Affirmed and Opinion Filed March 23, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00229-CR

BRIAN EVAN WALKER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 065997

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

A jury convicted appellant Brian Evan Walker of two counts of assaulting a public servant. The trial court sentenced him to seven years' imprisonment but later ordered shock probation. Appellant argues in two points of error that the trial court erred by (i) admitting a 911 recording during trial and (ii) ordering shock probation. We conclude that any error in admitting the 911 recording was harmless and that we lack jurisdiction to review the shock probation order. Accordingly, we affirm.

I. BACKGROUND

Appellant was indicted for assaulting peace officers James Harris and Kaleb Edwards. He pled not guilty. The issue of guilt was tried before a jury.

At trial, Sherman police officer Edwards testified to the following facts: He was dispatched to assist in dealing with a disturbance. When he arrived at the scene, appellant was cursing loudly at another police officer. Appellant refused to stop cursing, so Edwards "placed him in custody for disorderly conduct language [sic]." Edwards and the other officer handcuffed appellant. When appellant refused to get inside a "patrol unit," the officers physically forced him into the vehicle. During that process, appellant kicked Edwards in the chest. The officers decided they also needed to put leg restraints on appellant. Appellant kicked detective Harris in the groin while the officers were applying the restraints.

Detective Harris testified that he arrived at the scene after Edwards did and that appellant kicked him while he was helping other officers put leg restraints on appellant.

The jury convicted appellant of both counts. He elected to be sentenced by the trial court. After hearing additional evidence, the trial court sentenced appellant to seven years' imprisonment and imposed a $250 fine.

Appellant filed a motion for imposition of community supervision, which the trial court denied.

Appellant timely appealed.

After appellant perfected this appeal, the trial court held a hearing and announced that it would, on its own motion, grant appellant shock probation. The judge signed an order changing appellant's sentence to seven years' imprisonment probated for ten years.

II. ANALYSIS

A. Point of Error One: Did the trial court commit reversible error by admitting the 911 recording?

Appellant's first point of error argues that the trial court should have excluded State's Exhibit 1, which was a recording of two 911 conversations that took place shortly before Edwards's and Harris's contact with appellant. Appellant argues specifically that the evidence

was not relevant, that it was inadmissible extraneous offense evidence, and that its prejudicial effect substantially outweighed its probative value. *See* TEX. R. EVID. 401–404. The State responds that Exhibit 1 was admissible as context evidence and that its prejudicial effect did not outweigh its probative value.

Appellant's brief does not discuss the 911 recording's contents, so it does not adequately apply the law to the facts. *See* TEX. R. APP. P. 38.1(i). Nevertheless, we will review appellant's complaint in the interest of justice. *See Jamison v. State*, No. 05-15-00086-CR, 2016 WL 1725489, at *3 (Tex. App.—Dallas Apr. 27, 2016, pet. ref'd) (mem. op., not designated for publication) (addressing inadequately briefed argument in the interest of justice).

Assuming without deciding that the trial court erred by admitting the 911 recording, we conclude that any error was harmless.

"The erroneous admission of an extraneous offense is nonconstitutional error." *Garcia v. State*, No. 05-07-00345-CR, 2008 WL 2469273, at *5 (Tex. App.—Dallas June 20, 2008, pet. dism'd, untimely filed) (not designated for publication). The error is harmless if the appellate court, after examining the record as a whole, has fair assurance that the error had no effect or only a slight effect on the jury. *Id.*; *see also* TEX. R. APP. P. 44.2(b). We may consider the nature of the evidence supporting the verdict, the character of the alleged error, how the evidence might be considered in connection with the other evidence in the case, and whether the State emphasized the error. *Garcia*, 2008 WL 2469273, at *5.

The 911 recording includes both a telephone call made to a 911 operator and that operator's return telephone call to the original caller. The caller was a woman (M.H.). M.H. told the operator that appellant had previously been arrested for stalking M.H. and that he was not supposed to come within 1,000 feet of M.H. as a bond condition. M.H. also said that appellant had followed her into a parking lot and blocked her car with his truck so that she could

not move. M.H. described appellant as getting out of his truck and approaching her car, and she said she was going to shoot him. M.H. then said that appellant was moving away from her car. M.H. referred to the "stalking case" again before the conversation ended.

Some facts mentioned in the 911 recording also came into evidence through Harris's testimony. Harris testified without objection that (i) he was the detective handling a case against appellant, (ii) appellant was arrested for stalking, and (iii) appellant had some bond conditions after he was arrested. Thus, some facts shown by the 911 recording were also shown by Harris's testimony. This tends to show that the recording's admission was harmless. *See Rivon v. State*, No. 05-10-01417-CR, 2012 WL 1130274, at *1 (Tex. App.—Dallas Apr. 5, 2012, pet. ref'd) (not designated for publication) ("It is well-established that 'erroneously admitting evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.'") (quoting *Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010)).

Moreover, the State introduced without objection a dashboard camera video of appellant's arrest. The audio component of that video, State's Exhibit 2R, contains appellant's own statements referring to bond conditions and a "thousand yard radius." It also contains statements by police officers at the scene referring to stalking and violating bond conditions. These references to stalking and bond conditions tend to show that any error in admitting the 911 recording was harmless. *See id.*

Additionally, the evidence of appellant's guilt was ample. As previously noted, Harris testified that appellant kicked him, and Edwards testified that appellant kicked both him and Harris. The State also introduced photographs of Edwards's shirt showing the dirt from appellant's shoe. Exhibit 2R's video component shows appellant resisting police officers' attempts to put him in a police vehicle and to place added restraints on him when he continued to

be belligerent. Although the video does not afford a clear view of the alleged assaults (because appellant was inside a different vehicle when they occurred), the officers' difficulty in restraining appellant is clear, and the audio contains the police officers' subsequent conversations about appellant's kicking the two officers.

Appellant testified in his own defense. He denied that he intended to kick either Edwards or Harris. But he admitted that he remembered kicking; he just did not remember "kicking anybody in specific." He said he did not remember kicking Edwards, and he further said, "I don't believe I kicked James Harris at all."

The State briefly mentioned the 911 recording during closing argument, but it did not specifically mention the parts about the stalking case or appellant's bond conditions.

In light of the foregoing, we conclude that any error in admitting the 911 recording had no effect or only a slight effect on the jury. *See Garcia*, 2008 WL 2469273, at *5. Accordingly, any error was harmless, and we overrule appellant's first point of error.

B. Point of Error Two: Did the trial court commit reversible error by imposing shock probation?

Appellant's second point of error argues that the trial court erred by ordering shock probation. However, we have no appellate jurisdiction to hear an appeal from an order imposing shock probation pursuant to Texas Code of Criminal Procedure article 42.12. *Shortt v. State*, No. 05-13-01639-CR, 2015 WL 2250152, at *2 (Tex. App.—Dallas May 12, 2015, pet. granted) (mem. op., not designated for publication). Appellant is attempting to appeal such an order.

We dismiss appellant's second point of error for lack of jurisdiction.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRIAN EVAN WALKER, Appellant

No. 05-16-00229-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 397th Judicial District Court, Grayson County, Texas
Trial Court Cause No. 065997.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

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

Judgment entered March 23, 2017.