Opinion filed September 8, 2017

In The

Eleventh Court of Appeals

Nos. 11-14-00229-CR, 11-14-00230-CR, & 11-14-00231-CR

DAVEN ALEXANDER MALLARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court
Taylor County, Texas
Trial Court Cause Nos. 25423A, 25550A, & 25552A

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

These appeals arise from three convictions that occurred as a result of a single trial. In this court's Cause No. 11-14-00229-CR, the jury convicted Daven Alexander Mallard of possession of cocaine with intent to deliver. TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2017). In this court's Cause Nos. 11-14-00230-CR and 11-14-00231-CR, the jury convicted Appellant of burglary of a habitation. TEX. PENAL CODE ANN. § 30.02(a), (c)(2) (West 2011). Each conviction

was enhanced with a prior burglary conviction. The trial court assessed punishment on each conviction at confinement for twenty years, to run concurrently, in the Institutional Division of the Texas Department of Criminal Justice. We affirm.

Appellant challenges all three convictions in two issues on appeal. In his first issue, Appellant contends that the trial court erred in admitting hearsay testimony. In his second issue, Appellant contends that the trial court erred by admitting his cell phone into evidence when the chain of custody was not established.

Background Facts

Sergeant Jason Haak of the Abilene Police Department received information regarding burglaries at two houses in Taylor County occurring on the same day. One burglary took place at David Fuentes's house. The items stolen from Fuentes's home consisted of five or six electric guitars, a Vizio television, a Dell laptop, Dr. Dre Beats headphones, and an iPad.

Prior to police officers arriving on scene, Fuentes used the "Find My iPhone" application on his iPhone to locate the iPad. He discovered that it was located in the 1300 block of South Jefferson Street. Fuentes informed his brother of the burglary and told him where the iPad was located. Fuentes's brother went to that location and observed Appellant standing by a white Chevrolet Tahoe. He then saw Appellant remove a large flat-screen television from the vehicle.

The second burglary took place at John Martinez's house. Martinez testified that a flat-screen Zenith television was taken from his house. On the day of the burglary, Martinez's neighbor, Jim Starkey, saw a white Chevrolet Tahoe parked in front of Martinez's house and wrote down the license plate number. Starkey testified that there was a flat-screen television next to the vehicle and that Appellant was standing behind it.

The information gathered from both burglaries led police officers to a house located in the 1300 block of South Jefferson Street. Sergeant Haak and other officers

gathered at the Jefferson Street house and conducted a "knock and talk." Appellant answered the door and consented to the officers entering and searching the house. Officers conducted a search and discovered several of the stolen items, including the guitars, headphones, and television from Fuentes's house and the television from Martinez's house. The iPad was later found underneath a dumpster in the alley behind the Jefferson Street house.

Appellant informed the officers that he received the stolen televisions from someone who called him from a private number. Appellant consented to Officer Brandon Scott reading Appellant's text messages, and upon reading the messages, Officer Scott seized the cell phone as evidence. In addition to the stolen property, Sergeant Haak discovered a black piece of plastic that was tied in a knot containing crack cocaine. Following the search, the officers arrested Appellant.

Analysis

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

In his first issue, Appellant contends that the trial court erred in overruling his hearsay objection when it allowed Sergeant Haak to testify that Brittany Haynes and Appellant were a couple. The prosecutor asked Sergeant Haak if Haynes and Appellant were in a relationship. Appellant objected that the response would be hearsay because it was based on information provided to Sergeant Haak during his investigation. The trial court overruled the objection, and Sergeant Haak responded that Haynes and Appellant were a couple.

Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d); *Tienda v. State*, 479 S.W.3d 863, 874 (Tex. App.—Eastland 2015, no pet.). Hearsay

is inadmissible except as provided by statute or the Texas Rules of Evidence. TEX. R. EVID. 802; *Tienda*, 479 S.W.3d at 874. The State asserts that Sergeant Haak's testimony was not hearsay because it was not offered for the truth of the matter asserted but, rather, to identify the occupants at the Jefferson Street house.

Courts have recognized that a police officer may testify about out-of-court statements made to him as "information acted upon" in his investigation. *See Tienda*, 479 S.W.3d at 879 (citing *Sandoval v. State*, 409 S.W.3d 259, 281–82 (Tex. App.—Austin 2013, no pet.)). It is not a violation of the hearsay rule for a trial court to admit out-of-court statements that are offered to explain the reason that a defendant became a suspect in an investigation. *Id.*; *see Schaffer v. State*, 777 S.W.2d 111, 114–15 (Tex. Crim. App. 1989) (An officer should be allowed to testify as to the reasons for his behavior, his presence, and his conduct so that his involvement does not appear to have been simply by happenstance.). Out-of-court statements of this type are not inadmissible hearsay because they are not offered to prove the truth of the matter asserted but, rather, to explain how the defendant came to be a suspect. *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995).

