TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00285-CR

Samuel Adkins, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 427TH JUDICIAL DISTRICT
NO. D-1-DC-13-904105, HONORABLE JON N. WISSER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Samuel Adkins of the offense of aggravated sexual assault and assessed punishment at 65 years' imprisonment.[1] The district court rendered judgment on the verdict. In three points of error on appeal, Adkins asserts that the district court abused its discretion in admitting into evidence: (1) an audio recording containing what Adkins contends are inadmissible hearsay statements made by one of the investigating officers; (2) testimony tending to show that Adkins had previously been in jail; and (3) testimony offered during the punishment phase of trial relating to an extraneous offense for which the State failed to provide the statutorily required notice.[2] We will affirm the judgment of conviction.

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[1] *See* Tex. Penal Code § 22.021.

[2] *See* Tex. Code Crim. Proc. art. 37.07, § 3(g).

BACKGROUND

The jury heard evidence tending to show that in the early morning hours of July 30, 2012, Adkins drove "Rachel Smith,"[3] a woman with whom Adkins had spent time the previous day and night, to an undeveloped and isolated area in Southwest Austin, along MoPac Boulevard south of Slaughter Lane, and proceeded to physically and sexually assault her. Evidence considered by the jury during trial included the testimony of Smith, who described in detail the circumstances surrounding the assault; Kaylynn Simkins, a friend of Smith's who had also spent time with Adkins and Smith during the day and night preceding the assault; Joseph Kemp, a motorist who had found Smith "standing in the middle of the road" on MoPac, asking for help, and who had called the police upon learning that Smith had been assaulted; Corporal David Boyd of the Austin Police Department, who had responded to the call and interviewed Smith at the location where she had been found; and Jenny Black, a sexual assault nurse examiner who had examined Smith following the assault.[4] Based on this and other evidence, which we discuss in more detail below, the jury found Adkins guilty of aggravated sexual assault. After considering additional evidence during the punishment phase of trial, including evidence tending to show that Adkins had on a prior occasion attempted to sexually assault another woman, the jury assessed punishment at 65 years' imprisonment as noted above, and the district court rendered judgment on the verdict. This appeal followed.

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[3] Rachel Smith is a pseudonym that has been used throughout these proceedings.

[4] The evidence also included testimony by Diana Morales, a DNA analyst for the Austin Police Department. No appellate complaint is raised regarding this evidence, nor have we considered it in our disposition of the points Adkins does raise.

STANDARD OF REVIEW

We review a district court's evidentiary rulings for abuse of discretion.[5] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[6] We consider the ruling in light of what was before the district court at the time the ruling was made.[7] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[8]

ANALYSIS

Hearsay

Corporal Boyd was the first officer to arrive at the location along MoPac where Kemp had found Smith following the assault. Boyd testified that his patrol vehicle was equipped with a "digital mobile audio video system" that, combined with a body microphone that he was wearing, enabled him to record what was said and done following his arrival at the scene. A copy of this 45-minute recording—which contained numerous statements made by Boyd to Smith, EMS personnel, and other police officers during the course of Boyd's roadside investigation—was

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[5] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[6] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

[7] *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009).

[8] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)); *see Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).

admitted into evidence and played for the jury during Boyd's testimony. In his first point of error, Adkins asserts that Boyd's statements in the recording constituted inadmissible hearsay and that the district court accordingly abused its discretion in admitting the recording.[9]

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted.[10] Offense reports containing statements made by law enforcement officers during a criminal investigation—including audio and video recordings containing such statements—are generally considered to be inadmissible hearsay.[11] "An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative."[12] Such a narrative constitutes a "speaking offense report" in which the "on-the-scene observations and narrations of a police officer conducting a roadside investigation . . . are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime."[13] Accordingly, an officer "may testify to

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[9] The recording also contained Kemp's statements to Boyd and numerous statements made by Smith describing the assault. However, the State agreed not to play the portion of the recording that contained Kemp's statements, and the district court apparently admitted Smith's statements under the "excited utterance" exception to the hearsay rule, *see* Tex. R. Evid. 803(2), a ruling that Adkins does not challenge on appeal. Accordingly, Adkins notes in his brief that this point of error is limited to "the hearsay statements by Boyd."

