Opinion filed July 13, 2017

In The

Eleventh Court of Appeals

No. 11-16-00164-CR

TRAY DON GOSWICK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 132nd District Court
Scurry County, Texas
Trial Court Cause No. 10366

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

The jury convicted Tray Don Goswick of the offense of possession of a controlled substance in an amount of less than one gram.[1] At the punishment hearing, Appellant pleaded "true" to two enhancement allegations for two prior state jail felony convictions; the jury found those allegations to be "true" and assessed his punishment at confinement for ten years. The trial court then sentenced Appellant

[1]TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (West 2017).

accordingly. On appeal, Appellant asserts that the trial court erred when it failed to order a competency hearing and when it admitted testimony from rebuttal witnesses as well as the DVD of Appellant's postarrest conversation with police. We affirm.

I. *Evidence at Trial*

Joseph Warren, a certified peace officer, testified that he arrested Appellant for driving without a valid driver's license. While Officer Warren transported Appellant to jail, Appellant told Officer Warren that he had "dope" in his right watch pocket. Officer Warren retrieved a small black bag that contained a white crystal substance. Officer Warren field-tested the white crystal substance, and it tested positive for methamphetamine. The State also introduced testimony by John Keineth, a forensic scientist, who confirmed that the white crystal substance obtained from Appellant was 0.91 grams of methamphetamine.

During Officer Warren's testimony, the State introduced a DVD recording of Appellant's conversation with Officer Warren in the police vehicle, which included Appellant's statement that he had "dope" in his watch pocket. Defense counsel objected to the entry of the entire DVD, specifically Appellant's "rant" after his "confession of having dope" because the evidence was "prejudicial." The trial court overruled this objection and explained that a prejudicial statement alone does not make the evidence inadmissible.

A. Appellant testified on his own behalf.

At trial, Appellant testified that he thought the white crystal substance was bath salts, not methamphetamine. He explained that, when he referred to "dope," he meant bath salts. He said that he used bath salts to self-treat his attention deficit disorder because bath salts had the same effect as methamphetamine. During cross-examination, Appellant admitted that he had used several drugs during his life, including alcohol, methamphetamine, amphetamine, bath salts, heroin, molly, Ecstasy, and cocaine. Despite his prior use of controlled substances, including

methamphetamine, Appellant maintained that he did not know that he was in possession of methamphetamine.

B. Rebuttal testimony

To rebut Appellant's testimony, the State called two witnesses—Sergeant Randy Ford of the Snyder Police Department and Maggie Souder, a deputy with the Scurry County Sheriff's Department. Sergeant Ford testified that he saw the methamphetamine retrieved from Appellant. He also asserted that, based on his extensive encounters with methamphetamine and bath salts, an experienced drug user like Appellant would be able to tell the difference between the two substances. Bath salts are unlike methamphetamine in that bath salts are less expensive, more finely ground, and have a very distinct smell—differences that a drug user like Appellant would recognize. Although Appellant objected that this testimony called for "speculation," the trial court overruled the objection and indicated that "[t]hat's the very nature of a hypothetical [question]."

Deputy Souder testified that on April 26, 2016, approximately six months after Appellant's arrest for methamphetamine, she arrested Appellant on an outstanding warrant. Deputy Souder testified that Appellant told her that he had a pending felony case for possession of methamphetamine and that he was upset about that. Appellant also told Deputy Souder that there was a discrepancy in the amount of methamphetamine and that he had been charged with a lesser amount of "dope" or "meth" than he had possessed. Deputy Souder testified that Appellant said, "I want to know where the rest of my dope is." Appellant did not tell Deputy Souder that his pending possession case resulted because he was in possession of bath salts. Although Appellant objected to Deputy Souder's testimony for lack of notice, the trial court overruled the objection.

II. *Analysis*

On appeal, Appellant asserts in two issues that the trial court erred when it failed to order a competency evaluation and erred when it admitted testimony of rebuttal witnesses and the DVD of Appellant's postarrest conversation with Officer Warren.

A. Issue One: The trial court did not abuse its discretion when it declined to hold a competency hearing.

In his first issue, Appellant argues that the trial court should have conducted a competency hearing. We review a trial court's decision not to conduct a competency inquiry under an abuse of discretion standard. *Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009). Because the trial court has the ability to observe the defendant's mannerisms and behavior in person, it is in a "better position to determine whether [the defendant] was presently competent." *Id.* Therefore, the trial court abuses its discretion when it decides not to conduct a formal inquiry if that decision is arbitrary. *White v. State*, No. 11-13-00094-CR, 2015 WL 1470162, at *4 (Tex. App.—Eastland Mar. 26, 2015, pet. ref'd) (mem. op., not designated for publication). We do not substitute our judgment for that of the trial court; instead, we determine whether the trial court's decision was unreasonable. *Id.*

When we review the necessity of conducting a formal competency hearing, we begin with the notion that a defendant is presumed to be competent to stand trial. TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (West 2006). A defendant is incompetent if he does not have (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or (2) a rational as well as factual understanding of the proceedings against him. *Id.* art. 46B.003(a). A trial court must conduct a competency inquiry when there is any suggestion that the defendant is incompetent. *Id.* art. 46B.004(c-1) (West Supp. 2016). If, after an informal inquiry, the trial court determines that the defendant may be incompetent,

the trial court proceeds to the second step and orders that an expert examine the defendant's competency. *See id*. art. 46B.005(a).

