AFFIRM; and Opinion Filed May 14, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00431-CR
No. 05-17-00432-CR

ALLAN MCDOWELL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-11-59851-P, F-11-61628-P

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Lang-Miers

On November 2, 2011, appellant judicially confessed and entered an "open plea" of guilty to a charged offense of robbery.[1] The trial court deferred a finding of guilt and placed appellant on seven years' unadjudicated community supervision for this offense. In pronouncing sentence, the trial court admonished appellant to "report, take your meds, stay out of trouble and do what you're supposed to do" and, in exchange, the court would consider releasing appellant from community

[1] Cause No. 05-17-00431-CR/F-11-59851-P.

supervision early if he proved to be a good probationer. The following day appellant committed a second robbery.

Appellant was charged by indictment with this second robbery[2] and the State filed a motion to proceed to an adjudication of guilt on the first robbery. Appellant entered a plea of guilty to the second robbery charge as well as a plea of true to the motion to proceed to an adjudication of guilt. Following a hearing, the trial court found the allegations in the motion to proceed to an adjudication of guilt to be true and adjudicated appellant's guilt on the first robbery. The trial court also found appellant guilty on the second robbery. The trial court assessed punishment at 20 years' imprisonment for both offenses.

In his sole issue on appeal, appellant claims that the trial court erred by admitting a letter, written by the victim of the first robbery, into evidence because it contained inadmissible hearsay. We affirm.

Background

At trial, the State offered appellant's written and signed plea of true and stipulation of evidence to the allegations in the State's motion to proceed to an adjudication of guilt on the first robbery as well as appellant's written and signed judicial confession and stipulation of evidence to the second robbery allegation. The State asked the trial court to take judicial notice of the court's file and its contents on the first robbery. The trial court said that it had taken judicial notice of a "CATS[3] evaluation that was done in the probation case" and had "read the PSI."[4]

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[2] Cause No. 05-17-00432-CR/F-11-61628-P.

[3] CATS is a common abbreviation for a "Comprehensive Assessment and Treatment Services" evaluation.

[4] PSI is a common abbreviation for a "Presentence Investigation Report."

The State offered into evidence, as State's Exhibit 2, a letter written by the victim of the first robbery and indicated that it should already be a part of the trial court's file in that case. Appellant objected on grounds of "improper predicate and hearsay." The trial court overruled that objection, saying "I want to read it." The record indicates that the trial court reviewed the letter.

Prior to sentencing appellant, the trial court heard from appellant's mother. She testified that appellant had been diagnosed with bipolar disorder and schizophrenia; he had been put on medication at the age of fourteen. She also testified that appellant had been sexually abused at a young age. She stated that appellant heard voices which told him to do bad things; he did drugs to keep from hearing the voices. At one point, appellant had attempted to jump off a bridge "after he had got with some guys and they gave him some whack[5] to stop the voices." By the time of trial, she testified that appellant was HIV positive. Due to appellant's history of substance abuse, appellant's mother believed that if he was allowed back on the street without treatment, he would hurt another individual. She testified that he needed treatment in a "lock-down" facility so "he can't hurt anybody else." Appellant's mother knew that he had faced some criminal charges in Georgia for sexual battery for which he served a year on probation in that state.

Prior to hearing arguments, the trial court questioned appellant about his history of mental issues and drug abuse.

The trial court confirmed that appellant told the CATS department that he first saw a mental health professional as a juvenile due to behavior issues and anger management problems. He had reported being hospitalized at the age of fourteen for aggression and anger issues. He had reported being diagnosed with bipolar disorder and schizophrenia and had been taking anti-depressant

[5] "Whack" is common slang for Phencyclidine, a/k/a PCP.

medication on and off since that time. Appellant reported that he had experienced violent rages beginning in August of 2010 and had been prescribed Zoloft and Risperidone. Appellant reported that he had been hospitalized for one day in July 2011 when the police transported him there after a suicide attempt while he was under the influence of PCP; he was transferred to another facility for inpatient dual diagnosis treatment.

After hearing arguments, the trial court asked appellant why, within 24 hours after being placed on probation for the first robbery, he committed the same crime again:

> THE COURT: Can you tell me why that when you got out, you went straight and did almost the same thing? I'd like to hear why you did that.
>
> THE DEFENDANT: I didn't have no treatment.
>
> THE COURT: Are you going to blame because you didn't have any treatment –
>
> THE DEFENDANT: I'm not equipped with the tools to –
>
> THE COURT: Let me ask you this: Did you know it was wrong?
>
> THE DEFENDANT: Yes, ma'am.

