IN THE
TENTH COURT OF APPEALS

No. 10-18-00056-CR

LAMARJRICK MALONE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. D37015-CR

MEMORANDUM OPINION

Appellant Lamarjrick Malone was convicted by a jury of the aggravated sexual assault of his eight-year-old daughter.[1] After pleading true to two enhancements, the jury assessed Malone's punishment at ninety years in the Texas Department of Criminal Justice, Institutional Division. Malone appeals his conviction in two issues. We affirm.

[1] While there was testimony that Malone's daughter, identified by the pseudonym "Maria," was seven when the assault occurred, the child's mother testified that she was eight.

Issues

Malone asserts in his first issue that the trial court erred by denying his request for a continuance to secure the presence of an expert witness at trial. Malone contends that the denial of the continuance violated his right to due process.

In his second issue, Malone contends that the trial court erred by admitting testimony from more than one outcry witness.

Discussion

A. Motion for Continuance. Malone's attorney filed a motion for continuance on December 15, 2017. The basis for the motion was that the State tendered its completed DNA analysis on December 13 and that defense counsel had been unable to reach the defense's DNA expert, Dr. Michael Spence, to examine the report. Defense counsel asserted that he did not expect the expert to be able to complete an analysis and tender it to him in a reasonable time before trial. Defense counsel additionally noted that a forensic expert, Dr. Michael Gottlieb, who was expected to testify regarding Malone's mental state and its effects, was unavailable to testify the week of January 8, 2018. Defense counsel finally noted that he was also number one on the docket in the 265th Judicial District Court starting on January 8, 2018. The trial court denied the motion after a hearing. The judge's notes, included on the docket sheet, reflect that the defense attorney did not anticipate independent testing of the DNA evidence. The record does not indicate the reasons for the denial of the continuance, but the judge's notes reflect the concern that Malone had been in jail for 554 days. Both the State and the defense had each filed two previous motions for continuance.

Defense counsel filed a Renewed Motion for Continuance on January 4, 2018, four days prior to trial. In the motion, defense counsel asserts in writing for the first time that Dr. Spence will not be available to testify the week that trial is set. The unavailability of the DNA expert for trial was not included in the initial motion for continuance. If the DNA expert's conflict with the trial date was raised at the hearing on the motion for continuance, that matter is not before this Court as the reporter's record from that hearing is not part of the record on appeal. *See* TEX. R. APP. P. 34.1.

Malone's motion for continuance notes that DNA evidence "is crucial and is not anticipated to be provided by any other witness." In his renewed motion for continuance Malone notes: "DNA is expected to be a highly contested issue in this case, and Defendnat [sic] will be deprived of his right to an expert if this trial is not continued." Malone further notes in the motion that "[j]ustice will not be served if Defendant's expert is not given enough time to analyze the report and present said findings to Defense counsel to prepare for defense, cross examination, or live testimony."

At the hearing on Malone's Renewed Motion for Continuance, defense counsel argued that the State's expert had access to the DNA evidence for almost four months, while the defense had the information for only two weeks.[2] The State responded that a continuance would jeopardize the appearance of the doctor who performed the sexual assault examination of Maria, Dr. Matthew Cox. Dr. Cox had moved out of state since

[2] The State filed a motion for continuance on September 13, 2017 noting that DNA evidence had been turned over to the State from the Corsicana Police Department the day before and required laboratory testing. The trial court's order dated October 17, 2017 notes that the defendant agreed to the State's motion for continuance.

the time he examined Maria, and the State had made travel arrangements and hotel accommodations for him. The travel arrangements were complicated by the fact that Dr. Cox was set to testify in another state on Tuesday and Wednesday of the week of Malone's trial. The State additionally noted that there was no guarantee that the same scheduling conflicts with these and other expert witnesses would not occur were the trial to be continued. The State finally noted that Maria had already been brought to the courtroom to familiarize her with the place and procedure. The prosecutor noted, "I don't relish the notion of going back to that child and saying, oh, no, never mind forget about it. We'll call you in a couple of months and start all over again." In a letter to counsel, the trial court denied Malone's Renewed Motion for Continuance.

