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

No. 06-09-00122-CR

LYNTORANCE JAMAL RAWLS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 276th Judicial District Court
Marion County, Texas
Trial Court No. F13807

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

MEMORANDUM OPINION

Lyntorance Jamal Rawls, having been convicted by a jury of aggravated sexual assault of a child[1] and assessed a penalty of ten years' imprisonment and a fine of $5,000.00, but placed on ten years' community supervision contingent upon his serving 180 days in county jail as one of the conditions, effects this appeal.

Rawls raises two complaints on appeal, maintaining that: (1) the wrong person was allowed to testify as the outcry witness, and (2) the State made improper comments on closing argument.

Outcry Witness Complaint

The situation involving Rawls first came to light when his eleven-year-old sister, Jane Doe #215, sat on the floor of her fourth-grade classroom, wept, and refused to leave school at the termination of the school day. When her teacher, Chrystal Gregory, inquired of Doe to determine the reasons for this unusual behavior, Doe responded that her brother had hurt her, that he had pulled down her pants and did something he was not supposed to do, that he had gotten on top of her, and that she did not want to go to the place where Rawls would be.

Gregory reported this revelation to representatives of the Texas Department of Family and Protective Services, who arranged for the child to meet with Kashila Salazar, then the program director for the Gregg County Child Advocacy Center in Longview, Texas. Salazar conducted a forensic interview of the child. During that interview, Doe related that during an incident at her

[1]TEX. PENAL CODE ANN. § 22.021(a)(2)(B) (Vernon Supp. 2008).

mother's house, Rawls had, among other things, pulled off Doe's pants and panties, inserted his penis into her vagina and her anus, and put his penis into her mouth. Doe further intimated that some of these things had occurred numerous times, beginning when she was about five years old.

Rawls lodged no objection to the testimony of Gregory, but as the testimony of Salazar progressed beyond her qualifications as an expert toward a recounting of the statements made by Doe to Salazar in a formal forensic interview, Rawls objected. The basis of Rawl's objection was that Gregory (not Rawls) was the only person who could qualify as an outcry witness. The trial court's failure to sustain the objection is the object of the primary point of appeal Rawls now raises.

By way of explanation, hearsay is an out-of-court statement made by someone other than the testifying witness that is offered into evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d); *Long v. State*, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990). A "matter asserted" includes any matter expressly asserted and any matter implied by a statement if the probative value of the statement, as offered, stems from the declarant's belief as to the matter. TEX. R. EVID. 801(c). The statements made by Doe during the interview meets the definition of hearsay. *See Dunn v. State*, 125 S.W.3d 610 (Tex. App.—Texarkana 2003, no pet.). Hearsay is not admissible except as provided by statute or the rules of evidence. TEX. R. EVID. 802. In order for hearsay to be admissible, it must fit into an exception to the hearsay proscription which is provided either by statute or the rules of evidence. TEX. R. EVID. 802; *Long*, 800 S.W.2d at 547.

Plainly, an out-of-court statement made by an alleged victim of an assault to a third person (if presented for the truth of the statement) is hearsay. The Legislature recognized the difficulties inherent in obtaining coherent testimony from victims concerning certain crimes against them and enacted Article 38.072 of the Texas Code of Criminal Procedure as an exception to the hearsay rule.[2] TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 2005). That statute applies to alleged child victims of certain sexually assaultive crimes who are twelve years old or younger. Section 2 of Article 38.072 lays certain predicates to the introduction of such testimony:

> Sec. 2. (a) This article applies only to statements that describe the alleged offense that:
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> (1) were made by the child against whom the offense was allegedly committed; and
>
> (2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.
>
> (b) A statement that meets the requirements of Subsection (a) of this article is not inadmissible because of the hearsay rule if:
>
> (1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:
>
> (A) notifies the adverse party of its intention to do so;
>
> (B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and
>
> (C) provides the adverse party with a written summary of the statement;

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[2]A majority of states have enacted similar hearsay exceptions for a child's out-of-court statement about sexual abuse. *See Buckley v. State*, 758 S.W.2d 339, 342 (Tex. App.—Texarkana 1988), *aff'd*, 786 S.W.2d 357 (Tex. Crim. App. 1990).

> (2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and
>
> (3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

The first-person communicant to which reference is made in the statute is commonly known as an "outcry witness." By its qualification that the proper outcry witness is the "first person . . . to whom the child made a statement about the offense" (TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)), there can only be one outcry witness. Often, the identity of the person who qualifies as the outcry witness is (as in this case) the point of contention at the time of trial.[3] A person to whom a "'statement about the offense' [is made] means more than a general allusion to sexual abuse. It must describe the alleged offense in some discernible manner." *Thomas v. State*, 1 S.W.3d 138, 140–41 (Tex. App.—Texarkana 1999, no pet.).

