

Affirmed and Opinion filed December 30, 1999.



In The

Fourteenth Court of Appeals

NO. 14-97-00704-CR

DANA LOUIS COSGROVE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 734,843**

OPINION

The jury found appellant guilty of aggravated sexual assault of a child and assessed punishment at 75 years confinement and a fine of \$5,000. Appellant complains of the admission of expert testimony and of improper jury argument. We affirm.

M.S., the 9-year-old complainant, spent the night with her grandmother, who was married to appellant. M.S. was asleep on the couch when appellant awoke her and asked her to give him a "naked hug." As directed, she went to the bathroom, removed her clothes, returned to the couch and gave appellant a hug. After she put her clothes back on and returned to the living room, he told her to go back

into the bathroom. Appellant followed her to the bathroom where he sexually assaulted her. The next day, M.S. told her father what happened and he contacted the police.

Appellant denied committing the offense. John Gordy, appellant's stepson, testified he lived with his mother and appellant, and on the night of the incident, he was awake most of the night. He testified his bedroom and bed were positioned to where he could see into the living room, and he never saw appellant awaken M.S. that night. Linda Cosgrove, M.S.'s grandmother, testified appellant never got out of bed on the night of the incident.

EXPERT TESTIMONY

Appellant contends in his first point of error that the trial court abused its discretion by allowing the testimony of the State's expert witness, Gollaher, in violation of Texas Rules of Evidence 702 and 403.

During its case in chief, the State called M.S.'s mother to testify regarding the change in M.S.'s demeanor and whether she took M.S. to a psychologist. The court sustained defense counsel's relevance objection. The State argued that the testimony of the psychologist and of M.S.'s mother was relevant to show that some traumatic event had occurred. Defense counsel further urged that the prejudicial nature of the testimony far outweighed the probative value under rule 403. The court deferred a ruling on the objection and the State showed a videotaped interview of M.S. The State then rested.

After defense witnesses John Gordy and Cosgrove testified, the State again called M.S.'s mother to testify. She testified that after the incident, M.S. wet the bed more frequently than before the incident. Furthermore, M.S. had a distinct change in behavior. Before the incident, M.S. had been passive and thoughtful and was not a discipline problem, but after the incident she became very aggressive, very angry and agitated and fought with her brothers and sisters. M.S. also wanted to sleep with her mother or older sister.

Outside the presence of the jury, Gollaher, a doctor in clinical psychology, testified regarding her experience and training in assessing and counseling sexually abused children and described common symptoms exhibited by sexually abused children. Defense counsel stated, "I am going to renew my objection, judge." The trial court overruled his objection.

In the presence of the jury, Gollaher testified she worked at the children's assessment center with children who have been sexually abused, and consulted with Child Protective Services (CPS) cases. She had not talked to M.S. She testified regarding psychological signs of sexual abuse, which are common in children who have been victims of sexual abuse. She testified that increased anger and agitation, increased hostility with siblings, increased misbehaving, increased bed wetting, and wanting to sleep with the mother or an older sibling were all possible symptoms in sexually abused children.

Texas Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As a requisite to presenting a complaint for appellate review, the record must show that a timely objection was made to the trial court stating the specific grounds for the objection and ruled on by the trial court. TEX. R. APP. P. 33.1 (a). Appellant objected to the testimony on the basis of rule 403 and not on the basis of rule 702. An objection stating one legal basis may not be used to support a different legal theory on appeal. *Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993). Appellant therefore waived complaint regarding admissibility of the evidence under rule 702.

A trial court has discretion to admit relevant evidence unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. TEX. R. CRIM. EVID. 403; *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). The Texas Rules of Evidence favor admissibility of relevant evidence including relevant expert testimony. *Ortiz v. State*, 834 S.W.2d 343, 347 (Tex. Crim. App. 1992).

