Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00629-CR

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MARCOS EUGENIO GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 732,598

O P I N I O N

Appellant, Marcos Eugenio Garcia, challenges his conviction for the felony offense of delivery of over 400 grams of cocaine. In five points of error, appellant complains the trial court erred in admitting evidence. We affirm.

I. BACKGROUND

Sergeant Oscar Garcia of the Brookshire, Texas Police Department worked undercover in Houston with the narcotics unit of the Texas Department of Public Safety. A confidential

informant introduced Sgt. Garcia to a suspect named Juan Pablo Gomez. After learning that Gomez dealt in large amounts of narcotics, Sgt. Garcia, operating undercover, told Gomez he wanted to buy three kilograms of cocaine. Gomez and Sgt. Garcia negotiated a price of $19,000 per kilo and agreed to transact the sale days later at a restaurant on Interstate 45 in Houston. En route to the restaurant with the informant and $57,000 in cash, Gomez telephoned Sgt. Garcia and instructed him to go instead to a convenience store in the vicinity of the restaurant. Upon his arrival at the designated location, Sgt. Garcia was instructed to go to a nearby Burger King restaurant. There, Gomez told Sgt. Garcia to go to a house in the area to complete the transaction. Sgt. Garcia protested, stating that they would finish the deal there or not at all. Indicating he needed to discuss the matter with his supplier, Gomez talked with appellant and then told Sgt. Garcia he would return soon with the drugs.

Appellant, Gomez, and the informant left the Burger King to fetch the drugs from a nearby residence. A short time later, Gomez returned with a large package of cocaine. In opening the trunk of his vehicle, purportedly to stow the cocaine, Sgt. Garcia signaled fellow officers for the arrests to be made.

Meanwhile, police officers in a surveillance helicopter had observed appellant exit the house and get into a taxicab. About twenty minutes later, a marked police car stopped the cab. The approaching officers noticed appellant trying to stuff a plastic bag, later determined to contain three grams of cocaine, into the seam of the cab's back seat.

Appellant was charged not with possession of three grams of cocaine (the amount he had in the cab) but with the delivery of over 400 grams of the controlled substance. A jury convicted appellant of the offense charged, and the trial court assessed punishment at thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and imposed a fine of $1.00.

II. ISSUES PRESENTED AND STANDARD OF REVIEW

All the errors appellant raises on appeal challenge evidentiary rulings. We review a trial court's decision to admit evidence for an abuse of discretion. *Santellan v. State*, 939 S.W.2d 155, 168–69 (Tex. Crim. App. 1997). Where the trial court's evidentiary ruling is within the "zone of reasonable disagreement," there is no abuse of discretion and the reviewing court will uphold the trial court's ruling. *Id.* at 169.

III. ANALYSIS

A. Extraneous Offense Evidence

In his first three points of error, appellant argues the trial court erred in admitting evidence of an extraneous offense of appellant's possession of other cocaine during the guilt/innocence phase of his trial. Houston Police Officer Hans Miezel testified that he saw appellant stuffing the plastic bag, later determined to contain three grams of cocaine, into the cab's back seat. Appellant complains that the trial court erred in admitting the following testimony by Officer Miezel:

PROSECUTOR:	Can you tell us exactly what happened from the moment that you approached the taxicab?
OFFICER MIEZEL:	Okay. When I started – when I approached the taxicab, he was looking towards the patrol officer and he was reaching –
DEFENSE COUNSEL:	Excuse me, sir. Judge, I'm going to object that it's not relevant under 404(b), and he's getting into an issue of unadjudicated extraneous offenses, and I would object to it, Judge.
THE COURT:	That will be overruled.
DEFENSE COUNSEL:	All right, Judge.
PROSECUTOR:	You can tell us what he was doing.
OFFICER MIEZEL:	Okay. He – with his right hand he was reaching over, and I saw like a movement towards the seam of the seat. I didn't know what it was initially.

Appellant argues that this testimony constitutes evidence of an extraneous offense that was inadmissible as irrelevant, as more unfairly prejudicial than probative, and as not fitting into any of the exceptions under Texas Rule of Evidence 404(b). "[A]n accused is entitled to be tried on the accusation made in the state's pleading and he should not be tried for some collateral crime nor for being a criminal generally." *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). 404(b) states that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." TEX. R. EVID. 404(b). But the "other crime, wrong, or act" may have relevance "apart from character conformity; that it tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, e.g., absence of mistake or accident." *Montgomery v. State*, 810 S.W.2d 372, 387–88 (Tex. Crim. App. 1990) (op. on reh'g); TEX. R. EVID. 404(b); *see Webb v. State*, 36 S.W.3d 164, 180 (Tex. App.—Houston [14th Dist.] 2000, pet. filed). In addition, "other crimes" may be admissible as same transaction contextual evidence where "several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony . . . of any one of them cannot be given without showing the others." *Rogers v. State*, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993) (quoting *Mayes v. State*, 816 S.W.2d 79, 86–87 n.4 (Tex. Crim. App. 1991)).

