COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00326-CR
NO. 02-15-00327-CR

ROBERT GENE GEOTCHA, JR. APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1364883D, 1364887D

MEMORANDUM OPINION[1]

Appellant Robert Gene Geotcha, Jr. appeals his convictions following a jury trial for two counts of aggravated assault with a deadly weapon.[2] In his first point, appellant contends that the State's failure to call a complaining witness and

[1]*See* Tex. R. App. P. 47.4.

[2]*See* Tex. Penal Code Ann. § 22.02(a)(2) (West 2011).

the trial court's admission of testimony from two witnesses regarding her statements made to each of them constituted violations of his confrontation rights under the Sixth Amendment of the United States Constitution. In his second point, he asserts that the trial court erred by failing to provide the jury with a charge concerning the lesser-included offense of assault.[3] We affirm.

Background Facts

Through separate indictments, a grand jury indicted appellant on two charges of aggravated assault with a deadly weapon. The indictments alleged that in March 2014, he had used a knife—a deadly weapon by its use or intended use—to cut and injure Alquisha Knox and Wanda Jackson. Appellant received appointed counsel, and the parties filed various pretrial documents in both cases. For example, appellant filed a motion for the State to list the witnesses that it intended to call at trial, and the State filed a response that listed several "potential" witnesses, including Knox and Jackson. Appellant chose the trial court to assess his punishment in the event of his conviction.

At trial, appellant pled not guilty. The jury heard evidence that one spring evening, appellant, who was living with his then-girlfriend Jackson, forced his way into her apartment after an argument led to her telling him "that the relationship was getting too stressful, and he needed to just go . . . stay with his mom." Once inside the apartment, appellant pulled a knife from his backpack

[3]*See* Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2016).

and stabbed Jackson in the neck. The commotion caught the attention of Jackson's daughter, Knox, who was one of several family members present in the apartment. Knox attempted to assist Jackson by hitting appellant, who eventually used the knife to stab Knox in the head.

Jackson fled the apartment and sought help from her next door neighbors. Although she quickly entered the neighbors' apartment, appellant followed her inside, where he choked her, dragged her out of the apartment, and threw her down a flight of stairs into the apartment complex's parking lot. Appellant continued to attack Jackson in the parking lot by punching her face. As appellant attacked Jackson, he "kept repeating that . . . he was a killer."

Alex Dvorak, one of Jackson's neighbors who had never met either her or appellant prior to this incident, heard appellant tell Jackson that he was going to kill her. Dvorak left his apartment to see what was happening outside and saw appellant pushing Jackson down the stairs. After shouting at appellant to stop the commotion and threatening to call the police, Dvorak returned to his apartment to retrieve his handgun.

Dvorak returned to the scene armed with his handgun and saw appellant positioning himself on top of Jackson and striking her. After Dvorak commanded appellant to get off Jackson, appellant brandished a large kitchen knife and asked Dvorak, "Do you want some, too?" Dvorak pulled out his gun and got into a shooting stance, warning appellant not to come near him. Appellant stepped away from Jackson, and she immediately ran toward Dvorak. Noticing that

Jackson was bleeding from a cut on her neck, Dvorak escorted her back to his apartment to call the police. Appellant followed them to the hallway leading to Dvorak's apartment and told him, "I know where you live now" and "I have guns, too" before running away from the apartment complex. Jackson told Dvorak that she had been cut.

A paramedic went to the apartment complex, responding to a call of a "priority one stabbing." He saw blood soaking the front of Knox's clothing and estimated that she had lost about half a liter of blood. Knox told the paramedic that she had been stabbed in the side of her head. The paramedic noticed that Jackson had a cut toward the bottom of her neck and also had defense wounds on her arms. Jackson told the paramedic that she had been assaulted with a knife and had been thrown down the stairs. A police officer also arrived at the scene and saw puncture wounds on Jackson's neck and on Knox's temple. Another officer went to the complex and noticed, at several locations within it, red stains consistent with the appearance of blood. Jackson and Knox were transported to a hospital and were treated for multiple injuries that they said had been caused, in part, by appellant stabbing them. Several days later, the police found and arrested appellant;[4] he did not have any visible wounds.

