TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00763-CR
NO. 03-19-00764-CR

Eleazer Huerta, Appellant

v.

The State of Texas, Appellee

FROM THE 147TH DISTRICT COURT OF TRAVIS COUNTY
NOS. D-1-DC-18-302813 & D-1-DC-18-302814
HONORABLE CLIFFORD A. BROWN, JUDGE PRESIDING

MEMORANDUM OPINION

A jury convicted Eleazer Huerta on two counts in separate indictments and cause numbers, charging him with the first-degree felony offense of continuous sexual abuse of a young child, committed against his girlfriend Vanessa Villanueva's daughters, R.C. and M.A.[1] *See* Tex. Penal Code § 21.02. The district court assessed sentences of sixty years' imprisonment for each offense. On appeal, Huerta contends that the district court abused its discretion by admitting into evidence the entirety of R.C.'s forensic interview and by allowing multi-level hearsay statements into evidence through a detective's testimony. We will affirm the district court's judgments of conviction.

[1] The convictions were based on the first counts of indictments filed in trial court cause numbers D-1-DC-18-302813 (charging Huerta with offenses committed against R.C.) and D-1-DC-18-302814 (charging Huerta with offenses committed against M.A.).

BACKGROUND[2]

Huerta's girlfriend Villanueva failed to appear at trial despite having been served with a subpoena and the district court having issued a writ of attachment. The State moved the district court for a finding of "forfeiture by wrongdoing," a doctrine codified in article 38.49 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 38.49.[3] The State alleged that Huerta lost his right to object to the admissibility of otherwise inadmissible hearsay statements of witnesses because Villanueva's unavailability—and by extension that of the two daughters in her custody, R.C. and M.A.—was attributable to Huerta's actions. The district court held a hearing on the motion after selection of the jury and outside their presence.

During the pretrial hearing, the State introduced evidence showing that although Villanueva was initially cooperative with the investigation and had assisted in locating Huerta, after Huerta was arrested, she ceased communication with law enforcement and the district attorney's office. While in jail, Huerta made over 1,200 phone calls to Villanueva using different inmate accounts, and those calls were recorded, translated into English, and transcribed. In those phone calls over a period of months, Huerta encouraged Villanueva not to come to court, and in some of his calls they discuss whether his prosecution might be dismissed or

---

[2] We limit our discussion of the factual background because Huerta raises no challenge to the sufficiency of the evidence supporting his convictions. *See* Tex. R. App. P. 47.1.

[3] Article 38.49(a), in relevant part, provides that a party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness: (1) may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and (2) forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing. Section (b) of the statute requires a finding that the wrongdoing was "intended to . . . procure the unavailability" of the witness, and that it actually "did" so. Section (c) of the statute directs the trial court to determine the issue by a preponderance of the evidence, out of the jury's presence, in a pretrial hearing where practicable. Tex. Code Crim. Proc. art. 38.49.

whether he might receive a shorter sentence if Villanueva, R.C., and M.A. did not appear for trial.[4]

The district court found that Huerta helped procure Villanueva's unavailability as a witness, but heard further argument from counsel about the forensic interviews' admissibility:

> I do think [Huerta] has clearly, by his own actions, made this witness [Villanueva] unavailable, but I think still you have to do a balancing test with respect to all of the admissibility of all of this in terms of the prejudicial [e]ffect. So, if, in fact, through anything other than the CAC [Children's Advocacy Center] interview that the State can establish the allegations, that is significant to the Court.

The prosecutor noted that because there were "a lot of acts that [R.C. and M.A.] talk about to the forensic interviewers that they do not talk about to" the outcry witnesses, the State requested that "the forensics come in." Defense counsel requested that the district court conduct an in camera inspection before admitting the forensic interviews:

> It's a balancing test, Judge, and subject to your discretion with respect to 403 objections. I do appreciate you making the analysis. I really do. But, in the end, it's the Court's discretion. You might take a look with those CAC interviews to see if you agree with the State that they are probative to their case and whether or not it is a danger to unfair prejudice that substantially outweighs the probative value they bring to the case, please weigh that. So you might just conduct an in-camera inspection before it's admitted. Or we can do it in the courtroom. It doesn't have to be in-camera, but just out of the presence of the jury is what I would say.
>
> . . . .
>
> Judge, what I'm suggesting is, in order for you to properly make this balancing test, that might be necessary in this case based on your ruling that these things come in when they wouldn't ordinarily come into evidence.

