AFFIRM; and Opinion Filed May 25, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00854-CR

JOSE LUIS RODRIGUEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1658717-R

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Boatright

A jury convicted Jose Luis Rodriguez of the felony offense of driving while intoxicated. The jury also found two punishment enhancement paragraphs to be true and assessed punishment at forty-five years' imprisonment. Rodriguez appeals, claiming that the district court erred in admitting a medical record that in his view contained inadmissible hearsay. We affirm.

Rodriguez crashed his car into a MetroPCS store and was transported to Baylor University Medical Center to treat his injuries. During the guilt-innocence phase of the trial, the State sought admission of its Exhibit 10, which consisted of Rodriguez's hospital records. The exhibit was accompanied by an affidavit that authenticated the exhibit as a record of regularly conducted activity, which can be an exception to the prohibition on the admission of hearsay evidence. TEX.

R. EVID. 803(6). Pertinent to this appeal, Exhibit 10 included a page with the following nurse's note:

> EMS states [patient] in driver seat upon arrival, unknown if restrained, no airbag deployment. [W]reck happened on residential street, minimal damage to vehicle. [Patient] not answering any questions but thinks he's in space. [R]efusing to put on C collar. [A] lot of glass shards in the car.

Rodriguez objected to the admission of this note on hearsay grounds. The district court overruled the objection, stating that "except [for] perhaps the glass inside the car, every one of those references have already been testified to by EMS personnel, who are supposedly the source of that material." This evidentiary ruling is the basis of Rodriguez's appeal.

We review a trial court's admission of evidence under an abuse of discretion standard, and we will not reverse if the court's ruling is within the "zone of reasonable disagreement." *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Rodriguez's objection was in substance a hearsay-within-hearsay objection. He cites *Garcia v. State*, which noted that statements received by a business "from a person who is outside the business and who has no business duty to report or to report accurately" are not covered by the business records exception to the hearsay rule. 126 S.W.3d 921, 926 (Tex. Crim. App. 2004). Such statements must independently qualify for admission under their own hearsay exception, even if the record in which they are contained is itself admissible under the business records exception. *Id.* at 926–27.

It is undisputed that the EMS paramedic referenced in the nurse's note was not employed by the hospital. The State urges that the paramedic was responsible for relaying trustworthy information to hospital staff, but it does not contend that this responsibility was a "business duty" that brought the paramedic's statements within the business records exception. The State instead argues that the paramedic's statements were admissible under Texas Rule of Evidence 803(4), which provides a hearsay exception for statements made for medical diagnosis or treatment. Other courts have interpreted this exception to be limited to statements made by the one actually seeking

medical treatment or care. *Field v. Trigg County Hosp., Inc.*, 386 F.3d 729, 735–36 (6th Cir. 2004). Such an interpretation of Texas's Rule 803(4) would render the exception inapplicable here. *See Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (concluding that it is appropriate to look to federal cases and commentary when interpreting Texas's Rule 803(4)). However, we need not decide this issue. Assuming, without deciding, that the paramedic's statements in Exhibit 10 were inadmissible hearsay, we conclude that their admission was harmless error. *Cf. Mendoza v. State*, 69 S.W.3d 628, 634 (Tex. App.—Corpus Christi 2002, pet. ref'd) (holding that admission of nurse's hearsay testimony regarding what physician told her about complainant's injuries was rendered harmless by admission of the same or similar evidence without objection).

A violation of the evidentiary rules that results in the erroneous admission of evidence is non-constitutional error. *Jones v. State*, 111 S.W.3d 600, 604 (Tex. App.—Dallas 2003, pet. ref'd). We disregard any non-constitutional error that does not affect a defendant's "'substantial rights.'" TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016). In this case, the admission of the nurse's note was not reversible error given that the same facts were proved by other properly admitted evidence, specifically, the testimony and business records of Dallas Fire & Rescue personnel. *Jones*, 111 S.W.3d at 604–05.

Ian Martin, a Dallas Fire & Rescue paramedic who was on the scene of Rodriguez's accident, recalled asking Rodriguez a series of questions designed to assess his neurological status. Rodriguez was unable to answer any of these questions, and Martin considered him to be "not oriented" at the time. Related to this point, the district court admitted without any objection State's Exhibit 9, which was a Dallas Fire & Rescue "run report." This report described Rodriguez's mental status as "Normal, Hallucination," which Martin clarified as meaning abnormal. The report

also referenced "Slurring Speech," which Martin explained meant "incomprehensible language . . . that we can't really decipher."

The State presented additional evidence that supported Rodriguez's guilt. Witnesses identified Rodriguez as the driver, and the State offered evidence showing that the car he was driving struck a 7-Eleven store and a minivan before crossing the street and crashing into a MetroPCS store. There was also evidence that Rodriguez smoked cigars containing phencyclidine (PCP) before the accident, and a blood sample drawn not long after the accident revealed that his blood contained PCP and sertraline, an anti-depressant. Heidi Christensen, a toxicology chemist with the Dallas County Southwestern Institute of Forensic Sciences, testified as an expert that the effects of PCP can include hallucinations, disorientation, slurred speech, and a slow reaction time. Dallas police also conducted field sobriety tests on Rodriguez following the accident that evidenced he was intoxicated. Examining the record as a whole we have "fair assurance" that the objected-to hearsay evidence "did not have a substantial *and* injurious effect or influence in determining the jury's verdict." *Garcia*, 126 S.W.3d at 927 (emphasis in original).

In arguing otherwise, Rodriguez contends that the objected-to evidence was harmful "bolstering" evidence, citing *Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993). "Bolstering" is "any evidence the *sole* purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing" to prove the existence of a relevant fact. *Id.* at 819–20. Rodriguez failed to make any "bolstering" objection at trial, much less ground such an objection in an applicable Rule of Evidence. His hearsay objection at trial did not preserve his bolstering complaint. *Dixon v. State*, 2 S.W.3d 263, 265 (Tex.Crim.App.1998). Moreover, the objected-to evidence corroborated Martin's testimony and State's Exhibit 9 and therefore was not "bolstering." *Cohn*, 849 S.W.2d at 820.

We overrule Rodriguez's sole issue and affirm the judgment of the district court.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSE LUIS RODRIGUEZ, Appellant	On Appeal from the 265th Judicial District Court, Dallas County, Texas
No. 05-17-00854-CR V.	Trial Court Cause No. F-1658717-R.
	Opinion delivered by Justice Boatright.
THE STATE OF TEXAS, Appellee	Justices Bridges and Brown participating.

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

Judgment entered this 25th day of May, 2018.