Affirm as Modified; Opinion Filed July 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00017-CR

RICARDO BELTRAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1056077-M

MEMORANDUM OPINION

Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Pedersen, III

A jury convicted Ricardo Beltran of the murder of Sheldon McKnight and assessed punishment at seventy years' confinement. On original submission, we affirmed the trial court's judgment, rejecting Beltran's claim that the trial court erred in denying his request, during the punishment phase of trial, for an instruction on sudden passion. *See Beltran v. State*, No. 05-12-01647-CR, 2014 WL 3587367 (Tex. App.—Dallas July 22, 2014), *reversed*, 472 S.W.3d 283 (Tex. Crim. App. 2015). On Beltran's petition for discretionary review, the Texas Court of Criminal Appeals held Beltran was entitled to the requested instruction, reversed our judgment, and remanded the case for a harm analysis. *See* 472 S.W.3d at 293–96. This Court

concluded that Beltran was harmed by the trial court's refusal to instruct on sudden passion. We reversed the trial court's judgment as to punishment, and remanded the case to the trial court for a new punishment trial. *See Beltran v. State*, No. 05-12-01647-CR, 2016 WL 3749707, at *7 (Tex. App.—Dallas July 7, 2016, no pet.) (mem. op., not designated for publication).

On remand, Beltran elected to have a jury assess punishment. The trial court submitted the issue of sudden passion to the second jury. However, the jury was unconvinced by Beltran's sudden passion argument, and it assessed his punishment at sixty-six years' confinement.

Beltran raises two issues in this appeal. He first challenges the legal and factual sufficiency of the evidence to support the jury's rejection of his claim of sudden passion. He also contends the trial court erred by excluding "hyper-sexual" photos of the victim that Beltran offered to corroborate his claim that the victim sexually assaulted him. We affirm.

Background

This is the third time this case has come before this Court. Our prior opinions thoroughly present the facts leading up to McKnight's murder. Accordingly, we do not discuss those facts in detail here. This time, however, the testimony pertaining to McKnight's murder was dramatically different.

Three friends—Alprintice Green, Ricardo Beltran, and Victor Ramos—decided to celebrate Green's new job by spending the night partying. Green and

Beltran met at a Dallas Area Rapid Transit station and took a train to meet Ramos. Along the way, Beltran and Green stopped near McKnight's apartment so Green could buy Xanax from McKnight. Beltran testified that he had never met McKnight and did not speak to McKnight at that time. Beltran and Green consumed the Xanax and then walked to Ramos's apartment complex to meet Ramos. Ramos supplied heroin, and the three men sat outside, getting high and drinking Jack Daniels. At some point, Green decided he should go home, so Ramos arranged for McKnight to give him a ride. McKnight arrived, the three men got into McKnight's car, and McKnight drove Green home. Beltran and Ramos decided to return with McKnight to his apartment.

Upon arriving at McKnight's apartment, Beltran and Ramos consumed more drugs in the living room while McKnight went upstairs. After some time, McKnight came downstairs. He sat on the couch next to Beltran, stroked Beltran's face, and called him a "pretty little thing." This made Beltran uncomfortable, and he tried to leave. Ramos calmed Beltran down, and McKnight went back upstairs. Ramos and Beltran resumed snorting heroin. McKnight then came back downstairs and told Beltran and Ramos that they had to go upstairs because he was expecting "company." Beltran and Ramos went upstairs while McKnight remained downstairs. Once upstairs, Beltran and Ramos consumed more drugs. Ramos then went downstairs, leaving Beltran on the bed upstairs. Beltran said he took off his shoes, laid down, and passed out with all of his clothes on.

Beltran testified that when he awoke, he was completely naked and McKnight, dressed in women's lingerie, was licking his anus. Beltran said that he "panicked" and "tried to get up" but McKnight jumped on top of him. Beltran said that when he screamed, McKnight smothered his face into a pillow. Beltran said that Ramos arrived and tried to pull Beltran out from under McKnight. While McKnight struggled with Ramos, Beltran was able to free himself and get off the bed. Beltran recalls grabbing an object—he thinks it was a lamp—and hitting McKnight in the head. McKnight was still trying to get up from the bed so Beltran grabbed a drawer and began beat McKnight in the head with the drawer. When he tired of hitting McKnight with the drawer, Beltran dropped the drawer on the floor. He testified "I looked at myself and it just hit me. I got so, so angry at what he did." At that point, Beltran stated that he grabbed his knife, and started stabbing McKnight. Beltran testified that he, not Ramos, killed McKnight.[1]

