COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

OMAR CALDERON,		§	No. 08-20-00139-CR
	Appellant,	§	Appeal from the
v.		§	450th Judicial District Court
THE STATE OF TEXAS,		§	of Travis County, Texas
	Appellee.	§	(TC# D-1-DC-20-904007)

O P I N I O N

A jury found Appellant Omar Calderon guilty of two counts of aggravated sexual assault and three counts of indecency with a child by contact. In his sole issue, Appellant contends that the trial court abused its discretion by designating the incorrect person as an outcry witness under TEX.CODE CRIM.PROC.ANN. art. 38.072. For the reasons set forth below, we affirm the trial court's judgment.[1]

I. BACKGROUND

A. Incidents of Abuse

The victim in this case ("Child") testified at trial that she was Appellant's daughter.[2]

[1] This case was transferred from our sister court in Austin, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

[2] In order to protect the victim's identity, we refer to her as "Child" in place of her true name. *See* TEX.R.APP.P. 9.10.

Although she did not have a relationship with Appellant when she was younger, Child made contact with Appellant and eventually met him in Austin, Texas. After several further meetings, Child began spending nights with Appellant at his apartment in Austin. During one of these visits, Appellant and Child, who was thirteen years old at the time, were watching a movie on a couch in Appellant's apartment when he began touching Child's breasts above and underneath her clothing. Appellant also removed Child's underwear and touched the "[o]utside and inside" of her vagina with his finger and mouth. Child did not tell anybody about the incident because she was scared. Several months later, Child again visited Appellant at his apartment, and during the first night of the visit, Appellant touched Child's breasts with his hand under her clothing, touched the outside and inside of Child's vagina with his finger, and placed his penis against Child's cheek. The next morning, Appellant touched the outside of Child's vagina, "groped" her "butt" under her clothes, and caused Child's hand to contact his penis.

After these incidents, Child experienced suicidal ideation and engaged in self-harm by cutting herself, and she began receiving therapy from a licensed professional counselor, Barbara Ritchie. Following several outcries described in more detail below and an investigation into the allegations, the State charged Appellant with three counts of aggravated sexual assault of a child and three counts of indecency with a child by contact.

B. Outcry-Witness Hearing

At trial and outside the presence of the jury, the trial court held an outcry-witness hearing pursuant to TEX.CODE CRIM.PROC.ANN. art. 38.072 to determine the identity of the proper outcry witness. The State initially argued that although Child first told her mother about the abuse in general terms, the State contended that Detective Michael Dunn, a police officer who interviewed Child when she first reported the abuse, was the proper outcry witness because he was the first

adult to whom Child recounted sufficient details of the abuse. Although Appellant asserted in his pre-trial briefing that Detective Dunn was the proper outcry witness, Appellant argued at trial that Ritchie, Child's therapist, was the proper outcry witness.

1. Detective Dunn's outcry-witness-hearing testimony.

On voir dire examination, Detective Dunn testified that he was working at a police station on August 23, 2017, when Child and her sister came into the station to file a report. During the ensuing interview, which occurred that same day, Child told Dunn that around spring break in 2014, Appellant had sexually assaulted her for the first time while she was at his apartment in Austin. Child recounted that the abuse occurred in the apartment's living room and that other people were present in the apartment during the incident. Child told Dunn that she had fallen asleep on a couch while watching a movie and that she woke up when Appellant began touching her breasts. Child stated that Appellant also penetrated her vagina with his finger during this incident and told her not to say anything about the incident. Child also recalled to Dunn a second series of abusive acts that occurred at Appellant's apartment in April 2014 in which Appellant touched Child's vagina while they were in the bedroom with Appellant's sleeping wife and child, and in which Appellant placed her hand on his penis during the same visit. Dunn took written notes of Child's statement during the interview.

2. Ritchie's outcry-witness-hearing testimony.

Ritchie, Child's therapist, testified on voir dire examination that she began treating Child for depression and self-harming behavior in December 2015. Ritchie recalled that although Child told her at some point about some of the details of the sexual abuse, Child did not relate to her all the acts that occurred. Ritchie stated that she typically does not gather specific details of the abuse because the proper procedure is for a sexual-abuse victim to give another statement to a forensic

interviewer at a child-advocacy center. Although Child established a "trauma narrative" on November 23, 2016, that may have included some details of sexual acts, Ritchie could not recall with certainty whether Child did so. Child's narrative was not retained as a part of Ritchie's treatment records because the narrative was for Child to keep. Ritchie stated that the narrative may have included details about the abuse, but she could not recall the details of what may have been included because that was not the emphasis of the narrative's purpose. Although Ritchie recalled that there were two incidents of sexual abuse, she could not remember the specific nature of the acts Appellant committed against Child, including the details of when, where, and how the abuse occurred. Ritchie did not possess any records that could potentially refresh her memory about what Child told her regarding the abuse.

