Affirmed and Memorandum Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00030-CR

FLOYD EARL SHERWOOD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 17-05339-CRF-272

M E M O R A N D U M O P I N I O N

Appellant Floyd Earl Sherwood pleaded guilty to the first-degree felony offense of aggravated assault family violence causing serious bodily injury with a deadly weapon. *See* Tex. Penal Code Ann. § 22.02(a), (b)(1). The trial court assessed punishment at 45 years' confinement. Appellant appeals the trial court's final judgment and asserts the trial court erred by admitting hearsay testimony at

his punishment hearing. For the reasons below, we affirm.[1]

BACKGROUND

In the driveway in front of their residence, Appellant stabbed Complainant Coriel Riley numerous times in the abdomen, back, and arm. Complainant was transported to the hospital with life-threatening injuries. Complainant underwent emergency surgery and remained in the hospital for a week.

Appellant was arrested and charged with aggravated assault family violence causing serious bodily injury with a deadly weapon. Appellant pleaded guilty and elected to have the trial court assess punishment. The State filed a notice of enhancement describing two prior convictions the State intended to use to elevate Appellant's punishment:

> Enhancement Paragraph One: and it is further presented in and to said Court that, prior to the commission of the aforesaid offense, hereafter styled the primary offense, on the 30th day of May 1991 in the 272nd District Court of Brazos County, Texas, in cause number, 18012-272, the defendant was convicted of the felony offense of Aggravated Assault on a Public Servant.
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> Enhancement Paragraph Two: and it is further presented in and to said Court that, prior to the commission of the aforesaid offense, and after the conviction in Cause number 18012-272 was final, the defendant committed the felony offense of Injury to a Child and was convicted on the 8th day of January, 1996 in the 272nd District Court of Brazos County, Texas, in cause number 23,657-272.

Appellant pleaded "not true" to the first offense and "true" to the second offense.[2]

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[1] This case was transferred to this court from the Tenth Court of Appeals by Texas Supreme Court Transfer Order. Because of the transfer, we must decide the case in accordance with the precedent of the Tenth Court of Appeals if our decision otherwise would have been inconsistent with that court's precedent. *See* Tex. R. App. P. 41.3.

[2] In pleading "not true" to the first offense, Appellant's counsel explained that Appellant was not asserting he did not commit the offense. Rather, Appellant's "not true" response was based on his contention that the punishment assessed for the offense reduced the offense from a

Complainant testified at Appellant's punishment hearing and described the events precipitating the stabbing. Complainant shared a house with Appellant and said the electricity in their residence would frequently get knocked out. When this occurred, Complainant said he would flip the switch in the main breaker box to restore the power; the main breaker box was located in Appellant's bedroom. According to Complainant, Appellant kept his bedroom locked and gave one of the keys to Complainant so Complainant could access the breaker box.

On the day of the stabbing, Complainant said the power went out and he entered Appellant's bedroom to access the breaker box — Appellant was not home at the time. Complainant said that, when he opened the door to Appellant's bedroom, the door's side panel came loose. Appellant returned home and became angry when he saw the damage to the doorframe. Appellant called the police and the police responded to the residence, but they did not arrest anyone at the scene.

Complainant left and returned to the home later; he said Appellant was drunk and "still mad about the door." Complainant was outside talking to the landlord in the driveway when Appellant "[c]ame in from behind" and stabbed him several times in the abdomen, back, and arm. Complainant fell to the ground and a neighbor came up and kicked Appellant off of Complainant.

Officer Bryan Hovey with the Bryan Police Department responded to Appellant's and Complainant's residence twice on the day of the stabbing. When he responded to Appellant's initial call, Officer Hovey said Appellant "was upset at [Complainant] for entering his room and causing damage to the doorframe." Although Appellant wanted Officer Hovey to arrest Complainant for breaking and entering, Officer Hovey declined to arrest Complainant because Complainant had a key and permission to enter Appellant's room to reset the breaker box. Officer

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felony to a Class A misdemeanor.

Hovey recalled that, when he was leaving the residence, Appellant "made a comment that if [the police] didn't take care of it, that he would handle it himself."

When Officer Hovey returned to the residence that evening, he saw Complainant lying in the street in a pool of blood. Officer Hovey testified that Appellant came outside the residence, put his hands behind his back, and said, "I did it. You got me." Appellant told Officer Hovey the knife he used to stab Complainant was in his back pocket. According to Officer Hovey, Appellant kept repeating, "Didn't I tell you you'd be back out?" After Appellant was transported to jail, he asked Officer Hovey if Complainant was dead and said that, if Complainant was not dead, "he would finish the job."

