

Affirmed and Memorandum Opinion filed July 27, 2023.



In The

Fourteenth Court of Appeals

**NO. 14-22-00421-CR
NO. 14-22-00422-CR**

EDDY PAUL GINN, SR., Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause Nos. 17-CR-2262 & 17-CR-2263**

MEMORANDUM OPINION

A jury convicted appellant Eddy Paul Ginn, Sr. of two charges of aggravated sexual assault of a child. On appeal, appellant seeks to set aside his conviction on the grounds that the trial court erred in admitting evidence that he possessed adult pornography. Concluding appellant waived any error regarding admission of the evidence, we affirm.

BACKGROUND¹

Appellant was charged with three counts of sexual assault of a child and found guilty of two counts.

The complainant was five years old at the time her parents separated. The parents had joint custody and allowed the children to alternate weeks, one week living with their father and his parents, and the next week living with their mother. Appellant is the complainant's paternal grandfather, with whom the complainant lived alternating weeks. When the complainant was six years old her father moved out of his parents' home, but the complainant still stayed with the grandparents on alternating weeks.

The complainant was eight years old when she made an outcry of sexual abuse to her mother. The complainant's mother took the complainant to the hospital where the complainant told a sexual assault nurse examiner (SANE) that appellant, her grandfather, forced her to engage in oral sex and tried to penetrate her vagina with his penis. The complainant reported that the assaults began a year earlier, and that they happened "lots of times." The complainant reported that appellant assaulted her at night when everyone else was sleeping.

At trial, the complainant testified that during the weeks she stayed with her grandparents, appellant would frequently sleep in the room alone with the complainant while the complainant's siblings would sleep in the same room as their grandmother. With the help of anatomical diagrams the complainant testified that appellant tried to put his penis in her vagina. The complainant pushed appellant away

¹ Because appellant has not challenged the sufficiency of the evidence supporting his convictions, we include only those facts necessary to provide background for his issue raised in this appeal.

before penetration occurred. The complainant also described appellant performing oral sex on her and forcing her to perform oral sex on him. The abuse began when the complainant was six years old and ended when she was seven or eight.

The complainant also testified that appellant showed her pornographic videos. She further testified that appellant had pornographic CDs in his dresser and magazines under the bed. She knew about the magazines because appellant showed them to her.

The jury found appellant guilty of two counts of sexual assault of a child and the trial court sentenced appellant to fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

ANALYSIS

In a single issue on appeal appellant asserts the trial court erred in allowing the State, during guilt-innocence and punishment, to introduce evidence that appellant possessed pornography. The State responds that appellant failed to preserve error when he stated, "no objection" at the time the photographs of pornography were admitted.

After the jury was seated but before opening statements, the State sought "a pretrial ruling on the admissibility of some items seized from the defendant's home during a search warrant." The following exchange between the prosecutor, defense counsel, and the trial court occurred:

[Prosecutor]: Okay, Judge. So, I was just trying to get a pretrial ruling on the admissibility of some items seized from the defendant's home during a search warrant. There were magazines of adult pornography found under his bed. There, also, is one or two videos found in a dresser next to the bed. And the reason it's being offered is that the child in her outcry disclosed that the defendant showed her magazines of pornography and videos. She described where they would be found in the home. She said they would be in the dresser and under the bed,

which is where they were found. She also stated that on one occasion, he showed her a video on his phone of a young child, which would constitute child pornography. And then finally, some of the magazines that were found, they have — their character is involving young girls, teenage girls. Even though it's legal, that's clearly the way it's marketed, as young girls, things like that, which would be relevant to the defendant's character.

[Defense counsel]: On behalf of defense, Your Honor, my first objection would be it's not relevant under 401 of the code — of the Rules of Evidence. And if the Court decides that it is relevant, then the next one would be that it's merely offered to prove character conformity under 404. And if the Court overrules that, then we want to have the Court make the balancing test about whether the prejudicial weight outweighs the probative value.

THE COURT: Well, I find that it is relevant. I find that it does have probative value, in light of the testimony of the complaining witness. I will limit the State to a portion of the things that he's offering. In other words, not all the magazines, not all the pornography, but enough to demonstrate that it has the same character as what the complaining witness said was shown to her.

[Prosecutor]: Yes, Judge. And my intent was to show a single picture of the stack of magazines. It doesn't even show the covers. It's just to show the pile, as well as the dresser that has a couple of videos in it, and then to have an officer just testify to the titles of some of these.

THE COURT: That's fine. I think it would be pushing the limit to actually introduce those things for the jury to review. I'm sustaining that part of the objection.

[Defense counsel]: Thank you, Judge.

