In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-16-00086-CR
07-16-00087-CR

JOSÉ EUGENIO GALLARDO, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 31st District Court
Wheeler County, Texas
Trial Court Nos. 4844, 4846, Honorable Steven R. Emmert, Presiding

December 9, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, José Eugenio Gallardo, appeals the trial court's judgments by which he was convicted of indecency with a child and aggravated sexual assault of a child and sentenced to eight and twenty-five years' imprisonment, respectively and to run consecutively.[1] On appeal, he contends that the trial court erred by quashing his subpoena *duces tecum*, by overruling his objection to the admission of his oral and

[1] *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011), § 22.021(a)(2)(B) (West Supp. 2013).

written statements, and by denying his requested instruction on a lesser-included offense. We will affirm.

Factual and Procedural History

V.A.'s mother passed away when she was ten years old. She was moved from her North Carolina home to be with her maternal aunt, Katie Gallardo, in Wheeler, Texas. Her aunt Katie was married to appellant, and the couple had a daughter. Shortly after V.A. moved in with the family, appellant began having an inappropriate sexual relationship with V.A. The first encounter involved appellant grabbing V.A.'s breasts from behind and occurred in the first autumn that she lived there, when she was still ten years old. She would later testify that she reported it to her aunt, but her aunt dismissed the allegations. The sexual contact continued. When V.A. was in sixth or seventh grade—she was eleven or twelve years old—appellant forced V.A. to have sexual intercourse with him. The sexual assaults continued throughout the years, according to V.A., "more than two hundred times."

After V.A. turned eighteen, she left appellant's home and attempted to cut off ties with appellant. He continued to try to maintain contact with her, enlisting the assistance of other family members. Finally, she explained to one of her sisters what had happened and explained that she had not reported the abuse sooner because she was scared by appellant's threats and her report of the initial sexual contact went ignored.

Appellant was arrested and questioned about the allegations. He admitted having had sexual intercourse with V.A. He was charged with indecency with a child by contact and aggravated sexual assault of a child younger than fourteen. A Wheeler County jury heard evidence of the relationship between V.A. and appellant, including

V.A's account of the sexual abuse that began when she was about ten years old and escalated to sexual intercourse when she was eleven or twelve years old. The jury also heard appellant's confession, after the trial court overruled appellant's objections to the admission of his statements to police.[2] The jury found him guilty of both indecency with a child and aggravated sexual assault of a child and recommended punishment at eight and twenty-five years' imprisonment, respectively and to run consecutively. Appellant timely appealed.

Quashing of Subpoena *Duces Tecum*

Appellant contends that the trial court erroneously quashed his subpoena *duces tecum* in which he requested that V.A. provide years' worth of cell phone and banking records, ostensibly to buttress his theory that she was blackmailing him by requiring monetary payments for not reporting his conduct.

Standard of Review and Applicable Law

We review a trial court decision to quash a subpoena for an abuse of discretion. *See Drew v. State*, 743 S.W.2d 207, 225 n.11 (Tex. Crim. App. 1987) (en banc). Regarding the subpoena *duces tecum*, the Texas Code of Criminal Procedure provides as follows:

> If a witness have in his possession any instrument of writing or other thing desired as evidence, the subpoena may specify such evidence and direct that the witness bring the same with him and produce it in court.

[2] We note that the record does not suggest that a motion to suppress was filed in this case; appellant's opposition to the admission of his written and recorded oral statements came in the form of objections during trial. So, while both parties have briefed this issue in terms of the trial court's refusal to suppress, as will be seen below, we address the matter as it was presented below: an objection to the admissibility of the statements.

TEX. CODE CRIM. PROC. ANN. art. 24.02 (West 2009). A subpoena *duces tecum* is not to be used as a discovery weapon but as an aid to discovery based upon a showing of materiality and relevance. *Ealoms v. State*, 983 S.W.2d 853, 859 (Tex. App.—Waco 1998, pet. ref'd). This Court has held that a defendant's right under the statute to secure evidence material to his defense arises out of the Sixth Amendment right to compulsory process. *See Martin v. Darnell*, 960 S.W.2d 838, 841 (Tex. App.—Amarillo 1997, orig. proceeding). If appellant fails to show that the requested items are material, the trial court properly quashes the subpoena. *See Luvano v. State*, 183 S.W.3d 918, 924–25 (Tex. App.—Eastland 2006, no pet.); *see also Martin*, 960 S.W.2d at 840–41. We have also noted that, by its own terms, Article 24.02 applies to items in the witness's possession. *Cordova v. State*, 296 S.W.3d 302, 313 (Tex. App.—Amarillo 2009, pet. ref'd).

