COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GERONIMO FRANCISCO RIVERA a/k/a GERONIMO FRANCISCO RIVERA-LOZOYA,	§	No. 08-19-00223-CR
Appellant,	§	Appeal from the
v.	§	171st District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(Trial Court No. 20150D05113)

O P I N I O N

Appellant, Geronimo Francisco Rivera, appeals his conviction of continuous sexual abuse of a child. TEX.PENAL CODE ANN. § 21.02. A jury found Appellant guilty, and the trial court assessed his punishment as imprisonment for sixty years. Finding no error, we affirm.

BACKGROUND

Factual Background

Appellant began sexually assaulting the child victim, S.G., in 2008. S.G. was ten years' old when the assaults started; Appellant was seventeen years' old. Appellant is S.G.'s paternal uncle. Appellant lived with his parents (S.G.'s grandparents) when the assaults took place. S.G.'s father would leave S.G. alone in Appellant's care while running errands with S.G.'s grandmother.

At trial, S.G. described the details of the sexual assaults he endured for years. S.G. testified the abuse began with Appellant making S.G. look at a pornographic magazine while Appellant masturbated him. S.G. stated that he asked Appellant to stop because "it feels weird." Appellant, however, told him to "just relax and keep reading" and continued to masturbate S.G. until S.G. ejaculated. S.G. said Appellant used "his mouth to clean off the semen."

The sexual assaults escalated when S.G. was eleven years' old. S.G. testified that Appellant gave him a pornographic magazine and told him to "bend over and look at it." Then, according to S.G., Appellant pulled down S.G.'s pants and underwear and used his penis to penetrate S.G.'s anus. S.G. described several other instances of Appellant using his penis to penetrate S.G.'s anus and testified it happened at least ten times over the next two years. Appellant masturbated and performed oral sex on S.G. "almost every other day" for approximately three years.

S.G. testified Appellant told him not to tell anybody and to pretend the abuse never happened or he would hurt him. S.G. said Appellant told him he would "use rat poisoning and put it in my food." So S.G. did not tell his parents or grandparents because he was scared and confused about what was happening. But S.G. "had enough" and stood up for himself when he was thirteen years' old. When Appellant told him to "take off the pants and you know the drill," S.G. "started screaming and hitting [Appellant] as hard as [he] could." Appellant never sexually assaulted S.G. again.

Approximately three years later, in April 2015, S.G. told his mother that Appellant had sexually abused him from when he was ten years old until he was thirteen. He told his father a week later when he returned from a work trip. S.G.'s father and mother confronted Appellant that night. They asked him, "is it true what [S.G.] told us[?]" At trial, S.G.'s father and mother testified

that Appellant admitted to assaulting S.G.

Procedural Background

A grand jury indicted Appellant in October 2015 for continuous sexual abuse of a child. TEX.PENAL CODE ANN. § 21.02. Before trial, the trial court held a hearing regarding the appropriate outcry witness under Section 38.072 of the Texas Code of Criminal Procedure. After testimony from El Paso Police Officer Jessica Grijalva ("Grijalva"), the State argued that Grijalva was the proper outcry witness because she was the first person he described the abuse to in detail. When given a chance to respond, Appellant's attorney said, "No argument, your Honor." Consequently, the trial court found Grijalva the proper outcry witness. She testified at trial without objection from Appellant's counsel regarding the statements S.G. made to her about the abuse.

Before trial, the State disclosed that the office of Rodolfo Vasquez, a psychotherapist that had treated both Appellant and S.G., had accidentally shredded the only copy of Appellant's counseling records. Appellant filed a motion to exclude Vasquez's testimony because "any evidence which could have been in those counseling records to impeach, mitigate or exculpate the Defendant is no longer available." He argued that Texas Rules of Evidence 107 and 615 required the trial court to exclude Vasquez's testimony. Appellant did not, however, argue he was denied his right to due process, present any evidence of what was in the destroyed records, or claim the State had destroyed them in bad faith. The trial court denied Appellant's motion. Vasquez testified at trial Appellant admitted to him that he did touch S.G. and there was kissing and fondling. Appellant's counsel objected to his testimony as a narrative. But he did not object to it as hearsay.

