AFFIRMED and Opinion Filed June 23, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00088-CR
No. 05-20-00089-CR
No. 05-20-00090-CR
No. 05-20-00091-CR
No. 05-20-00092-CR
No. 05-20-00093-CR

JOSHUA JEFF BARRIER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 15th Judicial District Court
Grayson County, Texas
Trial Court Cause Nos. 070006 Ct. 1, 070006 Ct. 2, 070006 Ct. 3, 070006 Ct.4, 070006 Ct.5, 070006 Ct. 6

MEMORANDUM OPINION

Before Justices Molberg, Goldstein, and Smith
Opinion by Justice Smith

Joshua Jeff Barrier appeals his online solicitation of a minor-communicate in a sexually explicit manner convictions in count numbers 1, 3, and 5 of the indictment and his online solicitation of a minor-intent to engage in sexual conduct convictions in count numbers 2, 4, and 6. A jury convicted appellant of each offense, and the trial court sentenced him to ten years' confinement in count numbers 1, 3, and 5 and

twenty years' confinement in count numbers 2, 4, and 6. The trial court also imposed a $10,000 fine for each count. The trial court further ordered that the sentences in count numbers 1 and 2, 3 and 4, and 5 and 6 should run concurrently with one another, but the sentence in each pair of counts should run consecutively with the other pairs. In three issues, appellant argues the trial court abused its discretion by admitting Facebook evidence over appellant's hearsay objection, denying appellant's right to be present at trial, and denying appellant's right to testify. We affirm the trial court's judgment.

In November 2018, appellant was charged by indictment with two counts each of online solicitation of minors B.C.A., P.A.G., and D.P. pursuant to sections 33.021(b) and 33.021(c) of the penal code. Specifically, the indictment alleged appellant (1) with the intent to commit indecency with a child, sexual performance by a child, possession or promotion of child pornography, or sexual assault, intentionally communicated with each minor over the Internet or by electronic means in a sexually explicit manner and (2) with intent that each minor would engage in sexual contact or deviate sexual intercourse with appellant, knowingly solicited each minor over the Internet or by other electronic means to meet appellant.

When the case was called to trial in January 2020 but before voir dire, the trial court began the proceedings by observing on the record that appellant was present in person with his attorney, appellant had "indicated to the jail that he doesn't want to be up here for this trial," and appellant was "restrained in a chair to get him up

here." The trial court asked if appellant was going to be able to sit through trial and not disrupt the proceedings, and appellant answered, "Absolutely not." The trial court asked appellant what would happen if the court made appellant "be up here." Appellant answered that "It doesn't matter at this point" and proceeded to state that he "was filing charges" against the trial court and "other people in the room" and to complain that all of his files and legal documents had been stolen. The trial court advised appellant that it would be to his benefit to be present at his trial, and appellant responded, "I don't care to be." The trial court told appellant he was needed for the trial, but the trial court could not have appellant being disruptive during the trial. Appellant stated he was "going to sit here and not be disruptive," but he was "going to let the jury know what I need to let them know." The trial court asked if appellant understood that, "with that being the case," the trial court was going to send appellant back down to the jail and he would not be at his trial. Appellant responded, "Fine." Appellant then made comments about "filing charges."

The following exchange then took place between the trial court and appellant:

> THE COURT: All right. Mr. Barrier, in anticipation of the problems, the disruptions you've caused before, we are arranging to have a computer set up in here that will -- and a computer where you are, down in the jail, that will enable you, through Skype, to be able to watch the proceedings. I have told [defense counsel] that we'll take a break whenever he needs to, if he needs to come talk to you, if you will talk to him. My understanding is that you have refused to communicate with him.
>
> THE DEFENDANT: No, I'm not able to communicate. I had a stroke in there, and they didn't take it seriously, Judge. I have tried to tell you things that you didn't want to hear. You wouldn't even let me finish a

> sentence. I'm having so many medical problems that I'm not even able to . . . be here.

The trial court noted that appellant had indicated he was going to be disruptive, and appellant was going to be taken to the jail where he could watch the trial on a computer. The record shows appellant was screaming "Help. Help. Help." before being taken out of the courtroom. The trial court stated in the record that appellant was screaming "Help" at the top of his lungs "just like he did in his pre-trial" a couple weeks before. The trial court stated that defense counsel was going to talk to appellant in the afternoon and tell him that he was welcome to come back to the trial if he could stop being disruptive. The trial court said it was not possible to "figure out any less restrictive or lesser manner to be able to go ahead with the trial." Following an off-the-record discussion, the trial court stated the jail provided a room in which appellant could watch the trial proceedings on a computer, but appellant refused to go in the room. Appellant was not present during the voir dire and questioning of individual prospective jurors that followed.

