Opinion filed February 28, 2017

In The

Eleventh Court of Appeals

No. 11-14-00095-CR

ROCKY RICK CASTRO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 106th District Court
Dawson County, Texas
Trial Court Cause No. 13-7305

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

A jury found Rocky Rick Castro guilty of one count of continuous sexual abuse of a child[1] and four counts of indecency with a child.[2] The jury assessed punishment at confinement for twenty-seven years and a fine of $10,000 for the offense of continuous sexual abuse of a child. The jury assessed punishment at

[1]*See* TEX. PENAL CODE ANN. § 21.02 (West. Supp. 2016).

[2]*See* PENAL § 21.11 (West 2011).

confinement for two years for each of the four counts of indecency with a child. The trial court sentenced Appellant accordingly and ordered that the sentences run concurrently. Appellant moved for a new trial, and the trial court initially set it for a hearing. At the State's request, the trial court canceled the hearing, and the motion was overruled by operation of law.

Appellant presents five issues on appeal. In his first three issues, he asserts that the trial court abused its discretion when it permitted three witnesses to provide inadmissible evidence. Appellant asserts in his next issue that the trial court abused its discretion when it overruled his objection to an improper statement that the State made in its closing argument during the punishment phase. In his final issue, Appellant asserts that the trial court abused its discretion when it denied his motion for mistrial, which he advanced because of the State's improper closing argument. We affirm.

I. *Evidence at Trial*

Because Appellant does not assert a sufficiency challenge on appeal, we only outline those facts pertinent to the issues that he raised on appeal. In his first issue, Appellant asserts that the trial court should not have permitted Dr. Martin Salazar, a psychologist, to testify that A.Z. answered a questionnaire that indicated that she had been sexually abused. Dr. Salazar met with A.Z., and as part of his evaluation, he gave her a written questionnaire designed to detect psychological trauma and sexual abuse. A.Z. "endorsed" three of the four factors on this questionnaire, which indicated that she had been sexually abused.

On cross-examination, defense counsel asked Dr. Salazar if children sometimes lie. Dr. Salazar responded that research shows that less than ten percent of children fabricate their sexual abuse claims. Defense counsel continued to question Dr. Salazar for several minutes, at which time the trial court interrupted the testimony for a break. At the end of the break, defense counsel objected to

Dr. Salazar's testimony about the truthfulness of children who alleged they had been abused. Defense counsel asserted that Dr. Salazar had been nonresponsive to his questions and that Dr. Salazar had impermissibly offered an opinion as to A.Z.'s credibility. Defense counsel conceded that he had not immediately objected to Dr. Salazar's response, but claimed that he was under the impression that the State had informed Dr. Salazar "that he couldn't do that." The trial court denied Appellant's request for an instruction to disregard.

In Appellant's second issue, he asserts that Ismael Flores, a sergeant with the Lamesa Police Department at the time of the offenses, impermissibly testified about A.Z.'s truthfulness. Sergeant Flores responded to a report of an alleged sexual assault of A.Z., and he went to A.Z.'s home to investigate. While at her home, Sergeant Flores separated A.Z. from her family and then questioned her. A.Z. described in detail to Sergeant Flores how, several days earlier, Appellant had raped her in the bathroom. A.Z. also told Sergeant Flores that Appellant had raped her numerous times and had forced her to perform oral sex on him over the past four or five years.

Sergeant Flores testified that A.Z. "never ma[de] eye contact" during this interview and that she appeared to be "scared" and "ashamed." Upon cross-examination, defense counsel asked Sergeant Flores whether he had any children, whether his children had ever lied to him, and whether he could tell when his children had lied to him. Sergeant Flores answered that he had children, that he was sure that they had lied to him, and that he could tell when his children were being untruthful. On redirect examination, the State asked Sergeant Flores if A.Z. gave any indication that she had lied. Defense counsel objected to this question and claimed that it would invade the province of the jury if a lay witness were to opine on the truthfulness of another witness. The court overruled the objection, and Sergeant Flores stated that A.Z.'s body language, specifically "the way she looked

scared and the way she looked ashamed," indicated to him that A.Z. had told the truth.

In his third issue, Appellant asserts that the trial court abused its discretion when it permitted Laurie Aguilar, the supervisor for Child Protective Services, to testify that CPS had "found reason to believe" that Appellant sexually abused A.Z. The State questioned Aguilar about CPS's investigation, but defense counsel objected. Defense counsel objected to the "legal conclusion" and argued that the question was based on a less stringent standard. Counsel also asserted that the response would be more prejudicial than probative. The trial court overruled the objections.

