Affirmed and Opinion filed January 20, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-0932-CR

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TERRY BOWERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 738320

O P I N I O N

Terry Bowers appeals a murder conviction on the ground that the trial court erred in admitting evidence of prior adjudications and other bad acts during the punishment phase of his trial because the State failed to provide the required notice of its intent to introduce that evidence. We affirm.

Trial courts' rulings on the admissibility of evidence are reviewed for abuse of discretion. *See Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998). At the punishment phase of trial, evidence may be offered as to any matter the court deems relevant to sentencing, including the prior criminal record of the defendant and any extraneous crime or bad act regardless of whether he has previously been charged with or finally convicted of the crime or act. *See* TEX. CODE CRIM. PROC.

ANN. art. 37.07 § 3(a) (Vernon Supp. 1999).[1] However, on timely request of the defendant, notice of intent to introduce evidence under article 37.07 must be given in the manner required by Texas Rule of Evidence 404(b). *See id*. art. 37.07 § 3(g). Rule 404(b) requires, upon timely request by the defendant, that reasonable notice be given in advance of trial of the State's intent to introduce such evidence. *See* TEX. R. EVID. 404(b).[2] Similarly, evidence of a prior conviction is not admissible if, after timely written request, the proponent fails to give sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. *See* TEX. R. EVID. 609(f). A pending order of deferred adjudication is also admissible on the issue of punishment following a subsequent conviction. *See Brown v. State*, 716 S.W.2d 939, 950 (Tex. Crim. App. 1986). To introduce evidence of an extraneous crime or bad act that has not resulted in a final conviction, the notice must include the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(g).

In this case, appellant filed a pretrial motion requesting notice of the State's intent to use evidence of: (i) other crimes, wrongs, or acts under rule 404(b); and (ii) prior convictions under rule 609(f). This motion was granted by the trial court. Appellant also sent a letter to the State again requesting notice pursuant to rules 404(b) and 609(f), and additionally requesting notice of any evidence described in article 37.07, section 3(a). The State filed pretrial notices, pursuant to Rule 404(b), of its intent to introduce evidence of appellant's 1994 convictions for robbery and burglary of a coin operated machine and of appellant's 1995 assault of three people.

At trial, the jury found appellant guilty of murder. During the punishment phase, appellant objected to the State's introduction of evidence of appellant's prior robbery, burglary, and assault because the State's notice had not been given under article 37.07 (although it had been given under Rule 404(b)). The

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[1] However, it must be shown beyond a reasonable doubt that the defendant either committed, or was criminally responsible for committing, the extraneous crime or bad act. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a).

[2] Rule 404(b), however, does not govern the admissibility of character evidence at the punishment stage of trial. *See Rojas v. State*, 986 S.W.2d 241, 251 (Tex. Crim. App. 1998). The provision governing evidence at punishment is Rule 404(c), which does not contain a notice provision. *See id.*

trial court overruled the objection. Over further article 37.07 objections, the State introduced evidence, for which it had given no notice, that: (1) appellant was currently serving a deferred adjudication for possession of cocaine under an assumed name; and (2) according to appellant's parole officer, appellant had not complied with the conditions of his probation.[3] The jury sentenced him to sixty years confinement.

Rule 404(b) Notices

The purpose behind the reasonable notice requirement under rule 404(b) is to adequately apprise the defendant of the extraneous offenses the State intends to introduce at trial to allow him to prepare. *See Hernandez v. State*, 914 S.W.2d 226, 234 (Tex. App.–Waco 1996, no pet.). Similarly, the purpose of article 37.07, section 3(g) is to avoid unfair surprise, *i.e.*, trial by ambush. *See Hohn v. State*, 951 S.W.2d 535, 537 (Tex. App.–Beaumont 1997, no pet.); *Nance v. State*, 946 S.W.2d 490, 493 (Tex. App.–Fort Worth 1997, pet. ref'd).

Article 37.07, section 3(g), requires notice to be given "in the manner required by" rule 404(b). Thus, rule 404(b) is incorporated into section 3(g) to that extent, and notice under section 3(g) is, in effect, required to be made pursuant to rule 404(b). The State's notices in this case stated its intent to introduce the evidence "pursuant to" rule 404(b), and did not limit its intent to do so to the guilt/innocence phase of trial. Under these circumstances, we are satisfied that the requirements of article 37.07, section 3(g), were substantially complied with as to the robbery, burglary, and assault offenses.

However, even if section 3(g) was not complied with, reversal is not warranted unless appellant's substantial rights were affected. *See* TEX. R. APP. P. 44.2(b). In this case, the State's notice regarding the robbery and burglary offenses provided the cause numbers of the convictions, the counties and court numbers in which the trials occurred, the offenses committed, and the dates on which appellant was punished. The State's notice concerning the assault included the date on which it occurred, the county in which it occurred, the name of the alleged victims, and the offense for which appellant was being charged. As to these offenses, for which the State provided rule 404(b) notice, appellant does not complain of a lack

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[3] At the hearing on punishment, appellant's parole officer testified that after reporting to him once, appellant failed to report any further. The parole officer also testified that appellant was on parole from his previous offense of robbery, a prior offense for which the State did give notice.

of timeliness or sufficiency of the underlying information but only the failure to identify the notice as being pursuant to article 37.07 and thereby convey that it intended to introduce these matters at sentencing.

However, appellant does not assert surprise or indicate how his trial preparation might have differed or how the evidence might have been excluded, rebutted, or diminished at the punishment phase had a reference to article 37.07, section 3(g), been included in the State's notices. Nor does appellant indicate how evidence of these offenses might have been excluded, rebutted, or diminished if it had been offered during the guilt-innocence phase of trial as the State's rule 404(b) notices indicated it would be. Had it been admitted during that phase, the jury could have also considered it for purposes of determining punishment.[4] Appellant has not shown and we do not perceive how the effect of the evidence would have been any less adverse in that event than by the evidence being admitted during the punishment phase. Finding no harm from admission of the evidence of appellant's robbery, burglary, and assault from the lack of notice referring to article 37.07, we overrule appellant's challenge to that evidence.

Deferred Adjudication and Parole Violations

Appellant also complains of the admission without any notice of the State's intent to introduce: (1) evidence of his pending order of deferred adjudication for possession of cocaine; and (2) testimony of his parole officer that appellant did not comply with the conditions of his parole. Again, however, even if admission of this evidence was erroneous, we are persuaded that appellant's substantial rights were not affected.

Appellant alleges that admission of this evidence was harmful in that the jury chose a high range of punishment whereas, without the evidence, it could have chosen community supervision. However, the jury charge at punishment allowed community supervision to only be *recommended* by the jury, and only in the event it found that appellant had not previously been convicted of a felony in Texas. Even without the evidence of appellant's deferred adjudication and parole violations, appellant's prior convictions, discussed above, would have given the jury no basis to recommend community service. Furthermore, in the context of appellant's separate commissions of a murder, a robbery, a burglary, and

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[4] *See, e.g., Santana v. State*, 714 S.W.2d 1, 8 (Tex. Crim. App. 1986) (noting that at the penalty stage of trial, the jury may consider all of the evidence adduced at the guilt stage.).

an assault, evidence of his parole violation and drug possession are too minor to be considered to have affected a substantial right. Therefore, we conclude that any error in the admission of the complained of evidence was not harmful. Accordingly, we overrule appellant's point of error and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

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