AFFIRM; and Opinion Filed May 19, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00609-CR

JOHN PAUL RANGEL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 7
Dallas County, Texas
Trial Court Cause No. F-1333702-Y

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Schenck
Opinion by Justice Schenck

A jury convicted John Paul Rangel of aggravated sexual assault of his daughter and sentenced him to six-and-one-half year's confinement. On appeal, in five issues, appellant argues the trial court erred (1) by allowing the forensic interviewer to opine about the truthfulness of the complainant, (2) by allowing the forensic interviewer to testify the information provided during the interview was consistent with the outcry, (3) by allowing the examining physician to read the outcry statement to the jury, (4) by informing the jury about good conduct time, and (5) by failing to suppress appellant's confession. We affirm appellant's conviction. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

As appellant does not challenge the sufficiency of the evidence to support his conviction,

we will only briefly recount the evidence where necessary to address appellant's issues and to provide background for this case.

The complainant, identified as M.R., was twelve years old at the time of trial. M.R. first met and began visiting appellant, her biological father, when she was eight years old. M.R. claimed that appellant sexually abused her when she was ten years old during a weekend visit. The abuse involved appellant touching and penetrating M.R.'s vagina with his finger. M.R. told her grandmother and mother about the incident a week after it occurred. Appellant was arrested and charged with aggravated sexual assault of a child.

At trial, the State's witnesses were M.R., M.R.'s grandmother, a forensic interviewer, a therapist, a physician, Detective Stephen Lee, the investigating officer, and appellant's mother. The defense witnesses were a forensic psychologist and M.R.'s mother. The jury found appellant guilty of aggravated sexual assault of a child and sentenced him to six-and-a-half year's confinement. This appeal followed.

DISCUSSION

A. Admissibility of Evidence

Appellant's first, second, and third issues concern the admissibility of evidence. His first and second issues concern a trauma counselor's testimony about her forensic interview of M.R. His third issue concerns an examining physician's testimony concerning the history that was provided to her about M.R and the assault. Appellant argues the trial court abused its discretion in allowing trauma counselor Patricia Guardiola ("Guardiola") to testify that she did not detect any "red flags" that would indicate M.R. had been coached or manipulated in making her statement about the abuse, and in allowing Guardiola to testify that the information she gained from the interview was consistent with M.R.'s outcry report. Appellant claims these statements were comments on the truthfulness of M.R. and thus were inadmissible. As to the examining

physician Dr. Kristin Reeder's ("Dr. Reeder") testimony, appellant argues the trial court abused its discretion in overruling his objection to her reading the outcry statement to the jury because the statement was hearsay.

1. Standard of Review

A trial court's ruling on evidentiary matters is reviewed under an abuse of discretion standard. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). We will uphold the ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005). If the trial court's ruling was "within the zone of reasonable disagreement," we must uphold the ruling. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

2. Testimony of Guardiola

At trial, Guardiola described her training, what a forensic interview is, and the technique she uses to conduct forensic interviews. She testified that she generally obtains a copy of the offense report or is informed by law enforcement as to the allegations prior to the interview. On direct examination, the following exchange occurred:

> Q. Have you ever interviewed a child that you feel like was coached to lie or to not tell the truth?
>
> A. Yes.
>
> Q. How can you tell? What are you looking for?
>
> A. In a forensic interview, we're certainly looking for some key statements or key details that the child will be able to provide. We're looking for sensory details.
>
> Those are things that the child can tell us that he or she smelled, touched, felt, tasted, those types of things. Those tell us that that child was actually able to experience those things for him or herself instead of watching it or someone telling them about it because they have those sensory details.
>
> If a child continues to tell just the same story almost verbatim as the interview is progressing, that does raise a red flag that they may be coached or that they have

been told what to say, or maybe they're making something up because they're not able to provide supporting details or surrounding details of the event.

Further into direct examination, the following exchange occurred:

Q. And was she able to provide sensory details, those things you said that you were looking for?

A. Yes, she was.

Q. Was she able to give details about what had occurred before or after the abuse?

A. Yes.

Q. You said that there are certain red flags that you look for. Did you see any of those red flags in your interview with [M.R.]?

A. No.

[Defense counsel]: Objection, Your Honor. That calls for an opinion on the truthfulness of the child.

