Affirmed and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00476-CR

LISA SHERAE DETTLING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 806,734

O P I N I O N

Over her plea of not guilty, a jury found Lisa Sherae Dettling guilty of aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon Supp. 2000). The jury assessed punishment at twenty years' confinement in the Texas Department of Criminal Justice, Institutional Division. Dettling appeals her conviction on one point of error. We affirm the trial court's judgment.

FACTUAL BACKGROUND

The complainant, Pinkerton, arranged to meet Dean Lloyd at a restaurant to receive $200 Lloyd owed him. Pinkerton arrived at the restaurant to find Lloyd having lunch with Dettling. Pinkerton, Lloyd, and Dettling left the restaurant in Pinkerton's truck and headed to a cemetery where Lloyd had hidden the money. Upon arrival at the cemetery, Lloyd and Dettling exited the vehicle while Pinkerton remained in the parked truck. Pinkerton testified that Dettling returned to the truck, started making advances toward him, and told him she was "very, very high." Pinkerton rejected Dettling's advances and pushed her away. When he did this, Dettling lunged at Pinkerton with a knife, stabbed him in the neck three times, and demanded his money, which he gave her. Dettling then pushed Pinkerton out of the vehicle, and drove away with Lloyd, leaving Pinkerton bleeding on the ground.

Subsequently, Dettling was arrested for aggravated robbery. At trial, Dettling testified on direct examination that she stabbed Pinkerton, but she asserted that she acted in self-defense. She testified that when she left the restaurant with Pinkerton and Lloyd, she was not aware they were going to a cemetery. Once there, Lloyd stepped out of the truck and left her alone with Pinkerton. After a few minutes, Dettling followed Lloyd and found him in the corner of the cemetery. He appeared scared because he did not have Pinkerton's money. Dettling returned to the truck and told Pinkerton that Lloyd did not have the $200. Dettling testified that Pinkerton pushed her down in the seat, hit her on the head, and held her down. Dettling thought Pinkerton was going to kill her, so she grabbed a knife she noticed lying in the seat next to her and used it to stab Pinkerton in the neck.

On rebuttal, the State showed that a week after stabbing Pinkerton, Dettling met Orr at a party. About an hour after their meeting, Orr agreed to allow Dettling to stay at his house for a few days. He drove Dettling and her friend to his house in Friendswood. Upon arrival at Orr's house, Dettling asked to borrow Orr's truck to drive her friend back to Houston. Although Orr refused to let her borrow the truck, Dettling took it while Orr slept and returned to Orr's house in the morning, bringing two other people. At this point, Orr informed Dettling

that she could not longer stay at his house. Dettling became agitated and stabbed him with a knife. Dettling did not dispute that she and Orr were arguing, but claimed that Orr began to hit her, she found a knife sitting on the coffee table, and used it to stab Orr in the neck. Although Dettlingwas arrested for this offense, the charges were dismissed at Orr's request.

At trial, appellant objected to the admission of evidence relating to the Orr stabbing under rules 404(b) and 403 of the Texas Rules of Evidence. The trial court overruled Dettling's objection and granted her a running objection. Dettling appeals the trial court's decision to admit evidence of the subsequent offense over her objection.

DISCUSSION AND HOLDINGS

In her sole point of error, Dettling argues that the trial court abused its discretion in admitting evidence of a subsequent extraneous offense - the stabbing of Orr. Specifically, she argues (1) the stabbing is inadmissible because it lacks similarity to the underlying offense; (2) the State used the evidence to paint her as a criminal; (3) the evidence did nothing to refute her claim of self-defense; and (4) the trial court's error affected her substantial rights.

A. Standard of Review

Admission of an extraneous offense is generally within the discretion of the trial court. *See Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990) (op. on reh'g). An appellate court will only reverse the trial court's evidentiary decision upon a clear abuse of discretion. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). A clear abuse of discretion is defined as "when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

B. Rule 404(b)

An extraneous offense is any act of misconduct, whether resulting in prosecution or not, which is not shown in the charging instrument and which was shown to have been committed by the accused. *See Crawley v. State*, 513 S.W.2d 62, 65 (Tex. Crim. App. 1974); *Hernandez v. State*, 817 S.W.2d 744 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action 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. . . "

TEX. R. EVID. 404(b). It is well recognized that an accused may not be tried for some collateral crime or for generally being a criminal. *See Nobles v. State*, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992), *cert. denied*, 523 U.S. 1139, 118 S. Ct. 1845, 140 L. Ed. 2d 1094 (1998); *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983). To introduce an act of misconduct, the prosecution must show that the transaction is relevant to a material issue in the case and show that the relevance of the evidence outweighs its prejudicial potential. *See Williams*, 662 S.W.2d at 347. When the accused claims self-defense, in order to show the accused's intent, the State may show other violent acts where the defendant was the aggressor. *See Robinson v. State*, 844 S.W.2d 925, 929 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

Dettling's intent to commit the offense charged was a material issue in this case. The State's case showed an unprovoked stabbing. However, Dettling testified that she stabbed Pinkerton because she thought he was going to kill her. Once Dettling raised the issue of self-defense, the extraneous offense became relevant to show that Dettling had been violent on other occasions. *See Halliburton v. State*, 528 S.W.2d 216, 219 (Tex. Crim. App. 1975).

