Affirmed and Memorandum Opinion filed February 23, 2017.

In the

Fourteenth Court of Appeals

NO. 14-15-00684-CR

QUINTON COX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 434th Judicial District Court
Fort Bend County, Texas
Trial Court Cause No. 13-DCR-064794

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

Appellant Quinton Cox challenges his felony conviction for harassment by a person in a correctional/detention facility.[1] Appellant presents three issues. We affirm.

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[1] *See* Tex. Penal Code § 22.11(a)(1) (West 2015) ("A person commits an offense if, with the intent to assault, harass, or alarm, the person . . . while imprisoned or confined in a correctional or detention facility, causes another person to contact the blood, seminal fluid, vaginal fluid, saliva, urine, or feces of the actor, any other person, or an animal.").

I. FACTUAL AND PROCEDURAL BACKGROUND

At the time of the offense, appellant was incarcerated in the Jester IV Unit of the Texas Department of Criminal Justice, Institutional Division, serving a 55-year sentence for murder. Keisha Parkes worked as a correctional officer at the Jester IV Unit. On the morning of March 3, 2013, Parkes was on "pill call," which involves opening the inmates' individual food tray slots to provide the inmates with their medication. Parkes' supervisor, Lieutenant Tyrone Jackson, accompanied her to appellant's individual cell to assist in case appellant held his tray slot down. When Parkes opened appellant's tray slot, appellant put out an open hand, "dashed out some stuff out of a foam cup" through the slot, and cursed out Parkes. The substance struck Parkes' "left forearm, [her] right, and pretty much down [her] whole right side," as well as her ear. Parkes had "no doubt" the substance was urine and feces based on the "really strong odor" and what it looked like.

Appellant was subsequently charged by indictment with felony harassment by a person in a correctional/detention facility. Paragraph one alleged that appellant, while imprisoned or confined in the Jester IV Unit, a correctional facility, and with intent to assault, harass, or alarm, caused Parkes to contact the urine of appellant or another person or an animal. Paragraph two alleged that appellant, while imprisoned or confined in the Jester IV Unit, a correctional facility, and with intent to assault, harass, or alarm, caused Parkes to contact the feces of appellant or another person or an animal. Appellant pleaded not guilty.

At trial, the State presented Parkes, Jackson, Captain Kennis Lewis, and Investigator Patricia Harrison with the Office of the Inspector General—the state police for TDCJ. Lewis collected and Harrison processed Parkes' uniform. The State also presented Lori McElhaney, a chemist with the Texas Department of

State Health Services. McElhaney testified that tests she performed on the uniform confirmed the presence of urine and feces. Appellant presented Amanda Culbertson, a chemist with experience working in forensic laboratories. Culbertson testified that the tests used by the State confirm the presence of certain molecules present in urine and feces but do not confirm the presence of urine and feces.

Appellant testified, denying that he threw urine and feces on Parkes. According to appellant, Parkes was lying and instead had "doused herself" with a Styrofoam cup "full" of urine and feces. Appellant did not "dispute" that the substance smelled like urine and feces but denied that it was his urine and feces.

The jury found appellant guilty of the offense and assessed punishment at ten years' confinement in the Institutional Division of TDCJ and a $2000 fine. Appellant raises three issues. First, he argues that the trial court erred in overruling his objection to having to appear before the jury during voir dire restrained and in TDCJ-issued clothing. Second, appellant argues that the trial court erred in admitting McElhaney's testimony in violation of *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). Third, appellant contends that the trial court committed error by permitting Jackson's testimony after a violation of the Rule.

II. ANALYSIS

A. The trial court did not commit reversible error in overruling appellant's objections during voir dire.

In his first issue, appellant argues that the trial court erred by forcing him to conduct voir dire (1) restrained and (2) in "jail clothes."

Restraints. Where a stun belt would not be available until the next day, the trial court conducted a hearing to determine whether appellant would be shackled during voir dire. After hearing from both the State and appellant, the trial court

ordered the guards to keep appellant in restraints.

