Affirmed and Opinion filed February 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00408-CR

KEVIN SAUCEDA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 818,681

O P I N I O N

Kevin Sauceda appeals his conviction and forty-year sentence for aggravated sexual assault of a child committed in July 1999. Appellant identifies two alleged errors related to admission of an outcry statement and a third stemming from the trial court's decision to allow the admission of extraneous offenses. We affirm.

Background

The State charged appellant with three counts of sexual assault, one for each of his three nieces, M.S, B.S., and C.S. At trial, the State apparently elected to try only the assault

of M.S. M.S. was nine years old when the assault took place.

Appellant is a wheelchair-bound invalid. He was shot in the head in September 1999. At the time of the assault, appellant could not feed himself. Trial testimony established that the complainant and her two sisters assisted appellant with his daily needs. M.S. testified that the assault occurred at home, approximately one week before a family reunion. M.S. said appellant forced her at gunpoint to get on his bed and he put his penis inside her. M.S. also recalled a prior assault in which appellant had threatened her with a butcher knife. M.S. testified no penetration occurred on the prior occasion.

The family reunion was held in Baytown. Appellant's family stayed at a local motel. Appellant's sisters (M.S.'s aunts), Valicia Evans, Margo Suggs, and LaNelle Sauceda, as well as their cousin, Janette LaStrape, became alarmed when appellant asked both C.S. and B.S. to sleep in his room. B.S. and C.S. declined the invitation. That evening, the aunts questioned C.S. and M.S. separately. Both denied having been molested.[1] The following day, the aunts spoke with the girls again. They spoke first with the youngest, B.S., who said she had been molested. According to Ms. Evans' written recitation of the girls' outcry, B.S. also said M.S. and C.S. had been molested. The aunts then called C.S. into the room. According to Ms. Evans's narrative, the following transpired:

> We told her that she needed to tell us everything because her sister, [B.S.], has told us how [appellant] has done some things to her and her sisters and she replied why would you say a thing like that. So we told [B.S.] to tell her its OK, to tell the truth, and we won't be mad at her and that it is always better to tell the truth. It was hard at first, but she finally told us that he did. . . We then called [M.S., who admitted the molestation]. [brackets added]

After a non-jury hearing on the reliability of the girl's outcry statement under Code of

[1] Ms. Evans wrote in her affidavit that they first questioned M.S., then woke up C.S. and "tried to get her to open up by saying your sister told us everything." Having failed, Ms. Evans wrote that her sister came up with an idea of making a truth serum and giving it to my brother and letting them [the girls] over hear the conversation, but that still didn't work." [brackets added]

Criminal Procedure Article 38.072, Ms. Evans testified about the outcry at trial. Her written narrative of the outcry was also admitted. Though not introduced at trial, M.S. also gave a statement to Ms. Fiona Stephenson, a CPS case-worker, in which she alleged appellant had penetrated her vagina with his penis.

Issues

In three issues, appellant contends the trial court erred in (1) finding the outcry statement reliable; (2) admitting the outcry statement in violation of his rights of confrontation under the Texas and U.S. Constitutions;[2] and (3) ruling that impeachment of the complainant allowed the State to offer evidence of extraneous offenses. We address each claim in turn.

Discussion

I. Reliability under Article 38.072

Appellant's reliability claim relates to variances between Ms. Evans's written narrative and trial testimony regarding the girls' outcry. At trial, M.S. testified appellant threatened her with a gun and, in a prior incident, a knife. However, Ms. Evans written narrative does not mention weapons. At trial, Ms. Evans's testified M.S. also told her penetration had occurred. However, the prior, written narrative does not mention penetration. The relevant portion of the narrative states:

> [M.S.] told us that he would ask her to get in the bed and he would pull her over to the side, but sometimes he would ask her to put a towel over the window. She said she would jerk away sometimes, but he has succeeeded [sic] in touching her vagina and her breast. He has also made her touch his penis to the point of ejaculation. She also said it looked like (clear white spit bubbles). [parenthesis in original].

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[2] Appellant appeals under both the Texas and United States Constitutions without indicating in what manner, if at all, his rights differ under each. We therefore address both Constitutional claims together and without distinction. *See, e.g., Busby v. State*, 990 S.W.2d 263, 270 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1081 (2000).

