AFFIRM; and Opinion Filed December 20, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00140-CR

BRANDEN TRENNELL WATSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1575625-M

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Boatright

A jury convicted Branden Trennell Watson of aggravated assault with a deadly weapon and assessed punishment at ten years in prison. Watson raises six issues on appeal. He contends he was harmed by an erroneous jury instruction and the State's improper closing argument. He contends the trial court erred by allowing certain evidence to be admitted over his objections. And he complains he received ineffective assistance of counsel. We affirm the trial court's judgment.

BACKGROUND

Watson and Quierra Forest (complainant) have two children together. The couple broke up in 2010; Forest and her children live with Forest's mother. Pamela Bookman also lives with Forest and her mother. On January 30, 2015, Watson and his girlfriend, Sharrion Willis, unexpectedly arrived at Forest's house to see Watson's children. Bookman and her baby were the only people

at home when Watson arrived. Bookman told Watson that Forest was at work and the children were at school, but Watson insisted he would wait. Bookman called Forest at work to tell her Watson was at their home and refused to leave. Bookman put the call on speaker, and Forest argued with Watson, telling him to leave her house. According to Bookman, Watson then pulled out a gun and started acting crazy. Forest left work to go home, calling 911 on the way. When Forest arrived home, a fight ensued between Forest, Watson and Willis—first inside the house and ultimately in the front yard. Bookman watched from the front door and testified that Willis had a knife and Watson had a gun. Willis and Watson physically assaulted Forest, pulling her hair and hitting her in the face and head. Forest testified that when they stopped hitting her, she saw Watson shoot a gun into the air, and she was afraid he was going to shoot her. Watson shot again, this time in Forest's direction. Bookman retreated into the house and locked the door. Forest ran into the garage to hide. Watson kicked in the front door of the house, retrieved the car keys he apparently dropped inside, and left the scene.

Watson was charged with aggravated assault by threatening Forest with imminent bodily injury and using or exhibiting a deadly weapon. The jury found Watson guilty and sentenced him to ten years in prison. This appeal followed.

DISCUSSION

A. Jury Charge

In his first issue, Watson contends the trial court erred by instructing the jury on the lesser offense of assault by causing bodily injury. We first determine whether error exists. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). If error exists, we then determine whether the error caused sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). When, as in this case, the defendant did not object to the error during trial, the error must be "fundamental" and requires reversal "only if it was so egregious and created such harm that the

defendant 'has not had a fair and impartial trial.'" *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). Egregious harm exists when the record shows that a defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013).

An offense is a lesser included offense if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (West 2006). In the indictment, Watson was charged with aggravated assault by intentionally and knowingly threatening Forest with imminent bodily injury, and using and exhibiting a firearm and a knife during the commission of the assault. The indictment did not charge Watson with assault by causing bodily injury. Watson argues, and the State concedes, that assault by causing bodily injury is not a lesser included offense of aggravated assault by threat. We agree. *Hall v. State*, 225 S.W.3d 524, 531 (Tex. Crim. App. 2007). Accordingly, the trial court erred by giving the jury an instruction on the lesser offense of assault by causing bodily injury.

When error occurs in the jury instruction for a claimed lesser included offense and the jury finds the defendant guilty of the greater offense, the verdict nullifies any possible harm from the defective instruction on the lesser offense. *Saunders v. State*, 913 S.W.2d 564, 569 (Tex. Crim. App. 1995). As the Texas Court of Criminal Appeals has observed, when a jury convicts a defendant of a greater offense, any "errors in the charge on the lesser included offense, for which the appellant was not convicted, could not so have misled the jury as to constitute fundamental error." *Clark v. State*, 717 S.W.2d 910, 918 (Tex. Crim. App. 1986). Here the error was in the instruction on the lesser offense of assault. We conclude Watson was not egregiously harmed and resolve his first issue against him.

B. Admissibility of Evidence

Watson's second, third, and fourth issues challenge the trial court rulings on admissibility of evidence during trial. We examine a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id*. at 83.