The Texas Court of Criminal Appeals has long recognized that "the jury is entitled to know all the relevant surrounding facts and circumstances of the charged offense" and specifically has noted that "an offense is not tried in a vacuum." *Moreno v. State*, 721 S.W.2d 295, 301 (Tex. Crim. App. 1986). Under Rule 404(b), however, same transaction contextual evidence is admissible "'only to the extent that it is necessary to the jury's

understanding of the offense.'" *Pondexter v. State*, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996) (quoting *England v. State*, 887 S.W.2d 902, 915 (Tex. Crim. App. 1994)). In other words, the court should allow its introduction "only when the offense would make little or no

sense without also bringing in the same transaction evidence." *Id.* Such extraneous offenses are admissible to show the context in which the criminal act occurred. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). This evidence is considered "res gestae," under the reasoning that events do not occur in a vacuum, and the jury has a right to hear what occurred immediately before and after the commission of that act so that it may realistically evaluate the evidence. *Id.*

Applying these principles to the case now before us, we find the evidence of the plastic bag of cocaine from the cab was so intertwined with the cocaine delivery charge, the jury's understanding of the offense would have been obscured without it. The cocaine in appellant's possession was in powder form, as was the cocaine delivered to Sgt. Garcia at the Burger King. One of the kilos of cocaine recovered at the Burger King appeared to have been repackaged and was missing a small quantity. Packaging tape was found in the kitchen of the house appellant left when he fled in the cab. This packaging tape matched the packaging tape on the plastic bag containing the three-gram quantity of cocaine found with appellant in the cab. The three-gram quantity of cocaine officers found in appellant's possession appeared to be more than "for personal use" and was consistent with the amount missing from the larger package of cocaine delivered to the Burger King. Finally, officers found this repackaged bag of cocaine, appearing to be a subsection from the larger package, in appellant's possession not more than twenty minutes after the arrests at the Burger King. From this evidence, the trial court reasonably could have inferred that the cocaine appellant possessed was removed from the larger cocaine stash before it was delivered at the Burger King. Logically, appellant's possession of the smaller amount of cocaine in the cab was a continuation of the criminal transaction culminating in cocaine being delivered to the Burger

King. Evidence of appellant's possession of cocaine in the cab tends to support the delivery charge and is helpful to the jury's understanding of the transaction as a whole.

Appellant also complains that admission of the cocaine possession evidence was more prejudicial than probative and, thus, violated Texas Rule of Evidence 403. However, appellant did not object to this evidence at trial on the basis of Rule 403. Because appellant's trial objection does not comport with his objection on appeal, this argument is waived. *See* TEX. R. APP. P. 33.1.

Because the trial court did not err in admitting Officer Miezel's testimony regarding the discovery of the plastic bag of cocaine in the cab, we need not conduct a harm analysis or determine whether the alleged error affects appellant's substantial rights as urged in appellant's second and third points of error. Accordingly, appellant's first three points of error are overruled.

B. Hearsay

In his final two points of error, appellant complains that the trial court erred in overruling his objections to the following hearsay testimony: (1) Sgt. Garcia reading from his police report; and (2) Officer Thomas P. Null's testimony regarding what Sgt. Garcia told him about appellant's participation in the drug-buy negotiations.

At the outset, we note that the admission of inadmissible hearsay constitutes non-constitutional error. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Therefore, we must disregard the error unless it affected appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Whether the testimony complained of was admissible as an exception to the hearsay rule is irrelevant. If the fact to which the hearsay relates is sufficiently proved by other competent and

unobjected to evidence, the admission of the hearsay is properly deemed harmless and does

not constitute reversible error. *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000) .

Reading from Police Report

In his fifth point of error, appellant asserts that the trial court erred in allowing Sgt. Garcia to read part of his offense report, detailing the negotiations he had with appellant at the Burger King. Specifically, appellant asserts that the trial court erred in allowing the State to read large portions of the police report during redirect examination under application of the "doctrine of optional completeness."[1]

Sgt. Garcia read the following portion of his police report during trial:

> Sergeant Garcia then showed Garcia the buy money. Garcia explained to Sergeant Garcia that the house was nearby and was a safe location. Sergeant Garcia told Garcia he did not intend to go anywhere else and wanted to do the transaction at the Burger King. Garcia told Sergeant Garcia that Garcia would put or take the cocaine wherever Sergeant Garcia wanted to do the transaction.
>
> Sergeant Garcia again told Garcia that we wanted to do the transaction at the Burger King. Garcia told Sergeant Garcia that they – meaning he and Gomez – Gomez and Garcia, would go get the cocaine and be right back. Garcia told Sergeant Garcia that it would take him about five minutes to go get the cocaine and return.

While admission of this evidence has the potential for substantial harm, it was not harmful in this case. An examination of the record reveals that Sgt. Garcia earlier testified, without objection, to essentially the same information[2] as that he read from the offense report at trial. The first time Sgt. Garcia addressed the matter, he stated:

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[1] We need not address whether the testimony was admissible under the doctrine of optional completeness because we find, in any event, any error in admission of this evidence was harmless.

