In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00358-CR

LUCAS ORTIZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2019-417, 078, Honorable John J. McClendon, III, Presiding

August 25, 2023

MEMORANDUM OPINION

Before QUINN, CJ., and DOSS and YARBROUGH, JJ.

Appellant, Lucas Ortiz, appeals his conviction for sexual assault of a child.[1] He raises three issues: (1) Child Protective Services (CPS) did not give *Miranda* warnings prior to interviewing him in custody; (2) the denial of a continuance to subpoena the CPS investigator who conducted his custodial interview; and (3) the exclusion of evidence under Texas Rule of Evidence 412. We affirm.

[1] *See* TEX. PENAL CODE ANN. § 22.011(a)(2).

BACKGROUND

Because Appellant does not challenge the sufficiency of the evidence to support his conviction, we set forth only those facts necessary to the disposition of his appellate issues. *See* TEX. R. APP. P. 47.1.

Appellant was charged with the sexual assault of A.T., a minor age fifteen at the time. Appellant was arrested and detained awaiting trial. An investigation was simultaneously opened by CPS. During Appellant's detention, the CPS investigator assigned to the case, L. Hurtt, and another CPS investigator, F. Garcia, interviewed Appellant about the incident with A.T. Garcia served as a translator for Hurtt due to Appellant's lack of proficiency with English. Appellant neither admitted nor confessed to any details concerning the alleged assault at the time, but he did admit to drinking heavily and having no memory of the events leading to his arrest.

At trial, the State presented Garcia as a witness to attest to the responses of Appellant during the interview with Hurtt. Appellant's counsel objected to the testimony of Garcia on hearsay grounds and because Garcia and Hurtt did not give Appellant any *Miranda* warnings prior to the interview. Appellant's counsel opined Hurtt interviewed Appellant at the behest of police investigators and therefore was an agent of the police. During a voir dire examination of Garcia outside the presence of the jury, Garcia testified he never worked at the behest of law enforcement. Garcia could not attest to Hurtt's motivations in interviewing Appellant. Appellant's counsel asked Hurtt be made available by the prosecution, to which prosecutors responded he was not available to testify at trial.

Appellant's counsel then orally asked for a continuance from the trial court in order to find and subpoena Hurtt, which the trial court denied.

When A.T. took the stand, Appellant's attorney wished to introduce evidence of her past sexual conduct with a boyfriend as impeachment evidence and to contradict the evidence presented by the State alleging A.T.'s injuries from the assault were caused by Appellant. He wished to present to the jury an alternate theory of A.T.'s boyfriend having possibly caused the injury. The trial court conducted a Rule 412 evidentiary hearing in chambers, during which A.T. and her mother were questioned. A.T. testified she had snuck out to see a boyfriend two months before the assault and a week after the assault. The trial court excluded the evidence of A.T.'s past behaviors under Rule 412 after the in-camera examination.

At the conclusion of the trial by jury, Appellant was convicted of sexual assault of a child and sentenced to six years of imprisonment. This appeal followed.

STANDARD OF REVIEW

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *Ballard v. State*, No. 07-16-00333-CR, 2017 Tex. App. LEXIS 11719, at *6 (Tex. App.—Amarillo Dec. 15, 2017, pet. ref'd) (mem. op., not designated for publication) (citing *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005)). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Id*. We must review the trial court's ruling in light of what was before the trial court at the time the ruling was made. *Id*. A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement.

Aceituno-Urbina v. State, No. 07-22-00205-CR, 2023 Tex. App. LEXIS 4262, at *2 (Tex. App.—Amarillo June 16, 2023, no pet. h.) (mem. op., not designated for publication) (citing *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016)). We will not reverse the trial court's decision unless we find the ruling lies outside the zone of reasonable disagreement. *Aceituno-Urbina v. State*, No. 07-22-00205-CR, 2023 Tex. App. LEXIS 4262, at *2.

ANALYSIS

CPS was not an Agent of Law Enforcement

Appellant's first issue relates to whether Garcia and Hurtt were agents of law enforcement and therefore obligated to give him *Miranda* warnings. He contends, because no *Miranda* warnings were administered, the testimony of Garcia should have been excluded by the trial court. The State argues Hurtt and Garcia, as employees of CPS at the time of the interview, were not members of law enforcement and therefore not obligated to give Appellant *Miranda* warnings.

The State may not use any statements stemming from a custodial interrogation unless it has followed procedural safeguards to protect the accused's right against self-incrimination. *Wilkerson v. State*, 173 S.W.3d 521, 526–27 (Tex. Crim. App. 2005) (citations omitted). This generally means the administering of *Miranda* warnings prior to questioning. *Id.* However, *Miranda* warnings are only required if the party questioning the accused is an agent or member of law enforcement. *Id.* Other state actors from other agencies, including CPS investigators, whose function does not include law enforcement, need not administer warnings, unless the intention of the non-law enforcement state actor

is to gather information on behalf of law enforcement or for purposes of prosecuting the accused. *Id*. at 528–30. We look at the totality of the circumstances surrounding the custodial interview, including: law enforcement's knowledge of the meeting; whether law enforcement could elicit the same evidence themselves lawfully; whether the purported agent was helping to "build a case" leading to the defendant's arrest or acting out of some other duty; and whether a reasonable person in the defendant's position would believe the interviewer was an agent of law enforcement. *Id*. at 531. Our inquiry must determine at bottom "is the interviewer 'in cahoots' with the police?" *Id*. The law does not presume an agency relationship, and the person alleging its existence has the burden of proving it. *Elizondo v. State*, 338 S.W.3d 206, 210 (Tex. App.—Amarillo 2011), *aff'd*, 382 S.W.3d 389 (Tex. Crim. App. 2012); *Wilkerson*, 173 S.W.3d at 532.

