NO. 12-15-00248-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WILLIAM JAMES TAYLOR, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

William James Taylor appeals his conviction of aggravated sexual assault of a child. He presents five issues on appeal. We affirm.

BACKGROUND

The State indicted Appellant for four counts of aggravated sexual assault of a child, Jane Doe. According to the record, Appellant lived with Jane Doe and her mother when the offenses occurred. After Jane Doe told her mother that Appellant had touched and spit on her "tutu," Appellant was arrested and charged with aggravated sexual assault of a child.

The jury found Appellant guilty of two counts of penetration of Jane Doe's sexual organ and not guilty of two counts of penetration of Jane Doe's anus. Following a hearing on punishment, Appellant was sentenced to imprisonment for thirty-five years. This appeal followed.

CHARGE ERROR

In his first issue, Appellant contends the trial court improperly commented on the weight of the evidence when it included a definition of "penetration" in the jury charge.

Standard of Review

The review of an alleged jury charge error in a criminal trial is a two-step process. ***Abdnor v. State***, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). First, an appellate court must determine whether there was error in the jury charge. ***Id.*** Second, if there is charge error, we must determine whether there is sufficient harm to require reversal. ***Id.*** at 731–32. The standard for determining harm depends on whether the appellant objected to the error at trial. ***Id.*** at 732.

When an appellant does not raise the error at trial, as in this case, he can prevail only if the error is so egregious and created such harm that he has not had a fair and impartial trial. ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). In determining whether an appellant was deprived of a fair and impartial trial, we review the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *See* ***Taylor v. State***, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011); ***Almanza***, 686 S.W.2d at 171. We will examine any part of the record that may illuminate the actual, not just theoretical, harm to the accused. *See* ***Taylor***, 332 S.W.3d at 489–90. Errors which result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive. *See* ***id.*** at 490. Egregious harm is a difficult standard to prove and such a determination must be made on a case-by-case basis. *See* ***Hutch v. State***, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

Error in the Charge

Under Article 36.14 of the Texas Code of Criminal Procedure, the trial court must give the jury a written charge that sets forth the law applicable to the case and that does not express any opinion as to the weight of the evidence, sum up the testimony, or discuss the facts or use any argument calculated to arouse the sympathy or excite the passions of the jury. TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). Definitions of terms that are not statutorily defined are not considered "applicable law" under Article 36.14, and it is generally impermissible for the trial court to define such terms in the jury charge. ***Green v. State***, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015). Jurors should be allowed to read undefined statutory language as having any meaning acceptable in common language. ***Id.*** An exception to that general rule exists for terms that have a known and established legal meaning or have a peculiar and appropriate meaning in the law. ***Id.*** Such terms are considered as having been used in their technical sense, and it is not

error for the trial court to include a precise, uniform definition to guide the jury's deliberations. ***Id.***

In this case, the trial court provided the following instruction in the jury charge:

> One of the elements in this case is "penetration." The burden is upon the State to prove each and every element of the offense, if any, beyond a reasonable doubt. You are instructed that penetration is complete however slight. Any penetration of the labia majoria of the female sexual organ by any object is sufficient to meet the legal definition of penetration.

The term "penetration" is not defined in the sexual assault statute. *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016). Furthermore, it is a common term that has not acquired a technical meaning. ***Green***, 476 S.W.3d at 445. Therefore, the jury was free to assign that term any meaning that is acceptable in common language, and the trial court erred in providing a non-statutory definition of the term "penetration." *See* ***id.*** However, because Appellant did not object to the definition in the charge, we must examine the entire record to determine whether the error caused egregious harm. *See* ***Hutch***, 922 S.W.2d at 171; ***Almanza***, 686 S.W.2d at 171.

Harm Analysis

Appellant argues that the inclusion of the definition of "penetration" in the charge caused him egregious harm because it was an improper comment on the weight of the evidence. Specifically, he contends that whether penetration occurred was a contested issue and an element of the charged offenses.

We first note that the trial court's definition of "penetration" is consistent with the Texas Court of Criminal Appeals's description of the common meaning of the phrase "penetration of the female sexual organ." *See* ***Green***, 476 S.W.3d at 447; *see also* ***Vernon v. State***, 841 S.W.2d 407, 409-10 (Tex. Crim. App. 1992) (penetration of female sexual organ does not require proof of penetration of vaginal canal). Therefore, the definition describes "an obvious common-sense proposition" and, consequently, would not have infringed on the jury's fact-finding authority. ***Green***, 476 S.W.3d at 447.