In his second issue, Watson complains that on three separate occasions the trial court erroneously admitted improper hearsay evidence in the form of prior consistent statements. Hearsay is a statement, other than one made by the declarant testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay statements are generally not admissible unless the statement falls within a recognized exception to the hearsay rule. TEX. R. EVID. 802. One such exception is the excited utterance, which is "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement" caused by the event or condition. TEX. R. EVID. 803(2). The exception is based on the assumption that the declarant is not, at the time of the statement, capable of the kind of reflection that would enable him to fabricate information. *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005). To determine whether a statement is an excited utterance, trial courts should determine "whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition" when the statement is made. *Id*. The court may consider factors such as the length of time between the occurrence and the statement, the nature of the declarant, whether the statement is made in response to a question, and whether the statement is self-serving. *Id*. at 187; *Zuiliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003).

Watson first complains that Officer McClenon, one of the investigating officers, was permitted to testify about statements made at the scene by Bookman. McClenon testified that when

she arrived at the house, Bookman seemed very scared. When the prosecutor asked whether there was any indication why Bookman was scared, defense counsel made a hearsay objection. The State responded that such testimony described the state of mind of the witness, and the court overruled Watson's objection. McClenon testified that Bookman acted like a scared person—shaking and terrified that Watson had come there, started an argument, and fired a gun. The prosecutor asked what Bookman told her; defense counsel objected to hearsay and was overruled. McClenon stated that Bookman told her essentially what Forest told her—that Watson started an argument, was acting erratically, and Bookman was scared of him.

Watson disputes that Bookman's statements were excited utterances, arguing there was no reason for Bookman to be upset "merely from witnessing conduct affecting another." But Bookman and her baby were alone in the house when Watson first arrived. Bookman testified that before Forest even arrived at the house, Watson was acting crazy—yelling, waiving the gun around, and going outside to shoot the gun in the air. Later, as Bookman watched from the front porch, Watson fired the gun toward the house. When Bookman retreated inside and locked the door, Watson kicked down the door and entered the house. The evidence established that when McClenon responded to Forest's 911 call, she found Bookman terrified, scared, and shaking. Although the record does not indicate what period of time elapsed between the altercation and Bookman's statement, a reasonable inference exists that 911 response time is fairly quick. Based on these facts, we cannot say that the trial court acted outside the zone of reasonable disagreement by admitting Bookman's hearsay statement that Watson had come to the house, started an argument, and fired a gun.

Watson next complains that Detective Will Vic's statement that he had "two credible witnesses, their story basically matched up" was improper bolstering of the credibility of the witnesses. "Bolstering" is evidence offered for the "sole purpose" of enhancing the credibility of

a witness or source of evidence without substantively contributing to relevance. *Rivas v. State*, 275 S.W.3d 880, 886 (Tex. Crim. App. 2009) (citing *Cohn v. State*, 849 S.W.2d 817, 819–20 (Tex. Crim. App. 1993)).

During Vic's testimony, the prosecutor asked how he moves forward with a case like this. Vic testified that he speaks with the complainant and the witnesses, gathers information, and then determines if there is probable cause that an offense did occur. When asked why he did not speak to Watson, Vic explained that he had two credible witnesses with consistent stories. Watson made the following objection to Vic's statement: "I object, bolstering the witness, Your Honor, invades the province of the jury trying to say that they are credible witnesses, Your Honor." After the trial court overruled Watson's bolstering objection, Vic testified without objection that based on what Forest and Bookman told him, he believed an offense had occurred.

On its face, the bolstering objection appears to implicate the restrictions of rule 608(a), which provides that opinion or reputation evidence should not be admitted to support a witness's character for truthfulness unless that witness's character for truthfulness has already been attacked by an opposing party. TEX. R. EVID. 608(a). And in his appellate brief, Watson argues the State improperly offered the opinion of Vic that Forest and Bookman were trustworthy. However, in context, Vic's statement was not made for the sole purpose of enhancing the credibility of Forest or Bookman. It was made to explain why he did not need to interview Watson at that point in the investigation.

Watson also argues this was improper hearsay evidence in the form of a prior consistent statement, thus implicating the restrictions of rule 613(c), which makes inadmissible any prior statement of a witness that is consistent with the witness's own testimony. TEX. R. EVID. 613(c). But Vic did not introduce prior consistent statements by Forest or Bookman. He merely stated they

were consistent with each other. The trial court did not abuse its discretion in overruling Watson's bolstering objection.

