In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00442-CR
NO. 09-15-00443-CR

MICHAEL JOHN RUBINO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 15-03-02217-CR (Counts 1 and 2)

MEMORANDUM OPINION

In a two-count indictment, a grand jury charged appellant Michael John Rubino with continuous sexual abuse of R.F., a child younger than fourteen years of age, and with aggravated sexual assault of the same child. Both counts included six enhancement paragraphs. In count one, a jury convicted Rubino of continuous sexual abuse of a child and assessed punishment at life in prison. In count two, the jury convicted Rubino of aggravated sexual assault of a child, found all six of the

enhancement paragraphs to be true, and assessed punishment at life in prison. In two appellate issues, Rubino complains the trial court erred by preventing his defense counsel from (1) posing an alleged proper commitment question during voir dire, and (2) offering evidence on his defensive theory of an alternate perpetrator. We affirm the trial court's judgments.

In issue one, Rubino argues that the trial court erred by preventing his defense counsel from posing a proper commitment question during voir dire. Rubino contends that the question at issue is a commitment question because it commits prospective jurors to resolve the issue of the defendant's guilt a certain way after learning the manner and means of the sexual assault. According to Rubino, the commitment question is proper because it gives rise to a valid challenge for cause and contains only those facts necessary to test whether a prospective juror is challengeable for cause.

The State argues that the commitment question is improper because it required jurors to commit to the resolution of an issue in a particular manner based on specified hypothetical facts which were unnecessary to support a challenge for cause on grounds of inability to comply with the trial court's instruction regarding the State's burden of proof. The State further argues that the trial court did not prevent Rubino from addressing the topic of the State's burden of proof during voir dire,

because the trial court allowed defense counsel to question prospective jurors regarding their ability to follow the trial court's instructions and acquit Rubino if the State failed to meet its burden of proof on every element of the offense.

We review a trial court's ruling regarding the limitation of questioning during voir dire for an abuse of discretion. *Hernandez v. State*, 390 S.W.3d 310, 315 (Tex. Crim. App. 2012). "A trial court's discretion is abused only when a proper question about a proper area of inquiry is prohibited." *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). A commitment question is one that commits a prospective juror to resolve, or refrain from resolving, an issue a certain way after learning a particular fact. *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001). Often, commitment questions require a "yes" or "no" answer, and the answers commit a juror to resolve an issue in a particular way. *Id.* However, not all commitment questions are improper. *Id.* at 181.

To determine whether the question is a proper commitment question, the court must first inquire whether one of the possible answers to the question gives rise to a valid challenge for cause. *Id.* at 181-82. If it does not, then the question is not proper and the trial court should disallow it. *See id.* If the commitment question gives rise to a valid challenge for cause, then the trial court must determine whether the question contains only those facts necessary to test whether a prospective juror is

challengeable for cause. *Id.* at 182. We consider the voir dire as a whole in determining whether a question constitutes an improper commitment question. *See Halprin v. State*, 170 S.W.3d 111, 119 (Tex. Crim. App. 2005). "Where the trial court does not place an absolute limitation on the substance of an appellant's voir dire question, but merely limits a question due to its form, the appellant must attempt to rephrase the question or risk waiver of the alleged voir dire restriction." *Hernandez*, 390 S.W.3d at 315.

During voir dire, defense counsel attempted to propound the following "gut check" question: "What if the indictment alleges that the complainant's genitals were penetrated by a vibrator, but the undisputed evidence shows that penetration was done with the use of a hairbrush? Can you follow the trial court's instruction and find the defendant not guilty?" Defense counsel argued that the question was proper because it led to a challenge for cause concerning the State's failure to prove one element of the offense as charged in the indictment and because the question did not include the facts of the case. According to defense counsel, many jurors have a problem following the trial court's instructions when one element has not been found beyond a reasonable doubt because they view it as a technicality. The State complained about the structure of the question and argued that there was a better way to word the question so that it would not be inflammatory. The trial court found

that the question would inflame the prospective jurors, prohibited defense counsel from asking the question, and requested that defense counsel reword the question in a manner that would allow the defense to get the same information from the jurors. Defense counsel objected to the rewording of the question as being inadequate.

The record reflects that while the trial court sustained the State's complaint concerning the form of the question, the trial court allowed defense counsel the opportunity to reword the question and ask prospective jurors about the substance of the restricted question. Defense counsel thereafter questioned the prospective jurors about whether they could follow the trial court's instruction and find Rubino not guilty if the State failed to prove every element of the charged offense. We conclude that the trial court properly prohibited defense counsel from asking its proposed "gut check" question, because the question included hypothetical facts that were inflammatory and which were unnecessary to support a challenge for cause on the grounds of inability to comply with the trial court's instructions regarding the State's burden of proof. *See Standefer*, 59 S.W.3d at 182-83. We further conclude that the trial court did not limit defense counsel's ability to question the prospective jurors regarding the substance of the restricted question. *See Hernandez*, 390 S.W.3d at 315. We overrule issue one.

