Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-00-00260-CR & 14-00-00261-CR

ERIC CHARLES MOMON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause Nos. 823,211 & 818,474

O P I N I O N

The State charged Eric Charles Momon ("appellant") in two separate indictments with the first-degree felony offense of aggravated sexual assault of a child by placing his sexual organ in the female sexual organ of the complainant. One indictment alleged an offense occurring on July 1, 1998, while the other indictment alleged an offense occurring on August 1, 1998. Over appellant's plea of not guilty, a jury found appellant guilty of both offenses, and sentenced appellant to sixty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. The court granted the State's motion to have appellant's sentences run consecutively, and sentenced appellant

accordingly. Appellant appeals the trial court's judgment on four points of error. In his first point of error, appellant complains that the trial court violated appellant's protection against double jeopardy by stacking his sentences. In the remaining three points of error, appellant complains that the trial court erred, during the punishment phase of trial, in admitting outcry witness testimony of an extraneous offense. We affirm.

FACTUAL BACKGROUND

Appellant is the biological father of C.L., the complainant in this case. C.L. testified that appellant began touching her on her breasts when she was nine years old. C.L. went on to testify that she was eleven years old the first time appellant had sexual intercourse with her, and that he had sexual intercourse with her on a continual basis until she was thirteen years old, in 1998. C.L. first told her mother about this in July of 1999.

During the punishment phase of trial, the State called Kendra Manuel, the Children's Protective Services case worker who investigated this case, as a witness to an extraneous offense. Ms. Manuel testified that Peggy Turner, at the Children's Assessment Center, interviewed E.M., one of appellant's other children. E.M. told Ms. Turner that appellant had sexually assaulted her. Over an overruled objection to authenticating the outcry witness through hearsay, Ms. Manuel was allowed to testify that Peggy Turner was the first person to whom E.M. ever told this information. Ms. Turner, a specialized interviewer with the Children's Assessment Center, testified that after her interview of E.M., she concluded that appellant sexually abused E.M. The State then brought E.M. into the courtroom to be identified by Turner.

DISCUSSION AND HOLDINGS

A. Double Jeopardy

In his first point of error, appellant contends that the trial court erred in "stacking" appellant's sentences. Appellant claims that because the State chose to present both indictments on the same day, and chose to allege the identical manner and means, it, in

effect, charged, convicted, and punished appellant for committing the same crime twice in violation of appellant's protection against double jeopardy.

The constitutional provision against double jeopardy protects a defendant against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Illinois v. Vitale*, 447 U.S. 410 (1980); *Ex Parte Patterson*, 738 S.W.2d 688, 689 (Tex. Crim. App. 1987). In a situation where a defendant is subjected to a single trial, as here, only the third double jeopardy protection applies. *Ex Parte Herron*, 790 S.W.2d 623, 623-24 (Tex. Crim. App. 1990).

Various acts of sexual misconduct do not comprise a single offense. *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992). Rather, a person committing multiple, discrete sexual assaults against the same victim is liable for separate prosecution and punishment for each and every instance of this criminal misconduct. *Id.* Accordingly, in this case appellant was not subjected to multiple punishments for the same offense. Rather, he was given two punishments for two separate violations of one statutory offense. *Ex Parte Hawkins*, 6 S.W.3d 554, 557 & n.8 (Tex. Crim. App. 1999); *see Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Although under the indictments in the present case, the legal elements of aggravated sexual assault of a child are the same, the second indictment concerns a factually different offense. Appellant committed two offenses, not one. We overrule appellant's first point of error.[1]

B. Outcry Witness Testimony

In appellant's next three points of error, he contends that, for various reasons, the trial court erred in allowing the jury to hear extraneous offense evidence of appellant's

[1] Although appellant urged us to apply the *Blockburger* test in our analysis, *Blockburger* is used only to evaluate whether the same act or transaction constitutes a violation of two distinct statutory provisions. *Blockburger* is inapplicable here because, as we stated, this case concerns two separate violations under one statutory offense – in essence, two separate offenses. *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999).

sexual assault of E.M., another one of his daughters.

In certain circumstances, article 38.072 of the Texas Code of Criminal Procedure makes hearsay statements of a child abuse victim admissible. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 2000). When the statement is made by a child against whom an alleged offense was committed, the child is 12 years of age or younger, and the one testifying to the statement is 18 years of age or older, and is the first person to whom the child "outcried," that statement, though hearsay, will be admissible. *Id*. In point of error two, appellant argues that the trial court erred in allowing the State to use E.M.'s hearsay statement to prove an extraneous offense during the punishment phase because article 38.072 of the Texas Code of Criminal Procedure does not apply to extraneous offenses. Article 38.072, by its own terms, applies only to statements that describe the alleged offense. *Id*.; *Gallegos v. State*, 918 S.W.2d 50, 56 (Tex. App.—Corpus Christi 1996, pet. ref'd); *Beckley v. State*, 827 S.W.2d 74, 78 (Tex. App.—Fort Worth 1992, no pet.). However, unless trial counsel asks the trial court to exclude this testimony because it describes events other than the alleged offense, nothing is preserved for our review. *Gallegos*, 918 S.W.2d at 56. Here, trial counsel only objected to the testimony on the basis of hearsay. Appellant waived error. We overrule his second point of error.

In his third point of error, appellant contends that the trial court erred in allowing the State to use a hearsay statement to prove an extraneous offense during the punishment phase because the court failed to comply with the procedures set out in article 38.072 of the Texas Code of Criminal Procedure. Specifically, appellant complains on appeal that the State failed to give notice and the trial court failed to conduct a hearing. Appellant's objection on appeal to both of these matters does not comport with his objection at trial, which was that the State was attempting to authenticate the outcry witness testimony – that is proving that the person testifying was, in fact, the first person to whom E.M. outcried – through impermissible hearsay. As a result, nothing is presented for our review. TEX. R. APP. P. 33.1; *Ellason v. State*, 815 S.W.2d 656, 665 (Tex. Crim. App. 1991). Appellant's third point of error is overruled.

In appellant's fourth and final point of error, he contends that the trial court violated appellant's constitutional rights to confrontation and due process because appellant was not given the opportunity to cross-examine and confront E.M. outside of the presence of the jury. Again, appellant has waived this point of error. When the State offers an out-of-court statement pursuant to article 38.072, a defendant must object on the basis of confrontation and due course of law, otherwise, such objection is waived. TEX. R. APP. P. 33.1; *Beckham v. State*, 29 S.W.3d 148, 153 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Garza v. State*, 828 S.W.2d 432, 435 (Tex. App.—Austin 1992, no pet.). Appellant's trial counsel did not object on this basis. Appellant's fourth point of error is waived, and therefore is overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 16, 2001.
Panel consists of Justices Fowler, Wittig, and Amidei.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Maurice E. Amidei sitting by assignment.