Gollaher did not testify as to the truthfulness of the complainant or to truthfulness of child victims of sexual abuse in general. Testimony by an expert witness that provides useful background information to aid the jury in evaluating the testimony of another witness is admissible. *Duckett v. State*, 797 S.W.2d 906, 915 (Tex. Crim. App. 1990). Gollaher testified regarding the common symptoms exhibited in sexually abused children. Such testimony is admissible in conjunction with the mother's testimony to aid the jury

in determining whether M.S. suffered a traumatic event. *Cohn v. State*, 849 S.W.2d 817, 819-20 (Tex. Crim. App. 1993); *Duckett v. State*, 797 S.W.2d at 917-920. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in overruling appellant's objection. Appellant's first point of error is overruled.

JURY ARGUMENT

Appellant complains of five instances of improper jury argument. He first argues that the trial court erred in overruling his objection to the prosecutor giving his personal opinion about the facts of the case during jury argument. During rebuttal, appellant called Jennifer Gordy, his sixteen-year-old stepdaughter, to the stand. Jennifer testified that before this incident she had lied to her brother, M.S.'s father, and told him that appellant had sexually abused her. She testified that she had been using drugs and alcohol and that the accusations were false.

On cross-examination, the prosecutor questioned Jennifer regarding her prior statements to family members and to CPS that she had sex with appellant more than five times and that appellant would buy her marijuana to get her to have sex with him. Jennifer claimed that all of her previous statements were false. Outside the presence of the jury, the prosecutor played an interview of Jennifer previously videotaped by CPS. Jennifer then told the jury that she did not remember the allegations against appellant until she saw the video. During closing arguments in the guilt/innocence phase, the prosecutor stated:

Jennifer. Well, she is a shining example of Doctor Gollaher's long-term effects of sexual abuse. Look at her. Drug addict, liar.

Appellant objected, claiming the prosecutor was not qualified to make that determination. Proper jury argument must fall within one of four general categories: (1) summation of the evidence; (2) any reasonable deduction from the evidence; (3) an answer to argument of opposing counsel; and (4) a plea for law enforcement. *Moody v. State*, 827 S.W.2d 875, 894 (Tex. Crim. App. 1992). The prosecutor's comments in closing were a reasonable deduction from the evidence. *See Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990). The trial court did not err in overruling appellant's objection. Appellant's second point of error is overruled.

Appellant contends in his third point of error that the prosecutor's argument improperly accused his counsel of misconduct. Defense counsel argued to the jury:

You didn't hear any physical corroboration of anything, you didn't hear that anyone sat and talked with this child to verify that anything happened You could have had an opportunity to hear from the person who interviewed her directly [Ms. Stephenson], someone who talked to the child, but she wasn't brought in here. Why?

* * * * *

So, then, what would make a person make this kind of allegation? I don't know. I don't know. I know that if you listen to the tape of M.S.'s interview with Ms. Stephenson, Ms. Stephenson leaves opening to questions, [M.S.] says certain things, when the prosecutor asked her questions, gave leading questions Children are suggestible I believe, and with the right person asking the questions they can say what you want them to say, especially if someone has planted it in their heads that someone is a bad person, a mean person who maybe has done this to someone before.

* * * * *

And what this case boils down to, when you strip away all the mess, when you strip away all the bullcorn, it boils down to one person's word against another person's word.

Appellant complains about the following comments made during the prosecutor's closing argument during the guilt/innocence stage as being uninvited and unsubstantiated accusation of improper conduct directed at defense counsel:

Now, defense attorney muddied the water, confused the issues, talked about Mr. David picking [M.S.] up, about dunking the basketball. Nowhere near what happened here, if anything. Muddy the water about the other stuff, about the Ms. Stephenson on the tape not being here. That's what he does. He doesn't want you to follow the track. He wants you to get confused. He doesn't want you to use your common sense. He doesn't want you to follow your heart.

The prosecutor's statements were a response to argument by defense counsel and were proper. *Whitting*, 797 S.W.2d at 47; *Gonzales v. State*, 831 S.W.2d 491, 493 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). The trial court did not err in overruling appellant's objection. Appellant's third point of error is overruled.

