Affirmed and Memorandum Opinion filed March 9, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-00952-CR

TIMOTHY DWAYNE ANDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1138634

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

A jury convicted appellant Timothy Dwayne Anderson of indecency with a child. Because appellant is a repeat offender, the jury sentenced him to twenty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. On appeal, appellant argues the trial court erred in admitting the complainant's outcry statements. We affirm.

I. BACKGROUND

On March 24, 2007, the complainant, "Jane," took a school bus to her grandmother's house where she was to wait for her godmother, Patsy Evans. Jane lived with Evans, while Jane's younger sister and brother lived with their mother and their mother's boyfriend, the appellant. After getting off the bus, she walked over to appellant's truck where she said goodbye to her siblings. At that point, appellant asked her to come live with him and her mother. Then, according to Jane, appellant rubbed her buttocks and her vagina through her clothes, and announced in a low voice "she ready."

Jane later made various statements to Evans regarding this incident. First, immediately following the incident, Jane called Evans and left messages on her answering machine. In one message, Jane stated, "Mommy,[1] come and pick me up. Come and get me now." In another message, Jane stated, "Mommy come and get me. Mr. Tim felt on me."

Second, when Evans arrived at Jane's grandmother's house to pick Jane up, Jane told her, "Mommy, Mr. Tim felt on me . . . on [my] hip and between [my] legs." At that point, they further discussed the incident. Evans asked Jane whether she was telling the truth, and Jane responded that she was. Ultimately, appellant was arrested and indicted for indecency with a child.

Before trial, the State served appellant with notice of its intent to call Evans as an outcry witness. The notice summarized Jane's statements as follows: "The complainant stated to [Evans] that the defendant touched her on the side of her hip and then rubbed his left hand in between her legs and said in a low voice 'she ready.'"

At trial, appellant objected to the State calling Evans because the notice was untimely. The court ultimately determined, however, that appellant was not surprised or otherwise unfairly prejudiced by the testimony, and it overruled his objection.

At trial, Evans testified to both sets of statements that Jane made to her describing

[1] Jane's reference to "Mommy" is actually a reference to Evans, her godmother.

the incident: (1) those that Jane left on her answering machine, and (2) those that Jane made face-to-face. Appellant objected to both sets of statements, arguing they were not properly admissible outcry statements. The court sustained appellant's objection to Evans's testimony as to the statements that Jane left on the answering machine and instructed the jury to disregard them. Appellant moved for a mistrial, but the court denied his motion. The court overruled appellant's objections to the statements that Jane had made directly to Evans.

Jane independently testified at trial that appellant touched her on her buttocks and in between her legs with his left hand, cycling back and forth between the two. She further testified to the discussion she had with Evans immediately upon her arrival.

The jury convicted appellant of indecency with a child and sentenced him to twenty-five years' confinement. On appeal, appellant contends the trial court erred in admitting Evans's testimony of the statements that Jane made to her face-to-face because the State did not comply with the notice or hearing requirements set forth by statute.

II. DISCUSSION

Article 38.072 of the Texas Code of Criminal Procedure deems some hearsay statements admissible for the purpose of prosecuting certain offenses, including indecency with a child, as in this case. *See* Tex. Code Crim. Proc. Ann. art. 38.072 (Vernon Supp. 2009); Tex. Penal Code Ann. § 21.11 (Vernon Supp. 2009). The statute operates to make an otherwise inadmissible statement admissible where (1) the statement is made by the alleged child victim to a person, eighteen or older, other than the defendant, describing the alleged abuse; (2) the State provides the defendant with adequate notice of its intent to use the statement; (3) the child testifies or is available to testify; and (4) the court conducts a hearing outside the presence of the jury and determines the statement is reliable based on time, place, and circumstances. Art. 38.072.

We review a trial court's decision to admit or exclude a statement allegedly falling under article 38.072 for an abuse of discretion. *See Garcia v. State*, 792 S.W.2d 88, 92

(Tex. Crim. App. 1990). We will uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *Chapman v. State*, 150 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

A. The Notice Requirement

The purpose of the notice requirement is to avoid surprising the defendant with the introduction of outcry, hearsay testimony. *Gay v. State*, 981 S.W.2d 864, 866 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). The notice requirement mandates that, on or before the fourteenth day before proceedings begin, the State provide the defendant with notice of its intent to call an outcry witness, that witness's name, and a written summary of the statement to which the witness will testify. Art. 38.072. The State has satisfied the requirement if its notice is timely and reasonably informs the defendant of the essential facts related in the outcry statement. *Davidson v. State*, 80 S.W.3d 132, 136 (Tex. App.—Texarkana 2002, pet. ref'd).

1. Timeliness of the Notice

Appellant argues, and the State concedes, that the State's notice was untimely, having been served approximately ten days before trial. Nevertheless, appellant has not shown he was harmed by the somewhat abbreviated notice. *See Zarco v. State*, 210 S.W.3d 816, 832 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Instead, for the eleven months preceding trial, appellant had access to the offense report that listed Evans as an outcry witness and delineated the things to which she would testify.

Furthermore, five days before trial, counsel for the State and appellant discussed in chambers that the State intended to use Evans as an outcry witness. At no point did appellant request a continuance. Because appellant has not demonstrated he was surprised or prejudiced by the State's untimely notice, we cannot conclude he was harmed by notice that arrived slightly late but still ten days before trial. *See id.* at 833.

2. Outcry Summary

Appellant contends the summary in the State's notice was inadequate to reasonably inform him as to the following portions of Evans's testimony about the statements Jane made to Evans face-to-face: (a) that Evans repeatedly asked Jane whether Jane was telling the truth; (b) that Evans asked Jane what had happened in several different ways to see if Jane would change her story; and (c) that Jane demonstrated to Evans how appellant had touched her.

After reviewing the record, we believe the outcry summary in this case contained the essential facts necessary to provide appellant with adequate notice of the content and scope of the outcry testimony. *See Davidson*, 80 S.W.3d at 136. The summary provided to appellant detailed the reported conduct and statements in question with reasonable specificity. Therefore, we cannot conclude the State's notice did not reasonably inform appellant as to those statements.[2] *See Davidson*, 80 S.W.3d at 136.

B. Hearing

Appellant also contends the court erred in admitting the statements that Jane made to Evans face-to-face because the court did not conduct the requisite hearing described in article 38.072. *See* art. 38.072; *Zarco*, 210 S.W.3d at 831. That argument is not supported by the record. In fact, the court actually excused the jury and conducted a hearing during trial regarding these statements, thereby complying with the statute. *See Haley v. State*, 173 S.W.3d 510, 517 (Tex. Crim. App. 2005); *Zarco*, 210 S.W.3d at 831. Accordingly, we overrule appellant's issue on appeal.

[2] Appellant also claims the summary was inadequate to provide him with reasonable notice of the statements that Jane left on Evans's machine. The court instructed the jury to disregard those statements, but it denied appellant's motion for a mistrial. Appellant does not argue on appeal that the court abused its discretion in denying the mistrial. Consequently, that issue is not properly before us. *See* Tex. R. App. P. 38.1(f), (h), (i). However, even if it was properly subject to review, we note that Jane actually testified at trial without objection, and her testimony was virtually identical to Evans's testimony. Accordingly, even if the admission of Evans's testimony about the statements on her machine was error, it would not be harmful because very similar evidence was admitted through another source. *See Williams v. State*, 933 S.W.2d 141, 149 (Tex. Crim. App. 1996).

III. CONCLUSION

Having overruled appellant's issue, we affirm the judgment of conviction.

/s/ Kent C. Sullivan
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

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