IN THE
TENTH COURT OF APPEALS

No. 10-15-00164-CR
No. 10-15-00165-CR

JOSE DEJESUS MALDONADO, JR.,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 40th District Court
Ellis County, Texas
Trial Court Nos. 37976CR and 37977CR

MEMORANDUM OPINION

Jose DeJesus Maldonado, Jr. was convicted of two counts of aggravated sexual assault of a child and was sentenced to 99 years in prison on each, to be served consecutively. TEX. PENAL CODE ANN. § 22.021 (West 2011). Maldonado complains that the trial court abused its discretion by allowing two outcry witnesses to testify because the victim described the offenses charged in a discernable manner to only one person; by

allowing a forensic examiner to testify as an outcry witness because she was not the first person to whom the victim described the offenses in a discernable manner; by denying him the ability to present a defense by refusing to admit evidence of two separate allegations of sexual assault pursuant to Rule of Evidence 412; and violated his right to confrontation under the U.S. and Texas Constitutions. Because we find no reversible error, we affirm the judgments of the trial court.

OUTCRY WITNESSES

In his first issue, Maldonado complains that the trial court erred by allowing two outcry witnesses to testify because the victim had described the offenses charged in a discernable manner to one witness, the victim's mother, and therefore, should have been the only outcry witness. In his second issue, Maldonado complains that the trial court erred by permitting a forensic examiner to testify as an outcry witness because the forensic examiner was not the first person to whom the child described the offenses charged in a discernable manner.

To preserve error for appellate review, a complaining party must make a timely and specific objection. *See* TEX. R. APP. P. 33.1(a)(1); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Points of error on appeal must correspond or comport with objections and arguments made at trial. *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998); *see Brock v. State*, 495 S.W.3d 1, 11 (Tex. App.—Waco 2016, pet. ref'd). If a trial objection does not comport with the issue raised on appeal, nothing has been preserved

for review. *See Resendiz v. State*, 112 S.W.3d 541, 547 (Tex. Crim. App. 2003) (holding that an issue was not preserved for appellate review because appellant's trial objection "does not comport with" the issue he raised on appeal); *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999) (same).

In the hearing before the trial court to determine which, if any, outcry witnesses would be allowed to testify, Maldonado stated:

> [M]y client does not make an objection in reference to the two outcry witnesses. In particular the first outcry witness, [the victim's mother]. Obviously from also [the forensic examiner] who's indicated that [the victim] told her mother first. [Mother] here on the witness stand indicated that—about verbal abuse, physical abuse and also that he put his thing in her private indicating an act of sexual abuse there.
>
> We understand that the statements that [the victim] made to the investigator talked about other matters, but some of those were covered by [Mother], and we feel that using both [Mother] and [the forensic examiner] that talked—they are going to be touching up on the same issues. Basically that's going to try to prove that [the victim] was trying to prove that her statement that she made there for truth of the matter stated hearsay. We feel that it's prejudicial and we just need probably—*we agree to have [the forensic examiner] to be used as the outcry witness*. Also [Mother], she wasn't specific about the time period and her view of the facts as to what happened, how they occurred seem to be very unreliable stating multiple times I don't know when, I don't know how many times, things of that nature.
>
> We feel that by *using [Mother] as an outcry witness that it would confuse the facts and issues* here as to exactly what [the victim] indicated or is indicating. And so we feel that by using [Mother] as an outcry witness that, therefore, it is a use of hearsay just to prove the truth of the matter asserted and we make our objection.

(Emphasis added.)

Maldonado's objection at trial is exactly the opposite of what he is arguing on appeal in his first two issues. Because of this, his objection at trial does not comport with his complaints on appeal and is therefore not preserved. *Brock*, 495 S.W.3d at 11. We overrule issues one and two.

