In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00146-CR

PAYDEN SHAINE ALLEN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 286th District Court
Hockley County, Texas,
Trial Court No. 17-07-9098, Honorable Pat Phelan, Presiding

June 30, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and YARBROUGH, JJ.

Following a plea of not guilty, Appellant, Payden Shaine Allen, was convicted by a jury of murder with an affirmative finding on use of a deadly weapon, a firearm. He was sentenced to forty-seven years confinement and assessed a $4,000 fine.[1] By four issues, he challenges his conviction as follows: (1) the trial court abused its discretion by permitting unreliable expert testimony on the issue of his sanity which affected his

[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(1).

substantial rights; (2) the trial court erred in failing to sua sponte conduct a hearing on the voluntariness of his oral and written confessions in violation of article 38.22, section 6 of the Texas Code of Criminal Procedure; (3) the trial court violated his due process rights under the Fifth and Fourteenth Amendments by failing to hold a hearing on the voluntariness of his confessions where the issue was not previously determined by the court; and (4) the trial court erred by omitting an instruction in the charge based on article 38.22, section 6 regarding the voluntariness of his confessions which caused him egregious harm. We affirm.

BACKGROUND

Appellant was charged with causing the death of his father by shooting him with a firearm in 2017, when he was only eighteen years old. The family dynamic was complicated from years of custody battles involving Appellant and the abuse inflicted on him by his father. When Appellant's parents divorced, his paternal grandmother helped raise him.

Appellant and his father had allegedly argued over Appellant wanting to live with his mother and whether Appellant could cohabitate with his girlfriend. While his father was asleep on the couch, Appellant retrieved a gun from the kitchen and shot his father in the forehead at what was later determined to be close range. After the shooting, he collected the spent shell casing and disposed of it in a dumpster. Appellant collected a bag he had packed for a family reunion, left in his father's pickup, and went to stay with a friend in Lubbock.

When neither Appellant nor his father attended the family reunion, a family member contacted law enforcement to conduct a welfare check. A deputy responded to the

father's house but reported no one answered the door. Appellant's father's body was later discovered by neighbors.

After a search warrant was obtained, Appellant's cell phone was pinged and he was located. He was detained and questioned but was not arrested. Initially, Appellant concocted a story about hearing a loud bang in the house and calling out to his father and receiving no response. After questioning, Appellant was permitted to leave. During a second interview, however, he admitted to killing his father and was arrested and given his *Miranda* warnings.[2] After his oral confession, he was asked to make a written confession. He was later charged with murder and pleaded insanity as an affirmative defense.

During the years before commencement of trial, Appellant was interviewed by two psychologists. The State's psychologist, Dr. Timothy Nyberg, opined Appellant exhibited mild mental disability which fell short of the threshold requirement of severe mental defect and his conduct in disposing of evidence indicated he knew his conduct was wrong. He concluded Appellant was not insane under Texas law. Psychologist, Dr. Gregory Joiner, who was appointed by the trial court as a neutral expert, contradicted Dr. Nyberg's opinion. Dr. Joiner opined Appellant suffered from a severe mental defect which at the time of the offense made him believe his conduct was "moral."

Trial on the merits commenced five years after the shooting. The disputed issue at trial was Appellant's sanity at the time of the offense. Appellant's grandmother testified he experienced developmental delays while growing up and educational testing showed

[2] *Miranda v. Arizona*, 384 U.S. 436, 441, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

certain deficits. He was classified as a "special needs" student with learning disabilities and did not graduate from high school.

Appellant testified in his own defense. During direct examination, he testified on the night of the shooting his father had physically assaulted him by punching him in the chest. He ran to his bedroom, and after his father fell asleep on the couch, he retrieved a gun and shot him so he could run away. He testified he did not intend to cause his father's death but only meant to "immobilize" him. During cross-examination, he claimed to be "petrified" of his father.

During the State's case-in-chief, the trial court held a Rule 702 hearing outside the jury's presence to determine the admissibility of Dr. Nyberg's testimony regarding Appellant's mental state. The trial court ruled as follows:

> the witness is going to be allowed to testify as an expert witness because he has knowledge, skill, experience, training or education, the subject matter is appropriate and will assist the trier of fact and also the scientific theory is valid, the technique is valid and it was properly applied.

Appellant did not object to the ruling. When Dr. Nyberg testified before the jury, Appellant made a hearsay objection alleging Dr. Nyberg "did not follow the standards under [*Daubert*] and *Frye* as required . . . and sent an incomplete report."

ISSUE ONE—RELIABILITY OF EXPERT'S TESTIMONY

Appellant asserts the trial court abused its discretion by permitting unreliable expert testimony on the issue of his sanity which affected his substantial rights. We find Appellant did not preserve his challenge to the reliability of Dr. Nyberg's expert opinion.

