Motion for Rehearing Granted; Affirmed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-97-01324-CR

LONG NGUYEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 736,749

O P I N I O N O N R E H E A R I N G

On original submission, we held that the testimony of Martin Rivera and Joshua Thorne regarding statements made by "Lee," the complainant, shortly before his death were admissible under Rule 804 due to the unavailability of the declarant. On rehearing, Long correctly contends that our reliance on Rule 804 was misplaced because the statements at issue do not constitute (1) former testimony, (2) dying declarations, or (3) statements of personal or family history as required by the rule. *See* TEX. R. EVID. 804(b).

At trial, Long objected to the hearsay testimony of Martin and Thorne.[1] Thorne, who was Lee's roommate, testified that he overheard a phone conversation between Lee and Long in which Lee agreed to meet Long at a specific gas station. Thorne also testified that after the phone call ended, Lee and Tommy Fulcomer discussed meeting Long at the gas station. Martin testified that, while they were at the gas station, Long approached the driver's side of the van and instructed Lee to follow his car. As they drove away from the gas station, Lee said to his companions, "that was Long and Spanky." Long objected to the testimony, but the trial court overruled the objections and admitted the evidence. Long maintains that the "most harmful aspect of the erroneously admitted hearsay surrounds the identification of [him] in the commission of the capital murder."

Hearsay, defined as "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," is generally inadmissible. TEX. R. EVID. 801, 802. The trial court is the institutional arbiter of whether hearsay is admissible under exceptions to this general rule of exclusion. *See Coffin v. State*, 885 S.W.2d 140, 149 (Tex.Crim.App. 1994). Thus, whether hearsay testimony is properly admitted in evidence is a question for the trial court to resolve, reviewable on appeal only under an abuse of discretion standard. *See id.* Our role is limited to determining whether the record supports the trial court's ruling. *See id.*

One exception to the general rule barring hearsay is the "state of mind" exception, which allows testimony that is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health)." TEX. R. EVID. 803(3). Thorne's testimony regarding what Lee said both on the phone and later to Fulcomer about meeting Long at the gas station falls into this exception.

Lee's statements simply reflect his intention to meet Long at the gas station. *See Green v. State*, 839 S.W.2d 935, 942 (Tex. App.–Waco 1992, pet. ref'd) (holding that the state of mind exception to the hearsay rule allows statements admitted to prove declarant subsequently acted in accordance with that state

[1] In addition to disputing the admissibility of the hearsay statements, Long also complains the admission of the testimony resulted in collateral violations of his right to confront and cross-examine the witnesses against him as guaranteed by the United States and Texas constitutions.

of mind); *Norton v. State*, 771 S.W.2d 160, 166 (Tex. App.–Texarkana 1989, pet. ref'd) (wife's testimony that her husband told her his intent to go to the defendant's shop was admissible to show his state of mind); *see also Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892); *United States v. Sperling*, 726 F.2d 69, 74 (2nd Cir.1984).

Further, another exception to the general rule excluding hearsay is the "present sense impression" which allows testimony that is "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." TEX. R. EVID. 803(1). Martin's testimony about what Lee said in the van falls into this exception. Lee's statement "that was Long and Spanky" was no more than a present sense impression or explanation of an event that had occurred only seconds before. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) (holding that testimony was properly admitted under 803(1) when "the time lapse between the declarant's perception of the event and his statement to [the witness] was minimal").[2]

Accordingly, we find the trial court did not abuse its discretion in admitting the testimony at issue. Thus, while we adopt a different rationale from that articulated in our original opinion, we nevertheless affirm the judgment of the trial court.

/s/ Paul C. Murphy
Justice

Judgment rendered and Opinion filed May 25, 2000.

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[2] The State argues that Lee's statements to Long and Fulcomer were admissible as statements made by a co-conspirator. *See* TEX. R. EVID. 801(e)(2)(E) (defining statements made by "a co-conspirator of a party during the course and in furtherance of the conspiracy" to not be hearsay); TEX. R. EVID. 803(1). Without deciding whether this exemption is applicable, we note that a trial court's evidentiary ruling should not be disturbed on appeal if it is correct on any theory of law applicable to the case. *See Jones v. State*, 833 S.W.2d 118, 125 n.15 (Tex. Crim. App. 1992).

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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