



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-18-00861-CR & 04-18-00862-CR

Juan ORTIZ,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2017CR7171 & 2018CR0457
Honorable Sid L. Harle, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 10, 2020

AFFIRMED

Juan Ortiz appeals his convictions for aggravated sexual assault of a child in two consolidated cases. Ortiz argues that the evidence is insufficient to support his convictions and the trial court erred in denying his requests for continuance and mistrial based on a late *Brady* disclosure. We affirm the trial court's judgments.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Ortiz challenges the sufficiency of the evidence to support his convictions. Ortiz was convicted in Cause No. 2017-CR-7171 on one count of aggravated sexual assault of

G.O., a child younger than 14 years old, by causing his male sexual organ to contact G.O.'s female sexual organ.¹ *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B). In the second case, Cause No. 2018-CR-0457, Ortiz was convicted on two counts of aggravated sexual assault of T.T., a child younger than 14 years old, by causing T.T.'s female sexual organ to contact Ortiz's mouth and by penetrating T.T.'s sexual organ with Ortiz's finger. *See id.* The cases were consolidated by the trial court. Ortiz received a sentence of 60 years' imprisonment on each count to be served concurrently.

Both complainants testified at trial. T.T., 17 years old at the time of trial, testified that Ortiz is her uncle. T.T. used to go stay at her aunt and uncle's house in San Antonio when she was younger. T.T. would sleep in her cousins' bedroom with bunkbeds; she slept by herself in the bottom bunk. One night when she was seven years old, Ortiz came in the bedroom, took her blanket off, removed her skirt and underwear "halfway" and "started to kiss [her] vagina" "with his lips," and then "put his finger in [her] vagina." Ortiz left the room, but then came back and kissed her vagina again. T.T. kept what happened "a secret," but when she was 12 years old she told her 15-year-old sister J. about it. J. then told Ashley, their adult sister who was 25 years old. Ashley asked T.T. questions and T.T. told her what happened with Ortiz. Ashley then told their mother, who called the police. T.T. later spoke with a woman at Roxanne's House, a child advocacy center. After T.T.'s mother told her Aunt Nadia about what Ortiz did, the family split apart. T.T. testified that after the incident with Ortiz she became "nervous and anxious," started cutting herself, and tried to commit suicide. T.T. stated she never told G.O. the details of what Ortiz did to her, but G.O. knew about T.T.'s accusation against him.

¹ Ortiz was also indicted on one count of indecency with a child by sexual contact, but the State waived that count at trial.

The second complainant was G.O., one of Ortiz's daughters. G.O., 16 years old at the time of trial, testified that one day when she was in the fifth grade, Ortiz made her stay home alone with him while her mother and sisters went to church. Ortiz was helping G.O. with her math homework at the dining table when he turned and kissed her on her mouth. G.O. stood up and tried to get away but Ortiz pushed her against the wall and put his hand under her shirt and bra and rubbed her "chest." Ortiz then threw her to the ground and held her down and "raped her," inserting his penis in her vagina. Ortiz stopped when he heard her mother and sisters arrive home. He threatened to hurt her mother and sisters if G.O. told anyone. Years later, G.O. told her sister and her mother after she suffered flashbacks, started cutting herself, and tried to kill herself. When she was in eighth grade, G.O. told her sister when they were arguing in her bedroom and her sister got on top of her. G.O. "freaked out" and screamed that she had been "protecting her;" she meant she was protecting her by not telling anyone what Ortiz had done to her. G.O.'s mother was in the bedroom and questioned what G.O. meant. At that time, G.O. only told her mother that Ortiz put his hand up her shirt. Her mother got upset and called the police. G.O. gave a statement to a detective which was limited to Ortiz touching her breast under her shirt. Later, when she was in ninth grade and they were in an apartment where she felt safer, G.O. told her mother Ortiz had raped her after they argued about whether G.O. could see a boy and G.O. ran out into the street and tried to get run over. Finally, G.O. testified she knew about T.T.'s accusation against Ortiz, but not the details, before she told her mother that Ortiz sexually assaulted her.

In addition, the complainants' testimony was corroborated by the testimony of the two outcry witnesses. T.T.'s adult sister Ashley testified that in the summer of 2013 her younger sister J. told her what happened with T.T. and Ortiz. The next time Ashley was alone with T.T., she asked T.T. to tell her about what happened with their Uncle "Johnny," which is what they called Ortiz. T.T. "froze up" at first, but then answered Ashley's questions. T.T. stated that Ortiz touched

“her bottom” with his fingers under her clothes and put his finger “inside of her” and that Ortiz “put his mouth down there.” Ashley told her mother a few months later and her mother immediately called the police.

