Opinion issued May 23, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00200-CR

ALEXANDER A. ASCENCIO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1487505

MEMORANDUM OPINION

A jury convicted appellant Alexander A. Ascencio of aggravated sexual assault by intentionally and knowingly causing the sexual organ of J.C., his daughter, who was a person under 14 years of age, to contact his sexual organ. A jury sentenced Ascencio to 55 years in the Texas Department of Criminal Justice,

Institutional Division. *See* TEX. PENAL CODE 22.021(a)(1)(B)(iii). In two points of error, Ascencio contends that the trial court abused its discretion by (1) designating a forensic interviewer as the outcry witness even though J.C had told her mother about the sexual abuse first; and (2) preventing Ascencio's trial counsel from stating in closing argument that "an individual juror may form his or her own definition of proof beyond a reasonable doubt."

We affirm.

Background

J.C. and her sister and mother, Ursula Canales, moved from El Salvador to Houston in 2003, when J.C. was six years old. At that time, J.C. had only had contact with her biological father, Ascencio, by phone. After spending approximately two years in Houston, Canales decided in 2005, when J.C. was eight years old, to move to Maryland, where Ascencio lived.

After living together in Maryland for approximately three years, in 2008, the family moved from Maryland to Houston. Upon returning to Houston, Canales worked two jobs that kept her away from home from 8:00 a.m. to 11:00 p.m. While she was away, Canales would leave J.C., who was 11 years old at the time, in Ascencio's care.

J.C. testified that the abuse began when she was in the sixth grade. Ascencio walked into the room when J.C. was on MySpace, and saw a picture of J.C. with a

boy. Ascencio became angry and started to hit J.C. J.C. testified that Ascencio's behavior towards J.C. changed after that incident. J.C. testified that Ascencio refused to allow J.C.'s friends or cousins to visit the house, because Ascencio wanted her to be with him. Ascencio also refused J.C. access to a computer or phone. J.C. was only allowed to go to church, and only with her parents.

J.C. testified that Ascencio first touched her inappropriately when she was 11 or 12 years old. J.C. testified that the first assault occurred one morning when J.C. was sleeping and Ascencio came into her room and got into her bed. J.C. woke up to him touching her breasts and vagina under her clothes.

The touching continued daily and escalated. After school, Ascencio would tell her to come to his room and shut the door. Ascencio would tell J.C. to take off her clothes and get into bed with him. He would touch her breasts and her vagina with his hands, sometimes he would put his mouth on J.C.'s vagina, and sometimes he would put his finger inside J.C.'s vagina.

J.C. testified at trial that Ascencio had the most time alone with her on Sundays. One Sunday when J.C. was 11 or 12 years old, Ascencio positioned himself on top of her and tried to penetrate her vagina with his penis. When J.C. felt Ascencio's penis against her vagina, she screamed and tried to move, and Ascencio became angry and hit her with his fist. Ascencio complained that J.C. "can have sex

with [her boyfriend], why can't I." J.C. testified that this assault was painful and caused her to bleed.

On another Sunday, J.C. falsely told Ascencio that she was on her period in the hopes that he would not abuse her. But he discovered the ruse, became angry, and threatened her with a machete, whereupon J.C. fell to the floor, unable to breathe.

Ascencio assaulted J.C. for the last time in January 2011, when J.C. was 13 years old and in the eighth grade. Ascencio called J.C. into his room, made her get into bed, touched her vagina with his penis, and then tried to penetrate her vagina with his penis.

Shortly after this final assault, Ascencio traveled to Maryland. While in Maryland, Ascencio called Canales and learned that a nephew was with Canales and J.C. Ascencio became upset, asked to speak to J.C. by phone, and then caused J.C. to start crying while on the phone. Canales testified that she sensed something was wrong, and asked J.C. whether Ascencio had ever touched her. J.C. cried and told Canales that Ascencio had "touched her all over," kissed her, grabbed her, and tried to penetrate her with his penis.

