolution of this issue, we will assume for the sake of argument that Flores preserved his issue for appellate consideration.

fact is of consequence in determining the action." Tex. R. Evid. 401, 402. However, Rule 403 provides that relevant evidence may be excluded "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." *Id.* R. 403. "Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. The rule envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (footnotes and internal quotation marks omitted). Accordingly, "the plain language of Rule 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial. Indeed, all evidence against a defendant is, by its very nature, designed to be prejudicial." *Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013) (internal citation omitted). Moreover, reviewing courts should afford trial courts a high level of deference regarding admissibility determinations under Rule 403. *See Robisheaux v. State*, 483 S.W.3d 205, 218 (Tex. App.—Austin 2016, pet. ref'd).

When evaluating the admissibility of evidence under Rule 403, courts should balance the following factors:

> (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) (footnote omitted); *see Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) (explaining that "probative value" refers to how strongly evidence makes existence of fact more or less probable and to how much proponent needs evidence and that "unfair prejudice" considers how likely it is that evidence might result in decision made on improper basis, including emotional one).

On appeal, Flores argues that the evidence had no probative value because the type of misconduct that allegedly occurred during the extraneous offense differed from that of the charged offense because the charged offense did not involve a weapon and because the extraneous offense did not involve any bodily injury. Further, Flores contends that the State did not need the evidence because there was a recording of the alleged assault and because DeLaRosa testified regarding the charged offense and several other incidents of abuse. Additionally, Flores asserts that evidence that he brought a gun to DeLaRosa's workplace and threatened to shoot her coworkers was highly prejudicial.

During his opening statement, Flores presented defensive theories that he was acting in self-defense or that DeLaRosa consented to the physical contact. Specifically, Flores argued as follows:

> The video itself is quite interesting because, from our perspective, it appears as if she's intoxicated and wanting to leave. He's holding her, they're talking, they're tousling and she says, "Slap me. Slap the shit out of me." And he does this, (indicating).
>
> She rears back and hits him pretty hard. I mean, you can—you can determine for yourself, it's on video. He hits her back, and that's what we're here for. Is that self-defense? Is that consent? It's up to 12 people to decide.
>
> But she did say, "Slap the shit out of me." And he did not, he just gave her a little play slap. She slapped the shit out of him and in reaction he hit her back and that's what we're here for.

I appreciate it and I'm hoping you will consider self-defense or consent.

"[E]xtraneous-offense evidence . . . is admissible to rebut a defensive theory raised in an opening statement." *Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also* Tex. Code Crim. Proc. art. 38.371 (explaining that in prosecution of assault family violence "each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense . . . , including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim"); Tex. R. Evid. 404(b) (providing nonexhaustive list of permissible reasons for admitting evidence of prior offenses).

In light of Flores's opening statement, the trial court could have reasonably determined that the evidence pertaining to an incident in which Flores brought a weapon to DeLaRosa's work and threatened to hurt people was relevant to rebut Flores's defensive theory that DeLaRosa either consented to the assault in question or was the initial aggressor and forced him to defend himself. *See* Tex. R. Evid. 401; *see, e.g.*, *Houston v. State*, No. 13-18-00592-CR, 2019 WL 3486737, at *3 (Tex. App.—Corpus Christi Aug. 1, 2019, no pet.) (mem. op., not designated for publication) (determining that "[e]vidence of the two offenses is admissible because it was used to rebut [the defendant]'s defensive theory that [the victim] was the initial aggressor"); *Gonzalez v. State*, 541 S.W.3d 306, 312-13 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (concluding that trial court did not abuse its discretion by admitting evidence regarding prior incident of domestic abuse in trial for assault family violence because evidence "rebutt[ed] appellant's defensive theory").

Moreover, although there were differences between Flores's alleged misconduct in the extraneous offense and in the charged offense, the evidence demonstrated that the

extraneous offense occurred sometime in the few months between when Flores and DeLaRosa were married in April 2017 and when the charged offense allegedly occurred in August 2017. *Cf. Robinson v. State*, 701 S.W.2d 895, 898-99 (Tex. Crim. App. 1985) (determining that extraneous-offense evidence "had probative value as to appellant's intent," in part, where extraneous offense had close proximity in time to charged offense because it occurred between four and six months earlier). Accordingly, the trial court could have reasonably determined that the probative value of the evidence weighed in favor of admission of the evidence.