Furthermore, we disagree with Appellant's assertion that the definition focused the jury's attention on a particular type of evidence. Because penetration of the victim's sexual organ was a critical element of the offense, the jury was already focused on the evidence relating to penetration regardless of the definition of "penetration" in the charge. *See* ***id***. The definition was accurate under the law and did not draw additional or undue attention to any particular evidence

that might weigh in favor of or against a finding of guilt. *See* ***id.*** at 447-48. Because the definition was neutral and benign in that it merely described the common meaning of "penetration," and the jury already would have been focused on the evidence of penetration, we conclude that the charge's definition of "penetration" did not egregiously harm Appellant. *See* ***id***. We overrule Appellant's first issue.

ADMISSIBILITY OF THE SANE REPORT

In his second issue, Appellant argues that the trial court erred in overruling his hearsay objection to admission of a report by Norma Sanford, a sexual assault nurse examiner (SANE).

Standard of Review and Governing Law

A trial court has considerable discretion in determining whether to exclude or admit evidence. *See* ***Montgomery v. State***, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990); ***State v. Dudley***, 223 S.W.3d 717, 724 (Tex. App.—Tyler 2007, no pet.). Absent an abuse of discretion, we will not disturb a trial court's evidentiary rulings. *See* ***Martin v. State***, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005). We will uphold the trial court's ruling if it was within the zone of reasonable disagreement and correct on any theory of law applicable to the case. *See* ***Weatherred v. State***, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *see also* ***Martin***, 173 S.W.3d at 467.

Hearsay is generally inadmissible. *See* TEX. R. EVID. 802. Once an opponent of hearsay objects, the proponent of the evidence must establish that an exception makes the hearsay admissible. ***Taylor v. State***, 268 S.W.3d 571, 578–79 (Tex. Crim. App. 2008). One such exception is for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." TEX. R. EVID. 803(4). To establish this exception, the proponent of the evidence must show that (1) the out-of-court declarant was aware that the statements were made for purposes of medical diagnosis or treatment, and that proper diagnosis or treatment depended upon the veracity of the statements; and (2) the statements are pertinent to diagnosis or treatment, i.e., that it was reasonable for the care provider to rely on the statements in diagnosing or treating the declarant. ***Taylor***, 268 S.W.3d at 588–89, 591.

Erroneous admission of hearsay is nonconstitutional error. TEX. R. APP. P. 44.2(b); *see* ***Garcia v. State***, 126 S.W.3d 921, 927–28 (Tex. Crim. App. 2004). We must disregard all

nonconstitutional errors that do not affect the appellant's substantial rights. TEX. R. APP. P. 44.2(b); ***Russell v. State***, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005); ***Morales v. State***, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). A "substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." ***Morales***, 32 S.W.3d at 867 (quoting ***King v. State***, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). Substantial rights are not affected by the erroneous admission of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." ***Motilla v. State***, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

In determining the likelihood that a jury's decision was adversely affected by the error, an appellate court should consider "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." ***Morales***, 32 S.W.3d at 867. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, and voir dire, if material to an appellant's claim. ***Motilla***, 78 S.W.3d at 355–56. The trial court's error in admitting evidence can be rendered harmless if other evidence proving the same fact is admitted without objection. ***Anderson v. State***, 717 S.W.2d 622, 628 (Tex. 1986); ***Land v. State***, 291 S.W.3d 23, 28 (Tex. App.—Texarkana 2009, pet. ref'd).

Analysis

At trial, Sanford testified that she examined Jane Doe following a forensic interview.[1] During her testimony, the State offered Sanford's report into evidence. Appellant objected that Jane Doe's statements about the events of the alleged assault, contained in the report, were inadmissible hearsay within hearsay. The trial court admitted the report under the business records exception and overruled Appellant's objection based on the hearsay exception for statements made for the purpose of medical diagnosis or treatment. On appeal, Appellant contends that the trial court erroneously relied on this exception because there is insufficient evidence that Jane Doe knew the statements were for medical diagnosis or treatment.

