In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00447-CR

SHUAIB ADEREMILEKUN BAKARE, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 297th District Court
Tarrant County, Texas
Trial Court No. 1557529D

Before Birdwell, Womack, and Wallach, JJ.
Memorandum Opinion by Justice Birdwell

MEMORANDUM OPINION

Appellant Shuaib Aderemilekun Bakare appeals from his conviction for assaulting his sister C.A.[1] In two points, Bakare complains of the evidentiary sufficiency to prove that he assaulted C.A. and the trial court's admission of testimony by a police detective about statements made to her by Bakare's other sister, R.B. Because the evidence supports the jury's verdict and Bakare was not harmed by the admission of R.B.'s statements, we affirm.

I. Background

The State charged Bakare with assault causing bodily injury to C.A. by impeding her normal breathing (count one) and by hitting her with his hand (count two), and the indictment further alleged that Bakare had previously been convicted of assault against someone who was a member of his family or household or with whom he had a dating relationship. *See* Tex. Penal Code Ann. § 22.01(a)(1), (b)(2). It also charged him with the same offenses with respect to R.B. The State's only witness at trial was Arlington Police Detective Elisha Bradford, who had been dispatched to Bakare's home in response to R.B.'s 911 call. Bradford testified at trial about statements made to her by all three siblings, and the State introduced into evidence the recording of R.B.'s 911 call, C.A.'s written statement, photographs of C.A. taken

[1]We use initials to refer to Bakare's sisters to protect their privacy.

after the altercation, and some footage from Bradford's body camera. C.A. testified in Bakare's defense.

The jury acquitted Bakare of both charges regarding R.B. As for the charges with respect to C.A., the jury acquitted him on count one but found him guilty on count two. At punishment, the State offered no new evidence; the prosecutor stated that she was reoffering the evidence from the guilt/innocence phase of the trial and then rested. For the defense, Bakare's mother testified about her relationship with Bakare and his mental health struggles. The jury assessed punishment at six years' confinement, with a recommendation for community supervision. In accordance with the jury's verdict, the trial court sentenced Bakare to six years' confinement, suspended for ten years.

II. Evidence Sufficiency

Bakare argues in his first point that the evidence was insufficient to prove that he assaulted C.A. and that he caused her bodily harm. We disagree.

A. Standard of Review and Applicable Law

In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). We consider all the record evidence, whether admissible or inadmissible. *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006). To

determine whether the State has met its burden to prove the defendant's guilt beyond a reasonable doubt, we compare the elements of the offense as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). "A hypothetically correct jury charge is one that 'accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

As charged in the indictment, a person commits assault when the person intentionally or knowingly causes bodily injury to another.[2] Tex. Penal Code Ann. § 22.01. Assault by causing bodily injury is a "result-oriented" offense, meaning that "the State must prove that the defendant caused the result"—that is, bodily injury to the complainant—"with the requisite culpable mental state." *Baldit v. State*, 522 S.W.3d 753, 759 (Tex. App.—Houston [1st Dist.] 2017, no pet.). A person acts intentionally with respect to a result of his conduct when it is his "conscious objective

[2]To establish the offense as alleged in the indictment, the State further had to prove that C.A. was Bakare's family member or a member of his household and that he had been previously convicted of an assault with bodily injury against a member of his family or household or someone with whom he had a dating relationship. *See* Tex. Penal Code Ann. § 22.01(b)(2)(A); *Walker v. State*, No. 02-19-00309-CR, 2020 WL 7063298, at *3 (Tex. App.—Fort Worth Dec. 3, 2020, no pet.) (mem. op., not designated for publication) (holding that the prior-conviction requirement for assault–family violence is an element of felony assault–family violence under Penal Code Section 22.01(b)(2)(A)). Bakare stipulated to the prior assault–family violence conviction, and he does not challenge C.A.'s testimony that she is his sister.

or desire to . . . cause the result." Tex. Penal Code Ann. § 6.03(a). A person acts knowingly with respect to a result of his conduct when he is "aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). "Bodily injury" includes physical pain, illness, or any impairment of physical condition. *Id.* § 1.07(a)(8).

