Opinion issued October 20, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00622-CR

DANIEL PEREZ MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1202348

MEMORANDUM OPINION

A jury found appellant, Daniel Perez Martinez, guilty of the offense of aggravated sexual assault of a child under six years of age.[1] The jury assessed punishment at 25 years in prison.[2] On appeal, appellant raises two issues, asserting that the trial court erred (1) by admitting hearsay testimony and (2) by admitting evidence of an extraneous sexual offense.

We affirm.

Background

Four-year-old C.M. would often stay with her grandmother, Celia, while her mother, Flora, worked the night shift. On the evening of December 3, 2008, Celia's husband was transported to the hospital, and Celia could not care for C.M. Instead, C.M. stayed with Celia's sister, Rose, and Rose's husband, appellant.

On December 13, 2008, C.M. indicated to her mother, Flora, that appellant, had touched her genital area and kissed her on the mouth when she had stayed at appellant's house. When Flora confronted him, appellant denied the accusation.

On December 15, 2008, C.M. was examined by a sexual assault nurse at Texas Children's Hospital. The examination did not reveal any sign of sexual abuse and neither confirmed nor refuted that C.M. had been sexually assaulted.

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1 *See* TEX. PENAL CODE ANN. § 22.021(a) (Vernon 2011).

2 *See* TEX. PENAL CODE ANN. §§ 12.32(a) (Vernon 2011), 22.021(f)(1).

In April 2009, C.M. began seeing a licensed therapist, Dorothy Ashley. During one therapy session, Ashley showed C.M. pictures of various family members, including appellant. C.M. told Ashley that appellant was a "bad man." When Ashley asked C.M. why appellant was bad, C.M. told Ashley that appellant had touched her between her legs with his hand.

In June 2009, a grand jury indicted appellant for the offense of aggravated sexual assault. The indictment provided that, on December 3, 2008, appellant "unlawfully, intentionally and knowingly" penetrated, with his finger, the sexual organ of C.M., a child less than six years of age.

At trial, the State offered the testimony of Flora, who described C.M.'s outcry and the events that followed. Celia also testified regarding the events surrounding the incident. Flora and Celia both testified that, since the incident, C.M.'s behavior has changed. In addition, Dorothy Ashley, the therapist who counseled C.M., and the nurse, who had examined C.M. at Texas Children's Hospital, testified at trial.

C.M. also testified. She was five at the time of trial. Through the aid of an anatomically correct doll, C.M. testified about the details of the sexual assault. On direct examination, C.M. testified that she was sitting on a bed in appellant's house and was wearing her purple and yellow pajamas. Appellant's wife was in another room feeding the pet bird. C.M. stated that appellant was standing by the bed on

which she sat. C.M. testified that appellant took off her underwear and put his hand on her "butt" and touched her "middle part" with his hand. The prosecutor asked C.M. to indicate on the doll where appellant had touched her, and she complied. The prosecutor then stated for the record that C.M. had identified the "female sexual organ" on the doll. C.M. also testified that when he touched her "middle part," appellant had put his hand inside her body. C.M. indicated on the doll that appellant had also touched her anus. C.M. testified that, although appellant told her it would feel good, it felt "bad."

Appellant testified in his own defense at trial. He denied sexually assaulting C.M. Appellant's wife also testified. Her testimony generally corroborated that of her husband and indicated that appellant did not have the opportunity to assault C.M.

Appellant also called a number of character witnesses, including friends and family. These witnesses testified that appellant was a person of good moral character and a hard worker. A couple of the witnesses testified that appellant was someone with whom he or she would entrust his or her own children. Appellant's goddaughter testified that she had stayed with appellant when she was a child. She stated that she had never felt uncomfortable around appellant and that she was surprised by the allegations.

As a rebuttal witness, the State called appellant's niece, Lisa. She testified that, 26 years earlier, when she was nine years old, appellant had touched her inappropriately. In the first instance, Lisa recalled that she was sitting on the floor in a bedroom of appellant's home watching television. Appellant was in the room with her when he reached down from the bed and rubbed her breast a few times with his hand. Lisa stated that she was certain that the touching had been intentional.

