



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-19-00226-CR

MICHEL SKINNER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 367th District Court
Denton County, Texas¹
Trial Court No. F16-3231-367, Honorable Margaret Barnes, Presiding

June 25, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant Michel Skinner was convicted on three counts of aggravated sexual assault of a child and one count of indecency with a child.² In this appeal, he challenges the trial court's ruling admitting into evidence a videotaped interview of the victim. We affirm the judgment of the trial court.

¹ Originally appealed to the Second Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. See TEX. GOV'T CODE ANN. § 73.001 (West 2013).

² See TEX. PENAL CODE ANN. §§ 22.021, 21.11 (West 2019).

Background

The complainant, “Annie,” is a child with intellectual disabilities.³ When Annie was in the fifth grade, she told two friends at school about an incident of sexual abuse by appellant, who was her mother’s boyfriend. At Annie’s request, her friends informed their teacher. Annie’s teacher contacted Child Protective Services, which arranged for Annie to be interviewed by a forensic interviewer at the Children’s Advocacy Center for Denton County. Following an investigation, appellant was indicted by a grand jury on four counts of aggravated sexual assault and one count of indecency with a child.

At trial, the State presented several witnesses, including Annie. Outside the presence of the jury, the State informed the trial court of its intent to offer the video of Annie’s forensic interview into evidence. Appellant objected on the basis that the video was hearsay. In response, the State argued that appellant’s cross-examination of Annie “opened the door to her prior consistent statement by his express or implied suggestion that the witness is fabricating her testimony.” The State contended that appellant had insinuated that Annie was making things up to help her case and implied that there was a recent fabrication or that the State influenced her testimony. In addition, the State urged that the interview was admissible under the rule of optional completeness. The trial court allowed the video into evidence, and it was played for the jury.

The jury found appellant guilty of all charges, save one count of aggravated sexual assault. The trial court sentenced him to twenty years’ confinement in the Texas Department of Criminal Justice on the indecency with a child count and on two of the

³ We will use the pseudonym “Annie” to protect the identity of the child victim. See TEX. R. APP. P. 9.10(a)(3).

aggravated sexual assault counts, and ninety-nine years' confinement on the remaining aggravated sexual assault count, with sentences to run consecutively.

Discussion and Analysis

In his sole issue on appeal, appellant asserts that the trial court erred by admitting the video recording of Annie's forensic interview as either a prior consistent statement or under the rule of optional completeness.

Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion when its determination is beyond the zone of reasonable disagreement on the issue at hand. *Id.* If the trial court's ruling was correct on any theory of law applicable to the case, considering what was before the trial court at the time of the ruling, then we must uphold it. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004).

Applicable Law

The proponent of evidence generally has the burden of establishing its admissibility. *White v. State*, 549 S.W.3d 146, 151-52 (Tex. Crim. App. 2018). If the opposing side makes a proper objection to the admissibility of evidence, the proponent must demonstrate that the evidence overcomes the stated objection. *Id.* at 152. In general, a hearsay objection is sufficiently specific to require the offering party to show that the evidence is not hearsay or that it is admissible under an exception to the hearsay rule. *Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994) (en banc).

A hearsay statement—one made outside of court and offered for its truth—is generally inadmissible. TEX. R. EVID. 801-02. However, the prior statement of a witness that is consistent with her trial testimony is not hearsay if it is offered to rebut an express or implied charge that the witness recently fabricated it or acted from a recent improper motive in so testifying. TEX. R. EVID. 801(e)(1)(B). To qualify for admission as a prior consistent statement, the statement must have been made by the witness before her ostensible motive to fabricate or other improper motive arose. *Hammons v. State*, 239 S.W.3d 798, 808-09 (Tex. Crim. App. 2007). The predicate for the admission of a prior consistent statement “is laid by the content, tone, and tenor of defense cross-examination.” *Id.* at 808.

Application

At trial, appellant’s counsel elicited testimony from Annie that she and her mother moved to Texas from Louisiana because appellant had moved to Texas. Annie, her mother, and appellant lived in an apartment together, and Annie did not get to spend as much time with her father as she had before. Annie acknowledged that she did not like appellant and that she wanted to return to Louisiana.

