# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-16-00320-CR

Willie David **FLOYD**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR10665
Honorable Kevin M. O'Connell, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: June 14, 2017

AFFIRMED

Willie David Floyd was convicted by a jury of four counts of aggravated sexual assault of his daughter. The sole issue presented on appeal is whether the trial court erred in admitting outcry testimony without first conducting a hearing in compliance with article 38.072 of the Texas Code of Criminal Procedure. We affirm the trial court's judgments.

### BACKGROUND

Before the jury was sworn, the following discussion was held regarding the State's introduction of outcry testimony:

> THE COURT: Now have you received his motion in — to designate or indesignate [sic] outcry witness.
>
> [PROSECUTOR]: Yes, Judge. We can at this point say we are calling Michelle Mendez with intention of having her testify as to outcry statements. Annette Santos is being called for the medical exception to the hearsay rule. So at this point we wouldn't even be offering her as an outcry, but as medical testimony. And Carolyn Briones, we are not intending on calling her as an outcry. Officer Balderas, we would potentially call him in rebuttal, but not intending to designate him as an outcry now.
>
> THE COURT: That sounds fair enough. So sounds like Michelle Mendez is your only outcry at this point.
>
> [PROSECUTOR]: Yes, sir.
>
> THE COURT: Did you get that, [defense counsel]?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: If that changes or anything else like that, approach please before we go into that. And if you need a hearing outside the presence at any time all you got to do is ask for it.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

Later, during Mendez's testimony, the following exchange occurred:

> Q. And did you ever hear [the complainant] discuss a Willie or Willie Floyd at all before this date?
>
> A. Yes. She would — when she was with J.F., a lot, her little brother. She would tell him don't do that, Willie is going to get mad.
>
> [DEFENSE COUNSEL]: I'm going to have to object to any hearsay that's not covered by court order.
>
> THE COURT: That's sustained.
>
> Ms. Mendez, there's several exceptions to the hearsay rule. One of them might be an outcry, but anything else [the complainant] might have told you is hearsay. So don't tell us what she said unless I allow you to.
>
> THE WITNESS: Oh, okay.

Mendez then proceeded to testify that the complainant asked to speak with her in private before the complainant was sent home for the weekend. The complainant and her siblings were living in a children's shelter because they had been removed from their parent's care, and Mendez was an assistant supervisor at the shelter. The complainant told Mendez that she was afraid of Willie, who is her dad, because he rapes her and has "S E X" with her. Mendez then testified about the details the complainant provided regarding the abuse. No additional objections were made to any of the foregoing testimony.

**PRESERVATION OF ERROR**

Citing the Texas Court of Criminal Appeals decision in *Long v. State*, 800 S.W.2d 545 (Tex. Crim. App. 1990), Floyd contends he preserved his complaint about the trial court's failure to conduct a hearing regarding the admissibility of the outcry testimony based on the above-quoted hearsay objection made by defense counsel. The State responds *Long* is distinguishable because the trial court in *Long* overruled the objection, while the trial court in the instant case sustained the hearsay objection made by defense counsel. After the objection was sustained, defense counsel did not make any further objection or request a hearing when Mendez proceeded to testify regarding the complainant's outcry.

Initially, we question whether the hearsay objection made by defense counsel was an objection to the outcry testimony. When the objection was made, Mendez was testifying about a statement the complainant made to her brother which was not related to any outcry statement. The objection was to "any hearsay that's not covered by court order." The trial court then explained to Mendez that the complainant's outcry might be admissible under an exception to the hearsay rule, "but anything else [the complainant] might have told you is hearsay." Accordingly, we construe the objection as being limited to hearsay testimony other than the outcry statements.