At trial, Officer Evelyn Arredondo testified that she executed a search warrant at appellant's home where she and Officer Conan King seized, among other things, adult pornography. Through Officer King's testimony, the State introduced twenty photographs into evidence. When the photographs were introduced into evidence, appellant's counsel responded, "No objections as to these exhibits, Your Honor." State's exhibit 19, one of the photos, depicted pornographic material located in a

dresser drawer in appellant's master bedroom. State's exhibit 20, another photo, depicted a stack of magazines found under a bed, which King described as pornographic magazines.

King testified that he did not document every magazine, but documented some of them. King testified without objection that the magazines appeared to be "geared towards a younger woman." King then noted several titles of the magazines, without objection. King was shown photographs of some of the magazines and testified to their titles—"Young and Sexy" and "18." King testified that another photograph showed magazines with the titles, "Naked Newly Legal Girls Need You" and "Finally Legal Teen Porn Stars." There was no mention of an exhibit number when the State showed the photographs to King and the record does not reflect any admitted photographs that show the titles of magazines. There was also no objection to any of King's testimony about the magazines.

"Preservation of error is a systemic requirement." *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016). If an issue has not been properly preserved for appeal, a reviewing court should not address the merits of that issue. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). In fact, it is the duty of this court to ensure that a claim is preserved in the trial court before addressing its merits. *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010) (court of appeals should review preservation of error on its own motion).

Appellant asserts that he preserved error by objecting to admission of the pornography before trial. An adverse ruling on a pretrial motion regarding admission of evidence will ordinarily suffice to preserve error on appeal, and a defendant need not specifically object to the evidence when it is later offered at trial. *Thomas v. State*, 408 S.W.3d 877, 881 (Tex. Crim. App. 2013). But a defendant must also take care not to affirmatively indicate that he has "no objection" to the evidence that he

challenged in his pretrial motion when it is later offered at trial, for the Texas Court of Criminal Appeals has held that such an affirmative statement constitutes a “waiver” of the right to raise on appeal the error that was previously preserved. *Id.*

Here, there is room to discuss whether appellant preserved error before trial in that the trial court sustained that portion of appellant’s objection in which he objected to the items of pornography being admitted into evidence. Appellant did not pursue his objection to an adverse ruling. Even if we determine that appellant preserved error before trial, the record reflects appellant waived his objection to the evidence that was offered by affirmatively stating he had “no objection.” *See id.*

“[W]hen assessing the meaning of an attorney’s statement that he or she has ‘no objection’ in regard to a matter that may have been previously considered and ruled upon, courts should first ask whether ‘the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his ‘no objection’ statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal.’” *Stairhime v. State*, 463 S.W.3d 902, 906 (Tex. Crim. App. 2015) (quoting *Thomas*, 408 S.W.3d at 885). If, after applying the test, it remains ambiguous whether abandonment was intended, then we must resolve the ambiguity in favor of finding waiver. *Id.*

The record in this case is not ambiguous. Before trial appellant objected to the State’s introduction of pornography found during the search warrant executed on appellant’s house. The trial court sustained a portion of appellant’s objection and allowed the State to introduce photographs of the pornography found in a dresser drawer and magazines under a bed (corroborating the complainant’s testimony). When the State introduced the photographs into evidence, appellant affirmatively stated he had “[n]o objection to these exhibits.” Appellant waived his objection to the photographs of pornography admitted into evidence. *See Stairhime*, 463 S.W.3d

at 906.

Appellant complains generally of King's testimony about the titles of the pornographic magazines. Appellant also failed to preserve error with regard to King's testimony by failing to object at the time King testified. *See* Tex. R. App. P. 33.1.

Appellant also complains generally about the trial court's admission of evidence that appellant possessed pornography during the punishment phase of trial. Our review of the record reflects there was no admission of evidence at punishment that appellant possessed pornography. The only mention of pornography at the punishment phase was during the State's closing argument. The prosecutor argued, without objection, that the complainant testified about appellant showing her pornography. Therefore, appellant also waived error with regard to the prosecutor's mention of pornography during closing argument at punishment. *See Compton v. State*, 666 S.W.3d 685, 728 (Tex. Crim. App. 2023) (concluding that a defendant may not complain on appeal that jury argument was improper if he did not object at trial).

Appellant's "no objection" statement demonstrates that appellant took no issue with the evidence and intended to waive his right to appeal admission of the evidence at trial. *See Swain v. State*, 181 S.W.3d 359, 368 (Tex. Crim. App. 2005) (defendant waived any error in admission of State's exhibits, when after State offered such exhibits into evidence, defendant affirmatively stated he had no objections). We overrule appellant's issue on appeal.

CONCLUSION

Having overruled appellant's sole issue on appeal we affirm the trial court's judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Chief Justice Christopher and Justices Zimmerer and Poissant.

Do Not Publish — Tex. R. App. P. 47.2(b).