NO. 12-15-00299-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RICHARD WAYNE TAYLOR, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Richard Wayne Taylor appeals his conviction for murder. In two issues, Appellant argues that the trial court abused its discretion by admitting hearsay testimony and by permitting the State to impeach Appellant's testimony by questioning him about several remote convictions. We affirm.

BACKGROUND

On October 31, 2013, Lufkin Police Department Corporal Kevin Jackson was dispatched to investigate a reported stabbing. When he arrived at the scene, he found the victim, Shirley Taylor, lying on the floor of her residence in a pool of blood. Taylor had multiple stab wounds. Jackson used articles of clothing to apply pressure to one of the wounds while he attempted to keep Taylor conscious by snapping his fingers in her face and asking her questions. He described her as drifting in and out of consciousness. Jackson testified that, at one point, Taylor stated that she was "fading out." Nonetheless, Jackson stated that she experienced moments of coherence. During this time, Jackson asked Taylor who did this to her, and she identified Appellant, her husband, as her assailant. Thereafter, Taylor was transported to the hospital. She died approximately four to five hours later.

Appellant was charged by indictment with murder and pleaded "not guilty." The matter proceeded to a jury trial. At trial, the trial court admitted, over Appellant's hearsay objection,

Jackson's testimony regarding Taylor's statement to him identifying Appellant as her assailant. Later, Appellant testified on his own behalf. For purposes of impeachment, the trial court permitted the State, over Appellant's objection, to interrogate Appellant about certain remote convictions.

Ultimately, the jury found Appellant "guilty" as charged and assessed his punishment at imprisonment for life. The trial court sentenced Appellant accordingly, and this appeal followed.

HEARSAY AND THE DYING DECLARATION EXCEPTION

In his first issue, Appellant argues that the trial court abused its discretion in permitting Jackson to testify about Taylor's statement to him regarding the identity of her assailant because her statement constituted inadmissible hearsay.

Standard of Review and Governing Law

We review a trial court's decision to admit evidence under an abuse of discretion standard. ***Apolinar v. State***, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005). A trial court abuses its discretion only when the decision lies "outside the zone of reasonable disagreement." ***Id.***

Hearsay statements generally are not admissible unless the statement falls within a recognized exception to the hearsay rule. ***Mick v. State***, 256 S.W.3d 828, 831 (Tex. App.–Texarkana 2008, no pet.). If the declarant is unavailable as a witness, her hearsay statement is admissible if it constitutes a dying declaration. *See* TEX. R. EVID. 804(b)(2). Before a statement is admissible as a dying declaration, it must meet the following three requirements: (1) the declarant must be unavailable; (2) the declarant, at the time she makes the statement, must believe her death is imminent; and (3) the statement must concern the cause or circumstances of the potential impending death. ***Scott v. State***, 894 S.W.2d 810, 811 (Tex. App.–Tyler 1994, pet. ref'd); *see* TEX. R. EVID. 804(b)(2); ***Williams v. State***, 800 S.W.2d 364, 368 (Tex. App.–Fort Worth 1990), *pet. ref'd*, 805 S.W.2d 474 (Tex. Crim. App. 1991).

Contemplation of death may be inferred from surrounding circumstances; it is not necessary that the declarant specifically express her awareness of impending death. ***Scott***, 894 S.W.2d at 812 (citing ***Thomas v. State***, 699 S.W.2d 845, 853 (Tex. Crim. App. 1985); ***Hayes v. State***, 740 S.W.2d 887, 889 (Tex. App.–Dallas 1987, no pet.)). Circumstances to be considered in evaluating a potential dying declaration include (1) the express language of the declarant, (2) the nature of the injury, (3) any medical opinion provided to the declarant, and (4) the conduct of

the declarant. ***Scott***, 894 S.W.2d at 812. Additionally, the fact that the statement was made in response to a question does not render it inadmissible.[1] ***Id.***

Further still, the length of time the declarant lives after making the declaration is immaterial. *See* ***Charles v. State***, 955 S.W.2d 400, 404 (Tex. App.–San Antonio 1997, no pet.); *see also* ***Herrera v. State***, 682 S.W.2d 313, 320 (Tex. Crim. App. 1984); ***Franks v. State***, 625 S.W.2d 820, 822 (Tex. App.–Fort Worth 1981, pet. ref'd) (holding that fact declarant lived for eight weeks after making statement was immaterial to whether statement was dying declaration). The focus of the rule is on the declarant's state of mind when the statement is made, not on the eventual outcome of the patient's injuries. ***Charles***, 955 S.W.2d at 404.

