Opinion issued July 27, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00291-CR

ELYZA VARGAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1626772

MEMORANDUM OPINION

A jury convicted appellant, Elyza Vargas, of aggravated assault. *See* TEX. PENAL CODE § 22.02(a)(2). The jury assessed punishment at 10 years in the Institutional Division of the Texas Department of Criminal Justice, but suspended imposing the sentence, placed Vargas on community supervision for 10 years, and

ordered her to pay a $10,000 fine. On appeal, Vargas argues that the trial court abused its discretion by sustaining the State's relevance objections and excluding her evidence.

We affirm.

Background

D. Covey, the complainant, was the first witness to testify at trial. In April 2014, the complainant married Carmela Covey. The couple had two sons. About four years after they got married, the couple separated and decided to divorce after the complainant discovered that Carmela[1] was having an affair with Vargas. The complainant did not have custody of the children after the separation. The complainant testified that Carmela would let him see the children "mainly whenever Carmela and [Vargas] would break up."

On the afternoon of April 2, 2019, Carmela told the complainant that she and Vargas had broken up and asked him to take her to a hotel. The complainant dropped Carmela and the children off at a hotel and then went to work. After work, the complainant asked Carmela if the children could spend the night at his house. She agreed. The youngest child left with the complainant and the oldest child stayed with Carmela. Later that night, Carmela asked the complainant if she could drop off their

[1] In this opinion, we refer to Carmela Covey by her first name because she has the same last name as the complainant.

oldest child at his house while she picked up her belongings from Vargas's residence. The complainant agreed.

Around midnight, Carmela knocked on the complainant's door. The complainant testified that Carmela was crying and appeared "kind of distraught." She asked him to give their younger son back to her. The complainant testified that he was "confused" because he was expecting Carmela to drop off their oldest son. Carmela told the complainant that Vargas "was crazy" and that she "had a gun with her." Carmela then tried to force her way into the house. As the door opened, the complainant saw his son in the back seat of the car and Vargas in the driver's seat. He went outside and left Carmela near the doorway. Vargas rolled the window up and locked the door as the complainant walked toward her car. The complainant heard his son crying out for him.

The complainant approached the passenger side of the car and asked Vargas to unlock the door so he could get his son. She refused and told him, "No. Go away." The complainant and Vargas began arguing about unlocking the door. Vargas told him, "Fuck you," several times and threatened, "I'm going to kill you." Vargas pulled out a black handgun, held it sideways, and pointed it at the complainant. The complainant described the gun as "a semiautomatic. Maybe, like, a Glock or something." After Vargas had pointed the gun at the complainant, the complainant walked into the house and called police. Carmela got into the car with Vargas and

they drove away. The complainant testified that he "felt in danger of [his] life" and that "[his] son was in danger."

Deputy Z. Hollis, the responding officer for the Harris County Sheriff's Office, testified next. Deputy Hollis arrived at the scene and met with the complainant. The complainant told him that Carmela and her then-girlfriend, Vargas, were coming over to drop off his son. When the complainant asked Vargas if he could have his son, she pulled a gun on him and threatened him with it. When asked whether he found the complainant credible when he took his report, Deputy Hollis responded, "Yes." He explained, "I don't see why somebody would make something like that up and his story was consistent. There were no changes in his story when we went over it." Deputy Hollis testified that he did not interview Vargas because he did not know her telephone number, address, or potential location. He also testified that he did not recover a gun from the scene because Vargas had left.

Vargas testified that the complainant had fabricated the entire story because he was jealous of her relationship with Carmela and believed Vargas ruined his marriage and family. She denied being at the complainant's house. She also denied seeing Carmela that night. She claimed an alibi, saying that she was at S. Ramirez's house at the time of the aggravated assault. Vargas testified that she arrived at Ramirez's house around 10:30 p.m. and did not leave until the following morning around 7:00 a.m.

Ramirez testified that Vargas spent the night at her house and did not leave until the next morning.

Carmela testified that she did not go the complainant's house on the night of the offense. On cross-examination, Carmela testified that she was at a hotel with a co-worker from 6:00 p.m. until 10:00 a.m. the next day.

The jury convicted Vargas of aggravated assault. This appeal followed.

Exclusion of Evidence

Vargas asserts that the trial court erred by excluding evidence relevant to the complainant's character and credibility. She also asserts that such erroneous exclusion of her evidence is a non-constitutional error that affected her substantial rights.

A. Standard of review

We review a trial court's decision to exclude evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *Lynch v. State*, 612 S.W.3d 602, 609 (Tex. App.—Houston [1st Dist.] 2020, pet. granted). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Gonzalez v. State*, 616 S.W.3d 585, 594 (Tex. Crim. App. 2020) (citing *Rhomer v. State*, 569 S.W.3d at 669). We will uphold an evidentiary ruling unless it falls outside the "zone of reasonable disagreement." *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018).

B. Applicable law

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. EVID. 401. Irrelevant evidence is not admissible. TEX. R. EVID. 402; *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018). "A defendant's right to present relevant evidence is not unlimited, but rather subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Harris v. State*, 152 S.W.3d 786, 794 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd).

