

Opinion issued June 30, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00978-CR

CHRISTOPHER SABONYA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1273850**

MEMORANDUM OPINION

Christopher Sabonya pleaded no contest to the second degree felony of aggravated assault causing serious bodily injury¹ without a plea bargain or an

¹ See TEX. PENAL CODE ANN. § 22.02(b) (West 2010).

agreed recommendation on punishment. The trial court ordered a pre-sentence investigation and, after receiving it, held a sentencing hearing. The trial court sentenced Sabonya to eight years' confinement. In his sole issue on appeal, Sabonya contends that the trial court erroneously considered three extraneous offenses contained in the pre-sentence investigation. We conclude that the error, if any, did not harm Sabonya. We therefore affirm.

Background

Sabonya worked with Matthew Staley at Montana's Saloon. Sabonya was a bouncer; Staley was the DJ. There was no history of problems between the two. One evening in July 2009, while they were both at work and intoxicated, Sabonya and a third employee began to argue. Staley grabbed Sabonya's shoulder from behind to break up the quarrel. Sabonya turned and punched Staley in the head, knocking him unconscious. Sabonya fled, but was arrested a few minutes later still on the bar's premises.

Sabonya testified he and the other employee were "horseplaying" and that when Staley grabbed his shoulder he instinctively turned and swung his fist. He explained that he ran because he panicked and, when he found out that Staley was the person whom he had struck, he attempted to return but was apprehended by police before he got back into the bar.

Staley was unconscious and taken by helicopter to the hospital. Sabonya's blow fractured Staley's skull and caused bleeding in the brain. Staley was in a coma for eight days and hospitalized for over a month. Staley had trouble walking, talking, and even breathing. Because of the extent of swelling in his brain, doctors removed a portion of his skull until the swelling receded. Staley bears large scars from his surgeries. He lost 60% hearing in one ear and 50% in the other. The left side of Staley's face is paralyzed so that he has difficulty talking and chewing. He also suffers from anger issues due to the brain injury and will require medication for the rest of his life. Staley has been unable to work and it is unclear whether he will ever be able to return to work.

Sabonya was charged with aggravated assault. He pleaded no contest without an agreed sentencing recommendation from the State. The trial court ordered the preparation of a pre-sentence investigation (PSI). The trial court reviewed the PSI and heard Sabonya's testimony before sentencing Sabonya to eight years' imprisonment.

Contents of the Pre-Sentence Investigation

In his sole point of error, Sabonya contends that the trial court erred by considering three of the extraneous offenses in the PSI because there was no basis for a rational belief that Sabonya was criminally responsible for those three extraneous offenses.

A trial court may consider extraneous offenses in a PSI report as long as there is some rational basis to infer that the defendant bears criminal responsibility, even if the level of confidence does not reach the beyond-a-reasonable-doubt standard. *Smith v. State*, 227 S.W.3d 753, 764 (Tex. Crim. App. 2007). The PSI contains reference to two assaults that occurred in 2008 in Texas and one charge of criminal mischief from 1994 in New Jersey. Concerning the two Texas assaults, the PSI notes that they were dismissed due to missing witnesses. The PSI nevertheless states the facts of the alleged assault without any indication of the source of the information. Concerning the New Jersey criminal mischief charge, the PSI notes that the disposition is “unavailable” and that Sabonya stated the charges were dismissed.

Assuming without deciding that the trial court improperly considered these three extraneous offenses,² we conclude that the error, if any, is harmless. A trial court’s error in the admission of evidence³ constitutes non-constitutional error. *Jackson v. State*, 314 S.W.3d 118, 130 (Tex. App.—Houston [1st Dist.] 2010, no

² The trial court judge read the PSI before Sabonya had a chance to review and object to its contents. Sabonya and the State agreed to redact the three offenses mentioned above. After learning the trial court had already reviewed the PSI, Sabonya objected. The trial court stated, “Okay. But the problem is I’ve already seen it.” Contrary to Sabonya’s argument, there is no indication that the trial court relied on these three extraneous offenses in determining Sabonya’s punishment.

³ We note that the PSI was not formally introduced into evidence. However, we may still review it on appeal as though it had been. *See Smith*, 227 S.W.3d at 757; *Amador v. State*, 221 S.W.3d 666, 674 (Tex. Crim. App. 2007).

pet.). Texas Rule of Appellate Procedure 44.2(b) states that an appellate court must disregard a non-constitutional error that does not affect the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *Jackson*, 314 S.W.3d at 130. The Court of Criminal Appeals has held that the erroneous admission of evidence does not affect substantial rights "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). In viewing the record as a whole, we may consider the evidence admitted against appellant, defensive theories, and argument. *Id.* We may also consider whether the State emphasized the erroneously admitted evidence. *See id.* at 356.

Sabonya's argument concerning harm, in its entirety, is as follows:

The trial judge made only one quick mention of the unusable information in the PSI report but his words were telling: ". . . the problem is I've already seen it . . ." Clearly the Court had internalized the redacted information and intended to consider it in formulating [Sabonya's] sentence. [Sabonya's] three previous dismissed assault charges, despite the absence of evidence to support them, plainly suggested [Sabonya] had an extensive history of violence and suggested the present case of Aggravated Assault was a part of a pattern of aggressive conduct. The trial court's insistence on considering [Sabonya's] three dismissed charges of assault plainly augmented the trial court's ultimate sentencing decision and therefore affected his substantial rights. Reversal is required.

(Record references omitted). However, this argument ignores the proper review for determining whether Sabonya's substantial rights were affected, which includes a review of the entire record.

Sabonya pleaded guilty to recklessly causing serious bodily injury. It is undisputed that Staley's injuries are extremely severe and permanent. The State, in questioning Sabonya and in argument to the court, made no mention of the three dismissed charges or any extraneous offenses. When the trial court pronounced sentence, it made no mention of any extraneous offenses at all. Instead the focus of the trial court's brief explanation before pronouncing sentence was the seriousness of Staley's injuries.

The PSI also contained references to other instances of assaultive conduct in addition to the three charges that Sabonya asserts should not have been considered. These include a 1994 assault "with theft," a 2000 misdemeanor assault with a deadly weapon, a 2000 assault with a deadly weapon, and a 2007 misdemeanor family violence assault with bodily injury.⁴ These other four instances of assaultive conduct by themselves could have, to use Sabonya's words, "suggested . . . an extensive history of violence" and presented "a pattern of aggressive conduct."

The punishment set by the trial court was far less than it could have been. The punishment range for this second degree felony was two to twenty years,⁵ an eighteen year range. The trial court assessed punishment at eight years, six years

⁴ The PSI also listed other extraneous offenses such as driving while intoxicated, criminal mischief (breaking into a truck), and injury to real property.

⁵ See TEX. PENAL CODE ANN. § 12.33(a) (West 2010).

more than the minimum but twelve years from the maximum. Given the record in this case, we cannot conclude that, even if the trial court considered the three extraneous offenses, Sabonya has shown that they affected his sentence. *See Davis v. State*, 315 S.W.3d 908, 918–19 (Tex. App.—Houston [14th Dist.] 2010, pet. granted) (holding defendant could not show harm from erroneous PSI content—i.e., that he received a longer sentence—when appellant convicted of violent crime and showed no remorse and jury assessed punishment at lower end of range), *rev'd on other grounds*, No. PD-1400-10, 2011 WL 1135373 (Tex. Crim. App. 2011).

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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