Opinion issued June 25, 2020.

In The

Court of Appeals

For The

First District of Texas

NOS. 01-19-00328-CR
01-19-00329-CR

HECTOR MANCILLA-MENDOZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Case Nos. 18353 & 18364 (Counts I, II, III)

MEMORANDUM OPINION

A jury convicted appellant, Hector Mancilla-Mendoza, of aggravated sexual assault of a child,[1] one count of continuous sexual abuse of a child under the age of 14, and two counts of sexual performance by child under the age of 14.[2] In the aggravated-sexual-assault-of-a-child case, the jury assessed punishment at confinement for life. In the continuous-sexual-abuse-of-a-child-under-14 case (Count I), the jury assessed punishment at confinement for life; in the sexual-performance-by-a-child cases (Counts II and III), the jury assessed punishment at 20 years' confinement. In his sole issue on appeal, appellant contends that the trial court abused its discretion by admitting outcry testimony by a person he contends was not the first person over the age of 18 to whom the child described the offense. We affirm.

BACKGROUND

Evidence from the Outcry Hearing

In September 2017, Jennifer's mother cleaned out a vase in her house and placed the items found therein in Jennifer's purse. When Jennifer went through the purse, she discovered an SD card on which several digital videos were stored.

---

[1] Trial court cause no. 18,353, appellate cause no. 01-19-00328-CR; *see* TEX. PENAL CODE § 22.021(a)(1)(B), (a)(2)(B).

[2] Trial court cause no. 18,364 (Counts I, II, III), appellate cause no. 01-19-00329-CR; *see* TEX. PENAL CODE §§ 21.02(b)(2) and 43.25(d), (e).

Upon watching the videos, Jennifer saw appellant, her ex-boyfriend, molesting her seven-year-old daughter.

The same day that she discovered the SD card, Jennifer called the police. Both officers who responded spoke to Jennifer, not her daughter. Deputy Guerro said that Jennifer told him that she had spoken to the child about whether she had been inappropriately touched by someone, but the child had denied it. Detective Campbell said that Jennifer told him the child had not told her anything.

Shortly thereafter, the case was assigned to Brenham Police Officer M. Davis, who also spoke to Jennifer. Davis said that the child had not given Jennifer any specifics about the sexual abuse allegations. Davis did recall that Jennifer told him that the child said that "it happened over 100 times." Davis scheduled a forensic interview with the child at Scotty's House Child Advocacy Center.

Jennifer acknowledged that she spoke to the child about the allegations three times before the forensic interview for about ten to 15 minutes. The day she found the SD card, Jennifer asked her daughter why she never said anything about it, and the child replied, "I don't know anything. I'm just a little girl." They never discussed the specifics about the abuse. The only thing the child said was that "it happened more than 100 times." The child never gave Jennifer any details about how or where appellant touched her other than saying, "it hurt, the fingers." Jennifer said, "I actually continued asking her, like, did he touch her anywhere or

did he do anything else besides touching her," and the child responded that "the only thing he did was touch me."

Cameron Hines, the forensic interviewer from Scotty's House, testified that the child told her that appellant "had been touching her middle part" and "that he's not supposed to do that to a girl that little." The child described an instance when appellant came into her room, carried her to her mom's bed while her mom was at work, and "had put his finger insider of her middle part." When asked what her "middle part" was, the child tapped on her vagina with her finger. She said that she could feel appellant's fingernail and that it hurt. She said appellant stopped when they heard a truck approaching.

The child also described appellant taking pictures or videos of her during the assault. She recalled seeing the light from the camera on his cell phone. She saw one video when appellant put his finger in her "middle part" and another when he put his "middle part" in her "middle part." She said that when he used his "middle part" "it hurt more."

The child described the abuse as occurring at two different houses—a green house and a white house—in Brenham. She described one room as having bunk beds and one was the room with her mother's bed. The child said that the time he put his "middle part" in her "middle part" was when she was six, and when he put his finger in her "middle part," she was seven. The child told Hines that appellant

"never put anything on his middle part before putting it in her middle part." The child told Hines that she had never told anyone about the abuse before her.

After the outcry hearing, the trial court concluded that Hines, not Jennifer, was the appropriate outcry witness.

The Trial Evidence

The child testified at trial about the "bad stuff" appellant did to her. Specifically, she testified that appellant would touch her "privates" with his hands. Sometimes she was wearing clothes when it happened and sometimes she was not. She testified that her "privates" were used to "pee and poop."

Hines, the forensic interviewer, testified to much the same evidence as that she gave during the outcry hearing. She testified about how appellant put his finger in the child's "middle part" and put his "middle part" in her "middle part." The child said that it hurt more when he used his "middle part."

Jane Riley, a pediatric nurse at Scotty's House, testified that the child tested positive for chlamydia. She explained that chlamydia is a sexually transmitted disease that is passed from person to person through genital-to-genital contact.

Jennifer testified that, after the child tested positive for chlamydia, she too tested positive for chlamydia. Jennifer said that she did not have sexual relations with anyone else while she was with appellant. Jennifer also testified about how

she came to find the SD card containing images of appellant molesting her daughter.

The SD card was admitted into evidence, as well as a DVD containing a copy of the images from the SD card (State's exhibit 27). The DVD was published to the jury and contains two videos. The first video shows digital penetration of the child and the second video appears to show sexual intercourse.

The defense's theory of the case was that appellant was not the adult seen in the videos with the child. He denied sexually abusing the child or having a sexually transmitted disease. He did admit that the person depicted in a still photograph taken from one of the videos looked like him.