The record does not affirmatively demonstrate Appellant proved an agency relationship between law enforcement and either Garcia or Hurtt. Appellant's counsel's voir dire of Garcia did not elicit any information regarding the motivations for the interview conducted by Hurtt, and Garcia claimed he was merely there at the behest of Hurtt to translate. Garcia also testified an allegation of the sexual assault of a minor, as in this case, would be a "priority one" case requiring investigation and inquiry by CPS. Although the interview took place at the detention facility where Appellant was incarcerated, no law enforcement personnel were present during the interview. The responses elicited by Hurtt and Garcia about Appellant's intoxication is evidence law enforcement obtained themselves through other sources. Appellant complains he was unable to develop evidence of Hurtt's relationship with law enforcement because Hurtt was not made available by the State and the trial court refused to grant him a continuance to do so.

Although we appreciate his "hands being tied" by prosecutors and the trial court, even if Appellant managed to prove Hurtt and Garcia were agents of law enforcement, the admission of Garcia's testimony was nonetheless harmless.

Garcia could only testify Appellant admitted to heavily drinking on the night of the alleged assault and otherwise had no memory of the events. The erroneous admission of evidence can be rendered harmless if other evidence at trial is admitted without objection and it establishes the same facts the inadmissible evidence sought to establish. *Guevara v. State*, No. 07-08-00264-CR, 2009 Tex. App. LEXIS 8225, at *18 (Tex. App.—Amarillo Oct. 26, 2009, no pet.) (mem. op., not designated for publication) (citations omitted). The investigating police officer and the other family members who were present on the night in question, including the victim, testified Appellant was intoxicated. This is the same fact established by Garcia's testimony, rendering any error harmless.

This court finds no abuse of discretion by the trial court in the admission of Garcia's testimony or the denial of Appellant's motion for continuance. Appellant's first issue is overruled.

Error Not Preserved Regarding Continuance of Trial

Appellant complains the trial court abused its discretion in denying his motion for a continuance to locate Hurtt and subpoena him. Particularly, Appellant wished to examine Hurtt as a witness to ascertain whether Hurtt collaborated with law enforcement in violation of his *Miranda* rights.

To preserve error regarding the denial of a motion for a continuance, the motion must be in writing and sworn. TEX. CODE CRIM. PROC. ANN. art. 29.06–.08; *Dewberry v.*

State, 4 S.W.3d 735, 755–56 (Tex. Crim. App. 1999); *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex. Crim. App. 1995). Appellant's counsel only made an oral motion for continuance at trial and did not file a subsequent written motion. As such, this issue has not been preserved for appeal. Appellant's second issue is overruled.

A.T.'s Past Behavior Properly Excluded Under Rule 412

Appellant argues the trial court improperly excluded evidence of A.T.'s past sexual behavior with her boyfriend under Rule 412. TEX. R. EVID. 412.

As this Court has discussed previously:

> In a sexual assault case, opinion or reputation evidence of a victim's past sexual behavior is not admissible. Evidence of specific instances of the victim's previous sexual conduct may be admitted in certain enumerated circumstances; those include when the evidence is necessary to rebut or explain scientific or medical evidence offered by the prosecution. However, the probative value of that evidence must outweigh the danger of unfair prejudice. Evidence of the sexual history of a victim is to be highly scrutinized for its probative value.
>
> Under Rule 412(b)(3), the proponent of the evidence bears the burden to show the probative value of the evidence outweighs the unfair prejudice of admitting it. The balancing test under rule 412(b)(3) "weighs against the admissibility of evidence."

Escobedo v. State, Nos. 07-18-00096-CR, 07-18-00097-CR, 2019 Tex. App. LEXIS 1763, at *3 (Tex. App.—Amarillo Mar. 6, 2019, no pet.) (mem. op., not designated for publication) (citations omitted) (internal quotations original). Here, Appellant sought to enter evidence of A.T.'s prior sexual history and subsequent sexual history. However, none of the incidents Appellant wished to introduce occurred at or near the time of the alleged assault; they all occurred either weeks before or weeks after the alleged incident. Under these circumstances, given the relatively low probative value of the proffered

evidence and the highly prejudicial nature of evidence of past sexual conduct in a sexual assault case, the trial court did not err in excluding such evidence under Rule 412. *Montgomery v. State*, 415 S.W.3d 580, 584 (Tex. App.—Amarillo, 2013 pet. ref'd) ("Rule 412 strives to balance a defendant's right to defend himself against the need to protect victims from undue public humiliation and ridicule.") (citation omitted).

We cannot say the trial court abused its discretion in excluding evidence of the complainant's prior sexual conduct. Appellant's third issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Alex Yarbrough
Justice

Do not publish.