Assuming, without deciding, that the trial court abused its discretion by overruling Appellant's hearsay objection to Sanford's report, any error was harmless because Jane Doe's

[1] We refer to the victim as "Jane Doe" because that is how she was referred to at trial.

statements about the events of the alleged assault were admitted elsewhere without objection. Specifically, Jane Doe testified without objection to her recollection of the alleged assault. She testified that Appellant put his "thing" in her "tutu" and put lotion inside her "tutu."[2] A child victim's uncorroborated testimony is sufficient to support a conviction for aggravated sexual assault. TEX. CODE CRIM. PROC. ANN. art. 38.07(b)(1) (West Supp. 2016); ***Tear v. State***, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd); *see* ***Kimberlin v. State***, 877 S.W.2d 828, 831-32 (Tex. App.—Fort Worth 1994, pet. ref'd) (stating that child complainant's outcry statement alone can be sufficient to support conviction for aggravated sexual assault). As a result, regardless of whether the report was erroneously admitted into evidence, Jane Doe's testimony was sufficient for the jury to find Appellant guilty of aggravated sexual assault by penetrating her sexual organ. *See* TEX. PENAL CODE ANN. § 22.021 (elements of aggravated sexual assault). Having examined the record as a whole, we conclude that any error in the admission of Sanford's report did not influence the jury, or had but a slight effect. *See* ***Motilla***, 78 S.W.3d at 355. We overrule Appellant's second issue.

OUTCRY TESTIMONY

In his third issue, Appellant urges that the trial court improperly admitted certain testimony from outcry witnesses. He argues that the notice provided regarding the outcry testimony was inadequate and that the witnesses testified to the same outcry event.

Governing Law

Article 38.072 provides a statutory exception which allows the State to introduce outcry statements made by a child abuse victim, which would otherwise be inadmissible as hearsay. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2016). The provisions of article 38.072 are mandatory. ***Long v. State***, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990). Generally, an objection that a statement is "hearsay" will be considered sufficient to have apprised the trial court of a defendant's complaint that one or more of the requirements of article 38.072 have not been met. ***Id.*** at 548.

Before the outcry statement is admissible, several requirements must be satisfied. First, at least fourteen days before trial, the State must give the defendant (1) written notice that it intends to offer the hearsay statement; (2) the name of the witness through whom the statement will be

[2] The testimony at trial showed that Jane Doe referred to the vagina as the "tutu."

offered; and (3) a written summary of the hearsay statement. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(1)(A), (B), (C). Second, the trial court must hold a hearing outside the jury's presence to determine if the hearsay statement is reliable based on time, content, and circumstances. ***Id***. § 2(b)(2). Finally, the child must testify or be available to testify at trial. ***Id***. § 2(b)(3).

Analysis

We first address Appellant's contention that the trial court erred by admitting into evidence those parts of the outcry statements that he alleges exceeded the scope of the State's pretrial notice. The State's notice provided that Willie Moye and Candy Hartman would testify as outcry witnesses. According to the notice, Moye would testify that Jane Doe told her that Appellant had put lotion on her private area and spit on her private area. The notice also provided that Jane Doe told Hartman that Appellant touched her "tutu," applied lotion to her "tutu" and butt, put his "tutu" inside her "tutu," and put his "tutu" in her butt.

The trial court conducted a pretrial hearing to allow Appellant an opportunity to cross examine the witnesses regarding the content and scope of the statements. At the pretrial hearing, Moye and Hartman testified about the details of the offenses as told to them by Jane Doe. At trial, Moye testified that Jane Doe told her that Appellant put lotion on her "tutu" and spit on her "tutu." Hartman testified that Jane Doe told her Appellant put his "tutu" and finger inside her "tutu" and butt, and "rubbed lotion." Accordingly, their testimony at both the pretrial hearing and at trial was consistent with the summary in the State's notice. Because Appellant received actual notice of the content and scope of the statements, he suffered no harm as a result of any alleged deficiency in the State's summary. *See* ***Norris v. State***, 788 S.W.2d 65, 68 (Tex. App.—Dallas 1990, pet. ref'd).

We now address Appellant's argument that the trial court erred in allowing overlapping testimony from the two outcry witnesses. At the conclusion of the pretrial hearing, the court ruled that Hartman could not testify to the same statements as Moye because it would be a second outcry witness for the same incident. At trial, Moye testified that Jane Doe told her that Appellant spit on and put lotion on her "tutu," and Hartman testified that Jane Doe said Appellant "rubbed lotion" on her and had spit on her.

