Opinion filed June 30, 2017

In The

Eleventh Court of Appeals

No. 11-15-00111-CR

RICKY GLEN WHITE, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court

Taylor County, Texas

Trial Court Cause No. 25557A

MEMORANDUM OPINION

The jury convicted Ricky Glen White, Jr. of murder, and the trial court assessed his punishment at confinement for forty years. *See* TEX. PENAL CODE ANN § 19.02(b)(1) (West 2011). Appellant presents two issues on appeal. We affirm.

In Appellant's first issue, he asserts that the trial court erred when it allowed a hearsay statement of Willie Anderson into evidence. In his second issue, Appellant

argues that the trial court erred when it allowed a "hearsay statement of Carol Richards" into evidence.

Appellant had lived with Anderson for about one month. On April 7, 2013, William Byrd Bryan III, Appellant's uncle, received a phone call from Appellant. Appellant threatened Bryan for telling Anderson that Anderson probably should not have Appellant around him because Appellant gets violent when he drinks and that Anderson was "going to wind up hurt." Bryan testified that Appellant's demeanor on the phone was "agitated and drunk." However, when Appellant called Bryan again around 10:00 p.m., Appellant had calmed down by that time. Bryan said that he could hear Anderson in the background telling Appellant to calm down. That same night, Appellant left a voice mail message on the phone of Bridget Lowes, who resided in Oklahoma City. Lowes testified that, on the message, it sounded "like somebody was being strangled to death or just gurgling in my phone." She heard Appellant yelling in the background, and he said, "Hey, listen to this, this is what I do to people," and "you f-----g die."

The next morning, Appellant called Bryan and told him that Appellant thought he had killed Anderson and that Anderson was not breathing. Appellant said that Anderson had pulled a knife and that they had fought. Bryan then went to Anderson's house to check on him and found him dead. Bryan called the police and his son, Jeremy Clay Bryan.

At the instruction of the Abilene Police Department, Jeremy made arrangements with Appellant to pick him up from an apartment complex. When Jeremy picked Appellant up, Appellant had blood on his hands and pants, and Appellant said that Anderson had pulled a knife on him while they were drunk and in an argument. Shortly after Jeremy picked up Appellant, the police pulled Jeremy over and arrested Appellant.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim App. 1991). We will reverse a trial court's ruling only if it is outside the "zone of reasonable disagreement." *Id.*

At trial, the State asked Bryan about Appellant's demeanor when Appellant called Bryan around 10:00 p.m. The Stated asked, "What do you mean by [Anderson] had calmed him down?" Bryan answered, "You could hear [Anderson] in the background, telling him to calm down." Defense counsel objected on hearsay grounds, but the objection was overruled. The State asked Bryan what he heard Anderson saying; Bryan stated, "Telling [Appellant] to calm down." Defense counsel objected again on hearsay grounds, but the objection was also overruled.

Appellant argues that Bryan's statements at trial were hearsay and that there is no exception to the hearsay rule that would have allowed the statements into evidence. The State argues that the statement was not hearsay, but in the alternative, the State contends that it falls under the present-sense-impression exception to hearsay.

Although we do not necessarily agree that the statement is hearsay, we agree with the State that even if it is hearsay, the statement falls under the present-sense-impression exception to hearsay. 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). A statement falls under the present-sense-impression exception to hearsay if it "describ[es] or explain[s] an event or condition, made while or immediately after the declarant perceived it." TEX. R. EVID. 803(1). The rationale for this exception stems from the statement's contemporaneity, not its spontaneity. *Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 1992). Here, Bryan, the declarant, observed the event as it was happening; Bryan was on the

phone with Appellant when he heard Anderson in the background telling Appellant to calm down. Accordingly, the present sense exception applies. We hold that the trial court did not abuse its discretion. Appellant's first issue is overruled.

In his second issue, Appellant argues that the trial court erred when it allowed Carol Richards's statement—that Anderson was the peaceful person in this group—to be read into evidence over the objection of defense counsel. Appellant contends that the statement was hearsay.

At trial, Detective Joel Harris read into the record a written statement given by Carol Richards, a friend of Anderson. At the direction of Detective Harris, Detective Eric Vickers interviewed and took a statement from Richards. Richards had passed away prior to trial, and the State and the defense agreed to admit her written statement into the record. Richards stated that, on the night Anderson died, she received a call from Anderson, and that he invited her to his home for a steak and a baked potato. Appellant and Anderson were both there and "seemed very happy." After Richards had gone home and had gone to sleep, she heard Anderson knocking on her door. He was very drunk and said that he was going to "take his house back" and "kick [Appellant] out." Richards said that Anderson "was a gentleman and would never hurt anyone." The State later asked Detective Harris who Richards said "was the peaceful one." Appellant objected on hearsay grounds, but the objection was overruled.

Appellant argues that the statement that Anderson "was the peaceful one" was not in Richards's statement that was read into evidence and that, therefore, it had to be hearsay. The State argues that the State was merely paraphrasing from Richards's statement and that it is clear in context that Detective Harris was referring to what was said in her statement. We again note that the State and Appellant agreed to the admissibility of Richards's statement. The State contends that, even if the statement

was hearsay and erroneously admitted, any error was harmless. We agree with the State.

If a trial court commits error when it erroneously admits hearsay evidence, the error is nonconstitutional. *Render v. State*, 347 S.W.3d 905, 920 (Tex. App.—Eastland 2011, pet. ref'd). We must disregard a nonconstitutional error if it does not affect substantial rights. "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Schmutz v. State*, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014). "[S]ubstantial rights are not affected by the erroneous admission of evidence 'if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'" *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001)). In assessing the likelihood that the jury's decision was adversely affected by the error, we must "consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." *Id.*

First, the statement that Anderson "was a gentleman and would never hurt anyone" is very similar to the testimony challenged by Appellant that Anderson "was the peaceful one." Second, the evidence admitted at trial against Appellant was extensive. That evidence included Lowes's testimony that, on a voice mail left on her phone by Appellant, it sounded "like somebody was being strangled to death or just gurgling in my phone" and that she heard Appellant in the background yelling, "Hey, listen to this, this is what I do to people," and "you f-----g die." Accordingly, when we review the record as a whole, any error in the admission of the testimony that Anderson "was the peaceful one" did not influence the jury or had but a slight

effect. Appellant's substantial rights were not affected by the admission of such testimony. Appellant's second issue is overruled.

We affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

June 30, 2017

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

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