Generally, a defendant has a right to be tried without being shackled because restraining a defendant in the courtroom implicates the fundamental legal principles of the presumption of innocence, the right to counsel and ability to communicate with counsel, and the dignity of the judicial process. *Yglesias v. State*, 252 S.W.3d 773, 776–77 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Davis v. State*, 195 S.W.3d 311, 315 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see Deck v. Missouri*, 544 U.S. 622, 630 (2005). However, the trial court has discretion to order restraints if there is a showing of a manifest need or exceptional circumstances, such as when a defendant poses a threat to himself or others. *Yglesias*, 252 S.W.3d at 777; *Davis*, 195 S.W.3d at 315. The need for restraints must be assessed on a case-by-case basis. *Yglesias*, 252 S.W.3d at 777; *Davis*, 195 S.W.3d at 315. A trial court abuses its discretion where it requires a defendant to be shackled during trial without first finding a particular reason for shackling that is specific to the defendant. *Yglesias*, 252 S.W.3d at 777; *Davis*, 195 S.W.3d at 316.

If the trial court abuses its discretion, we proceed to a harm analysis. In the absence of harm, any error by the trial court is not reversible. *See Yglesias*, 252 S.W.3d at 778. Whether the error is of a constitutional dimension that it deprived appellant of his presumption of innocence requiring analysis under rule 44.2(a) or of a nonconstitutional nature requiring analysis under rule 44.2(b) depends on "whether the record shows a reasonable probability that the jury was aware of the defendant's shackles." *Bell v. State*, 415 S.W.3d 278, 283 (Tex. Crim. App. 2013); *see* Tex. R. App. P. 44.2(a) (constitutional errors subject to harmless-error review), 44.2(b) (other errors that do not affect substantial rights must be disregarded). Whether a shackling error is of a constitutional dimension also depends on whether

there is a reasonable probability that the restraints interfered with appellant's ability to communicate with counsel or undermined the dignity of the judicial process. *See Bell*, 415 S.W.3d at 283.

Here, the trial court assessed the need for restraints for this specific appellant in this case. This was not a situation where the trial court merely expressed generalized security concerns. *Cf. id.* (trial court erred where no particularized finding articulating reason for shackling defendant, only "a generalized concern for courtroom security," and no justifiable reasons clear from record); *Long v. State*, 823 S.W.2d 259, 283 (Tex. Crim. App. 1991) (trial court abused its discretion in ordering restraints where concerns were general security concerns rather than specific to defendant); *Davis*, 195 S.W.3d at 315–17. Instead, the trial court specifically referenced three pending assault cases involving a public servant against this particular appellant. *See Tracy v. State*, 14 S.W.3d 820, 823–24 (Tex. App.—Dallas 2000, pet. ref'd) (no abuse of discretion where defendant had violent tendencies toward guards and fellow inmates and stated his objective was to escape). The court expressly stated that it had a duty to ensure, and was concerned for, the safety of everyone in the courtroom, including the jurors, counsel, and appellant. Nor did the court "want [appellant] to be in a situation where if he started to act out a little bit that he could have a thunderous response." We conclude that the trial court did not abuse its discretion in ordering appellant to be shackled during voir dire.

Moreover, we cannot conclude that there was a reasonable probability that appellant's shackles deprived him of the presumption of innocence, interfered with his ability to communicate with counsel, or undermined the dignity of the judicial process. *See Bell*, 415 S.W.3d at 283. The record here reflects that based on where appellant was seated at counsel's table, there were bags obscuring the jury's

view of his shackles. Nothing in the record reflects that any member of the jury actually saw or noticed that appellant was shackled. *See Yglesias*, 252 S.W.3d at 778; *Grayson v. State*, 192 S.W.3d 790, 792 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Tracy*, 14 S.W.3d at 824–25. In addition, appellant does not assert nor does anything in the record reflect that the restraints interfered with appellant's ability to communicate with counsel during jury selection. *See Bell*, 415 S.W.3d at 283; *Yglesias*, 252 S.W.3d at 778. Appellant's counsel told appellant to communicate with him by whispering in his ear or writing on paper. The trial court suggested to appellant that he put his pad on his lap instead of on the table to take notes. *Cf. Davis*, 195 S.W.3d at 317–18 (where trial court ordered bailiff to remove pen appellant was unable to take notes). Appellant's counsel acknowledged that he was able to communicate with appellant about the jury strikes. Finally, appellant does not assert nor was there any evidence that appellant's shackles undermined the dignity of the judicial process. *See Bell*, 415 S.W.3d at 283. We cannot conclude there was a reasonable probability that appellant's shackles deprived him of the presumption of innocence, interfered with his ability to communicate with counsel, or undermined the dignity of the judicial process. *See id.*

