In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-08-00029-CV

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IN THE MATTER OF J.R.N., III

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 06-12-12428-JV

MEMORANDUM OPINION

A jury found J.R.N. engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child. The trial court committed J.R.N. to the Texas Youth Commission for a ten-year determinate sentence. In four issues, J.R.N. appeals the jury's verdict. We affirm the trial court's judgment.

In August of 2006, S.W., who was eight years of age, was living with her mother, M.N., sister, B.W., brother, A.W., stepfather, B.N., and her stepbrothers, J.R.N. and J.N. S.W. and B.W. were at their grandparents' home when S.W. asked to speak with her biological father, T.W., on the telephone. T.W. lived in Georgia at that time. S.W.'s

grandparents called T.W. so that S.W. could speak with him. While speaking with T.W. on the telephone, S.W. told him that her stepbrother, J.R.N., had been touching her "privates." T.W. immediately called the Texas Child Protective Services ("CPS") and reported S.W.'s allegations of molestation. T.W. also told his parents about S.W.'s allegations, and that CPS would contact them.

S.W.'s grandfather, E.W., called the Montgomery County Sheriff's Department and reported S.W.'s allegations of molestation, and an officer was sent out to investigate. CPS gave S.W.'s grandparents temporary custody of S.W., B.W. and A.W., and arranged for the children to go to Children's Safe Harbor to be interviewed.

Kari Prihoda, a forensic interviewer with Children's Safe Harbor, testified at trial that she interviewed S.W. on August 8, 2006, and that S.W. told her about the alleged sexual abuse. Prihoda provided details of the allegations as relayed to her by S.W. S.W. claimed J.R.N. performed both oral and anal sex on her. S.W. also claimed that the sexual abuse started when she was in kindergarten and continued through August 1, 2006, at which time she was eight years of age. S.W. reported to Prihoda that she told her dad and mom about the abuse, but that her mom did not believe her. S.W.'s interview was videotaped, admitted into evidence at trial, and played for the jury.

Following the interview at Children's Safe Harbor, Karen Trevino, a Sexual Assault Nurse Examiner ("SANE") with Children's Safe Harbor performed a SANE exam on S.W.

Nurse Trevino testified at trial that S.W. reported that her stepbrothers, J.R.N. and J.N., touched her butt and privates with both their "fingers and dingaling." S.W. told nurse Trevino this happened from kindergarten through the second grade. Nurse Trevino's physical exam of S.W. indicated "clear evidence of blunt force, of penetrating trauma," to S.W.'s vagina. Nurse Trevino also found scarring on S.W.'s anus which could only be indicative of "a very traumatic assault" or "chronic abuse over and over, which is mostly the case with kids." Nurse Trevino testified that she reviewed her findings with S.W.'s mother, M.N., immediately following the exam, and that M.N. was extremely angry and told S.W. "that she had messed the whole family and everything up." Nurse Trevino's written findings were admitted into evidence at trial.

At trial, S.W. recanted. S.W. testified that she remembered meeting with Prihoda at Children's Safe Harbor and telling her that J.R.N. abused her. However, she testified that J.R.N. had not abused her, and that she made it up because her grandmother, father, and stepmother promised her "a horse and two dogs" to "lie on the boys." When questioned further regarding the details of the abuse she had provided to Prihoda, S.W. claimed she did not remember making those statements to Prihoda. Specifically, she did not remember telling Prihoda the following: that she woke up to J.R.N. touching her, that he had pulled off her pants, that he moved his finger around, that he put his dingaling in her butt, that he touched the inside of her butt, that he was lying on top of her and she was on her belly, that he licked

her thing, that he told her he was doing it because it was a "medical thing," that he made her touch his "dingaling" and that it felt nasty, and that she told her mother first because she didn't want it to happen over and over again. Further, at trial, S.W. did not remember sitting in the prosecutor's office prior to trial and telling him that she did remember saying these things to Prihoda.

