

Opinion issued July 21, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-18-00974-CR

JOSE RIVERA GARCIA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1425969

MEMORANDUM OPINION

After a jury convicted appellant, Jose Rivera Garcia, of the offense of possession with intent to deliver a controlled substance, namely, methamphetamine, weighing at least 400 grams¹ the trial court sentenced him to confinement for 15

¹ See TEX. HEALTH & SAFETY CODE §§ 481.102; 481.112(e).

years. Appellant raises two issues on appeal. First, appellant contends that the trial court abused its discretion in denying his request for disclosure of the identity of the confidential informant. Second, appellant contends that the trial court abused its discretion by admitting testimony that he knowingly possessed methamphetamine.

We affirm.

Background

Houston Police Department Officer D. Rosales testified that, on the evening of March 4, 2014, police officers set up surveillance at Garcia's Tires and Wheels in response to information provided by a confidential informant. Officer Rosales observed a silver Nissan Xterra arrive at the tire shop and appellant get out. A few minutes later, Mario Solorzano arrived at the tire shop in a gray Pontiac and parked the Pontiac directly behind the Xterra. Appellant opened the rear driver's side door of the Xterra, and Solorzano reached into the Xterra and removed a plastic bag that contained a black block-shaped object. Solorzano placed the package into the Pontiac, and he and appellant got into their respective vehicles and drove off.

Police officers followed Solorzano to a house near the tire shop, where he got out of the Pontiac without the package and entered the house. Shortly thereafter, Solorzano and his mother left the house, got into the Pontiac, and drove to a strip center. Police followed Solorzano and his mother to the strip center, approached the Pontiac, and obtained consent from Solorzano's mother to search the vehicle. During

the search, officers discovered a speaker box on the backseat of the passenger's side, which matched the description of the item that Officer Rosales observed Solorzano remove from appellant's Xterra at the tire shop. Officer Rosales testified that the speaker box contained methamphetamine, and Mona Colca, a forensic analyst with the Houston Forensic Science Center, testified the methamphetamine weighed 889.93 grams.

Solorzano also testified at trial that appellant approached him and asked if he knew anyone who would be interested in buying methamphetamine. Solorzano arranged for a buyer of the methamphetamine and, on the day of the incident, appellant told Solorzano to come to the tire shop to pick up the methamphetamine. When Solorzano arrived, appellant opened the door of the Xterra and told Solorzano that the package containing the methamphetamine was inside the speaker box. Solorzano took the package out of the Xterra and drove away. He then went home and called the buyer to arrange a meeting spot to drop off the methamphetamine. Solorzano testified that he had his mother drive him to the meeting spot, and that, once there, they were approached by officers who searched the vehicle and discovered the methamphetamine. Solorzano further testified that he was "the middle person" between appellant (his supplier) and the buyer. He also testified appellant told him that the package of methamphetamine was inside the speaker box

and that, based on all the circumstances, he believed appellant knew that the speaker box contained methamphetamine.

Before trial, appellant filed a motion to require disclosure of the identity of the confidential informant. The trial court conducted a hearing on appellant's motion and explained that it had met with Officer Rosales in camera. The trial court stated that it had asked the questions provided in appellant's supplemental memorandum in support of his motion to disclose and that it had concluded "that the confidential informant was not present at the scene on March 4th, 2014 and therefore [was] not required to be disclosed." Appellant argued that the informant's identity would still be required to be disclosed if he participated in the offense, that the informant did participate in the offense by setting up the narcotics transaction, and that such was enough for the trial court to require the disclosure of the informant's identity. The trial court found that "while the informant did set up a narcotics transaction[,] the informant was not present at the time Mr. Garcia allegedly possessed the methamphetamine nor was the informant present at the time the officers recovered the methamphetamine." The trial court denied appellant's motion.

Disclosure of Identity of Confidential Informant

In his first issue, appellant argues that the trial court abused its discretion in denying his request for disclosure of the identity of the confidential informant. Appellant contends that because the informant "set up the transaction that is the basis

of this prosecution[,] [h]e possessed personal knowledge about the offense that was necessary to a fair determination of guilt or innocence.”

A. Standard of Review

We review the trial court’s ruling on a motion to disclose the identity of a confidential informant under an abuse-of-discretion standard. *Blake v. State*, 125 S.W.3d 717, 728 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Under this standard, we affirm the judgment unless the trial court’s decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id.*

