

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00403-CR
NO. 09-15-00404-CR

MANUEL SALVADOR MALDONADO JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 13-09-10177-CR, Counts 5 and 8

MEMORANDUM OPINION

An eight-count indictment charged appellant Manuel Salvador Maldonado Jr. with continuous sexual abuse of a child, aggravated sexual assault of a child,¹ three counts of sexual assault of a child, two counts of prohibited sexual conduct, and one count of sexual performance by a child. A jury convicted Maldonado of one count

¹Count two, which alleged aggravated sexual assault of a child, was dismissed prior to trial.

of sexual assault of a child (count five) and one count of sexual performance by a child (count eight), and found Maldonado not guilty as to the remaining counts. The jury assessed punishment at seven years of imprisonment for count five, but recommended that Maldonado's sentence be suspended and that he be placed on community supervision. The jury assessed punishment at three years of confinement for count eight. In two appellate issues, Maldonado challenges the trial court's judgment on count five, which ordered him to repay attorney's fees as a condition of his community supervision and the trial court's exclusion of certain evidence. We affirm the trial court's judgment on count five as modified, and we affirm the trial court's judgment on count eight.

ISSUE ONE

In his first issue, Maldonado contends that the trial court's judgment on count five, which ordered Maldonado to repay attorney's fees as a condition of his community supervision, is "void and not supported by the evidence[.]" Specifically, Maldonado argues that the trial court's judgment on count five is not authorized because the record contains no evidence regarding his financial resources and ability to pay. The State concedes error and recommends that this Court modify the judgment to delete the award of attorney's fees.

For a trial court to assess court-appointed attorney’s fees against a defendant, the court must determine that the defendant has financial resources that enable him to offset, in part or in whole, the costs of the legal services provided. *See* Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2016);² *see also Roberts v. State*, 327 S.W.3d 880, 883 (Tex. App.—Beaumont 2010, no pet.). The record must contain some factual basis to support the determination that the defendant can pay attorney’s fees. *See Youkers v. State*, 400 S.W.3d 200, 212 (Tex. App.—Dallas 2013, pet. ref’d); *Perez v. State*, 323 S.W.3d 298, 307 (Tex. App.—Amarillo 2010, pet. ref’d). A defendant who has been determined to be indigent by the trial court “is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant’s financial circumstances occurs.” Tex. Code Crim. Proc. Ann. art. 26.04(p) (West Supp. 2016).³ Unless the record reflects that the defendant’s financial status has changed, the evidence will not support the imposition of court-appointed attorney’s fees against the defendant. *Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013); *see also Roberts*, 327 S.W.3d at 883-84.

²Because the amendments to article 26.05 do not affect the outcome of this appeal, we cite to the current version.

³Because the amendments to article 26.04 do not affect the outcome of this appeal, we cite to the current version.

In this case, Maldonado submitted a sworn affidavit, in which he averred that he lacked money to retain an attorney and requested court-appointed counsel. The record reflects that the trial court appointed counsel to represent Maldonado, both at trial and on appeal. Our review of the record reveals no evidence of a material change in Maldonado's financial circumstances. Therefore, we conclude that due to the absence of evidence that Maldonado had the financial resources to pay the court-appointed attorney's fees assessed by the trial court, the trial court erred in ordering reimbursement of court-appointed attorney's fees. *See Roberts*, 327 S.W.3d at 884; *see also* Tex. Code Crim. Proc. Ann. art. 26.04(p). We sustain issue one and modify the trial court's judgment on count five to delete the assessment of court-appointed attorney's fees against Maldonado. *See Roberts*, 327 S.W.3d at 884.

ISSUE TWO

In his second issue, Maldonado argues that the trial court erred by excluding certain evidence pursuant to Rule 412 of the Texas Rules of Evidence. Specifically, Maldonado contends it was error for the trial court to exclude evidence and prohibit cross-examination regarding the victim's sexual behavior, prior false outcries of sexual abuse against other individuals, and the victim's internet usage and communications on social media because Rule 412 does not apply to the offenses of sexual performance by a child and prohibited sexual conduct. Maldonado asserts that

the proffered evidence would have supported his defensive theory that the victim had the motive, bias, or interest to make false claims against him. In addition, Maldonado argues that the doctrine of chances made evidence of the victim's allegedly false prior allegations against other individuals admissible.

Prior to the victim's testimony, the trial court conducted a hearing outside the jury's presence. During this hearing, defense counsel argued that the victim's prior allegations of sexual assaults by other alleged perpetrators were admissible to "reveal prejudices and biases and ulterior motives of the witness as they relate to outcries of sexual abuse." In addition, defense counsel argued that the evidence was admissible under the doctrine of chances. The trial court overruled defense counsel's objections and refused to allow the victim's prior allegations against others into evidence.

Later in the trial, after the State rested but before the defense began presenting its case, the trial court reminded defense counsel that he could not "talk about other sex things that might have occurred to [the victim] . . . or that were reported." The trial court also stated that the defense could not mention any other individuals who might have offended against the victim or other outcries the victim might have made against other persons without first approaching the bench, and clarified that its ruling extended to any nude photographs the victim sent to anyone else. During the

defense's case, the trial court also instructed defense counsel that he would not be allowed to question a witness about whether the victim viewed pornography or engaged in other sexual acts. In addition, the trial court refused to admit into evidence two discs that contained the victim's internet activity.