Even if the objection is broadly construed to cover all hearsay statements by the complainant, including her outcry statements, we agree with the State that *Long* is distinguishable. In *Long*, the appellant objected to the testimony of the complainant's mother on hearsay grounds. 800 S.W.2d at 546. On appeal, the appellant complained that the mother's testimony "was hearsay and should not have been allowed because the trial court failed to conduct a hearing to determine whether the statement was reliable, and so the mandatory requirements of [article] 38.072 were

not followed."[1] *Id*. The intermediate appellate court held the objection did not comport with the appellant's complaint on appeal because the objection was a general objection to hearsay that was not sufficient to preserve error. *Id*. The Texas Court of Criminal Appeals granted the appellant's petition for discretionary review "to determine whether the hearsay objection was sufficient to preserve [his complaint]." *Id*.

The Texas Court of Criminal Appeals first noted compliance with article 38.072 is mandatory in order to render outcry testimony admissible over a hearsay objection. *Id*. at 547. The court asserted the State, as the proponent of the evidence, had the burden to satisfy each requirement of the statute for the mother's testimony to be admissible. *Id*. at 548. The court then held the trial objection preserved the appellant's complaint on appeal, reasoning:

> Appellant preserved error by raising an objection to hearsay. The burden then became the State's to show the evidence was admissible pursuant to either the provisions of Art. 38.072 or to some other exception to the hearsay rule. However, because the trial court immediately overruled the objection, instead of immediately convening a hearing, the State was not required to indicate whether any exception was applicable, or to even show it had complied with the provisions of the statute. On appeal, appellant argued not only noncompliance with the statute, but also that the evidence was hearsay and should not have been admitted because the trial court failed to hold the required hearing to determine its reliability. This argument adequately comported with the trial objection.

*Id*.; *but see Cordero v. State*, 444 S.W.3d 812, 817 (Tex. App.—Beaumont 2014, pet. ref'd) (following *Long* but noting "a split of opinion in the court of appeals as to whether a general 'hearsay' objection is sufficient to preserve an issue that the requirements of article 38.072 have been met or whether a more specific objection is required"); *Halbrook v. State*, 322 S.W.3d 716,

[1] Article 38.072 provides, in pertinent part, that an outcry statement is not inadmissible because of the hearsay rule if "the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement." TEX. CODE CRIM. PROC. ANN. art. 38.072(b)(2) (West Supp. 2016).

721–22 (Tex. App.—Texarkana 2010, no pet.) (noting the split); *Zarco v. State*, 210 S.W.3d 816, 828–29 (Tex. App.—Houston [14th Dist.] 2006 no pet.) (discussing the split).

Key to the court's analysis in *Long* was that the trial court immediately overruled the objection instead of convening the hearing required by article 38.072. *See Long*, 800 S.W.2d at 548. As previously noted, unlike the trial court's ruling in *Long*, the trial court in the instant case sustained defense counsel's objection. Because the trial court sustained the objection, defense counsel needed to make an additional hearsay objection when the State questioned Mendez about the complainant's outcry statements, and defense counsel needed to obtain an adverse ruling on his objection in order to preserve his complaint for our review. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (noting party must object each time the inadmissible evidence is offered in order to preserve error); *Dixon v. State*, 2 S.W.3d 263, 265 (Tex. Crim. App. 1998) (noting party must obtain an adverse ruling from the trial court to preserve error for appellate review); *Barroso v. State*, Nos. 14-06-00994-CR & 14-06-00995-CR, 2008 WL 220327, at *5 (Tex. App.—Houston [14th Dist.] Jan. 29, 2008, pet. ref'd) (not designated for publication) (holding appellant failed to preserve error regarding trial court's failure to hold hearing where his hearsay objection to outcry testimony was sustained and "there was no basis for the trial court to conduct a hearing regarding the admissibility of the complained of testimony"). Because Floyd did not: (1) make any additional objection to the outcry testimony; (2) obtain an adverse ruling on the objection he did make; or (3) request a hearing regarding admissibility, Floyd's complaint is not preserved for our review. Therefore, the sole issue Floyd presents on appeal is overruled.

## CONCLUSION

The trial court's judgments are affirmed.

Sandee Bryan Marion, Chief Justice

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