Opinion issued July 29, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00365-CV

GREGORIUS BROWN, Appellant

V.

GLORIA BROWN, Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Case No. 2020-19597

MEMORANDUM OPINION

This is an appeal from a protective order that the trial court granted to appellee, Gloria Brown, against appellant, Gregorius Brown. In three issues on appeal, Gregorius contends that the trial court abused its discretion by: (1) refusing to permit him to testify at the protective-order hearing, (2) improperly restricting his

right to cross-examination, and (3) permitting the prosecutor to withhold notice of acts of family violence and "exculpatory" evidence. We affirm.

BACKGROUND

Gloria seeks a protective order and temporary ex parte protective order

Gloria and Gregorius Brown were divorced on May 19, 2017. On March 23, 2020, Gloria filed an application for a protective order against Gregorius. In her application for protective order, Gloria also sought a temporary ex parte protective order, which she supported with an affidavit detailing the reasons she believed that such a temporary ex parte protective order was required.[1] On March 27, 2020, the trial court signed a temporary protective order and set the matter for a final hearing on April 23, 2020.

Pretrial proceedings

At the pretrial conference before the April 23, 2020 hearing, Gregorius indicated that he planned to call seven witnesses. The trial court responded that she did not need to "hear seven people get on the stand and tell me the exact same thing." Instead, she told Gregorius to "choose your best two to three witnesses." The

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[1] *See* TEX. FAM. CODE § 82.009 (requiring that applicant for temporary ex parte order submit "a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order," which must be "signed by each applicant under an oath that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant").

prosecutor was also limited to three witnesses. According to the trial court, "at that time [Gregorius] did not object."

Trial proceedings—by the prosecutor for Gloria

In accordance with pretrial discussions with the trial court, the prosecutor called three witnesses. Matthew White testified that his father was in a relationship with Gloria and that he had been "monitor[ing] the home" where she lived because she "had been receiving threats from her ex-husband and they were going through some issues." White testified that in the three weeks before the hearing, Gregorius "kep[t] coming back . . . for very petty reasons." Once White saw Gregorius "recording through the front window." When White confronted him, Gregorius left to get law enforcement, but he did not return. On another occasion, White again saw Gregorius recording and removing water bottles from behind the house. White also testified that workers from the electric and water companies had been sent out to the house "at least three times per week."

Gloria testified about three previous incidents of family violence. First, she testified that Gregorius "basically beat [her] up" in 1988[2] when she was pregnant

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[2] When Gloria offered this testimony, counsel for Gregorius objected that it "was not in the affidavit." The trial court responded that "[t]he only purpose of the affidavit is for the Court to consider whether or not to grant a temporary ex parte protective order. . . . [E]very single incident of violence or threat of violence [admitted at trial] does not have to be in the affidavit." The affidavit was not admitted into evidence at trial.

with the couple's middle child. Gloria testified that "he hit me. He punched me. He kicked me while I was on the ground, tried to kick me all over while I was on the ground."

Next, Gloria testified about an assault in August 2018,[3] which began as an argument about why Gloria's name was not on the paperwork involving the potential sale of their home. When Gloria asked him about it, Gregorius said "he [could] do what he wants to do with his house," then he pushed Gloria, hit her, punched her with his fist, choked her, and finally stomped on her face. Gloria testified that her "whole face was swollen and her eyes were black." She introduced into evidence a photo taken of her face two days after the assault.

Finally, Gloria testified about an assault that occurred on November 14, 2019, when Gregorius called her around 1 a.m. or 2 a.m. and asked "why aren't you home . . . why aren't you where you supposed to be[?]" After Gloria hung up on him, Gregorius burst in while she was getting ready to shower and began choking her. Gloria testified that when he was choking her, she was unable to breath. Gloria was finally able to push Gregorius out of the room and lock the door. She called both her son and the police. Gregorius was charged with assault, and the trial court in the

[3] Gloria admitted at trial that her affidavit in support of the ex parte temporary restraining order said that this event occurred in August 2019, but she claimed "[t]hat was a clerical error. It was '18." Again, the affidavit was never admitted into evidence at trial.

criminal case issued a no-contact order on December 6, 2019. Nevertheless, Gloria testified that Gregorius violated the no-contact order by entering her garage on March 10, 2020.