C. Probative Value

Having found that the evidence of the extraneous offense was relevant, we proceed to examine whether the probative value outweighs the prejudicial effect. Three factors are relevant to this inquiry. First, this court has previously determined that a similarity between

the extraneous act and the charged offense is an important measure of probative value. *See Morrow v. State*, 735 S.W.2d 907, 909 (Tex. App.—Houston [14 Dist.] 1987, pet. ref'd). Substantial, but not exact, similarity is necessary where Dettling's intent to commit the offense charged is a material issue. *See id.* In the instant case, the extraneous offense is similar in nature to the offense for which appellant was tried: (1) in both the extraneous offense and the charged offense, Dettling stabbed a man; (2) Dettling knew the victims a relatively short period of time; (3) Dettling stabbed both men with a knife; (4) Dettling testified that, on both occasions, the knives she used happened to be lying close by; (5) the location of the wounds on both victims was the neck; and (6) Dettling claimed her actions resulted from altercations with the victims. We find that these are strong similarities between the offenses that give substantial probative value to the extraneous offense.

A second factor used to measure probative value is the closeness in time between the charged offense and the extraneous offense. *See Robinson v. State,* 701 S.W.2d 895, 898 (Tex. Crim. App. 1985). In the case before us, appellant committed the extraneous offense one week after stabbing the complainant. Such closeness in time adds additional probative value to the extraneous offense.

A third factor used to measure probative value is the availability of alternative sources of proof. *See id.* Where there is specific, controverting evidence presented to support a defensive theory, the probative value of the extraneous offense is enhanced. *See Morrow,* 735 S.W.2d at 912. On direct examination, appellant offered her version of the Pinkerton stabbing. Her testimony raised the issues of self-defense and lack of intent, controverting the State's theory that appellant acted with unlawful intent. Intent is often difficult for the fact finder to discern; thus, some leeway is granted in the introduction of such extraneous evidence that is probative and of assistance to the fact finder in evaluating this element. *See id.*

Thus, taking into account the factors of strong similarity, close proximity in time, and controverting evidence in the form of a defensive theory, we find that the extraneous offense had substantial probative value as to Dettling's theory of self defense and her intent in

committing the aggravated robbery. We must now measure the extraneous offense's prejudicial effect.

D. Prejudicial Effect

Relevant criteria in determining whether the prejudice of an extraneous offense outweighs its probative value includes the following:

1. whether the ultimate issue was seriously contested by the opponent;

2. whether the State had other convincing evidence to establish the ultimate issue;

3. whether the probative value of the extraneous offense, either alone or in combination with other evidence, was particularly compelling; and

4. whether the extraneous offense was so inflammatory that jury instructions probably would not be effective.

See Montgomery, 810 S.W.2d. at 392-93; *Willis v. State*, 932 S.W.2d 690, 696 (Tex. App.—Houston [14th Dist.] 1996, no pet.). If the record reveals that one or more of the above criteria reasonably leads to the risk that substantial unfair prejudice outweighs the probativeness of the evidence, the appellate court should conclude that the trial court acted unreasonably and abused its discretion. *See Montgomery,* 810 S.W.2d at 393. Appellant's testimony clearly raised the issue of self-defense and lack of intent. The extraneous offense had probative value, and the State had a compelling need to use the evidence. Further, the inherent prejudicial effect of the use of an extraneous offense can be lessened by a proper instruction limiting the use of the extraneous offense to its specific purpose. *See Plante v. State,* 692 S.W.2d 487, 494 (Tex. Crim. App. 1985); *Robinson,* 701 S.W.2d at 899. Here, the trial court limited the consideration of the extraneous offense to the question of appellant's intent in connection with the offense charged. Thus, the instruction lessened the prejudicial effect. After considering the above criteria, we find that the probative value of the evidence outweighs the prejudicial effect.

Reviewing the relevance of the evidence of the extraneous offense and its substantial probative value as compared to its limited prejudicial effect, we find that the trial court's decision to admit testimony of the Orr stabbing is within the zone of reasonable disagreement. *See Montgomery*, 810 S.W.2d at 391. As long as the trial court's ruling is within the zone of reasonable disagreement, an appellate court will not disturb the trial court's ruling. *See id*. We find the trial court did not abuse its discretion in its decision to admit evidence of the extraneous offense. Accordingly, we overrule appellant's sole point of error.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 24, 2000.
Panel consists of Justices Yates, Fowler and Edelman.
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