Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00658-CR

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MARK KEVIN DANIEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 30,743

O P I N I O N

Appellant, Mark Kevin Daniel, was convicted of indecency with a child. After his conviction, he was sentenced to ten years imprisonment which was probated for ten years. He appeals, claiming that his conviction must be reversed due to prosecutorial misconduct and the trial court's refusal to grant a mistrial. Finding no reversible error in the record, we affirm the judgment of the trial court.

In his first point of error, appellant alleges prosecutorial misconduct arising from a written court order that the child complainant remain in Brazoria County. This order was entered at a hearing on appellant's pre-trial motion for a continuance. At this hearing, it came

to light that the complainant's maternal grandmother was in the process of absconding to San Antonio with the complainant, appellant's step-son, to prevent him from testifying at trial. This attempt was cut short when the complainant's biological father arrived to pick up the child immediately prior to the trip to San Antonio.

Based on this information, the prosecutor moved that the child be ordered to remain in Brazoria County. The judge responded to this request by asking the prosecutor if he had an order prepared. The prosecutor stated that he did not, but he would tell all of the witnesses and family members involved.

During the course of the hearing, the appellant decided to change his plea of no contest to a plea of not guilty. After a heated and lengthy discussion about whether or not it would be necessary to have a jury trial on this matter, the trial court reset the case. At the end of this hearing, the prosecutor again asked the court for an order that the child remain in one place–this time asking that the child be ordered to remain in Burleson County. The trial court entered this order verbally. The next day, however, the trial court signed an order that the child remain in Brazoria County. This order was not given to appellant's counsel prior to its submission to the court for approval.

Appellant claims that he was harmed by this conduct since he was deprived of an effective cross-examination of one of the State's witnesses due to the different county appearing in the order. At trial, appellant attempted to impeach one of the State's rebuttal witnesses by asking her if she knew of, and subsequently violated, the court's order that the complainant remain in Burleson County. The court responded that the court's order mandated that the complainant remain in Brazoria County, and after a bench conference, appellant's counsel stated "I don't know that it makes a whole lot of difference" which county the complainant was ordered to stay in.

On appeal, however, appellant asserts that the prosecutor's misconduct in changing the order prevented him from adequately cross-examining and impeaching the State's rebuttal witness. The State contends that appellant waived this argument by failing to object and failed

to meet his burden of proof that the misconduct was perpetrated in bad faith. We find that no prosecutorial misconduct was committed in this case.

In cases where prosecutorial misconduct is alleged, there are several factors to consider. Among these factors are whether the prosecutor deliberately violated a court order, whether the prosecutor's conduct was so blatant as to border on being contumacious, and whether the misconduct was objected to by the defendant. *See Stahl v. State*, 749 S.W.2d 826, 831 (Tex. Crim. App. 1988). This list, however, is not exhaustive and prosecutorial misconduct is to be determined based on the facts of each individual case. *See id.* at 830-31.

Here, the record does not reflect prosecutorial misconduct. First, the prosecutor does not appear to have deliberately violated an order of the court. While the court's verbal and written orders do conflict, the prosecutor appears more confused than devious. Even though the court verbally ordered that the child remain in Burleson County at the behest of the prosecutor, the earlier discussion surrounding this order had centered on the child's remaining in Brazoria County. The court's docket sheet also reflects this confusion. The court's notes from the hearing reflect that the child is to remain "in the county," with both "Burleson" and "Brazoria" crossed out above this statement. Next to these words, the court wrote the word "Burleson" and did not strike it out. At trial, the court, the court reporter, and the prosecutor stated their belief that the order was that the child remain in Brazoria County, rather than Burleson County. This is far more indicative of confusion than subterfuge.

Further, the confusion associated with this order makes the prosecutor's conduct far from contumacious. This act does not appear to be blatant defiance of a court order or so egregious as to warrant a reversal of the appellant's conviction. Nor do the prosecutor's actions appear to be committed in bad faith, something appellant is required to prove in establishing prosecutorial misconduct. *See Hernandez v. State*, 532 S.W.2d 612, 614 (Tex. Crim. App.1976). Rather than reflecting bad faith, however, the record reflects that this action was prompted by a misunderstanding.

