Trial court abused its discretion in admitting complained-of disciplinary records from TYC into evidence over appellant's hearsay and Confrontation Clause objections.[Smith v. State](14-1-5B)

On December 19, 2013, the Houston (1st Dist.) Court of Appeals held that the trial court abused its discretion in admitting the reports into evidence over appellant's hearsay and Confrontation Clause objections and further appellant did suffer harm from the trial court's error in admitting the complained-of disciplinary records.

¶ 14-1-5B. **Smith v. State**, No. 01-11-00898-CR, 2013 WL 6699495 [Tex.App.—Houston (1st Dist.), 12/19/13].

Facts: Ned White, a maintenance man at the Apache Springs apartment complex, testified that on May 30, 2009, while walking through the complex, he saw two men, later identified as Daniel Sepeda, the complainant, and his younger brother, Gregory Ramos, washing a car. After White spoke to them for a few minutes, he returned to an area outside of a friend's apartment, where he watched television. White then saw two young black men pass by the apartment; one wore a bandana around his head and the other a bandana around his neck. White later heard two gunshots, ran inside his friend's apartment, and locked the door. He then looked out from a window and saw the two men, each holding a handgun, run toward and then past his friend's apartment. White exited the apartment to see that Sepeda had been shot.

Jessica DeLaRosa, a resident at the apartment complex, testified that on May 30, 2009, she, while standing on her balcony, saw the complainant and a young child washing a car in the apartment complex parking lot. Approximately one or two minutes after she went inside her apartment, she heard two gunshots. When she looked back to the parking lot, she saw two black men running away.

Harris County Sheriff's Office ("HCSO") Sergeant C. Clopton testified that at about 2:00 p.m. on March 30, 2009, he was dispatched to the apartment complex to investigate the shooting. Clopton identified three witnesses to the shooting: Laura Vincent, the complainant's fiance, Ramos, and White. Ramos, who was eleven years old at the time, appeared "very scared or traumatized" but "could describe what had occurred." Clopton interviewed Ramos and recorded the interview.

Ramos testified that on May 30, 2009, he was helping the complainant wash his car. The complainant told Ramos to find Vincent, who lived at the apartment complex, and ask her to bring him his gun because he had seen someone watching him. Later, the complainant and Ramos were approached by two young black men who said something to the complainant. Ramos could not remember what was said, but when the complainant stood up to face the men, he told Ramos to "get back." Ramos climbed into the back seat of the car, and, approximately five seconds later, heard two gunshots. When he looked out of the car, he saw the complainant bleeding from his neck and the two men running away. Later, Ramos gave a recorded statement to a police officer.

Ramos further testified that, at the time of trial, he remembered the "important" events of the shooting, but could not remember "every single detail." On cross-examination, Ramos noted that he remembered telling a police officer that he had seen the complainant pull a gun from his waist. And, over appellant's objection, the State then offered, and the trial court admitted into evidence, a redacted audio recording of Ramos's statement to Sergeant Clopton.

Bobby Williams, Jr., appellant's cousin, testified that on May 30, 2009, Roderick Brooks, another cousin, picked him up in a white Buick to run errands. At some point, Brooks received a cellular telephone call, and the two drove to pick up appellant and Marquieth Jackson. Appellant then asked Brooks to drop him off at an apartment complex to meet some friends at around 12:30 or 1:00 p.m. After Brooks parked the car at the apartment complex, appellant and Jackson exited the car.

Approximately five minutes later, Williams heard a gunshot, and appellant ran back into the car, saying that someone "tried to rob him," "the guy shot him," and "he shot the guy." Although Williams wanted to take appellant to the closest hospital, Houston Northwest Memorial Hospital, appellant insisted on going to Doctors Hospital, which was further away. Brooks told Williams to lie to law enforcement officers and state that they had picked up appellant and Jackson from a nearby convenience store. Williams later told officers that he did not know that appellant had a gun with him until he got back into the car after the shooting.

Houston Police Department ("HPD") Officer T. Winn testified that on May 30, 2009, he was dispatched to check on appellant at Doctors Hospital because he was a shooting victim. Appellant told Winn that he was shot and robbed while walking to a store in the 6800 block of West Montgomery. Winn investigated the parking lot of the store, but he did not see any evidence that a shooting had occurred or find any witnesses.