The second outcry witness was Nadia, Ortiz’s former wife. Nadia testified they were married for 17 years and had four daughters together. Ortiz was physically, verbally, and mentally abusive and suffered from alcoholism and an addiction to pornography. Nadia testified that learning Ortiz sexually abused her niece T.T. was the last straw and prompted her to file for divorce. Nadia first found out that Ortiz sexually abused her daughter G.O. when G.O. was fighting with her sister C. and told C., “I don’t know why you’re so mean to me, I kept Dad from raping you like he raped me.” Nadia overheard and became very upset. She questioned G.O. what she meant by “raped.” G.O. “lost it” and started crying and “freaking out about what she said.” G.O. told Nadia only that Ortiz tried to kiss her and refused to say any more. Nadia called the police and G.O. gave a statement to a detective. Nadia later found a letter G.O. had written stating that Ortiz tried to kiss her and when she tried to run away he pushed her against the wall and stuck his hand under her bra and in her shorts. G.O. seemed better at first after her disclosure, but then started sleeping with a knife and staying up all night because she was convinced Ortiz was going to come get them because she told others about what he did. On the day Nadia moved into an apartment with her daughters, she found out more details about the sexual assault when G.O. darted into heavy traffic and one of her sisters had to grab her and pull her back. G.O. was hysterical and yelled, “you don’t know what it’s like to lose your virginity to your own Dad.” Nadia stated this was the first time G.O. disclosed that Ortiz had sex with her. Nadia called the police and they took G.O. to a psychiatric hospital. G.O. previously tried to take her life by taking pills. Nadia testified she remembered the day she took her girls to a church revival but G.O. had to stay home with Ortiz to work on her math homework. When they returned home, G.O. was in her bed crying, but Nadia

thought Ortiz had just yelled at her about the homework. Finally, Nadia testified G.O.'s outcry came about two years after T.T. made her accusation against Ortiz.

Dr. Natalie Kisson, a pediatrician specializing in child abuse, testified she performed a sexual abuse evaluation on G.O. by taking a complete history and conducting an extensive physical examination. Because it had been more than two years since the alleged abuse, it was not surprising to find no physical evidence of sexual assault. Dr. Kisson stated that 96% of children evaluated for sexual abuse have normal medical exams because most children do not immediately disclose the abuse and their genital tissue heals quickly. A normal medical exam neither confirms nor excludes sexual abuse. Dr. Kisson's final assessment of G.O. was "concerning for sexual abuse."

In addition to several investigating officers, Vanessa Paulini testified she conducted the forensic interview of T.T. at Roxanne's House. T.T. disclosed sexual abuse and circled the vaginal area on an anatomically correct diagram. Paulini also explained the concept of "delayed outcry" and testified it often occurs when there is an existing relationship between the child and the alleged perpetrator.

Finally, Ortiz testified and denied committing any of the alleged offenses. Ortiz admitted he was physically abusive to his wife Nadia and was unfaithful to her; he was psychologically abusive to the children; and he drank heavily and would sometimes pass out. He repeatedly denied ever molesting or sexually assaulting T.T. or any of his daughters, including G.O. Ortiz stated that when he found out about T.T.'s allegation, he "felt horrible" and "was in shock." He characterized the allegations against him as "disgusting." Ortiz suggested maybe G.O. was trying to get back at him. Ortiz testified he has no explanation why T.T. would make up the allegations.

Ortiz argues on appeal that, while there was testimony from the complainants that he committed the alleged offenses, there was also contradictory evidence. He points to his own

repeated denials and the lack of physical evidence. Ortiz argues he was truthful about being physically and mentally abusive to his wife and children and therefore his denials of sexual abuse should be believed. He also relies on the delayed outcries, arguing the complainants are not believable because they did not confide in an adult figure within a reasonable length of time.

