NO. 14-24-00606-CR

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

DEUNTAE DISHAUN ROBINSON, Appellant

VS.

THE STATE OF TEXAS, Appellee

On Appeal from the 506th District Court
Waller County, Texas
Trial Court Cause No. 23-12-18981

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:

FOR THE STATE:

At Trial:	**Bennett Dodson** **Elliot Beatty**
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FOR APPELLANT:

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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 convictions for Evading Arrest/Detention in a Motor Vehicle and Smuggling of Persons, for which the Appellant was sentenced to five (5) years in the Texas Department of Criminal Justice - Institutional Division.

Appellant was indicted for the felony offenses of Evading Arrest/Detention in a Motor Vehicle and Smuggling of Persons. CR 10-11. On April 9, 2024, Appellant waived his right to a jury trial, pleaded guilty to both counts in the indictment, and the cause was set-off for a sentencing hearing following the preparation of a pre-sentence investigation report. 1 RR 4-12.

After a sentencing hearing on July 30, 2024, the trial court found Appellant guilty of both counts in the indictment, and sentenced Appellant to five (5) years in the Texas Department of Criminal Justice - Institutional Division. 3 RR 94; CR 76-81.

Notice of Appeal was filed on August 20, 2024. CR 109.

Following a transmission from this Court regarding whether Appellant was granted permission to appeal, the trial court signed an order amending the trial court's certification of defendant's right to appeal. 2 Supp CR 3-8. This amended certification clarified that Appellant has the right to appeal as to punishment. *Id*.

This brief follows.

ISSUES PRESENTED

FIRST POINT OF ERROR

THE TRIAL COURT ERRED WHEN IT REFUSED TO INCLUDE IN THE PSI REPORT 4 CHARACTER REFERENCE LETTERS FROM APPELLANT ON THE GROUND THAT THE ITEMS CONSTITUTED HEARSAY

SECOND POINT OF ERROR

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

STATEMENT OF FACTS

The Appellant pled guilty to cause number 23-12-18981, in which he was charged by indictment with the felony offenses of Evading Arrest/Detention in a Motor Vehicle and Smuggling of Persons. 1 RR 4-12. The trial court then set the cause off for a sentencing hearing and ordered that a pre-sentence investigation (PSI) report be prepared. *Id*.

At the pre-sentence investigation / punishment hearing, Appellant moved to admit four character reference letters as a supplement to the PSI report. 2 RR 6-7. These character letters were authored by out-of-state residents who worked at the New York charter school that Appellant attended (Appellant is from New York). *Id*. The prosecutor objected to these letters on the ground that they constituted hearsay. 2 RR 7. Appellant noted that these witnesses were nevertheless unavailable, and again asked that these letters be included as a supplement to the PSI report. 2 RR 8. The trial court stated that he would like to consider them but sustained the

prosecutor's objection — refusing to admit the Appellant's four character reference letters on grounds that the items constituted hearsay. 2 RR 8.

Waller County Sheriff's Deputy Folkes testified that he performed an "initial traffic stop for welfare" in response to a call about a reckless driver on October 15, 2023. 2 RR 16-7. Folkes testified that the vehicle did not stop in response to the activation of his emergency lights — instead accelerating at a high rate of speed. 2 RR 17. Once the vehicle came to a stop, the occupants fled the vehicle. 2 RR 21. Folkes later arrested Appellant. 2 RR 22.

Waller Police Department Lieutenant Santellana testified that on October 15, 2023, he, too, pursued this vehicle along with Deputy Folkes. 2 RR 27. When he caught up to Folkes, Santellana observed individuals fleeing the vehicle, and he called for backup. 2 RR 28. Santellana coordinated with other supporting agencies and efforts to locate the occupants. 2 RR 28-9. Through a K-9 ground search, the occupants were eventually located. 2 RR 29.

Waller County Sheriff's Deputy Lucherk testified about his specialized training and experience as a K-9 officer. 2 RR 31-2. When he arrived, there was already a K-9 working, so Lucherk provided support. 2 RR 32. Lucherk then reviewed a map of the area and set out for an area to the east where the brush was thickest. 2 RR 33. Together with another officer's K-9, Lucherk located 4 occupants — including Appellant — following foot pursuit. 2 RR 34-5.

