Reversed and Remanded and Opinion filed January 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00407-CR

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DANIEL LEE WEBB, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 730,233

O P I N I O N

In this case we address issues arising in connection with a defendant's right to a speedy trial and right to reasonable notice of the State's intent to use evidence of extraneous offenses at trial.

INTRODUCTION

Challenging his conviction for aggravated sexual assault, the appellant, Daniel Lee Webb asserts the trial court erred in (1) overruling his motion to dismiss the case for denial

of a speedy trial; (2) allowing the introduction of an extraneous offense notwithstanding the state's failure to give reasonable notice of intent to use it at trial; (3) allowing the introduction of an extraneous offense not falling within any exception under Texas Rule of Evidence 404(b); and (4) allowing a material witness for the state to testify notwithstanding her failure to produce written material she used to refresh her recollection. We affirm the trial court's decision to overrule the appellant's motion to dismiss. We find the trial court committed reversible error in admitting evidence of an extraneous offense when the state failed to give reasonable notice and, therefore, reverse and remand for a new trial.

FACTUAL BACKGROUND

In August 1996, the appellant met Kimberly Baird, the complainant, at a nightclub where she worked as a topless dancer. Baird willingly left the club with the appellant and accompanied him to his home. She was heavily intoxicated at the time, having consumed at least ten shots of liquor and having inhaled two or three lines of cocaine. On the way to the appellant's home, Baird smoked a marijuana cigarette, and once there, she drank beer and inhaled several more lines of cocaine.

After they arrived at the appellant's home, the appellant requested Baird to perform some dances for him, and she did so; however, when the appellant began taking photographs of her dancing, Baird became angry and decided to leave. She called a taxicab and sat down on the floor to wait for it to arrive. While she was waiting, the appellant, who was sitting in the recliner behind her, grabbed her and forced her to perform oral sex. Baird attempted to escape the appellant's clutches by kicking out the window. She ultimately succeeded in doing so, but only after being choked and passing out several times.

At trial, the appellant contradicted Baird's version of the events and claimed he never choked or sexually assaulted her. He testified that Baird kicked at him because she was angry with him for not giving her the camera film and, in her rage, missed him and kicked the window instead. The appellant claimed that Baird then lost her balance and fell into the window, and

when he tried to help her out of the broken window, she got hysterical. At that point, the appellant claimed, he unlocked the door and told Baird to leave.

The next day, the police arrested the appellant and charged him with sexual assault. His trial did not begin until almost twenty months later, in April 1998. At trial, the state introduced evidence that the appellant had made a similar attack on another topless dancer who worked at the same nightclub as Baird. The jury convicted the appellant of aggravated sexual assault and sentenced him to thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division.

SPEEDY TRIAL

In his first point of error, the appellant claims the trial court erred in overruling his motion to dismiss the case for denial of a speedy trial.

The *Barker* Test

The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution and applies to the states through the Fourteenth Amendment. *See Barker v. Wingo*, 407 U.S. 514, 517 (1972); *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967). Additionally, Article I, Section 10 of the Texas Constitution and article 1.05 of the Texas Code of Criminal Procedure guarantee a speedy trial to the accused in a criminal proceeding. In determining whether an accused was denied his state right to a speedy trial, we use the same balancing test used to evaluate his federal right to a speedy trial, as set out by the United States Supreme Court in *Barker v. Wingo*. *See Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992). The factors we consider are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant resulting from the delay. *See State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999) (citing *Barker*, 407 U.S. at 530-32). None of these factors is a necessary or sufficient condition to finding a speedy trial violation, but they should be considered in conjunction with other relevant circumstances. *See Munoz*, 991 S.W.2d at 821. As the reviewing court, we apply a *de novo*

standard of review for the legal components and an abuse of discretion standard for the factual components. *See id.*

Length of the Delay

First, we consider the length of the delay between the accused's arrest and trial. We must find this delay presumptively prejudicial before we inquire into the other three factors. *See Barker*, 407 U.S. at 530. There is, however, no *per se* length of delay that automatically constitutes a violation of the right to a speedy trial. *See Hull v. State*, 699 S.W.2d 220, 221 (Tex. Crim. App. 1985) (en banc). The delay is measured from the time the defendant is formally accused or arrested until the time of trial. *See United States v. Marion*, 404 U.S. 307, 313 (1971). Most delays of eight months or more are considered presumptively unreasonable and prejudicial. *See id.* at 313. A seventeen-month delay is presumptively unreasonable. *See Munoz*, 991 S.W.2d at 822. In this case, the appellant was arrested on August 15, 1996, and the trial did not begin until April 6, 1998. The state essentially concedes that a nearly twenty-month delay is more than sufficient to trigger our consideration of the other three *Barker* factors. Because we conclude the delay in the appellant's trial is presumptively prejudicial, we now address each of the remaining *Barker* factors.

