In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00277-CR

DAVID GEORGE PFEIFER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 216th District Court
Kerr County, Texas
Trial Court No. A13103; Honorable N. Keith Williams, Presiding

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July 21, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, David George Pfeifer, was convicted following a jury trial of continuous sexual abuse of K.M.,[1] a child younger than fourteen years of age,[2] and sentenced to confinement for thirty years. On appeal, Appellant asserts the trial court erred by (1)

[1] To protect the privacy of the victim and other testifying witnesses, we refer to them by their initials.

[2] *See* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2015).

denying his motion to suppress statements he made to law enforcement officers, (2) denying his oral motion for mistrial, (3) permitting a rebuttal witness for the State to testify concerning an extraneous act involving him, (4) overruling his objection to the jury charge, and (5) denying his motion for discovery of certain testimony given before the grand jury. We modify the judgment of the trial court to correct a clerical error and affirm the judgment as modified.

MOTION TO SUPPRESS STATEMENTS

On November 11, 2011, Appellant was videotaped during an interview conducted by Detective James Ledford at the Kerr County Sheriff's Department. Appellant asserts he was subjected to a custodial interrogation without being properly *Mirandized*[3] and his statements were involuntary.[4] We disagree.

We review the trial court's ruling on a motion to suppress evidence for an abuse of discretion. *See Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010); *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). In reviewing the trial court's decision, we do not engage in our own factual review; rather, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *St. George v. State,* 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). We give almost total deference to the trial court's rulings on (1) questions of historical fact, especially when based on an evaluation of credibility and demeanor and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador*, 221 S.W.3d at 673. We review *de novo* "mixed questions of law and fact" that do not

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] In a letter opinion, the trial court found that Appellant was not the subject of a custodial interrogation when he was interviewed by Detective Ledford.

depend upon credibility and demeanor, *id.*, and will uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007).

A determination of whether a person is in custody requires that we review the totality of the circumstances rather than apply a bright-line rule. The Court of Criminal Appeals has stated that there are four general situations that may constitute "custody" for purposes of article 38.22 of the Texas Code of Criminal Procedure as follows:

> (1) The suspect is physically deprived of his freedom of action in any significant way;
>
> (2) A law enforcement officer tells the suspect he is not free to leave;
>
> (3) Law enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; and
>
> (4) There is probable cause to arrest a suspect, and law enforcement officers do not tell the suspect he is free to leave.

Gardner v. State, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009) (citing *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996)).

Generally, a person is considered to be "in custody" for purposes of a custodial interrogation, if a reasonable person, under the same or similar circumstances, would not feel free to disregard the officer's question and walk away. *California v. Hodari D.,* 499 U.S. 621, 628, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991); *Hunter v. State*, 955 S.W.2d 102, 105 (Tex. Crim. App. 1997). To determine whether a defendant voluntarily spoke with law enforcement, the court must determine "whether the officer engaged in

conduct designed to elicit an incriminating response from the accused . . . ." *State v. Maldonado*, 259 S.W.3d 184, 191 (Tex. Crim. App. 2008).

Detective Ledford was the sole witness at the suppression hearing. He testified that the purpose of his interview with Appellant was based on an outcry of abuse by the victim. On the day of the interview, he and Ryan Morales, a CPS investigator, drove to Appellant's house in an unmarked pickup truck. Neither he nor Morales were wearing uniforms although Detective Ledford was wearing his badge and gun. Detective Ledford introduced himself to Appellant and asked if he would mind coming to the sheriff's office for an interview. Appellant was seventy years old. He responded affirmatively. Prior to Appellant leaving in Detective Ledford's pickup, he informed Appellant that he was not under arrest and did not have to agree to the interview. He also informed Appellant that he would give him a ride home after the interview, that Appellant could terminate the interview at any time, and that Appellant would not be arrested that day. When they arrived at the interview room,[5] he again advised Appellant that he was not under arrest and was free to terminate the interview at any time. At the beginning of the interview, Appellant was asked if he knew why he was there and he responded, "Yes." Detective Ledford asked him why and Appellant began describing the victim's behavioral changes over time. The interview lasted approximately one and a half hours. At the conclusion, Detective Ledford drove Appellant home.

