Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00630-CR

Troy Stanley **STAIR**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 14-0709-CR-B
Honorable William Old, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: May 31, 2017

AFFIRMED

Troy Stanley Stair was convicted by a jury of retaliation and placed on eight years' community supervision. On appeal, Stair contends the evidence is insufficient to support his conviction, and the trial court erred in admitting evidence of prior extraneous bad acts into evidence. We affirm the trial court's judgment.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Stair challenges the sufficiency of the evidence to support his conviction. Specifically, Stair contends the evidence is insufficient to prove he threatened to harm the

complainant in retaliation for the complainant's service either as a prospective witness or a person who has reported the occurrence of a crime.

When conducting a legal sufficiency review, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on the evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). "The trier of fact is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the evidence so long as it is supported by the record." *Ramsey*, 473 S.W.3d at 809.

A person commits the offense of retaliation if the person intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service or status of another as a public servant, witness, prospective witness, informant, or a person who has reported or who the actor knows intends to report the occurrence of a crime. TEX. PENAL CODE ANN. § 36.06(a)(1) (West 2016). In this case, the indictment charged Stair with retaliation based on the complainant's status as "a person who has reported the occurrence of a crime and/or a prospective witness," and the jury was properly charged with regard to this element of the offense. Therefore, we must determine if the evidence is sufficient to prove beyond a reasonable doubt that the complainant was a prospective witness or a person who reported the occurrence of a crime.

"[A] 'prospective witness' is any 'person who may testify in an official proceeding.'" *Ortiz v. State*, 93 S.W.3d 79, 86 (Tex. Crim. App. 2002) (quoting *Morrow v. State*, 862 S.W.2d 612, 614 (Tex. Crim. App. 1993)). "Formal proceedings 'need not be initiated.'" *Id*. "Any person who is involved in an offense with a defendant, who sees the defendant committing an offense, or who hears the defendant discuss committing an offense is a 'prospective witness' in the prosecution of

that defendant because he 'may' testify." *Id.* As the Texas Court of Criminal Appeals has further explained:

> [W]hether a person will eventually testify does not affect whether he is, before trial, a prospective witness. It is impossible to know, until the moment of trial, who will actually testify in a case. A prosecutor may engage in extensive meetings with a witness with the intention of calling him at trial, only to change his mind at the last minute. On the other hand, a prosecutor may believe initially that a witness has nothing to offer his case, but decide at the last minute to use his testimony. And, many times, the prosecutor himself will not know whether any given person will be available at the time of trial or be willing to testify. The phrase "prospective witness" encompasses all of these possibilities.

Id. at 86-87. When a person gives a statement to an officer for use in a police report, that person becomes a prospective witness. *Rudolph v. State*, 70 S.W.3d 177, 179 (Tex. App.—San Antonio 2001, no pet.); *Johnston v. State*, 917 S.W.2d 135, 137 (Tex. App.—Fort Worth 1996, pet. ref'd).

The evidence established that Stair was issued a criminal trespass warning in December of 2013 preventing him from being on the property where his brother, Calvin Stair, lived. Calvin lived in a mobile home with his girlfriend, Stephanie, and her three minor children.

On the morning of March 9, 2014, Stephanie confronted Stair on her property. Stair asked to borrow a gun, but Stephanie told him to leave. Later that evening, Stair returned and broke into Calvin's home. At the time, Stephanie's 16-year-old son Joe was the only one home.[1] Stair went into Joe's bedroom and asked where Calvin was. Knowing that Stair was not supposed to be on their property, Joe convinced Stair to go outside with him. A neighbor, who saw Stair at Calvin's home, called Calvin because he knew Stair did not have permission to be on the property. When Calvin arrived and parked at his neighbor's house, Joe ran to the neighbor's house and told Calvin what happened. Calvin called the police and told Stair he had called the police. When the police arrived, they ordered Stair to leave.

[1] Joe is an alias for Stephanie's minor son.

After Stair left, he called Calvin and left a voice mail message stating, "Don't call the cops or you'll be dead." A recording of the voice mail message was played for the jury. Calvin was also informed Stair made threats about him in a message Stair left with their cousin.

Sergeant Zach McBride, a criminal investigator with the Guadalupe County Sheriff's Office, was assigned to investigate Stair's threat after it was reported by Stephanie. Sergeant McBride reviewed Stephanie's report and the report of the events of the prior evening. Sergeant McBride spoke with Stephanie, Calvin, Joe, and the neighbor. He also met with Calvin's cousin and obtained a recording of that message which was played for the jury. In that message, Stair stated he was going to kill Calvin.

Stair was indicted for retaliation and burglary of a habitation. Based on the evidence, Stair could also have been charged with criminal trespass. *See* TEX. PENAL CODE ANN. § 30.05 (West Supp. 2016) (defining criminal trespass as entering the property of another without effective consent and with notice that the entry was forbidden). The evidence established Stair had received a criminal trespass warning, and Calvin saw Stair on his property when he arrived. Accordingly, the evidence established that Calvin was a prospective witness. In addition, the evidence showed that Calvin called and reported to the police that Stair broke into his house and was on his property. Therefore, the evidence is sufficient to support the jury's finding that Stair threatened to harm Calvin in retaliation for his service as either a prospective witness or a person who has reported the occurrence of a crime.[2]

[2] In his brief, Stair relies heavily on the analysis in *Cada v. State*, 334 S.W.3d 766 (Tex. Crim. App. 2011). In that case, however, the defendant was indicted for threatening the complainant in retaliation for his service as a witness, not in retaliation for his status as a prospective witness. 334 S.W.3d at 767. Accordingly, *Cada* is readily distinguishable from the instant case.

