



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00148-CR

RICKY CHARLES GILLON

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1433031R

MEMORANDUM OPINION¹

A jury found Appellant Ricky Charles Gillon guilty of aggravated assault with a weapon on a family member. The evidence showed that Gillon stabbed his girlfriend in the throat with a straight razor when she rejected his marriage proposal. The trial court sentenced Gillon to 60 years in prison. In one point, Gillon contends that the trial court erred by admitting into evidence his oral

¹See Tex. R. App. P. 47.4.

statement to the detective that he had indeed stabbed his girlfriend in the neck. We hold that even assuming the trial court erred, any error was harmless, and so we affirm.

EVIDENCE

Charlene Moore testified that she and Gillon had started dating in May 2014. But roughly two months later, on July 10, 2014, while the two were sitting in her vehicle, Moore told Gillon that she wanted to break up. After they talked inside her Hummer H2 for over half an hour, Gillon went to his pickup truck, returned to Moore's Hummer, and tossed a box containing an engagement ring in Moore's lap. Moore refused the ring; Gillon responded by stabbing her in the neck. Hearing Moore scream, her nephew pulled Gillon out of Moore's car.

Gillon then ran to the Hummer's driver's side, climbed inside through the sunroof, and resumed his attack. A photograph shows that the Hummer's sunroof was large enough for someone to climb into the vehicle with relative ease.

The attack stopped when Moore agreed to drive away with Gillon. Instead, though, Moore drove down the street, made a U-turn, got out of her Hummer, and ran into her house.

Once inside, Moore told her mother to call 9-1-1. Moore then watched Gillon bash her car before fleeing in his pickup.

When the police arrived, they saw a two-inch vertical cut on the left side of Moore's throat that exposed her esophagus. The officers called for medical help,

and Moore was eventually transported to the trauma center at John Peter Smith Hospital.

In Moore's car, the police saw blood on the driver's seat, floorboard, and console. On the driver's side floorboard, they found a handle for a straight razor. Outside Moore's car, they found a bloody straight razor.

Moore's nephew told the police that Gillon had attacked Moore. The police went to Gillon's home, and after a long stand-off, they arrested him there.

While in an ambulance at the scene, Gillon admitted to a detective that he had cut Moore's neck. Inside Gillon's pickup, the police saw a red stain on the center console that appeared to be blood. They also found a shaving kit containing a box of razor blades on the front seat.

The following day, the detective went to the hospital to meet with Moore. Moore had tape around her neck and a tube attached to her mouth, so the detective instructed Moore to communicate with him by squeezing his hand once for yes and twice for no. Moore responded yes when asked if Gillon was her attacker.

GILLON'S STATEMENT

The trial court originally grants Gillon's motion to suppress his incriminating statement.

The trial court initially suppressed Gillon's statement based on the lack of an express waiver under article 38.22 of the code of criminal procedure. See Tex. Code Crim. Proc. Ann. art. 38.22, §§ 2(b), 3(a)(2) (West Supp. 2016).

These statutorily mandated rights are commonly known as *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); Tex. Code Crim. Proc. Ann. art. 38.22, § 2(a)(1)-(5), (b). The trial court stated that on the audio, Gillon did not expressly waive his rights. After reading Gillon his rights, the detective simply asked if he understood them, and Gillon answered, “Yes.” The detective then launched directly into his questions rather than ask Gillon whether he was willing to waive those rights. On that basis, the trial court granted Gillon’s motion to suppress.

During the State’s case-in-chief, Gillon cross-examines the detective regarding the extent of his investigation, and the State rehabilitates the detective on redirect.

During the State’s case-in-chief, Gillon cross-examined the detective. The detective did not remember requesting a fingerprint analysis on anything and denied having various items tested for blood. He also admitted not sending any items off for DNA testing.

On redirect, the detective testified that he did not feel that he needed DNA testing because there was no identity issue and no unknown person. Additionally, the detective testified that no other weapon was found at the scene.

Gillon moves for a directed verdict.

