PD-0638-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No. PD-0638-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/14/2017
DEANA WILLIAMSON, CLERK

RODERICK BEHAM, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bowie County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Roderick Beham.

* The trial judge was the Hon. Bill Miller, Presiding Judge, 5th District Court, Bowie County, Texas.

* Counsel for Appellant at trial were Bowie County Public Defenders Chad Crowl and William Williams, 424 West Broad, Texarkana, TX 75501.

* Counsel for Appellant on appeal was Alwin Smith, 602 Pine Street, Texarkana, TX 75501.

* Counsel for the State at trial were Assistant District Attorneys Lauren Richards and Kelley Crisp, 601 Main Street, Texarkana, TX 75501.

* Counsel for the State on appeal before the court of appeals was Assistant District Attorney Lauren Richards, 601 Main Street, Texarkana, TX 75501.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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No. PD-0638-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

RODERICK BEHAM, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

Appellant was convicted of aggravated robbery. The jury's original sentence was set aside on appeal. CR 21. At the punishment retrial, the jury assessed a 40-year sentence. CR 77. The court of appeals reversed again—this time for admission of "gang-related" testimony.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals granted a new punishment hearing in an unpublished opinion. *Beham v. State*, No. 06-16-00094-CR, 2017 Tex. App. LEXIS 4595 (Tex. App.—Texarkana May 19, 2017) (not designated for publication). No motion for rehearing was filed. This Court granted the State's motion for extension of time to file this petition on or before July 19, 2017.

GROUNDS FOR REVIEW

1) **Is expert opinion testimony that a defendant holds himself out as a gang member—without proof he is one—relevant to sentencing?**

2) **In assessing harm, did the court of appeals err in failing to isolate the opinion testimony from the properly admitted photographs on which that opinion was based?**

ARGUMENT

This Court construes Article 37.07 to permit consideration of nearly any matter helpful in determining the sentence. The court of appeals reversed Appellant's sentence because a detective opined—based on admitted photos from Appellant's Facebook—that Appellant held himself out as a gang member. Could that opinion help a jury? If not, do the photos speak for themselves?

1. Background

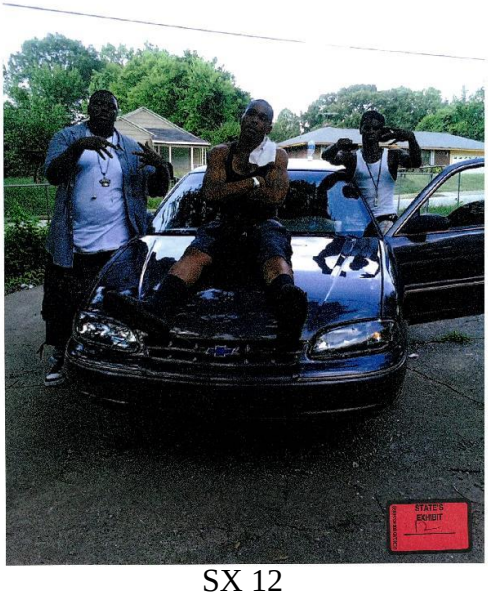
On resentencing, Appellant filed an application for community supervision. CR 44. He also asked for a hearing before the State referred to Appellant "holding himself out" as a gang member or associate. CR 38 (motion in limine). At the first out-of-presence hearing, the State called the lead detective to sponsor five photos from Appellant's Facebook page. 3 RR 121-33; SX 8-12. State's Exhibit 8 was a red-tinted montage of Appellant's repeated hand gestures, bordered by the words "Money Power Respect" in Old English font. SX 8. State's Exhibits 9 & 10 showed Appellant gesturing, and in State's Exhibit 11, Appellant gestured behind a table laid out with cash and bags of drugs. SX 8-11. In State's Exhibit 12, Appellant pointed a handgun sideways at the camera alongside a car and two other men, one of whom was also making hand signs. SX 12.

SX 8

SX 9

SX 10


SX 11


SX 12

At the first out-of-presence hearing, the State clarified that it intended to offer the photographs; testimony about gang affiliation would be offered through a later witness. 3 RR 123. Appellant raised various authentication objections to the photos, including that the State had not established Appellant's identity. 3 RR 132. He also objected that the photos were "being relied upon" and "offered to help add to the testimony that's going to be elicited later from the gang expert regarding [Appellant's] holding [himself] out or involvement [in a gang]." 3 RR 122-23, 132. After the trial court overruled his authentication objections, Appellant pressed the judge further:

> [DEFENSE ATTORNEY]: . . . there's still our objection that they're being used to propose to the jury that [Appellant] is either holding himself out or a member of an illegal street gang. . . the state is going to have a witness to testify . . . that those pictures are [Appellant] holding himself out as a gang member.
>
> THE COURT: Well with regard to the pictures themselves being admissible, and as to the identity, those objections are overruled.
>
> [DEFENSE ATTORNEY]: Okay.
>
> THE COURT: This witness has not been offered, at least not yet, to provide any testimony with regards to whether he's -- whether or not that's a gang affiliation or any gestures or anything of that nature, and therefore the Court's going to overrule that objection as --
>
> [DEFENSE ATTORNEY]: Yes, sir.
>
> THE COURT: -- I guess premature, because that's not been offered by the state at this point.

3 RR 133.[1] The photographs were admitted before the jury. 3 RR 152.

At a second out-of-presence hearing, the State proffered the testimony of a detective with experience in the gang unit. 3 RR 179. He identified several characteristics in Appellant's photos suggestive of gang membership: Appellant's use of hand signals or "gang signs," the color red, his boasting display in another photo of marijuana and cash laid out in front of him, and pointing the gun sideways while his associate was "throwing" a "double gang sign" in another photo. 3 RR 179-81. Based on the photographs, the detective opined that even if he was not a gang member, Appellant was holding himself out as one. 3 RR 181. The detective admitted he had no personal knowledge that Appellant was in a gang but testified that people do not generally hold themselves out as gang members unless they are. 3 RR 181, 186. Appellant argued that, without evidence that he was in a gang, the testimony was more prejudicial than probative. 3 RR 188-89. The trial court found that the detective's testimony was relevant to Appellant's character and not unduly prejudicial as long as the State did not attempt to argue that Appellant was in a gang. 3 RR 191.

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[1] Appellant never corrected the trial court's impression that his relevance objection to evidence of "holding out" went to the gang detective's testimony. Consequently, no relevance objection was preserved as to the photos.

On appeal, Appellant argued the detective's testimony should have been excluded because it was not relevant and was more prejudicial than probative. App. Br. at 10, 14, 17. Citing *Beasley v. State*, 902 S.W.2d 452 (Tex. Crim. App. 1995), the court of appeals agreed that the detective's testimony[2] was not relevant or admissible without proof of Appellant's gang membership and the illegal activities of that particular gang. *Beham*, slip op. at 8-9. The court did not address Appellant's second issue that the testimony was inadmissible under Rule 403. *Id*. at 15.

2. Issue One

> **Is expert opinion testimony that a defendant holds himself out as a gang member—without proof he is one—relevant to sentencing?**

Here, the court of appeals erred in finding the detective's testimony irrelevant and inadmissible because it overlooked that the public desire to be a thug says as much (or more) as being one.

At punishment, "evidence may be offered . . . as to any matter the court deems relevant to sentencing, including but not limited to

- the prior criminal record of the defendant,
- his general reputation,
- his character,
- an opinion regarding his character,

---

[2] Although the court sometimes referred to the error as admission of "gang-related evidence," this cannot fairly include the photographs because that objection was preserved nor was it urged on appeal.

- the circumstances of the offense for which he is being tried, and,
- notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed the defendant . . .”

TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). Rule of Evidence 401 defines relevance as “any tendency to make a fact more or less probable than it would be without the evidence” where “the fact is of consequence in determining the action.” TEX. R. EVID. 401. Because deciding what punishment to assess is a normative process without discrete fact-issues, the question of what evidence is admissible at the punishment phase of a non-capital felony trial is a function of policy, not logical relevance. *Sunbury v. State*, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002). Rule 401 is not a “perfect fit” at punishment; instead, what is relevant “should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.” *Id*.

A. *Beasley* does not control this case

The court of appeals should not have relied on *Beasley*. First, *Beasley* is a plurality decision interpreting a prior, narrower version of Article 37.07 that did not permit the admission of unadjudicated bad acts at punishment. *Beasley*, 902 S.W.2d at 455. There is better authority for the proposition that evidence of membership and the group’s illegal or violent activities are necessary to admit testimony that the defendant belonged to or associated with a particular group: *Dawson v. Delaware*,

503 U.S. 159, 160 (1991),[3] *Davis v. State*, 329 S.W.3d 798, 805 (Tex. Crim. App. 2010) (defendant's connection to Satanism), and *Mason v. State*, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995) (membership in Aryan Brotherhood). Second, and more importantly, that line of cases is inapposite because the State was not attempting to prove Appellant was in a gang.[4]

B. Actual Membership is a Red Herring

Regardless of whether Appellant actually was a gang member, his desire to portray himself as one by displaying images of his unlawful and violent behavior was relevant to sentencing. Unlike with conventional gang-membership evidence, the State was not attempting to distill a violent character trait from alleged membership in a violent group. Even if Appellant was not actually a member, his posing as a drug-dealing and violent gangster had relevance because it made it far

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[3] *Dawson* is a First Amendment case, which is not an issue here. But *Dawson* also held that the fact that he associated with a group with racist beliefs (and thus may have been racist himself) had no relevance to sentencing because its potential relevance came only from the group's connection to unlawful or violent activity. *Dawson*, 503 U.S. at 166-67. Without this evidence, the group's abstract beliefs were not relevant character evidence. *Id*.