After assessing punishment at 20 years imprisonment in both cases, the trial court explained its sentence to appellant as follows:

> And the reason I read what I did to you, you're not a stupid man. You sat right there and you regurgitated all of your mental health problems and what all you were supposed to do and what meds you were on. You have chosen to – refuse not to help yourself, and when you don't help yourself, you put people in this community in fear of there (sic) lives, including children. This is not an aggravated sentence, so you probably won't even do ten years. But it is time for you to know that if you don't get your act together and know about your mental illness and do what you're suppose to do, you will end up next time getting a life sentence. I and numerous people have tried to help you and you have refused the help and I am not going to put anybody else in danger of you being out on the street.

Standard of Review

We review a trial court's decision to admit punishment evidence under an abuse of discretion standard. *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010); *Walters v. State*,

247 S.W.3d 204, 217 (Tex. Crim. App. 2007); *see also Davis v. State*, 68 S.W.3d 273, 283 (Tex. App.—Dallas 2002, pet. ref'd). The trial court abuses its discretion only when its decision lies "outside the zone of reasonable disagreement." *Walters*, 247 S.W.3d at 217.

Relevant Evidence

Trial courts have broad discretion to admit evidence the court deems relevant to punishment, including the circumstances of the offense for which a defendant is on trial. TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). Evidence is relevant if it has any tendency to make a fact more or less probable and the fact is of consequence in determining the action. TEX. R. EVID. 401. During the punishment phase of a trial, relevant evidence is that which assists the factfinder in determining the appropriate sentence to assess a particular defendant under the circumstances presented by the case. *Davis*, 68 S.W.3d at 282–83.

The Letter

The letter offered by the State into evidence and admitted by the trial court was written by the victim of appellant's first robbery, which occurred at a check cashing business. The letter detailed how appellant approached the victim, struck her in the chest with his elbow, and took both her wallet and the cash she had in her hand. The letter stated that she went to the police station, gave a written statement of the incident, and was informed as to the process and steps that would be taken in the case. She wrote that, in the immediate aftermath of the robbery, she had to remain calm and strong for her children, her cousin and her mother, all of whom had been with her at the time. It was only later, after she calmed her family that she was able to give in to her own emotions of fear and anger. She had awakened in the middle of the night "fighting and screaming" and had continued to do so "every night for almost two months."

The victim also described in the letter that, when she was still hurting two days later from the blow to her chest, she went to the emergency room where she was diagnosed with rib

contusions as a result of that blow. The pain made it hard for her to sleep, in addition to the nightmares she was having. She was given a prescription for pain medication, but the medication made it hard to be fully functional at her job. It took her a full ten days to recover and she still experienced intermittent pain in her chest.

At the time she wrote the letter, the victim was pursuing counseling avenues in the hope that it would alleviate some of her anxiety, nightmares and anger.

In this same letter, the victim described the effects the robbery had on her children. Her 16-year-old son had chased appellant out of the store. Once outside, her two other children, aged 12 and 15, as well as her 14-year-old cousin, joined the chase until the police arrived and subdued appellant. One of her children was unable to calm down until the police had advised him of the possible sentence for the robbery.

After the robbery, the children were afraid and crying. Her mother, who had also been with her at the time, was so upset her asthma started acting up. The children's father came to the house and stayed the night to help ensure that the children felt safe. At the time she wrote the letter, her children were still having nightmares and their behavior was affected:

> [M]y children won't allow me to leave home alone except to go to work, my daughter sleeps with a knife under her bed, my oldest sleeps in spurts as he wakes up through out the night to walk through the house at every little noise, and my middle son falls asleep right after school during the day so that he can stay up all night without nightmares and guard us.

Her mother and her cousin were also still experiencing issues related to the robbery.

Allegations on Appeal

Appellant argues that the trial court abused its discretion by admitting the letter into evidence. Appellant alleges the letter contained out-of-court statements that were offered to prove the truth of the statements therein and thus constituted inadmissible hearsay that did not fall within any recognized exception. TEX. R. EVID. 801(d), 802, 803. Appellant also argues that, because the

trial court assessed the maximum sentence in each case, there can be no assurance that the contents of the letter did not influence the verdict and admission of the letter was harmful.

The State does not dispute appellant's hearsay allegations. Instead, the State responds that the letter was properly admitted because the letter contained evidence concerning the circumstances of the offense and, as such, was relevant as to punishment and admissible. TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). The State also claims that the letter was admissible as victim-impact evidence under TEX. CODE CRIM. PROC. art. 56.03 (e).

