Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00741-CR

Eduardo Ernesto **CARIELO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR2826
Honorable Kevin M. O'Connell, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 12, 2017

AFFIRMED

Appellant Eduardo Ernesto Carielo was convicted by a jury of one count of aggravated sexual assault and two counts of indecency with a child and was assessed punishment at thirty-years' and twenty years' confinement, respectively, in the Institutional Division of the Texas Department of Criminal Justice. Carielo raises two issues on appeal contending: (1) the trial court committed fundamental error in sua sponte asking an adolescent child leading questions about truth and honesty in front of the jury; and (2) the trial court erred in admitting unreliable testimony regarding an outcry statement. We overrule Carielo's issues and affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A.P. spent several weeks with Carielo, her father, during the summer of 2012. A.P. was nine-years-old at that time.

On September 30, 2012, A.P. told her mother that Carielo sexually abused her during the time she stayed with him. After an investigation, Carielo was indicted for one count of aggravated sexual assault and two counts of indecency with a child. After several days of trial, the jury convicted Carielo on all three counts. Carielo appeals.

TRIAL COURT QUESTIONING

In his first issue, Carielo contends the trial court committed fundamental error in sua sponte asking A.P. leading questions about truth and honesty in front of the jury.[1] Acknowledging that counsel did not lodge any objection to the questions, Carielo contends that because the questions rose to the level of fundamental error, he was not required to make an objection to preserve the error for appellate review. The State responds Carielo was required to object because the questions did not rise to the level of fundamental error.

The record reflects the following occurred when A.P. was called as the State's first witness at trial:

THE COURT:	Call your first witness.
[Prosecutor]:	State calls [A.P.], Your Honor.
THE COURT:	I need you to rise [sic] your right-hand [sic]?
	(Witness sworn)
THE COURT:	You understand what the truth means and everything else. Right? And you swear to tell the jury the truth. Right?
THE WITNESS:	Yes.

[1] In the body of his brief, Carielo makes reference to other comments made by the trial court; however, his issue only challenges the questions the complainant was asked about truth and honesty. We only address the issue expressly presented. We note, however, that "a trial judge's irritation at the defense attorney does not translate to an indication as to the judge's views about the defendant's guilt or innocence." *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). In addition, [a] trial judge has broad discretion in maintaining control and expediting the trial." *Id*.

Carielo asserts the trial court's questions bolstered A.P.'s credibility by conveying the impression that the trial court found A.P. to be truthful.

"Generally, a claim that the trial court erred by commenting on the weight of the evidence during trial or while ruling on evidentiary matters must be preserved by objection before the appellate court may consider it." *Morgan v. State*, 365 S.W.3d 706, 710 (Tex. App.—Texarkana 2012, no pet.). In his brief, Carielo relies on *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000), to assert an objection is not required when a judicial comment rises to the level of fundamental error. As Carielo also recognizes, however, *Blue* is a plurality opinion without precedential value. *Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013) (holding "the *Blue* decision has no precedential value"). Even if we followed *Blue*, a trial court's comment would not constitute fundamental error under the plurality's holding unless it "rose to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *See Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001).

In *Blue v. State*, 41 S.W.3d at 130, "at the beginning of the jury selection process, the trial judge apologized to a group of prospective jurors for their long wait." In doing so, the trial judge informed the jurors the defendant was going "back and forth" in deciding whether to accept a plea deal or go to trial. *Id*. The trial judge also stated he preferred the defendant to plead, and "we were all trying to work toward that and save you time and cost of time." *Id*. A plurality of the Court of Criminal Appeals concluded, "the judge's comments imparted information to the venire that tainted the presumption of innocence." *Id*. at 132. The plurality explained:

> A juror who knows at the outset that the defendant seriously considered entering into a plea agreement no longer begins with a presumption that the defendant is innocent. A juror who hears the judge say that he would have preferred that the defendant plead guilty might assume that the judge knows something about the guilt of the defendant that the juror does not. Surely, no trial judge would want an

> innocent man to plead guilty, no matter how much delay and expense he might be causing.

Id.

Unlike the comment in *Blue*, the trial court's questions in this case did not impart information about the case that the jurors would not otherwise know. Because the questions immediately followed the oath, the questions simply sought additional affirmation that A.P. understood her obligation to tell the truth. As such, the questions did not taint the presumption of innocence or vitiate the impartiality of the jury. *See Jasper*, 61 S.W.3d at 421. Therefore, even under the plurality's holding in *Blue*, an objection was required to preserve Carielo's right to complain about the trial court's questions on appeal because they did not rise to the level of fundamental error. Because no objection was made to the questions, Carielo's first issue was not preserved for appellate review and is overruled. *See Morgan*, 365 S.W.3d at 710.

RELIABILITY OF OUTCRY STATEMENT

In his second issue, Carielo contends the trial court abused its discretion in overruling his objections to the outcry statement. Carielo asserts the trial court erred in determining the outcry statement was sufficiently reliable to submit to the jury.