3. Trial court's ruling and verdict.

At the conclusion of the witnesses' testimonies, the State argued that Ritchie was not the appropriate outcry witness because: (1) Child's trauma narrative was not intended to be a recitation of the details of the abuse; and (2) even if it was, Ritchie had no memory of the narrative's contents or any details of what Child told her about the abuse. Citing *Foreman v. State*, 995 S.W.2d 854, 859 (Tex.App.--Austin 1999, pet. ref'd), the State contended that Detective Dunn was the proper outcry witness because he was the first person to whom Child sufficiently described when, where, how often, and by what means the abuse occurred. Appellant responded that the *Foreman* opinion's holding was unconstitutional because it permitted a violation of his rights under the Confrontation Clause and his Sixth-Amendment right to present a defense. The trial court found that Detective Dunn was the proper outcry witness and allowed him to testify in the State's case-in-chief regarding what Child told him about the abuse.

At trial, Appellant defended against the State's allegations by presenting testimony from

his girlfriend and an investigator that contradicted certain aspects of the Child's testimony regarding the circumstances of the abuse, as well as testimony from a psychologist that called into question the validity of certain aspects of Child's forensic interview. Appellant also argued that Child had fabricated the allegations of abuse. The jury found Appellant guilty of two counts of aggravated sexual assault and three counts of indecency with a child by contact and sentenced him to 20 years' imprisonment on each count. The jury did not reach a unanimous verdict on one count of aggravated sexual assault. This appeal followed.

II. DISCUSSION

In his sole issue on appeal, Appellant argues that the trial court abused its discretion by designating Detective Dunn as the proper outcry witness and allowing him to testify about Child's outcry of sexual abuse to him. In particular, Appellant contends that the Austin court of appeals' decision in *Foreman*, that authorizes trial courts to designate as the outcry witness a person who was not the first adult to whom a victim reported the abuse, violates TEX.CODE CRIM.PROC.ANN. art. 38.072 and should be overruled.

A. Applicable Law and Standard of Review

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex.Crim.App. 2011), *citing* TEX.R.EVID. 801(d). Hearsay is inadmissible unless it falls into one of the exceptions in Texas Rules of Evidence 803 or 804, or it is allowed by "other rules prescribed under statutory authority." *Sanchez*, 354 S.W.3d at 484, *citing* TEX.R.EVID. 802. One of the "other rules" is found in article 38.072 of the Texas Code of Criminal Procedure, which provides for the admission of certain out-of-court "outcry" statements. Relevant here, that article applies to statements that: (1) describe the alleged offense; (2) were made by a child victim who is younger than 14 years of age; and (3)

the defendant is charged with certain enumerated offenses. TEX.CODE CRIM.PROC.ANN. art. 38.072, §§ 1, 2(a)(1)(A), (a)(1)(B)(ii), (a)(2). Aggravated sexual assault of a child and indecency with a child by contact are two of those enumerated offenses. *Id*. at 38.072, § 1(1). Further, article 38.072 specifically provides that the statement must be one made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense. *Id*. at 38.072, § 2(a)(3).

Procedurally, the State cannot introduce the statement until the trial court holds a hearing outside the presence of the jury to determine whether the statement is "reliable based on the time, content, and circumstances of the statement." *Id*. at 38.072, § 2(b)(2). In addition, the child must testify at trial or be available to testify at the trial. *Id*. at 38.072, § 2(b)(3). Outcry testimony admitted in compliance with article 38.072 is considered substantive evidence, admissible for the truth of the matter asserted in the testimony. *Duran v. State*, 163 S.W.3d 253, 257 (Tex.App.--Fort Worth 2005, no pet.).

We review a trial court's determination whether an outcry statement is admissible under article 38.072 for an abuse of discretion. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex.Crim.App. 1990) (en banc). A trial court only abuses its discretion in admitting outcry testimony if its decision falls outside the zone of reasonable disagreement. *Gonzales v. State*, 477 S.W.3d 475, 479 (Tex.App.--Fort Worth 2015, pet. ref'd), *citing Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1991) (en banc) (op. on reh'g).

B. Foreman v. State

On appeal, Appellant primarily contends that *Foreman v. State*, was wrongly decided because the opinion allows someone, other than the first person to whom a victim informed of the abuse, to be designated as an outcry witness, thereby violating article 38.072 § 2(a)(3)'s

requirement that the outcry witness be the "first person" to whom the victim made a statement about the abuse. Appellant argues that the Austin court of appeals deviated from proper canons of statutory construction by "legislat[ing] new language into the statute—'who can remember.'" For these reasons, Appellant advocates that we should overrule *Foreman*.

