Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00220-CR
NO. 14-99-00223-CR

MICHAEL ANTHONY PACE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 751,495 & 751,494

O P I N I O N

Michael Anthony Pace appeals his conviction by a jury of two counts of aggravated sexual assault of a child. The jury assessed ninety-nine years confinement for each offense. We address whether the court erred in admitting testimony of another minor that appellant sexually assaulted him and whether the court erred in its determination of which of two possible outcry witnesses should testify. We affirm.

Facts

At trial, the complainant, C.E., testified of numerous instances of sexual abuse between the time he was five and ten years old by his uncle, the appellant. C.E. was fifteen-years old at time of trial. In January 1996,[1] he told Yolanda Bailey, his mother's roommate, about some of appellant's sexual abuse. In March 1996, he told Lynn Waldmann, a clinical social work supervisor, about the abuse in greater detail. The State notified appellant of its intent to use Waldmann as its outcry witness. Appellant filed a pre-trial motion requesting the court declare Bailey the proper outcry witness.

The indictments alleged that appellant had caused: (1) "the sexual organ of [C.E.] . . . to contact and penetrate [appellant's] mouth," and (2) "the anus of [C.E.] . . . to contact [appellant's] sexual organ."

At the hearing, C.E. testified that he had told Bailey that appellant had been molesting him, touching his penis, and that appellant had taken videos of him. He denied telling Bailey that appellant had put something in his anus. C.E. testified that this information was "pretty much" all he told Bailey and that she asked for more details but he did not provide them. In contradiction to C.E., Bailey testified that C.E. told her appellant had put "something in his rectum" but "he didn't know what it was." Bailey also testified that C.E. told her appellant had bound his hands and feet and that appellant had touched his penis. Bailey did not recall C.E. telling her about appellant making videos of him.

Waldmann testified that C.E. told her that appellant had inserted something into his "bottom" and that he demonstrated the act with a anatomical doll. She also testified C.E. told her that appellant put C.E.'s penis in his mouth, videotaped him, tried to french kiss him, and played with his penis. C.E. testified that he told Waldmann that appellant had been putting his "private part" into his "butt" and that he had been playing with his private parts.

The court found Waldmann to be the proper outcry witness. At trial, Waldmann testified of C.E.'s statements about appellant's sexual abuse.

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[1] There is some confusion whether the date was January 1995 or 1996. Bailey testified she talked to C.E. about the abuse for the first time in January 1995; however, the circumstances indicate this occurred in 1996. We note the determination of which year this occurred is not material to our holding.

Also at trial, on direct examination, appellant asked his sister, Sheila Ellinwood, about whether he had "any type of condition with his bladder." The State objected to relevance. Appellant defended the relevance of the information, noting that appellant was sitting "on a pad" as they spoke. Appellant also stated, "I don't mind telling the court I plan on showing basically there was no mention of this in any kind of an outcry statement." The State withdrew its objection. Ellinwood then testified appellant had been wearing adult diapers since 1984. On cross-examination, the State asked, "So what you are basically saying is that that's another way it would have been impossible for your brother to have sexually assaulted [C.E.] because he has a bladder problem, is that right?" Ellinwood replied, "Basically, yes."

Appellant then took the stand to testify he did not commit the charged offenses. On cross-examination, the State questioned appellant about his bladder problem and established his contention that he had not had sexual relations since 1984. Appellant also stated during cross that he was never alone with any children in his house and had strict rules against them coming into his room.

At the close of appellant's testimony, the State moved to offer the testimony of J. P. to, among other things, rebut the appellant's claim that he was incapable of having sexual relations. Appellant objected under "608, 404, and relevance." The court overruled the objections and J.P. testified that appellant had sexually assaulted him several ways, including appellant's committing anal intercourse on him.

Proper Outcry Witness

We first address appellant's complaint that the court erred in designating Lynn Waldmann as the proper outcry witness over Yolanda Bailey. Article 38.072 of the Texas Code of Criminal Procedure allows admission of outcry testimony in prosecution of offenses against children twelve years of age or younger. *See* TEX. CODE CRIM. PROC. ANN., art. 38.072 (Vernon Pamph. 2000). This statute applies to statements made: (1) by the child against whom the offense was allegedly committed, and (2) to the first person, eighteen years of age or older, to whom the child made a statement about the offense. *Id*. To be a proper outcry statement, the child's statement to the witness must describe the alleged offense in some discernible manner and must be more than a general allusion to sexual abuse. *See Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990); *Hayden v. State*, 928 S.W.2d 229, 231 (Tex. App.-Houston [14th Dist.] 1996, pet. ref'd). The trial court has broad discretion in determining the proper outcry witness, and its determination will not be disturbed absent an abuse of discretion. *See Garcia*, 792 S.W.2d at 92.

We first observe that the proper outcry witness is not necessarily the first adult the complainant relates detailed information about any sexual assaults by a defendant. Rather, the statements must pertain to the *alleged* offense. *See* TEX. CODE CRIM. PROC. ANN., art. 38.072. This is important in this case because there are allegations of numerous instances of sexual misconduct by appellant, but, as shown above, only two specific acts are alleged in the indictments. For instance, C.E.'s statement to either Waldmann or Bailey that appellant videotaped him or touched his penis would not constitute outcry testimony because, while it may specify an offense, it does not specify the alleged offense. To hold otherwise is to potentially allow designation of an outcry witness who has knowledge of nothing but extraneous offenses. We therefore view C.E.'s statements in reference to the alleged offense in each indictment.