The next day, appellant was again present in the courtroom before trial began, and the trial court observed that appellant was wearing a jail uniform but was entitled to wear street clothes. Appellant said "It doesn't matter" and again referred to "emergency medical issues" that were not being addressed. When the trial court asked if appellant could sit through trial without being disruptive, appellant said he was going to do his best but wanted "to put some things on the record." The trial court said they were not going into appellant's claims that the jail was "doing

something" to him. Appellant complained he could not get any paper and his legal files had been taken.

Appellant said he wanted to talk to his lawyer, and the trial court directed appellant and his attorney to a conference room where they met before returning to the courtroom. After appellant complained that he was not able to finish the meeting with his attorney, the jury was brought in to the courtroom and sworn. Immediately following the opening statements, appellant made an "unintelligible interruption" and stated that he was "in a corrupt situation here, congressional investigation" when the trial court told him he needed to be quiet.

The State then called its first witness, City of Anna police officer Cole Dotson. He testified he was working at the Whitesboro Police Department as the primary investigator at the time of the underlying offenses in late 2016 and early 2017. On January 24, 2017, Dotson was dispatched to Whitesboro High School in response to a call that a student was using a school-issued laptop to make contact with an adult male. Dotson met with the principal, who provided Dotson with a copy of the Facebook messages showing the conversation that had been taking place. Dotson testified the principal got the copy of the Facebook messages from the parent of a minor student, B.C.A. The prosecutor showed Dotson State's Exhibit 1, a copy of the Facebook messages that was provided by B.C.A.'s mother. Dotson testified the first two pages of the Facebook account showed the messages came from appellant. The prosecutor offered Exhibit 1 into evidence, and defense counsel made a hearsay

objection. The prosecutor responded that the exhibit was a statement by appellant, and there is a hearsay exception that covers admissions by a party-opponent. The trial court sustained the objection, stating it had not "been proven up."

Dotson testified that he contacted B.C.A., and the Children's Advocacy Center conducted a forensic interview with B.C.A. on February 1,2017. Dotson testified that, after the interview, he believed appellant was the one who sent the Facebook messages to B.C.A. due to the Facebook profile showing appellant's picture. The prosecutor again offered Exhibit 1, noting that Dotson had "verified that it is the same person." Again, defense counsel made a hearsay objection, and again the trial court sustained the objection, stating it had not been "proven up whose account it was."

Dotson testified he obtained a search warrant for Facebook records and received all of the messages from the Facebook account in appellant's name from a particular timeframe. Pursuant to the search warrant, Dotson also obtained the registered email addresses that were affiliated with appellant's Facebook account. To establish the identity of the Facebook account holder, Dotson contacted TCU campus police because two of the email addresses were "TCU-generated or from a college." Dotson confirmed that there was an enrolled student at TCU identified as Joshua Jeff Barrier, and the contact information for the two email addresses had been updated within the prior four to six months. Dotson obtained a TCU transcript showing Joshua Jeff Barrier as a student at TCU, and the transcript showed an

address verified as appellant's address. The address also matched the address where appellant was ultimately arrested. The TCU records also showed three email addresses on his TCU account, and all three were registered to appellant's Facebook account. Dotson testified he verified that the person with the registered emails was appellant. The prosecutor again offered Exhibit 1, and the trial court overruled defense counsel's hearsay objection and admitted the exhibit.

Dotson testified he received more than 2000 pages of messages from appellant's Facebook account pursuant to the search warrant. Dotson was able to locate in the messages from Facebook the conversation that was provided by B.C.A.'s mother, and it matched perfectly the conversation contained in Exhibit 1. Dotson testified appellant's conversations with B.C.A. were sexual in nature, and some discussed when they were going to meet. Dotson's review of the messages also revealed appellant's similar conversations with two other minors, P.A.G. and D.P. Based on his investigation, Dotson obtained an arrest warrant and arrested appellant at one of the addresses that was on file with TCU.

The next day, appellant informed the trial court that he was "too sick to be here right now" and said he wanted to participate but was not able to participate. The trial court observed that medical staff in the jail had looked at appellant, and the trial court was of the opinion that appellant was able to be present if he wanted to be. Appellant said he doubted he would be able to be quiet while other people were testifying and there was "no point" in his staying in the courtroom. The trial court

then sent appellant out of the courtroom to a place where he could watch the trial on a computer.