Finally, Watson complains that the recording of Forest's 911 call was hearsay and asserted facts that were not within Forest's personal knowledge. At trial, Forest testified that she called 911 several times on her drive home because she was nervous, scared, and shaking. The prosecutor offered one of the recordings, State's Exhibit No. 1, into evidence. Watson objected to the entire recording as hearsay and did not request that specific portions be excluded. Without soliciting a response from the State or stating the basis for its decision, the trial court overruled Watson's objection. When a recording contains both admissible and inadmissible evidence, the objecting party must specifically identify which portion of the recording is inadmissible. *Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009). A trial court does not abuse its discretion when it admits the exhibit in its entirety if the objecting party fails to segregate the admissible from the inadmissible. *Reyes v. State*, 314 S.W.3d 74, 78 (Tex. App.—San Antonio 2010, no pet.); *see also Sanchez v. State*, No. 05-14-00908-CR, 2015 WL 2400783, at *3 (Tex. App.—Dallas May 20, 2015, no pet.) (mem. op., not designated for publication) (trial court did not abuse its discretion in admitting entire 911 recording where appellant failed to specifically point out only the objectionable portion). Because it appears that at least some statements in the recording of Forest's 911 call were not hearsay or fall within exceptions to the hearsay rule, the trial court did not abuse its discretion by admitting the recording. Having concluded the trial court did not abuse its discretion in ruling on the hearsay and bolstering objections discussed in Watson's second issue, we overrule Watson's second issue.

In his third issue, Watson challenges the trial court's admission of Forest's testimony that he had previously assaulted her. Watson argues that Forest's testimony was inadmissible character or character trait evidence under evidence rule 404. However, Watson did not make this objection

to the trial court, and it is not preserved for our review. TEX. R. APP. P. 33.1. Watson also argues Forest's testimony was unfairly prejudicial under evidence rule 403. Rule 403 allows for the exclusion of otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403; *Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010). Rule 403 creates a presumption that relevant evidence will be more probative than prejudicial. *Hernandez v. State*, 390 S.W.3d 310, 323 (Tex. Crim. App. 2012). All evidence is prejudicial to one party or the other; thus, it is only when there is a clear disparity between the degree of prejudice and the probative value that rule 403 is applicable. *Id*. at 324. Once a rule 403 objection is asserted, the trial court must engage in the balancing test required by that rule. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). However, the trial court is not required to place the results of its balancing test on the record. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997). "Rather, a judge is presumed to engage in the required balancing test once Rule 403 is invoked," and the trial court's failure to conduct the balancing test on the record does not imply otherwise. *Id*. at 195–96.

Outside the presence of the jury, Forest testified that on a previous occasion when Watson came to see his children, they got into an argument, and Watson hit her in the stomach even though she was pregnant. Forest stated that whenever they argued, Watson got physical. The prosecutor argued this evidence should be admitted to give the jury a full understanding of the nature of the relationship between Watson and Forest so the jury would understand that the offense alleged in this case was not an isolated event. The prosecutor also argued it was offered to show Forest's state of mind as to what was going on that day and why she may have acted as she did. Watson objected that such evidence was unfairly prejudicial.

The trial court did not explain the basis for its ruling but the record reflects the judge entertained Watson's objection. The judge conducted a hearing outside the presence of the jury,

allowing the parties to examine Forest and to present argument regarding the admissibility of the evidence. At the conclusion of the hearing, the trial court ruled that the State could present evidence of the prior altercation between Watson and Forest. However, the trial court also ruled that Watson could present evidence of a fight between Forest and her brother that resulted in Forest's arrest. Under these circumstances, we cannot conclude that the court abused its discretion by allowing evidence showing the nature of the relationship between Watson and Forest. We overrule his third issue.

In his fourth issue, Watson contends the trial court erred by admitting two photographs of a handgun obtained from his Facebook page. He argues the authenticity proof was insufficient to exclude the possibility that someone else could have created or manipulated the Facebook page. To satisfy the requirement of authenticating an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. TEX. R. EVID. 901(a). "In a jury trial, it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims." *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015). The trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

Electronic evidence may be authenticated by direct testimony from a witness with personal knowledge. *Id*. Here, Bookman testified that: she and Watson were Facebook friends; Watson used the name of Tramell Watson as his FaceBook name; the FaceBook page in question belonged to Watson; the FaceBook profile photograph was Watson; and she had conversed with Watson on that Facebook page. She testified that on the day of the offense, her Facebook news feed showed that two photographs of a handgun had been posted to Watson's Facebook profile page. She stated that the gun in the FaceBook photographs (State's Exhibits 29 and 30) was the same gun she

observed at her home that day. She also confirmed that she told Vic about Watson's FaceBook page and the photographs of the gun.