THE COURT: Overruled.

A. No, I did not.

At the end of direct examination, the following exchange occurred:

A. And was her outcry consistent with the information that you had gained?

[Defense Counsel]: Objection, Your Honor. That calls for hearsay and it also violates the opinion that the child is telling the truth.

THE COURT: Overruled.

Q. Was her statement consistent with information that you had going into the interview?

A. Yes.

3. Admissibility of Guardiola's Testimony

Appellant argues that Guardiola's testimony that M.R.'s interview did not raise "red flags" implied that M.R. was telling the truth and was therefore, a "clear invasion of the province of the jury." We disagree. While, an expert's testimony that a child witness is truthful is

inadmissible under Texas Rule of Evidence 702, an expert's opinion on signs of coaching or manipulation may assist the trier of fact and may therefore be admissible. *Schutz v. State*, 957 S.W.2d 52, 73 (Tex. Crim. App. 1997) (expert's testimony that the complainant did not exhibit the traits of manipulation did not constitute a direct comment upon the truth of the complainant's allegations); *Vasquez v. State*, No. 05–11–01096–CR; 2012 WL 3125171, at *4 (Tex. App.—Dallas Aug. 2, 2012, pet. ref'd) (mem. op., not designated for publication) (concluding that the trial court did not abuse its discretion when it overruled appellant's objection and allowed the forensic interviewer [Guardiola] to answer the question about whether she observed any "red flags" in this case); *Charley v. State*, No. 05–08–01691–CR, 2011 WL 386858, at *5 (Tex. App.—Dallas Feb. 8, 2011, no pet.) (mem. op., not designated for publication) (holding that the expert was not asked and did not testify that the child was telling the truth; testimony was that the child was able to provide sensory details which was important because she would not have been able to do so had she been coached). As a result, we conclude that the trial court did not abuse its discretion when it overruled appellant's objection and allowed Guardiola to answer the question about whether she observed any "red flags" in this case. We overrule appellant's first issue.

Next, appellant argues that Guardiola's testimony regarding the consistency of M.R.'s interview and outcry report implied that M.R.'s outcry was truthful. Guardiola was not asked and did not express an opinion that M.R. was abused or truthful in her allegations. *Wagner v. State*, Nos. 14–07–00906–CR, 13–07–00907–CR, 2009 WL 838187, at *10 (Tex. App.—Houston [14th Dist.] Mar. 31, 2009, pet. ref'd) (mem. op., not designated for publication) (holding that the therapist indicated only that the children consistently offered the same facts of the alleged abuse, but did not attempt to suggest that the children were truthful or that the children's allegations were true; and therefore, not a comment on the children's truthfulness). As

a result, the trial court did not abuse its discretion in overruling appellant's objection to Guardiola's testimony concerning the consistency of M.R.'s statements. Accordingly, we overrule appellant's second issue.

4. Dr. Reeder's Testimony

Dr. Reeder, an attending physician at the REACH Clinic at Children's Medical Center in Dallas, Texas, examined M.R. for sexual assault. Prior to the exam, Dr. Reeder obtained a history from M.R.'s mother. At trial, Dr. Reeder explained that the purpose of taking a history from the family is to have an understanding of the type of contact that has been disclosed and to determine the type of medical exam that may be needed. Further, Dr. Reeder explained that while the history is being taken from the family, the child and a child life specialist are in the exam room preparing the child for her exam, helping her understand what type of exam will be done and to make the child feel comfortable in the clinic. Dr. Reeder elaborated that the main reasons they do an exam is to reassure the child and the family that the child is healthy, that the child's body is normal and to evaluate for any medical conditions that may arise from being sexually abused.

At trial, the following exchange occurred during direct examination:

Q. And did you take a history with regards to [M.R.]?

A. I did, yes.

Q. And who did you receive a history from?

A. Her mother.

Q. And what history did you receive from her mother?

[Defense counsel]: Objection, Your Honor. That calls for hearsay.

[Prosecutor]: Statements made for medical treatment diagnosis, Your Honor.

[Defense counsel]: Doesn't fit the exceptions.

THE COURT: Overruled.