Jackson's Testimony

In the instant case, Jackson testified, in pertinent part, as follows:

> Q. . . . . Walk us through what you saw when you walked into that, where you walked in and saw what was in the bedroom?
>
> A. There was a black female that was on the floor. She was naked. She had some articles of clothing that she was holding around her abdomen. She was laying in what looked like a pool of blood. There was more on her left side, but it looked like - - on her left side, my right side - - and, she was holding it, but she was gasping for air. I grabbed some clothes that were in front of a dresser that was in front of her. And, I took what she had that was blood soaked off, and put, started to put something else on.
>
> Q. All right.
>
> A. When I was putting it on her, I took that, or I'm sorry, when I took that other stuff off, and in the transition of taking it off and putting the other stuff on, you could see what - - it looked like either fatty tissue or muscle tissue, or wherever it may be, that her insides were coming out.
>
> Q. Okay.
>
> A. So, I grabbed the, the clothing items that I had, and helped hold it in, pushed it back in.
>
> . . . .
>
> Q. And, you said you observed one wound down here on her right side - -
>
> A. I believe there were several.
>
> Q. Okay.
>
> A. But, the one wound that had - - it was - - I don't even remember exactly which side it was on. I just remember seeing the fatty . . . tissue protruding out of it.
>
> Q. All right. And, how many wounds were you able to see in just that quick moment?
>
> A. I mostly paid attention to that one. I know there were several other ones. Some of them came after the fact when we moved a lot of the clothing out so we could wrap her up in

[1] This principle is not necessarily applicable where the declarant merely responds to leading questions. ***Id.*** at 812 n.1.

something else so we could move her. There was something that was on her shoulder, or somewhere up top that was actually squirting blood.

. . . .

Q. Right. And, you said she was, she was awake, she was alive, right?
A. She was.

Q. Was she coherent?
A. Off and on.

Q. Okay. Could you speak with her?
A. I could speak with her a little bit. I asked her a few questions. I tried to keep her awake. I was snapping my fingers in front of her face (indicating), like that. I was asking her what her name was. I was asking her who did this to her. I was trying to keep her awake until somebody else could get there.

. . . .

Q. Is that blood you saw when you came into the apartment, or how did it get there?
A. That got there after the fact.

Q. And, how?
A. Was to try to save her life. She kept telling me that she was fading in and out. She said, "I'm fading out[."] And, I was talking to her, snapping (indicating) in front of her face. I was trying to get her to engage in - - she was fading out. And, I said[,] "[N]o ma'am, no, ma'am" - -

. . . .

Q. Corporal Jackson, from what you observed and learned, did she appear weak throughout that time you were with her?
A. Yes, ma'am.

Q. And, were her eyes open the whole time, or were they open and shut, back and forth?
A. They were open and shut. She was gasping for air.

Q. Okay. And, other than the stab wound to her abdomen, and the cut on her right forearm, did you see any other visible signs of injury?
A. When I would go to move her[,] there would be blood that would squirt out.

. . . .

Q. Okay. Based on your personal observations there, leaning down at Mrs. Taylor, do you think that she knew death was close?
A. I believe so.

Q. And you said you snapped your fingers, you asked her questions. Was she primarily - - I mean, was she mostly responsive to you, to these questions?
A. At times. She would answer some. She wouldn't on some others. I would pat her on the cheek. I told her to stay with me. I'd asked her questions about, you know, "Who did this to you? Why would they do this to you?" Anything along that line?

Q. Okay.
A. She would answer every once in a while.

Q. And, that was my next question. Did her answers appear to be coherent?
A. Yes, ma'am. You could understand her.

Q. Okay. She wasn't babbling about something that wasn't in response to your question or anything of that nature?
A. No, ma'am.

Q. Okay. In doing this, in trying to keep her alert and responsive, did she identify who her attacker was?
A. Yes, ma'am.

Q. And, what did she say?
A. She told me it was Richard.

. . . .

Q. . . . . You asked her, "Who did this to you?" Do you recall her answer?
A. Yes, ma'am.

Q. And, what was it?
A. Richard Taylor.

Additionally, the record contains multiple pictures of Taylor's injuries. From the pictures and Jackson's testimony relating to them, it is apparent that Taylor suffered lacerations to her abdomen, shoulder, and arm.

Analysis

In the case at hand, Taylor was unavailable to testify because she is deceased. Moreover, the record reflects that at the time she made the statements to Corporal Jackson, she had suffered multiple stab wounds, which exposed subdermal tissue and caused a great amount of blood loss. She stated that she was "fading out." Jackson described her as drifting in and out of consciousness and gasping for air. He further stated that he believed she thought her death was near. Lastly, Taylor's statement concerns identity of the person who, according to her, caused her impending death.

Appellant argues that Taylor's statement does not satisfy the criteria of Rule 804(b)(2) because Taylor did not die until several hours later and her statement was made in response to Jackson's leading questions to her. We disagree. As set forth previously, the length of time the declarant lives after making the declaration is immaterial. *See* ***Charles***, 955 S.W.2d at 404. Furthermore, Jackson's question, "Who did this to you?" is not leading. *See* ***Myers v. State***, 781 S.W.2d 730, 733 (Tex. App.–Fort Worth 1989, pet. ref'd) (question is impermissibly leading only when it suggests which answer, "yes" or "no," is desired, or when it puts into witness's

mouth words to be echoed back); *see also* ***Hodges v. State***, 299 S.W. 907, 908 (Tex. Crim. App. 1927) (mere fact that question may be answered by simple "yes" or "no" will not render it an impermissibly leading question).