Glenn Bowie testified that on May 13, 2009, he walked to a gas station near his apartment to buy food. On his way to the gas station, two black men punched him in the ribs and mouth, stole his wallet, and drove away in a blue Cadillac. Law enforcement officers later asked Bowie to identify two potential suspects, and Bowie identified appellant and Jackson as the men who had robbed him.

HPD Officer J. Salazar testified that on May 14, 2009, he received a call from Bowie claiming that he had seen the two men who had robbed him the previous day. Bowie told him that the men left in an "aqua blue" Cadillac with "front end damage." Salazar later pulled over a car matching Bowie's description. Appellant was driving the car, Jackson was in the passenger seat, and Chris Hines sat in the back seat. Bowie specifically identified appellant and Jackson as his assailants, and he later identified appellant from a photograph lineup.

Appellant testified that he had previously gotten into a fight with the complainant when he was in high school. On May 30, 2009, appellant and Jackson were walking back from a store

when Brooks offered to give them a ride to the Apache Springs apartment complex to sell marijuana. When they arrived, Brooks handed a gun to appellant. After appellant and Jackson sold marijuana in one of the apartments, appellant "locked eyes" with the complainant. Appellant kept walking, but the complainant and Jackson soon began fighting each other. The complainant pulled a gun and fired it at Jackson, but he missed and struck appellant instead. Appellant then fired his gun at the complainant, turned around, and ran away.

In his sixth issue, appellant argues that the trial court, during the punishment phase of trial, erred in admitting into evidence disciplinary records from the Harris County Jail, the Harris County Probation Department, and the Texas Youth Commission because the offense reports constituted hearsay and were not admissible under the business records exception to the hearsay rule. See Tex.R. Evid. 803(6). Appellant asserts that the admission of these records into evidence violated his United States Constitution Sixth Amendment right to confront the witnesses against him.

Held: Affirmed

Opinion: The State first argues that appellant waived his complaint regarding the admission of his disciplinary records because although appellant "objected to voluminous records with the jail, juvenile probation, and [Texas Youth Commission]," he "failed to specifically refer to material deemed objectionable in those records ." And the State asserts that "[m]uch of those records were relevant and admissible."

"[F]ailure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. This is true even though the error may concern a constitutional right of the defendant." Saldano v. State, 70 S.W.3d 873, 889 (Tex.Crim.App.2002) (footnote omitted); see Briggs v. State, 789 S.W.2d 918, 923 (Tex.Crim.App.1990) (noting constitutional error may be waived). General rules of preservation must be followed to preserve error on Confrontation Clause grounds. See Paredes v. State, 129 S.W.3d 530, 535 (Tex.Crim.App.2004) (holding Confrontation Clause argument not preserved because of failure to object on that ground in trial court); see also Reyna v. State, 168 S.W.3d 173, 176–77 (Tex.Crim.App.2005) (applying error preservation requirement with regard to Confrontation Clause argument).

When an exhibit contains both admissible and inadmissible material, the objection must specifically refer to the material deemed objectionable. See Brown v. State, 692 S.W.2d 497, 501 (Tex.Crim.App.1985); Maynard v. State, 685 S.W.2d 60, 64–65 (Tex .Crim.App.1985); Winners v. State, 616 S.W.2d 197, 202 (Tex.Crim.App.1981); Hernandez v. State, 599 S.W.2d 614, 617 (Tex.Crim.App.1980).

Here, at the punishment hearing, the State first sought to admit into evidence Exhibit 228, appellant's disciplinary records from his time in jail. Appellant objected,
Your Honor, for the record Exhibit 228 has statements about incidents, events that happened from other people, hearsay. Unless they are going to bring those witnesses in and I have the

opportunity to cross-examine[ ] them, I would object to any document that contains hearsay, what someone else said. It denies me confrontationalhearsay confrontational objection. So, anything that has to do with what anyone else says in the file, any statements made by someone else, or conclusions made by someone else, I would object to its admission.