[4] In some of those calls, Huerta also told Villanueva not to take R.C. and M.A. for a nonacute medical examination, and Villanueva did not take them to be examined.

Initially, the district court stated its inclination not to allow transcripts of the forensic interviews into evidence. During a noon recess, the district court reviewed R.C.'s forensic interview. After the recess, the court issued its ruling, which drew no objection:

> Before the jury comes in, just so the record is clear, just as we had left, the Court had decided to allow—and the Court has had an opportunity to review the CAC interview of at least [R.C.], so the Court finds that that exam is very probative insofar as detail of when, where, timing, and details, that it's so probative that I think it outweighs even the prejudicial value to the defendant, so the Court is going to allow that in light of its decision that this defendant through his actions has procured the nonattendance and availability of not only Vanessa Villanueva, but [M.A.], as well as [R.C.]. So the Court is not going to allow the cumulative hearsay of the testimony of Detective [Gabriel] Fernandez with respect to the interview of [Villanueva]. And based on [Villanueva]'s unavailability based on this defendant's actions, the detective will be allowed to testify to the statements that [Villanueva] made to him that she otherwise would have made in this court were she not made unavailable. But he will not be able to testify as to the statements that the minor children made to [Villanueva]. So that's the Court's ruling. All right. I think we are ready to proceed.
>
> Prosecutor: Yes, Your Honor.
>
> [Trial proceeds.]

When the State began questioning the first forensic interviewer about her interview of R.C. but before evidence of the interview itself was offered, defense counsel asked to approach the bench and objected "on hearsay grounds and confrontation." The district court "noted for the record" that defense counsel was "objecting on confrontation and hearsay grounds to the admission of not only this interview [with R.C.], but the interview with [M.A.]." The district court added that if defense counsel wanted an ongoing objection "to th[e] admissibility of this [R.C.'s] interview as well as the interview of [M.A.]," it was noted for the record. Later, when a second forensic interviewer began testifying about her interview with M.A. and evidence

of the interview itself was offered, defense counsel again raised his "[h]earsay [and] confrontation" objections, which the district court stated were "noted for the record."

The district court admitted into evidence the English-translated transcripts of R.C.'s and M.A.'s forensic interviews and the recordings of their interviews conducted in Spanish. During her forensic interview, R.C., who was twelve years old when interviewed, stated that Huerta had been putting his "private part" in her "private part" and touching her "private part" from the time she was seven or eight years old until recently, while she was twelve. She described having to perform oral sex on Huerta, which made her feel like she was choking. R.C. stated that she did not want to do it, but Huerta threatened to hit her and told her to do it. R.C. stated that Huerta also told M.A. to perform oral sex on him.

R.C. told the forensic interviewer that after Huerta assaulted her the first time, he warned her not to tell anyone or he would kill her, her siblings, and her mother. After the second assault, R.C. was bleeding and she recalled crying a lot. Huerta asked her if she wanted him to kill her, her siblings, and her mother, and he said that he was going to kill them right now. R.C. responded that she did not want that and told him that she was not going to cry anymore.

R.C. also told the forensic interviewer about several different locations where Huerta had assaulted her over the years, including her home, the homes of friends and relatives, at a hotel, and inside a parked van. Further, R.C. recalled M.A. telling her that Huerta had put his "private part" in M.A.'s "private part" and M.A. saying that R.C. should not tell anyone because Huerta told M.A. that he was going to kill everybody. M.A., who was nine years old when her forensic interview was conducted, reported that her mom's boyfriend "Eleazar [Huerta]" had touched her "private parts" starting when she was seven years old.

