Affirmed and Opinion filed January 17, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01295-CR

MIA ABRAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 832,176

O P I N I O N

Appellant, Mia Abrams, appeals her conviction of the offense of murder. Over her plea of not guilty, the jury convicted appellant of the charged offense and assessed punishment at forty years' confinement in the Institutional Division of the Texas Department of Corrections. Appellant asserts six points of error on appeal. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Appellant's Testimony

On December 30, 1999, appellant stabbed and killed Christopher Moore, her cousin and lover. Appellant testified that she and her cousin began having a sexual affair when she was a freshman in college, but it ended when she got married. Their relationship resumed in 1999, upon her moving to Houston. On the night in question, appellant and Moore went out for dinner, returned to appellant's apartment, had sexual intercourse, and got into an argument. According to appellant's testimony, Moore wanted to bring his handgun into appellant's apartment and she refused permission. As a result of their argument, appellant asked Moore to leave, and he did.

Appellant testified that after Moore left, she took a bath. While drying off, appellant heard a noise so she went into the corridor that connected the bedroom and the livingroom. She saw a figure in the dark, sitting on her couch. Appellant went into the kitchen to get a knife. As she was returning from the kitchen, the figure started moving towards her. She stabbed him in the arm and chest. Then, she turned the light on and saw that the person she stabbed was Moore. Appellant and Moore went into the bedroom and appellant got dressed so she could take Moore to the hospital. Appellant and Moore then went into the bathroom where appellant put a towel around Moore's neck. Appellant called 9-1-1 and went out the front door to see where her car was. When she went back inside, she tried to convince Moore to come with her to the hospital, but Moore was in a daze and refused to go with her. Eventually, Moore left the apartment with appellant. They made it to the bottom of the stairs and Moore collapsed to his knees.

2. Officer Cannaday's Testimony

When Officer Cannaday arrived, he asked appellant what happened. Appellant told him that she stabbed Moore. She said she had just come home and found someone in her apartment. Initially, appellant denied knowing Moore. Appellant told Officer Cannaday

that when she walked into her apartment she heard someone come in behind her so she went to the kitchen, got a knife, and stabbed him. Appellant later told Officer Cannaday that after she stabbed Moore, she realized he was her boyfriend. Officer Cannaday obtained appellant's consent to search the apartment and to retrieve the knife. He testified that there were no signs of a struggle in the apartment. Officer Cannaday also testified that there was no blood in the kitchen or in the living room, but there was blood in the bedroom and in the bathroom.

3. Officer Suro's Testimony

Officer Suro arrived on the scene to collect evidence. He also testified there were no signs of a struggle in the apartment. According to Officer Suro, the blood spatter in the bathroom indicated that the bathtub was dry when the blood hit it. If the bathtub had been wet at the time, the blood droplets would not have been circular in nature. Instead, they would have run. He also testified that the blood spatter in the bathroom was of a low to medium velocity. Low velocity blood spatter is what normally occurs when blood drips off of an injured person. Medium velocity blood spatter can occur in the same manner as low velocity, depending on how quickly the injured person is walking around, or it could occur during an assault with a knife. Officer Suro testified that there was blood on appellant's comforter, the bedroom carpet, and on the adjacent wall. He was unable to form an opinion regarding where the stabbing occurred.

4. Officer Snow's Testimony

Appellant was transported from Ben Taub Hospital, where Moore was taken, to the police station so she could make a statement. Officer Snow met with appellant at the police station. Appellant again gave consent for the police to search her apartment. Officer Snow read appellant her rights and statutory warnings. Appellant waived her rights and gave a statement. Appellant told Officer Snow that when she was in the shower she heard a bump or something. Consequently, she got out of the shower, wrapped herself in a towel, and

went into the kitchen. She grabbed a knife from a drawer, and when she turned around she saw a person standing there, so she stabbed him. Then, she turned on the lights and realized she had just stabbed Moore. In her statement, she said Moore stumbled into the bedroom and she called for an ambulance. Moore grabbed a towel and tried to stop the bleeding while appellant got dressed.

