Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NOS. 01-18-00148-CR & 01-18-00149-CR

LAMAR CASTOR III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case Nos. 1526128 & 1526158

MEMORANDUM OPINION

Appellant, Lamar Castor III, was charged with the third-degree felony offense of evading arrest in a motor vehicle (cause number 1526128) and the first-degree felony offense of aggravated robbery by threat with a deadly weapon (cause number

1526158). After finding appellant guilty of the charged offenses, the jury assessed his punishment at five years' and thirty years' confinement, respectively, and the trial court ordered the sentences to run concurrently. In two points of error, appellant contends that the trial court abused its discretion by admitting extraneous offense evidence during the punishment phase of the trial because (1) the evidence was supported only by inadmissible hearsay, and (2) its admission violated his right to confrontation under the Sixth and Fourteenth Amendments. We affirm the judgment in cause number 1526128, but we reverse the judgment in cause number 1526158 and remand for a new punishment hearing only.

Background

Early in the morning of October 5, 2016, Nicholas Rout returned to his apartment complex after a late-night study session at the University of Houston. After he parked his car, a silver Dodge Caliber, outside of his apartment building, Rout began climbing the stairs to his third-floor apartment when he noticed a couple of people a short distance away.

Appellant, one of the two people, approached Rout, mumbling something. Rout stopped and appellant walked up to him and asked Rout if he knew what time it was. Rout told appellant that he did not know the exact time but guessed that it was between 1:30 and 2:00 a.m. Appellant replied that he needed to know the exact time, so Rout reached into his backpack for his cell phone. When Rout looked up,

he saw appellant pointing a semiautomatic pistol at him. The second person, later identified as Detorian Swain, walked up and demanded Rout's belongings. Rout gave the assailants his backpack, which contained Rout's laptop, wallet, and phone, but hesitated when Swain demanded Rout's car keys. Swain then told Rout, "[i]t doesn't have to be a murder" and ordered him again to hand over his keys. Rout complied and appellant told him to lay face down on the ground. Swain walked to Rout's car and started the ignition. Appellant began walking toward Rout's car, but when he saw Rout begin to get up, he returned, pointed his pistol at Rout, and ordered him to lay back down. Rout complied. The assailants got into Rout's vehicle and fled the scene.

Rout subsequently flagged down a passerby, borrowed his cell phone, and called the police at 1:46 a.m. to report the aggravated robbery. Rout provided a description of his car and a physical description of the robbers' appearances and clothing.

Later that morning, while on routine patrol, Houston Police Department (HPD) Sergeant Jeffrey Chapman was running license plates through his mobile computer system to check for stolen vehicles. At 3:27 a.m., Sergeant Chapman observed a silver Dodge Caliber, ran its plates, and learned that it was stolen. Sergeant Chapman confirmed with HPD dispatch that the vehicle had been reported stolen during an aggravated robbery. Once other HPD units responded to his

location, Sergeant Chapman, who had been following the car, activated his emergency lights and sirens and attempted to initiate a stop. The car immediately accelerated, ran several red lights, and drove under the arm of a railroad crossing. The car hit a curve, causing two tires to blow out, and came to a halt. Appellant and Swain jumped out and ran into a large industrial pipe yard. Sergeant Chapman drove into the yard and called for an HPD K9 unit, and appellant and Swain were apprehended.

Several hours later, HPD Officer Erick Westrup met with Rout and transported him to the police station to provide a statement regarding the aggravated robbery. After Rout gave his statement, Officer Westrup showed Rout a live lineup consisting of appellant and four other men. Rout identified appellant as the gunman. At trial, Rout testified that he was "100% sure" of his identification of appellant in the lineup, and he identified appellant in the courtroom as the gunman.

After the jury found appellant guilty of the charged offenses, the trial court held a punishment hearing. The State called four witnesses: Renee Devereaux, appellant's probation officer,[1] Officer John Montgomery, Officer Westrup, and Officer Felise Otabor.

[1] Appellant stipulated to three misdemeanor convictions: two for unlawful carrying of a weapon and one for possession of marijuana, for which he received probation.