[4] The court of appeals also cited *Sierra v. State*, 266 S.W.3d 72, 78 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). *Beham*, slip op. at 8-9. To the extent *Sierra* suggests that proof of the gang's illegal and violent activities is a required predicate for admission of gang-membership evidence, that holding is inapplicable for the same reasons as *Beasley*.

more likely that he would engage in such behavior in the future. Even if future-dangerousness was not a specific issue at trial, preventing the likelihood of recurrence of criminal behavior, as a Penal Code objective, was relevant to sentencing generally and the jury's consideration of community supervision. TEX. PENAL CODE § 1.02(1)(c); *see Ellison v. State*, 201 S.W.3d 714, 722 (Tex. Crim. App. 2006) (suitability for community supervision is a matter "relevant to sentencing" when a defendant seeks community supervision).

C. *Res Ipsa Loquitur*: Illegal and Violent Activities

The court of appeals erred to hold that testimony of a particular gang's unlawful or violent acts was also required. *Beham*, slip op. at 9. Appellant's posing was necessarily tied to both unlawful and violent acts. He was emulating street gangs in general, the nature of which inherently involves criminal activity. *See* TEX. PENAL CODE § 71.01(d) (defining "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly association in the commission of criminal activities."); Merriam Webster Dictionary Online, www.merriam-webster.com, *last visited July 7, 2017* (defining "gang" as "GROUP: such as (1): a group of persons working together (2): a group of persons working to unlawful or antisocial ends; *especially*: a band of antisocial adolescents"). If the State were trying to prove

a connection between Appellant and a particular group, evidence of its activities might be needed to assess what it meant that the defendant was connected to their organization. But here, the purpose of street gangs is widely known. The jury needed no further information about what such gangs do to understand the significance of the detective's opinion: Appellant was promoting criminal and violent conduct.

D. Reputation by Design

While not in the traditional form of reputation evidence, the detective's opinion based on the Facebook postings was similar to the community's collective impressions of a defendant, which may be relevant to sentencing. *See* TEX. CODE CRIM. PROC. art. 37.07, § 3(a) (listing "general reputation" as a matter the court may deem relevant to sentencing). And unlike reputation evidence, because the detective's testimony was based on Appellant's Facebook postings, it reflected exactly the kind of image Appellant wanted others to perceive. Dangerous. Threatening. Illicit drug user. This information would have been helpful to understanding the circumstances of the offender. "Highly relevant — if not essential — to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 246 (1949). A jury deciding punishment must tailor the

sentence to the particular defendant. *Sims v. State*, 273 S.W.3d 291, 295 (Tex. Crim. App. 2008).

Because the testimony was relevant to the jury's determination of an appropriate punishment for Appellant, the court of appeals erred to hold otherwise.

3. Issue Two

> **In assessing harm, did the court of appeals err in failing to isolate the opinion testimony from the photographs on which that opinion was based?**

An erroneous ruling on the admission of evidence will not result in reversal when similar, unchallenged evidence was also admitted. *Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010); *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). In assessing the likelihood that the jury's decision was adversely affected by an error, the reviewing court should consider all the testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, and closing arguments. *Thomas v. State*, 505 S.W.3d 916, 927 (Tex. Crim. App. 2016).

Here, the court of appeals failed to consider how the allegedly erroneous admission of the detective's testimony was harmful in light of similar evidence

inherent in the photographs.[5] For example, the court of appeals highlighted the State's closing argument—"People put stuff on social media that they want [you] to know about them. . . . He puts pictures of drugs and money and gang signs. That's the type of person he is"—but did not isolate the harm it believed resulted from the detective's testimony apart from the photographs. *Beham*, slip op. at 14; 4 RR 12.