5. Sergeant Allen's Testimony

Sergeant Allen met with appellant in order to get another statement from her. In this statement, however, appellant said Moore left her apartment to meet a friend and take care of some business and he told her he would not be back until the morning. She gave Moore a key to her apartment before he left. Appellant said that while she was taking a bath at approximately 1:00 a.m., she heard a noise. She came out into the kitchen and she thought she saw a figure sitting on the couch. The figure got up and walked towards her. He did not say anything. She pulled a knife out of a kitchen drawer and turned around and stabbed him. Later in her statement, however, she said that she stabbed him in the living room. She admitted they had an argument that evening related to Moore's desire to bring his gun into appellant's apartment.

6. Betty Kiper's Testimony

Betty Kiper, appellant's downstairs neighbor, testified at trial regarding her knowledge of what happened that night. Kiper testified that she went to bed at approximately 11:00 p.m. and was awakened by a female voice coming from appellant's apartment saying "get off me." The next thing she heard that she could make out was a female voice angrily saying "get the fuck out." She testified that she heard arguing for about fifteen or twenty minutes and during that time she heard doors opening and closing. She also testified that she heard a male voice moaning and a female whimpering. The next thing she heard was sirens.

7. Savannah Vidaurri's Testimony

Savannah Vidaurri, whose apartment adjoins appellant's, testified at trial regarding her recollection of the events. Because of the proximity of the two apartments, she testified she was awakened at approximately 10:00 p.m. by the sound of two people having sex. The sounds were apparently coming from appellant's apartment. Later the same night, she was awakened again by two people arguing. She recognized the male voice because she had heard his voice in the past. Vidaurri went back to sleep but was awakened a third time by a loud thump. She testified that the room was shaking and she heard yelling and screaming. Vidaurri called the apartment complex because she thought the man was beating the woman. She heard a woman yelling for someone to get out and a man saying: "I am trying to get my stuff. Hold on." Then she heard the man laughing. She testified that she believed the man was in the bedroom because she always heard his voice when he yelled back to the woman and the woman must have left the bedroom because sometimes she heard her and sometimes she did not. It had been quiet for approximately ten minutes when Vidaurri heard the man choking and vomiting. She heard the male tell the female that she was not going to get away with this. Then she heard the man make a phone call and heard him say he needed a doctor immediately. Vidaurri called the apartment complex and told them there had been a stabbing and she was a witness.

II. POINTS OF ERROR PRESENTED ON APPEAL

In six points of error on appeal, appellant asserts the trial court erred: (1) by failing to charge the jury on the justifiable use of deadly force in self-defense; (2) by failing to charge the jury on the justifiable use of deadly force in defense of property; (3) by admitting photographs of an unidentified woman in various stages of nudity during the punishment phase of trial; (4) by admitting photographs of appellant in various stages of nudity at the punishment phase of trial; (5) by overruling appellant's objection to the prosecutor's improper argument during the punishment phase; and (6) by failing to instruct the jury on the State's burden of proof on extraneous misconduct admitted at the punishment phase.

III. CHARGE ERROR: POINTS OF ERROR ONE AND TWO

In points of error one and two, appellant asserts the trial court erred by failing to charge the jury as to two defensive issues: justifiable use of deadly force in self-defense and in defense of property. Appellant failed to request the inclusion of either of these issues in the jury charge, and failed to object to the absence of these defensive issues in the charge. Therefore, these points of error present the question of whether the trial court had a duty to charge the jury on these defensive issues *sua sponte*.

Appellant concedes that in *Posey v. State*, the Court of Criminal Appeals determined a trial judge has no duty to *sua sponte* instruct the jury on defensive issues. 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). Specifically, the *Posey* court held that *Almanza v. State* does not apply to the omission in the jury charge of defensive issues that have not been properly preserved by a defendant's request or objection. *Id*. at 60. Appellant argues that *Posey* is based on unfounded and misplaced concerns, and notwithstanding *Posey*, this court should reverse her conviction under the *Almanza* egregious error standard. *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). We decline appellant's invitation to reconsider the issue decided by *Posey*. Accordingly, appellant's first and second points of error are overruled.

