

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00234-CR
NO. 09-16-00235-CR
NO. 09-16-00236-CR
NO. 09-16-00237-CR

BOBBY JOE SANSING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 15-04-04335-CR (Counts 1, 2, 3, and 4)

MEMORANDUM OPINION

A jury convicted appellant, Bobby Joe Sansing, of four counts of sexual assault of a child. *See* Tex. Penal Code Ann. § 22.011(a)(2) (West Supp. 2017). Sansing appeals his convictions, and in his sole appellate issue, complains that the trial court improperly admitted into evidence data taken from Sansing’s cellphone. We affirm the trial court’s judgments.

Factual and Procedural Background

Sansing began dating Brenda, the mother of K.B., in 2011.¹ In April, 2015, when K.B. was seventeen years old, she disclosed to Brenda that Sansing had sexually assaulted her. These assaults, as K.B. described at trial, began when she was fourteen years old and occurred on numerous occasions for the next several years. K.B. provided detailed descriptions of several specific assaults. Brenda, upon K.B.'s disclosure of Sansing's acts, took K.B. to the Montgomery County Sheriff's Office to make a report. She also turned over a cellphone with potential evidence of the assaults on it. The cellphone was one Brenda had purchased and paid the bill for but allowed Sansing to use. The deputy that took K.B.'s statement collected the phone from Brenda and logged it as potential evidence, but he did not perform any type of search on it, leaving it to the detectives' discretion as to how the phone would be processed. A detective subsequently obtained a search warrant for the phone. After the warrant was signed by a judge, it was executed by a crime scene investigator who performed a "cell dump" and produced reports of the images and data retrieved.

¹ To protect the privacy of the victim, who was a minor at the time of the assaults, we identify her by her initials and refer to her mother by first name only. *See* Tex. Const. art. I, § 30(a)(1) (granting victims of crime "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

Sansing was ultimately indicted on four separate counts of sexual assault of a child. He entered a plea of not guilty as to all counts, and a jury trial followed. The jury found Sansing guilty on all four counts as charged in the indictment and assessed punishment at fifty years in the Texas Department of Criminal Justice for each count. The trial court entered judgment on each verdict, ordering the sentences to run concurrently.

Admission of Cellphone Evidence

In his sole issue on appeal, Sansing argues that the trial court erred by admitting data from his cellphone into evidence because the phone was illegally taken from him by a third party and given to law enforcement without his knowledge or consent.

We review a trial court's ruling to admit or exclude evidence under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Under the abuse of discretion standard, "an appellate court should not disturb the trial court's decision if the ruling was within the zone of reasonable disagreement." *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008). Moreover, erroneous admission of evidence will not support reversal unless such error affected a substantial right of the complaining party. Tex. R. Evid. 103(a); Tex. R. App. P. 44.2(b). "A substantial right is affected when the error had a substantial

and injurious effect or influence in determining the jury's verdict.” *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

At trial, Sansing timely objected to the introduction of the phone itself and also to the evidence obtained from the cellphone. Specifically, he argued that the cellphone “was basically taken from him . . . at the direction and the encouragement of law enforcement.” Counsel argued that Sansing had an expectation of privacy in the contents of the phone, therefore the evidence should be excluded under the Fourth Amendment to the United States Constitution and article I, section 9 of the Texas Constitution. *See* U.S. Const. IV; Tex. Const. art. I, § 9. The trial court overruled the objection, acknowledging Sansing’s right to privacy, but finding that, because the contents of the cellphone were lawfully obtained pursuant to a warrant duly signed before the search of the phone was conducted, there was no violation of the Fourth Amendment.

On appeal, Sansing concedes that the data from his cellphone was recovered pursuant to a search warrant. However, he argues that it should have been excluded nonetheless pursuant to article 38.23 of the Texas Code of Criminal Procedure, which provides that “[n]o evidence obtained by an officer or other person in violation of [the law] shall be admitted in evidence against the accused on the trial of any criminal case.” Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005).