Detective Ledford also testified Appellant was never restrained in any way. He described Appellant as comfortable, talking freely, not in any distress, calm, lucid, and

[5] The interview room was approximately twenty feet by twenty feet. It contained several chairs, a table, and videotaping equipment.

comprehensive of the detective's questions.[6] In his opinion, Appellant was not in custody at any time preceding, during, or following the interview. Considering the totality of the circumstances, we cannot say the trial court abused its discretion by denying Appellant's motion to suppress. Neither were *Miranda* warnings required because the interview was non-custodial. *Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007). Appellant's first point of error is overruled.

MOTION FOR MISTRIAL

Appellant next asserts the trial court abused its discretion by denying his oral motion for a mistrial where, after commencement of trial, the trial court required the State to disclose to Appellant exculpatory *Brady* material.[7] The evidence in question (the grand jury testimony of two witnesses (D.R. and T.R.) taken the day before trial) was disclosed by the State to the defense attorney on the first day of trial, i.e., the day after the testimony was obtained by the State. The testimony in question was described as short in length. After an *in camera* inspection and *ex parte* hearing with the State, the trial court found the grand jury testimony constituted *Brady* material and ordered its immediate disclosure. Appellant's counsel stated that he believed he could review the material that same day. The State did not call the two witnesses to testify; however, Appellant did. At no time did Appellant seek a continuance on the basis of the "untimely" disclosure of the grand jury testimony but rather made only an oral motion for mistrial.

[6] Our viewing of the videotaped interview corroborates Detective Ledford's account of the facts as well as his description of Appellant.

[7] *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Under the facts of this case, not only was the disclosure of the evidence timely, Appellant failed to preserve his claimed *Brady* violation by not first seeking a continuance before requesting a mistrial. In cases involving near or mid-trial disclosure of evidence, in order to preserve error, the complaining party must first request a continuance, which must be denied, before requesting a mistrial. *Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999); *Cohen v. State*, 966 S.W.2d 756, 763-64 (Tex. App.—Beaumont 1998, pet. denied). Because Appellant did not seek a continuance in order to investigate the previously undisclosed evidence, he waived error, if any, resulting from the disclosure of the evidence during trial. Appellant's second point of error is overruled.

REBUTTAL TESTIMONY

Appellant contends the trial court erred by permitting M.C. to testify as a rebuttal witness for the State regarding an extraneous act involving Appellant that occurred in 1988 or 1989. The State offered M.C.'s testimony in rebuttal to the two witnesses, D.R. and T.R., who were the subject of the *Brady* disclosure previously discussed and who testified on behalf of Appellant that they were around him as children and were never inappropriately touched by him. Appellant asserts M.C.'s testimony is extraneous offense testimony that is not relevant, more prejudicial than probative, too remote, and improperly offered as rebuttal testimony. We disagree.

We review a trial court's decision regarding the admission of extraneous offense evidence under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009); *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). We will affirm a trial court's ruling that an extraneous offense has relevance

apart from proving conformity with the defendant's character if the ruling is within the zone of reasonable disagreement. *De La Paz*, 279 S.W.3d at 343-44; *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). A trial court's ruling is generally within this zone of reasonable disagreement if the evidence shows that 1) an extraneous transaction is relevant to a material, non-conformity issue, and 2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury. *De La Paz*, 279 S.W.3d at 344 (citing *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997)). Similarly, we give great deference to a trial court's determination that the probative value of the evidence is not outweighed by the danger of unfair prejudice. *Moses,* 105 S.W.3d at 627.

