TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00713-CR
NO. 03-18-00714-CR

Juan Lopez a/k/a Delfino Torres a/k/a Delfino Torres Solorio, Appellant

v.

The State of Texas, Appellee

FROM THE 403RD DISTRICT COURT OF TRAVIS COUNTY
NOS. D-1-DC-17-300273 & D-1-DC-17-300274
THE HONORABLE BRENDA KENNEDY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Juan Lopez, a/k/a Delfino Torres a/k/a Delfino Torres Solorio, guilty of aggravated kidnapping and aggravated sexual assault. *See* Tex. Penal Code §§ 20.04, 22.021. The jury further found the enhancement paragraph in each of the indictments, which alleged a prior murder conviction, to be true and, pursuant to the repeat offender punishment provision of the Penal Code, assessed appellant's punishment at confinement in the Texas Department of Criminal Justice for twenty years for the aggravated kidnapping and for forty-nine years for the aggravated sexual assault. *See id.* § 12.42(c)(1). In a single point of error on appeal, appellant asserts that the trial court violated his constitutional right to confrontation by limiting his cross-examination of the complainant. We affirm the judgments of the trial court.

DISCUSSION[1]

The defensive theory at trial was that the complainant, known by the pseudonym Fernanda Garcia, had fabricated the allegations against appellant in order to obtain a U-Visa. In support of this theory, the defense strategy at trial was to attack Garcia's credibility. In pursing this strategy, appellant sought to question Garcia about a purported "previous accusation." During appellant's cross-examination of Garcia, the following exchange occurred at a bench conference:

> [APPELLANT]: Your honor, at this time I want to go into a previous accusation that she had made against, I guess, her husband now. I know that the State — and that would go towards her credibility.
>
> THE COURT: No.

At that point, the bench conference ended. Appellant then passed the witness.

In his sole point of error, appellant asserts that the trial court violated his Sixth Amendment right to confrontation by improperly limiting his cross-examination of Garcia and excluding the evidence of the "previous accusation."

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). An abuse of discretion does not occur unless the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). Further, we may not reverse the trial

[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we do not recite them in this opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

court's ruling unless the determination "falls outside the zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). An evidentiary ruling will be upheld if it is correct on any theory of law applicable to the case. *Henley*, 493 S.W.3d at 93; *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Before considering the trial court's ruling excluding the testimony about the "previous accusation," we must determine whether appellant preserved his complaint for appellate review. *See Darcy v. State*, 488 S.W.3d 325, 328 (Tex. Crim. App. 2016); *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). Preservation of error is a systemic requirement on appeal. *Darcy*, 488 S.W.3d at 327; *Blackshear v. State*, 385 S.W.3d 589, 590 (Tex. Crim. App. 2012). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Darcy*, 488 S.W.3d at 327; *Blackshear*, 385 S.W.3d at 590; *Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010).

Rule 103(a)(2) of the Texas Rules of Evidence, which limits the scope of issues that may be appealed when evidence is limited or excluded, and Rule 33.1(a) of the Texas Rules of Appellate Procedure, which governs error preservation generally, operate together with respect to error preservation regarding a trial court's decision to exclude evidence. *See Golliday v. State*, 560 S.W.3d 664, 668–69 (Tex. Crim. App. 2018) (citing *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005)).

To preserve error regarding a trial court's decision to exclude evidence, the complaining party must comply with Rule 103 by making an "offer of proof" that sets forth the substance of the proffered evidence. *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009); *see* Tex. R. Evid. 103(a)(2) (requiring party to inform trial court of substance of excluded evidence by "an offer of proof" unless substance apparent from context). The offer of proof may

be in the form of a concise statement by counsel, or it may be in question-and-answer form. *Holmes v. State*, 323 S.W.3d 163, 168 (Tex. Crim. App. 2009); *Mays*, 285 S.W.3d at 889; *Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998). If in the form of a statement, the proffer "must include a reasonably specific summary of the evidence offered and must state the relevance of the evidence unless the relevance is apparent, so that the court can determine whether the evidence is relevant and admissible." *Holmes*, 323 S.W.3d at 168 (quoting *Warner*, 969 S.W.2d at 2); *accord Mays*, 285 S.W.3d at 889–90. The proffer must extend "beyond the anticipated questions" that the complaining party intends to ask the witness and reveal, "with some degree of specificity, the substantive evidence [the complaining party] intended to present." *Mays*, 285 S.W.3d at 890. "The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence." *Id.* (quoting Steven Goode, Olin Guy Wellborn III, & M. Michael Sharlot, 1 *Texas Practice–Guide to the Texas Rules of Evidence: Civil and Criminal* § 103.3 (1993)); *accord Holmes*, 323 S.W.3d at 168.

