Opinion filed January 28, 2016

In The

Eleventh Court of Appeals

No. 11-13-00340-CR

AKEEM DESMOND NASH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 30th District Court
Wichita County, Texas
Trial Court Cause No. 52,446-A

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

The jury convicted Akeem Desmond Nash of aggravated robbery with a deadly weapon. The trial court assessed his punishment at confinement for a term of forty-five years in the Institutional Division of the Texas Department of Criminal Justice. In three issues on appeal, Appellant asserts that the trial court erred in admitting three instances of hearsay into evidence, that the trial court gave an

erroneous instruction to the jury when it requested to review witness testimony, and that Appellant's sentence was improperly enhanced with a plea from a juvenile adjudication. We affirm.

Background Facts

On June 12, 2012, three armed men robbed a 7-Eleven convenience store in Wichita County. Surveillance video depicted three men in masks entering the 7-Eleven convenience store with a long rifle or shotgun, taking money from the cashier, and taking DVDs from the front counter. Appellant's half brother, Kadeem Emmers, admitted to participating in the robbery. He identified Appellant and Appellant's cousin, Quawannocci Moore, as his accomplices. Emmers was given a plea deal, which involved a twenty-three-year sentence for aggravated robbery, in exchange for his testimony at Appellant's trial. Appellant's mother, Michelle Nash, testified that the three men were at her home before the robbery, left around midnight, and returned two hours later with money and DVDs.

Hearsay

In his first issue, Appellant asserts that the trial court erred in admitting hearsay statements in three instances at trial. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

Appellant first complains about Michelle's testimony that, upon returning home from the robbery, Emmers said to Appellant and his cousin that "[t]hey just could split it," referring to the money stolen during the robbery. Appellant made a timely hearsay objection to the prosecutor's question asking Michelle what Emmers

had said. The prosecutor responded to the objection by asserting that the question was not hearsay because it was not offered for the truth of the matter asserted.

Appellant argues on appeal that the statement was offered for the truth of the matter asserted. We agree. "Matter asserted" means "(1) any matter a declarant explicitly asserts; and (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter." TEX. R. EVID. 801(c). The significance of the statement that "[t]hey just could split it" is not merely that Emmers wanted to split the money but, instead, that Appellant was entitled to a share of the money because he was involved in the robbery. This "matter implied by a statement" is, therefore, hearsay. However, we must also consider whether this statement falls within an exception to the hearsay rule. *See* TEX. R. EVID. 802; *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). In this regard, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial judge gave the wrong reason for his right ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009) (citing *Sewell v. State*, 629 S.W.2d 42, 45 (Tex. Crim. App. [Panel Op.] 1982)).

One of the exceptions to the hearsay rule allows the admission of statements made against the declarant's interest. TEX. R. EVID. 803(24). This exception permits the admission of a statement that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and

> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

TEX. R. EVID. 803(24). The rationale behind admitting these types of statements "stems from the commonsense notion that people ordinarily do not say things that are damaging to themselves unless they believe they are true." *Walter v. State*, 267 S.W.3d 883, 890 (Tex. Crim. App. 2008). "[A] reasonable person would not normally claim that he committed a crime, unless it were true." *Id.* Rule 803(24) sets out a two-step foundation requirement for the admissibility of hearsay statements against a person's penal interest. *Id.* The trial court must first determine whether the statement, considering all of the circumstances, subjects the declarant to criminal liability and whether the declarant realized this when he made the statement. *Id.* at 890–91. The trial court must then determine whether sufficient corroborating circumstances exist that clearly indicate the trustworthiness of the statement. *Id.* at 891.

Statements against penal interest can inculpate both the declarant and a third party, such as a codefendant. *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999). "An admission against a co-defendant declarant's interest can be admissible against the defendant so long as it is sufficiently against the declarant's interest to be reliable." *Id.* Emmers's statement that Appellant and his cousin could split the money subjected Emmers, Moore, and Appellant to criminal liability because it implied joint participation in the robbery. Emmers made this statement to two accomplices to the crime and in the presence of a non-accomplice. Emmers undoubtedly knew that robbing the convenience store at gunpoint was illegal, evidenced by the fact that he wore a mask during the commission of the robbery. He also knew, as would the "average reasonable person," that speaking openly about

splitting the proceeds from a robbery in the presence of someone who did not participate in the crime would expose him to criminal liability. *Walter*, 267 S.W.3d at 898.