A. Standard of Review and Applicable Law in Determining Reliability

Article 38.072 provides an exception to the hearsay rule allowing "outcry" statements made by children "younger than 14 years of age" be admitted at trial if the statements "were made to the first person, 18 years of age or older, other than the defendant," to whom the victim, in some discernable manner, described an alleged offense of sexual abuse. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2016); *Sanchez v. State*, 354 S.W.3d 476, 487 (Tex. Crim. App. 2011). A trial court has broad discretion in determining the admissibility of outcry statements, and the trial court's exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion

is established by the record. *Garcia*, 792 S.W.2d at 92; *Marquez v. State*, 165 S.W.3d 741, 746 (Tex. App.—San Antonio 2005, pet. ref'd).

Before admitting an outcry statement, the trial court must conduct a hearing outside the presence of the jury to determine if "the statement is reliable based on the time, content, and circumstances of the statement." TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2). The phrase "time, content, and circumstances" refers to the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of the statement. *Sanchez*, 354 S.W.3d at 487 (quoting *Broderick v. State*, 89 S.W.3d 696, 697–98 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd)); *Marquez*, 165 S.W.3d at 747. The trial court, however, is not charged with determining the reliability of the statement based on the credibility of the outcry witness. *Sanchez*, 354 S.W.3d at 487–88. In reversing a decision from one of our sister courts, the Texas Court of Criminal Appeals explained:

> The Court of Appeals believed that because an indicium of reliability is whether the outcry was prompted or manipulated by adults, evidence of the outcry witness's biases is relevant at an Article 38.072 hearing. This is not correct. The outcry witness's biases may be such that a fact-finder would not believe the outcry statement as relayed by the witness, but that is not a matter that the legislature has given to the trial court's discretion. The same is true of the outcry witness's ability to remember, which the court below also thought relevant at an Article 38.072 hearing.

Id. at 488.

In conducting the article 38.072 hearing, the trial court may consider the following indicia of reliability:

> (1) whether the child victim testifies at trial and admits making the out-of-court statement,
>
> (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate,
>
> (3) whether other evidence corroborates the statement,

(4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults,

(5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty,

(6) whether the statement is consistent with other evidence,

(7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate,

(8) whether the child behaves abnormally after the contact,

(9) whether the child has a motive to fabricate the statement,

(10) whether the child expects punishment because of reporting the conduct, and

(11) whether the accused had the opportunity to commit the offense.

Gonzalez v. State, 477 S.W.3d 475, 479 (Tex. App.—Fort Worth 2015, pet. ref'd) (quoting *Norris v. State*, 788 S.W.2d 65, 71 (Tex. App.—Dallas 1990, pet. ref'd)); *see also Torres v. State*, 424 S.W.3d 245, 257 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). In considering these factors, the trial court must focus on the outcry statement and not on the circumstances of the alleged abuse. *Broderick*, 89 S.W.3d at 699. "A child's outcry statement may be held reliable even when it contains vague or inconsistent statements about the actual details of the sexual abuse." *Id*. "Any inconsistency between the testimony of [the outcry witness] and [the child] is a matter of credibility and goes to the weight of the evidence, not its admissibility." *Marquez*, 165 S.W.3d at 747.

B. Testimony of Outcry Witness at Hearing Outside Jury's Presence

The State called A.P.'s mother, F.P.,[2] as the outcry witness. F.P. testified she had an affair with Carielo while they were both married to other people. Carielo lived in San Antonio, and F.P. lived in Corpus Christi. During the course of the affair, F.P. and her husband separated and subsequently divorced. The affair lasted about a year and ended shortly after Carielo's wife learned about the affair. In the summer of 2002, F.P. became pregnant. After telling Carielo about the pregnancy, F.P. did not see him again. A.P. was born on April 21, 2003.

[2] To protect the minor's identity, we refer to the mother as F.P. *See* TEX. R. APP. P. 9.8.

F.P. applied for government assistance when A.P. was about six months old. The application required F.P. apply for child support through the attorney general's office. Paternity tests proved that Carielo was A.P.'s father. Carielo and F.P. agreed to joint custody of A.P., and A.P. visited with Carielo approximately four or five times before she turned three years old. After A.P. turned three, Carielo was able to have visitation for entire weekends; however, Carielo rarely exercised his visitation rights.

In 2012, when A.P. was nine years old, F.P. called Carielo and asked if he would keep A.P. from June 2nd through July 7th. During that visit, F.P. called and spoke with A.P. every day. F.P. also went to San Antonio to visit A.P. on June 16, 2012. A.P. never told F.P. about any sexual abuse during their phone calls or her visit.

A couple of months later, on September 30, 2012, F.P., her boyfriend, and A.P. were seated in F.P.'s parked car. F.P. was seated in the driver's seat, and A.P. was seated behind her in the back seat. F.P.'s boyfriend gave F.P. a package that he purchased online. When A.P. inquired about the package's contents, F.P.'s boyfriend told her it was a toy for F.P. that A.P. could not see. Knowing the package contained a vibrator, F.P. did not look at the contents. Instead, F.P. drove back to her apartment and hid the package. F.P. and A.P. then drove to the grocery store. When F.P. testified that A.P. expressed further curiosity about the package on their way to the grocery store, Carielo's attorney requested an article 38.072 hearing outside the presence of the jury and the jury was excused.