The error was harmless because the jury would have reached many of the same negative character judgments about Appellant from the photographs themselves. Gang signs and red and blue bandanas have a strong enough association in popular culture with gangs that even without the detective's testimony, the jury could infer from the photos that Appellant wanted others to see him as a gang banger. Gang associations aside, Appellant's flaunting his drugs and money and pointing a gun at the camera would have had a negative impact on jurors' assessment of an appropriate sentence, and the court of appeals erred in not considering the alleged error in this context. *See McNac v. State*, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007) (proper harm analysis "would have to take into account" evidence

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[5] As observed earlier, Appellant did not clarify that he was also objecting to the photographs when the trial court ruled his objection to evidence he was "holding [himself] out" was premature. 3 RR 132-33. Consequently, this objection to the Facebook photos was not preserved. Nor was admission of the photos challenged on appeal. *See* App. Br. at 10, 14, 17.

unchallenged on appeal that was essentially cumulative of erroneously admitted evidence); *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999) (finding any error in admitting exhibit harmless where testimony relayed the same information).

The court seemed to find harm only because it was not treating the detective's opinion testimony for what it was—evidence that Appellant was posing as a gang member—but for how it may have been misused:

> As opposed to merely submitting the photographs alone and raising inferences therefrom, the addition of [the detective's] expert testimony of what [Appellant] held himself out to be gave significant credibility to the State's attempt to paint [Appellant] as a violent gang member deserving of a severe sentence even though [the detective] admitted that he had no knowledge or information that [Appellant] was ever actually in a gang.

Id. at 14-15. But this is not what occurred in the retrial. In fairness to the court of appeals, the State initially told the trial judge that Appellant's membership was a rational deduction from the evidence. 3 RR 190. But thereafter, the trial court ruled that the detective's testimony would be admitted "as long as . . . the state does not attempt to argue that the defendant is in a gang," and Appellant never contended at trial that the State crossed that line. 3 RR 191. There was no objection to improper jury argument, and in fact, the State told the jury in its final closing argument, "I don't care if [Appellant is] in a gang. The pictures are designed to show you that's

what he wants people to think about him, and in a shocking [turn] of events after he displays that to the public he holds a woman up at gunpoint. Y'all do with that information what you want to do. All this is-he-or-is-he-not-in-a-gang, I don't care. I want y'all to look at the pictures and see his dope and money and guns on his Facebook profile. That's what the evidence is designed to show you." 4 RR 24.

This Court should grant review to consider whether the court of appeals's harm analysis was proper or, alternatively, summarily remand for a harm analysis that considers the alleged error for what it was and in light of the admitted photos.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals, and remand for that court to consider Appellant's remaining Rule 403 issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,792 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of July 2017, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals's Opinion

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00094-CR

RODERICK BEHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 14 F 0004-005

Before Morriss, C.J., Moseley and Carter,* JJ.
Memorandum Opinion by Justice Carter

*Jack Carter, Justice, Retired, Sitting by Assignment

M E M O R A N D U M O P I N I O N

In his first trial, Roderick Beham was convicted of aggravated robbery and sentenced to twenty-five years' imprisonment. On appeal, this Court reversed and remanded the case for a new trial on punishment only. *Beham v. State*, 476 S.W.3d 724, 742 (Tex. App.—Texarkana 2015, no pet.). On remand, the jury assessed Beham a sentence of forty years in prison, and the trial court sentenced Beham accordingly.

On appeal, Beham contends that the trial court erred by admitting gang-related evidence during the trial on punishment because it was (1) irrelevant and inadmissible and (2) inadmissible under Rule 403 of the Texas Rules of Evidence.

Because the gang testimony was irrelevant and harmful, we reverse Beham's sentence and remand the case for a new punishment trial.

I. Background

A detailed discussion of the facts of this case is included in our previous opinion. *See id.* at 728–29. For purposes of this opinion, we will confine our discussion of the facts to those pertinent to this issue before us.

During the punishment phase of the trial, the State called Detective Shane Kirkland of the Texarkana, Arkansas, Police Department, to testify regarding gangs in general and that Beham held himself out to be a gang member. Beham objected to the testimony arguing that it was inadmissible and irrelevant because the State could not prove that he was a gang member and that it was inadmissible under Rule 403 because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

The trial court conducted a hearing outside the presence of the jury to evaluate Kirkland's proposed testimony. Kirkland had spent five years as a gang unit investigator in the Texarkana area. He was trained to look for characteristics of those holding themselves out to be gang members. He testified that gang members generally dress in a similar manner, wear certain colors or symbols, or wear apparel from certain sports teams. Kirkland testified that when investigating someone for possible gang activity, he would examine their prior criminal activity and whether they associate with known gang members or others "holding themselves out to be a gang member." He stated that officers would also examine posts on social media to see how someone dressed, "their manner, how they make a living or how they make money, and do they boast about that process and enterprise in the gang."

