COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00288-CR

JAMES LEMARC BYRD — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1410499R

MEMORANDUM OPINION[1]

I. INTRODUCTION

A jury convicted Appellant James Lemarc Byrd of the offense of directing the activities of a criminal street gang. *See* Tex. Penal Code Ann. § 71.023(a) (West Supp. 2016). The trial court assessed his punishment at fifty years' confinement. In two issues, Byrd argues that the trial court erred by admitting

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

cell tower evidence disclosed shortly before trial and by admitting a jailhouse phone call that allegedly contained hearsay and violated his right to confront witnesses. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2008, Lovick Haldon Stikeleather III was serving time in prison for drug-related offenses. While in prison, Stikeleather became a member of the Aryan Brotherhood of Texas (ABT). The ABT is a white-supremacist gang operating both inside and outside of the prison system. The ABT regularly and continuously engages in criminal activities in Texas. When he became a member of the ABT, Stikeleather signed a blind-faith commitment acknowledging that his membership was for life and that he would follow any ABT order without question. Members who violate the blind-faith commitment often receive severe consequences, ranging from beatings to death.

The ABT has five geographic regions in Texas. Each geographic region is headed by a different general. Below the general, each region also has an outside major, inside major, captain, lieutenant, and sergeant-at-arms.[2] At the time of the offense at issue, Byrd held the rank of outside major for Region II of the ABT, which covers an area spanning Dallas, Fort Worth, Wichita Falls, and Hillsboro. At that time, Byrd was the highest ranking ABT member in Region II who was outside of prison.

[2]Typically, the outside major exercises control over members outside of prison, while the inside major exercises control over members inside prison.

When Stikeleather got out of prison in November 2013, he lived with a woman named Sherri Turner in Sansom Park. He was supposed to check in with Byrd upon his release from prison; Stikeleather, however, did not check in with Byrd because he no longer wished to affiliate with the ABT. On January 28, 2014, approximately six ABT members went to Turner's house looking for Stikeleather. Two members went to the front door, and two members went to each side of the house. The men eventually left, however, after police arrived at the scene.

The next day, the men returned to Turner's house again looking for Stikeleather. Stikeleather was not home, and the men left. Turner was upset that ABT members came to her house, so she called Stikeleather and asked him to "take care of it." When Stikeleather arrived back at Turner's house, he called ABT member Michael Young and asked to be picked up. Young, along with ABT member Charles Garrett, picked up Stikeleather and took him to a different house in Sansom Park. When they arrived at the house, Garrett led Stikeleather to a back bedroom where ABT affiliate Nicholas Acree was waiting. Garrett told Stikeleather that "he didn't know what was going on, but that he got an order from Byrd to strip [Stikeleather] and zip [him]." Garrett and Acree then removed all of Stikeleather's clothes and zip-tied his hands behind his back. They next led him to a laundry room, tied his feet, and told him to lie down and wait because Byrd was not at the house.

Approximately three hours later, Byrd walked into the laundry room and stomped on Stikeleather's head three times. When Stikeleather rolled to the side to avoid getting stomped again, Byrd kicked him in the lower back. Byrd then pulled out a gun, pointed it at Stikeleather, and began interrogating him about whether he was doing business for a rival white-supremacist gang. Byrd put the gun in Stikeleather's mouth and asked Acree, "Do you think I should just kill this motherfucker?" When Acree responded, "No," Byrd removed the gun from Stikeleather's mouth and, after some discussion, told Stikeleather, "[F]or me letting you walk out of here today, you're going to pay me a thousand dollars a month, and the next time you disrespect me, you're going to be dead."

Byrd then pulled a knife from his belt, said, "Just so you know that I'm serious," and stabbed Stikeleather twice in the left shoulder. Byrd then ordered Acree to untie Stikeleather. Acree brought Stikeleather out of the laundry room and into the kitchen and gave Stikeleather his clothes, but Stikeleather was bleeding too much to put his shirt back on. Noticing the blood, Byrd grabbed a piece of bread from the kitchen counter and asked Stikeleather if he knew what a blood oath was, and Stikeleather responded that he did.[3] Byrd then dabbed the bread onto Stikeleather's wound, tore the bread in half, ate one piece, and shoved the other into Stikeleather's mouth. Stikeleather returned to Turner's

[3]Stikeleather testified that a blood oath is "an oath that you make and if you don't abide by it, you get killed."

house early the next morning. He did not seek medical treatment or report the crime to police because he feared ABT retaliation.

