NO. 01-24-00947-CR

IN THE COURT OF APPEALS

FOR THE

FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

MARQUIS DWAINE VISER

APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

ON APPEAL CAUSE NO 93282-CR

FROM THE 300TH JUDICIAL DISTRICT COURT

BRAZORIA COUNTY, TEXAS

HONORABLE CHAD D. BRADSHAW, JUDGE PRESIDING

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

This is a direct appeal from a conviction for Unlawful Possession of a Firearm. Appellant was charged by an indictment for Unlawful Possession of a Firearm, under TEX. PEN. CODE Sec. 46.04 on August 5, 2021. (C.R. at 6). Appellant entered a plea of not guilty on February 13, 2024. (IV R.R. at 21). The jury returned a verdict of guilty on February 13, 2024. (IV R.R. at 125).

Unlawful Possession of a Firearm, under TEX. PEN. CODE Sec. 46.04 (e) is a 3rd degree felony offense with a range of punishment of not more than 10 years or less than 2 years within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00. The State further alleged Appellant was convicted of a prior felony other than the felony considered within the indictment. The range of punishment increasing to that of a 2nd degree felony offense with a range of punishment of not more than 20 years or less than 2 years within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00

Following evidence and arguments on the issue of punishment, the jury, having found Appellant had previously been found guilty of a felony, accessed punishment at 14 years in the Texas Department of Criminal Justice-Institutional Division and a $5,000.00 fine. (V R.R. at 75).

PROCEEDURAL HISTORY

Appellant advised the trial court of his desire to appeal on February 13, 2024, with said notice being due on or before March 14, 2024. (V R.R. at 78). Trial counsel filed an untimely notice of appeal on April 12, 2024. (C.R. at 92). Following the filing of the notice of appeal the trial court on April 14, 2024, appointed counsel to represent defendant on appeal. Appellate counsel upon a review of the record recognized the need to perfect said appeal requires the filing of an out-of-time appeal. Appellant's counsel filed an untimely motion for out-of-time appeal with the Court of Appeals for the First District of Texas at Houston, Texas, NO. 01-24-00294-CR. Said motion was denied for lack of jurisdiction per TEX. R. APP. P. 26.2 and TEX. R. APP. P. 26.3 due to the notice of the appeal being filed 58 days after the judgment was signed. An application for Writ of Habeas Corpus seeking the right to file an out of time appeal was filed on July 24, 2024. (C.R. at 41). Said application, NO. WR-96,069-01, was granted on November 27, 2024. (C.R. at 74). A subsequent Notice of Appeal was filed on December 3, 2024. (2nd Supp. C.R. at 4).

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HONORABLE CHAD D. BRADSHAW, JUDGE PRESIDING

BRIEF FOR APPELLANT

TO THE COURT OF APPEALS:

COMES NOW, Marquis Dwaine Viser, appellant herein, and files this, his brief in this cause. This is an appeal from the 300th Judicial District Court, Brazoria County, Texas.

STATEMENT OF THE FACTS

The State indicted Appellant on August 5, 2021. (C.R. at 6). The State Alleged Appellant committed an offense under the TEX. PEN. CODE Sec. 46.04, Unlawful Possession of a Firearm. (C.R. at 6). The indictment alleged Appellant did then and there intentionally or knowingly possess a firearm away from the premises where the said defendant lived and prior to the commission of said act the said defendant was duly and legally convicted of the felony offense of Possession the Intent to Deliver Cocaine on or about the 4th day of December 2013. TEX. PEN. CODE Sec. 46.04 (e), stipulates the offense as alleged is a third-degree felony offense with a range of punishment of not more than 10 years or less than 2 years within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00. To the indictment, Appellant pleaded not guilty on February 13, 2024. (IV R.R. at 21).

The testimony asserted by the State is that Appellant having previously being convicted of a felony, unlawfully possessed a firearm away from his current residence. The State presented two witnesses, Matthew Boswell and Alexander Tuan.

Matthew Boswell, an investigator with the Brazoria County Sheriff's Office serving as the forensic latent print specialist testified to the previous felony

conviction of Appellant. (IV R.R. at 27). Investigator Boswell provided testimony supporting the introduction of Appellant's previous judgement indicating a felony conviction in the 209th District Court, Harris County, Texas on December 4, 2013. The judgement indicating a term of confinement for seven years in the Texas Department of Criminal Justice – Institutional Division. (State's Exhibit #2).