Kirkland was shown five photographs[1] taken from Beham's Facebook page and asked, as a gang investigator, what stood out to him in each photograph. He testified that Beham was making "gang signs" with his hand(s) in all of the photographs, and that one photograph depicted the words "money, power, respect," which is a catchphrase or a statement of "what the gang is all about." He further noted that Beham was wearing red clothing in three of the photographs, "which is a big identifier for affiliate [sic] with Crips or their associated gang."[2] Kirkland testified that Exhibit 11, showing Beham sitting at a table that is covered with cash and several baggies of a "distribution

[1]Exhibits 8–12.

[2]The testimony of gang experts uniformly indicates that the color red is associated with the Bloods street gang and its affiliates, while the colors blue and purple are associated with the Crips street gang and its affiliates. *See Beasley v. State*, 902 S.W.2d 452, 454 (Tex. Crim. App. 1995); *Beham*, 476 S.W.3d at 739; *Armstead v. State*, 977 S.W.2d 791, 798 (Tex. App.—Fort Worth 1998, pet. ref'd); *Stern v. State*, 922 S.W.2d 282, 285 (Tex. App.—Fort Worth 1996, pet. ref'd). In fact, during Behams' previous trial, Kirkland testified that red was "a color associated with the Bloods street gang." *Beham*, 476 S.W.3d at 739.

amount" of marihuana, is the kind of boasting associated with gang members, broadcasting that "this is what I'm making by selling drugs." In Exhibit 12, a photograph of Beham and two other men posing near a car, Beham is making a gang sign with one hand and pointing a pistol at the camera with the other, and according to Kirkland, "That would be characteristic of a, you know, I've got a gun and I'm a gangster."

Based on the totality of the circumstances present in the photographs, it was Kirkland's opinion that Beham was "holding himself out" to be a member of an illegal street gang and that generally, if someone was not in a gang, he would not hold himself out as a gang member. Kirkland admitted that his opinion was based solely on the five photographs and that he had no knowledge or information that Beham was a member of any street gang or that he had ever participated in gang-related activity. Kirkland conceded that gang members generally have extensive criminal histories, while Beham does not, and he acknowledged that merely wearing red, using certain hand gestures, and/or being involved in criminal activity do not necessarily indicate gang membership.

After hearing Kirkland's proposed testimony and the arguments of counsel, the trial court overruled Beham's objections, stating,

> The Court's going to find that the evidence being offered does have probative value with regard to the character of the defendant and it is relevant. The Court's going to find that the state is entitled to put on evidence of his character and that this evidence clearly goes to the character of the defendant. The Court's going to find the probative value of this does not outweigh bias or prejudice and that, while there's a risk of some prejudice here, that it is not so great as long as the -- as the state does not attempt to argue that the defendant is in a gang and that that is an extraneous bad act. As long as the state is limiting its offer of this evidence merely to the character of the defendant, the Court's going to permit that.

The jury returned to the courtroom, and the trial court proceeded with the remainder of the trial on punishment. Kirkland's testimony before the jury was virtually identical to the testimony he gave during the evidentiary hearing. Alberto Cantu and Brandon Sumner, employees of LaSalle Corrections Center, testified that on two separate occasions while Beham was incarcerated awaiting trial, he had stolen food from the jail's kitchen and punched another inmate. Beham rested without calling any witnesses. At the conclusion of the testimony, the jury assessed Beham's punishment at forty years in the Institutional Division of the Texas Department of Criminal Justice and assessed him a fine of $5,000.00.

II. Gang Evidence

A. Relevancy

In his first point of error, Beham contends that the trial court erred in admitting Kirkland's gang-related testimony because the State failed to show that the evidence was relevant and admissible.

"The trial court's decision to admit or exclude evidence at the punishment phase is subject to review for abuse of discretion." *Reed v. State*, 48 S.W.3d 856, 859–60 (Tex. App.—Texarkana 2001, pet. ref'd) (citing *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex. Crim. App. 1996)). "If the trial court's decision falls within the zone of reasonable disagreement, that decision will not be disturbed." *McClure v. State*, 269 S.W.3d 114, 119 (Tex. App.—Texarkana 2008, no pet.) (citing *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)). The trial court's discretion is limited by the

Texas Rules of Evidence,[3] except as otherwise provided by Article 37.07, Section 3(a), of the Code of Criminal Procedure, which provides that

> evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, not withstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2016). "[E]vidence is relevant if it is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Reed*, 48 S.W.3d at 859–60 (citing *Rogers*, 991 S.W.2d at 265). Extraneous crimes or bad acts must be shown beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1).