The relevant portion of the pre-trial statutory Notice of Intention to Use Child Abuse Victim's Hearsay Statement (as amended) indicated that the aunts, including Ms. Evans, and the cousin would testify to the following:

> [M.S.] detailed that Defendant touched her breasts, touched her vagina. She stated that she would try to fight him off. Defendant would ask her to get in the bed then he would pull her over to the side, sometimes he would ask her to put a towel on the window. She saw something that looked like clear spit bubbles came from his private.

The Notice also indicated that Ms. Fiona Stephenson would testify that M.S. told her that appellant "would contact and penetrate her vagina with his penis." [3] Ms. Stephenson did not testify at trial.

The court below determined the outcry to be reliable. *See* TEX. CODE CRIM. P. ANN. Art. 38.072 (Vernon Supp. 2002) (requiring determination of reliability based on the time, content, and circumstances). A trial court's ruling on whether to admit an outcry statement will not be disturbed absent an abuse of discretion. *See Hayden v. State*, 928 S.W.2d 229, 231 (Tex. App.—Houston [14th Dist.] 1996, writ ref'd). A trial court abuses its discretion when its ruling on the admissibility of evidence falls outside the zone within which reasonable persons might disagree. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Factors to be considered in determining reliability include: (1) whether the child victim testifies at trial and admits making the out-of-court statement; (2) the child's level of maturity and ability to observe, recollect, narrate, and appreciate the need to be truthful; (3) the existence of corroborative evidence; (4) whether the child made the statement spontaneously in his own terminology; (5) the statement's clarity and consistency with other evidence; (6) whether the event described is likely to have been fabricated by a child of the victim's age; (7) abnormal behavior by the child after contact; (8) motive to lie; (9) the

[3] The first Notice did not include an allegation of penetration.

expectation of punishment; and (10) the defendant's opportunity for commission of the crime. *See Norris v. State*, 788 S.W.2d 65, 71 (Tex. App.—Dallas 1990, pet. ref'd).

Citing these factors, appellant claims the outcry is unreliable because M.S. was not questioned at trial about the importance of being truthful. M.S. was subjected to repetitive questioning by her aunts under suggestive circumstances. The statement was not spontaneous. There is no physical evidence of assault; no evidence of altered, post-assault behavior; and no independent means of corroboration. There is some evidence of motive to lie. Finally, appellant opines the "spit-bubble" description is consistent with knowledge possessed by a nine-year old because of modern television.

In rebuttal, the State observes that M.S. testified at trial and demonstrated maturity by recalling specific details of the assault. The State notes a physical examination showed vaginal redness and swelling. The State argues the spit-bubble description is of a nature a nine-year old would not be expected to fabricate. The evidence shows appellant had the opportunity to commit the crime.

Viewing the evidence militating both for and against a finding of reliability, we cannot say the trial court's decision lies outside the zone of reasonable disagreement. *See Montgomery*, 810 S.W.2d at 391.

We overrule appellant's first issue.

II. Right of Confrontation

In his second issue, appellant contends the trial court violated his constitutional right of confrontation. *See* U.S. CONST. Amend. VI. Specifically, appellant contends he was denied an opportunity to cross-examine the State's witnesses regarding the circumstances of the outcry itself because the trial court ruled such cross-examination could permit

disclosure of the charges brought by M.S.'s sisters.[4] *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988) (right to cross-examination one of the rights protected by Sixth Amendment).[5]

Appellant relies upon *Spain v. State*, 585 S.W.2d 705, 710 (Tex. Crim. App. [Panel Op.] 1979), which held a cross-examiner should be allowed to expose the limits of witness's knowledge of relevant facts, place the witness in his proper setting, and test the witness's credibility. *Spain* is inapposite. The defendant in *Spain* was affirmatively denied the right to cross-examine his co-conspirator in an embezzlement scheme regarding whether the conspirator had received a lenient sentencing recommendation in return for his testimony. Here, by contrast, the court did not affirmatively deny appellant any rights. Instead, the trial court stated appellant's cross-examination could operate as a two-edged sword, though defense counsel might avoid bringing up the other sisters' allegations by phrasing his questions carefully. The Confrontation Clause guarantees only the opportunity for cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The *opportunity* for cross-examination is not the same as the right to cross-examination without adverse consequence. Appellant's counsel chose not to attempt cross-examination. Because appellant had the opportunity to cross-examine, but declined to do so in order to avoid the possibility of bringing in the extraneous offenses, there was no violation of the Confrontation Clause. *Id. See also Beckham v. State*, 29 S.W.3d 148, 153 (Tex. App.—Houston [14th Dist] 2000, pet. ref'd) (providing opportunity to cross-examine child on outcry statement satisfied Confrontation Clause, though opportunity not exercised).