In his fourth issue, Appellant argues that the State made improper comments in closing arguments during the punishment phase of trial. In response to defense counsel's closing argument that Appellant had gone thirty-one years without a black mark on his record, the prosecutor argued, "I think it's a misstatement to say that the defendant has gone 31 years with no black marks. There hasn't been any evidence put on that he hasn't been in trouble." Defense counsel objected and argued that the State had impermissibly shifted the burden of proof and argued outside the record; the court overruled the objections.

Finally, Appellant moved for a mistrial based upon other improper closing arguments made by the State in the punishment phase, and he asserts in his fifth issue that the trial court erred when it denied that motion. During the closing arguments in the punishment phase, the prosecutor stated, "Furthermore, I think it's fair to say that the defense is acquainted with cases when people spend less than the minimum amount of time in prison."[3] Defense counsel objected, and the trial court sustained that objection. The prosecutor tried to clarify his statement and said, "The

[3]The State referenced a case where a defendant was sentenced to confinement for thirty years but was released after serving only six months.

defense would have personal knowledge of a case in Garza County where a murderer was sentenced to 30 years in prison and was released after one month." Defense counsel again objected, and the court again sustained the objection that the State had argued outside the record. Defense counsel requested that the trial court instruct the jury to disregard those statements, and the trial court did so. Defense counsel then requested a mistrial; however, the trial court denied that request.

II. *Standard of Review*

We review a trial court's ruling to admit or exclude testimony under an abuse of discretion standard. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). However, a trial court does not abuse its discretion if some evidence exists to support its decision. *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002). Similarly, we review the trial court's ruling to grant or deny a request for mistrial under an abuse of discretion standard. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). A mistrial is an extreme remedy reserved only for a very narrow group of circumstances that involve highly prejudicial and incurable errors. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009).

III. Analysis

A. Issue One: The trial court did not abuse its discretion when it overruled Appellant's untimely objection to Dr. Salazar's testimony about the percentage of children that fabricate claims of sexual abuse.

In his first issue, Appellant contends that the trial court abused its discretion when it admitted Dr. Salazar's testimony that less than 10% of children lie about being sexually abused. Appellant argues that the statement constituted improper opinion testimony about the class of the victims to which A.Z. belonged. Expert

testimony that "assists" the trier of fact is admissible. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); *see also* TEX. R. EVID. 702. Expert testimony may assist the trier of fact when the jury is not qualified to "the best possible degree" to determine the particular issue without such expert testimony. *Schutz*, 957 S.W.2d at 59 (quoting *Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990)). However, expert testimony does not assist the jury if it constitutes "a direct opinion on the truthfulness" of a child's sexual assault complaint. *Id.* (quoting *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993)). In addition, any error in the admission of improper opinion testimony will not be preserved for review without a timely objection from the complaining party. *See* TEX. R. APP. P. 33.1(a)(1)(A).

The party opposed to the evidence must object as soon as its necessity becomes apparent. *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997); *Sikes v. State*, 500 S.W.2d 650, 651 (Tex. Crim. App. 1973) (holding defendant's failure to object to judge's question before it was answered waived the error). If a defendant does not object until after an objectionable question has been asked and answered, the objection is untimely unless the defendant can show a legitimate reason to justify the delay. *Id.* Defense counsel asked Dr. Salazar, an expert witness, to give a direct opinion on whether children sometimes tell lies. Counsel failed to immediately object to Dr. Salazar's answer. Rather, defense counsel continued his cross-examination of Dr. Salazar on several different subjects before the court recessed. After the recess, defense counsel complained of Dr. Salazar's response and requested that the jury be instructed to disregard the statement previously elicited. In attempting to justify this delay, defense counsel stated, "We thought maybe the State had told him that he couldn't do that . . . ." Regardless of the propriety of Dr. Salazar's answer, trial counsel failed to timely object to the answer. Therefore, Appellant failed to preserve this complaint for appellate review. TEX. R. APP. P. 33.1(a)(1)(A). Appellant's first issue is overruled.

B. *Issue Two: The trial court did not abuse its discretion when it permitted Sergeant Flores to testify about whether he thought A.Z. had fabricated her claims of sexual abuse.*

In his second issue, Appellant contends that the trial court abused its discretion and affected his substantial rights when it allowed Sergeant Flores to testify on A.Z.'s truthfulness. Generally, witnesses are not allowed to offer direct opinions on the truthfulness of other witnesses. *Fisher v. State*, 121 S.W.3d 38, 40–41 (Tex App.—San Antonio 2003, pet. ref'd) (citing *Schutz*, 957 S.W.2d at 59). Direct opinions on a witness's truthfulness tend to impede the jury's fact-finding mission because such opinions can decide the issue of the witness's credibility for the jury. *Fisher*, 121 S.W.3d at 41 (citing *Yount*, 872 S.W.2d at 709). A "fine but essential" line separates helpful expert testimony and impermissible comments. *Schutz*, 957 S.W.2d at 60 (quoting *State v. Myers*, 382 N.W.2d 91, 98 (Iowa 1986)). Though this issue generally arises in the context of expert witnesses, lay witnesses are likewise not permitted to offer an opinion that another witness is or is not truthful. *See* TEX. R. EVID. 701; *Arzaga v. State*, 86 S.W.3d 767, 776 (Tex. App.—El Paso 2002, no pet.).

