NUMBER 13-16-00662-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JERRY WAYNE BURTON, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of DeWitt County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez

Appellant Jerry Wayne Burton was indicted for the felony criminal offense of aggravated sexual assault of a child younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 21.021(a)(2)(B) (West, Westlaw through 2017 R.S.). A jury found Burton

guilty, and after a punishment hearing where Burton pleaded "true" to his enhancement paragraph,[1] the trial court assessed a mandatory life sentence in the Texas Department of Criminal Justice. *See id.* § 12.42(c)(2)(A) (West, Westlaw through 2017 R.S.).

By three issues, Burton contends that the trial court erred by (1) denying his motion for continuance, (2) conducting a preliminary competency determination of the complainant child in front of the jury, and (3) commenting on the weight of the evidence during the child's competency determination. We affirm.[2]

I. MOTION FOR CONTINUANCE

By his first issue, Burton contends that the trial court erred when it denied his motion for continuance on the first day of trial and before jury selection commenced. By his motion, he requested time to investigate potential *Brady* material given to him by the State on the Saturday before trial began on Monday.

A. Standard of Review and Applicable Law

"We review the trial court's ruling on a motion for continuance for abuse of discretion." *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007); *see Fears v. State*, 479 S.W.3d 315, 325 (Tex. App.—Corpus Christi 2015, pet. ref'd). In a criminal action, a motion for continuance must be in writing and must fully state sufficient cause for the continuance. TEX. CODE CRIM. PROC. ANN. art. 29.03 (West, Westlaw through

[1] The enhancement paragraph alleged a prior conviction for aggravated sexual assault of a child in Harris County almost twenty years earlier.

[2] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

2017 R.S.). The motion must also be sworn to "by a person having personal knowledge of the facts relied on for the continuance." *Id*. art. 29.08 (West, Westlaw through 2017 R.S.); *see Fears*, 479 S.W.3d at 325. "A motion for continuance not in writing and not sworn preserves nothing for review." *Dewberry v. State*, 4 S.W.3d 735, 755 (Tex. Crim. App. 1999) (en banc); *Fears*, 479 S.W.3d at 325.

B. Discussion

Before jury selection, Burton orally requested a continuance, stating that he needed to investigate a potential *Brady* issue that the State had informed him of over the weekend. Burton filed no written motion. *See* TEX. CODE CRIM. PROC. ANN. art. 29.03. He filed no sworn motion. *See id.* art. 29.08. So we conclude Burton preserved nothing for appellate review with his oral motion for continuance. *See Dewberry*, 4 S.W.3d at 755; *Fears*, 469 S.W.3d at 325.

II. COMPETENCY DETERMINATION OF THE CHILD

By his second issue, Burton complains that the trial court erred when it conducted its preliminary competency-to-testify determination of four-year-old C.M., the complaining child in this case, in the presence of the jury.[3] Burton asserts that the court should have conducted the competency hearing "outside the jury's presence to avoid undue pressure on the child or [to avoid political pressure on] the court itself which could contaminate the process." The State responds that the child witness was properly qualified during a competency hearing in the presence of the jury. We agree with the State.

A. Applicable Law

[3] C.M. was three years old at the time of the events that form the basis of this appeal.

The issue of the competence of a child witness is generally a question for the trial court. *Watson v. State*, 596 S.W .2d 867, 871 (Tex. Crim. App. 1980); *Reyna v. State*, 797 S.W.2d 189, 191 (Tex. App.—Corpus Christi 1990, no pet.). We will not disturb the court's ruling unless an abuse of discretion is shown. *Watson*, 596 S.W.2d at 871; *Reyna*, 797 S.W.2d at 191.

The trial court must decide any preliminary question about whether a child witness is qualified to testify and must conduct any hearing on this "question so that the jury cannot hear it if . . . justice so requires." TEX. R. EVID. 104(a), (c); *see id.* R. 601 (setting out that a child, examined by the court and found to lack sufficient intellect to testify concerning the matters at issue, is incompetent to be a witness). Yet "[c]learly, there is no literal requirement in the foregoing [evidentiary rules] that the competency hearing of a child be conducted outside the presence of the jury." *Reyna*, 797 S.W.2d at 192.

B. Discussion

The State presented the testimony of C.M. during the guilt/innocence phase of the trial. Before the child testified, the trial court informed counsel that it would ask the child questions regarding "whether she knows right from wrong and whether she understands that there's a moral obligation as well to be truthful." Burton objected to the trial court's "determining the child's competency in the presence of the jury." The court denied his objection.