After the State rested its case, the trial court called a recess and, outside the presence of the jury, asked appellant if he wanted to testify. Appellant said he "would not be able to make that decision" and claimed he was "not even sure that there is a real trial at this point or not." Appellant spoke at length about charges against him that were dismissed and more serious charges that were brought against him. The trial court repeatedly asked appellant if he wanted to testify, but appellant responded by asking how the court expected to be taken seriously and whether the court believed in due process. At one point, appellant answered that he "absolutely" wanted to testify but said he was "not even able to" and was "barely competent." Appellant then began a series of statements explaining why he did not "have enough information to testify" and he needed "to put some things on the record." For several pages in the record, appellant interrupts and talks over the trial court before the record shows appellant exited the courtroom. The trial court stated that appellant "wouldn't quit talking over me" and "clearly was disruptive in a way that would prevent us from going forward with the trial, so that's why I had him removed." The jury unanimously convicted appellant of each count in the indictment. This appeal followed.

In his first issue, appellant complains the trial court abused its discretion by admitting Facebook evidence over his hearsay objection. We review a trial court's

decision to admit or exclude evidence under an abuse of discretion standard. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002).

Texas Rule of Evidence 801(e)(2) provides that a statement is not hearsay if it is offered against a party and is a party's own statement. TEX. R. EVID. 801(e)(2); *Ripstra v. State*, 514 S.W.3d 305, 315 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The only requirements for admissibility of an admission of a party opponent under Rule 801(e)(2) are that the admission is the opponent's own statement and that it is offered against him. *Id.* The State offered appellant's own statements that he made on Facebook against him. Although the trial court did not at first admit appellant's statements, the State presented evidence linking appellant's email addresses, physical address, and information contained in appellant's TCU files to appellant's Facebook account. Only after the State made a clear showing that the statements in appellant's Facebook messages belonged to appellant did the trial court admit the statements. We conclude that the trial court did not err in admitting appellant's Facebook posts as admissions of a party opponent. *See id.*; *Jackson v. State*, No. 05–14–00274–CR, 2015 WL 3797806, at *4 n.4 (Tex. App.–Dallas 2015, no pet.) (mem. op., not designated for publication) (concluding appellant's text messages were not hearsay because they were admissions of a party opponent). We overrule appellant's first issue.

In his second issue, appellant argues the trial court abused its discretion by denying his right to be present for trial. Before voir dire, the trial court stated on the record that appellant was present in person with his attorney, appellant had "indicated to the jail that he doesn't want to be up here for this trial," and appellant was "restrained in a chair to get him up here." Appellant said he was "absolutely not" going to be able to sit through trial and not disrupt the proceedings. The trial court warned appellant that it would be to his benefit to be present at trial, but appellant continued to be disruptive and disrespectful of the trial court. In light of appellant's behavior, the trial court had appellant, screaming for help, taken out of the courtroom. The trial court stated that defense counsel was going to talk to appellant in the afternoon and tell him that he was welcome to come back to the trial if he could stop being disruptive. The trial court said it was not possible to "figure out any less restrictive or lesser manner to be able to go ahead with the trial."

Twice more, appellant was removed from the courtroom. The first time, appellant said he was "too sick" to participate in the trial and he doubted he would be able to be quiet while other people were testifying. The second time, appellant was removed because, as the trial court stated, appellant "clearly was disruptive in a way that would prevent us from going forward with the trial."

In support of his argument under this issue, appellant cites (1) the statutory requirement that a defendant must be present at trial pursuant to article 33.03 of the code of criminal procedure and (2) the constitutional requirement that a defendant

threatened with loss of liberty be present at all phases of the criminal proceedings against him pursuant to the Sixth Amendment of the United States Constitution and Article I, section 10 of the Texas Constitution.

First, as to the statutory requirement, article 33.03 of the code of criminal procedure provides that a defendant has an absolute right to remain in the courtroom until the jury has been selected. TEX. CODE CRIM. PROC. ANN. art. 33.03. An accused's right to be present at his trial is unwaivable until such a time as the jury "has been selected." *Miller v. State*, 692 S.W.2d 88, 91 (Tex. Crim. App. 1985).