Beth Barron, attorney for Gloria, testified about her attorney's fees.

Trial proceedings—by counsel for Gregorius

After the prosecutor rested Gloria's case, Gregorius's attorney stated, "I'm calling the respondent Mr. [Gregorius] Brown." The trial court began to administer Gregorius his rights, informing him that anything to which he testified in the current proceeding could be used against him at his upcoming criminal trial. Counsel then conferred with Gregorius and told the trial court that he was not calling his client "at this time . . . . I consulted with him and I changed my mind."

Gregorius then called Tremaya Brown, the couple's oldest daughter. Brown testified that in November of 2019,[4] she never noticed anything unusual about her mother's face. Her mother never told her that Gregorius had stomped on her face.

Gregorius next called Marajana Brown, Gregorius's niece. She, too, testified that she "never noticed any bruises on Gloria Brown the entire month of August 2019 while I was residing in that house." She admitted that she was not living in the house in August 2018, when Gloria testified that the assault occurred.

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[4] Gloria had previously testified about an assault in August 2018.

After these two witnesses, the trial court reminded Gregorius's counsel of the witness limit and asked if Gregorius would be testifying. The trial court stated "I already said you could call two to three witnesses. Do you want to call [Gregorius]?" Gregorius's counsel responded that he had to see "if [Gregorius] wants to testify." Counsel then told the trial court, "I'm gonna call the witnesses that I think I need to call. You can prevent me from doing that but then I'm gonna make a record." To which the trial court responded:

> Sir, I told you during our pretrial earlier today that I was not gonna hear from seven witnesses. I wasn't gonna hear seven people get on the stand and tell me the exact same thing. I told you to choose your best two to three witnesses. And at that time you did not object. So therefore, I'm limiting you to three witnesses. [The prosecutor] got three witnesses. So if you want to call another witness and not call your client, then that is fine with me. So please choose your next witness.

Thereafter, Gregorius called Warren Deforge, who testified that he was living at the home where Gloria was also living on November 14, 2019, and he never saw any marks on her face during that time. He also testified that he did not see any marks on her face in August 2019. He was not living there in August 2018 when she testified that one of the assaults occurred. Deforge also contradicted one of the assertions in Gloria's affidavit, which was not admitted at trial, by testifying that Gregorius was not at a boxing match on November 23, 2019.[5]

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[5] Gloria had asserted in her affidavit in support of her request for an ex parte temporary restraining order that, on November 23, 2019, she and Gregorius were both, separately, at a boxing match and that he was talking badly about her to others.

After presenting the three witnesses he was allowed, Gregorius's counsel asked to call his client to the stand. The trial court responded:

> No, sir. I allowed—I gave you three witnesses. I told you that, sir and you elected not to call [Gregorius], so we're going to go ahead and close the testimony.
>
> . . . .
>
> And [counsel], I'm gonna put this on the record again, just so it is perfectly clear for the appellate court in the event that you want to appeal any decision that I may or may not make today, okay? Here's the deal.
>
> We had a pretrial earlier this morning, I told you then, you said you had around seven witnesses, and I told you that you could choose you best two or three because I was not going—I did not need to hear from seven people. You did not object to it at that time. And when it came to your case in chief, I gave you the opportunity to call any witnesses that you wanted to call. I told—you know, you elected that you did not want to call your client, that you were talking to him about it and therefore you called the other witnesses. You chose not to call your client as one of the three witnesses. Therefore, I'm closing the testimony. That is well within my prerogative to do so that is what I'm doing.

The trial court's ruling

Thereafter, the trial court found that Gregorius had committed family violence and that such violence had occurred in the past and was likely to occur in the future. The trial court further found that Gregorius had committed an act constituting a

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> At trial, she acknowledged that Gregorius was not at the boxing match on November 23. The November 23, 2019 incident at the boxing match did not involve any allegations of family violence, and the affidavit raising the incident was not admitted at trial as evidence to support the permanent restraining order.

felony involving family violence. Based on these findings, on April 30, 2020, the trial court granted Gloria a protective order against Gregorius, which would continue for the duration of Gregorius's lifetime.[6]

This appeal followed.[7]

RIGHT TO TESTIFY—DUE PROCESS

In his first issue, Gregorius contends that the trial court violated his right to due process by refusing to allow him to testify at trial. Gloria responds that the trial court did not violate Gregorius's right to due process, but merely placed reasonable restrictions on the parties' presentation of the evidence.