After hearing the evidence, the jury found Appellant guilty of the continuous sexual abuse of a child as alleged in the indictment. And the court sentenced him to sixty years in prison. This

appeal followed.

DISCUSSION

Issues

Appellant presents four issues on appeal. He claims in his first issue the trial court abused its discretion by designating Grijalva as the outcry witness under Section 38.072 of the Texas Code of Criminal Procedure. In Issue Two, Appellant argues the trial court improperly allowed hearsay testimony from Vasquez. In his third issue, Appellant asserts the "trial court denied [him] due process . . . when it failed to exclude Vasquez's testimony despite the destruction of [Appellant]'s file." He claims in his fourth issue "the evidence presented was legally and factually insufficient" for a jury to find him guilty.

Preservation of Error

The State responds on appeal Appellant did not preserve his first two issues; the trial court abused its discretion by designating Grijalva as the outcry witness, and the trial court improperly allowed hearsay testimony from Vasquez. We agree.

The rules of Appellate Procedure require a party to preserve error by making a timely and specific objection. TEX.R.APP.P. 33.1(a). To preserve error related to the admission of evidence, the complaining party must object and secure an adverse ruling in a hearing held outside of the jury's presence or when the evidence is offered at trial. *Id.;* TEX.R.EVID. 103(a)(1). An objection stating one legal theory may not be used to support a different legal theory on appeal. *See Sterling v. State*, 800 S.W.2d 513, 521 (Tex.Crim.App. 1990).

In his first issue, Appellant argues the trial court erred in designating Grijalva as the outcry witness. Appellant's counsel at trial, however, did not present any argument opposing the trial

court's designation of Grijalva as the outcry witness or otherwise object to her testimony. Consequently, Appellant failed to preserve error on this point of review. His first issue is overruled.

In Issue Two, Appellant argues Vasquez's testimony regarding admissions Appellant made for him was impermissible hearsay. Relying on *Perez v. State*, 113 S.W.3d 819 (Tex.App.—Austin 2003, pet. ref'd) and *Moore v. State*, 82 S.W.3d 399 (Tex.App.—Austin 2002, pet. ref'd), Appellant argues the hearsay exception for statements made for purposes of medical diagnosis do not apply to Vasquez because he is not a licensed physician. The Court of Criminal Appeals has rejected that portion of *Perez* and *Moore* requiring a medical professional to be a licensed physician before the hearsay exception applies. *Taylor v. State*, 268 S.W.3d 571, 587 (Tex.Crim.App. 2008). Regardless, the only objection Appellant's trial counsel made to Vasquez's testimony was for "narrative." He did not object on the grounds of hearsay or otherwise argue Vasquez should be prohibited from testifying because the hearsay exception for statements made for medical diagnosis or treatment did not apply. And his objection for narrative is not sufficient to preserve his hearsay argument. *Sterling*, 800 S.W.2d at 521 ("Generally, error must be presented at trial with a timely and specific objection, and any objection at trial which differs from the complaint on appeal preserves nothing for review."). As a result, Appellant failed to preserve error on this issue. His second issue is overruled.

Due Process

Appellant frames his third issue as challenging the trial court's denial of his motion to exclude the testimony of Vasquez. But his argument does not center on the admissibility of Vasquez's testimony; it focuses on the accidental destruction of Vasquez's records related to Appellant's treatment. Specifically, he claims the State violated his right to due process because it

failed to preserve Vasquez's records before they were destroyed. However, his motion to exclude the testimony of Vasquez filed with the trial court does not assert a due process violation. It claims Vasquez's testimony should be excluded under Texas Rules of Evidence 107 and 615. But he abandons his Rules 107 and 615 arguments on appeal. As a threshold matter, the Court must determine whether Appellant preserved any issue related to the destruction of his medical records. We find he did not.

As discussed, the rules of Appellate Procedure require a timely and specific objection to preserve error. TEX.R.APP.P. 33.1(a). And an objection stating one legal theory may not be used to support a different legal theory on appeal. *Sterling*, 800 S.W.2d at 521. The same is true with alleged constitutional errors. In *Clark v. State*, 365 S.W.3d 333, 340 (Tex.Crim.App. 2012), the Court of Criminal Appeals held "that the trial court should know when it is being asked to make a constitutional ruling because constitutional error is subject to a much stricter harm analysis on appeal." As a result, if a party fails to object to constitutional errors at trial properly, those errors can be forfeited. *Id.* at 339.

