In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00369-CR

CHRISTOPHER VIDRIO, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 331st District Court
Travis County, Texas
Trial Court No. D-1-DC-19-904040; Honorable Chantal Eldridge, Presiding

August 14, 2020

MEMORANDUM OPINION

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

Appellant, Christopher Vidrio, appeals from his convictions by jury of the felony offenses of aggravated sexual assault of a child (Count I),[1] indecency with a child by

[1] TEX. PENAL CODE ANN. § 22.021(A)(2)(B) (WEST 2019).

contact (Counts II, III, and IV),[2] and indecency with a child by exposure (Count V)[3] and the resulting court-imposed life sentences for Counts I, II, III, and IV and the twenty-year sentence for Count V. Appellant challenges his convictions through two issues.[4] First, he contends the trial court reversibly erred in allowing the victim's mother to testify as an outcry witness. Second, he argues his right to be free from double jeopardy was violated when the jury convicted him of both Counts I and IV of the indictment. The State has conceded that Appellant is entitled to relief pursuant to his second issue. We will vacate Appellant's conviction under Count IV and affirm Appellant's convictions under Counts I, II, III, and V.

BACKGROUND

The child victim in this case is fourteen-year-old J.V., the daughter of Appellant.[5] J.V. was in the third grade at the time of the alleged acts by Appellant but she did not disclose them until approximately four years later.

During trial, the State sought to admit the outcry testimony of J.V.'s mother. The trial court held a hearing outside the presence of the jury after which it determined the mother was a proper outcry witness as to the allegations involving Appellant touching

[2] TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2019).

[3] TEX. PENAL CODE ANN. § 21.11(a)(2) (West 2019).

[4] Originally appealed to the Third Court of Appeals, sitting in Austin, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Third Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

[5] J.V.'s mother was in a relationship with another woman. Appellant fathered J.V. and another daughter with the mother and fathered a third female child with the mother's partner. The women had asked the father to impregnate them rather than seek a sperm donor. Appellant did not have an emotional relationship with either the mother or her partner.

J.V.'s breasts and vagina and putting his penis in J.V.'s mouth. It found the forensic interviewer was the proper outcry witness as to the allegation that Appellant exposed himself to J.V. and masturbated in front of her.

At trial, J.V.'s mother testified that J.V. told her about the abuse that occurred in 2013 during a 2017 car ride after her mother had picked J.V. up from school. That day, the mother received a call from J.V.'s school. A teacher at the school caught J.V. passing a note with another student in class. In that note, the other student indicated she had been sexually abused. J.V. told her classmate that she too had been abused by her father. The day the teacher intercepted the note, J.V. had a knife and razor blades in her possession and had been cutting herself. She was suspended for bringing a knife on campus but did not elaborate on why she had the weapon or why she was cutting herself. During the car ride home, J.V.'s mother told her that she had her attention and she could tell her anything she needed to tell her.

J.V. told her mother Appellant had sexually abused her when they lived at an apartment complex her grandmother managed in fall 2013. She told her mother Appellant "made her put his penis inside of her mouth at one occasion. There was him touching her, and he had her touch him as well." J.V. also told her mother that Appellant touched her "on her vagina" and made her touch his penis with "[h]er hand and her mouth."

The mother immediately contacted police. J.V. subsequently participated in a forensic examination and interview as a result of the allegations against Appellant. A redacted version of the interview was played before the jury. During that interview, J.V. related several instances of abuse, including one she had not told her mother in which

Appellant masturbated in front of her in the kitchen. J.V. also testified at trial, detailing each instance of sexual assault.

ANALYSIS

ISSUE ONE—ADMISSION OF OUTCRY TESTIMONY

In Appellant's first issue, he contends the trial court reversibly erred in permitting J.V.'s mother to testify as an outcry witness because the statements were unreliable. The State disagrees, arguing the trial court did not err in determining the substance of the statements was reliable or alternatively, that any error was harmless.