EXTRANEOUS BAD ACTS

In his second issue, Stair contends the trial court erred in admitting evidence of extraneous bad acts. Specifically, Stair contends the trial court erred in allowing Calvin to testify regarding: (1) Stair's prior "cases of assault;" (2) Stair's prior entry into Calvin's home without permission to steal a firearm; (3) Stair's threat to kill his own son with the firearm; and (4) Stair throwing a hammer at Calvin at a worksite.

A motion in limine does not preserve error. *Martinez v. State*, 98 S.W.3d 188, 193 (Tex. Crim. App. 2003). Instead, in order to preserve error with regard to the admission of evidence, a party must make a proper objection and obtain a ruling on that objection. *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008); *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003)). "Moreover, an objection must be made each time inadmissible evidence is offered unless the complaining party obtains a running objection or obtains a ruling on his complaint in a hearing outside the presence of the jury." *Lopez*, 253 S.W.3d at 684.

Before trial, in response to a motion in limine, the trial court instructed the prosecutor to approach the bench before he questioned any witness regarding extraneous bad acts. During Joe's testimony, the prosecutor requested permission to question Joe regarding extraneous acts; however, the trial court did not allow the questioning. During Calvin's testimony, the following exchange occurred:

> [THE PROSECUTOR]: Regarding the Motion in Limine, I think that his prior interactions with the defendant are relevant to show why he took the threat seriously and why it was a credible threat to him.
> THE COURT: Okay.
> [THE PROSECUTOR]: So I'm just asking, under the Motion in Limine, to be allowed to go into those prior incidents.
> [DEFENSE COUNSEL]: I guess, can we get a little specific, while we're here at the bench, about what he's — I guess just in general —
> THE COURT: What do you specifically want to ask him?

> [THE PROSECUTOR]: I'm going to ask him if the defendant was ever aggressive or threatening towards him; if he knew of his brother being aggressive or threatening towards anyone else; if his brother had ever entered his house, prior to March of 2014, without his permission, and I think that pretty much covers it.
> THE COURT: I'll allow it. Go ahead.

In response to the prosecutor's questions, Calvin testified he knew his brother had "cases of assault." Calvin further testified his brother previously entered his home without permission and took his shotgun which he used to threaten his own son.[3] Finally, Calvin testified his brother threw a hammer at him one day at a work site. No objection was made to any of the prosecutor's questions eliciting this testimony. Instead, after Calvin testified that Stair previously entered his home without his permission in December of 2013 and made reference to his firearm, defense counsel approached the bench and stated, "Judge, my — my understanding is we weren't going to go into this particular issue." The trial court responded other witnesses were not allowed to testify about the event, but the trial court was going to allow Calvin to testify about it.

As previously noted, the motion in limine did not preserve any error. *Martinez*, 98 S.W.3d at 193. Instead, it required the prosecutor to approach the bench and obtain permission to question the witnesses about extraneous acts, which the prosecutor did. It was incumbent on defense counsel to then object when the prosecutor questioned the witnesses about the extraneous acts. In this case, defense counsel did not make any proper objection to the testimony. Defense counsel's statement that he understood the witness was not "going to go into this particular issue" was not an objection, but a reference to the motion in limine. Because defense counsel did not make a proper objection to the testimony or obtain a ruling on that objection, any error in the admission of Calvin's testimony has not been preserved for our review.

Even if defense counsel's statement is considered a proper objection to the testimony regarding Stair taking Calvin's shotgun and threatening his own son, any error in admitting that

---

[3] The shotgun was recovered by the sheriff's department and was still in the department's possession.

testimony is non-constitutional error that must be disregarded unless it affected appellant's substantial rights. TEX. R. APP. P. 44.2(b); *Banks v. State*, 494 S.W.3d 883, 895 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Bezarra v. State*, 485 S.W.3d 133, 143 (Tex. App.—Amarillo 2016, pet. ref'd). "Erroneously admitted evidence does not affect substantial rights when the appellate court examines the record as a whole and can fairly assess that the error did not adversely influence the jury or had only a slight affect." *Bezarra*, 485 S.W.3d at 143 (citing *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002)). "In making this assessment, the presence of overwhelming evidence supporting the appellant's guilt is a factor in determining whether the erroneously admitted evidence was harmful." *Id*.

In this case, all of the witnesses testified Stair was present on Calvin's property without permission, and the audio recordings of the threats Stair made were played for the jury. The State introduced the evidence that Stair took Calvin's shotgun and threatened his own son to establish that Calvin believed his brother's threats; however, Calvin's state of mind and the credibility of Stair's threats are not elements of the offense of retaliation. *See Pollard v. State*, 255 S.W.3d 184, 189 (Tex. App.—San Antonio 2008), *aff'd*, 277 S.W.3d 25 (Tex. Crim. App. 2009). Furthermore, Calvin testified, without objection, that he believed his brother could carry out his threat and that the threat caused him to fear for himself and his family. Therefore, having examined the record as a whole, we conclude any error in admitting the testimony in question did not adversely influence the jury or had only a slight affect.

CONCLUSION

The judgment of the trial court is affirmed.

Irene Rios, Justice

DO NOT PUBLISH