Generally, inadmissible testimony may be admissible if the party against whom the evidence is offered "opens the door," such as by questioning the veracity of a witness. *Schutz*, 957 S.W.2d at 71. However, the evidence offered in response to this opening may not "stray beyond the scope of the invitation." *Id.* (quoting *Bush v. State*, 773 S.W.2d 297, 301 (Tex. Crim. App. 1989)). As outlined in *Schutz*, there "need only be a 'loose fit' between the rebuttal evidence and the predicate attacks on character." *Id.* at 72. Thus, if the defense were to offer testimony that a child had lied about his or her sexual assault claims, or were to seek to elicit such testimony, the State could offer testimony to the contrary.

The court in *Fisher* provides guidance on this issue. In *Fisher*, a child alleged that a family member sexually assaulted her. 121 S.W.3d at 39. On cross-examination, defense counsel asked the victim's aunt a series of questions about whether she believed the victim's cousin could have assaulted the victim. *Id.* at 40–41. The State improperly responded by asking the aunt whether she believed the victim's allegations against the defendant to be true. The trial court properly sustained defense counsel's objection to this question. *Id.* at 41. However, the trial court did allow the State to ask the aunt if she had any reason to doubt the victim. *Id.* at 40. The court of appeals reasoned that this question was permissible because the victim's aunt knew the victim well enough to provide lay opinion on the victim's character for truthfulness. *Id.* at 41.

In the present case, the opinion offered by Sergeant Flores was that of a lay person, as he was a patrol officer making a report and never claimed to have any special training or experience in child sexual abuse cases. *See Clark v. State*, 305 S.W.3d 351, 357 (Tex. App—Houston [14th Dist.] 2010), *aff'd*, 365 S.W.3d 333 (Tex. Crim. App. 2012) (stating police officers can provide lay opinion testimony). Such opinion testimony would normally be automatically excluded. However, Appellant opened the door when, at the end of cross-examination, defense counsel pursued the following line of inquiry:

> Q. Okay. Kind of want to – side note: Do you have any children?
>
> A. Yes.
>
> Q. Have your children ever lied to you before?
>
> A. I'm sure.
>
> . . . .
>
> Q. As a parent you pretty well get a good feel for when your child is telling you the truth?
>
> A. Yes.

Q. And when your child is not telling you the truth?

A. Yes.

On redirect, the prosecutor immediately began the following line of inquiry:

> [PROSECUTOR]: To pick up where [defense counsel] left off, was [A.Z.] making any indications, any body language, anything that you have been trained on, that she was lying to you?
>
> [DEFENSE COUNSEL]: Objection.
>
> [PROSECUTOR]: They opened the door to that, Judge.
>
> [DEFENSE COUNSEL]: For a witness to say that he believed somebody was telling the truth invades the province of the jury, and we object to it.
>
> [PROSECUTOR]: That's exactly where he was going.
>
> THE COURT: Your objection is overruled.

Defense counsel's questioning implied that A.Z. had fabricated her sexual assault claims and that Sergeant Flores could recognize this from his experience with his own children. Sergeant Flores testified that he observed that A.Z. never made eye contact with him and that she spoke in a whisper during the interview. Sergeant Flores indicated that these facts led him to believe that she was telling the truth. Moreover, this rebuttal testimony elicited by the State did not "stray beyond the scope" of inquiry by defense counsel. *See Schutz*, 957 S.W.2d at 71 (quoting *Bush*, 773 S.W.2d at 301). Because Appellant opened the door and the State responded with limited, narrow, and tailored questions to Sergeant Flores, we cannot say that the trial court abused its discretion when it permitted this limited testimony. Appellant's second issue is overruled.

C. Issue Three: The trial court did not abuse its discretion when it permitted Laurie Aguilar to testify that CPS had reason to believe that Appellant had sexually assaulted A.Z.

In his third issue, Appellant contends that the trial court abused its discretion

when it admitted testimony from Aguilar that CPS "had reason to believe" that Appellant sexually assaulted A.Z. Appellant argued that, under Rule 403 of the Texas Rules of Evidence, Aguilar's testimony would confuse the jury and was more prejudicial than probative. Rule 403 states that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. Appellant contends Aguilar's testimony was improper because CPS employed a lower standard of proof in reaching its conclusion than that used in criminal proceedings. Appellant argues that the jury would be confused by these standards and, thus, could not put this "reason to believe" standard in the proper legal perspective. Appellant also argues that the weight of a state agency's opinion would improperly influence the jury's decision. As Appellant's case rested on impugning the credibility of A.Z., Appellant argues that Aguilar's testimony impermissibly bolstered A.Z.'s credibility.

