YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Evidence during assault trial regarding stolen items was not inadmissible extraneous offense evidence. [In the Matter of R.M.](05-3-02)

On May 18, 2005, the San Antonio Court of Appeals held that evidence of juvenile's behavior and threats at the time of arrest were admissible to show his consciousness of guilt.

05-3-02. In the Matter of R.M., MEMORANDUM, No. 04-04-00261-CV, 2005 Tex.App.Lexis 3759 (Tex.App.— San Antonio 5/18/05).

Background: This is an appeal from an order of adjudication following a jury trial finding that the Appellant, R.M., engaged in delinquent conduct by committing the offense of Assault Causing Bodily Injury. R.M. raises two issues for review. We overrule both issues and affirm the judgment of the trial court.

Facts: At approximately 6:20 a.m., on February 4, 2004, San Antonio Police Officer Earl Tovar was dispatched to a residence at 138 Verne Street on a family disturbance call. Arriving at the location, he observed a teenage male frantically signaling him to hurry to the house. As Officer Tovar exited his police car, the teenage male informed Officer Tovar that his father and brother were fighting inside the house. Upon entering the residence, Officer Tovar was led to a hallway where he observed Ricardo Mendiola grappling with his son, R.M. Officer Tovar twice ordered R.M. to release Mr. Mendiola. When R.M. failed to obey his instructions, Officer Tovar had to physically grab R.M. and pull him away from Mr. Mendiola.

After separating the two persons, Officer Tovar placed R.M. on a bed in an adjacent room and interviewed Mr. Mendiola to determine the cause of the incident. According to Officer Tovar, Mr. Mendiola explained that his son had attacked him after he woke him to go to school and confronted him about stealing things from their house. Therefore, after interviewing Mr. Mendiola and observing a physical injury to Mr. Mendiola's wrist which appeared to be a "bite mark, with blood," Officer Tovar placed R.M. under arrest on suspicion of assault. R.M. resisted Officer Tovar's attempts to restrain him, however, and began fighting and pulling away. Consequently, R.M.'s father and brother had to help control R.M. so that he could be handcuffed. Officer Tovar sustained an injury to his right-hand palm and index finger during the struggle.

After placing R.M. in the patrol car, R.M. remained defiant; he banged his head on the car's plexiglass divider, and he cursed and threatened his father. Officer Tovar described R.M.'s demeanor as both combative and argumentative.

As a result of these incidents, the State charged R.M. with two counts of delinquent conduct: one for

assault causing bodily injury and another for resisting arrest. On March 5, 2004, a jury found that R.M. did engage in delinquent conduct by committing the offense of assault causing bodily injury, but found that R.M. did not engage in delinquent conduct regarding the charge of resisting arrest. The trial court entered an order of adjudication of delinquent conduct and a disposition order committing R.M. to the Texas Youth Commission. R.M. appeals the judgment of the trial court.

In his first issue, R.M. contends that the trial court erred in admitting irrelevant extraneous offense evidence. Specifically, R.M. contends that it was harmful error for the trial court to allow Officer Tovar to testify concerning statements Mr. Mendiola made to him at the time of R.M.'s arrest, as well as observations regarding R.M.'s actions during his arrest. We disagree.

Held: Affirmed

Memorandum Opinion: We review a trial court's decision to admit or to exclude evidence for an abuse of discretion. *Weatherred v. State, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000)*. An abuse of discretion occurs where a trial court's decision lies outside the zone of reasonable disagreement. *Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)*. In determining whether a trial court has abused its discretion, we consider whether the court acted arbitrarily or unreasonably and without reference to guiding rules or principles. *810 S.W.2d at 380*.