IV. ADMISSION OF PHOTOGRAPHS DURING PUNISHMENT PHASE: POINTS OF ERROR THREE AND FOUR

Appellant asserts the trial court erred in admitting photographs during the punishment stage of a sexual nature (1) of an allegedly unidentified woman, and (2) of appellant. Specifically, appellant asserts that some of the faceless photographs were of portions of a female body that were not identifiable as photographs of appellant's body. Appellant also

asserts the photographs were irrelevant and greatly prejudicial. The photographs complained of can be described as follows:[1]

1. Nos. 97, 102–Appellant wearing bra and panties, with her hand framing her crotch.
2. Nos. 98, 99–Appellant in a short robe or hooded jacket.
3. No. 100–Appellant in a short jacket, showing small portion of bra.
4. No. 101–Appellant in short robe, showing bra and panties.
5. Nos. 103, 104–Appellant wearing lingerie, exposing portion of buttocks.
6. No. 105–Appellant in bra and panties with hand inside panties.
7. No. 106–Appellant in lingerie.
8. No. 107–Unidentifiable female, showing buttocks.
9. No. 108–Appellant in lingerie.
10. No. 110–Unidentifiable female, showing genitalia.
11. No. 111–Unidentifiable female, showing breasts.
12. No. 112–Unidentifiable female, showing buttocks.
13. Nos. 109, 113, 114–Unidentifiable female, showing buttocks.

A. Identity of Female in Photographs Not Depicting Subject's Face

Contrary to appellant's assertion, we find that there is strong evidence appellant is the female in all of the admitted photographs, even those where her face does not appear in the photograph. In photograph number 107, the back of the female's head is shown and the short haircut is just like appellant's haircut as depicted in the photographs in which the subject is clearly appellant, and appellant's couch, shown in other photographs of appellant, is in the background. In photograph number 109, appellant's couch is in the background and the female in the picture is wearing the same panties and robe worn by appellant in other photographs. Regarding photograph number 110, appellant is identifiable because the robe

[1] Appellant complained of other photographs. However, appellant conceded in her brief that even if erroneous, the admission of the other photographs was harmless. Therefore, we will not address those photographs.

worn by appellant in other photographs is visible in this picture. In photograph number 111, the female appears to be wearing the same bracelet worn by appellant in other photographs. In photograph number 113, the appellant can be identified because the female in the picture is wearing the same panties worn by appellant in another picture.

Two of the photographs cannot be firmly linked to appellant through evidence in the photographs alone. The State asserts photograph number 112 can be identified as a photograph of appellant because the skin tone is the same as appellant's in another picture and the back of appellant's head is visible. The State identifies appellant in photograph number 114 by matching her skin color, the blinds on the window, and the background fabric. We cannot determine, looking solely to the photographs themselves, whether these are of appellant. However, the State produced evidence that the photographs were of appellant by eliciting testimony from Detective Gonzalez that the photographs of the unidentified female were found with the other photographs of appellant in Moore's suitcase, which was found in appellant's apartment. Furthermore, these photographs are of the same nature as other photographs not challenged by appellant on the basis of the identity of the person depicted in the photograph. These facts, taken together, tend to establish that the challenged photographs are of appellant. We conclude, therefore, all of the photographs introduced by the State at the punishment state can be linked to appellant.

B. Standard of Review

We review the trial court's decision to admit photographs under an abuse of discretion standard. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997). Under article 37.07 of the Texas Code of Criminal Procedure, the trial court may admit any evidence it deems relevant to sentencing, including evidence concerning the defendant's general reputation, bad character, and extraneous bad acts. TEX. CRIM. PROC. CODE ANN. art. 37.03, § 3(a) (Vernon Supp. 2001). Texas Rule of Evidence 401 is helpful to determine what is relevant under article 37.03, but is not a "perfect fit." *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999). The Court of Criminal Appeals has said that the

admissibility of evidence at the punishment stage is a "function of policy rather than relevancy." *Miller-El v. State,* 782 S.W.2d 892, 895–96 (Tex. Crim. App. 1990). This is so because "there are no discreet factual issues at the punishment stage." *Id*. Deciding the appropriate punishment "is a normative process, not intrinsically fact bound." *Id*. (citations omitted). The jury is entitled to know all of the circumstances surrounding the crime. *Green v. State*, 839 S.W.2d 935, 945 (Tex. Crim. App. 1996) (citing *Williams v. State*, 535 S.W.2d 637, 639 (Tex. Crim. App. 1976)). Determining relevance in the punishment phase is really a question of what would be helpful to the jury in making its assessment. *Rogers*, 991 S.W.2d at 265.