Appellant asserts that the trial court erred when it did not proceed to the second step and order an expert evaluation of his competency. We disagree.

At a pretrial hearing, Appellant's trial counsel asked the trial court to have Appellant's competency evaluated by an expert. Defense counsel asserted that a competency hearing was warranted because Appellant had a history of suicide attempts, preferred to receive a higher sentence after a jury trial rather than enter into a plea agreement, and preferred to commit suicide rather than go to jail. The trial court inquired into Appellant's competency and asked if he understood the charges against him and their accompanying penalties, to which he responded, "Yes, sir." However, Appellant disagreed with the trial court's explanation of the enhancement paragraphs and, based on a conversation he had with his brother, a "narcotics agent," Appellant asserted that "[he] couldn't be enhanced like that." Appellant also disclosed that he had tried to commit suicide before and that he was not sure he was competent because he "[does not] see the law the same way [the trial court] does." When the trial court pointed out that, while his responses indicated an overall disagreement with the outcome of the charges, Appellant understood the charges, Appellant responded: "I'm not ignorant. I'm not ignorant by any means." When asked if he understood the proceedings, Appellant responded to the trial court, "I believe so." At the end of the pretrial hearing, the trial court found Appellant competent to stand trial.

The trial court conducted an informal inquiry into Appellant's competency. During that inquiry, Appellant demonstrated his understanding of the charges and the proceeding against him. Although Appellant disagreed with the trial court's application of the enhancement paragraphs, his responsiveness, research in "law books," and consultation with his brother demonstrated a clear understanding. Yet

the inquiry did not end there; the trial court further explained to Appellant that his responses indicated competency, even if they also showed his disagreement. Appellant, in this exchange, responded, "I'm not ignorant."

We also are not persuaded by Appellant's claims that his stated desire to commit suicide instead of receiving hospitalization, or to take a longer sentence at trial rather than plead out, indicated a clear lack of competency. Texas courts have consistently held that previous treatment for mental illness, depression, or suicide attempts does not per se establish incompetence. *See Moore v. State*, 999 S.W.2d 385, 395 (Tex. Crim. App. 1999); *Quick v. State*, No. 11-15-00179-CR, 2016 WL 6023892, at *2 (Tex. App.—Eastland Oct. 13, 2016, no pet.) (mem. op., not designated for publication); *Baker v. State*, No. 04-14-00676-CR, 2016 WL 1588278, at *3 (Tex. App.—San Antonio Apr. 20, 2016, pet. ref'd) (mem. op., not designated for publication); *Hobbs v. State*, 359 S.W.3d 919, 925 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Additionally, there is nothing in the record to suggest that the trial court failed to consider Appellant's arguments. The trial court, with the benefit of examining Appellant's mannerisms and behaviors, found him to be "obviously intelligent" and concluded that it was "extremely obvious" that Appellant was competent. *See Montoya*, 291 S.W.3d at 426. We decline to hold that the trial court's decision to not order a formal competency evaluation was arbitrary, and we overrule Appellant's first issue on appeal.

B. Issue Two: The trial court did not abuse its discretion when it admitted the testimony of two rebuttal witnesses and a DVD of Appellant's arrest.

In his second issue on appeal, Appellant asserts that the trial court erroneously admitted two sets of evidence. First, Appellant contends that the trial court erred when it admitted the testimony of two rebuttal witnesses, Sergeant Ford and Deputy Souder. Second, Appellant asserts that the trial court improperly admitted a DVD

of Appellant's conversation with Officer Warren. Appellant asserts that the rebuttal testimony and the DVD were inadmissible under Rule 404(b) of the Texas Rules of Evidence and were "unfairly prejudicial."

1. Objections not made at trial or complaints made on appeal that do not comport with objections made at trial are not preserved for review.

In order to preserve a complaint for appellate review, a party must present the trial court with a timely request, objection, or motion stating the specific grounds for the desired ruling if those grounds are not apparent from the context and must also obtain a ruling. TEX. R. APP. P. 33.1(a); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Failure to object when there was an opportunity to do so generally waives error. *Burt v. State*, 396 S.W.3d 574, 577–78 (Tex. Crim. App. 2013).

