



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00383-CR

FLORENCIO MARTINEZ SANCHEZ

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM 432ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1375147D

MEMORANDUM OPINION¹

In six issues, Appellant Florencio Martinez Sanchez appeals from his conviction for continuous sexual abuse of a child and resulting eighty-year sentence. See Tex. Penal Code Ann. § 21.02 (West Supp. 2017). We affirm.

¹See Tex. R. App. P. 47.4.

I. BACKGROUND

Sanchez and C.C. are brothers-in-law who lived close to one another. C.C. is married to C.F., and they have three children, S.C., D.C., and Y.C. Sanchez also has three children, and Sanchez's and C.F.'s children would often play together at each other's houses.

On June 21, 2014, C.F.'s children were at Sanchez's house playing video games with two of his children. Sanchez called for nine-year-old S.C. to join him in the garage, and when she did so, Sanchez had her sit down on the floor. Sanchez took a phone out of his pocket, sat down behind S.C., and pulled down her shorts and underwear. He then navigated to a pornographic video on his phone, had S.C. hold the phone while the video was playing, and began touching her genitals with his hand. Sanchez also unzipped his pants and rubbed his genitals on S.C.'s back. The evidence showed that Sanchez had previously sexually abused S.C. in approximately June 2013, as well as on another occasion approximately six months later.

A grand jury indicted Sanchez for continuous sexual abuse of a child, and a jury convicted him of that offense. *See id.* Sanchez elected to have a jury assess his punishment, the jury assessed punishment at eighty years' confinement, and the trial court sentenced him accordingly.

II. ADMISSION OF STATE'S EXHIBIT 7

In his first issue, Sanchez contends the trial court erred by admitting State's Exhibit 7. Upon arresting Sanchez, investigators seized his cell phone.

Because S.C. had stated in her June 21 outcry that Sanchez had her watch a pornographic video on his phone while he sexually abused her, the police conducted a forensic analysis on the phone to see if they could determine whether any pornography had been accessed on it at any time, including June 21.² The forensic analysis found approximately 260 pornographic images that were stored in the phone's Internet browser cache.³ The trial court admitted all of these images into evidence as State's Exhibit 7.

The phone from which the images in State's Exhibit 7 were extracted was a white and gray Motorola DROID RAZR XT912. Sanchez contends on appeal the evidence established his phone was a red flip phone that was incapable of playing the pornographic video S.C. claims he showed her on June 21. Since

²During an interview, Sanchez had told investigators not merely that they would find he did not look at or show a pornographic video on his phone on June 21; he told them that they would not find any pornography on his phone whatsoever.

³During trial, Detective Mike Weaver, a computer forensic examiner with the Arlington Police Department, testified that a cache is a temporary repository for files. Detective Weaver stated that when one uses an Internet browser to navigate to a website, the browser will store key pieces of information related to that website in its cache to allow for quicker retrieval of that information if someone navigates to the website at a later time. *See generally Wise v. State*, 364 S.W.3d 900, 904 n.3 (Tex. Crim. App. 2012) ("A cache (pronounced 'cash') is a storage mechanism designed to speed up the loading of Internet displays. When a computer user views a webpage, the web browser stores a copy of the page on the computer's hard drive in a folder or directory. That folder is known as the cache, and the individual files within the cache are known as temporary Internet files. When the user later returns to a previously visited webpage, the browser retrieves the cached file to display the webpage instead of retrieving the file from the Internet.").

the images in State's Exhibit 7 came from a phone that did not belong to him, Sanchez argues, those images were inadmissible under rule of evidence 401 because they were not relevant, and were inadmissible under rule of evidence 403 because their probative value was substantially outweighed by the danger of unfair prejudice. See Tex. R. Evid. 401, 403.

A. STANDARD OF REVIEW

A trial court is afforded wide discretion in deciding whether to admit evidence, and we may not disturb such an evidentiary ruling absent an abuse of discretion. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). Under this standard, we will uphold a trial court's evidentiary ruling as long as it falls within the zone of reasonable disagreement and was correct under any theory of law applicable to the case. *Id.*

B. PRESERVATION

We address first the State's argument that Sanchez did not preserve this issue because his complaint on appeal does not comport with his trial objection. See *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009) (noting that appellate courts should not address the merits of an issue that has not been preserved for appeal). Among the several rules of error preservation is the requirement that the complaint a party makes on appeal must comport with the complaint it made in the trial court. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) ("The point of error on appeal must comport with the objection made at trial.").

Sanchez's appellate complaint is that State's Exhibit 7 was inadmissible under Rules 401 and 403 of the Texas Rules of Evidence because the images came from a phone that did not belong to him. At trial, however, Sanchez did not object to the exhibit on this basis. Rather, with respect to Rules 401 and 403, Sanchez's objection was that State's Exhibit 7 was inadmissible under those rules for two reasons: first, because S.C. had stated that Sanchez showed her a pornographic video on his phone on June 21, and there was no evidence that any of the images in State's Exhibit 7 had been displayed on the Motorola phone on that specific day; and second, because S.C. had alleged that Sanchez had shown her a pornographic video, but State's Exhibit 7 contained still pornographic images, not video. Since the complaint Sanchez raises in his first issue does not comport with his objection at trial, he failed to preserve his first issue. See *Clark*, 365 S.W.3d at 339.