In proving these elements, direct evidence of the culpable mental state is not required, as a defendant's culpable mental state may be inferred from the defendant's acts, words, and conduct. *Baldit*, 522 S.W.3d at 759. As to bodily injury, "[a]ny physical pain, however minor, will suffice to establish" it and "[a] fact finder may infer that a victim actually felt or suffered physical pain because people of common intelligence understand pain and some of the natural causes of it." *Garcia v. State*, 367 S.W.3d 683, 688 (Tex. Crim. App. 2012).

B. Application of Law to Facts

The 911 call provided the jury with R.B.'s explanation for what started the siblings' altercation. In the call, R.B. told the dispatcher that her brother had just "attacked me and my mom and my sister." In parts of the recording, Bakare could be heard yelling, and in some parts a female voice can be heard yelling in response. R.B. told the dispatcher that the altercation started while R.B. was using the bathroom. Bakare began banging on the bathroom door saying that he needed his nail clippers. R.B. told him that the clippers were not in the bathroom, but he kept banging on the door, so C.A. told him, "[Y]ou need to leave her alone." R.B. told the dispatcher that that was when Bakare charged at her sister and choked her. R.B. also said that Bakare

had slammed C.A.'s head into the ground. R.B. stayed on the phone with the dispatcher until Bradford arrived.

As the State's sole witness, Bradford testified about what happened when she responded to R.B.'s 911 call. Bradford and her partner arrived at the address provided by dispatch, and as Bradford approached the house, she saw R.B. outside on the phone with 911.

Bradford stated that R.B. "was speaking loudly," seemed upset and in distress, and made statements to her about the reason that the police had been called. Over Bakare's Confrontation Clause objection, the trial court permitted the State to elicit testimony from Bradford about the statements that R.B. made to her.[3] Bradford stated, "[R.B.] told me that she was choked[.] . . . She told me that her sister was punched multiple times. Her neck was burning and—and they were just in the house fighting." "[S]he just got in between them. She saw them punching. And she just—she just tried to get in between them."

Bradford stated that C.A. "seemed extremely upset. I could see injury on her. Her hair was—was really messed up. She was crying. . . . [H]er voice was shivering as she was talking to me and—and she just kept rubbing her head like putting her face in her [hands]." Bradford asked C.A. and Bakare to come out of the house, and she put

[3]In his second point, Bakare complains of the trial court's admission of Bradford's testimony about R.B.'s statements. He does not, however, argue on appeal that the 911 tape or bodycam footage should not have been admitted.

Bakare in her car to separate the siblings. Bakare "seemed kind of upset." On the walk to the car, Bradford asked Bakare if he was hurt, and he showed her a scratch on his hand, which he said was from fighting with C.A. After putting Bakare in her car, Bradford went to speak with C.A. and R.B.

According to Bradford, C.A. had a lump on the back of her head, and she complained of a headache and feeling pressure in her head. Bradford further testified that C.A. told her that Bakare had been "on top of her and hitting her" and that he hit her with his fist. Bradford saw marks on the front and both sides of C.A.'s neck, and she told the jury that C.A. had injuries that were consistent with the type of defensive wounds a person could receive while being strangled. Bradford testified that C.A. was coughing and that coughing is a sign of strangulation.

State's Exhibit 10, an excerpt of footage from Bradford's body camera, showed the first part of Bradford's conversation with R.B. and C.A. at the scene. In that footage, C.A. reiterated what R.B. had said on the 911 call—that R.B. had been in the bathroom, that Bakare began banging on the door for his nail clippers, and that the siblings' argument began when C.A. told him to leave R.B. alone. C.A. explained that Bakare started swearing at her, that the two of them began arguing back and forth, and that Bakare then "just charged out of nowhere." He tried to choke C.A., but R.B. got in the way. In response to Bradford's questioning, C.A. told Bradford that she had no trouble breathing while Bakare attempted to choke her. But Bakare was on

top of her on the couch, preventing her from getting up, and he then grabbed her and slammed her hard to the floor. C.A. told Bradford, "[M]y head is hurting so bad."

C.A. additionally made a written statement on a preprinted form in which she stated that during their altercation, Bakare was "swinging and punching" at her and that her sister tried to get in the middle, and "next thing I feel my body go to the floor and head slam[m]ed to the tile floor." At the prosecutor's request, C.A. read this statement to the jury.