Probation officer Lisa Rolirad prepared the pre-sentence investigation report. 2 RR 45. Over objection, probation officer Rolirad testified to her opinion on the type of punishment that Appellant should receive. Specifically, officer Rolirad testified that Appellant was a poor candidate for community supervision. 2 RR 49-50.

Appellant called several witnesses. Appellant's aunt Nicole Washington testified about Appellant's good character traits and his history in special education. 2 RR 60-3. Washington also testified about the support Appellant has in his family. 2 RR 62-68. Appellant's mother Latoya Jamison testified about Appellant's upbringing, his good character traits, special education, that as a young person he followed the rules of the house, and his support in the family. 2 RR 73-80.

SUMMARY OF THE ARGUMENT

The trial court refused to include four different character reference letters 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 trial court did not receive valuable evidence related to the circumstances of the offense and the Appellant's social history as a part of this punishment hearing.

During the punishment hearing, the trial court allowed probation officer Rolirad to give opinion testimony as to what constituted an appropriate punishment. Officer Rolirad was permitted to testify to her opinion that Appellant was a poor candidate for community supervision. Several intermediate courts have held that this opinion testimony is irrelevant and therefore inadmissible. The Appellant submits that Officer Rolirad'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 four 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 FOUR CHARACTER REFERENCE LETTERS OFFERED BY 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 four character reference letters submitted by the Appellant. The prosecutor objected to the inclusion of these items in the PSI report — citing "Hearsay" as his legal objection. 2 RR 7. The trial court noted that he wished to review these items but sustained the prosecutor's objection. 2 RR 7-8. Thus, these four character letters were excluded from the PSI report and from evidence.

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's ruling contravened "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. The trial court's ruling was arbitrary; the trial court disregarded guiding principles and established caselaw.

In another type of proceeding, such as a trial, these character letters 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 admit the 4 character letters 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. When the trial court sustained the prosecutor's Hearsay objection, the trial court refused to include four items detailing the "social history" of the Appellant as well as some additional "circumstances of the offense." 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. These witnesses were out of state employees at the charter school that Appellant attended. 2 RR 6-7. Testimony

from his teachers was vital and should have been considered as Appellant was not very far removed from his secondary education as he was only 24 years old when he was sentenced. 2 RR 51. Additionally, the trial court explicitly expressed his desire to consider these materials. 2 RR 7-8. The absence of these materials obviously hurt Appellant in this punishment hearing.

The effect of the trial court's error is substantial considering the nature 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 character letters were detailed and offered personal knowledge from 4 different individuals — all of whom were close to the Appellant. When the trial court denied Appellant's offering of material, relevant, and admissible evidence, in the form of these 4 character reference letters, 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 A WITNESS'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); s*ee 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); *see also Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex. Crim. App. 1989).

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 probation officer Rolirad offered opinion testimony that community supervision was not an appropriate punishment in this case. 2 RR 49-50. Specifically, Rolirad asserted that in her opinion Appellant was a "poor candidate" for community supervision. *Id*. Appellant submits that this opinion testimony was irrelevant in assessing an appropriate sentence, and therefore, the complainant's opinions were inadmissible. Appellant objected that this opinion were irrelevant, but was overruled. *Id*. Appellant submits that officer Rolirad's opinion 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. As such, this testimony was inadmissible, and the trial court erred by allowing it.

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), this Court should 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 there are "grave doubts" about whether an error affected the outcome, then the error must be treated 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 officer Rolirad's opinion on what was an appropriate sentence had a substantial and injurious effect on the sentence. Yes, the punishment hearing featured other evidence about the circumstances of the offense and Appellant. 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 four character reference letters that were erroneously excluded from the PSI report. Combining the wrongful exclusion of the four character reference letters with the wrongful admission of officer Rolirad's opinion 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,

/s/ Daniel Lazarine

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CERTIFICATE OF SERVICE

This is to certify that on February 13, 2024, a true and correct copy of the above and foregoing Appellant's Brief was served on the Waller County District Attorney's Office by electronic service through e-filing.

/s/ Daniel Lazarine
DANIEL LAZARINE

CERTIFICATE OF COMPLIANCE

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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