The admissibility of gang-membership evidence during the punishment phase is specifically addressed in the Texas Court of Criminal Appeals' decision in *Beasley*, 902 S.W.2d at 456. Under *Beasley*, evidence regarding a defendant's membership in a gang is relevant and admissible even if it does not link the accused to the bad acts or misconduct generally engaged in by gang members, so long as the fact-finder is "1) provided with evidence of the defendant's gang membership, 2) provided with evidence of [the] character and reputation of the gang,[4] 3) not

[3]*See Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999).

[4]"Evidence of gang affiliation alone is . . . meaningless to a jury which has no knowledge of the gang's purpose or activities." *Moseley v. State*, 223 S.W.3d 593, 599 (Tex. App.—Amarillo 2007), *aff'd*, 252 S.W.3d 398 (Tex. Crim. App. 2008); *see Anderson v. State*, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995).

required to determine if the defendant committed the bad acts or misconduct and 4) only asked to consider [the] reputation or character of the accused." *Id*. at 457. Courts apply *Beasley* when the gang-related evidence is offered as relevant to the defendant's character. *See Orellana v. State*, 489 S.W.3d 537, 541–43 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Moseley v. State*, 223 S.W.3d 593, 599 (Tex. App.—Amarillo 2007, no pet.); *Aguilar v. State*, 29 S.W.3d 268, 270 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

However, in *Sierra v. State*, the First Court of Appeals held that *Beasley* is not the only means through which gang-membership evidence may be introduced during the punishment phase. *Sierra v. State*, 266 S.W.3d 72, 78 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). Noting that the *Beasley* decision relied upon a prior version[5] of the Texas Code of Criminal Procedure, which prohibited the admission of unadjudicated extraneous bad acts at the punishment phase, the court reviewed the State's evidence of gang affiliation using both *Beasley* and the current version of Article 37.07, Section 3(a)(1). *Id*. at 77–80. The court concluded that even though the State failed to meet the third and fourth prongs of *Beasley*, the evidence that the defendant was a member of the Texas Syndicate gang was admissible under the current version of Article 37.07, Section 3(a), because such membership is a bad act and the trial court had instructed the jury not to consider extraneous crimes or bad-act evidence if there was a reasonable doubt that the defendant committed the crime or act. *Id*. at 78–80.

[5]In 1993, the Texas Legislature amended the Texas Code of Criminal Procedure to make evidence of extraneous bad acts admissible during the punishment phase if shown by evidence beyond a reasonable doubt. *See State v. Vasilas*, 187 S.W.3d 486, 489 n.5 (Tex. Crim. App. 2006); *see also Sierra*, 266 S.W.3d at 78.

Therefore, punishment evidence regarding gang membership can be properly admitted for different purposes under Article 37.07, Section 3(a)(1). If the gang membership evidence is offered for or tends to show a defendant's extraneous bad act, it is admissible if the jury is instructed that it cannot consider evidence of the alleged bad act unless it is satisfied beyond a reasonable doubt that the act is attributable to the defendant. *Sierra*, 266 S.W.3d at 79. However, if the evidence is offered as to the defendant's character, the evidence must meet the first two prongs of *Beasley* in order to be relevant and admissible, and the jury must be given instructions consistent with the third and fourth prongs of *Beasley*. *See Beasley*, 902 S.W.2d at 457; *see also Orellana*, 489 S.W.3d at 543; *Moseley*, 223 S.W.3d at 599.

Here, the State argued that the evidence was admissible because "the character of the defendant is of the utmost relevance at this point," and in admitting the gang evidence, the trial court held that the "evidence clearly [went] to the character of the defendant." Because the State offered the gang evidence as relevant to Beham's character, the State was required to present evidence that Beham was a gang member and evidence of that gang's character and reputation. *See Beasley*, 902 S.W.2d at 457; *see also Orellana*, 489 S.W.3d at 543. Kirkland testified that based on the photographs, Beham was holding himself out to be a gang member, but he did not testify that Beham was ever actually in a particular gang. Though he testified that the red color of Beham's clothing was associated with the Crips street gang, he did not testify that Beham was a member of that gang. Furthermore, there was no evidence presented of the character and reputation of a particular gang of which Beham was a member. Accordingly, the evidence does

not meet the *Beasley* test as articulated by the Texas Court of Criminal Appeals, and the trial court erred in finding the gang evidence admissible.