The State responded, "These are all business records that are kept by the jail. They're an exception to hearsay for that purpose." The State asserted,

> In those incidents the officers are not referring to a detailed narrative of the actual facts that happened. If they break up a fight, they are not detailing what actually happened in the fight. They are just detailing the witnesses that were involved and the fact that there was an infraction. And furthermore, the statements made by the police officers in the reports are not made for the purpose of anticipated testimony or litigation which would be kind of at the heart of any confrontation clause issues. They are simply made just to document a disciplinary infraction by this inmate at the Harris County Jail. These are not things that—you know, statements given in anticipation of any kind of testimony to be given.
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> You know, we can call every single officer from every single incident, but we are going to be here until some time next week if we do that for the jail and for TYC and for juvenile probation. And I think that's at the heart of why these records come in as a business records exception, and, you know, why jail records and parole records, disciplinary records, come in as an exception to hearsay.(Emphasis added.)

The trial court overruled appellant's objection, stating, "These are business records and they have been on file for more than 10 days before trial. And they are held and recorded through regular business."

Although appellant was required to make a timely and specific objection in order to preserve his Confrontation Clause issue, no specific language is necessary to preserve a complaint for appellate review. Layton v. State, 280 S.W.3d 235, 239 (Tex.Crim.App.2009). All a party must do to preserve a complaint is to "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." Id. (quoting Lankston v. State, 827 S.W.2d 907, 909 (Tex.Crim.App.1992)).

Here, although appellant did not specifically object to certain page numbers of the complained-of documents, it is clear from the record that both the State and the trial court understood the nature of his objection. The State's response to his objection was specifically directed at the testimonial statements of officers and witnesses in the disciplinary records that described appellant's infractions in detail. And the State specifically argued that appellant was not entitled to confront those witnesses because of the "time" it would take to call each of them to testify. Moreover, the trial court, in overruling appellant's objection, clearly agreed with the

State. Accordingly, we hold that appellant has preserved his Confrontation Clause complaint for review in regard to Exhibit 228.

The State later offered into evidence Exhibits 234 through 238, appellant's probation records. Appellant again objected on "hearsay, confrontational" grounds, and the trial court overruled his objection. And the State offered into evidence Exhibit 240, appellant's records from the Texas Youth Commission. Appellant objected, stating, "The objection I had made previously, we feel it's hearsay, the confrontational issue." The trial court overruled the objection and admitted the exhibit into evidence, stating, "These are business records." Thus, in regard to Exhibits 234 through 238 and Exhibit 240, the trial court understood appellant's confrontation objection to be based on his previous argument as well. Accordingly, we hold that appellant has preserved his Confrontation Clause complaint for review in regard to Exhibits 234 through 238 and Exhibit 240.

The Confrontation Clause of the Sixth Amendment bars the admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004); Russeau v. State, 171 S.W.3d 871, 880 (Tex.Crim.App.2005). Generally speaking, a statement is "testimonial" if it is a solemn declaration made for the purpose of establishing some fact. Crawford, 541 U.S. at 51, 124 S.Ct. at 1364; Russeau, 171 S.W.3d at 880.

In Russeau, the State introduced into evidence at the defendant's punishment hearing "incident reports" from the Smith County Jail and "disciplinary reports" from the Texas Department of Criminal Justice. 171 S.W.3d at 880. The reports contained "statements which appeared to have been written by corrections officers and which purported to document, in the most detailed and graphic of terms, numerous and repeated disciplinary offenses" by the defendant when he was incarcerated. Id. The corrections officers also "relied upon their own observations or, in several instances, the observations of others." Id. Several of the written reports were read aloud to the jury during the punishment phase. Id.

The Texas Court of Criminal Appeals held that the reports contained inadmissible statements under the Confrontation Clause because they contained "testimonial statements" from corrections officers whom the defendant did not have the opportunity to cross-examine. Id. at 880–81. The court noted that the statements in the reports "amounted to unsworn, ex parte affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit." Id. at 881 (citing Crawford, 541 U.S. at 50, 124 S.Ct. at 1363).

In contrast, in Ford v. State, the State sought to introduce into evidence at a punishment hearing "inmate disciplinary grievance records from the Harris County Jail." 179 S.W.3d 203, 208 (Tex.App.-Houston [14th Dist.] 2005, pet. ref'd). The records were read into evidence as follows:

> February 5th, 2004, the defendant was charged fighting. Seven days loss of privileges, found guilty. October 15, 2003, extortion. June the 11th, 2003, extortion, ten days loss of privileges. April the 21st, 2003, assault on an inmate. April 21st, 2003, horseplaying, altercation, five days' loss of privileges. February the 24th, 1998, 25 days loss of privileges for fighting. February the 18th, 1998, fighting. February the 18th, 1998, fighting. And again February the 18th, fighting.Id.

