Affirmed as Modified and Memorandum Opinion filed June 4, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00113-CR
NO. 14-19-00116-CR

RAUL AARON TADEO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 1522508 & 1522474

MEMORANDUM OPINION

In this appeal from two convictions arising out of the same criminal episode, appellant raises four issues in total, two of which challenge the trial court's admission of evidence, and two of which challenge the trial court's assessment of court costs. For the reasons explained below, we overrule the evidentiary issues, but we sustain the court costs issues.

BACKGROUND

After a night at the bar, appellant got behind the wheel of his truck, sped through a red light, and collided in the intersection with a small car, killing the other driver and injuring her passenger. When he realized what he had done, appellant exited his truck and ran away on foot.

A civilian chased after appellant, who eventually turned around. As he walked back towards the accident, appellant repeated the phrase, "Damn-it, my truck. Damn-it, my truck." At one point, appellant heard sirens approaching in the distance. Apparently fearing his arrest, appellant took a swing at the civilian and at one other man who had come to assist. A struggle ensued, with the two other men trying to keep appellant from fleeing.

Police officers eventually joined in the struggle. They had to tase appellant three times because he was belligerent, kicking, and refusing to cooperate. Once he was subdued, appellant was placed in the back of a patrol car in handcuffs.

Appellant was later taken to a police station, where he was asked to perform field sobriety tests in a video interview room. Appellant exhibited clues of intoxication on all three of the standardized tests.

Appellant refused to give his consent to have his blood drawn, so a warrant was obtained, and then he was taken to a hospital, where a phlebotomist collected a blood specimen. A subsequent analysis of that specimen showed that appellant had a blood alcohol concentration of 0.164 grams of alcohol per 100 milliliters of blood.

Appellant was then charged in separate indictments with intoxication manslaughter and with failing to stop and render aid. He pleaded not guilty to both offenses, but a jury found otherwise and assessed his punishment for each offense at nineteen years' imprisonment, to be served concurrently.

VIDEO STATEMENT

The defense moved to suppress a video that the prosecution planned on offering into evidence. The video was recorded by a dash cam, and it captured a verbal exchange in which an officer asked appellant if he was the driver of the truck that had just been totaled in the accident. Appellant answered in the affirmative, but because of overlapping radio traffic from other officers, his statement is very difficult to hear.

The defense argued that the video should be suppressed because appellant was already in custody, having just been handcuffed and tased, and he was being interrogated by the officer without having first received his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The prosecution responded that appellant had only been detained for officer safety, and that the officer lacked probable cause to arrest appellant until he stated that he was the driver.

In a hearing conducted outside the presence of the jury, the trial court considered testimony from the officer, who explained that when she had arrived on scene, she did not know what role appellant had played in the accident. She only knew that the accident had occurred. The officer testified that she asked her question just to determine what had happened.

The trial court credited the officer's testimony and ruled that appellant's statement was admissible. But because the statement established probable cause for an arrest and yet the officer did not follow up by reading appellant his rights under *Miranda*, the trial court ruled that the audio following appellant's statement would have to be redacted.

Appellant now challenges the admission of his video statement, arguing that the trial court erred by finding that the statement was the product of a detention,

instead of a custodial interrogation. For the sake of argument, we will assume without deciding that the trial court's ruling was erroneous and proceed to a harm analysis for constitutional error. *See Jones v. State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003) (using the harm standard for constitutional error to review the erroneous admission of a statement taken in violation of *Miranda*).