We are aware of the rule that even when the trial court gives the wrong reason for its decision if the decision is correct on any theory of law applicable to the case, it will be sustained. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Calloway v. State*, 743 S.W.2d 645, 651–52 (Tex. Crim. App. 1988); *Moreno v. State*, 341 S.W.2d 455, 456 (Tex. Crim. App. 1961); *Salas v. State*, 629 S.W.2d 796, 799 (Tex. App.—Houston [14th Dist.] 1981, no pet.). This is especially true with regard to the admission of evidence. *Dugard v. State*, 688 S.W.2d 524 (Tex. Crim. App. 1985), *overruled by Williams v. State*, 780 S.W.2d 802 (Tex. Crim. App. 1989) (per curiam); *Sewell v. State*, 629 S.W.2d 42, 45 (Tex. Crim. App. [Panel Op.] 1982). Even if it could be argued that the State's gang-related evidence was admissible as "bad act" evidence following the *Sierra* line of cases, it would be to no avail. We have previously addressed the fact that the State failed to prove either that Beham was a member of a particular gang or the violent and unlawful activities of such a gang. Therefore, the gang evidence failed to meet the requirements for admissibility under the alternate theory as annunciated in the *Sierra* line of cases.

B. Harm

We must now assess the error in admitting the evidence to determine whether it harmed Beham. "Generally, errors resulting from admission or exclusion of evidence are nonconstitutional." *Gotcher v. State*, 435 S.W.3d 367, 375 (Tex. App.—Texarkana 2014, no pet.) (citing *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007)). We see nothing in this circumstance that would elevate the erroneous admission of the gang evidence to the level of a

constitutional violation of Beham's rights. *See* TEX. R. APP. P. 44.2(b). As nonconstitutional error, harm resulted if Beham's substantial rights were affected. *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002); *see also* TEX. R. APP. P. 44.2(b). "[A] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). The error is not harmful if we are assured that it did not influence the jury's decision or it had but a slight effect. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In making our assessment, we consider everything in the record, including the other evidence admitted, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. *Id*. We "may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire[,] and whether the State emphasized the error." *Haley v. State*, 173 S.W.3d 510, 518–19 (Tex. Crim. App. 2005); *see also Motilla*, 78 S.W.3d at 355–56 (citing *Morales*, 32 S.W.3d at 867).

Beham was found guilty of aggravated robbery, a first degree felony, and was sentenced to forty years in prison out of a possible five to ninety-nine years or life. The motel's video recording of the robbery was played for the jury. As shown in the recording and as testified to by Amanda Gardner, masked men entered the motel and one of them put a gun to Gardner's head, demanding the key to the safe or register. When she did not have the key, one of them entered a back office and took the wallet from Gardner's purse, containing her driver's license, social security card, and gift cards that she intended to give her parents as Christmas gifts. After the men

left, it took Gardner a little while to compose herself such that she could make the 9-1-1 call, which was played for the jury.

Gardner testified that she was the lone clerk working the night shift at the motel that night. She testified that the gun was real and she heard it cock, though Officer Billy Giddens testified that Beham had told him that the gun used in the robbery was fake, but he did not know it at the time, and that he later determined that the gun was "in fact either fake or not operating correctly." She was "scared to death," in definite fear for her life, thinking that "there's a bullet and it's coming my way, and that's it." After the robbery, she continued to work at the motel, but she could no longer work the graveyard shift because she developed obsessive compulsive disorder. Gardner had to move back home with her parents because she reached a point where she "would not sleep for days" and when she did sleep, she had nightmares. She testified that this event changed her life for the worse, and she had "to redo a lot of things" in her life.

Giddens testified that Beham was cooperative and that during his interview, Beham confessed to the crime, identified one of his codefendants, and went with Giddens to help him find her. He testified that Beham admitted to being the man who pointed the gun at Gardner during the robbery. Beham said that he was sorry about the robbery, that he did not mean for anyone to get hurt, claiming he was drunk at the time of the robbery, and that he did it to help his sister with bills and food. Giddens believed that this robbery was related to Beham's dislike for people telling him what he could not do. On cross-examination, Giddens admitted that Beham had no felony convictions prior to this case.

The photographs from Beham's Facebook page were published to the jury. Beham is making gang sign hand gestures in several of the photographs. The first photograph shows Beham and the words "Money," "Power" and "Respect" on a red background. Another photograph showed Beham sitting at a table that is covered with cash and what appears to be a drug dealer's amount of marihuana. In the final photograph, two unidentified men are posing next to and on top of a car, with Beham standing next to the car pointing a gun at the camera. As described in detail hereinabove, Kirkland testified that in several of Beham's Facebook photographs, he is shown making known gang signs with his hands and wearing a lot of red, a color associated with the Crips gang. Based solely on the Facebook photographs, it was Kirkland's opinion that Beham was holding himself out as a gang member, though he admitted that he had no knowledge or information that Beham was then, or was ever, in a gang or that he participated in gang-related activity.