Austin Police Department Detective Gabriel Fernandez testified during trial about the child-abuse investigation he conducted, including his recorded interview with Villanueva. Detective Fernandez recalled that Villanueva found a two-pack pregnancy test, which was missing one test, in R.C.'s backpack. Villanueva told Detective Fernandez that she spoke to R.C., who said that "she was forced to take the pregnancy test by [Huerta]."

Detective Fernandez also testified that Villanueva reported finding blood-stained lingerie under R.C.'s bed. Villanueva told Detective Fernandez that it was not her lingerie and that when she asked R.C. about it, R.C. explained that the gown was underneath her on the bed when Huerta sexually assaulted her, that she was on the last day of her menstrual cycle when he forced himself on her, and that she bled on the gown and tried to hide it afterward. Detective Fernandez further testified that Villanueva told him about finding some of R.C.'s shorts, which R.C. said she had been wearing another time when Huerta "forced himself upon her, and basically moved the shorts aside and penetrated her with his penis."

At the conclusion of the trial, the jury convicted Huerta of committing the offense of continuous sexual assault of a young child against R.C. and M.A. as charged in the separate indictments. The district court assessed punishment at sixty years' imprisonment for each offense. Huerta filed a motion for new trial in each cause number, contending without explanation that the verdicts were "contrary to the law and evidence." Both motions were denied by operation of law. This appeal followed.

DISCUSSION

Admission of forensic interview

In his first issue, Huerta contends that the district court abused its discretion by admitting into evidence R.C.'s forensic interview because that ruling allowed the State to present evidence whose probative value was outweighed by its prejudicial effect, in violation of Texas Rule of Evidence 403. But during trial when defense counsel anticipated that R.C.'s forensic interview would be offered, he objected only "on hearsay grounds and confrontation."

Preservation of an issue for appellate review requires a party to lodge a timely and specific request, objection, or motion with the trial court and obtain an adverse ruling. Tex. R. App. P. 33.1(a). Preservation of error is a systemic requirement on appeal. *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016); *see Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020) (noting that "preservation of error is a systemic requirement that a first-tier appellate court is obligated to address before reversing a conviction"). A point of error on appeal must comport with the objection made at trial. *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). 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).

Here, when defense counsel anticipated that R.C.'s forensic interview would be admitted into evidence, he did not object that its admission would allow the State to present evidence whose probative value was outweighed by its prejudicial effect or that its admission would violate Rule 403. As the State points out, defense counsel objected only "on hearsay grounds and confrontation." The district court confirmed the nature of the objections presented at the time by "not[ing] for the record" that defense counsel was "objecting on confrontation and

hearsay grounds to the admission of not only this interview [with R.C.], but the interview with [M.A.]." Although defense counsel referenced Rule 403 when requesting that the district court conduct an in camera inspection of the forensic interviews—"to see if [the district court] agree[d] with the State that they are probative to their case and whether or not it is a danger to unfair prejudice that substantially outweighs the probative value they bring to the case"—the court complied with that request by conducting the requested in camera inspection as to R.C.'s forensic interview. Thus, to the extent that Huerta contends that defense counsel's reference to Rule 403 when requesting the in camera inspection was the equivalent of a Rule 403 objection, we note that he failed to obtain an adverse ruling to preserve this error for appeal. *See* Tex. R. App. P. 33.1(a)(2). The district court's subsequent admission of R.C.'s forensic interview into evidence, without an adverse ruling on a Rule 403 complaint, was insufficient to preserve error on that ground. *See Smith v. State*, 499 S.W.3d 1, 6 & n.14 (Tex. Crim. App. 2016) (noting that admission of evidence does not preserve error without adverse ruling on record); *see also Garcia v. State*, No. 03-02-00416-CR, 2003 Tex. App. LEXIS 7913, at *8 (Tex. App.—Austin Sept. 11, 2003, pet. ref'd) (mem. op., not designated for publication) (noting that defendant's motion contained request for in camera inspection of prosecution's file but because defendant "never obtained an adverse ruling on the request," he failed to preserve his complaint for appellate review).

