Opinion issued August 13, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00327-CR

EVAN DAVID NOLAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 16-CR-2249

MEMORANDUM OPINION

A jury convicted appellant, Evan David Nolan, of recklessly causing serious bodily injury to a child and assessed his punishment at ten years' incarceration. On appeal, appellant contends that the trial court erred in admitting State's Exhibits #8, #9, and #9A of the Texas Children's Hospital records and in allowing Dr. Rami

Sunallah to testify about the contents of the records. Appellant argues that admission of the records and testimony should have been excluded under the Confrontation Clause because appellant did not have the opportunity to examine the preparer of the records, which therefore deprived appellant of his Sixth Amendment and state right to confrontation. We affirm the trial court's judgment.

Background

Appellant shared an apartment with his girlfriend, Brithony Williams, their daughter, and Brithony's six-year-old daughter from a former relationship, Whitney Williams. On August 17, 2016, appellant was home alone with the girls while Brithony was at work. That afternoon, appellant called Brithony and told her that she needed to leave work early and return to the apartment because Whitney had suffered a seizure and had fallen. When Brithony returned to the apartment, she took Whitney to the car and attempted to drive to the hospital, when she was pulled over by the police. During the traffic stop, the police officer discovered that Whitney was unconscious and not breathing.

Whitney was transported by ambulance to Clear Lake Regional Medical Center, where she was treated by Dr. Rami Sunallah, a pediatric emergency room doctor. Dr. Sunallah discovered that Whitney had extra fluid in her lungs, had suffered from retinal hemorrhaging, and she was bleeding in her brain, which had caused her brain to shift. Dr. Sunallah determined that Whitney's injuries were

consistent with trauma and diagnosed Whitney with "Child abuse, physical abuse, compression of brain, [and] disseminated intravascular coagulation . . ." Dr. Sunallah knew that a neurosurgeon would need to see Whitney to determine if surgery was necessary to reduce the blood flow and pressure in her brain, but Clear Lake Regional hospital was not a pediatric trauma center. Whitney was then transported to Texas Children's Hospital.

Upon arrival at the pediatric intensive care unit at Texas Children's Hospital, a neurosurgeon determined that surgery to release the pressure on Whitney's brain would be futile because she had already suffered brain death. Texas Children's Hospital determined that Whitney was "terminally injured." The assistant medical examiner who performed Whitney's autopsy determined that her cause of death was multiple blunt force injuries to various areas of her body, and the manner of death was found to be homicide.

Appellant's trial commenced on March 11, 2019. At the beginning of trial, the parties agreed to the pre-admission of several exhibits, including Whitney's medical records from Texas Children's Hospital, which were designated as State's Exhibits #8, #9, and #9A. The exhibits were admitted into evidence and the State called Dr. Sunallah to testify about Whitney's medical treatment. When the State started to question Dr. Sunallah about Exhibits #8, #9, and #9A, defense counsel objected:

> Judge I'm going to object to this witness testifying as to the contents of the Texas Children's Medical Records. . . . This particular witness was

> not involved in the documentation that was provided from these records. He didn't help in the evaluation when these records were being taken. So I would object to him being able to testify that he has specific knowledge as to what these documents contain.
> …
> If you're going to allow him to testify, Judge, I would ask that I be allowed to take him on voir dire and establish the fact that he didn't have anything to do with the documenting of these records.

The trial judge allowed defense counsel to take Dr. Sunallah on voir dire but reminded counsel that the records had already been admitted by agreement and ruled that Dr. Sunallah was allowed to testify about them. During the voir dire examination, Dr. Sunallah acknowledged that he stopped treating Whitney when she was transferred to Texas Children's Hospital. Dr. Sunallah further acknowledged that he did not have anything to do with the documents from Texas Children's Hospital. After the voir dire examination, defense counsel renewed his objection to Dr. Sunallah being allowed to testify about the medical records from Texas Children's Hospital, and the trial court overruled that objection.

