In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00042-CR

DONALD GENE FLINT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 202nd Judicial District Court
Bowie County, Texas
Trial Court No. 06F0023-202

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

At Donald Gene Flint's trial for three counts of indecency with a child by sexual contact and one count of aggravated sexual assault of a child,[1] Flint's child victim was allowed to testify, without objection, under the pseudonym "Gloria Hernandez," a name used throughout the court proceedings. After Flint was convicted, Sann Terry was allowed to testify, over objection but without motion for continuance, during the punishment phase of trial.[2]

On appeal, Flint contends that the trial court fundamentally erred by allowing the child victim to use the pseudonym without following statutory requirements and in light of what he asserts to be the unconstitutionality of Article 57.02 of the Texas Code of Criminal Procedure in violation of Flint's Sixth Amendment rights to confrontation and to a public trial. *See* U.S. CONST. amend. VI; Tex. CODE CRIM. PROC. ANN. art. 57.02 (Vernon Supp. 2008). He also asserts the trial court erred in allowing Terry to testify.

We affirm the judgment of the trial court because (1) the victim's use of a pseudonym did not present fundamental error and (2) allowing Terry to testify was not error and was not preserved.

---

[1]Flint pled guilty to the count of aggravated sexual assault and to one count of indecency with a child by sexual contact; he pled not guilty to the remaining two charges.

[2]Flint received sentences of ten years' imprisonment for each of the three counts of indecency with a child and fifty years' imprisonment for aggravated sexual assault, with the sentences to be served concurrently.

(1) The Victim's Use of a Pseudonym Did Not Present Fundamental Error

Flint asserts that the trial court erred by allowing the State to use a pseudonym when the record reflects neither that Hernandez invoked the right nor completed the proper pseudonym forms. In related points of error, Flint contends that Article 57.02 of the Texas Code of Criminal Procedure, which provides for the use of a pseudonym, is an unconstitutional violation of his Sixth Amendment rights to confrontation and to public trial. Flint concedes that he failed to object to the use of the pseudonym or to assert Article 57.02's unconstitutionality and, therefore, must show fundamental error on all three of those points of error.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a); *Mother Earth Commercial Servs., Inc. v. Kerst*, No. 06-06-00103-CV, 2007 WL 2385119 (Tex. App.—Texarkana Aug. 23, 2007, no pet.) (mem. op.); *see also* TEX. R. EVID. 103(a)(1). If a party fails to do this, error is not preserved, and the complaint is waived. *See Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). A criminal defendant, however, need not timely object to an error stemming from an absolute right or prohibition. *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), *overruled on other grounds*, 891 S.W.2d 267 (Tex. Crim. App. 1994) (discussing the three categories of rights and their respective susceptibility to waiver and procedural default). Errors based on such rights or prohibitions, "fundamental errors," may be raised for the first time on appeal.

TEX. R. EVID. 103(d) (appellate court may take notice of fundamental errors affecting substantial rights although errors not preserved at trial). Fundamental errors are violations of rights which are "waivable only" or denials of absolute systemic requirements, neither of which must be preserved by objection. *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004); *Marin*, 851 S.W.2d at 279.

Here, Flint fails to cite any authority holding that the alleged errors are fundamental errors, and he admits that he did not object at trial to the use of the pseudonym or the constitutionality of Article 57.02.

Article 57.02 implicates a defendant's constitutional due process rights. *Washington v. State*, 59 S.W.3d 260 (Tex. App.—Texarkana 2001, pet. ref'd) (notice requirement). A defendant, however, may waive any constitutional errors by failing to object at trial. *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Wise v. State*, 223 S.W.3d 548, 554 (Tex. App.—Amarillo 2007, pet. ref'd) (even constitutional rights may be waived). The Sixth Amendment rights to confrontation and public trial must be preserved at trial, and the failure to object on a timely basis results in waiver. *Levine v. United States*, 362 U.S. 610, 619 (1960) (failure to raise public-trial objection at trial forfeited right to raise complaint on appeal); *Dewberry v. State*, 4 S.W.3d 735, 752 (Tex. Crim. App. 1999) (waived confrontation-clause issue by failing to object); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990) (failure to object at trial resulted in waiver of right to

confrontation); *Brandley v. State*, 691 S.W.2d 699, 707 (Tex. Crim. App. 1985) (right to public trial must be preserved).

