In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00019-CR

DOMINGO CEPEDA GARZORIA JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 15-01-00807-CR

MEMORANDUM OPINION

Appellant Domingo Cepeda Garzoria Jr. appeals his conviction for continuous sexual abuse of a child. In issue one, Garzoria argues that the trial judge's admonishment during voir dire deprived him of a fair and impartial jury, and in issue two, Garzoria contends that the prosecutor's improper comments during direct examination deprived him of a fair trial. In issues three and four, Garzoria complains about the admission of evidence and jury charge error. We affirm the trial court's judgment.

PROCEDURAL BACKGROUND

A grand jury indicted Garzoria with one count of continuous sexual abuse of a child and one count of indecency with a child by contact. *See* Tex. Penal Code Ann. §§ 21.02(b), 21.11(a)(1) (West Supp. 2017). The State abandoned count two, which alleged indecency with a child by contact, and proceeded to trial on count one. A jury found Garzoria guilty of continuous sexual abuse of a child and assessed punishment at ninety-nine years of confinement.

ANALYSIS

In issue one, Garzoria complains that the trial judge admonished the jury panel during voir dire that they must answer questions regarding punishment in a specific way, depriving him of a fair and impartial jury at the punishment phase of his trial. The record shows that the trial judge informed the venire that they must answer in the affirmative when asked if they could consider the full range of punishment. However, the record also reflects that the trial judge modified the complained-of comment by explaining to the venire that a juror must be able to consider the full range of punishment. According to Garzoria, the trial judge's comment allowed jurors who could not consider the full range of punishment to be seated. Garzoria argues that the trial judge's comment constituted fundamental error that required no

objection at trial. The State argues that Garzoria forfeited his right to an impartial jury by failing to object at trial.

The right to an impartial jury is guaranteed by the Sixth Amendment and the Texas Constitution. *See* U.S. Const. amend. VI; Tex. Const. art. I, § 15. Because the Sixth Amendment right to an impartial jury is subject to waiver, it is not to be regarded as a fundamental feature of the system which is not optional with the parties. *State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008); *see also Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998) (noting that there is no significant textual difference between the Sixth Amendment and the Texas Constitution). Thus, the right to an impartial jury is a right to be exercised at the option of the defendant, and it is subject to the legitimate strategic processes of defense counsel during the course of trial, including the tactical decision not to challenge prospective jurors for cause. *Morales*, 253 S.W.3d at 697-98. Because Garzoria failed to object at trial, Garzoria has not preserved this issue for our review. *See* Tex. R. App. P. 33.1(a)(1); *Buntion v. State*, 482 S.W.3d 58, 69 (Tex. Crim. App. 2016). We overrule issue one.

In issue two, Garzoria complains that the trial court abused its discretion by admitting testimony that Garzoria contends improperly commented on his Fifth Amendment right against self-incrimination. *See* U.S. Const. amend. V. According

to Garzoria, the complained-of testimony violated his right to remain silent and to not testify at trial. *See id.*; Tex. Const. art. I, § 10; *see also* Tex. Code Crim. Proc. Ann. art. 38.22 (West 2018).

The record shows that during the direct examination of Detective Shannon Spencer of the Montgomery County Sheriff's Office, the prosecutor asked Spencer if she had attempted to interview Garzoria during her investigation, and Spencer testified, "Yes." The prosecutor then asked Spencer if she was ever able to do so, and Spencer testified, "No." The record reflects that defense counsel did not object until after Spencer had answered both of the prosecutor's questions. The trial court overruled defense counsel's objection that Spencer's statement commented on Garzoria's failure to testify. In *Salinas v. State*, the Court of Criminal Appeals has held that pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against compelled self-incrimination, and prosecutors may comment on such silence regardless of whether a defendant testifies at trial. *Salinas v. State*, 369 S.W.3d 176, 178-79 (Tex. Crim. App. 2012). We overrule issue two.

In issue three, Garzoria complained that the trial court erred by admitting the certified sexual assault nurse examiner's (SANE) report into evidence, which includes a paraphrased narrative of A.G.'s statements to the SANE concerning the abuse allegations. According to Garzoria, the SANE report contains inadmissible

hearsay statements made by A.G., and the State failed to meet its burden to show that the statements A.G. made during the SANE examination were made for the primary purpose of medical treatment or diagnosis. *See* Tex. R. Evid. 802, 803(4); *Taylor v. State*, 268 S.W.3d 571, 578 (Tex. Crim. App. 2008). Garzoria argues that because A.G.'s SANE examination occurred several years after the alleged abuse occurred, A.G.'s statements were not pertinent to treatment.

