In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-19-00257-CR
07-19-00258-CR

BRANDON EDWARD STANDERFER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 31st District Court
Wheeler County, Texas
Trial Court Nos. 5150 & 5151, Honorable Steven Emmert, Presiding

June 11, 2020

MEMORANDUM OPINION

Before QUINN, CJ., and PARKER and DOSS, JJ.

These appeals involve two issues. One concerns hearsay admissible as outcry, and the other, a hearing on a motion for new trial. The records illustrate that appellant, Brandon Edward Standerfer, was twice convicted, by a jury, of indecency with a child by sexual contact. We overrule the second issue; and abate and remand the first issue.

Issue Two - Outcry

The child victim at bar purportedly informed her parents and others of being touched on her breasts and vaginal area by appellant. The two allegedly were in a

bathroom at the school gym. Appellant and his wife provided gymnastic lessons there, and the child participated in those classes.

Several of those told of the incident were permitted, over objection, to reiterate what the child disclosed. They did so as outcry witnesses. Appellant contends that "[t]here may be only one outcry witness per event" and since "each of the 'outcry witnesses' here testified about the same events, the trial court abused its discretion in admitting more than one statement." The trial court also erred in admitting "video-recorded statements of [the] complaining witness," he continues. We overrule the issue.

The admission of substantially the same evidence elsewhere at trial and without objection ameliorates any harm arising from the admission of improper evidence. *Saucedo v. State*, No. 07-10-00188-CR, 2011 Tex. App. LEXIS 2281, at *12–13 (Tex. App.—Amarillo Mar. 29, 2011, pet. ref'd) (mem. op., not designated for publication). The same is true of the improper admission of outcry testimony. *Hull v. State*, No. 14-18-00443-CR, 2019 Tex. App. LEXIS 7937, at *2–3 (Tex. App.—Houston [14th Dist.] Aug. 29, 2019, pet. ref'd) (mem. op., not designated for publication). In that circumstance, the purportedly inadmissible evidence simply is cumulative of admissible evidence.

In addition to the outcry witnesses, the sexual assault examination nurse testified. Unlike the former, though, no one objected to her testimony about the child's medical history. That testimony included a description of how and where appellant touched the youth, as well as the identification of the facility and room wherein the touching occurred.

In the explaining his complaint to us, appellant alluded to the testimony of the child's mother. She described two purported instances of outcry. The second occurred a day after the first. Though a bit more detailed, it concerned the one event and,

consequently, should have been excluded, he argues. Comparison of the examining nurse's testimony with the mother's outcry about which appellant complains reveals the two to be substantially similar. Thus, any error in admitting it was and is harmless.

There is one other potential instance of outcry here. Though not substantively developed in the portion of his brief labelled "application to the facts," appellant mentioned it briefly when analyzing harm. The allusion consisted of appellant asserting: "And, while SANE O'Neal and counselor Jennings also testified, without objection, about statements B.A. allegedly made to them, those statements were much less detailed than those B.A. made to the forensic interviewer at the Bridge." Having failed to substantively brief this aspect of the complaint or reveal the particular comments deemed objectionable, this potential complaint was waived. *Blanco v. State*, No. 08-15-00082-CR, 2017 Tex. App. LEXIS 1287, at *19 (Tex. App.—El Paso Feb. 15, 2017, no pet.) (mem. op.) (concluding that issues lacked substantive analysis and legal argument as required by rule of appellate procedure and, therefore, were waived due to inadequate briefing).

As for the allegation that the trial court erred in admitting the video memorializing the Bridge interview, it too was waived. Not because the argument went undeveloped but because the grounds underlying the objection urged at trial differ from those underlying his appellate complaint. Below, appellant argued that the video was not outcry. That is, he said:

> I would renew my objection that the Bridge interview is hearsay and it does not fit under any of the exceptions to the hearsay rule or it does not fit under 38.078 to the outcry statute because of number 1 it was not — she was not the first outcry witness, she was not the second. This was a later date. This was like at least 10 days after the initial outcry was made. And there's nothing in the interview that was not said in the statement that the child made to the mother and to the father.