Sergeant Haak's testimony that Haynes and Appellant "were a couple" occurred near the beginning of his testimony as he was identifying the people that were inside the house on South Jefferson. The testimony did not appear to be offered for the truth of the matter asserted but, rather, to establish that Haynes also lived at the Jefferson Street house and that she and Appellant shared the bedroom where the stolen items were found. Accordingly, we conclude that the trial court did not abuse its discretion in overruling Appellant's hearsay objection.

Further, even assuming that the trial court erred when it overruled Appellant's hearsay objection, such error was harmless. Error in the admission of hearsay evidence is nonconstitutional error and is, therefore, subject to a harm analysis under

Rule 44.2(b) of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 44.2(b); *see Campos v. State*, 317 S.W.3d 768, 779 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (the erroneous admission of a hearsay statement constitutes nonconstitutional error). When an appellate court applies Rule 44.2(b), it must disregard a nonconstitutional error unless the error affects the appellant's substantial rights. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). An appellate court should not overturn a criminal conviction for nonconstitutional error "if the appellate court, *after examining the record as a whole*, has fair assurance that the error did not influence the jury, or influenced the jury only slightly." *Id.* (quoting *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001)).

Haynes subsequently testified without objection that she and Appellant were dating and sharing a bedroom at the time of his arrest. Consequently, any alleged error in the admission of Sergeant Haak's statement was harmless because the same evidence was later admitted. The improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *Land v. State*, 291 S.W.3d 23, 28 (Tex. App.—Texarkana 2009, pet. ref'd). Accordingly, we overrule Appellant's first issue.

In his second issue, Appellant asserts that the trial court erred in admitting a cell phone into evidence because the cell phone presented at trial was not proven to be the one seized from Appellant. Appellant is essentially challenging the State's chain-of-custody evidence for the cell phone. An item of physical evidence offered at trial must be authenticated under Rule 901. *Gardner v. State*, 306 S.W.3d 274, 293 (Tex. Crim. App. 2009); *see* TEX. R. EVID. 901(a) ("[T]he proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").

Evidence should be admitted if the trial court finds that a reasonable juror could find that the evidence was authenticated. *Pondexter v. State*, 942 S.W.2d 577, 586 (Tex. Crim. App. 1996). Proof of the beginning and end of the chain of custody will support admission of an object barring any evidence of tampering or alteration. *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989). Without evidence of tampering, most questions concerning care and custody of an item go to the weight attached, not the admissibility, of the evidence. *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997). Once the proponent of evidence meets the threshold requirement of presenting testimony that the evidence is what the proponent says it is, the weight given the evidence and related testimony is within the province of the trier of fact. *See Davis v. State*, 992 S.W.2d 8, 10–11 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

Sergeant Haak identified the cell phone as Appellant's cell phone, but he stated that he did not take the cell phone into custody as evidence. Additionally, Sergeant Haak could not recall if he ever actually looked at the cell phone. Officer Scott testified that he seized Appellant's cell phone after determining that it was evidence but that he did not place it into the police evidence locker. However, Officer Scott stated that he spent some time looking at the text messages on the phone. Officer Scott identified the cell phone presented at trial as Appellant's phone and stated that he recognized the cell phone by the case that was on it. He also testified that the phone was a BlackBerry and that "you don't see BlackBerries very often anymore." Further, Officer D.D. Gray testified that he recognized the cell phone as the BlackBerry that he made a report on for Appellant's case.

We conclude that the trial court did not abuse its discretion in determining that the State satisfied the threshold question of admissibility by offering the above-mentioned testimony identifying the cell phone as the one seized from Appellant. Moreover, any alleged error in the trial court's admission of the cell phone was

harmless. A violation of the evidentiary rules that results in the erroneous admission of evidence is nonconstitutional error. *See Potier v. State*, 68 S.W.3d 657, 662–63 (Tex. Crim. App. 2002).

Overwhelming evidence of guilt is a factor to be considered under a Rule 44.2(b) analysis. *Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002). Proof of Appellant's guilt in this case was overwhelming. Starkey provided eyewitness testimony that Appellant's white Chevrolet Tahoe was parked in front of Martinez's house with a flat-screen television next to it. The same vehicle was parked outside of Appellant's residence. Fuentes provided testimony that he tracked his stolen iPad to Appellant's residence, and the stolen iPad was later located under a dumpster behind the residence. Furthermore, officers conducted a search of Appellant's residence and found many of the items stolen from both burglaries, as well as drugs. Accordingly, we have fair assurance that the admission of the cell phone into evidence could not have had a substantial or injurious effect or influence on the jury's verdict. *See Barshaw*, 342 S.W.3d at 93–94. We overrule Appellant's second issue.

This Court's Ruling

We affirm the judgments of the trial court.

JOHN M. BAILEY
JUSTICE

September 8, 2017

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

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