After the State rested, Gillon moved for a directed verdict. When asked on what basis, Gillon’s counsel responded, “Failed to sufficiency of the evidence [sic], lack of proven identity of a deadly weapon.” Although this oral motion was not a model of clarity, Gillon appeared to be arguing that the State failed to prove

that the straight razor was the deadly weapon used in the offense. The trial court denied Gillon's motion.

Gillon presents evidence regarding the lack of fingerprints on the razor.

Gillon then put on a police-department fingerprint examiner. He testified that he tested the razor for fingerprints in June 2015—nearly a year later—and found none.

On the State's cross-examination, the examiner noted that fingerprints were not always recoverable. When asked if it was true that an investigation will dictate how in depth he goes in processing certain evidentiary items, the fingerprint examiner responded, "Yes. At Fort Worth that would be a true statement." He also agreed that if there were no issues about the suspect's identity, the investigation might not warrant a full-scale search for latent prints. He added that the investigator decides what he wants done. The fingerprint examiner agreed that the longer one waits to take a print off an object, the less likely one finds an identifiable print. In this instance, the examination for prints occurred roughly a year after the incident.

The State moves to admit Gillon's inculpatory statement.

Outside the jury's presence, the State argued that Gillon had opened the door by raising a false impression regarding identity and by suggesting the police did a shoddy investigation and advocated for admitting Gillon's statement to correct that false impression. The trial court agreed, relying primarily on three cases: *Haywood v. State*, No. 01-13-00994-CR, 2014 WL 7131176 (Tex. App.—

Houston [1st Dist.] Dec. 11, 2014, pet. ref'd) (mem. op., not designated for publication); *Sandoval v. State*, No. 14-05-00389-CR, 2006 WL 3433805 (Tex. App.—Houston [14th Dist.] Nov. 30, 2006, pet. ref'd) (mem. op., not designated for publication); and *Walker v. State*, No. 01-98-00394-CR, 1999 WL 826203 (Tex. App.—Houston [1st Dist.] Sept. 14, 1999, pet. ref'd) (not designated for publication). The trial court also mentioned *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971), and *Wheeler v. State*, 67 S.W.3d 879 (Tex. Crim. App. 2002).

Gillon requested a jury instruction on the voluntariness of his statements—an article 38.23 instruction.² The trial court agreed and gave that instruction when the case later went to the jury.³

²Article 38.23 provides:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005).

³We're a bit perplexed at this article 38.23 instruction. When the trial court granted Gillon's motion to suppress, it had already ruled that the detective had violated Gillon's *Miranda* rights. Despite that violation, it later admitted Gillon's statement on another basis—that Gillon had left a false impression with the jury

During the State's rebuttal, it presents Gillon's statement.

In rebuttal, the State presented the testimony of the detective who had taken Gillon's oral statement; this time, the trial court allowed the State to play the audio recording of Gillon's admissions. The jury thus heard Gillon's admitting to having his shaving bag in his pickup and grabbing his razor; stating that he and Moore were arguing when "all hell had broke loose"; and admitting cutting Moore's neck.

Final arguments.

During final arguments, Gillon initially argued that the jury should not consider his statement because he had not waived his Miranda rights. Gillon then questioned the State's investigation for its failure to test the blood, to search for fingerprints, and to check for DNA. Gillon argued that the police did not do the various tests because they had already made up their minds. Gillon conceded that something obviously happened to Moore, but the jury still did not know what that was. Gillon did not dispute that Moore was injured but contended that her story about how she was hurt "made absolutely no sense." Gillon finished with arguments again urging the jury not to consider his statement because the detective had violated his *Miranda* rights.

and that admitting his statement was necessary to correct it. Consequently, even if the jury found that Gillon's *Miranda* rights had been violated—exactly as the trial court had—that finding should have been irrelevant. It was admissible regardless.

In response to the argument that the State's investigation was inadequate, the prosecutor argued:

I'm going to break some news to you and hope—take it however you want. I'm an African-American, black. I've known this for awhile, over 40-something years. You can test me all day, but you're going to find that out. The same thing about this injury that happened with Ms. Charlene Moore. You can test all that evidence if you want, it's going to get you back to the same conclusion as what she told you. I don't need any test for that. You ain't got to take no genetic test to tell me I'm African-American. That's an insult to your intelligence for somebody to come in here and tell you some information that what you heard and what you saw and what all the evidence support is not the conclusion that happened.

