

Affirmed and Memorandum Opinion filed April 5, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-00991-CR

BRYAN O. KOSSIE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1356861**

M E M O R A N D U M O P I N I O N

Appellant Bryan O. Kossie appeals his murder conviction, asserting in a single issue that the trial court erred in admitting a witness's prior statements to police for impeachment purposes. We affirm.

I. F A C T U A L A N D P R O C E D U R A L B A C K G R O U N D

Appellant was charged with the murder of Byron Reado, who died from gunshot wounds. Appellant entered a plea of "not guilty." At appellant's jury

trial, the State called Raymond Lee as a witness and began questioning him about previously identifying appellant as the person who shot Reado. On the stand, Lee claimed he could not remember what he told the police around the time of the offense. Outside the presence of the jury, the State attempted to refresh Lee's recollection by playing a recording of his prior statements to the police. The recording did not refresh Lee's recollection, so the State instead sought to use the recording as prior inconsistent statements to impeach him in front of the jury. Appellant objected on two grounds: (1) inability to confront the witness and (2) the statements amounted to hearsay.¹ The trial court overruled appellant's objections and allowed the State to play the recording of Lee's prior statements and question him about it to impeach his credibility. The trial court then instructed the jury not to consider the recorded statements as substantive evidence of appellant's guilt, but only as evidence to impeach the credibility of the witness.² The jury charge also included a similar limiting instruction.³

The jury found appellant guilty of murder and assessed punishment at forty-five years' confinement.

¹ In his appellate brief, appellant does not challenge the admission of the prior statements on confrontation grounds.

² The trial court instructed the jury as follows:

Jurors, you are instructed that the recorded statement that was played for you was played for the purpose to impeach the witness with a prior inconsistent statement. Such evidence was admitted to aid you in considering Mr. Lee's testimony. It's only to be used for impeachment purposes. It cannot and should not be used as substantive evidence of those facts stated.

³ The jury charge included the following limiting instruction:

You are instructed that a witness may be impeached by showing that he or she has made other and different statements out of court from those made before you in the trial. Such impeachment evidence may be considered by you to aid you in determining, if it does so, the weight, if any, to be given the testimony of the witness at trial and his or her credibility; but such impeaching evidence is not to be considered as tending to establish the alleged guilt of the defendant in such case.

II. ISSUE AND ANALYSIS

On appeal, appellant contends the trial court erred in allowing the State to use the recorded statements under the guise of impeachment to get otherwise inadmissible hearsay evidence before the jury. We review evidentiary rulings under an abuse-of-discretion standard. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007).

Failure to Preserve Error

The hearsay objection appellant voiced at trial is not exactly the same as the “straw-man ploy” complaint he now raises on appeal. *See* Tex. R. App. P. 33.1(a) (providing that, generally, to preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired); *Miranda v. State*, 813 S.W.2d 724, 737 (Tex. App.—San Antonio 1991, pet ref’d) (holding objections to hearsay and improper predicate were insufficient to preserve complaint that State called witness solely for purposes of getting inadmissible hearsay before jury under guise of impeachment); *Martinez v. State*, 732 S.W.2d 401, 403 (Tex. App.—Houston [14th Dist.] 1987, no pet.) (stating that a general “hearsay” objection preserves nothing for review and that it is the opponent’s burden to show any underlying reason why testimony is admissible). But, presuming for the sake of the argument that appellant’s objection was sufficient to preserve his complaint for appellate review, we cannot conclude that the error, if any, warrants reversal.

Harm Analysis Based on Presumed Error

We presume, without deciding, that the trial court abused its discretion in admitting Lee’s prior statements, and we consider whether this presumed error was harmful. Because the admission of otherwise inadmissible hearsay is

nonconstitutional error, we must conduct a harm analysis under Rule 44.2(b) and determine whether the error affected appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. *King*, 953 S.W.2d at 271. We may not reverse if, after examining the record, we are fairly assured that the error did not influence the decision or had but a slight effect on it. *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001).