In his fourth point of error, appellant contends the prosecutor sought to persuade the jury to decide the case on matters not raised by the evidence and which were contrary to the court's charge. The prosecutor argued:

You got to believe my case beyond a reasonable doubt, and you got good evidence. All I need to do is put [M.S.] on because she is a good kid. I don't want you to send [M.S.], this little girl right here, back to Mississippi and tell her that you don't believe her, you don't think it happened. I don't want you to give a great Father's Day present to Dave and tell him we think you're a liar, too. I don't want you to do that. Father's Day is coming up.

Defense counsel objected that the jury did not have any obligation to anyone in this case but the truth and facts. The trial judge then responded, "All right. Move along."

The prosecutor then argued:

For God's sake, folks do not put this man on the elevator with those children and with you and with our citizens. You got to convict that man before he can get out there and do it again to any other children because you got to think what is going to happen to the next child if he gets out there with the message of not guilty. You know there are going to be more victims and you know it's not going to be a pretty sight. You have got to convict this man of this offense. I can not implore you enough. Thank you.

Appellant did not object to the above argument. On appeal, he contends the prosecutor's argument invited the jury to consider the emotional impact of a not guilty verdict on the complainant and her father. Appellant did not object at trial to either of the arguments on the basis he brings forth on appeal. Having failed to object, appellant failed to preserve error for appeal. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Appellant's fourth point of error is overruled.

In his fifth point of error, appellant contends the trial court erred in denying his motion for mistrial due to the prosecutor's improper inflammatory argument. The prosecutor argued during the punishment phase:

Don't have any sympathy for him. You know what he came in here to try to do to you, the trouble that he caused you.

Appellant objected, claiming that by requesting a jury trial, he was not causing trouble. The court sustained defense counsel's objection and instructed the jury to disregard the statement. The trial court denied defense counsel's request for mistrial.

Mistrials are an extreme remedy for prejudicial events occurring during the trial process and should not be granted unless an objectionable event is so emotionally inflammatory that curative instructions are not likely to prevent the jury being unfairly prejudiced against the defendant. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996).

Reversible error occurs only where statements to the jury are extreme, manifestly improper, inject new and harmful facts into the case, or violate a mandatory statutory provision, and thus are so inflammatory that their prejudicial effect cannot reasonably be cured by judicial instruction to disregard the argument. *Hernandez v. State*, 819 S.W.2d 806, 820 (Tex. Crim. App. 1991).

The prosecutor's remark was not so prejudicial that it could not be cured by instructing the jury to disregard it. The trial court did not err in denying appellant's motion for mistrial. Appellant's fifth point of error is overruled.

In his sixth point of error, appellant contends the prosecutor injected matters outside the record, which were intended to inflame the minds of the jurors. The prosecutor argued during the punishment phase:

We need to talk now about prevention and punishment for what he did. How can you prevent Dana Cosgrove from going after any more children? You can make sure that he stays in prison for the rest of his life, for a long, long time because you don't want any other kids to be his victim. You know that he has learned from this experience. Witnesses are going to cause him problems. Think about what he is going to do the next time he gets ahold of a little child.

Defense counsel objected, "I object to that as improper jury argument." Appellant did not specify the basis of his objection and therefore waived his complaint. TEX. R. APP. P. 33.1(a). *Hougham v. State*, 659 S.W.2d 410, 414 (Tex. Crim. App. 1983). Appellant's sixth point of error is overruled.

Judgment of the trial court is affirmed.

/s/ Cynthia Hollingsworth
Justice

Judgment rendered and Opinion filed December 30, 1999.

Panel consists of Justices Amidei, Anderson, and Hollingsworth.¹

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

¹ The Honorable Cynthia Hollingsworth, former Justice, Court of Appeals, Fifth District of Texas at Dallas, participating by assignment.