The jury charge.

The jury was instructed, in accordance with article 38.23, that before it could consider Gillon's oral statement, the jury had to believe beyond a reasonable doubt that the detective gave Gillon sufficient warnings and that Gillon voluntarily waived those rights.

GILLON'S POINT

In one point, Gillon argues that the trial court erred by overruling his objection to the admission of his statement to the police. Assuming, without deciding, that the trial court erred by admitting Gillon's statement, for the reasons set out below we hold that the error, if any, was harmless.

DISCUSSION

The erroneous admission of evidence is generally non-constitutional error and not grounds for reversal unless it affects an accused's substantial rights. Tex. R. App. P. 44.2(b); *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App.

2001). Substantial rights are not affected if the reviewing court has fair assurances that the erroneous exclusion of evidence had no influence or only a slight influence on the jury. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). Put another way, to be reversible, the jury must have been “substantially swayed” by the improperly-admitted evidence. *Hinds v. State*, 970 S.W.2d 33, 35 (Tex. App.—Dallas 1998, no pet.). In making its assessment, the reviewing court should consider everything in the record, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. *Motilla*, 78 S.W.3d at 355.

The claimed error was harmless for two reasons.

First, the trial court’s article 38.23 instruction instructed the jury not to consider Gillon’s statement if it was involuntary. The trial court had previously suppressed Gillon’s statement because he did not expressly waive his *Miranda* rights. On this record, we cannot tell if the jury actually considered Gillon’s statement or whether it agreed that Gillon’s statement should not be part of the jury’s deliberations.⁴

⁴Gillon notes that the jury, during deliberations, requested to hear his audio statement again. Although true, the record does not show whether the jurors wanted to hear his statement for purposes of determining whether his *Miranda* rights had been violated, which hinged on whether he knowingly and voluntarily waived his rights in the absence of an express waiver, or whether they had already determined his rights had not been violated and wanted to listen to it substantively.

Second, the evidence was overwhelming. See *Motilla*, 78 S.W.3d at 357 (holding that overwhelming evidence of guilt is a factor courts consider under a nonconstitutional-error harm analysis). A jury might question the complainant's identification if the complainant had seen an assailant only once under stressful circumstances. Gillon, however, was not a stranger to Moore; he was her boyfriend. She was not likely to misidentify her attacker. Moore's testimony established that Gillon stabbed her in the neck. And although Moore's nephew did not testify, there was evidence that he too had identified Gillon as Moore's attacker.

The handle to a razor blade was found in Moore's Hummer, which was where Moore testified that the assault occurred, and a razor blade was found at the scene.

The police found a shaving kit with razor blades in Gillon's pickup. Moore testified that Gillon went to his pickup and returned moments before the assault.

In short, the other evidence corroborated Moore's testimony that Gillon attacked her in her Hummer and stabbed her in the neck with a sharp object. As the detective told the jury when initially questioned about his limited investigation, and as the prosecutor argued to the jury in his closing arguments, blood tests, fingerprints, and DNA would all have been overkill. Gillon's confession, even if improperly admitted, was overkill as well. This was not a close case where the disputed evidence might have tipped the scales. See *Booker v. State*, 103 S.W.3d 521, 539 (Tex. App.—Fort Worth 2003, pet. ref'd) (op. on reh'g).

On this record, then, we cannot say that the jury must have been “substantially swayed” by any improper admission of Gillon’s statement. See *Hinds*, 970 S.W.2d at 35. The record presented no reason to question Moore’s testimony. Assuming the jury considered Gillon’s statement at all, we are persuaded that its admission had, at most, only a slight influence—not enough to constitute reversible error. See *Motilla*, 78 S.W.3d at 255. We hold that Gillon’s substantial rights were not violated and hold that the error was harmless. See Tex. R. App. P. 44.2(b); *Solomon*, 49 S.W.3d at 365.

We overrule Gillon’s sole point.

CONCLUSION

Having overruled Gillon’s sole point, we affirm the trial court’s judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

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

DELIVERED: May 4, 2017