Spencer Price, a crime scene technician with the Texarkana Texas Police Department, confirmed that Beham is the same person who was convicted in Harris County of theft of over $50.00, but less than $500.00, a class B misdemeanor. Price testified that Beham was placed on deferred adjudication community supervision and that if he successfully completed and complied with the terms and conditions, the charge against him would be dismissed, but Beham failed to comply with the terms and conditions, and he was later adjudicated guilty and sentenced to ten days in jail.

Two of the corrections officers at the LaSalle Correctional Facility where Beham was incarcerated awaiting trial testified regarding Beham's behavior while in jail. Cantu testified that

on August 7, 2014, Beham was caught stealing food from the kitchen. Cantu testified that the theft was not committed in a way that endangered persons or property and that while it was a minor offense, offenders having contraband can cause fights among prisoners, though this episode did not. Sumner testified that while another prisoner, Marquavis Finley, was on the telephone, Beham punched him in the face causing a swollen eye. A photograph of Finley taken after the incident was admitted into evidence and published to the jury. Sumner testified that this was a major infraction and that as a result of Beham's repeated behavioral problems, he was placed in administrative segregation, though this was the only time he was transferred into segregation. Sumner admitted that after the fight, Beham showed no resistance, readily admitted his role in the fight, approached prison officers, and placed his hands behind his back.

Beham argued for a five-year sentence, pointing out that he had cooperated with authorities, confessed to the crime, shown remorse, taken responsibility for his actions, and refused to take the stand in his own defense, and arguing that "a young man taking responsibility, admitting what he did to that police officer counts." Even though it was no excuse, Beham further noted that he had been drinking that night, that his sister was having money troubles, and that it was almost Christmas. Beham characterized the jail issues as minor, pointing out that just like in this case, Beham admitted what he did and was cooperative. Kirkland's opinion testimony that Beham was either a gang member or holding himself out to be one was characterized as "ridiculous" because it was based entirely on four "cherry-picked" photographs of a young man with no criminal record. Beham argued that the Facebook photographs were taken out of context, that young people who are not gang members wear certain clothing and mimic hand gestures all the time, and that

teenagers and their friends put all manner of "stupid" things on social media to look tougher or more important than they really are.

In its closing arguments, the State pointed out the harm suffered by Gardner and the seriousness of the offense, but its argument primarily focused on "the type of person Roderick Beham is." The State argued that Beham did not respect the rules or respect authority, as evidenced by his behavior while in jail awaiting trial and his failure to fulfill the terms of his earlier community supervision, and the State spent about a quarter of its argument referencing the gang evidence, as follows:

> And as far as the gang evidence, you heard from Shane Kirkland. Based on all that training and experience that he has in evaluating people and putting together whether or not someone is affiliated or holding themselves out to be in a gang, in his opinion, based on what Roderick Beham was putting out on social media that he is at least portraying himself that he is involved with a gang. That's the type of person he is. That's his character that he at least wants people to think he is. You know, the talk about, "Well, people flash signs like that in that hip-hop music. People that like hip-hop music don't also go commit aggravated robbery. People that wear red don't also commit aggravated robbery." But he's putting it out there and his actions are also showing the type of person he is. So don't discount that evidence because there's not definitive proof that we have him on the list of what gang he's in. This is what he at least wants people to believe. People put stuff on social media that they want to know about them. You put your best pictures out there, you put your pictures of your family. He puts pictures of drugs and money and gang signs. That's the type of person he is.

Even though he had no prior felony record, confessed to the crime, showed remorse, and cooperated with law enforcement, Beham received a sentence near the middle of the punishment range. As opposed to merely submitting the photographs alone and raising inferences therefrom, the addition of Kirkland's expert testimony of what Beham held himself out to be gave significant credibility to the State's attempt to paint Beham as a violent gang member deserving of a severe

sentence even though Kirkland admitted that he had no knowledge or information that Beham was ever actually in a gang. Based on the foregoing and having examined the record as a whole, we are unable to form a fair assurance that the error had a slight or no effect on the jury's punishment decision. *See Motilla*, 78 S.W.3d at 355. Therefore, we sustain this point of error and reverse and remand the case for a new trial on punishment. Due to the ruling on this issue, we need not reach Beham's remaining point of error.

Jack Carter
Justice

Date Submitted: February 22, 2017
Date Decided: May 19, 2017

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