ALLEGATIONS OF PRIOR SEXUAL ASSAULTS PERPETRATED AGAINST THE VICTIM

In his third issue, Maldonado complains that the trial court abused its discretion by denying him the ability to raise the defensive theory of the "doctrine of chances" by refusing to allow him to present evidence of other sexual assault allegations made by the victim against other perpetrators. At trial, Maldonado attempted to establish that the victim had fabricated outcries of sexual assaults in order to avoid punishment from being administered by her mother and father. At trial, the trial court did not allow the admission of evidence surrounding the specific sexual assault claims, but did allow Maldonado to question the victim and other witnesses about his claims of discipline that had been inflicted by her parents and the timing of the discipline as it related to her outcries against Maldonado.

During the trial, the trial court conducted a hearing pursuant to Rule 412 of the Rules of Evidence outside of the presence of the jury at which time Maldonado wanted to question the victim regarding specific instances of other alleged sexual assaults, which he claimed would show the victim's motive for fabricating sexual assaults in order to avoid corporal punishment from her parents. The trial court refused to allow Maldonado

to question the victim in the Rule 412 hearing, and Maldonado complained that this failure violated his right to confront and cross-examine the victim in order for him to attempt to establish his defense in the Rule 412 hearing. As required by precedent of the Court of Criminal Appeals, we abated this proceeding for the trial court to conduct a hearing pursuant to Rule 412, at which time Maldonado was allowed to question the victim regarding these claims. *See LaPointe v. State*, 225 S.W.3d 513, 524 (Tex. Crim. App. 2007).

In his third issue, Maldonado argues that the trial court abused its discretion by refusing to allow him to question the victim in front of the jury about two other occasions where the victim claimed to have been sexually assaulted. The victim had made outcries regarding these two other incidents approximately four to five months after her forensic interview regarding the allegations against Maldonado. The first incident in question had taken place when the victim was a freshman in high school in a school restroom by one individual and the second had occurred approximately a year later in an alley by four males. The victim reported the second incident because she was concerned that she might be pregnant. The victim was in a consensual sexual relationship with a boyfriend that her parents did not know about at the time of the second incident. The perpetrators were unknown to the victim in both incidents. While offense reports were made after the outcries, no charges had been filed on either incident. Neither of these incidents were similar to the allegations against Maldonado.

Maldonado is the victim's uncle. The victim claimed that Maldonado had physically and sexually abused her repeatedly and regularly when she was approximately five years old, in kindergarten, and living with her grandparents and Maldonado in Waxahachie. The victim also claimed that Maldonado had also coerced four of his friends to sexually assault her on several occasions during that time period, which ended when the victim was seven or nine. The victim claimed that Maldonado had regularly sexually assaulted her vaginally and anally with his finger and penis and had forced her to perform oral sex on him. The victim had also told the forensic examiner that, at Maldonado's instigation, a black man and a white man had sexually assaulted her on separate occasions during this period of time, but she denied these incidents at trial.

In the later hearing conducted by the trial court pursuant to our abatement order, the victim testified that she could not remember details regarding these incidents with any specificity and few details were given, but the victim was firm in her allegations that the incidents had occurred. The victim had claimed at all times that the allegations against Maldonado were true and there was no evidence that the allegations of the sexual assaults by Maldonado were fabrications. Maldonado, at trial and during both Rule 412 hearings, attempted to argue that the victim was having problems at home for which she was being corporally disciplined by her parents. The victim denied that she had ever made outcries in an attempt to avoid discipline or that she was in trouble with her parents at the time she made the outcries to her mother.

At the conclusion of the first Rule 412 hearing, the trial court ruled that Maldonado was not allowed to question the victim regarding the two incidents, but that he could question any of the witnesses about the boyfriend, the allegations of physical discipline, and could even call the investigators in Kansas to testify about the two incidents to attempt to determine whether there was a concern regarding fabrication since no charges had ever been filed. Maldonado stated that he did not intend to ask questions regarding pregnancy and the trial court ordered that he approach the bench if he later wanted to do so. He did not do so during the trial.

Maldonado argues that the trial court abused its discretion by determining that the evidence of the two incidents was not admissible pursuant to Rule 412 of the Rules of Evidence. Rule 412 is a "rape shield" law intended to shield a sexual assault victim from the introduction of highly embarrassing, prejudicial, and irrelevant evidence of prior sexual behavior. *Boyle v. State*, 820 S.W.2d 122, 147-48 (Tex. Crim. App.1989) (en banc) (op. on reh'g), *overruled on other grounds by Gordon v. State*, 801 S.W.2d 899, 911 n.13 (Tex. Crim. App. 1990); *Allen v. State*, 700 S.W.2d 924, 929 (Tex. Crim. App. 1985) (en banc).

