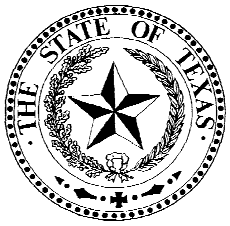
Affirmed and Opinion filed March 7, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-01365-CR

THOMAS SIMMONS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 182nd District Court
Harris County, Texas
Trial Court Cause No. 826,105

O P I N I O N

Thomas Simmons appeals a conviction for murder under the immediate influence of sudden passion arising from an adequate cause[1] on the grounds that the trial court erred by: (1) not allowing appellant to testify about statements the complainant made during the encounter with appellant; (2) not excluding evidence of a prior bad act of appellant; and (3) denying appellant's request for a mistrial after the State made an improper argument. We affirm.

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[1] A jury found appellant guilty and assessed punishment of ten years confinement and a $10,000 fine.

Exclusion of Evidence

Appellant's first issue argues that the trial court erroneously sustained the State's objection to appellant's testimony about statements the complainant made to appellant during an encounter leading up to the complainant's shooting.

We review a trial court's ruling on admissibility of evidence for abuse of discretion. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). However, error may not be predicated on a ruling excluding evidence unless the substance of the evidence was made known to the trial court by an offer of proof or bill of exceptions or was apparent from the context in which the questions were asked. TEX. R. EVID. 103(b); *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999).

In this case, appellant's brief concedes that the State was allowed to cross-examine appellant on the complainant's statements to him. Appellant's complaint is thus that he was not able to tell the jury in his own words what he heard the complainant say and how those comments affected his state of mind. However, appellant did not develop a record showing what this excluded testimony would have been, nor was it apparent from the context in which any questions were asked. Because appellant failed to preserve this complaint, his first point of error presents nothing for our review and is overruled.

Admissibility of Prior Misconduct

Appellant's second issue contends that the trial court erred by failing to exclude evidence of appellant's threatening conduct toward a neighbor prior to the shooting because this prior bad act did not constitute a classic confrontation of a violent nature.

In reviewing a ruling on admissibility of evidence for abuse of discretion, we must uphold the ruling if it is within the zone of reasonable disagreement. *Powell*, 63 S.W.3d at 438. Evidence of a person's bad character is generally not admissible for the purpose of showing that he acted in conformity with it. TEX. R. EVID. 404(b); *Powell*, 63 S.W.3d at 438. Such evidence may, however, be admissible when it is relevant to a noncharacter conformity fact of consequence in the case, such as to rebut a defensive theory. *Powell*, 63 S.W.3d at

438. Thus, where a defendant has claimed self-defense, his motive and intent to kill are in issue, and the State may introduce evidence of extraneous offenses by appellant to show his state of mind. *See Halliburton v. State*, 528 S.W.2d 216, 218 (Tex. Crim. App. 1975).

In the present case, the trial court admitted, over appellant's objections, testimony of his neighbor describing appellant's taunting conduct toward the neighbor to rebut appellant's claim of self-defense. Appellant's brief acknowledges there was evidence that the complainant had an aggressive and violent nature but appellant did not. Appellant does not dispute that extraneous offense evidence can be admissible to rebut such a claim of self-defense, but only challenges whether the taunting conduct toward his neighbor in this case was violent enough to actually do so. Although this conduct was not overtly violent, it was nevertheless probative of whether appellant had an aggressive and violent nature and thus his state of mind. Beyond that, the extent to which it actually rebutted the evidence that appellant was not violent or aggressive went to the weight of the evidence and not to its admissibility.[2] Because we therefore conclude that it was within the trial court's discretion to admit the extraneous offense evidence, we overrule appellant's second issue.

Improper Jury Argument

Appellant's third issue asserts that the trial court erred by denying his request for a mistrial because the State's improper argument, insinuating that appellant and all the defense witnesses had an incestuous relationship, prevented appellant from receiving a fair and impartial trial.

In most instances, an instruction to disregard improper jury argument will cure the error. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Therefore, when an instruction to disregard has been given, only error that is so offensive or flagrant as to render the instruction ineffective warrants reversal. *See id*. at 116. A denial of a mistrial is

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[2] Because appellant did not also object to this evidence on the ground that its probative value was substantially outweighed by a danger of unfair prejudice, we do not address that issue. *See Alba v. State*, 905 S.W.2d 581, 585-86 (Tex. Crim. App. 1995).

reviewed for abuse of discretion. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000).

In this case, appellant complains of the following portion of the prosecutor's closing argument:

> The Defense can bring in violent acts of my complaining witness, Shaun Lynch, if they want to. You never once heard about Shaun Lynch committing any robberies against anybody. In fact, what you heard, the only bad acts you heard was from *this little group of people that are all somehow incestuously related*, live on two streets in Northwood Manor.

(emphasis added). Appellant immediately objected to this comment on the ground that it was outside the record, and the trial judge sustained the objection, instructed the jury to disregard the statement, and denied appellant's motion for mistrial. The prosecutor did not thereafter allude to any such relationship again. Under these circumstances, we conclude that the State's comment was not so offensive or flagrant as to render the instruction to disregard ineffective. Accordingly, appellant's third issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Hudson, Fowler, and Edelman.

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