Here, appellant provided no statement summarizing what Garcia's testimony would have been concerning the alleged "previous accusation" and made no attempt to question Garcia about the alleged "previous accusation." Because he failed to make an offer of proof, this Court cannot determine whether the trial court abused its discretion by excluding the evidence and, if so, whether appellant was harmed by the exclusion. Similarly, the trial court did not have any information upon which to reconsider its ruling.

Furthermore, to preserve a complaint for appellate review, a party must lodge a timely and specific request, objection, or motion with the trial court and obtain an adverse ruling.

See Tex. R. App. P. 33.1(a)(1)(A) (imposing requirement of making specific request, objection, or motion to preserve complaint for appellate review). While no "hyper-technical or formalistic use of words or phrases" is required in order to preserve error, the proffering party must "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Golliday*, 560 S.W.3d at 670 (quoting *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012)).

An appellate issue involving a proffer of evidence, as opposed to an objection, must still satisfy the preservation-of-error requirements. *Reyna*, 168 S.W.3d at 179. Thus, to preserve error regarding the exclusion of evidence, a party must not only tell the judge that the evidence is admissible but must also explain *why* it is admissible. *See id.* at 177 (explaining that "it is not enough to tell the judge that evidence is admissible[;] [t]he proponent . . . must have told the judge why the evidence was admissible"); *see also Golliday*, 560 S.W.3d at 669 (observing that "[a]ppellant was responsible for preserving the error he sought to raise on appeal by specifically articulating the legal basis for his proffer at trial"); *White v. State*, 549 S.W.3d 146, 152 (Tex. Crim. App. 2018) (stating that "[t]he proponent of the evidence must identify to the trial court the basis of admissibility for the proffered evidence"). In addition, the explanation given at trial must match the one urged on appeal. *Reyna*, 168 S.W.3d at 179; *see Golliday*, 560 S.W.3d at 670–71; *see also Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial.").

On appeal, appellant argues that the limitation of his cross-examination of Garcia violated his constitutional right of confrontation. *See* U.S. Const. amends. VI, XIV. However,

at trial, when appellant sought to question Garcia about the alleged "previous accusation" against her husband, he explained to the trial court that the evidence "would go towards her credibility."[2] He never raised a constitutional argument for admitting the evidence. He did not cite to any constitutional provisions or to any cases involving the Confrontation Clause. Nor did he mention the right to confrontation. He did not in any way assert that the court's refusal to allow him to question Garcia about the alleged previous accusation improperly limited his right to cross-examine in violation of his constitutional right to confront witnesses. Because appellant did not articulate that his right to confrontation supported the admission of the evidence about the alleged previous accusation, the trial court never had the opportunity to rule on this rationale.

In sum, the record reflects that appellant failed to satisfy the preservation-of-error requirements, under both Rule of Evidence 103 and Rule of Appellate Procedure 33.1, concerning his constitutional complaint. First, he did not make an "offer of proof" that set forth the substance of the proffered evidence (the alleged "previous accusation") by either a concise statement of the anticipated testimony or through questioning of Garcia. Second, he did not raise a constitutional confrontation complaint in any way to the trial court. *See, e.g.*, *Golliday*, 560 S.W.3d at 670–71 (explaining that to preserve argument that exclusion of defensive evidence violates constitutional principles, defendant must state grounds for ruling sought with sufficient specificity to make court aware of constitutional grounds). Further, appellant's explanation for the admission of the testimony at trial (to attack Garcia's credibility) does not comport with his legal basis for admission on appeal (his constitutional right of confrontation). *See, e.g.*, *id.* at 671 (concluding that "general appeal to a proffer's relevance . . . [did] not

[2] We note that appellant did not explicitly state that the previous accusation was false but implied such when he sought to use it to attack Garcia's credibility.

adequately articulate constitutional basis sufficient to preserve argument concerning confrontation violation for appellate review"); *Reyna*, 168 S.W.3d at 179 (concluding that "arguments about hearsay did not put the trial judge on notice that he was making a Confrontation Clause argument").

Accordingly, for these reasons, we hold that appellant's complaint—that the trial court's limitation of his cross-examination of Garcia, which excluded evidence about her purported "previous accusation," violated his constitutional right to confrontation—is not preserved for appellate review. *See Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) (observing that even constitutional rights may be waived if proper request, objection, or motion is not asserted in trial court). We overrule appellant's sole point of error.

CONCLUSION

Having concluded that appellant failed to preserve his sole complaint for appellate review, we affirm the trial court's judgments of conviction.

Edward Smith, Justice

Before Chief Justice Rose, Justices Triana and Smith

Affirmed

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