In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00216-CR

LONNIE RAY O'NEAL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 27727

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

A Lamar County jury found Lonnie Ray O'Neal guilty of one count of continuous sexual abuse of a child, for which he was sentenced to forty years' imprisonment, and two counts of indecency with a child, each carrying sentences of five years' imprisonment. On appeal, O'Neal argues that the trial court erred in concluding that Rebecca Peavy, the executive director of the Children's Advocacy Center of Paris, was the proper outcry witness. He also argues that the jury charge was erroneous and the indictment fundamentally defective because they both omitted the required mens rea.

We find that (1) the trial court did not err by determining that Peavy was the proper outcry witness, that (2) there is no jury charge error, and that (3) O'Neal's complaint about the indictment is unpreserved. As a result, we affirm the trial court's judgment.

(1) The Trial Court Did Not Err by Determining that Peavy Was the Proper Outcry Witness

"Hearsay is not admissible at trial except as provided by statute or by the Texas Rules of Evidence." *Allen v. State*, 436 S.W.3d 815, 820 (Tex. App.—Texarkana 2014, pet. ref'd) (citing *Long v. State*, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990) (per curiam)). However, there is "an exception to the hearsay rule, applicable in prosecutions of sexual offenses, for statements describing the offense made by a child victim 'to the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense.'" *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)(3) (Supp.)).

O'Neal objected to Peavy as the outcry witness. At the Article 38.072 hearing, Peavy testified that the victim, Hannah,[1] described "both general sexual abuse that happened as well as a few specific events at different ages" during a forensic interview conducted when the child was fifteen. According to Peavy, Hannah said that, when she was between eight and ten years old, O'Neal touched her vagina over and under her underwear while she was in his bedroom, "moved her hand to touch his penis" during another incident when he was also touching her vagina, and exposed his penis while touching her vagina on a drive "behind Walmart." Peavy said that Hannah described "a lot of instances of what she called grinding" on O'Neal while she was not wearing underwear that occurred after her puberty, but before she turned fourteen, at several different locations. During cross-examination, Peavy testified that Hannah was brought to her after the child informed Paris Junior College Counselor Lanetta De La Pena of the sexual abuse. Peavy also said Hannah had twice told her mother of the abuse.

De La Pena testified that Hannah "came in to tell [her] about the abuse that she had been experiencing." According to De La Pena, Hannah said that she was "abus[ed]" and that O'Neal "would touch her inappropriately." As a result of this conversation, Hannah was taken to the police department and later interviewed by Peavy. De La Pena testified that Hannah never said where O'Neal touched her, and "never said what part of his body touched what part of her body," and De

[1]In this opinion, we refer to the child by a pseudonym in order to protect the child's identity. *See* TEX. R. APP. P. 9.10.

La Pena affirmed that she did not "know the specifics" of the allegations. Hannah's mother did not testify at the Article 38.072 hearing.[2]

After hearing Peavy and De La Pena testify, the trial court overruled O'Neal's objection to the designation and use of Peavy as the outcry witness. O'Neal argues that the trial court's ruling was erroneous because Hannah had told her mother and De La Pena of the abuse.[3] "We review a trial court's decision to admit an outcry statement under an abuse of discretion standard." *Allen*, 436 S.W.3d at 820–21 (citing *Owens v. State*, 381 S.W.3d 696, 703 (Tex. App.—Texarkana 2012, no pet.) (citing *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000)). "We will uphold the trial court's ruling if it is within the zone of reasonable disagreement." *Id*. at 821.

"To be admissible under Article 38.072, outcry testimony must be elicited from the first adult to whom the outcry is made." *Id.* (citing *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd)). "To be a proper outcry statement, the child's statement to the witness must describe the alleged offense, or an element of the offense, in some discernible manner and must be more than a general allusion to sexual abuse." *Id.* (citing *Lopez*, 343 S.W.3d at 140; *Broderick*, 35 S.W.3d at 73; *Thomas v. State*, 1 S.W.3d 138, 140–41 (Tex. App.—Texarkana 1999, pet. ref'd)). As the Texas Court of Criminal Appeals has emphasized,

> In picking the particular wording of the "first person" requirement, the legislature was obviously striking a balance between the general prohibition against hearsay

[2]At trial, Hannah's mother testified that the day she took Hannah to the police station was the first time she heard that O'Neal had molested her.

[3]O'Neal also argues that Hannah told her brother and her friends of the sexual abuse, but no testimony was introduced at the hearings to show that they were over the age of eighteen or that they were aware of anything more than a general allusion of sexual abuse.

> and the specific societal desire to curb the sexual abuse of children. . . . The portion of the statute catering to the hearsay prohibition demands that only the "first person" is allowed to testify. But the societal interest in curbing child abuse would hardly be served if all that "first person" had to testify to was a general allegation from the child that something in the area of child abuse was going on at home. Thus we decline to read the statute as meaning that any statement that arguably relates to what later evolves into an allegation of child abuse against a particular person will satisfy the requisites of [the statute]. The statute demands more than a general allusion of sexual abuse.