Canales did not immediately report the abuse to police. But J.C. did talk to Lisa Holcomb, a forensic interviewer at the Children's Assessment Center.

During trial, the court held a hearing outside of the jury's presence regarding the testimony of Holcomb, who was the State's proposed outcry witness. During the hearing, Holcomb testified that she interviewed J.C. in April 2011, when J.C. was 13 years old. Holcomb testified that J.C. told her that Ascencio started to sexually assault her when they moved into their house in Houston in 2008, when J.C. was 11 years old. Holcomb testified that J.C. reported that Ascencio would touch her breasts and vagina. Holcomb also testified that J.C. told her that Ascencio would try to put his penis inside her vagina and it hurt.

Holcomb testified that J.C. reported that the last incident occurred when she was 13 years old in January 2011, when her father "put his penis on top of her vagina." Holcomb recounted that J.C. told her that Ascencio "tried to stick it in, and she felt pain, and he got mad at her, and hit her, and told her to leave." Holcomb testified that she was not aware of J.C. previously informing anyone else of the genital to genital contact that she had reported to Holcomb. Holcomb testified that while J.C. told her mother that the abuse was occurring, J.C. did not tell Canales all of the details that she had told Holcomb and, specifically, she did not tell Canales about the genital-to-genital contact.

Canales also testified during the hearing and related the facts that led J.C. to disclose the abuse. She testified that J.C. told her that Ascencio had "touched her

all over," kissed her, grabbed her, and tried to penetrate her. But Canales also testified that J.C. never told her that Ascencio touched her vagina with his penis.

Following the hearing testimony, Ascencio objected to the State's proffer of Holcomb as the outcry witness, arguing that J.C. first told Canales about the sexual abuse, and, therefore, Canales was the only proper outcry witness under article 38.071. The trial court overruled Ascencio's objection and designated Holcomb as the outcry witness.

Holcomb then testified, telling the jury the details that J.C. reported to her during their interview, including J.C's report of genital-to-genital contact. Canales also testified before the jury. She testified that J.C. told her that Ascencio had touched her, but did not discuss the details of the sexual abuse. The jury found Ascencio guilty and sentenced him to 55 years' imprisonment. Ascencio appealed.

Admission of "Outcry Witness" Testimony

In his first issue, Ascencio contends that the trial court improperly designated Holcomb as the outcry witness because Holcomb was not the first person J.C. told that she was sexually abused.

A. Standard of Review and Applicable Law

Texas Code of Criminal Procedure 38.072, the outcry statute, provides that a child-abuse victim's statement to another is not inadmissible hearsay if the statement describes the alleged offense and the person to whom the statement is made is at

least 18 years old and is the first person to whom the child made a statement about the offense. TEX. CODE CRIM. PROC. art. 38.072; *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990) (en banc); *Carty v. State*, 178 S.W.3d 297, 305 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

In general, the proper outcry witness is the first adult to whom the alleged victim relates the "how, when, and where" the abuse took place. *See Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd). There may be only one outcry witness per event. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011) (citing *Broderick v. State*, 355 S.W.3d 67, 73–74 (Tex. App.—Texarkana 2010, pet. ref'd)). But the Court of Criminal Appeals has held that if the child makes only a "general allusion" of sexual abuse to the first person, but gives a more detailed account to a second person, the second person may be the proper outcry witness. *Garcia*, 792 S.W.2d at 91.

A court's decision that an outcry statement is reliable and admissible under article 38.072 is reviewed for an abuse of discretion. *Carty*, 178 S.W.3d at 305 (citing *Broderick v. State*, 89 S.W.3d 696, 698 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). A trial court has broad discretion in determining the admissibility of such evidence and its findings will be upheld when they are supported by the evidence. *Garcia*, 792 S.W.2d at 92.

B. Analysis

Ascencio argues that because J.C. told Canales about the sexual abuse first, only Canales is the proper outcry witness, and Holcomb's testimony was improperly admitted. The State responds that Holcomb was the proper outcry witness because she was the first person to whom J.C. told the details that constitute the elements of the offense, namely, that there had been genital-to-genital contact.