Alexander Tuan, a Patrol Officer with the Pearland Police Department for the past twelve years testified he received a dispatch at approximately 9:00 p.m. to investigate a driver who passed out in his vehicle. (IV R.R. at 36). Officer Tuan arrived at the same time as Officer Rogers. (IV R.R. at 37). Upon investigation the Officer testified Appellant appeared to be passed out. (IV R.R. at 37). While looking into the vehicle's window, Officer Tuan noted a pistol on the back seat. (IV R.R. at 38). Prior to attempting to wake the driver, Officer Tuan positioned his patrol vehicle in front of Appellant's vehicle to prevent Appellant from moving his vehicle when startled by being woken by the Officers. (IV R.R. at 38). During the investigation Officer Tuan noted a strong odor of marijuana. (IV R.R. at 43). With this information Appellant was searched. (IV R.R. at 43). During the search, a considerable sum of cash was discovered in Appellant's pocket. (IV R.R. at 44). Officer Rodgers retrieved the previously observed firearm from the rear seat of Appellants vehicle. (IV R.R. at 45). Officer Rodgers then retrieved a second handgun discovered on the center

console. (IV R.R. at 46). The firearms were introduced as exhibits five and seven. (IV R.R. at 47). Testifying as to what is being presented to the jury via an introduced video, Officer Tuan testified to the search of Appellant's vehicle and the subsequent discovery of marijuana. (IV R.R. at 55). The video shows Officer Rodgers retrieving a duffle bag containing marijuana. Officer Rodgers is then observed stacking marijuana on the rear of the vehicle. (IV R.R. at 68). Additionally, the duffle bag contained $125,776.00 in cash. (IV R.R. at 70). After placing Appellant in the patrol car, the Officers continued to search the vehicle, finding additional marijuana in the trunk. (IV R.R. at 69). Additional items retrieved from the vehicle included THC wax, a syringe, and seven cell phones. (IV R.R. at 70). Over Appellant's objection, the wax, syringe, three duffle bags, and the marijuana are introduced as State's exhibits 9 through 12. (IV R.R. at 72-74). State's exhibit 13 consists of thirty-two photographs displaying cash, marijuana, and the other items collected from Appellant's vehicle. Of the thirty-two photographs twenty-eight photographs contain an image of each bag of marijuana on a scale. (VI R.R. Exhibit 13). Officer Tuan testified the total of the cash was $125,776.00 and the total weight of the marijuana was 26.31 pounds. (IV R.R. at 80). Officer Tuan testified the marijuana was never evaluated to verify or quantify THC levels. (IV R.R. at 88).

POINT OF ERROR ONE

THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF EXTRANEOUS OFFENSES.

Appellant, through a motion in limine requested the State approach the bench before presenting to the jury evidence of his possession of marijuana and the $125,776.00 in cash discovered during the arrest of Appellant. (IV R.R. at 9). During the presentation of the motion, Appellant moved for the evidence to be excluded and objected to the admission of this evidence on the basis of relevance under TEX. R. EVID.403, 404 (b), and TEX. CODE CRIM. P. art. 37.07. Defense argued the extraneous offenses are not relevant in determining if Appellant was a felon in possession of a firearm as charged in the indictment. (IV R.R. at 12-14). The objections were overruled, (IV R.R. at 17), Following the hearing the State, during opening statements and the guilt/innocence portion of trial, was allowed to comment and present evidence of the twenty-six pounds of marijuana and $125,776.00 cash found to be in the possession of Appellant the night he was arrested. The State references the marijuana six times in opening statements and thirty-three times during the presentation of evidence during the guilty/innocence portion of the trial. (IV R.R.). Trial counsel for Appellant continued his objections throughout trial at any time the State moved to introduce testimony or exhibits

reflecting the extraneous offenses, cash and other illegal substances. (IV R.R.). Additionally, the trial court overruled Appellant's trial objection as to the introduction of State's exhibit #13, containing thirty-two photographs displaying the marijuana and cash. (IV R.R. at 78-79).

A. Texas Rules of Evidence

A trial court's ruling on the admissibility of evidence is reviewed under an abuse-of-discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App.2003). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App.2005).