Garcia v. State, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990).

The State established that Hannah told Peavy about the details of the sexual abuse she suffered. "If the State presents evidence that a person is a proper outcry witness, the burden to rebut this evidence then falls on the defendant." *Eldred v. State*, 431 S.W.3d 177, 184 (Tex. App.—Texarkana 2014, pet. ref'd). Here, no evidence was presented by O'Neal showing that any other person over eighteen, including Hannah's mother and De La Pena, were privy to anything more than a general allusion of sexual abuse. As a result, the trial court did not abuse its discretion in concluding that Peavy was the proper outcry witness at the Article 38.072 hearing. We overrule this point of error.

(2) There Is No Jury Charge Error

O'Neal also argues that the jury charge failed to include the element of mens rea for the offense of continuous sexual abuse of a child. "We employ a two-step process in our review of alleged jury charge error." *Murrieta v. State*, 578 S.W.3d 552, 554 (Tex. App.—Texarkana 2019, no pet.) (citing *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994)). "Initially, we determine whether error occurred and then evaluate whether sufficient harm resulted from the error

to require reversal." *Id.* (quoting *Wilson v. State*, 391 S.W.3d 131, 138 (Tex. App.—Texarkana 2012, no pet.) (citing *Abdnor*, 871 S.W.2d at 731–32)).

"[T]he jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby." *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 36.13). "A trial court must submit a charge setting forth the 'law applicable to the case.'" *Id.* (quoting *Lee v. State*, 415 S.W.3d 915, 917 (Tex. App.—Texarkana 2013, pet. ref'd) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14)). "The purpose of the jury charge . . . is to inform the jury of the applicable law and guide them in its application. It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and prevent confusion." *Id*. (quoting *Lee*, 415 S.W.3d at 917; *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007)).

Section 21.02 of the Texas Penal Code states that a person commits the offense of continuous sexual abuse of a child if:

> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

TEX. PENAL CODE ANN. § 21.02(b). This portion of the statute requires no additional mens rea because an "act of sexual abuse" under Section 21.02 "means any act that is a violation of one or more of the [listed] penal laws," including indecency with a child. TEX. PENAL CODE ANN. § 21.02(c). As a result, "Section 21.02 . . . is defined in terms of other acts that by their terms require a culpable mental state" and "need not prescribe some additional mental state because its

actus reus is merely the repeated commission of acts already requiring culpable mental states." *Lane v. State*, 357 S.W.3d 770, 776 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Here, the State alleged, and the jury was charged on, five separate acts of indecency with a child as predicate offenses. The "intent to arouse or gratify the sexual desire of any person" is the mens rea required to prove indecency with a child. TEX. PENAL CODE ANN. § 21.11(a)(2), (c)(2).

The trial court's abstract portion of the jury charge contained the following definitions:

> **1.**
>
> Our law provides that a person commits the offense of Continuous Sexual Abuse of Young Child if, during a period that is thirty (30) days or more in duration, the person commits two (2) or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims and, at the time of the commission of each of the acts of sexual abuse, the person was seventeen (17) years of age or older and the victim is a child younger than fourteen (14) years of age.
>
> Our law provides that a person commits the offense of Indecency with a Child by Sexual Contact if, with a child younger than seventeen (17) years of age, the person:
>
> 1) engages in sexual contact with the child; or
>
> 2) causes the child to engage in sexual contact.
>
> **2.**
>
> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> . . . .
>
> **3.**
>
> "Act of sexual abuse" means any act that is a violation of the penal law of indecency with a child.
>
> . . . .

> "Sexual contact" means the following acts, if committed with intent to arouse or gratify the sexual desire of any person:
>
> 1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child with intent to arouse or gratify the sexual desire of any person; or
>
> 2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person with intent to arouse or gratify the sexual desire of any person.

Because the required mens rea of intent to arouse or gratify sexual desire was included in the abstract portion of the jury instructions, there was no error in this portion of the charge.

We turn next to the application paragraph, which read:

> Now, *bearing in mind the foregoing instructions*, if you find from the evidence beyond a reasonable doubt that in Lamar County, Texas, the Defendant, Lonnie Ray O'Neal, did then and there, during a period that was 30 or more days in duration, to-wit: from on or about January 1, 2013 through on or about March 1, 2016, when the Defendant was 17 years of age or older, commit two or more acts of sexual abuse against a child younger than 14 years of age, namely: indecency with a child by sexual contact, namely: by causing the hand of the Defendant to contact the female sexual organ of [Hannah]; and/or indecency with a child by sexual contact, namely: by causing the hand of [Hannah] to contact the male sexual organ of the Defendant; and/or indecency with a child by sexual contact, namely: by causing the hand of the Defendant to contact the female sexual organ of [Hannah]; and/or indecency with a child by sexual contact, namely: by causing the hand of the Defendant to contact the female sexual organ of [Hannah]; and/or indecency with a child by sexual contact, namely: by causing the female sexual organ of [Hannah] to contact the male sexual organ of the Defendant, then you will find the Defendant *Guilty* of the offense of Continuous Sexual Abuse of Young Child as charged in Count One of the Indictment.