[2] It appears that Sgt. Garcia did not testify elsewhere that Garcia said it would take him about "five minutes" to get the cocaine from the residence and return to the Burger King.

> Basically he [appellant] leaned into the car and we shook hands and he said, you know, for me not to worry, that it was okay, that it was a nearby location, that everybody was safe. And I said, look, I'm not going to go anywhere. I'm here. If you want to do the transaction, you know, bring the stuff here. At that time I showed him the flash money. I showed him the moneys that we had to buy the cocaine.
>
> . . . .
>
> He initially again tried to convince me to go to the house, and I again told him I was not going to. And he said that that was fine, that he would put it wherever I wanted to. Meaning, that he would bring the cocaine to whatever location I wanted to. I said, well, I want to do it here, and he said – he agreed to it. He said, okay, we'll be right back, and he walked back to where Mr. Gomez and the confidential informant were. Mr. Gomez and Marcos. . . . . Garcia and the CI left that location in Mr. Gomez's truck.

Because the facts about which the hearsay relates are sufficiently proven by other competent and unobjected to evidence, the admission of hearsay from the police report is harmless and does not constitute reversible error. *See Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000). Accordingly, appellant's fifth point of error is overruled.

Information Learned from Other Officers

In his fourth point of error, appellant complains he was harmed by the trial court's admission of inadmissible testimony from Officer Null, the policeman involved in the investigation that led to appellant's arrest. Officer Null conducted surveillance from his vehicle at the Burger King and followed the suspects to the residence. The excerpt from Officer Null's testimony that forms the basis of appellant's complaint states:

> STATE: Did anybody ever leave the residence while you were still sitting there on surveillance?
>
> OFFICER: Yes, ma'am.
>
> STATE: And who left the residence? How many people did you see?

OFFICER: Three individuals left the residence, got back into the red truck, and went back to Burger King.

STATE: Was the large Hispanic male, the one that you've identified as Marcos Garcia, the defendant, was he with those people when they went back to the Burger King?

OFFICER: No, ma'am.

STATE: Did you know at that point whether Marcos Garcia had been at the Burger King with Sergeant Garcia?

OFFICER: Yes, ma'am.

STATE: Did you have – had you been having conversations over the radio about what had transpired at Burger King?

OFFICER: Yes, ma'am.

STATE: What were you aware of at that point about Marcos Garcia?

DEFENSE: ***Object to any hearsay, Judge, as to what he may have learned from other officers unless they're here to testify, and that would be hearsay.***

STATE: ***In response, Your Honor, it goes to probable cause for the eventual stop.***

COURT: ***All right. That will be overruled.***

STATE: Were you receiving information from Sergeant Garcia and other officers about what was transpiring at the Burger King location?

OFFICER: Yes, ma'am.

STATE: What information did you have regarding the activities of Marcos Garcia at the time you were there on surveillance at the house on Torrington?

DEFENSE: Calls for hearsay, Judge, unless he has personal knowledge or unless he personally observed it.

COURT: That will be overruled.

DEFENSE: All right.

OFFICER: ***He was involved in the negotiations.***

STATE: And was that information from another officer?

OFFICER: It was from Sgt. Garcia.

STATE: And in your – based on your training and experience did that lead you

to believe that he was in the commission of a felony offense?

OFFICER: Yes, ma'am.

STATE: What did you do after you saw the three individuals that did not include Marcos Garcia leaving the residence?

OFFICER: I remained and watched the house.[3]

The State concedes that the trial court erred in overruling appellant's hearsay objection to Officer Null's testimony. In response to appellant's hearsay objection, the State justified admission of this hearsay testimony by arguing that "it goes to probable cause for the eventual stop." However, the trial court errs in admitting hearsay relating to probable cause when the defense does not first raise probable cause as an issue. *Perez v. State*, 678 S.W.2d 85, 87 (Tex. Crim. App. 1984). Because the trial court erred in overruling appellant's hearsay objection, we must determine whether the error in admitting this evidence was harmless. *See* TEX. R. APP. P. 44.2(b).

Earlier in the trial, Sgt. Garcia testified as to his own participation in the negotiations, stating:

STATE: Was that the first time you had ever talked to Marcos Garcia?

SGT. GARCIA: Yes, Ma'am, it was.

STATE: And what did Marcos Garcia say to you?

SGT. GARCIA: Basically, he leaned into the car and we shook hands and he said, you know, for me not to worry, that it was okay, that it was a nearby location, that everybody was safe. And I said, look, I'm not going to go anywhere. I'm here. If you want to do the transaction, you know, bring the stuff here. At that time I showed him the flash money. I showed him the moneys that we had to buy the cocaine.

Because the same evidence (that appellant *participated* in the negotiations) was

[3] Emphasis added.

introduced through Sgt. Garcia's testimony without objection, the trial court's error in admitting Officer Null's inadmissible hearsay testimony, also establishing appellant's participation, is harmless. *See Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000). Appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Edelman, Wittig, and Frost.

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