Authorities learned about the assault against Stikeleather from the Department of Homeland Security's monitoring of phone calls of an incarcerated ABT member. When Stikeleather was later arrested for possession of methamphetamine, authorities discussed the assault with him. Stikeleather agreed to cooperate with authorities in exchange for a downward departure from his sentence and the dismissal of a weapons charge.

At Byrd's trial, Stikeleather was the only person to give a first-hand account of the assault. Other witnesses testified that they saw Stikeleather with stab wounds shortly after the assault, but they did not witness the assault itself. The State, however, introduced cell tower records, as well as expert testimony, to demonstrate that Byrd and Stikeleather were near the address where the assault took place when it took place. Byrd challenges the admission of that evidence on appeal. The State also introduced evidence at trial demonstrating Byrd's rank and involvement in the ABT, including a recording of a jailhouse phone call between Byrd, an incarcerated ABT member, and the member's wife. Byrd challenges the admission of that phone call on appeal.

III. THE CELL TOWER EVIDENCE

In his first issue, Byrd argues that the trial court erred by admitting the cell tower evidence because it was provided to him too close to trial, violating his

right to due process and article 39.14 of the code of criminal procedure.[4] Byrd complains that 893 pages of cell tower records were disclosed one week prior to trial, that the expert witness testifying about the cell tower records was not disclosed until nineteen days before trial, and that the expert witness's PowerPoint presentation was disclosed for the first time during trial.

A. Timeline of the Disclosure of the Cell Tower Evidence

On October 22, 2014, Byrd was originally indicted for engaging in organized crime. That same day, the State announced that it was ready for trial. On January 14, 2015, Byrd—who was in federal custody in West Virginia—requested final disposition of his charges under the Interstate Agreement on Detainers Act. *See* Tex. Code Crim. Proc. Ann. art. 51.14 (West 2006). He was bench warranted from West Virginia to Texas on March 16, 2015.

On April 15, 2015, Byrd was reindicted for the present offense, directing the activities of a criminal street gang, and the State announced that it was ready for trial. Two weeks later, Byrd was appointed new trial counsel. On June 9, 2015, Byrd filed a motion to disclose experts; Byrd, however, never obtained a ruling on that motion. On June 16, 2015, Byrd filed a motion for continuance to allow his newly-appointed counsel time to prepare for trial. The trial court

[4]The version of article 39.14 applicable to this case is the one in effect prior to September 1, 2015. *See* Act of May 16, 2013, 83rd Leg., R.S., ch. 49, 2013 Tex. Gen. Laws 106 (amended 2015) (current version at Tex. Code Crim. Proc. Ann. art. 39.14 (West Supp. 2016)). All citations to article 39.14 will be to that version, unless otherwise noted.

granted Byrd's motion for continuance that same day, and trial was scheduled for August 10, 2015.

On July 22, 2015—nineteen days before trial—the State filed a supplemental witness and expert witness list adding Special Agent Mark Sedwick of the FBI to testify regarding cell tower evidence linking Byrd to Stikeleather's assault. On July 24, 2015, the State received cell tower records from MetroPCS. That same day, the State filed a notice to offer the records as business records, along with a business records affidavit and a disk of the records, and faxed notice to Byrd's counsel. Three days later, the State received corrected cell tower records from MetroPCS, and the State filed another notice to offer the records as business records, along with a business records affidavit and a disk of the corrected records, and faxed another notice to Byrd's counsel.[5] Byrd's counsel was out of the country at that time, and, thus, was unable to review the cell tower records until August 3, 2015—one week before trial.

On August 5, 2015—five days before trial—Byrd filed a motion to exclude the cell tower records and the testimony of Agent Sedwick on the grounds that they were disclosed too close to trial and unfairly surprised him. During the hearing on Byrd's motion to exclude, Byrd expressly declined to seek a continuance. The trial court stated on the record its finding that the State notified Byrd's counsel of the existence of the cell tower evidence "in the most timely

[5]The cell tower records had to be corrected because one of the phone numbers listed in the first batch of records included transposed numbers.

way, and more timely than the legally required way, that this evidence existed, and it is not [Byrd's counsel's] fault or [the State's] fault that [Byrd's counsel wasn't] able to review it until a week ago." The trial court then told Byrd that it would "likely grant" a request for a continuance if he desired it, but Byrd indicated that he wanted to move forward with his trial. The trial court ultimately denied Byrd's motion to exclude, but it granted Byrd a running objection to the cell tower evidence on the bases of due process and violation of article 39.14.

