NUMBER 13-15-00265-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

BRYAN BERNARD KULHANEK,

Appellant,

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the County Court of Wharton County, Texas.

MEMORANDUM OPINION

Before Justices Garza, Perkes and Longoria
Memorandum Opinion by Justice Perkes

Pursuant to a plea agreement, appellant Bryan Bernard Kulhanek pleaded guilty to burglary of a motor vehicle, a class A misdemeanor. *See* TEX. PENAL CODE ANN. § 30.04 (West, Westlaw through 2015 R.S.). The trial court deferred a finding of guilt and placed appellant on deferred adjudication community supervision for a period of twelve

months. The State subsequently filed a motion to adjudicate guilt**,** alleging appellant committed additional criminal offenses. After an evidentiary hearing, the trial court found the allegations to be true, revoked appellant's community supervision, adjudicated appellant guilty, and sentenced appellant to 200 days in jail. By a single issue, appellant raises various evidentiary challenges to the State's evidence. We affirm.

I. BACKGROUND

Following appellant's plea agreement and placement on community supervision, the State filed a motion to revoke his community supervision. The State alleged that appellant violated the terms of his community supervision by committing the criminal offenses of evading arrest with a vehicle, *see id.* § 38.04(b)(2)(A) (West, Westlaw through 2015 R.S.), and sexual assault of a child, *see id.* § 22.011(a)(2) (West, Westlaw through 2015 R.S.). During the hearing on the State's motion to revoke, appellant pleaded "true" to the allegation of evading arrest with a vehicle and "not true" to the allegation of sexual assault of a child.

In support of its motion, the State presented the testimony of Deputy Benjamin Swain. Deputy Swain testified that he observed appellant's vehicle traveling at a high rate of speed. While following appellant, Deputy Swain watched appellant pass another vehicle in a no-passing zone. Deputy Swain activated his emergency lights and siren and pursued appellant. While reaching speeds of over ninety miles-per-hour, appellant shut off his vehicle's lights in an attempt to elude Deputy Swain. Appellant attempted to turn down another county road, but lost control and crashed into a cornfield. Deputy Swain apprehended appellant.

The State also presented testimony from C.H. and E.B.[1] C.H. testified that appellant was having a sexual relationship with a sixteen-year-old female, K.B. He described appellant spending the night with K.B. after drinking and smoking marijuana with her. C.H. stated that appellant was in a bedroom with K.B., and that appellant made comments indicating that he had sexual intercourse with her. C.H. observed "hickeys" on appellant. K.B.'s stepmother, E.B., testified that she found sexualized text messages from appellant to K.B. on K.B.'s iPad and iPhone.

The State presented video of statements made by appellant during a custodial interrogation concerning the sexual assault allegations. Sergeant Matthew Machart, a Wharton County Sheriff's deputy, conducted the custodial interrogation of appellant. Sergeant Machart testified that appellant confessed to "engaging in sexual contact on two different occasions with [K.B.]."

The trial court found both allegations to be "true," revoked appellant's community supervision, adjudicated appellant guilty, and sentenced appellant to two hundred days in jail. This appeal followed.

II. DISCUSSION

Appellant argues that "the trial court erred when it adjudicated appellant for Burglary of a Motor Vehicle not (sic) a judicial proceeding, but at an Administrative Hearing in which the court wrongfully admitted evidence." Appellant's arguments focus on the trial court's admission of evidence pertaining to the offense of sexual assault of a child. Specifically, appellant argues that the trial court erred (1) by allowing the State to

[1] We utilize aliases to refer to children and other persons involved to protect the children's privacy. *See* TEX. R. APP. P. 9.8(b).

admit appellant's video-taped confession; and (2) by allowing E.B.'s testimony describing the text messages she read on K.B.'s iPhone and iPad. Appellant generally maintains that the admission of this evidence had a "negative effect" on the sentence imposed by the trial court.

A. Nature of Proceedings

We first address appellant's contention that the trial court wrongfully considered the proceeding to be administrative in nature. In *Ex parte Doan*, the Court of Criminal Appeals held that community-supervision revocation proceedings are judicial proceedings subject to the rules governing judicial proceedings. 369 S.W.3d 205, 212 (Tex. Crim. App. 2012). In reaching this holding, the court disavowed prior cases holding that a community-supervision revocation hearing was merely an administrative proceeding. *Id.* The court explained:

> A Texas community-supervision revocation proceeding involves the application of law to past facts that remain static. It is conducted according to judicial rules before a trial judge, not an administrative agency. Applying administrative law—the law that governs the decision-making process of administrative agencies—to revocation hearings has no basis in the Code of Criminal Procedure. Community-supervision revocation proceedings are not administrative hearings; they are judicial proceedings, to be governed by the rules established to govern judicial proceedings.

