Affirmed and Opinion Filed November 13, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00918-CR

No. 05-16-00919-CR

DAVID NORMAN HAZLITT, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause Nos. F-1600438-I, F-1600439-I

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

A jury convicted appellant of two charges of aggravated sexual assault of a child under fourteen and the trial court assessed punishment at fifty years imprisonment. Appellant now argues that: (i) the evidence is insufficient to support his convictions; (ii) the trial court granted him hybrid representation but would not allow him to consult with counsel during jury selection; depriving him of the right to consult counsel, due process, and equal protection of the law; (iii) he was denied due process of law because the State engaged in ex parte communication; (iv) the trial court erred by allowing him to represent himself; (v) one of the convictions is barred by double jeopardy and he was denied due process because both charges were tried together; and (vi) the trial court erred by denying his request for a mistrial. We affirm the trial court's judgment.

I. BACKGROUND

VC and JC lived at their uncle Lanny's house with their mother and appellant (their other uncle). Appellant sexually assaulted VC when she was nine years old. She outcried to her mother the next morning.

Appellant was charged in two indictments with: (i) knowingly and intentionally causing the penetration of VC's anus with his finger and (ii) knowingly causing VC's anus to have contact with his sexual organ.

Appellant was unhappy with his two court-appointed lawyers and, just before trial, told the court that he wanted to represent himself. The court admonished appellant about self-representation and confirmed that was his wish. The judge told appellant that he was not entitled to represent himself with counsel's "side" assistance, but that his lawyers would remain in the courtroom in case appellant changed his mind. Appellant also signed a written waiver of counsel.

Appellant represented himself during voir dire, but changed his mind and requested reinstatement of trial counsel before opening statement. When the case concluded, the jury found appellant guilty of both charges, and after finding two enhancement paragraphs true, the trial court assessed punishment at fifty years imprisonment. Appellant moved for a new trial, and later amended that motion.

The court held a hearing on the amended motion. During that hearing, appellants' trial counsel testified that appellant had exercised a peremptory challenge on a juror struck for cause and struck two of the venire who were outside the strike zone.

Appellant also testified that he has sleep disorder, major depression, seizures, and hallucinations, and was taking various medications, was overwhelmed by representing himself, and wanted to consult with counsel during voir dire.

The trial court denied the motion, and this appeal followed.

II. ANALYSIS

A. Issues Seven and Eight: Is the evidence sufficient to convict appellant?

1. Applicable Standards

We review the sufficiency of the evidence to support a conviction by viewing all of the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

This standard gives full play to the fact finder's responsibility to resolve testimonial conflicts, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id*. at 319; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). And the fact finder is the sole judge of the evidence's weight and credibility. *See* TEX. CODE CRIM. PROC. art. 38.04; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder's. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in the verdict's favor and defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

As applicable here, a person commits aggravated sexual assault if he intentionally or knowingly (i) causes the penetration of the anus of a child younger than fourteen years of age by

any means or (ii) causes the anus of a child younger than fourteen years to contact the person's sexual organ. *See* TEX. PENAL CODE § 22.021(a)(1)(B), (a)(2)(B).

The testimony of a child victim alone is sufficient to support a conviction for aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC. art. 38.07; *Lee v. State*, 186 S.W.3d 649, 655 (Tex. App.—Dallas 2006, pet ref'd).

2. The Evidence

VC testified that she and her sister JC were home alone with appellant the night the assault happened. Appellant insisted that VC drink "Kool-Aid," but she only had one sip because it was thick and tasted like "bubble gum medicine."

Appellant checked on the girls twice after they went to bed, asking if they were still awake. VC pretended to be asleep because she "didn't want him to get on [her]."

On a third trip upstairs, appellant got into the bed behind VC. He pulled down her jean shorts and underwear and touched the "hole on [her] bottom" with what she believed to be his finger. The touching felt weird and hurt. Then, appellant pulled down his pants and touched the "hole on [her] bottom" with his penis. VC said that appellant was "like, moving the bed." The assault lasted three minutes and hurt.

VC tried to wake her sister, but JC is a heavy sleeper. VC tried shaking, punching, and finally pushing her off the bed to wake her. JC finally woke up, and the assault stopped.

While remaining on the mattress appellant then moved in front of the girls and told them to turn around while he pulled up his pants. He said they could stay up longer, watch television, and play with their cousins' puppies if they promised not to tell their mother.

The next morning, VC discovered blood when she went to the bathroom. She called JC and showed her the toilet paper with blood on it.

Later that morning, the girls' mother arrived home, and they accompanied her to get the oil changed in her car. VC told her mother that she needed to go to the bathroom but that it hurt "to go pee." VC's mother asked her if someone had touched her and named off names. VC shook her head "yes" when she named appellant, and "no" to the other names. VC then told her mother about the blood on the toilet paper.

