



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

NO. 02-17-00124-CR

JESUS INIGUEZ LUNA

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 1426938D

MEMORANDUM OPINION¹

Appellant Jesus Iniguez Luna appeals his convictions for two counts of aggravated sexual assault of a child and for two counts of indecency with a child by contact.² In two related issues, he contends that the trial court erred by

¹See Tex. R. App. P. 47.4.

²See Tex. Penal Code Ann. §§ 21.11(a)(1), 22.021(a) (West Supp. 2017).

excluding evidence showing that before the complainant A.L. (Annie)³ made an outcry of sexual abuse against him, she threatened to call the police on him for pushing her. We affirm.

Background

Annie lived with her mother and Luna, her stepfather. Her relationship with Luna was contentious; they verbally argued and sometimes “push[ed] each other back and forth.” Their arguments concerned “[t]ypical things that [Annie] wanted to do and . . . wasn’t allowed to do.” They also arose from Luna’s critical words about her biological father.

According to Annie’s testimony, when she was eleven years old and while her mother was working away from home one night, Luna grabbed her waist, pulled her close to him, sat her on his lap, kissed her, and sexually abused her. She tried to get away but could not. Luna put his mouth on her breast and on her sexual organ, put his fingers on her sexual organ, and had her place her mouth on his sexual organ. When the abuse ended, she used wipes to clean her sexual organ and threw the wipes in a bathroom trash can. She then texted and called her mother to say that Luna had raped her, jumped out of a window (because she did not want Luna to see her leave through a door), and began running.

A neighbor saw Annie running and stopped her. With a panicking demeanor, she told the neighbor that she had been raped, and the neighbor

³To protect Annie’s anonymity, we use an alias. See *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

called the police. Later that night, after Annie's mother arrived home from work, Annie had a more detailed conversation with her about the sexual abuse.

Annie and her mother rode together to a children's hospital, where Annie participated in a sexual assault examination. To collect potential DNA, a sexual assault nurse examiner, Theresa Fugate, swabbed Annie's genital area, her neck, and her breasts. After hearing Annie's story of how Luna had sexually abused her, Fugate believed that Annie was credible. Annie later participated in a forensic interview. She told the forensic interviewer that Luna had sexually abused her and gave sensory details about the abuse.

Arlington Police Department Officer Juan Duran went to the house where Luna, Annie, and Annie's mother lived. To Officer Duran, Luna did not appear to be curious as to why the police were dispatched there. Luna agreed to participate in an interview and rode to a police station to do so. He spoke with Arlington Police Department Detective Grant Gildon. Luna denied sexually abusing Annie. He told Detective Gildon that Annie had kissed him on the mouth and had stated that "she had urges like him." Luna also said that Annie had mental health problems, including depression⁴ and suicidal thoughts, and that she often embellished events. When Detective Gildon asked him whether the police would discover DNA on Annie that inculpated him, he said that Annie might have rubbed his dirty clothes or his pillowcase on her body "to get his DNA

⁴Annie told her sexual assault nurse examiner that she had suffered from depression.

on her.” Luna agreed to produce his DNA by submitting to swabs of his testicles, penis, and cheeks.

After finishing his interview with Luna, Detective Gildon went to the house. He saw what appeared to be dried blood on the living room sofa, which was significant because Annie had stated that she was menstruating and that she had bled on the sofa while the sexual abuse occurred. Detective Gildon collected a cutting from the sofa and Annie’s wipes from the bathroom trash can.

A forensic biologist, Peggy Le, tested several items for the presence of DNA, including the wipes and swabs taken from Annie’s and Luna’s bodies. Some of Le’s tests were inconclusive, but other tests showed the presence of Luna’s DNA on a swab of Annie’s right breast, the presence of Annie’s DNA (along with another unknown individual’s DNA) on the stained cutting from the couch, and the presence of a male’s DNA that was consistent with Luna’s lineage on two of the three wipes that the police had gathered from the bathroom trash can.

A grand jury indicted Luna with five charges relating to his sexual acts with Annie. He pleaded not guilty to all of the charges. At trial, Sabino Martinez testified that when she was working as an investigator with the Department of Public Safety, Luna had told her that when Annie kissed him, he thought it was “strange” and pushed her away while “touching her vagina” through her clothes but not in a “sexual way.” When Martinez asked him whether the kiss had

excited him in a sexual way,⁵ he initially said yes and then said no and began to cry. Luna then told Martinez, “I know I did something wrong and I know that I should be punished, but I didn’t mean to hurt the child.”

Following the parties’ presentations of evidence and arguments, the jury convicted Luna of three counts of indecency with a child by contact and of two counts of aggravated sexual assault of a child. The State and Luna later asked the trial court to vacate one of Luna’s convictions for indecency with a child by contact because of double-jeopardy concerns, and the trial court did so.