(Emphasis added). O'Neal argues that this paragraph was erroneous because it omitted the required mens rea of intent to gratify sexual desire. We disagree.

"When we review a charge for alleged error, we must examine the charge as a whole instead of a series of isolated and unrelated statements." *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995). While the application paragraph "'specifies the factual circumstances under which the jury should convict or acquit,' it need not set forth specifically all of the elements necessary to convict a defendant if those elements have been accurately set forth in another section of the charge." *Riley v. State*, 447 S.W.3d 918, 923 (Tex. App.—Texarkana 2014, pet. ref'd) (quoting *Vasquez v. State*, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012)). Accordingly, the Texas Court of Criminal Appeals has held that there is no error where the abstract portion of the charge supplies a culpable mental state not specified in the application paragraph. *See id.* at 923–24 (citing *Dinkins*, 894 S.W.2d at 339); *see also Vasquez*, 389 S.W.3d at 367 ("if the application paragraph 'necessarily and unambiguously' refers to another paragraph of the jury charge, then a conviction is authorized, and the trial judge need not *sua sponte* 'cut and paste' that definition into the application paragraph").

Here, we have already concluded that the abstract portion of the charge supplied the mens rea element since it instructed the jury that sexual abuse included indecency with a child, specified that indecency with a child occurred by sexual contact with intent to arouse or gratify the sexual desire of any person, and included the general definition of intentional conduct. The application paragraph further instructed the jury to bear these instructions in mind when deliberating and allowed the jury to convict only if they found O'Neal had engaged in "sexual contact" with Hannah, which was a term defined as touching of the anus, breast, or genitals "with intent to arouse or gratify the sexual desire."

Because the abstract portion of the charge supplied the culpable mental state referred to in, but not specified by, the application paragraph, we conclude that the jury charge was not erroneous when read as a whole. As a result, we overrule this point of error.

(3) O'Neal's Complaint About the Indictment Is Unpreserved

Finally, O'Neal argues that the indictment was fundamentally defective because it did not specify any level of mens rea for the offense of continuous sexual abuse of a child. In response, the State argues that O'Neal complains of a defect in form or substance, which was required to be raised below. We agree.

Article 1.14(b) of the Texas Code of Criminal Procedure states,

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

TEX. CODE CRIM. PROC. ANN. art. 1.14(b).

The State's indictment alleged that O'Neal was charged with continuous sexual abuse of a child, correctly referred to Section 21.02 of the Texas Penal Code as the statute of offense, and listed several predicate offenses of indecency with a child. O'Neal's argument is not that the indictment was so defective that it failed to allege the crime of continuous sexual abuse of a child—it is only that the indictment failed to allege a mens rea.

This Court has previously rejected the argument that a failure to allege a mens rea constitutes a fundamental defect. *Piland v. State*, 453 S.W.3d 473, 479–80 (Tex. App.—Texarkana 2014, pet. ref'd). This is because the "omission of an element of the offense [] does

not prevent the instrument from being an information." *Smith v. State*, 494 S.W.3d 243, 247 (Tex. App.—Texarkana 2015, no pet.) (alteration in original) (concluding that "[b]ecause the information is sufficient to identify the penal statute under which the State intends to prosecute, the error is not a 'fundamental' error") (quoting *Mantooth v. State*, 269 S.W.3d 68, 72 (Tex. App.—Texarkana 2008, no pet.) ("The Texas Court of Criminal Appeals held, in *Studer* [*v. State*, 799 S.W.2d 263, 272 (Tex. Crim. App. 1990)], that 'the language in Art. V. § 12 [of the Texas Constitution], "charging a person with the commission of an offense," does not mean . . . that each element of the offense must be alleged in order to have an indictment or information as contemplated by Art. V, § 12.'")).

Therefore, O'Neal "was required to assert any objection 'to any defect, error, or irregularity of form or substance in [the] indictment' before trial," and the omission of a mens rea was such a defect. *Nguyen v. State*, 506 S.W.3d 69, 78 (Tex. App.—Texarkana 2016, pet. ref'd) (quoting TEX. CODE CRIM. PROC. ANN. art. 1.14(b)). By failing to raise the issue below, O'Neal failed to preserve the complaint he now asserts for the first time on appeal. Accordingly, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

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