Affirmed and Memorandum Opinion filed July 14, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00443-CR

MOISES BENAVIDES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1587885

MEMORANDUM OPINION

In this appeal from a conviction for continuous sexual abuse of a child, appellant contends that the trial court abused its discretion when it admitted the testimony of multiple outcry witnesses and when it denied a motion for mistrial. For the reasons explained below, we overrule each of these issues and affirm the trial court's judgment.

OUTCRY WITNESSES

The complainant, a thirteen-year-old girl, approached her teacher after class and disclosed that she had been sexually assaulted by appellant, her biological father. The teacher escorted the complainant to a school counselor, to whom the complainant made additional disclosures. The counselor then contacted the appropriate authorities, after which the complainant was interviewed by a child advocate, to whom the complainant made even more disclosures.

The prosecution gave notice that it intended to elicit outcry testimony from the teacher, the counselor, and the advocate. Pursuant to that notice, the trial court conducted two hearings outside the presence of the jury to determine the admissibility of the outcry testimony. The teacher and the counselor testified during the first hearing, and the advocate testified during the second hearing. At the end of both hearings, the trial court ruled that all three witnesses could testify, over appellant's hearsay objections.

Appellant now challenges the trial court's rulings with respect to the counselor and the advocate.

A. The Law

Hearsay is inadmissible unless it is excepted under Rules 803 or 804 of the Texas Rules of Evidence, or by "other rules prescribed under statutory authority." *See* Tex. R. Evid. 802. One of these "other rules" is Article 38.072 of the Texas Code of Criminal Procedure, which provides that in a case such as this involving sexual assault against a child under the age of fourteen, the complainant's out-of-court statement is admissible so long as the statement is a description of the offense and it is offered into evidence by the first adult to whom the complainant made the statement.

Though the terms do not appear in Article 38.072, the complainant's out-of-court statement is commonly known as the "outcry," and the adult who testifies about the outcry is commonly known as the "outcry witness." *See Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). Outcry-witness designations are event-specific, rather than person-specific, which means that more than one outcry witness may testify if each witness testifies about a different event. *See Rosales v. State*, 548 S.W.3d 796, 806–07 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd). The trial court determines in the first instance whether the witnesses may be designated as outcry witnesses, and we review that determination for an abuse of discretion. *See Polk v. State*, 367 S.W.3d 449, 452 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

B. The Counselor

Appellant challenges the admission of the counselor's outcry testimony, claiming that it was too similar to the teacher's outcry testimony, and that there was no showing that these two witnesses were offering statements into evidence about separate and discrete events. To review this claim, we must first recount the testimony from the outcry hearing.

The teacher testified during the hearing that the complainant was one of her eighth grade students. The teacher said that the complainant came to her during a lunch break with two of her friends, who were encouraging her to make a disclosure. Sensing that the complainant would be more comfortable in a private setting, the teacher asked the two friends to leave, and then she invited the complainant to tell her what was going on. The complainant responded, "My dad." Her eyes then got big, and she told the teacher that appellant "was having sexual intercourse with her to the extent that she had to take two pregnancy tests." The complainant also revealed that the most recent sexual assault had happened about a month earlier, around New

Year's Day in a trailer, and that the complainant had told appellant that he had to stop. The teacher added that the complainant did not disclose any particular details about the nature of the sexual intercourse.

According to the counselor, who testified next, the complainant said that appellant had been sexually abusing her for over a year, ever since she was in the sixth or seventh grade. The complainant said that the abuse would happen on the weekends, when she occasionally visited appellant with her younger sister. In describing the very first assault, the complainant said that she was in bed with appellant and her younger sister and that she began to feel someone touching her breasts and her vagina. She said that she was shocked, that she did not know what was happening, and that appellant ultimately penetrated her vagina with his penis. The complainant added that the assaults did not happen every time she visited, but she was fearful that appellant would someday abuse her younger sister.

At the end of the outcry hearing, the prosecution argued that both witnesses were outcry witnesses because the teacher described the last incident of sexual assault, whereas the counselor described the first incident of sexual assault. The defense countered that, at most, only the teacher should be designated as an outcry witness because the teacher "was able to get sufficient detail about what was going on." The trial court ruled that both witnesses qualified as outcry witnesses "because it's the Court's impression, based on what I've heard, that they are indeed testifying to different facts."

The trial court's ruling is supported by the record. The teacher testified about a sexual assault that occurred in a trailer around New Year's Day when the complainant was still in the eighth grade, while the counselor testified about a sexual assault that occurred in a bedroom when the complainant was in the sixth or seventh grade. Even though both assaults involved vaginal penetration, the assaults

themselves were separate events. Because outcry-witness designations are event-specific, rather than person-specific, the trial court did not abuse its discretion by designating both witness as outcry witnesses for the separate events.

C. The Advocate

In a separate outcry hearing, the advocate testified that the complainant disclosed multiple incidents of sexual abuse. The complainant talked about the very first time that she was sexually assaulted by appellant, and she described that assault using the same details that she earlier used when making her outcry to the counselor, adding only that appellant digitally penetrated her vagina as well (in addition to touching her vagina with his hand and penetrating her vagina with his penis). The complainant also talked about other incidents in which she was forced to perform oral sex on appellant, in which he performed oral sex on her, and in which he engaged in anal sex with her. The complainant said that these assaults happened when she was twelve years old and in the seventh grade.