More than one outcry witness may testify as long as their testimony concerns different events, and is not simply a repetition of the same event as related by the victim to different

individuals. ***Matthews v. State***, 152 S.W.3d 723, 729 (Tex. App.—Tyler 2004, no pet.). In this case, the outcry testimony does exceed the scope of that permitted by the trial court's earlier ruling. *See* ***id***.; *see also* ***Tear***, 74 S.W.3d at 559. However, Appellant was not harmed by admission of the outcry testimony. Jane Doe testified to substantially the same facts as did the two outcry witnesses. As previously stated, her testimony alone is sufficient to support Appellant's conviction for aggravated sexual assault. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(b)(1); *see also* ***Tear***, 74 S.W.3d at 560; TEX. PENAL CODE ANN. § 22.021. For this reason, any error in the admission of the outcry testimony could not have substantially and injuriously influenced the jury's verdict. *See* ***Morales***, 32 S.W.3d at 867. We overrule Appellant's third issue.

WAIVER OF *MIRANDA* RIGHTS

In his fourth and fifth issues, Appellant contends the trial court improperly admitted his recorded interview because he did not knowingly, intelligently, and voluntarily waive his rights under ***Miranda*** and article 38.22 of the Texas Code of Criminal Procedure.

Governing Law and Standard of Review

In ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that the Fifth Amendment to the United States Constitution prohibits use of an accused's oral statement made as result of custodial interrogation unless he is given certain warnings and knowingly, intelligently, and voluntarily waives the rights set out in those warnings. *See* ***Miranda***, 384 U.S. at 478–79, 85 S. Ct. at 1629–30. Specifically, an accused must be warned prior to any questioning "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney[,] one will be appointed for him prior to any questioning if he so desires." ***Id.***, 384 U.S. at 479, 85 S. Ct. at 1630.

"A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." TEX. CODE CRIM. PROC. ANN. art. 38.21 (West 2005). Under Article 38.22, no oral statement of an accused made as a result of custodial interrogation shall be admissible against an accused in a criminal proceeding unless (1) the statement was recorded, and (2) prior to the statement but during the recording, the accused was warned of his rights and knowingly,

intelligently, and voluntarily waived those rights. ***Id***. art. 38.22 § 3(a) (West Supp. 2016); ***Joseph v. State***, 309 S.W.3d 20, 23–24 (Tex. Crim. App. 2010). The warnings required by Article 38.22 include those stated in ***Miranda***, as well as a warning that the accused "has the right to terminate the interview at any time." TEX. CODE CRIM. PROC. ANN. art. 38.22 §§ 2(a), 3(a)(2); ***Herrera v. State***, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

The State has the burden of showing by a preponderance of the evidence that an accused knowingly, intelligently, and voluntarily waived his ***Miranda*** rights. *See* ***Joseph***, 309 S.W.3d at 24. "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." ***Id***. at 25. Additionally, "the waiver must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ***Id***. In making a determination as to waiver, "the totality of the circumstances surrounding the interrogation" must be considered. ***Id***. We review the trial court's decision to admit the videotape under an abuse of discretion standard. *See* ***Martin***, 173 S.W.3d at 467.

Analysis

At trial, the State offered into evidence the audio recording of an interview between David Wells, a former deputy with the Angelina County Sheriff's Department, and Appellant. This interview occurred on September 4, 2013. During the interview, Appellant admitted to touching Jane Doe but denied that penetration occurred.

On the recording, Deputy Wells identified himself, another investigator, and Appellant. After confirming that Appellant had graduated from high school, Deputy Wells gave Appellant written ***Miranda*** and Article 38.22 warnings and had him read them aloud. Appellant affirmed that he understood the warnings and initialed each warning. Appellant also signed the bottom of the warnings to indicate that he understood them. Immediately thereafter, Deputy Wells proceeded with his questioning and Appellant answered the questions. At no time did Appellant request an attorney or insist that the interview cease.

Accordingly, we conclude that the totality of the circumstances shows that Appellant knowingly, intelligently, and voluntarily waived his rights under Article 38.22 and ***Miranda***. *See* ***Miranda***, 384 U.S. at 479, 85 S. Ct. at 1630; *see also* TEX. CODE CRIM. PROC. ANN. arts. 38.21, 38.22 §§ 2(a), 3(a). The recording demonstrates that Appellant appeared to understand his rights and answered affirmatively when asked if he understood those rights. *See* ***Joseph***, 309

S.W.3d at 25. The record contains no evidence of intimidation or coercion. *See* ***id***. Therefore, we conclude the trial court did not abuse its discretion when it admitted the recording into evidence. *See* ***Martin***, 173 S.W.3d at 467. We overrule Appellant's fourth and fifth issues.

DISPOSITION

Having overruled Appellant's first, second, third, fourth, and fifth issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered March 22, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 22, 2017

NO. 12-15-00248-CR

WILLIAM JAMES TAYLOR,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2014-0145)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.