IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1053-20

JUAN MACEDO, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

KELLER, P.J., delivered the opinion of the Court in which YEARY, NEWELL, KEEL, SLAUGHTER and MCCLURE, JJ, joined. HERVEY, RICHARDSON and WALKER, JJ., concurred.

At the punishment stage of Appellant's trial, a police report regarding an extraneous offense was admitted into evidence over a hearsay objection. Although the judgment convicting Appellant of that extraneous offense was also admitted into evidence, the police report is the only item of evidence that includes details of the offense. Nevertheless, in light of the evidence of the offense and the severity of the other punishment evidence, we conclude that any error in admitting the police report was harmless. Consequently, we reverse the judgment of the court of appeals.

I. BACKGROUND

A. Trial

Evidence at the guilt stage of trial showed that Appellant brought the dead body of his wife, Maria Alvarado, to a hospital. She had been shot in the head. Appellant gave two inconsistent accounts of his wife's injury. He first claimed that she was the victim of a random shooting, and then he later claimed that she shot herself. Other evidence, however, showed convincingly that Appellant shot her.

Also at the guilt stage, Maria's father, Armando, testified that appellant mistreated Maria. Armando further testified that he once found Maria crying and that she told him that Appellant had threatened her. Juan Jr., the son of Appellant and Maria, also testified at guilt. He said that Appellant always carried a gun, that his parents fought all the time, and that one time Appellant pulled Maria's head toward his own and pointed his gun at his own head and said they were both going to die. Juan testified that Appellant then kicked holes in the bedroom wall.

At the punishment stage, the State introduced a judgment of Appellant's guilty plea to a domestic violence offense in California. The State also introduced a police report for that offense over Appellant's hearsay objection. The police report indicated that the type of force used in the offense was "kicking" and "biting." The report also said that Appellant kicked the victim in the jaw and "bit her on the right eye area."

The State questioned Armando about the prior conviction. He testified that Appellant "beat her." Armando also testified to the void felt by Maria's children because of her absence.

Juan testified that Appellant was "really aggressive" with him and Maria and that Appellant would "just be mean all the time." When asked whether Appellant was ever "happy or nice" to him,

he said "no." He further testified that he was afraid of Appellant because he "was just very mean, and he would hit me for no reason all the time." When asked whether Appellant hit him with any objects, Juan responded that he used a horse whip. When asked how long or often that happened, he responded, "All the time." When asked if Appellant ever hit Maria, Juan replied, "Yes, a lot of times."

Juan recounted a particular incident when Appellant was driving the family home from a party. Appellant started elbowing Maria a lot, and she told him to stop. Then she said, "I'm going to leave you." Appellant responded, "If you're going to leave me – if you're going to leave me, I'm going to crash the car and we're all going to die."

Defense counsel's entire closing argument consisted of simply asking the jury to be fair. Among other things, the prosecutor asked the jury in closing argument, "What is important is how long do you force him to stay away from his kids? How long do you protect them from a horse whip?" The prosecutor also talked about the evidence of biting in the prior extraneous conviction:

> You can ask for the evidence to come back and you can read this. You can read these judgments. You can learn about the defendant biting Maria. Where does a person go in their mind to bite somebody? We teach children don't bite people. You should be worried about being bit by a dog, not by your husband. How vicious does somebody have to be to bite? How angry. You can look at this, and you should if you want to.

The prosecutor also talked about the testimony regarding the effect of Maria's absence on her children—about "the abyss that's been created" by her absence. And the prosecutor talked about Appellant putting a gun to his and Maria's heads, and that the prosecutor believed that Appellant never intended to kill himself. The prosecutor characterized Appellant's crying during trial as a show for the jury and pointed out that he lied consistently to the police about what happened.