The court contrasted the records with those at issue in Russeau, describing them as "sterile recitations of appellant's offenses and the punishments he received for those offenses." Id . Thus, the court concluded, the disciplinary records did not contain statements that could be considered testimonial in nature. Id.

Here, the documents contain several testimonial statements similar to those at issue in Russeau. For example, appellant's disciplinary records from the Harris County Sherriff's Office contained the following passage from Detention Officer M. Nguyen:

> I observed an unidentified inmate standing in the shower of cellblock 5D1 looking directly at me and appeared to be holding his penis. Deputy Gilbert and I ordered the inmate to get out of the shower and participate with the inmate count. At approximately 09:05 hours, while conducting another visual security check, I observed the inmate standing in the shower with his issued county T-shirt off and half of his issued county pants off looking directly at me while holding and stroking his penis.

Appellant's disciplinary records from the Texas Youth Commission contain similar testimonial statements. For example, one incident report contained a statement from Anita Hyman that reads as follows:

> [Appellant] was disrupting in Ms. Richmond's class. He was sent out to security. Youth refused to go. Student was counseled by staff and refused to comply. Mr. Henderson tried counseling with [appellant]. He refused all counseling. Youth then moved away from staff trying to run. I grabbed [appellant] to place him in a standing PRT. [Appellant] balled his fists up and swung at staff. Mr. Henderson took [appellant] and placed him into a part. At this time Mr. Spearman ... came to assist. I then went down and secured his legs.

This statement, along with several others from the Texas Youth Commission documents, was read aloud at the punishment hearing. Unlike the statements at issue in Ford, these statements contained subjective observations from witnesses who did not testify at trial.

Accordingly, we hold that the trial court abused its discretion in admitting the reports into evidence over appellant's hearsay and Confrontation Clause objections. See Russeau, 171 S .W.3d at 880–81; Grant v. State, 218 S.W.3d 225, 231 (Tex.App.-Houston [14th Dist.] 2007, pet. ref'd) (stating that "presence or absence of a subjective narration of events related to [the defendant's] guilt or innocence" establishes difference between testimonial and non-testimonial statements).

Although the trial court erred in admitting this evidence, we nevertheless will affirm if we determine beyond a reasonable doubt that the harm from the error did not contribute to the defendant's punishment. Russeau, 171 S.W.3d at 881. In determining whether error in admitting testimonial statements in violation of Crawford is harmless beyond a reasonable doubt, we consider: (1) the importance of the testimonial statements to the State's case; (2) whether the statements were cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the statements on material points; and (4) the overall strength of the State's case. Davis v. State, 203 S.W.3d 845, 852 (Tex.Crim.App.2006) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986)); Grant, 218 S.W.3d at 233. The error does not require reversal unless there is "a reasonable possibility that the Crawford error, within the context of the entire trial, 'moved the jury from a state of non-persuasion to one of persuasion' on a particular issue." Davis, 203 S.W.3d at 852–53 (quoting Wesbrook v. State, 29 S.W.3d 103, 119 (Tex.Crim.App.2000)).

Here, as in Russeau, the State spent a substantial amount of time at the punishment hearing introducing appellant's disciplinary records. With the exception of one witness, Officer T. Vaughn, who testified that appellant had threatened him during his incarceration, none of the many testimonial statements were cumulative of the State's other witnesses. Also as in Russeau, the State had a sponsoring witness read several of the testimonial statements off the records from the Texas Youth Commission. And, as in Russeau, the State made several references to appellant's disciplinary records during its closing argument. For example, at one point, the State argued,

> Even in a disciplined, supervised facility, this man could not in any form or fashion play by the rules, could not possibly keep himself together, keep himself in order.... And he couldn't control himself at the Texas Youth Commission.

Although the State did admit other evidence during the punishment phase, we cannot conclude beyond a reasonable doubt that the trial court's error did not contribute to appellant's punishment. See Russeau, 171 S.W.3d at 881. Accordingly, we hold that appellant did suffer harm from the trial court's error in admitting the complained-of disciplinary records.

We sustain appellant's sixth issue.

Conclusion: We affirm the judgment of the trial court as to appellant's conviction, reverse the judgment of the trial court as to appellant's punishment, and remand this cause for a new punishment hearing.