Any party may attack a witness's credibility. TEX. R. EVID. 607. The credibility of a witness may be attacked "by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character." TEX. R. EVID. 608(a). Subject to certain exceptions inapplicable here, a party may not offer extrinsic evidence to prove specific instances of a witness's conduct to attack the witness's character for truthfulness. TEX. R. EVID. 608(b).

C. Evidence of the complainant's character and credibility

Vargas argues that the trial court did not permit her to offer evidence of an agreement on the exchange of child possession between the complainant and Carmela ("Band-Aid Order") and text messages between the complainant and

Carmela to attack his credibility by rebutting his testimony that he was a "loving father." She also argues that this case involves "he said, she said" testimony, and the only evidence of her guilt was provided by the complainant's testimony. Thus, the excluded evidence was her "most effective means of attacking the [complainant's] credibility at trial."

At trial, the complainant testified that he was a "loving and kind husband" to Carmela. Carmela testified in detail about past instances of custody disputes between her and the complainant. Defense counsel offered into evidence Exhibit 7, a Band-Aid Order, reflecting the complainant and Carmela's temporary custody agreement of the children. The State objected based on relevance, stating that custody of the children was not relevant to Vargas's aggravated-assault case. Defense counsel explained that the evidence was relevant to show the complainant's character: that he was not a good father:

> The character of the complainant is put at issue by the State as far as him being a great father. This is relevant to his history as far as the custody of the children. . . . And it goes to his character of being a good father or not, and that was quite a big part of the State's case.

The trial court sustained the State's objection without explanation.

Carmela then testified that she filed for divorce. When asked about the complainant's reaction to the divorce, Carmela testified that he was "very upset." Defense then offered Exhibits 8 through 26 into evidence. These exhibits consisted of text messages between Carmela and the complainant from December 2019. The

State objected and argued that the messages were irrelevant because the parties sent them eight months after the offense date and that they had "nothing to do with this case itself other than they [were] phone conversations between" Carmela and the complainant.

Defense counsel responded that the text messages were relevant to show that the complainant was not a loving father because he planned to separate the children as soon as the Band-Aid Order expired:

> [T]he credibility of the complaining witness is very much the most important issue in this case. It's he said/she said. Now, he made certain representations to the jury as a loving father, and he was going to get his kid. We have text messages here where once the Court order went out of effect, he stopped sharing and there are about 30, 40, 50 messages here where he never once—she asked him many times how was [their youngest son]. Not one time did he ask her how was [their oldest son]. It shows that all this tense [sic] to jury about how much he cares for his kids is not credible, Judge. It goes to credibility. They were back and forth for a long time and not once did he inquire.[2]

The trial court sustained the State's objection and explained that the evidence was irrelevant given how much time had elapsed since the offense date:

> Okay. I think that something going on almost a year later, all right, is not relevant to what was going on April [3], 2019, or the nature of the relationship at that point in time. . . . But this is stuff that's almost a year later. So I am going to sustain the State's objection to relevance.

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[2] Defense counsel also made these same arguments on bill of exception outside of the jury's presence.

Vargas has failed to show the relevance of the excluded evidence to the merits of the case. *See Crenshaw v. State*, 125 S.W.3d 651, 654 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). "[T]here is an important distinction between an attack on the general credibility of a witness and a more particular attack on credibility that reveals 'possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.'" *Hammer*, 296 S.W.3d at 562 (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Thus, a defendant does not maintain the "absolute constitutional right to impeach the general credibility of a witness in any fashion that he chooses" by making collateral attacks against a witness. *Id*. Such attack must conform to the evidentiary rules and relate to the pertinent issues at trial.

Neither the history of the complainant and Carmela's custody arrangement through the Band-Aid Order nor text messages about the complainant's character as a parent were germane to this case. The State needed to prove beyond a reasonable doubt that Vargas committed the aggravated assault as charged in the indictment. The evidence did not make it more or less likely that Vargas threatened the complainant with a gun. The material issues at trial would have been convoluted if the trial court had admitted the extrinsic evidence because the jury would have centered its attention on the complainant's character as a parent rather than the defendant's personal responsibility and moral culpability. *See Hayden v. State*, 296

S.W.3d 549, 554–55 (Tex. Crim. App. 2009) (prohibiting defendant from using extrinsic evidence to impeach a witness on a collateral issue); *Keller v. State*, 662 S.W.2d 362, 365 (Tex. Crim. App. 1984) (en banc) ("A 'collateral' question is one which seeks only to test the witness'[s] general credibility, or relates to facts irrelevant to the issues at trial.").

Vargas argues that the text messages prove that the complainant was not a loving father because he did not ask about the well-being of one of his sons, which directly "weakens his credibility and aids the defense." She also argues that "this evidence is probative in that it tends to make the existence of a material fact, i.e., that [the complainant] fabricated the allegations against [Vargas] more probable than it would be without the evidence." These arguments are unpersuasive for three reasons.

