COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00056-CR

ROBERT MARQUIS LAMAR WILLIAMS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1425043R

MEMORANDUM OPINION[1]

Appellant Robert Marquis Lamar Williams appeals his conviction for murder[2] of his three-year-old daughter, Anastasia. In two points, he contends that the evidence is insufficient to support the conviction and that the trial court

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

[2]*See* Tex. Penal Code Ann. § 19.02(b)(3) (West 2011).

abused its discretion by excluding evidence of Twitter social media posts (tweets) by Fred LaRue, whom appellant identified at trial as an alternative suspect for the crime. We affirm.

Background Facts

Appellant, his girlfriend Danyelle LaRue, Danyelle's son Fred, and Anastasia lived together in an upstairs unit of a fourplex in Hurst. Rebecca Fields lived in another unit of the fourplex; she resided on the floor directly below appellant. The fourplex had thin walls, so Fields could hear events that occurred in the other units. From appellant's unit, Fields sometimes heard a "lot of domestic fighting, thuds, [and] screams." Fields did not call the police on those occasions because she did not want to become involved in the disputes.

One day in March 2013, Fields saw Anastasia through an open but screened-in window and asked her whether she was ok. Anastasia shook her head from side to side to indicate that she was not ok.

Later that month, near 11:30 a.m. on March 21, Fields, who was home sick with the flu, was awoken by "loud thuds" and a child crying; these sounds were coming from appellant's unit. According to Fields, the child was "clearly screaming 'No, Daddy, no.'" The thuds and screaming lasted "[a]t least up to one minute," and the child screamed "[n]o, Daddy, no" at least three times. Danyelle testified, however, that Anastasia had not reached an age where her words were "super clear"; she said that Anastasia was only verbal "[t]o a point." Fred testified that Anastasia's vocabulary was minimal but that she was able to say "Daddy."

After the thuds and screaming stopped, Fields heard slamming doors and the sound of a television blaring "to muffle out any other cries." The next day, March 22, Fields heard no sounds of any child, and she learned that Anastasia had died. On March 23, Fields walked upstairs to appellant's unit to offer condolences. According to Fields, appellant had a frigid and expressionless demeanor. Another one of appellant's neighbors, however, described his demeanor after Anastasia's death as "hysterical." She testified that appellant was crying and "couldn't contain himself."

Jimmy Meeks, a Hurst police officer, responded to a dispatch about a "sick child" and went to appellant's unit on March 22. He saw Anastasia lying on a bed, and he determined that she was dead. Anastasia's body was "hard." Officer Meeks saw blood to the left of Anastasia's head. After speaking to a woman at the scene (presumably Fields), Officer Meeks said to another officer, "The father did it."

A paramedic arrived and noticed that Anastasia's body had rigor mortis, indicating that she had been dead for some time. Anastasia's body had significant bruising. She had a frothy substance coming from her nose and mouth that was consistent with decomposition, and her body smelled like it was decomposing. The paramedic noticed that appellant had an abnormal lack of emotion about Anastasia's death; the paramedic explained that when he had responded to similar scenes, he had encountered frantic, highly stressed parents.

A grand jury indicted appellant for committing capital murder or murder of Anastasia. Count two of the indictment alleged that he murdered her by committing the felony of injury to a child and by committing an act clearly dangerous to human life—striking her with or against a hard or soft object—that caused her death.[3] Appellant received appointed counsel, chose the trial court to assess his punishment in the event of his conviction, and pled not guilty. His defensive theory at trial was that Fred was Anastasia's killer.

Danyelle, who was still dating appellant at the time of trial, testified that Fred had babysat Anastasia before and that Anastasia had not been harmed on that occasion. She explained that she was the only person in the household who worked and that appellant had primarily cared for Anastasia.

Concerning the days surrounding Anastasia's death, Danyelle testified that on the morning of March 21 (the day before police discovered Anastasia's dead body), she, appellant, and Anastasia ran errands before returning home. Danyelle explained that she went to work before noon that day and that Anastasia was alive and was eating when she left. According to Danyelle, when she returned home after 9 p.m. that night, Anastasia was not awake, and Danyelle went to sleep. Danyelle had to work early the next morning, and she did not see Anastasia before she left. Appellant took her to her job and dropped her off there. Later that morning, just before noon, appellant picked her up and

[3] *See* Tex. Penal Code Ann. § 19.02(b)(3) (establishing the requirements to prove felony murder).

brought her home. She noticed that Fred, who was supposed to be watching Anastasia, was not there, and she saw Anastasia "[lying] down" in her bed and left her there. Danyelle became upset that Fred had apparently deserted Anastasia, and she went back to work. When Danyelle returned home after work that afternoon, she saw police and medical personnel there, and she learned that Anastasia had died. Danyelle did not speak again to Fred until weeks later, which she described as an unusual amount of time to have not spoken to him.