Outside the jury's presence, F.P. testified A.P. stated the package contained "one of those things that you turn." F.P., who was texting her boyfriend, stopped and gave A.P. her full attention. A.P. then made a motion and said, "it's one of those things that you turn (indicating) and you put it on your bell." F.P. testified A.P. used the word "bell" to refer to her vagina. Knowing the package contained a vibrator, an upset F.P. asked A.P. "who spoke to you about this?" When A.P.

reluctantly identified Carielo, F.P. told A.P. that Carielo did not have any business talking to her about those things. F.P. also told A.P. she was going to call Carielo. A.P. asked F.P. not to call because Carielo was going to get mad. When F.P. again stated she intended to call Carielo, A.P. became frightened and denied Carielo said anything about it.

At that point, F.P. and A.P. went inside the grocery store. After F.P. picked up a loaf of bread, A.P. told her, "Mommy, daddy hurt me." When F.P. asked A.P. how Carielo hurt her, A.P. stated, "Daddy hurt me. Daddy hurt my biscuit." F.P. inquired further and A.P. told her that "he put his finger in her biscuit." According to F.P., "biscuit" was another word A.P. used for vagina. A.P.'s statement made F.P. sick to her stomach. F.P. called her boyfriend, who told her to call 911. After talking to the 911 operator, F.P. took A.P. to the hospital.

While driving to the hospital, A.P. also told F.P. that Carielo made her shower with him and massage his "wee wee," and that Carielo made her play a game that required her to take off her clothes. F.P. told A.P. to wait and tell her the rest when they arrived at the hospital because F.P. was afraid the information would cause her to have an accident.

At the hospital, A.P. described two vibrators. A.P. said one vibrator was blue and looked like an animal, and the second vibrator looked more normal. Because a Sexual Assault Examiner (SANE) was not available at the hospital, and given the amount of time that had elapsed since the abuse, A.P. was not examined until a few days later. After A.P.'s SANE exam and forensic interview, A.P. told F.P. more details about the abuse.

On cross-examination, F.P. testified she had given one statement to a detective regarding A.P.'s outcry, but was unable to recall how many other times she recounted the outcry. After further prompting, F.P. recalled giving a statement to a nurse or social worker when she took A.P. for her SANE exam; however, F.P. was unable to recall the specifics of the statement she provided to the nurse or social worker. F.P. also could not recall if the SANE nurse told her what A.P. said

during the exam. After additional prompting, F.P. testified she believed she also told CPS about A.P.'s outcry. F.P. recalled taking A.P. to the CPS office for her forensic interview, but F.P. testified she did not watch the interview. After the interview, F.P. recalled being informed that the evidence showed A.P. was sexually assaulted and a reference was made to ejaculation. F.P. stated this was the first time she heard about any ejaculation. F.P. provided the detective with her statement after A.P.'s SANE exam and forensic interview by completing the form that was faxed to her and returning the form by fax.

When cross-examined about her written statement to the detective, F.P. agreed she did not specifically state A.P. mentioned the vibrators on the way to the hospital. Instead, the written statement indicates the conversation occurred at the grocery store. F.P. also could not recall if she told the nurse/social worker or CPS worker about the number of vibrators and A.P.'s description of them. F.P. stated it was possible she obtained those details in later conversations with A.P. F.P. denied her written statement contained information she received from the case worker or SANE nurse, but she agreed her reference to Carielo ejaculating was information she received after the forensic interview.

On re-direct examination, F.P. testified the details she provided on direct examination were based on statements A.P. made at the grocery store and on their drive to the hospital. After that day, A.P. provided F.P. with additional details of the abuse.

C. Analysis

In considering the indicia of reliability, A.P. testified at trial and admitted making the outcry to F.P. A.P. demonstrated that she understood the need to tell the truth and possesed the ability to observe, recollect, and narrate. A.P.'s outcry was clear and unambiguous and made spontaneously, using her own terminology like bell and biscuit. A.P.'s statement described an

event that a nine-year-old child could not be expected to fabricate. A.P. had no motive to fabricate her statement, and she was frightened after telling F.P. about the abuse.

Other evidence admitted at trial was consistent with and corroborated A.P.'s outcry statement. For example, Carielo and his wife admitted to owning two sexual devices, both admitted into evidence and matched A.P.'s descriptions. In addition, Carielo and his wife admitted Carielo spent time alone with A.P. while Carielo's wife was at work, giving him the opportunity to commit the offenses. Carielo admitted describing strip poker to A.P., but denied actually playing the game with her.

Although A.P. did not behave abnormally after the contact, the trial court did not abuse its discretion in determining all the other indicia of reliability were present. *See Gonzalez*, 477 S.W.3d at 479. Accordingly, the trial court did not err in determining A.P.'s outcry statement was reliable.

Carielo's second issue is overruled.

CONCLUSION

Having overruled each of Carielo's issues on appeal, we affirm the trial court's judgment.

Patricia O. Alvarez, Justice

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