C.A. testified in Bakare's defense. She stated that before trial she had filled out an affidavit of non-prosecution and that she did not want her brother prosecuted. She did not deny that she had been hit during the altercation and acknowledged that she felt "a small amount" of pain after the fact. She stated that she could not tell who hit her but denied that it was Bakare. Bakare relies on this denial, as well as on C.A.'s testimony that it could have been R.B. who hit her because all three of the siblings were involved in the fight, to make his sufficiency argument. But C.A. also testified that she did not really remember the day of the incident because "[i]t happened too fast" and "was a blur" for her. She remembered only that "it escalated too quickly," that the three siblings "got into a physical fight," and that "it wasn't like a normal fight." After she reiterated on cross-examination that her brother had not assaulted her, the State asked her if she could "remember that," to which she responded, "I don't remember the day. It was—it's hard to remember." Bakare also asserts that it was C.A. who instigated the fight by attacking him and that she testified to that fact,

but when asked if she attacked her brother first, she replied, "No. We all just started fighting after the argument." C.A. did not remember writing a statement and denied making the statements that her brother was swinging and punching at her and that her head was slammed to the floor, but she admitted that the statement was in her handwriting.

In summary, the 911 recording contained R.B.'s statement that Bakare had charged at C.A. and attacked her; the bodycam footage showed R.B. and C.A., both visibly upset, stating that Bakare had charged at C.A.; C.A. further stated in the footage that Bakare had slammed her to the ground; Bradford testified about C.A.'s statement that Bakare punched her with his fist during the altercation; C.A. said in her written statement that Bakare was "punching at" her and she was slammed to the ground; and C.A. testified at trial that she felt some pain after the altercation. Although C.A. told the jury that Bakare did not hit her, she also stated that she did not clearly remember the events of the day. The jury could believe C.A.'s testimony that she did not remember the events of the day, her written statement, her statements captured on the bodycam footage, and her testimony that she felt some pain after, and it could discredit her testimony that Bakare did not hit her. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018) ("A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony."). We conclude that a rational factfinder could have concluded that Bakare committed the offense of assault on a family

member as charged in the indictment by having a conscious objective or desire to, or by being aware that his conduct was reasonably certain to, cause injury to C.A. and by causing such injury.[4] We overrule Bakare's first point.

III. Admission of Evidence

Bakare argues in his second point that he was denied his right to face-to-face confrontation and cross-examination as guaranteed by the Sixth Amendment when the trial court admitted hearsay testimonial statements by R.B., a witness who did not testify at trial.[5] He asserts that the error was not harmless because it contributed to his conviction or punishment. We disagree.

A. Harmless Error Standard of Review and Analysis

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "In accordance with this constitutional right,

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[4]Sufficient evidence supported a finding that Bakare assaulted C.A. by hitting her with his hand. But the State also produced sufficient evidence that Bakare slammed C.A. to the ground, thereby causing her injury. *See Sanivarapu v. State*, No. 02-16-00416-CR, 2018 WL 3580878, at *7 (Tex. App.—Fort Worth July 26, 2018, pet. ref'd) (mem. op. on reh'g, not designated for publication) ("[T]he manner and means of injuries alleged in an assault case are 'not an essential element of the offense and therefore [are] not included within the hypothetically correct jury charge,' and thus they are not challengeable under a sufficiency-of-the-evidence review." (quoting *Thomas v. State*, 303 S.W.3d 331, 333 (Tex. App.—El Paso 2009, no pet.))); *see also Hernandez v. State*, 556 S.W.3d 308, 316 (Tex. Crim. App. 2017); *Bin Fang v. State*, 544 S.W.3d 923, 929 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

[5]R.B. was present at trial and was sworn in as a witness, but she was not called to testify by either the State or Bakare.

out-of-court statements offered against the accused that are 'testimonial' in nature are objectionable unless the prosecution can show that the out-of-court declarant is presently unavailable to testify in court and the accused had a prior opportunity to cross-examine him." *Langham v. State*, 305 S.W.3d 568, 575–76 (Tex. Crim. App. 2010) (citing *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 1369, 1374 (2004)). When the trial court admits evidence in violation of the Confrontation Clause, Texas Rule of Appellate Procedure 44.2(a) requires us to reverse the conviction unless we determine beyond a reasonable doubt that the trial court's admission of the evidence did not contribute to the conviction. *See* Tex. R. App. P. 44.2(a); *Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997). "If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error was not harmless beyond a reasonable doubt." *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000); *see also Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008). This harmless-error test 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 v. State*, 353 S.W.3d 815, 821–22 (Tex. Crim. App. 2011).

