NUMBER 13-19-00152-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ERNEST LEIJA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 187th District Court of Bexar County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Longoria

Appellant Ernest Leija was convicted of assault family violence by impeding breath, enhanced to a second-degree felony by a prior felony conviction. *See* TEX. PENAL CODE ANN. §§ 12.42(a), 22.01(b)(2)(B). By three issues which we consider as one, Leija argues that the trial court erred by admitting the transcript of a jail call made by Leija. We affirm.

I. BACKGROUND[1]

In July of 2018, Leija was indicted for "impeding the normal breathing or circulation of the blood of Stephanie Hernandez by applying pressure to the throat or neck." At trial, Hernandez testified that on April 13, 2018, she got into an argument with Leija, who is her uncle. According to Hernandez, the argument escalated to the point that Leija shoved her to the ground and began to choke her. Hernandez claimed that she was completely unable to breathe for several seconds. Hernandez also testified that her grandmother—Leija's mother—was present during the argument. Hernandez claimed that as soon as Leija released her, she ran to her room and called 911; her call to 911 was played for the jury. During the call, a male voice, which Hernandez asserts is the voice of Leija, can be heard saying "Don't do this." However, at the end of the call, Hernandez tells the 911 operator "never mind" and hangs up. Hernandez testified that she hung up "[b]ecause of my grandmother. She—you know, she didn't want no problems at her house and she didn't want to have any—any SAPDs coming over and stuff like that, causing any trouble." Later that day, at the urging of another uncle, Hernandez called the police to report the assault.

At trial, the State sought to introduce a transcript of a phone call made by Leija to a woman—allegedly his mother—while he was in jail. Leija objected to the admission of the transcript based on relevance, hearsay, and its probative value being outweighed by its prejudicial impact. Portions of the transcript[2] are included below:

[Leija]: I went to court already.

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[1] This case is before this Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[2] The original call was in Spanish but it was translated and published to the jury in English.

[Woman]: Oh you did *mijo*.

. . . .

[Leija]: I went to court already. Since Friday, no since today they are going to start calling, looking for her, so . . .

[Woman]: Uh-huh.

[Leija]: So tell her not to answer or to tell them that she is not coming or something.

[Woman]: Uh-huh.

[Leija]: Because they are going to call, so I don't know if you have her number.

[Woman]: No, no, she doesn't want to, she doesn't want nothing, no she doesn't want anything.

[Leija]: Ok, are you sure mom, because if I lose this case, mom.

[Woman]: No, no she doesn't want anything.

[Leija]: Ok, that's fine, that's fine.

[Woman]: I will talk to her, I'm gonna talk to her, if she doesn't go, for her not to answer the phone if someone calls her from Bexar County or attorney or something.

[Leija]: Well she can talk to them mom, but to tell them that she is not going.

[Woman]: Well, I already told her that *mijo*, I already told her.

. . . .

[Leija]: She can hang up and that's it, she doesn't have to say anything, they are not going to do nothing to her.

[Woman]: Yeah.

. . . .

[Leija]: But talk to her because they are gonna start calling everybody, they might call you, too.

. . . .

[Woman]: Well, let's see, let's see if I convince her.

The trial court overruled the hearsay and relevancy objections and additionally informed the parties that the "Court is doing a balancing test; and the Court is going to find that [the jail call transcript] is more probative than prejudicial." The trial court then admonished the State and Leija to agree on which portions of the transcript would be redacted for trial. However, the following day, the trial court decided that the caption at the beginning of the call, which identified the call as being made by an inmate from the Bexar County Jail, would not be redacted. The trial court also reiterated that Leija's objections were being overruled.

The jury found Leija guilty and sentenced him to nineteen years' imprisonment in the Correctional Institutions Division of the Texas Department of Criminal Justice. This appeal ensued.

II. ADMISSION OF EVIDENCE

Leija argues that the trial court erred by admitting the jail call transcript into evidence. More specifically, Leija complains that the transcript should have been excluded under: (1) Article 2.03 of the Texas Code of Criminal Procedure and the federal and Texas Constitutions; (2) Rule 403 of the Texas Rules of Evidence; and (3) Rule 801 of the Texas Rules of Evidence, concerning hearsay. *See* U.S. CONST. amend. IV, VI, XIV; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 2.03; TEX. R. EVID. 403, 801(e)(2)(B).

A. Standard of Review and Applicable Law

In order to preserve a challenge to the trial court's admission of evidence, the complaining party must have lodged a timely and specific objection and have obtained an adverse ruling. TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103. Also, in order to preserve error for appeal, complaints and argument on appeal must correspond with the objection made at the trial court level. *Runnels v. State*, 193 S.W.3d 105, 108 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see* TEX. R. APP. P. 33.1.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). "As long as the trial court's ruling is within the 'zone of reasonable disagreement,' there is no abuse of discretion, and the trial court's ruling will be upheld." *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). Upon finding a non-constitutional error, the reviewing court will reverse only upon a finding that the error affected the substantial rights of the accused. TEX. R. APP. P. 44.2(b); *see Barshaw v. State*, 342 S.W.3d 91, 94 (Tex. Crim. App. 2011). Substantial rights are not affected if, based on the record as a whole, this Court has a fair assurance that the erroneous admission of evidence had either no influence or only a slight influence on the verdict. *See Whitaker v. State*, 286 S.W.3d 355, 364 (Tex. Crim. App. 2009); *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In making this assessment, this Court considers everything in the record, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. *See Motilla*, 78 S.W.3d at 355. The presence of overwhelming evidence supporting the conviction can be a factor in the evaluation of harmless error. *See id.* at 356.