Reason for the Delay

The second factor we consider is the reason for the delay. The state has the burden to prove a reason for the delay. *See State v. Flores*, 951 S.W.2d 134, 137 (Tex. App.—Corpus Christi 1997, no pet.); *State v. Empak*, 889 S.W.2d 618, 621 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). We consider whether the delay was due to deliberate attempts to hamper the defense, justified circumstances, such as missing witnesses, or more neutral reasons, such as overcrowded court dockets. *See Crowder v. State*, 812 S.W.2d 63, 66 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). Delay attributable to the defendant may constitute a waiver of a speedy trial claim under the standard waiver doctrine. *See Munoz*, 991 S.W.2d at 822 (citing *Barker*, 407 U.S. at 529).

Here, the delay is due in part to the fact that the appellant could not decide if he would represent himself at trial or allow counsel to defend him. In October 1997, the appellant advised the trial court that he had not been able to get along with his court appointed attorney and that he sought "to represent himself or help in his representation" and that he needed "time to prepare the proper motions and a defense." On several other occasions, the appellant indicated that he planned to retain new counsel. Three days before the initial trial setting in November 1997, the appellant hired a lawyer to replace his first lawyer. In order to give the new lawyer time to prepare the case for trial, the court reset the trial until April 1998. Additionally, during part of the time (November 1996), the appellant was standing trial in a separate action, which also contributed to the delay of the trial in this case. We find these are valid reasons for the delay. Although the appellant stated his belief that the state was trying to "hamper his defense" and testified that the delays were due to the prosecution, there is no evidence in the record to suggest the prosecution caused any delay in order to hamper the defense. In any event, the appellant's self-serving, conclusory statements, unsupported by facts, are insufficient to rebut the state's showing of valid reasons for the delay.

The Appellant's Assertion of his Right to a Speedy Trial

The third factor we consider is whether the appellant asserted his right to a speedy trial. A criminal defendant must assert this right. *See Barker*, 407 U.S. at 528-29. If he does, the court must give strong evidentiary weight to his assertion. *See Crowder*, 812 S.W.2d at 67. This factor is not in dispute in this case. The state acknowledges that the appellant put the trial court on notice that he desired a speedy trial and that a hearing was held on the matter.

Prejudice to Appellant

The final *Barker* factor focuses on the prejudice, if any, the appellant has suffered. Although the appellant need not show actual prejudice, he must make a *prima facie* showing of prejudice. *See Munoz*, 991 S.W.2d at 826. Then, the burden shifts to the state to show that prejudice did not exceed that which occurs from the ordinary and inevitable delay. *See id.*

(citing *Ex parte McKenzie*, 491 S.W.2d 122, 123 (Tex. Crim. App. 1973)). In determining whether the appellant suffered prejudice, we look to whether the three discernable interests which the speedy trial right was designed to protect were affected. *See id.* (citing *Barker*, 407 U.S. at 532). These interests are: (i) prevention of oppressive pretrial incarceration; (ii) minimization of the accused's anxiety and concern; and (iii) limitation of the possibility that the accused's defense will be impaired. *See id.* Interference with the third subfactor is the most serious because the entire fairness of the trial is jeopardized by the inability of the defendant to properly prepare his case. *See id.*

In determining if the pretrial incarceration was oppressive, the dispositive consideration is the effect the incarceration has upon the defendant. *See id.* at 828. Incarceration affects a defendant's livelihood and family life and enforces idleness. *See Barker*, 407 U.S. at 532. In *Munoz*, the Texas Court of Criminal Appeals implicitly found a seventeen-month delay oppressive by holding that incarceration throughout that length of time was dispositive of the effect the incarceration had upon the defendant. 991 S.W.2d at 828. In this case, the appellant was convicted of another aggravated sexual assault in November 1996, and sentenced to twenty years' confinement as punishment for that crime. Therefore, the appellant would have been incarcerated under the first tried case for the entire twenty months. We cannot find that the twenty-month delay in the trial of *this* case had any additional effect upon the appellant. Thus, the appellant's pretrial incarceration was not oppressive.