In the second incident, Lisa was lying on her stomach on the bed watching television. She stated that appellant came into the bedroom and lay on top of her. Lisa testified that appellant began "rubbing his pelvis and his penis on her butt." She did not recall staying with appellant and his wife again after the second incident.

The jury found appellant guilty of the offense of aggravated sexual assault of a child under six years of age, as charged in the indictment. The jury assessed appellant's punishment at 25 years in prison. This appeal followed.

Admission of Therapist's Testimony

In his first issue, appellant contends that the trial court abused its discretion in admitting the testimony of C.M.'s therapist, Dorothy Ashley, regarding certain declarations made by C.M. to Ashley. Appellant complains specifically about

Ashley's testimony in which she stated that, during a therapy session, C.M. told her that appellant was a "bad man" because he had touched her between her legs.

In the trial court, appellant asserted a hearsay objection to the testimony. The State countered appellant's objection by asserting that Ashley's testimony fell within the medical treatment and diagnoses exception to the hearsay rule. *See* TEX. R. EVID. 803(4). On appeal, appellant claims the medical treatment and diagnoses exception does not apply because, as required in *Taylor v. State*, the State did not show that (1) C.M.'s statement to Ashley was pertinent to her diagnosis or treatment of C.M. or that (2) C.M. understood why she was seeing a therapist. 268 S.W.3d 571 (Tex. Crim. App. 2008). In *Taylor*, the Court of Criminal Appeals concluded that Rule 803(4) requires proof that (1) the child-declarant was aware that the statements were made for the purpose of medical diagnosis or treatment, which depended on the veracity of such statements, and (2) the particular statement was pertinent to treatment, that is, it was appropriate for an expert to rely on that information. *Id.* at 588–91.

The State argues that appellant waived his *Taylor* challenge because he did not raise it in the trial court. The State acknowledges, citing *Long v. State*, 800 S.W.2d 545, 546–48 (Tex. Crim. App. 1990), that "a hearsay objection is generally sufficient to preserve error for appeal," but, at the same time asserts, in the context

of this case, that appellant's hearsay objection was too general to preserve the specific complaint he raises on appeal.

The State further asserts that, even assuming appellant preserved error, any error in admitting Ashley's testimony, is harmless error. We agree.

We will not reverse a judgment if the error was harmless. Rule of appellate procedure 44.2(b) provides that any error, other than constitutional error, that does not affect the defendant's substantial rights must be disregarded. TEX. R. APP. P. 44.2(b). Here, any error in admitting Ashley's hearsay testimony is non-constitutional error. *See Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007) (applying standard of review under rule 44.2(b) to erroneous admission of evidence); *see also Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007) (stating erroneous evidentiary ruling "generally constitutes non-constitutional error and is reviewed under Rule 44.2(b)").

A substantial right is affected when, after reviewing the record as a whole, a court concludes the error had a substantial and injurious effect or influence on the outcome of the proceeding. *Burnett v. State*, 88 S.W.3d 633, 637 & n.8 (Tex. Crim. App. 2002); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Stated conversely, a substantial right is not affected by the erroneous admission of evidence "if the appellate court, after examining the record as a whole, has fair

assurance that the error did not influence the jury, or had but a slight effect." *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

In assessing harm, we examine the entire record and "calculate, as much as possible, the probable impact of the error upon the rest of the evidence." *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). We consider, among other relevant factors, the testimony or physical evidence admitted for the fact finder's consideration, the nature of the evidence supporting the verdict, the character of the alleged error, and how the evidence might be considered in connection with the other evidence in the case. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005); *Motilla*, 78 S.W.3d at 355–56. The weight of the evidence of the defendant's guilt is also relevant in conducting the harm analysis under rule 44.2(b). *Neal v. State*, 256 S.W.3d 264, 285 (Tex. Crim. App. 2008); *Motilla*, 78 S.W.3d at 357. An improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *Leday v. State*, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998); *see Duncan v. State*, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (holding improper admission of outcry testimony was harmless error because similar testimony was admitted through complainant, pediatrician, and medical records).