The admissibility of an alleged victim's past sexual behavior is subject to a two-part test: (1) the evidence must fall within one of the five enumerated circumstances in rule 412(b)(2); and (2) its probative value must outweigh the danger of unfair prejudice. *Boyle*, 820 S.W.2d at 148; TEX. R. CRIM. EVID. 412(b)(2), 412(b)(3). If the evidence of the victim's prior sexual behavior is not relevant, it is properly excluded. TEX. R. CRIM. EVID.

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A trial court has considerable discretion in determining whether to exclude or admit evidence. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). Absent an abuse of discretion, we will not disturb a trial court's decision to admit or exclude evidence. *See State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). Under this standard, we will uphold a trial court's evidentiary ruling so long as the ruling is reasonably supported by the record and is correct under any theory of law applicable to the case. *Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008).

Under Texas Rule of Criminal Evidence 412(b)(2)(C), evidence of the victim's sexual behavior that "relates to the motive or bias of the alleged victim" is admissible, provided its probative value outweighs the danger of unfair prejudice. TEX. R. CRIM. EVID. 412(b)(2)(C), 412(b)(3). *Hale v. State* provides an example of the application of this rule. *Hale v. State*, 140 S.W.3d 381, 395-96 (Tex. App.—Fort Worth 2004, pet. ref'd). In *Hale*, the court of appeals considered the argument that the offered evidence was probative of the victims' motive to lie. Yet, that court could find no evidence in the record to support the assertion. *Id*. (concluding there was no abuse of discretion in excluding evidence of past sexual behavior where there was "[n]o evidence in the record, or offered outside the jury's presence, suggest[ing] the boys were biased or motivated to lie about the assault.").

In this proceeding, there was no evidence even when the victim was questioned at

the second Rule 412 hearing that her allegations regarding the two incidents in question were fabrications. Further, the victim testified at that hearing that she was not being inappropriately disciplined at the time that she made those outcries. Rather, the outcries were made several months after the outcries against Maldonado during therapy sessions she was attending. There was no evidence that the two outcries were fabrications.

Maldonado argues that the "doctrine of chances" applies to this evidence and even though the incidents are not similar to the allegations against Maldonado, the trial court's failure to admit them into evidence prevented him from presenting his defense of fabrication.[1] The "doctrine of chances" tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance. *De La Paz v. State*, 279 S.W.3d 336, 347 (Tex. Crim. App. 2009). One case Maldonado cites to in support of his position is *Hammer v. State*, 296 S.W.3d 555 (Tex. Crim. App. 2009). In *Hammer*, in addition to the allegations made against the defendant, the victim had alleged that she was sexually molested by all of her mother's boyfriends, had been held at knife point by five men, and had been sexually assaulted by another man. *See Hammer*, 296 S.W.3d at 570. The Court

[1] There is some question as to whether the argument regarding the doctrine of chances is preserved through an objection at the time of trial. It was not even mentioned as a defensive theory until the second Rule 412 hearing held after the trial. Moreover, the number of allegations of sexual assaults perpetrated against the victim as well as the victim's consensual sexual activity was known to Maldonado at the time of trial. Maldonado's focus of his cross-examination at trial was on the motive of the victim to fabricate her allegations. The purpose of the Rule 412 hearing was to allow Maldonado to develop and attempt to connect the timing of the outcry to what events were occurring in the victim's life at that time, not at the time the alleged events occurred. Maldonado has failed to establish any probative evidence that the timing of the outcry was linked to the timing of events in the victim's life, disciplinary or otherwise. Thus, Maldonado's attempt to shift the argument on appeal to this new theory of the doctrine of chances does not appear to have been properly preserved in the trial court at the time of trial.

of Criminal Appeals concluded that the trial court abused its discretion by excluding evidence of these prior allegations by the victim because those allegations made the victim's other allegations of sexual misconduct against the defendant somewhat less likely pursuant to the doctrine of chances. *Id*. However, the victim in *Hammer* was shown to have a motive for fabricating the allegations against the defendant who was the victim's father, and there was other evidence that the victim had falsely accused someone of sexually assaulting her to avoid her father finding out that she had consensual sex with her boyfriend. There are no similar circumstances in this proceeding.