In arguing that his anxiety and concern were not minimized, the appellant points to the letters he wrote to the trial court, including one in which he claimed the postponement of his trial caused him anxiety and duress. In another letter, the appellant wrote that he was desperate to present his case before he lost contact with his witnesses. Although the state argues there is no *testimony* regarding anxiety and concern, it gives no reason why the letters in the record cannot be construed as showing anxiety and concern beyond that which would result from the ordinary and inevitable delay. Therefore, in the absence of evidence to the contrary, we find that the appellant's anxiety and concern were not minimized.

In determining whether the appellant's defense was impaired, we consider the appellant's testimony concerning the availability of a defense witness (the appellant's neighbor at the time of the offense), who died very shortly before this case was called to trial. Specifically, we consider the information the appellant claims this witness would have provided to determine if the appellant was prejudiced as a result of the delay. Because prejudice is obvious when witnesses die or disappear during a delay,[1] a defendant need only show that the prospective witness was believed to be material to the case, not that the witness would have testified favorably to the defense. *See Phillips v. State*, 650 S.W.2d 396, 402 (Tex. Crim. App. 1983); *Crowder*, 812 S S.W.2d at 67. In determining if the witness was believed to be material to the case, a court can consider whether there is any evidence that the defendant attempted to obtain the witness's statement during the delay. *See State v. Kuri*, 846 S.W.2d 459, 467 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). *See also Broussard v. State*, 978 S.W.2d 591, 597 (Tex. App.—Tyler 1997, pet. ref'd). At the speedy trial hearing, the appellant testified that the witness, had he lived, would have corroborated the appellant's version of the events on the evening in question. According to the appellant, the witness would have testified that the complainant (Baird) told the witness she kicked out a window and then fell through it. Additionally, the appellant testified that the witness knew the layout of the appellant's home and would have corroborated the appellant's testimony that a key is not necessary to get out of the appellant's house, a fact that Baird disputed at trial.

In *Philipps*, the Texas Court of Criminal Appeals noted that the defendant was unable to talk to a co-defendant through no fault of his own because the co-defendant died before the defendant learned of the indictment. 650 S.W.2d at 402-03. The *Philipps* court reasoned that requiring a showing that unknown testimony would have been favorable to the defense imposes an impossible burden. *Id.* This case, however, is distinguishable because the appellant had over nineteen months after he was indicted to contact the witness and prepare to present his

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[1] *See Barker v. Wingo*, 407 U.S. at 532; *Rivera v. State*, 990 S.W.2d 882, 891 (Tex. App.—Austin 1999, pet. ref'd).

testimony at trial.

Notably, the appellant failed to take any action that would suggest the now deceased witness had material information about this case. It is logical to conclude that the defense would have at least interviewed, if not subpoenaed, a material witness when trial was little more than two weeks away. There is nothing in the record to indicate that the appellant attempted to interview the witness, take a sworn statement from him, or arrange for a trial subpoena to secure his attendance at trial. While a showing of actual prejudice is not required, the appellant must come forward with more than his own self-serving and conclusory statement that a witness who died before trial would have given testimony on a material issue. The appellant's bold assertion, standing alone, is insufficient to demonstrate prejudice. Furthermore, the record suggests that at least part of the evidence claimed to have been lost with the untimely death of the neighbor was available from other sources, i.e., others who had been in the appellant's home could have testified as to its layout and whether it was necessary to have a key to get out of the appellant's house. Considering all of these matters, we cannot conclude that the appellant's defense was impaired; if it was impaired, the impairment was minimal.

Keeping in mind that limiting the possibility that the accused's defense will be impaired is the most important subfactor, we do not find that the appellant suffered prejudice as a result of the delay in his trial. His defense was not impaired, and his pretrial incarceration was not oppressive. We find that these two subfactors outweigh any anxiety and concern the appellant may have suffered as a result of the delay in his trial.

Balancing the *Barker* Factors

We must now balance the four *Barker* factors to determine if the appellant was denied his right to a speedy trial. While the presumption of an unreasonable delay and the assertion of a right to a speedy trial support the appellant's position, the state showed valid reasons for the delay, and the appellant suffered little or no prejudice. Although asserting a right to a speedy trial carries strong evidentiary weight in determining whether the appellant was

deprived of the right, the other factors and circumstances weigh heavily against him. Balancing these factors, we find that the appellant was not denied his right to a speedy trial. Accordingly, we overrule the first point of error.

EXTRANEOUS EVIDENCE

In his second point of error, the appellant claims the trial court erred by admitting evidence of an extraneous aggravated sexual assault because the state failed to provide reasonable notice as mandated by Texas Rule of Evidence 404(b).

