In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00125-CR

LEDYS GEOVANNY ALVARENGA-SARMIENTO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 23380

MEMORANDUM OPINION

Ledys Geovanny Alvarenga-Sarmiento appeals his conviction for trafficking of a child.[1] Tex. Penal Code Ann. § 20A.02(a)(7)(B) (West Supp. 2016) (trafficking

[1] The indictment and judgment refer to the appellant by his compound surname, Alvarenga-Sarmiento. For convenience, we refer to the appellant as Alvarenga in the opinion because he simplified his last name by using Alvarenga as his last name on documents that he signed when the case was pending in the trial court.

of a child that causes the child to engage in or become a victim of the crime of indecency with a child).[2] In three issues, Alvarenga argues that Texas Penal Code sections 20A.01(4) and 20A.02(a)(7)(B) are unconstitutionally vague, that he received ineffective assistance of counsel, and that the trial court erred by admitting medical records when the information in the records included statements that he contends were not made to facilitate the patient's treatment. *Id*. § 20A.01(4) (West Supp. 2016) (defining the term "[t]raffic"), § 20A.02(a)(7)(B). We overrule Alvarenga's issues, and we affirm the trial court's judgment.

Background

In 2014, a DPS trooper stopped Alvarenga for a traffic violation on Highway 59 in Polk County, Texas. When Alvarenga was stopped, he was traveling with Mary,[3] a minor female who was not related to him. During the stop, Mary produced a document given to her by immigration authorities reflecting that she had recently been released from federal custody in El Paso to a female relative. Shortly after the

[2] We cite the current version of the statute, as any amendments do not affect the outcome of this opinion.

[3] "Mary" is a pseudonym that is used to conceal the victim's actual name. *See* Tex. Const. art. I, § 30 (granting crime victim's "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

stop, the trooper took Mary and Alvarenga to a nearby office used by the highway patrol.

At the highway patrol office, a special agent employed by the Department of Homeland Security and assigned to the Human Tracking Task Force interviewed Alvarenga. During his interview, Alvarenga admitted that he arranged to have Mary smuggled into the United States from Honduras so he could make a life with her, that he paid the smuggler, that he then paid Mary's relative to bring Mary from an immigration camp located in El Paso to Houston, that he travelled to Houston from Pennsylvania to pick Mary up, that he then took Mary to a hotel in a city outside Houston where he tried to have sexual intercourse with her, and that he was taking Mary to Tennessee where he claimed Mary had other relatives. Approximately four weeks after he was stopped, a grand jury indicted Alvarenga for child trafficking, alleging that he violated section 21.11 of the Penal Code. *Id*. § 21.11 (West 2011) (Indecency With a Child); *see also id*. § 20A.02(a)(7)(B) (prohibiting trafficking of a child that by any means causes the trafficked child to engage in or become a victim of the types of conduct prohibited under section 21.11 of the Penal Code).

Alvarenga's case was tried in a jury proceeding in March 2015. Following the guilt-innocence phase of the trial, Alvarenga was found guilty of trafficking, as

charged in the indictment. The jury assessed a thirty-year sentence, and found that Alvarenga should pay a fine of $10,000.

Constitutional Challenge

In his first issue, Alvarenga argues that section 20A.01(4) of the Penal Code, which defines the term "[t]raffic," and section 20A.02(a)(7)(B) of the Penal Code, which prohibits causing the trafficked child to engage in or become a victim of the types of conduct prohibited by the child-indecency statute, are unconstitutionally vague. *See id*. §§ 20A.01(4), 20A.02(a)(7)(B). According to Alvarenga, the types of conduct that are prohibited by the child-trafficking statute are not clearly defined, and because the statute is unclear, the statute failed to give him adequate notice that his conduct could be punished as a first-degree felony. Alvarenga also complains that the "human trafficking statute does not require any connection between the act of indecency and act of transportation[,]" even though a defendant who is found guilty of committing child trafficking and indecency with the child commits a first-degree felony. *See id*. § 20A.02(b)(1) (West Supp. 2016).