Vic testified that Bookman told him she saw photographs of the gun used in the offense on Watson's FaceBook page. He described finding Watson's FaceBook page under the name of Tramell Watson, and he identified the FaceBook profile photograph (State's Exhibit 27) as Watson. Vic also identified the current profile photograph on Tramell Watson's Facebook page (State's Exhibit 26) as Watson. Vic testified that one of Watson's Facebook photographs showed a handgun, including the make, model, serial number and caliber. Vic was able to identify the gun as a .380 caliber, Thunder 380. He also confirmed that Detective Gonzalez had collected a .380 cartridge from the scene of the offense.

We conclude the State supplied facts sufficient to support a reasonable jury determination that the photographs of the handgun were authentic printouts from Watson's FaceBook page. The trial court did not abuse its discretion in admitting the evidence over Watson's objection to authentication. We overrule Watson's fourth issue.

C. Improper Jury Argument

In his fifth issue, Watson complains that the trial court erred by failing to instruct the jury to disregard the incorrect and improper argument made by the State concerning its proof of an imminent threat of bodily injury. Watson argues the indictment did not authorize the prosecutor's argument that Watson inflicted bodily injury and Forest felt pain. However, according to the record, Watson did not contemporaneously object to any of the prosecutor's statements about which he now complains.

A defendant's failure to object to a jury argument, or failure to pursue an adverse ruling to his objection to the jury argument, forfeits his right to complain about the jury argument on appeal. *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *Threadgill v. State*, 146 S.W.3d 654,

670 (Tex. Crim. App. 2004); *see also* TEX. R. APP. P. 33.1(a). Because Watson failed to object at trial, he forfeited his right to complain about improper jury argument on appeal. We overrule his fifth issue.

D. Ineffective Assistance of Counsel

In his sixth issue, Watson asserts that because his counsel failed to request a suspended sentence and community supervision, he was deprived of effective assistance of counsel at trial. To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984); *Villa v. State*, 417 S.W.3d 455, 462–63 (Tex. Crim. App. 2013). Appellant bears the burden of proving his claims by a preponderance of the evidence. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Review of counsel's representation is highly deferential; we presume that counsel's conduct fell within a wide range of reasonable representation. *Villa*, 417 S.W.3d at 463; *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). In order for an appellate court to find that counsel was ineffective, counsel's alleged deficiency must be affirmatively demonstrated in the record. *Lopez*, 343 S.W.3d at 142. Appellant must produce record evidence sufficient to overcome the presumption that, under the circumstances, the challenged action was sound trial strategy. *Strickland*, 466 U.S. at 689; *Villa*, 417 S.W.3d at 463.

Watson contends his trial counsel must have assumed that Watson would not be eligible for community supervision because of his state jail convictions. He argues counsel should not have made this assumption because "the legislature has not always used the term 'felony' to include state jail felonies." However, there is nothing in the record to support Watson's contention that his

counsel assumed he was not eligible for community supervision. Although Watson filed a motion for new trial, his motion did not raise the issue of ineffective assistance of counsel. There was no hearing on the motion for new trial, and it was overruled by operation of law. Consequently, there is no record of a hearing at which Watson's trial counsel was afforded the opportunity to explain the motivation or trial strategy behind his decision not to seek community supervision. Generally, a silent record that provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Brennan v. State*, 334 S.W.3d 64, 71 (Tex. App.—Dallas 2009, no pet.). Trial counsel should ordinarily be given an opportunity to explain his actions before being denounced as ineffective. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). Because the record fails to demonstrate trial counsel's alleged ineffectiveness for failing to seek community supervision, we conclude that Watson has not shown that trial counsel's performance fell below an objective standard of reasonableness. We overrule Watson's sixth issue.

CONCLUSION

Having overruled Watson's six issues on appeal, we affirm the trial court's judgment.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRANDEN TRENNELL WATSON, Appellant	On Appeal from the 194th Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1575625-M.
No. 05-16-00140-CR V.	Opinion delivered by Justice Boatright. Justices Lang-Miers and Brown
THE STATE OF TEXAS, Appellee	participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 20th day of December, 2017.