Standard of Review

In determining whether a trial court erred in admitting evidence, the standard for review is abuse of discretion. *See Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999). "A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *See Foster v. State*, 909 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)).

Reasonable Notice Under Texas Rule of Evidence 404(b)

Texas Rule of Evidence 404(b) provides:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *It may*, however, *be admissible for other purposes*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief* such evidence other than that arising in the same transaction.

TEX. R. EVID. 404(b) (emphasis added). The purpose behind this rule is to adequately make known to the defendant the extraneous offenses the state intends to introduce at trial. *See Self v. State*, 860 S.W.2d 261, 264 (Tex. App.—Fort Worth 1993, pet. ref'd). What constitutes

"reasonable notice" depends on the facts and circumstances of the case. In *Self*, the appellant had requested notice three weeks before trial. *See id.* at 263. The court found five days' notice adequate where defense counsel was able to cross-examine the witness about the specifics of the extraneous offense, noting that the defendant was not surprised by the extraneous offense testimony. *See id.* at 264. While lack of surprise is a valid consideration, we do not believe that notice is deemed reasonable merely because the defense attorney, by skill or luck, is able to locate and interview the undisclosed witness on short notice or manages to track down reliable information in some other way.

In determining whether the notice provided was "reasonable" within the meaning of rule 404(b), we consider the notice that is to be expected or required under the particular circumstances of the case. For example, when notice was requested ten months before trial and written notice was given on the Friday afternoon before trial was to begin on the following Monday, the notice was not reasonable. *See Hernandez v. State*, 914 S.W.2d 226, 234-35 (Tex. App.—Waco 1996, no pet.). Here, the appellant requested notice of extraneous offenses six months before trial. He received oral notice of the state's intent to use an extraneous offense involving a similar attack on another nightclub dancer, Jamie Porter, in its case in chief on Thursday before trial was to commence on the following Monday. As a result, the appellant had only one business day to investigate a pivotal witness and to prepare for her cross-examination at trial. Considering the appellant had requested notice six months before trial, we do not find that one business day is reasonable notice, particularly given the importance of the extraneous evidence to the case. In the absence of reasonable notice, the trial court's decision to admit evidence of the extraneous offense involving Jamie Porter constitutes error.

In an effort to avoid the consequences of insufficient notice under rule 404(b), the state argues that the appellant's *pro se* request for notice of extraneous offenses was not sufficient because his counsel never adopted it. In making this argument, the state cites as authority several cases holding that courts are not required to consider *pro se* motions after the defendant is represented by counsel, i.e., a defendant has no constitutional right to hybrid

representation. *See Scarborough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App. 1989); *Ashcraft v. State*, 900 S.W.2d 817, 831 (Tex. App.—Corpus Christi 1995, pet. ref'd); *Busselman v. State*, 713 S.W.2d 711, 714 (Tex. App.—Houston [1st Dist.] 1986, no pet.). The state's reliance on the "hybrid representation" argument is misplaced because it overlooks a critical distinction between a motion and a request for notice. A motion requires a court to take action. A request, on the other hand, is self-executing and therefore requires no court action. Unlike a motion, any request under rule 404(b) which the appellant files while representing himself is effective for all purposes and remains in effect even if the appellant subsequently retains counsel. The trial court abused its discretion in allowing the state to offer evidence of the extraneous offense involving Jamie Porter without providing the reasonable notice prescribed by rule 404(b).

Harmless Error Analysis

Having found the trial court committed error in allowing the state to offer evidence of the extraneous offense, we now consider whether the error is reversible. Constitutional errors are reversible. *See* TEX. R. APP. P. 44.2(a). If the error is not constitutional, we must determine if it affects substantial rights. *See id.* 44.2(b). If the error is neither constitutional nor affects a substantial right, the error is harmless. *See id.* Because no constitutional error is involved when evidence of an extraneous offense is admitted without notice, we look to whether a substantial right was violated. Before we can consider this issue, however, we must determine who has the burden to show that a substantial right was violated.