At trial, Appellant made only one objection to Sergeant Ford's testimony, which was that his testimony about drug packaging called for "speculation." And Appellant only objected to Deputy Souder's testimony because she was not on the witness list. At trial, Appellant did not object that Sergeant Ford's or Deputy Souder's testimony was inadmissible under Rule 404(b), nor did Appellant object on the basis that the testimony of these witnesses was unfairly prejudicial. Because Appellant did not advance these objections at trial, they are not preserved for review. TEX. R. APP. P. 33.1(a); *see Wilson*, 71 S.W.3d at 349; *Burt*, 396 S.W.3d at 577–78.

With respect to the DVD, Appellant objected at trial that it was "prejudicial," but he made no other objections to the DVD. On appeal, Appellant asserts that the DVD violated Rule 404(b) of the Texas Rules of Evidence and was "unfairly prejudicial." Again, Appellant did not preserve his Rule 404(b) complaint for appellate review because he did not object on this basis at trial and because his

complaint on appeal does not comport with the objection made at trial. TEX. R. APP. P. 33.1(a); *see Wilson*, 71 S.W.3d at 349; *Burt*, 396 S.W.3d at 577–78. The remaining complaint regarding the prejudicial nature of the DVD, which is essentially a complaint under Rule 403, was preserved for review.

2. The trial court should have had the State redact certain parts of the DVD of Appellant's conversation with Officer Warren.

The trial court overruled Appellant's objection to the DVD because, although the evidence was "prejudicial," that by itself did not render the evidence inadmissible. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Hignojos v. State*, No. 11-12-00358-CR, 2013 WL 3833209, at *2 (Tex. App.—Eastland July 18, 2013, no pet.) (mem. op., not designated for publication).

a. Rules Governing Admission of Evidence

"The general rule is that an accused may not be tried for being a criminal generally." *Graff v. State*, 65 S.W.3d 730, 738 (Tex. App.—Waco 2001, pet. ref'd) (citing *Couret v. State*, 792 S.W.2d 106, 107 (Tex. Crim. App. 1990); *Hankton v. State*, 23 S.W.3d 540, 545 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)). We note that evidence may be excluded when its probative value is substantially outweighed by its prejudicial effect. TEX. R. EVID. 403; *Massingill v. State*, No. 11-14-00289-CR, 2016 WL 5853180, at *1 (Tex. App.—Eastland Sept. 30, 2016, no pet.) (mem. op., not designated for publication). We additionally presume that the trial court engaged in the required balancing test when Rule 403 was implicitly invoked. *Vidaurri v. State*, No. 11-14-00291-CR, 2016 WL 6652785, at *3 (Tex. App.—Eastland Oct. 31, 2016, pet. ref'd) (mem. op., not designated for publication).

We further presume that relevant evidence will be more probative than prejudicial. *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002). However, evidence is unfairly prejudicial when it has the undue tendency to suggest an improper basis for reaching a decision. *Reese v. State*, 33 S.W.3d 238, 240 (Tex. Crim. App. 2000).

b. Appellant's "rant" included inadmissible evidence.

When the trial court reviews whether evidence should be excluded because it is unfairly prejudicial, it should consider a number of factors, including (1) the probative value of the evidence; (2) the potential that the evidence will impress the jury in an irrational, yet indelible, way; (3) the time needed to develop the evidence at trial; and (4) the proponent's need for the evidence. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005); *Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). In deciding whether the admission of evidence is error, these criteria are to be applied objectively on a case-by-case basis. *Williams v. State*, 116 S.W.3d 788, 792 (Tex. Crim. App. 2003); *see Montgomery v. State*, 810 S.W.2d 372, 390–92 (Tex. Crim. App. 1991).

The appellate court measures the trial court's ruling against the relevant criteria by which a Rule 403 decision is to be made. *Montgomery*, 810 S.W.2d at 392.

> The four relevant criteria as identified by the Court of Criminal Appeals are: (1) that the fact at issue was not seriously contested; (2) that the State had other convincing evidence to establish the issue; (3) that the probative value of the evidence was not particularly compelling; and (4) that the evidence was of such a nature that a limiting instruction would not likely have been effective.

Graff, 65 S.W.3d at 740 (citing *Reese*, 33 S.W.3d at 241; *Montgomery*, 810 S.W.2d at 392–93). "When the record demonstrates one or more of the relevant criteria reasonably creating a risk that the probative value of the tendered evidence is substantially outweighed by the danger of unfair prejudice, then we should conclude

that the trial court abused its discretion." *Id.* (citing *Reese*, 33 S.W.3d at 241; *Montgomery*, 810 S.W.2d at 393).