Under the well-established standard of review for sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the verdict, deferring to the jury's assessment of credibility and weight of the evidence. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (reasonable inferences may be drawn from the basic facts to the ultimate facts). We also presume the jury resolved any conflicts in the evidence in favor of their verdict and defer to that resolution. *Murray v. State*, 457 S.W.3d 446, 448-49 (Tex. Crim. App. 2015). Here, in assessing the credibility of the witnesses and resolving any inconsistencies, the jury could have chosen to believe the complainants and to disbelieve Ortiz's denials of guilt. *See Martinez v. State*, 524 S.W.3d 344, 349 (Tex. App.—San Antonio 2017, pet. ref'd) (it was jury's province as factfinder to resolve any contradictions in the testimony of the child, the mother, and the SANE nurse). Moreover, the uncorroborated testimony of a child victim of a sexual offense may alone be sufficient to support the conviction. TEX. CODE CRIM. PROC. ANN. art. 38.07; *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978); *Beltran v. State*, 517 S.W.3d 243, 250 (Tex. App.—San Antonio 2017, no pet.). In addition to the complainants' testimony, there was corroborating evidence the jury could have also credited: the outcry witnesses' testimony describing the same sexual conduct by Ortiz; the medical expert's testimony that the absence of physical evidence of sexual assault does not negate the offense; and the forensic examiner's testimony that delayed outcry is common in children that have been abused by a relative. We conclude that a rational trier of fact could have found the essential elements of the

offenses beyond a reasonable doubt in both cases. *See Jackson*, 443 U.S. at 319; *see also Brooks*, 323 S.W.3d at 899. Therefore, we overrule Ortiz’s challenge to the sufficiency of the evidence to support his convictions.

LATE DISCLOSURE OF BRADY MATERIAL

In his second issue, Ortiz asserts the trial court erred in denying his motion for mistrial based on the State’s late disclosure of *Brady* material.² He asserts that, at a minimum, the trial court should have granted an immediate continuance of the trial. The State responds that it disclosed the information about a potential State’s witness as soon as it was discovered and Ortiz was not harmed because the witness was not called to testify, and the trial court did in fact grant a continuance which Ortiz declined.

The record reflects the State filed a “Notice of Brady Material” at 4:56 p.m. on the day of jury selection, Wednesday, August 15, 2018. The notice stated the prosecutor had difficulty setting up a pretrial meeting with a previously subpoenaed State’s witness, a forensic interviewer at ChildSafe. After inquiring, the prosecutor learned the person was terminated by ChildSafe because she was hired to be the bilingual forensic interviewer but misrepresented her proficiency in Spanish. The *Brady* notice declared the State would no longer sponsor her as a witness due to the credibility issue.

The next morning, Ortiz filed a motion for continuance asserting the late disclosure prejudiced him because it influenced his counsel’s advice on plea negotiations, voir dire strategy, and trial strategy. *See* TEX. CODE CRIM. PROC. ANN. art. 29.13 (grounds for continuance during trial). Ortiz’s motion stated the information was relevant because it was the forensic interview which led to an upgrade in the charge from a second-degree felony to a first-degree felony.

² *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (prosecution has burden to timely disclose exculpatory or mitigating evidence).

After recessing so the State could obtain the witness's presence and noting that it was at least the eighth and maybe the twelfth reset of the trial, the court held a hearing outside the jury's presence to determine the materiality of the information and the reason for the delay in disclosure. The witness stated she was terminated from ChildSafe because she was not sufficiently fluent in Spanish; she was subpoenaed on Thursday, August 9, 2018; and she informed the court advocate of her termination by ChildSafe the same day she received the subpoena. She was not asked any questions about her forensic interview of G.O.

In argument to the court, the prosecutor explained that given the difficulty in obtaining a pretrial meeting with the witness and the new information about her termination which he learned within "the last few days," he had determined the forensic interviewer was not necessary to the State's case; she was not the outcry witness in G.O.'s case and could not have testified to the content of the statements G.O. made during the interview. The prosecutor stated he filed the *Brady* notice as soon as practicable, even though he was unsure whether the information was actually *Brady* material. When the trial court specifically asked whether information revealed during the forensic interview led to the upgrade in the charged offense, the prosecutor replied that was not true. The charge was upgraded to a first-degree felony based on G.O.'s additional outcry statement to her mother, not based on statements she made during the forensic interview which occurred after the additional outcry. The prosecutor confirmed the State would not call the forensic interviewer to testify.

Ortiz first argued for a continuance until Monday, asserting he was ambushed by the late disclosure, needed time to investigate, and might need to adjust the defense strategy. Ortiz then orally moved for a mistrial, arguing the late disclosure had prejudiced him with respect to his plea negotiations, voir dire, and defense strategy. The trial court denied the mistrial but granted Ortiz's request for a continuance "in part." The court ruled the State could proceed with its case-in-chief

because there were jurors and witnesses waiting but that after the State rested Ortiz would receive a continuance to prepare his defense case. The trial court instructed the forensic interviewer to be available to testify Monday or Tuesday if called by the defense. When the State rested its case on Friday, the trial court inquired how much time Ortiz needed for the continuance. Ortiz replied that he was ready to proceed on the defense case without a continuance. Ortiz did not call G.O.'s forensic interviewer to testify.

