Affirmed as modified; Opinion Filed December 28, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00552-CR

ELIAS MUNOZ GUTIERREZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F15-12656-L

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Evans

Elias Munoz Gutierrez appeals his conviction for aggravated assault with a deadly weapon. Appellant entered an open plea of guilty to a jury. The jury found appellant guilty and assessed punishment at life imprisonment and a $10,000 fine. Appellant contends that the trial court erred in admitting the translation of appellant's jail call. In a cross-issue, the State requests that we modify the judgment to include an affirmative finding of family violence. We modify the trial court's judgment to reflect an affirmative finding of family violence. As modified, we affirm the trial court's judgment.

BACKGROUND

On November 6, 2015, appellant shot his wife, Blanca Yolanda Gutierrez Nava. The evidence shows that Blanca and appellant had been married for thirty-two years and had three

daughters. Over the course of the marriage, appellant became increasingly possessive and controlling. They separated a few times but each time Blanca went back to appellant because he threatened to hurt members of her family if she did not return. Following the last separation, the situation got worse. Appellant threatened to kill Blanca if she left again, accused Blanca of having affairs with strangers, forced her to stop working and stop wearing makeup, and boarded up the house so she could not see outside. Blanca decided to leave appellant after a night in which appellant continuously insulted her, spit in her face, pulled her hair, and threatened to tie her up in front of her grandchildren. Blanca stayed with her sister, Marina, for the next two weeks. However, she continued to live in fear because she and her sister received constant phone calls and messages from appellant insulting them.

On the day appellant shot Blanca, she and her two sisters, her niece, her daughter-in-law, and three young children,[1] were eating in the apartment while two internet cable company employees were installing cable. Appellant suddenly appeared in the apartment demanding to see Blanca. Appellant then stood in front of Blanca, racked the gun he was holding and pointed it at her. When one of the cable installers attempted to call the police, appellant tried to shoot him, but the gun jammed. Appellant then shot Blanca in the chest and tried to shoot her again but the gun jammed once again. Appellant left the apartment briefly but soon returned with the gun again operational. Blanca's sister tried unsuccessfully to stop appellant. Appellant then pointed the gun at the other adults and small children in the room and went over to Blanca, who was lying on the floor, and shot her again in the chest and in the arm she was using to try to cover her face. Blanca was hospitalized for twelve days due to her injuries. She had two

[1] The three children at the apartment were Blanca's grandson and granddaughter, and her daughter-in-law's granddaughter. Two of the children were one year old, and the other child was three years old.

surgeries on her arm and has never recovered full movement in her arm, hand or fingers. The two bullets in Blanca's chest were never removed to avoid any further damage.

After appellant was arrested, he sent Blanca a letter essentially threatening to kill her after he got out of jail. Appellant stipulated to his three prior convictions for driving while intoxicated.

ANALYSIS

I. Admission of Translation of Jail Call

In appellant's sole issue, he contends that the trial court erred in admitting the translation of appellant's jail call. The State argues that the issue was not preserved for appellate review because it does not comport with appellant's objection at trial. We agree with the State.

As an appellate court, we generally review a trial court's ruling or an objection to its refusal to rule. *See* TEX. R. APP. P. 33.1(a)(2); *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004). "The two main purposes of requiring a specific objection are to inform the trial judge of the basis of the objection so that he has an opportunity to rule on it and to allow opposing counsel to remedy the error." *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). This is called preservation of error and "is a systemic requirement on appeal." *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009) (footnote omitted). To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context. *See* TEX. R. APP. P. 33.1(a)(1). We are not hyper-technical in examination of whether error was preserved, but a complaint on appeal must comport with the complaint made at trial. *See Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). If an issue has not been preserved for appeal, we should not address it. *Clark*, 365 S.W.3d at 339. This is because if an appellant fails to preserve a complaint nothing is presented for our review. *See Sterling v. State*,

800 S.W.2d 513, 521 (Tex. Crim. App. 1990) ("Generally, error must be presented at trial with a timely and specific objection, and any objection at trial which differs from the complaint on appeal preserves nothing for review.").

Investigator Claudia Marroquin testified that as part of her investigation of cases, prosecutors sometime ask her to download jail calls made by specific defendants. She also testified that State's Exhibit 109 was a jail call she pulled for appellant. When the State offered State's Exhibit 109 into evidence, appellant's counsel objected as follows:

> [APPELLANT'S COUNSEL]: Your Honor, we would object on the basis, under Texas Rules of Evidence, Rule 1009. The witness is not a certified translator. Specifically, under Rule 1009, I anticipate that the call in question is in Spanish and would call for some translation.
>
> [PROSECUTOR]: Your Honor, the Defense has Notice of Intent To Use A Certified Translation of Foreign Language Document, accompanied by an Affidavit, stating it's a true and accurate translation that was given to the Defense pursuant to Rule 1009. And the State has provided a specific translation of this jail call to Defense to use during trial.
>
> [APPELLANT'S COUNSEL]: Your Honor, I'm not quarreling – I'm not objecting to the fact that it was furnished to me. I'm just simply stating that the qualification that is necessary, pursuant to Rule 1009, is that the translation occur by someone who is certified to do so.
>
> And it's not been established that the documents that were produced to me were produced by a certified translator.
>
> [PROSECUTOR]: And they were. Because we gave her the Affidavit that a certified translator translated it, not this witness. And we're using the translation from the certified translator.
>
> THE COURT: Let me see the document in question.
>
> [PROSECUTOR]: And, further, under that Rule, the Defense waived any objection to it, because you have to do it ten days before trial.
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> [APPELLANT'S COUNSEL]: Your Honor, in terms of -- Your Honor, in response to that, I would argue that it's not waived. Because it wasn't an official -- the person who is testifying to the jail call is not the person who did the translation.
>
> [PROSECUTOR]: She's not testifying to the translation. She's testifying to the jail call that's accompanying the translation, Your Honor.

THE COURT: All right. Objection's overruled. The document will be admitted.

[THE PROSECUTOR]: And, for the record, the certified translation is State's Exhibit 100.

Based upon the above exchange between the parties, counsel's objection at trial appears to be two-fold. Her first objection goes to the admission of the recording of the jail call through the testimony of the investigator and is based on the flawed assumption that the investigator was going to translate the recording of the jail call as it was being played for the jury.[2] Her second objection goes to the admission of the written translation of the jail call based on the fact that it had "not been established that the documents that were produced to me were produced by a certified translator." Appellant's complaint on appeal is that the trial court erred by admitting the translation because the certifications and notarizations accompanying the translation do not state the translation was "accurate" as required by Rule 1009. At trial, defense counsel never objected on this basis. Her only objections went to whether the person providing the translation was a certified translator, whether it be an oral translation by the testifying witness, or the written translation. Under these circumstances, we conclude that appellant's complaint on appeal was not preserved for appellate review because it does not comport with his objection at trial. We overrule appellant's issue.

II. Modification of Judgment

The judgment in this case shows that appellant was found guilty of aggravated assault and contains an affirmative deadly weapon finding. In a cross-issue on appeal, the State argues that the judgment should be modified to include an affirmative finding of family-violence.

[2] We base this conclusion on counsel's statement that "I anticipate that the call in question is in Spanish and would call for some translation;" her statement "I'm not objecting to the fact that it was furnished to me. I'm just simply stating that the qualification that is necessary, pursuant to Rule 1009, is that the translation occur by someone who is certified to do so;" and her later statement "the person who is testifying to the jail call is not the person who did the translation."

Article 42.013 of the Code of Criminal Procedure directs that if a trial court determines that an offense under title five of the penal code involved family violence, as defined by section 71.004 of the family code, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case. TEX. CODE CRIM. PROC. ANN. art. 42.013 (West 2006); *see also Butler v. State*, 189 S.W.3d 299, 302 (Tex. Crim. App. 2006) ("[T]he trial court is statutorily obligated to enter an affirmative finding of family violence in its judgment, if during the guilt phase of trial, the court determines that the offense involved family violence as defined by TEX. FAM. CODE § 71.004(1)."). Section 71.004(1) of the family code provides that "[f]amily violence" means "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault[.]" TEX. FAM. CODE ANN. § 71.004(1) (West Supp. 2017). Spouses and former spouses are "family" for the purposes of section 71.004. *See id.* § 71.003 (West 2014).

The indictment charged appellant with aggravated assault with a deadly weapon and that appellant "has had a dating relationship with the said complainant and the said defendant was a member of the complainant's family and household." Appellant plead guilty and judicially confessed to the offense as charged. In addition, Blanca testified that she had been married to appellant for thirty-two years and that at the time of trial, they were still married. Numerous other witnesses also testified that Blanca and appellant were married. The jury found appellant guilty of the offense, as charged in the indictment.

On this record, we conclude that the trial court was statutorily obligated to include an affirmative finding of family violence in its judgment. TEX. CODE CRIM. PROC. ANN. art. 42.013; *see also Butler*, 189 S.W.3d at 302. This Court has the power to modify a judgment to make the record speak the truth when we have the necessary information before us to do so.

TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993). Accordingly, we modify the trial court's judgment to reflect an affirmative finding of family violence. *See Thornton v. State*, No. 05-16-00565-CR, 2017 WL 1908629, at *8 (Tex. App.—Dallas May 9, 2017, pet. ref'd.) (mem. op., not designated for publication).

CONCLUSION

As modified, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ELIAS MUNOZ GUTIERREZ, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas
No. 05-16-00552-CR V.	Trial Court Cause No. F15-12656-L.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans, Justices Lang and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect an affirmative finding of family violence. As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 28th day of December, 2017.