Indictment 1: Bailey did not testify that C.E. told her about oral/genital contact with appellant, thus she clearly would not be an outcry witness to that charged offense. Conversely, Waldmann testified that

C.E. told her about the oral/genital contact. C.E. corroborated this with his testimony. Waldmann was thus the proper outcry witness for this alleged offense.

Indictment 2: Bailey testified that C.E. told her about anal/genital contact with appellant. However, C.E. denied he told her this. Waldmann testified that C.E. told her about the anal/genital contact. Again, C.E. corroborated Waldmann's testimony. The court, as factfinder, resolved the contradiction in C.E.'s and Bailey's testimony by impliedly finding C.E. did not tell Bailey about this alleged offense. *See State v. Johnson*, 896 S.W.2d 277, 280 (Tex. App.–Houston [1st Dist.] 1995), *aff'd*, 939 S.W.2d 586 (Tex. Crim. App. 1996) (in the absence of findings of fact, we presume that the trial court impliedly found the facts necessary to support its ruling). We therefore hold the court did not abuse its discretion in naming Waldmann as the proper outcry witness for both alleged offenses. This issue is overruled.

Admission of J.P.'s Testimony

Next, appellant contends the court erred in admitting J.P.'s extraneous offense testimony of appellant sexually assaulting him. The admission of evidence is a matter within the discretion of the trial court. *See Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990) (op. on reh'g). Evidence of "other crimes, wrongs, or acts" may be admissible if it has relevance to a material issue other than to show that the accused acted in conformity with some trait of character. *See Montgomery*, 810 S.W.2d at 387; TEX. R. EVID. 404(b). Extraneous offense evidence may be relevant and admissible to rebut a defensive theory. *See Ransom v. State*, 920 S.W.2d 288, 300 (Tex. Crim. App. 1994). By raising a defensive theory, the defendant opens the door for the State to offer rebuttal testimony regarding an extraneous offense if the extraneous offense has common characteristics with the offense for which the defendant was on trial. *See Bell v. State*, 620 S.W.2d 116, 126 (Tex. Crim. App. 1980). However, as a general rule, the defensive theory that the State wishes to rebut through the use of extraneous offense evidence must be elicited on direct examination, and may not by elicited by "prompting or maneuvering" by the State. *See Shipman v. State*, 604 S.W.2d 182, 185 (Tex. Crim. App. 1980); *Mares v. State*, 758 S.W.2d 932, 936 (Tex. App.--El Paso 1988, pet. ref'd).

Appellant concedes that J.P.'s testimony was relevant apart from character conformity. Instead, he argues J.P.'s testimony was inadmissible because the "false impression" it was offered to rebut was elicited by the State in its cross-examination. In support, appellant cites *Celeste v. State*, 80 S.W.2d 579 (Tex. App.–Tyler, no pet.). There, after the defendant denied allegations of sexual assault on direct examination, the State asked him why the complainant would tell such a story. *Id*. at 579-80. The defendant testified he believed he had been set up. Over the defendant's objection, the State then called a rebuttal witness to recount several acts of sexual assault against him by the defendant. *Id*. at 580. Observing that the State may not first extract a defensive theory from the accused on cross-examination and then proceed to rebut it, the court of appeals held the trial court erred in admitting the extraneous acts. *Id*.

Our case is distinguishable from *Celeste*. Here, appellant, not the State, elicited the facts implying appellant's defense that he was incapable of or disinclined to engage in sexual activity. A defendant raises a defensive theory in the context of charged sexual offenses by presenting evidence of physical incapability or denial of propensity to commit such acts. *See Ballard v. State*, 464 S.W.2d 861, 862-63 (Tex. Crim. App. 1971); *Mendiola v. State*, 995 S.W.2d 175, 183 (Tex. App.--San Antonio 1999, pet. granted). Though the State followed up with a question to clarify what the witness meant by volunteering the facts, we would hardly characterize this as "prompting or maneuvering" by the State. *Cf. Ex parte Carter*, 621 S.W.2d 786, 789-90 (Tex. Crim. App. 1981) (McCormick, J., concurring) (where cross-examination grew out of appellant's testimony on direct, subsequent rebuttal evidence of extraneous acts was not improper).

We also note that when the State objected to the question about appellant's bladder problems, appellant's attorney's affirmatively represented the evidence was relevant, claiming that he planned to show that there was no mention of the bladder problems in any outcry statement. The outcry statement, of course, pertained solely to allegations of appellant's sexual activity.

In view of these circumstances, we hold that appellant offered evidence of his physical problems implying sexual dysfunction as a defense to the charged offenses. Therefore, the court did not abuse its

discretion by allowing the State to rebut with J.P.'s testimony of appellant's sexual activity. *See Mendiola*, 995 S.W.2d at 183.[2] Appellant also contends the extraneous offense testimony should have been excluded under Rule 403. However, because appellant did not object on this basis at trial, he did not preserve the issue for appeal. *See* TEX. R. APP. P. 33.1; *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). We overrule this issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Because the facts stated by Ellinwood were independently sufficient to open the door to J.P.'s extraneous offense testimony, we need not consider whether appellant's own testimony on direct or cross-examination warranted admission of that testimony.