Opinion issued July 11, 2017

In The

Court of Appeals

For The

First District of Texas

NOS. 01-16-00672-CR & 01-16-00679-CR

NATHAN MAXWELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Case Nos. 13-DCR-063043A & 16-DCR-073827

MEMORANDUM OPINION

This criminal appeal addresses whether the trial court erred by providing the jury with trial exhibits as it entered the jury deliberation room without the jury first asking to view those exhibits. Concluding that there was no reversible error, we affirm.

Background

Nathan Maxwell sexually assaulted his niece. The abuse began when she was eleven years old. It escalated to include sexual intercourse when she was thirteen. And it continued with frequent sexual contact and intercourse until she was fifteen. Through a plea agreement, Maxwell pleaded guilty to two offenses: aggravated sexual assault of a child and sexual assault of a child. The State and Maxwell agreed that a jury would determine punishment.

During the punishment trial, the trial court admitted various photographs and documents into evidence. These included photographs of Maxwell's niece near the ages of seven, twelve, and thirteen. Maxwell did not object to these exhibits.

After the State and the defense rested, the trial court announced that exhibits would go with the jury to the jury deliberation room. Maxwell objected, arguing that the exhibits should not go to the jury deliberation room without a specific request from the jury. The trial court overruled the objection and sent the exhibits to the jury room.

At the conclusion of its deliberations, the jury announced a sentence of 70 years' confinement for the offense of aggravated sexual assault of a child and 20 years' confinement for the offense of sexual assault of a child. Maxwell appeals both convictions.

Unprompted Provision of Exhibits to Jury in Criminal Trial

In a single issue, Maxwell argues that the trial court's providing the jury with trial exhibits without the jury first requesting them violated Articles 36.25 and 38.05 of the Code of Criminal Procedure and amounted to an improper comment on the weight of the evidence.

A. Articles 36.25 and 38.05

Article 36.25 of the Code of Criminal Procedure provides that a jury shall be furnished "upon its request" any exhibits admitted as evidence. TEX. CODE CRIM. PROC. art. 36.25. The rule does not speak directly to what shall occur when a jury has not requested exhibits. *See id.*

Article 38.05 addresses judicial comments on the weight of the evidence. TEX. CODE CRIM. PROC. art. 38.05. It provides that at no point before the jury returns its verdict shall a trial judge "make any remark calculated to convey to the jury his opinion of the case." *Id.*

Maxwell argues that the trial court's providing the jury with unrequested exhibits violated these rules and amounted to an impermissible comment on the weight of the evidence. To reverse a judgment due to improper conduct or comments by the trial judge, an appellate court must conclude that there was judicial impropriety and that it probably prejudiced the complaining party. *Wilson v. State*, 473 S.W.3d 889, 903 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

B. Case law

Article 36.25 does not directly address a trial court sua sponte providing unrequested exhibits to a jury, as happened here. *See* TEX. CODE CRIM. PROC. art. 36.25; *Robinson v. State*, 704 S.W.2d 565, 568 (Tex. App.—Beaumont 1986, pet. ref'd). Nonetheless, a handful of cases have addressed whether providing unrequested exhibits to a criminal jury violates Article 36.25 and whether it amounts to an impermissible comment on the weight of the evidence under Article 38.05. *See Saenz v. State*, 879 S.W.2d 301, 306 (Tex. App.—Corpus Christi 1994, no pet.); *Johnson v. State*, 846 S.W.2d 373, 377 (Tex. App.—Houston [14th Dist.] 1992), *remanded on other grounds*, 853 S.W.2d 574 (Tex. Crim. App. 1993); *Robinson*, 704 S.W.2d at 568; *see also Butler v. State*, No. 01-92-00822-CR, 1997 WL 476307, at *11 (Tex. App.—Houston [1st Dist.] Aug. 21, 1997, pet. ref'd) (mem. op., not designated for publication); *Hickey v. State*, No. 06-07-00077-CR, 2008 WL 191202, at *2 (Tex. App.—Texarkana Jan. 24, 2008, no pet.) (mem. op., not designated for publication).

In *Robinson*, for example, the trial court sent six out of eight exhibits to the jury room without the jury requesting them. 704 S.W.2d at 567. The defendant objected, arguing that it was a comment on the weight of the evidence. *Id.* at 568. The trial court overruled the objection. *Id.* After his conviction, the criminal defendant appealed, arguing that the trial court violated Articles 36.25 and 38.05.

Id. The court of appeals held that, while the procedure "did not strictly comply with article 36.25," it could not be construed as a comment on the evidence and did not amount to reversible error. *Id.*

In each of the other cases, the appellate courts held similarly. *See Saenz*, 879 S.W.2d at 306 (concluding no reversible error or harm in providing exhibits to jury in criminal trial without jury first requesting exhibits); *Johnson*, 846 S.W.2d at 377 (holding that trial court's sending exhibits to jury room without request from jury was not comment on weight of evidence given that trial court did not single out particular exhibits or indicate importance of any piece of evidence over other evidence); *see also Butler*, 1997 WL 476307, at *11 (concluding trial court did not err by sending unrequested exhibits to jury); *Hickey*, 2008 WL 191202, at *2 (holding that trial court did not err by allowing to go to jury room before specific request for those exhibits from jury, nor did trial court impermissibly comment on evidence by doing so).

Maxwell does not cite to any of the above cases or attempt to distinguish them. Instead, he focuses his argument on the contention that photographs of Maxwell's niece served only to highlight the girl's young age at the point of sexual contact and, in turn, to anger and inflame the jury. We next discuss these photographs.

C. No reversible error

The trial court sent a set of 12 exhibits into the jury room. Nine of the exhibits were photographs of Maxwell's niece at various ages. His niece testified about five of them. She stated that the photographs accurately represented her appearance at age seven, which was before the abuse began, and at age thirteen, which was her age when she and Maxwell began having sexual intercourse. Maxwell's ex-wife testified about two other photographs of their niece, indicating that the niece was about ten years old in one and six years old in the other. The final two pictures of the niece were admitted through Maxwell's mother. She testified that she was unsure how old the niece was in those photographs but that she was "young."

Another exhibit was a chart showing the niece's age, grade, and school of attendance from kindergarten through high school.

Yet another exhibit was an earlier judgment of conviction indicating that Maxwell had been convicted in 2014 of hindering the apprehension of another.

The last exhibit was a photograph of Maxwell in his National Guard uniform.

Maxwell did not object to any of these exhibits being admitted into evidence. When the trial court provided the exhibits to the jury, over Maxwell's

objection, it made no statement to the jury regarding the exhibits' content or their importance relative to any other exhibit or testimony.

We conclude that there was no reversible error in the trial court's unprompted provision of this group of exhibits to the jury as it left to begin its deliberations. *See Johnson*, 846 S.W.2d at 377 (noting that trial judge "did not single out particular exhibits to be sent to the jury, nor did he in any way indicate to the jury the importance of any one piece of evidence over another" and holding that trial court's provision of exhibits, while it "did not strictly comply with article 36.25," did not impermissibly comment on evidence).

We overrule Maxwell's single issue.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Justices Higley, Bland, and Brown.

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