Therefore, based on our review of the record, we hold that the trial court did not abuse its discretion in admitting Taylor's statement to Jackson identifying Appellant as her assailant. Appellant's first issue is overruled.

EVIDENCE OF PRIOR CONVICTIONS FOR IMPEACHMENT

In his second issue, Appellant argues that the trial court abused its discretion in permitting the State to impeach his testimony by questioning him about several remote convictions.

Texas Rule of Evidence 609(a) provides that witness credibility may be attacked by admitting evidence that the witness previously has been convicted of a felony or crime of moral turpitude if the trial court determines that the probative value of admitting the evidence simply outweighs its prejudicial effect. *See* TEX. R. EVID. 609(a); ***Meadows v. State***, 455 S.W.3d 166, 170 (Tex. Crim. App. 2015). Rule 609(b) limits Rule 609(a) by providing that evidence of a prior conviction is inadmissible if more than ten years has elapsed since the later of the date of conviction or release of the witness from the confinement imposed for that conviction, whichever is later, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." TEX. R. EVID. 609(b); ***Meadows***, 455 S.W.3d at 170.

In weighing the probative value of a conviction against its prejudicial effect, we consider the following nonexclusive list of such factors: (1) the impeachment value of the prior crime; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history; (3) the similarity between the past crime and the offense being prosecuted; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue. *See* ***Leyba v. State***, 416 S.W.3d 563, 572 (Tex. App.–Houston [14th Dist.] 2013, pet. ref'd) (citing ***Theus v. State***, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992)); *see also* ***Meadows***, 455 S.W.3d at 170 ("In deciding whether, in the interests of justice, the probative value of a remote conviction substantially outweighs its prejudicial effect, a court may consider all relevant

specific facts and circumstances, including whether intervening convictions dilute the prejudice of that remote conviction").

Analysis

In the instant case, the State provided notice to Appellant of its intent to introduce evidence of his remote convictions. *See* TEX. R. EVID. 609(f). Ultimately, the trial court permitted the State to question Appellant concerning some of Appellant's remote convictions, four of which were for aggravated assault and one of which was for aggravated sexual assault.

Appellant testified that he was on parole following a conviction for aggravated assault. He further testified that he regularly visited Taylor, who was in poor health. Appellant described himself as a caregiver to Taylor. He stated that he rubbed her feet and gave her massages to relieve fluid buildup. He further stated that he intended to drive her to Houston, in violation of his parole, to attempt to get her on a liver transplant list. He also testified that he had no recent physical contact with his wife other than sexual contact.

Considering the record and evidence of remote convictions, we first note that the impeachment value of the prior crimes for which Appellant was convicted was high. Appellant, by his testimony, portrayed himself as a loving husband devoted to caring for his ailing wife. The prior convictions about which the State sought to impeach Appellant's testimony all were aggravated offenses—three for aggravated assault and one for aggravated sexual assault. Of course, the temporal proximity of the past crimes relative to the charged offense in this case were remote. Specifically, the four convictions raised by the State occurred between 1987 and 1992. However, during direct examination, Appellant's counsel questioned him about the 2001 aggravated assault conviction, for which he was on parole at the time of the incident in question. Thus, the aggravated nature of the remote convictions the State utilized to impeach Appellant's testimony related both to the violent allegations in the instant case as well as to Appellant's criminal history in the years in between those remote convictions and the facts of the instant case.

We further note that Appellant's testimony and his credibility in this case were significant factors for the jury's consideration. The State was unable to recover any DNA evidence linking Appellant to the crime. And although the jury was able to consider Taylor's dying declaration, Appellant testified that Taylor knew and had dated another man named Richard Taylor and also was acquainted with another man named Richard, who had run an

errand for her the day before she was killed. Thus, it was important for the State to be able to question Appellant about his violent past so the jury could consider Appellant's portrayal of himself as a devoted caregiver in light of his past behavior.

In sum, the probative value of the State's questioning Appellant concerning these prior convictions was high. The State's case against Appellant was largely circumstantial, and Appellant portrayed himself to the jury as a devoted caregiver. To the contrary, Appellant's counsel first questioned Appellant about a conviction for aggravated assault, which occurred in 2001, and for which Appellant was on parole at the time of the incident in question. Along with providing an additional probative link to the remote convictions, this testimony likely served to diminish, to a degree, any prejudicial effect connected to the State's being able to question Appellant about remote convictions for aggravated offenses. Therefore, having carefully considered the record in this case in light of the ***Theus*** factors, we hold that the trial court did not abuse its discretion in determining that the probative value of the prior convictions substantially outweighed its prejudicial effect.[2] *See* ***Theus***, 845 S.W.2d at 880. Appellant's second issue is overruled.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered July 12, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

[2] Appellant suggests the possibility that the trial court may not have, in fact, weighed these convictions' probative value related to their prejudicial effect. We note that it is not required that a balancing test be performed on the record. *Cf.* ***Belcher v. State***, 474 S.W.3d 840, 848 (Tex. App.–Tyler 2015, no pet.).

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JULY 12, 2017

NO. 12-15-00299-CR

RICHARD WAYNE TAYLOR,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2014-0049)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.