Danyelle testified that on the night that she discovered Anastasia's death, she and appellant "cr[ied] and [held] each other and . . . wonder[ed] what the hell happened." According to Danyelle, that night, appellant was distraught. At trial, Danyelle opined that Anastasia had died from a medical condition, not from anyone beating her. Danyelle admitted that she and appellant had a history of arguing, but she said that he had never put his hands on her.

Fred testified that he had seen appellant physically discipline Anastasia before her death by hitting her leg. He stated that on March 21, while he was playing a game on his phone and Anastasia was crying, appellant "walked into her room and made her stop crying." He remembered hearing Anastasia say "Daddy," hearing "thumping noises," and then not hearing anything else. Fred described the thumping as a "stomp, stomp, stomp noise." Fred did not hear Anastasia again after hearing those noises. He checked on her early the next morning and saw that she was lying down. Later that day a little before noon, he went into Anastasia's room to check on her again because it was unusual for her

to sleep that late. When he found her, he saw that her body was bruised in several places, that her skin was cold and stiff, and that she had no pulse. He performed CPR to no avail. While he did so, liquid from Anastasia's mouth flew into Fred's face, and he vomited and wiped his face with a tissue. Fred then grabbed his cell phone and his jacket and left home.

After he left home, while panicking because of what he had discovered, Fred walked to a pawn shop and to two McDonald's restaurants. He was looking for someone who could "help [him] with the situation." When the State asked Fred why he had run away after discovering Anastasia's body, he stated, "Personally, I was . . . afraid. I was afraid for my own life due to previous situations. I . . . didn't feel like I was safe in that house." Later, during appellant's counsel's questioning, Fred testified that he "ran because . . . [he] figured that [his] mother and [appellant] had conspired to murder [him] and [Anastasia]." He said that calling 9-1-1 was not "in [his] thought process" and that he did not "have [his] head on straight at the time."

Fred explicitly denied ever physically abusing Anastasia or killing her. He did not make contact with the police for four days following the discovery of Anastasia's death. When appellant's counsel asked Fred whether he had ever publicly threatened to kill Danyelle, he admitted that he had done so.

Chad Woodside, a Hurst police detective, testified that during his investigation into Anastasia's death, Danyelle had told him that she had been in "scuffles" with appellant and that during those scuffles, he had choked her.

Detective Woodside admitted that fleeing may sometimes indicate guilt, and he conceded that Fred had fled after Anastasia was killed and that appellant had not fled and had called 9-1-1 on the date that the police discovered her death.

Tarrant County Medical Examiner Dr. Nizam Peerwani testified that Anastasia presented to his office with many recently-formed bruises across her body, that the bruises had been caused by blunt force, and that Anastasia also had several internal injuries caused by blunt force, including a large tear in her liver. Dr. Peerwani opined that Anastasia died from internal bleeding. When the State asked Dr. Peerwani whether he could determine a time of Anastasia's death, he responded, "One can only very roughly say that the child was not decomposing. And if it was in an enclosed environment, probably the death was less than 24 hours and . . . that's all you can say."[4] He also stated that based on Anastasia's injuries, she could have been unconscious and then in a coma for hours before she died.

After Anastasia's death, appellant gave the police different answers to questions asking when he had last seen her alive. He told one officer that he last saw Anastasia alive at 6 a.m. on March 22, but he told another officer that he last saw her alive between 10 a.m. and 11 a.m. that day and had heard her playing in a room after that and before he took a nap. Jacob Eubanks, a Hurst police

[4]The evidence indicates that another doctor who worked in the Tarrant County Medical Examiner's office initially reached a conclusion that Anastasia had died on March 22 but then concluded that it was possible that she had died on March 21 or March 22.

detective, testified that the police focused their investigation on appellant rather than Fred because while Fred's story about what occurred before and after Anastasia's death remained consistent, appellant's story "continued to change."

During interviews with the police, appellant admitted that he had "whooped" Anastasia to discipline her a week before her death and again on March 21. He also admitted that he had choked Danyelle on one occasion. Fred testified that appellant also once brandished a gun inside the home and shot it "into the air." Danyelle's testimony confirmed that appellant had shot a gun inside the home, leaving a bullet hole in the ceiling.