In a pre-trial hearing on Monday, January 8, 2018, the day trial began, the State notified the court that it had been in contact with Dr. Spence, the defense's DNA expert, in regard to scheduling.

> **He indicated to [Prosecutor 2], I didn't speak to him personally, but that he has received all of the materials that he needs to review. And that he's not available this Friday, but he is available next Monday or Tuesday.** And so my question is whether we should try to schedule our DNA expert at a time that he would be available to be here in the courtroom? I don't know whether it's important to the defense that he be here for our expert or just for his testimony.
>
> THE COURT: Who is this, Dr. Spence, your expert?
>
> [DEFENSE COUNSEL]: Yeah.
>
> THE COURT: What's the problem? Because I'm not going to have this trial going into two weeks, no.
>
> [PROSECUTOR 1]: Judge, I don't, well, let me say this. As I have said before Dr. Cox is, we have bought a plane ticket. He's supposed

to land at DFW at 11:00 on Thursday. And so I don't see any way that the state rests before the end of the day Thursday. That being the case, I don't know what the defense has, but it doesn't seem likely to me that, that we're going to finish on Friday.

THE COURT: Well, we're working into Saturday and Sunday too, those days will be available.

[PROSECUTOR 1]: Again, my question is - -

THE COURT: Let's get all of these witnesses if they can't be here during the week, we'll do it during the weekend.

[PROSECUTOR 1]: Okay.

THE COURT: So make sure and see if Dr. Spence is available.

[PROSECUTOR 1]: Again, my question is whether we should try to schedule our DNA expert Mrs. Casmus at a time that Dr. Spence will be here. I don't know if that's important to the defense.

THE COURT: I don't know. You've got him standing right there.

[PROSECUTOR 1]: That's why I'm asking. And the same question would go for the given notice of Dr. Gottlieb. I gather that his testimony is going to be about the child forensic interview. So I would have the same question as to whether we need to attempt to schedule Ms. Bailey at a time that Dr. Gottlieb can be here or whether, I know he's watched the CAC video because he watched it in our office. But I don't know whether it's important to the defense that he be here when Ms. Bailey testified.

THE COURT: Hold on one second. Okay. We had a, we had a jury panel member come in.

[PROSECUTOR 1]: I understand. I don't know whether it's important that the defense, that Mr. Gottlieb be here when Ms. Bailey testifies. And so, you know, we have some, obviously a lot more flexible when Ms. Bailey comes if, you know, if we can accommodate that. Dr. Cox obviously is a little more difficult because what he told me is that he is already set to testify in Oregon tomorrow and Wednesday.

THE COURT: [Defense Counsel], you've heard the state. You tell me.

[DEFENSE COUNSEL]: Right now, Your Honor, I don't, as we've previously stated I think this is a new development. **But as we've previously said we have designated him but at this point I'm not sure if they're testifying.** I mean if the Court is - -

THE COURT: Okay.

[DEFENSE COUNSEL]: - - if the Court is, obviously if we are making it into two weeks that changes the scheduling a little bit for my guys. **At this point, you know, the defense hasn't decided one way or the other on that.**

THE COURT: **Well, the Court will continue the schedule as it sees fit. And if that means Saturdays and Sunday and into Monday we'll do it.** Anything else?

[PROSECUTOR 1]: I just wanted to try to offer to accommodate if we could, Judge.

THE COURT: Yeah. I understand.

At trial, the State's DNA analyst testified that her final report concluded there was only one contributor to the DNA on the swab collected from the child during the sexual assault exam and that it was 321 trillion times more likely that the DNA came from Malone than from anyone else. Defense counsel cross-examined her regarding her initial report that there were two contributors but ruled that out after more extensive analysis. Defense counsel did not raise the issue of the unavailability of the defense's DNA expert before or after the testimony of the State's DNA expert.

The State rested on Thursday, January 11, and the defense rested without calling any witnesses. Defense counsel did not renew his request for a continuance, did not file a bill of exception or other motion for relief, and did not indicate in any manner that the

defense's DNA expert would testify if the defense was given additional time. Defense counsel did not file a motion for new trial.