S.W. testified that she remembered writing letters about her grandfather, E.W., her grandmother, J.W., and her father, T.W. The two letters, which were dated December 20 and December 30 of 2006, stated that it was her grandfather, E.W., who had abused her and not her stepbrothers. The letters stated specifically that "[E.W.] put his finger up my pee pee." S.W. testified that her grandfather touched her in her privates with his "fingers" and "with his thing." The letters further stated that her grandfather, E.W., grandmother, J.W., stepmother, C.W., and her father, T.W., told her to lie "because they wanted [B.N.], [J.R.N.] and [J.N.] out of the [h]ouse." The two letters were admitted into evidence at trial. When questioned by the State about the spelling of the names in the letters, S.W. admitted that at the time of her Safe Harbor interview with Prihoda she did not know how to spell J.R.N.'s last name. However, she testified that she learned how to spell it while the boys were still living with them, which was before the interview.

Detective Lisa Pickering testified that she investigated the allegations made by S.W. against J.R.N. and later, against the grandfather. Pickering testified that on December 8,

2006, she called S.W.'s mother, M.N., to get J.R.N.'s father's phone number so that she could call him and give him an opportunity to bring J.R.N. to the police station, prior to his arrest. Pickering further testified that on December 12, M.N. called Pickering and said she filed a report on December 10 because of a note her daughter wrote to her. Specifically, Pickering testified that according to M.N., S.W. brought a note to M.N. saying her grandfather was the one who touched her, not her stepbrothers. J.R.N. was arrested on December 14, 2006. Pickering testified that she spoke with the grandfather about the subsequent allegations S.W. had asserted against him, but found the new allegations not to be credible. Pickering took the information to the district attorney's office for review, but they refused to file criminal charges against the grandfather based on S.W.'s allegations.

After the State rested, J.R.N. put on testimony from several witnesses, including S.W.'s mother, M.N. After deliberation, the jury returned a verdict against appellant committing him to the Texas Youth Commission ("TYC") for a ten-year determinate sentence.

In four issues, J.R.N. argues that the trial court erred because (1) J.R.N. was denied the opportunity to pursue a vigorous defense in violation of his right to confront the witnesses against him through complete cross-examination of the witnesses and by denying him the right to introduce certain testimony in support of his defensive theory; (2) the court allowed testimony concerning allegations against J.R.N.'s brother, J.N., to be introduced into

evidence in violation of J.R.N.'s Sixth Amendment right to confrontation and Fourteenth Amendment right to due process and fundamental right to fair trial; (3) the court allowed the SANE report to be admitted into evidence, without redactions, and the Children's Safe Harbor videotaped interview, without redacting inadmissible statements, and (4) the evidence is factually insufficient to sustain the verdict in this case.

PRESERVATION OF ERROR

In his first, second, and third issues J.R.N. asserts that the trial court violated a variety of his constitutional rights and argues the judgment should be reversed and that the trial court "enter judgment of acquittal, or, in the alternative . . . grant a new trial . . . ." The argument J.R.N. makes in support of issue one is twofold. J.R.N. argues he was denied his constitutional right to pursue a vigorous defense because he was denied the right to introduce certain testimony of M.N., S.W., and B.W., in support of his defensive theory; and he was denied his right to confront witnesses through a complete cross-examination of T.W., E.W., and Detective Pickering. In issue two, J.R.N. argues that the trial court violated various constitutional rights by allowing evidence concerning allegations against J.N., J.R.N.'s brother, to be introduced into evidence against J.R.N. J.R.N. further argues that the trial court violated his constitutional rights by refusing to give a limiting instruction to the jury concerning the introduction of evidence related to the allegations against J.N. In issue three, J.R.N. argues that the trial court violated his right to confront the evidence by admitting

hearsay statements in the SANE report and by admitting the entire, unredacted, Safe Harbor videotaped interview of S.W.

Before we determine whether J.R.N.'s constitutional rights were violated as a result of the challenged evidentiary rulings, we must first determine whether J.R.N. preserved his constitutional challenges for review. *See Hughes v. State*, 878 S.W.2d 142, 151 (Tex. Crim. App. 1992) (holding preservation of error is a systemic requirement that a first level appellate court should ordinarily review on its own motion). To preserve error, a defendant must assert a timely, specific objection. *See* TEX. R. APP. P. 33.1. In addition, the error assigned on appeal must correspond to the objections made at trial. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). "In other words, '[a]n objection stating one legal theory may not be used to support a different legal theory on appeal.'" *Id*. (quoting *Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1078 (1991)). The law is well settled that even constitutional errors may be waived by failure to raise the issues at trial. *Broxton*, 909 S.W.2d at 918; *see also Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005); *Holland v. State*, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990).