Rule 403 states that a trial court may exclude relevant evidence if the evidence's "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. However, courts presume that the probative value of relevant evidence exceeds any potential danger of unfair prejudice until proven otherwise. *See Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (en banc) (op. on reh'g). A trial court's decision on a Rule 403 objection is "rarely" disturbed and is given "an especially high level of deference." *United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007); *see Robisheaux v. State*, 483 S.W.3d 205, 218 (Tex. App.—Austin 2016, pet. ref'd); *see also Garza v. State*, No. 13-17-00677-CR, 2018 WL 3655519, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 2, 2018, no pet.) (mem. op., not designated for publication). When performing a Rule 403 analysis, the trial court

> must balance (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. Of course, these factors may well blend together in practice.

Gigliobianco v. State, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

"The hearsay doctrine, codified in Rules 801 and 802 of the Texas Rules of Evidence, is designed to exclude out-of-court statements offered for the truth of the matter asserted that pose any of the four 'hearsay dangers' of faulty perception, faulty memory, accidental miscommunication, or insincerity." *Alcala v. State*, 476 S.W.3d 1, 21 (Tex. App.—Corpus Christi–Edinburg 2013, pet. ref'd). Thus, any extra-judicial statements that

are offered "for the purpose of showing *what* was said rather than for the truth of the matter stated therein" do not constitute hearsay. *Id.* at 23 (quoting *Crane v. State,* 786 S.W.2d 338, 352 (Tex. Crim. App. 1990)) (emphasis added); *see* TEX. R. EVID. 801(d) (defining "hearsay" as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement").

B. Analysis

Leija first argues on appeal that admitting the jail call transcript with minimal redactions undermined his presumption of innocence in violation of article 2.03. *See* TEX. CODE CRIM. PROC. ANN. art. 2.03(b) ("It is the duty of the trial court, the attorney representing the accused, the attorney representing the state and all peace officers to so conduct themselves as to . . . not impair the presumption of innocence . . . ."). Accordingly, he argues that his due process rights under the Fifth and Fourteenth Amendments were violated. *See* U.S. CONST. amend. IV, XIV. However, this argument does not comport with Leija's complaints below. *See* TEX. R. APP. P. 33.1; *Runnels*, 193 S.W.3d at 108. Below, Leija argued that the transcript was irrelevant, more prejudicial than probative, and inadmissible hearsay; Leija never mentioned Article 2.03, never objected under the United States or Texas Constitutions, and never specifically argued that his due process rights were being violated. As such, Leija has not preserved this argument for appeal. *See* TEX. R. APP. P. 33.1.

Next, Leija argues that the transcript should have been excluded under Rule 403's balancing test. However, as we mentioned above, a trial court's ruling on a Rule 403 objection is rarely disturbed. *See Robisheaux*, 483 S.W.3d at 218. During the phone call,

Leija repeatedly insisted that the woman on the phone tell Hernandez not to testify or talk to anyone who tries to reach out to her for information or, if Hernandez does talk to anyone, that she should tell them she will not testify. The jury could make rational conclusions about the fact that Leija proactively attempted to prevent the complainant from testifying. Accordingly, the transcript had probative value. *See Gigliobianco*, 210 S.W.3d at 641–42. Neither Leija nor the State refer to the State's need for the transcript; however, from the record, it does not appear that the State's need for the transcript was overwhelmingly strong because ultimately Hernandez testified in detail concerning the alleged offense anyway. It is possible that the transcript possessed at least some tendency to "suggest decision on an improper basis" because the transcript, without heavier redactions, showed that the call was made by an "inmate at Bexar County Detention Center." Thus, the transcript might undermine the presumption of innocence and suggest Leija is guilty simply because he had already been detained. However, the court instructed the jury as follows so as to minimize such a risk:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. . . . The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

And we presume that jurors follow the trial court's instructions as presented. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). Furthermore, there is nothing in the record to suggest that the introduction of the transcript took an inordinate amount of time or merely repeated evidence otherwise admitted already. *See Gigliobianco*, 210 S.W.3d

at 641–42. Therefore, we cannot conclude that the trial court abused its discretion in determining that the transcript's probative value outweighed any prejudicial effect it might have. *See* TEX. R. EVID. 403; *Gigliobianco*, 210 S.W.3d at 641–42.

Lastly, Leija argues that the transcript should have been excluded as inadmissible hearsay. TEX. R. EVID. 801(e)(2)(B). More specifically, Leija argues that the woman's comments in the transcript constitute inadmissible hearsay. Leija asserts that admitting her portion of the transcript violated his right to confront the witness. *See* U.S. CONST. amend. VI. However, Leija has not preserved the Sixth Amendment issue because he never raised that issue below. *See Runnels*, 193 S.W.3d at 108; TEX. R. APP. P. 33.1. And concerning the hearsay objection, we conclude that the woman's statements in the transcript were not inadmissible hearsay because they were not offered for the truth of the matter asserted. *See* TEX. R. EVID. 801(d); *Alcala*, 476 S.W.3d at 23. The State was not trying to prove that the woman actually tried to persuade Hernandez not to testify. Rather, the State offered her statements in the transcript as context to demonstrate Leija's desire to not have the complainant cooperate with the criminal investigation. Therefore, the transcript did not contain inadmissible hearsay. *See id.* Accordingly, the trial court did not err in admitting the transcript over Leija's objections. *See id*.

However, even assuming the trial court did err by admitting the transcript, Leija has not demonstrated that his substantial rights have been affected. *See* TEX. R. APP. P. 44.2(b); *Barshaw*, 342 S.W.3d at 94. Based on the strength of the photographic evidence and the testimonial evidence by Hernandez, we have a fair assurance that any alleged erroneous admission of the transcript had either no influence or only a slight influence on the verdict. *See Whitaker*, 286 S.W.3d at 364. Therefore, we overrule Leija's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

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

Delivered and filed the
14th day of May, 2020.