During trial, the trial court held a hearing regarding Agent Sedwick's testimony. Agent Sedwick testified during the hearing that he had prepared a PowerPoint presentation containing data from the cell tower records and that he did not consider the PowerPoint presentation to be a written expert report. Byrd's counsel told the trial court that he considered the PowerPoint presentation to be an expert report and that his lack of notice about the report prevented him from getting his own expert to refute Agent Sedwick's testimony. The trial court once again inquired as to whether Byrd wished to seek a continuance, and Byrd once again maintained that he did not want a continuance. During the hearing, the State emailed Agent Sedwick's PowerPoint presentation to Byrd's counsel, and the trial court recessed for the day to give Byrd's counsel an opportunity to review the presentation and prepare for Agent Sedwick's cross-examination.

B. The Law

The United States Constitution and the Texas constitution both provide that the State shall not deprive a person of life, liberty, or property without due

process of law. U.S. Const. amends. V, XIV; Tex. Const. art. I, § 19. To establish a due process violation from untimely discovery, a defendant must show pretrial prejudice, substantial impairment to his defensive posture at trial, and an explanation of how that defensive posture could have been materially improved with proper and timely discovery. *See Francis v. State*, 428 S.W.3d 850, 859–60 (Tex. Crim. App. 2014).

Article 39.14, sometimes referred to as the Michael Morton Act, contains provisions relating to the State's duty to provide discovery to criminal defendants. As it existed at the time of Byrd's offense, article 39.14 required as follows:

> [*A*]*s soon as practicable* after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or of a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and *that are in the possession, custody, or control of the state or any person under contract with the state*.

Tex. Code Crim. Proc. Ann. art. 39.14(a) (emphasis added). Article 39.14 also contains a provision relating to the State's disclosure of its expert witnesses. As it existed at the time of Byrd's offense, article 39.14 required as follows:

> On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence.

> The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

Id. art. 39.14(b).

C. Application of the Law to the Timeline of the Disclosure of the Cell Tower Evidence

We begin by addressing Byrd's argument that the disclosure of the 893 pages of cell tower records violated article 39.14 and his due process rights. The record reflects that the State turned over the first batch of cell tower records on the date it received them from MetroPCS, July 24, 2015. The State turned over the corrected batch of cell tower records on July 27, 2015, the date it received the corrected batch. We are thus satisfied that the State met article 39.14's requirement to provide discovery in its possession, custody, or control "as soon as practicable." *Id*. art. 39.14(a).

While Byrd complains that he was prejudiced by the "untimely" disclosure of the cell tower records—he claims it affected his case assessment and strategy—and that it substantially impaired his defensive posture—he claims he was denied the ability to competently review the evidence and obtain his own expert—we note that a continuance would have alleviated Byrd's alleged concerns of prejudice and impairment of his defensive posture. Despite numerous opportunities to request a continuance, and despite the trial court's indication that it would "likely grant" a continuance, Byrd expressly declined to

seek one. Because Byrd had the opportunity to avoid the prejudice and impairment complained of but chose not to, we hold that he waived his complaint that the timing of the disclosure of the cell tower records precluded their admission. *See Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982) ("The failure to request a postponement or seek a continuance waives any error urged in an appeal on the basis of surprise."); *Martin v. State*, 176 S.W.3d 887, 900 (Tex. App.—Fort Worth 2005, no pet.) (holding failure to request a continuance waives any error urged on appeal on the basis of surprise).