Turning to the State's need for the evidence, we note that DeLaRosa testified that Flores assaulted her and that a recording of the assault was admitted into evidence before the State offered extraneous-offense evidence. Moreover, the State was permitted to introduce evidence of other instances of abuse that did not involve a firearm in addition to the incident at DeLaRosa's workplace. For these reasons, the State's need for the evidence was not great, and this factor did not weigh in favor of admission. *See Fruge v. State*, Nos. 03-14-00722—00724-CR, 2015 WL 7969209, at *6 (Tex. App.—Austin Dec. 3, 2015, pet. ref'd) (mem. op., not designated for publication) (observing that "the State's need for the [extraneous-offense] evidence was not great" because "other evidence presented during the trial established that [the defendant] committed the alleged crimes").

As for the potential of the evidence to suggest a decision on an improper basis, *see Gigliobianco*, 210 S.W.3d at 641 (stating that evidence might encourage decision on improper basis if "it arouses the jury's hostility or sympathy . . . without regard to the logical probative force of the evidence"), we note that although the evidence indicated that Flores had a gun and threatened to shoot multiple individuals during the extraneous offense, none of the testimony addressing that incident indicated that Flores physically injured anyone on that

occasion. Moreover, although DeLaRosa related that she "was crying hysterically" after the incident, her testimony regarding the incident was otherwise not inflammatory in nature. *See Fruge*, 2015 WL 7969209, at *7 (reasoning that extraneous-offense evidence did not suggest conviction on improper basis where witness "did not testify that [defendant] pointed [weapon] at [witness] or shot the gun" and where witness's "testimony was not emotional in nature and simply related the events that occurred"); *see also Norwood v. State*, No. 03-13-00230-CR, 2014 WL 4058820, at *5 (Tex. App.—Austin Aug. 15, 2014, pet. ref'd) (mem. op., not designated for publication) (explaining that "[w]hen the extraneous offense is no more heinous than the charged offense, evidence concerning the extraneous offense is unlikely to cause unfair prejudice"). Furthermore, the trial court gave a limiting instruction informing the jury that it could only consider the extraneous-offense evidence for certain purposes and only if the jury determined beyond a reasonable doubt that he committed the prior offenses. *See Norwood*, 2014 WL 4058820, at *5 (noting that "any impermissible inference of character conformity can be minimized by the use of a limiting instruction"); *see also Gaytan v. State*, 331 S.W.3d 218, 228 (Tex. App.—Austin 2011, pet. ref'd) (stating that appellate courts "presume that the jury obeyed" limiting instructions). Even so, the trial court could have reasonably determined that the potential for the evidence to result in a decision on an improper basis weighed against admission of the evidence.

Regarding the time needed to present the evidence, the testimony describing the incident in which Flores brought a weapon to DeLaRosa's work took up less than one page of the reporter's record. For that reason, the trial court could have reasonably concluded that this factor weighed strongly in favor of admission of the evidence. *Cf. Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (deciding that amount of time devoted to extraneous-offense

evidence was not excessive where it "constituted less than one-fifth of the testimony in the State's case-in-chief").

Turning to the potential for the evidence to confuse the jury, we note that the extraneous offense was a discrete act between Flores and DeLaRosa. Additionally, as discussed above, significantly less time was spent developing the evidence regarding the workplace offense than was spent developing the evidence pertaining to the charged offense. *See Gigliobianco*, 210 S.W.3d at 641, 642 (explaining that presentation "that consumes an inordinate amount of time" might "confuse or distract jury from the main issues"). Accordingly, the trial court could have determined that this factor either was neutral regarding admission or weighed in favor of admission of the evidence.

Finally, regarding the potential for the jury to give undue weight to the evidence, the trial court could have reasonably concluded that the jury would not give undue weight to the evidence because the evidence did not address a complex subject matter. *Cf. id.* at 641 (explaining that scientific evidence is one type of evidence that might mislead jury not properly equipped to consider probative value). Therefore, the trial court could have reasonably determined that this factor weighed in favor of admission.

Given our standard of review, the presumption in favor of admissibility, and the resolution of the factors discussed above, we cannot conclude that the trial court abused its discretion by overruling Flores's Rule 403 objection. *Cf. Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *12 (Tex. App.—Austin May 24, 2018, pet. granted) (mem. op., not designated for publication) (affirming trial court's ruling denying Rule 403 objection when majority of factors weighed in favor of admission of evidence).

For all of these reasons, we overrule Flores's sole issue on appeal.

CONCLUSION

Having overruled Flores's issue on appeal, we affirm the trial court's judgment of conviction.

Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

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