On this record, we conclude that Huerta failed to preserve for our review his appellate complaint that admission of R.C.'s forensic interview violated Rule 403. *See* Tex. R. App. P. 33.1(a); *Cunningham v. State*, 846 S.W.2d 147, 151 (Tex. App.—Austin 1993) (noting that we would not address defendant's contention that probative value of certain evidence was outweighed by danger of unfair prejudice because defendant did not object to admission of that

evidence on those grounds), *aff'd*, 877 S.W.2d 310 (Tex. Crim. App. 1994); *see also Lopez v. State*, 615 S.W.3d 238, 259 (Tex. App.—El Paso 2020, pet. filed) (noting that during trial defendant lodged objections to certain statements on multiple bases but not as to Rule 403 and concluding that his Rule 403 complaint was not preserved for appellate review). Accordingly, we overrule Huerta's first issue.

Admission of multi-level hearsay statements

In his second issue, Huerta contends that the district court abused its discretion by allowing multi-level hearsay statements through Detective Fernandez's testimony about his interview with Villanueva and what she told him that R.C. said to her. Huerta contends that the statements about what R.C. told Villanueva were "hearsay within hearsay" and inadmissible despite the district court's ruling granting the State's motion for forfeiture by wrongdoing because "the doctrine of forfeiture by wrongdoing is still subject to hearsay evidence rules."

We review a trial court's ruling on the admission of evidence under an abuse-of-discretion standard. *Colone v. State*, 573 S.W.3d 249, 263-64 (Tex. Crim. App. 2019). Under this standard, the trial court's evidentiary ruling will be upheld as long as it was within the "zone of reasonable disagreement." *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). Further, the ruling will be upheld when the trial court's decision "is reasonably supported by the record and is correct under any theory of law applicable to the case." *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005).

Here, the district court specifically found that Huerta prevented Villanueva and the child witnesses in her custody, R.C., and M.A., from appearing in court for his trial and that the doctrine of forfeiture by wrongdoing applied to this case. In *Colone v. State*, the Court of

Criminal Appeals noted that under Texas Rule of Evidence 802, hearsay is not admissible unless a statute, the rules of evidence, or other rules prescribed under statutory authority provide otherwise. 573 S.W.3d at 264-65 (citing Tex. R. Evid. 802). The Court further noted the existence of a statute—article 38.49—prescribing the doctrine of forfeiture by wrongdoing, applicable to offenses committed on or after September 1, 2013, that "would allow the doctrine of forfeiture by wrongdoing to trump the rule against hearsay." *Id*. at 265 & n.41 (observing that defendant's 2010 offense in that case predated statute's enactment).

Additionally, the Court of Criminal Appeals referenced its prior holding "recogniz[ing] the rule of forfeiture by wrongdoing as a rule of estoppel." *Id.* at 264, 265 (citing *Gonzalez v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006) and noting that doctrine of forfeiture by wrongdoing is based on principle that "any tampering with a witness should once [and] for all estop the tamperer from making any objection based on the results of his own chicanery"). The Court stated that "rules of estoppel will bar relief even for a trial court ruling that violates a mandatory provision in a statute and may even bar relief on what would otherwise be an absolute requirement." *Id.* at 265. Further, the Court noted "the wide application of the doctrine of forfeiture by wrongdoing to hearsay as well as to confrontation claims." *Id.* Then the Court overruled defendant's hearsay and confrontation claims, concluding that even in cases where article 38.49 does not apply, "the common-law doctrine of forfeiture by wrongdoing, as a doctrine of estoppel, trumps the hearsay rule." *Id.*

Under this authority from the Court of Criminal Appeals, we conclude that the doctrine of forfeiture by wrongdoing codified in article 38.49 supported the district court's ruling, within the zone of reasonable disagreement, that because Huerta procured the unavailability of Villanueva and R.C., each part of the combined statements in Detective

Fernandez's testimony was admissible as a statutory exception to the hearsay rule. *See id.* at 264-65; *see also* Tex. R. Evid. 802. Accordingly, we overrule Huerta's second issue.

CONCLUSION

We affirm the district court's judgments of conviction.

_____

Gisela D. Triana, Justice

Before Justices Goodwin, Triana, and Kelly

Affirmed

Filed: April 21, 2021

Do Not Publish