Initially, we note that the comments to Texas Rule of Appellate Procedure 44.2(b) specifically state that the rule is taken from Federal Rule of Criminal Procedure 52(a) without substantive change,[2] which suggests that we should look to federal cases for guidance. While the Texas Court of Criminal Appeals has yet to address this issue, at least two intermediate appellate courts have adopted this approach and looked to federal courts for guidance,

[2] *See* TEX. R. APP. P. 44.2 cmt.

reasoning that rule 44.2(b) was taken from Federal Rule 52(a). *See Umoja v. State,* 965 S.W.2d 3, 11 (Tex. App.—Fort Worth 1997, no pet.) (op. on reh'g); *Fowler v. State,* 958 S.W.2d 853, 864-66 (Tex. App.—Waco 1997), *aff'd*, 991 S.W.2d 258 (Tex. Crim. App. 1999) (en banc). The First Court of Appeals, however, has rejected this view and instead looked to the statute for reviewing error in the jury charge for guidance, reasoning that because the jury charge statute has wording similar to rule 44.2(b), cases construing that statute are instructive. *See Merritt v. State,* 982 S.W.2d 634, 636-37 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd, untimely filed). Given the origin of the rule, we believe the better approach is to look to federal case law for guidance in construing and interpreting rule 44.2(b).

The United States Supreme Court has instructed that courts should not try to put the question of whether a substantial right has been affected in terms of burden of proof. *See O'Neal v. McAnnich*, 513 U.S. 432, 435 (1995). Rather, the question each judge should ask is *"Do I, the judge, think that the error substantially influenced the jury's decision?*" *Id.* (emphasis added). The reviewing court should apply a legal standard – harmlessness – and not enforce a control mechanism for the presentation of evidence at trial. *See id.* Two other intermediate appellate courts have found that neither party has the burden of proof to show the error violates a substantial right and that the reviewing court should instead look to the entire record in ascertaining the effect of the error. *See Umoja*, 965 S.W.2d at 12; *Fowler*, 958 S.W.2d at 866. *But see Merritt*, 982 S.W.2d at 637 (finding that the defendant has the burden of proof). We, too, conclude that neither party has the burden of proof under rule 44.2(b) and that we will instead look to the record ourselves. We now turn to the issue of whether a substantial right was violated. In making this determination, we look for guidance to federal authority applying the federal counterpart to rule 44.2(b), in addition to considering how Texas state courts apply rule 44.2(b).[3]

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[3] *See Carranza v. State*, 980 S.W.2d 653, 657 (Tex. Crim. App. 1998) (looking to the federal court's application of Federal Rule of Criminal Procedure 52(a) for guidance regarding the proper standard of review to apply in 44.2(b) situations); *King v. State*, 953 S.W.2d 266 (Tex. Crim. App. 1997) (looking to (continued...)

A substantial right is violated when the error made the subject of the appellant's complaint had a substantial and injurious effect or influence in determining the jury's verdict. *See King*, 953 S.W.2d at 271 (citing *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)). If the error had no influence or only a slight influence on the verdict, it is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). However, if the reviewing court harbors "grave doubts" that an error did not affect the outcome, that court must treat the error as if it did. *See United States v. Lane*, 474 U.S. 438, 449 (1986). The United States Supreme Court has defined "grave doubts" to mean "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435. If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict. *See id.*

The extraneous offense at issue in this case involved another topless dancer (Jamie Porter) who worked at the same nightclub as the complainant (Baird). In an unrelated incident, the appellant sexually assaulted Porter in much the same fashion as the assault for which he was being tried in this case. In describing the events leading up to the attack, Porter testified that the appellant offered her a ride home from the nightclub after she became intoxicated. According to Porter, the appellant took her to his home and told her she should sleep there for a few hours before going home to her son; after she fell asleep, the appellant got on top of her and began choking her. Porter testified that the appellant then commanded her to have oral and vaginal sex with him. She did.

Porter's testimony undoubtedly had more than a slight effect upon the jury's verdict. The similarities in the two incidents are striking. Both victims were topless dancers at the same nightclub. Porter testified that the appellant sexually assaulted her in much the same way

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[3] (...continued)
federal cases in interpreting when a substantial right is affected).

he was accused of sexually assaulting the complainant in this case (Baird). Given that the appellant and Baird were the only witnesses to the event and they related different versions of the facts, Porter's testimony significantly bolstered the state's case. While the jury may well have found Baird's version of events more credible than the appellant's testimony, Porter's damaging testimony almost certainly played a significant role in the appellant's conviction. In light of these facts, we have grave doubts that the trial court's error in allowing evidence of the extraneous offense involving Porter did not affect the outcome. Therefore, we treat the error as having a substantial and injurious effect upon the jury's verdict. Accordingly, we find the error harmful and reversible.

Having found reversible error based on the state's failure to give reasonable notice of its intent to use evidence of extraneous offenses under rule 404(b), we need not address the appellant's remaining issues, all of which seek only remand relief. We reverse the appellant's conviction and remand the case for a new trial.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Yates, Fowler and Frost.

Publish — TEX. R. APP. P. 47.3(b).