Article I, section 19, of the Texas Constitution provides that "[n]o citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. Due process affords litigants the right to be heard. *Striedel v. Striedel*, 15 S.W.3d 163, 166 (Tex. App.—Corpus Christi-Edinburg 2000, no pet.). The opportunity to be heard must amount to more than mere cross-examination of

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6 *See* TEX. FAM. CODE §§ 81.001, 85.025(a-1)(1). We note that Gregorius has not challenged the propriety of the lifetime duration of the protective order or any of the other prohibitions found therein, such as going within 200 feet of Gloria's residence, communicating with her through any means other than her attorney, or possessing a firearm.

7 *See id.* § 81.009.

the adverse party's witnesses. *Id.* "[F]undamental fairness dictates that a party not be arbitrarily deprived of the right to offer evidence." *Id.*

However, the trial court has great discretion in the conduct of the trial. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001). A trial court's "inherent power" and the applicable rules of procedure and evidence accord judges broad, but not unfettered, discretion in handling trials. *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App.—Houston [14th Dist.] 1997, writ denied). A trial court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time. *Francis*, 46 S.W.3d at 241; *Hoggett v. Brown*, 971 S.W.2d 472, 495 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (noting that trial court has inherent power to control disposition of cases "with economy of time and effort for itself, for counsel, and for litigants").

We review the trial court's imposition of limits on the parties' presentation of evidence using an abuse-of-discretion standard. *See In re M.A.S.*, 233 S.W.3d 915, 924 (Tex. App.—Dallas 2007, pet. denied); *State v. Reina*, 218 S.W.3d 247, 250 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *see also Francis*, 46 S.W.3d at 240–41 (stating that "the discretion vested in the trial court over the conduct of a trial is great" and that trial courts "may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of

time"); *see also* TEX. R. EVID. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."); *M.A.S.*, 233 S.W.3d at 924 (noting that trial court has authority to exercise control over presentation of evidence). A trial court does not abuse its discretion unless it acts in an arbitrary and unreasonable manner. *Reina*, 218 S.W.3d at 250.

Here, the trial court did not prohibit Gregorius from testifying. Instead, it gave both parties the opportunity to bring up to three witnesses in what is essentially a one-issue case, i.e., whether there had been family violence and whether it was likely to occur in the future. The trial court specifically discussed the issue of Gregorius testifying before he called his first and third witnesses. In both instances, Gregorius chose not to testify, but instead called other witnesses. The three witnesses Gregorius chose presented essentially the same evidence, i.e., that they had not seen any physical evidence of abuse on Gloria's face. Gregorius could have testified instead of one of these witnesses but chose not to do so. Under these facts, we cannot say that the trial court abused its discretion in the manner in which it controlled the presentation of the evidence to prevent wasting time with the presentation of duplicative evidence. *See Sims v. Brackett*, 885 S.W.2d 450, 452 (Tex. App.—Corpus Christi-Edinburg 1994, writ denied) (citing Texas Rules of Evidence 403

and 611 and noting that trial court has authority to exclude testimony to avoid needless presentation of cumulative evidence).

We also note that, at the time the trial court imposed the three-witness limitation, Gregorius made no objection. Thus, the issue is waived. *See Schwartz v. Forest Pharms., Inc.*, 127 S.W.3d 118, 126–27 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (concluding that party failed to preserve error as to time limits imposed by trial court because he failed to object when he first knew of time limit); *see also Reina*, 218 S.W.3d at 254 (holding same). And, even if the need for a fourth witness only ripened later because Gregorius was undecided about testifying, his objection to the limit does not match the issue on appeal. When Gregorius objected to the trial court's decision to prohibit a fourth witness, he never claimed that such a ruling was a due process violation. To be entitled to appellate review of a claim of denial of due process, a party must raise that claim in the trial court. *In re L.M.I.*, 119 S.W.3d 707, 710–11 (Tex. 2003).

Accordingly, we overrule issue one.

LIMITATION OF CROSS-EXAMINATION—DUE PROCESS

In issue two, Gregorius contends that the trial court violated his right to due process by "objecting to material evidence sua sponte on behalf of [Gloria]." Essentially, Gregorius complains about two instances in which the trial court

interrupted his cross-examination and asked counsel to move on to other, more relevant, issues.