During the trial, the victim's father testified that the victim was misbehaving and disrespectful during the time before and after her outcries, and that he would physically discipline her with a belt as punishment. There was one time when he testified that he was pulling the victim toward his room with the intent to spank her when she accused him of being like Maldonado, which Maldonado claims demonstrates that the victim would make outcries to avoid punishment. However, the victim's father was not asked if the discipline changed based on her outcries, and the victim and her mother specifically testified that it did not change and that her outcries were not made as a result of discipline or the victim being in trouble with her parents. Although the trial court had informed Maldonado that he would be allowed to cross examine the victim regarding the relationship between punishment and the outcries against Maldonado during the trial, he did not do so.

Even if the doctrine of chances would favor admissibility of the two allegations, pursuant to Rule 412 the trial court was still required to determine if the probative value outweighed the danger of unfair prejudice. Because there were no indications that the allegations were false, related in any way to discipline of the victim, or showed any bias or motive for the victim to fabricate the allegations against Maldonado, we find that whatever probative value the two allegations have was not outweighed by the danger of unfair prejudice, and therefore, the trial court did not abuse its discretion by refusing to allow Maldonado to introduce evidence of those two incidents stemming from its ruling pursuant to Rule 412. We overrule issue three.

In his fourth issue, Maldonado complains that the trial court abused its discretion by not allowing testimony regarding the victim's sexual history in violation of his right to confrontation pursuant to the United States Constitution. In his fifth issue, Maldonado complains that his right to confrontation pursuant to the Texas Constitution was violated by the trial court's abuse of discretion regarding the same testimony.

The exclusion of a victim's sexual history has been held to not generally violate the defendant's confrontation and cross-examination rights. *See Allen*, 700 S.W.2d at 930. In *Allen*, the Court of Criminal Appeals noted that there have been numerous attacks on rape shield laws as violative of the Sixth Amendment, but those attacks generally have been rejected. *Id*. Rape shield laws are not intended to exclude "highly relevant evidence and violate the defendant's right of confrontation[.]" *Id*. at 931. However, the United

States Supreme Court has stated that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (*citing Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972)); *see also Allen*, 700 S.W.2d at 931. The right to cross-examine for the purpose of attacking the credibility of a witness is "not inviolate." *Allen*, 700 S.W.2d at 931 (*citing Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624 (1931)). The Sixth Amendment protects an accused's right to cross-examine a witness, but it does not prevent a trial court from limiting cross-examination on legitimate concerns such as harassment, prejudice, confusion of the issues, or to exclude evidence that is marginally relevant. *See Kesterson v. Texas*, 997 S.W.2d 290, 293 (Tex. App.—Dallas 1999, no pet.) (*citing Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Based on our determination that the trial court did not abuse its discretion by refusing to admit the evidence pursuant to Rule 412, we do not find, and Maldonado has not shown, that his right to confrontation regarding the two incidents was violated. To the degree he did object to being unable to confront the victim, we allowed him to do so through the second Rule 412 hearing, and in that hearing he did not establish that the incidents should have been admitted into evidence to show a motive to fabricate the allegations against Maldonado. We overrule issue four.

As to the complaint regarding the Texas Constitution in his fifth issue, we note

that it is necessary to separately distinguish violations of the Texas Constitution from the United States Constitution in order to properly present an issue on appeal. *See* TEX. R. APP. P. 38.1(i); *Garcia v. State*, 919 S.W.2d 370, 388 (Tex. Crim. App. 1996). Maldonado did not do so, and therefore, this issue was inadequately briefed, and therefore waived. We overrule issue five.

CONCLUSION

Having found no reversible error, we affirm the judgments of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed February 14, 2018
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