NO. 12-16-00235-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ANTHONY REYES, APPELLANT	***§***	***APPEAL FROM THE 87TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Anthony Reyes appeals his conviction for continuous sexual assault of a child under fourteen years of age. In two issues, Appellant argues that the trial court abused its discretion by overruling his objection to the admission of his video confession and his motion for mistrial. We affirm.

BACKGROUND

Appellant was charged by indictment with continuous sexual assault of a child under fourteen years of age and pleaded "not guilty." The matter proceeded to a jury trial, following which the jury found Appellant "guilty" as charged and assessed his punishment at imprisonment for sixty years. The trial court sentenced Appellant accordingly, and this appeal followed.

ADMISSIBILITY OF A SWORN CONFESSION

In his first issue, Appellant argues that the trial court abused its discretion in admitting his oral confession into evidence because he was not informed that he had the right to terminate the interview with the officers at any time.

Standard of Review

In reviewing claims concerning the admission of statements made as the result of custodial interrogation, we conduct the bifurcated review articulated in ***Guzman v. State***, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). *See* ***Pecina v. State***, 361 S.W.3d 68, 78–79 (Tex. Crim. App. 2012). We measure the propriety of the trial court's ruling with respect to alleged violations under the totality of the circumstances, almost wholly deferring to the trial court on questions of historical fact and credibility, but reviewing de novo all questions of law and mixed questions of law and fact that do not turn on credibility determinations. *See* ***Leza v. State***, 351 S.W.3d 344, 349 (Tex. Crim. App. 2011). We afford almost total deference to the trial court's determination of historical facts and mixed questions of law and fact that turn on the evaluation of credibility and demeanor. ***Guzman***, 955 S.W.2d at 89. Questions of law and mixed questions of law and fact not turning on credibility are reviewed de novo. ***Id.*** When the trial court does not make express findings of fact, we must view the evidence in the light most favorable to the trial court's rulings, assuming that it made implicit findings of fact that are supported by the record. *See* ***Arguellez v. State***, 409 S.W.3d 657, 662–63 (Tex. Crim. App. 2013). We will sustain the trial court's decision if it is correct on any applicable theory of law. ***Id.***

Governing Law

Under Texas Code of Criminal Procedure, Article 38.21, "[a] statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion[.]" TEX. CODE CRIM. PROC. ANN. art. 38.21 (West 2005); ***Oursbourn v. State***, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008). A defendant may claim that his statement was not freely and voluntarily made and, thus, may not be used as evidence against him because, among other theories, the statement was obtained in violation of the Texas Confession Statute. *See* ***Oursbourn***, 259 S.W.3d at 169; *see also* TEX. CODE. CRIM. PROC. ANN. art. 38.22 §§ 2, 3 (West Supp. 2016).

Pursuant to Article 38.22, section 3, no oral statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless (1) an electronic recording is made of the statement, (2) prior to making the statement, but during the recording, the accused is given a warning from the person to whom the statement is made that, among other things, he has the right to terminate the interview at any time, and (3) the accused

knowingly, intelligently, and voluntarily waives any rights set out in the warning. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(a)(5), 3(a).

Courts have repeatedly held that there is not one singularly correct form of the required warnings. ***Martinez-Hernandez v. State***, 468 S.W.3d 748, 759 (Tex. App.–San Antonio 2015, no pet.). To the contrary, substantial compliance with Article 38.22 is sufficient. *See* ***id.*** (citing ***Bible v. State***, 162 S.W.3d 234, 240–41 (Tex. Crim. App. 2005)). Because an incomplete or incorrect warning may be sufficient if it substantially complies with Article 38.22, Texas courts look to whether any alleged defect in the warning "falls within the bounds of an incomplete or incorrect warning, rather than one which is completely omitted." ***Rutherford v. State***, 129 S.W.3d 221, 224–25 (Tex. App.–Dallas 2004, no pet.); *see also* ***Nonn v. State***, 41 S.W.3d 677, 679 (Tex. Crim. App. 2001) (reiterating that warnings need only "substantially comply" with Article 38.22). Thus, the warnings given to an accused are effective even if not given verbatim, so long as they convey the "fully effective equivalent" of the warnings contained in Article 38.22, section 2(a). ***Baiza v. State***, 487 S.W.3d 338, 343 (Tex. App.–Eastland 2016) pet. ref'd). As long as the substance of the warnings is adequately communicated, the failure to give the warnings precisely does not invalidate a subsequent confession. *See* ***Hutchison v. State***, 424 S.W.3d 164, 175 n.7 (Tex. App.–Texarkana 2014, no pet.). But a statement will not be admissible if there is a complete omission of one of the warnings contained in Section 2(a).