After considering this evidence along with other facts, a jury convicted appellant of murder under count two of the indictment. Without receiving any additional evidence in the brief punishment phase of the trial, the trial court sentenced appellant to fifty-five years' confinement. He brought this appeal.

Evidentiary Sufficiency

In his first point, appellant argues that the evidence is insufficient to support his conviction. In our due-process review of the sufficiency of the evidence to support a conviction, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493

S.W.3d 583, 599 (Tex. Crim. App. 2016).[5] This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the

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[5]In his argument on his first point, appellant contends that the jury's decision to convict him "was against the great weight of the evidence" and was "clearly wrong and manifestly unjust." These standards were tied to the now-defunct factual-sufficiency review of evidence to support a conviction. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) ("[T]he *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."); *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, 560 U.S. 966 (2010). Appellant also asks us to grant a new trial if we sustain his first point, but an appellate court's holding that the evidence presented at trial is insufficient to support a conviction requires acquittal, not a new trial. *See Stobaugh v. State*, 421 S.W.3d 787, 869 (Tex. App.—Fort Worth 2014, pet. ref'd).

cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

A person commits murder if the person "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code Ann. § 19.02(b)(3). On appeal, appellant contends, as he did at trial, that the evidence supports a finding that Fred, not appellant, killed Anastasia. He contends that in convicting him, the jury disregarded evidence within an autopsy report stating that Anastasia died on the afternoon of March 22 and relied on the testimony of Fred, whom appellant characterizes as "an admitted thief, felon, liar, and [sender of] threatening tweets." He argues that other than Fred's testimony, "no evidence . . . connects [him] to [Anastasia's] death." We disagree with that assertion[6] and with

[6]We note, however, that even if Fred's testimony solely linked appellant to Anastasia's death, our evidentiary sufficiency review recognizes the jury's authority to "accept or reject any or all of the evidence of either party, and any or all of the testimony of any witness." *Franklin v. State*, 193 S.W.3d 616, 620 (Tex. App.—Fort Worth 2006, no pet.).

appellant's broader contention that the evidence is insufficient to support his conviction.

The jury could have reasonably relied on circumstantial evidence drawn from sources beyond Fred's testimony to connect appellant to Anastasia's death. As stated above, appellant admitted in a statement to the police that on March 21, 2013, the day before the police discovered Anastasia's death, he "whooped" her. The jury could have rationally determined that this admission corroborated Fred's statement that on that day, appellant went into Anastasia's room and "made her stop crying" while making thumping or stomping noises. Fields's testimony also evidenced appellant's violence toward Anastasia on March 21. Although Fields gave a different time frame for that violence than Fred did,[7] Fields testified that on that day, she heard loud thuds coming from appellant's unit and a child screaming "[n]o, Daddy, no." She and a paramedic also testified that following Anastasia's death, appellant had an expressionless, unemotional demeanor. *See Hernandez v. State*, 939 S.W.2d 173, 178 (Tex. Crim. App. 1997) (explaining that a defendant's demeanor may connect the defendant to a crime); *Stevens v. State*, 234 S.W.3d 748, 778 (Tex. App.—Fort Worth 2007, no pet.) (weighing a defendant's lack of emotion about a two-year-old girl's death as evidence supporting the defendant's conviction for capital

[7]Fields testified that she heard thuds and a child screaming "[n]o, Daddy, no" at about 11:30 a.m. Fred testified that he heard thumping noises and Anastasia saying "Daddy" sometime between 7 p.m. and 9 p.m.

murder). Anastasia's body had bruising that was consistent with being beaten in the way that Fields's and Fred's testimony implied. After Anastasia's death, appellant gave conflicting statements to the police about when he last saw her alive, and the jury could have drawn an inference of appellant's guilt from those conflicts. *See Gear v. State*, 340 S.W.3d 743, 747 (Tex. Crim. App. 2011) (explaining that a jury may consider a defendant's inconsistent statements as affirmative evidence of guilt); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("[I]nconsistent statements . . . to the police are probative of wrongful conduct and are . . . circumstances of guilt.").

Fred's testimony, which the jury had the authority to accept despite appellant's challenges to its credibility, also circumstantially supports the jury's finding that appellant killed Anastasia. From Fred's testimony, the jury could have determined that there was not a nurturing, healthy relationship between Anastasia and appellant. Fred explained that he slept in the living room and indicated that he stayed there during the daytime on some occasions because he did not have a job, but he stated that he rarely saw Anastasia because she was brought out of her room twice per day to eat and was taken back to her room after doing so. Similarly, Danyelle testified that Anastasia "sometimes" spent the majority of her time in her room, and appellant told the police that Anastasia's door remained shut for large amounts of time and that she went outside once a week "[i]f that."