Finding that Emmers knew his statement would expose him to criminal liability, we must now determine whether sufficient corroborating circumstances exist that clearly indicate the trustworthiness of the statement. The corroboration must be sufficiently convincing to clearly indicate the trustworthiness of the statement. *Dewberry,* 4 S.W.3d at 751. A trial court should consider the factors put forth in *Davis v. State*: (1) whether guilt of declarant is inconsistent with guilt of the defendant, (2) whether declarant was so situated that he might have committed the crime, (3) the timing of the declaration, (4) the spontaneity of the declaration, (5) the relationship between the declarant and the party to whom the statement is made, and (6) the existence of independent corroborative facts. *Id.* (citing *Davis v. State,* 872 S.W.2d 743, 749 (Tex. Crim. App. 1994)); *see Bingham v. State*, 987 S.W.2d 54, 58 (Tex. Crim. App. 1999).

The evidence at trial showed that Emmers's statement bore the necessary indicia of trustworthiness. First, Emmers's guilt of armed robbery is not inconsistent with Appellant's guilt. The evidence at trial indicates that Emmers and Appellant were accomplices in the robbery. Second, Emmers and Appellant were seen together both before and after the armed robbery, demonstrating that Emmers was situated so that he could have committed the instant offense. Third, Emmers made the incriminating statement immediately after the robbery and before he, Moore, or Appellant became suspects of the robbery. Fourth, the statement was unprompted by Moore or Appellant, and fifth, the statement was made to an accomplice but overheard by Michelle, Appellant's mother.

Additionally, the State developed independent corroborative facts, which verified the statement made by Emmers in the presence of Michelle. Along with cash, several DVDs were stolen from the 7-Eleven convenience store during the robbery. Emmers, Moore, and Appellant counted money in the presence of Michelle when they returned home from the robbery, and they also possessed several DVDs. The robbers wore masks during the commission of the robbery. A black mask was recovered from Appellant's house. We conclude that the preceding independent corroborative facts, plus evidence demonstrating the other *Davis* factors, indicate Emmers's statement was trustworthy under Rule 803(24). *See Davis*, 872 S.W.2d at 749. Therefore, the trial court did not abuse its discretion in overruling Appellant's hearsay objection because Emmers's statement was admissible under Rule 803(24).

Appellant next complains about Michelle's testimony concerning a statement that Appellant had made to her to the effect that Emmers "should have been hiding his face" when he attempted to redeem stolen lottery tickets that were taken in another robbery. Appellant made a timely hearsay objection to the prosecutor's question asking Michelle what Appellant had said. The prosecutor responded by asserting that the statement constituted the statement of a party-opponent and a statement against interest. The State argues on appeal that the statement did not constitute hearsay because it was an admission by a party-opponent. We agree.

Rule 801(e)(2) of the Texas Rules of Evidence provides that a statement is not hearsay if it is offered against a party and if it is a party's own statement. TEX. R. EVID. 801(e)(2)(A). Thus, a party's own statement, when offered against him, is not hearsay and is admissible. *Trevino v. State*, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999). The only requirements for admissibility of an admission of a party-opponent under Rule 801(e)(2)(A) is that the admission is the party's own statement

and that it is offered against him. *Id.* Unlike statements against interest, a party's admission need not be against the interests of the party when made in order to be admissible—the admission only needs to be offered as evidence against the party. *Id.* Appellant uttered the challenged statement, and it was offered by the State against Appellant, the State's opposing party. Accordingly, the statement qualified as an opposing party's statement and was not hearsay by definition.

The third statement challenged by Appellant was a statement made by Emmers after he was arrested. The prosecutor sought to introduce a statement that Emmers made during a recorded phone conversation between Emmers and his father while Emmers was in jail. Emmers said to his father: "[T]hey want me to give information. If I give information, Des and Q are going down with me."[1] Appellant objected to the statement as hearsay. The prosecutor responded that the statement that he sought to introduce constituted a prior consistent statement. On appeal, Appellant challenges the trial court's implicit determination that the statement constituted a prior consistent statement.

A prior statement may be admitted if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." TEX. R. EVID. 801(e)(1)(B). The rule gives substantive, non-hearsay status to prior consistent statements of a witness proffered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *Hammons v. State*, 239 S.W.3d 798, 804 (Tex. Crim. App. 2007). There are four requirements that must be met for prior consistent statements to be admissible: (1) the declarant must testify at trial and be subject to cross-examination;

[1]The record indicates that Appellant's family members called him "Des" and that they called his cousin "Q."

(2) the opponent must have made an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must have been made prior to the time that the supposed motive to falsify arose. *Id.*

During his cross-examination of Emmers, Appellant's trial counsel repeatedly asked if Emmers had previously stated that someone else was involved in the robbery other than Appellant. It appears from the questions posed that trial counsel was attempting to imply that Emmers's trial testimony implicating Appellant in the robbery was fabricated. Following this series of questions, the State sought to introduce the recorded phone conversation indicating that Emmers had implicated Appellant prior to trial.

