NO. 01-24-00285-CR

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL
DISTRICT OF TEXAS
HOUSTON, TEXAS

KIROLOS HANY FALTAOUS, Appellant

VS.

THE STATE OF TEXAS, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Cause No. 22-DCR-099095

APPELLANT'S BRIEF

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ORAL ARGUMENT IS REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to this suit are as follows:

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant hereby requests oral argument. Counsel is of the opinion that oral argument would serve to emphasize and clarify the important legal points regarding this appeal.

STATEMENT OF THE CASE

This appeal is from a conviction for Sexual Assault of a Child, in which the Appellant was sentenced to eight (8) years in the Texas Department of Criminal Justice - Institutional Division.

Appellant was indicted for the felony offense of Sexual Assault of a Child. Appellant waived his right to a jury trial, pled guilty to the indictment, and the cause was set-off for a sentencing hearing following the preparation of a pre-sentence investigation report.

After a sentencing hearing on April 9, 2024, the trial court found Appellant guilty, and sentenced Appellant to eight (8) years in the Texas Department of Criminal Justice - Institutional Division.

Notice of Appeal was filed on April 10, 2024.

This brief follows.

ISSUES PRESENTED

FIRST POINT OF ERROR

THE TRIAL COURT ERRED WHEN IT REFUSED TO INCLUDE IN THE PSI REPORT 22 DIFFERENT ITEMS FROM APPELLANT ON THE GROUND THAT THE ITEMS CONSTITUTED HEARSAY

SECOND POINT OF ERROR

THE TRIAL COURT ERRED WHEN IT ALLOWED THE COMPLAINANT'S OPINION TESTIMONY ABOUT AN APPROPRIATE PUNISHMENT SENTENCE

STATEMENT OF FACTS

The Appellant pled guilty to cause number 22-DCR-099095, in which he was charged by indictment with the felony offense of Sexual Assault of a Child. 1 RR 5-9. The trial court then set the cause off for a sentencing hearing and ordered that a pre-sentence investigation (PSI) report be prepared. 1 RR 8-10.

At the pre-sentence investigation / punishment hearing, on April 9, 2024, Appellant objected to the PSI report because the items in Appellant's PSI packet, which was submitted to the community supervision department prior to the sentencing hearing, were not included in the final PSI report. 2 RR 6. Appellant's PSI packet included 23 different items — including a psychological evaluation, Appellant's personal statement, 8 character letters, 4 family photos, 3 annual work evaluations, undergraduate diploma, a leadership development certificate, and and 4 martial arts development certificates. 3 RR 13-69. Appellant's PSI packet was coordinated and compiled by retired community supervision and corrections

department court officer Brian Patterson. 2 RR 124-32. Eventually the prosecutor agreed to include Appellant's personal statement about the offense in the PSI report. 2 RR 9, 14-5; 3 RR 70-1. The prosecutor further agreed to the admission of defense expert Dr. Karen Gollaher's psychological report as an exhibit but not part of the PSI report — conditioned on the witness's appearance and testimony in court during the hearing that afternoon. 2 RR 15, 3 RR 73-8. However, the prosecutor objected to the rest of the items contained in Appellant's PSI packet on the ground that it contains hearsay. 2 RR 9, 17. Appellant offered his entire PSI packet which was marked as defense exhibit 1. 2 RR 10; 3 RR 13-69. The trial court took the matter under advisement but later sustained the prosecutor's objection — refusing to admit the Appellant's PSI packet contained in defense exhibit 1 on grounds that the items constituted hearsay. 2 RR 89-90; 3 RR 13-69.

The complainant Suzy Marks[1] testified first. She stated that she moved to the United States from Kuwait in 2008 when she was 12 years old. 2 RR 25. Marks and her family attended St. Mary and Archangel Michael Coptic Orthodox Church where Marks was very involved. 2 RR 27. Marks testified that she met the Appellant at church when she was 13 years old. 2 RR 29-30. Marks stated that at first their conversations were "innocent" but that the nature of their interactions changed, then later became physical when she was 14 years old. 2 RR 34, 35-6. Marks testified that she performed oral sex on the Appellant. 2 RR 41-44, 53-4.

[1] a pseudonym.

Marks testified that Appellant penetrated her vagina with his penis. 2 RR 49, 51-3. Marks testified that Appellant performed oral sex on her. 2 RR 53-4. Marks said she told a Father in her church but nothing was done. 2 RR 59. Marks later made a report to law enforcement. 2 RR 66-7. Over objection, Marks testified to her opinion on the type of punishment that Appellant should receive. Specifically, Marks gave three opinions. Marks testified that community supervision would not be an appropriate disposition. 2 RR 77. Marks testified that in her opinion, the sentencing range was inadequate. 2 RR 78. Further, in response to a question asking how many years she would like the judge "to sentence [Appellant] for," Marks repeatedly stated that the number 14 was "symbolic" to her. 2 RR 78.

