Opinion issued October 19, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00799-CR

DAVILON EUGENE CARTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1513809

MEMORANDUM OPINION

Davilon Eugene Carter appeals from his judgment of conviction for felony assault of a family member. He contends that the trial court erred in limiting cross-examination of the complainant, with whom he had a dating relationship, as to

whether she consented to sexual intercourse at or near the time of the assault. Because Carter did not preserve this issue in the trial court, we affirm the judgment.

BACKGROUND

The State indicted Carter for assaulting the complainant by placing her in a chokehold and impeding her breathing. *See* TEX. PENAL CODE § 22.01(a). It alleged that Carter had been convicted of a prior assault against a family member and a person with whom he had a dating relationship, making the current offense for which he was indicted a felony of the second degree. *See id.* § 22.01(b-2).

Carter pleaded guilty without an agreed recommendation as to his punishment. In exchange for his plea, the State agreed to dismiss an accompanying aggravated sexual assault charge when the trial court assessed punishment. The trial court ordered a presentence investigation, and subsequently held a punishment hearing.

Several witnesses testified at the punishment hearing, including the complainant and Carter. It was undisputed that the complainant was having an extramarital affair with Carter. She said that on the night of the assault Carter accused her of reconciling with her estranged husband and then beat her for several hours at his residence. According to her, Carter repeatedly hit her in the face with one fist while using his other hand to choke her, pulled her hair, kicked her, and dragged her from one room into another. He threatened to kill her and verbally

abused her during the assault. After beating her for a long time, he forced himself on her sexually, after which he kicked her in the buttocks hard enough to leave a footprint-shaped bruise and subsequently hit her some more when she tried to leave.

Carter testified that he and the complainant had consensual sex that night. According to him, their physical altercation ensued afterward when he told her that their affair was over and she reacted by trying to take his phone away from him to investigate whether he was involved with someone else. Carter conceded that he put the complainant in a headlock but expressed surprise that he injured her. He admitted that he assaulted her and acknowledged that he caused the injuries to her face shown in a photograph subsequently taken at the hospital; however, he denied causing injuries to her face, neck, and chest shown in another photograph. He also denied kicking her in the buttocks, contending that he inadvertently bruised her there by pulling her off the bed.

The complainant went to the hospital after the assault, and the State introduced into evidence the resulting medical records documenting her injuries, which included bruises and abrasions to her face and neck, ruptured capillaries consistent with nearly fatal strangulation, and bruises to her chest and buttocks. A sexual assault nurse examiner who examined the complainant also testified that the complainant's swollen labia and inability to tolerate a vaginal examination were

consistent with the allegation of rape but that labial swelling also could result from vigorous consensual sex.

After hearing this and other evidence, the trial court assessed Carter's punishment at 20 years of confinement, the maximum punishment allowed by statute. *See id.* § 12.33(a). Carter appeals.

DISCUSSION

In a single issue, Carter contends that the trial court violated Rule 412(b)(2)(B) of the Texas Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution by prohibiting his lawyer from cross-examining the complainant about her past sexual behavior. He asserts that he tried to introduce evidence of the complainant's "past sexual behavior with him" that was relevant to whether their sexual contact on the night of the assault was consensual. The State responds that Carter failed to preserve any such error.

To preserve error as to a ruling excluding evidence, a party must inform the trial court of the substance of the evidence by making an offer of proof, unless the substance of the evidence is apparent from context. TEX. R. EVID. 103(a)(2). An offer of proof may be made either in question and answer format or by counsel's summary; however, if the latter method is used, the summary must be reasonably specific so that the appellate court is able to assess the relevance and admissibility of the proof. *Holmes v. State*, 323 S.W.3d 163, 168 (Tex. Crim. App. 2009). In

addition, counsel must explain in the trial court why the proof in question is admissible and cannot predicate error on a different ground on appeal. *Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005).

When Carter's counsel tried to examine the complainant about her alleged appetite for rough sex, the following exchange occurred:

> Q. [Complainant], isn't it true that in your sexual relationship with Mr. Carter, you-all had vigorous sex?
>
> A. What do you mean by that?
>
> Q. Rough sex?
>
> A. I mean, we had a sexual relationship. There was sex. I mean I don't know how else to describe it. It wasn't one of those, you know, use a whip and ties, because that never happened.
>
> Q. But you have told Mr. Carter that you wanted—you wanted to let him rape you; isn't that true?
>
> A. I don't remember saying that.
>
> * * *
>
> Q. I want to show you what's been marked as Defense Exhibit No. 2. Do you recognize that e-mail?
>
> A. Yes.
>
> Q. Okay. Could you read what's there? And this is from your e-mail account to Mr. Carter; is that correct?
>
> A. Correct.
>
> State: Your Honor, I have the same objection as to relevance. I mean, this is—as we've talked—as we said during direct examination, they had a consensual sexual relationship. This is clearly sexual banter that's going on between them, and this is just like an ongoing onslaught of the same thing.
>
> Court: Sustained. Why are we doing this?

Defense: Her credibility is at issue, Your Honor.

Court: With me?

Defense: I would think it's a credibility issue to you, too, as a finder of fact.

Court: That's sustained.

The e-mail in question is not part of the record. Carter's counsel did not make an offer of proof regarding the e-mail's content, his proposed questions concerning the e-mail, or the complainant's anticipated testimony about it.

On this record, we hold that Carter did not preserve error because he failed to make an offer of proof and the substance of the proof is not apparent from context. *See Holmes*, 323 S.W.3d at 168. The record does not disclose what the complainant said to Carter in the e-mail or the context in which she wrote the e-mail. Without these details we could only speculate as to the potential relevance or admissibility of the e-mail, and speculation is not a proper basis for appellate review. *See Mims v. State*, 434 S.W.3d 265, 272 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Moreover, Carter's counsel referred to neither Rule 412 nor the Confrontation Clause as a basis for admitting the e-mail into the evidence or questioning the complainant about it. Carter therefore cannot invoke these grounds on appeal. *See Reyna*, 168 S.W.3d at 179–80 (arguments about hearsay did not preserve error premised on Confrontation Clause); *Eaves v. State*, 141 S.W.3d 686, 693 (Tex. App.—Texarkana 2004, pet. ref'd) (defendant did not invoke any of the exceptions

to Rule 412's general bar on evidence of alleged victim's past sexual behavior in the trial court and thus failed to preserve error).

CONCLUSION

We affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Bland, and Brown.

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