Therefore, even assuming the trial court erred in ordering appellant to be shackled during voir dire, and performing our harm analysis under rule 44.2(b) governing nonconstitutional error, we conclude that appellant's shackling did not affect his substantial rights. *See id.* at 284 & n.24.

"Jail clothes." Next, with regard to appellant's argument on appeal that the trial court erred by forcing him to conduct voir dire in "jail clothes," *see Estelle v. Williams*, 425 U.S. 501, 504 (1976), we conclude that appellant failed to preserve this error. An objection at trial that does not comport with the complaint on appeal

does not preserve error for appellate review. *McLendon v. State*, 167 S.W.3d 503, 510 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *see* Tex. R. App. P. 33.1; *Guevara v. State*, 97 S.W.3d 579, 583 (Tex. Crim. App. 2003). Below, instead of objecting that he was forced to appear in prison clothing, appellant challenged the "visual presence of correctional officers in full uniform" guarding appellant. To address this concern, the trial court stated that it would "order [the officers] to wear civilian clothing tomorrow so that it's not so obvious in everyone's view . . . [t]hat they're here in their official capacity." Even if appellant had preserved error on the issue he now raises, the trial court expressly noted on the record that appellant "was in civilian clothes" during voir dire.

We overrule appellant's first issue.

B. The trial court did not commit reversible error in admitting McElhaney's testimony.

In his second issue, appellant argues that the trial court committed reversible error by admitting the testimony of McElhaney in violation of *Kelly v. State*.[2] Here, appellant objected to the admission of McElhaney's testimony and findings

[2] Under rule 702 the proponent of expert testimony or evidence based on a scientific theory must show by clear and convincing evidence that the evidence is reliable and relevant to assist the trier of fact in its fact-finding duty. *Kelly*, 824 S.W.2d at 572–73; *see Hartman v. State*, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997) (applying *Kelly* test beyond just novel to all scientific evidence). For evidence to be considered sufficiently reliable: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. Factors that could affect a trial court's determination of reliability include, but are not limited to: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the testifying expert(s); (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id.*

in a pretrial motion for *Kelly*/*Daubert*[3] hearing regarding State's expert. The trial court conducted a pretrial *Kelly* hearing. After hearing from McElhaney and Culbertson, the court overruled appellant's objection.

During McElhaney's testimony, appellant reurged his objection to her testifying as an expert. The trial court again overruled the objection. When the State sought to introduce McElhaney's written report, appellant objected that it was not independently admissible. The trial court overruled his objection and admitted the report. McElhaney's report described what particular Association of Official Analytical Chemists methods of analysis she used to analyze Parkes' uniform. The report also provided McElhaney's expert conclusion based on her testing that urine stains and fecal matter were "evident." Although appellant objected to the admission of McElhaney's written report at trial, he does not challenge the admission of this report on appeal.

In addition to McElhaney's testimony and report, the State provided nonscientific evidence of the nature of the substance. Lay witnesses may provide their opinions regarding whether a substance is urine or feces rationally based on their perception. *See* Tex. R. Evid. 701; *Copeland v. State*, 848 S.W.2d 199, 201 (Tex. App.—Corpus Christi 1992, pet. ref'd). Here, Parkes and Jackson definitively testified that the substance appellant threw on Parkes and her clothing was feces and urine. Lewis testified that Parkes smelled of urine and feces when she came into his office to provide her uniform as evidence. These witnesses based their opinions on the substance's strong odor and what it looked like on Parkes' clothing. In addition, although he denied that he threw the substance on Parkes and that it came from him, appellant did not dispute the substance involved in the incident was urine and feces. Appellant "honestly believe[d]" the substance

[3] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

was urine and feces. Appellant does not challenge the admission of any of this lay testimony on appeal.

