IN THE
TENTH COURT OF APPEALS

No. 10-19-00174-CR

WYLIE KAY CURL,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 82nd District Court
Falls County, Texas
Trial Court No. 10097

MEMORANDUM OPINION

The jury convicted Wylie Curl of the offense of continuous sexual abuse of a child. The trial court assessed punishment at 30 years confinement. We affirm.

BACKGROUND FACTS

When A.S. was approximately eight years-old, he went to live with Curl and his wife, Debbie. Debbie and A.S. were distant cousins. A few years later, A.S. told his school counselor that Curl made him perform oral sex on him. A.S. told the counselor that it

began when he was nine or ten years-old and that it happened multiple times while he lived in the home. A.S. testified that he lived with Curl and Debbie for approximately five years and that he shared a bedroom with Curl while he lived in the home. A.S. testified that he performed oral sex on Curl multiple times.

ADMISSION OF CONFESSION

In his first and second issues, Curl complains that the trial court erred in admitting the video recording of his confession.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is reviewed on appeal for abuse of discretion. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018). The record is viewed in the light most favorable to the trial court's determination, and a trial court's ruling should be reversed only if it is arbitrary, unreasonable, or outside the zone of reasonable disagreement. *Id.*; *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014). Because the trial court is the sole trier of fact, we will give almost total deference to the trial court's determination of historical facts. *State v. Story*, 445 S.W.3d at 732; *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). The trial court's application of the law to those facts, however, is reviewed de novo. *Id*. We will sustain the trial court's decision if we conclude that the decision is correct under any applicable theory of law. *State v. Cortez*, 543 S.W.3d at 203.

VIDEO RECORDING OF STATEMENT

After Curl was arrested Deputy David Henderson, an investigator with the Falls County Sheriff's Office, took him into his office for questioning. Deputy Henderson read Curl his statutory warnings, and Curl stated that he wanted a lawyer. Deputy Henderson terminated the interview and escorted Curl back to the jail where he released him to the jail staff.

While in the booking area, Curl happened to see the sheriff and told the sheriff that he would like to speak with him in a private area. Curl informed the sheriff that he previously told Deputy Henderson that he wanted a lawyer, but now he would like to talk. The sheriff had Deputy Henderson return to talk to Curl. Deputy Henderson took Curl back into his office and "reminded him that he had been read his rights" and asked "if he was wanting to waive his right to a lawyer." Curl indicated that he wanted to waive his right to a lawyer and talk. Deputy Henderson did not read the statutory warnings to Curl before the second interview. Curl made a confession during the second interview, and a video of that interview was played before the jury.

MIRANDA

In the first issue, Curl argues that admission of his confession violated *Miranda v. Arizona*, 384 U.S. 436 (1966). Under *Miranda* and Article 38.22 of the Code of Criminal Procedure, an oral statement of an accused made as a result of custodial interrogation is not admissible at trial unless the accused was warned of his rights and knowingly,

intelligently, and voluntarily waived those rights. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); TEX. CODE CRIM. PROC. art. 38.22 § 3 (West 2018).

In *Cross v. State*, the defendant invoked his right to counsel, but later initiated communications with the police. *Cross v. State*, 144 S.W.3d 521, 524 (Tex. Crim. App. 2004). The Court noted that in *Edwards v. Arizona*, the Supreme Court stated that:

> an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversation with the police.

Cross v. State, 144 S.W.3d at 526 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981).

Curl concedes that he initiated the communication with police. He contends, however, that a "fresh set" of *Miranda* warnings was required before the second interview.

In *Ex parte Bagley*, the Court of Criminal Appeals found that warnings given six to eight hours prior to the statement would satisfy *Miranda*. *Ex parte Bagley*, 509 S.W.2d 332, 337 (Tex. Crim. App. 1974). Curl waived his right to counsel before giving his statement. He gave the statement to the same officer who provided the statutory warnings approximately three hours earlier and the statement involved the same offense. *See Jones v. State*, 119 S.W.3d 766, 773 n. 13 (Tex. Crim. App. 2003); *Miller v. State*, 196 S.W.3d 256, 266-267 (Tex. App. —Fort Worth 2006, pet. ref'd).

