Affirmed and Memorandum Opinion filed June 28, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00446-CR

CARLOS JOSE CACERES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1406225

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

A jury found Carlos Jose Caceres guilty of theft. The trial court sentenced him to five years' confinement and suspended the sentence. In three issues, appellant asserts the trial court erred in admitting certain invoices and photographs, allowing the State to cross-examine him about taking pain medication, and excluding medical records regarding the pain medication. We affirm.

BACKGROUND

This case concerns medical supplies and equipment owned by a hospital but found in a nearby medical clinic. Appellant is a medical sales representative who sold products to both facilities.

The supplies and equipment involved are Essure devices and hysteroscopes. An Essure device is a type of birth control inserted into the Fallopian tube. A hysteroscope is a surgical instrument used to look inside the uterus for various reasons, including insertion of an Essure device. Other equipment is used in conjunction with a hysteroscope. That other equipment is commonly and collectively referred to as "the tower" or "tower equipment" and includes a light source, a camera, a video monitor, and a multi-shelf stand that supports and provides power to the equipment. The hysteroscope and tower components are modular and can be acquired separately.

Appellant sold Essure devices for a company called Conceptus. According to appellant, Conceptus loaned hysteroscopes to its sales representatives, who could loan them to their customers, who would use them during Essure-insertion procedures. However, Conceptus did not loan each representative a tower. Instead, several Conceptus representatives in the area shared one and loaned it to their customers based on availability. Seeking to gain a competitive advantage, appellant acquired a tower in 2011 from Brad Turnley, a non-Conceptus medical sales representative.[1] That way, he could loan his own tower to his customers as he pleased. He believed that would help him sell Essure devices. He did not buy his own hysteroscope, though. He continued to borrow one from Conceptus.

[1] The invoice for that tower identifies the buyer as Advantage Women's Care, where appellant's wife, Jennifer Nguyen, M.D., is an obstetrician-gynecologist.

In the summer of 2012, Cypress OBGYN ("the Clinic") wanted to buy a hysteroscope and tower rather than continuing to borrow them. The Clinic's business manager, Quincy Khong, spoke with appellant about purchasing them. Khong testified he agreed to buy 25 Essure devices from appellant for $32,500 plus tax, and appellant would "throw in a hysteroscope" for free. Khong refers to "the scope," "equipment," and "the machine" in his testimony, so it is not clear from the record what he believed was free: the hysteroscope alone or a scope and tower. On July 10, 2012, Khong made two partial payments totaling $11,000 by swiping two credit cards through a card reader attached to appellant's cell phone. One payment was for $3,727.08 on a Chase credit card.

Sandy Espinoza, a certified medical assistant at the Clinic, testified she saw appellant carry in five boxes on a Friday in July. Each of the boxes contained five Essure devices. She said appellant brought the hysteroscope and tower the following Wednesday. According to Espinoza, he stayed at the Clinic and taught her how to use the hysteroscope and tower.

Appellant disputes Khong's and Espinoza's testimony. He testified he did not agree to sell Essure devices to the Clinic. Instead, he "made a deal with Quincy to sell [the Clinic] my actual tower" and give the Clinic a hysteroscope.[2] According to appellant, the boxes he brought to the Clinic contained the components of his tower, not Essure devices. He said he saw other boxes, already in the Clinic, that did contain Essure devices. Appellant said he asked Espinoza about them because he was concerned Conceptus did not give him his commission for the sale of those devices.

[2] Appellant said he approached Turnley to buy a hysteroscope he could give the Clinic since he did not own one. The record does not indicate if that sale occurred.

In the beginning of August, Khong received the statement for the Chase credit card he swiped through the card reader on appellant's phone. The statement showed a charge on July 10, 2012, for $3,727.08 by CJ Remodeling Company, which Khong found odd. Appellant testified that since he was selling his personal property and Khong was paying by credit card, the only way he could accept payment was through his remodeling company.