Jackson testified at trial, but Knox did not. After the parties finished presenting evidence and arguments, appellant asked for the jury to be charged

[4]When the police found appellant, he was hiding in a home between mattresses.

on the lesser-included offense of simple assault causing bodily injury as to Jackson. The trial court denied that request.

The jury found appellant guilty of both charges. The trial court sentenced him to sixty-five years' confinement on each charge with the sentences running concurrently.[5] Appellant brought these appeals.

Confrontation Clause

In his first point, appellant contends that his right to confrontation under the Sixth Amendment was violated with respect to his conviction for aggravated assault against Knox. *See* U.S. Const. amend VI (stating that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). Appellant presents three arguments related to this point. First, he argues that the State's failure to call Knox as a witness or notify trial counsel before trial of her absence constituted a general violation of the Confrontation Clause. Second, he appears to argue that the admission of a statement made by Knox to Jackson constituted a violation of the Confrontation Clause. Third, he argues that the admission of a statement made by Knox to the attending paramedic who was in the process of treating her wounds constituted a violation of the Confrontation Clause. The State argues that appellant has failed to preserve this point for our review.

[5]Appellant pled true to the State's allegation that he had been previously convicted of two felony offenses. Before sentencing appellant, the trial court heard testimony from him and from his mother.

Preservation

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 263 (Tex. Crim. App. 2009). These preservation requirements apply to constitutional objections, including objections under the Confrontation Clause. *See Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005); *Lozano v. State*, 359 S.W.3d 790, 823 (Tex. App.—Fort Worth 2012, pet. ref'd).

The complaint made on appeal must comport with the complaint made in the trial court or the error is forfeited. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009) ("A complaint will not be preserved if the legal basis of the complaint raised on appeal varies from the complaint made at trial"); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial.").

At trial, appellant urged only one objection under the Confrontation Clause. This objection was made during the testimony of the paramedic regarding statements made to him by Knox while he was treating her wounds. The following colloquy occurred:

> [STATE:] The young one with . . . the wound to her head, did she tell you what happened to her?
>
> [WITNESS:] She did.
>
> [STATE:] What did she say?
>
> [DEFENSE COUNSEL]: Your Honor, we object to hearsay.
>
> THE COURT: Sustained.
>
> [STATE]: Your Honor, may I respond?
>
> THE COURT: Yes, go ahead.
>
> [STATE]: . . . [The paramedic] just stated that he takes a history from the patient for the purposes of medical diagnosis and treatment. And [he said that] he uses that information to determine what course of action to take. So, therefore, I think it's an exception to the hearsay rule.
>
> THE COURT: Let me hear from the defense.
>
> [DEFENSE COUNSEL]: Your Honor, we would also object under the confrontation clause that when we're discussing Alquisha Knox, she's not been called as a witness. So we have not had an opportunity to cross-examine her.
>
> THE COURT: Okay. All right. I'm going to change that ruling. Overrule.[6]

[6]The trial court later allowed appellant to make a running objection to the paramedic's testimony.

We conclude that these objections that distinctly and specifically contained hearsay and confrontation grounds preserved appellant's constitutional argument with regard to the admissibility of the testimony of the paramedic. *See* Tex. R. App. P. 33.1(a); *Clark*, 365 S.W.3d at 339; *Smith v. State*, 420 S.W.3d 207, 223 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd); *cf. Reyna*, 168 S.W.3d at 179 (explaining that when a single, unspecific objection could encompass complaints under the rules of evidence and under the Confrontation Clause, it does not preserve error on Confrontation Clause grounds); *Moore v. State*, Nos. 02-10-00288-CR, 02-10-00289-CR, 2012 WL 117979, at *3 (Tex. App.—Fort Worth Jan. 12, 2012, no pet.) (mem. op., not designated for publication) (following *Reyna*). But appellant did not object under the Confrontation Clause or the Sixth Amendment at any other time in the trial court.[7] Thus, we conclude that his constitutional contentions regarding the State's decisions to not call Knox as a witness or notify trial counsel of her absence as well as the admissibility of testimony by Jackson, each raised for the first time on appeal, are forfeited.[8] *See*

