Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01303-CR

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KENNETH WEST, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 771,595

O P I N I O N

Kenneth West appeals his jury conviction for murder. The trial court assessed his punishment at 60 years' imprisonment. In two issues, appellant contends: (1) the trial court abused its discretion in admitting evidence of an extraneous shooting, and (2) the trial court erred by refusing to instruct the jury on the law of self-defense to the extraneous shooting. We affirm.

FACTS

On June 6, 1997, at about 2:00 a.m., Jerome Sampson drove his friends, Sammy Johnson, Robert Levi, and Carl Anderson, to the Carrington Club parking lot after a concert at the club. They visited with friends for a short time, then Jerome Sampson started driving the group toward the exit. Appellant and Chris White walked up behind Sampson's car and fired approximately thirty shots into the rear of the car. Sammy Johnson died at the scene from a bullet wound to the rear of his head, and the other three men were wounded by bullets during the shooting.

Two eye witnesses testified that they observed appellant standing behind Sampson's car firing bullets into it. Lawrence Fields was driving a car in front of Sampson's car, and he and his girlfriend, Tracy, heard the shooting. Fields turned around in his seat and saw gun flashes and then saw appellant standing behind Sampson's car. Larry Risher stated that he recognized appellant from having seen him ten to fifteen times before at other clubs. When he first observed appellant, Risher testified that appellant was walking toward Sampson's car. Risher also saw White walking up to Sampson's car. Appellant walked around the back of Sampson's car and opened fire.

Appellant's trial counsel extensively cross-examined Risher and Fields to test their powers of observation. Fields admitted to wearing glasses, but did not have them on that night. He stated he could see well without glasses, but admitted he could see better with them. Appellant's counsel repeatedly challenged Fields' ability to see well enough to identify the appellant on a dark night from a distance of 100 feet. Although Risher had no visual problems, appellant's counsel repeatedly challenged his ability to identify appellant as a shooter. Appellant's counsel also questioned Risher as to why he took over three months to report the killing to the police. Appellant's counsel also questioned Risher as to why he could not remember what type clothing appellant was wearing on that night. Risher also stated he thought there were three or four shooters.

After the State rested, appellant called Marlo Bluitt as a witness to the incident. She stated there were three men involved in the shooting, none of which was appellant. She stated the third man was named "Cha Cha." Marlo and Cha Cha ducked behind a car when the shooting started and she did not see the shooting take place.

THE EXTRANEOUS CRIME

In his first issue, appellant contends the trial court abused its discretion in admitting evidence of appellant's involvement in a shooting incident that occurred six months earlier. Appellant was subsequently tried and convicted for the murder of Efrem Breaux that occurred in that shooting under cause number 768,322 (on appeal in our cause no. 14-98-01301-CR) in the same trial court as this offense.

The trial court held a hearing outside the presence of the jury to determine the admissibility of the extraneous shooting which occurred on November 9, 1996, at about 2:00 a.m., at an Exxon station across the street from the Carrington Club. The State contended such offense was admissible on the issue of appellant's identity because his theory of defense was that he was present at Carrington's but he did not participate in the shooting. The State also argued that the other killing was admissible to show appellant's motive. Both killings were similar, but appellant objected that to be admissible, the extraneous offense must be so similar to the offense charged that the offenses are marked as the accused's handiwork.

In the extraneous case, four men left the Carrington Club at 2:00 a.m., after it closed and they drove a green Elantra to the Exxon across the street. The Exxon station was very crowded with partygoers from the club. Appellant and Chris White walked by the car and started shooting at the back of the car. The car was hit with approximately twenty-five bullets, and Efrem Breaux died from two of four bullets that hit him in the upper part of his back.

After the hearing out of the jury's presence, Christopher St. Romaine was called by the State as a witness. St. Romaine stated he was high on codeine cough syrup and marijuana when he left Carrington's Club at closing time and met with appellant and White. St. Romaine stated

that appellant indicated a group of men were after him and had been following him. White drove appellant, St. Romaine, and another man, Winfrey, from the club to the Exxon station. The Exxon parking lot was full of cars, and White parked alongside the Exxon building. Appellant, White, and St. Romaine got out of White's car and walked around the Exxon lot. Winfrey stayed in the car and slept through the entire incident. White saw the green Elantra and said, "those were the guys at Carrington." White walked up to the green Elantra and asked someone in the car if they had any problems with him. St. Romaine stated he observed Breaux bend forward and reach for something. White said, "he's got a gun," and ran away. St. Romaine ran away, and heard gunshots. He turned and saw appellant and White shooting at the green Elantra.

