

Affirmed and Memorandum Opinion filed June 20, 2017.



In The

Fourteenth Court of Appeals

**NO. 14-16-00266-CR
NO. 14-16-00267-CR**

MATTHEW GARZA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause Nos. 1484320 & 1484321**

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

Appellant Matthew Garza was convicted of burglary of a habitation and aggravated assault. In his sole issue on appeal, appellant argues the trial court abused its discretion in overruling appellant's objection to the relevance of a complainant's testimony about an existing medical condition. We conclude that even if the trial court erred, the error was harmless because the medical condition

testimony was brief and the evidence presented against appellant was strong. We therefore affirm the judgment.

BACKGROUND

Appellant and complainant Michael Hailey lived in the same apartment complex. Michael shared his apartment with his brother, complainant Gregory Hailey. One afternoon, Michael saw appellant outside arguing with a woman, spitting, and “talking crazy.” As Michael was walking up the stairs to his apartment, appellant came up behind him. Michael testified that he turned and said, “Man, I sure hope you don’t spit on me.” Then Michael went inside his apartment and shut the door.

Once Michael was inside, appellant started beating on the door. Gregory, who was watching television in his room, came out to see what was happening. Appellant kicked the door in but then left. As Michael was pushing the door shut, he could hear appellant yelling outside. Gregory called the police. While Gregory was on the phone with the police, appellant kicked the door in again and entered the apartment carrying a knife. Appellant said to Michael and Gregory, “Y’all might as well do something to me. Because if you don’t, my homeboys are going to get you anyway.” Michael and Gregory testified they felt scared and threatened. They pleaded with appellant to put the knife down. Gregory testified that he considered the knife a deadly weapon given his medical condition, as we discuss below. Appellant threw the knife down and Gregory picked it up and put it in a drawer. When the police arrived, appellant admitted the knife was his and he was arrested.

Appellant was charged with both burglary of Michael’s habitation and aggravated assault of Gregory, which were consolidated for trial. The jury convicted appellant of both offenses. He was sentenced to twenty-three years’

confinement for burglary of a habitation and twelve years' confinement for aggravated assault, with the sentences to run concurrently. This appeal followed.

ANALYSIS

Appellant's complaint on appeal centers on a portion of Gregory's testimony. The testimony was as follows:

Q. [State] Sir, I want to get your perspective on -- when he entered your apartment after kicking in the door wielding a knife, what did you think he was going to do while he was there?

A. I thought he was going to hurt us, going to kill us, cut us up.

Q. Bodily injury?

A. Yes. Yes, sir.

Q. You said a knife. Is that a deadly went [sic]?

A. With a deadly weapon. And if I'm truthful with you, I can't get sliced, cut, or a nail cut or anything right now because I'm on blood thinners. By me being on blood couldn't, if you touch me any kind of way I will bleed to death.

THE DEFENDANT: Objection, Your Honor.

THE COURT: And the objection is what?

THE DEFENDANT: Evidence -- relevance.

THE COURT: That's overruled. But let's move along.

Appellant argues that Gregory's testimony about being on blood thinners was irrelevant because it did not make any fact of consequence more or less probable and it created sympathy for the complainant, similar to a victim-impact statement. The State counters that the testimony was relevant because it explained why Gregory felt in imminent fear of bodily injury or death when appellant entered the

house, why he called 9-1-1, and why he did not get into a confrontation with appellant.

I. Standard of review and applicable law

We review a trial court's decision to admit evidence for an abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). Under this standard, we should not disturb the trial court's decision if its ruling was within the zone of reasonable disagreement. *Id.*

Only relevant evidence is admissible. Tex. R. Evid. 402; *Montgomery*, 810 S.W.2d at 375. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Tex. R. Evid. 401. A "fact of consequence" includes an elemental fact or an evidentiary fact from which an elemental fact can be inferred. Tex. R. Evid. 401; *Henley v. State*, 493 S.W.3d 77, 84 (Tex. Crim. App. 2016); *Montgomery*, 810 S.W.2d at 375. Evidence does not need to prove or disprove a particular fact by itself to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence. *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004).