We need not address the merits of these competing claims, however, because even if we agreed that the letter was inadmissible, we do not agree that the contents of the letter were so harmful as to mandate a reversal.

Error, if Any, is Harmless

The admission of inadmissible hearsay is non-constitutional error. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Non-constitutional error that does not affect an appellant's substantial rights is to be disregarded. TEX. R. APP. P. 44.2(b); *Garcia v. State*, 126 S.W.3d 921, 927–28 (Tex. Crim. App. 2004). An appellant's substantial rights are not affected by the erroneous admission of evidence if, after examining the record as a whole, we have fair assurance that the error did not influence the verdict or had only a slight influence on the verdict. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002); *see also Garcia*, 126 S.W.3d at 927–28; *Johnson*, 967 S.W.2d at 417. In making this determination, we consider the entire record, including the other evidence admitted in the case, the nature of the evidence supporting the factfinder's determination, the character of the alleged error and how it might be considered in connection with other evidence in the case, the State's theory, any defensive theories, closing arguments, and whether the State emphasized the error. *Motilla*, 78 S.W.3d at 355-56.

In assessing error due to improperly admitted evidence at the punishment phase of a trial, we must ask whether appellant received a longer sentence as a result of the erroneously admitted evidence. *Ivey v. State*, 250 S.W.3d 121, 126 (Tex. App.—Austin 2007), *aff'd,* 277 S.W.3d 43 (Tex. Crim. App. 2009) (affirming a conviction because the defendant had not demonstrated that he received a longer sentence or was harmed by the admission of improper testimony concerning the conditions of and his eligibility for probation); *Peterson v. State*, No. 05-12-01417-CR, 2013 WL 5776287, at *5 (Tex. App.—Dallas Oct. 24, 2013, no pet.) (not designated for publication) (concluding that a defendant was not harmed by the trial judge's refusal to rule on a hearsay objection and the admission of hearsay testimony because the objected-to evidence had only a slight effect on the punishment verdict).

After examining this record as a whole, we have fair assurance that the letter did not have a substantial and injurious effect in determining the trial court's punishment verdict or, if it did, that the influence was slight.

The evidence of appellant's violent nature was before the trial court in both judicial confessions wherein appellant confessed that he had caused bodily injury to his victims. Appellant confessed that he struck the victim of the first robbery with his arm and elbow and struck the victim of the second robbery with his fist. The trial court did not need any information from the letter to conclude that appellant had caused the victim of the first robbery bodily injury. The State did not rely on the contents of the letter at all in its arguments for a prison sentence as opposed to probation.[6] The trial court's remarks and questions indicate that it was focused on appellant's lack of responsibility with respect to managing his drug addiction and mental health issues as well as

[6] The State did, however, argue some of the facts of the second robbery: "[N]ot even 24 hours of getting out of jail, (he) goes and commits the exact same kind of crime, assault a woman who is trying to put her grandchild in the back of her car, to take her purse so he can go get more drugs."

the undisputed fact that, within 24 hours after being placed on probation for the first robbery, appellant committed a second robbery. The only possible mention that the trial court made of the letter was in the context of admonishing appellant on his need to manage his drug and mental health issues: "when you don't help yourself, you put people in this community in fear of there (sic) lives, including children." There is no indication that the trial court used the actual facts surrounding the first robbery to enhance its punishment decision. And, if the trial court did consider the letter, there is no evidence that it was an overriding factor in assessing punishment.

Consequently, we are unable to conclude that appellant received a longer sentence as a result to the contents of the letter. The length of the sentences assessed were due to appellant's disinclination to manage his drug addiction and mental issues, as well as his proven potential for recidivism. We conclude that the trial judge's admission of the letter, even if erroneous, was harmless.

Conclusion

We overrule appellant's sole issue and affirm.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ALLAN MCDOWELL, Appellant	On Appeal from the 203rd Judicial District Court, Dallas County, Texas
No. 05-17-00431-CR V.	Trial Court Cause No. F-1159851-P.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Stoddart participating.

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

Judgment entered this 14th day of May, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ALLAN MCDOWELL, Appellant	On Appeal from the 203rd Judicial District Court, Dallas County, Texas
No. 05-17-00432-CR V.	Trial Court Cause No. F-1161628-P.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Stoddart participating.

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

Judgment entered this 14th day of May, 2018.