C. Analysis

At the guilt/innocence phase of the trial, appellant testified that her affair with Moore had broken off before she got married and she had only resumed an intimate relationship with Moore in October 1999. Appellant's husband testified that appellant told him that her affair with Moore was a one-time occurrence. The State argues the photographs in question were admissible (1) as character evidence addressing appellant's moral character, (2) to demonstrate a pattern of behavior, (3) to rebut the impression appellant attempted to present to the jury that she was a demure woman, and (4) to rebut the impression appellant gave the jury that her relationship with Moore was intermittent.

As stated above, the trial court may admit evidence it deems relevant to sentencing, including evidence concerning bad character and extraneous bad acts. TEX. CRIM. PROC. CODE ANN. art. 37.03, § 3(a). The trial court is in a superior position to determine the relevance of evidence and evaluate its impact. *Montgomery v. State*, 810 S.W.2d 372, 378–79 (Tex. Crim. App. 1990). The trial judge views the witnesses and their demeanor. *Id*. at 379. Appellate courts have only a cold record to review so they must afford trial courts a substantial amount of discretion. *Id*. Looking at the evidence that was presented at trial and applying these principles, we find the trial court did not abuse its discretion in admitting these photographs of appellant.

Furthermore, even if admission of these photographs constituted an abuse of discretion, we cannot find appellant's substantial rights were affected. Texas Rule of Appellate Procedure 44.2 requires a reviewing court to disregard non-constitutional errors not affecting appellant's substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when: (1) the error had a substantial injurious effect or influence in determining the jury's verdict; or (2) leaves one in grave doubt whether it had such an effect. *Espinosa v. State*, 29 S.W.3d 257, 259 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Here, in order to obtain reversal of her conviction, this court must determine admission of the photographs affected appellant's substantial rights in that they influenced the jury's assessment of her punishment. *See* TEX. R. APP. P. 44.2(b). In determining the effect on the jury, the reviewing court should gauge the probable impact on the jury in light of all the evidence, including the overwhelming evidence supporting the conviction. The jury was instructed that it could sentence appellant from five to ninety-nine years or life, and if they assessed punishment at ten years or less, they could recommend community supervision. While appellant requested community supervision, the State requested that the jury assess punishment at forty-five years' confinement. The jury ultimately assessed punishment at forty years' imprisonment.

Applying the rule in *Espinosa,* we cannot say the admission of the photographs had a substantial injurious effect in the jury's determination of appellant's punishment, nor are we left in grave doubt whether that evidence had such an effect. Accordingly, we overrule appellant's third and fourth points of error.

V. PROSECUTOR'S ARGUMENT: POINT OF ERROR FIVE

Appellant asserts the trial court erred in overruling her objection to an improper argument made by the prosecutor during the punishment phase. Clifford Moore, the victim's brother and appellant's cousin, testified on appellant's behalf during the punishment phase of the trial. Appellant was asking the jury to assess probation in lieu of confinement in the Texas Department of Corrections. The prosecutor asked Clifford if he felt strongly

one way or the other regarding appellant's punishment. Clifford Moore responded that he was "not telling the jury anything." He testified that the family was in favor of probation but they did not "want to be the sole voice for probation," and in order to honor his brother's memory, there had to be justice and by that he meant the jury had to decide punishment. Clifford Moore conceded that he was in a "lose-lose" situation because he had already lost one family member.

During closing argument, the prosecutor stated:

> Ladies and gentlemen, I would ask that you not rely on what the family members want to see happen in this case. They didn't know the facts of this case. Clifford Moore doesn't know the facts of this case. He hasn't sat in here. He hasn't listened to the 911 call. . . . Even today Clifford Moore comes here from New Jersey innocent. What kind of position do you think that poor man is in, when being pressed on what does the family want? Does the family want probation? Mr. Moore is up there being questioned, what does the family want? The family wants probation. What is he supposed to say? What is he supposed to say? The whole family is ripped apart. And why? Because of her.
>
> What he told you is, what I want you to remember, and his words ring true enough, I want justice for my brother. I want justice for my brother. And ladies and gentlemen, probation is not justice.

To fall within the realm of proper jury argument, the argument must encompass one of the following areas: (1) summation of the evidence presented at trial; (2) reasonable deduction drawn from the evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000), *cert. denied*, 121 S. Ct. 1407 (2001). Counsel is allowed wide latitude in drawing inferences from the evidence, provided those inferences are reasonable, fair, legitimate, and offered in good faith. *Lagrone v. State*, 942 S.W.2d 602, 619 (Tex. Crim. App.1997).