ADMISSION OF OUTCRY WITNESS TESTIMONY

In his sole issue on appeal, appellant contends that "[t]he trial court abused its discretion by admitting outcry testimony from the forensic interviewer [Hines] who was not the first person over 18 years of age [to whom] the child described the alleged offense." Specifically, appellant contends that the mother, not the forensic interviewer, was the first adult the child spoke with about the offenses.

Applicable Law and Standard of Review

Article 38.072 of the Texas Code of Criminal Procedure allows the admission of a hearsay statement describing sexual abuse made by a child abuse victim to an outcry witness. TEX. CODE CRIM. PROC. art. 38.072. For

the outcry statement to be admissible, the witness must be the first person over the age of eighteen to whom the child made a statement about the offense. *Id.* § 2(a)(3); *Bays v. State*, 396 S.W.3d 580, 585 (Tex. Crim. App. 2013). The statement must describe the alleged offense "in some discernible manner" and must be more than "a general allusion that something in the area of child abuse was going on." *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). In general, the proper outcry witness is the first adult to whom the child abuse victim describes "how, when, and where" the abuse occurred. *Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd). If the child makes only a general allusion to the first adult and gives a more detailed account to a second adult, the second adult may be the proper outcry witness. *See Garcia*, 792 S.W.2d at 91.

The trial court has broad discretion to determine which of several witnesses is an outcry witness. *Chapman v. State*, 150 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). We review a trial court's designation of an outcry witness under an abuse of discretion standard. *Garcia*, 792 S.W.2d at 92. A trial court abuses its discretion when its ruling is outside the zone of reasonable disagreement. *Walters v. State*, 247 S.W.3d 204, 217 (Tex. Crim. App. 2007). We will not disturb a trial court's designation of an outcry witness if it is supported by the evidence. *Garcia*, 792 S.W.2d at 92.

Analysis

Appellant contends that Jennifer was the proper outcry witness because (1) she spoke to the child about the abuse three times before the forensic examiner, Hines, spoke to the child, and (2) the child told Jennifer that the abuse occurred "at least 100 times" and that appellant's fingers "hurt." The State responds that the child's statements to Jennifer were "'general allusions' of abuse [and] were not specific enough to make her an outcry witness.'" We agree with the State.

Although Jennifer spoke to the child about the abuse three times before Hines did, the child gave her no details besides that it happened "at least 100 times" and that appellant's finger "hurt." The child gave no information about "how, when, and where" the abuse occurred. Nor did the child describe how appellant used his fingers to hurt her. She never described any acts of intercourse, claiming that appellant only "touched her," without describing how he touched her.

In contrast, when the child spoke to Hines, she provided specific instances of abuse and details. She said that appellant put his finger in her "middle part," which she indicated was her vagina. She described that his fingernail hurt. She also remembered that appellant took videos during the abuse. On another occasion, the child stated that appellant put his "middle part" in her "middle part" and that it felt rough and hurt more. She remembered there being a video of this abuse also. She recalled seeing the light from the camera on the cell phone appellant used to film

the abuse. The child also described to Hines the two houses and rooms in which the abuse occurred, and she was able to say that one event occurred when she was six and another when she was seven.

On this record, it would not be outside the zone of reasonable disagreement for the trial court to find that Hines, rather than Jennifer, was the first adult to whom the child described appellant's sexual abuse in a discernable manner. Therefore, we cannot conclude the trial court abused its discretion by designating Hines as the outcry witness under article 38.072 and admitting her testimony at trial. *See Rogers v. State*, 442 S.W.3d 547, 552 (Tex. App.—Dallas 2014, pet. ref'd) (holding trial court did not err by designating forensic interviewer and not mother as outcry witness when "[child victim] made general allusions of abuse to his mother but it was not until he spoke to the forensic interviewer that he made all of his allegations and it became clear the sexual abuse involved multiple incidents"); *Sims v. State*, 12 S.W.3d 499, 500 (Tex. App.—Dallas 1999, pet. ref'd) (holding trial court reasonably could have determined child victim's statement to her mother that defendant "had touched her private parts" was insufficient to designate mother as outcry witness because statement "was nothing more than a general allusion that something in the area of sexual abuse was occurring and not a clear description of the offense charged as required by article 38.072"); *Gutierrez v. State*, No. 05-17-00772-CR, 2018 WL 2001614, at *5 (Tex. App.—Dallas Apr.

30, 2018, no pet.) (mem. op., not designated for publication) (holding child victim's statement that defendant had done "bad things" to her and she thought she was pregnant was only general allusion that sexual abuse was occurring); *see also Garcia*, 792 S.W.2d at 91 (holding child victim's statement that "something had happened at home, and that it had to do with child abus[e]" was a "general allusion" insufficient to designate the first adult as outcry witness); *Smith v. State*, 131 S.W.3d 928, 931 (Tex. App.—Eastland 2004, pet. ref'd) (concluding trial court reasonably could have determined child victim's statement that defendant had been performing oral sex on him for "about a year" was "a general allusion that something in the area of sexual abuse was occurring and not a clear description of the offense charged as required by article 38.072") (quoting *Sims*, 12 S.W.3d at 500); *Josey v. State*, 97 S.W.3d 687 692–93 (Tex. App.—Texarkana 2003, no pet.) (holding child victim's statement that defendant "fingered" him only alluded to digital penetration when child victim did not explain what "fingered" meant or give further details of sexual assault).

We overrule appellant's sole issue.

CONCLUSION

We affirm the trial court's judgments.

Sherry Radack
Chief Justice

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

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