In issue two, Rubino complains that the trial court erred by excluding defense evidence of an alternate perpetrator, thereby denying Rubino his constitutional right to present a defense. According to Rubino, throughout his case, he presented the theory that R.F.'s uncle, C.F., was the perpetrator, but the trial court prevented him from offering witness testimony in support of his defense theory. The State maintains that the evidence was properly excluded because identity was not an issue in the case and there was no likelihood that R.F. was mistaken about the identity of the man who had continuously abused her for approximately five years. According to the State, evidence that C.F had attempted to have sex with one of his nieces and had sexually abused two boys was irrelevant and had vast potential to be unfairly prejudicial, to confuse the issues, and mislead the jury.

The record shows that Rubino asked the trial court to allow him to present testimony from three witnesses in support of his alternative perpetrator defense and to rebut the false impression that Rubino was the only man who had access to R.F. to commit the alleged acts. Rubino argued that C.F. had access to R.F. as well as three other children, and that the testimony would show that C.F. had sexually abused the three other children. Rubino also argued that C.F. had access to the camera and computer where pornography was found, and that one of the witnesses

would testify that he recognized C.F.'s penis in the video that showed R.F. being sexually abused.

The State argued that the alternative perpetrator evidence was not relevant and was more prejudicial than probative because there was no evidence that C.F. had assaulted R.F., and R.F. had never indicated that anyone other than Rubino had sexually assaulted her. *See* Tex. R. Evid. 403. The trial court denied Rubino's request to present alternative perpetrator evidence. After allowing Rubino to make a bill of review regarding the excluded evidence, the trial court found that there was no evidence that R.F. had reported being sexually abused by C.F. and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusing the issues. The trial court noted that the evidence concerned other people who have alleged that they were victims of someone other than the defendant and who had not been connected with R.F's allegations. The trial court found that a defendant may not present evidence of an alternate suspect of a crime without proof that the alternate suspect committed some act directly connecting him to the particular charged offense, and in this case, Rubino had not presented evidence connecting C.F. with the charged offenses.

Erroneous evidentiary rulings rarely rise to the level of denying the fundamental constitutional right to present a meaningful defense. *Potier v. State*, 68

S.W.3d 657, 663 (Tex. Crim. App. 2002). "[T]he exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Id.* at 665; *see Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002). The Court of Criminal Appeals has held that

> [a]lthough a defendant obviously has a right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged "alternative perpetrator."

Wiley, 74 S.W.3d at 406. It is not sufficient if a defendant merely offers up unsupported speculation that another person may have committed the crime. *Martinez v. State*, 212 S.W.3d 411, 424 (Tex. App.—Austin 2006, pet. ref'd). Such speculation intensifies the grave risk of confusing the jury, and it invites the jury to base its findings on emotion or prejudice. *Id.*

The alternative perpetrator defense typically arises in cases in which the complaining witness is attacked by a stranger. *Ex parte Huddlestun*, 505 S.W.3d 646, 661 (Tex. App.—Texarkana 2016, pet. ref'd). Here, R.F., who was sixteen years old at the time of trial, testified that Rubino was her stepfather and that he had sexually abused her. R.F. testified that she was seven years old when Rubino sexually abused her for the first time. R.F. explained that Rubino touched her with

his penis and his hands and that he had penetrated her both vaginally and anally with his penis. R.F. testified that Rubino would often put his penis in her mouth, and Rubino made R.F. rub his penis with her hand. R.F. also testified that Rubino took pictures of her when she was naked. According to R.F., the abuse occurred a few times a week from the age of seven until she turned twelve.

The record shows that R.F. identified Rubino as the only person who had sexually assaulted her. R.F. did not allege that she had been sexually assaulted by a stranger, or that she was unsure of her attacker's identity. Thus, based on the facts in this case, the alternative perpetrator defense is not applicable. *See Ex parte Huddlestun*, 505 S.W.3d at 661. Even if the defense were applicable, Rubino failed to demonstrate a foundation sufficient to support the defense because his proffered evidence did not show a connection between C.F. and the sexual abuse alleged by R.F. *See Wiley*, 74 S.W.3d at 406; *Ex parte Huddlestun*, 505 S.W.3d at 661; *Martinez*, 212 S.W.3d at 424. Thus, any suggestion that C.F. was the alternative perpetrator is both meager and speculative. *See Wiley*, 74 S.W.3d at 406; *Ex parte Huddlestun*, 505 S.W.3d at 662; *Martinez*, 212 S.W.3d at 424. Accordingly, we conclude that the trial court's exclusion of Rubino's alternative perpetrator evidence did not violate Rubino's right to present a complete defense. We overrule issue two. Having overruled both of Rubino's issues, we affirm the trial court's judgments.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on March 27, 2017
Opinion Delivered May 10, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.