Fred testified that he never saw appellant playing with Anastasia and that when Anastasia was in her room, the door remained closed. He explained that when Anastasia began crying while in her room, either appellant or Danyelle "would go in there and make her stop crying."

Fred testified that on the night of March 21, after Anastasia had been crying in her room for thirty to forty-five minutes, appellant went in the room. At that time, Fred heard Anastasia say "Daddy" and heard thumping or stomping noises. Fred testified that shortly after Anastasia stopped crying, appellant left her room and went to Danyelle's room. Fred did not hear Anastasia make any further noises that night or the next morning (nor did Danyelle hear Anastasia after she returned from work or before she left for work the next morning),[8] and he found her dead near 11 a.m. on March 22. By the time Fred found Anastasia's dead body, her skin was "kind of cold and stiff." Fred's testimony about what occurred on March 21 and March 22 was consistent with what he told the police four days after the police discovered Anastasia's death.

Appellant relies on a report prepared by a forensic death investigator that appears to describe Anastasia's death as having occurred at "15:23" (3:23 p.m.) on March 22; he argues that this time of death supports his theory that Fred killed Anastasia that day. But Detective Eubanks testified that the report's "time of

[8]Danyelle testified that she did not hear Anastasia on the morning of March 22 even though her light was on and appellant went into her room. Appellant told the police that Anastasia was awake that morning and that she ate, drank, and used the bathroom.

death" referred to the time that Anastasia was officially pronounced dead (instead of the time she actually died). Also, the jury heard testimony that a paramedic had been sent to assess Anastasia before 3:23 p.m., and that paramedic testified that Anastasia had been dead for some time when he arrived because she had rigor mortis in her arms. Thus, the jury was not bound to determine that Anastasia's death occurred on the afternoon of March 22 based on the reference in the forensic death investigator's report. Moreover, the doctor who performed Anastasia's autopsy initially opined that her death occurred on March 22 but later told the police that she possibly died on March 21. Finally, even if the evidence conclusively established that Anastasia died at some point on March 22, Dr. Peerwani testified that she could have been in an unconscious state for hours before she died, which means that appellant's acts on the night of March 21 (as described by Fred) could have still caused her death. Therefore, we cannot agree with appellant that evidence concerning the time of Anastasia's death foreclosed the jury's finding of his guilt.

We note that appellant's statements to the police and to the paramedic on the day that the police discovered Anastasia's death allowed for a limited time in which Fred could have killed her. Appellant told the police that he saw Anastasia alive near 9 a.m. on March 22 (after appellant had returned home from a job interview) and heard her playing in her room until a little after 10 a.m., when he

left to pick up Danyelle for lunch.[9] He told the paramedic that he saw Anastasia alive between the hours of 10 a.m. and 11 a.m. on the day of her death. But the evidence shows that by 10:47 a.m. that day, Fred arrived at the pawn shop, and it also shows that Fred did not return home thereafter. Appellant said in his initial statement to the police that he had no reason to suspect that Fred would have hurt Anastasia.

We recognize that a rational factfinder could have weighed some of the evidence summarized above or otherwise contained in the record—including, for example, Fred's flight after Anastasia's death and violent sentiments he had expressed verbally and through his tweets[10]—against a finding of appellant's guilt. But the verdict establishes that this jury implicitly resolved conflicting evidence and conflicting inferences from the evidence in favor of a finding of appellant's guilt, and we are not free to act as a thirteenth juror by rejecting those decisions. *See Blea*, 483 S.W.3d at 33; *Murray*, 457 S.W.3d at 448–49; *see also Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016) (explaining that an "appellate court cannot act as a thirteenth juror and make its own assessment of the evidence"); *Goodman v. State*, 66 S.W.3d 283, 287 (Tex. Crim. App. 2001)

[9]In a subsequent interview, appellant said that he only glanced at Anastasia when he returned home from the interview and that he thought she was sitting on her floor at that time. He then expressed that he was not "100% for sure" that Anastasia was alive during these times.

[10]As explained below, the jury received some evidence about Fred's tweets, while the trial court excluded other evidence.

