In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00347-CR

FELIPE GOMEZ-RODRIGUEZ A/K/A
MANUEL PESINA-RODRIGUEZ A/K/A
DANNY E. NAVARETTE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 287th District Court
Parmer County, Texas
Trial Court No. 3402; Honorable Gordon H. Green, Presiding

September 13, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant, Felipe Gomez-Rodriguez, was convicted following a jury trial of knowingly delivering a controlled substance, methamphetamine, in an amount of four grams or more, but less than 200 grams and was sentenced to six years confinement.[1]

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2017) (an offense under this

In a single issue, Appellant asserts the trial court erred by permitting the State to impeach Appellant's testimony with evidence of recorded statements he made to law enforcement during questioning even though the trial court had previously found the recorded statements were inadmissible under *Miranda*.[2] We affirm.

BACKGROUND

In July 2014, an indictment issued alleging that on March 4, 2014, Appellant knowingly delivered to Joseph Luis Ortiz a controlled substance, namely methamphetamine, in an amount of four grams or more, but less than 200 grams. In June 2015, a two-day jury trial was held.

The State's evidence at trial established that in March 2014, the Department of Public Safety was conducting a drug investigation in Parmer and Deaf Smith Counties. Agent Gabriel Medrano recruited Ortiz as an informant to assist in the investigation. Ortiz had delivered methamphetamine to a DPS Special Agent, and in return for his cooperation, he had been promised favorable consideration by the prosecutors.

On March 4, Ortiz told Agent Medrano that he had set up a drug transaction with Appellant. DPS supplied Ortiz with $400 in cash in order to purchase methamphetamine from Appellant. The transaction was to occur in the alley behind Appellant's residence in Friona, Texas. DPS brought together several agents to act as a surveillance team and Ortiz was given a recording device.

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section is a felony of the first degree).

[2] *See Miranda v. Arizona*, 384 U.S. 436, 467-68, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

When the surveillance team was in place, Ortiz met Appellant in the alley. Ortiz gave Appellant the cash and Appellant gave Ortiz 6.87 grams of methamphetamine packaged in a clear plastic baggie. Ortiz drove his car out of the alley and immediately met with DPS further down the street. Appellant was subsequently arrested in August after DPS completed its overall investigation.

At trial, Appellant's primary defense was entrapment.[3] In support of his defensive theory, Appellant testified that on March 4, Ortiz approached him multiple times insisting that he sell him methamphetamine. Appellant refused his requests until he finally relented. After he returned home from work, he testified he met Ortiz and exchanged his personal stash of methamphetamine for the price he had paid for the drugs, $400. During cross-examination, the following exchange occurred, in pertinent part, between Appellant and the State as follows:

> STATE: You said that you never sold drugs to anybody. You never sold drugs to your cousin?
>
> APPELLANT: No, I never sold drugs.
>
> STATE: Do you remember telling law enforcement—
>
> APPELLANT: Your Honor I'm going to object under the subject of 38.22 objection I made earlier to the Court under—
>
> STATE: May we approach?
>
> COURT: You may.
>
> STATE: I'm using—the defendant gave statements to law enforcement that are contrary to what he talked about. And I've got authority that says

[3] Appellant's overall trial strategy was structured to support an entrapment defense. Further, Appellant received an entrapment instruction over the State's objection and his attorney argued an entrapment defense during closing arguments.

that I can use his statement, even though it doesn't comply with that provision of the Code of Criminal Procedure, for impeachment purposes.

* * *

COURT: The objection is overruled. You can ask the question.

* * *

STATE: Do you remember talking to law enforcement and telling them that you – that you only sold drugs to your cousin?

APPELLANT: I don't recall ever saying that.

STATE: Do you recall telling law enforcement that – you were asked if you sold 16's or 50's, and you told them that you only sold 20's?

DEFENSE COUNSEL: Your honor, I'm going to object. Again, it goes to the Court's previous ruling on my 38.22 objection, and the first question covered the Court's previous ruling, and I believe that the second one is only intended to prejudice my client's credibility with no basis whatsoever.

COURT: Do you have a – what you believe is a prior inconsistent statement?

STATE: Yes, Your Honor, I have a prior inconsistent statement.

COURT: The objection is overruled. The witness will answer the question.

STATE: Would he answer—does he—does he recall telling law enforcement that he sold them 20's?

APPELLANT: I do not recall because I was on drugs. I don't recall right now.

STATE: Do you recall telling law enforcement that you use more than you sell?

APPELLANT: Well, I would always use it all.

STATE: I'm just—

APPELLANT: I never sold to anyone.