Several witnesses testified about other extraneous crimes or bad acts committed by Appellant:

- Jereme Williams, Appellant's step-son. Describing the incidents precipitating Appellant's 1995 conviction for injury to a child, Williams said Appellant whipped him on his arms and legs with an extension cord.
- Mike Johse, an investigator with the Brazos County district attorney's office. Johse met with Williams a week before Appellant's punishment hearing. Johse testified about statements Williams made regarding his relationship with Appellant and Appellant's relationship with his mother.
- Joyce Gaines, another resident at the residence Appellant shared with Complainant. On the day of the stabbing, Gaines said Appellant also tried to set fire to the home.
- Albert Neveu, a detention officer at the Brazos County jail. Describing an incident that occurred in April 2018, Neveu said he and another inmate went to Appellant's cell to retrieve a spray bottle. Neveu said Appellant started "cursing and threatening," pushed past Neveu, and grabbed the inmate. Appellant struck the inmate several times in the face.
- Michael Matott, security sergeant at the Brazos County jail. Matott

testified regarding two of Appellant's ten disciplinary violations that occurred at the Brazos County Jail. Both incidents occurred in February 2018. In the first incident, Appellant pursued another inmate in the dayroom and struck him four times with an object wrapped in a towel. In the second incident, Appellant jammed the locking mechanism of his cell door, preventing it from locking.

- Morris Carrillo, a jail supervisor with the College Station Police Department. In October 2005, Carrillo saw Appellant becoming angry while going through the jail's booking process. Carrillo said Appellant started using profanity and making threats, eventually shoving one of the jailers. A fight started and the jailers took Appellant to the ground and pepper sprayed him.
- Jamison Allen, a police officer with the City of Georgetown. In January 2005, Allen responded to a call involving "an assault in progress involving knives." The victim (Appellant's brother) had a knife wound to his stomach. Allen arrested Appellant for family violence.
- Steven Tyler, formerly a police officer with the Bryan Police Department. Tyler testified about an incident that occurred in 1988 when he responded to a call reporting a fight in progress. When he was arresting Appellant, Appellant bit Tyler on the arm.
- Nesi Lillard, a therapist. During a therapy session with Lillard, Appellant said he was going to get a gun and go over to the Housing and Urban Development office. Lillard reported Appellant's threat to the police.

Appellant also testified at his punishment hearing and discussed the stabbing. Appellant said Complainant swung at him first; Appellant saw Complainant reach in his pocket and get something in his hand. Appellant took out his knife and stabbed Complainant.

After the parties rested, the State assessed punishment at 45 years' confinement. Appellant timely appealed.

ANALYSIS

Appellant's issue on appeal focuses on the testimony from two witnesses:

Jereme Williams and Michael Johse. Testifying at Appellant's punishment hearing, Williams said Appellant whipped him on his arms and legs with an extension cord, which precipitated Appellant's 1995 conviction for injury to a child. Williams said the incident occurred only once; Williams also stated that he never saw Appellant hit his mother.

Testifying after Williams, Johse described statements Williams made at their meeting a week before Appellant's punishment hearing. According to Johse, Williams stated to Johse that Appellant (1) regularly whipped him, first with a belt and later with an extension cord; and (2) hit his mother on one occasion. Appellant argues Johse's testimony regarding Williams's prior statements constitutes impermissible hearsay.[3]

Hearsay is "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." Tex. R. Evid. 801(d). Hearsay is not admissible except as otherwise provided by the Rules or by statute. Tex. R. Evid. 802. We review the trial court's decision to admit or exclude hearsay evidence under an abuse of discretion standard. *See Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008).

Here, the trial court's admission of Johse's testimony regarding Williams's prior statements constitutes an abuse of discretion. Falling squarely within the definition of hearsay, Johse testified about Williams's out of court statements and this testimony was offered into evidence to prove the truth of the matter asserted, *i.e.*, that Appellant regularly whipped Williams (first with a belt and later with an extension cord) and that Appellant hit Williams's mother on one occasion. *See* Tex. R. Evid. 801(d); *see, e.g., Barnes v. State*, 165 S.W.3d 75, 79-81 (Tex.

[3] Appellant raised this objection at the punishment hearing and received a ruling, thereby preserving the issue for appellate review. *See* Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a).

App.—Austin 2005, no pet.) (witness's testimony about statements victim made at pretrial interview constituted hearsay); *Rodriguez v. State*, 280 S.W.3d 288, 289-90 (Tex. App.—Amarillo 2007, no pet.) (same).

Testimony may fall within an exception to the hearsay rule where, as here, the declarant testifies at trial. *See* Tex. R. Evid. 613(a), 801(e)(1). But these exceptions do not apply to Johse's testimony about Williams's prior statements.

Texas Rule of Evidence 613(a) permits extrinsic evidence regarding a witness's prior inconsistent statement. *Id*. 613(a)(4). This extrinsic evidence is only admissible if "the witness is first examined about the statement and fails to unequivocally admit making the statement." *Id*. Here, the State acknowledges in its appellate brief that this foundational requirement was not met. Therefore, Johse's testimony regarding Williams's prior statements was not admissible under Rule 613(a) as extrinsic evidence of a witness's prior inconsistent statement.