Once McKnight was dead, Beltran tried to clean himself. His clothes were covered in blood so he placed his clothes in a bag and put on some clothes from McKnight's closet. Ramos suggested they should clean anything that could link them to the scene so they wiped off things in the apartment. Beltran and Ramos left the apartment, but returned when Beltran realized that he had left his clothes there. Beltran then decided they should take McKnight's vehicle and stage McKnight's

[1] During his first trial, Beltran testified that Ramos stabbed McKnight to death while Beltran held McKnight from behind. In this trial, he testified that his prior sworn testimony was false.

apartment to look like a robbery. He opened drawers, pulled out clothes, and threw things around to make it look like the apartment had been ransacked. The two men loaded McKnight's Suburban with items from his apartment and drove away.

Beltran drove McKnight's Suburban to his house where he took a shower and changed his clothes. He also snorted more Xanax. Beltran and Ramos then attempted to drive to a destination in Oak Cliff where they planned to drop off McKnight's Suburban. However, before arriving at their destination, Beltran crashed the Suburban into a utility pole. Beltran and Ramos attempted to flee on foot, but they were arrested shortly thereafter.

Discussion

A. Sudden Passion

In his first issue, Beltran challenges the legal and factual sufficiency of the evidence to support the jury's negative finding on the sudden passion issue. The State responds that appellant's legal sufficiency argument fails because the jury had at least a scintilla of evidence from which it could conclude that appellant did not kill McKnight while under the immediate influence of sudden passion. The State further responds that appellant's factual sufficiency argument also fails because the jury's verdict is not so against the great weight of the evidence as to be manifestly unjust.

A person commits murder by intentionally or knowingly causing the death of an individual. TEX. PENAL CODE § 19.02(b)(1). Typically, murder is a first-degree

felony. *Id*. § 19.02(c). However, during the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. *Id*. § 19.02(d). If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree. *Id*.; *see Wooten v. State*, 400 S.W.3d 601, 605 (Tex. Crim. App. 2013). "Sudden passion" means "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." PENAL CODE § 19.02(a)(2); *see also McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005) (stating that a defendant raising sudden passion to mitigate a murder conviction must prove that there was an adequate provocation, that a "passion or an emotion such as fear, terror, anger, rage, or resentment existed[;] that the homicide occurred while the passion still existed and before there was reasonable opportunity for the passion to cool; and that there was a causal connection between the provocation, the passion, and the homicide"). An "adequate cause" is one that would "commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *Id*. § 19.02(a)(1). Neither ordinary anger nor fear alone raises an issue of sudden passion arising from adequate cause. *Moncivais v. State*, 425 S.W.3d 403, 407 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

"Although the issue of sudden passion is a punishment issue, it is analogous to an affirmative defense because the defendant has the burden of proof by a preponderance of the evidence." *Gaona v. State*, 498 S.W.3d 706, 710 (Tex. App.—Dallas 2016, pet. ref'd); *see also Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013). For this reason, a negative finding on sudden passion is subject to legal and factual sufficiency review. *Cf. Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015) ("Affirmative defenses may be evaluated for legal and factual sufficiency, even after this Court handed down its opinion in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), which abolished factual-sufficiency review as it applies to criminal convictions."); *see Smith v. State*, 355 S.W.3d 138, 147–48 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (addressing legal sufficiency of finding on sudden passion issue); *Gillam v. State*, No. 05-11-01334-CR, 2013 WL 1628386, at *15–16 (Tex. App.—Dallas Apr. 16, 2013, pet. ref'd) (addressing legal and factual sufficiency of finding on sudden passion).

When an appellant asserts that the evidence is legally insufficient to support a negative finding on sudden passion, we first examine the record for a scintilla of evidence to support the jury's negative finding on sudden passion and disregard all evidence to the contrary unless a reasonable factfinder could not. *Gaona*, 498 S.W.3d at 711 (citing *Smith*, 355 S.W.3d at 147–48). If we find no evidence to support the finding, we examine the entire record to determine whether it establishes the contrary proposition as a matter of law. *Id*. In reviewing the record, we defer to

the factfinder's determination of the credibility of the witnesses and the weight to give the evidence. *Id*.