STATE: I'm asking if he remembers telling law enforcement that.

APPELLANT: No.

After the State completed its cross-examination, defense counsel finished his redirect examination. During the State's recross-examination, the State sought to play the tape recording of Appellant's inconsistent statements to law enforcement prior to any *Miranda* warnings. Defense counsel objected that the statements were made without advising Appellant of his *Miranda* rights and objected under Rules 401, 402, and 403 of the Texas Rules of Evidence contending that any probative value of the extraneous offense testimony was more prejudicial than beneficial to the jury. The trial court overruled his objections and the proceedings continued, in pertinent part, as follows:

> STATE: Mr. Gomez, you have had an opportunity to listen to a recording of some statements you made, is that correct?
>
> APPELLANT: Yes.
>
> STATE: And the voice that is on the recording is yours—one of the voices on the recording is yours; is that correct?
>
> APPELLANT: Yes
>
> * * *

At that point the State sought permission to play a portion of the recording as a prior inconsistent statement. During the original recording of the tape a court interpreter translated Appellant's answers to the State's questions from Spanish to English. The tape included the following conversation:

> 1st VOICE ON TAPE: It was just for my habit.

* * *

1st VOICE ON TAPE: I sold to my cousin. It's only for my use. He only sells small amounts. He doesn't sell much.

2nd VOICE ON TAPE: What do you sell? Do you sell 16's or how much, or what?

1st VOICE ON TAPE: I only sell 20's. I don't have anything of—extra or excess.

Back on the record of the trial proceedings, the following exchange took place:

STATE: Was that you answering those questions?

APPELLANT: Yes, but they had me scared and they wanted me to say more. They were pressing me.

* * *

The tape continued:

2nd VOICE ON TAPE: How many times have you –- (inaudible).

1st VOICE ON TAPE: It's more than I use, than what I have to sell.

* * *

The trial record continued:

STATE: Was that your voice?

APPELLANT: Yes.

At the trial's conclusion, the jury convicted Appellant of knowingly delivering a controlled substance, methamphetamine, in an amount of four grams or more, but less than 200 grams and he was sentenced to six years confinement. This appeal followed.

Appellant asserts on appeal that the trial court erred by permitting the State to impeach his testimony with recorded statements he made to law enforcement before he

was *Mirandized* despite the fact that the trial court had previously ruled the statements inadmissible under *Miranda*. He also asserts that the probative value of the prior inconsistent statements was substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. We disagree.

STANDARD OF REVIEW

Because trial courts are in the best position to decide substantive admissibility questions, we review a trial court's decision to admit or exclude evidence for abuse of discretion. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009). *See Hernandez v. State*, 205 S.W.3d 555, 558 (Tex. App.—Amarillo 2006, pet. ref'd). We consider the ruling in light of what was before the trial court at the time of the ruling and uphold the ruling if it lies within the zone of reasonable disagreement. *Billodeau*, 277 S.W.3d at 39.

If the trial court abused its discretion, the evidentiary error is subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure and we must disregard any error unless it affects Appellant's substantive rights. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). *See also* TEX. R. APP. P. 42(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *See Thomas v. State,* 505 S.W.3d 916, 926 (Tex. Crim. App. 2016) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)).

PRIOR INCONSISTENT STATEMENTS

Appellant made the decision to testify in his own defense and one of the factors he had to consider in making that decision was the fact that he would be subject to cross-examination. During the State's cross-examination, he testified that "[he] never sold drugs," and more specifically, he did not recall telling police officers that he "sold only 20's." The State sought to impeach this testimony with prior inconsistent statements given to police officers before he was *Mirandized,* such as, "I sold to my cousin[]" and "I only sell 20's."

The United States Supreme Court has held that while "statements taken in violation of . . . *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant." *Michigan v. Harvey*, 494 U.S. 344, 350-51, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990) (citing *Harris v. New York,* 401 U.S. 222, 223-26, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)); *Oregon v. Hass,* 420 U.S. 714, 722-24, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). "[W]here a criminal defendant takes the stand on his own behalf, prior inconsistent statements by him to the police may be used to impeach his testimony, even though the statements were obtained in violation of the defendant's *Miranda* rights and could not have been used by the State as direct evidence of guilt." *See Franklin v. State*, 606 S.W.2d 818, 825 (Tex. Crim. App. 1979).