Here, the indictment charged Ascencio with aggravated sexual assault by knowingly and intentionally causing the sexual organ of J.C., a person under 14 years of age, to contact his sexual organ. And the trial court conducted a hearing on the admissibility of J.C's outcry statement to Holcomb during which both Holcomb and Canales testified.

Canales testified that J.C. told her that Ascencio had been abusing her and had touched her all over. According to Canales, J.C. told her that Ascencio had undressed her, kissed her, touched her breasts and vagina, and put his fingers in her vagina. But Canales also testified that J.C. did not tell her about any genital-to-genital contact, and this testimony was uncontroverted.

By contrast, Holcomb testified that J.C. had reported genital-to-genital contact. According to Holcomb, J.C. told her that the abuse started in 2008, after they moved to Houston, and would occur in their house while Canales was working. Holcomb stated that J.C. reported that Ascencio would "try to have relations with

her, and they would occur on Sunday," and he would take her clothes off, kiss her, touch her private areas, and try to put his penis in her vagina and it would hurt. Holcomb testified regarding a specific incident of abuse that J.C. described to her in which Ascencio touched his penis to J.C.'s vagina in January 2011.

In short, Holcomb was the first person to whom J.C. made an outcry statement detailing the conduct charged in the indictment—genital-to-genital contact. Accordingly, the trial court did not abuse its discretion in designating Holcomb as the outcry witness under article 38.072. *See Garcia*, 792 S.W.2d at 91 (holding that though child first told teacher about her stepfather's abuse, child protective specialist was properly designated as outcry witness because he was "first person" to whom child actually described offense in a discernable manner); *Carty*, 178 S.W.3d at 306 (holding trial court did not abuse its discretion in designating forensic interviewer as outcry witness where victim first told her mother about abuse but did not provide details of charged offenses).

We overrule Ascencio's first issue.

Limitation of Closing Argument

In his second issue, Ascencio contends that the trial court erred by preventing Ascencio's trial counsel from stating in closing argument that "an individual juror may form his or her own definition of proof beyond a reasonable doubt."

A. Standard of Review and Applicable Law

"[P]roper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement." *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). A defendant has the right to argue any theory supported by the evidence, and may make all inferences from the evidence that are legal, fair, and legitimate. *Wilson v. State*, 473 S.W.3d 889, 902 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *Melendez v. State*, 4 S.W.3d 437, 442 (Tex. App.—Houston [1st Dist.] 1999, no pet.), *overruled on other grounds by Small v. State*, 23 S.W.3d 549 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). Counsel is entitled to correctly argue the law, even if the law is not included in the jury charge. *State v. Renteria*, 977 S.W.2d 606, 608 (Tex. Crim. App. 1998). However, an argument that misstates the law or is contrary to the court's charge is improper. *Melendez*, 4 S.W.3d at 442. And defense counsel may not make statements about the State's burden of proof that are inaccurate or misleading. *Id.* (citing *Loar v. State*, 627 S.W.2d 399, 401 (Tex. Crim. App. 1981)).

In *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) (en banc), the Court of Criminal Appeals adopted a jury instruction defining "reasonable doubt" and held that the instruction shall be submitted to the jury in all criminal cases. *Id.* at 162. Nine years later, the Court of Criminal Appeals overruled its holding in

Geesa and held, instead, that the better practice is to give no definition of reasonable doubt to the jury. *See Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000). The Court of Criminal Appeals has since clarified that *Paulson* does not prohibit inquiry during voir dire into a prospective juror's understanding of what proof beyond a reasonable doubt means. *See Fuller v. State*, 363 S.W.3d 583, 586–87 (Tex. Crim. App. 2012) ("inquiry into a prospective juror's understanding of what proof beyond a reasonable doubt means constitutes a proper question *regardless* of whether the law specifically defines that term"). And the Court of Criminal Appeals held that a venireman is not subject to challenge for cause merely because he indicates he would require more evidence than the legal minimum. *Garrett v. State*, 851 S.W.2d 859, 860 (Tex. Crim. App. 1993) (en banc) (just because "an individual venireman would set his threshold of reasonable doubt higher than the minimum required to sustain a jury verdict does not indicate he has a bias or prejudice against the law"); *see also Murphy v. State*, 112 S.W.3d 592, 598 (Tex. Crim. App. 2003) (en banc) (trial court erred in granting the State's challenge for cause of a venireperson based on her stated view as to type and amount of evidence she would require to reach level of confidence of beyond a reasonable doubt).