In this case, Appellant's trial counsel objected at trial to the admission of parts of the DVD where, after Appellant confessed to having dope, Appellant went into a "rant" because the "rant" was "prejudicial" to his case. On appeal, Appellant asserted that the complained-of evidence was an "extended 'rant'" where, in a "passion-fueled" statement, he "threatened to go on a crime spree when he was out." In the "rant," Appellant stated that he would start "taking" everything he "loved" or "want[ed]," "every f-----g thing." Appellant also mentioned that he had been imprisoned for four years. Appellant's counsel on appeal asserted that the "rant" or "passion-fueled" statement was unfairly prejudicial. The "rant," which included a statement about "taking" everything, is not relevant to the charge of possession of a controlled substance, and the State had no need for this evidence. Because this evidence tended to paint Appellant as a criminal generally in that he contemplated future theft or burglary was inadmissible, its prejudicial effect substantially outweighed the probative value of the evidence. The evidence had nothing to do with the contested issue of possession, which was seriously contested; the evidence was not compelling; and a limiting instruction may not have been useful. Therefore, the DVD should have been redacted. *See id.* at 741 (holding that evidence about how cold pills that could be used to make methamphetamine was substantially more prejudicial than probative). Having determined that the trial court should have had the DVD redacted, we now turn to the issue of harm.

c. Appellant suffered no harm as a result of the erroneous admission of evidence.

We analyze, under a Rule 44.2(b) harm analysis, any errors by the trial court when it admitted the evidence. *See Hernandez v. State*, 176 S.W.3d 821, 824–25 (Tex. Crim. App. 2005); *see also* TEX. R. APP. P. 44.2(b). In accordance with Rule

44.2(b), an error is reversible when it affects a defendant's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error has "a substantial and injurious effect or influence in determining the jury's verdict." *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). In evaluating the harm of an erroneous admission of evidence, a reviewing court considers everything in the record, including:

> [A]ny testimony or 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, the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire, and whether the State emphasized the error.

Rich v. State, 160 S.W.3d 575, 577–78 (Tex. Crim. App. 2005). We note that the erroneous admission of extraneous-offense evidence often weighs in favor of finding harm. "Extraneous-offense evidence is 'inherently prejudicial, tends to confuse the issues, and forces the accused to defend himself against charges not part of the present case against him.'" *Sims v. State*, 273 S.W.3d 291, 294–95 (Tex. Crim. App. 2008) (quoting *Pollard v. State*, 255 S.W.3d 184, 187–88 (Tex. App.—San Antonio 2008), *aff'd*, 277 S.W.3d 25 (Tex. Crim. App. 2009)). However, when reviewing the record as a whole, it is evident that an overwhelming number of factors indicate that the admission of Appellant's "rant" did not affect his substantial rights. The State alleged that Appellant possessed methamphetamine in an amount of less than one gram, and Appellant asserted that he thought the substance in his watch pocket was bath salt. Law enforcement explained that bath salts and methamphetamine look different and that Appellant, who admitted to the prior use of methamphetamine, would know the difference between the two. The substance that Appellant admitted that he had with him when he was arrested field-tested positive for methamphetamine, and subsequent lab tests confirmed that analysis. In addition,

Appellant admitted to Officer Warren that he had "dope" in his watch pocket, and he told Deputy Souder that he thought the State had alleged that he had possessed the wrong amount of methamphetamine. Appellant's "rant" did not implicate him in the possession of any controlled substance but was a future threat to start "taking" things.

During voir dire, the State never mentioned Appellant's statements but, instead, focused on the allegation that Appellant possessed methamphetamine, the State's burden of proof, the presumption of innocence, and the range of punishment. During his voir dire, defense counsel focused on the duties of law enforcement, Appellant's right to remain silent, the presumption of innocence, any bias or prejudice against Appellant, the elements of the crime, the meaning of "dope," experiences with those affected by drugs, the State's burden of proof, ways to assess a witness's credibility, and the range of punishment.

In its closing argument, the State argued that it had proved beyond a reasonable doubt that Appellant had intentionally or knowingly possessed methamphetamine. The State emphasized Officer Warren's, Sergeant Ford's, and Deputy Souder's testimony, as well as Appellant's knowledge as an experienced drug user, and encouraged the jury to watch the DVD. In his closing argument, defense counsel argued that Appellant did not know the substance was methamphetamine and mentioned that Appellant misspoke in his conversation with Deputy Souder. While the admission of the "rant" and the State's general mention of the DVD in closing argument weigh in favor of Appellant, the "rant" did not implicate Appellant in the crime; however, his admission that he had "dope" indicated that he knowingly or intentionally possessed methamphetamine.

After a review of the record, we hold that, although the trial court should have had the State redact the DVD, the erroneous admission of Appellant's "rant" or "passion-fueled" statement did not have a substantial or injurious effect on the jury's verdict and did not affect his substantial rights. We overrule Appellant's second issue on appeal.

III. *This Court's Ruling*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

July 13, 2017

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

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