It is well-established that an accused is entitled to be tried on the accusations made in the State's pleading and not for some collateral crime or for being a criminal generally. *See TEX. R. EVID. 404(b)*; *Nobles v. State, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992)*. However, Mr. Mendiola's statements to Officer Tovar that R.M. attacked him because he had confronted him about stolen items were not inadmissible extraneous offense evidence. The testimony was relevant to a material issue at trial, *i.e.*, whether R.M. assaulted Mr. Mendiola. Likewise, evidence of R.M.'s behavior and threats made toward Mr. Mendiola at the time of arrest was admissible to show the accused's consciousness of guilt. *See Greene v. State, 928 S.W.2d 119, 123 (Tex. App.-San Antonio 1996, no pet.)*. In fact, assuming the testimony relates to extraneous bad acts by R.M. at all, the statements were merely examples of admissible same transaction contextual evidence, as such evidence was necessary to the jury's understanding of the instant offense and did not introduce an impermissible character element. n1 *See Rogers v. State, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993)* (holding that "acts, words and conduct" made at the time of arrest are admissible as an exception under *Rule 404(b)* where such evidence is necessary to the jury's understanding of the instant offense); *Blakeney v. State, 911 S.W.2d 508, 515 (Tex. App.-Austin 1995, no pet.)*. We admit such evidence under the reasoning that events do not occur in a vacuum, and the jury has a right to hear what events immediately surrounded the criminal act charged so that they may realistically evaluate the evidence. *Hoffert v. State, 623 S.W.2d 141, 144 (Tex. Crim. App. 1981)*; *Albrecht v. State, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972)*.

> n1 Moreover, Mr. Mendiola's statements did not constitute impermissible hearsay, as they were not offered to prove the truth of the matter asserted. *See TEX. R. EVID. 801(d)*; *see also McCraw v. Maris, 828 S.W.2d 756, 757, 35 Tex. Sup. Ct. J. 488 (Tex. 1992)* ("Out-of-court statements are not hearsay if offered for a purpose other than to prove the truth of the matter asserted"). Instead, they were offered to show what precipitated R.M.'s assault.

Nevertheless, even had the trial court erred in admitting Officer Tovar's testimony, we conclude that any error was harmless. Error in the admission of evidence constitutes non-constitutional error. *See Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)*. We disregard non-constitutional error that does not affect the substantial rights of the defendant. *TEX. R. APP. P. 44.2(b)*. A substantial right is affected only when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)*.

Here, there was only one statement before the jury concerning R.M. stealing items from the house. During direct examination, Officer Tovar testified: "I was asking [Mr. Mendiola] what had happened and that's when he went into detail about how he confronted [R.M.] about stolen items in the house." Following a hearing conducted outside of the jury's presence on the admissibility of Mr. Mendiola's statements to Officer Tovar, no mention was made again concerning the alleged theft. Moreover, evidence of threats R.M. made to both Mr. Mendiola and Officer Tovar at the time of his arrest was only briefly mentioned at trial and was not emphasized in the State's arguments or at closing. Consequently, a review of the entire record indicates that even if the evidence had been erroneously admitted, R.M.'s substantial rights were not affected. Therefore, we conclude that the trial court did not abuse its discretion in admitting this evidence, and we overrule R.M.'s first issue on appeal. n2

> n2 Further, the admission of the disputed evidence did not violate *Rule 403*. Under *Texas Rule of Evidence 403*, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, considerations of undue delay, or needless presentation of cumulative evidence. *See TEX. R. EVID. 403*; *see also Reese v. State, 33 S.W.3d 238, 240-41 (Tex. Crim. App. 2000)* (holding that relevant *403* criteria includes: (1) the probative value of the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence). Here, we have already concluded that Officer Tovar's testimony was only minimally developed at trial and was both relevant and probative in determining whether R.M. assaulted Mr. Mendiola. Furthermore, Officer Tovar's testimony was necessary in order to controvert Mr. Mendiola's conflicting in-court version of the events. Therefore, in our review, we cannot say the trial court's decision to admit the evidence was unduly prejudicial or lay outside the "zone of reasonable disagreement." *See Robbins v. State, 88 S.W.3d 256, 260 (Tex. Crim. App. 2002)*.

Conclusion: Trial court did not abuse its discretion in admitting this evidence.