Such is the case here. Appellant asked the trial court to exclude Vasquez's testimony due to alleged non-compliance with the Texas Rules of Evidence. At no point did he argue to the trial court that Vasquez's testimony or the destruction of Appellant's medical records violated his right to due process. Appellant should have given the trial court the opportunity to rule on a specific constitutional objection. But he did not. As a result, Appellant has not preserved any point of error related to the accidental destruction of Vasquez's records. For this alone, his third issue is overruled.

However, even if Appellant had properly preserved the issue, we find there was no

violation of due process. The Due Process Clause of the Fourteenth Amendment guarantees a defendant in a criminal prosecution a trial comporting with fundamental fairness. *See California v. Trombetta*, 467 U.S. 479, 485 (1984). In cases addressing the prosecution's failure to preserve evidence in a criminal trial, the United States Supreme Court has distinguished between "material exculpatory evidence" and "potentially useful evidence." *Ex Parte Napper*, 322 S.W.3d 202, 229 (Tex.Crim.App. 2010)(citing *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)); *see also Gelinas v. State*, No. 08-09-00246-CR, 2015 WL 4760180, at *8 (Tex.App.—El Paso Aug. 12, 2015, no pet.) (not designated for publication). When the State fails to preserve or disclose material-exculpatory evidence, it violates the defendant's due process rights regardless of whether the State acted in bad faith. *Ex Parte Napper,* 322 S.W.3d at 229; *see also Illinois v. Fisher*, 540 U.S. 544, 547 (2004). This standard of constitutional materiality is only met where the missing evidence possesses an exculpatory value that was apparent before the evidence is destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Gelinas*, 2015 WL 4760180, at *8 (citing *Trombetta,* 467 U.S. at 489). It is not enough to show that the missing or destroyed evidence *might* have been favorable for the defendant; its exculpatory value must be apparent to be considered exculpatory. *Id.*, (citing *Lee v. State*, 893 S.W.2d 80, 87 (Tex.App.—El Paso 1994, no pet.)). But when the State fails to preserve evidence that is mere "potentially useful," the defendant has the burden of showing the State acted in bad faith. *Ex Parte Napper*, 322 S.W.3d at 229, (citing *Youngblood*, 488 U.S. at 58).

In the instant case, Appellant claims the State violated his right to due process because Vasquez's records of his treatment of Appellant were destroyed before trial. He claims he was deprived of "[a]ny evidence, which could have been in the records to impeach, mitigate or

exculpate" him of wrongdoing. There is nothing in the appellate record, however, showing that Appellant's medical records were material-exculpatory evidence. Appellant simply asserts there "could have been" relevant evidence in Vasquez's records. As a result, at best, the destroyed records *might* have contained evidence valuable to Appellant's defense. But it is just as likely they contained incriminating evidence. Appellant seems to agree; he refers to the destroyed records as having "*potentially* exculpatory evidence." This type of "mere speculation" regarding the materiality of destroyed evidence is insufficient. *State v. Colasso,* No. 08-19-00043-CR, 2020 WL 1872334, at *3 (Tex.App.—El Paso April 15, 2020, no pet.)(not designated for publication)(citing *Ex Parte Napper*, 322 S.W.3d at 231). Consequently, the destroyed records fall into the category of potentially useful evidence.

Because his destroyed medical records were only potentially useful, Appellant bears the burden of proving the State acted in bad faith by not preserving them. *Ex Parte Napper*, 322 S.W.3d at 229. He has not carried that burden. The Court of Criminal Appeals has made it clear that "bad faith" entails more than mere negligence from the State or law enforcement officials where evidence is either lost or destroyed. *See Ex Parte Napper*, 322 S.W.3d at 238. Instead, bad faith requires showing "some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful."*Id.* Appellant did not present any evidence or otherwise argue at the trial court the State acted in bad faith by not preserving the records. On the contrary, the appellate record demonstrates the documents were accidentally destroyed not by the State but by Vasquez's office. This is insufficient to show either personal animus toward Appellant or a desire by the State to prevent him from obtaining useful records. As a result, even if Appellant had preserved his due process

argument for appeal, we would find no violation of his right to due process. Consequently, his third issue is overruled.