B. Applicable Law

Generally, the State has a privilege to withhold the identity of any person who provides information relating to, or assisting in, the investigation of a possible crime. TEX. R. EVID. 508(a). If it appears from the evidence in the case, or from some other showing by a party, that an informant may be able to give testimony necessary to a fair determination of a material issue on guilt or innocence, and the State invokes the privilege, the trial court must give the State an opportunity to show in camera facts relevant to determining whether the informant can, in fact, supply that testimony. TEX. R. EVID. 508(c)(2). A party requesting disclosure under Rule 508 has the threshold burden to demonstrate that the informant’s identity must be disclosed. *Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991). Before a

court orders the identity of the informant to be revealed, the informant's potential testimony must be shown to significantly aid the defendant—mere conjecture about possible relevance is insufficient to meet the threshold burden. *Id.* A party seeking disclosure must make a plausible showing of how the informant's information may be important. *See Southwell v. State*, 80 S.W.3d 647, 650 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Only after a defendant makes a plausible showing is the trial court required to hold an in-camera hearing to determine whether disclosure is necessary. *Olivarez v. State*, 171 S.W.3d 283, 292 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

When it is shown that the informant was an eyewitness to an alleged offense, then the informant can give testimony necessary to a fair determination of the issues of guilt or innocence. *Anderson v. State*, 817 S.W.2d 69, 72 (Tex. Crim. App. 1991). But, if the informant's information was used only to establish probable cause for a search warrant or if the informant merely provided information that led police to investigate a potential offense and the informant was neither a participant in the offense for which the accused was charged nor present when a search warrant was executed or an arrest was made, then the identity of the informant need not be disclosed because the testimony is not essential to a fair determination of guilt or innocence. *Ford v. State*, 179 S.W.3d 203, 210 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

C. Analysis

Appellant argues that because the informant in this case set up the narcotics transaction, the informant possessed personal knowledge about the offense that was necessary to a fair determination of guilt or innocence. Relying on *Bernard v. State*, 566 S.W.2d 575, 578 (Tex. Crim. App. 1978), appellant argues that the presence of the informant was not the critical issue in this case because “[a]n informer who makes the arrangements for the delivery of a controlled substance is in the unique position of being able to shed light on whether the appellant knowingly committed the act with which he was charged.”

We have reviewed the sealed record from the in-camera hearing at which Officer Rosales described the facts related to the confidential informant. It is evident from Officer Rosales’s testimony at that hearing that the informant was involved in arranging the narcotics transaction to some extent, but that the informant did not have any contact with appellant. In fact, the informant did not know appellant. Officer Rosales’s testimony further demonstrated that the informant did not participate in, and was not present for, the exchange between Solorzano and appellant. The informant did, however, provide information to police that led police to believe that the narcotics exchange might take place at Garcia’s Tire Shop, which resulted in officers placing the tire shop under surveillance.

Contrary to appellant's claims, the fact that an informant had some involvement in arranging a narcotics transaction does not automatically mean that the informant's identity must be disclosed. We conclude that *Bernard*, on which appellant relies, is distinguishable. There, the facts surrounding the narcotics transaction were hotly contested. The State put on evidence that a confidential informant had called the defendant and arranged for the undercover police officer to come by the defendant's residence that evening. *Bernard*, 566 S.W.2d at 576. Thus, the informant had direct contact with the defendant. In contrast to the State's evidence, the defendant testified that he had left his residence on the day in question in the morning and did not return until that night, after the alleged narcotics transaction took place. *Id.* at 577. In holding that the informant's identity should have been disclosed, the Court of Criminal Appeals found that the informant "was in a unique position to confirm or deny he had made such arrangements, to shed light on the [defendant's] defense of alibi, and on whether appellant knowingly committed the act charged." 566 S.W.2d at 578. In contrast to *Bernard*, wherein the informant had direct contact with the defendant, here, the informant had no contact with appellant (and, in fact, did not know him), was not present during the exchange between Solorzano and appellant, and could not have provided information as to whether appellant knowingly possessed the methamphetamine.

Instead, we conclude that the facts herein are more in line with those cases in which this court has previously held that the disclosure of the informant's identity was not required, even though the informant set up the narcotics transaction, because the informant did not witness or otherwise participate in the offense. For example, in *Boykin v. State*, No. 01-00-00678-CR, 2002 WL 188462, at *1 (Tex. App.—Houston [1st Dist.] Feb. 7, 2002, no pet.) (not designated for publication), the confidential informant set up a narcotics transaction between the defendant and an undercover police officer, drove the undercover officer to the location of transaction, identified the defendant to the officer, and then left the scene. This court held that, because the informant was not an eyewitness to the transaction, the informant's testimony would not have been necessary to determination of the defendant's guilt or innocence. *See also Cannady v. State*, No. 01-03-00466-CR, 2004 WL 1119951, at *2–3 (Tex. App.—Houston [1st Dist.] May 20, 2004, no pet.) (mem. op., not designated for publication) (holding trial court did not abuse its discretion by denying motion to disclose when informant called friend of defendant to set up meeting place for narcotics transaction and drove police officer to location where transaction was to occur, but stayed in vehicle and did not see any portion of transaction between officer and defendant).