Burton appears to be arguing that justice requires that we reverse and remand for a new trial because the trial court qualified the child witness with the jury present. *See* TEX. R. EVID. 104(a), (c). Burton argues that "[l]egal matters of this kind of preliminary

nature should be out-of-sight, out-of-mind for the jurors." He contends that a competency hearing before the jury "puts pressure on an especially young child . . . to 'perform' for the serious-looking group of grown-ups in the jury box, and to say things that the child thinks might please them." Burton further asserts that the trial judge inadvertently put political pressure on himself, an elected official, because he "may not wish to be seen as the judge who ended the case against the 'child molester' by telling the little girl she cannot testify or is not 'smart' enough to testify." Burton provides no record citations and no authority, and we find none, for his assertions that justice requires a reversal and remand because pressures were, or might have been, imposed on the child and the trial court. *Cf. Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App.1995) (citing *Jackson v. Denno*, 378 U.S. 368, 380 (1964)) ("Once a defendant moves to suppress a statement on the ground of 'involuntariness,' the due process guarantee requires the trial court to hold a hearing [in the interest of justice] on the admissibility of the statement outside the presence of the jury."). Instead, with no literal requirement in the evidentiary rules that the competency hearing of a child be conducted outside the presence of the jury, *see Reyna*, 797 S.W.2d at 192, we conclude that the trial court did not abuse its discretion in qualifying the child with the jury present. *See Watson*, 596 S.W.2d at 871; *Reyna*, 797 S.W.2d at 191. We overrule Burton's second issue.

III. COMMENT OF THE WEIGHT OF THE EVIDENCE

In his third issue, Burton argues that in violation of article 38.05 of the code of criminal procedure, the trial court commented on the weight of the evidence during its

preliminary competency determination of the child in front of the jury. *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 (West, Westlaw through 2017 R.S.). He claims that the trial court made repeated remarks to the child that she was "smart" and asked her questions concerning the alleged crime itself, all of which amounted to comments on the weight of the evidence. In response, the State asserts that Burton failed to preserve error and error, if any, was harmless.

A. Challenged Comments and Conduct

During the competency hearing the trial court made the following statements, about which Burton now complains:

THE COURT: And how old are you? You seem pretty smart.

THE WITNESS: Four.

THE COURT: Four? Can you count?

THE WITNESS: 1, 2, 3, 4, 5, 6, 11, 12, 13, 15, 16.

THE COURT: You're doing good. Okay. So what are you wearing today? Can I see what you're wearing? Oh, okay. Wow. What is this? Are these pants or is this a dress?

THE WITNESS: Tights.

THE COURT: That's exactly . . . I didn't get it right either way, did I? And who is this little character right here?

THE WITNESS: Minnie Mouse.

THE COURT: Minnie Mouse. Okay. Let me ask you a question. I'm going to see if you can answer this, I think you're smart enough to but let's try it. Okay? That's Minnie Mouse. Okay. Do you know a person called Dora?

THE WITNESS: (Nods head affirmatively.)

THE COURT: What—that's a TV show, isn't it, Dora in the TV show? Okay. Minnie Mouse, if I were to ask am I a real person—

THE WITNESS: Yes.

THE COURT: —or is Minnie Mouse a real person, which one of us is—is Minnie Mouse make believe or a real person or am I a real person?

THE WITNESS: (Points.)

THE COURT: Yeah, good.

. . . .

THE COURT: Did somebody do anything to hurt you some[ ]time ago?

THE WITNESS: (Nods head affirmatively.)

THE COURT: They did? Do you know who did that?

THE WITNESS: (Nods head affirmatively.)

THE COURT: Who did it?

THE WITNESS: Jerry.

THE COURT: Okay. Is that Jerry or not? Can you see that man? Do you know Jerry's last name?

THE WITNESS: (Nods head affirmatively.)

THE COURT: What's his last name?

THE WITNESS: He's got one name.

THE COURT: One name? What's that name?

THE WITNESS: Jerry.

Burton did not object to the trial court's remarks about the child being smart, and he did not object when the trial court asked the child questions regarding events that occurred one year earlier and who was involved.