[7]We do not hold that rule 33.1(a) required appellant to make multiple confrontation objections; rather, we hold that he forfeited the confrontation arguments on appeal to the extent that his sole confrontation objection in the trial court does not comport with those arguments. *See Clark*, 365 S.W.3d at 339.

[8]We note that the paramedic's testimony occurred after Jackson's testimony, so to the extent that appellant's objection could be construed to broadly relate to Jackson's testimony, it was untimely. *See* Tex. R. App. P. 33.1(a); *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex. Crim. App. 2006) (explaining that a "party's complaint is timely if the party makes the complaint as soon as the grounds for it become apparent").

Tex. R. App. P. 33.1(a); *Clark*, 365 S.W.3d at 339; *Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004); *Browning v. State*, Nos. 05-01-00605-CR, 05-01-00606-CR, 2002 WL 31820243, at *6 (Tex. App.—Dallas Dec. 17, 2002, pet. ref'd) (holding that a defendant failed to preserve error when he did not object to the complainant's failure to testify). We overrule those portions of appellant's first point.

Confrontation Clause analysis

We now turn to whether the trial court erred by overruling appellant's Confrontation Clause objection to the paramedic's testimony about what Knox told him. In all state and federal criminal prosecutions, the accused has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359 (2004). In *Crawford*, the Supreme Court drew a distinction between testimonial and nontestimonial statements, holding that the Confrontation Clause bars the admission of an out-of-court testimonial statement of a declarant who does not testify at trial unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59, 124 S. Ct. at 1369.

Also, nothing in the record indicates that the parties or the trial court understood appellant's sole Confrontation Clause objection to encompass an objection to Knox's overall absence from the proceedings or the State's lack of giving notice to appellant of Knox's absence. Further, the trial court did not purport to rule on such an objection.

"[T]estimonial statements are those 'that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Adkins v. State*, 418 S.W.3d 856, 861–62 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (quoting *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013)). Whether a statement is testimonial under the Confrontation Clause is a question of law that we review de novo. *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008); *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006). When an out-of-court statement is made by the declarant to a medical professional primarily for the purpose of diagnosis and treatment rather than to develop facts for later litigation, it is not testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 2533 n.2 (2009) (stating that "medical reports created for treatment purposes" are not testimonial); *Malone v. State*, No. 02-10-00436-CR, 2011 WL 5118820, at *3 (Tex. App.—Fort Worth Oct. 27, 2011, no pet.) (mem. op., not designated for publication) (holding that a victim's statement that the defendant kicked her, made to an EMT on the scene, was not testimonial for Confrontation Clause purposes); *Martinez v. State*, No. 08-09-00065-CR, 2010 WL 2619647, at *4 (Tex. App.—El Paso June 30, 2010, no pet.) (not designated for publication) (holding similarly and collecting similar cases); *see also Lollis v. State*, 232 S.W.3d 803, 807 (Tex. App.—Texarkana 2007, pet. ref'd) ("[W]hen a forensic or investigatory motive predominates, the resulting statements are

testimonial; when therapeutic or healing motive predominates, statements are not testimonial.").