In order for an issue to be preserved for appeal, there must be a timely objection that specifically identifies the legal basis for the objection. *See* Tex. R. App. P. 33.1(a). Because an objection preserves only the specific grounds expressly cited or clearly understood among the parties, “[w]hether a party’s particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial.” *See Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009); *see also Schultze v. State*, 177 S.W.3d 26, 38 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d) (noting that “an objection stating one legal basis may not be used to support a different legal theory on appeal”).

In this case, the record shows that Sansing’s constitutional objection to the trial court does not comport with his statutory complaint on appeal—that Brenda taking his cellphone without permission constituted an illegal act of theft and that article 38.23, as extended to acts of private citizens, required exclusion of the evidence on statutory grounds. Thus, the statutory argument made on appeal is factually and legally distinct from the constitutional argument made at trial. *See Resendez v. State*, 306 S.W.3d 308, 315 (Tex. Crim. App. 2009) (holding that a statutory complaint under article 38.22 of the Code of Criminal Procedure was legally distinct from the constitutional argument relied upon at trial, and therefore, was not preserved for appeal); *see also Linh Diem Le v. State*, No. 05-12-00462-CR,

2013 WL 3929199, at *2 (Tex. App.—Dallas July 26, 2013, no pet.) (not designated for publication) (holding that, because article 38.23 of the Code of Criminal Procedure is a statutory complaint, it is not preserved on appeal by a constitutional objection made at the trial level).

We recognize that an appellant need not always specifically cite article 38.23 at trial in order to preserve error on that basis for appeal. *See Polk v. State*, 738 S.W.2d 274, 275–76 (Tex. Crim. App. 1987). Indeed, if Sansing’s complaint on appeal were that article 38.23 required exclusion of the evidence based on the violation of the federal and state constitutional provisions he cited at trial, his complaint would have been sufficiently preserved. However, Sansing’s argument at trial was that Brenda was acting “at the direction and the encouragement of law enforcement,” invoking Fourth Amendment protections applicable only to actions by government officials or those acting as a government agent. *See Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 613–14 (1989). By comparison, a defendant challenging the admissibility of evidence under article 38.23 on the ground that such evidence was wrongfully obtained by a person acting solely in her private capacity must prove that the private actor obtained the evidence in violation of the law. *Mayfield v. State*, 124 S.W.3d 377, 378 (Tex. App.—Dallas 2003, pet. ref’d). Sansing’s argument in the trial court was that he had an expectation of privacy in the

contents on the phone because his name was listed on Brenda's account with the service provider. At no point before the trial court did Sansing allege that Brenda had violated any criminal law in obtaining the phone.

Moreover, even if we were to address Sansing's argument, the record reveals that Sansing failed to prove that Brenda committed theft, as alleged on appeal, as that offense requires a person to have unlawfully appropriated property with the intent to deprive the owner of the property. *See* Tex. Penal Code Ann. § 31.03(a) (West Supp. 2017). Rather, the record shows that Brenda took the phone and turned it directly over to law enforcement officers at the time K.B. made her initial report and for the purpose of aiding a criminal investigation. Such an action does not generally, on these facts, implicate article 38.23(a). *See Stone v. State*, 574 S.W.2d 85, 88–89 (Tex. Crim. App. 1978) (where babysitter lawfully in appellant's home found photographs containing child pornography, took the photographs, and turned them directly over to law enforcement, there was no "intent to deprive," and article 38.23 did not require exclusion of the photographs as evidence); *Crunk v. State*, 934 S.W.2d 788, 793 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (finding that article 38.23 did not require exclusion of evidence where appellant's roommates turned over to law enforcement a sheet of paper upon which appellant had documented potential evidence because appellant failed to show the roommates had

an intent to deprive him of the property when it was given to police to facilitate the investigation of a crime).

Accordingly, because Sansing has failed to preserve this complaint for appeal, we overrule Sansing's issue and affirm the judgments of the trial court. *See* Tex. R. App. P. 33.1.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on December 4, 2017
Opinion Delivered January 31, 2018
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Before McKeithen, C.J., Kreger and Johnson, JJ.