Malone argues that the denial of a continuance effectively denied him the assistance of his expert in violation of his due process rights. Malone relies on *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995) wherein the Court of Criminal Appeals held that, pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the denial of an expert witness is "structural error" not subject to harmless error review. However, *Rey* was decided prior to *Cain v. State*, which held that "[e]xcept for certain federal constitutional errors labeled by the United States as 'structural,' no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis." *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). "Structural" error applies to a very limited class of errors "that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 569 U.S. 597, 611, 133 S.Ct. 2139, 2149, 186 L.Ed.2d 139 (2013). A "structural" error is a fundamental constitutional error that defies analysis by harmless error standards. *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999). We treat error as "structural" "only if the Supreme Court has labeled it as such." *Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017). Such errors exist in only a limited class of cases: "a total deprivation of the right to counsel, lack of an impartial trial judge, unlawful exclusion of grand jurors of defendant's race, the right to

self-representation at trial, the right to a public trial, [and an] erroneous reasonable-doubt instruction to the jury." *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004) (*quoting Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 1549-50, 137 L.Ed.2d 718 (1997)); *see also United States v. Marcus*, 560 U.S. 258, 263, 130 S.Ct. 2159, 2165, 176 L.Ed.2d 1012 (2010) (structural errors include denial of counsel, lack of impartial trial judge, denial of self-representation, denial of a public trial, and lack of a proper reasonable-doubt instruction).

The United States Supreme Court did not label the denial of an expert as a structural error in *Ake*. *See Lighteard v. State*, 982 S.W.2d 532, 535 (Tex. App.—San Antonio 1998, pet. ref'd); *see also White v. Johnson*, 153 F.3d 197, 201 (5th Cir. 1998), *cert. denied*, 525 U.S. 1149 (1999) (*Ake* error subject to harmless-error analysis); *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 664 (Tex. App.—Dallas 2009, no pet.) (exclusion of expert subject to harm analysis); *Calhoun v. State*, No. 12-19-00285-CR, 2020 WL 5406274, at *1 (Tex. App.—Tyler Sept. 9, 2020, pet. ref'd) (mem. op., not designated for publication) (denial of expert subject to harmless error analysis). Therefore, even if the denial of Malone's request for a continuance is classified as a "due process" violation because he was denied the testimony of an expert, he must still establish that he suffered harm. *See Johnson v. State*, No. 10-11-00256-CR, 2012 WL 1992888, at *1-3 (Tex. App.—Waco May 30, 2012, pet. ref'd) (mem. op., not designated for publication) (wherein we previously held that a defendant

was required to show actual prejudice when a motion for continuance is denied even though his argument is framed as a denial of due process).

Ordinarily, a motion for new trial hearing is the appropriate setting for development of evidence showing such harm. *Gonzales v. State*, 304 S.W.3d 838, 842-43 (Tex. Crim. App. 2010). As previously noted, Malone did not file a motion for new trial or otherwise establish how he was prejudiced by the denial of his request for a continuance. Malone did not include affidavits from his expert in support of his motion for continuance or his renewed motion for continuance, nor did he inform the trial court at any of the pre-trial hearings what testimony Dr. Spence would offer or how it would be material to his defense. Nor did Malone present anything to indicate that the DNA tests performed by the State's analyst were not performed properly or in any other manner questioned. *Ehrke v. State*, 459 S.W.3d 606, 615 (Tex. Crim. App. 2015) (quoting *Rey*, 897 S.W.2d at 338) ("In cases holding that a sufficient showing was not made under *Ake*, the defendant has typically failed to support his motion with affidavits or other evidence in support of his defensive theory, an explanation as to what his defensive theory was and why expert assistance would be helpful in establishing that theory, or a showing that there was a reason to question the State's expert and proof.").[3]

[3] In his brief, Malone cites articles on DNA evidence that were not included in the motions presented to the trial court. Whether construed as new evidence or new authority, such information should have first been presented to the trial court for review. *See* TEX. R. APP. P. 33.1(a). Our review is limited, therefore, to the information and exhibits presented to the trial court. *See Booth v. State*, 499 S.W.2d 129, 135 (Tex. Crim. App. 1973) (appellate court not authorized to consider documents attached to appellate brief that are not part of the record); TEX. R. APP. P. 34.1 ("appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. . . .").