Over defense counsel's running objections on the grounds of hearsay and violation of his right to confrontation, Officer Westrup testified that he was assigned two aggravated robbery cases which occurred on October 5, 2016—the first involving Rout and the second involving a complainant named Aaron Davis. Westrup testified that the case manager of the HPD robbery department linked the second case to the first one "[b]ecause the MO was the same, number of suspects, and similar or same vehicle was used," as well as similar descriptions of the suspects. Westrup testified that he met with Rout on October 5, and with Davis the next day. Officer Westrup was asked specifically about the second aggravated robbery. He testified that he learned about the facts of the robbery from his interview with Davis, and that the robbery had occurred the same morning as the robbery involving Rout. In the course of his investigation, Officer Westrup discovered that the second aggravated robbery had occurred approximately two to three miles from the first one. The call on the second case came in at 2:58 a.m., shortly after Rout's call at 1:43 a.m. The investigation also led Officer Westrup to obtain video surveillance from a Wells Fargo bank drive-thru ATM that was time-stamped 2:44 a.m. Officer Westrup testified that the items Davis told him had been stolen—his wallet, his photo identification card, and credit cards—were found in Rout's stolen car.

Following Officer Westrup's testimony, the State called Officer Felise Otabor, who testified that she was dispatched to the second aggravated robbery,

spoke with Davis, and observed an injury to the back of his head. When the prosecutor asked whether Davis told her that he had sustained the injury to his head in the robbery, Officer Otabor answered "yes." Defense counsel objected on hearsay grounds. The trial court sustained the objection and instructed the jury to disregard the officer's statement.

During closing arguments, the prosecutor emphasized the evidence of the second aggravated robbery which came in solely through the testimony of Officers Westrup and Otabor. Davis did not appear at trial. Following closing arguments, the jury assessed appellant's punishment at five years' confinement for evading arrest in a motor vehicle and thirty years' confinement for aggravated robbery. This appeal followed.

Standard of Review

We review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *See Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). An appellate court must uphold the trial court's ruling if it is reasonably supported by the evidence and is correct under any applicable theory of law. *See Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

Extraneous Offense Evidence

In his first point of error, appellant contends that the trial court abused its discretion by admitting extraneous offense evidence during the punishment phase of the trial that was supported only by inadmissible hearsay.

A. Applicable Law

Hearsay is inadmissible except as provided by statute or the rules of evidence. *See* TEX. R. EVID. 802. Hearsay is defined as an oral or written "statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801. "Matter asserted" means "(1) any matter a declarant expressly asserts; and (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter." TEX. R. EVID. 801(c). "It is well settled that an out-of-court 'statement' need not be directly quoted in order to run afoul of the hearsay rules." *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999) (en banc) (citing *Schaffer v. State*, 777 S.W.2d 111, 114 (Tex. Crim. App. 1989)).

A limited exception enables testifying officers to place their investigative actions in context. *See Schaffer*, 777 S.W.2d at 114. The State may offer out-of-court statements in evidence without violating the hearsay rule to explain why the defendant became the subject of an investigation. *See Dinkins v. State*, 894 S.W.2d

330, 347 (Tex. Crim. App. 1995) (en banc). "An arresting officer should not be put in the false position of seeming just to have happened upon the scene, he should be allowed some explanation of his presence and conduct." *Schaffer*, 777 S.W.2d at 114–15. Therefore, "testimony by an officer that he went to a certain place or performed a certain act in response to generalized 'information received' is normally not considered hearsay because the witness should be allowed to give some explanation of his behavior." *Poindexter v. State*, 153 S.W.3d 402, 408 n.21(Tex. Crim. App. 2005), *abrogated on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 n.32 (Tex. Crim. App. 2015); *see also Sandoval v. State*, 409 S.W.3d 259, 282 (Tex. App.—Austin 2013, no pet.). "But details of the information received are considered hearsay[.]" *Poindexter*, 153 S.W.3d at 408 n.21. The officer "should not be permitted to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the grounds that [he] was entitled to tell the jury the information upon which [he] acted." *Schaffer*, 777 S.W.2d at 114–15.

