In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-16-00180-CR
07-16-00181-CR
07-16-00182-CR
07-16-00183-CR
07-16-00184-CR
07-16-00185-CR

CHRISTOPHER EDWARD VAN ANDEN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Randall County, Texas
Trial Court Nos. 25,650-A, Honorable Dan L. Schaap, Presiding

December 9, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Christopher Edward Van Anden appeals his multiple convictions for aggravated sexual assault of a child.[1] Three issues pend for review. The nature of the first is somewhat unclear. He seems to generally attack the constitutionality of allowing a child to testify via closed circuit television. The next issue involves the trial court's purported

[1] The convictions are represented through six separate judgments referencing the cause number followed by the respective count under which he was convicted. Those counts numbered six in all.

failure to issue findings purportedly required by the United States Constitution and Texas statute before the child may be permitted to testify via closed circuit television. The final issue concerns the sufficiency of the evidence underlying his conviction under Count V of the indictment. We affirm.

Background

The child victim was appellant's daughter. She accused him of sexually assaulting her on multiple occasions. The accusations served as the basis for the seven counts mentioned in the State's indictment. Only six were tried given that the State apparently waived Count VII.

At the trial, the victim attempted to testify but began vomiting once she took the witness stand. After the child did so three times, the trial court recessed the proceeding and directed that she be examined by a physician. Such a medical examination occurred, and the results were disclosed to the trial court. They led the trial court to state that "based on what I have observed and what I have learned in this process . . . it would raise significant concerns for the health and welfare of the witness involved to try to proceed at this time." Upon uttering those words, it also granted the State's motion to continue the proceeding for several weeks. Appellant had objected to the motion because, in his view, "a continuance would violate due process and *Crawford*. . . ." He also moved for a mistrial ". . . if we cannot go forward." Needless to say, the latter motion was denied.

While the trial was continued, the State moved to permit the witness to testify by closed circuit television per art. 38.071, § 3 of the Texas Code of Criminal Procedure.[2] Appellant responded, in writing, to the motion. Various objections were alleged in his response; they included the allegation that art. 38.071, § 3 1) was unconstitutional, 2) violated his right to confront witnesses, and 3) violated due process. The trial court convened an evidentiary hearing on the matter. At that point, the State called a counselor to testify. The witness had a "license professional counselor supervisor license as well as a license sex offender treatment provider license." When questioned, she described how she met with the child victim, interviewed the twelve-year-old girl, and subjected her to testing. The results garnered from doing so left the counselor to opine that 1) the child suffered from "extreme anxiety and . . . extreme PTSD," 2) the child ". . . needs to not be in the presence of him [appellant] when she testifies," and 3) allowing the child to testify through closed circuit television was “necessary to protect the welfare" of the child. The circumstances underlying those opinions also were discussed by the counselor. Upon hearing the testimony, the trial court granted the State's motion.

Issue One

As previously mentioned, appellant seems to argue that allowing a child to testify via closed circuit television is unconstitutional in and of itself. Such an argument was

[2] The provisions states:

> On its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. To the extent practicable, only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. . . .

TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3(a) (West Supp. 2016).

rejected by our United States Supreme Court in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). The facts in *Maryland* also involved the provision of testimony via closed circuit television, and the Supreme Court held that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 497 U.S. at 855; *accord, Gonzalez v. State*, 818 S.W.2d 756, 764-65 (Tex. Crim. App. 1991) (holding that the use of closed circuit television under the particular circumstances involved did not deny the appellant his right to confront witnesses); *Coronado v. State*, 351 S.W.3d 315, 320 (Tex. Crim. App. 2011) (acknowledging the holding in *Maryland*); *Ordonez-Orosco v. State*, No. 05-15-00688-CR, 2016 Tex. App. LEXIS 2945, at *7 (Tex. App.—Dallas March 22, 2016, no pet.) (mem. op., not designated for publication) (holding that the closed circuit television procedure utilized "preserved the salutary effects of face-to-face confrontation" because the victim "testified under oath, was subject to cross-examination and the jury was able to observe [the witness'] demeanor" and that utilizing the procedure did not deny the appellant "his Sixth Amendment right to confrontation").[3] Given this authority, we overrule the contention.

[3] To the extent that appellant insinuates that the United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) somehow abrogated *Craig*, we were provided with no substantive discussion or analysis on the matter. Indeed, he says little more than the "Supreme Court appeared to have turned the tide back to favoring the right to confrontation." Without attempting to explain why the differing facts and circumstances in *Crawford* overcame the policy considerations addressed in *Craig*, appellant has not adequately briefed his insinuation. Consequently, the debate was not preserved for review due to insufficient briefing.