Appellant asserts that the recorded phone conversation could not constitute a prior consistent statement because it was not made prior to Emmers's initial disavowal that Appellant was involved in the 7-Eleven robbery. Trial counsel's cross-examination indicated that Emmers's account of the robbery had changed numerous times and that it had changed as recently as one week prior to trial. A prior consistent statement, however, need not predate each alleged instance of fabrication or improper influence; it need only predate one alleged instance of fabrication or improper influence. *Dibello v. State*, 432 S.W.3d 913, 916 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) ("The rule requires merely that the witness' prior consistent statement be offered 'to rebut *an* express or implied charge against him of recent fabrication or improper influence or motive.'" (quoting *Dowthitt v. State*, 931 S.W.2d 244, 264 (Tex. Crim. App. 1996))). The phone conversation was recorded before the latest change in Emmers's account of the robbery that he gave at trial. Thus, the statement was consistent with

Emmers's testimony and was offered to rebut the implied charge that his trial testimony was fabricated or that he had an improper motive for his trial testimony. Accordingly, we conclude that the trial court did not abuse its discretion in overruling Appellant's hearsay objection to the recorded phone conversation.

We note that Appellant has advanced some additional arguments in his first issue that merit comment. In discussing the harm analysis, Appellant asserts that Emmers's accomplice testimony was insufficiently corroborated by inadmissible hearsay.[2] *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). In order to support a conviction based upon the testimony of an accomplice, there must be corroborating evidence that tends to connect the accused with the offense. *Id.*; *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). Once corroborated, testimony of an accomplice may be considered by the jury in the same manner as any other competent evidence. *See Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002). Because we conclude that the trial court did not err when it admitted the statements challenged by Appellant, we need not conduct the harm analysis requested by Appellant concerning the corroborative effect of the challenged statements on Emmers's testimony. TEX. R. APP. P. 44.2(b).

Additionally, Appellant suggests that the plea agreement that Emmers received requiring him to testify at Appellant's trial violated Appellant's due process rights and resulted in Appellant's unjust conviction and punishment. Appellant does not assert that the plea agreement was improper under our current interpretation of the law but, instead, attacks the constitutionality of admitting accomplice testimony against a defendant when the accomplice has agreed to testify as a condition of a

[2]Appellant has not cited any authority for the proposition that inadmissible hearsay cannot serve as corroboration for accomplice testimony.

plea agreement. Appellant urges that accomplice testimony often results in unjustly disproportionate sentences, violating a defendant's right to due process, and suggests that "[t]his risk may be mitigated by limiting the sentence of the implicated party to no more than that of the testifying principally culpable defendant."[3] Appellant has not cited, and we have not found, any authority to support his proposition that the admission of accomplice testimony violates a defendant's due process rights. We have, instead, found support for the proposition that such testimony is admissible. *See, e.g.*, *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987).

We conclude that the trial court did not abuse its discretion in overruling Appellant's hearsay objections. We overrule Appellant's first issue.

Trial Court's Response to Request from Jury

In his second issue, Appellant challenges the trial court's written response to a request from the jury to review a portion of the testimony offered at trial. He contends that the trial court's response was too long and that it "chilled" the jury's attempt to review evidence when it advised the jury that it might take the court reporter as long to look up the testimony as it had taken the attorneys to put on the testimony. The note from the jury stated as follows: "We request the testimony of the mother during the trial." The trial court's response to the jury note is as follows:

> You're instructed that the jury is not entitled to a general rereading of any witness's testimony. In that regard, you're instructed that our rules provide if the jury disagree as to the statement of any witness they may, upon applying to the Court, have read to them from the court reporter's notes that part of such witness's testimony on the point in dispute.
>
> You are charged that the jury is not entitled to have any testimony reread to them unless they first disagree or have a dispute with regard

[3]Under the terms of his plea agreement, Emmers received a sentence of imprisonment for a term of twenty-three years for the same robbery for which Appellant received a sentence of forty-five years.

> to testimony and it must be stated in writing that the jury have disagreed or are in dispute. And still the jury are not entitled to have any testimony reproduced unless they point out in writing the point or points upon . . . which they have disagreed and then the jury would be entitled only to have read to them the point or points upon which they disagreed and no other. If you are in dispute on any point or points of evidence, if you will so state in writing and point out the point or points so that they may be located in the evidence then the Court will have the court reporter read back only the testimony on the point or points in dispute as best as can be obtained from the record.
>
> In this connection you are further instructed that the court reporter will be required to read all the testimony of the witness involved in order to pick out the point or points upon which you state you have disputed, and it will take the court reporter as long to read the testimony as it did for the attorneys to put the testimony on. So in the event you ask that any testimony be read back, then you'd be patient and give the court reporter sufficient time to read the testimony which will be required of her and select the testimony on the point or points in dispute.

