



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00310-CR

Willie Antonio **ORTIZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR0278
Honorable Mary D. Roman, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: February 24, 2016

AFFIRMED

A jury convicted Willie Antonio Ortiz of three counts of aggravated sexual assault and two counts of indecency with a child. On appeal, Ortiz complains about the trial court's decision to exclude certain evidence. We affirm.

BACKGROUND

Ortiz had a long-term relationship with Maria Mesa. Although never married, Ortiz and Mesa lived together for many years. Ortiz and Mesa had a son together. Mesa also had three daughters from prior relationships. Mesa's youngest daughters, G.G. and C.G., lived with Mesa

and Ortiz consistently. Mesa's eldest daughter, E.M.L., lived with Mesa and Ortiz sporadically. G.G. and C.G. were twins.

When G.G. and C.G. turned eighteen they each filed complaints against Ortiz, alleging that he had sexually assaulted them when they were children. Ortiz was indicted for multiple counts of aggravated sexual assault and indecency with a child. Ortiz pled not guilty, and the case was tried to a jury.

The State called G.G., C.G., and several other witnesses to testify during its case-in-chief. Mesa and Ortiz testified for the defense. The State called Mesa's oldest daughter, E.M.L., to testify as a rebuttal witness. The jury convicted Ortiz of three counts of aggravated sexual assault and two counts of indecency with a child. All of these counts involved G.G. The trial court sentenced Ortiz to sixty years in prison on the aggravated sexual assault counts and twenty years in prison for the indecency with a child counts. The sentences were ordered to run concurrently.

On appeal, Ortiz argues the trial court abused its discretion in excluding evidence concerning Mesa's problems with E.M.L. Ortiz further argues his convictions should be reversed because the exclusion of the evidence was harmful.

EXCLUSION OF EVIDENCE

During Mesa's testimony, defense counsel asked her, "And did you have problems with [E.M.L.]?" The State objected to the question based on relevance. The trial court heard arguments on the objection outside of the jury's presence. Defense counsel argued his question was relevant because

[E.M.L.] left the home early. She was kind of a wild child, and because Mr. Ortiz attempted to impose some limits, some discipline on [G.G. and C.G.], I think that's part of the friction and I think that's part of the motivation for the allegations [G.G. and C.G.] have made against him.

The trial court sustained the State's objection, stating, "[E.M.L.] is not part of this, so it's not relevant, and [the State's] objection is sustained." Defense counsel then stated, for purposes of the record, that the trial court's ruling had unfairly limited his ability to explore a defensive theory.

After the trial court sustained the State's objection, defense counsel went on to elicit testimony from Mesa that Ortiz had attempted to place limits on C.G. and G.G. and to discipline them while they were growing up. Mesa further testified that G.G. and C.G. obeyed these limits.

We review a trial court's decision to exclude evidence under an abuse of discretion standard. *Walters v. State*, 247 S.W.3d 204, 217 (Tex. Crim. App. 2007). A trial court abuses its discretion only when the decision lies outside the zone of reasonable disagreement. *Id.* We review the trial court's ruling in light of what was before the trial court at the time it made its ruling. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

"A defendant has a fundamental right to present evidence of a defense so long as the evidence is relevant and is not excluded by an evidentiary rule." *Miller v. State*, 36 S.W.3d at 503, 507 (Tex. Crim. App. 2001). To be relevant, evidence must be material and probative. *Id.* Evidence is material if it is addressed to the proof of any fact of consequence to the determination of the action. *Id.* Evidence is probative if it tends to make the existence of a material fact more or less probable than it would be without the evidence. *Id.*

The crux of Ortiz's argument is that the excluded evidence was significant to his defensive theory that G.G. and C.G. were motivated to make false allegations against him because Ortiz had disciplined them in the past. The State counters that the excluded evidence was not relevant because it was not material. The trial court's decision to exclude the evidence certainly lies within the zone of reasonable disagreement. At the time the evidence was offered, the trial court could have reasonably concluded that whether Mesa had problems with E.M.L., who was not a complainant in this case, was not material. In other words, the trial court could have reasonably

concluded that evidence of any problems Mesa had with E.M.L. did not address the proof of any fact that was of consequence to the determination of the charges before it. We, therefore, hold that the trial court did not abuse its discretion in deciding to sustain the State's relevance objection and exclude the evidence.