[10] Tex. R. Evid. 801(d).

[11] *See* Tex. R. Evid. 803(8); *Fischer v. State*, 252 S.W.3d 375, 384-85 (Tex. Crim. App. 2008).

[12] *Fischer*, 252 S.W.3d at 376.

[13] *Id*. at 384.

exactly what he saw and heard during his [roadside investigation], and his words might be the very same as those he used during his on-the-scene narrative, but they must be given under oath and subject to cross-examination."[14]

Assuming without deciding that Boyd's statements in the recording constituted inadmissible hearsay, we cannot conclude on this record that Adkins was harmed by their admission. Nonconstitutional error that does not affect a defendant's substantial rights must be disregarded.[15] "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict."[16] Therefore, "[a] criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as whole, has fair assurance that the error did not influence the jury, or had but a slight effect."[17] It is well established that "[i]nadmissible evidence can be rendered harmless if other evidence at trial is admitted without objection and it proves the same fact that the inadmissible evidence sought to prove."[18]

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[14] *Id*. at 387.

[15] Tex. R. App. P. 44.2(b).

[16] *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United State*, 328 U.S. 750, 776 (1946)).

[17] *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

[18] *Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986); *see Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Land v. State*, 291 S.W.3d 23, 28-31 (Tex. App.—Texarkana 2009, pet. ref'd); *Sanchez v. State*, 269 S.W.3d 169, 172 (Tex. App.—Amarillo 2008, pet. ref'd); *Jensen v. State*, 66 S.W.3d 528, 535 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (op. on reh'g); *Matz v. State*, 21 S.W.3d 911, 912-13 (Tex. App.—Fort Worth 2000, pet. ref'd).

We first observe that many of Boyd's statements on the recording consisted of Boyd repeating details of the assault and the events preceding it that had been told to him by Smith. However, Smith provided extensive testimony during trial regarding those same facts. Thus, many of Boyd's statements in the recording were merely cumulative of Smith's more detailed testimony describing the assault. Other statements made by Boyd in the recording, including statements in which he had discussed the nature of Smith's injuries with EMS personnel and had provided descriptive information to other officers regarding the vehicle that Adkins was driving and the location of the assault, were similarly cumulative of other evidence in the record that was admitted without objection. The material evidence consisted of: the testimony of Boyd, who recounted his observations of Smith's injuries, explaining that she had "some swelling on her face from being hit in the face, bruises on her arms, [and] abrasions on her knees"; multiple photographs of Smith showing the extent of her injuries; the testimony of Corporal Ryan Lillie of the Austin Police Department, who testified that he had found the location where the assault had occurred and that he had discovered a purse and other personal property belonging to Smith at that location; the testimony of Kemp, who described a truck that he had seen fleeing the scene near where Kemp had found Smith; and the testimony of Simkins, Smith's friend, who had been with Adkins and Smith the day and night preceding the assault and who was able to describe the truck that Adkins had been driving at the time the three of them had been together. In summary, even if the statements made by Boyd in the recording constituted inadmissible hearsay, the same facts were proven by other properly admitted evidence and thus did not affect Adkins's substantial rights. Accordingly, we cannot conclude that Adkins was harmed by any error in admitting Boyd's statements in the recording.

We overrule Adkins's first point of error.

Rule 403 objection

Smith testified that before Adkins had sexually assaulted her, he had threatened to kill her. When the State asked Smith to describe the threat in more detail, Smith testified, over a Rule 403 objection by Adkins, that Adkins had told her "that he was going to fuck me and that he didn't want to go to jail so he was going to kill me so he wouldn't go back." In his second point of error, Adkins asserts that Smith's testimony alluding to the fact that Adkins had previously been in jail was more prejudicial than probative and should have been excluded for that reason.