Because this case was transferred to this Court from our sister court in Austin, we are obligated to follow its precedent if they conflict with our own. TEX.R.APP.P. 41.3. And setting aside the question of whether we could overrule *Foreman*, we would not do so because the Texas Court of Criminal Appeals has similarly interpreted article 38.072 § 2(a)(3). In *Garcia*, the Court of Criminal Appeals held that the "first person" language of that article means "the first person, 18 years old or older, to whom the child makes a statement that in some discernible manner describes the alleged offense . . . [such] that the statement must be more than words which give a general allusion that something in the area of child abuse was going on." *Garcia*, 792 S.W.2d at 91. The *Foreman* decision cites to and is largely premised on *Garcia*, and the several cases that applied *Garcia* in analogous situations. *See Foreman*, 995 S.W.2d at 858-859. We are of course bound by the *Garcia* decision. *See Ex parte Ramos*, 583 S.W.3d 748, 756 (Tex.App.--El Paso 2019, pet. ref'd) (recognizing that intermediate courts of appeal are bound by Court of Criminal Appeals' holdings). For these reasons, we decline to overrule *Foreman* or other decisions standing for the same proposition.

Moreover, for the reasons below, we find that the trial court did not abuse its discretion by designating Detective Dunn as the outcry witness under article 38.072.

C. Specificity

Article 38.072's specificity requirement has been construed to mean that an outcry statement must be "more that words which give a general allusion that something in the area of

child abuse was going on." *Waldrep v. State*, No. 08-19-00027-CR, 2019 WL 6888522, at *4 (Tex.App.--El Paso Dec. 17, 2019, no pet.) (not designated for publication), *citing Garcia*, 792 S.W.2d at 91; *see* TEX.CODE CRIM.PROC.ANN. art. 38.072, § 2(a)(1)(A). Stated differently, the specificity requirement is generally met when a victim sufficiently describes the "how, when, and where" of the abuse. *See Rivera v. State*, No. 08-19-00136-CR, 2021 WL 3129261, at *4 (Tex.App.--El Paso July 23, 2021, no pet.) (not designated for publication), *quoting Martinez v. State*, No. 05-18-01096-CR, 2020 WL 897247, at *2 (Tex.App.--Dallas Feb. 25, 2020, no pet.) (mem. op., not designated for publication).

During the outcry-witness hearing, Detective Dunn testified that he interviewed Child on August 23, 2017. Child told Dunn that around spring break in 2014, Appellant had sexually assaulted her for the first time while she was at his apartment in Austin. Child recalled that the abuse occurred in the apartment's living room and that other people were present in the apartment during the incident. Child told Dunn that she had fallen asleep on a couch while watching a movie and that she awakened when Appellant began touching her breasts. Child stated that Appellant also penetrated her vagina with his finger during this incident and told her not to say anything about the incident. Child also recalled to Dunn a second series of abusive acts that occurred at Appellant's apartment in April 2014 in which Appellant touched Child's vagina while they were in the bedroom with Appellant's sleeping wife and child, and in which Appellant placed her hand on his penis.

In contrast, Ritchie testified during the outcry hearing that she began treating Child in December 2015, that Child made a general outcry of sexual abuse at some point during her therapy, and that Child established a trauma narrative that referenced the abuse on November 23, 2016. Nevertheless, Ritchie could not testify as to the details of the abuse, such as when or how the abuse

occurred. Although Ritchie stated that Child likely included at least some details of the abuse in her trauma narrative, Ritchie could not remember those details. Ritchie also testified that she did not have any details of the abuse in her records.

Although the record suggests that Child told Ritchie about the general existence of the abuse as early as November 2016, nearly a year before Child made her outcry to Detective Dunn, the record establishes that Dunn was the first person to whom Child provided sufficient specificity of the details of the abuse, including how, when, and where the abuse occurred. Based on the above, we conclude that the trial court did not abuse its discretion in concluding that Dunn, not Ritchie, was the proper outcry witness under article 38.072. *See Rivera*, 2021 WL 3129261, at *4 (finding that victim's sister was the proper outcry witness because victim told her sister the "how, when, and where" of the abuse, even though victim first told her mother about the general existence of the abuse); *Waldrep*, 2019 WL 6888522, at *4 (finding that child's statement was sufficiently specific to meet article 38.072's specificity requirements where child told mother that defendant put his penis in the defendant's mouth when she was six years old).