Alvarenga raised no complaints about the constitutionality of any of the provisions in Chapter 20A of the Penal Code when his case was before the trial court. *Id*. §§ 20A.01-20A.04 (West & West Supp. 2016). Moreover, Alvarenga does not explain why the usual rules of error preservation do not apply to his constitutional

challenges regarding the child-trafficking statute. *See id*. §§ 20A.01(4), 20A.02(a)(7)(B). Generally, challenges like the ones Alvarenga seeks to raise for the first time in his appeal must first be presented to the trial court before the defendant may raise them in an appeal. *See Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014) ("'As applied' constitutional claims are subject to the preservation requirement and therefore must be objected to at the trial court in order to preserve error."); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (explaining that absent certain exceptions, constitutional challenges to penal statutes follow the usual error preservation requirements and require the defendant to first raise complaints about the constitutionality of a statue in the trial court to preserve the defendant's right to appellate review); *see also* Tex. R. App. P. 33.1(a) (preserving error for appellate review requires the complaining party to show that he presented his complaint to the trial court in a timely request, objection, or motion and that the trial court ruled on the request). We hold that Alvarenga forfeited his right to challenge the constitutionality of the child-trafficking statute because he did not preserve the claims for review in his appeal. *See Marin v. State*, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993) (categorizing the criminal system as containing three different types of rules for the purpose of error preservation, and concluding that

most rights are forfeited unless the defendant preserved the complaint by bringing it to the trial court's attention).

We hold that Alvarenga cannot challenge the constitutionality of the child-trafficking statute by complaining that it operated unconstitutionally in his case because he failed to present that claim to the court below. *Id*. Issue one is overruled.

Ineffective Assistance of Counsel

In his second issue, Alvarenga argues that the attorney representing him in his trial was ineffective because he failed to object to portions of the testimony of the special agent who interviewed him about why he was with Mary after he was stopped. Generally, the special agent testified about the dangers associated with child trafficking. Alvarenga contends that the attorney representing him at trial should have objected when the special agent testified about the dangers involved with human smuggling. Alvarenga argues that the testimony was not relevant to proving that he trafficked Mary for the purpose of causing Mary to engage in or become a victim of indecent conduct. *See* Tex. R. Evid. 402. Alvarenga also argues that the special agent's testimony, even if relevant, was more prejudicial than probative to proving that he was guilty of child trafficking. *See* Tex. R. Evid. 403.

To establish a claim of ineffective assistance of counsel, the defendant must show that the performance of his attorney fell below an objective standard of

reasonableness, and that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). When making an ineffective assistance of counsel claim, the defendant bears the burden of developing the facts needed to show that his attorney was ineffective under the standards identified in *Strickland*. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (citing *Strickland*, 466 U.S. at 689). Additionally, to prove a claim of ineffective assistance, the defendant must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Thompson v. State,* 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Strickland*, 466 U.S. at 690).

Ordinarily, when the defendant did not raise a claim of ineffective assistance of counsel when the case was in the trial court, the record of the trial proceedings will not be sufficiently developed for the purposes of the defendant's appeal to allow the defendant to demonstrate in his appeal that counsel's alleged errors violated the *Strickland* standards. *Menefield v. State,* 363 S.W.3d 591, 592-93 (Tex. Crim. App. 2012). Where the record indicates that the attorney who represented the defendant in his trial was never provided an opportunity to explain the conduct that the defendant challenges in his appeal, courts generally presume that the explanation that the defendant's trial attorney would have offered would have shown that the

choices being criticized in the appeal were related to matters that concerned choices between different trial strategies. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In Alvarenga's case, the record does not reflect that Alvarenga filed a motion for new trial; consequently, the record before us is silent concerning whether the complaints Alvarenga levels at trial counsel represented reasonable choices between different possible strategies. Moreover, given the nature of Alvarenga's complaints, and in the absence of trial counsel's explanation, we are unable to evaluate Alvarenga's claim that the representation he received was constitutionally ineffective. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003).

In summary, Alvarenga's appeal does not present "the rare case where the record on direct appeal is sufficient to prove that counsel's performance was deficient[.]" *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). On this record, Alvarenga has not overcome the strong presumption that he received reasonable professional assistance. *See Thompson*, 9 S.W.3d at 813-14. We overrule Alvarenga's ineffective assistance claim without prejudice to his right to raise his claim in a post-conviction writ. *See Goodspeed*, 187 S.W.3d at 392; *Robinson*, 16 S.W.3d at 813 n.7. We overrule issue two.