The record shows appellant was disruptive, disrespectful, and unruly prior to voir dire, leaving the trial court with no less restrictive manner to proceed with trial other than removing appellant from the courtroom. To the extent appellant's removal during voir dire violated article 33.03, we conclude any error was harmless. *See Smith v. State*, 534 S.W.3d 87, 92 (Tex. App.—Corpus Christi-Edinburg 2017, pet. ref'd). Because the error was statutory, we may not reverse unless we determine the error affected a substantial right. *Tracy v. State*, 14 S.W.3d 820, 827 (Tex. App.—Dallas 2000, pet. ref'd). A substantial right is affected when the error (1) had a "substantial and injurious" effect or influence in determining the jury's verdict or (2) leaves one in grave doubt whether it had such an effect. *Id.* A substantial right is not affected and the error is harmless if, after reviewing the entire record, the appellate court determines the error did not influence, or had only a slight influence, on the trial's outcome. *Id.* In this case, the record does not show the jury selected

in appellant's absence was unfair or partial. Therefore, even though appellant's right to be present during all portions of voir dire was violated, the error did not affect a substantial right. Accordingly, we must disregard the error. *See* TEX. R. APP. P. 44.2.

Second, as to the constitutional requirement, the court of criminal appeals has "recognized that under the Sixth Amendment to the United States Constitution and Article I, § 10 of the Bill of Rights in the Constitution of Texas, 'the scope of the right of confrontation is the absolute requirement that a criminal defendant who is threatened with loss of liberty be physically present at all phases of proceedings against him . . . .'" *Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001) (quoting *Baltierra v. State*, 586 S.W.2d 553, 556 (Tex. Crim. App. 1979)). The court in *Baltierra* stated this right to be present was subject to a waiver of that right through defendant's own conduct. *Baltierra*, 586 S.W.2d at 556 (citing *Illinois v. Allen*, 397 U.S. 337, 343, (1970)).

A defendant can lose his constitutional right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. *Ramirez v. State*, 76 S.W.3d 121, 129 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *Allen*, 397 U.S. at 343). Moreover, expulsion is not constitutionally improper when a defendant fails to assure the trial court that he will

remain quiet and the trial court lacks any reason to believe his misbehavior will cease. *Id.* at 130.

We have already discussed appellant's disruptive, unruly behavior at trial. On this record, we conclude that appellant's removal from the courtroom in each instance was not constitutionally improper. *Ramirez*, 76 S.W.3d at 129; *see Allen*, 397 U.S. at 343. We overrule appellant's second issue.

In his third issue, appellant argues the trial court erred by denying his right to testify. The right to testify is "fundamental" in the sense that the defendant possesses the ultimate authority on whether to invoke the right. *Johnson v. State*, 169 S.W.3d 223, 236 (Tex. Crim. App. 2005) (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). The denial of the right to testify is a trial error, rather than a structural error, which is subject to a harm analysis. *Id.* at 237. A court assesses the effect of any alleged error by looking at the defendant's anticipated testimony, the evidence admitted at trial, the jury charge, and other factors. *Id.* at 237–38.

Here, in response to the trial court's questioning regarding whether appellant wanted to testify, appellant gave conflicting responses. Appellant said he "would not be able to make that decision" whether to testify, he "absolutely" wanted to testify, and he was "not even able to" testify. Appellant continued to talk over the trial court in the ensuing conversation and never definitively invoked his right to testify. There is nothing in the record to show the content of appellant's anticipated testimony. Appellant does not challenge the sufficiency of the evidence to support

his conviction on every count. Once the Facebook messages sent by appellant to the three minors were admitted into evidence, it is unclear what testimony from appellant could have countered that evidence. Moreover, given the disruptive and argumentative nature of appellant's communications with the trial court throughout the trial, it is likely that any testimony from appellant would have had a negative effect on the jury. Under these circumstances, we conclude the error, if any, in denying appellant's right to testify was harmless. *See Id.* at 237–38. We overrule appellant's third issue.

We affirm the trial court's judgment.

/Craig Smith/
CRAIG SMITH
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA JEFF BARRIER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-20-00088-CR V.	Trial Court Cause No. 070006 Ct. 1. Opinion delivered by Justice Smith.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 23, 2021

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA JEFF BARRIER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-20-00089-CR V.	Trial Court Cause No. 070006 Ct. 2. Opinion delivered by Justice Smith.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 23, 2021

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA JEFF BARRIER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-20-00090-CR V.	Trial Court Cause No. 070006 Ct. 3. Opinion delivered by Justice Smith.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 23, 2021

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA JEFF BARRIER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-20-00091-CR V.	Trial Court Cause No. 070006 Ct. 4. Opinion delivered by Justice Smith.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 23, 2021

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA JEFF BARRIER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-20-00092-CR V.	Trial Court Cause No. 070006 Ct. 5. Opinion delivered by Justice Smith.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 23, 2021

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSHUA JEFF BARRIER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-20-00093-CR V.	Trial Court Cause No. 070006 Ct. 6. Opinion delivered by Justice Smith.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 23, 2021