In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00047-CR

DEL RAY SANDERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 20,597

MEMORANDUM OPINION

A jury convicted Del Ray Sanders of murder and sentenced Sanders to life in prison. In six issues, Sanders challenges the denial of his requested jury instructions on lesser-included offenses and the admission into evidence of alleged hearsay statements. We affirm the trial court's judgment.

Factual Background

Sanders was married to Linnie Jo Sanders. At trial, witnesses testified that Linnie and Sanders both abused prescription drugs. Witnesses testified that Linnie sometimes fell when under the influence, but other witnesses testified that Linnie never fell when

under the influence. The record contains testimony that Sanders was mellow when taking prescription medication, but other testimony shows that he was aggressive. Witnesses testified that Sanders was abusive towards Linnie, Linnie was submissive and fearful, and Linnie sought a protective order against Sanders.

Sanders testified to the events preceding Linnie's death. Sanders testified that he saw Linnie run through the house and fall on a loose floor tile. Sanders unsuccessfully tried to lift Linnie. Sanders dragged Linnie to the couch, but Linnie fell face down on the coffee table. Sanders knew that Linnie had a prior neck injury. Sanders dragged Linnie to the bedroom, but fell into the paneled wall with Linnie. Sanders called Linnie's mother and followed her advice to put Linnie to bed. Sanders put Linnie in bed, took some pills, and went to sleep. During the night, Sanders awoke to find the bed wet and he thought that Linnie had urinated on the bed. Sanders "kneed" Linnie off the bed and Linnie "hit the floor." He removed Linnie's clothes, wiped her body, clothed her with clean clothes, placed a cold cloth on her forehead, and took the sheets off the bed. Sometime during the night, Sanders thought he heard Linnie call his name. When Sanders later awoke, he told Linnie that he was going to get breakfast, but Linnie did not respond. When Sanders returned from getting food, Linnie was still in bed, non-responsive, cold, and not breathing. Sanders attempted CPR. He then sought help from the neighbors.

Sharon Burt, one of Sanders's neighbors, testified that she saw Sanders staggering around outside and that Sanders told her, "I think my wife is dead." Burt and Sanders walked to Sanders's house and Burt saw Linnie in bed with a huge, purple bruise on her forehead. Burt testified that Linnie's cheek was "ice cold." Burt saw the curtains hanging off the wall and Sanders told Burt that Linnie "does a lot of drugs" and "staggers all over the place," so the "curtains kind of fell down." Burt called 911. Sanders told Burt that he wanted to die and later told Burt, "I guess I'll be going to jail."

Paramedic Keith Morris testified that Sanders told him that he and Linnie took pills the night before; fought because he had hidden the pills; Linnie found the pills; and Sanders did not get his share of the pills. Deputy Craig Taylor testified that Sanders told him that he and Linnie took prescription medications, argued over the medications, Linnie began falling down and passed out, and Sanders awoke the next day to find that Linnie was not awake and was non-responsive. Sanders told Morris and Taylor that he "cleaned [Linnie] up to make her pretty." Morris testified that Sanders cried. Sanders told Taylor that he did not want to live without Linnie.

Deputy David Ramsey testified that he heard Sanders say that he tried to put Linnie in his truck, Linnie was wet, he tried to put clothes on Linnie, and he wanted to die because of Linnie's death. Ramsey also heard Sanders tell a doctor that he and Linnie fought over drugs, that he had dragged Linnie and tripped over her, and that he thought he was supposed to let Linnie "sleep it off[.]"

Detective Christi Allen testified that she saw cuts or abrasions on Sanders's hands, which appeared to be from a fight or altercation and were consistent with someone who had been in a physical fight. Captain Rickie Childers testified that it appeared as though a struggle, assault, or violence had occurred in the bedroom where Linnie's body was found. Crime scene analysts testified that Linnie's blood and Sanders's blood was found on various items throughout the house.

Officers testified that what happened in the house was more than a drug overdose or a death from natural circumstances. Witnesses testified that the scene appeared to have been cleaned and the body staged. Law enforcement officers did not believe that Linnie accidentally fell through the wall or died of an overdose.