Id. As a judicial proceeding, a community-supervision revocation hearing is governed by the Rules of Evidence. *See id.* at 210; *see also Leonard v. State*, 385 S.W.3d 570, 572 n. 1 (Tex. Crim. App. 2012) (adjudication hearings are governed by the same rules as hearings to revoke community supervision). Therefore, we will address appellant's evidentiary issues in the same manner as other judicial proceedings.

B. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002) (citing *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001)). We will not reverse the trial court's ruling unless the ruling falls outside the zone of reasonable disagreement. *Torres*, 71 S.W.3d at 760; *see also Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (trial court abuses discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree"). In applying the abuse of discretion standard, we may not reverse a trial court's admissibility decision solely because we disagree with it. *See Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). We will not disturb a trial court's evidentiary ruling if it is correct on any theory of law applicable to that ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

C. Analysis

1. Video Statement

Appellant objected to the admission of the video statement on the grounds that appellant was not provided a copy of the video twenty days prior to the hearing, as required by Texas Code of Criminal Procedure article 38.22. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(5) (West, Westlaw through 2015 R.S.). The trial court overruled the objection.[2]

Recorded oral statements of an accused, made as a result of custodial interrogation, are not admissible unless "not later than the 20th day before the date of the

[2] It is not clear from the reporter's record whether the trial court ever viewed the video, and the video is not included in the appellate record.

proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article." *Id.* As long as the defense counsel is informed of the existence of the recording and is permitted reasonable access to a copy, the purpose of article 38.22, section 3(a)(5) has been met. *See Lane v. State*, 933 S.W.2d 504, 515–17 (Tex. Crim. App. 1996) (explaining that State is not required to "give" defense counsel a copy of any recorded statements, but rather, the State is merely required to "provide access" to the statements). We must "strictly construe [the requirements of this section] and may not interpret [the statute] as making admissible a statement unless all requirements . . . have been satisfied by the state[.]" TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(e).

Appellant was not provided access to the video statement until two days before the revocation hearing. Therefore, the statement was inadmissible under article 38.22, and the trial court abused its discretion by overruling appellant's objection. *See Torres*, 71 S.W.3d at 760.

2. Text Messages

Appellant objected to E.B.'s testimony regarding sexualized messages that she viewed on K.B.'s iPad and iPhone. Appellant argued the testimony was hearsay and maintained there was no way to authenticate the text messages because the actual messages were not admitted into evidence. The State responded that the messages, which were purportedly sent by appellant, were admissible as an admission by a party-opponent.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R.

EVID. 801(d); *see Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). "Hearsay testimony is inadmissible except as provided by statute or the rules of evidence." *Lee v. State*, 442 S.W.3d 569, 575 (Tex. App.—San Antonio 2014, no pet.); *see* TEX. R. EVID. 802. Whether an out-of-court statement falls under an exception to the hearsay rule is a determination within the trial court's discretion. *See Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003) (citing *Lawton v. State*, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995)). Statements by a party are admissible as admissions by a party-opponent. TEX. R. EVID. 801(e)(2)(A); *see Hughes v. State*, 4 S.W.3d 1, 6 (Tex. Crim. App. 1999); *see also Lozano v. State*, 2007 WL 4216349, at *8 (Tex. App.—Fort Worth Nov. 29, 2007, no pet.) (mem. op., not designated for publication) (defendant's statements in text messages were properly admitted as party admissions).

Appellant argues that K.B.'s step-mother "did not witness [a]ppellant send the messages . . . or that she . . . was even familiar with [a]ppellant's phone number[.]" Appellant maintains that, without authentication regarding who sent the messages, the testimony is hearsay. The Texas Court of Criminal Appeals has provided the following guidance regarding the admission of text messages:

> A witness might have "knowledge" of the authorship of a text message for a number of reasons. One reason might be that the witness is the actual author of the text message. Another reason might be that the witness personally observed the purported author actually type and/or send the message. A witness might also claim to have knowledge that a text message came from a phone number known to be associated with the purported sender. The association of a cell-phone number with a particular individual might suggest that the owner or user of that number may be the sender of a text message. Indeed, the suggestion may be quite strong. Unlike so-called "land lines," commonly utilized by an entire household, cell phones tend to be personal and user-specific. Still, evidence that merely shows the association of a phone number with a purported sender—alone—might be too tenuous.