Appellant called several witnesses. Dr. Karen Gollaher testified first. As a forensic psychologist, Dr. Gollaher testified about Appellant's psychological evaluation, which included a risk assessment, and his subsequent treatment. 2 RR 91-98. Mr. Brian Patterson testified that he assisted the defense team by compiling mitigation materials similar to the type of PSI report generated by the probation department. 2 RR 124-5. Appellant's wife, Mary Faltaous, testified in support of her husband. 2 RR 135-9. Through Mrs. Faltaous, several photos were admitted as evidence. 2 RR 138-9; 3 RR 85-92. Appellant's sister, Mary Zachary, also testified in support of Appellant. 2 RR 145-8.

SUMMARY OF THE ARGUMENT

The trial court refused to include 22 different items from the Appellant which describe the circumstances of the offense and the Appellant's social history on the ground that the items were "hearsay." Yet, the Court of Criminal Appeals has repeatedly held that hearsay items may be included in the PSI report. The trial court's ruling destroyed the "obvious purpose of the statute" and must be reversed because in the end the PSI report was incomplete and the judge did not receive valuable evidence related to the circumstances of the offense and the Appellant's social history.

During the punishment hearing, the trial court allowed the complainant to give opinion testimony as to what constituted an appropriate punishment. The complaint was permitted to testify to her opinion that community supervision was inappropriate, that the sentencing range (2-20) was inadequate, and that the number 14 was "symbolic" to her. Several intermediate courts have held that this opinion testimony is irrelevant and therefore inadmissible. The Appellant submits that the complainant's opinion testimony as to the proper sentence in this matter was inadmissible, and further argues that this error was harmful considering the entire proceeding in which the trial court also refused to include 22 items from the Appellant in the PSI report.

ARGUMENT AND AUTHORITIES

FIRST POINT OF ERROR

THE TRIAL COURT ERRED WHEN IT REFUSED TO INCLUDE IN THE PSI REPORT 22 DIFFERENT ITEMS FROM APPELLANT ON THE GROUND THAT THE ITEMS CONSTITUTED HEARSAY

Authorities

Standard of Review

A trial court's ruling on the admission of evidence should be reviewed for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

Applicable Law

Article 37.07, section 3(d) provides that a trial court may consider pre-sentence investigative reports when assessing punishment. TEX. CODE CRIM. PROC. ART. 37.07, § 3(d).

The Court of Criminal Appeals has held that "the Rules of Evidence do not apply to the contents of a PSI." *Stringer v. State*, 309 S.W.3d 42, 46 (Tex. Crim. App. 2010) (citing *Fryer v. State*, 68 S.W.3d 628, 631 (Tex. Crim. App. 2002)); *see also Smith v. State*, 227 S.W.3d 753, 761 (Tex. Crim. App. 2007) (noting that "otherwise-objectionable matters may now be properly considered by the court

using the pre-sentence report to determine punishment"). The Court in *Fryer v. State* wrote that hearsay items can be included in PSI reports. *Fryer v. State*, 68 S.W.3d 628. The court reasoned that "[t]o hold otherwise ... would be 'to deny the obvious purpose of the statute.'" *Fryer v. State*, 68 S.W.3d at 631 (quoting *Brown v. State*, 478 S.W.2d 550, 551 (Tex. Crim. App. 1972)).

The Court of Criminal Appeals has held that when a PSI is used in a non-capital case in which the defendant has elected to have the judge determine sentencing, Sixth Amendment rights to confrontation as defined in *Crawford v. Washington* do not apply. *Stringer v. State,* 309 S.W.3d at 48 (discussing *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Supreme Court held that a defendant has a right to confront witnesses who made testimonial statements against him unless the witness is unavailable and the defendant had a prior opportunity for cross-examination).

PSI reports must contain, among other things, the circumstances of the offense with which the defendant is charged and the criminal and social history of the defendant. TEX. CODE OF CRIM. PROC. ART. 42A.253(a).

The PSI should contain "general punishment-phase evidence" to assist the court in determining the sentence to assess. *Stringer*, 309 S.W.3d at 45; *Townes v. State,* 572 S.W.3d 767, 769–70 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) (citing to *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984), which held that a PSI may be utilized to assist a trial judge in the exercise of his

discretion when an issue of the proper punishment is present). The purpose of a PSI is to "provide a wide range of information to the trial court without an adversarial hearing." *Stringer*, 309 S.W.3d at 48; *Townes*, 572 S.W.3d at 769–70.