Under Texas Rule of Evidence 401, evidence is relevant if it makes the existence of a fact that is of consequence to the determination of the action more probable than it would be without the evidence. However, even relevant evidence may not be admissible for every purpose. Because our system of justice recognizes that a defendant should be tried only for the crime charged and not for his criminal propensities, evidence of extraneous offenses is normally inadmissible. *Robles v. State*, 85 S.W.3d 211, 213 (Tex. Crim. App.2002).

Texas Rule of Evidence 403 states "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." The Courts have recognized trial courts should consider several factors in determining whether the prejudicial effect of evidence substantially outweighs its probative value. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App.2002). These factors include: (1) how compelling evidence of the extraneous offense serves to make a fact of consequence more or less probable; (2) the extraneous offense's potential to impress the jury in some irrational but indelible way; (3) the trial time that the proponent will require to develop evidence of the extraneous misconduct; and (4) the proponent's need for the extraneous transaction evidence. *Id*.

Texas Rule of Evidence 404(b) conditions admissibility of other-crimes evidence on the State's compliance with the notice provisions of Rule 404(b)." *Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005). Specifically, evidence of a crime, wrong, or act other than the offense charged is not admissible to prove that the defendant acted in conformity with his character but may be admissible for other purposes. TEX. R. EVID.404(b). The rule requires "reasonable" notice. *Hayden v. State*, 66 S.W.3d 269, 272 (Tex. Crim. App .2001). An "open file" policy, by itself, is not sufficient to comply with the rule's notice requirement. *Buchanan v. State*, 911 S.W.2d 11, 15 (Tex. Crim. App.1995).

B. Evidence of possession of marijuana and $125,776.00.

The appellant's possession of marijuana was an extraneous offense. His possession of $125,776.00 was perceived to be tied to appellant's drug dealing. Neither makes the existence of any fact that was of consequence to the determination of guilt more probable than it would be without the evidence. Appellant argued that the evidence should not come in because the evidence of twenty-six pounds of marijuana and $125,776.00 in cash was not relevant to the issue of Appellant's unlawful possession of a firearm. (IV R.R. at 12-13). In arguing for the redaction of the video footage, Appellant argues the focus of the investigation during the arrest of Appellant is focused entirely on marijuana and cash. The weapons for which Appellant is charged with possessing are discovered before the investigation discovers the marijuana and cash. Appellant argues that after the discovery of marijuana and cash, the investigation is focused on these extraneous items. Appellant complains the State failed to provide notice of the intent to introduce evidence of extraneous offenses. "Now, I understand their argument would be that this marijuana was contextual to the arrest for felon in possession of firearm. What I would respond to that would be that sometimes we confuse the words 'contextual' with 'contemporaneous.' You can have a contemporaneous offense. It doesn't necessarily provide any context to a finder of

fact about the underlying offense that we're here for." The extraneous offense of possessing the marijuana does not rise to "contextual" merely by the discovery of such evidence. (IV R.R. at 13).

> "The jury is entitled to know all relevant surrounding facts and circumstances of the charged offense. *Id.* But, under Rule 404(b), same-transaction contextual evidence is admissible only when the offense would make little or no sense without also bringing in that evidence, and it is admissible 'only to the extent that it is necessary to the jury's understanding of the offense.' *Wyatt v. State,* 23 S.W.3d 18, 25 (Tex.Crim.App. 2000) (quoting *Pondexter v. State,* 942 S.W.2d 577, 584 (Tex.Crim.App.1996)."

Devoe v. State, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). The evidence of the extraneous offenses is not relevant and is unnecessary in establishing unlawful possession of a firearm by Appellant. (IV R.R. at 12-14).

C. Argument

Finding a piece of evidence to be "relevant" is the first step in a trial court's determination of whether the evidence should be admitted before the jury. Evidence which is not relevant is not admissible per TEX. R. CRIM. EVID.402. *Montgomery v. State*, 810 S.W. 2d 372, 375 (Tex. Crim. App. 1991) (op. on reh'g). Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the determination of the offense charged more probable or less probable than it would be without the evidence. TEX. R. CRIM. EVID.401. In

determining whether evidence is relevant the trial court should ask "would a reasonable person, with some experience in the real world believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit." *United States v. Brashier,* 548 F.2d 1315, 1325 (9th Cir.1976).