In the first instance, Gregorius's counsel was questioning Gloria about inaccuracies that she admitted were in her affidavit in support of her application for an ex parte temporary restraining order when the trial court stopped counsel from asking about a discrepancy in the date of the boxing match but counsel did not object:

> [Gloria]: . . . . So last night, I read over [the affidavit] really good and then I sent the corrections to them. And I don't—I think that there were only two dates actually. The error was on the dates and I corrected them.
>
> [Defense Counsel]: There was not an error that on November the 23rd that [Gregorius] was at a boxing match asking—
>
> [Gloria]: Yes, there was an error and that was the date. That was the date, yes. The whole thing, yes. That's correct?
>
> [Defense Counsel]: What's the correct date? What's the correct date he was at a boxing match asking questions?
>
> [Trial Court]: I really don't need to hear that, that's irrelevant. Please stick to the issues at hand. Let's move on.
>
> [Defense Counsel]: I want to shift to the property. Do you and Mr. Brown own equity interest in the property jointly, correct?

In the second instance, after the trial court had admonished defense counsel to address the relevant issue of domestic violence,[8] the trial court limited cross-

[8] The trial court stated, "All I want to know is if the incidents that Mrs. Brown claimed about, as far as the domestic violence, whether they're true and correct. I don't—it doesn't matter to me who has access or who has legal rights to that property."

examination about Gloria's motive for seeking a protective order but defense counsel did not object:

> [Defense Counsel]: Now neither party has exclusive rights to enjoy the use and possession of the premises; is that correct, until closing:
>
> [Gloria]: Yes.
>
> [Defense Counsel]: That's correct. Did your attorney state that if Mr. Brown sold the property to you, you would stop filing domestic violence allegations; is that correct?
>
> [Trial Court]: That is—that is a product. Wait a minute, Ms. Brown. That is a work product or a confidential and that's an improper question and I don't need an objection for that.
>
> [Defense Counsel]: Your Honor.
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> [Trial Court]: Ask another question, please.
>
> (Exchange on the record regarding technology issues)
>
> [Trial Court]: Mr. Brown, you need to be quiet. Ask your next question, please.
>
> [Defense Counsel]: I pass the witness.

As seen from the exchanges above, Gregorius neither objected nor obtained a ruling. Almost every right, both constitutional and statutory, may be forfeited by a failure to object. *Glover v. State*, 496 S.W.3d 812, 816 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *see Roman v. State*, 571 S.W.3d 317, 320 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Constitutional rights, including the rights of due process and due course of law, may be waived if the proper request, objection, or

motion is not asserted in the trial court. *Curry v. State*, 186 S.W.3d 39, 42 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also Jackson v. State*, 495 S.W.3d 398, 419 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Because Gregorius did not object that the trial court's conduct violated his due process rights, or obtain a ruling, he waived the right to complain about it on appeal.[9] *See* TEX. R. APP. P. 33.1(a).

Accordingly, we overrule issue two.

LACK OF NOTICE—DUE PROCESS

In issue three, Gregorius contends he was deprived of due process because the prosecutor did not give him notice that (1) she intended to introduce evidence regarding an incident of violence that occurred in 1988, and (2) she was aware of, but did not disclose, exculpatory evidence, i.e., inaccuracies in the affidavit Gloria submitted in support of her request for a temporary ex parte restraining order. We address each complaint, respectively.

In the first instance, Gregorius objected as follows when the prosecutor asked Gloria about an assault occurring in 1988:

[Prosecutor]: Do you recall the first time [Gregorius assaulted you]?

[Gloria]: Yes.

[Prosecutor]: And what year was that?

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[9] We note that a trial court's comment on the weight of the evidence may be raised for the first time on appeal. *See* TEX. CODE CRIM. PROC. art. 38.05; *Proenza v. State*, 541 S.W.3d 786, 798–02 (Tex. Crim. App. 2017). Gregorius does not bring an article 38.05 challenge in this case.

[Gloria]: 1988.

[Prosecutor]: Okay. And what happened on that incident?

[Gloria]: We were—

[Defense Counsel]: Judge, we're gonna object— . . . . This has nothing to do with the issue.