J.R.N.'s constitutional complaints in issues one and two center around the trial court's exclusion of certain testimony he attempted to introduce at trial through both direct and cross-examination of various witnesses. A party seeking to introduce evidence must meet

an objection to the evidence with an argument stating the basis for its admission. *Reyna*, 168 S.W.3d at 177. In some instances, J.R.N. stated his basis for the admission of the excluded testimony and in some instances he did not, merely continuing instead with his direct or cross-examination after the trial court sustained the State's objections. In those instances where J.R.N. did make an argument asserting the basis for the admission of the challenged evidence, he failed to assert any constitutional grounds as the basis for admission of such evidence. Likewise, J.R.N. failed to assert constitutional grounds when he objected to the admission of evidence concerning similar allegations made against J.R.N.'s brother. Further, J.R.N. did not raise constitutional grounds when he objected to the admission of the SANE report, testimony regarding the report, and the unredacted Safe Harbor videotaped interview.

We note that J.R.N. did raise constitutional challenges to the trial court's evidentiary rulings in his motion for new trial, and the trial court heard arguments on that motion. However, we find that the assertion of the violation of J.R.N.'s constitutional rights in J.R.N.'s motion for new trial were vague and untimely. *See* TEX. R. APP. P. 33.1(a) (To preserve a complaint for review the record must show the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint). The only constitutional challenge set forth with any specificity in J.R.N.'s motion for new trial is his complaint that he was denied the right to

pursue a vigorous defense due to the exclusion of the testimony set forth in his bill of exceptions. To be timely, an objection must be made at the earliest possible opportunity. *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991); *see also Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997) ("An objection should be made as soon as the ground for objection becomes apparent."). Here, J.R.N.'s constitutional challenges to the trial court's evidentiary rulings should have been raised at trial, at the time the trial court sustained the State's objections to the admission of the proffered evidence. Failure to timely object at trial to error under the Confrontation Clause waives this argument on appeal. *See Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000); *see also Reyna*, 168 S.W.3d at 179 (concluding to preserve error proponent of evidence must clearly articulate to trial court that confrontation clause requires admission of evidence). Because J.R.N. does not complain on appeal that the trial court abused its discretion in denying his motion for new trial, we find that J.R.N. failed to preserve his constitutional challenges for review.

ISSUE ONE

In his first issue, J.R.N. complains that the trial court erred in excluding certain testimony of various witnesses preserved through a bill of exceptions, and that prevented him from fully presenting his defensive theory. While we have found the constitutional challenges to the trial court's evidentiary rulings were not properly preserved, we review J.R.N.'s complaints from an evidentiary basis. "We review the admission or exclusion of

evidence under an abuse of discretion standard." *Adams v. State*, 156 S.W.3d 152, 158 (Tex. App.--Beaumont 2005, no pet.).

At trial, S.W. recanted her allegations against J.R.N. and testified that it was E.W., her grandfather, who had committed the sexual abuse against her. S.W. also testified that her father, stepmother, and grandmother promised her a horse and two dogs if she would "lie on the boys." As part of his defense, J.R.N. sought to introduce testimony from M.N., S.W., and B.W. to establish that the allegations initially made by S.W. against J.R.N. were part of a plan by E.W. and T.W. to blame J.R.N. for sexual assaults committed by E.W. On cross-examination, J.R.N. questioned T.W. regarding whether he had been sexually abused by E.W., in an attempt to show that E.W. had a history of sexual molestation. J.R.N. complains that the trial court erred by excluding the testimony of M.N., as set forth in J.R.N.'s bill of exceptions, regarding alleged semen stains M.N. found on sheets more than thirteen years before the trial and T.W.'s proclivity for anal sexual relations which led to "her belief that [E.W.] is a pedophile molester." The proffered testimony of M.N. as set forth in the bill of exceptions was properly excluded as speculative pursuant to Rule 602 of the Texas Rules of Evidence. *See* TEX. R. EVID. 602. In addition, M.N. was not shown to be qualified as an expert to testify under Rule 702 of the Texas Rules of Evidence. *See* TEX. R. EVID. 702. We find the trial court did not abuse its discretion by excluding M.N.'s testimony. We note that while J.R.N. further asserts that excluded testimony of M.N. is relevant to impeach T.W.'s

responses regarding whether he and his little brother, N.W., had been abused by E.W., J.R.N. did not call N.W. to testify at trial. E.W. and T.W. testified at trial and were cross-examined by counsel for J.R.N. regarding S.W.'s allegations of bribery and sexual abuse by E.W.