We next turn to Byrd's argument that Agent Sedwick's testimony should have been excluded because he was disclosed as an expert witness nineteen days before trial, rather than the twenty days contemplated by article 39.14. *See* Tex. Code Crim. Proc. Ann. art. 39.14(b). We note that while Byrd filed a motion to disclose expert witnesses, he never obtained a ruling on that motion. "[U]nder its plain language, the disclosure provision of article 39.14(b) is triggered only by a defendant's motion requesting disclosure of the State's testifying experts *and a trial court order*." *In re Tibbe*, No. 03-13-00741-CV, 2013 WL 6921525, at *2 (Tex. App.—Austin Dec. 31, 2013, orig. proceeding) (mem. op.) (emphasis added). Because the trial court never ruled on Byrd's motion, he was not entitled to the twenty-day notice contemplated by article 39.14. *Id.*; *see Palomino v. State*, No. 14-10-00926-CR, 2011 WL 6578391, at *6 (Tex. App.—Houston [14th Dist.] Dec. 20, 2011, no pet.) (mem. op., not designated for publication) ("A party must procure a ruling from the trial court on a motion to disclose expert witnesses

in order to preserve error."); *Tamez v. State*, 205 S.W.3d 32, 39 (Tex. App.—Tyler 2006, no pet.) ("[A]rticle 39.14(b) allows the trial court to require the State to list their expert witnesses upon request. The record does not show that the court ever ordered disclosure, and Appellant does not direct us to any place in the record where such an order was made.").

While Byrd complains that the "untimely" disclosure of Agent Sedwick and his PowerPoint presentation prejudiced his case and substantially impaired his defense, we again note that a continuance would have alleviated Byrd's concerns. By not seeking a continuance, Byrd waived his complaint regarding Agent Sedwick's testimony and PowerPoint presentation. *See Lindley*, 635 at 544; *Martin*, 176 S.W.3d at 900.

We overrule Byrd's first issue.

IV. THE JAILHOUSE PHONE CALL

In his second issue, Byrd argues that the trial court erred by admitting a recording of a jailhouse phone call between ABT member Joey Kemp, who was incarcerated, and his wife, Meagan Kemp. Joey also spoke to Byrd during portions of the phone call. Byrd argues that the trial court erred by admitting the recording because it contained hearsay and violated his right to confront witnesses under the Confrontation Clause.[6] *See* U.S. Const. amend. VI. The State counters that the statements in the recording do not contain hearsay and

[6]Joey Kemp did not testify at trial.

are not the type of statements to which the Confrontation Clause applies. The State further argues that even if the trial court erred by admitting the recording, such error was harmless.

A. The Substance of the Jailhouse Phone Call

The phone call, which lasts approximately eight minutes, begins with a brief greeting between Joey and Meagan in which some expletives are spoken. Byrd then gets on the phone and encourages Joey to "keep [his] head up" and to "rep it." Joey expresses concern about not being able to see and take care of his family, and Byrd reassures him that Meagan has support. Joey then tells Byrd about his plan to pursue a plea deal in his case. Byrd tells Joey to "keep [his] head down" and "be sure [he] knows who these dudes are before [he] expose[s] himself." Joey and Byrd then discuss Joey's need for money to hire an attorney and need for money to be placed on his "books."

Byrd then gets off the phone, and the final minute of the phone call is between Joey and Meagan. Joey asks Meagan to ask Byrd what rank he should hold while in prison. Meagan is heard asking someone this question, presumably Byrd, and she relays the answer "inactive" to Joey.

The State used the recording to proffer expert testimony explaining how the language in the recording reflected Byrd's involvement and rank in the ABT.

B. Harm Standard

Assuming, without deciding, that the trial court erred by admitting the jailhouse phone call, we still have to determine whether the error calls for

reversal. *See* Tex. R. App. P. 44.2. If the error is constitutional, we apply rule 44.2(a) and reverse unless we determine beyond a reasonable doubt that the error did not contribute to Byrd's conviction or punishment. *Id*. Otherwise, we apply rule 44.2(b) and disregard the error if it did not affect Byrd's substantial rights. Tex. R. App. P. 44.2(b); *see Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999).

Here, the alleged error is based on both the Confrontation Clause and hearsay. Error in admitting evidence in violation of the Confrontation Clause is constitutional error. *Ellison v. State*, 494 S.W.3d 316, 325 (Tex. App.—Eastland 2015, pet. ref'd). The admission of inadmissible hearsay, on the other hand, is nonconstitutional error. *Moon v. State*, 44 S.W.3d 589, 594 (Tex. App.—Fort Worth 2001, pet. ref'd). Because this issue involves both nonconstitutional and constitutional error, we apply the standard of harm for constitutional error. *See Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001) ("Because we are faced with non-constitutional and constitutional error, we will apply the standard of harm for constitutional error.").