Our harmless-error analysis should not focus on the propriety of the trial's outcome—that is, whether the jury verdict was supported by the evidence. *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). Instead, we determine the

likelihood that the constitutional error was actually a contributing factor in the jury's deliberations—in other words, whether the error adversely affected "the integrity of the process leading to" the conviction. *Id.*; *see also Wesbrook*, 29 S.W.3d at 119 ("[T]he appellate court should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence."). "[T]he reviewing court must ask itself whether there is a reasonable possibility that [the error] moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Langham*, 305 S.W.3d at 582. "[T]he reviewing court must be able to declare itself satisfied, to a level of confidence beyond a reasonable doubt, that the error did not contribute to the conviction before it can affirm it." *Id.* We "should take into account any and every circumstance apparent in the record that logically informs" our determination. *Snowden*, 353 S.W.3d at 822 (quoting Tex. R. App. P. 44.2(a)). We may consider in our analysis "1) how important was the out-of-court statement to the State's case; 2) whether the out-of-court statement was cumulative of other evidence; 3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and 4) the overall strength of the prosecution's case." *Langham*, 305 S.W.3d at 582 (quoting *Scott*, 227 S.W.3d at 690); *see also Davis v. State*, 203 S.W.3d 845, 852 (Tex. Crim. App. 2006). We may also consider the extent, if any, that the State emphasized the error and how a juror would probably weigh the evidence "compared to the balance of the evidence with respect to the element or defensive issue to which it is relevant." *Langham*, 305 S.W.3d at 582. While the most

significant concern must be the error and its effects, the presence of overwhelming evidence supporting the finding in question can be a factor in the evaluation of harmless error. *Wesbrook*, 29 S.W.3d at 119.

B. Application of Law to Facts

Bradford's testimony about what R.B. told her fits broadly into three categories: what R.B. said about Bakare choking C.A. and R.B., what R.B. said about Bakare hitting C.A., and what R.B. said about the circumstances of the fight. Assuming that the evidence of R.B.'s statements to Bradford was testimonial (which the State contests) and its admission was erroneous, its admission was nevertheless harmless.

Regarding the first category, R.B.'s statements that Bakare choked C.A. (and R.B.) did not persuade the jury to convict Bakare of the assault-by-impeding-breath charge. If the testimony did not "move[ ] the jury from a state of non-persuasion to one of persuasion" on the question of whether Bakare impeded C.A.'s breath or circulation—the charge to which those statements most directly related—then it is unlikely that the testimony had a significant impact on the mind of the average juror on the question of whether Bakare hit her. *See Langham*, 305 S.W.3d at 582; *Davis*, 203 S.W.3d at 852–53.

As for the other two categories—R.B.'s statements related to Bakare starting the fight and hitting C.A.—Bradford testified that R.B. told her that her sister was punched and that she (R.B.) got between C.A. and Bakare. Bradford's testimony on

this point was important to the State as evidence that Bakare committed the charged offense. But the evidence of R.B.'s statements was cumulative of and corroborated by other evidence, including C.A.'s own statements, that Bakare hit C.A. and injured her.

The State presented photographs of C.A. showing red marks on her neck and face that appeared to be scratches, evidence that she had been involved in and injured in a physical fight. As for how the fight started, R.B.'s statements on the 911 call and C.A.'s and R.B.'s statements in the bodycam footage showed that Bakare started the physical fight when he "charged" at C.A. after they began arguing about his bothering R.B. over the nail clippers. And the State produced other evidence that in that fight, Bakare hit C.A. At trial, although C.A. denied remembering what happened (but also denied that her brother hit her), she did not deny that she and her siblings had a physical fight, that she did not start the fight, and that during that fight, someone hit her. C.A.'s written statement, which she read to the jury, stated that Bakare was "swinging and punching at [her]" during the altercation and that she was slammed to the ground. And Bradford testified that C.A. told her that it was her brother who hit her and that he did so with his fist. In other words, the jury had other evidence aside from R.B.'s statements to Bradford that Bakare intentionally or knowingly hit C.A.