B. Appeal

On appeal, Appellant contended that the police report with the details of the prior offense was erroneously admitted. The court of appeals first concluded that the issue was preserved,[1] then concluded that the police report was erroneously admitted because it was hearsay,[2] and finally concluded that the error was harmful.[3]

In its harm analysis, the court of appeals conceded that overwhelming evidence showed that Appellant killed his wife by placing a gun against her head and pulling the trigger, that Appellant lied about the incident more than once, that he had previously threatened to shoot his wife in front of their son, and that he had threatened to kill the entire family if Maria left him.[4] The court of appeals also said that Juan's testimony about the horse whip showed Appellant's vicious nature, and the court noted that the the jury heard ample evidence concerning the void left in the lives of the victim's family.[5]

But the court of appeals pointed to the State's argument about the biting and to the fact that the jury asked to see both the judgment and the police report for the prior conviction.[6] Even though the life sentence may have been "amply justified" given that the jury convicted Appellant of "murdering his wife by shooting her in the head at point-blank range," the appellate court felt it

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[1] *Macedo v. State*, 609 S.W.3d 342, 345-46 (Tex. App.-Houston [14th Dist.] 2020).

[2] *Id.* at 346-49.

[3] *Id.* at 349-51.

[4] *Id.* at 350.

[5] *Id.*

[6] *Id.*

could not say with fair assurance that the police report did not influence the jury or influenced the sentence only slightly, given that "the State emphasized it in closing and the jury asked to see it before returning a verdict for the maximum sentence."[7] Consequently the court of appeals reversed and remanded for a new punishment hearing.[8]

II. ANALYSIS

In one of its grounds for review, the State contends that any error was harmless.[9] We agree. Assuming for the sake of argument that the police report was inadmissible hearsay, its admission was non-constitutional error. Such an error must be disregarded if it "does not affect substantial rights."[10] An error does not affect substantial rights if the appellate court has "a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect."[11] In deciding that question, we consider: (1) the character of the alleged error and how it might be considered in connection with other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence supporting the verdict; and (4) whether the State emphasized the error.[12]

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[7] *Id.*

[8] *Id.* at 351.

[9] The State also argues that the rules of evidence do not apply to punishment proceedings except for Rule 403 and that Rule 403 was not violated here. We need not address this contention in light of our disposition of the issue of harm. Our conclusion as to harm also obviates the second point of error in the court of appeals, an ineffective assistance claim alleging that counsel failed to properly preserve error with regard to the police report.

[10] TEX. R. APP. P. 44.2(b).

[11] *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018).

[12] *Id.*

In light of all of the punishment evidence, the evidence that Appellant bit the victim one time was relatively insignificant. Appellant's son testified to suffering the harrowing experience of being beaten "all of the time" with a horse whip. He also testified that Appellant was violent towards Maria many times, and he testified to Appellant threatening Maria with a gun and to later threatening to kill the entire family. And even without the details of the extraneous offense, the jury would still have learned from the prior judgment that Appellant had a prior family violence conviction against his wife. Also, Appellant gave false stories about his wife's shooting—indicating that he had not accepted responsibility for what happened.

It is true that the prosecutor emphasized the evidence of biting and suggested that it showed that Appellant was particularly angry and vicious. But the prosecutor also emphasized the continuous use and ever present threat of the horse whip. Appellant's use of a horse whip against his son on a regular basis was far more probative of Appellant's anger and viciousness than the fact that he bit his wife once. It is also true that the jury asked for the two exhibits relating to the extraneous offense—the judgment and the police report. Nevertheless, even if the jury had not learned about the biting and kicking from the police report, it would have learned from the prior judgment that Appellant was convicted of a prior domestic violence incident against his wife. Without the details, the jury would have been left to imagine what happened during that offense, and given the horse-whip testimony and the prior threat with the gun, the jury could have imagined the extraneous offense to be even worse than it was. Under these circumstances, we have a fair assurance that the details of the offense in the police report did not influence the jury or had but slight effect.

We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Delivered: September 15, 2021

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