Even assuming without deciding that the admission of McElhaney's testimony as an expert witness was error, such error does not require reversal. *See* Tex. R. App. 44.2(b). Even improper admission of evidence is not reversible when the same or similar evidence is received without objection or challenge. *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *Chapman v. State*, 150 S.W.3d 809, 814 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); *see also Smith v. State*, 499 S.W.3d 1, 6 (Tex. Crim. App. 2016). The same or similar evidence was admitted through McElhaney's written expert report. The same or similar evidence also was admitted through lay testimony from the State's witnesses and from appellant. Appellant challenges none of this evidence on appeal.

We overrule appellant's second issue.

C. The trial court did not commit reversible error in permitting Jackson's testimony.

In his third issue, appellant argues that the trial court committed reversible error in permitting Jackson to testify as a fact witness after an alleged violation of the Rule occurred.

When the Rule is invoked, the trial court orders witnesses to remain outside the courtroom during other witnesses' testimony and not to discuss the case. *See* Tex. R. Evid. 614; Tex. Code Crim. Proc. art. 36.05, 36.06 (West 2015). "The Rule is designed to prevent witnesses from altering their testimony, consciously or not, based on hearing other witnesses' testimony." *Routier v. State*, 112 S.W.3d 554, 590 (Tex. Crim. App. 2003) (citing *Webb v. State*, 766 S.W.2d 236, 239 (Tex. Crim. App. 1989)). "[T]he court's decision to allow testimony from a witness who

has violated the rule is a discretionary matter." *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996).

After Jackson testified, appellant became aware of an alleged violation of the Rule and moved for a mistrial. Culbertson was the person who reported the incident. At the hearing, Culbertson testified that Parkes discussed her testimony for several minutes in the hallway, near the bench where Jackson was sitting, prior to his testimony. Culbertson did not ask Jackson whether he heard what Parkes said. Jackson testified that he did not hear Parkes or anyone else speak about the case while he was waiting to testify. One of appellant's counsel testified that in her notes she recorded the stopping time for Parkes' testimony as 10:47 a.m. and the starting time for Jackson's testimony as 10:47 a.m.[4] At the conclusion of the hearing, appellant's counsel stated:

> Given the testimony of both Lieutenant Jackson, Ms. Culbertson, and Ms. Day, it seems that neither Mr. Jackson nor Ms. Day, in their recollection or written notes, think that the amount of time Ms. Culbertson recalls this conversation taking place transpired in a time where Lieutenant Jackson could have heard what the other witness had to say. As that information came out, I think it would be difficult to say that Mr. Cox's rights have been harmed in this particular instance.
>
> THE DEFENDANT: Objection, Your Honor.
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> THE COURT: I concur.
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> THE DEFENDANT: That's an objection, Your Honor. How does that help my defense?
>
> THE COURT: All right. Let's have our next witness.

Arguably, appellant's counsel created the distinct impression that appellant was abandoning his motion for mistrial based on any violation of the Rule because

[4] The record also reflects that Jackson took the witness stand immediately after Parkes.

of the lack of a time gap between Parkes' testimony ending and Jackson's testimony beginning such that his initial objection did not preserve any alleged error. *See Purtell v. State*, 761 S.W.2d 360, 366 (Tex. Crim. App. 1988) (record did not convey to trial court that appellant continued to oppose motion to dismiss for cause such that court did not know it needed to rule on contested point); *Cole v. State*, 194 S.W.3d 538, 545 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

To the extent that appellant himself continued to object, based on the record, we cannot conclude that a violation of the Rule occurred, much less that any error in connection with such violation was reversible. *See Bell*, 938 S.W.2d at 50–51; *Webb*, 766 S.W.2d at 240 ("[A] violation of the rule is not in itself reversible error, but only becomes so where the objected-to testimony is admitted and the complaining party is harmed thereby.").

We overrule appellant's third issue.

III. CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Busby, Donovan, and Brown.
Do Not Publish — TEX. R. APP. P. 47.2(b).