After hearing evidence concerning Luna’s punishment, the trial court sentenced him to twenty years’ confinement for each count of aggravated sexual assault and for twelve years’ confinement for each count of indecency with a child. The court ordered the sentences to run concurrently. Luna brought this appeal.

⁵Martinez conducted the interview in Spanish. She testified that when she had asked Luna whether he had been “excited” by the kiss with Annie, she had used a word that had a sexual connotation. On cross-examination by Luna’s counsel, this exchange occurred:

Q. And you’re telling the jury that excited in Spanish carries a little bit of a different connotation. . . . [I]t has a sexual connotation?

A. It is sexual, sir.

Q. So it is. You were asking him specifically, [“]Did you get sexually excited?["]

A. Absolutely.

Exclusion of Evidence: Assuming Error, No Harm

On appeal, Luna contends that the trial court erred by excluding evidence showing that before Annie made her outcry of sexual abuse, she threatened to call the police to have him arrested. During Luna's cross-examination of Annie, outside the jury's presence, his counsel told the trial court that he wanted to ask Annie whether (1) she had ever threatened to call the police on Luna, and (2) that threat had included the statement that he would be thrown in jail and would "rot [there] forever." His counsel stated, "[I]t's our contention *the jury needs to understand the relationship between these two* and the depth of the animosity . . . and they're entitled to hear the fights, the content of the fights including the threats." [Emphasis added.]

Testifying outside of the jury's presence, Annie admitted that she had threatened to call the police as a result of a physical altercation with Luna; she explained that she had done so because Luna "had no right to put his hands on [her]." She also admitted that part of the reason for her contentious relationship with Luna was that he had disparaged her biological father. She denied that she had ever made a statement about Luna rotting in jail.

Luna argued that the jury should hear Annie's testimony concerning the threat to call the police because the testimony showed her bias and her motive for alleging that Luna had raped her. He relied on the Sixth Amendment in contending that the testimony was admissible. See U.S. Const. amend VI. The State objected to the testimony:

[THE STATE:] . . . I believe it's improper, number one, as an improper collateral matter for impeachment because it has nothing to do with this specific day and this specific incident.

I understand he's trying to draw a conclusion that it goes towards their relationship, but it has nothing to do with a fight that happened on this particular day.

Luna responded that the evidence was admissible because the jury should know that from Annie's perspective, Luna

maligned her dad and it obviously create[ed] great anger in her and resentment towards him that . . . carried forward.

. . . .

. . . What I want to do is . . . develop a theory of *motive and demonstrate bias on the part of the witness.*

She doesn't like him. [Emphases added.]

The trial court sustained the State's objection to the extent of precluding Luna from asking Annie about her threat to call the police. But the court permitted Luna to ask Annie about her animosity toward him that arose from his critical words about her biological father and how that animosity had caused some of the fights between Luna and Annie. Luna asked Annie several questions related to those subjects in front of the jury.

Luna argues on appeal that the trial court's exclusion of evidence about Annie's threat to call the police violated his right of confrontation under the Sixth Amendment. See *id.* ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ."); see also Tex. R. Evid. 101(d) (stating that a court must admit evidence if constitutionally required).

He contends that Annie's threat showed her motive, bias, and prejudice and was a "necessary part of [his Sixth Amendment] right to confront" her. He asserts that by offering the evidence of Annie's threat, he was not attacking her character generally but was attempting to establish that she "had a particularized bias and prejudice regarding [him]."

Assuming, without deciding, that the trial court constitutionally erred by excluding the testimony described above, we review that error for harm under Texas Rule of Appellate Procedure 44.2(a) and reverse the judgment unless we determine "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." See Tex. R. App. P. 44.2(a); see also *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010) (recognizing that Confrontation Clause error is subject to a constitutional harm analysis); *Dees v. State*, Nos. 02-12-00488-CR, 02-12-00489-CR, 2013 WL 6869865, at *6–9 (Tex. App.—Fort Worth Dec. 27, 2013, pet. ref'd) (mem. op., not designated for publication) (assuming, without deciding, that a trial court committed constitutional error by excluding evidence, conducting a harm analysis under rule 44.2(a), and holding that the assumed error was harmless). In applying the "harmless error" test, we ask whether there is a "reasonable possibility" that the error might have contributed to the conviction. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), cert. denied, 526 U.S. 1070 (1999). Our harmless error analysis should not focus on the propriety of the outcome of the trial; instead, we should calculate as much as possible the probable impact on the jury

in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 944 (2001).