VC's testimony was also corroborated by other witnesses. For example, JC testified that VC pushed her off the bed to wake her because she is a deep sleeper. When she awoke, she saw appellant in bed with them and saw his boxers. He told them to turn around while he pulled his pants up, and made them promise not to tell. Her sister called her to the bathroom the next morning when she discovered blood on the toilet paper.

Additionally, VC's mother said that appellant had appeared "clingy" when she returned home that morning, as though he did not want her to be alone with the girls. VC and JC then accompanied her to get the oil changed in her car. VC's mother confirmed VC's outcry statements with VC.

VC's mother called the police after the outcry, filed a report, and the police escorted them to the hospital so VC could be examined.

A nurse practitioner conducted a REACH exam, and Dr. Mathew Cox reviewed and testified about VC's records from the exam.

Dr. Cox said that VC had tearing or splitting of the skin around her perineum extending down towards her anus. The injury was caused by direct trauma to the area, and the tearing indicated that an object went into or penetrated the gluteal crease. This type of injury would cause pain and be consistent with a child claiming to have been touched or penetrated by a penis to her anus. Dr. Cox also said that, given the extent of the injuries and the location, the injury would have been less likely to have resulted by contact with a finger.

Patricia Guardiola, a forensic interviewer with the Dallas Children's Advocacy Center, testified that she interviewed VC and JC. Although VC was soft spoken, she was able to articulate what she had experienced.

Detective David Mayne, the lead detective on the case, testified that a tissue with something that looked like blood and semen was turned over to the police, but no DNA results were obtained. Detective Mayne also interviewed the other uncle living at the house and that uncle's son, as well as VC's mother, but appellant refused to speak with him.

Reviewing the cumulative force of this evidence in the light most favorable to the verdict, we conclude that there is sufficient evidence for a rational jury to have found appellant guilty of both offenses beyond a reasonable doubt. We thus resolve appellant's seventh and eight issues against him.

B. Issues One, Two, and Three: Did the trial court deny appellant's right to counsel?

In his first three issues, appellant argues that the trial court granted him hybrid representation but would not allow him to consult with counsel during jury selection, depriving him of the right to consult counsel, due process, and equal protection of the law. The record reflects, however, that the trial court expressly denied hybrid representation and that appellant did not request help with jury selection.

A request for standby counsel is viewed as a request for hybrid representation. *See Landers v. State*, 550 S.W.2d 272, 279–80 (Tex. Crim. App. 1977). Although a trial court has discretion to permit hybrid representation, a defendant has no absolute right to it. *Hathorn v. State*, 848 S.W.2d 101, 123 n.12 (Tex. Crim. App. 1993); *Scarbrough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App. 1989).

The court of criminal appeals has held that the trial court should, if it has so decided, make it plain to the accused during self-representation admonishments that he has no right to standby counsel. *Scarbrough*, 777 S.W.2d at 93.

Furthermore, where an accused, though asserting a desire for "self" representation, indicates he would prefer what actually amounts to hybrid representation, the trial court should decide at the earliest practicable moment whether to allow it and, if not, should tell the accused that he must instead choose between two mutually exclusive rights—the right to self-representation or to representation by counsel—and that there is no "middle ground." *Id.* If hybrid representation is not a permitted option, the accused must be made aware of that circumstance and given the opportunity to reassert his right to self-representation. *Id.*

Here, before trial began, the judge asked appellant to confirm that he wanted to represent himself. When appellant replied that he did, the judge confirmed that appellant understood the range of punishment. Then, the judge told appellant:

> You're not entitled to what they call hybrid representation. So if you're gonna represent yourself, you're gonna have to do all the questioning of witnesses and make all the objections. And they have a lot of technical rules here in -- in the court, technical rules of evidence of procedure, that you're going to be required to follow. You may not know how to get certain evidence admitted or excluded, but an experienced attorney who's familiar with the rules of evidence and procedure could get that evidence in.
>
> However, the Courts aren't gonna help you try to represent yourself. You're doing -- you're on your own. And you may waive possible important points of error. And [your counsel] have been doing this many, many years, these type of cases. They know what they're doing.

Appellant replied that he was very capable of representing himself.

The judge further admonished appellant that there were many difficulties in selecting a jury and he would be required to follow the rules during voir dire. Appellant confirmed that he understood.

The judge continued:

> There may be issues that may come up in preparation of the jury charge. If you had an attorney, they may be able to ask, you know, for instructions that might be more favorable to you than you would know to ask for. But you want to give that up?

Appellant replied, "the defendant believes that he is capable of representing hisself [sic], Your Honor."

The judge also told appellant that his failure to object to certain charge errors might be waived or found harmless on appeal, and said, "you understand this is a real risky course you're doing?" Appellant replied that he understood.

