



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-16-00406-CR

Carl Wade **BAILES**,  
Appellant

v.

The **STATE** of Texas,  
Appellee

From the 290th Judicial District Court, Bexar County, Texas  
Trial Court No. 2013CR0076  
Honorable Melisa Skinner, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice  
Rebeca C. Martinez, Justice  
Irene Rios, Justice

Delivered and Filed: December 6, 2017

**AFFIRMED**

A jury found appellant Carl Bailes guilty of five counts of the offense of aggravated sexual assault of a child and eight counts of the offense of sexual assault of a child. The trial court assessed punishment at life imprisonment for each count of aggravated sexual assault of a child and twenty years' imprisonment for each count of sexual assault of a child. In a single issue on appeal, Bailes contends the trial court erred by excluding evidence of specific instances of the complainant's past sexual behavior. We affirm the judgment of the trial court.

## **BACKGROUND**

On October 4, 2012, the complainant made an outcry to her mother (Mother) against Bailes. The complainant related to Mother that Bailes began engaging in sexual acts with the complainant when she was five years' old; at the time of the outcry, the complainant was sixteen years' old. Over the years, the sexual acts progressed from oral sexual acts to anal penetration to vaginal penetration. Mother contacted authorities to report the outcry.

A grand jury subsequently indicted Bailes in a sixteen-count indictment, which alleged five counts of the offense of aggravated sexual assault of a child and eleven counts of the offense of sexual assault of a child. The State waived and abandoned two counts of sexual assault of a child prior to trial. The jury found Bailes guilty of the offense of aggravated sexual assault of a child as charged in counts one through five of the indictment, and of the offense of sexual assault of a child as charged in counts six, seven, and nine through fourteen. The jury found Bailes not guilty of the offense of sexual assault of a child as charged in count eight of the indictment. Bailes elected for the trial court to assess punishment. The trial court assessed punishment at life imprisonment for counts one through five, and at twenty years' imprisonment for counts six, seven, and nine through fourteen. The trial court ordered for the sentences on counts one, two, and seven to be served consecutively, and for the sentences for all other counts to be served concurrently.

This appeal followed.

## **ANALYSIS**

In a single issue, Bailes contends that the trial court violated Rule 412(b)(2)(B) of the Texas Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution by prohibiting his lawyer from cross-examining the complainant about the complainant's past sexual behavior. Bailes argues that evidence of the complainant's prior sexual conduct was admissible to show bias and motive to make false accusations against him under

Texas Rules of Evidence 404(b), 412(b)(2), and 613(b). Bailes further argues his constitutional right to confront the witness against him was violated by the exclusion of testimony regarding the sexual components of the complainant's past relationships with other individuals.

### **Standard of Review**

We review the trial court's decision on the admissibility of evidence under an abuse of discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* If the trial court's evidentiary ruling is correct under any applicable theory of law, it will not be disturbed. *Id.*

To preserve error as to a ruling excluding evidence, a party must inform the trial court of the substance of the evidence by making an offer of proof, unless the substance of the evidence is apparent from context. TEX. R. EVID. 103(a)(2). An offer of proof may be made either in question and answer format or by counsel's summary; however, if the latter method is used, the summary must be reasonably specific so that the appellate court is able to assess the relevance and admissibility of the proof. *Holmes v. State*, 323 S.W.3d 163, 168 (Tex. Crim. App. 2009). Additionally, counsel must explain in the trial court why the proof in question is admissible and, on appeal, cannot predicate error on a ground different than that argued before the trial court. *Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005).

### **Discussion**

The trial court held a pre-trial hearing regarding Bailes's motion to suppress evidence collected by law enforcement agents. During Mother's testimony, Bailes's counsel asked Mother whether the complainant had a boyfriend. The trial court interrupted the questioning, and the following exchange took place:

[The Court]: I'm missing the legal consequence of this if we're trying to have a motion to suppress. I'm wondering how this goes to whether or not the authority should have been in possession of this camera. Isn't that what this is about? It's a motion to suppress.