Standard of Review

If the opponent of extraneous offense evidence objects on the grounds that the evidence is not relevant, violates Rule 404(b), or constitutes an extraneous offense, the proponent must satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App.1990) (opinion on reh'g). If the trial court determines the evidence has no relevance apart from supporting the conclusion that the defendant acted in conformity with his character, it is absolutely inadmissible. *Id*. On the other hand, extraneous offense evidence is admissible if the proponent persuades the trial court that [the extraneous offense evidence] tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, e.g. absence of mistake or accident . . . [or] that it is relevant upon a logical inference not anticipated by the rule makers. *Montgomery*, 810 S.W.2d at 387-388; *see also Taylor v. State*, 920 S.W.2d 319, 321 (Tex. Crim. App. 1996). As long as the trial court's ruling was within the zone of reasonable disagreement, there is no abuse of discretion and the trial court's ruling will be upheld. *Montgomery*, 810 S.W.2d at 391. *See also Santellan v. State*, 939 S.W.2d 155, 168-169

(Tex. Crim. App. 1997).

Once the trial judge has ruled on whether the evidence is relevant beyond its character conformity value, he has ruled on the full extent of the opponent's Rule 404(b) objection. *Montgomery,* 810 S.W.2d at 388. The opponent must then make a further objection based on rule 403, in order for the trial judge to weigh the probative and prejudicial value of the evidence. *Id.* If appellant fails to object based on rule 403, he waives his complaint on appeal that the evidence was unfairly prejudicial. TEX. R. APP. P. 33.1(a); *Montgomery,* 810 S.W.2d at388-89; *Peoples v. State*, 874 S.W.2d 804, 809 (Tex. App.—Fort Worth 1994, pet. ref'd).

Discussion

At the hearing out of the presence of the jury on the extraneous offense, appellant and the State presented only argument covering thirty pages. We find no objection by appellant in the record at this hearing to the admissibility of the extraneous offense and its relevancy. Both sides merely argued the respective merits of their positions. There was also discussion as to the "probative" value of the offense compared to the "prejudicial effect" but no objection that would comply with rule 403. The trial judge concluded that he was "going to admit it."

The next day, appellant's trial counsel proposed to the trial court: "Before testimony begins, I want to make sure the record was clear in terms of our objections, many of which were made in yesterday's argument. . . ." Appellant's counsel concluded his argument with the only objection we find in this record to this evidence: "We object to the testimony of any – introduction of any extraneous offenses." The trial court answered: "The ruling was not changed." Thereafter, the record indicates an unreported bench conference, and the reporter inserted only: "(Proceedings concluded at the bench)." Appellant made *no objection* thereafter to any of the testimony of the State's rebuttal witnesses as to the facts of the extraneous offense of the November 9, 1996, killing.

Assuming *arguendo*, appellant's objection was sufficient to preserve error as to the admissibility of the other murder, he has waived any complaint of undue prejudice by failing

to make a rule 403 objection. *Peoples,* 874 S.W.2d at 809.