B. Applicable Law and Standard of Review

Texas Code of Criminal Procedure article 38.05 provides,

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Id. Ordinarily, a complaint regarding an improper judicial comment must be preserved at trial. *See* TEX. R. APP. P. 33.1(a) (stating that to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"); *Unkart v. State*, 400 S.W.3d 94, 98 (Tex. Crim. App. 2013). If a defendant does not object to "remarks and conduct of the [trial] court," he may not subsequently challenge the trial court's remarks "unless they are fundamentally erroneous." *Wilson v. State*, 473 S.W.3d 889, 903 (Tex. App.—Houston [1st Dist.] 2015, no pet.). And the trial court's comments do not constitute fundamental error unless they rise "to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001); *see Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party.").

B. Discussion

1. Trial Court's Comments that C.M. Was Smart

Now on appeal, Burton appears to be arguing that the court's comments about C.M. being smart went to the weight of the evidence, specifically to the quality of the child as a witness, and created egregious harm. He argues that the trial court created "a judicially approved or endorsed pre-impression of [C.M.'s] ability to recall events and to accurately relay them in the courtroom." Burton asserts that "[t]his makes it all the harder for defense counsel to try to impeach a child witness with questions to try to show that she is unable to do these things well enough to prove guilt beyond a reasonable doubt." We disagree.

We cannot reasonably conclude that these remarks were improper judicial comments. "A judge can lawfully provide guidance and manage the presentation of evidence from the bench without abandoning his role as an independent arbiter." *Strong v. State*, 138 S.W.3d 546, 552 (Tex. App.—Corpus Christi 2004, no pet.). Here it is clear from the record that the trial court's comment to four-year-old C.M. was part of a larger effort to make the child witness comfortable in the courtroom. *See In re J.G.*, 195 S.W.3d 161, 178 (Tex. App.—San Antonio 2006, no pet.) (noting that the trial judge's statement to a child witness that the witness had done "very good" could not be properly understood without also considering the child's age at the time of his testimony). And even were we to conclude that the remarks were improper comments on the weight of the evidence, we could not conclude that they constituted fundamental error, which would negate the need for an objection. *See Wilson*, 473 S.W.3d at 903. The trial court's use of the word

"smart" did not result in a benefit to the State by providing an indication as to the court's views about Burton's guilt or innocence. *See Jasper*, 61 S.W.3d at 421. And it did not prejudice or harm Burton's right to a fair and impartial trial. *See id.*

2. Court's Questions to C.M. Regarding the Event in Question

Burton also complains by his third issue, that the trial court "asked more probative questions, beyond whether C.M. knew the difference between the truth and a lie, between right and wrong, or the moral duty to tell the truth." He argues that the trial court commented on the weight of the evidence when it exceeded "its role as jurist, asking the child partial questions aimed at [Burton] concerning the alleged crime itself." Finally, Burton contends "[w]hen the trial judge began asking C.M. to identify Burton, he crossed the line from impartial judge and evidentiary gatekeeper into the role of State's prosecutor." Again, we disagree.

The interaction between the trial court and C.M., about which Burton complains, occurred during a competency determination before the jury. In that setting, the court will consider whether the witness possesses: (1) the ability to intelligently observe the events in question at the time of the occurrence; (2) the capacity to recollect the events; and (3) the capacity to narrate the events. *Hogan v. State*, 440 S.W.3d 211, 213–14 (Tex. App.—Houston [14 Dist.] 2013, pet. ref'd); *see* Watson, 596 S.W.2d at 870. The third element involves the ability to understand the moral responsibility to tell the truth, to understand the questions posed, and to frame intelligent answers. *Hogan*, 440 S.W.3d at 213–14l *see Watson*, 596 S.W.2d at 870.

In making its competency determination, the trial court questioned C.M. regarding whether she observed the events in question at the time of the occurrence and whether she was able to recollect the events, including the people involved. *See Hogan*, 440 S.W.3d at 213—14. It is also clear that the trial court was attempting to determine whether C.M. understood that she had a responsibility to tell the truth, to understand the questions posed, and to frame intelligent answers. *See id.* We cannot reasonably conclude by this conduct that the trial court improperly commented on the weight of the evidence. And, as above, even were we to conclude that the conduct was in error, we could not conclude that it constituted fundamental error, which would negate the need for an objection. *See Wilson*, 473 S.W.3d at 903.

3. Summary

Having concluded the trial court did not err and error, if any, was not fundamental, we overrule Burton's third issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

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

Delivered and filed the 14th
day of September, 2017.