[Defense counsel]: Your Honor, we object to the identity of the perpetrator being stated. That does not fit the exception and it doesn't fit the case law. Unless the identity of the perpetrator shown by the proponent of the evidence is relevant to the diagnosis and treatment, the identity of the perpetrator given in the history can't be expressed by the witness.

THE COURT: Overruled.

Dr. Reeder then recounted M.R.'s outcry statement as relayed to her by M.R.'s mother.[1]

5. Admissibility of Dr. Reeder's Testimony

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay is not admissible except as provided by statute or the rules of evidence or by other rules prescribed pursuant to statutory authority. *Id*. 802. Once an opponent of hearsay evidence makes a proper objection, it becomes the burden of the proponent of the evidence to establish that an exception applies that would make the evidence admissible in spite of its hearsay character. *Taylor v. State*, 268 S.W.3d 571, 578–79 (Tex. Crim. App. 2008). In this case, the State asserted the medical treatment diagnosis exception applies. That exception is contained in rule 803(4) of the Texas Rules of Evidence and provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
> **(4) Statements for Purposes of Medical Diagnosis or Treatment.**
> Statements 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 eternal source thereof insofar as reasonably pertinent to diagnosis or treatment.

[1] More particularly, Dr. Reeder testified "The history that was provided to me per the mother was that [M.R.] had gone to her dad's for the weekend. The next week she -- this had happened a few months prior -- had gone to her dad's for the weekend. The next week she was riding in the car with her grandmother when she told her that John had touched her in a way that he wasn't supposed to. She said that she had a nightmare and went to her father's room. He told her to get in bed with him. He put his leg over her and started rubbing her leg. Then rubbed her in her genital area over her clothes, then under her clothes, and put his finger in her. He told her that's what Daddies do. It only happened once. Maternal grandmother texted Mother at work to tell her what had happened and when she returned home, Mother had Melanie tell her what happened."

TEX. R. EVID. 803(4). The plain language of rule 803(4) does not limit its application to patient-declarant statements. *Sandoval v. State*, 52 S.W.3d 851, 856 (Tex. App.—Houston [1st Dist.] 2001, pet ref'd). The declarant must simply have an interest in the proper diagnosis or treatment of the patient. *Luster v. State*, Nos. 05–13–01342–CR, 05–13–01343–CR, 2014 WL 6736921, at *4 (Tex. App.—Dallas Dec. 1, 2014, no pet.) (mem. op., not designated for publication). Statements made by the parent of an injured child for purposes of diagnosing or treating the child qualify as an exception under rule 803(4). *Sandoval*, 52 S.W.3d at 856–57. In this case, the declarant was M.R.'s mother. As M.R.'s parent, her statements to the examining doctor are admissible under Rule 803(4) if they are pertinent to treatment. *Taylor*, 268 S.W.3d at 590–91. That is to say, that it was reasonable for the medical provider to rely on the particular information contained in the statement in treating the patient. *Id.* at 591. This includes showing that a statement from a child-declarant revealing the identity of the perpetrator of sexual abuse is pertinent. *Id*. This information might be pertinent because it is important for a physician to discover the extent of the child's emotional and psychological injuries, particularly when the perpetrator might be a family or household member as it may be important to remove the child from the abusive environment. *Id*. Because the identity of the perpetrator and how and where the inappropriate touching occurred impacts the scope of the physical exam and whether emotional counseling is necessary, the history Dr. Reeder obtained from M.R.'s mother was pertinent to the treatment of M.R., the trial court did not abuse its discretion in overruling appellant's objection to Dr. Reeder's testimony concerning same. We overrule appellant's third issue.

B. Jury Instruction on Good Conduct Time

In his fourth issue, appellant argues the trial court erred by informing the jury about good conduct time because he is not eligible to earn good conduct time. We have previously

considered this exact issue and have decided it against appellant. *See Gallegos v. State*, 76 S.W.3d 224, 228–29 (Tex. App.—Dallas 2002, pet. ref'd). We overrule appellant's fourth issue.

C. Confession

Prior to trial, appellant moved to suppress statements he made during interviews with Detective Lee and independent polygraph examiner Andy Sheppard ("Sheppard"), claiming they were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court denied the motion. In his fifth issue, appellant challenges the trial court's ruling.