Appellant argues that the prosecutor's remarks did not fall within any of the four realms of proper jury argument. Appellant complains that the prosecutor's statements insinuated that Clifford Moore had been coerced by appellant to testify on her behalf.

However, we find the prosecutor's argument was a reasonable deduction from the evidence presented during the punishment phase of the trial. Several family members testified on appellant's behalf during the punishment phase in favor of probation. Clifford Moore's testimony, however, showed he was conflicted. He testified that he was in a "lose-lose" situation and he would neither accept nor denounce the jury's punishment assessment. The prosecutor's argument that the whole family was being ripped apart and what is Clifford Moore supposed to say is a reasonable deduction from the evidence. Therefore, the prosecutor's argument was not improper and we overrule appellant's fifth point of error.

VI. JURY INSTRUCTION ON EXTRANEOUS MISCONDUCT: POINT OF ERROR SIX

Appellant asserts the trial court erred in failing to instruct the jury in the punishment charge that they could not consider evidence of extraneous misconduct unless they found that the State proved beyond a reasonable doubt the conduct was committed by appellant. Appellant argues the photos of the unidentified woman constituted evidence of an extraneous offense or bad act. The State argues that these photos were not evidence of an extraneous act, but were evidence of bad character.

Article 37.07, section 3, allows evidence of an extraneous offense or bad act to be admitted if it is shown beyond a reasonable doubt that the act was committed by the defendant or he could be held criminally responsible for it, regardless of whether he was previously convicted or charged with the crime or act. TEX. CODE CRIM. PRO. art. 37.07 § 3(a) (Vernon Supp. 2001).

Evidence of extraneous offenses cannot be considered by the jury unless they find beyond a reasonable doubt that the defendant committed those offenses. TEX. CRIM. PROC. CODE ANN. art. 37.07, § 3(a) (Vernon Supp. 1999); *George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994). Upon request, a defendant is entitled to have this instruction given to the jury. *Huizar v. State*, 12 S.W.3d 479, 483 (Tex. Crim. App. 2000). If a defendant

fails to request this instruction or object to its omission, she is not precluded from complaining on appeal. *Id.* However, in order to obtain reversal for this error, appellant must show harm under *Almanza*. *Id*. (citing *Almanza*, 686 S.W.2d 157). Under *Almanza*, in order to obtain a reversal, appellant must show that the harm was so egregious that she was denied a fair and impartial trial. *Almanza*, 686 S.W.2d at 171.

In considering whether the harm was egregious, we shall consider: (1) the entire charge; (2) the state of the evidence; (3) arguments of counsel; and (4) any other relevant information. *Webber v. State*, 29 S.W.3d 226, 236 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996); *Taylor v. State*, 7 S.W.3d 732, 736 (Tex. App.—Houston [14th Dist.] 1999, no pet.)). Where the extraneous offense evidence is strong, uncontroverted, and unimpeached, it is unlikely that appellant will be able to show egregious harm resulted. *Collins v. State*, 2 S.W.3d 432, 436 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

In this case, appellant did not request this instruction or object to the omission of this instruction. Therefore, we will proceed with a harm analysis under *Almanza*. *See Huizar*, 12 S.W.3d at 479 (citing *Almanza*, 686 S.W.2d at 157). First, assuming the photographs constituted evidence of extraneous offenses or conduct, it was error for the trial court to omit the reasonable doubt instruction. Second, as discussed in relation to appellant's third and fourth points of error, there was strong evidence from which the jury could have concluded beyond a reasonable doubt that the photos were of appellant. Third, although there was argument from appellant's counsel that the State did not prove the photos in question were of appellant, appellant did not produce any evidence to rebut the State's assertions. Finally, as discussed in relation to appellant's fourth point of error, we cannot say the photographs had a substantial injurious effect on the jury's punishment assessment. We conclude appellant has failed to show that she was egregiously harmed from the trial court's failure to include an instruction regarding extraneous offenses. Therefore, we overrule appellant's sixth point of error.

VII. CONCLUSION

We overrule all of appellant's points of errors, and affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed January 17, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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