If the evidence is legally sufficient, we then turn to factual sufficiency. *Smith*, 355 S.W.3d at 148. In reviewing the factual sufficiency of a finding rejecting an affirmative defense, we examine all of the evidence in a neutral light. *Id.*; *Matlock*, 392 S.W.3d at 671. A finding rejecting an appellant's affirmative defense cannot be overturned unless, after setting out the relevant evidence supporting the verdict, the court clearly states why the verdict is so much against the great weight of the evidence as to be manifestly unjust, conscience-shocking, or clearly biased. *Velasquez v. State*, No. 05-17-01214-CR, 2018 WL 6065257, at *4 (Tex. App.—Dallas Nov. 20, 2018, no pet.) (mem. op., not designated for publication) (citing *Matlock*, 392 S.W.3d at 671–72).

In his appellate brief, Beltran asserts that there is no evidence to support the jury's negative finding. Beltran contends that he and McKnight had no previous history that could have provoked the offense. The night of McKnight's murder was the first time he met McKnight. Beltran also contends there was no evidence that he had anticipated or prepared for a fight to occur. Therefore, according to Beltran, there is no scintilla of evidence to support the jury's negative finding, and he urges this Court to move to the next inquiry—whether the evidence establishes the contrary proposition as a matter of law. He asserts that the number of stab wounds McKnight suffered, and the medical examiner's testimony that seventy-one stab

wounds indicates a "frenzy killing," is ample evidence for an affirmative finding of sudden passion. He further claims that adequate cause was provided by the fact that he woke to find McKnight, dressed in women's lingerie, licking his anus.

The jury's resolution of a claim of sudden passion turns on the jury's assessment of the witness's credibility. *See Smith*, 355 S.W.3d at 146. During cross-examination, Beltran conceded that during the investigation and trials of this case, he had provided four different versions of his story. In the first version of his story, immediately after being arrested, Beltran told Detective Ibarra that he knew nothing about McKnight's murder, he had not been driving McKnight's Suburban, and he was just in Oak Cliff to visit a friend. As the police obtained additional information from their simultaneous interview of Ramos, Detective Ibarra let Beltran know that his initial story was not holding up.

In his second version, Beltran claimed that Ramos showed up at his house with a Suburban full of items that Beltran assumed were stolen. Ramos asked for a change of clothing and used Beltran's bathroom, apparently leaving the bloody clothing he had been wearing under Beltran's sink. Detective Ibarra continued to question Beltran, inviting him to tell the truth about any mitigating factors and even asking if McKnight had "crossed the line" with Beltran in some way. But Beltran maintained his story that he had not been at McKnight's apartment and he did not know who killed McKnight. Beltran said nothing about a sexual assault. As this Court previously noted, lying during his custodial interrogation does not, without

more, preclude a finding that Beltran committed the offense while under the immediate influence of passion arising out of McKnight's provocation. *Beltran*, 2016 WL 3749707, at *7.

Beltran conceded that he provided a third version of his story when he testified under oath at his first trial. Beltran testified that he was in McKnight's apartment and woke to find McKnight licking his anus. *See Beltran*, 472 S.W.3d at 287. However, he claimed that Ramos was the one who hit McKnight over the head and stabbed McKnight. *Id*. Beltran testified that he held McKnight from behind while Ramos continued stabbing him. *Id*. He also denied knowing where Ramos got the knife that he used to kill McKnight. *Id*. at 288.

During this trial, Beltran testified that this time—the fourth version of his story—he was finally telling the truth. And this time, he testified that *he* was the one who beat and stabbed McKnight to death, not Ramos. He testified that he killed McKnight while under the immediate influence of sudden passion (confusion, panic, and anger) caused by McKnight's licking his anus. Beltran's testimony is the only evidence that McKnight sexually assaulted Beltran. Beltran's testimony is the only evidence that he was the person who killed McKnight. And Beltran's testimony is the only evidence that he killed McKnight while under the immediate influence of sudden passion.

Beltran argues that "the State imagines reasons why Beltran's testimony was not credible." However, it does not take imagination to perceive significant

discrepancies between Beltran's testimony at this trial, and the testimony Beltran concedes he gave during his first trial—the most significant being who killed McKnight. Beltran told the jury that he had testified falsely about McKnight's murder at his first trial. The jury was free to make its own determination of Beltran's credibility and to reject Beltran's current version of events if it did not believe he was telling the truth. *See Trevino v. State*, 157 S.W.3d 818, 822 (Tex. App.—Fort Worth 2005, no pet.).