Additionally, circumstances noted at the pre-trial hearing on January 8 contradict any allegation of harm: (1) Dr. Spence spoke with one of the prosecutors and related that he had received all of the information he needed to review and that he would be available to testify on Monday or Tuesday the week after trial started; (2) the trial court noted that he would continue the trial through the Monday after the trial started; (3) defense counsel told the court that he was undecided whether he would call Dr. Spence to testify; and (4) the defense rested without calling any witnesses or renewing the objection to Dr. Spence's absence.

When the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the appellate court must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a); *see also Gonzales*, 304 S.W.3d at 843. On the record before us, we find beyond a reasonable doubt that if the denial of Malone's motion for continuance was erroneous, it did not contribute to his conviction. We overrule Malone's first issue.

B. Outcry Witnesses. Malone argues that the trial court erred in admitting the evidence of both Joe Aguilar, who was the first officer to speak with Maria after the assault, and Lydia Bailey, a forensic interview specialist with the Children's Advocacy Center who conducted a forensic interview of Maria.

The record reflects that Aguilar was dispatched to investigate a 911 hang-up call from a child. After arriving at the scene, Aguilar suspected that something was amiss when he noticed Maria crying whenever he made eye contact with her. Malone denied

that a 911 call had been made. After Aguilar separated Maria from Malone, she continued to cry and told him "My dad rubbed his privacy [sic] part on me." When Aguilar said, "What?", Maria repeated her statement. At that point Aguilar placed Maria in the back of his patrol car and called for a detective. The detective then arranged for a forensic interview for Maria. Maria then told Bailey in greater detail what Malone had done to her.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). Outcry testimony is viewed under the same standard. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim App. 1990); *see also Gibson v. State*, 595 S.W.3d 321, 325 (Tex. App.—Austin 2020, no pet.). We will not disturb the trial court's decision "if the ruling was within the zone of reasonable disagreement." *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008). We will uphold an evidentiary ruling on appeal if it is correct on any theory of law that finds support in the record. *Gonzalez v. State*, 195 S.W.3d 114, 126 (Tex. Crim. App. 2006).

Generally, hearsay statements are not admissible unless they fall within the exceptions provided in Rules of Evidence 803 or 804, or they are allowed "by other rules prescribed pursuant to statutory authority." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011) (quoting TEX. R. EVID. 802). Article 38.072 of the Code of Criminal Procedure permits the admission of an out-of-court statement of a child sexual-abuse complainant "so long as that statement is a description of the offense and is offered into

evidence by the first adult the complainant told of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.072; *see also Sanchez*, 354 S.W.3d at 484. "Outcry testimony admitted in compliance with article 38.072 is considered substantive evidence and is admissible for the truth of the matter asserted in the testimony." *Buentello v. State*, 512 S.W.3d 508, 518 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

The trial court did not err in admitting both Officer Aguilar's testimony and that of the forensic examiner because Maria's statements to Officer Aguilar do not constitute an outcry that falls within the parameters of article 38.072. The statement by an outcry witness

> must be more than words which give a general allusion that something in the area of child abuse was going on. . . . [T]he societal interest in curbing child abuse would hardly be served if all th[e] "first person" had to testify to was a general allegation from the child that something in the area of child abuse was going on. . . . The statute demands more than a general allegation of sexual abuse.

Schuster v. State, 852 S.W.2d 766, 768 (Tex. App.—Fort Worth 1993, pet. ref'd) (quoting *Garcia*, 792 S.W.2d at 91); *see also Bargas v. State*, 252 S.W.3d 876, 894 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("[S]tatements must be more than words that 'give a general allusion' that something in the area of child abuse has occurred. . . . [G]eneral allusions, in which the complainant does not describe the abuse in a discernible manner, are not within the purview of article 38.072."); *Elder v. State*, 132 S.W.3d 20, 26 (Tex. App.—Fort Worth 2004, pet. ref'd) (statement must be more than general allegation of sexual abuse);

Divine v. State, 122 S.W.3d 414, 419 (Tex. App.—Texarkana 2003, pet. ref'd) (statement must have more than generally insinuated that sexual abuse occurred).