Appellant alleges that Annie’s motive to fabricate testimony was her desire to get appellant out of her life and move back to Louisiana with her mother. In his brief, he asserts that the hearsay exclusion to prior consistent statements to rebut recent fabrication does not make Annie’s interview admissible because the interview “took place long after her alleged motive for fabrication had arisen.” According to appellant, for the forensic interview to qualify as a prior consistent statement, Annie would have had to sit for the interview before developing her motive to fabricate testimony. Thus, the question

before us is whether a charge of recent fabrication or improper motive was raised which would warrant admission of Annie's statement under Rule 801(e)(1)(B).

The focus of appellant's trial strategy was on persuading the jury that Annie had completely fabricated the offenses from the outset. However, appellant's counsel also suggested that Annie embellished her story over time. For example, appellant's trial counsel asked Annie the following questions:

Q: Did you ever see anything come out of [appellant's] private part?

A: Yes, sir.

Q: Do you remember whenever the interviewer asked that, you said no? Describe what you saw, if you remember.

(Brief pause)

Q: Do you – do you remember, [Annie]? It's okay if you do, and it's okay if you don't. There's no right or wrong answer.

A: No.

Q: No? No which one?

A: No, sir.

Q: Okay. I'm going to ask that question again because I'm not sure how we're answering it. But did you ever see anything come out of his private part, [Annie]?

A: No, sir.

Q: Okay. Well, do you know why just a couple of seconds ago you told me that you did?

A: Yes, sir.

Q: So did you or did you not see something come out?

A: No, sir.

Q: No?

A: (Shook head.)

Q: Okay. Do you know why you just told me a few minutes ago that you did?

A: (Shook head.)

Q: Was it just to kind of help out with the case?

As another example, after challenging Annie's credibility based on changes in her story, appellant's trial counsel asked Annie how many times she had met with the prosecutor, implying that the prosecutor was the source of Annie's differing statements.

As appellant claims, one element of the Rule 801(e)(1)(B) exception is that the prior consistent statement must have been made before the motive to fabricate arose. Appellant is correct that Annie's forensic interview did not predate her alleged motivation to remove appellant from her life.

We bear in mind that the trial court is in the position to observe "the tone and tenor of the questioning, combined with the cross-examiner's demeanor, facial expressions, pregnant pauses, and other nonverbal cues." *Hammons*, 239 S.W.3d at 808 (also stating that, in assessing whether cross-examination of a witness makes an implied charge of fabrication or improper motive, the trial court considers not only the totality of the questioning but also may consider other clues). Bearing this in mind, we believe the comments recited above could reasonably be viewed as suggestions that Annie had been coached by prosecutors and embellished her testimony in an effort to "help out" the prosecution. Such an implication would create a separate, distinct improper influence on Annie arising after the interview. *See, e.g., Martinez v. State*, 276 S.W.3d 75, 82-83 (Tex. App.—San Antonio 2008, pet. ref'd) (cross-examination opened the door to admission of forensic interview when defense counsel implied that complainant had been coached in her testimony by the prosecutor before and during trial); *Wisdom v. State*, 143 S.W.3d

276, 281 (Tex. App.—Waco 2004, no pet.) (mem. op.) (trial court properly admitted prior consistent statement when cross-examination “raised an inference of recent fabrication” or that the prosecutor, witness’s mother, or victim had improperly influenced witness’s testimony).

A prior consistent statement need not predate each alleged improper influence; it need only predate one alleged improper influence. *Dibello v. State*, 432 S.W.3d 913, 916 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d) (citing *Dowthitt v. State*, 931 S.W.2d 244, 264 (Tex. Crim. App. 1996)). Here, because Annie’s forensic interview predated her interaction with the prosecutors, the trial court could have reasonably determined that her statements therein were made before any supposed efforts by prosecutors to influence her testimony and thus met the requirements of Rule 801(e)(1)(B).

We conclude that the trial court’s ruling to admit the forensic interview into evidence as a prior consistent statement was within the zone of reasonable disagreement; therefore, we will not disturb it on appeal. Accordingly, we need not address whether the evidence was properly admitted under the rule of optional completeness. See TEX. R. APP. P. 47.1. We overrule appellant’s sole issue.

Conclusion

For the reasons set forth above, the judgment of the trial court is affirmed.

Judy C. Parker
Justice

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