Texas Code of Criminal Procedure article 38.072 sets forth the procedure for admission of outcry testimony. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2019). Appellant does not claim the trial court failed to follow this procedure and acknowledges the court held a hearing outside the presence of the jury as required. *Id.* at art. 38.072(b)(2). Rather, Appellant argues the trial court erred in concluding the outcry testimony was reliable. *See Gonzales v. State*, 477 S.W.3d 475, 479 (Tex. App.—Fort Worth 2015, pet. ref'd) (listing several non-exhaustive facts for trial courts to consider when determining reliability of outcry statement). In support of his argument, Appellant states that "evidence suggests that [the mother] had been planting the idea of sexual abuse by Appellant in J.V.'s mind for years" because the mother had asked J.V. about any potential sexual misconduct numerous times over several years.[6] Despite her inquiry, the mother said, "[J.V.] never, ever admitted anything." Appellant also points to the mother's testimony that J.V. denied any sexual abuse by Appellant while the two were

[6] It should be noted that the mother may have been motivated to ask this question due to Appellant's prior conviction for indecency with a child.

in the school counselor's office as evidence of the unreliability of J.V.'s statements. He further points to the mother's testimony that J.V. did not admit to the abuse until she was being questioned about why she was cutting herself. This, Appellant claims, indicates the statements made by J.V. to her mother were not spontaneous and were, in fact, motivated by a need to please her mother and avoid any potential punishment. Appellant also contends that because J.V. was not sufficiently clear in her testimony regarding the incidents, the statements her mother claims J.V. made to her did not rise to the necessary level of certainty.

A trial court has broad discretion in determining who qualifies as a proper outcry witness, and we review a trial court's decision regarding the testimony of an outcry witness under an abuse of discretion standard. *Garcia v. State,* No. 03-14-00269-CR, 2016 Tex. App. LEXIS 4219, at *4-5 (Tex. App.—Austin Apr. 22, 2016, pet. ref'd) (mem. op., not designated for publication) (citations omitted). Pursuant to that standard, we will uphold the trial court's ruling if it is reasonably supported by the record and within the zone of reasonable disagreement. *Martinez v. State*, 178 S.W.3d 806, 810 (Tex. Crim. App. 2005). Conversely, we will find an abuse of discretion only when the trial court's ruling is outside the zone of reasonable disagreement. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008).

Admissible outcry witness testimony is event-specific, not person-specific. *Garcia*, 2016 Tex. App. LEXIS 4219, at *5 (citing *Villalobos v. State*, No. 03-13-00687-CR, 2015 Tex. App. LEXIS 8927, at *9 (Tex. App.—Austin Aug. 26, 2015, pet. ref'd) (mem. op., not designated for publication); *Eldred v. State*, 431 S.W.3d 177, 181-82 (Tex. App.—Texarkana 2014, pet. ref'd); *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.—Houston

[14th Dist.] 2012, pet. ref'd)). Therefore, in cases in which a child has been victim to more than one instance of sexual assault, multiple outcry witnesses may testify about separate acts of abuse committed by the defendant against the child. *Garcia*, 2016 Tex. App. LEXIS 4219, at *5 (citations omitted).

Furthermore, even if the trial court erred by admitting the mother's outcry testimony, we cannot conclude Appellant was harmed by the admission of that evidence. *Wong v. State,* No. 03-19-00211-CR, 2020 Tex. App. LEXIS 2571, at *18-20 (Tex. App.—Austin Mar. 27, 2020, no pet.) (mem. op., not designated for publication). The erroneous admission of evidence, including outcry testimony, is considered non-constitutional error. *Id.* (citing *West v. State*, 121 S.W.3d 95, 104 (Tex. App.—Fort Worth 2003, pet. ref'd)). For non-constitutional errors in criminal cases, the error must be disregarded unless it affected the defendant's substantial rights. *Wong*, 2020 Tex. App. LEXIS 2571, at *19 (citing TEX. R. APP. P. 44.2(b)). A substantial right is not affected "when, after examining the record as a whole, the reviewing court has a fair assurance that the error did not influence the jury or had but a slight effect." *Wong*, 2020 Tex. App. LEXIS 2571, at *19 (citing *McDonald v. State*, 179 S.W.3d 571, 578 (Tex. Crim. App. 2005)). Under this standard, if the same or similar evidence is admitted during another portion of the trial without objection, "the improper admission of the evidence will not constitute reversible error." *Wong*, 2020 Tex. App. LEXIS 2571, at *19 (citation omitted).

During the trial, the mother testified J.V. made an outcry of sexual abuse in the car after the mother picked her up from school. The mother asked her what was wrong because when people cut themselves, such behavior generally indicates something is wrong. The mother said J.V. told her that Appellant had been touching her. She told her

about one incident in which Appellant touched her vagina and breasts. She also told her about another incident in which Appellant put his penis in her mouth.