Finally, appellant objected to the difference between the written order and the court's verbal order. However, at the end of the bench conference where this objection was discussed, appellant's counsel stated that he did not know whether it made any difference where the child was ordered to remain.

We agree with this statement by appellant's counsel. The only two harms that appellant claims were caused by this misunderstanding are that he was deprived of an effective cross-examination of one of the State's rebuttal witnesses and was deprived of his right of equal access to the child. We find neither of these harms supported by the record.

Appellant's claim that he was deprived of the right to effective cross-examination of the State's witness is basically a complaint that appellant could not impeach this witness because she was telling the truth. We find no harm here since the witness obeyed the court's written order and could not be impeached based on that fact, even if the appellant had a different view of what the court's order actually required.

Appellant's claim that the child's presence in Brazoria County rather than Burleson County prevented equal access to the victim is likewise unsupported by the record. Rather, the record discloses that appellant's counsel had an opportunity to meet with the child prior to trial. Again, appellant has failed to show what harm was done to the presentation of his case.

We overrule appellant's first point of error.

In his second point of error, appellant complains that the trial court erred when it refused to grant a mistrial following a non-contemporaneous instruction to disregard a witness' testimony. During the cross-examination of the police officer to whom the victim first complained, the State asked the officer whether or not he believed the child to be truthful. The appellant objected to this line of questioning, the objection was overruled, and the officer testified that he believed the child was truthful. After cross-examination, the witness was dismissed. While the next witness was on the stand, however, the court instructed the jury to disregard the officer's testimony about the child's truthfulness after a bench conference with

the two attorneys. The appellant moved for a mistrial after this instruction and the trial court overruled his motion. Appellant now complains of this ruling and late instruction.

Here, we need not decide if the trial court's late instruction to disregard and subsequent refusal to grant a mistrial was erroneous. It is well established that improper admission of evidence is harmless and not reversible error when the same facts are proven by the defendant or other testimony admitted without objection. *See Anderson v. State*, 717 S.W.2d 622, 626-27 (Tex. Crim. App.1986); *Ybarra v. State*, 890 S.W.2d 98, 115 (Tex. App.–San Antonio 1994, pet. ref'd); *Miranda v. State*, 813 S.W.2d 724, 739 (Tex. App.–San Antonio 1991, pet. ref'd). Here, the appellant challenged the child's reputation for truth and veracity through several witnesses. On rebuttal, the State introduced witnesses to support the child's reputation for truth and veracity. This testimony was not objected to because it was admissible at that time to support the child's character for truthfulness. TEX. R. EVID. 608(a).

In *Marles v. State*, the San Antonio Court of Appeals was faced with a similar issue. *See* 919 S.W.2d 669 (Tex. App.–San Antonio 1996, pet. ref'd). There, the defendant was accused of sexually assaulting several children. During its case in chief, the State asked the investigating officer if she believed the minor complainants were telling the truth about the molestation. *Id*. at 672. When she stated that she did, the defendant objected and received an instruction to disregard. *Id*. The defendant then moved for a mistrial and his request was denied. *Id*. Following this exchange, however, the defendant cross-examined this witness on her belief about the complainant's credibility. *Id*. The defendant also took the stand and denied that the sexual assaults ever occurred, a fact which the court found to be an indirect attack on the credibility of the minor complainants. *See id*. The appellate court held that any error in admitting this testimony was harmless since the testimony would arguably have become admissible after the defendant took the stand and denied that any molestation occurred. *Id.*

Here, as in *Marles*, the appellant chose to attack the child's veracity by denying the child's allegations. Unlike the situation in *Marles*, however, the argument here supporting the admissibility of the supporting evidence is much stronger, especially since the attack on the

complainant's credibility was direct and brought about through the testimony of several witnesses, including appellant, rather than appellant's testimony alone. We are guided by *Marles* in our belief that any error in admitting the evidence was harmless and overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed January 13, 2000.

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

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