In a case involving constitutional error, an appellate court must reverse the judgment of conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction. *See* Tex. R. App. P. 44.2(a). When performing this harm analysis, the question is not whether the outcome of the trial was proper, or whether the verdict was supported by the evidence. *See Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). Instead, the question is whether the constitutional error was actually a contributing factor in the jury's deliberations. *Id.* To answer that question, the appellate court may consider several factors, including (1) whether the erroneously admitted evidence was important to the prosecution's case, (2) whether the erroneously admitted evidence was cumulative of other evidence, (3) whether there was evidence to corroborate or contradict the erroneously admitted evidence on material points, (4) whether the erroneously admitted evidence was emphasized by the prosecution, (5) how weighty the jury may have found the erroneously admitted evidence, and (6) the overall strength of the prosecution's case. *Id.*

Focusing on just the properly admitted evidence, we conclude that there was overwhelming proof that appellant was the driver. Surveillance cameras from nearby buildings captured footage of the accident, and the footage showed a lone figure running away from the truck after the accident. Testimony from the civilian established that this figure was appellant, who had to be chased down. The civilian

even described how appellant had agonized over the loss of his truck: "Damn-it, my truck. Damn-it, my truck."

Other circumstantial evidence included a vehicle registration notice that was recovered from the truck. Appellant's name was on that notice.

Also, the evidence established that appellant could not have been a passenger. Black box data from the truck showed that the passenger seatbelt was unbuckled at the time of the collision and that there was insufficient weight on top of the passenger seat to trigger an airbag sensor. That data was corroborated by photographs showing that only the driver's airbag had deployed.

Appellant's video statement that he had been driving the truck was cumulative of this other evidence. Even though the prosecution referenced this statement in closing arguments, the prosecution also conceded that the statement was "kind of hard to hear," which supports a conclusion that the statement was not likely to move the jury from a state of non-persuasion to a state of persuasion.

Having considered the entire record, we conclude beyond a reasonable doubt that the erroneous admission of appellant's video statement, if any, did not contribute to his conviction.

TOXICOLOGY REPORT

The arresting officer testified that, after she obtained a warrant, she transported appellant to the hospital, where a blood specimen was collected by a certified phlebotomist. The phlebotomist did not testify during appellant's trial, but the officer described the procedures that were taken by the phlebotomist in collecting appellant's blood specimen.

Following the officer's testimony, the prosecution offered into evidence the toxicology report showing the alcohol concentration of appellant's blood, using a

forensic toxicologist as the sponsoring witness. The defense objected to the report on the basis that there was insufficient evidence regarding the phlebotomist's qualifications. This objection invoked a provision under Chapter 724 of the Texas Transportation Code, which requires blood specimens to be taken by a certain type of professional, including "a qualified technician." *See* Tex. Transp. Code § 724.017(a)(2).

The trial court overruled the objection and admitted the toxicology report. Appellant now challenges this ruling, which we review for an abuse of discretion. *See Sexton v. State*, 93 S.W.3d 96, 99 (Tex. Crim. App. 2002).

A phlebotomist employed by a hospital is a qualified technician for purposes of Chapter 724. *See Krause v. State*, 405 S.W.3d 82, 85–86 (Tex. Crim. App. 2013). Assuming for the sake of argument that there needed to be evidence of this particular phlebotomist's qualifications before the trial court could admit the toxicology report, the trial court's error would be subject to a harm analysis for nonconstitutional error. *See Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). Nonconstitutional error must be disregarded unless it affects a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when the error has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error had no influence or only a slight effect on the verdict, the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

The toxicology report was offered into evidence because it was probative of whether appellant was intoxicated, which is an elemental fact in a prosecution for intoxication manslaughter. *See* Tex. Penal Code § 49.08(a)(2). But even before the toxicology report was admitted, there was already overwhelming evidence of appellant's intoxication. This evidence included the following facts: (1) he was

drinking at a bar in the hours before the accident; (2) he greatly exceeded the speed limit at the time of the accident; (3) he had an open container in his truck after the accident that was still cold to the touch; (4) he had bloodshot, glassy eyes; (5) he was slurring his speech; (6) he was unsteady on his feet; (7) he had a strong odor of alcohol; and (8) he exhibited clues of intoxication on all three of his field sobriety tests. Because this evidence already provided the jury with a substantial basis for finding that appellant was intoxicated, we conclude that the toxicology report had, at most, just a slight effect on the jury's verdict. Therefore, any error in the admission of that report was harmless.