C. NO ABUSE OF DISCRETION

Even assuming Sanchez preserved his first issue, his argument that the trial court abused its discretion by admitting State's Exhibit 7 is unpersuasive. Contrary to Sanchez's assertion, the evidence at trial showed that the Motorola phone was the phone he used as of June 21 and that it was the only phone he used as of June 21.

Arlington Police Department Detective Grant Gildon testified that he executed a warrant to arrest Sanchez at his residence. Detective Gildon stated that while at Sanchez's residence, he asked Sanchez's wife if his cell phone was

there, and Sanchez's wife showed him. Detective Gildon further testified that "[t]he others that were there . . . stated that a certain [phone] was [Sanchez's] phone" and that he seized it as evidence. Detective Gildon also said that Sanchez admitted the Motorola phone was his when Detective Gildon interviewed him. When the prosecutor showed Detective Gildon the Motorola phone, he confirmed it was "the cell phone that was identified to [him as] being [Sanchez's] cell phone."

In addition, Sanchez's stepson, G.R., testified that the Motorola phone was the phone Sanchez used around June 2014. G.R. stated that prior to owning the Motorola phone, Sanchez used a red flip phone that was not a smart phone and was not capable of playing videos or accessing the Internet. But G.R. also said that prior to June 21, Sanchez's red flip phone had been turned back in to the carrier in exchange for the Motorola phone. G.R. confirmed that the Motorola was the only phone Sanchez had as of June 21. Sanchez's wife also confirmed the Motorola phone was the phone he used as of June 21 and that it was the only phone he had. And one of Sanchez's biological children confirmed the same.

Assuming Sanchez preserved his first issue, Sanchez's argument that the trial court abused its discretion by admitting images extracted from the Motorola phone because that phone did not belong to him is unavailing given all of the evidence showing that phone not only belonged to him as of June 21 but also was the only phone he used as of that date.

We overrule Sanchez's first issue.

III. EXCLUSION OF PRIOR FALSE ABUSE ALLEGATIONS

In his second issue, Sanchez argues the trial court abused its discretion by excluding evidence that S.C. had previously made two false allegations of sexual abuse. Sanchez's argument is no model of clarity. It appears he claims that the trial court prohibited S.C.'s grandfather, C.C., from testifying about false allegations of sexual abuse S.C. had previously made against him and that the trial court also prohibited one of her cousins, E.S., from testifying that she had previously falsely accused him of sexual abuse. Sanchez also appears to claim that he was denied the right to cross-examine S.C. about her prior false allegations.

It is elementary that to preserve a complaint for appellate review, the complaining party must have presented the complaint to the trial court and either obtained a ruling from the trial court on that complaint or objected to the trial court's refusal to rule on it. Tex. R. App. P. 33.1(a). Sanchez points us to no place in the record showing either that the trial court actually precluded him from cross-examining S.C. about prior false allegations of abuse she made against C.C. and E.S. or that it prevented him from eliciting testimony from C.C. and E.S. regarding such false allegations. See *Davis v. State*, 313 S.W.3d 317, 352 (Tex. Crim. App. 2010) (noting that an appellant is obligated to point out on appeal "where the record shows that he has preserved error on his claim"). And though we are not obligated to pore through the voluminous trial record to verify that

Sanchez preserved his complaint, *see Rousseau v. State*, 291 S.W.3d 426, 437 (Tex. Crim. App. 2009), we note that our review of the record shows that Sanchez never actually attempted to cross-examine S.C. about any previous allegations of abuse she made against C.C. or E.S., and that being the case, the trial court never made a ruling precluding him from doing so.⁴ The record further

⁴Toward the end of Sanchez's cross-examination of S.C., the following exchange occurred:

[Defense Counsel]: Judge, there is a matter, if I can approach.

THE COURT: You may.

[Defense Counsel]: Judge, I have a duty to -- I need to confirm with [Sanchez] and there is a matter to be ethical in this I have information that [S.C.] made false outcries regarding other individuals.

THE COURT: Okay.

[Defense Counsel]: And normally what I meant is the State doesn't want me asking [the victim], ^[4]Did you also claim and so and so that so and so did something,^[7] particularly because of the law says that that's only admissible if she's made an outcry and that it is proved to be false or is it premature? I don't think she is going to say, ^[4]Yes, I said that or made that claim^[7] if it wasn't true.

The trial court dismissed the jury so that Sanchez could confer with his counsel regarding the subject of S.C.'s prior allegations of abuse. When the jury returned, Sanchez continued his cross-examination, but did not broach the subject of prior abuse allegations.