We review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). We will not reverse a trial court's ruling if it falls within the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153-54 (Tex. Crim. App. 2001). "Hearsay" means a statement that: (1) the declarant did not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Tex. R. Evid. 801(d). Statements that are made for, and are reasonably pertinent to, medical diagnosis or treatment and which describe medical history, past or present symptoms or sensations, their inception, or their general cause are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness. Tex. R. Evid.803(4).

For a statement to be admissible under Rule 803(4), the proponent of the evidence must show that (1) the declarant was aware that the statement was made

for the purposes of medical diagnosis or treatment and that proper diagnosis or treatment depended on the veracity of the statement, and (2) the statement offered is pertinent to treatment. *Prieto v. State*, 337 S.W.3d 918, 921 (Tex. App.—Amarillo 2011, pet. ref'd). This medical treatment exception to the hearsay rule is based on the assumption that the child victim understood the importance of being truthful with medical personnel to receive an accurate diagnosis and treatment, and it does not require medical personnel to expressly state that the child victim recognized the need to be truthful. *Beheler v. State*, 3 S.W.3d 182, 188 (Tex. App.—Fort Worth 1999, pet. ref'd). Instead, the record must show that the child victim understood why she needed to be honest with medical personnel. *See id.* at 188-89. Additionally, because the treatment of child abuse victims includes removing the child from the abusive setting, the identity of the abuser is pertinent to the medical treatment of the child. *Fleming v. State*, 819 S.W.2d 237, 247 (Tex. App.—Austin 1991, pet. ref'd).

The record shows that Jamie Ferrell, the clinical director of forensic nursing at Memorial Hermann Health System, testified that she is a certified SANE. Ferrell testified that in September 2014, she conducted a medical forensic assessment on A.G., and Ferrell made records regarding her assessment. Defense counsel objected to the admission of the medical records Ferrell created, arguing that the history portion of the records contains hearsay statements made by A.G., and that the records

were not medically necessary because they did not pertain to a medical diagnosis or treatment due to A.G. not having had any contact of a sexual nature in more than two years. Ferrell explained that even when a child makes a delayed outcry, the child's history is relevant for medical purposes to form a diagnosis and treatment plan. Ferrell also explained that the child's history is relevant in considering whether the child has a sexually transmitted infection and in determining the emotional and psychological impact for the purposes of counseling, safety, and security. According to Ferrell, she is mandated to assess every patient, and it is medically necessary that she obtain a patient's history to make treatment decisions. The trial court overruled defense counsel's objection and admitted the SANE report.

Ferrell also testified regarding the contents of the SANE report, and Ferrell explained that A.G. had provided her information concerning the history of the assault. Ferrell testified that A.G. provided her a patient history of sexual contact as well as sexual contact that A.G. had witnessed. According to Ferrell, A.G. reported that Garzoria had touched her on two occasions while A.G. was sleeping. Ferrell testified that A.G. reported that when she was seven, Garzoria put his hand inside her clothes and touched her breast and her genitalia. Ferrell further testified that A.G. reported that when she was eight, Garzoria put his hand underneath her shirt and

touched her breasts. Ferrell stated that A.G. also reported that Garzoria had rubbed his private on the face of another child, V.G., while V.G. was sleeping.

Based on Ferrell's testimony, the trial court could have found that A.G.'s statements during the SANE examination were reasonably pertinent to A.G.'s diagnosis and treatment. *See Prieto*, 337 S.W.3d at 921. Because A.G.'s statements were made for the purposes of medical diagnosis and treatment, we conclude that the trial court did not abuse its discretion by admitting the SANE report and Ferrell's testimony into evidence. *See Beheler*, 3 S.W.3d at 189. We overrule issue three.

In issue four, Garzoria argues that the trial court erred by submitting a jury charge that allowed the jury to find, without unanimity, that the State need only prove that the acts of sexual abuse occurred prior to the indictment, which Garzoria contends includes the period before the statute at issue became law. The offense of continuous sexual abuse of a young child became effective on September 1, 2007, and the statute does not apply to acts of sexual abuse committed before its effective date. *See* Act of May 18, 2007, 80th Leg., R.S., ch. 593, §§ 1.17, 4.01(a), 2007 Tex. Gen. Laws 1120, 1127, 1148 (current version at Tex. Penal Code Ann. § 21.02 (West Supp. 2017)).