> "If the trial court determines that evidence of "other crimes, wrongs, or acts" has relevance apart from character conformity, he should admit the evidence absent a further objection by the opponent of the evidence. The opponent's earlier objection that the evidence has no relevance beyond character conformity, and is therefore inadmissible under Rule 404(b), has been ruled upon. It is now incumbent upon him, in view of the presumption of admissibility of relevant evidence, to ask the trial court to exclude the evidence by its authority under Rule 403, on the ground that the probative value of the evidence, assuming it is relevant apart from character conformity, is nevertheless substantially outweighed by, e.g., the danger of unfair prejudice…..To the extent that this language may suggest an opponent has an obligation to do anything more than level an objection that the trial court should exclude the evidence under Rule 403, we disavow it now."

Montgomery, 810 S.W.2d at 375.

Evidence of a crime, wrong, or act other than the offense charged is not admissible to prove that the defendant acted in conformity with his character but may be admissible for other purposes. TEX. R. EVID.404(b). These purposes include proving intent and motive as well as illustrating other aspects of an "indivisible criminal transaction," also known as same-transaction contextual evidence. *Devoe,* 354 S.W.3d at 469. However, the Court established same-transaction

contextual evidence must be "necessary to the jury's understanding of the offense" such that the charged offense would make little sense without the same-transaction evidence. *Pondexter v. State,* 942 S.W.2d 577, 584 (Tex. Crim. App. 1996).

The Courts recognize four balancing factors in the analysis of admitting evidence of an extraneous offense. (1) The inherent probative value. (2) The potential to impress the jury in some irrational and indelible way. (3) The time associated with developing or introducing the evidence. (4) The State's need for the evidence in establishing the charged offense. *Montgomery,* 810 S.W.2d at 389-90.

1. Probative value: As argued by trial counsel the introduction of extraneous offense evidence does not tend to make it more probable that Appellant committed the charged offense of unlawful possession of a firearm. The State establishes Appellant has a prior felony and the weapons are in plain sight of a vehicle with the sole occupant, Appellant. (IV R.R. 32-33).
2. Unfair prejudice: The State's case in chief on guilt/innocence consists of sixty-four pages of testimony. Of these sixty-four pages, seven pages are devoted to testimony of Appellant's prior felony conviction, two pages provide testimony and argument outside the presence of the jury, and only four pages provide testimony of the weapons discovered. The time spent introducing testimony of the extraneous offenses and the introduction of the marijuana

and cash found during Appellant's arrest constitutes nine pages. State's exhibit #13, introduced over the objection of Appellant consist of thirty-two photos of the marijuana and cash displayed at the police department. The risk the jury becomes focused on the extraneous offense and the allegation Appellant is nothing more than drug dealer pushing large amounts of marijuana is great and undeniable. The potential to impress the jury in some irrational and indelible way is certain.

3. The time necessary to present the evidence: Again, Appellant refers to the State's case in chief on guilt/innocence consisting of only four pages of testimony devoted to the discovery of the weapons and nine pages devoted to the discovery of the extraneous offense and prejudicial finding of an excessive amount of cash not commonly found on an individual. The State presented the elements of the offense within four pages referring to the weapons found and seven pages establishing the previous conviction for a felony. This level of testimony supports the offense was not difficult to follow or understand. The introduction and review of the thirty-two photos took more time to review than testimony reflecting the elements of the indicted offense. The jury did not require the extraneous offenses to find intent and

motive as well as illustrating other aspects of the criminal transaction. *Moreno v. State,* 721 S.W.2d 295, 301 (Tex. Crim. App. 1986).

4. The State's need to present the evidence: The State did not have a need for the evidence. The State's need for the evidence is reflected in their presentation of their case-in-chief. Two Officers participated in the detention of Appellant. Yet the State only believed one witness was needed to provide sufficient testimony. The State knows all that is necessary to support a conviction is the testimony of a single Officer as to evidence of Appellant's possession of firearm. With the support of a witness to provide testimony of Appellant's prior felony, the evidence is clear and concise. That is to say the State presented the relevant or necessary information clearly and in a few words. The State had no need of the evidence to provide a clear understanding for the jury in establishing the elements of the crime charged.