Argument

In this case, the PSI report was incomplete because it did not contain the 23 different items submitted to the PSI writer by the Appellant. For this reason, the Appellant objected to the PSI report. The Appellant further requested that the trial court include all 23 items in his PSI packet and offered his complete PSI packet as Defense Exhibit 1. The prosecutor objected to the inclusion of these items in the PSI report — citing "Hearsay" as her legal objection. 2 RR 15-7. The prosecutor further argued that — if admitted — she would not be able to cross examine the witnesses who were responsible for the letters, and the other items. 2 RR 15-7. Appellant argued for admission of the materials in defense exhibit 1 — noting in response that the Court of Criminal Appeals has repeatedly held that hearsay is admissible in a PSI report. 2 RR 7. After taking the matter under advisement, the trial court issued its ruling that sustained the prosecutor's objection. 2 RR 89-90. Thus, of the 23 items, only the defendant's personal statement (reluctantly agreed to by the prosecutor) was included in the PSI report.

It is clear that the trial court erred. As the Appellant argued to the trial court during the punishment hearing, the Court of Criminal Appeals has repeatedly held that the Rules of Evidence to not apply to PSI reports. The Court has held that

hearsay is permitted in the contents of the PSI report. And the Court has found that the confrontation clause as we know it from *Crawford* does not apply to PSI reports.

The trial court only sustained the prosecutor's objection that the items contained Hearsay. But that was wrong. And the trial court offered no other justification for its ruling which denied "the obvious purpose of the statute." *Fryer v. State*, 68 S.W.3d at 631. The trial court's ruling excluding these items defeats the purpose of a PSI which is to "provide a wide range of information to the trial court without an adversarial hearing." *Stringer*, 309 S.W.3d at 48; *Townes*, 572 S.W.3d at 769–70. Further, the trial court only excluded hearsay content that was offered by and benefited the Appellant; the trial court did not strike from the PSI report any other hearsay content—particularly that which was not flattering to the Appellant.

The trial court's ruling was arbitrary. The trial court disregarded guiding principles and established caselaw. And the ruling was directed only at the Appellant.

In another type of proceeding, such as a trial, the items contained in the Appellant's PSI packet in defense exhibit 1 would have been objectionable — but here, they were not. *See Smith v. State*, 227 S.W.3d 753, 761 (Tex. Crim. App. 2007) (noting that "otherwise-objectionable matters may now be properly considered by the court using the pre-sentence report to determine punishment").

For all of these reasons, this Court should find that the trial court erred when it sustained the prosecutor's objection and refused to include the 23 items in Appellant's packet in the PSI report.

Harm

The proper harm standard is found in Rule 44.2(b). TEX. R. APP. PROC. 44.2(b). As such, having found that the trial court erred, this Court should consider whether the error had a substantial and injurious effect in the trial court's punishment decision. *See Id.; See also Hernandez v. State,* 176 S.W.3d 821, 823–25 (Tex. Crim. App. 2005).

This Court should find that this error was substantial and injurious. The prosecutor agreed to allow only Appellant's personal statement. Thus, when the trial court sustained the prosecutor's Hearsay objection, the trial court refused to include 22 items detailing the "social history" of the Appellant as well as some additional "circumstances of the offense." A few of the family photos were admitted through witnesses at the hearing but as the Appellant noted at the beginning when arguing for admission of these materials—several potential witnesses wrote letters because they were unable to attend the hearing. This includes Appellant's brother in law, his priest, his sister in law, his wife's brother, Appellant's mother, and Appellant's father and priest. *See* 3 RR 13-69. Additionally, the trial court was not able to review Appellant's recent work evaluations, his undergraduate diploma, his training certificates, or his martial arts

awards. *Id*. The absence of these materials obviously hurt Appellant in this punishment hearing.

The effect of the trial court's error is substantial considering all of the materials that were omitted from the PSI report. The effect of the trial court's error was injurious given the supportive and positive content of the character letters, the exceptional work evaluations, and the high achievement records. The character letters were detailed and offered personal knowledge from 8 different individuals — all of whom were very close to the Appellant. The exceptional work evaluations shine a positive light on Appellant's professional contributions to society. The achievement records reveal a commitment to excellence and self-improvement. When the trial court denied Appellant's offering of material, relevant, and admissible evidence, in the form of these 22 items in his packet, the trial court injured Appellant's substantial rights, and therefore this error requires reversal.