The judge said he would have trial counsel remain in the courtroom and they could resume representing appellant if he changed his mind. When appellant seemed to suggest that he could rely on such counsel for "side assistance," the judge said:

> Wrong . . . You represent yourself. There's no hybrid representation . . . If you want to represent yourself, you can; if you want them to represent you, they can. But you can't do both. There's no hybrid representation.

The judge then offered appellant the opportunity to consult with counsel again before waiving his right to counsel, and appellant declined, responding, "No, your honor. I'll proceed." After the judge explained the written waiver of counsel forms, appellant signed them.

Appellant's issues concerning hybrid representation collectively rest on the premise that his "right to counsel was denied when the trial court granted him his right of self-representation with stand-by counsel, but then instructed stand-by counsel not to consult with appellant during the voir dire process in which he had no knowledge of the strike zone and struck three jurors outside of this zone."

Appellant bases this premise on how the judge introduced appellant's counsel to the jury. Both counsel were sitting in the jury box, and the judge introduced them to the venire as "kind of here on a stand-by basis." In context, however, this description reflects the judge's intent to explain counsels' presence to the venire rather than granting appellant hybrid representation.

Given the court's previous admonishments, there is no question but that the judge intended for counsel to be there only if appellant changed his mind about representing himself.

Furthermore, at the motion for new trial hearing, everyone, including appellant, testified that they understood the judge had denied hybrid representation. Specifically, trial counsel said this meant they were not to assist or consult with appellant, and appellant told them he did not want to speak with them anymore. Nor did appellant ask for counsel's assistance during voir dire. And appellant admitted that he understood the hybrid representation admonishments and knew that meant he would be conducting the trial alone.

Finally, appellant insists that *Faretta v. California*, 422 U.S. 806 (1973) gave him the right to consult standby counsel during jury selection. We disagree. *Faretta* holds that a defendant in a state criminal trial has a constitutional right to proceed pro se when he voluntarily and intelligently elects to do so. *Id.* at 807. It does not hold that a defendant has a right to hybrid representation.

Because everyone, including appellant, understood that the trial court denied hybrid representation, the trial court did not err by disallowing it during voir dire. Moreover, there is no evidence that appellant asked for the lawyers' help during jury selection. We thus resolve appellant's first three issues against him.

C. Issue Four: Did the trial court conduct an ex parte conversation without appellant?

Appellant's fourth issue argues that his right to due process was violated when the State engaged in ex parte communication during voir dire. This argument, however was not preserved for our review. *See* TEX. R. APP. P. 33.1.

To preserve a complaint for appellate review, a defendant must show on the record that the complaint was made to the trial court by a timely request, objection, or motion that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient

specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." *See* TEX. R. APP. P. 33.1. This rule ensures that trial courts are given an opportunity to correct their own mistakes at the most convenient and appropriate time. *Hull v. State*, 67 S.W.3d 215, 217 (Tex. Crim. App. 2002). Due process and due course of law violations are waived when a defendant fails to assert them in the trial court. *See Cockrell v. State*, 933 S.W.2d 73, 88–89 (Tex. Crim. App. 1996).

Appellant complains that the State had a conversation with the judge at the bench about which jurors had been struck for cause and the strike range, and says he was excluded from that conversation. But appellant did not object about this alleged ex parte conversation at the time, or in his amended motion for new trial. Thus, nothing was preserved for our review. *See* TEX. R. APP. P. 33.1.

Moreover, even had the issue been preserved, the record does not reflect that an ex parte conversation occurred. Appellant relies on defense counsel's testimony to support his argument. But counsel did not testify that appellant was excluded from or could not hear the conversation about the strikes; she only said that appellant did not understand the jury selection process. We thus resolve appellant's fourth issue against him.

D. Issue Five: Did the trial court err by allowing appellant to represent himself?

Appellant's fifth issue argues the trial court erred in allowing him to represent himself because the evidence at the motion for new trial hearing showed that he had an intellectual disability that adversely effected his ability to represent himself. We disagree.

The Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help. *Faretta*, 422 U.S. at 814. However, to represent himself, the accused must knowingly and intentionally relinquish the benefits associated with the right to counsel. *Id*. at 835. To this end, the *Faretta* court held:

> Although a defendant need not himself have the skill and competence of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he was doing and his choice is made with eyes open.'

Id., (citing *Adams v. U.S.*, 471 U.S. 269, 279 (1942)). Thus, to be constitutionally effective, the waiver of counsel must be made (i) competently, (ii) knowingly and intelligently, and (iii) voluntarily. *Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997). The decision is "knowing and intelligent" if it is made with a full understanding of the right being abandoned as well as the dangers and disadvantages of self-representation. *Faretta*, 422 U.S. at 835–36. The decision is "voluntary" if it is not coerced. *Godinez v. Moran*, 509 U.S. 389, 401, n.1 (1993).

