Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-00-00516-CR
14-00-00517-CR
14-00-00518-CR

JERRY WAYNE NOBLES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause Nos. 817,062; 821,018; 817,166

O P I N I O N

Appellant, Jerry Wayne Nobles, pled guilty to the felony offenses of possession of child pornography and two counts of aggravated sexual assault of a child. TEX. PEN. CODE ANN. §§ 43.26, 22.021 (Vernon Supp. 2001). A jury subsequently assessed punishment at ten years confinement for the former offense and two life sentences for the latter offenses. The trial court ordered all three sentences to run consecutively. Challenging the punishment assessed in each case, appellant raises four issues for review. We affirm.

Background

On May 1, 1999, Pamela Hebert held a birthday party for her three-year old son. Approximately ten children attended the party, one of whom was four-year-old complainant, S. P. Appellant was Pamela Hebert's neighbor. Sometime during the course of the party, appellant invited the entire group to his home and suggested that they use the hot tub. Hebert consented, and the party moved to appellant's residence. Eventually, Hebert noticed complainant was missing. She sent her thirteen year-old son, Courtney, and guest, Angel Keiffer to search. Courtney and Angel entered appellant's home unannounced and found complainant sitting on appellant's lap, looking at his computer monitor. As Courtney and Angel stood quietly, they noticed that the monitor was displaying nude images of complainant. Shocked, the two announced their presence and informed appellant that Hebert was looking for complainant. Appellant was charged and pled guilty to possession of child pornography and two counts of aggravated sexual assault. Appellant raises four evidentiary issues pertaining to the punishment phase of trial.

Probation Officer Testimony

In his first issue for review, appellant complains the trial court erred under Rules of Evidence 401 and 403 by admitting irrelevant and inflammatory testimony offered by probation officer Martha Montalvo. In addition, appellant argues that the court's admission of this testimony was error under Rule of Evidence 702. We disagree.

Appellant's complaint pertains to the following testimony elicited from witness Montalvo:

> Prosecutor: Miss Montalvo, probation or community supervision is for a first offender; is that correct?
>
> Witness: Yes.
>
> Prosecutor: And especially on the serious offenses that we are talking about, is it typically for someone who has offended multiple victims?
>
> Defense: Object to that, Your Honor. Outside the Scope of this - - outside the scope of cross-examination. Also outside of [the

witness's] expertise.

Court: Overruled.

Defense: Also not relevant.

Court: Overruled.

Prosecutor: You can answer the question.

Witness: Can you repeat the question please?

Prosecutor: Yes. Is it typically for someone in these types of serious offenses, aggravated sexual assault, possession of child pornography, is it for someone who has offended multiple victims?

Witness: Not typically, no.

An appellate court reviews a trial court's admission of testimony over a Rule of Evidence 401 or 403 objection under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). Likewise, the same standard of review applies to a trial court's admission of testimony admitted over a Rule 702 objection. *Alvarado v. State*, 912 S.W.2d 199, 216 (Tex. Crim. App. 1995). Under this standard, we must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Montgomery*, 810 S.W.2d at 391.

We first turn to that part of appellant's issue based on Rule of Evidence 403. Here, we observe that appellant's objection at trial does not comport with his issue on appeal. Accordingly, appellant has waived his complaint that the probative value of Montalvo's testimony was outweighed by its prejudicial effect. *Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993) ("An objection stating one legal theory may not be used to support a different legal theory on appeal."); *Castiblanco-Gomez v. State*, 882 S.W.2d 564, 568 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd).

Next, we examine appellant's sub-issue contending that the court's admission of Montalvo's testimony was error under Rule of Evidence 702. In support of this sub-issue, appellant cites authority for the proposition that a court should not admit expert testimony

unless: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and, (3) admitting the testimony will actually assist the fact-finder in deciding the case. *Alvarado*, 912 S.W.2d at 215-16. However, appellant utterly failed to explain how Montalvo's testimony did not fulfill these requirements. Also, he did not apply the law to the case's facts and show why he should prevail. Accordingly, appellant failed to adequately brief this issue. TEX. R. APP. P. 38.1(h) (providing that the brief must contain a clear and concise argument for the contentions made); *Smith v. State*, 907 S.W.2d 522, 531 (Tex. Crim. App. 1995).

In his final sub-issue appellant contends the trial court erred by admitting Montalvo's testimony because it was irrelevant under Rule of Evidence 401. Specifically, the court allowed Montalvo to state his opinion that appellant was not a good candidate for community supervision. As we held in *Johnson v. State*, such testimony is irrelevant. 991 S.W.2d 427, 430 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Accordingly, the trial court's admission of this testimony was error. *Id*.