For these reasons, the trial court's error did affect Appellant's substantial rights, and therefore, reversal is required.

SECOND POINT OF ERROR

THE TRIAL COURT ERRED WHEN IT ALLOWED THE COMPLAINANT'S OPINION TESTIMONY ABOUT AN APPROPRIATE PUNISHMENT SENTENCE

Authorities

During the punishment phase, evidence may be offered on matters the trial court deems relevant to sentencing. *See* TEX. CODE CRIME. PROC. ANN. ART.

37.07, § 3(a)(1). Relevant evidence in the punishment phase is helpful to the fact-finder in determining the appropriate sentence for a particular defendant in light of the facts of the case. *Hayden v. State,* 296 S.W.3d 549, 552 (Tex. Crim. App. 2009). A punishment recommendation from a non-victim, such as an expert or a victim's family members is inadmissible. *See Simpson v. State,* 119 S.W.3d 262, 272 (Tex. Crim. App. 2003) (providing that the wishes of a victim's family members as to a defendant's fate are beyond the parameters of victim-impact evidence). *See also Taylor v. State,* 109 S.W.3d 443, 454 (Tex. Crim. App. 2003) (suggesting difference between a victim's punishment recommendation from a non-victim's in a harm analysis of error resulting from the trial court's mistaken hypothetical as to punishment in voir dire).

Some intermediate appellate courts have extended that rule to opinions of non-experts regarding punishment, including victims. *See Johnson v. State,* 987 S.W.2d 79, 87 (Tex.App.—Houston [14th Dist.] 1998, pet. ref'd); *Wright v. State,* 962 S.W.2d 661, 663 (Tex.App.—Fort Worth 1998, no pet.) (providing that victim's opinion on type of punishment the defendant should receive was irrelevant in assessing a proper punishment); *Hughes v. State,* 787 S.W.2d 193, 196 (Tex. App.—Corpus Christi 1990, pet. ref'd) (providing that victim's testimony on an appropriate sentence was not relevant); *Gross v. State,* 730 S.W.2d 104, 105–06 (Tex. App.—Texarkana 1987, no pet.) (providing that a victim's testimony on

punishment had little value when the witness was in no better a position to form an opinion than the jury).

Argument

At the hearing the complainant offered opinion testimony that community supervision was not an appropriate punishment in this case. 2 RR 77. The complaint also testified that in her opinion, a prison sentence within the range of punishment (2-20 years in prison) was inadequate. 2 RR 78. Finally, although the complainant did not state a specific number, in response to a question asking how many years she would like the judge "to sentence [Appellant] for," the complainant testified that the number 14 was "symbolic" to her — specifically mentioning the number "14" 4 times in one sentence. 2 RR 78.

Appellant submits that this opinion testimony was irrelevant in assessing an appropriate sentence, and therefore, the complainant's opinions were inadmissible. Appellant objected that these opinions were irrelevant, but was overruled. 2 RR 77-8. The complainant was permitted to offer not just one but three opinions about the proper punishment. Appellant submits that the complainants opinions on what constitutes an appropriate sentence, as held in the opinions cited above, did not make any fact of consequence to the determination of the sentence more or less probable. Thus, this testimony was irrelevant, and therefore, inadmissible.

Harm

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 Rule of Appellate Procedure 44.2(b). 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 on the verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If we have "grave doubts" about whether an error affected the outcome, we must treat the error as if it did. *Webb v. State*, 36 S.W.3d 164, 182 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Considering the entire proceeding, this court should find that the complainant's three different opinions on what was an appropriate sentence had a substantial and injurious effect on the sentence. Yes, the punishment hearing featured other testimony from the complainant that outlined the abuse she suffered. However, this testimony was not just irrelevant; the testimony served no purpose but to inflame the mind of the judge. Additionally, considering the entire proceeding also means considering the 22 items that were erroneously excluded from the PSI report. Combining the wrongful exclusion of the 22 different items in Appellant's PSI packet with the wrongful admission of the complainant's opinions on what constituted an appropriate punishment — this court should have "grave

doubts" about whether this error affected the outcome, and find that this error was harmful because the effect was both substantial and injurious.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant prays that this Court reverse the trial court's judgment and sentence, remand for a new trial, and grant any other relief that may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on September 30, 2024, a true and correct copy of the above and foregoing Appellant's Brief was served on the Fort Bend County District Attorney's Office by electronic service through e-filing.

/s/ Daniel Lazarine
DANIEL LAZARINE

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Pursuant to TEX. R. APP. P. 9.4(1)(i)(1), I certify that this document complies with the type-volume limitations of TEX. R. APP. P. 9.4(i)(2)(D):

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