Analysis

In the instant case, Detective David Kassaw testified that at the beginning of Appellant's video recorded custodial interview, he told Appellant that he could "decide at any time to exercise these rights and not answer any questions or make any statements." Appellant also was asked if he understood each of the rights that were explained to him, and responded that he understood.

Other courts have held that similar language has substantially complied with the warning of a defendant's right to terminate the interview at any time. *See* ***White v. State***, 779 S.W.2d 809, 826–27 (Tex. Crim. App. 1989) (warning advising "[if] you desire to make a statement or answer questions, you have the right to stop at any time" substantially complied with Article 38.22); *see also* ***Parra v. State***, 743 S.W.2d 281, 285–86 (Tex. App.–San Antonio 1987, pet. ref'd) (acknowledgement of warning stating "if I decide to talk with any one, I can, and that I can stop talking to them at any time I want" held to substantially comply with Article 38.22). Moreover, this court has held that a warning identical to the warning given in the instant case substantially

complied with Article 38.22. *See* ***McGowan v. State***, No. 12-12-00056-CR, 2013 WL 1143240, at *5 (Tex. App.—Tyler Mar. 20, 2013, no pet.) (mem. op., not designated for publication). Therefore, we hold that the trial court did not abuse its discretion in overruling Appellant's objection to the admissibility of his oral confession because the warning given conveyed the "fully effective equivalent" of the warning contained in Article 38.22, section 2(a) and, thus, amounted to substantial compliance with Article 38.22. *See* ***Baiza***, 487 S.W.3d at 343; ***McGowan***, 2013 WL 1143240, at *5. Appellant's first issue is overruled.

MOTION FOR MISTRIAL

In his second issue, Appellant argues that the trial court abused its discretion in overruling his motion for mistrial because the jury was prejudiced when some jurors potentially witnessed the complaining witness "crumpled over," crying, and exhibiting great distress outside of the courtroom.

Standard of Review

We review a trial court's denial of a mistrial for an abuse of discretion. ***Ocon v. State***, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We view the evidence in the light most favorable to the trial court's ruling. ***Id.*** The ruling must be upheld if it was within the zone of reasonable disagreement. ***Id.***

Governing Law

A defendant has a constitutional right "to be tried by impartial, indifferent jurors whose verdict must be based upon the evidence developed at trial." ***Howard v. State***, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996), *overruled on other grounds*, ***Easley v. State***, 424 S.W.3d 535 (Tex. Crim. App. 2014); ***Parker v. State***, 462 S.W.3d 559, 567 (Tex. App.–Houston [14th Dist.] 2015, no pet.). When a defendant claims reversible error based on external juror influence, he must show either actual or inherent prejudice. *See* ***Parker***, 462 S.W.3d at 567.

A showing of actual prejudice is made when jurors actually articulate a consciousness of prejudicial effect. ***Alfaro v. State***, 224 S.W.3d 426, 430–31 (Tex. App.–Houston [1st Dist.] 2006, no pet.). Here, Appellant presented no evidence from the jurors, and thus, made no showing of actual prejudice. *See* ***id.*** at 431. The issue here turns on whether appellant has shown that the external influence—complainant's emotional outburst outside the courtroom in view of some of the jurors—was inherently prejudicial.