Khong called Conceptus director Derrick Ziemer about the charge. After speaking with Khong, Ziemer contacted Joe Martinez, the director of security at North Cypress Medical Center ("the Hospital"). As a result of their conversation, Martinez launched an investigation into a possible theft of 25 Essure devices and a hysteroscope from the Hospital.

On August 13, 2012, Martinez and Chris Stewart, the Hospital's director of perioperative services, went to the Clinic and spoke with Khong, who brought out the hysteroscope.[3] Stewart inspected it and confirmed its serial number matched that of a hysteroscope that had gone missing from the Hospital in 2011. He also saw five boxes of Essure devices. Each box bore a handwritten, 5-digit number in the spot the Hospital writes its purchase order numbers on boxes it receives. Those numbers matched the purchase order numbers for fives boxes of Essure devices the Hospital bought from Conceptus over a period of time. Appellant testified he did not know how the hysteroscope or the boxes belonging to the Hospital wound up at the Clinic.

The jury found appellant guilty and assessed punishment. The trial court signed a judgment on the jury's verdict and assessment. Appellant timely appealed.

[3] The Clinic had two hysteroscopes at that time. It is not clear who owned the second scope.

ANALYSIS

I. Admission of invoices and photographs

In his first issue, appellant asserts the trial court erred in admitting exhibits 7–16 over his objection because they were inadmissible hearsay. Exhibit 7 is an invoice from a company called Richard Wolf to the Hospital for a hysteroscope and other equipment. Exhibit 8 is a photograph of part of a hysteroscope. Each of exhibits 9, 11, 13, and 15 is a purchase order for five Essure devices. The purchase order numbers are 0000074097 (exhibit 9), 0000064166 (exhibit 11), 0000071532 (exhibit 13), and 0000064726 (exhibit 15). Each of exhibits 10, 12, 14, and 16 is a photograph of a cardboard box with a handwritten, 5-digit number. Those numbers are 74097 (exhibit 10), 64166 (exhibit 12), 71532 (exhibit 14),[4] and 64726 (exhibit 16).

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). If the trial court's decision was within the bounds of reasonable disagreement, we will not disturb its ruling. *See Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). If the decision is correct on any applicable theory of law, it will be sustained. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Tex. R. Evid. 801(d). Hearsay is inadmissible unless made admissible by statute or rule. Tex. R. Evid. 802. A record of an act, event, condition, opinion, or diagnosis, commonly called a "business record," is admissible hearsay if: (A) the record was made at or near the time by—or from

[4] Stewart looked at the original exhibit 14 and testified the 5-digit number was 71532. The court's copy of exhibit 14 is of poor quality, and no numbers are visible.

information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted business activity; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony, affidavit, or unsworn declaration of the custodian or another qualified witness; and (E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Tex. R. Evid. 803(6). "Business" includes every kind of regularly organized activity whether conducted for profit or not. *Id.*

The State asked Stewart about the Hospital's procedures in 2012 for ordering and receiving materials for the operating room. Stewart testified when equipment or supplies needed to be ordered, his department (perioperative services) generated a purchase order through the Hospital's computer system and called the vendor to confirm the purchase. A courier service delivered the equipment to the Hospital's loading dock, where it was received by the materials management department. Upon receipt, the materials management department verified the purchase order for the equipment and wrote the purchase order number on the box. A copy of the purchase order and the packing slip were attached to the box, and the box was sent to Stewart's department. His department then re-verified the purchase order, making sure the equipment received matched the equipment ordered.

A. Photographs

Appellant's counsel questioned Stewart on voir dire about the photographs. Stewart testified he did not know who wrote the numbers on the boxes depicted in the photographs. Counsel objected to admission of the photographs because they were "basically hearsay because we don't know where those numbers came from." Photographs are not statements for hearsay purposes. *Herrera v. State*, 367 S.W.3d

762, 773 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Wood v. State*, 299 S.W.3d 200, 214 (Tex. App.—Austin 2008, pet. ref'd). Therefore, the trial court did not abuse its discretion in overruling appellant's hearsay objections to exhibits 8, 10, 12, 14, and 16.