During a subsequent portion of Dr. Sunallah's direct examination, defense counsel objected once again by stating:

> Judge, I know that they've had witness problems. And I know that these records are in. But now what they're trying to [do] is back door the consulting that was not done by this particular doctor. It doesn't have any type of medical opinion or anything like that. It just goes towards what the mother was saying and he wasn't even there. So I would object to him being able to testify as to any of this.

The trial judge did not rule on this objection and there were no further objections to Dr. Sunallah's testimony. The record reflects that defense counsel did not object to the admission of State's Exhibits # 8, # 9, or # 9A.

Confrontation Clause

In his sole issue, appellant contends that the trial court erred in admitting State's Exhibits #8, #9, and #9A of the Texas Children's Hospital records and in allowing Dr. Sunallah to testify about the contents of the records. Appellant argues that admission of the records and testimony should have been excluded under the Confrontation Clause because he did not have the opportunity to examine the preparer of the records, which therefore deprived him of his Sixth Amendment and state right to confrontation. The State argues that appellant failed to preserve his complaints for our review and, even if appellant had raised a proper objection, the trial court would not have erred in admitted the exhibits or allowing Dr. Sunallah to testify regarding their contents.

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). "As long as the trial court's ruling was at least within the zone of reasonable disagreement, an appellate court should not intercede." *Gentry v. State*, 259 S.W.3d 272, 279 (Tex. App.—Waco 2008, pet. ref'd).

B. Preservation of Error

Generally, a party must object to preserve an error for appellate review. *See* TEX. R. APP. P. 33.1(a). To preserve a complaint, a party must have presented to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling. *Id.* Confrontation Clause claims are subject to this general preservation requirement. *Davis v. State*, 313 S.W.3d 317, 347 (Tex. Crim. App. 2010); *see also Scott v. State*, 555 S.W.3d 116, 126 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). Thus, a defendant's failure to object to the admission of evidence on this ground at trial waives a Confrontation Clause complaint for appellate review. *Davis*, 313 S.W.3d at 347; *see also Scott*, 555 S.W.3d at 126.

Because appellant failed to object to the admission of the three exhibits and to Dr. Sunallah's testimony based on the Confrontation Clause, this issue is not preserved for appellate review. We further note that the record reflects that appellant agreed to the admission of State's Exhibits #8, #9, or #9A at the beginning of trial and did not object to their admission on any basis.

However, even if appellant had preserved his challenge to the admission of these exhibits and Dr. Sunallah's testimony regarding their contents based on the Confrontation Clause, he would not prevail on appeal.

C. Sixth Amendment Confrontation Clause

The Confrontation Clause within the Sixth Amendment of the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. "Witnesses" are those that "bear testimony" against the accused, offering a declaration or affirmation made for the purpose of establishing or proving a fact. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The Confrontation Clause prohibits trial courts from admitting testimonial statements of a witness who are absent from trial unless the witness is unable to testify, and the defendant had a proper opportunity to cross-examine the witness. *Infante v. State,* 404 S.W.3d 656, 664 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The Confrontation Clause does not apply to all out-of-court statements introduced at a trial; it applies only to hearsay that is "testimonial" in nature. *Id.*; *see also Sanchez v. State*, 354 S.W.3d 476, 485 (Tex. Crim. App. 2011). The United States Supreme Court has identified three kinds of out-of-court statements that can be considered testimonial:

- ex parte in-court testimony or its functional equivalent—that is, materials such as affidavits, custodial examinations, prior testimony that the accused was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

- extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and
- statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52; *see also Langham v. State*, 305 S.W.3d 568, 575–76 (Tex. Crim. App. 2010).