Here, appellant argues that the video is inadmissible because only live testimony from an outcry witness is admissible. *Bays v. State*, 396 S.W.3d 580, 581–82 (Tex. Crim. App. 2013) (holding that under "article 38.072 of the Texas Code of Criminal Procedure, the outcry statute, is a hearsay exception statutorily limited to live testimony of the outcry witness"). Nothing was said of only live testimony being admissible at trial. Because the grounds underlying an objection at trial must comport with those urged on appeal and they do not here, appellant's complaint about admitting the video itself was not preserved for review. *Guevara v. State*, 97 S.W.3d 579, 583 (Tex. Crim. App. 2003) (holding "that appellant has failed to preserve any error regarding its admission because the objection at trial does not comport with the complaint raised on appeal).

Issue One - Hearing on Motion for New Trial

Appellant next complains of the trial court's decision forgoing a hearing on his motion for new trial. He moved for new trial on the ground that a juror "failed to disclose that she had been sexually abused when the prosecutor, and later the judge, asked the venire members whether any of them had been so abused." Because this circumstance was not discernible from the record, and affidavits accompanying the motion presented reasonable grounds for holding that relief should be granted, appellant believes himself entitled to a hearing on the motion. We sustain the issue.

A hearing on a motion for new trial is not an absolute right and is not required when the matters raised in the motion are determinable from the record. *Ray v. State*, No. 10-10-00285-CR, 2012 Tex. App. LEXIS 675, at *7 (Tex. App.—Waco Jan. 25. 2012, pet ref'd) (mem. op., not designated for publication). Additionally, when a matter is not determinable from the record, no hearing is required unless the complaining party

establishes the existence of "reasonable grounds" showing that he would be entitled to relief. *Id.* So, as a prerequisite to a hearing when the grounds are non-discernible from the record, the motion must be supported by an affidavit, either of the defendant or someone else, specifically setting out the factual basis for the claim. *Id.* The affidavit need not establish a prima facie claim, but a fair reading of it must give rise to reasonable grounds supporting it. *Id.*

Next, a juror's withholding material information during voir dire denies the parties the opportunity to exercise their challenges, which, in turn, hampers their selection of a disinterested and impartial jury. *Id.* at *8 (citing *Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004)); *accord State v. Gutierrez,* 541 S.W.3d 91, 99–100 (Tex. Crim. App. 2017) (stating the same). To secure a new trial based on such juror misconduct, the defendant must show that the juror withheld material information despite the defendant's exercise of due diligence. *Ray*, 2012 Tex. App. LEXIS 675, at * 8. That is, counsel must ask questions calculated to bring out information that might indicate a juror's inability to be impartial and truthful. *Id.* at *8–9 (citing *Armstrong v. State*, 897 S.W.2d 361, 363–64 (Tex. Crim. App. 1995)). Unless defense counsel asks such questions, material information that a juror fails to disclose is not actually withheld. *Id.* at *9. Furthermore, counsel's questions must be specific, as opposed to general. *Id.*

Though not involving the denial of a hearing on a motion for new trial, we find the words of the Court of Criminal Appeals in *State v. Gutierrez* particularly insightful. As indicated above, it reiterated that a juror withholding material information during voir dire hinders the selection of an impartial jury. *State v. Gutierrez*, 541 S.W.3d at 99–100. Furthermore, disposing of the appeal entailed explaining what was meant by "material

information." The court said that to be material, the information need not prove actual bias but only have a tendency to show bias. *Id.* at 100. If it has such a tendency, then the appropriate procedure is to hold a hearing during which evidence may be obtained regarding whether the juror is actually biased. *Id.*

Here, there is no question that the motion for new trial was presented to the trial court. That the complaint in dispute is not discernible from the record is also clear. Thus, appellant attempted to explain it through his motion and accompanying affidavits. There were three in total. One was executed by appellant's wife, who happened to also be the local county attorney. She attested to having been asked by a client why a particular person was selected to serve on the jury trying her husband's guilt. The juror was Krystal Yarborough. Allegedly, Krystal's sister-in-law had informed the client that Krystal had been molested by her mother's boyfriend when younger, removed from her mother's home by "CPS" due to that molestation, and later raped. This led to the retention of an investigator to investigate the matter.