Because we determine that the alleged error is constitutional, we apply rule 44.2(a). Tex. R. App. P. 44.2(a). The question is whether the trial court's admission of the recording of the jailhouse phone call was harmless beyond a reasonable doubt. *See Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997). In applying the "harmless error" test, our primary question is whether

there is a "reasonable possibility" that the error might have contributed to the conviction. *Mosley*, 983 S.W.2d at 259.

Our harmless error analysis should not focus on the propriety of the outcome of the trial; instead, we should calculate as much as possible the probable impact on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 944 (2001). We "should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment,'" and if applicable, we may consider the nature of the error, the extent that it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011) (quoting Tex. R. App. P. 44.2(a)). This requires us to evaluate the entire record in a neutral, impartial, and even-handed manner, not "in the light most favorable to the prosecution." *Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989), *disagreed with in part on other grounds by Snowden*, 353 S.W.3d at 821–22.

C. Was the Admission of the Jailhouse Phone Call Harmful?

Byrd complains that the admission of the jailhouse phone call was harmful because it made it appear that he had a controlling position in the ABT. He also complains that the expletives used by Joey and Meagan only worked to prejudice

the jury against him, as did the fact that he appeared to be helping Joey, a person charged with a serious crime.

Here, the State presented overwhelming evidence, apart from the jailhouse phone call, that Byrd had a controlling position in the ABT. Special Agent Steven Van Geem, of the Department of Homeland Security, testified that Byrd was Region II's outside major and that Byrd was "at the top of [the] chain of command for the outside members of Region II." Steven Lair, a Carrollton police officer and Department of Homeland Security task officer, also testified that Byrd was Region II's outside major. Lair further testified that ABT members have to sign a blind-faith commitment agreeing that their membership is for life and that they will follow orders from ABT leadership without question. Stikeleather also testified that Byrd was Region II's outside major, as did Meagan Kemp, who added that there was no Region II member outside of prison who outranked Byrd.

The State also introduced, and the trial court admitted, numerous letters demonstrating Byrd's authority and influence over the ABT. Several letters were admitted that were written to Byrd by incarcerated ABT members in which the ABT members paid their respects to Byrd and inquired about ABT matters. The trial court also admitted a letter written by Byrd to "Big Wood" that Byrd asked to be circulated to "all confirmed members in [Big Wood's] area." In that letter, Byrd provides "guidelines [that] are to be upheld without question," including the need to collect information from "[a]ll [b]ros," that "[e]very brother is to maintain weekly

contact without question," and that "[d]ues are mandatory [and] are to be paid at the first of each month."

We note that the State did not emphasize the recording during its opening statement and closing argument.[7] Rather, the State emphasized the assault on Stikeleather that occurred at the house in Sansom Park. The recording of the jailhouse phone call did not contain any statements relating to that assault, but merely shed some light on Byrd's involvement and rank in the ABT. Because ample evidence was admitted demonstrating Byrd's involvement and rank in the ABT, including the testimony of Agent Van Geem, Officer Lair, Stikeleather, and Meagan Kemp, in addition to the letters written to and from Byrd, we do not believe the jury placed much, if any, weight on the statements made in the jailhouse phone call. Nor do we believe the jury placed much, if any, weight on the fact that the Kemps used expletives during the phone call, or on the fact that Byrd appeared to be helping Joey, a person charged with a serious crime. In making that determination, we note that rife evidence was presented demonstrating that Byrd associated with criminals and gang members and that several of the letters written to him by incarcerated ABT members contained expletives.

[7]A different recording was mentioned by the State during its opening statement and closing argument—the recording in which the Department of Homeland Security first learned of the offense against Stikeleather—but the recording complained of on appeal was not mentioned.

After carefully reviewing the record and performing the required harm analysis under rule 44.2(a), we hold beyond a reasonable doubt that, assuming the trial court erred by admitting the recording of the jailhouse phone call, such error did not contribute to Byrd's conviction or punishment. *See* Tex. R. App. P. 44.2(a). We overrule Byrd's second issue.

V. CONCLUSION

Having overruled Byrd's two issues, we affirm the trial court's judgment.

PER CURIAM

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

DELIVERED: March 2, 2017