[Counsel]: I'm trying — yes, it is a motion to suppress. I'm trying to suppress the — this video from being used against my client in his trial based — I'm trying to establish the fact that it could be other people and not my client.

[The Court]: Okay. That still does not affect whether or not the authorities should have taken this camera, whether or not it was evidence that should be suppressed because it's somehow the fruit of the poisonous tree. I thought that's what we're here for, to determine whether or not the authorities had the right under the law to be in possession of this equipment. No?

Bailes's counsel agreed and thereafter, limited questioning during the motion to suppress hearing to questions related to the subject matter contained in Bailes's motion to suppress.

Later, during further pre-trial proceedings, the trial court heard argument on the State's motion in limine addressing the complainant's past sexual relationships. At that time, Bailes's counsel offered no counter-arguments to the State's reasoning. The trial court granted the motion in limine, which required a hearing outside the jury's presence prior to any questioning regarding the complainant's past sexual relationships.

During the State's direct examination of the complainant, the jury was excused for a hearing regarding the admissibility of videos, text messages, and Facebook messages. The State and Bailes's counsel questioned the complainant about the videos, text messages, and Facebook messages. Bailes's counsel then requested the trial court's permission to question the complainant about any boyfriends the complainant may have had. The following exchange took place:

[Counsel]: Since we're outside the presence of the jury, I'd like to inquire, it's something that's covered in the motion in limine, since we're outside the presence of the jury, may I make the inquiry?

[The Court]: About?

[Counsel]: If she had any boyfriends or anything — if this is her — I'm going to address now the other person in the video.

On voir dire, Bailes's counsel elicited testimony from the complainant about her past relationships, including a past sexual relationship with a boyfriend, A.B. The complainant testified she began dating A.B. when she was 15 years old. The complainant characterized her relationship with A.B. as "serious" but then also described the relationship as off-and-on. The complainant admitted the two were sexually active but denied she and A.B. were sexually active in the summer of 2011 when the videos of the complainant having sex with a male she identified as Bailes were allegedly made. The complainant stated she and A.B. did not become sexually active until near the end of their relationship, which the complainant testified ended in the summer of 2012. Although the complainant testified she and A.B. were no longer dating on the date of her outcry, which was made on October 4, 2012, she acknowledged that she and A.B. communicated via text message at around 3:00 a.m. on October 3, 2012.

At the close of the hearing, the trial court ruled as follows regarding testimony of the complainant's past sexual conduct with anyone other than Bailes:

Now, I do not find that under the rules any testimony or cross-examination as to this particular witness, other than what she's testifying to that's relevant to this defendant, any specific instances of past sexual behavior with anyone else is admissible, so you are not to question her about those things.

The record reflects Bailes's counsel made no objection in response to the trial court's ruling and offered no argument as to why the evidence of the complainant's past sexual conduct shows bias and motive to make false accusations, and as such, is an exception to Rule 412. *See* TEX. R. EVID. 412 (providing generally for the exclusion of the evidence of a victim's previous sexual conduct with third parties in the prosecution of sexual assault cases). The record further reflects Bailes's counsel did not address Rule 613(b) or Rule 404(b) in the trial court. Nor did Bailes object to exclusion of the evidence on the basis of the confrontation clause.

Because Bailes did not present any argument to the trial court as to how the evidence should be admissible, we conclude Bailes did not preserve for appeal his appellate arguments regarding Rule 404(b), Rule 412(b)(2), and 613(b). *See* TEX. R. APP. P. 33.1(a)(1)(A); TEX. R. EVID. 103(a)(2); *see also Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014) (complaining party must let the trial court know what he wants and why he thinks he is entitled to it, and he must do so clearly enough for the trial court to understand and at a time when the trial court is in a position to do something about it). Nor did Bailes preserve his appellate argument relating to the confrontation clause. *Reyna*, 168 S.W.3d at 179 (objecting under the rules of evidence does not preserve unraised constitutional issues); *see also Bekendam*, 441 S.W.3d at 300.

Accordingly, Bailes's sole issue on appeal is overruled.

#### CONCLUSION

For the above reasons, the judgment of the trial court is affirmed.

Irene Rios, Justice

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