



IN THE
TENTH COURT OF APPEALS

No. 10-18-00342-CR

WILLIAM JOSEPH SUMMERVILLE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 443rd District Court
Ellis County, Texas
Trial Court No. 42294CR

MEMORANDUM OPINION

William Joseph Summerville was charged with the offense of continuous sexual abuse of a child. TEX. PENAL CODE ANN. § 21.02. The indictment alleged three acts of sexual abuse against his niece, M.B., and one act of sexual abuse against another niece, R.B., during a period of 30 days or more. *See id.* After a jury trial, Summerville was convicted of one count of the lesser included offense of aggravated sexual assault of a child committed against M.B., *see* TEX. PENAL CODE ANN. § 22.021, and sentenced to 60 years in prison. Because any error in the admission of forensic interview videos of M.B.

and R.B. was harmless and because Summerville's complaints about the proportionality of his sentence were not preserved, the trial court's judgment is affirmed.

FORENSIC INTERVIEWS

In his first issue, Summerville contends the trial court abused its discretion in admitting the videos of M.B.'s and R.B.'s forensic interviews pursuant to Texas Rule of Evidence 107, the rule of optional completeness.¹ Specifically, he contends 1) he never introduced any portion of the interviews for any purpose, so Rule 107 is inapplicable; and 2) the State sought to introduce the entire interviews to prove the absence of statements which is an impermissible use of Rule 107.

Although we question whether these videos were admissible, assuming without deciding that they were not, we do not find that Summerville was harmed by their admission. The purported erroneous admission of evidence is non-constitutional error and is subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(b). *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). Under Rule 44.2(b), an appellate court must disregard non-constitutional error unless the error affected the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *see also Geron v. State*, 524 S.W.3d 308, 325 (Tex. App. – Waco 2016, pet. ref'd). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016). If so, or if one is left in grave

¹ "When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given." TEX. R. EVID. 107.

doubt, the conviction cannot stand. *Id.* But, if the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. *Id.*

In this case, the videos did not have a substantial and injurious influence on the verdict. As the parties agree, the videos were consistent with M.B.'s and R.B.'s trial testimony. They did not inject any additional evidence before the jury, such as evidence of extraneous offenses or additional details to which the girls may have neglected to testify. The videos were not offered during M.B.'s or R.B.'s testimony. They were offered and introduced into evidence the day after their testimony and without any testifying witness. No one took the stand to testify about or narrate any portion of the videos. And although the State mentioned during its opening argument to the jury what one of the girls told the interviewer, Summerville used the interviews more extensively in his argument to discredit M.B. and R.B., to which the State responded in its closing argument.

Further, the jury only convicted Summerville as to one lesser included offense against M.B. Summerville was charged with the offense of continuous sexual abuse of a child in which the indictment alleged three acts of sexual abuse (two aggravated sexual assault and one indecency) committed against M.B. and one act of sexual abuse (indecency) committed against R.B. Instead of convicting Summerville of the offense charged, the jury found Summerville guilty of only one count of aggravated sexual assault against M.B.

Accordingly, after reviewing the record, the trial court's admission of the forensic interview videos, if erroneous, did not have a substantial and injurious influence on the verdict, and Summerville's first issue is overruled.

DISPROPORTIONATE SENTENCE

In his second and third issues, Summerville complains that his sentence of 60 years is grossly disproportionate under the U.S. and Texas Constitutions. See U.S. CONST. amend. VIII; see also TEX. CONST. art. I, § 13. A disproportionate-sentence claim must be preserved for appellate review. See TEX. R. APP. P. 33.1(a)(1); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App. – Houston [1st Dist.] 2007, pet. ref'd). At trial, Summerville did not object to the imposed sentence. Further, Summerville did not raise a disproportionate-sentence claim in his motion for new trial or otherwise present a post-trial objection to the imposed sentence. Thus, Summerville's complaints are not preserved, and his second and third issues are overruled.

CONCLUSION

Having overruled each issue on appeal, we affirm the trial court's judgment.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill

Affirmed
Opinion delivered and filed July 23, 2020
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