We overrule appellant's second issue.

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[4] A similar, but not identical, "Hobson's choice" argument is addressed in *Garza v. State*, 828 S.W.2d 422, 434 (Tex. App.—Austin 1992, pet. ref'd).

[5] Our citation to *Coy* should not be read to imply a failure to distinguish proper appellate review of in-court procedures from review of admission of out-of court statements. *See Smith v. State*, 61 S.W.3d 409, 412 (Tex. Crim. App. 2001) (citing *White v. Illinois*, 502 U.S. 346, 358 (1992)). Our holding today involves neither of these two reviews.

III. Admission of Extraneous Offenses

At the close of appellant's case-in-chief, appellant advised the court of his desire to call Ms. Fiona Stephenson, the CPS caseworker with whom M.S. interviewed. According to appellant's offer of proof, Ms. Stephenson would testify M.S. never mentioned a gun or knife during their (taped) interview. On the other hand, Ms. Stephenson would also testify M.S. was never asked about the use of a weapon. The State requested the right under the rule of optional completeness to play the tape of the interview, in its entirety, if Ms. Stephenson testified. *See* TEX. R. EVID. 107 (Rule of Optional Completeness). The hearing on the ramifications of calling Ms. Stephenson consumes five pages in the record. It concluded with the following discussion:

> Court: I mean, that's kind of a hard call, but I don't think it's fair for you to get the impeachment value without risking the rule of optional completeness. I guess I'm going to have to –
>
> Defense: Based on that, Judge, can I make my Bill and release Ms. Stephenson? I will make my Bill in summary form.

A. Waiver

We first address the State's contention that appellant waived this point of error. In general, to preserve a complaint for appellate review, a defendant must make a timely and specific request or objection, notifying the trial court of the grounds of the complaint, and the trial court must either expressly or impliedly make an adverse ruling. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). *See also* TEX. R. APP. P. 33.1(a) (preservation of error rule). The State argues the trial court ruled in appellant's favor, granting appellant's request to allow Ms. Stephenson to testify. The State distinguishes the grant of this request from the ruling to allow introduction of the tape under Rule of Evidence 107, arguing appellant failed to object to the trial court's Rule 107 conclusion. We interpret the ruling differently and disagree. The trial court's ruling, in context, (1) allowed impeachment through Ms. Stephenson, and (2) granted the State's Rule 107 motion over

appellant's objection. Appellant therefore preserved error of the trial court's Rule 107 decision. *Id*.

B. Optional Completeness – Rule 107

A trial court's Rule 107 decision will not be disturbed on appeal absent an abuse of discretion. *See Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000). Texas Rule of Evidence 107 states, in pertinent part:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other; and *any other act, declaration, writing or recorded statement* which is *necessary to make it fully understood* or to explain the same may also be given in evidence. (Italics added)

At trial, defense counsel agreed with the judge that playing the entire tape would be required if any portion of the conversation were discussed by Ms. Stephenson:

> Prosecutor: I don't think it's fair either to have him going into what [M.S.] talked about on the videotape and not be allowed to show the videotape.
>
> Defense: I think the reason it's a problem is, Judge, the only way you can show that something is not on the tape, if you're trying to show –
>
> Court: Is to show the whole tape.
>
> Defense: – is to show the entire tape. If I get up there and show the jury 30 seconds here, 30 seconds there, the jury is going to be thinking, we know the interview lasted longer than 30 seconds, they are going to be thinking we are hiding something from them.

The court and all parties agreed playing the entire tape would be necessary to enable the jury to fully understand whether M.S. had lied at trial about appellant's use of a gun and knife. Under these circumstances, we cannot say the trial court abused it's discretion in ruling the State would be allowed to play the entire tape if Ms. Stephenson testified.

Appellant's third issue is overruled.

Accordingly, the judgement of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed February 28, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.[6]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[6] Senior Justice Don Wittig sitting by assignment.