Issue Two

Next, appellant contends that 1) "Article 38.071 requires a finding of unavailability before closed circuit testimony may be allowed," 2) the United States Supreme Court in *Coy*[4] "require[d] specific findings be made prior to allowing such procedures," and 3) "[n]o findings were made" here. Thus, his "right to confrontation was denied without due process of law," allegedly. We overrule the issue.

Appellant does not contend that the trial court lacked sufficient evidentiary basis upon which to conclude that the child victim could testify via closed circuit television. Rather, he seems to complain about the lack of expressed findings to underlie the decision permitting the use of closed circuit television which findings were supposedly required by art. 38.071 and the *Coy* opinion.

While objection was made implicating due process and confrontation rights below, nothing was said of the need for or absence of expressed findings. This is of import since the complaint on appeal must comport with that urged below. *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). If they do not then the complaint is waived, and this may even apply to constitutional error. *Id.* The right to confront a witness is one such right subject to waiver if not properly preserved. *Sharper v. State*, 485 S.W.3d 612, 614-15 (Tex. App.—Texarkana 2016, no pet.). Since appellant's complaints at trial did not include that urged here, he did not preserve the issue for review.[5]

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[4] *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct.2798, 101 L.Ed.2d 857 (1988).

[5] More importantly, we perused the record before us. The evidence provided by the counselor at the hearing was sufficient to satisfy the prerequisites for unavailability as specified in art. 38.071(a) and necessity in *Coy*. *See Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (stating that whatever exceptions there may be to the right to confront one's accuser "face-to-face," "they would surely be allowed only when necessary to further an important public policy"). So too was it enough to satisfy the test espoused in *Craig*, which opinion issued about two years after *Coy*. In Craig,

Third Issue

Finally, appellant asserts that the evidence was insufficient to support his conviction under Count V of the indictment. The State agrees and "requests that the judgment of Count V be reversed." The conviction at issue is reflected in the judgment numbered "25650A Count V" and encompassed in appellate cause number 07-16-00184-CR. We overrule the issue.

Per Count V, the State accused appellant of "intentionally or knowingly caus[ing] the sexual organ of [the child] . . . to contact the mouth of the defendant. . . ." This event purportedly occurred on September 9th. September 9th was the second day on which appellant sexually abused the child via multiple acts. Appellant argues, though, that the State failed to prove this crime since the victim denied that appellant's mouth touched her vagina or sexual organ. This denial occurred at trial. So, according to appellant, "[t]he sole witness' direct refutation of the conduct alleged was all the evidence presented to the jury on this allegation." Appellant is mistaken.

The child was not the "sole witness." The person who conducted the forensic interview of the victim also testified. Regarding the events transpiring on September 9th, the State asked that witness: "[b]ut she talked about the three acts of her on top of him *and then him licking her privates* and then her having to suck on his thing?" (Emphasis added). The witness answered: "[t]hat is correct." The latter statement garnered no objection. Nor was it admitted in any conditional manner. Thus, it was before the jury

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we were told that the requisite finding of necessity is made on a case-by-case basis. *Maryland v. Craig*, 497 U.S. 836, 855-56, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). And, it is satisfied where the evidence illustrates that 1) use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify, 2) the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and 3) the emotional distress suffered by the witness when testifying in the defendant's presence "is more than de minimis" or caused by mere nervousness, excitement or some reluctance to testify. *Id.*

for all purposes. More importantly, it serves as some evidence illustrating that appellant's mouth did, in fact, contact the child's sexual organ on the day in question. *See Balderas v. State*, __ S.W.3d __, 2016 Tex. Crim. App. LEXIS 1329, at *10 (Tex. Crim. App. November 2, 2016) (discussing the pertinent standard of review to apply when determining if the evidence is legally sufficient to support the verdict). While it may be contradicted by the child's later version of events, the contradiction did nothing other than raise issues of credibility and questions of fact. That is, it simply provided the jury with an opportunity to exercise one of its inherent powers, that being the power to decide who and what to believe. *See Delay v. State*, 465 S.W.3d 232, 235 (Tex. Crim. App. 2014) (stating that the jury has the sole authority to resolve issues of credibility and issues created by contradictory evidence). Undoubtedly, it chose to believe the version of events the victim told the forensic interviewer.

Had appellant cited us to authority suggesting that the conviction could not withstand scrutiny when the victim propounded contradictory versions of the event, then the outcome may differ. But, no such authority was provided by either appellant or the State. A conviction may well be based upon contradictory evidence. *See Pendleton v. State*, No. 07-15-00108-CR, 2015 Tex. App. LEXIS 10941, at *14-15 (Tex. App.—Amarillo October 3, 2015, no pet.). Consequently, some evidence appears of record supporting appellant's conviction under Count V of the indictment.

Having overruled each issue, we affirm the judgments.

Brian Quinn
Chief Justice