In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-17-00166-CR
07-17-00167-CR
07-17-00168-CR

JESUS JOSE HERRERA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 320th District Court
Potter County, Texas
Trial Court Nos. 70,712-D, 71,423-D, 71,424-D, Honorable Richard Dambold, Presiding

April 18, 2018

MEMORANDUM OPINION

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

Jesus Jose Herrera (appellant) appeals his three convictions, two of which were for continuous sexual abuse of a child under fourteen years of age and one of which was for indecency with a child by contact. He received two life sentences on the continuous-sexual-abuse convictions and a twenty-year sentence on the indecency conviction. His sentences were ordered to run consecutively with each other. Three issues pend before

us. We overrule the first two because they were not preserved for review. The third issue involves the modification of the judgment to accurately reflect the manner in which the sentences were to run; the State conceded the point. We modify the judgment and affirm it as modified.

Background

Appellant and J.B. cohabitated. J.B. had a daughter while appellant had two daughters. Each child lived with him and J.B. Eventually, the relationship between J.B. and appellant ended. Thereafter, all three children accused appellant of sexual abuse. Though he denied it when interrogated by an investigating officer and his two children later may have vacillated on whether he abused them, a jury convicted him of the three crimes previously mentioned.

First Issue: Admission of Opinion Testimony on Truthfulness

In his first issue, appellant complains about the investigating officer being permitted to offer his opinion about whether he believed appellant was telling the truth during the interrogation. When the opinion was made, appellant objected on the ground of "speculation." His objection was overruled. Before us, he argues that (1) "Rule of Evidence 702 prohibits an expert witness from testifying that a particular witness is truthful" and (2) the officer's "comment cannot be characterized as anything other than a direct opinion as to appellant's truthfulness." As can be seen, the objection uttered at trial fails to comport with the complaint urged on appeal. The former relates to the absence of a legitimate foundation (evidentiary or otherwise) upon which the opinion was based, while the latter implicates the ability of the witness to simply render the opinion on the

topic of truthfulness. When the complaint urged on appeal does not comport with the objection asserted at trial, the complaint goes unpreserved for review. *Gomez v. State,* No. 07-16-00156-CR, 2017 Tex. App. LEXIS 9239, at *8 (Tex. App.—Amarillo Sept. 29, 2017, no pet.) (mem. op., not designated for publication). Consequently, we overrule the issue.[1]

Second Issue: Failure to Conduct "Reliability Hearing" Regarding Outcry

Next, appellant contends that the trial court erred in failing to conduct a "reliability hearing" pursuant to article 38.072 of the Texas Code of Criminal Procedure. The issue concerns the outcry witness designated by the State. She was the forensic examiner. When she was about to testify regarding statements made to her by J.B.'s daughter, appellant uttered the following: "Your Honor, at this point, I would object as this being the outcry witness and we would urge that [J.B.] was, in fact, the outcry witness." Here, though, he argues that (1) a purported outcry "statement . . . is not inadmissible because of the hearsay rule [unless], among other things, the trial court finds, in a hearing outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement"; and (2) such a hearing was not held. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2) (West Supp. 2017).

Like the substance of issue one, the objection at trial does not comport with the complaint raised on appeal. The former concerns the identity of the actual outcry witness, while the latter pertains to the reliability of the outcry statements made by the victim and

[1] We further note that like evidence was admitted without objection. That cured any purported error, as well. *See Lane v. State,* 151 S.W.3d 188, 192–93 (Tex. Crim. App. 2004) ("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.").

the absence of a hearing to assess their reliability. And, like the result in issue one, the failure of the objection below and the complaint at bar to comport means the matter before us was not preserved. *See Gomez*, 2017 Tex. App. LEXIS 9239, at *8; *Christensen v. State*, No. 07-96-00271-CR, 1997 Tex. App. LEXIS 183, at *3 (Tex. App.—Amarillo Jan. 16, 1997, no pet.) (not designated for publication) (stating that the failure to object to the absence of an article 38.072 reliability hearing waives the complaint). Thus, we overrule this issue too.

Third Issue: Consecutive Sentences and Reformation of Judgment

Lastly, appellant contends, and the State concedes, that the written judgments executed by the trial court should be reformed to reflect the trial court's oral pronouncement regarding the manner in which the sentences must be served. The issue is sustained, and the judgments will be reformed to reflect the trial court's pronouncement.[2] *See Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998) (en banc) (stating that "it is the pronouncement of sentence that is the appealable event, and the written sentence or order simply memorializes it and should comport therewith").

We modify the three judgments executed by the trial court to reflect that appellant's sentences are to run consecutively in the following order: (1) the sentence in Cause No.

[2] In its written judgments, the trial court stated:

> The Court being of the opinion that, in accordance with 3.03 of the Penal Code, the sentences in each count should run consecutively with the sentence assessed in each prior cause. The Court orders that the sentence in Cause 71,424-D will not begin until the sentence in Cause 70,712-D has ceased to operate. The sentence in Cause 71,423-D of this cause number will not begin until the sentences in both Causes 70,712-D and 71,424-D have ceased to operate.

When pronouncing sentence, the trial court ordered that the life sentence in cause 71,424-D be served first.

71,424-D will be served first; (2) the sentence in Cause No. 70,712-D will not run until the sentence in Cause No. 71,424-D has terminated; and (3) the sentence in Cause No. 71,423-D will not run until the sentences in Cause Nos. 71,424-D and 70,712-D have terminated. The judgments are affirmed as modified.

Per Curiam

Do not publish.