Preservation of error is a systemic requirement on appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). Generally, no specific words or technical

considerations are required to preserve an issue for appeal. *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015); *Resendez v. State*, 306 S.W.3d 308, 312-13 (Tex. Crim. App. 2009). However, to preserve a complaint that scientific evidence is unreliable, a party must make a specific objection to the particular deficiency regarding reliability to allow the offering party an opportunity to cure any defect. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998); *Cockrell v. State*, No. 07-09-0233-CR, 2010 Tex. App. LEXIS 3208, at *7 (Tex. App.—Amarillo April 28, 2010, pet. ref'd) (mem. op., not designated for publication). *See also Pinkston v. State*, Nos. 02-22-00076-CR, 02-22-00077-CR, 2023 Tex. App. LEXIS 2566, at *16 (Tex. App.—Fort Worth April 20, 2023, no pet. h.) (mem. op., not designated for publication) (noting that objection to intoxilyzer evidence by referring to "Rule 702, *Daubert*, [and] *Kelly*" was so broad and constituted only a general objection which was insufficient to preserve error).

Appellant made no objection to the reliability of Dr. Nyberg's testimony following the Rule 702 hearing. When Dr. Nyberg testified before the jury, Appellant's only objection was based on hearsay with references to *Daubert* and *Frye*. His objection did not detail the particular deficiencies with regard to the reliability of Dr. Nyberg's testimony. Thus, Appellant did not preserve his reliability argument for review. Issue one is overruled.

ISSUES TWO AND THREE—VOLUNTARINESS OF CONFESSIONS

Appellant contends the trial court erred by not sua sponte conducting a hearing pursuant to article 38.22, section 6 of the Code of Criminal Procedure on the voluntariness of his confessions during law enforcement interviews. He further contends the trial court's

failure to conduct such a hearing violated his due process rights under the Fifth and Fourteenth amendments of the United States Constitution. We disagree.

There are three ways in which a defendant can raise the issue of voluntariness of a confession to trigger the requirements of article 38.22, section 6: (1) make an explicit request for a hearing on the matter; (2) make an explicit objection on the grounds of voluntariness of the confession; and (3) through objections, motions, or the evidence presented, draw the attention of the trial court to a factual scenario that presents the question of whether the statement was made voluntarily. *Crittenden v. State*, No. 07-09-00158-CR, 2010 Tex. App. LEXIS 3049 at, *7 (Tex. App.—Amarillo April 23, 2010, no pet.) (mem. op., not designated for publication). "[I]f the issue of voluntariness is not brought to the court's attention, there is no requirement for a hearing." *Id.* at *4.

At trial, Appellant did not alert the trial court to any "voluntariness" issue sufficient to implicate article 38.22, section 6. *See Gims v. State*, No. 01-14-00279-CR, 2018 Tex. App. LEXIS 1607, at *14-15 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) ("mere introduction of evidence is not enough to 'raise a question' about the voluntariness of a confession" under article 38.22, section 6).

Insofar as Appellant raises federal constitutional due process claims because the trial court did not hold a hearing, evidentiary claims under article 38.22, section 6 raise only a general voluntariness question and not a constitutional due process claim. *Oursbourn v. State*, 259 S.W.3d 159, 171 (Tex. Crim. App. 2008) ("The Constitution leaves voluntariness claims based on the defendant's state of mind to be resolved by state laws governing the admission of evidence.") As such, Appellant has forfeited his

complaints regarding the voluntariness of his confessions. Issues two and three are overruled.

ISSUE FOUR—JURY CHARGE ERROR

By his fourth and final issue, Appellant asserts the omission of an instruction on voluntariness egregiously harmed him. We disagree.

Appellate review of claimed jury-charge error involves a two-step process. *See Cortez v. State*, 469. S.W.3d 593, 598 (Tex. Crim. App. 2015). *See also Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). A reviewing court must initially determine whether charge error occurred. *Price v. State, 457* S.W.3d 437, 440 (Tex. Crim. App. 2015).

Here, the record reflects Appellant's confession was not involuntary. Nor did Appellant request a voluntariness instruction. Accordingly, we find the omission of a voluntariness instruction was not erroneous. Finding no error, an analysis of egregious harm is unnessecary.[3] Issue four is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Alex L. Yarbrough
Justice

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[3] Even assuming the trial court erred in failing to give a voluntariness instruction, we find Appellant did not suffer actual, egregious harm as a result. *See Chavez v. State*, No. 07-17-00004-CR, 2018 Tex. App. LEXIS 9010, at *13 (Tex. App.—Amarillo Nov. 2, 2018, no pet.) (mem. op., not designated for publication).