J.R.N. further argues that he was prepared to impeach E.W. with testimony from S.W. and B.W. regarding a meeting E.W. allegedly had with the children after S.W.'s outcry, but prior to the Monday morning interview with Deputy Traylor. However, at trial J.R.N. was allowed to question S.W. and B.W. regarding the meeting they allegedly had with their grandparents during this time period. The only testimony excluded by the trial court during defense counsel's examination of S.W. and B.W. was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds. *See* TEX. R. EVID. 802. J.R.N.'s bill of exceptions sets forth the testimony he asserts S.W. would have offered regarding what she told her grandparents during the alleged meeting. However, defense counsel did not question S.W. regarding what she told her grandparents during this meeting. Additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. We overrule issue number one.

ISSUE TWO

In issue two, J.R.N. complains generally of the trial court's admission of evidence before the jury that J.R.N.'s brother, J.N., was also alleged to have sexually abused S.W.

We have previously determined that J.R.N. failed to preserve his complaints of constitutional violations with regard to the trial court's evidentiary rulings. J.R.N.'s brief does not contain a clear and concise argument as to how the inclusion of such references may have caused the rendition of an improper verdict. There were no separate incidents or other details offered concerning any allegations against J.N. that were also not asserted against J.R.N. An appellant's brief must contain, *inter ali*, a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(h).

In addition, J.R.N. argues in conjunction with issue two that the trial court violated his right to a fair trial by refusing to include a limiting instruction in the jury charge instructing the jury not to consider evidence that may have been introduced against J.R.N.'s brother, J.N., in determining whether J.R.N. engaged in delinquent conduct by committing the alleged offenses. At trial J.R.N. did not object on constitutional grounds to the admission of evidence regarding allegations of conduct committed by J.N. in connection with the alleged offenses. At trial, J.R.N. objected to the admission of evidence regarding allegations of conduct committed by J.N. as "prejudicial" toward J.R.N. because J.R.N. "has the right to a separate trial." J.R.N. raised his broad constitutional arguments for the first time during the charge conference well after testimony was admitted regarding S.W.'s allegations against J.N. The trial judge denied his request for a limiting instruction on the basis that the instruction was "vague" and "confusing to the jury."

Texas Rule of Evidence 105(a) states that:

> [w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

TEX. R. EVID. 105(a). Assuming, without deciding, that the evidence may have been prejudicial, J.R.N. did not request a limiting instruction at the time the testimony regarding J.N. was provided; he waited until the charge conference at the conclusion of the evidence to request a limiting instruction on the basis that such evidence violated J.R.N.'s "right to confrontation" and "right to due process," which the trial court denied. J.R.N. waived his right to complain of the trial court's denial of his request for a limiting instruction because he failed to request a limiting instruction at the time the evidence was admitted. *See* TEX. R. EVID. 105(a); *see also Hammock v. State*, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001) (holding the trial court did not err by failing to submit limiting instruction in guilt-innocence charge because appellant failed to request one when evidence was admitted); *Williams v. State*, 273 S.W.3d 200, 230 (Tex. Crim. App. 2008) ("A failure to request a limiting instruction at the time evidence is presented renders the evidence admissible for all purposes and relieves the trial judge of any obligation to include a limiting instruction in the jury charge."). We overrule issue two.

ISSUE THREE

In issue three, J.R.N. contends that the trial court erred in allowing the SANE report and the Children's Safe Harbor videotaped interview into evidence without redacting inadmissible statements. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). Unless the trial court's decision was outside the zone of reasonable disagreement, we uphold the ruling. *Id.*; *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). The State offered the SANE report through the testimony of nurse Trevino. While J.R.N. objected to the unredacted report as containing hearsay, J.R.N. did not specify the portions of the report that he alleged contained hearsay statements nor did he tender a redacted report. Likewise, J.R.N. objected to the admission of the videotaped interview on the basis that it contained hearsay and "information about other alleged perpetrators." J.R.N. objected to any portion of the videotape "[t]hat's not specifically a prior inconsistent statement . . . to use for impeachment purposes." However, J.R.N. failed to offer a redacted version of the tape or otherwise specify what portions of the interview were inadmissible. In light of the fact that S.W. recanted on the stand, and that the videotape was not redacted or edited prior to trial, the trial court admitted the videotaped interview in its entirety.