B. Invoice and purchase orders

Counsel asked Stewart only one question about exhibits 9, 11, 13, and 15 (the purchase orders):

> Q. Sir, are you the custodian of records for State's Exhibit 15, 13, 11, and 9?
>
> A: Those are all stored electronically. I don't have those, like, in my office. They're all – it's electronic computerized system, so I would assume that the IT department is responsible for the maintenance of the computer system.

He did not question Stewart about exhibit 7 (the Richard Wolf invoice).

At best, that testimony establishes Stewart is not the custodian of records for the purchase orders. However, rule 803(6) does not require testimony from the custodian of records; testimony from "another qualified witness" is acceptable. Tex. R. Evid. 803(6)(D); *see Melendez v. State*, 194 S.W.3d 641, 644 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) ("[T]he predicate for the business records exception to the hearsay rule may be established either by the custodian of records or *another qualified witness*.") (emphasis in original). Appellant did not suggest Stewart was not a qualified witness. Moreover, Stewart's earlier testimony regarding the Hospital's procedures for ordering and receiving equipment was evidence of his qualification to testify about the purchase orders.

Stewart's testimony also satisfied rule 803(6)'s other requirements. He said purchase orders were generated by his department at the time equipment was ordered. *See* Tex. R. Evid. 803(6)(A) ("the record was made at or near the time

by—or from information transmitted by—someone with knowledge"). Although he did not use the phrase "regularly conducted business activity," his testimony establishes that (1) ordering equipment was a regular part of the Hospital's business, and (2) generating a purchase order was a regular part of ordering equipment. *See* Tex. R. Evid. 803(6)(B), (C) ("the record was kept in the course of a regularly conducted business activity" and "making the record was a regular practice of that activity."). Therefore, the trial court did not abuse its discretion in overruling appellant's objections to exhibits 7, 9, 11, 13, and 15.

We overrule appellant's first issue.

II. Evidence about appellant's use of pain medication

Appellant's second and third issues concern evidence of his use of pain medication in the days preceding his arrest. He asserts in his second issue that the trial court erred in overruling his objection to the State's questions during cross-examination that "portrayed [him] as a drug addict." In his third issue, he says the trial court erred in not allowing him to introduce his medical records to rebut the State's "assertion that appellant was a drug addict."

A. Cross-examination

The scope of cross-examination is left to the sound discretion of the trial court, and we will not disturb its ruling absent a clear abuse of discretion. *Temple v. State*, 342 S.W.3d 572, 593 (Tex. Crim. App. 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013); *Smith v. State*, 436 S.W.3d 353, 375 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). Generally, a defendant who chooses to waive his privilege against self-incrimination by voluntarily taking the witness stand is subject to the same rules as any other witness. *Bell v. State*, 620 S.W.2d 116, 124 (Tex. Crim. App. [Panel Op.] 1980) (op. on reh'g). "A witness may be cross-examined on any matter relevant to any issue in the case, including

credibility." Tex. R. Evid. 611(b); *Linney v. State*, 401 S.W.3d 764, 772 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

Appellant testified during direct examination about the nature and extent of back injuries he suffered while serving in the military. He said as a result of those injuries, he "unfortunately [had] to take pain medication in order to be able to just go about everyday life."

Appellant also testified that before he was arrested, he made plans to surrender to the police on a Monday in August. The State asked him about the circumstances of his arrest on cross-examination:

> Q. [W]hen you were arrested, it wasn't at your home?
>
> A. No, ma'am.
>
> Q. It wasn't at a job?
>
> A. No, ma'am.
>
> Q. You and your girlfriend had rented a hotel room?
>
> A. I was at a hotel next to a hospital because of my back issues. I was trying to detox of [sic] the medication and I wanted to be close to a hospital in case something bad happened to me from being off of the medicines.
>
> . . .
>
> Q. And you said you were trying to detox. How much medication do you take on a daily basis?
>
> A. At that point in time I was – I always take what the doctors tell me, but I had –
>
> Q. My question is –
>
> A. I was taking about 80 mg –

APPELLANT'S COUNSEL: I'm going to object to relevance, Your Honor.