One part of Bradford's testimony about R.B.'s statements was not cumulative of other evidence: according to Bradford, R.B. told her that she thought that Bakare was going to kill C.A. This testimony was helpful to the State as evidence that Bakare

was the aggressor in the fight. But considering that the jury, despite hearing that statement, nevertheless acquitted Bakare of the impeding-the-breath charge and that the jury had other evidence of Bakare's starting the fight and hitting C.A., it is unlikely that this statement moved the jury to convict Bakare of the assault-by-hitting charge.

Nor did the State emphasize R.B.'s statements as relayed by Bradford. In its closing arguments, the State brought up two parts of Bradford's testimony about R.B.'s statements—briefly referencing R.B.'s statement that Bakare hit C.A. and once relying on her statement that she was afraid that Bakare would kill C.A. to argue that the altercation was not a mutual fight between Bakare and C.A. But it did not emphasize that testimony and instead focused primarily on the videos, the 911 call, and C.A.'s written statement.

Compared to the balance of the other corroborating, cumulative evidence, we cannot say that there was a reasonable probability that R.B.'s statements admitted through Bradford's testimony moved the jury from a state of non-persuasion to one of persuasion on whether Bakare assaulted C.A. *See, e.g.*, *Quiroz v. State*, No. 04-09-00634-CR, 2010 WL 4492939, at *5 (Tex. App.—San Antonio Nov. 10, 2010, no pet.) (mem. op., not designated for publication) (holding admission of complainant's statements to police officer was harmless when another witness testified that the complainant made the same statements to her and thus the State met its burden by either the officer's testimony or the other witness's testimony). In summary, after carefully reviewing the record and performing Rule 44.2(a)'s required harm analysis,

we are convinced beyond a reasonable doubt that the admission of R.B.'s statements to Bradford did not contribute to Bakare's conviction.[6] Thus, any error in admitting testimony about R.B.'s statements was harmless. *See* Tex. R. App. P. 44.2(a); *Langham*, 305 S.W.3d at 582; *Quiroz*, 2010 WL 4492939, at *5; *Thai v. State*, No. 05-06-00206-CR, 2007 WL 2193309, at *10 (Tex. App.—Dallas Aug. 1, 2007, no pet.) (not designated for publication). We overrule Bakare's second point.

[6]Although Bakare states in his point that "[t]he error was not harmless because it contributed to [his] conviction or punishment," he limits his argument and analysis to the alleged error's effect on his conviction. We nevertheless have considered the probable effect of the alleged error on punishment and conclude beyond a reasonable doubt that the admission of R.B.'s statements did not affect Bakare's punishment. The prosecutor did not specifically mention R.B.'s statements during its case on punishment or in closing arguments and referred only generally to "the evidence that [the jury] heard." While the prosecutor referenced "the evidence" to ask the jury to "consider the safety of the community and the safety of this family" in sentencing, she also told the jury that she was not asking it to punish Bakare to the fullest extent of the law. And the jury assessed a sentence in the middle of the punishment range and opted to recommend probation. *See, e.g.*, *Bailey v. State*, No. 01-15-00215-CR, 2016 WL 921747, at *11 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet.) (mem. op., not designated for publication) (concluding that, when the State did not emphasize error in its closing argument at punishment, the error had only peripheral importance to main issues in State's closing argument, and jury assessed a relatively light sentence, the appellant was not harmed by the error); *cf. Crayton v. State*, No. 03-14-00570-CR, 2016 WL 6068250, at *8 (Tex. App.—Austin Oct. 14, 2016, pet. ref'd) (mem. op., not designated for publication) (holding that error in admitting evidence at guilt/innocence stage did not affect punishment when the State's evidence and argument at punishment did not include the erroneously admitted evidence and when the jury assessed punishment at the lower end of the applicable sentencing range).

IV. Conclusion

Having overruled Bakare's two points, we affirm the trial court's judgment.

/s/ Wade Birdwell

Wade Birdwell
Justice

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Tex. R. App. P. 47.2(b)

Delivered: June 17, 2021