According to Beltran, he first hit McKnight in the head with an object he thought was a lamp. Once that object broke, he grabbed a drawer and hit McKnight in the head with the drawer. Beltran stated that he knocked McKnight down on to the bed; he kept hitting McKnight with the drawer because McKnight kept resisting. Beltran testified that he finally stopped beating McKnight with the drawer because the drawer was heavy and he got tired. The jury could have concluded that Beltran stopped beating McKnight because there had been reasonable opportunity for his passion to cool. *See McKinney*, 179 S.W.3d at 569.

Then Beltran saw his knife.[2] McKnight was still struggling, so Beltran grabbed his knife and started stabbing him. Beltran testified that he felt such a rage that he did not even understand his own mind at the time. However, the jury could

[2] Beltran contends that on the evening in question, he was just "chillin" with his friends and was not looking to get into fights or confrontations. Nevertheless, at this trial, he testified that he was carrying a knife. He testified that when he took his shoes off to lay down on McKnight's bed, he placed his knife in his shoe.

have reasonably concluded that the act of stopping to retrieve his knife showed that Beltran anticipated the event at issue and prepared himself to respond to McKnight's resistance by arming himself with the knife he had placed in his shoe. *See Walker v. State*, 557 S.W.3d 678, 689 (Tex. App.—Texarkana 2018, pet. ref'd) (instruction on sudden passion not warranted where evidence showed appellant anticipated the event at issue and prepared to respond to victim's actions by getting her gun from closet).

Beltran asserts that the number of stab wounds and the medical examiner's testimony corroborate his testimony of sudden passion. Dr. Chester Gwin, medical examiner, testified that McKnight died of sharp-force injuries and blunt-force injuries. He described brain contusions and skull fractures caused by blunt force. He also described seventy-one sharp-force injuries, with forty-six of those injuries being stab wounds. On cross-examination, defense counsel asked Dr. Gwin if that many stab wounds would indicate some type of "frenzy killing" or "overkill" situation. Dr. Gwin agreed that was a reasonable conclusion. When asked if that would be consistent with a person who did the stabbing being very angry or rageful at McKnight, Dr. Gwin responded that it was a lot of wounds and would indicate an angry moment. However, proof of overkill does not categorically prove sudden passion. *See Cleveland v. State*, 177 S.W.3d 374, 391 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (demonstration of "hatred" and "overkill" does not categorically constitute passion arising out of adequate cause).

"We can envision no circumstances in which physical evidence could conclusively resolve the issue of sudden passion and acknowledge that, in most cases, sudden passion is resolved exclusively by the jury's assessment of whether the witness is credible." *Id*. at 389. After weighing all the evidence, we conclude that the evidence is legally and factually sufficient to support the jury's negative finding on the issue of whether Beltran acted under the immediate influence of sudden passion when he murdered McKnight. *See Matlock*, 392 S.W.3d at 669–70; *Trevino*, 157 S.W.3d at 822–23. We overrule Beltran's first issue.

B. Admissibility of Photographs

In his second issue, Beltran argues that the trial court erred by excluding "hyper-sexual" photos of the victim that were offered to corroborate Beltran's claim that the victim sexually assaulted him. "We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard." *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id*. (citing *Martinez*, 327 S.W.3d at 736). Provided the trial court's ruling falls within the reasonable-disagreement zone, we may not substitute what we would have done for what the trial court actually did. *Id*. We uphold the trial court's ruling if it is reasonably supported by the evidence and is correct under any theory

of law applicable to the case. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

Under rule 403, evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. TEX. R. EVID. 403. Once a rule 403 objection is made, the trial court must weigh the probative value of the evidence to determine if it is substantially outweighed by its potential for unfair prejudice. A rule 403 balancing test includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012). Rule 403 favors admitting relevant evidence and presumes that relevant evidence will generally be more probative than unfairly prejudicial. *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006); *Beam v. State*, 447 S.W.3d 401, 404–05 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

To be admissible, a photograph must have some probative value and its probative value must not be substantially outweighed by its inflammatory nature. *See* TEX. R. EVID. 403; *see also Williams v. State*, 301 S.W.3d 675, 690 (Tex. Crim. App. 2009). "Photographs are neither cumulative nor lacking in significant probative value simply because they merely corroborate other kinds of evidence." *Kirk v.*

State, 421 S.W.3d 772, 782 (Tex. App.—Fort Worth 2014, pet. ref'd) (citing *Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999)). Several factors may be considered in determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice, including the number of photographs offered, whether they are in color or black-and-white, the detail shown in the photographs, whether the body is naked or clothed, whether the photographs are gruesome, the availability of other means of proof, and other circumstances unique to the individual case. *Id*. (citing *Reese v. State*, 33 S.W.3d 238, 241 (Tex. Crim. App. 2000)).

