Affirmed and Opinion Filed November 13, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00012-CR

MARCUS ANTUANE BRISCOE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-0740354-T

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Bridges

Appellant Marcus Antuane Briscoe pleaded guilty pursuant to a negotiated plea agreement to burglary of a habitation. Subsequently, appellant pleaded true to the State's motion to revoke community supervision based on his failure to report and repeated failed drug tests. The trial court adjudicated guilt and sentenced him to four years' imprisonment. In a single issue, appellant argues the trial court erred by admitting extraneous offense evidence without ruling whether it was proven beyond a reasonable doubt. We affirm.

During the revocation hearing, appellant admitted to the underlying burglary of a habitation offense and to repeated violations of his community supervision despite the State providing several past opportunities for appellant to abide by the terms of his community supervision prior to seeking revocation. After questioning appellant about the original offense,

the State asked, "But you also broke into 131; is that right?" Defense counsel objected, "He was never charged for that or ever pled to it." The trial court overruled the objection. At the conclusion of the hearing, the judge asked if there was any legal reason appellant should not be sentenced and defense counsel stated, "No legal reason, Judge." The trial court then revoked appellant's community supervision and sentenced him to four years' imprisonment.

Appellant argues the trial court erred by admitting extraneous offense evidence of another alleged burglary without ruling whether it was proven beyond a reasonable doubt. *See* TEX. CODE CRIM. PROC. ANN. art. 37.03 § 3(a)(1) (extraneous offenses must be proven beyond a reasonable doubt). The State responds appellant failed to preserve his complaint, or alternatively, error, if any, was harmless.

Error preservation does not involve a hyper-technical use of words or phrases but the complaining party must "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Pena v. State*, 285 S.W.3d 459, 463 (Tex. Crim. App. 2009); *see* TEX. R. APP. P. 33.1. Thus, the complaining party bears the responsibility of clearly conveying to the trial judge the particular complaint, including the precise and proper application of the law as well as the underlying rationale. *Id*. Appellant's objection that he was never charged with or pleaded to the separate burglary offense did not put the trial court on notice that he was challenging the State's failure to prove, and the trial court's failure to find, an extraneous offense beyond a reasonable doubt pursuant to article 37.03, section 3(a)(1). Because appellant's trial objection does not comport with his argument on appeal, his argument is waived. TEX. R. APP. P. 33.1; *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

However, even if we concluded appellant preserved his issue, error, if any, was harmless. We review a trial court's decision to admit or exclude extraneous offense evidence under an

abuse of discretion standard. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). As long as the trial court's ruling is within the "zone of reasonable disagreement," the ruling will be upheld. *Id*.

The erroneous admission or exclusion of evidence is nonconstitutional error. *See, e.g.*, *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). It is not reversible error unless it affects a substantial right of the defendant. TEX. R. APP. P. 44.2(b); *Solomon*, 49 S.W.3d at 365. A substantial right is affected when the error has a substantial and injurious effect or influence in determining the verdict. *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). Conversely, a substantial right is not affected if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the verdict or had but a slight effect. *Gray v. State*, 233 S.W.3d 295, 299 (Tex. Crim. App. 2007).

Appellant relies on *Delaney v. State*, an unpublished opinion, to support his argument. *See Delaney v. State*, No. 12-07-00035-CR, 2008 WL 2571715, at *5 (Tex. App.—Tyler June 30, 2008, pet. ref'd) (mem. op., not designated for publication). In that case, Delaney pleaded guilty to aggravated robbery and the trial court placed him on deferred adjudication community supervision for ten years. *Id*. at *1. The State later filed an application to proceed to final adjudication for violating certain community supervision terms. *Id*. During punishment, the trial court stated that although "[i]t's not a basis for revocation," appellant was "under investigation for murder." *Id*. at *3. Over defense objection, the State then presented eleven witnesses and thirty-seven exhibits, which covered 248 pages of the record regarding the investigation into the murder. *Id*. Defense counsel argued at the conclusion of the hearing that the State did not prove beyond a reasonable doubt that defendant was guilty of the extraneous offense. *Id*. at *4. The trial court adjudicated guilt and sentenced defendant to a life sentence. *Id*.

On appeal, the Tyler court concluded that, after reviewing the entire record, Delaney was harmed by the admission of the extraneous offense because the evidence at punishment related solely to the murder without any evidence affirmatively connecting him to it. *Id*. at *5. The State strongly emphasized the murder during closing argument rather than the underlying aggravated robbery offense, and the trial court did, in fact, sentence Delaney to life imprisonment even though it originally stated investigation for murder was not a ground for revocation. *Id*. Thus, the appellant court did not have "fair assurance that the erroneous admission of the evidence relating to [the] murder did not influence the trial court" in deciding punishment. *Id*. at *6.

The present facts are distinguishable from *Delaney*. The State asked two questions regarding other burglaries that allegedly occurred in the same area on the night of his offense. Appellant denied knowledge of any other burglary. The State did not offer any evidence regarding other offenses or emphasize the extraneous offenses during closing argument. Rather, the hearing focused on appellant's inability to comply with his conditions of community supervision despite repeated opportunities from the State. In fact, appellant acknowledged he had received "enormous amount of chances" and "slaps on the wrist do not work." Nothing in the record indicates the trial court considered the extraneous offenses in reaching its punishment determination. *See, e.g., Cook v. State*, No. 12-09-00201-CR, 2010 WL 5141777, at *6 (Tex. App.—Tyler Dec. 15, 2000, pet. ref'd) (mem. op., not designated for publication) (distinguishing *Delaney* because no indication trial court considered inadmissible evidence). After examining the record as a whole, we have fair assurance error, if any, did not influence the trial court's punishment determination. *Gray*, 233 S.W.3d at 299. Appellant's issue is overruled.

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARCUS ANTUANE BRISCOE,
Appellant

No. 05-17-00012-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-0740354-T.
Opinion delivered by Justice Bridges.
Justices Fillmore and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 13, 2017.