TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00801-CR

Charles Samuel Crank, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 426TH JUDICIAL DISTRICT
NO. 76210, THE HONORABLE FANCY H. JEZEK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Charles Samuel Crank guilty of continuous sexual abuse of a young child for sexually abusing his biological daughter, R.L.C., beginning when she was eight years old and continuing until she disclosed the sexual abuse to her mother at age 13.[1] *See* Tex. Penal Code § 21.02(b). The jury assessed appellant's punishment at confinement for 50 years in the Texas Department of Criminal Justice. *See id.* § 21.02(h). In a single point of error, appellant argues that the trial court erred by admitting the outcry statements R.L.C. made to her mother, L.C.C.,

[1] The jury heard evidence that on numerous occasions during that five-year period appellant perpetrated various sexual acts against his daughter, including making her masturbate him, making her perform oral sex on him, performing oral sex on her, penetrating her sexual organ with his penis, and penetrating her anus with his penis. Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we do not further recite them in this opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

because the State failed to comply with the notice provisions of the outcry statute. We affirm the trial court's judgment of conviction.

DISCUSSION

Article 38.072 of the Texas Code of Criminal Procedure, the outcry statute, governs the admissibility of certain hearsay evidence in specified crimes against a child younger than 14 years old or a person with disabilities. *See* Tex. Code Crim. Proc. art. 38.072. Because it is often traumatic for children to testify in a courtroom setting, the Legislature enacted article 38.072 to make admissible the testimony of the first adult in whom a child confides regarding sexual or physical abuse. *Martinez v. State*, 178 S.W.3d 806, 810–11 (Tex. Crim. App. 2005). The child's statement to the adult is commonly known as the "outcry," and the adult who testifies about the outcry is commonly known as the "outcry witness." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). Outcry testimony admitted pursuant to article 38.072 is substantive evidence, admissible for the truth of the matter asserted in the testimony. *Martinez*, 178 S.W.3d at 810–11; *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991); *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.—Fort Worth 2005, no pet.).

Article 38.072 has a mandatory notice requirement that must be met before an outcry witness may testify. *Sanchez*, 354 S.W.3d at 484; *see Long v. State*, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990) (recognizing that procedural provisions of statute are mandatory); *Villalobos v. State*, No. 03-13-00687-CR, 2015 WL 5118369, at *3 (Tex. App.—Austin Aug. 26, 2015, pet. ref'd) (mem. op., not designated for publication) (observing that statute's procedural notice and hearing requirements are mandatory and must be complied with); *see* Tex. Code Crim. Proc. art.

38.072, § 2(b). The party intending to offer the outcry statement must timely provide the adverse party with notice of its intent to offer the statement, the name of the witness through whom it intends to offer the statement, and a written summary of the statement. Tex. Code Crim. Proc. art. 38.072, § 2(b)(1); *see Long*, 800 S.W.2d at 547.

In this case, the trial court conducted a hearing as required by the outcry statute. *See* Tex. Code Crim. Proc. art. 38.072, § (2)(b). At the hearing, the State proffered the testimony of R.L.C.'s mother, L.C.C., who described two outcries that R.L.C. made to her: one made when they were watching a movie when R.L.C. was 13 years old,[2] and a previous one made when the family was living in Fort Polk, Louisiana when R.L.C. was eight or nine.[3] Both incidents were included in

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[2] L.C.C. related that one evening when R.L.C. was 13 years old, she and her daughter were watching a movie that included a scene where a mother walked in on a man sexually abusing her children. L.C.C. recounted that she paused the movie about ten minutes after that scene to take appellant's phone call. She took the call out in the garage so she could smoke a cigarette, and R.L.C. followed her mother out to the garage. After L.C.C. got off the phone, she told R.L.C. when her father would be home. L.C.C. testified that after that:

> [R.L.C.] told me she had to tell me something. And she started crying. And she said that her dad had made her do things. She said it wasn't right to lose your virginity to your father.
>
> And at that point she started crying so hard she couldn't talk any more.

L.C.C. stated that R.L.C. did not describe any specific sexual acts at that time. She indicated that immediately after R.L.C.'s disclosure, she took her children to her mother's house and called the police.

[3] L.C.C. testified that the family lived in Fort Polk, Louisiana for two years beginning when R.L.C. was eight. She described a time when appellant became "exceedingly intoxicated" one night, and the next day R.L.C. told her mother that after L.C.C. had gone to sleep on the couch, appellant came and got R.L.C. out of her bed, put her in his bed, and "asked her to touch him on his private area." L.C.C. said that R.L.C. told her dad that she had to go to the bathroom and she came downstairs and got on the couch with her mother. After R.L.C. told her mother what appellant had done, L.C.C. confronted appellant. According to L.C.C.'s testimony, appellant "was devastated."