Rule 403 allows for the exclusion of evidence if its probative value is "substantially outweighed" by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.[19] "Accordingly, 'the plain language of Rule 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial. Indeed, all evidence against a defendant is, by its very nature, designed to be prejudicial.'"[20] Rather, "[t]he rule envisions exclusion of evidence only when there is a 'clear disparity between the degree of prejudice of the offered evidence and its probative value.'"[21] In determining whether such a disparity exists, "a trial court, when undertaking a Rule 403 analysis, must balance

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[19] Tex. R. Evid. 403.

[20] *Robisheaux v. State*, 483 S.W.3d 205, 217-18 (Tex. App.—Austin 2016, pet. ref'd) (quoting *Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013) (internal citation omitted)).

[21] *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (quoting *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001); *Joiner v. State*, 825 S.W.2d 701, 708 (Tex. Crim. App. 1992)).

(1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted."[22] "[T]hese factors may well blend together in practice."[23]

In this case, it would not have been outside the zone of reasonable disagreement for the district court to find that there was no "clear disparity" between the probative value of the evidence and its prejudicial effect. Adkins was charged with the offense of aggravated sexual assault. One of the elements of that offense as charged was that the defendant "by acts or words place[d] the victim in fear" of death or serious bodily injury.[24] The district court would not have abused its discretion in concluding that evidence tending to show that Adkins did not want to "go back" to jail had a strong tendency to place Smith in fear that Adkins would follow through with his threat to kill her. As the district court noted in its ruling on the objection, "The fact that he says I'm not going back to jail, I mean, she's aware he has been in jail and in my belief that makes the threat more meaningful and more powerful to the victim." Nor would the district court have abused its discretion in concluding that the prejudicial effect of the evidence was minimal. The testimony did not reveal

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[22] *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

[23] *Id*. at 642.

[24] *See* Tex. Penal Code § 22.021(a)(2)(A)(ii).

any details concerning why or for how long Adkins had been in jail, so as to suggest a jury decision on an improper or emotional basis, and presenting the evidence did not consume an inordinate amount of time during trial. On this record, we cannot conclude that the district court abused its discretion in failing to conclude that the probative value of the evidence was "substantially outweighed" by its prejudicial effect.[25]

We overrule Adkins's second point of error.

Article 37.07 extraneous-offense notice

Prior to trial, the State had provided written notice to Adkins that it intended to present evidence that Adkins had "[c]ommitted the offense of [a]ttempted [s]exual [a]ssault on August 6, 2009[,] in Travis County[,] Texas[,] by attempting to [s]exually [a]ssault his therapist." During the punishment phase of trial, that therapist was called as a witness and testified to the circumstances surrounding the attempted sexual assault. In his third point of error, Adkins asserts that the district court abused its discretion in admitting this extraneous-offense evidence because the State had failed to include in the notice the name of the therapist as required by Article 37.07 of the Code of Criminal Procedure. Pursuant to that statute, "If the attorney representing the [S]tate intends to introduce an extraneous crime or bad act . . . notice of that intent is reasonable only if the notice includes the date

[25] *See Espinosa v. State*, 328 S.W.3d 32, 43 (Tex. App.—Corpus Christi 2010, pet. ref'd); *Smith v. State*, 774 S.W.2d 280, 281-82 (Tex. App.—Houston [14th Dist.] 1989, no pet.); *see also Aylor v. State*, No. 04-94-00759-CR, 1997 Tex. App. LEXIS 1442, at *75-76 (Tex. App.—San Antonio Mar. 26, 1997, pet. ref'd) (op., not designated for publication) ("Evidence of what appellant was willing to do in order to avoid incarceration is inherently probative and was not unfairly prejudicial.").

on which and the county in which the alleged crime or bad act occurred and *the name of the alleged victim of the crime or bad act*."[26]

The notice requirements of article 37.07 are mandatory.[27] However, "[a]lthough the notice provision is mandatory, 'the violation of a mandatory statute does not, by itself, call for the reversal of a conviction.'"[28] "We must disregard any nonconstitutional error that does not affect substantial rights."[29] To assess whether the defendant was harmed by a statutory violation, "we examine whether the purpose of the statute or rule violated was thwarted by the error."[30] "Accordingly, we must assess the harm from the violation of the notice provision of article 37.07, section (3)(g) against its intended purpose," which is "to enable the defendant to prepare to meet the extraneous offense evidence."[31] "Thus, we must analyze how the deficiency of the notice affected appellant's ability to prepare for the evidence."[32] We also "examine the record to determine whether

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[26] Tex. Code Crim. Proc. art. 37.07, § 3(g) (emphasis added).