The record indicates that Knox's statements to the paramedic were made for the purpose of medical diagnosis and treatment, not in anticipation of furthering a future criminal prosecution, rendering them nontestimonial and not within the scope of the Confrontation Clause. The following exchange occurred during the paramedic's testimony:

> [STATE:] [W]hen you're treating patients, do you ask them questions related to what happened to them?
>
> [WITNESS:] Yes, I do.
>
> [STATE:] Why do you do that?
>
> [WITNESS:] To get a better understanding of what kind of injury that they got, how it was delivered, and how . . . severe the injury would be.
>
> [STATE:] Do you use that information to treat or . . . to diagnose any kind of medical issues that they may have?
>
> [WITNESS:] Yes, I do.

Because Knox's statements to the paramedic were made by a patient to an attending medical professional for the purposes of medical diagnosis and treatment and because the record does not indicate that the statements were made under circumstances where Knox or the paramedic contemplated that they would be used at a later trial, we conclude that they were not testimonial for the purposes of invoking the requirements of the Confrontation Clause. *See Crawford*, 541 U.S. at 59, 124 S. Ct. at 1369. Therefore, we conclude that the

trial court did not err by admitting the statements. We overrule the remainder of appellant's first point.

Appellant's Request for a Lesser-Included Instruction

In his second point, Appellant argues that the trial court erred by failing to provide the jury with an instruction on the lesser-included offense of assault in the case involving Jackson. We use a two-step analysis to determine whether an appellant was entitled to a lesser-included offense instruction. *Hall v. State*, 225 S.W.3d 524, 528 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App.), *cert. denied*, 510 U.S. 919 (1993). First, the lesser offense must come within article 37.09 of the code of criminal procedure. Tex. Code Crim. Proc. Ann. art. 37.09 (West 2006); *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). Under article 37.096(1), an offense is a lesser-included offense of another offense if the indictment for the greater-inclusive offense either alleges all of the elements of the lesser-included offense or alleges elements plus facts (including descriptive averments, such as nonstatutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g).

Second, some evidence must exist in the record that would permit a jury to rationally find that if the appellant is guilty, he is guilty only of the lesser offense. *Hall*, 225 S.W.3d at 536; *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau*, 855 S.W.2d at 672–73. The evidence must be evaluated in

the context of the entire record. *Moore*, 969 S.W.2d at 8. There must be some evidence from which a rational jury could acquit the appellant of the greater offense while convicting him of the lesser-included offense. *Id.* The purpose of the second step is to ensure that the lesser-included offense is a "valid, rational alternative" to the charged offense. *Wortham v. State*, 412 S.W.3d 552, 557 (Tex. Crim. App. 2013). "It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser-included offense for the factfinder to consider before an instruction on a lesser-included offense is warranted." *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).

The State concedes that appellant meets the first element—that assault in which a defendant causes bodily injury is a lesser-included offense of aggravated assault in which a defendant causes bodily injury and uses or exhibits a deadly weapon. *See Grey v. State*, 298 S.W.3d 644, 646 (Tex. Crim. App. 2009). The dispositive question is whether the record contains some evidence from which a rational jury could have acquitted appellant of aggravated assault with a deadly weapon while convicting him only of the lesser-included offense of assault causing bodily injury.[9]

[9]In his brief, appellant does not contend that the record contains evidence by which the jury could have rationally found that the knife he used did not qualify by its characteristics as a deadly weapon under the penal code's definition of that term. *See* Tex. Penal Code Ann. § 1.07(a)(17)(B) (West Supp. 2016) (stating that a deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury"); *Wingfield v. State*, 282

While a review of the record shows that appellant used his hands to assault Jackson, the record does not contain any evidence indicating that he did not also use a knife to stab and cut her. The State presented uncontradicted evidence that Jackson suffered a stab wound to her neck and that appellant caused the wound.

Specifically, the State's first witness, Dvorak, testified that when he approached appellant while appellant was on top of Jackson and was striking her, appellant exhibited a knife and threatened him with it. Dvorak stated that Jackson was bleeding from a cut on her neck and that he gave her a towel and told her to press it against her neck to stop the bleeding.