1. Standard of Review

A trial court's ruling on a motion to suppress is reviewed for an abuse of discretion under a bifurcated standard. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). As the reviewing court, we defer to the trial court's determination of facts but review its application of the law de novo. *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000). When, as here, the trial court does not make findings of fact, appellate courts view the evidence in the light most favorable to the trial court's ruling. *Id.* The trial court's ruling should be sustained if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Valtierra v. State*, 310 S.W.3d 442, 447–48 (Tex. Crim. App. 2010). A trial judge's ultimate custody determination presents a mixed question of law and fact. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). Therefore, we afford almost total deference to the trial judge's custody determination when the questions of historical fact turn on credibility and demeanor. *Id.* at 527. With these standards in mind, we shall review the implied facts supported by the record and the law as it applies to custodial interrogations.

2. The *Miranda* warning and Custodial Interrogations

The constitutionally required *Miranda* warnings and the warnings mandated by article 38.22 of the code of criminal procedure are intended to safeguard a person's privilege against

self-incrimination during custodial interrogation. *Gardner v. State*, 306 S.W.3d 274, 293 (Tex. Crim. App. 2009). The defendant bears the initial burden of proving that a statement was the product of custodial interrogation. *Herrera*, 241 S.W.3d at 525. A person is in "custody" only if, under the circumstances, a reasonable person would believe his freedom of movement was restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The "reasonable person" standard presupposes an innocent person. *Dowthitt*, 931 S.W.2d at 254. The subjective intent of an officer to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect. *Stansbury*, 511 U.S. at 322.

The determination of custody must be made on an ad-hoc basis, after considering all of the objective circumstances. *Dowthitt*, 931 S.W.2d at 255. The fact that questioning takes place in a police station does not, in and of itself, constitute custodial questioning. *Id*. However, the mere fact that an interrogation begins as noncustodial does not prevent custody from arising later, as police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation. *Id.*

Four general situations may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the suspect that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and (4) when there is obvious probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. *Id*.

The first three situations require that the restriction on a suspect's freedom of movement must reach the degree associated with an arrest instead of an investigative detention. *Id*. The fourth situation only applies when information substantiating probable cause is communicated by

a law enforcement officer to the suspect or by the suspect to the officer; even then, custody is established only "if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *Id; Gardner*, 306 S.W.3d at 295 n.48.

3. Hearing on the Motion to Suppress

At the hearing on appellant's motion to suppress, the State called Detective Lee and Sheppard to testify. Their testimony established the following. Detective Lee conducted his initial interview of appellant on January 25, 2013. Appellant voluntarily appeared at the police station after Detective Lee called him and asked him to come in and talk to him. During that interview, Detective Lee told appellant that he was not under arrest and was free to leave at any time. Appellant was not handcuffed or restrained in any way. Appellant did not make any admissions or confession during that interview. Appellant was not taken into custody and he left on his own. That interview lasted approximately one hour and thirty minutes.

In March, Detective Lee contacted appellant again to see if he would submit to a polygraph examination. He agreed to do so. Before commencing the polygraph examination, Sheppard informed appellant that he was not under arrest and that the polygraph examination was voluntary. Appellant was not handcuffed or restrained in any way while he was questioned by Sheppard. During the post-test interview, appellant admitted to Sheppard that he had abused M.R. The polygraph test and interview with Sheppard lasted roughly one hour and thirty minutes. Detective Lee then interviewed appellant. Detective Lee told appellant that he was not under arrest and that he was free to leave at any time. Appellant acknowledged that he understood. Appellant was not handcuffed or restrained in any way. During the further interview with Detective Lee, appellant made additional admissions of abuse. Appellant was still not taken into custody. Rather, upon conclusion of the interview, appellant left the police

station with his mother. That interview lasted a little over thirty minutes. Video recording of the interviews were introduced into evidence at the hearing.

4. Application of the Law to the Facts

The record shows that appellant was not restricted in his personal freedom during his interviews with Detective Lee and Sheppard. Therefore, the record supports implicit findings by the trial court that (1) appellant was not physically deprived of his freedom in any way, (2) Detective Lee and Sheppard did not tell appellant he could not leave, and (3) Detective Lee and Sheppard did not create a situation in which appellant would believe his freedom of movement was significantly restricted. Thus, we are left with considering the fourth general situation of custody, whether there was probable cause to arrest appellee. *See Dowthitt*, 931 S.W.2d at 254.