Detective Craig Finegan testified that Sanders was originally charged with aggravated assault because Linnie's injuries indicated that she had been "beaten at the hands of someone" and Sanders was the last person to have contact with Linnie. Finegan testified that, in a recorded telephone conversation placed by Sanders from jail, Sanders stated that he "chunked [Linnie] around a lot."

J.C. Fleming, who shared a jail cell with Sanders, testified that Sanders told him that he came home from work and found that Linnie had taken all the pills. Sanders told Fleming that he was "p----- off about it" and he argued with Linnie. Sanders told Fleming that he threw Linnie on the sofa, Linnie's head hit the table, he lifted Linnie to carry her to bed, he fell through the wall with Linnie, he pulled Linnie out of the wall,

Linnie had splinters in her head, he threw Linnie on the bed, he placed a lit cigarette in Linnie's hand, he let the cigarette "burn down to the bone," he combed Linnie's hair, and he changed Linnie's clothes. Fleming testified that Sanders was not remorseful, but was angry and "wanted to kill people." Fleming testified that Sanders was "talking about how he can . . . get away with something and that they didn't have no evidence of what he was doing . . . what he did."

Dr. Merrill O. Hines, III, an assistant medical examiner, testified that Linnie's injuries appeared to be recent, *i.e.*, at or following the time of death, and were caused by "inflicted, blunt-force trauma." Hines testified that some of Linnie's injuries were consistent with being grabbed or moved. Hines testified that Linnie's hair had been pulled out of her head, which caused bleeding under the scalp, that bleeding in Linnie's brain indicated significant force, and that the base of Linnie's neck was completely severed. Hines explained that Linnie's hair loss is inconsistent with both falling and natural hair loss. Hines testified that Linnie's particular neck injury is seen in cases of "very severe, blunt-force trauma," but because Linnie had a plate in her neck, less force than normal could cause her injury. Hines testified, "So the fact that those surgical appliances were present made it more likely, in my opinion, that the injuries could have been inflicted versus the result of these extreme, usually accidental scenarios." Hines testified that it is unlikely that a person could harm herself to that extent.

Hines testified that Linnie had some injuries consistent with those sustained by intoxicated individuals, but that "the extent and magnitude of the injuries is far and above anything that I have seen in association with intoxicated individuals and is beyond any scenario that I have heard of or read about of self-inflicted injuries beyond somebody jumping off a building or something of that nature." Hines testified that toxicology reports did not show a lethal amount of drugs in Linnie's system and that drugs would not explain her death. Hines testified that intoxicated individuals rarely injure themselves severely and that it is extremely unlikely that Linnie fell and caused her injuries.

Hines opined that Linnie's injuries were caused by being accelerated, thrown, or forcibly pushed. Hines testified that Linnie's fracture patterns were consistent with the body being bent backward and were caused by external force applied to the body. According to Hines, being pushed into a wall of paneling could explain Linnie's head and neck injuries. Hines testified that if a person intentionally and knowingly inflicted Linnie's injuries, a reasonable person would anticipate that Linnie might die from the injuries.

Hines testified that Linnie's pattern of injuries does not comport with the story given, but are "suggestive more of a spectrum of inflicted injuries and subsequent manipulation of the body, which . . . suggests that this was a homicide versus an accident." Hines concluded that Linnie "died as a result of blunt-force injuries and the

associated hemorrhage and spinal cord trauma," "that it was a homicide[,]" and that Linnie's injuries were "inflicted rather than accidental[.]."