The indictment alleges that before the presentment of the indictment, Garzoria

> did then and there, during a period that was 30 or more days in duration, to-wit: from on or about May 1, 2012 through August 24, 2014, when

> the defendant was 17 years of age or older, commit two or more acts of sexual abuse against A.G. and V.G., children younger than 14 years of age, namely, Indecency with a Child by Contact, by touching the sexual organ of A.G. with the Defendant's hand; and by Indecency with a Child by Contact, by touching the Defendant's genitals onto V.G.'s face[.]

Paragraph one of the jury charge defines the offense of continuous sexual abuse of a child as follows:

> [a] person commits an offense if, during a period that is 30 days or more in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.

Paragraph two states that the phrase "on or about" means any time prior to the presentment of the indictment, which was May 7, 2015. Paragraph four of the jury charge explains as follows:

> In order to find the Defendant guilty of the offense of Continuous Sexual Abuse of a Child, you are not required to agree unanimously on the exact date when the acts were committed. However in order to find the Defendant guilty of the offense of Continuous Sexual Abuse of a Child, you must agree unanimously that the Defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse against a child younger than 14 years of age.

The application paragraph of the charge provides as follows:

> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about May 1, 2012 through on or about August 24, 2014, in Montgomery County, Texas, the Defendant, DOMINGO CEPEDA GARZORIA JR., did then and

> there, when he was 17 years of age or older, commit two or more acts of sexual abuse against A.G. and V.G., children younger than 14 years of age, namely: Indecency with a Child by Contact, by touching the sexual organ of A.G. with the Defendant's hand; and by Indecency with a Child by Contact, by touching the Defendant's genitals onto V.G.'s face, then you will find the Defendant Guilty of Continuous Sexual Abuse of a Child as charged in Count 1 of the Indictment.

The record shows that during a jury charge conference, Garzoria's counsel objected that paragraph one in the jury charge was misleading because it failed to inform the jury that the acts of sexual abuse had to have taken place after 2007, when the statute became effective. Garzoria's counsel made the same objection concerning paragraph four, arguing that it should have included the relevant time period from 2007 until the child became fourteen years of age. The trial court overruled Garzoria's counsel's objections.

The trial court must give the jury a written jury charge that sets forth the applicable law. Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007); *Celis v. State*, 416 S.W.3d 419, 423 (Tex. Crim. App. 2013). We review a claim involving charge error by determining whether the charge is erroneous, and if it is, we conduct a harm analysis. *Celis*, 416 S.W.3d at 423. Although some courts have found charge error based on a trial court's failure to instruct the jury that it could only convict for the offense of continuous sexual abuse of a child based on conduct committed after September 1, 2007, the effective date of the statute, the error in those cases arose

because the juries had heard evidence of the defendant's conduct that had occurred prior to or very near September 1, 2007. *See Gomez v. State*, 459 S.W.3d 651, 656, 660 (Tex. App.—Tyler 2015, pet. ref'd); *Martin v. State*, 335 S.W.3d 867, 873-76 (Tex. App.—Austin 2011, pet. ref'd); *see also Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). In this case, there was no evidence that Garzoria had committed any of the acts of sexual abuse prior to or even close to September 1, 2007.

The record shows that A.G. was born on June 2, 2004, and A.G. was twelve years old when she testified at trial in January 2017. A.G. testified that her cousin, V.G., was eight years old at the time of trial. A.G. testified that in August 2014, V.G. spent the night with her, and A.G. saw Garzoria put his genitalia on V.G.'s face while V.G. was sleeping. A.G. testified that Garzoria had touched her inappropriately on two occasions. A.G. testified that in 2010, Garzoria touched her private part underneath her clothing with his hand. A.G. testified that when she was eight or nine, Garzoria tried to put his hands underneath her clothes, but he never touched her because she pulled away and told him to stop. Based on this record, it was not necessary for the trial court to instruct the jury that it could not convict Garzoria based on conduct committed prior to September 1, 2007, because there was no evidence that Garzoria had committed any of the acts of abuse prior to or even

close to that date. Because there was no charge error in this case, we conclude that the trial court did not err by overruling Garzoria's objections and submitting the jury charge. *See Celis*, 416 S.W.3d at 423. Because our review of the record shows that there is no charge error in this case, we need not conduct a harm analysis. *See id.* We overrule issue four. Having overruled all of Garzoria's issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on June 26, 2018
Opinion Delivered August 29, 2018
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.