First, Vargas provides no specific legal authority supporting the proposition that the proffered evidence was probative to the material issues in the case. *See* TEX. R. APP. P. 38.1 ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Her bald allegation suggesting that the complainant lied about being a loving father does not support an inference that he had a motive to falsely testify about his character or falsely accuse Vargas of a committing a crime. *See Crenshaw*, 125 S.W.3d at 654

(proponent of evidence must establish connection between the relevance of evidence supporting witness's self-interested motive to falsify testimony and merits of case).

Second, the evidence does not concern the complainant's character for truthfulness or seek to attack the complainant's credibility by testimony in the form of opinion or reputation. TEX. R. EVID. 608(a); *Wills v. State*, 867 S.W.2d 852, 855 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Nor did Vargas adduce any testimony to show that the complainant had a bad reputation for being truthful. TEX. R. EVID. 608(a). She does not contend that she intended to use the evidence to establish or elicit testimony to show that the complainant had a reputation for being dishonest either.

Finally, attacks like Vargas's amount to "character assassination," as noted by the Court of Criminal Appeals. *Hammer v. State*, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009). It explained that a "witness's general character for truthfulness or credibility may not be attacked by . . . offering extrinsic evidence concerning specific prior instances of untruthfulness." *Id*. (citing TEX. R. EVID. 608(b)); *see Eris v. Phares*, 39 S.W.3d 708, 717 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (specific instances of witness's misconduct other than conviction for a felony or a misdemeanor involving moral turpitude may not be used to impeach a witness's credibility under Evidence Rule 608(b)). In sum, Vargas sought to paint the

complainant as a bad father, instead of an untruthful witness, which is not permitted under the rules of evidence.

For these reasons, we hold that evidence about the complainant's character as a loving parent is collateral to the issues at trial, which may not be used to impeach him. *See Keller*, 662 S.W.2d at 365; *Allen v. State*, 473 S.W.3d 426, 452–53 (Tex. App.—Houston [14th Dist.] 2015, pet. granted).

Even if the trial court had erred in excluding the order and the text messages, the exclusion did not affect Vargas's substantial rights because the evidence would have been cumulative. The erroneous exclusion of evidence is non-constitutional error, subject to a harm analysis. *Easley v. State*, 424 S.W.3d 535, 539 (Tex. Crim. App. 2014); *Robinson v. State*, 236 S.W.3d 260, 269 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Non-constitutional error requires reversal only if it affects the accused's substantial rights. TEX. R. APP. P. 44.2(b) ("Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see Barshaw v. State*, 342 S.W.3d 91, 94 (Tex. Crim. App. 2011) (requiring reversal for erroneous admission of evidence "if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error"). An error affects an accused's substantial rights "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). We will not overturn a criminal conviction for non-

constitutional error if we have fair assurance that the error did not influence the jury or had but a slight effect. *Barshaw,* 342 S.W.3d at 93–94.

Vargas contends that she wanted to use the Band-Aid Order to elicit testimony from Carmela that the complainant "returned to the status quo of separating the children once the order became void." She also contends that she should have been allowed to present the text messages to show that the complainant "was not in fact the loving father that he represented himself to be." Yet the jury heard significant testimony about the Band-Aid Order, the complainant's refusal to exchange possession of his younger son after the order expired, and the complainant's purported uncaring attitude as a father.

On cross-examination, the complainant testified that he was not willing to comply with the expired custody agreement—the Band-Aid Order—and that he prevented his sons from being together because Carmela had a history of keeping the children from him and he did not want that to happen again. He also testified that he got into a heated altercation with Carmela and Vargas while the children were in their room. Carmela testified that the complainant was not a good father. When asked why she did not believe that the complainant was a good father, Carmela said:

> Just to the fact that he doesn't let me see the children as well as he's been physical with me in front of the children where he's grabbed me against my neck the [sic] against the wall when the children were present in the room. He's bad-mouthed me in front of the children, as well.

Because there is extensive evidence in the record showing that the complainant was not a loving father, the exclusion of the Band-Aid Order and text messages did not have a "substantial and injurious effect or influence in determining the jury's verdict." *See Leday v. State*, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998) (en banc) (erroneous admission of evidence is harmless when equivalent evidence is admitted elsewhere without objection); *Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991) (en banc) (error in admission of evidence may be rendered harmless when "substantially the same evidence" is admitted elsewhere without objection); *Schmidt v. State*, 612 S.W.3d 359, 372 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (admission of evidence of appellant's violence rendered harmless because same evidence was admitted through other testimony without objection); *Johnson v. State*, 925 S.W.2d 745, 749 (Tex. App.—Fort Worth 1996, pet. ref'd) (exclusion of evidence is harmless if the jury hears similar evidence through other means).

We therefore conclude that the trial court did not abuse its discretion when it sustained the State's relevance objections and excluded the Band-Aid Order and the text messages from evidence. We overrule Vargas's sole issue.

Conclusion

We affirm the judgment of the trial court.

Sarah Beth Landau
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

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