Mark Jones, an investigator for the district attorney, testified that, on the day of trial, he was adjusting the courtroom projector when he heard Sanders say, "That is Linnie's mother, and I would like to tell her I'm sorry." Sanders testified that this was not an admission that he intentionally killed Linnie. Sanders testified that he worked as a machinist, which had caused the marks on his hands. He explained that the curtain rod in the bedroom fell because individuals under the influence will hug the walls. He testified that Linnie had previously burned her fingers and would sometimes fall when under the influence. He admitted fighting with Linnie over drugs, but testified that this did not mean a "fistfight." He denied attempting to alter the scene or discard evidence. He denied telling Fleming that he killed Linnie, was angry with Linnie over the pills, tried to cover up the scene, or could have covered up the scene. Sanders admitted that he could have hurt Linnie by falling on her or throwing her on the bed, but he denied intentionally killing Linnie.

In its jury charge, the trial court authorized the jury to find Sanders guilty of either murder or aggravated assault with a deadly weapon. The jury convicted Sanders of murder.

Denial of Requested Jury Instructions

In issues one and two, Sanders challenges the trial court's denial of his written requests for jury instructions on the lesser-included offenses of manslaughter and criminally negligent homicide.

"[A] lesser-included offense instruction shall be included in the jury charge if: (1) 'the requested charge is for a lesser-included offense of the charged offense; and (2) there is some evidence that, if the defendant is guilty, he is guilty *only* of the lesser offense.'" *Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006) (quoting *Hayward v. State*, 158 S.W.3d 476, 478 (Tex. Crim. App. 2005)).

The first step is a question of law that is determined by the pleadings and does not depend on the evidence produced at trial. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense. Tex. Code Crim. Proc. Ann. art. 37.09 (West 2006). "[T]he elements and the facts alleged in the charging instrument are used to find lesser-included offenses[.]" *Hall*, 225 S.W.3d at 535.

"The second step in the analysis should ask whether there is evidence that supports giving the instruction to the jury." *Id.* at 536. "[A]nything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge." *Id.* "[T]he evidence must establish the lesser-included offense as 'a valid, rational alternative to the charged offense.'" *Id*. (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999)).

In this case, the indictment contained two paragraphs alleging murder. Under Penal Code section 19.02(b)(1), the indictment alleges that (1) Sanders (2) intentionally or knowingly (3) caused Linnie's death (4) by inflicting blunt force trauma to Linnie's body by striking Linnie with an unknown object or causing Linnie's body to strike an unknown object. Tex. Penal Code Ann. § 19.02(b)(1) (West 2003). Under Penal Code section 19.02(b)(2), the indictment alleges that (1) Sanders (2) with intent to cause serious bodily injury to Linnie, (3) committed an act clearly dangerous to human life, namely, inflicting blunt force trauma to Linnie's body by striking Linnie with an unknown object or causing Linnie's body to strike an unknown object (4) which caused Linnie's death. *Id*. at § 19.02(b)(2).

In comparison, the elements of manslaughter are (1) Sanders (2) recklessly (3) caused Linnie's death (4) by inflicting blunt force trauma to Linnie's body. *Id.* at § 19.04(a) (West 2003). The elements of criminally negligent homicide are (1) Sanders (2) with criminal negligence (3) caused Linnie's death (4) by inflicting blunt force trauma to Linnie's body. *Id*. at § 19.05(a) (West 2003).

Citing *Cavazos v. State*, 329 S.W.3d 838 (Tex. App.—El Paso 2010, pet. filed), the State contends that manslaughter and criminally negligent homicide are not lesser-included offenses of murder as charged and presented to the jury.

In *Cavazos*, the indictment alleged that Cavazos (1) intentionally and knowingly caused the death of Rogelio by shooting him with a firearm, and (2) with intent to cause serious bodily injury to Rogelio, committed an act clearly dangerous to human life by shooting Rogelio with a firearm, which caused his death. *Cavazos*, 329 S.W.3d at 840. The trial court granted a directed verdict as to intentional or knowing murder. *Id.* Cavazos challenged the trial court's failure to include a manslaughter instruction in the jury charge. *Id*. at 844. The El Paso Court stated:

> [T]he State was not required to prove that Appellant intended to cause Rogelio's death in this scenario; rather, the State was only required to prove that Appellant intended to cause serious bodily injury to Rogelio, which in turn caused Rogelio's death. Indeed, neither the statute nor the indictment requires a culpable mens rea for committing an act clearly dangerous to human life. Therefore, much like felony murder, the murder charged in this case does not require a culpable mental state for causing another's death.
>
> In contrast, the statutory elements of manslaughter require proof that Appellant recklessly caused Rogelio's death. Therefore, manslaughter actually requires proof of a culpable mental state for causing the death of an individual whereas the murder charged here, as discussed above, requires no proof of a culpable mental state for causing the death of an individual. As such, the elements of the requested lesser-included offense are not established by proof of the same or less than all of the facts required to establish the commission of the charged offense, nor does the proposed lesser-included offense differ from the offense charged only in the respect that a less culpable mental state suffices to establish its commission. Thus, we conclude manslaughter is not a lesser-included offense of the charged

> murder in this case, and the trial court did not err by denying Appellant's request to instruct the jury on manslaughter.

Id. at 845 (internal citations omitted).

In this case, unlike *Cavazos*, the offense as charged and presented to the jury included intentional or knowing murder under section 19.02(b)(1), which requires a culpable mental state. Tex. Penal Code. Ann. § 19.02(b)(1). "The only distinction between an intentional or knowing murder and the lesser offenses of manslaughter and criminally negligent homicide lies in the culpable mental state accompanying the homicidal act." *Pitonyak v. State*, 253 S.W.3d 834, 846 (Tex. App.—Austin 2008, pet. ref'd). Accordingly, manslaughter and criminally negligent homicide differ from the charged offense of intentional or knowing murder only in the respect that a less culpable mental state suffices to establish their commission; thus, they are lesser-included offenses of murder as charged and presented to the jury. *See* Tex. Code Crim. Proc. Ann. art. 37.09(3) (West 2006); *see also Pitonyak*, 253 S.W.3d at 846-47; *Pierce v. State*, 234 S.W.3d 265, 269-71 (Tex. App.—Waco 2007, pet. ref'd) (Where indictment charged Pierce with murder under 19.02(b)(1) and (b)(2), the Waco court concluded that manslaughter and criminally negligent homicide were lesser-included offenses of murder as charged in the indictment).

To establish the second prong of the lesser-included offense analysis, Sanders contends that Fleming's testimony raises the issue of manslaughter and criminally negligent homicide because the jury could have concluded that Sanders did not

knowingly or intentionally kill Linnie, but either recklessly or negligently caused her death when Linnie hit her head on the table or fell through the wall.

However, given the evidence of Sanders's intent, Fleming's testimony does not demonstrate that Sanders is guilty of only manslaughter or criminally negligent homicide. Tex. Penal Code Ann. § 6.03(c) (West 2003) (defining "recklessly"); *Id*. at § 6.03(d) (defining "criminal negligence"); *See Guzman,* 188 S.W.3d at 188; *see also Lewis v. State*, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975) ("At the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct; the key to criminal negligence is found in the failure of the actor to perceive the risk."). Law enforcement officers observed evidence at the scene that indicated that Linnie's death was not accidental. Sanders told various witnesses that he fought with Linnie over drugs and that he became angry. Hines testified that Linnie's hair had been pulled out of her head, that her injuries were consistent with being grabbed, and that her injuries were caused by being accelerated, thrown, or forcibly pushed. Hines testified that Linnie's injuries were inflicted and intentional, not accidental. In light of other evidence showing that Sanders acted intentionally, the evidence does not show that, if Sanders is guilty, he is guilty only of acting recklessly or with criminal negligence. *See Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000); 329 S.W.3d at 846; *Jackson v. State,* 115 S.W.3d 326, 330-31 (Tex. App.—Dallas 2003), *aff'd by* 160 S.W.3d 568 (Tex. Crim. App. 2005).

Under the circumstances of this case, we cannot say that the trial court improperly denied Sanders's requests for jury instructions on the lesser-included offenses of manslaughter or criminally negligent homicide. We overrule issues one and two.

Admission of Alleged Hearsay Statements

In issues three through six, Sanders challenges the admission of alleged hearsay statements regarding his prior relationship with Linnie.