(stating that it "is a jury, not a reviewing court, that accepts or rejects reasonably equal competing theories"). The inferences supporting appellant's guilt included Dr. Peerwani's testimony that blunt force trauma led to Anastasia's death, the testimony of two witnesses who heard violent noises that coordinated with Anastasia saying "Daddy," evidence showing that appellant lacked emotion about Anastasia's death, evidence showing that appellant made inconsistent statements after Anastasia's death, evidence that limited the suspects in Anastasia's death to either appellant or Fred, Fred's denial (which the jury had authority to accept) that he had caused Anastasia's death, appellant's initial statement that he had no reason to suspect that Fred could have killed Anastasia, and the lack of any evidence directly connecting Fred to Anastasia's injuries that led to her death.

Viewing all the evidence in the light most favorable to the verdict, we conclude that a rational jury could have determined beyond a reasonable doubt that appellant murdered Anastasia. *See* Tex. Penal Code Ann. § 19.02(b)(3); *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. We overrule appellant's first point.

Exclusion of Evidence

In his second point, appellant argues that the trial court abused its discretion by excluding evidence of Fred's tweets through a printout from his Twitter account. Appellant contends that the trial court erroneously excluded the

exhibit displaying the tweets on the ground that the tweets were hearsay, and he asserts that the exclusion deprived him of an ability to present a defense at trial.

During Fred's testimony, appellant's counsel introduced an exhibit that contained tweets that Fred had posted to his Twitter account. The tweets contained statements such as

- "Hey can you watch the baby for an hour or 2? 12 hours later better believe [I'm] pissed";
- "Don't walk through that door without food in your hand";
- "Who gambles for 12 hours? Seriously!";
- "Come home w/o food & I'll kill you . . . mother!";
- "You said I'll be home 4 fuccin hours ago";
- "[I'm] evil";
- "I can't stop taking my anger out on her";
- "Even bad people have good friends";
- "Will it ruin my career";
- "Bitch ass case";
- "Come to the dark side";
- "Satan I need you"; and
- "Even Jesus had to kill a man once."

The State objected to the exhibit's admission on the grounds of relevance and hearsay. The trial court sustained the State's objection.

Later, outside of the jury's presence, appellant's counsel asked Fred more questions about his Twitter account. Fred confirmed that he had tweeted all of

the statements contained on the proffered exhibit, but he testified that the tweets did not necessary reflect what he was feeling at the time he posted them. He referred to the tweets as "advertisement" for his career as a musician. Appellant reoffered the exhibit containing Fred's tweets and contended that the tweets were excepted from hearsay because they showed Fred's state of mind. *See* Tex. R. Evid. 803(3). The following exchange then occurred:

> THE COURT: And [defense counsel] asked him every question and he said that wasn't how he felt. So you want me to just disbelieve what he said for no reason whatsoever?
>
> [DEFENSE COUNSEL]: Your Honor, he had the opportunity to explain to the jury what he meant. However, they are his tweets, he admitted, and they show his state of mind.
>
> THE COURT: I've sustained their objection and I'm going to leave my ruling as it is.

After this exchange, appellant again urged the trial court to admit the tweets. He contended that they were not hearsay because they were not offered for the truth of the matters asserted within them. *See* Tex. R. Evid. 801(d)(2). The trial court again excluded the evidence.

To the extent that appellant argues on appeal that the trial court violated his constitutional rights by denying his ability to present a defense at trial, such a contention must be raised in the trial court to be preserved for our review. *See* Tex. R. App. P. 33.1(a)(1); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995); *Carrion v. State*, 488 S.W.3d 925, 928 (Tex. App.—Eastland 2016, pet. ref'd); *Schumm v. State*, 481 S.W.3d 398, 399 (Tex. App.—Fort Worth 2015,

no pet.) ("[Schumm] directs us to no place in the record where he raised a constitutional basis for admitting the excluded evidence. He has therefore not preserved his due process claim or any other constitutional claim."); *see also Chavarria v. State*, No. 02-13-00463-CR, 2015 WL 1544204, at *3 (Tex. App.—Fort Worth Apr. 2, 2015, no pet.) (mem. op., not designated for publication) ("A defendant's constitutional right to a meaningful opportunity to present a complete defense is rooted in the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process and Confrontation Clauses, and these rights are subject to procedural default."). At trial, appellant argued that Fred's tweets were not hearsay or were an exception to hearsay, but he never asserted a constitutional basis for their admission. Thus, based on the authority above, we conclude that he forfeited his constitutional complaint.

