Affirmed and Opinion filed November 4, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01416-CR
NO. 14-97-01417-CR
NO. 14-97-01424-CR

TERRY JAMES GRIFFIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause Nos. 710,214, 728,254, and 728,255

O P I N I O N

Appellant, Terry James Griffin, was convicted by a jury of aggravated sexual assault of a child (six-year-old Dominique), and injury to a child (his seven-year-old niece, Brittany). The jury also found true two enhancements alleging previous offenses of rape and armed robbery and assessed a punishment of life imprisonment for aggravated sexual assault and twenty-five years imprisonment for injury to a child. Previously, appellant had been given and was serving probation for the felony of unauthorized use of a motor vehicle. After appellant's conviction for the sexual assault and injury to a child, the trial court granted

the State's motion to revoke probation and assessed two years confinement. In the consolidated appeal of three cases, appellant's issues boil down to three points: (1) there was a fatal variance between the name of the victim alleged in the indictment for aggravated sexual assault and the name of the victim proven at trial, therefore there was legally insufficient evidence to convict appellant on that charge; (2) The State's notice regarding its intent to use outcry testimony was insufficient; and (3) The trial court admitted inadmissible hearsay testimony made by Brittany to a law enforcement officer. We affirm.

In issue one, appellant points out the indictment and the jury charge for the aggravated sexual assault charge spell the first name of the victim as "Dominque." At trial, the victim, gave her name as "Dominique." At the close of evidence, appellant moved for an instructed verdict, which was denied. The court, however, included an *idem sonans* instruction in the jury charge.[1]

A variation between the allegation and proof of a name will not impugn the validity of a judgment so long as the names sound alike or the attentive ear finds difficulty distinguishing them when pronounced.[2] The question of whether two spellings are *idem sonans* is one of fact for the jury to decide.[3] The jury was properly instructed on *idem sonans* in this case and, by its guilty verdict, found the names were *idem sonans*.

Appellant argues we should ignore that finding because "Dominque" and "Dominique" cannot be pronounced the same in that "Dominique" has an additional syllable. Therefore, he asserts, the names are not *idem sonans* as a matter of law. We disagree. We hold a rational trier of fact could find the names

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[1] The instruction read: "You are instructed that unless you find from the evidence beyond a reasonable doubt that the names 'Dominque' appearing in the indictment, and 'Dominique' as testified to in this trial usually are or can be pronounced the same or are usually pronounced in such a way that the names are indistinguishable, you will find the defendant not guilty."

[2] *Farris v. State*, 819 S.W.2d 490, 496 (Tex. Crim. App. 1990), *cert. denied* 503 U.S. 911 (1992), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993).

[3] *Id.*

"Dominque" and "Dominique" *idem sonans*. Similarly, the court of criminal appeals in *Martin v. State*[4] held the names "Dina" and "Dianna" were not patently incapable of being sounded the same. While the names could arguably be pronounced differently, and with a different number of syllables, the court would not disturb the jury's findings:

> The rule [of *idem sonans*] depends for its application on the intricacies and foibles of articulated speech; its application must suffer the consequences of accents, dialects, and the peculiarities of localized or personalized pronunciations. It is difficult in the preparation of an appellate record for a court reporter to accurately describe on a printed page the nuances of sound in a witness's articulation of a name. Even on those occasions when a witness is asked to sound out a name phonetically, it is not easy to capture on paper the accent with which the witness spoke. . . . Inasmuch as appellate courts are now limited to reading a "cold" record, they are rarely in a position to make a truly informed determination of whether two names could be or were pronounced the same.[5]

The *Martin* court then held, "we will therefore refrain from disturbing on appeal a jury or trial court determination that names in question are *idem sonans* unless evidence shows that the names are patently incapable of being sounded the same or that the accused was misled to his prejudice."[6] There is no evidence before us to show any prejudice to the appellant by the variance in the names. Therefore, appellant's contention is overruled.

In his second issue, appellant points out that the State's notice to him of its intent to use outcry testimony was that of "Dominique Destin" while the evidence presented at trial showed the outcry testimony was of "Dominique Collins." Therefore, he argues, the notice was deficient under TEX. CODE CRIM.

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[4] 541 S.W.2d 605 (Tex. Crim. App.1976)

[5] *Id.* at 607.

[6] *Id.* at 607-08.

PROC. ANN. art. 38.072, § 2(a) (Vernon Supp. 1999).[7] The record shows that on January 10, 1997, the State provided the following notice to appellant:

> On July 21, 1996, six-year-old Dominique Destin, told her grandmother, Ms. Bobbi Destin, that the [appellant], whom she knew as the uncle of her friend, Brittany [], had taken her and Brittany into his bathroom and locked the door. Dominique told her grandmother that the Defendant then made her take off her panties, and he took out his private part and touched it to her private part. After this, the [appellant] attempted to put his private part in Dominque's mouth, but she refused, so he made her hold his private part with her hand. Dominique told her grandmother that she let it go quickly because it smelled bad.

At trial, appellant objected to Bobbi Destin's testimony relating what her granddaughter, Dominique Collins, told her above. The trial court overruled the objection and allowed the jury to hear the testimony.

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[7] The text of the relevant portion of art. 38.072, § 2(a) is as follows:

This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.

(b) A statement that meets the requirements of Subsection (a) of this article is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement.

As stated by the court in *Garcia v. State*, the purpose of article 38.072 is to prevent a defendant from being surprised by the introduction of outcry-hearsay testimony.[8] The State's notice provided appellant with graphic detail of the testimony that would be provided against him, approximately ten months in advance of his trial. Moreover, appellant was on notice that the indictment, which originally named Dominique Destin as the victim, had been amended on September 10, 1997 (more than two months before trial) to name Dominique Collins. Appellant lodged no objection to the amendment. Though the victim's surname in the State's notice was that of her grandmother, it is patently clear from the circumstances who was being referred to. There is no assertion the six-year-old victim's first name was incorrectly stated in the notice. There is no claim by appellant that he was surprised or otherwise harmed by the technical defect in the notice. Further, appellant points to no place in the record that shows he even requested the trial court conduct a hearing outside the presence of the jury to determine whether the statement was reliable, as was permissible under TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2). Therefore, this point of error is overruled.

Finally, appellant argues that the trial court erred in admitting, over timely objection, hearsay testimony from Deputy Ashworth that Brittany told him she saw appellant touch Dominique's private parts with his. We agree that the trial court clearly abused its discretion in allowing this testimony. The statement was inadmissible hearsay and we see no basis, including the outcry exception, for the court to have allowed it.

The erroneous admission of evidence, however, does not require reversal unless a substantial right is affected.[9] Here, overwhelming evidence of substantially same or similar character as Officer Ashworth's testimony was adduced from at least three other witnesses: the victim, Dominique; Bobbi Destin; and Brittany. Therefore, no substantial rights of appellant were affected by Officer Ashworth's hearsay testimony and its erroneous admission was harmless.

The convictions and revocation of probation are affirmed.

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[8] 907 S.W.2d 635, 638 (Tex. App.–Corpus Christi 1995, no pet.)

[9] TEX. R. EVID. 103; TEX. R. APP. P. 44.2.(b).

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 4, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

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