In assessing the likelihood that the jury's decision was improperly influenced, the appellate court must consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Barshaw v. State*, 342 S.W.3d 91, 94 (Tex. Crim. App. 2011). The reviewing court also may consider the jury instructions, the state's theory, defensive theories, closing arguments, voir dire, and whether the state emphasized the error. *Id.*

Appellant avers that it was improper for the jury to hear Lee's prior recorded statement, which included his identification of appellant as the shooter. He further argues that the jury must have relied on that statement in reaching its verdict because the only other witness identification was discredited by cross-examination. Finally, appellant contends that any error in admitting the recorded statement could not have been cured by the limiting instructions given.

The trial court gave limiting instructions both at the introduction of the prior statements and in the jury charge. We presume the jury followed the trial court's instructions in the manner presented, and we will abandon this presumption only if the record contains evidence showing that the jury did not follow the instructions.

See Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996); *Draper v. State*, 335 S.W.3d 412, 417 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Because the timing and content of the instructions were appropriate and there is no evidence indicating that the jury did not follow them, we presume the jury did not treat the recorded statements as substantive evidence. *See Rankin v. State*, 974 S.W.2d 707, 712 (Tex. Crim. App. 1996); *Scott v. State*, 222 S.W.3d 820, 829 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Ushonda Wooten, an eyewitness, testified at trial and identified appellant as the shooter. Appellant argues that Wooten's testimony should be disregarded because "defense counsel sufficiently cross-examined [her] as to discredit her in the eyes of the jury." But, the trier of fact is the exclusive judge of the facts, credibility of witnesses, and weight to be afforded their testimony. *Sills v. State*, 846 S.W.2d 392, 394 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Because we are to afford almost complete deference to a jury's decision when that decision is based on an evaluation of credibility, we cannot conclude that defense counsel effectively discredited a witness by cross-examination. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

Even if appellant's cross-examination had discredited Wooten's testimony, the record contains a substantial amount of additional evidence showing appellant shot the complainant. Among other evidence, the State offered and the trial court admitted DNA evidence found on a soda can at the crime scene. The State linked the DNA evidence to appellant. Also admitted into evidence was a photo lineup from which Lee identified the shooter, circled appellant's photograph, and signed it. While on the stand at trial, Lee confirmed, although reluctantly, that he had made the photo-lineup identification.

Given that the evidence included Lee's photo-lineup identification and his admission on the stand that he made the identification, the jury had before it evidence showing Lee previously had identified appellant as the shooter. Additionally, Lee's photo-lineup identification was corroborated by both DNA evidence at the scene and other eyewitness testimony. Given that the photo-lineup identification and DNA evidence were in front of the jury, the recorded statement likely did not affect the verdict. *See Torres v. State*, 424 S.W.3d 245, 260 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

Finally, if the trial court erred in admitting the prior statements, the record reflects that the State did not emphasize the statements. Upon playing the recording, the State focused on impeachment and questioned Lee only briefly about his photo-lineup identification. In closing argument the State mentioned Lee and his lack of testimony, but focused on Lee's confirmation, reminding the jury that Lee admitted making the photo identification, though he did so reluctantly and inconsistently. Defense counsel addressed Lee's testimony in closing argument, reminding the jury not to treat the recording as evidence against appellant. Because the State did not emphasize the recorded prior statements in making its case or in closing arguments, the risk of harm is minimal. *See Hoffman v. State*, 874 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

After examining the record as a whole, we cannot conclude that any erroneous admission of the prior inconsistent statements, as presumed improper impeachment, had a substantial and injurious effect on the jury's verdict. *See Ruth v. State*, 167 S.W.3d 560, 566–67 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Accordingly, we conclude that even if the trial court erred in admitting the recorded statements, the error is harmless and thus does not warrant reversal. *See*

Amador v. State, 376 S.W.3d 339, 345 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

We overrule appellant's sole issue on appeal and affirm the trial court's judgment.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.
Do Not Publish — Tex. R. App. P. 47.2(b).