Whether an out-of-court statement is testimonial is a question of law. *Langham*, 305 S.W.3d at 576. We will defer to the trial court's determination of credibility and historical fact, and we review de novo the constitutional question of whether the facts, as determined by the trial court, establish that the out-of-court statement is testimonial. *Id.* In order to make the judgment in this case, we must determine whether "the surrounding circumstances objectively indicate that the primary purpose" behind the creation of these medical records was "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* (quoting *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008)). The "primary purpose" is the "'first in importance' among multiple, potentially competing purposes" for creating the records. *Langham*, 305 S.W.3d at 579.

Medical reports created for treatment purposes generally are non-testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009). However, forensic laboratory reports that are prepared in connection with a criminal

investigation or prosecution are considered testimonial. *Bullcoming v. New Mexico*, 564 U.S. 647, 657–58 (2011) (recognizing that report documenting blood-alcohol content of defendant's blood sample in DWI case was testimonial); *see also Melendez-Diaz*, 557 U.S. at 310 (holding affidavits reporting results of forensic analysis showing material seized by police and connected to defendant was cocaine fell within "core class of testimonial statements").

D. Analysis

The record indicates that Dr. Sunallah, who was called by the State to testify to the contents of the medical records from Texas Children's Hospital, had neither drafted the medical records in dispute nor observed the preparation of the medical records. Rather, Dr. Sunallah's treatment ended when the child was placed in a helicopter and taken to Texas Children's Hospital. However, the record reflects that the primary purpose for the creation of the Texas Children's Hospital's medical records was for treatment purposes, namely, to determine the type and extent of Whitney's injuries, assess her medical condition, and determine the proper course of medical treatment. The fact that the records were compiled during an ongoing medical emergency and that the contents of the medical records set forth a plan for treatment and listed steps that were taken or needed to be taken are further evidence that these records were created primarily for treatment purposes. *See Murray v. State*, 597 S.W.3d 964, 975 (Tex. App.—Austin 2020, pet. ref'd) (stating that

existence of ongoing medical emergency is circumstance that informs inquiry into whether statement is non-testimonial) (citing *Ohio v. Clark*, 576 U.S. 237, 244 (2015)).

Appellant relies on *Bullcoming* and argues that the medical records prepared by Texas Children's Hospital "were created as an expression of forensic examination, and, therefore should be subject to the same confrontational examination as the forensic records of *Bullcoming*." Appellant recognizes that medical records are not always prepared specifically for the purpose of testimony at a trial, unlike the type of forensic report at issue in *Bullcoming*. However, appellant reasons that "the probability of a medical report or autopsy being testified about in trial is sufficiently high enough that it should be regarded as a forensic examination, and subject to the same confrontational rights. . . ." This approach, however, contradicts prior case law as we must look to the primary purpose of the medical records, and the reason for the creation of the medical records, not the mere possibility of use in a later trial. *See Langham*, 305 S.W.3d at 579 (stating "primary purpose" is "'first in importance' among multiple, potentially competing purposes" for creating the records); *see generally Murray*, 597 S.W.3d at 974 (holding victim's allegations of sexual abuse included in report prepared by sexual assault nurse examiner were not testimonial because examination was conducted for primary purpose of providing medical treatment).

Additionally, appellant contends that it was difficult to determine if Dr. Sunallah was opining generally or opining on the entries by the preparer of the medical records. However, the Rules of Evidence allow a witness who is qualified as an expert to testify in the form of an opinion if the expert's specialized knowledge will help the trier of fact understand the evidence. *See* TEX. R. EVID. 702(a). Dr. Sunallah's testimony provided definitions of medical terms, explained Whitney's condition, the consequences of her condition, the consequences of treatment versus Whitney not receiving treatment and, on occasion, he read directly from the medical records in the trial court. Dr. Sunallah utilized his expert knowledge while interpreting Whitney's medical records. Specifically, Dr. Sunallah simplified the record as he explained why the neurosurgeon had decided not to operate on Whitney, as an effort to assist the trial court to better understand the evidence. *See id.* Therefore, we overrule appellant's sole issue.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.
Do Not Publish. TEX. R. APP. P. 47.2(b).