"The appropriate inquiry focuses on whether the 'information received' testimony is a general description of possible criminality or a specific description of the defendant's purported involvement or link to that activity." *Poindexter*, 153 S.W.3d at 408 n.21. "[W]here there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party

may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly." *Schaffer*, 777 S.W.2d at 114.

Article 37.07, section 3(a) of the Code of Criminal Procedure states that extraneous offenses can be used to enhance the punishment of the charged offense provided that the extraneous crime or bad act has been shown by the State beyond a reasonable doubt to have been committed by the defendant or is one for which the defendant can be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (West Supp. 2018).

B. Testimony Regarding Extraneous Offense

During the punishment hearing, defense counsel informed the trial court that he would object if the State attempted to offer extraneous offense evidence through Officer Westrup. He argued that the State was attempting to tie appellant to another robbery, and that the officer's testimony would constitute inadmissible hearsay and violate his right to confront the witness. The trial court advised counsel that it would grant him a running objection and, absent an exception, the hearsay evidence would not be admitted.[2]

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[2] The trial court stated:

> This is the punishment phase of the trial, so any bad acts or allegation would be admissible. So, I think what we'll have to do is just move forward. Certainly as a cautionary statement, I

Officer Westrup testified that, when he arrived to work on October 5, 2016, the HPD robbery department case manager assigned him the aggravated robbery case involving Rout and a second aggravated robbery case. He testified that the second case was linked to the aggravated robbery of Rout because the "MO," the number and description of the suspects, and the vehicle used by the perpetrators was the same. Officer Westrup then testified:

> Q: When did you make contact with the victim of that second aggravated robbery that you were assigned?
>
> A: The following day.
>
> Q: And so that is October 6th, 2016?
>
> A: Yes.
>
> Q: Officer Westrup, in that report and through your investigation, were you able to determine where that second aggravated robbery occurred?
>
> A: Yes.
>
> . . . .
>
> Q: And where was that location?
>
> A: It was 6100 block of Martin Luther King Boulevard.
>
> Q: And, Officer Westrup, to your knowledge about how far away is the 6100 block of MLK from the location of the aggravated robbery where Nicholas Rout was your victim?

> would tell the State not to introduce any hearsay at all without a witness to sponsor that testimony, meaning the person who said it, if that makes any sense; and then you'll just have to object at the time that you think it's appropriate to object.

A: Distance-wise, maybe about two to three miles.

Q: And through your investigation and assignment of that case, were you able to determine when that aggravated robbery was reported?

A: Yes.

Q: And what time was that?

A: That one was called in at 2:59 a.m.

Q: And 2:59 a.m. on October 5th, 2016?

A: No—yes, October 5th.

Q: And if you could remind me again, when was the aggravated robbery of Nicholas Rout called in?

A: That one was called in at 1:43 a.m.

Q: So was the second aggravated robbery report that was assigned to you not only the vehicle description, MO, suspect description similar, this was also in the same area and time?

A: Yes.

Q: You said you made contact with that victim October 6, 2016, what was that person's name?

A: Aaron Davis.

. . . .

Q: And, Officer Westrup, in your—through your investigation speaking with Aaron Davis, not to get into anything that this victim said to you, but were you able to do further investigation into the aggravated robbery that he had reported?

. . . .

A: Yes.

Q: Yes. And what was that further investigation, what were you able to look for?

A: Well, I interviewed Complainant Davis. Based on that, based on what he told me, I was able to link the two cases.

THE COURT: The question is what did you look for?

Q: Did you make contact with anyone else regarding any other sort of evidence that could help your case?

A: No.

Q: Specifically any video surveillance?

A: Oh, yes.

Q: And what was that?

A: Video surveillance from Wells Fargo.

. . . .

Q: And what was it that you asked for?

A: Video surveillance from the drive-up ATM.

Q: About what time were you asking for the video footage?

A: The footage I got was time stamped at 2:44 a.m.

. . . .

Q: Officer Westrup, did Aaron Davis inform you of what was taken from him?

A: Yes, he did.

Q: And through your investigation of this aggravated robbery, were the items that were taken from him ever returned to him?

A: Yes, they were.

Q: Where were they found?

A: They were in the Complainant Rout's car after the pursuit.