L.C.C.'s written statement given to the police the night she called to report the sexual abuse. The record reflects that appellant's counsel was provided a copy of L.C.C.'s written statement.

Appellant questioned L.C.C. at the outcry hearing about various statements she made to authorities in connection with her report of the sexual abuse of her daughter, including the one to the police the night she called to report the abuse (describing R.L.C.'s two outcry statements); a second to the sexual assault nurse examiner at the hospital later that same night (informing the nurse that a sexual abuse outcry had been made); and a third to police a few days later (a "secondary" statement, the contents of which are not reflected in the record). At the conclusion of the hearing, appellant objected to "any other additional statements under the category of outcry" "other than the statement[s] made by [L.C.C.] in court here today." He argued that L.C.C.'s initial statement to police on the night she called to report the abuse qualified as outcry testimony but not any other statement. There was then additional discussion at which time the trial court clarified its understanding of the State's proffer, and the court ruled that it was going to admit L.C.C.'s outcry testimony about R.L.C.'s disclosures of sexual abuse that were included in the written statement that L.C.C gave to police on the night the sexual abuse was reported, which included R.L.C.'s outcry statement to her mother during the movie and her outcry statement concerning the Fort Polk incident.

During trial when the outcry testimony was presented, appellant asserted a hearsay objection to L.C.C.'s testimony about R.L.C.'s outcry statement about the Fort Polk incident. The

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She indicated that appellant was "blackout drunk" and did not remember. In response to this incident, they poured out all the alcohol in the house, stopped drinking, and told R.L.C. she was safe. They did not report the incident to any authorities.

trial court overruled this hearsay objection. Appellant did not object to L.C.C.'s testimony about the outcry statement that R.L.C. made during the movie.

To preserve error, a party must timely object and state the grounds for the objection with enough specificity to make the trial judge aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1)(A); *see Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016); *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). The objection must be sufficiently clear to give the judge and opposing counsel an opportunity to address and, if necessary, correct the purported error. *Thomas*, 505 S.W.3d at 924; *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009); *see also Smith v. State*, 499 S.W.3d 1, 7–8 (Tex. Crim. App. 2016) ("There are two main purposes behind requiring a timely and specific objection. First, the judge needs to be sufficiently informed of the basis of the objection and at a time when he has the chance to rule on the issue at hand. Second, opposing counsel must have the chance to remove the objection or provide other testimony."). If a trial objection does not comport with arguments on appeal, error has not been preserved. *Thomas*, 505 S.W.3d at 924; *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996); *see also Yazdchi*, 428 S.W.3d at 844.

At trial, appellant's objection appears to challenge which of the statements L.C.C. made to authorities qualified as outcry testimony.[4] He never complained about the State's failure to comply with the statutory notice requirements, either during the 38.072 hearing or when the outcry

[4] The discussion of the objection at the hearing is somewhat confusing. Appellant seems to focus on the various statements of L.C.C.—when and to whom they were made. However, the relevant issue before the trial court concerning the admissibility of outcry testimony was the statements of R.L.C. disclosing the sexual abuse—when and to whom the child made statements describing the sexual abuse.

testimony was admitted during trial. In no way did he inform the trial court or the State that he was asserting that L.C.C.'s testimony should be excluded because he did not get the requisite notice under the statute. He raises this concern for the first time on appeal.[5] Thus, the record reflects that appellant failed to properly preserve his complaint about any failure of the State to provide such notice for appellate review.

Preservation of error is a systemic requirement on appeal. *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016); *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014); *Roberts v. State*, No. 03-14-00637-CR, 2016 WL 6408004, at *8 (Tex. App.—Austin Oct. 26, 2016, pet. ref'd) (mem. op., not designated for publication). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Blackshear v. State*, 385 S.W.3d 589, 590 (Tex. Crim. App. 2012); *Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010); *Roberts*, 2016 WL 6408004, at *8. Accordingly, we overrule appellant's sole point of error.

CONCLUSION

Having overruled appellant's single point of error, we affirm the trial court's judgment of conviction.

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[5] In his brief, appellant suggests that at the outcry hearing the trial court "did not allow in evidence" a copy of L.C.C.'s written statement. However, we note that while appellant offered to "tender" a copy of the statement to the court to provide "the context" of his argument, he did not in fact offer the statement into the record. Furthermore, appellant raises his concern about the exclusion of the statement from the record for the first time on appeal.

Melissa Goodwin, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: June 22, 2017

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