Finding the evidence to have been erroneously admitted, we must now determine whether the trial judge committed reversible error. *See* TEX. R. APP. P. 44.2. This error pertains to an evidentiary matter; therefore, 44.2(b) applies rather than 44.2(a). *Id.*; *Garza v. State*, 963 S.W.2d 926, 930 (Tex. App.—San Antonio 1998, no pet.). Rule 44.2(b) requires examination of error in relation to the entire proceeding. Also, we must determine whether admission of the evidence had a "substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). We must disregard the error if our review of the record does not adequately reveal such an impact. *Johnson*, 991 S.W.2d at 430.

Appellant could only have qualified for community supervision if the punishment assessed by the jury did not exceed ten years imprisonment. TEX. CODE CRIM. PROC. ANN. Art. 42.12 § 3(e)(1) (Vernon Supp. 2000). The jury assessed two life sentences plus two

years. It is apparent that the possibility of community supervision was not an issue the jury considered. Therefore, we hold the trial court's error was harmless and overrule appellant's first issue for review.

Expert Witness Testimony

In his second issue for review, appellant complains the trial court erred under Rules of Evidence 401 and 403 by admitting irrelevant and inflammatory testimony offered by detective Randy Rhodes. In addition, appellant argues that the court's admission of this testimony was error under Rule of Evidence 702. While appellant cites trial counsel's objections corresponding to these arguments, he provides no discussion or analysis of relevant supporting authority. Instead, appellant makes conclusory statements that "[the witness's] qualifications were totally inadequate," and "[his] testimony was not proper for jury consideration and was extremely prejudicial and inflammatory." We hold that this issue is inadequately briefed because appellant fails to apply the law to facts and show why he should prevail. TEX. R. APP. P. 38.1(h); *Smith*, 907 S.W.2d at 531. Appellant's second issue is overruled.

Admission of Photographs

In his third issue for review, appellant argues that the trial court erred under Rules of Evidence 401 and 403 by admitting "voluminous photographs" of children which were both irrelevant and more prejudicial than probative. Because a number of the photographs depict fully dressed children, Appellant contends their admission implicitly inferred that he had either committed or was intending numerous offenses against children.

We begin by addressing the relevant evidence portion of appellant's issue. Relevant evidence "[has] any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." TEX. R. EVID. 401. Evidence is relevant in the punishment context if it is helpful to the jury in determining an appropriate sentence for a particular defendant in a particular case. *Rogers v. State*, 991

S.W.2d 263, 265 (Tex. Crim. App. 1999). The trial court's determination of relevancy will not be reversed absent an abuse of discretion. *Reese* v. State, 33 S.W.3d 238, 240 (Tex. Crim. App. 2000).

At the outset, we note that the trial court admitted approximately 104 photos containing images of children.[1] Thirty-eight photos depict children primarily in nightgowns or swimsuits. Sixty-six photos displayed children either completely or partially undressed. The majority of the sixty-six photographs consist of either lewdly choreographed poses where a female child has exposed, or in one instance inserted items inside, her vagina. Also, one of the photographs depicts appellant in the act of penetrating a child's vagina with his penis. Considering all of the photographs admitted into evidence, we have fair assurance that the trial court's admission of the non-pornographic photographs did not influence the jury in assessing punishment. TEX. R. APP. P. 44.2; *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

In a sub-part to his third issue, appellant complains that the trial court erred under Rule of Evidence 403 because the non-pornographic photos were more prejudicial than probative. Appellant's only record objection involving this evidence was for relevance under Rule of Evidence 401; therefore, this issue was not preserved for appeal. TEX. R. APP. P. 33.1(a); *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990) (holding that after the court overruled defendant's Rule 404(b) objection, a further objection under Rule 403 was required to preserve error thereunder). Accordingly, we overrule appellant's third issue for review.

Admission of Journals

In his final issue for review, appellant contends the trial court erred under Rules of

[1] Several photographs contained unrecognizable images and were not counted.

Evidence 401 and 403 by admitting two journals not sufficiently linked to him. Our review of the record indicates that appellant's actual objection was that the State failed to lay a proper predicate for such linkage. In his fourth issue, however, appellant relies on this objection to preserve his contention that such evidence was irrelevant and more prejudicial than probative. Appellant's objection at trial does not comport with the issue raised on appeal. Accordingly, appellant has waived his Rule 401 and 403 objections because he makes them for the first time on appeal. *Camacho* 864 S.W.2d at 533; *Castiblanco-Gomez v. State*, 882 S.W.2d at 568. We overrule appellant's fourth issue for review and affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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