Q: Do you remember what some of that property entailed?

A: His wallet, his identification from Missouri, credit cards.

. . . .

Q: Officer Westrup, from the items that were found in that stolen vehicle and returned to Aaron Davis as well as the surveillance that you were able to find, did all of these things corroborate the information that you were given from this victim?

A: Yes, it did.

Q: And, Officer Westrup, specifically regarding the suspect's description in this second aggravated robbery that took place in the early morning hours of October 5th, 2016, were there unique items of clothing that were recovered?

A: Yes, there was.

Q: And, Officer Westrup, I know that you've already mentioned that you were given an aggravated robbery, a second report for an aggravated robbery, but what is it that would make this case an aggravated robbery?

A: The use of a weapon or bodily injury.

Q: In this case specifically?

A: It was the use of a weapon.

Q: And did you subsequently ask for charges on this second aggravated robbery that you investigated?

A: Yes, I did.

Q: And who were those charges requested for?

A: For Defendant Castor and Defendant Swain.

Defense counsel repeatedly objected to Westrup's testimony on the grounds of hearsay and violation of his right to confrontation; the trial court overruled the objections.[3]

Appellant contends that Officer Westrup's testimony was inadmissible hearsay because the evidence "exceeded a mere explanation of 'presence and conduct.'" The State argues that "Westrup's limited testimony concerning the Davis robbery was offered only for the purpose of showing what was said—in order to explain how appellant came to be a suspect in that case—not to prove the truth of the matter asserted."

Officer Westrup's testimony was not merely a generalized description of possible criminality that explained how appellant came to be a suspect but contained specific details about a second armed robbery, all of which he obtained from his interview of Davis. Officer Westrup initially testified that, upon arriving to work on October 5, 2016, the HPD robbery department case manager assigned him the aggravated robbery case involving Rout and a second aggravated robbery case. He

[3] The State did not indicate which hearsay exception, if any, it believed applied to Officer Westrup's testimony.

testified that the second case had been linked to the aggravated robbery of Rout because the "MO, the number and description of the suspects, and the vehicle used by the perpetrators was the same." Thus, at this point, the cases had already been linked and assigned to Officer Westrup, and his subsequent testimony "provided far greater detail than was reasonably necessary to explain why" police had linked the two cases and was not necessary to establish how appellant became a suspect in the second robbery. *See Langham v. State*, 305 S.W.3d 568, 580 (Tex. Crim. App. 2010) (concluding detective's representation of confidential informant's statements provided far greater detail than was reasonably necessary to explain why police decided to investigate appellant's residence); *Sandoval*, 409 S.W.3d at 283–84 (concluding that officer's testimony about child complainant's and others' statements were not offered to explain how defendant became focus of police investigation, went far beyond permissible general description of information received about possible criminality, and instead provided specific details and descriptions of defendant's involvement in sexual assault); *see also, e.g., Guillory v. State*, No. 01-05-00076-CR, 2005 WL 2670938, at *4 (Tex. App.—Houston [1st Dist.] Oct. 20, 2005, pet. ref'd) (concluding trial court erred in admitting officer's testimony about what witnesses told him about murder because officer was already on scene when he received witnesses' comments and therefore comments were not necessary to establish how officer became involved in case).

In support of its argument that Officer Westrup's testimony regarding the extraneous offense was not hearsay, the State cites several cases in which courts concluded that an officer's testimony was admissible under the investigative exception to the hearsay rule. *See e.g., Dinkins*, 894 S.W.2d at 347 (concluding that patient application form and victim's appointment book were not inadmissible hearsay where evidence was submitted only to show how defendant became suspect in investigation); *Lee v. State*, 29 S.W.3d 570, 577–78 (Tex. App.—Dallas 2000, no pet.) (concluding detective's testimony that his investigation resulted from his interview of theft victim was not hearsay because testimony explained how investigation began and how defendant became suspect); *Short v. State*, 995 S.W.2d 948, 954 (Tex. App.—Fort Worth 1999, pet. ref'd) (holding officer's testimony that he began investigation based on information he received that controlled substances were being brought into jail by staff personnel was not hearsay because it explained only what prompted officer to conduct investigation); *Thornton v. State*, 994 S.W.2d 845, 853–54 (Tex. App.—Fort Worth 1999, pet. ref'd) (holding trial court did not allow indirect admission of hearsay testimony by allowing officer to testify that he spoke with child protective service workers, hospital staff, and doctors, followed by his statement that he filed case, where officer's testimony merely described his investigation of facts before charging defendant). However, those cases are factually distinguishable from the one before us. In each of those cases, the testimony at issue