Evidence that is relevant to the issues in the case generally is admissible. *Henley*, 493 S.W.3d at 84. Here, appellant was charged with two crimes: aggravated assault and burglary of a habitation. A person commits assault if he intentionally or knowingly threatens another with imminent bodily injury. Tex. Penal Code Ann. § 22.01(a)(2) (West 2011). A person commits aggravated assault if he commits assault while using or exhibiting a deadly weapon. *Id.* § 22.02(a)(2). A person commits burglary of a habitation if he enters a habitation without the

owner's consent with the intent to commit a felony, such as aggravated assault. *Id.* § 30.02(a)(3).¹

In reviewing an argument that a trial court erred in admitting evidence, we apply Texas Rule of Appellate Procedure 44.2(b), which provides that an appellate court must disregard non-constitutional error that does not affect a defendant's substantial rights. *See Jabari v. State*, 273 S.W.3d 745, 754 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A substantial right is affected “when the error had a substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* (citing *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)). A criminal conviction should not be overturned for non-constitutional error if the court, after examining the record as a whole, has “fair assurance that the error did not influence the jury, or but had slight effect.” *Id.* (citing *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). To determine whether the error

¹ In this case, the indictment charges appellant with a different method of burglary of a habitation than the method on which he was tried and convicted. The indictment alleges that appellant

[d]id then and there unlawfully with intent to commit a felony, namely AGGRAVATED ASSAULT, . . . *remain concealed* in a habitation owned by MICHAEL HAILEY, . . . without the effective consent of [Michael].

(Emphasis added). *See* Tex. Penal Code § 33.02(2). The jury charge, however, instructed that if the jury found appellant “[d]id then and there unlawfully, with intent to commit aggravated assault, *enter* a habitation owned by Michael Hailey . . . without effective consent of [Michael], then you will find the defendant guilty of burglary of a habitation with intent to commit aggravated assault, as charged in the indictment.” (Emphasis added). *See* Tex. Penal Code § 33.02(3). We recognize that this discrepancy between the elements listed in the indictment and the elements included in the jury charge and found by the jury implicates due process concerns. *See Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001); *Uddin v. State*, 503 S.W.3d 710, 716 (Tex. App.—Houston [14th Dist.] 2016, no pet.). We need not address this discrepancy, however, because it was not preserved in the trial court or assigned as error on appeal. *See Zahorik v. State*, 475 S.W.3d 459, 464 n.4 (Tex. App.—Houston [14th Dist.] 2015, no pet.). In particular, appellant has not explained how the discrepancy was egregiously harmful in light of the entire record, including the evidence and arguments of counsel. *Cf. Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006) (holding that unassigned charge error must be egregiously harmful to warrant reversal).

adversely affected the jury's decision, the appellate court should consider the entire record and factors such as the character of the alleged error and how it might be considered in connection with other evidence in the case, whether the State emphasized the error, and any overwhelming evidence of guilt. *Motilla v. State*, 78 S.W.3d 352, 355–57 (Tex. Crim. App. 2002); *Morales*, 32 S.W.3d at 867.

II. Any error in admitting evidence of the complainant's medical condition was harmless.

Assuming without deciding it was error to admit testimony about Gregory's medical condition, we conclude it was nonetheless harmless error.² Having reviewed the entire record, we have fair assurance that this testimony did not influence the jury. *See Johnson*, 967 S.W.2d at 417.

Gregory's testimony about his medical condition was brief and the evidence presented against appellant was strong. The State did not dwell on the fact that Gregory was on blood thinners after Gregory mentioned it in his testimony. Both Michael and Gregory testified about appellant kicking the door in and entering with a knife. They both testified they felt scared and threatened. The 911 call revealed Gregory's reaction to appellant kicking in the door the second time with a knife. Appellant admitted the knife was his when he spoke to the police and when he testified at trial. Although appellant testified he did not threaten Michael and Gregory with the knife, he testified he was drunk and in the wrong state of mind, that he kicked the door a couple of times, and that he was angry and screaming at them.

² Although we do not decide whether the district court reasonably concluded that the testimony in question was relevant, we do not agree with appellant that the testimony is similar to a victim-impact statement. While victim-impact testimony focuses on the after-effect of a victim's injuries, Gregory's testimony was about his medical condition at the time of the offense. *See Garrett v. State*, 815 S.W.2d 333, 337 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd).

Given all of the evidence against appellant, we have fair assurance that testimony about Gregory's medical condition was harmless. We overrule appellant's sole issue.

CONCLUSION

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

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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