Appellant asserts that the manifestation of probable cause via a "crucial admission," *standing alone*, turned the noncustodial encounter into a custodial one.[2] We disagree. Manifestation of probable cause does not automatically establish custody. *State v. Malena*, No. 05–11–01551–CR, 2013 WL 2467251, at *4 (Tex. App.—Dallas June 6, 2013, pet. ref'd)(mem. op., not designated for publication). Rather, custody attaches if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Dowthitt*, 931 S.W.2d at 255.

Situations where the manifestation of probable cause triggers custody are unusual. *State v. Stevenson*, 958 S.W.2d 824, 829 n.7 (Tex. Crim. App. 1997) (en banc). Courts often compare the facts in *Dowthitt* when determining if probable cause triggers custody. *See, e.g.*, *Malena*, 2013 WL 2467251, at *4; *Hodson v. State*, 350 S.W.3d 169, 174 (Tex. App.—San Antonio 2011,

[2] Appellant relies upon the court of criminal appeals decision in *Ruth v. State* for the proposition that when a suspect admitted to shooting the victim, explained his motive, and reenacted the offense, the interrogation became custodial because a law enforcement officer had probable cause to arrest him. 645 S.W.2d 432, 435 (Tex. Crim. App. 1979). But the court of criminal appeals explained in *Dowthitt* that "situation four does not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *Dowthitt*, 931 S.W.2d at 255.

pet. ref'd); *Garcia v. State*, 237 S.W.3d 833, 837 (Tex. App.—Amarillo 2007, no pet.); *Xu v. State*, 100 S.W.3d 408, 413–14 (Tex. App.—San Antonio 2002, pet. ref'd). In *Dowthitt*, the court determined the defendant was in custody after he admitted to being present during a murder because "a reasonable person would have realized the incriminating nature of the admission." *Dowthitt*, 931 S.W.2d at 257. But in addition to the incriminating statement, the court noted the interrogation lasted approximately twelve hours before he made the incriminating statement, and officers exercised control over him by accompanying him on restroom breaks and denying repeated requests to see his wife. *Id*.

Here, approximately an hour and twenty minutes into the questioning by Sheppard and during the second interview with Detective Lee, which lasted a little over thirty minutes, appellant admitted to touching his daughter. While this admission implicated appellant in the commission of a crime, "unless the circumstances are unique, as in *Dowthitt*, 'this alone does not trigger custody.'" *Malena*, 2013 WL 2467251, at *4; (citing *Hodson*, 350 S.W.3d at 174). The undisputed facts show appellant voluntarily went to the station for questioning, he was not handcuffed at any time, Detective Lee and Sheppard told appellant he was not under arrest and he was free to leave at any time, the length of the interview was not unreasonable, and nothing in the record indicates Detective Lee or Sheppard used any force or tactics to restrain his freedom. Under these circumstances a reasonable person would not have believed he was under restraint to the degree associated with an arrest. *See Oregon v. Mathiason*, 429 U.S. 492 (1977) (concluding an interview was noncustodial when the suspect came to police voluntarily, was told he was not under arrest, gave an incriminating confession before receiving *Miranda* warning, and was allowed to leave freely after being told the case would be referred to the district attorney); *Ervin v. State*, 333 S.W.3d 187, 211 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (concluding the record showed a noncustodial interview when the suspect voluntarily went to station, was told

she could leave, remained un-handcuffed, was at station for four hours, and went home after making incriminating statements). The record supports an implied finding by the trial court that appellant was not in custody when he admitting to touching M.R. Therefore, the trial court did not err in denying appellant's motion to suppress. Accordingly, we overrule appellant's fifth issue.

CONCLUSION

We affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN PAUL RANGEL, Appellant	On Appeal from the Criminal District Court No. 7, Dallas County, Texas
No. 05-15-00609-CR V.	Trial Court Cause No. F-1333702-Y. Opinion delivered by Justice Schenck.
THE STATE OF TEXAS, Appellee	Justices Francis and Fillmore participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 19th day of May, 2016.