Evidence

In his third issue, Alvarenga argues the trial court erred by failing to sustain his objections to the admission of Mary's medical records. According to Alvarenga, the records should not have been admitted because they included statements that were inadmissible because the statements were not made so that Mary's medical providers could provide her with a medical diagnosis or treatment. *See* Tex. R. Evid. 803(4) (excepting statements made for medical diagnosis or treatment from the rule of evidence that generally prohibits the admission of hearsay).

During the trial, Alvarenga's attorney objected to Mary's medical records being admitted because they contained Mary's statement to an emergency room physician that she was sold to someone. Alvarenga's attorney also objected to the admission of the records because they included information showing that an employee of Child Protective Services told a nurse who examined Mary that Mary had been "purchased." Finally, Alvarenga's attorney objected during the trial to the records being admitted because they contained a statement indicating that Mary told the emergency room physician she had attempted sexual intercourse. The trial court overruled all three of Alvarenga's objections, and the records before the jury included the statements that Alvarenga complains about in his appeal.

We review a trial court's ruling to admit or to exclude evidence using an abuse-of-discretion standard. *Carrasco v. State,* 154 S.W.3d 127, 129 (Tex. Crim. App. 2005). When the trial court's evidentiary ruling can be sustained under any theory of law that applies to the case, the ruling will not be reversed on appeal. *See Romero v. State,* 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). To demonstrate that the trial court committed error, the appellant is required to show in the appeal that the trial court's ruling "was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State,* 268 S.W.3d 571, 579 (Tex. Crim. App. 2008).

Generally, statements that are categorized as hearsay are not admissible. *See* Tex. R. Evid. 802. However, Rule 803 outlines numerous exceptions to Rule 802's general prohibition against admitting statements that are hearsay. *See* Tex. R. Evid. 803. One of the exceptions is outlined in Rule 803(4) of the Texas Rules of Evidence, which applies to statements that are made for and reasonably pertinent to a person's medical diagnosis or treatment. Importantly under the circumstances in this case, the scope of Rule 803(4)'s hearsay exception is not limited to statements that are made by the patient. *See Sandoval v. State,* 52 S.W.3d 851, 856-57 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (concluding that the information in the medical records

that came from the complainant's mother "does not affect the admissibility of the statements therein").

In our opinion, the exception making medical records admissible can include statements made by individuals other than the patient if such statements were made to assist the medical provider in diagnosing or treating the patient. *Id*. The testimony in Alvarenga's case shows that a CPS caseworker and a DPS officer were present when Alvarenga was interviewed at the highway patrol office, and that they then accompanied Mary to the hospital so that she could be examined to determine whether she had been sexually assaulted. Based on the information that Alvarenga provided in his interview, the DPS officer and the CPS caseworker were aware that Mary was an unaccompanied minor when she and Alvarenga were stopped, that Alvarenga had smuggled her into the United States, that he had spent the night with her in a hotel, and that he had attempted to have sex with her. The statement in the hospital records attributable to the CPS caseworker is in the section of the sexual assault examination report that described the history of the assault. During the trial, the nurse who examined Mary explained that the history recorded in the records helps her to know where to look for trauma on a patient, and provides information relevant to the patient's treatment. Alvarenga also complains about a statement that Mary made to the emergency room physician that she had been sold, which is a

statement similar to the information the CPS worker provided to Mary's nurse. Mary's statement is in the emergency room physician's record under a section that is labelled "context."

The information indicating that Mary was sold or that she was purchased, as well as the information indicating that she had attempted sexual intercourse, are all statements found in the sections of the medical records designed to provide information to medical providers about the patient's history. Rule 803(4) expressly provides for the admissibility of statements in medical records that describe a patient's medical history or the general character or cause of the symptoms, insofar as "reasonably pertinent to medical diagnosis or treatment[.]" Tex. R. Evid. 803(4). The emergency room physician did not testify, so there is no direct testimony indicating whether he thought the information recorded in his records was pertinent to his diagnosis or treatment. But, the nurse's testimony about why she records information generally, and the fact that all of the statements at issue are located in the sections of the reports that one would expect to find information that a medical provider recorded because it was relevant to a patient's history is circumstantial evidence that supports the trial court's conclusion that the statements were admissible under Rule 803(4). In our opinion, the trial court's conclusion that the statements were admissible under Rule 803(4) is not a ruling that is so clearly wrong

that it lies outside the zone of reasonable disagreement. *See Taylor*, 268 S.W.3d at 579; *Sandoval*, 52 S.W.3d at 856-57.