Here, nothing suggests that appellant's waiver was not voluntary or knowledgeable. The trial court gave appellant strong admonishments with specific examples of when the assistance of counsel would be beneficial—including during jury selection. Appellant continuously affirmed that he understood, but wanted to represent himself and believed himself capable of doing so.

The trial court also asked about appellant's educational background and ability to read and write. Appellant said he could read and write and had completed the ninth grade. Despite the court's numerous cautions about the danger of self-representation, appellant insisted that he wanted to represent himself.

After the court's admonishments,, appellant also signed a written waiver of counsel where he acknowledged that he that he understood his right to counsel and wanted to waive it.

Although appellant testified at the motion for new trial hearing that he has sleep disorder, depression, seizures and hallucinations, and was taking various medications for those disorders, he admitted that he understood the court's admonishments about self-representation. Moreover, the fact that he was "overwhelmed" when he represented himself during voir dire does not diminish the evidence that he voluntarily elected to do so.

The record reflects that appellant's counsel waiver was knowing, intelligent, and not coerced, and therefore the trial court did not err by affording appellant his right to self-representation. We resolve appellant's fifth issue against him.

E. Issue Six: Did the trial court erroneously deny appellant's mistrial motion based on a detective's testimony that appellant declined to be interviewed by the detective?

Appellant's sixth issue argues that the trial court erred in denying his request for a mistrial after his objections to Detective Mayne's testimony about not being able to interview appellant were sustained. This issue, however, was not preserved for our review.

When the State asked Detective Mayne whether he was able to interview appellant, he replied, "The defendant was in custody for another charge . . ." Defense counsel objected without stating the grounds, and the objection was sustained. After an off-the record conference, the court asked defense counsel if she had a specific objection, and she replied, "Yes, Judge. Comments by the officer are not in direct response and are prejudicial more than probative." The trial court sustained the objections, and defense counsel moved for a mistrial. The motion was denied.

Appellant now argues that "the trial court obviously knew" he was objecting to the witness's comment on his right to remain silent, and should have granted a mistrial on that basis after the objection was sustained. However, appellate arguments must comport with the trial objections or requests to preserve the issue for appellate review. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). Because the trial objections concerning the responsiveness and prejudicial effect of the answer do not comport with the appellate argument concerning the right to remain silent, the issue was not preserved for our review. *See id.* We resolve appellant's sixth issue against him.

F. Issues Nine and Ten: Was appellant punished twice in violation of the prohibition against double jeopardy?

Appellant's ninth issue argues that he was convicted and punished twice in violation of his double jeopardy rights. Even had this issue been preserved for our review, there was no double jeopardy violation because appellant was not punished twice for the same offense.

The double-jeopardy prohibition protects against (i) a second prosecution for the same offense after an acquittal, (ii) a second prosecution for the same offense after a conviction, and (iii) multiple punishments for the same offense. U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 14; *Monge v. California*, 524 U.S. 721, 727–28 (1998).

The court of criminal appeals has concluded that separately described conduct in the sections of penal code 22.021 constitute separate statutory offenses. *See Vick. v. State*, 991 S.W.2d 830, 832–33 (Tex. Crim. App. 1999).

Here, appellant was charged with digital penetration of the child's anus in one indictment and sexual contact with the child's anus in the second indictment. These two acts constitute separate and distinct offenses. *See* TEX. PENAL CODE ANN. § 22.012 (i),(iv); *David v. State*, 808 S.W.2d 239, 242–243 (Tex. App.—Dallas 1991, no pet.) (vaginal penetration and oral penetration two distinct acts that could not have occurred simultaneously). The double jeopardy inquiry ends once it is determined that the indictments allege separate and distinct offenses involving separate and distinct acts. *See Vick*, 991 S.W.2d at 833. We thus resolve appellant's ninth issue against him.

Finally, appellant's tenth issue argues that his due process rights were also violated because one of the indictments was jeopardy barred. We have concluded that neither indictment was jeopardy barred because appellant was not punished twice; thus, there was no due process violation, and we resolve appellant's tenth issue against him.

III. CONCLUSION

Having resolved all of appellants' issues against him, we affirm the trial court's judgments.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID NORMAN HAZLITT, Appellant	On Appeal from the Criminal District Court No. 2, Dallas County, Texas
No. 05-16-00918-CR V.	Trial Court Cause No. F-1600438-I.
	Opinion delivered by Justice Whitehill.
THE STATE OF TEXAS, Appellee	Justices Francis and Myers participating.

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

Judgment entered November 13, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID NORMAN HAZLITT, Appellant

No. 05-16-00919-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2, Dallas County, Texas
Trial Court Cause No. F-1600439-I.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

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

Judgment entered November 13, 2017.