At the end of the hearing, the prosecution argued that the advocate "would be the appropriate outcry witness for the multiple incidents of anal sex that occurred and also for the oral sex that he performed on the victim and that [the] victim performed on Defendant." The defense objected that the advocate's testimony would be repetitive and duplicative because the other two outcry witnesses had already testified about the anal sex, although counsel conceded that he "could be mistaken" as to that point—and he was mistaken, as neither the teacher nor the counselor testified that the complainant had made an outcry about anal sex (or oral sex). The trial court overruled the defense's objection and determined that the advocate could testify.

When the trial resumed, the prosecution elicited testimony from the advocate about the complainant's first sexual assault. The defense sought a running objection

to this line of testimony, which the trial court granted. The advocate then mentioned the complainant's outcry statements about how appellant penetrated her vagina with both his fingers and his penis. The advocate continued with additional descriptions about the anal and oral sex.

Now on appeal, appellant does not dispute that the advocate was the proper outcry witness for the descriptions of anal and oral sex. However, he argues that the advocate was not a proper outcry witness for the statements regarding vaginal intercourse because the complainant had previously made those same statements to the counselor.

For the sake of argument, we will assume without deciding that the trial court should have excluded the advocate's testimony about how appellant penetrated the complainant's vagina with his penis. The question then becomes whether the admission of this testimony was reversible under the standard for nonconstitutional error. *See Chapman v. State*, 150 S.W.3d 809, 814 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) ("The admission of inadmissible hearsay constitutes nonconstitutional error . . . .").

Nonconstitutional error must be disregarded unless it affects a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when the error has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error had no influence or only a slight effect on the verdict, then the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

In this case, the advocate did not testify with any significant details about the first time that appellant and the complainant had vaginal intercourse. The advocate merely stated that "after [the digital penetration] they had sex . . . vaginal sex." This generic statement about vaginal intercourse was cumulative of the testimony that the

counselor had given, and that the complainant would also give at a later stage during the trial. Because the testimony from the counselor and the complainant was properly admitted, the advocate's cumulative testimony was not likely to have a substantial and injurious effect on the jury's verdict. At most, the advocate's testimony had just a slight effect on the jury's verdict. We therefore conclude that any error in the admission of the advocate's testimony was harmless. *See Nino v. State*, 223 S.W.3d 749, 754 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (the improper admission of testimony from a forensic interviewer was harmless because the same or similar testimony was properly admitted by the child complainant's mother).

MOTION FOR MISTRIAL

During closing arguments, the prosecution summarized all of the evidence and concluded with the following remarks: "We are going to ask you to protect [the complainant] because a not guilty in this case means that she's a liar, that you don't believe her, that you don't believe what she told you." The defense objected that these remarks were improper, and the trial court sustained the objection. At the defense's request, the trial court also instructed the jury to disregard the remarks and not consider them for any purpose. The defense then moved for a mistrial, which the trial court denied.

Appellant now challenges this adverse ruling, which we review for an abuse of discretion. *See Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). In deciding whether the trial court abused its discretion, we consider the following three factors: (1) the severity of the prejudicial event, (2) the curative measures taken by the trial court, and (3) the certainty of conviction absent the prejudicial event. *See Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

Beginning with the first factor, appellant suggests that the prosecution's remarks were severe because they had the effect of lessening the burden of proof and bolstering the truthfulness of the complainant. We do not perceive how the remarks could have affected the burden of proof: the prosecution correctly observed that the jury could not acquit appellant without disbelieving the complainant, as her testimony established every essential element of the offense beyond a reasonable doubt. Moreover, we do not perceive how the remarks were severe, as they were a response to the defense's own closing arguments, in which the defense highlighted inconsistencies in the complainant's story and then told the jury that "clearly she wasn't telling you the truth" and "you have to have some concerns about her believability." This factor does not weigh greatly in appellant's favor.

The second factor does not weigh in appellant's favor either because the trial court gave an instruction to disregard the prosecution's remarks. We ordinarily presume that an instruction to disregard cures any prejudice because we also presume that the jury follows the trial court's instructions. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). The record does not reveal any reason to believe that the trial court's instruction to disregard was ineffective in this case.

As for the final factor, we note that in a case like this that deals with sexual assault, the credibility of the complainant is generally the central and dispositive issue in the trial. *See Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009). Because the complainant's credibility would have already been on the forefront of the jury's considerations, there is little reason to believe that the prosecution's remarks moved the jury from a state of non-persuasion to a state of persuasion.

We also note that the complainant's testimony was corroborated by her younger sister, who testified that she would sleep in the same room as appellant and the complainant, and that they woke her up on several occasions. The sister described

how she heard sounds that resembled people jumping on the bed. She also said that she saw the complainant "floating" above appellant on one occasion, and that on another occasion, she saw appellant on top of the complainant with "not that much" clothes on.

The defense did not produce much evidence to counter this testimony. The only witnesses called by the defense were appellant's sister, who testified that she slept in a nearby bedroom and never heard or saw anything suspicious, and appellant's cousin, who testified that she trusted appellant around her own daughters.

Having considered all three factors and the state of the entire record, the trial court could have reasonably determined that the prosecution's remarks were not the sort of extreme event in which prejudice was incurable. We therefore conclude that the trial court did not abuse its discretion by denying the motion for mistrial.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jewell, and Hassan.
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