The proper procedure when the State discloses *Brady* material³ during trial is for the defendant to request a continuance to review the material and the courts have held this procedure satisfies the due process requirements of *Brady*. *Payne v. State*, 516 S.W.2d 675, 677 (Tex. Crim. App. 1975); *Aguirre v. State*, 683 S.W.2d 502, 516 (Tex. App.—San Antonio 1984, pet. ref'd); *Cohen v. State*, 966 S.W.2d 756, 763 (Tex. App.—Beaumont 1998, pet. ref'd). Failure to request a continuance when *Brady* evidence is disclosed at trial waives any *Brady* violation. *Williams v. State*, 995 S.W.2d 754, 762 (Tex. App.—San Antonio 1999, no pet.). A motion for mistrial based on a *Brady* violation is appropriate only when a continuance is denied. *Aguirre*, 683 S.W.2d at 516.

Here, Ortiz requested an immediate continuance after the late *Brady* disclosure, but received only a partial continuance to be given after the State rested its case-in-chief. Ortiz argues on appeal that the trial court abused its discretion by denying his motion for mistrial in light of the court's failure to grant an immediate or full continuance. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) (trial court's denial of motion for mistrial is reviewed for abuse of discretion). Mistrial is an extraordinary remedy appropriate only for "a narrow class of highly

³ For purposes of our analysis, we assume the disclosed information constituted *Brady* material. *See Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (*Brady* requires the prosecution to disclose any material evidence favorable to the defense, which includes both exculpatory and impeachment evidence).

prejudicial and incurable errors.” *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). *Brady* and its progeny do not require the State to disclose *Brady* material that it does not have in its possession and does not know exists. *Harm v. State*, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006).

In determining whether a prosecutor’s actions violated the defendant’s due process rights under *Brady*, we consider whether: (1) the prosecutor failed to disclose evidence, regardless of the prosecution’s good or bad faith; (2) the evidence was favorable to the defendant; and (3) the evidence was material, meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). When *Brady* evidence is disclosed in an untimely manner, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable the outcome of the trial would have been different had the prosecutor made a timely disclosure. *Id.* A defendant cannot meet his burden under *Brady* where, despite late disclosure, evidence is nonetheless disclosed in time for him to use it in his defense. *Marshall v. State*, 210 S.W.3d 618, 636 (Tex. Crim. App. 2006); *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (if defendant received *Brady* material in time to use it effectively at trial, his conviction should not be reversed just because the material was not disclosed as early as it might or should have been).

Here, the impeachment evidence about the reason for the forensic interviewer’s termination was disclosed in time for Ortiz to use it at trial. Therefore, the relevant issue is whether Ortiz was prejudiced by the late disclosure. *Little*, 991 S.W.2d at 866. To show prejudice, Ortiz must show a reasonable probability that “the outcome of the proceeding would have been different had [the information] been disclosed earlier.” *Id.* at 866-67; *Hampton*, 86 S.W.3d at 612. The trial court provided Ortiz with the opportunity for a continuance before the defense case began to permit time

to investigate the late *Brady* disclosure. Ortiz chose not to use the continuance and proceeded with the defense case which consisted of Ortiz's testimony. Neither the State nor Ortiz called the forensic interviewer as a witness; therefore, Ortiz had no need for the impeachment evidence. Although Ortiz asserts the late *Brady* disclosure prejudiced him by influencing the way he conducted plea negotiations, voir dire, and his defense, he has made no particular showing of how the failure to timely disclose impeachment information about a potential but ultimately non-testifying witness harmed his ability to conduct his defense. Ortiz has failed to establish a reasonable probability that the outcome of his trial would have been different if the *Brady* information was disclosed earlier. *See Hampton*, 86 S.W.3d at 612; *see also Little*, 991 S.W.2d at 866-87. Therefore, we hold the trial court did not abuse its discretion by not granting an immediate continuance or denying Ortiz's motion for mistrial based on the late *Brady* disclosure.

CONCLUSION

Based on the foregoing reasons, we overrule Ortiz's issues on appeal and affirm the trial court's judgments.

Liza A. Rodriguez, Justice

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