As we explained in *Dees*,

The United States Supreme Court has established the appropriate three-prong analysis for determining whether a denial of the Sixth Amendment Confrontation Clause right of cross-examination is harmless error. Initially, under the first prong, we must assume that the damaging potential of the cross-examination was fully realized. Under the second prong, we then must perform our review under these factors: (1) whether the witness's testimony was important to the prosecution's case; (2) whether the testimony was cumulative; (3) whether there was evidence corroborating or contradicting the testimony of the witness on material points; (4) whether and to what extent cross-examination was otherwise permitted; and (5) whether the prosecution's case was strong. Finally, keeping the first two prongs in mind, we determine whether the error was harmless beyond a reasonable doubt.

2013 WL 6869865, at *7 (citations omitted); *see Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986); *McDaniel v. State*, 3 S.W.3d 176, 181 (Tex. App.—Fort Worth 1999, pet. ref'd) (reciting the same factors).

Applying these factors, we conclude that the exclusion of Annie's testimony about threatening to call the police was harmless beyond a reasonable doubt.⁶ Principally, we hold that the exclusion was harmless because (1) the matter that Luna wanted to show through evidence of the threat—that Annie harbored resentment against him because of his attitude toward her father—was well-developed through other cross-examination, and (2) Annie's testimony that

⁶An error analysis is not required when a harm analysis is dispositive. *See Wooten v. State*, 400 S.W.3d 601, 607 (Tex. Crim. App. 2013).

Luna sexually abused her was strongly corroborated by other evidence. See *Dees*, 2013 WL 6869865, at *7.

Annie was the victim, and we recognize that her testimony was important to the State’s case. See *id.* But to the extent that Luna contended at trial and argues on appeal that asking Annie about her threat to call the police was critical to showing her bias caused by his criticisms of her father,⁷ such testimony would have been cumulative of other extensive cross-examination testimony relating to

⁷Luna’s theory of admissibility in the trial court was that Annie’s threat to call the police proved her bias against him for criticizing her father and established a “motive for making up a story.” Luna’s appellate argument for the admissibility of Annie’s threat likewise hinges on his premise that the threat showed bias arising from his criticisms of her biological father. Luna argues that testimony regarding the threat was

not mere propensity evidence. It is quite clear that defense counsel was attempting to establish a specific motive on the part of the child against the Appellant. . . . [C]ounsel established the child had made such threats solely against [Luna] for specific reasons, or put another way, pursuant to a specific motive.

The child testified that the threats to call law enforcement were motivated by her anger, which manifested when [Luna] attempted to take the place of her father or criticized her father. This is evidence of a specific motive

. . . .

In addition to establishing a motive to falsely accuse [Luna], such threats clearly show her bias against him. . . .

Ultimately, [Annie’s] threats to call the police illustrate a common reaction to her anger as well as her outright bias towards [Luna]. Because of such, [Luna’s Sixth Amendment] right to confront the child was denied and the trial court abused its discretion. [Emphasis added.]

that alleged bias. See *id.* After the trial court's challenged ruling, in Annie's cross-examination in front of the jury, the following exchange occurred:

Q. . . . Now, before we took a break, I think we were talking about prior fights or pushing incidents or fights, however we want to describe them, and one in particular that occurred not too long prior to this incident, the July 30th incident; is that correct?

A. Yes.

Q. Okay. And I just want to talk about the fights in general. Let's go back to that for a second. I mean, the fact is you resented Jesus, didn't you?

A. What do you mean?

Q. I mean, you resented Jesus; that he was taking the place of . . . your biological father?

A. What do you mean by resented? I don't know what that means.

Q. You didn't like him?

A. That wasn't the issue.

Q. You did not like him because he talked bad about [your father], or at least that's what you felt; is that not right?

A. It's not that I didn't like him.

Q. The fact is you complained to your mother about him and about him talking badly about [your father]; isn't that right?

A. Yes.

Q. And that was the basis of a number of these fights, wasn't it?

A. There's a difference between not liking what a person does and says and between not liking the person himself.

Q. Are you telling the jury that when he spoke bad about [your father], that that did not make you angry?

A. It made m[e] angry. It did.

Q. It made you very angry, did it not?

A. Not very, very angry.

Q. I didn't say very, very angry. It made you very angry, did it not?

A. Just angry.

Q. And it made you angry not only because he was talking bad about [your father], but because you felt like he was taking the place of your dad; isn't that a fact?

A. Yes.

. . . .

Q. . . . When Jesus came into your and your mom's life in 2009, you had someone else who was competing with you for your mom's attention; isn't that right?

A. No.

Q. So your mom never paid any attention to Jesus?

A. It wasn't a competition.

Q. And when they had a child, you had someone else --

A. It wasn't a competition.

Q. And when Jesus began to step into the role of your father, that didn't make you happy, did it?

A. Not exactly.

Q. Y'all had some nasty fights over that, didn't you?

A. Not just over that.

Through this cross-examination, Luna developed his theory of Annie's alleged bias. And in his closing argument on the issue of his guilt, he argued that her alleged bias motivated her accusation of sexual abuse, stating in part,

[Annie], her dad had gone. She loved her dad. 2007 her mom meets Jesus and they get married. And now she doesn't get as much attention from mom because they're newlyweds. And again, you can use your common sense in figuring these things out.