> The trial court need never sort through challenged evidence in order to segregate the admissible from the excludable, nor is the trial court required to admit only the former part or exclude only the latter part. If evidence is offered and challenged which contains some of each, the trial court may safely

> admit it all or exclude it all, and the losing party, no matter who he is, will be made to suffer on appeal the consequences of his insufficiently specific offer or objection . . . .

Willover v. State, 70 S.W.3d 841, 847 (Tex. Crim. App. 2002) (quoting *Jones v. State*, 843 S.W.2d 487, 492 (Tex. Crim. App. 1992) (overruled on other grounds), *cert. denied*, 507 U.S. 1035, 113 S.Ct. 1858, 123 L.Ed.2d 479 (1993)). J.R.N.'s objection was insufficient to identify to the trial court the portions of the SANE report and videotaped interview that were alleged to be inadmissible. Under these circumstances, we find no abuse of discretion in the admission of the report and videotape in their entirety. Issue three is overruled.

ISSUE FOUR

In issue four, J.R.N. asserts that the evidence is factually insufficient to sustain the jury's verdict. (APT. 16). We review adjudications of delinquency in juvenile cases by applying the same standards applicable to sufficiency of the evidence challenges in criminal cases. *See* TEX. FAM. CODE ANN. §54.03(f) (Vernon Supp. 2009); *In re M.C.L.*, 110 S.W.3d 591, 594 (Tex. App.--Austin 2003, no pet.). Thus, in a factual-sufficiency review, we view the evidence in a neutral light and ask whether the fact-finder was rationally justified in finding guilt beyond a reasonable doubt. *See Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We then determine (1) whether the evidence supporting the verdict is so weak that the verdict is clearly wrong and manifestly unjust or (2) whether the verdict is against the great weight and preponderance of the evidence. *Id*. at 414-15. We will not

reverse a verdict for factual insufficiency unless we can say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the fact-finder's verdict. *Id*. at 417. Nor will we intrude on the fact-finder's role as the sole judge of the weight and credibility of witness testimony. *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002).

The jury found and the Dispositional Order of Commitment to TYC states that J.R.N. had engaged in delinquent conduct of aggravated sexual assault (three counts) and indecency with a child (two counts).

The record contains the entire videotaped interview of the child-complainant, S.W., as well as the testimony of the investigating officer, the forensic interviewer at Children's Safe Harbor, and the SANE nurse. Through these witnesses, the record includes evidence that S.W. stated the following to various individuals: that J.R.N. penetrated the sexual organ and anus of S.W. with his finger and with his penis, that J.R.N. licked the sexual organ of S.W., that J.R.N. caused S.W. to touch his penis with her hand, and that J.R.N. touched the breast of S.W. The record shows that S.W. was eight years old and younger when the offenses occurred. The SANE nurse introduced medical records and testified that from her examination of S.W., there was physical evidence of blunt force trauma to S.W.'s hymen and anus, which in the opinion of the nurse, was indicative of a "clear history of anal and vaginal penetration on many occasions by . . . [J.R.N.]"

The evidence also shows that S.W. recanted her story before and during trial, alleging instead that her grandfather, E.W., was the molestor. Various letters in the handwriting of S.W. were introduced into the record whereby S.W. alleged she was assaulted by her grandfather. S.W.'s sister testified that she did not believe S.W.'s outcry against her stepbrother because she slept in the same room as S.W. and would have been awakened if the assault had occurred at night in the bedroom as related by S.W.

We note that the testimony of a complainant, standing alone, is sufficient to support a conviction for sexual assault. *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978); *see also Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App.--San Antonio 1994, pet. ref'd); *Jordan-Maier v. State*, 792 S.W.2d 188, 190 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd). The jury could reasonably have disbelieved the recantation of S.W. on the stand and the handwritten letters as there was evidence introduced that S.W. may have had help in writing the letters and may have received pressure from other family members to recant from her original outcry. On this record, then, we cannot say that the court's findings are "clearly wrong and manifestly unjust" or "against the great weight and preponderance of the conflicting evidence." *Watson*, 204 S.W.3d at 414-15. Issue four is overruled.

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on August 7, 2009
Opinion Delivered April 1, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.