Sufficiency of the Evidence

The jury convicted Appellant of continuous sexual abuse of a child. In his fourth issue, Appellant argues the State did not present sufficient evidence at trial to prove his guilt beyond a reasonable doubt. We find that based on the evidence presented at trial, a rational trier of fact could have found Appellant guilty.

1. Standard of Review

As a threshold matter, Appellant asserts the Court should use both a factual-sufficiency and legal-sufficiency standard of review. We disagree. In *Cary v. State*, 507 S.W.3d 761, 765-66 (Tex.Crim.App. 2016), the Court of Criminal Appeals held that "when determining whether the evidence is sufficient to support a criminal conviction, the *only* standard an appellate court should apply is the *Jackson v. Virginia* test for legal sufficiency." So we will review this case using the legal-sufficiency standard of review.

In a legal-sufficiency challenge, viewing all evidence in the light most favorable to the jury's verdict, we determine whether any rational jury could have found the essential elements of the charged offense beyond a reasonable doubt. *Queeman v. State*, 520 S.W.3d 616, 622 (Tex.Crim.App. 2017)(citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Evidence may be legally insufficient when the record "contains either no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes a reasonable doubt." *Id.* We may not re-weigh the evidence or substitute our judgment for the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007). Further, we presume the jury resolved any conflicting

inferences from the evidence in favor of the verdict, and we do not substitute our judgment for that of the jury because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to their testimony. *Merritt v. State*, 368 S.W.3d 516, 525-26 (Tex.Crim.App. 2012).

3. Analysis

To convict Appellant of continuous sexual abuse of a child, the State was required to prove that: (1) Appellant was seventeen years' of age or older; (2) S.G. was younger than fourteen years' of age; and (3) during a period of thirty or more days, Appellant committed at least two acts of "sexual abuse"—here, aggravated sexual assault of a child or indecency with a child as pled in the indictment—against S.G. *See* TEX.PENAL CODE ANN. § 21.02; *Gutierrez v. State*, 585 S.W.3d 599, 607 (Tex.App.—Houston [14th Dist.] 2019, no pet.). The State could meet its burden of proving aggravated sexual assault of a child by proving, among other possible bases, that Appellant caused the penetration of S.G.'s anus by any means. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i). It could prove indecency with a child by showing that Appellant engaged "in sexual contact" with S.G. "in a manner other than by touching . . . ." TEX.PENAL CODE ANN. §§ 21.11(a)(1), 21.02(c)(2).

S.G. testified at trial that Appellant continuously sexually abused him from when he was ten years old until he was thirteen. He testified that Appellant masturbated and performed oral sex on him "[a]lmost every other day" for approximately three years. S.G. also told the jury that Appellant used his penis to penetrate S.G.'s anus at least ten times over two years. The State also presented evidence Appellant was seventeen years' old when he started abusing S.G. While Appellant attempted to discredit S.G.'s testimony at trial, it was solely the jury's duty to judge his credibility and resolve any conflicts in the evidence. *Merritt,* 368 S.W.3d at 525-26.

S.G.'s testimony, standing alone, is sufficient to support Appellant's conviction. *Gutierrez*, 585 S.W.3d at 607. However, S.G.'s testimony is also corroborated by testimony indicating Appellant admitted to sexually abusing S.G. Vasquez testified Appellant admitted touching, kissing, and fondling S.G. And S.G.'s parents both testified Appellant admitted to sexually assaulting S.G. As a result, viewing the evidence in the light most favorable to the jury's verdict, we find that a rational jury could have found Appellant guilty of continuous sexual abuse of a child. Appellant's fourth issue is overruled.

CONCLUSION

For these reasons, we overrule Appellant's issues and affirm his conviction.

May 16, 2022

YVONNE T. RODRIGUEZ, Chief Justice

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

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