was offered in the guilt-innocence phase and related to the investigation of the offense with which the defendant had been charged. Here, in contrast, Officer Westrup testified in the punishment phase about the details of an extraneous offense based on his interview of a complainant who did not testify at trial.

Officer Westrup did not begin investigating either of these armed robberies until well after appellant was in custody. The arrest and conviction of appellant had nothing to do with Officer Westrup's actions beyond his showing Rout the lineup. Appellant was arrested a few hours after the robbery by an officer on routine patrol. He was driving Rout's stolen car, with Rout's property still in the car, and was arrested only after a high-speed car chase and a foot pursuit. Appellant was positively identified by Rout both on the same day as the robbery and at trial. Further, appellant was recorded on video entering the apartment complex shortly before the robbery. None of the evidence which was used to convict appellant was generated by Officer Westrup so there was no need to use hearsay statements to explain why Officer Westrup was where he was, or how appellant became the subject of an investigation. This extraneous offence can only have been introduced for the purpose of enhancing appellant's punishment. It was introduced entirely through hearsay testimony because the victim of the robbery did not appear at trial.

The record leads us to the "inescapable conclusion" that Davis was testifying through Officer Westrup, and that the State offered the testimony to prove that

appellant was the person who committed the extraneous offense. *See Schaffer*, 777 S.W.2d at 114 ("[W]here there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly."). Indeed, without his testimony, the State could not show beyond a reasonable doubt that appellant committed the second aggravated robbery. Consequently, this evidence was inadmissible, and the trial court abused its discretion in overruling appellant's hearsay objections and admitting the evidence.

C. Harm Analysis

The erroneous admission of evidence is non-constitutional error. *See Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011); *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). Non-constitutional error requires reversal only if it affects the substantial rights of the accused. *See* TEX. R. APP. P. 44.2(b); *Barshaw*, 342 S.W.3d at 93–94. "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). We will not overturn a criminal conviction for non-constitutional error if, after examining the record as a whole, we have fair assurance the error did not influence the jury or influenced the jury only slightly. *See Barshaw*, 342 S.W.3d at 93. The "record as a whole" includes

testimony, physical evidence, the nature of the evidence supporting the verdict, the jury instructions, the State's theory, any defensive theories, closing arguments, voir dire, the character of the alleged error, how the character of the error might be considered in connection with other evidence in the case, and whether the State emphasized the error. *Motilla v. State*, 78 S.W.3d 352, 355–56 (Tex. Crim. App. 2002).

The State argues that "since Westrup's punishment testimony was largely cumulative of evidence already presented to the jury, even if done indirectly, any error in admitting the testimony did not affect appellant's substantial rights and was harmless." *See Smith v. State*, 236 S.W.3d 282, 300 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (finding admission of indirect hearsay testimony by police officer erroneous, but harmless, because hearsay was cumulative of other evidence already before jury). In support of its argument, the State points to Sergeant Chapman's testimony that he found a Missouri identification card in Rout's car after appellant was apprehended. The officer, however, did not identify the card's owner or otherwise refer to a second aggravated robbery. The State also points to Officer Westrup's testimony about how he learned the stolen vehicle belonged to Rout. When asked how he knew, Officer Westrup stated, "Because Complainant, Aaron Davis—" but the prosecutor interrupted his answer to question him about the vehicle's license plate. There was no other mention of Davis or anything related to

the second aggravated robbery, nor was the reference to Davis placed into context. Officer Westrup's testimony during the punishment phase was not cumulative of other evidence presented in the guilt-innocence phase of trial.