Analysis

Here, appellant requested three years' worth of records relating to V.A.'s banking deposits and an unidentified number of text messages between V.A. and appellant. First, we reiterate that, by its own terms, Article 24.02 applies to items in the possession of the witness. Here, as the State points out, appellant requested on the day of trial years' worth of banking records and text messages. Although appellant argued that V.A. could likely access banking data by way of a smart phone, the State successfully argued that she did not have those in her possession.

Further, we question whether such a request would pass the materiality test of Article 24.02 in that whether appellant paid V.A. money out of a sense of guilt or fear or obligation and whether the two remained in contact by text messages for whatever

purposes have little bearing on the outcome here, when appellant admitted to having engaged in a sexual relationship.[3] Appellant's defense seemed to focus on whether the appellant sexually assaulted V.A. when she was younger or older than fourteen. On these facts, appellant cannot show that the bank deposits and text messages, most of which seem to cover years after V.A. reached the age of majority, are material to his defense. Whether V.A. did or did not request and receive money from appellant does not change the facts from which the jury was called on to decide whether appellant was guilty of the charged offense. We add that V.A. was available to, and did, testify about the alleged financial contributions appellant made to her and their continued communications. It was not outside the zone of reasonable disagreement for the trial court to conclude that appellant failed to meet Article 24.02's requirements relating to possession and materiality. That said, it did not abuse its discretion when it quashed appellant's subpoena *duces tecum*. We overrule appellant's first point of error.

Admission of Statements

Appellant complains that the trial court erroneously overruled his objections to the admission of his written and oral statements taken during his interrogation by Wheeler County Deputy Sheriff Jayme Schlabs. He contends that, although he was advised of his constitutional rights at the outset, he should have been re-advised of those rights when the deputy returned after having left the room for nine and one-half minutes. Because Deputy Schlabs failed to re-issue *Miranda* warnings when she returned, appellant contends, the second part of his statement—the portion during

[3] Further, we see nothing in the record that would explain why appellant would not have equal access to text messages exchanged between himself and V.A.

which he admitted and described his sexual relationship with his young niece—was involuntary and should have been excluded from evidence or suppressed.[4]

Standard of Review and Applicable Law

It appears that appellant framed this issue below as an objection to the admissibility of the evidence when the evidence was offered at trial, meaning that we do not see where appellant filed a motion to suppress his statement. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *See Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990) (en banc).

In certain circumstances, *Miranda* warnings given once continue in effect for some time afterwards, even when there has been a break in the questioning after which questioning resumes. *See Bible v. State*, 162 S.W.3d 234, 241–42 (Tex. Crim. App. 2005). To determine whether such is the case here, we consider four factors when evaluating the circumstances of a case: (1) the passage of time; (2) whether the interrogation was conducted by the same or different officers; (3) whether the interrogation relates to the same or different offense or allegations; and (4) whether the officer asked the accused if he had received earlier warnings, whether the accused remembered those warnings, and whether he wished to waive or invoke those rights. *See id.* at 242 (citing *Jones v. State*, 119 S.W.3d 766, 773 n.13 (Tex. Crim. App. 2003) (en banc)).

[4] *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Analysis

Here, we learn from the record that it was Deputy Schlabs who began the interrogation and who, by appellant's own admission, did advise appellant of his *Miranda* rights at the beginning of the interrogation. The interrogation continued for approximately fourteen minutes. Deputy Schlabs left the room for less than ten minutes and then returned to continue questioning appellant about the sexual assault allegations.

So, in terms of the passage-of-time factor, we note that less than ten minutes passed from the first phase of the interrogation to the next phase. We observe, too, that Deputy Schlabs conducted both phases of the interrogation and that the topic of the questioning did not appear to shift away from the allegations that he had sexually abused his niece. Indeed, appellant seems to concede that the only questionable factor here is the fourth one: whether Deputy Schlabs, upon her return, asked about appellant's continued understanding of his rights and a reminder of those rights.

Considering the rather short length of time that had passed from the moment he undisputedly received warnings concerning his constitutional rights, the fact that the same officer continued the questioning after the short break, and the fact that the general topic of the questioning remained the same, Deputy Schlabs was under no such obligation to remind appellant that he had waived his constitutional rights less than one-half hour ago when the two began their interaction. Appellant admits that he was advised of his rights at the beginning of the interrogation, and his acknowledgment and waiver of those rights remained effective after Deputy Schlabs returned from a short break to continue questioning appellant about his relationship with his niece. The trial

court did not err by so concluding; it did not abuse its discretion by overruling appellant's objections to the admission of his statements. We overrule appellant's second point of error.