And then 2011 they get married. They meet in 2007. 2011 they get married and they have a baby, their own child. And that's their child. And now that child is getting some attention too. And then mom starts working three jobs. And what did mom tell you? She was so far out of [Annie's] life, she sat up here and swore under oath Jesus was the primary caretaker. . . . Am I attacking her because I'm defending my man? I'm telling you what happened. And I'm not telling you. You heard the evidence yourself. She had fights and she especially had fights when Jesus tried to step in and be her father and discipline her and tell her, you can't do this It's when he stepped in that role that they started having fights. And they did. They just did. [Everyone] admitted to that.

By its guilty verdict, the jury implicitly rejected Luna's defensive theory that Annie accused him of sexual abuse because of her alleged bias against him.⁸ See *McIntyre v. State*, No. 02-17-00167-CR, 2018 WL 1866083, at *4 (Tex. App.—Fort Worth Apr. 19, 2018, no pet.) (mem. op., not designated for publication) (“The jury’s guilty verdict served as an implicit rejection of McIntyre’s defensive theories.”). We cannot conceive that the jury would have changed its

⁸The jury could have rationally concluded that Luna's defensive theory—that Annie falsely accused him because she resented him—was inconsistent with his earlier statement to law enforcement that Annie kissed him and told him that she had “urges” for him. We also note that by its verdict, the jury rejected testimony from one of Annie's mother's friends who opined that Annie has a poor reputation for honesty and is a “person that lies” to “hurt someone.”

position to accepting that extensively-developed defensive theory merely if it had learned that Annie had threatened to call the police for, in her words, Luna's "put[ting] his hands on [her]," an allegation that Annie testified was true and that the remaining evidence did not show to be false.⁹ See *Dees*, 2013 WL 6869865, at *7–8 (holding assumed error in limiting cross-examination harmless because, in part, Dees had "ample opportunity to . . . present his defensive theory to the jury" though cross-examination and through closing argument, and the jury implicitly rejected the defensive theory).

Furthermore, Annie's testimony about Luna's sexual abuse was materially corroborated, and the evidence supporting his guilt was strong. See *id.* at *7 (relying on the fact that there was "physical and testimonial evidence that corroborated the complainant's testimony"). As described above, DNA evidence from a swab of one of Annie's breasts and from wipes that she used to clean her sexual organ matched to Luna. Next, in her outcry, Annie said that she had bled on the couch where the sexual abuse occurred, and a red-stained cutting from

⁹Luna emphasizes that "evidence of prior false accusations on the part of a witness may be appropriate fodder for cross-examination in a case alleging sexual assault." We emphasize that Annie's testimony outside of the jury's presence did not establish that her alleged bias against Luna caused her to threaten to *falsely* report him to the police; at most, the evidence showed that she threatened to call the police for an event that, according to her testimony, occurred. Cf. *Hammer v. State*, 296 S.W.3d 555, 564 (Tex. Crim. App. 2009) ("A past false accusation makes it more likely that the witness lacks credibility and thus should not be believed concerning this accusation."); *Hughes v. State*, 850 S.W.2d 260, 263 (Tex. App.—Fort Worth 1993, pet. ref'd) ("[W]ithout a showing of falsity as to the other two accusations, however, the excluded evidence does not establish a motive for the complainant to lie in the case at bar.").

the couch confirmed the presence of her DNA. The neighbor who found Annie running on the night of her outcry testified that Annie was “shaky,” panicking, and crying. The nurse examiner who saw Annie that night opined that her story of sexual abuse was credible. Finally, while Luna never explicitly admitted his guilt, he told an investigator that kissing Annie excited him sexually and stated, “I know I *did something wrong and I know that I should be punished*, but I didn’t mean to hurt the child.” [Emphasis added.]

For all of these reasons, we conclude that if the trial court constitutionally erred by limiting Luna’s cross-examination through foreclosing his ability to ask Annie whether she had threatened to call the police, that error was harmless beyond a reasonable doubt. See Tex. R. App. P. 44.2(a); *Mosley*, 983 S.W.2d at 259; *Dees*, 2013 WL 6869865, at *6–9. Because the record does not establish harm justifying reversal, we overrule Luna’s two related issues.

Conclusion

Having overruled Luna’s issues, we affirm the trial court’s judgments of conviction.

/s/ Wade Birdwell
WADE BIRDWELL
JUSTICE

PANEL: MEIER, GABRIEL, and BIRDWELL, JJ.

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

DELIVERED: August 30, 2018