Consequently, Officer Westrup's testimony—approximately nine of the twenty-nine pages of punishment testimony—was the *only* evidence that tied appellant to the second aggravated robbery.[4] If his testimony had been properly excluded, the jury could not have concluded beyond a reasonable doubt that appellant committed the second aggravated robbery. However, because Officer Westrup's testimony was admitted, the jury may have concluded beyond a reasonable doubt that appellant committed the extraneous offense. *See Motilla*, 78 S.W.3d at 355; *see Chapman v. State*, 150 S.W.3d 809, 818 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (holding that trial court's erroneous admission of witness's outcry testimony related to extraneous offense in punishment phase was not harmless, in part because jury could not have concluded beyond reasonable doubt that defendant sexually abused victim without testimony).

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[4] Following Officer Westrup's testimony, Officer Otabor testified that she was dispatched to the second aggravated robbery, made contact with Davis, and observed an injury to the back of his head. When the prosecutor asked whether Davis told her that he had sustained the injury in the robbery, she replied "yes." Defense counsel objected on hearsay grounds, and the trial court sustained the objection and instructed the jury to disregard it. Despite the objection being sustained, the prosecutor emphasized this fact in her closing argument. Officer Otabor made no reference to appellant.

Such a conclusion could have influenced the jury in assessing appellant's punishment. The State's primary purpose during the punishment phase was to prove appellant committed a second aggravated robbery and, thus, maximize his sentence. Appellant filed a motion requesting probation. In arguing against probation, the State emphasized the second aggravated robbery, and that Davis was injured, during closing argument:

> You can consider the fact that there is some evidence that on the night, when he and his friend went over and took Nick's car at gunpoint after Nick got done studying at the library, which I was never doing at 22 years old, that they then went and committed another aggravated robbery.
>
> Defense Counsel: I'll renew my objection to that, Judge. It's all based on hearsay.
>
> The Court: Overruled.
>
> There is evidence that Aaron Davis' ID was found in Nick's car. Why would that ID be in Nick's car? It's not Nick's ID. It wasn't in there before. Because it was taken from someone, right? You heard an officer come in here and say I saw Aaron Davis that night and he had fresh injury to the back of his head because maybe—I don't know, I wasn't out there. Maybe Davis wasn't as cooperative as Nick was. I don't know. I know he had an injury to the back of the head and then his stuff ended up in the same car that he ran from that he had stolen from Nick. You can consider that, and you should because it's scary. It's a scary thing.

The range of punishment for aggravated robbery was five years to ninety-nine years or life. *See* TEX. PEN. CODE ANN. § 12.32 (West 2011). The jury sentenced appellant to thirty years' confinement. Although his sentence was in the middle of

the statutory range, appellant was a youthful offender—twenty-two years old at the time of trial—and had previously only been convicted of three misdemeanor convictions. *See Ivey v. State*, 250 S.W.3d 121, 126 (Tex. App.—Austin 2007), *aff'd*, 277 S.W.3d 43 (Tex. Crim. App. 2009) (noting that in assessing injurious influence of evidence at punishment phase, appellate court must ask whether defendant "received a longer sentence or was harmed" as result of erroneously admitted evidence). Viewing the record as a whole, we do not have fair assurance that the erroneous admission of the complained-of hearsay statements did not influence the jury. *See Chapman*, 150 S.W.3d at 818; *see also Aleman v. State*, 49 S.W.3d 92, 96 (Tex. App.—Beaumont 2001, no pet.) (concluding no fair assurance that improper admission of DWI convictions did not influence jury's punishment verdict; although convictions were not only evidence admitted in punishment phase, prosecutor relied on them to urge maximum sentence and jury imposed maximum sentence). Accordingly, we sustain appellant's first point of error.[5]

[5] In his second point of error, appellant contends that the trial court abused its discretion by admitting Officer Westrup's testimony because it denied him his right to confrontation under the Sixth and Fourteenth Amendments. In light of our disposition of appellant's first point of error, we need not address his second point of error.

Conclusion

We affirm the judgment in cause number 1526128, but we reverse the judgment in cause number 1526158 and remand for a new punishment hearing only.

Russell Lloyd
Justice

Panel consists of Justices Higley, Lloyd, and Caughey.

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