Appellant contends that he was harmed by the admission of Ashley's testimony. He asserts that the testimony served to bolster C.M.'s credibility—the

key issue in this case. In addition, appellant states that C.M.'s characterization of him as a "bad man" was "inflammatory," and he describes the State's case against him as "weak."

A review of the record reveals that Ashley's testimony regarding C.M.'s statement that appellant was a bad man because he put his hand between her legs was not substantial. In contrast, five-year-old C.M. testified and told the jury, in her own words, how appellant had touched her and how it made her feel. C.M. showed the jury where appellant had touched her by pointing to the parts of a doll. C.M.'s mother, Flora, also testified and stated that C.M. had told her that appellant had touched her "private part."

Flora and Celia each testified that C.M.'s behavior had changed since the incident. Specifically, they testified that C.M. now acts shy and embarrassed around strangers. In addition, C.M.'s speech, appetite, and sleep patterns have changed.

Ashley also testified that, when she initially met C.M., she noticed that C.M. was "hypervigilant" and was clinging to her mother. Ashley stated that such behavior is commonly seen in a child who has suffered a traumatic event such as sexual abuse.

The defense thoroughly cross-examined C.M. and the State's other witnesses, including Ashley. The defense cross-examined Ashley specifically

about C.M.'s characterization of appellant as a bad man. The defense cross-examined Ashley regarding the possibility that C.M. may have been influenced or manipulated by her family to refer to appellant as a bad man.

In addition, the jury heard from appellant's niece, Lisa. She testified that appellant had touched her in a sexual manner, on two occasions, when she was a child.

Lastly, the record shows that that State did not emphasize Ashley's testimony in its closing statement. Instead, the State emphasized the credibility of C.M.'s allegations. In doing so, the State did not rely on Ashley's testimony, but on C.M.'s demeanor and other corroborating evidence. The State also pointed out inconsistencies in the defense's theory of the case and asserted that appellant and his witnesses were not credible. Again, the State did not rely on Ashley's testimony in making this argument.

A review of the record shows that the effect of the testimony in dispute was muted by other evidence introduced by the State that was either similar to the testimony or which served to corroborate C.M.'s testimony. Importantly, both C.M. and appellant testified at trial, allowing the jury to observe each and make a credibility assessment. In short, the State presented ample evidence of appellant's guilt, aside from the disputed testimony. After examining the record as a whole, we have a fair assurance that the alleged errors did not influence the jury, or had

but a slight effect. *See Motilla*, 78 S.W.3d at 355. Accordingly, we hold that any error in admitting the disputed testimony was harmless. *See* TEX. R. APP. P. 44.2(b).

We overrule appellant's first issue.

Admission of Extraneous Offense Testimony

In his second issue, appellant contends that the trial court erred when it admitted the testimony of Lisa in which she stated that, 26 years earlier, appellant had touched her inappropriately on two occasions. On appeal, appellant asserts that the incidences were too remote in time to have any probative value. We agree with the State that appellant has not preserved this complaint for appeal.

To preserve error, the record must show that the complaining party gave the trial court an opportunity to rule on the complaint by presenting that complaint to the trial court in a specific and timely objection. *See* TEX. R. APP. P. 33.1(a); *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). Concomitantly, a ground of error presented on appeal must comport with the objection raised at trial; otherwise nothing is presented for review. *See Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005) (stating that objection does not preserve error unless it comports with appellant's argument on appeal); *see also Hailey v. State*, 87 S.W.3d 118, 122 (Tex. Crim. App. 2002) (stating that appellate court cannot reverse on legal theory not presented to trial court by complaining party). We will

not reverse a trial court's evidentiary ruling on a theory of admissibility or inadmissibility not raised at trial. *See Martinez*, 91 S.W.3d at 336.

At trial, appellant objected to Lisa's testimony on the ground that he had not received proper notice of her testimony regarding the extraneous offenses. Appellant did not object to the testimony on the ground that it had no probative value because the incidents were temporally too remote. Because he did not give the trial court the opportunity to consider whether Lisa's testimony was inadmissible on the ground that the incidents were too remote in time, appellant may not now raise that argument on appeal. *See* TEX. R. APP. P. 33.1(a). We conclude that appellant has failed to preserve error with respect to the admission of Lisa's testimony. *See id.*

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).