In the instant case, the trial court denied the motion to disclose because the informant was not present at the scene, *i.e.*, not an eyewitness to the offense. Being

an eyewitness to the offense is one reason, but not the only reason, why an informant may be able to offer testimony necessary to a fair determination of the issues of guilt or innocence. Here, the facts demonstrate that not only was the informant not an eyewitness to the offense, but he also did not participate in the offense and was not present during the exchange between appellant and Solorzano. Moreover, the informant did not have any contact with appellant and could not provide testimony as to whether appellant knowingly possessed the methamphetamine for which he was charged. Thus, we hold that the trial court did not abuse its discretion in ruling that the State was not required to disclose the identity of the confidential informant because the informant's testimony was not essential to a fair determination of guilt or innocence. *See Boykin*, 2002 WL 188462, at *1; *Cannady*, 2004 WL 1119951, at *2–3.

We overrule appellant's first issue.

Testimony Regarding Appellant's Mental State

In his second issue, appellant argues that the trial court abused its discretion by overruling his objection to the following testimony from Officer Rosales that appellant knowingly possessed methamphetamine:

STATE: Officer Rosales based on your training and experience when someone is in possession of approximately \$90,000.00 of narcotics would they have knowledge of what they had?

DEFENSE COUNSEL: Same objection Your Honor speculation.

THE COURT: Overruled.

OFFICER ROSALES: Yes.

Appellant contends this testimony was inadmissible because it went to an ultimate issue to be decided by a jury and was not necessary to a clear understanding of the evidence before the jury.

A. Standard of Review

We review a trial court's decision to exclude evidence under an abuse of discretion standard. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Id.*

B. Applicable Law

Testimony of a defendant's culpable mental state is a fact question for the jury's determination. *Taylor v. State*, 774 S.W.2d 31, 34 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). For lay opinion testimony about a culpable mental state to be admissible, the trial court must determine whether the opinion is (1) rationally based on perceptions of the witness and (2) helpful to a clear understanding of the witness's testimony or to the determination of a fact issue. TEX. R. EVID. 701; *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997). Generally, if the trial court determines that lay witness opinion testimony is an attempt to communicate the subjective mental state of the actor, the trial court should exclude the testimony

because it could never be based on personal knowledge. *Fairow*, 943 S.W.2d at 899–900. However, such an opinion will satisfy the personal knowledge requirement for lay witnesses if the testimony is an interpretation of the witness’s objective perception of events based on his own senses or experience. *Id.* at 899.

The opinion must also be helpful to the trier-of-fact either to understand the witness’s testimony or to determine a fact issue. *Id.* at 900. The trial court considers factors to make this determination, including whether the testimony is overly confusing or complicated, and the degree to which the witness is able to convey the events from which the opinion is drawn. *Id.* The helpfulness of an opinion will be determined by the facts of the case. *Id.*

C. Analysis

Appellant argues that Officer Rosales’s testimony that appellant knowingly possessed the methamphetamine hidden within the speaker box was inadmissible because it was neither rationally based on the perceptions of Officer Rosales, nor helpful to the jury. *See Fairow*, 943 S.W.2d at 898. However, even if we assume that the trial court erred in admitting this testimony, we conclude that any such error was harmless in light of other evidence on the same subject that was admitted without objection and the overwhelming evidence of guilt.

Generally, a violation of the rules of evidence that results in the erroneous admission of evidence is non-constitutional error and is analyzed for harm pursuant

to Texas Rules of Appellate Procedure 44.2(b). *See* TEX. R. APP. P. 44.2(b); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In conducting an analysis under Rule 44.2(b), we examine the entire proceeding to determine whether the alleged 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). A criminal conviction should not be overturned for non-constitutional error if we determine that the error did not influence the jury or had but a slight effect. *Johnson*, 967 S.W.2d at 417.

As detailed above, Officer Rosales testified extensively about what he saw on the night of March 4, 2014, including that he saw Solorzano take a speaker box out of the back of appellant’s vehicle that was found to contain methamphetamine. Solorzano’s testimony corroborated Officer Rosales’s version of the events. Solorzano specifically testified that appellant told him to come to the tire shop after work to pick up the methamphetamine, that the package of methamphetamine was inside the speaker box, and that he believed that appellant knew that the speaker box contained methamphetamine. Thus, Officer Rosales’s testimony was merely cumulative of other properly admitted evidence, and the conclusion that appellant knowingly possessed the methamphetamine was a reasonable inference given the evidence of guilt. *See Macias v. State*, No. 14-15-00030-CR, 2016 WL 1578787, at *4 (Tex. App.—Houston [14th Dist.] Apr. 16, 2016, pet. ref’d) (mem. op., not

designated for publication) (holding any error in admitting officer's opinion regarding defendant's culpable mental state was harmless because other evidence on same subject was admitted without objection and there was overwhelming evidence of guilt); *Taylor v. State*, 774 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (same). We hold that any error in the admission of this evidence did not influence the jury or had but a slight effect and was, therefore, harmless. *See Johnson*, 967 S.W.2d at 417.

We overrule appellant's second issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).