The alleged errors are not fundamental in nature.[3] By failing to object at trial, Flint waived these claims. Therefore, Flint's points of error related to the victim's use of the pseudonym were not preserved for our review. Flint's contentions of error are overruled.

(2) Allowing Terry to Testify Was Not Error and Was Not Preserved

In March 2006, two years before his trial, Flint filed a motion for discovery seeking the production and disclosure of nine designated items; among the requested items, however, was not the names or addresses of the State's witnesses. About a year later, the State filed an application for subpoena listing the State's potential witnesses. The application did not name or include Terry. On February 20, 2008, about two weeks before trial, the State filed a second application for subpoena naming Terry as a potential witness. The record does not show that the trial court either ordered the State to provide a witness list or to forward either application to Flint.

Approximately five days before trial, in a conference with Flint's trial counsel, the State provided Flint with a witness list that included Terry as an expert who would testify in rebuttal or during the punishment phase of the trial. In a motion in limine, Flint moved to exclude Terry as a witness because of late disclosure. The trial court denied the motion. During the punishment phase of the trial, the State called Terry to testify, and Flint renewed his objection. The trial court

[3]There is no indication or claim that Flint did not know the identity of the child claiming to be the victim.

overruled the objection and allowed Terry to testify. Flint then cross-examined Terry. Flint did not seek a continuance at any time.

Flint argues that the trial court abused its discretion by allowing Terry to testify. The State argues that Flint failed to request the names of State witnesses through discovery, that five days was sufficient time in which to prepare for the cross-examination of Terry, and that, if Flint wanted more time, he should have requested a continuance.

Article 39.14(b) of the Texas Code of Criminal Procedure states that,

> on motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence.

TEX. CODE CRIM. PROC. ANN. art. 39.14(b) (Vernon 2005). When requested by a criminal defendant, and when ordered to do so by the trial court, the State must give notice of its witnesses before trial. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993); *Stoker v. State*, 788 S.W.2d 1, 15 (Tex. Crim. App. 1989).

In the absence of court-ordered disclosure, our standard of review is whether the trial court abused its discretion in allowing a previously undisclosed witness to testify. *See Stoker*, 788 S.W.2d at 15 (citing *Bridge v. State*, 726 S.W.2d 558, 566 (Tex. Crim. App. 1986)). Two factors to be considered in determining whether the trial court abused its discretion is to see if the record establishes bad faith on the part of the State in failing to provide the advance witness disclosure and if the defendant could have reasonably anticipated that the witness would testify, even without such

express notice. *Id.* (citing *Hightower v. State*, 629 S.W.2d 920, 925 (Tex. Crim. App. [Panel Op.] 1981)).

In the event the trial court abuses its discretion in overruling a defendant's objection to a previously undisclosed witness, the defendant's failure to move for a continuance renders any error harmless. *Barnes v. State*, 876 S.W.2d 316, 328 (Tex. Crim. App. 1994) (defendant objected to previously undisclosed witness, but error was harmless because he failed to move for continuance); *Gonzales v. State*, 4 S.W.3d 406, 416 n.6 (Tex. App.—Waco 1999, no pet.). In the case of *Rushing v. State*, 50 S.W.3d 715, 729 (Tex. App.—Waco 2001, pet. ref'd), the State disclosed a witness on the morning before voir dire began, and despite the State offering no explanation of why the witness' name had not been previously provided, the appellate court, citing *Barnes* and noting that the defendant failed to request a continuance, and "assuming the trial court abused its discretion," affirmed the trial court's decision to allow said witness to testify over the defendant's objection.

The record in this case does not reflect a court-ordered disclosure, and Flint's pretrial discovery motion did not request a list of the State's witnesses. Five days before trial, the State provided Flint with notification that Terry was a potential witness. Similar to the defendants in *Barnes* and *Rushing*, Flint objected to the witness but failed to move for a continuance. Therefore, an abuse-of-discretion analysis is unnecessary because, even assuming the trial court abused its discretion, the failure to request a continuance rendered any such error harmless. *Barnes*, 876 S.W.2d at 328. Accordingly, we overrule this point of error.

We affirm the judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 16, 2009
Date Decided: August 7, 2009

Do Not Publish