We note there is not a question raised as to the voluntariness of Appellant's oral statements to law enforcement. The only question raised by Appellant was whether he had made a knowing and intelligent waiver of his *Miranda* rights. That is, Appellant did not knowingly, intelligently, and voluntarily waive any of the rights set out in the warning

in section 2(a) and section 3(a) of article 38.22, i.e., *Miranda* warnings. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2(a), 3(a)(2) (West Supp. 2016) (no oral statement made by an accused as a result of a custodial interrogation is admissible in a criminal proceeding unless prior to making the oral statement, the accused knowingly, intelligently, and voluntarily waived the rights set out in the warning in section 2(a) of article 38.22). Because Appellant's statements had a direct bearing on his credibility as a witness, they were properly used for impeachment as authorized by section 5 of article 38.22. *See Garrett v. State*, 682 S.W.2d 301, 306-07 (Tex. Crim. App. 1984). *See also* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 5 (West Supp. 2016).

The State introduced Appellant's recorded statements in direct response to his testimony that he never sold drugs to anyone. Although his prior inconsistent statements were made to law enforcement before he received any *Miranda* warnings, the statements were nonetheless admissible for impeachment purposes. *See Franklin*, 606 S.W.2d at 825; *Garrett*, 682 S.W.2d at 306-07. Accordingly, this portion of Appellant's issue is overruled.

RULE 403 OF THE TEXAS RULES OF EVIDENCE

Any party may impeach a witness with a prior inconsistent statement. *See* TEX. R. EVID. 607, 613(a).[4] Under Rule 613(a), the prior statement must be inconsistent with the testimony the witness gives at trial. *Lopez v. State*, 86 S.W.3d 228, 230-31 (Tex. Crim. App. 2002).

[4] Throughout the remainder of this memorandum opinion, references to the Texas Rules of Evidence will simply be as "Rule ____."

Evidence admissible as impeachment under Rule 613(a), however, may be excluded under Rule 403 if its probative value is substantially outweighed by its prejudicial effect. *See Winegardner v. State*, 235 S.W.3d 787, 791 (Tex. Crim. App. 2007). Rule 403 "gives the trial court considerable latitude to assess the courtroom dynamics, to judge the tone and tenor of the witness' testimony and its impact upon the jury, and to conduct the necessary balancing." *Id.* When a party objects to the admission of evidence and asks the court to weigh the probative value against the potential for unfair prejudice, as here, "[c]ourts should balance the probative value of admitting the prior inconsistent statement for its legitimate impeachment purpose against the danger of unfair prejudice created by the jury misusing the statement for substantive purposes." *Id.*

To determine whether the probative value of the impeachment evidence is outweighed by the danger of undue prejudice, courts should balance the following factors: (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational yet indelible way, (3) the amount of time the proponent needed to develop the evidence, and (4) the proponent's need for this evidence to prove a fact of consequence. *Jenkins v. State*, 493 S.W.3d 583, 608 (Tex. Crim. App. 2016). When, as in this case, the record is silent as to the trial court's balancing of these factors, we presume the trial court conducted the balancing test. *Bargas v. State,* 252 S.W.3d 876, 893 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Williams v. State*, 958 S.W.2d 186, 195-96 (Tex. Crim. App. 1997)).

The first of the factors, the strength of the evidence to make a fact of consequence more or less probable, weighs strongly in favor of admissibility. The

State's extraneous-offense evidence was probative as to a critical issue, i.e., the Appellant's entrapment defense. *See Bargas*, 252 S.W.3d at 893. By his testimony, Appellant sought to establish that he was simply a user who was entrapped into selling to Ortiz, a cooperating informant, who was motivated by a promise of leniency. That Appellant had sold drugs prior to the offense in question made it *less probable* that Appellant was simply an entrapped user and not a dealer.

As to the second and third factors, the State spent minimal time developing Appellant's testimony and its presentation was neither lengthy nor detailed making it unlikely that the jury was impressed in some irrational or indelible way. Accordingly, these factors also weigh in favor of admissibility.

The fourth factor, requiring balancing the State's need for such extraneous-offense evidence, is significant. On direct examination, Appellant sought to establish that he was a user who sold his personal stash of methamphetamine to a co-worker. He testified that after repeated refusals, he finally relented and sold the drugs at no financial gain to himself. There was no other testimony or physical evidence with which the State could counter much of Appellant's testimony. As such, this factor weighs heavily in favor of admissibility.

In balancing the above factors in the instant case, the trial court's ruling that any unfair prejudice from Appellant's extraneous-offense testimony does not outweigh its probative value is within the zone of reasonable disagreement. *See Billodeau*, 277 S.W.3d at 39. Accordingly, we find that the trial court did not abuse its discretion by admitting the extraneous-offense evidence and we overrule Appellant's single issue.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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