Appellant focuses primarily on the probative value of M.C.'s testimony to rebut the testimony of D.R. and T.R., while failing to acknowledge or discuss the State's other reasons for presenting that evidence. The State also offered M.C.'s testimony to rebut various defensive theories regarding Appellant's innocence such as (1) that he did not inappropriately touch K.M., (2) he touched K.M. but not in a sexual way, (3) K.M. was not telling the truth, and (4) K.M. was coached to make the allegations. The same extraneous acts, though inadmissible as propensity evidence, may be admissible under a proper analysis and a proper rationale. *Wheeler v. State,* 67 S.W.3d 879, 886-87 (Tex. Crim. App. 2002) (nine-year-old incident of abuse admitted). "Extraneous sex offenses [are] still admissible if they fall into one of the proper 'exceptions' to the 'general rule' barring their admission." *Id.*

M.C.'s testimony was relevant to rebut Appellant's theory that he did not inappropriately touch children but rather touched them only in a "grandfatherly" way.

M.C.'s testimony further served to contradict Appellant's "frame-up" theory by showing Appellant's prior conduct was very similar to the conduct described in the present case, i.e., rubbing and massaging K.M.'s back and body ending in or around her privates. Thus, although M.C.'s testimony regarding Appellant's abuse would have been inadmissible character evidence if offered to solely prove that Appellant acted in conformity therewith, her testimony was relevant for other permissible purposes. *Id.* at 887-88.

In addition, the trial court did not abuse its discretion by admitting M.C.'s testimony because the danger of unfair prejudice did not substantially outweigh the probative value of that testimony. In its determination, a trial court should consider: (1) how compellingly evidence of the extraneous offense serves to make a fact of consequence more or less probable, (2) the extraneous offense's potential to impress the jury in some irrational but indelible way, (3) the trial time that the proponent required to develop evidence of the extraneous misconduct, and (4) the proponent's need for the extraneous transaction evidence. *Id.* at 888 (citing *Lane v. State,* 933 S.W.2d 504, 520 (Tex. Crim. App. 1996)).

Here, the State needed to show that the offensive touching actually occurred, a fact hotly contested by Appellant. The Court of Criminal Appeals "has recognized that in prosecutions for sexual offenses, a successful conviction 'often depends primarily on whether the jury believes the complainant, turning the trial into a swearing match between the complainant and defendant.'" *Wheeler,* 67 S.W.3d at 888 (quoting *Boutwell v. State*, 719 S.W.2d 164, 177-78 (Tex. Crim. App. 1986)). Because numerous witnesses testified that there was no evidence of abuse in Appellant's

household, his touching of K.M. was not inappropriate, K.M.'s outcry was coached, K.M.'s allegations in her forensic interview were prompted by the interviewer, and Appellant had been around other children without inappropriately touching them, M.C.'s rebuttal testimony "provided, at a minimum, the 'small nudge' towards contradicting Appellant's defensive theories and towards proving that the molestation did indeed occur." *Wheeler,* 67 S.W.3d at 888. M.C.'s testimony showed an event quite similar to the charged event, i.e., rubbing and massaging a young girl's body prior to touching her private parts. Moreover, M.C.'s direct testimony was short and to the point. In this case, the trial court could reasonably conclude that the State had a great need for rebuttal evidence to counteract these many witnesses and the defensive theories they represented.

We conclude that the trial court's decision to admit M.C.'s testimony in this case fell within the zone of reasonable disagreement and thus was not an abuse of discretion. Accordingly, we affirm the trial court's admission of that testimony and overrule point of error three.

JURY CHARGE

Appellant asserts the trial court erred by submitting a jury charge that did not require a unanimous verdict as to which two or more acts of sexual abuse were committed by Appellant during a time period in excess of thirty days. *See* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2015). We disagree.