Texas Rule of Evidence 801(e)(1) provides that a declarant-witness's prior inconsistent statement is not hearsay if, in a criminal case, the statement "was given under penalty of perjury at a trial, hearing, or other proceeding — except a grand jury proceeding — or in a deposition". *Id*. 801(e)(1). Here, this requirement was not met: Johse testified that Williams made the statements in question at a "meeting" Johse had with Williams at Williams's apartment. The evidence does not show Williams's statements at this meeting were made under penalty of perjury. Accordingly, Johse's testimony regarding the statements Williams made at the meeting were not admissible under Rule 801(e)(1).

We conclude the trial court erred by admitting Johse's testimony about Williams's prior statements and proceed to analyze the harm stemming from this error. *See* Tex. R. App. P. 44.2. We review the erroneous admission of evidence for non-constitutional error. *See Garcia v. State*, 126 S.W.3d 921, 927-28 (Tex.

Crim. App. 2004) (improper admission of hearsay evidence is non-constitutional error); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998) (same). Non-constitutional error does not require reversal unless it affects the defendant's substantial rights and causes a substantial and injurious effect or influence on the factfinder's determination. *See* Tex. R. App. P. 44.2(b); *see also Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). In conducting a harm analysis, we examine everything in the record, including any testimony or physical evidence; the nature of the evidence supporting the determination; the character of the alleged error and how it might be considered with other evidence in the case; closing arguments; and whether the State emphasized the error. *Motilla v. State*, 78 S.W.3d 352, 355-56 (Tex. Crim. App. 2002).

Applying this analysis, we conclude that the admission of Johse's hearsay testimony was harmless error. First, with respect to Johse's testimony that Appellant regularly whipped Williams, similar testimony was heard from other witnesses. *See Williams v. State*, No. 10-17-00274-CR, 2018 WL 2142724, at *1 (Tex. App.—Waco May 9, 2018, no pet.) (mem. op., not designated for publication") ("improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial"). Describing the incident preceding the conviction, Williams said he had injuries on his arms and legs after Appellant whipped him with an extension cord. Appellant also pleaded "true" to the enhancement paragraph describing the injury to a child conviction and, during his testimony, said he "hit" Williams "about three times" on that occasion.

Johse's testimony that Appellant "regularly whipped" Williams conflicted with Williams's and Appellant's statements that the whipping occurred on only one occasion. But this inconsistency does not give rise to non-constitutional error

where similar evidence on this point indicated that Appellant, on at least one occasion, whipped Williams with an extension cord and was convicted of the offense of injury to a child.

Moreover, considering Johse's testimony in conjunction with the other evidence presented at the punishment hearing shows the challenged testimony could, at most, have had only a slight effect on the trial court's sentencing determination. Several witnesses testified regarding numerous acts of violence involving Appellant. Matott testified that Appellant struck an inmate while in jail and Neveu testified about a similar incident where Appellant pushed past him to strike another inmate. Carrillo testified about an incident where Appellant started threatening jailers during the booking process — an incident that ended with a fight and Appellant getting pepper sprayed. Allen testified about a family violence incident he responded to where Appellant was arrested for stabbing his brother in the stomach. These — as well as the other incidents the witnesses described — would significantly temper the challenged testimony's influence on the trial court's sentencing determination.

Likewise, the evidence pertaining to the underlying offense would lessen any improper effects. Officer Hovey testified that, while he was leaving Appellant's residence after the first call, Appellant "made a comment that if [the police] didn't take care of it, that he would handle it himself." Appellant proceeded to stab Complainant numerous times in the abdomen, back, and arm. After Officer Hovey returned to the residence, Appellant told Officer Hovey, "Didn't I tell you you'd be back out?" At jail, Appellant told Officer Hovey that, if Complainant was not dead, Appellant "would finish the job." Appellant's expressed intent to harm Complainant, the actions he took to follow through with that threat, and his apparent lack of remorse (as well as his additional threat) would

mitigate any effects from Johse's testimony regarding isolated incidents involving Williams and Williams's mother.

Finally, the State did not emphasize the challenged testimony in its closing argument. Instead, the State focused on the evidence of the underlying offense and the other acts of violence the witnesses described — making only passing mention of Johse's challenged statements.

We conclude that the erroneous admission of Johse's hearsay testimony did not give rise to non-constitutional error and did not have a substantial and injurious effect or influence on the trial court's punishment assessment. *See* Tex. R. App. P. 44.2(b). Accordingly, we overrule Appellant's sole issue.

CONCLUSION

We affirm the trial court's final judgment.

/s/ Meagan Hassan
Justice

Panel consists of Justices Zimmerer, Spain, and Hassan.
Do Not Publish – Tex. R. App. P. 47.2(b).