During the second sentencing trial, Dallas Police Detective John Palmer testified that, as part of his investigation, he analyzed the cell-phone records of the parties involved. On cross-examination, Beltran attempted to introduce the entire report from McKnight's cell phone, including naked and clothed photos of McKnight posing provocatively, McKnight dressed in women's lingerie, and McKnight sexually touching various parts of his body. There were also several close-up photos of sexual acts. Beltran argued that the photographs showed McKnight's sexual nature and how "hyper sexual" he was, thereby corroborating Beltran's testimony that McKnight sexually assaulted him.[3] The State objected that the photographs were not relevant and were being offered as an attack on

[3] Beltran also argued to the trial court that the photographs should be admitted to rebut testimony that McKnight was a good person. He does not make this argument on appeal.

McKnight's character. The State argued that under evidence rule 403, the photos had low probative value and were highly prejudicial. In addition, the State questioned how naked photos on McKnight's cell phone could provide relevance to Beltran's argument that McKnight was a predator. The trial court ruled that the photos were an attack on the character of the deceased and would not be admitted under rule 403.

We first consider the probative value of the evidence. Beltran argues that the photos were highly probative to corroborate his claim that he was sexually assaulted. He argues that the photos would have given the jury an understanding of McKnight and his tendency to be a sexual predator. However, there is nothing in the photographs to indicate that the sexual poses and activity depicted in McKnight's photographs were predatory or non-consensual. Further, none of the photos depicted the type of sexual activity described by Beltran in his testimony. Thus, the photos were not relevant to any issue in this case and had very little, if any, probative value. *See Gonzalez*, 544 S.W.3d at 370 (evidence is relevant if it provides a small nudge toward proving or disproving fact of consequence).

On the other hand, the potential for the excluded evidence to impress the jury in some irrational way was high. The jury had already heard uncontested testimony that McKnight was gay, occasionally dressed in women's clothing, and was a sexually active man. McKnight's photographs show this—in color and in detail. The photographs had the potential to suggest a decision on an improper basis or to confuse or distract the jury from the main issue. It is possible that the photographs

could have fostered the sort of comparative-worth analysis that is barred by Rule 403. "[E]vidence that draws comparisons between the victim and other members of society based on the victim's worth or morality should usually be excluded under Rule 403." *Hayden v. State*, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009). Further, the evidence was likely to elicit a negative emotional response regarding the victim's character. *See Reese*, 33 S.W.3d at 242 (contents of photograph has emotional impact that suggests decision be made on emotional basis and not on basis of other relevant evidence).

The time needed to develop the evidence weighs in favor of Beltran. It did not take much time to lay the foundation for admission of the photographs. While this factor weighs in favor of admission of the evidence, it is not enough. The probative value of the photographs on McKnight's cell phone is substantially outweighed by the danger of unfair prejudice and the potential to confuse or distract the jury. Consequently, the trial court did not abuse its discretion in excluding the photographs. *See Gonzalez*, 544 S.W.3d at 370. Beltran's second issue is overruled.

C. Modification of Judgment

The State requests that we reform the judgment to correct the name of the prosecutor for the State at trial. We have the authority to modify the trial court's judgment to make it speak the truth. TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). Accordingly, we modify the judgment to reflect that Maxim Ternosky was the prosecutor for the State at trial.

Conclusion

Having overruled both of Beltran's issues, we affirm the trial court's judgment as modified.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

190017f.u05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RICARDO BELTRAN, Appellant	On Appeal from the 194th Judicial District Court, Dallas County, Texas
No. 05-19-00017-CR V.	Trial Court Cause No. F-1056077-M.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Pedersen, III. Justices Osborne and Partida-Kipness participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The prosecutor representing the State at trial was Maxim Ternosky.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 20th day of July, 2020.