[Trial Court]: Wait. If there are—any physical violence or threats of physical violence that happened in the past are relevant to the protective order. The Court has to find that family violence occurred in the past and it's likely to occur in the future.

[Defense Counsel]: Only in the past 30 days.

[Trial Court]: No, that is not correct, sir. That is not correct. You need to read the Family Code and you need to read the case law. Go right ahead, Ms. Brown.

[Gloria]: In 1988, when I was pregnant with my son, was the first time Mr. Brown put his hands on me. I was seven months pregnant with our son.

* * *

[Prosecutor]: Okay. What did Mr. Brown do to you?

[Gloria]: He basically beat me up. He was upset. I was pregnant and we were away from home, military, and I threw something across the room because he said something and—it wasn't at him, but it was across the room away from him—but it hit the window. And once it hit the window, the window broke and he got mad and started fighting me because I broke the window. I was pregnant and just away from my home. I was really frustrated.

[Prosecutor]: Ms. Brown. Ms. Brown.

> [Defense Counsel]: Judge, I'm gonna object to the testimony. It was not in the affidavit. It's not in the pleadings.
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> [Trial Court]: Okay. [Defense Counsel], you've already said that you've never done a protective order before. The only purpose of the affidavit is for the Court to consider whether or not to grant a temporary ex parte protective order. It is not—every single incident of violence of threat of violence does not have to be in the affidavit. It's overruled. Go ahead, Ms. Brown.

Gregorius first contends that he was denied due process because he did not have prior notice that Gloria intended to introduce evidence of a 1988 assault that she did not include in her affidavit.

Gregorius cites no authority, and we can find none, to support his contention that an applicant for a protective order must disclose all incidents of violence to which he or she will testify at the protective-order hearing. As the trial court correctly stated, the purpose of the affidavit is to support the applicant's request for a temporary ex parte restraining order. *See* TEX. FAM. CODE § 82.009 (requiring that applicant for temporary ex parte protective order submit "a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order," which must be "signed by each applicant under an oath that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant"). The affidavit is not a pleading that limits an applicant's proof at the protective-order hearing. An application for a protective order need only state: (1) the name and county of residence of each applicant; (2)

the name and county of residence of each individual alleged to have committed family violence; (3) the relationships between the applicants and the individual alleged to have committed family violence; (4) a request for one or more protective orders; and (5) whether an application is receiving services from the Title IV-D agency in connection with a child support case and, if known, the agency case number for each open case. TEX. FAM. CODE § 82.004.

Next, Gregorius, relying on *Giglio v. United State*s, 405 U.S. 150, 153–54 (1972), contends that the prosecutor had knowledge of exculpatory information, i.e., inaccuracies in Gloria's affidavit affecting her credibility, but never disclosed those to him before the protective-order hearing. *Giglio*, of course, is the progeny of *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963), which held that a prosecutor in a criminal proceeding has an affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment under the Due Process Clause of the Fourteenth Amendment. However, Gregorius cites no authority, and we can find none, holding that *Brady* is applicable to a protective-order hearing, which is a civil procedure. *See Culver v. Culver*, 360 S.W.3d 526, 536 (Tex. App.—Texarkana 2011, no pet.).

And, we cannot reverse for a *Brady* error unless "the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *See Hampton v. State*, 86 S.W.3d 603, 613 (Tex. Crim. App. 2002). In this case, during direct examination, Gloria testified

about the inaccuracies regarding certain dates and events in her affidavit, and defense counsel cross-examined her extensively on them. Thus, Gregorius has not shown that had he known about the inaccuracies in her affidavit, the outcome would have been different. Again, we note that the affidavit was not admitted into evidence, and, to the extent that it was erroneous in any respect, Gregorius was permitted to attack Gloria's credibility on cross-examination.

We overrule Gregorius's complaints that he was denied due process because (1) Gloria's affidavit did not provide him with notice that she intended to testify about the 1988 assault and (2) the prosecutor withheld exculpatory information.[10] Having disposed of both of Gregorius's lack-of-notice complaints, we overrule issue three.

CONCLUSION

We affirm the trial court's protective order.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.

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[10] We also note that, again, Gregorius did not raise a due process objection as to the arguments he raises in issue three; thus, those issues are also waived. *See In re L.M.I.*, 119 S.W.3d at 710–11.