Even if Officer Aguilar is considered an "outcry" witness, the statements Maria made to him are a general allegation of sexual abuse. Maria's statements to the forensic examiner included far greater details of the abuse to which she was subjected, including genital-to-genital contact. "Testimony of a second outcry witness is admissible if it concerns a separate, discrete instance of sexual abuse from the instance testified about by the first outcry witness." *McDaniel v. State*, No. 10-18-00353-CR, 2020 WL 1429675, at *1 (Tex. App.—Waco Mar. 23, 2020, no pet.) (mem. op., not designated for publication). Malone was charged by indictment with aggravated sexual assault by intentionally or knowingly causing his sexual organ to contact that of Maria's, a violation of Section 22.021 of the penal code. Maria's statement to Officer Aguilar did not include such allegations, but, as the State argues, at most alleged the offense of indecency with a child.

Even if there was error in the admission of Maria's statement to Officer Aguilar, it would be harmless in this case. The erroneous admission of evidence, including the admission of outcry testimony in violation of article 38.072, is non-constitutional error. *Gibson*, 595 S.W.3d at 327 (citing *Gonzalez*, 544 S.W.3d at 373). Non-constitutional error must be disregarded unless it affects a defendant's substantial rights. *Id.*; *see also* TEX. R. APP. P. 44.2(b). An error affects a defendant's substantial rights if it has "a substantial or injurious effect or influence on the jury's verdict." *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011). We will not overturn a criminal conviction for non-constitutional error if, after examining the record as a whole, we have fair assurance that the error did

not influence the jury or influenced the jury only slightly. *Id.* "A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error." *Id.*, at 94.

In cases involving the improper admission of outcry testimony, the error is harmless when the victim testifies in court to the same or similar statements that were improperly admitted or other evidence setting forth the same facts is admitted elsewhere at trial. *Merrit v. State*, 529 S.W.3d 549, 556 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd); *see also, Allen v. State*, 436 S.W.3d 815, 821-22 (Tex. App.—Texarkana 2014, pet. ref'd); *Duncan v. State*, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

Maria testified:

> Q. Okay. And, Maria, why did you tell Mrs. Lydia that you called 911 that day?
>
> A. Because my dad put his private on my private.
>
> . . .
>
> Q. Okay. And when your dad was touching his privates on your privates, did you feel anything else? Do you remember other than just his privates?
>
> A. Something wet.

In addition to the detailed testimony from Bailey, which detailed the sexual encounter between Maria and her father, the jury also heard the testimony of Dr. Matthew Cox, who conducted a sexual assault examination of Maria. Dr. Cox testified:

> And then I met with, directly with the patient. And I asked her, you know, how are you feeling? Does anything hurt? I was told my privacy [sic]. And I when asked why, my daddy. [sic] And she pointed to her inner thighs

> and said there was wetness. So that was enough information for me to know that I needed to fully examine her.

On cross-examination, the following exchange occurred between defense counsel and Dr. Cox:

> Q. Okay. And in your investigation did Maria tell you what had caused her pain or her injury?
>
> A. As I stated before I got enough information to know I had concerns. She described to me, you know, her privacy [sic] hurt and it was her daddy and that she had wetness. I didn't ask more details because my job was based on that information I needed to swab her, make sure she was healthy.

On redirect, Dr. Cox's testimony continued:

> Q. She told you that it hurt.
>
> A. Yes.
>
> Q. She told you that daddy did it.
>
> A. Yes.

After examining the record as a whole, we have fair assurance that Aguilar's testimony regarding Maria's statements did not influence the jury because more inculpatory testimony was provided by Bailey, Cox, and by Maria herself. Malone's second issue is overruled.

Conclusion

Having overruled both issues presented by Malone, we affirm the judgment of the trial court signed on January 18, 2018.

REX D. DAVIS
Justice

Before Chief Justice Gray,*
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed December 9, 2020
Do not publish
[CRPM]

*(Chief Justice Gray concurs in the court's judgment. A separate opinion will not issue.)