Next, Jackson testified that appellant pulled a knife out of a backpack and stabbed her neck (while later using the knife to stab Knox). Jackson identified and described photographs (admitted as exhibits) depicting her stab wound. She testified that she did not recall telling officers that appellant got the knife only after there was a physical altercation between her, Knox, appellant, and another person.

S.W.3d 102, 107 (Tex. App.—Fort Worth 2009, pet. ref'd) ("Factors considered in determining whether a knife is capable of causing death or serious bodily injury include . . . the size, shape, and sharpness of the weapon . . . ."); *see also* Tex. Penal Code Ann. § 22.02(a)(2) (stating that a person commits aggravated assault by using or exhibiting a deadly weapon during the commission of an assault). Rather, he appears to contend that the record contains evidence by which the jury could have found that he did not use the knife to stab Jackson.

After Jackson's testimony concluded, the paramedic testified that when he saw Jackson, he noticed that she had a "laceration to the base of her neck" along with defense wounds on her arms. The paramedic testified that on the scene, Jackson told him that she had been "assaulted with a knife." The paramedic stated that Jackson's injuries were consistent with what she said had happened to her.

Next, a police officer testified that he saw Jackson's puncture wound near her collarbone area and that at the time he saw it, it was "bleeding out a bit." That officer also testified that Jackson told him that the knife appeared after there was a physical altercation between her, Knox, another person, and appellant. The officer also confirmed that Jackson said that appellant had stabbed her and that no witness at the scene stated that anyone other than appellant ever had a weapon. Another officer testified to finding red stains consistent with the appearance of blood at various locations within the apartment complex.

The trial court admitted medical records showing that when Jackson went to the hospital, she had an "[o]pen wound" in her neck. The records show that Jackson presented with a "stab wound" that was not self-inflicted, had pain in her neck, and suffered from a "[s]oft tissue injury . . . consistent with clinical history." The records indicate that the injury occurred near "the cervical segments of the left internal carotid artery." They also indicate that treatment for the wound required the use of sutures.

Throughout all of the record, the evidence presents no contradiction to the facts that Jackson's neck was injured by being stabbed and cut with a knife or that appellant was the person who stabbed and cut her. Appellant focuses his appellate argument on the fact that a conflict existed between Jackson's testimony and a police officer's testimony about whether appellant stabbed her in the course of an altercation between only her and appellant or whether the altercation also involved others. But this conflict, at most, shows uncertainty in the sequence of when appellant stabbed her; it does not qualify as "affirmative evidence" that he did not stab her. *See Wortham*, 412 S.W.3d at 558 (stating that to justify the submission of a lesser-included offense, evidence "cannot be mere speculation—it must consist of affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense"). Although appellant proposed to the trial court that the stabbing could have been a "mistake" or "some sort of self-wounding," no affirmative evidence supports those theories. *See id.*

Appellant also emphasizes that the record shows distinct acts of assault by appellant against Jackson. At most, however, the totality of the record shows only that appellant assaulted Jackson in ways in addition to stabbing her, not that he only assaulted her in those other ways.

Finally, appellant appears to rely on the absence of Knox from the trial as a basis for supporting the submission of the lesser-included instruction in Jackson's case. He does not adequately explain how Knox's absence qualifies

as some evidence that would permit a rational jury to find that he was guilty only of assault and not aggravated assault of Jackson. *See Hall*, 225 S.W.3d at 536.

We conclude that the record contains no evidence that would have permitted the jury to rationally find that if appellant was guilty, he was guilty only of assault rather than aggravated assault of Jackson. *See id.*; *Salinas*, 163 S.W.3d at 741; *Rousseau*, 855 S.W.2d at 672–73. Thus, we conclude that the trial court did not err by denying his request for an instruction on the lesser-included offense of assault, and we overrule his second point.

Conclusion

Having overruled appellant's two points, we affirm the trial court's judgments.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GARDNER, JJ.

DAUPHINOT, J., filed a concurring and dissenting opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2016