While the general rule is that the jury must unanimously agree on each element of the offense, there is no requirement that the jury agree on the manner and means by

which those elements were accomplished. *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006). "[T]he statute [TEX. PENAL CODE ANN. § 21.02] does not violate due process by permitting a conviction based on a jury's unanimous finding that the defendant engaged in a course of conduct consisting of repeated acts of sexual abuse, but without requiring jury unanimity." *Kennedy v. State*, 385 S.W.3d 729, 731-32 (Tex. App.—Amarillo 2012, pet. ref'd). "We agree with the great weight of authority in Texas that the individual acts of sexual abuse are the manner and means by which the element of 'two or more acts of sexual abuse' is committed, and not elements in and of themselves." *Fulmer v. State*, 401 S.W.3d 305, 310-13 (Tex. App.—San Antonio, pet. ref'd), *cert. denied*, ___ U.S. ___, 134 S. Ct. 436, 187 L. Ed. 2d 293 (2013), *reh'g denied*, ___ U.S. ___, 134 S. Ct. 819, 187 L. Ed. 2d 620 (2013). Accordingly, Appellant's fourth point of error is overruled.

GRAND JURY TESTIMONY

Appellant further asserts the trial court erred when it denied his pre-trial motion for discovery of the grand jury testimony of Janet Pfeifer, his spouse during the relevant time period. We disagree.

If a defendant asserts the trial court improperly denied the discovery of admissible evidence, the defendant must show harm resulted from the trial court's error to obtain reversal on appeal. *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. [Panel Op.] 1978). To show harm, the defendant must show the evidence withheld was material; that is, that disclosure of the evidence would have affected the outcome of the trial in his favor. *Crane v. State*, 786 S.W.2d 338, 348 (Tex. Crim. App. 1990).

In this case, we need not determine whether the trial court erred in denying Appellant's motion because, even if it did, we conclude any error was harmless. An accused is not ordinarily entitled to inspect grand jury testimony to ascertain evidence the prosecution has or for discovery in general. *Villegas v. State*, 791 S.W.2d 226, 232 (Tex. App.—Corpus Christi 1990, no pet.). If a prosecutor uses or introduces portions of the grand jury testimony during the course of a trial as occurred here, the defense is entitled to inspect and use such testimony that covers the same subject matter involved in the portions used and introduced by the prosecution. *Id.* (citing *Garcia v. State*, 454 S.W.2d 400, 403 (Tex. Crim. App. 1970)).

As Appellant asserts, the trial court did deny his motion prior to trial. However, prior to the State using Janet Pfeifer's grand jury testimony for impeachment purposes, the trial court granted Appellant's request for a delay of the trial and he was given the opportunity to review her seventeen minutes of grand jury testimony. Upon counsel's return from the break, the trial court asked both the State and Appellant whether they were ready to proceed and received affirmative answers. Because counsel had access to the grand jury testimony of Janet Pfeifer prior to its use at trial, we cannot say he was harmed by the denial of his pre-trial motion. Accordingly, Appellant's fifth point of error is overruled.

JUDGMENT

In our review of the record, it has come to our attention that the judgment includes a clerical error. The judgment indicates Appellant was convicted of "Continuous Sexual Abuse of a Child," violating TEX. PENAL CODE ANN. § 22.02 (West 2011). The correct statute should be TEX. PENAL CODE ANN. § 21.02 (West 2015).

This Court has the power to modify the judgment of the court below to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b). *See Ramirez v. State*, 336 S.W.3d 846, 852 (Tex. App.—Amarillo 2011, pet. ref'd) (citing *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993)). Appellate courts have the power to reform whatever the trial court could have corrected by a judgment *nunc pro tunc* where the evidence necessary to correct the judgment appears in the record. *Ashberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). The power to reform a judgment is "not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court." *Id.* at 529-30. Accordingly, we reform the judgment below to indicate Appellant was convicted for Continuous Sexual Abuse of a Child, TEX. PENAL CODE ANN. "§ 21.02," rather than TEX. PENAL CODE ANN. § "22.02" (West 2011).

CONCLUSION

The trial court's judgment is reformed to recite that the statute under which Appellant was convicted was "§ 21.02" of the Texas Penal Code. As reformed, the judgment of the trial court is affirmed.

Patrick A. Pirtle
Justice

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