To determine inherent prejudice, we look to whether an unacceptable risk is presented of impermissible factors coming into play. ***Parker***, 462 S.W.3d at 567. Essentially, the test is whether there is a "reasonable probability that the conduct or expression interfered with the jury's verdict." ***Id.*** Inherent prejudice rarely occurs and is reserved for extreme situations. ***Id.***

Analysis

In the instant case, the thirteen year old victim was in the hallway of the courthouse while a matter was considered outside the jury's presence. While in the hallway near the open jury room door, the victim began crying and exhibiting great distress before being ushered away from the jurors by District Attorney Allyson Mitchell. Thereafter, Mitchell made the trial court and Appellant's counsel aware of the incident.

Preservation of Error

The request for an instruction that the jury disregard an objectionable occurrence is essential only when such an instruction could have had the desired effect, which is to enable the continuation of the trial by an impartial jury. *See* ***Young v. State***, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004). The party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could have been "cured" by such an instruction. ***Id.*** But if an instruction could not have had such an effect, the only suitable remedy is a mistrial, and a motion for a mistrial is the only essential prerequisite to presenting the complaint on appeal. ***Id.*** Faced with incurable harm, a defendant is entitled to a mistrial and if denied one, will prevail on appeal. ***Id.***

Here, Appellant requested a mistrial without first requesting that the trial court give the jury a curative instruction. "Instructions to the jury are generally considered sufficient to cure improprieties that occur during trial." ***Gamboa v. State***, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). Generally, we presume that a jury follows the trial court's instructions. ***Id.*** The Texas Court of Criminal Appeals has held that the trial court's correction of and instruction to the jury to disregard improprieties that occur is sufficient to continue a trial without declaring a mistrial. *See, e.g.*, ***Coble v. State***, 330 S.W.3d 253, 290–93 (Tex. Crim. App. 2010) (mistrial not necessary where two witnesses while testifying made spontaneous emotional outbursts involving crying and expletives, and trial court instructed jury to disregard each outburst); ***Gamboa***, 296 S.W.3d at 580 (same where during testimony victim's relative shouted, "You did this for 200 dollars?" and trial court instructed jury to completely disregard outburst); ***Ashley v State***, 362 S.W.2d 847, 850–51

(Tex. Crim. App. 1963) (same where victim's widow made verbal outcry during closing arguments and trial court instructed jury to disregard statement and incident).

Here, the victim's outburst was no more inflammatory than the aforementioned examples of outbursts for which the court of criminal appeals has held a curative instruction to have been effective. Therefore, we hold that by failing to request a curative instruction before moving for mistrial, Appellant failed to preserve error, if any.

Inherent Prejudice

Even had Appellant preserved error, the outcome would not differ. It is not clear from the record how many of the jurors observed the victim's outburst. But it is apparent that the outburst was nonverbal and made outside of the courtroom. *See, e.g.*, ***Landry v. State***, 706 S.W.2d 105, 112 (Tex. Crim. App. 1985) (distinguishing between lesser injurious effect of nonverbal emotional outburst versus verbal outburst in jury's presence); *see also* ***Ashley***, 362 S.W.2d at 851 (considering whether verbal outburst was contradictory of the appellant's trial testimony). Moreover, despite the fact that the outburst was nonverbal, the evidence offered by the State in the case—Appellant's confession, DNA evidence from semen recovered from the scene, and records from the victim's medical exam consistent with sexual abuse—strongly supported the jury's finding that Appellant was "guilty."

Based on our review of the record, we cannot conclude that there is a reasonable probability that the victim's nonverbal emotional outburst interfered with the jury's verdict. *See* ***Parker***, 462 S.W.3d at 567. Accordingly, we hold that even had Appellant preserved error, the trial court did not abuse its discretion in overruling his motion for mistrial.

Appellant's second issue is overruled.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered November 8, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

NOVEMBER 8, 2017

NO. 12-16-00235-CR

ANTHONY REYES,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 87th District Court
of Anderson County, Texas (Tr.Ct.No. 87CR-15-32149)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.