Curl distinguishes such cases because they do not discuss the situation where an accused has previously invoked his rights. We do not find the distinction persuasive.

Curl initiated the conversation with law enforcement and waived his previously invoked right to counsel. We find that the trial court did not err in admitting the video recording of the statement pursuant to federal law. *See Miller v. State*, 196 S.W3d. at 267. We overrule the first issue.

ARTICLE 38.22

In the second issue, Curl argues that admission of the video statement violates Article 38.22 of the Texas Code of Criminal Procedure. Article 38.22 provides that no oral statement is admissible unless electronically recorded. TEX. CODE CRIM. PROC. art. 38.22 § 3 (a) (1) (West 2018). In addition, the accused must be warned prior to the statement and on the record: (1) that he has the right to remain silent and not make any statement at all, (2) any statement he makes may be used as evidence against him in court, (3) that he has the right to have a lawyer present to advise him prior to and during any questioning, (4) that if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning, and (5) that he has the right to terminate the interview at any time. TEX. CODE CRIM. PROC. art. 38.22 § 2 (a) & § 3 (2) (West 2018).

In *Bible v. State*, the Court of Criminal appeals addressed the implications of Article 38.22 when the accused gives a second statement without law enforcement repeating the statutory warnings. *Bible v. State*, 162 S.W.3d 234 (Tex. Crim. App. 2005). In determining if the statement was admissible under Article 38.22, the Court considered: (1) the passage

of time between the interviews, (2) whether the interrogation was conducted by a different person, (3) whether the interrogation related to a different offense, and (4) whether the officer asked the defendant if he had received any earlier warnings, whether he remembered those warnings, and whether he wished to waive or invoke them. *Bible v. State*, 162 S.W.3d at 242.

Deputy Henderson read Curl the statutory warnings, and those warnings are recorded. Approximately three hours later, Curl gave the statement to Deputy Henderson. Both interviews were conducted by Deputy Henderson and involved the same offense. Deputy Henderson reminded Curl of the prior warnings, and Curl indicated that he remembered those warnings and wished to waive his right to counsel. We find that the second video recording was a continuation of the first recording that contained the statutory warnings. *See Bible v. State*, 162 S.W.3d at 242. We overrule the second issue.

CONSTITUTIONALITY OF STATUTE

In the third issue, Curl contends that the continuous sexual abuse statute, Section 21.02 of the Texas Penal Code, is unconstitutional on its face. Curl specifically argues that the statute is unconstitutional because it does not require jury unanimity as to which specific acts of sexual abuse were committed by the accused.

The constitutionality of a statute is a question of law we review de novo. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007); *Navarro v. State*, 535 S.W.3d 162, 165

(Tex. App. — Waco, 2017, pet. ref'd). We begin with the presumption that the statute is valid and that the legislature did not act arbitrarily and unreasonably in enacting it. *Navarro v. State*, 535 S.W.3d at 165. The burden rests upon the individual who challenges the statute to establish its unconstitutionality. *Id*. We must uphold a statute if we can determine a reasonable construction which will render it constitutional. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *Navarro v. State*, 535 S.W.3d at 165.

Texas Penal Code section 21.02 provides that, for the offense of continuous sexual assault of a young child, a jury is "not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed." TEX. PENAL CODE ANN. § 21.02(d) (West 2019). Instead, the jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse. *Id*.

In *Navarro v. State*, this Court addressed the arguments made by Curl, and found that Section 21.02 of the Texas Penal Code is not unconstitutional on its face. *Navarro v. State*, 535 S.W.3d at 166. We decline to overturn our decision in *Navarro*. We overrule the third issue.

CONCLUSION

We affirm the trial court's judgment.

JOHN E. NEILL

Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed November 12, 2020
Do not publish
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