

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00076-CR

Everton Roxroy Bailey, Jr., Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT
NO. 13-0933-K26, HONORABLE DONNA GAYLE KING, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellant Everton Roxroy Bailey, Jr. appeals his conviction for aggravated assault with a deadly weapon. In his sole issue, he argues that the trial court erred in admitting testimony that he claims contained inadmissible hearsay. We will affirm.

BACKGROUND

Bailey was charged with aggravated assault involving family violence causing serious bodily injury by use of a deadly weapon, to which he entered a plea of not guilty. *See* Tex. Penal Code § 22.02(b)(1). At trial, the jury heard evidence that Bailey had intentionally poured boiling water on Amanda Mitchell, his wife, causing life-threatening burns to her scalp, face, and upper body. Over Bailey's hearsay objection, Officer Stephen Smith, the police officer to whom Mitchell made her initial report, testified that Mitchell had informed him that Bailey had committed the offense:

Q. Okay. And so you get a report [that Mitchell] was assaulted at that address. Did you get a name from her of a suspect?

A. Yeah. She reported that Mr. Bailey, her husband, had been the one that had assaulted her.

* * *

Q. . . . Now, you get this information from Ms. Mitchell, and she's identified Everton Bailey as the person who did this to her. Did you get information about their relationship, how she and Mr. Bailey were to each other?

A. Basically, that they were husband and wife and lived together in the address that I spoke of.

Q. Okay. And did you also get information that they had a child together at that point?

A. Yes. She had told me that – I guess he was about five years old at the time.

The jury found Bailey guilty, assessed punishment at 37 years' imprisonment, and the trial court rendered judgment accordingly. Bailey appealed.

DISCUSSION

Bailey contends that the challenged testimony by the officer contained inadmissible hearsay because it relayed out-of-court statements made by Mitchell that were offered to prove the truth of the matter asserted, namely, that Bailey was the perpetrator. The State responds that (1) Bailey failed to preserve his issue; (2) the officer's testimony was not hearsay because it was not offered for the truth of the matter asserted, but was instead offered to "give the context and basis for which the police began to suspect and investigate" Bailey; and (3) even if the admission of such testimony was error, the error was harmless and does not warrant reversal.

I. Standard of review

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009). We consider the ruling in light of what was before the trial court at the time the ruling was made and will not reverse if it is within the zone of reasonable disagreement. *Id.*

II. Applicable law

A. Hearsay or "information received"

Hearsay is a statement that is not made by the declarant while testifying at the current trial or hearing that is offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d). Hearsay statements are generally inadmissible. *Id.* Rule 802. However, out-of-court statements may be admitted into evidence to explain why the defendant became the subject of an investigation without violating the hearsay rule. *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995). The admissibility of such statements depends upon whether the testimony provides "a general description of possible criminality or a specific description of the defendant's purported involvement or link to that activity." *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999). Details of the information received are considered hearsay and are inadmissible unless the officer's conduct has been challenged, such as lacking probable cause. *Poindexter v. State*, 153 S.W.3d 402, 408 (Tex. Crim. App. 2005) (citing *Schaffer v. State*, 777 S.W.2d 111, 114-15 (Tex. Crim. App. 1989)). Thus, courts must distinguish out-of-court statements that are admissible because they are necessary to explain the officer's actions from those that constitute inadmissible hearsay. That

distinction turns upon the degree to which the defendant has challenged the testifying officer's actions. *See Schaffer*, 777 S.W.2d at 115 n.4.

B. Harmless error

The erroneous admission of hearsay evidence is non-constitutional error. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Such error must be disregarded unless it affects a defendant's substantial rights. Tex. R. App. P. 44.2(b). A conviction will not be overturned for a non-constitutional error if the record provides the reviewing court a fair assurance that the error did not influence the jury or had only a slight effect. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011).

In assessing the potential harm, "we examine the entire record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence." *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). It is well established that the improper admission of evidence is rendered harmless when other properly admitted or unobjected-to evidence is admitted to prove the same fact. *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) ("[A]ny error in admitting the evidence was harmless in light of other properly admitted evidence proving the same fact."); *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("Our rule . . . is that overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."); *Burks v. State*, 876 S.W.2d 877, 898 (Tex. Crim. App. 1994) (admission of officer testimony as necessary contextual information was error but harmless because same facts admitted through different witnesses).

II. Application

Assuming, without deciding, that Bailey properly preserved error and that the trial court erred in admitting the challenged testimony over his hearsay objection, we conclude that Bailey was not harmed by the admission of such testimony because the statements were cumulative of properly admitted or unobjected-to testimony. *See Brooks*, 990 S.W.2d at 287; *Leday*, 983 S.W.2d at 718.

The record shows that, after the admission of the challenged testimony, Mitchell testified, without objection, that Bailey was the perpetrator of the offense. Unlike Officer Smith's limited testimony regarding Mitchell's out-of-court statement that Bailey had assaulted her, Mitchell's testimony detailed the offense: According to Mitchell, Bailey dragged her into the bedroom, punched her in the face repeatedly, and forced her onto the floor. He ordered her to wait there while he boiled water in a tea kettle. After she heard the kettle whistle, he returned to the bedroom, stood over her, and poured the water over her head, causing severe burns to her scalp, face, and throughout her upper body. She screamed and tried to leave, whereupon Bailey ordered her to "be quiet and sit down" and continued to pour the water on her. When she again tried to leave, he threatened her with "another pot" if she didn't allow him to pour all of that pot on her, which he proceeded to do, all while their young child and niece were in the next room.

In addition to Mitchell's testimony, the jury also heard testimony from other witnesses that tended to establish that Bailey was the perpetrator. A medical provider at the burn unit who had cared for Mitchell in the months following the offense testified that Mitchell had informed him that

Bailey had caused her injuries.¹ The detective to whom Officer Smith had referred the case testified that, after interviewing Mitchell, he determined that the suspect of the offense was Bailey.² Mitchell's neighbor and the property manager of her apartment complex also provided circumstantial evidence linking Bailey to the offense and corroborating the properly admitted testimony. Bailey does not challenge the admission of any of the above testimony on appeal.

In light of the extensive and compelling testimony provided by several other witnesses establishing the same fact that the challenged portions of Officer Smith's testimony concerned, we conclude that the challenged testimony, even if erroneously admitted, was harmless. *See Barshaw*, 342 S.W.3d at 93; *Brooks*, 990 S.W.2d at 287; *Burks*, 876 S.W.2d at 898. Accordingly, we overrule Bailey's sole issue.

CONCLUSION

We affirm the judgment of the trial court.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

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¹ That testimony was admitted over Bailey's hearsay objection as a statement made for medical diagnosis or treatment. *See* Tex. R. Evid. 803(4).

² Bailey did not object to that testimony.