In short, Appellant's possession of marijuana and $125,776.00 was simply offered so that Appellant's character in general would be negatively impacted. The introduction of this evidence was inherently inflammatory. The probative value of the evidence was tenuous at best, non-existent at worst. The marijuana and cash did not make any fact of consequence more probable and the possibility of affecting the jury in some irrational and improper way was high. The State did not need the

evidence for any purpose whatsoever as it was not an element of the charged offense of unlawful possession of a firearm by a felon. The evidence did not provide the jury with information of consequence in determining Appellant's guilt or innocence of the charged crime. The trial court's ruling allowed the State to put forth the prejudicial testimony of marijuana, $125,776.00, cash, or drug paraphernalia forty-five times during the guilt/innocence portion of the trial. Appellant was not simply a citizen with a prior felony in possession of a firearm he was portrayed as a major drug dealer with twenty-six pounds of marijuana and $125,776.00 in cash.

Testimony of the extraneous offense and possession of the $125,776.00 should have been excluded. The trial court abused its discretion with a decision so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App.2005).

D. Harm

Evidence erroneously admitted under rule 401, 403 or 404(b) is harmful if it had a substantial and injurious effect or influence in determining the jury's verdict. *Hernandez*, 176 S.W. 3d at 824. Furthermore, under rule 404(b), if the rule 404(b) evidence was "substantively inadmissible" and substantially influenced the jury's verdict, then the influence on the jury's verdict will always be injurious. *Hernandez*,

176 S.W.3d at 825. The evidence of the extraneous conduct was inadmissible. It did nothing more than place the defendant in a bad light before the jury without providing any evidence that was of consequence to the charged offense. The State was allowed to portray Appellant as a dangerous drug dealer.

> "Q. Okay. Have you had the occasion to conduct other traffic stops involving drugs or controlled substances?
>
> A. I have.
>
> MR. CALDWELL: Objection. Relevance.
>
> THE COURT: Overruled.
>
> Q. (BY MR. TAMEZ) You have?
>
> A. I have.
>
> Q. Okay. And in traffic stops involving drugs or other controlled substances, what typically follows drugs?
>
> A. Guns."

(IV R.R. at 76).

Appellant request this Honorable Court to sustain point of error one and Accordingly, Appellant requests this Court reverse his conviction and remand this case back to the trial court for a new trial.

POINT OF ERROR TWO

THE TRIAL COURT ERRED IN ORDERRING FEES TO BE REPAID BY THE APPELLANT

Per *Wiley v. State*, 410 S.W.3d 313 (Tex. Crim. App. 2013) if a defendant has been found indigent, this indigence is presumed to remain unless the record can show the defendant's financial status has changed. Following trial, the trial court found Appellant indigent on February 13, 2024. (Supp. C.R. at 85). The trial court additionally signed an "Order to Withhold Funds." (Supp. C.R. at 83). This order directs the Texas Department of Criminal Justice to withhold funds from Appellants inmate trust account to repay unpaid court cost, fees and/or fines and/or restitution. The record does not contain evidence appellant financial status changed prior to the judgement signed by the trial court. The two orders are in conflict in that the trial court may not order Appellant to repay cost that has been found indigent. The record is insufficient to support Appellant's financial status has changed, the trial court erred in ordering Appellant to pay reimbursement fees and cost.

Appellant request this Honorable Court to reform the judgement to reflect Appellant is not ordered to repay said fees unsupported by the record.

PRAYER

WHEREFORE, PREMISE CONSIDERED, Appellate Counsel respectfully prays this Honorable Court sustain Appellants points of Error, reverse the trial courts judgement, and remand for a new trial.

Respectfully Submitted,

By: /S/ Perry Stevens
Perry Stevens
Attorney for Appellant
Texas State Bar #00797496

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to Tom Selleck, 111 East Locust, Suite 408A, Angleton, Texas 77515, on January 13, 2025.

/S/ Perry Stevens
Perry Stevens
Attorney for Appellant
State Bar #00797496

CERTIFICATE OF COMPLIANCE

I hereby certify, per Texas Rules of Appellate Procedure 9.4i (1), 9.4i (2) (B), and 9.4i (3), this brief is a computer-generated document, and the computer program used to prepare the document calculates the word count to be 3466 words.

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