Butler v. State, 459 S.W.3d 595, 601 (Tex. Crim. App. 2015) (internal citations omitted).

The State did not present any evidence to establish E.B.'s knowledge of the authorship of the text messages. *See id.* Without a showing that appellant authored the messages, they do not qualify as an admission by a party-opponent. *See* TEX. R. EVID. 801(e)(2)(A); *see also Black v. State*, 358 S.W.3d 823, 831–32 (Tex. App.—Fort Worth 2012, pet. ref'd) (no hearsay exception justified admission of text messages where there was no showing that appellant "wrote or ratified any of the messages," or "that the messages were written while the cell phone was in [the appellant's] possession"). Therefore, the trial court abused its discretion in overruling appellant's hearsay objection. *See Torres*, 71 S.W.3d at 760.

D. Harm

An erroneous evidentiary ruling is generally nonconstitutional error. *See Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). Nonconstitutional error requires reversal only if it affects the substantial rights of the accused. *See* TEX. R APP. P. 44.2(b); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). It is well established that the improper admission of evidence does not constitute reversible error if the same facts are shown by other evidence which is not challenged. *Leday v. State*, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998).

Sergeant Machart testified, without objection, that appellant confessed to "engaging in sexual contact on two different occasions with [K.B.]." C.H. testified that K.B. spent the night in appellant's bedroom and that appellant made statements regarding his sexual relationship with K.B. This "other evidence" established the same facts as the

evidence which was improperly admitted. Therefore, the trial court's evidentiary rulings constitute harmless error. *See* TEX. R APP. P. 44.2(b); *Barshaw*, 342 S.W.3d at 93; *Jimenez v. State*, 446 S.W.3d 544, 548 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (concluding that the admission of defendant's statement in violation of article 38.22 was harmless error in revocation proceeding where other inculpatory evidence was overwhelming).

We also note that appellant's evidentiary arguments pertain only to the sexual assault allegation. Appellant does not address his plea of true to the State's allegation that he committed the offense of evading arrest. Appellant also does not address Deputy Swain's testimony regarding the facts and circumstances regarding the evading arrest offense. A plea of true standing alone is sufficient to support a trial court's revocation order. *Moses v. State*, 590 S.W.2d 469, 470 (Tex. Crim. App. 1979). Texas law is clear that "one sufficient ground for revocation would support the trial court's order revoking community supervision." *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009); *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. 1980).

The trial court heard from Deputy Swain about his car chase involving appellant, in which appellant "blacked out" his vehicle by turning off its lights, exceeded speeds of ninety miles-per-hour, and ultimately crashed into a cornfield. Given appellant's plea of true and Deputy Swain's testimony, the trial court could reasonably conclude that the State met its burden of proving by a preponderance of evidence that appellant committed the offense of evading arrest. *See Cobb v. State*, 851 S.W.2d 871, 873–74 (Tex. Crim. App. 1993) (State's burden in revocation proceedings is preponderance-of-the-evidence standard). This finding alone is sufficient to support the trial court's judgment. *See*

Smith, 286 S.W.3d at 342.

Finally, although appellant generally maintains that the admission of this evidence had a "negative effect" on the sentence imposed, appellant has not shown or otherwise discussed how that evidence somehow affected his sentence. In this regard, we note that the offense of burglary of a motor vehicle is a class A misdemeanor, punishable by confinement in jail for a term not to exceed one year and/or a fine not to exceed $4,000. *See* TEX. PENAL CODE ANN. §§ 12.21, 30.04 (West, Westlaw through 2015 R.S.). Appellant was sentenced to 200 days in jail and no fine— a penalty far less than the maximum sentence permitted for such an offense. In addition, appellant did nothing in the trial court to preserve any error regarding the punishment assessed.

For the foregoing reasons, we conclude the trial court's evidentiary rulings did not affect appellant's substantial rights. *See* TEX. R APP. P. 44.2(b); *Barshaw*, 342 S.W.3d at 93. Appellant's sole issue is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
10th day of November, 2016.