Raising the issue of identity does not automatically render extraneous offenses admissible. *Lane,* 933 S.W.2d at 519. To be admissible to show identity, an extraneous offense must be so similar to the offense charged that the offenses are marked as the accused's handiwork. *Id.* In this case, appellant and White used the same method of operation for each crime. In *Ransom v. State,* 503 S.W.2d 810, 813 (Tex. Crim. App. 1974), the court of criminal appeals held the offenses to be sufficiently similar in that case when: (1) both offenses were robberies, (2) both offenses were committed at gunpoint, (3) the defendant was aided by a confederate, and (4) the offenses occurred three days apart. *Id.* In *Ransom,* the court of criminal appeals explained that sufficient similarity may be shown by proximity in time and place or by a common mode of committing the offenses. *Id.* In this case, the offenses were similar in that: (1) both offenses were murders committed with with automatic pistols; (2) both offenses occurred at approximately the same time at night and after the Carrington Club had closed for the night; (4) appellant was aided by the same confederate, Chris White; (5) the offenses were committed in the same area, at or near the Carrington Club; (6) appellant and White used the same method of operation in each offense (appellant and White walked to the rear of the victims' cars and opened fire on the rear of the car with automatic pistols, puncturing the cars with a large number of bullets); and (7) the extraneous act was committed six months earlier. We hold that the proximity in time and place, the common mode of committing the offenses, and the circumstances surrounding the offenses, are sufficiently similar for the extraneous offense of the Efrem Breaux murder to be relevant to the issue of identity. *Lane,* 933 S.W.2d at 519; *Ransom,* 503 S.W.2d at 813.

The extraneous act was also admissible in rebuttal of appellant's defensive theory that he did not commit these crimes. *See Creekmore v. State,* 860 S.W.2d 880 (Tex. App.—San Antonio 1993, pet. ref'd). *See also Harvey v. State,* 3 S.W.3d 170, 175-176 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). We overrule appellant's contentions in issue one that the trial court abused its discretion in admitting the extraneous murder of Efrem

Breaux to prove appellant's identity and to rebut his defensive theory.

THE FAILURE TO CHARGE THE JURY ON SELF-DEFENSE IN THE EXTRANEOUS OFFENSE

In issue two, appellant further contends that he was making a plea of self-defense in the Breaux murder and the jury should have been additionally instructed on the law of self-defense as it would apply to the extraneous murder. Appellant argues that the jury cannot consider any extraneous crimes unless they believe beyond a reasonable doubt that appellant committed the offense. Therefore, appellant argues that the jury should be able to consider appellant's self-defense plea in the Breaux murder in determining whether he committed the extraneous offense beyond a reasonable doubt. The trial court refused appellant's request for a special charge on self-defense to the Breaux murder. The trial court included an instruction in its jury charge that the jury is not to consider evidence of other offenses for any purpose unless they find and believe beyond a reasonable doubt that appellant committed such other offense, "and even then you may only consider the same in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the defendant. . . ."

Appellant's specially requested charge was filed on the same day the case went to jury, August 7, 1998. Appellant made no request to the trial court for a limiting instruction at the time the extraneous offense evidence was introduced by the State to prove appellant's identity, August 6, 1998. Appellant's specially requested charge was in the form of a further limiting instruction to the trial court's general limiting instruction which required the jury to consider only extraneous offenses proved beyond a reasonable doubt and then only for purposes stated. Appellant's specially requested charge further instructed the jury that "it is a defense to the offense of homicide that defendant acted in self defense," and setting out the general law of self-defense. The trial court denied the request.

No limiting instruction is required when an extraneous offense is offered to prove one

of the main issues in the indicted case such as motive, intent, or malice. *Knapp v. State*, 942 S.W.2d 176, 182 (Tex. App.—Beaumont 1997, pet. ref'd). The State offered the extraneous offense evidence to prove appellant's identity. Identity is an elemental fact, or "main issue." *Montgomery*, 810 S.W.2d at 387-388.

Appellant ignores rule 105(a), Texas Rules of Evidence, which provides as follows:

> When evidence is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

Knapp, 942 S.W.2d at 182.

A party opposing evidence has the burden of objecting and requesting the limiting instruction at the introduction of the evidence. *Garcia v. State*, 887 S.W.2d 862, 878-79 & n. 18 (Tex. Crim. App. 1994). Once evidence is received without a proper limiting instruction, it becomes part of the general evidence in the case and may be used as proof to the full extent of its rational persuasive power. Once admitted, the fact that evidence might have been inadmissible for certain purposes if the proper objection had been made does not limit its use. *Id*. Because no limiting instruction was requested at the time the evidence was admitted, the appellant's request for an instruction was not timely and no error has been shown. *Id*. We overrule appellant's contentions that trial erred in denying his specially requested charge.

We affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Robertson, Sears, and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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* Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.