When the jury is not qualified to "the best possible degree" to intelligently determine an issue, an expert may assist the jury in determining an issue but must not supplant it. *Schutz*, 957 S.W.2d at 59. Aguilar was an expert trained and experienced in the investigation of child sexual abuse, and she could assist the jury in determining related issues, even "an ultimate issue" to be decided by the trier of fact. *See* TEX. R. EVID. 704; *Ex parte Nailor*, 149 S.W.3d 125, 134 (Tex. Crim. App. 2004); *Johnson v. State*, 970 S.W.2d 716, 720 (Tex. App.—Beaumont 1998, no pet.) (finding a CPS official could provide expert testimony as to whether "there was reason to believe" sexual abuse of a child had occurred). In *Harrell v. State*, we affirmed the trial court's decision to allow CPS testimony, over a Rule 704 objection, that CPS "had reason to believe" child abuse occurred. *Harrell v. State*, No. 11-03-00092-CR, 2005 WL 1405729, at *3 (Tex. App.—Eastland, June 16, 2005, no pet.) (not designated for publication). We follow that sensible approach here as well and

hold that the trial court did not abuse its discretion when it allowed Aguilar's testimony. Appellant's third issue is overruled.

D. Issue Four: The trial court did not abuse its discretion when it overruled Appellant's objection to the prosecutor's comments in closing argument.

In his fourth issue, Appellant argues that the trial court abused its discretion and affected his substantial rights when it allowed the State to argue that Appellant had not demonstrated a clean criminal record prior to this offense. Defense counsel objected at trial and claimed that it was impermissible burden shifting. The trial court overruled the objection. As we explain below, we disagree with Appellant that this isolated statement in nine days of testimony affected his substantial rights, especially when the State made it in response to Appellant's argument.

"Permissible jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement." *Gallo v. State*, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007); *Mason v. State*, 416 S.W.3d 720, 736 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Counsel's remarks during final argument must be considered in the context in which they appear. *See Denison v. State*, 651 S.W.2d 754, 761 (Tex. Crim. App. 1983). In addition, counsel has wide latitude in drawing inferences from the evidence as long as the inferences are reasonable and made in good faith. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). Remarks must be "extreme or manifestly improper" to qualify as reversible error. *Denison*, 651 S.W.2d at 762. The remarks must be part of a "calculated effort on the part of the State to deprive appellant of a fair and impartial trial." *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997). In Appellant's case, the prosecutor's comment, an answer to an argument made by Appellant's trial counsel, was not "extreme or manifestly improper," was isolated, and was not part of a calculated

effort to deprive Appellant of a fair trial. *See Denison*, 651 S.W.2d at 762; *Cantu*, 939 S.W.2d at 633. The trial court did not abuse its discretion when it overruled defense counsel's objection. Appellant's fourth issue is overruled.

E. Issue Five: The trial court did not abuse it's discretion when it denied Appellant's motion for mistrial.

In his final issue, Appellant contends that the trial court abused its discretion when it failed to grant his motion for mistrial. The State argued for a strong sentence in its closing argument during the punishment phase and said that the "defense is acquainted with cases when people spend less than the minimum amount of time in prison." Defense counsel objected, and the trial court sustained that objection. On request of defense counsel, the trial court provided an instruction to disregard. Defense counsel asked for a mistrial, but the trial court denied that request. If a party makes an objectionable comment, an instruction to disregard such a remark will cure the error in most cases. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Only clearly offensive and flagrant comments warrant a reversal when an instruction to disregard has been issued. *Id.* at 116 (citing *Wilkerson v. State*, 881 S.W.2d 321, 327 (Tex. Crim. App. 1994)). In this case, the State's argument that Appellant may serve substantially less time than sentenced was certainly improper, but the isolated remark was not highly prejudicial, especially in light of the court's charge to the jury that Appellant "is not eligible for release on parole" for his conviction of continuous sexual abuse of a child. *See* TEX. GOV'T CODE ANN. § 508.145(a) (West Supp. 2016). Additionally, the trial court's instruction to disregard the remark cured any resulting prejudice. Further, only one of Appellant's five sentences exceeded the mandatory minimum, and that sentence only exceeded the minimum by two years. *See* PENAL § 21.02(h); *see also Snowden v. State*, 353 S.W.3d 815, 825–26 (Tex. Crim. App. 2011) (Appellant was not prejudiced by the State's objectionable comment during the punishment phase because he received the

mandatory minimum). We hold that the State's improper comment did not prejudice Appellant in such a way as to require reversal and that the trial court did not abuse its discretion when it denied the request for a mistrial. Appellant's fifth issue is overruled.

IV. Conclusion

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

February 28, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.