HARM ANALYSIS

But even if the trial court's ruling was an abuse of discretion, any error was harmless. The erroneous exclusion of evidence generally constitutes non-constitutional error and is reviewed under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Walters*, 247 S.W.3d at 219. An exception exists when erroneously excluded evidence offered by a criminal defendant forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense. *Id.* Exclusion of evidence might rise to the level of a constitutional violation if (1) a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense; or (2) a trial court's clearly erroneous ruling results in the exclusion of evidence that forms the vital core of a defendant's theory of defense and effectively prevents him from presenting that defense. *Id.* When this transpires, the standard for constitutional errors, Rule 44.2(a), applies. *Id.* However, when the excluded evidence does not prevent a defendant from presenting a defense, but only incrementally furthers a defensive theory, any corresponding error is non-constitutional and the harm standard articulated in Rule 44.2(b) applies. *See id.* at 222.

Here, the record shows that one of Ortiz's defensive theories was that G.G. and C.G. were motivated to make false accusations against him because he had disciplined them and set limits on them in the past. During his own testimony, Ortiz testified that he had disciplined G.G. and C.G. because he did not want them to have the same problems as E.M.L. In addition, during Mesa's testimony, defense counsel elicited testimony that Ortiz had attempted to place limits on C.G. and

G.G. and to discipline them while they were growing up. Therefore, the record shows that Ortiz was not prevented from presenting his defense. *See Ray v. State*, 178 S.W.3d 833, 836 (Tex. Crim. App. 2005) (“[B]ecause appellant was permitted to testify about her defensive theory, we cannot say that the exclusion of [an acquaintance’s] testimony effectively prevented her from presenting her defense.”). At most, the excluded evidence would have only incrementally furthered Ortiz’s defense. We conclude that any error in excluding the evidence was non-constitutional in nature. *See id.* (concluding court of appeals did not err in declining to apply a constitutional harm analysis when the exclusion of evidence did not prevent the appellant from presenting her defense).

Because any error was non-constitutional, we apply the harm standard under Rule 44.2(b). *Walters*, 247 S.W.3d at 219. Under Rule 44.2(b), we must disregard any error that does not affect Ortiz’s substantial rights. *See TEX. R. APP. P. 44.2(b)*. We cannot overturn a criminal conviction for non-constitutional error if we, after examining the record as a whole, have fair assurance that the error did not influence the jury, or only influenced the jury slightly. *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011).

In this case, both G.G. and C.G. testified at length about the charged offenses and the circumstances that led them to file complaints against Ortiz. In addition, one of G.G.’s friends testified that when she and G.G. were in high school, G.G. told her that G.G. had been sexually abused by Ortiz. Thereafter, Ortiz was given the opportunity to develop his defense. Ortiz testified at length about E.M.L.’s behavioral problems and his discipline of G.G. and C.G. According to Ortiz, E.M.L. would sneak out of the house without Mesa’s permission. Ortiz said he had discussed E.M.L.’s behavioral problems with Mesa, but Mesa felt she could not do anything about it. Ortiz also testified that, after E.M.L. left home, Mesa, G.G., and C.G. left San Antonio for about a year to follow E.M.L. Ortiz stated that he did not want G.G. and C.G. to grow up like E.M.L. Ortiz then testified about his attempts to impose discipline on G.G. and C.G., and their reactions to this

discipline. Ortiz said that initially G.G. and C.G. listened to him, but once they turned seventeen or eighteen, they would argue with him. Finally, E.M.L. acknowledged in her testimony that she had left home without her mother's permission when she was fourteen years old. E.M.L. later returned to live with her mother and Ortiz for about five or six months, but then, at age fifteen, she left again and rented her own apartment. E.M.L. testified that she left home because she did not get along with Ortiz and she felt like she had to leave.

The State's case hinged, in large part, on the jury's determination of the credibility of G.G. and C.G. Furthermore, Ortiz was permitted to develop his defense before the jury. After reviewing the record as a whole, we are convinced that the exclusion of Mesa's testimony about the problems she had with E.M.L. did not affect Ortiz's substantial rights.

CONCLUSION

The trial court's judgment is affirmed.

Karen Angelini, Justice

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