We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Martinez*, 327 S.W.3d at 736. We will not disturb a trial court's evidentiary ruling if it is correct on any applicable theory of law, even if the trial court gave the wrong reason for its ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009); *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]" Tex. R. Evid. 103(a); *see* Tex. R. App. P. 44.2(b). We will not overturn a conviction if, after examining the record as a whole, we have fair assurance that the error did not influence the jury or had but slight effect. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008).

"[I]n a prosecution for sexual assault, aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault[.]" (1) reputation or opinion

evidence of a victim's past sexual behavior and (2) specific instances of a victim's past sexual behavior are not admissible. Tex. R. Evid. 412(a). Subsection (b) of Rule 412 provides that specific instances of a victim's past sexual behavior are admissible in certain instances, such as to prove the victim's motive or bias, if the probative value of such evidence outweighs the danger of unfair prejudice. Tex. R. Evid. 412(b)(2)(C), (3). The proponent of such evidence must demonstrate that the evidence is relevant by establishing that a "nexus, or logical connection, exists between the witness's testimony and the witness's potential motive to testify in favor of the other party." *Woods v. State*, 152 S.W.3d 105, 111 (Tex. Crim. App. 2004); *see also* Tex. R. Evid. 401, 402.

As discussed above, Maldonado argues that because he was being tried for offenses to which the prohibition contained in Rule 412 does not apply, as well as for offenses to which Rule 412 does apply, the trial court erred by excluding evidence of the victim's sexual behavior, prior false outcries of sexual abuse against other individuals, internet usage, and communications on social media. Maldonado's argument appears to be that if a defendant is being tried for an offense that is listed in Rule 412(a) of the Texas Rules of Evidence concurrently with an offense that is not listed in Rule 412(a), evidence that would normally be prohibited by Rule 412(a) is admissible.

At the outset, we note that Maldonado was on trial for sexual assault and aggravated sexual assault, both of which are listed in Rule 412(a). *See* Tex. R. Evid. 412(a). We note that Maldonado had the right to request separate trials, but he did not request a severance. *See* Tex. Penal Code Ann. § 3.04(a) (West 2011). The fact that all of the offenses for which Maldonado was on trial are not listed in Rule 412(a) does not, *ipso facto*, make the type of evidence described in Rule 412(a) admissible. The trial court could have reasonably determined that evidence of the victim's allegations against other individuals and the victim's internet and social media activity were not relevant to whether Maldonado was guilty of the charged offenses. *See* Tex. R. Evid. 401(a). In addition, the trial court could have reasonably determined that the prejudicial effect of such evidence outweighed any probative value. *See* Tex. R. Evid. 403, 412(b)(3); *see also De La Paz*, 279 S.W.3d at 344; *Romero*, 800 S.W.2d at 543. Maldonado did not demonstrate that the proffered evidence is relevant to show bias by establishing that a nexus or logical connection exists between the proffered evidence and the victim's potential motive to falsely testify in favor of the State. *See Woods*, 152 S.W.3d at 111; *see also* Tex. R. Evid. 401, 402.

We now turn to Maldonado's argument within issue two that the doctrine of chances made the proffered evidence of the victim's prior allegations and her

internet and social media usage admissible. *See Hammer v. State*, 296 S.W.3d 555 (Tex. Crim. App. 2009). In *Hammer*, the victim had alleged that she was sexually molested by all of her mother's boyfriends, had been held at knife point by five men, and had been sexually assaulted by another man. *Id.* at 570. The Court of Criminal Appeals concluded that the trial court abused its discretion by excluding evidence of the victim's prior allegations because those allegations made the victim's other allegations of sexual misconduct somewhat less likely pursuant to the doctrine of chances. *Id.*

In this case, the victim testified outside the jury's presence that her uncle had sex with her on a few occasions. The victim also testified that another individual had touched her "butt" over her clothing when she was at school. The victim denied making any allegation against the third individual referenced in Maldonado's brief. Unlike the facts present in *Hammer*, the allegations about which the victim testified in this case are not demonstrably false or facially unbelievable, and they do not constitute repetition of the same allegations against multiple individuals. *See id.* We therefore conclude that the trial court did not err by excluding this testimony, since those allegations do not make the victim's allegations against Maldonado less likely. *See id.* Likewise, the trial court did not err by excluding evidence of the victim's

internet and social media activity because such evidence does not make Maldonado's guilt of the charged offenses more or less likely. *See id.*

Maldonado also argues in his brief that the trial court's exclusion of the proffered evidence violated his rights to confrontation under the Sixth Amendment of the United States Constitution, article I, section 10 of the Texas Constitution, and his right to due process. However, Maldonado cites no authorities in support of his constitutional arguments, and they are therefore waived. *See Tex. R. App. P. 38.1(i).*

Furthermore, in light of the entire record, we conclude that Maldonado has not demonstrated that the exclusion of the proffered evidence affected his substantial rights. *See Tex. R. Evid. 103(a); Tex. R. App. P. 44.2(b).* After examining the entire record, we conclude that the trial court did not err in excluding the proffered evidence, and we have fair assurance that any potential error did not influence the jury or had but slight effect. *See Taylor*, 268 S.W.3d at 592. For all of these reasons, we overrule issue two. We affirm as modified the trial court's judgment on count five, and we affirm the trial court's judgment on count eight.

AFFIRMED; AFFIRMED AS MODIFIED.

STEVE McKEITHEN
Chief Justice

Submitted on March 27, 2017
Opinion Delivered May 31, 2017
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Before McKeithen, C.J., Horton and Johnson, JJ.