J.V. testified at trial to each of those incidents. She testified that the first time Appellant engaged in sexual conduct with her, she was in the third grade and was living at the apartment complex her grandmother managed. During that incident, Appellant told her to lie down with him. She did and he "tickled [her] a little bit and then—like under [her] shirt. And his hand went a little higher up to [her] breasts . . . and he . . . massaged a little bit." He then "put his hands lower into [her] pants under [her] underwear and said, 'Does that tickle?'" J.V. later clarified Appellant touched her vagina with his hand on that occasion.

J.V. described the second incident as another occurring during third grade and an incident she had tried to forget and thus, did not remember "perfectly." She said she did not recall what led up to the incident but remembered being in the living room of the apartment on her knees and Appellant telling her to "put it in [her] mouth, and [she] did. And it was like nasty. It tasted nasty, and I took it out of my mouth." J.V. then told the jury his "penis" was the part of Appellant's body that went into her mouth.

J.V. testified that the third incident, again while she was in third grade, occurred in the kitchen. J.V. was preparing something to eat when Appellant came in and told her to "look." She turned around and "he had his penis in his hands, and he was masturbating to himself. And like he just told me to look, and I was looking. And as I was looking, he

had his head raised up, and his mouth opened a little bit. And then white stuff was coming out and was going into the trash can."[7]

Because the mother's testimony regarding J.V.'s outcry described the same incidents as those described by J.V. at trial, any potential error from the admission of the outcry testimony was harmless. *Wong*, 2020 Tex. App. LEXIS 2571, at *20 (citing *Moody v. State*, 543 S.W.3d 309, 314 (Tex. App.—Eastland 2017, pet. ref'd) (deciding any error in admission of outcry testimony was harmless where "[t]he victim testified before the jury without objection to the same facts contained in the outcry"); *Zarco v. State*, 210 S.W.3d 816, 833 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (determining that erroneous admission of outcry testimony was harmless where child "testified in detail about the abuse" and provided "the same testimony [the outcry witness] gave regarding the abuse"); *Duncan v. State*, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (concluding that error from the admission of outcry testimony was harmless because victim testified at trial that defendant sexually abused her and because testimony regarding statements that victim made to nurse was also presented)). Accordingly, the error, if any, arising from the admission of J.V.'s outcry statements to her mother was harmless. We overrule Appellant's first issue.

ISSUE TWO—DOUBLE JEOPARDY

In Appellant's second issue, he claims his right to be free from double jeopardy was violated when the jury convicted him of both Count I (aggravated sexual assault of a

[7] A redacted version of the forensic interview of J.V. was admitted into evidence by agreement. During that interview, J.V. admitted to several instances of abuse and admitted to a separate instance in which Appellant exposed himself and masturbated in front of her.

child) and Count IV (indecency with a child by contact) because both counts involved the same victim, J.V., on the same day. The State agrees, noting the proper remedy is to vacate Appellant's conviction under Count IV.

Appellant did not raise his double jeopardy claim at trial. He contends he can do so for the first time on appeal because two conditions are met: (1) the undisputed facts show that the violations are clearly apparent on the face of the record and (2) enforcement of the usual rules of procedural default serves no legitimate state interest. *Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013). A double jeopardy claim is "apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim." *Id.* (citations omitted).

In that regard, we have before us all the information needed to determine whether Appellant's double jeopardy rights were violated. *Id.* And, because all of Appellant's convictions arise out of the same trial, enforcement of the usual procedural default would not serve a legitimate state interest. *Hammock v. State*, No. 03-18-00089-CR, 2019 Tex. App. LEXIS 10811, at *6 (Tex. App.—Austin Dec. 13, 2019, no pet.) (mem. op., not designated for publication) (citing *Shaffer v. State*, 477 S.W.2d 873, 876 (Tex. Crim. App. 1971) (enforcement of rules of procedural default serves no state interest when "the two convictions were in the same court, on the same day, before the same judge, and were based on the same evidence"); *Johnson v. State*, 208 S.W.3d 478, 510 (Tex. App.—Austin 2006, pet. ref'd) (because both convictions arose out of same trial, enforcement of usual rules of procedural default would serve no legitimate state interest)).