EMS TRAUMA FUND FEE

The trial court assessed a $100 court cost, which was described in the bill of costs as the "EMS Trauma Fund." This cost was imposed pursuant to Former Article 102.0185 of the Texas Code of Criminal Procedure, which mandates the cost upon the conviction of certain intoxication offenses, including intoxication manslaughter. *See* Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 1213, § 4, 2003 Tex. Gen. Laws 3440, 3442.[1]

Appellant argues that the court cost is facially unconstitutional because the former statute requires courts to operate as tax collectors, in violation of the separation of powers. Appellant further argues that the court cost cannot be supported as a fee for a legitimate criminal justice purpose because the Legislature directed the money collected from the court costs to be used for a much broader purpose. *See* Tex. Health & Safety Code § 773.122(a) (providing that the money collected from the court costs would be eligible "to fund county and regional

[1] The Legislature recently amended this statute so that the $100 is assessed as a "fine" instead of a "cost." *See* Act effective Jan. 1, 2020, 86th Leg., R.S., ch. 1352, § 2.38. Because appellant's case involves an application of the former statute only, we express no opinion as to the validity of the amended statute.

emergency medical services, designated trauma facilities, and trauma care systems"). These arguments are supported by *Casas v. State*, 524 S.W.3d 921, 925–27 (Tex. App.—Fort Worth 2017, no pet.), which held that the former statute is facially unconstitutional.

The State responds in acquiescence that the former statute is facially unconstitutional under the current case law set forth by the Court of Criminal Appeals because the former statute does not reimburse the criminal justice system for expenses incurred in connection with a defendant's particular criminal prosecution, nor does it direct the payment of funds to offset future criminal justice costs. *See Allen v. State*, No. PD-1042-18, — S.W.3d —, 2019 WL 6139077, at *6 (Tex. Crim. App. Nov. 20, 2019). The State agrees that we are bound to follow this case law, even though the State believes that the case law was "incorrectly decided" and the State intends to challenge it in subsequent proceedings.[2]

Following *Allen* and *Casas*, we hold that the former statue is facially unconstitutional, which means that the $100 EMS Trauma Fund fee must be deleted from the bill of costs.

DUPLICATIVE COURT COSTS

The trial court issued two separate bills of costs—one for the intoxication manslaughter case, and the other for the failure to stop and render aid case. The bills of costs reflect that the following fees were assessed in both cases, for a sum of $234:

- Commitments ($5)
- Release ($5)

[2] The State Prosecuting Attorney has already filed petitions for discretionary review in *Dove v. State*, No. PD-0156-20 (filed Feb. 25, 2020), and *Deaver v. State*, No. PD-0197-20 (filed Mar. 4, 2020), both of which involve the constitutionality of Former Article 102.0185. As of the date of this opinion, both petitions remain pending.

- District Clerk's Fee ($40)
- Security Fee ($5)
- Consolidated Court Cost ($133)
- Jury Reimbursement Fee ($4)
- DC Records Preservation ($25)
- Support of Indg Defense ($2)
- Support Judiciary Fee08 ($6)
- Court Technology Fee ($4)
- Electronic Filing State ($5)

Because these fees were assessed in cases that were tried together, appellant argues that they are duplicative and must be deleted from one of the bills of costs. *See* Tex. Code Crim. Proc. art. 102.073(a) ("In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant."). The State has not responded to this issue.

We agree with appellant that the duplicative costs must be deleted. *See Guerra v. State*, 547 S.W.3d 445, 446–47 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (deleting duplicative costs pursuant to Article 102.073(a)).

CONCLUSION

We modify the judgment in the intoxication manslaughter case by deleting the $100 EMS Trauma Fund fee, and we modify the judgment in the failure to stop and render aid case by deleting $234 in duplicative fees. The trial court's judgments are affirmed as so modified.

/s/ Tracy Christopher

Tracy Christopher
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.

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