[27] *See Worthy v. State*, 312 S.W.3d 34, 38 (Tex. Crim. App. 2010); *Roethel v. State*, 80 S.W.3d 276, 281 (Tex. App.—Austin 2002, no pet.).

[28] *Roethel*, 80 S.W.3d at 281 (quoting *Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002).

[29] *Id*. (citing Tex. R. App. P. 44.2(b)).

[30] *Id*.

[31] *Id*. at 281-82 (citing *Nance v. State*, 946 S.W.2d 490, 493 (Tex. App.—Fort Worth 1997, pet. ref'd)).

[32] *Id*. at 282.

the deficient notice resulted from prosecutorial bad faith or prevented the defendant from preparing for trial."[33]

In this case, we first observe that the written notice that was provided to Adkins included at least some of the statutorily required information, including the name of the extraneous offense and the county in which it had occurred.[34] And, although the notice failed to include the name of the victim, there is no indication in the record that Adkins did not know the identity of the therapist to whom the notice referred. Moreover, counsel for Adkins acknowledged during a hearing outside the presence of the jury that, prior to trial, he had received discovery concerning the extraneous offense, and Adkins has made no contention, either during trial or on appeal, that he was unprepared to meet the evidence as a result of the deficient notice.

There is also no indication in the record that the State acted in bad faith when it failed to include the victim's name in the notice. In response to Adkins's objection to the notice, the prosecutor provided the following explanation for the deficiency:

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[33] *Id*.

[34] Although the notice also included a date on which the offense had allegedly occurred (August 6, 2009), the accuracy of that date was disputed. In a hearing outside the presence of the jury, the therapist testified that the offense occurred either on August 4 or 5, although she added that "[i]t was not a very clear calendar day." Following this testimony, Adkins further objected to the notice on the ground that the State had failed to include the correct date of the offense. In response, the State claimed that "[t]he police report was on August 6 and our defense is that criminal law is 'on or about.'" The district court admonished the State that the written notice "doesn't say 'on or about,'" but nevertheless overruled Adkins's objection. Assuming without deciding that the lack of precision regarding the date of the offense violates article 37.07, there is no indication in the record that this lack of precision resulted from any bad faith on the part of the State or adversely affected Adkins's ability to prepare to meet the evidence.

> Judge, in response to that, me and Defense counsel had several conversations about the fact that a lot of this discovery was coming from a juvenile court file and what we could and couldn't turn over and make public record. And I invited him to come—I gave him discovery of this extraneous offense. I invited him to come and look at the entire juvenile file. We did it that way, I assumed by agreement, to protect people's confidentiality and to protect this defendant given that a lot of the information came from a juvenile court file, which we're not allowed to turn over because of the fact that it was obtained in juvenile court.

Later, when asked by the district court why the State did not disclose the therapist's name, the prosecutor replied, "Because I talked to Defense counsel about that and we had several discussions about how much we were going to make public record and how much we weren't. And in order to protect—because this sexual assault victim was not given the opportunity to have a pseudonym when she was in juvenile court because of the way the juvenile court handled that case. I didn't want to make her name public record and we discussed that." Counsel for Adkins did not dispute the prosecutor's explanation for why the notice had failed to include the victim's name. Because there is no indication in the record that the State had acted in bad faith or that Adkins was unable to prepare to meet the evidence, we cannot conclude that Adkins was harmed by the deficient notice.

We overrule Adkins's third point of error.

CONCLUSION

We affirm the judgment of the district court.

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Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: February 2, 2017

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