The Double Jeopardy Clause found in the Constitution of both the United States and the State of Texas forbids the imposition of multiple punishments for the same offense in a single prosecution. *See* U.S. Const. amend. V; TEX. CONST. ART. I, § 14. *See also Bien v. State*, 550 S.W.3d 180, 184 (Tex. Crim. App.), *cert. denied*, 139 S. Ct. 646, 202 L. Ed. 2d 496 (2018); *State v. Donaldson*, 557 S.W.3d 33, 41 (Tex. App.—Austin 2017, no pet.). A multiple-punishments double jeopardy claim arises in two situations: (1) in the context of lesser-included offenses, where the same conduct is punished under both a greater and a lesser-included offense and (2) when the same conduct is punished under two distinct statutes where the Legislature intended for the conduct to be punished only once. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014).

To determine whether Appellant's convictions violate the double jeopardy prohibition against multiple punishments for the same offense, we must consider whether the convictions in this case are based on the same act or whether each violation is predicated on a separate act. *Hammock,* 2019 Tex. App. LEXIS 10811, at *8-9 (citing *Blockburger v. United States*, 284 U.S. 299, 301-03, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Maldonado v. State*, 461 S.W.3d 144, 149-50 (Tex. Crim. App. 2015); *Aekins v. State*, 447 S.W.3d 270, 274 (Tex. Crim. App. 2014); *Barnes v. State*, 165 S.W.3d 75, 88 (Tex. App.—Austin 2005, no pet.)). If alleged offenses occur "during a single continuous act, with a single impulse, in which several different statutory provisions are necessarily violated along that continuum, some of the offenses may merge together or be subsumed, and the defendant may be punished only once." *Hammock*, 2019 Tex. App. LEIXS 10811, at *9 (citing *Aekins*, 447 S.W.3d at 275 (discussing "the merger doctrine," "the single impulse doctrine," or, here in Texas, "the doctrine of subsumed acts"). Therefore, a

"defendant may not be convicted for a completed sexual assault by penetration and also for conduct—such as exposure or contact—that is 'demonstrably and inextricably part of that single sexual assault.'" *Hammock*, 2019 Tex. App. LEXIS 10811, at *9 (citing *Aekins*, 447 S.W.3d at 281; *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004)).

Here, Count I of the indictment alleged that Appellant "on or about September 28, 2013 . . . did then and there, intentionally and knowingly, cause the penetration of the mouth of [J.V.], a child younger than 14 years of age, by the sexual organ of Christopher Vidrio." Count IV of the indictment alleged that Appellant "on or about September 28, 2013 . . . did then and there, with the intent to arouse and gratify the sexual desire of Christopher Vidrio, engage in sexual contact with [J.V.], a child younger than 17 years of age, by causing [J.V.] to touch the genitals of Christopher Vidrio."

Both Appellant and the State agree Appellant was improperly convicted for a completed sexual assault by penetration (Count I, the penetration of J.V.'s mouth by Appellant's sexual organ) and also for indecency with a child by contact (Count IV, J.V.'s mouth touching Appellant's genitals) that is demonstrably and inextricably part of that single sexual assault. More specifically, the evidence at trial showed Appellant's sexual organ contacted J.V.'s mouth as alleged in Count IV in the course of the penile penetration of her mouth as alleged in Count I. As such, the penile contact with J.V.'s mouth was incident to and subsumed by the oral penile penetration. *Maldonado*, 461 S.W.3d at 149 (an offense may be "factually subsumed when there is a single act that cannot physically occur in the absence of another act"). Accordingly, Appellant's convictions for both Count I and Count IV violate the double jeopardy prohibition against multiple punishments for the same offense. We sustain Appellant's second issue.

Appellant and the State also agree on the remedy to be applied here. When a defendant is convicted in a single criminal trial of two offenses that are considered the same offense for the purposes of double jeopardy, the remedy is to affirm the conviction for the "most serious" offense and vacate the other conviction. *Shelby v. State*, 448 S.W.3d 431, 440 (Tex. Crim. App. 2014). Appellant was convicted of aggravated sexual assault of a child as alleged in Count I, a first degree felony. Appellant was also convicted of indecency with a child by contact under Count IV, a second degree felony. Both parties agree that under the circumstances of this case, we are to set aside the conviction for the less serious offense. *Barnes v. State,* 165 S.W.3d 75, 87 (Tex. App.—Austin 2005, no pet.). Here, the less serious offense is the offense alleged in Count IV. Accordingly, we affirm Appellant's conviction for aggravated sexual assault of a child as alleged in Count I and vacate his conviction for indecency with a child by sexual contact as alleged in Count IV.

CONCLUSION

We affirm the trial court's judgments of conviction as to Counts I, II, III, and V and we vacate the trial court's judgment of conviction as to Count IV.

Patrick A. Pirtle
Justice

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