To the extent that appellant contends that the trial court abused its discretion by excluding the tweets on the grounds that they were hearsay or were irrelevant,[11] even if we were to agree, the record must show harm to appellant's substantial rights under rule of appellate procedure 44.2(b). *See* Tex. R. App. P. 44.2(b) ("Any [nonconstitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see also James v. State*, 335

[11]During oral argument in this court, appellant argued that Fred's tweets were not hearsay but that even if they were hearsay, they were admissible because they showed his state of mind toward Danyelle, his state of mind toward Anastasia, and his state of mind "as the person that actually committed this crime."

S.W.3d 719, 726 (Tex. App.—Fort Worth 2011, no pet.) (explaining that generally, the "erroneous admission or exclusion of evidence is nonconstitutional error governed by rule 44.2(b)"). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). Conversely, an error does not affect a substantial right if we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). The exclusion of evidence is harmful when it would likely move a jury from a state of non-persuasion to a state of persuasion on a critical issue. *See Petetan v. State*, No. AP-77,038, 2017 WL 915530, at *32 (Tex. Crim. App. Mar. 8, 2017).

We cannot conclude that the exclusion of the exhibit containing Fred's tweets caused appellant harm under these standards because the jury later learned about Fred's Twitter identity, about the specific content of several of the tweets, and about the gist of all of them through Fred's unobjected-to testimony.

See Mosley v. State, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998) (op. on reh'g) (explaining that harm from the erroneous exclusion of evidence may be mitigated by the admission of similar evidence), *cert. denied*, 526 U.S. 1070 (1999); *see also Alvarez v. State*, No. 02-05-00376-CR, 2007 WL 117700, at *1 (Tex. App.—Fort Worth Jan. 18, 2007, no pet.) (mem. op., not designated for publication) ("[T]he trial court's exclusion of the evidence was harmless because similar evidence was admitted through the same witness and two other witnesses later in the trial.").

At the end of the trial on guilt-innocence, appellant recalled Fred. Appellant's counsel asked Fred whether he had publicly threatened to kill his mother with "something that [he] wrote," and Fred admitted that he had. The jury then learned through the State's questioning that Fred had made that threat on his Twitter account. On further questioning by appellant's counsel, the jury learned that Fred had written a rap song about curses from "Lucifer," that he had tweeted that he used tweets to express angry thoughts, that his Twitter account in March 2013 had a screenname of "SatanicSlayer09," that he had expressed through a tweet that he was "pissed" because he had to watch Anastasia for several hours while appellant and Danyelle gambled at a casino, that he had tweeted that he was "evil," and that he had tweeted that he could not "stop taking [his] anger out on her."[12] Thus, through this unobjected-to testimony, the jury

[12]Appellant's counsel proposed that "her" referred to Anastasia, but Fred testified that "her" referred to his ex-girlfriend.

learned about the general sentiments expressed in (and context of) some of the tweets, the specific language of others, and the themes of Fred's references to Satan, evil, anger, and violence. Even so, the jury convicted appellant while rejecting Fred's culpability for the murder. We cannot conclude that the admission of more evidence of the same character would have likely changed the jury's decision in that regard.[13] *See Guerra v. State*, 942 S.W.2d 28, 33 (Tex. App.—Corpus Christi 1996, pet. ref'd) (stating that "no harm results when evidence is excluded if other evidence of substantially the same nature is admitted"); *Akeredolu v. State*, No. 08-07-00191-CR, 2009 WL 1609372, at *2–3 (Tex. App.—El Paso June 10, 2009, pet. ref'd) (not designated for publication) (holding that a trial court's exclusion of a poem written by the deceased to another man, which the defendant claimed was admissible to show his state of mind, was harmless because there was other "abundant evidence concerning the [defendant's] state of mind").

Reviewing the record as a whole and considering the excluded evidence along with the admitted evidence, we conclude that even assuming that the trial court erred by excluding appellant's exhibit showing Fred's tweets on the grounds that the tweets were hearsay or were irrelevant, that error did not affect

[13]We also note that most of the excluded tweets referenced matters such as where Fred lived, record labels he wanted to sign with, his rap music, drug use, "koolaid popsicles," and other matters that had little to no apparent probative value on the issue of the identity of Anastasia's killer. We conclude that the exclusion of these tweets could not have been harmful. *See* Tex. R. App. P. 44.2(b).

appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Motilla*, 78 S.W.3d at 355; *Mosley*, 983 S.W.2d at 258. Thus, we conclude that the record does not show harm required for reversal, and we overrule appellant's second point.

Conclusion

Having overruled both of appellant's points, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

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

DELIVERED: June 15, 2017