Alvarenga also argues that statements in the sexual assault report stating that "[Mary] reported by CPS to have been 'purchased,'" and a statement in the emergency room physician's record that Mary's relative "allegedly 'sold' [Mary] to someone" were statements that should have been excluded because the statements were unduly prejudicial. *See* Tex. R. Evid. 403. Rule 403 favors the admission of relevant evidence, so a presumption exists that relevant evidence will generally be more probative than prejudicial. *See Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). Rule 403 also requires that relevant evidence be excluded only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001). Given the definition in the Penal Code of "[t]raffic," evidence that a human had been purchased would be directly probative to prove one of the ways that a person can be trafficked. *See* Tex. Penal Code Ann. § 20A.01(4) (defining "[t]raffic" to mean "transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means"). Therefore, the information about Mary being purchased and sold has relevance that is separate from its relevance to the medical treatment that Mary required when she was examined at the hospital. Moreover, to

be excluded under Rule 403, the evidence must be unfairly prejudicial. *See* Tex. R. Evid. 403.

The emergency room physician's record indicates that Mary was the person who gave the physician the information that is at issue in the appeal. The history that Mary gave to the emergency room physician indicating her relative sold her to someone who then took her to a hotel room is a significant probative circumstance regarding whether Alvarenga was involved in child trafficking. *See* Tex. Penal Code Ann. § 20A.01(4). When evidence provides context for the offense, the prejudicial effect of evidence rarely makes the evidence inadmissible. *See Mann v. State*, 718 S.W.2d 741, 744 (Tex. Crim. App. 1986). Given that Alvarenga was on trial for child trafficking, the trial court could reasonably conclude that the statement in the hospital records indicating that Mary told the emergency room physician that she was "sold" is a statement the trial court could reasonably find to be more probative than prejudicial. We hold the trial court could reasonably determine that the admission of Mary's statement indicating that she told the emergency room physician that she was "sold" was not unduly prejudicial.

Except for the fact that the statement in the nurse's report was made by the CPS worker, not Mary, the statement at issue in the nurse's records is not significantly different than the statement Mary made indicating she had been sold to

someone. In our opinion, given that Alvarenga was tried for child trafficking, the trial court could have reasonably found the probative value of the statement in the nurse's report outweighed its prejudicial value.

Nonetheless, even if the CPS worker's statement about Mary's "purchase" was unduly prejudicial when compared to the statement's probative value, the admission of the statement in the nurse's report is cumulative of other evidence that was properly admitted to show that Alvarenga was engaged in child trafficking. The statements about Mary being sold and purchased are both cumulative of the special agent's testimony, which indicated that Alvarenga paid to have Mary smuggled into the United States. In our opinion, the admission of the statement about Mary's "purchase," even if error, did not have a substantial and injurious effect or influence on the jury's verdict when considering all of the testimony that was before the jury. Tex. R. App. P. 44.2(b); *see also Diamond v. State*, 496 S.W.3d 124, 142-43 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (holding that the admission of hearsay testimony was harmless where the testimony was cumulative of other evidence in the record); *Austin v. State*, 222 S.W.3d 801, 809 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (determining the prejudicial impact by considering the evidence in the context of the entire trial). We overrule Alvarenga's third issue.

Conclusion

In summary, Alvarenga failed to preserve the challenges he raises for the first time in his appeal regarding the constitutionality of the child-trafficking statute. While Alvarenga also complains that he received ineffective assistance during his trial, the record before us was not sufficiently developed to allow that claim to be resolved in this appeal. Finally, we hold the trial court did not abuse its discretion by relying on Rule 803(4) of the Texas Rules of Evidence to admit Mary's medical records into evidence during Alvarenga's trial. We affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on June 17, 2016
Opinion Delivered March 15, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.