Once Rawls raised his hearsay objection to Salazar's testimony, the State had the burden to satisfy each element of the Article 38.072 predicate for admission of Salazar's testimony to demonstrate that the hearsay rule did not apply. *Long*, 800 S.W.2d at 547. This would include a determination by the trial court in a hearing outside the presence of the jury that all of the requirements of Article 38.072 had been met, including a showing that the proposed outcry witness

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[3]Certain things in the State's direct examination of Gregory would seem to give rise for Rawls to believe that Gregory received sufficient detail from Doe to have been deemed the outcry witness. The State asked Gregory to relate "without going into the specifics of what she was telling you" that caused Gregory to be concerned about the child.

was the first adult to whom a rendition of the events was made in a discernible manner. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)(2).

In Rawls's case, the trial court did not conduct a formal hearing outside the presence of the jury, the only hearing in regard to this being in the form of a bench conference. If the statutorily-required predicates are addressed, a bench conference is sufficient to meet this requirement. *Zarco v. State*, 210 S.W.3d 816, 831 (Tex. App.—Houston [14th Dist.] 2006, no pet.). However, in the bench conference held in Rawls's trial, the sole inquiry by the trial court was whether the State had complied with the required 14-day notice requirement of Section 2(b)(1). The State did not address the predicate that Salazar was the "first person" to whom Doe had revealed the events. It was error to fail to conduct the hearing once the hearsay objection was raised. *Nelson v. State*, 893 S.W.2d 699, 703 (Tex. App.—El Paso 1995, no pet.).

Here, the State failed to offer proof that Salazar was the proper outcry witness whose testimony was an exception to the hearsay rule. Without having complied with the statutory predicates, it was error to have permitted her to testify concerning Doe's statements. The objection was properly preserved by Rawls.

The error here was the violation of a statutory provision, not a constitutionally-guaranteed right. Non-constitutional error must be disregarded unless it affects the substantial rights of the defendant. TEX. R. APP. P. 44.2; *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). A substantial right is affected when the error had a substantial and injurious effect or influence in

determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).

In this case, the statements made by Doe which were the subject of Salazar's testimony were cumulative of other evidence presented to the jury. Doe herself testified and, although the testimony was not as lengthy as the interview with Salazar, the substance was the same. Further, Ashley Jones, a sexual assault nurse examiner, was permitted to read (with no objection) a written statement given by Doe at the time of her examination. The content of that statement was:

> My brother, Jamal Rawls, age 17, messes with me. He pulls my pants down. He pulls his clothes off. He touches my cat.[4] He uses his hand and his private. He touches my mouth with his private. He puts his private in my mouth. He puts his private in my cat. He puts his private in my bottom. He stops when white stuff come[s] out. He has done this since I was five years old.

Since the content of the same or similar evidence to which Rawls had objected (the statements by Doe as related by her to Salazar) was introduced multiple times during Rawls's trial, we cannot find that Salazar's testimony had a substantial and injurious effect or influence in determining the jury's verdict. Therefore, we find the error to be harmless and overrule this point of error.

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[4]The name Doe ascribes to her vagina.

Improper Jury Argument Statement

As a part of its closing argument, the State told the jury, " [Y]ou didn't hear any evidence in this case about, you know, her being a wild 11 year old sex addict. You didn't hear any evidence like that." Rawls promptly objected to the statement and the objection was overruled. This closing argument statement, which Rawls characterizes as being designed merely to inflame the passions of the jury, is the basis for Rawls's second point of error.

"[P]roper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement." *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008); *Cannady v. State*, 11 S.W.3d 205, 213 (Tex. Crim. App. 2000). Improper jury argument is reversible error "when it violates a statute, injects new and harmful facts into the case, or is manifestly improper, harmful, and prejudicial to the rights of the accused." *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996), *overruled on other grounds by Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002). The argument must be considered within the context in which it appears. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988).

Putting the statement made by the State on closing into the context of the trial, we observe that during his opening statement, Rawls's attorney told the jury that he expected Doe's mother to testify that Doe was sexually active and that the mother had caught Doe in bed with little boys having

sex. The State raised an objection at that point and the trial court responded, "We need a hearing on that. Right now, it's sustained." Rawls never made a proffer of that kind of evidence.

Without delving into the morass of the admissibility of evidence which was not tendered, it is unlikely that Rawls would have been attempting to raise a defense of promiscuity on the part of Doe in order to exculpate himself. Even under former laws when the defense of promiscuity was an available defense in some child sexual assault cases, it would not have been an available defense where the alleged child victim was only eleven years of age. *See Hernandez v. State*, 861 S.W.2d 908, 909 (Tex. Crim. App. 1993). Accordingly, it is not credible to assume that Rawls intended at any time to inject evidence that Doe was a "wild 11 year old sex addict."

However, although the phraseology employed by the State in calling the attention of the jury to the omission of an attempt to introduce promised testimony was somewhat over the top, the statement of the State to which Rawls now objects would fit within the category of being in answer to the argument of opposing counsel and amounted to a comment on the lack of evidence which was promised but not delivered; it was marginally permissible as argument. We do not find it to have been manifestly improper, harmful, and prejudicial to Rawls's rights. Therefore, the point of error is overruled.

We affirm the judgment of the trial court.

Bailey C. Moseley
Justice

Date Submitted: October 5, 2009
Date Decided: October 16, 2009

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