No. 14-23-00968-CR
No. 14-24-00011-CR
No. 14-24-00098-CR

In the
Court of Appeals
for the
Fourteenth District of Texas

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On Appeal from the 228th District Court, Harris County, Texas
Trial Court Cause Nos. 1708537, 1708538, 1708539

———————♦———————

BYRON ANDREW RICHARDS V. THE STATE OF TEXAS

———————♦———————

APPELLANT'S BRIEF

———————♦———————

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 38.1(e), Appellant does not request oral argument. The case can be decided on the briefs.

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1(a), a complete list of the names of all interested parties is provided below.

Judge Presiding over Voir Dire:	Honorable Kimberly McTorry
Trial Judge:	Honorable Frank Aguilar
Appellant:	Byron Andrew Richards
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Counsel for Appellant on Appeal:	Cherí Thomas Lewis Thomas Law P.C. 4801 Woodway Drive, Suite 480E Houston, Texas 77056
Counsel for the State at Trial:	Brianna Perry Briana Head Kimberly Nwebeke Harris County District Attorney's Office 1201 Franklin, Suite 600 Houston, Texas 77002
Counsel for the State on Appeal:	Jessica Caird Harris County District Attorney's Office 500 Jefferson Street, Suite 600 Houston, TX 77002

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STATEMENT OF THE CASE

Appellant Byron Andrew Richards was charged with aggravated robbery with a deadly weapon, evading arrest, and felon in possession of a weapon on January 28, 2021. (1708537 CR 6; 1708538 CR 7; 1708539 CR 6.)[1] A jury found Appellant guilty on all three counts, and because Appellant elected to have the judge assess punishment, the cases proceeded before the judge for the punishment phase of trial. At the conclusion of punishment, the judge assessed 15 years confinement on the evading arrest, 15 years on the felon in possession of a weapon, and 30 years for the aggravated robbery with a deadly weapon. (1708537 CR 112-14; 1708538 CR 237-40; 1708539 CR 109-12.) The trial court pronounced Appellant's sentence and issued a written judgment on December 13, 2023. (5 RR 131-32; 1708537 CR 112-14, 121; 1708538 CR 237-40, 255; 1708539 CR 109-12, 126.) On the same day, Appellant timely filed his Notice of Appeal. (1708537 CR 103; 1708538 CR 244; 1708539 CR 116.)

[1] Each Clerk's Record is identified by the trial cause number. The Reporter's Record is identical for all three cause numbers.

ISSUE PRESENTED

Whether the State violated Appellant's Sixth Amendment right to confront witnesses against him by presenting improper and unconstitutional hearsay evidence (and thus insufficient evidence) of extraneous offenses in the punishment phase of trial.

STATEMENT OF FACTS

During punishment, the State attempted to maximize Appellant's sentence of imprisonment by presenting incomplete and incompetent evidence of extraneous offenses. At the outset of the punishment proceedings, trial counsel expressed his objection that the State could not prove Appellant's extraneous offenses without presenting improper evidence:

> I anticipate the State intends to prove up essentially extraneous offenses in the punishment stage and, Your Honor, my understanding of the law is if they intend to prove up the extraneous offenses, they have to show that those can be proved beyond a reasonable doubt and I don't believe . . . they have . . . the ability to do that. So I don't know that they can just shotgun and say here are the offenses. I think they have to provide more information and under article 37.07[§ 3(a)(1)] of the Code of Criminal Procedure it says "Evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed". So I believe that's a requirement to introduce an extraneous offense at the punishment state of a criminal case.
>
> . . .
>
> Judge, I believe that to get there they'd have to elicit hearsay. I don't believe they have any of the victims of the crimes prepared to testify this morning. I believe they're going to call [t]he police officers to somehow summarize . . . what's in the police report; and I don't believe that's an appropriate method of proof.

(5 RR 11-12.) In response, the court asked trial counsel to "make the objections at the appropriate time." (5 RR 12.) Trial counsel followed the court's instruction.

First, the State called Officer Cowels. When Officer Cowels began to summarize and restate the police report from 2003, trial counsel objected, "for them to offer an extraneous offense into evidence, they have to prove it beyond a

reasonable doubt, not just give a summary of the facts." (5 RR 15-16.) The State responded that the officer's personal knowledge was based on his expertise and his own investigation but acknowledged that he "reviewed the offense report in order to learn about this investigation." (5 RR 17.) The judge cautioned the State, "don't get into any hearsay." (5 RR 17-18.) The State nonetheless continued to elicit testimony based on hearsay so trial counsel asked for, and was granted a running objection to hearsay. (5 RR 18, 20-21.)

Trial counsel explained, "The only way he could know any of these details would be from witnesses that he spoke to. And, of course, we're not going to be able to cross-examine those witnesses. So I don't believe . . . this is the proper way to establish an extraneous offense." (5 RR 18-19.) The trial court seemed persuaded by trial counsel's argument but ultimately allowed the State to continue. (5 RR 20-21.)

Officer Cowels testified he learned that an aggravated robbery with a deadly weapon had occurred at the Family Dollar Store on the 15900 block of South Post Oak. (5 RR 21.) Officer Cowels testified that he learned of Appellant's connection to the case through another offense report. (5 RR 22.) Although the trial court initially sustained trial counsel's objection to hearsay, he later overruled the objection. (5 RR 22-23.) Officer Cowels then testified that he presented photo arrays to two complaining witnesses who made identifications and based on those

identifications, Appellant was charged in that case. (5 RR 26-28.) Although trial counsel objected, the trial court overruled his objections. (5 RR 27.) Officer Cowels admitted that he interviewed witnesses to obtain the information he learned about the cases. (5 RR 28-29.)