Article 36.28 of the Texas Code of Criminal Procedure provides that, "if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other." CRIM. PROC. art. 36.28 (West 2006). When the jury requests evidence during deliberations, the trial court must determine whether that request is in compliance with Article 36.28. *Robison v. State*, 888 S.W.2d 473, 480 (Tex. Crim. App. 1994) (citing *Iness v. State*, 606 S.W.2d 306, 314 (Tex. Crim. App. 1980)). We review the trial court's rulings on the jury's request to review testimony for an abuse of discretion. *Jones v. State*, 706 S.W.2d 664, 668 (Tex. Crim. App. 1986).

Appellant does not challenge the validity of the instructions contained in the trial court's response with respect to Article 36.28. In this regard, "[a] simple request

for testimony does not, by itself, reflect disagreement, implicit or express, and is not a proper request under [Article] 36.28." *Moore v. State*, 874 S.W.2d 671, 673 (Tex. Crim. App. 1994). Instead, Appellant challenges the length of the note and the portion informing the jury about the time that might be required to prepare the testimony for their review.

Appellant cites no authority, and we have found none, to suggest that the length of a trial court's response to a jury note could in and of itself be considered a comment on the case, or could be seen as chilling the jury's attempt to review testimony. We conclude that it was within the trial court's discretion to give this length of a response to the jury's request to review testimony. Appellant only objected to the trial court's instruction based upon its length. Accordingly, Appellant did not preserve error concerning his complaint to the portion advising the jury about the time that would possibly be required by the court reporter to prepare the disputed testimony for the jury's review. TEX. R. APP. P. 33.1. We overrule Appellant's second issue.

Challenge to Use of Juvenile Felony Adjudication
to Enhance Minimum Range of Punishment

In his third issue, Appellant challenges the use of his prior juvenile felony adjudication to enhance the applicable punishment range for his conviction for a first-degree felony. *See Thompson v. State*, 267 S.W.3d 514, 517 (Tex. App.—Austin 2008, pet. ref'd) (explaining how a juvenile felony adjudication can be used to enhance the minimum punishment range for a first-degree felony). He asserts that the trial court in the juvenile proceeding failed to admonish him that a juvenile plea could be used against him in a subsequent adult adjudication. Appellant contends that the prior juvenile felony adjudication deprived him of the right to have the jury

grant him community supervision because his minimum term of confinement was a term of fifteen years. *See id.*

At the punishment phase, the State offered into evidence various documents from the juvenile proceeding, including the stipulation of evidence, waiver of jury trial, judgment, waiver of appeal, and order of commitment. These documents indicate that Appellant was represented by counsel in the juvenile proceeding and that he did not contest the State's allegation of delinquent conduct or the trial court's imposition of the sentence.

On appeal, Appellant is essentially making a collateral attack on his prior juvenile felony adjudication. A prior conviction used to enhance a subsequent offense may only be collaterally attacked on direct appeal of the subsequent conviction if the prior conviction is void. *Rhodes v. State*, 240 S.W.3d 882, 887 (Tex. Crim. App. 2007). When prior convictions are collaterally attacked, the judgments reflecting those prior convictions are presumed to be regular, and the accused bears the burden of overcoming that presumption by making an affirmative showing that error occurred. *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985) (op. on reh'g). The presumption of regularity applies to a collateral attack of a judgment of conviction for an offense committed as a juvenile when that judgment is used to prove an enhancement allegation. *Johnson v. State*, 725 S.W.2d 245, 247 (Tex. Crim. App. 1987).

Appellant contends that the trial court in the juvenile proceeding should have admonished him about the potential effect of his guilty plea on a subsequent criminal proceeding. However, Appellant did not provide the trial court or this court with a reporter's record from the juvenile proceeding. Furthermore, in *Green v. State*, the Court of Criminal Appeals held that a trial court does not have a duty to admonish a defendant that a guilty plea has the consequence of potentially enhancing his

punishment in a subsequent case. 491 S.W.2d 882, 883 (Tex. Crim. App. 1973). Thus, the fact that Appellant was, possibly, not warned by the trial court in the juvenile proceeding prior to entering a guilty plea that the adjudication might later be used for enhancement did not preclude the State from later using the adjudication for enhancement purposes. *Id.* We conclude that the trial court did not abuse its discretion by its implicit determination that Appellant's prior juvenile adjudication was not void. We overrule Appellant's third issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY

JUSTICE

January 28, 2016

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.