After the parties had completed questioning S.C., the trial court dismissed the jury and then allowed Sanchez to "make a bill with three or four questions concerning extraneous matters." Sanchez questioned S.C. whether she had previously accused C.C. or E.S of sexually abusing her or told anyone that they had, and S.C. unequivocally answered no. Sanchez had no other questions, and the trial court dismissed S.C.

shows that Sanchez never attempted to elicit evidence of such false allegations from C.C. or E.S. and that the trial court never made a ruling excluding such evidence.⁵ Since the record does not show either that the trial court precluded Sanchez from cross-examining S.C. about any former abuse allegations against C.C. or E.S. or that it prohibited C.C. or E.S. from testifying about such allegations, Sanchez's second issue is not preserved. See Tex. R. App. P. 33.1(a).

We overrule Sanchez's second issue.

Absent from the relevant portion of the record regarding S.C.'s testimony is any attempt from, or request by, Sanchez to cross-examine S.C. about prior false allegations of abuse, as well as any ruling from the trial court precluding him from doing so. See Tex. R. App. P. 33.1(a).

⁵Indeed, after the State rested its case in chief, Sanchez told the trial court that he was not going to ask his witnesses about any other accusations S.C. had made against any other persons:

[Defense counsel]: Thank you. I anticipate our [m]otion in [l]imine will come into play with those witnesses as well.

THE COURT: What motion in limine? Are you alleging the victim has made other accusations against other persons? You do not intend to go into any others?

[Defense counsel]: No, sir. The predicate necessary to do that has been denial that the accusations are made and, therefore, I cannot establish admissibility of false outcries because I have to have an outcry that says that this was made and I was going to get that from [S.C.] or [C.F.], so in the absence of that, the law would not permit me.

THE COURT: So you don't intend to go into that?

[Defense counsel]: No, sir.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his third, fourth, fifth, and sixth issues, Sanchez argues he received ineffective assistance of counsel. Specifically, he contends his trial counsel was ineffective by (1) failing to object to the admission of an English translation of a portion of his videotaped interview with Detective Gildon; (2) failing to object to an extraneous offense C.F. disclosed on cross-examination; (3) failing to object to the admission of his Motorola cell phone; and (4) failing to request an “outcry” hearing.

One of the things Sanchez must show in order to prevail on his third, fourth, fifth, and sixth issues is that his counsel’s alleged deficiencies prejudiced his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). The prejudice prong of *Strickland* requires a showing that counsel’s errors were so serious that they deprived the defendant of a fair trial, i.e., a trial with a reliable result. *Strickland*, 466 U.S. at 687. In other words, Sanchez must show there is a reasonable probability that, without the deficient performance, the result of the proceeding would have been different. *Id.* at 694; *Nava*, 415 S.W.3d at 308. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Nava*, 415 S.W.3d at 308.

In his brief, Sanchez provides no argument, analysis, explanation, or citation to authorities showing how his counsel’s alleged deficiencies prejudiced his defense. He does not explain how his trial counsel’s alleged deficiencies

were so serious that he was deprived of a trial with a reliable result. *Strickland*, 466 U.S. at 687. Nor does he explain how there is a reasonable probability that without those alleged deficiencies, the result of his trial would have been different. See *Strickland*, 466 U.S. at 694; *Nava*, 415 S.W.3d at 308. Instead, Sanchez makes wholly conclusory statements. With regard to *Strickland's* prejudice prong, the extent of Sanchez's briefing is that

- his counsel's failure to object to the admission of the translated portion of his interview with Detective Gildon "resulted in evidence coming before the jury that did lead to" his conviction;
- his counsel's failure to object to C.F.'s statement on cross-examination that he had committed an extraneous offense "was harmful to [him]";
- had his counsel objected to the admission of the Motorola cell phone "the pornographic content on the phone would not have gone before the jury and severely prejudiced [him]"; and
- his trial counsel's failure to seek an "outcry" hearing led to his conviction.

Because Sanchez provides no argument, analysis, explanation, or citation to authorities showing how any of his counsel's alleged deficiencies prejudiced his defense, we overrule his third, fourth, fifth, and sixth issues as inadequately briefed. See Tex. R. App. P. 38.1(i); *McCarthy v. State*, 65 S.W.3d 47, 49 n.2 (Tex. Crim. App. 2001) (noting that an inadequately briefed issue may be waived on appeal); see also *Bessey v. State*, 199 S.W.3d 546, 555–56 (Tex. App.—Texarkana 2006) (overruling ineffective assistance claim as inadequately briefed because appellant made no effort to demonstrate how his counsel's alleged

deficiencies prejudiced his defense under *Strickland*), *aff'd on other grounds*, 239 S.W.3d 809 (Tex. Crim. App. 2007).

V. CONCLUSION

Having overruled all of Sanchez's issues, we affirm the trial court's judgment. See Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL and KERR, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: April 26, 2018