Subsequently, Officer Varela similarly testified regarding a series of robberies, 11 robberies of Family Dollar stores and 1 robbery of a convenience store, based on his review of offense reports. (5 RR 67-69.) Trial counsel again objected to testimony without personal knowledge. (5 RR 70.) Trial counsel elaborated, "Your Honor, . . . I'm objecting because I think they're going to try again to sort of back door testimony like they did with the other two cases." (5 RR 71.) Trial counsel again requested, and was granted, a running objection based on hearsay and Appellant's right to confrontation. (5 RR 72-73.) Trial counsel further objected to Officer Varela's testimony regarding audio and video recordings of businesses and line-ups that were not in evidence. (5 RR 81-83.) Officer Varela then testified that he presented photo arrays to multiple complaining witnesses who made identifications and based on those identifications, Appellant was charged in two of the twelve aggravated robbery cases. (5 RR 84-88.) Officer Varela testified only two of the twelve cases were charged for "judicial economy." (5 RR 88.) Although trial counsel objected, the trial court overruled his objections. (5 RR 84-88.)

Detective Bruzas similarly testified regarding an aggravated robbery of a Family Dollar store. (5 RR 92-93.) Trial counsel again objected based on hearsay and Appellant's right to confrontation. (5 RR 93.)

In the State's closing argument in the punishment phase of trial, the State emphasized the extraneous offenses described by these officers. (5 RR 128-29.)

The trial court ordered concurrent sentences of 15 years confinement in TDCJ on the evading arrest, 15 years on the felon in possession of a weapon, and 30 years for the aggravated robbery with a deadly weapon. (5 RR 131-32.)

SUMMARY OF THE ARGUMENT

The State presented insufficient evidence of extraneous offenses in the punishment phase of trial. Instead of presenting competent evidence of extraneous offenses and linking them to Appellant, the State erroneously relied on hearsay evidence of extraneous offenses. The State's repeated reliance on hearsay violated Appellant's Sixth Amendment right to confront the witnesses against him. Appellant was harmed because the trial court erroneously relied upon this improper evidence and sentenced Appellant to 30 years imprisonment for aggravated robbery with a deadly weapon.

ARGUMENT

Evidence of extraneous offenses may be presented during the punishment phase of trial, but it must be proven beyond a reasonable doubt that the defendant committed the extraneous crime or bad act alleged. Tex. Code Crim. Proc. Art. 37.07 § 3(a)(1). Similarly, in order to "establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. *Henry v. State*, 509 S.W.3d 915, 918 (Tex. Crim. App. 2016). There is no specific way the State must prove these two elements. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). The totality of the circumstances determines whether the State met its burden of proof. *Id.* at 923. Some of the ways by which a defendant may be linked to a prior conviction is through the testimony of a fingerprint expert, through the testimony of a witness who personally knows that the defendant was previously convicted and can identify the defendant, by the defendant's stipulation or judicial admission, or by a photograph that is contained in the prior judgment. *See, e.g.*, *Littles v. State*, 726 S.W.2d 26, 31-32 (Tex. Crim. App. 1987); *Beck v. State*, 719 S.W.2d 205, 209 (Tex. Crim. App. 1986).

However, neither prior convictions nor other extraneous offenses may be proven through hearsay. The Confrontation Clause of the Sixth Amendment bars the admission of non-testifying witness's testimonial statements, unless the witness

is unavailable and the defendant had a prior opportunity to cross-examine the witness. *See Smith v. State*, 420 S.W.3d 207, 223 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)). A statement is generally considered testimonial if it is a solemn declaration made for the purpose of establishing some fact. *Id.*

In this case, the State failed to properly prove several purported prior convictions and other extraneous offenses. The alleged offenses described by Officer Cowles, Officer Varela, and Detective Bruzas were improperly bolstered by hearsay. Officer Cowels and Officer Varela repeatedly testified from offense reports, and although the trial court repeatedly warned the state not to rely on hearsay, the Officers continually testified to details of the offenses that they could only have learned from witnesses. Officer Cowels admitted that he interviewed witnesses to obtain the information he learned about the cases. In addition, both Officer Cowels and Officer Varela effectively testified that witnesses identified Appellant in different line-ups. Particularly egregiously, Officer Varela summarily and derivatively testified based on hearsay regarding 10 aggravated robberies that were not charged.

The State's repeated presentation of this evidence through backdoor hearsay violated the Confrontation Clause of the Sixth Amendment of the United States

Constitution. In addition, such improper evidence is not sufficient to prove the alleged extraneous offenses beyond a reasonable doubt.

In closing, the State made it clear that it presented this "evidence" to lengthen Appellant's sentence. The State explicitly asked the court to consider the purported extraneous offenses and sentence Appellant to 60 years in prison. (5 RR 129.) The purported, prior aggravated robberies presented by the State had their intended effect because while the trial court sentenced Appellant to 15 years on the charges for evading arrest and felon in possession of a weapon, the trial court sentenced Appellant to double that time on the aggravated robbery. The trial court erroneously relied on the improper and unconstitutional, and thus insufficient, evidence presented by the State.

CONCLUSION

For the foregoing reasons, Appellant prays that this Court reverse and remand the judgment of the trial court, and order a new trial on punishment. Appellant further prays for such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 19, 2024, a true and correct copy of the foregoing Appellant's Brief was served on the Harris County District Attorney's office by electronic filing, which will provide notice to all parties.

/s/ Cherí Thomas
Cherí Thomas

CERTIFICATE OF COMPLIANCE

This is to certify that this document contains 1,601 words, in compliance with Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ Cherí Thomas
Cherí Thomas

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