"When reviewing a trial judge's decision to admit or exclude evidence, an appellate court must determine whether the judge's decision was an abuse of discretion." *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). "In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." Tex. Code Crim. Proc. Ann. art. 38.36(a) (West 2005). The admissibility of evidence pursuant to article 38.36 is limited by the Rules of Evidence. *See Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006). Rule of Evidence 803 allows a party to introduce into evidence "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of

declarant's will." Tex. R. Evid. 803(3). "[T]he type of statement contemplated by this rule includes a statement that on its face expresses or exemplifies the declarant's state of mind--such as fear, hate, love, and pain." *Garcia v. State*, 246 S.W.3d 121, 132 (Tex. App.—San Antonio 2007, pet. ref'd). "But it is not permissible to admit hearsay evidence regarding facts that reveal *why* the person was afraid." *Menefee v. State*, 211 S.W.3d 893, 906 (Tex. App.—Texarkana 2006, pet. ref'd).

Erroneous admission of evidence is subject to harmless error under Rule of Appellate Procedure 44.2(b). *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Rule 44.2(b) requires that we disregard any error that does not affect substantial rights. *See* Tex. R. App. P. 44.2(b). "[E]rror is reversible only when it has a substantial and injurious effect or influence in determining the jury's verdict." *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). "We should not overturn the conviction if we have fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but slight effect." *Id*. We 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, the character of the alleged error and how it might be considered in connection with other evidence in the case." *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). We may also consider "the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire and whether the State emphasized the error." *Id*. at 518-19.

Sanders challenges testimony provided by Whitney Betros, Debra Sanders, Deputy Vance Berry, and Sherry Sprayberry. Specifically, Sanders complains of testimony that Linnie and Sanders fought, Sanders threatened Linnie, Sanders and Linnie argued over prescription medication, Linnie feared Sanders, Linnie feared for her life, Sanders abused Linnie, Sanders put a gun to Linnie's head, Linnie had a black eye, Linnie had to seek help with food and money, Linnie sometimes had bruises or cuts on her body, Sanders destroyed Linnie's photographs and threatened to burn her belongings, Linnie planned to leave Sanders, Sanders pushed Linnie, Sanders yelled obscenities at Linnie, Sanders threw a coral rock at Linnie, Linnie reported Sanders for assault, and Linnie filed for a protective order against Sanders. Sanders admits that testimony regarding Linnie's fear is admissible, but argues that testimony regarding why Linnie was afraid constitutes inadmissible statements of memory or belief.

Assuming, without deciding, that the trial court abused its discretion by admitting the complained-of testimony, we cannot say that Sanders's substantial rights were affected. *See* Tex. R. App. P. 44.2(b). The jury heard Sanders testify to some of the same facts as the other witnesses. *See Hollis v. State*, 219 S.W.3d 446, 468 (Tex. App.—Austin 2007, no pet.) (Concluding error regarding admission of hearsay testimony harmless where appellant testified to same fact). Sanders testified that he and Linnie fought, they argued over drugs, Linnie filed charges against him, Linnie sought a protective order against him, and he threw a rock at Linnie. Sanders did not dispute that

he had threatened Linnie or been physically abusive in the past. During closing argument, the State did not emphasize the prior instances of abuse, but focused on the events surrounding Linnie's death. Additionally, the record contains other evidence from which the jury could conclude that Sanders committed the offense of murder. *See Nonn v. State*, 117 S.W.3d 874, 883 (Tex. Crim. App. 2003) ("properly admitted evidence of guilt is one factor to be considered when performing a harm analysis under Rule 44.2(b)"). Based on the record, the complained-of testimony either did not influence the jury or had but slight effect. *See Taylor*, 268 S.W.3d at 592; *see also Menefee*, 211 S.W.3d at 906. Because any error in the admission of the complained-of testimony did not affect Sanders's substantial rights, we overrule issues three, four, five, and six.

Having overruled Sanders's six issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on March 25, 2011
Opinion Delivered April 6, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.