A description of the investigator's efforts also appeared in one of the three affidavits. Therein, she discussed her efforts to contact Krystal, Krystal's mother, and the sister-in-law. None cooperated. For instance, Krystal purportedly refused to speak with the investigator when contacted via phone. Additionally, no one responded to the investigator's door knocks when she visited their homes, even though people could be heard inside.

Appellant's trial counsel provided the third affidavit. He attested to believing "victims of sexual abuse cannot be fair and impartial in a trial involving sexual abuse, even when they are confident in their ability to put the experience aside and decide the

case on its own merits." To that he added: "When I try sexual abuse cases, I routinely strike any venire member who was a victim of sexual abuse of any kind" and "if my challenges for cause were denied, I exercised peremptory strikes to remove them from the panel."

Next, the reporter's record illustrates that the venire members were asked during voir dire the following question: "Is there anybody who, close friend, family member, themselves were sexually abused or assaulted as a child? Do you know anybody that has been or you personally . . . ?" The question was posed by the prosecutor, and of the five venire members responding to it, none were Krystal.

That a victim of crime may carry biases against those accused of engaging in similar crimes is hardly a farfetched notion. Indeed, the prosecutor acknowledged as much after asking the foregoing question. He explained why he asked it by telling the venire that "this is kind of what I talked about, if you just had a case where your house was burglarized, you probably don't want to sit on a burglary trial because it would be hard to be fair and impartial." No less is true of sexual assault, and defense counsel opined as much via his affidavit and experience as a criminal defense attorney. Simply put, the comments of both the prosecutor and defense counsel lend support to the conclusion that one victimized by sexual assault may have a tendency to show an adverse bias towards those allegedly engaging in such assaults.

We also note that while much of the information about Krystal being the victim of sexual assault could constitute hearsay, appellant tried to confirm or negate the information through the efforts of an investigator. More importantly, appellant is not arguing that such hearsay established bias and grounds for a new trial. Rather, he posits

that the substance of the hearsay, coupled with its source being Krystal's sister-in-law, the specific question asked during voir dire about sexual assault, Krystal's silence during voir dire, and her arguable evasion from the investigator create reasonable grounds supporting the claim of bias. That said, we return to the words of *Gutierrez*. The information withheld need not prove actual bias but only have a tendency to show bias, and if there is such tendency, then the appropriate procedure is to hold a hearing to develop the matter. The information purportedly withheld here, if true, has a tendency to show bias and may provide reasonable grounds for a new trial. Thus, the appropriate procedure was to convene a hearing whereat the potential bias, and its basis could be confirmed or negated.

We sustain appellant's issue, abate the appeals for sixty days, and remand the causes to the trial court for a hearing on appellant's motion for new trial. If the trial court grants the motion, it must immediately forward a copy of the order granting it to this Court, upon receipt of which we will dismiss the appeals. If the motion is overruled, the district court shall immediately cause to be developed and filed with the Clerk of this Court a supplemental record containing its decision and a transcription of the hearing. Upon receipt of that supplemental record, the parties will be permitted to brief any issues relating to the decision overruling of the motion. *Garcia v. State*, 291 S.W.3d 1, 18–19 (Tex. App.—Corpus Christi 2008, pet. ref'd) (describing the foregoing procedure upon concluding that the trial court erred in failing to hold a hearing on the motion for new trial).

Brian Quinn
Chief Justice

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