THE COURT: I think it's relevant.

Q. You were taking how many milligrams total?

A. I was taking 80 mg of Oxycontin two or three times a day, plus additional medicines that you may not know the – they're medicines that are given for pain. Cymbalta – there's multiple meds, I don't know all the names of them.

Appellant testified on direct examination about his plans to surrender and his use of pain medication. Accordingly, the State was entitled to cross-examine him about those plans. *See Temple*, 342 S.W.3d at 596 (defendant's direct testimony that he "wanted [his unborn daughter] more than anything" opened the door to cross-examination about defendant's arguments with his pregnant wife about having the baby). In response to the State's question about his not surrendering but rather being found in a hotel room, appellant volunteered he was there "to detox" from medications. Due to that statement and appellant's earlier testimony that he took medication for pain, the State could appropriately question him about the medication he was taking—for example, the names and dosages of the medications. *See id.* Therefore, the trial court did not abuse its discretion in overruling appellant's objection to relevance.

Appellant also asserts the State's questioning was improper because a witness may not be impeached with evidence of drug addiction. *See* Tex. R. Evid. 608(b); *Lagrone v. State*, 942 S.W.2d 602, 612–13 (Tex. Crim. App. 1997). He did not raise that objection at trial, so he has not preserved that complaint for appellate review. *See* Tex. R. App. P. 33.1(a).

We overrule appellant's second issue.

B. Medical records

Appellant testified more about his back condition on redirect examination, describing the surgeries and procedures he had undergone. His lawyer sought to have appellant's medical records admitted into evidence. The trial court questioned the relevance of the documents:

> THE COURT: Well, I just don't understand what the relevance of it is in the guilt-innocence phase of the trial.
>
> APPELLANT'S COUNSEL: I think the prosecutor has asked my client in such a way the questions about his medication might leave the jury with the impression that he's a junkie and he's avoiding the police officers' arrest because he's a junkie. And that's why I would like to put these medical records into evidence. And I had discussed this with the prosecutor before trial.
>
> STATE'S COUNSEL: Actually, I told him then they weren't relevant and that I didn't see that they were guilt-innocence material when we spoke prior to trial. And that would be my objection. I don't see anything in there that's relevant. I've not implied he's a junkie, he said he took a certain number of milligrams and that's fine.
>
> APPELLANT'S COUNSEL: If the only objection is relevancy, Your Honor, what's your –
>
> THE COURT: I sustain it.

Appellant asserts he "suffered a predicate attack on his character for truthfulness when the prosecutor used questions on cross-examination designed to call his truthfulness into doubt by mischaracterizing him as a drug addict." When a witness's character for truthfulness has been attacked, the proponent of the witness may introduce evidence to rehabilitate the witness. *See* Tex. R. Evid. 608(a); *Michael v. State*, 235 S.W.3d 723, 725 (Tex. Crim. App. 2007). In deciding whether to allow rehabilitative evidence, "[t]he question for the trial judge is whether a reasonable juror would believe that a witness's character for truthfulness

has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements)." *Michael*, 235 S.W.3d at 728.

The State did not state or imply appellant was taking an inappropriate amount of Oxycontin. It did not use the words "junkie" or "addict" in its questions to appellant or in its closing argument. The State did not suggest appellant's use of pain medication affected his truthfulness. We hold there was no abuse of discretion by the trial court in determining a reasonable juror would not believe appellant's character for truthfulness had been attacked. Accordingly, the trial court did not abuse its discretion in excluding appellant's medical records.

We overrule appellant's third issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby.
Do Not Publish — Tex. R. App. P. 47.2(b).