We review a trial court's ruling on the State's objection to the defendant's jury argument for an abuse of discretion. *Vasquez v. State*, 484 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

B. Analysis

Ascencio contends that he was entitled to argue in his closing that "an individual juror may form his or her own definition of proof beyond a reasonable doubt." He further argues that the trial court abused its discretion by prohibiting him from making such an argument. The State responds that Ascencio failed to preserve this issue and that even if he had, he failed to establish that the trial court abused its discretion. The State further argues that any alleged error was harmless.

Here, the State objected to Ascencio's request to argue in closing that "an individual juror may form his or her own definition of proof beyond a reasonable doubt." The State argued that the jury charge was clear about the definition of reasonable doubt and that Ascencio's proposed instruction "invites the jury to lower the burden." The trial court sustained the State's objection, noting that Ascencio was prohibited from arguing "anything that will suggest to the jury that the jury should make its decision based on anything other than the Constitutional standard of proof beyond a reasonable doubt." But the trial court then clarified that, while Ascencio could not argue that the jury could "form his or her own definition," he could argue that each juror may "determine the type and amount of evidence they require to reach the level of confidence beyond a reasonable doubt":

> While the Court will not permit the Defendant to state to the jury that the jury may make up it's [sic] on [sic] definition of beyond a reasonable doubt, the Defendant will be permitted to state to the jury if the defendant chooses to do so that the jury may determine the type and amount of evidence they require to reach the level of confidence beyond a reasonable doubt. For to do otherwise, would invite the jury to not follow the legal standard of beyond a reasonable doubt.

Ascencio argues that the trial court's ruling runs afoul of the law set forth in *Murphy* and *Garrett*. We disagree. The trial court's ruling was consistent with *Murphy* and *Garrett*, both of which held that jurors could not be struck for cause based on the fact that jurors may have varying viewpoints on the amount or kind of evidence they feel is necessary to conclude that an issue was proven beyond a reasonable doubt. *See Murphy*, 112 S.W.3d at 598; *Garrett*, 851 S.W.2d at 860. Likewise, here, the trial court expressly allowed Ascencio to argue "that the jury may determine the type and amount of evidence they require to reach the level of confidence beyond a reasonable doubt." There is no dissonance between *Murphy* and *Garrett*, on the one hand, and the trial court's ruling, on the other.

Rather, the trial court merely prohibited Ascencio from arguing that the jury was free to "form its own definition of reasonable doubt" because such argument would "invite the jury to not follow the legal standard of beyond a reasonable doubt." Because Ascencio's proposed argument—that jurors are entitled to form their own definition of "reasonable doubt" and thereby potentially increase or lower the State's

burden of proof—would misstate the law and mislead jurors, we conclude that the trial court did not abuse its discretion in sustaining the State's objection. *See Loar*, 627 S.W.2d at 401 (holding that trial court did not abuse discretion in sustaining State's objection to defendant's closing argument that "jury was required to render a verdict of not guilty if they harbored any doubt based on reason" because such was not proper statement of burden of proof); *Melendez*, 4 S.W.3d at 443 (holding trial court did not abuse its discretion in sustaining objection to defense counsel's argument that contained inaccurate and misleading statements regarding the burden of proof).

We overrule Ascencio's second issue.

Conclusion

We affirm the judgment of the trial court.

Rebeca Huddle
Justice

Panel consists of Justices Keyes, Bland, and Huddle.

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