D. Reliability

Article 38.072 further requires that a trial court determine, "based on the time, content and circumstances of the statement, [whether] the outcry is reliable." *Waldrep*, 2019 WL 6888522, at *4, *quoting Sanchez*, 354 S.W.3d at 484; *see* TEX.CODE CRIM.PROC.ANN. art. 38.072, § 2(b)(2). We have previously considered a non-exhaustive list of factors that a court may consider in determining whether an outcry statement is reliable, including:

> (1) whether the child victim testifies at trial and admits making the out-of-court statement, (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate, (3) whether other evidence corroborates the statement, (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults, (5) whether the child's statement is clear and unambiguous and rises to the

> needed level of certainty, (6) whether the statement is consistent with other evidence, (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate, (8) whether the child behaves abnormally after the contact, (9) whether the child has a motive to fabricate the statement, (10) whether the child expects punishment because of reporting the conduct, and (11) whether the accused had the opportunity to commit the offense.

Waldrep, 2019 WL 6888522, at *4-5, *quoting Gonzales v. State*, 477 S.W.3d 475, 479 (Tex.App.--Fort Worth 2015, pet. ref'd). Although these factors are helpful, our focus must be on the key issue of whether the trial court properly found the statement reliable, considering the "time, content and circumstances" under which it was made. *Waldrep*, 2019 WL 6888522, *quoting Buentello v. State*, 512 S.W.3d 508, 518-19 (Tex.App.--Houston [1st Dist.] 2016, pet. ref'd).

Appellant advances no argument regarding the reliability of Child's outcry to Detective Dunn. Even so, the record indicates that: (1) Child testified at trial and recalled making the outcry to Dunn; (2) Child indicated that she understood the difference between a truth and a lie at the time she gave an interview regarding the abuse when she was 15 years old; (3) Child's trial testimony corroborated her outcry; (4) Child used her own terminology when describing the abuse to Dunn (e.g., Child told Dunn that Appellant "[p]ut his finger inside her" instead of describing the act as "digital penetration;") (5) Child's outcry described the details of the abusive acts with clarity; (6) Child began behaving abnormally after the abuse by performing poorly in school and engaging in suicidal ideation and self-harming behaviors; (7) nothing in the record suggests that Child had a motive to fabricate the allegations; and (8) based on Child's testimony, Appellant had the opportunity to commit the offense during Child's visits to his apartment.

Considering the above factors, we conclude that the trial court did not abuse its discretion in determining Dunn's outcry testimony to be sufficiently reliable under article 38.072. *See Waldrep*, 2019 WL 6888522, at *5-6 (finding outcry-witness's testimony sufficiently reliable where the victim related specific details of the abuse that was consistent with the victim's trial

testimony, other evidence corroborated the victim's outcry, and there was no evidence that the outcry witness manipulated the victim into making a false statement).

E. Harm Analysis

Finally, even if we were to find that the trial court abused its discretion by admitting Dunn's outcry testimony at trial, any error would have been harmless. The erroneous admission of evidence, including outcry-witness testimony, is considered a non-constitutional error. *Waldrep*, 2019 WL 6888522, at *6, *citing West v. State*, 121 S.W.3d 95, 104 (Tex.App.--Fort Worth 2003, pet. ref'd). Under TEX.R.APP.P. 44.2(b), we can only reverse non-constitutional error that affected Appellant's substantial rights. *Id.* Non-constitutional error is harmless if, after reviewing the entire record, the court is reasonably assured the error did not influence the jury's verdict or had but a slight effect. *Id.* Moreover, if the same or similar evidence is admitted without objection at another point during the trial, the improper admission of the evidence will not constitute reversible error. *Id*.

Here, the State presented Child's testimony that described, in greater detail than Dunn's testimony, the particular details of the sexual abuse and the psychological effects the abuse had on her. Moreover, the State presented similar testimony from a Sexual Assault Nurse Examiner (SANE), who testified that Child related: (1) she "was touched with a hand on [the inside and outside] of her vagina" while she was in Austin in "March and May and April;" (2) Appellant placed her hand on his penis; and (3) Appellant told her not to tell anyone about the incident. A forensic interviewer who interviewed Child also testified that Child made allegation of three separate incidents of Appellant's sexual abuse that occurred in "either March, April, or May." Finally, Child's mother testified that Child made a general outcry of abuse to her that prompted her to take Child to receive therapy from Ritchie.

Thus, given that Detective Dunn's outcry testimony was similar to other evidence in the record, we are reasonably assured that any error in admitting the testimony did not influence the jury's verdict or had only a slight effect. *See Waldrep*, 2019 WL 6888522, at *6 (stating that any error in admitting outcry-witness testimony would have been harmless because several other witnesses testified that victim had made similar outcries to them, and because victim provided factually specific testimony regarding the abuse).

Appellant's Issue One is overruled.

III. CONCLUSION

The trial court's judgment is affirmed.

JEFF ALLEY, Justice

October 29, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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