Lesser-Included-Offense Instruction

Appellant was charged with aggravated sexual assault of a child, a first-degree felony. He unsuccessfully sought an instruction in the jury charge for the lesser-included offense of sexual assault of a child, which is a second-degree felony. Appellant maintains on appeal that he was entitled to an instruction on the lesser-included offense. His basis is as follows: though he did admit having had sexual intercourse with V.A., he did not give a clear statement as to how old she was when he did so. By looking at his statement, he maintains, she could have been older than fourteen but younger than seventeen when he sexually assaulted her, making him guilty of sexual assault of a child rather than *aggravated* sexual assault of a child younger than fourteen. *See* TEX. PENAL CODE ANN. §§ 22.011(a)(2), (c)(1) (West 2011), 22.021(a)(2)(B). From that, appellant contends that the evidence was such that he was entitled to an instruction on sexual assault of a child, a lesser-included offense of aggravated sexual assault of a child.

Standard of Review and Applicable Law

We review a trial court's refusal to include a lesser-included-offense instruction for an abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004) (en banc). An offense is a lesser-included offense if, among other reasons, it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(1)

(West 2006); *Hall v. State*, 225 S.W.3d 524, 527 (Tex. Crim. App. 2007). The Texas Court of Criminal Appeals has developed a two-stepped analysis to determine whether a defendant is entitled to an instruction on a lesser-included offense. *See State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). First, a court must determine whether the proof necessary to establish the charged offense also included the lesser offense. *See Meru*, 414 S.W.3d at 162. If so, a court must then consider whether the evidence shows that, if an appellant is guilty, he is guilty only of the lesser offense. *See id.* at 162–63; *Hall*, 225 S.W.3d at 536.

Analysis

The State concedes that the first step of the lesser-included-offense analysis is satisfied. The State's concession is well-taken; indeed, proof of the facts that would establish that a person sexually assaulted a child younger than fourteen is evidence that would also establish that the person sexually assaulted a child younger than seventeen. *See Meru*, 414 S.W.3d at 162.

With that, we move on to the second step of the applicable test: determining whether a rational jury could find from this record that, if appellant is guilty, he is guilty *only* of the lesser offense. *See id.* at 162–63. In support of his contention that the evidence so shows, appellant seems to ignore that the evidence in the record that addresses the issue of the age at which V.A. was assaulted clearly indicates that she was younger than fourteen when appellant first forced her to have intercourse with him. Appellant's statement does not clearly address the timeline of the sexual relationship. V.A.'s testimony, however, does do so. She testified that appellant first engaged in

sexual intercourse with her when she was in sixth or seventh grade, when she was eleven or twelve. That appellant's statement did not address the issue of age is *not* evidence that V.A. was older than fourteen when appellant assaulted her. As the State points out, there is no mention of V.A. being over the age of fourteen when appellant first assaulted her that does not come as or in response to appellant's questioning on that issue. Take for instance the following exchange between appellant's counsel and V.A.:

> Q. Isn't it true that the sex was happening when you were 17?
>
> A. Yes.
>
> Q. Isn't it true that it was only happening when you were 17?
>
> A. No.
>
> Q. Isn't it true that the fondling, the touching for sexual gratification[,] only happened when you were 17?
>
> A. No.

This is not evidence that, if appellant is guilty, he is guilty *only* of sexual assault of a child.[5] "[R]emarks by counsel are not evidence." *Wells v. State*, 730 S.W.2d 782, 786 (Tex. App.—Dallas 1987), *pet. ref'd*, 810 S.W.2d 179 (Tex. Crim. App. 1990) (en banc) (op. on reh'g). "Questions put to a witness are not evidence." *See id.* More specifically, a cross-examiner's questions typically are insufficient to create a factual conflict in the jury-instruction context, although the witness's answer may ultimately serve to create one. *See Madden v. State*, 242 S.W.3d 504, 513 (Tex. Crim. App. 2007). Here, such is not the case however. Defense counsel's questions are not evidence that, if appellant

[5] As V.A.'s testimony suggests, it appears that appellant also committed sexual assault of a child based on his having assaulted her during the years after she turned fourteen and while she was younger than seventeen. We note, however, that the applicable test looks for evidence that appellant is *only* guilty of the lesser offense, not evidence that he is *also* guilty of the lesser offense. *See Meru*, 414 S.W.3d at 162–63.

was guilty, he was guilty only of sexual assault of a child, and certainly V.A.'s answers to those questions are clear and consistent with the other record evidence on the matter and do not serve as evidence that appellant was guilty only of sexual assault of a child.

On this record, a rational jury could not have found that, if appellant was guilty, he was guilty only of sexual assault of a child. *See Meru*, 414 S.W.3d at 162–63. The trial court did not abuse its discretion by refusing appellant's requested lesser-included-offense instruction. *See Threadgill*, 146 S.W.3d at 666. We overrule appellant's third and final point of error.

Conclusion

Having overruled appellant's three points of error on appeal, we affirm the trial court's judgment of conviction. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Justice

Do not publish.