Affirm and Opinion Filed June 18, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00306-CR

IVAN ORTIZ MERIDA, Merida
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-81221-2018

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Molberg

Based on acts involving his daughter, M.M., a jury found Ivan Ortiz Merida guilty of continuous sexual abuse of a child under fourteen, a first degree felony, and two counts of indecency with a child by sexual contact, both second degree felonies. The jury assessed punishment at confinement for life on the first degree felony and twenty years' confinement on the two second degree felonies. Merida appeals, raising four issues regarding his rights under the due process and confrontation clauses in the Fifth and Sixth Amendments of the United States Constitution. *See* U.S. CONST. amends. V, VI. For the reasons below, we affirm the court's judgments.

BACKGROUND

Merida was convicted on three felony counts relating to sexual abuse of M.M., the oldest of his three daughters. At the time of trial, Merida was thirty-five years old, and M.M. was twelve.

In October 2012, when M.M. was almost six years old, Merida, M.M., and her two younger sisters moved in with Merida's uncle and aunt, Adan and Monica Ortiz, after Merida and his daughters' mother separated. The three sisters continued living with Adan and Monica until some point in 2018, after M.M. made an outcry to Monica regarding Merida's abuse.

M.M.'s outcry occurred in January 2018, when M.M. was eleven years old. After Adan and Monica returned home from a trip to Houston, Monica noticed a cut on M.M.'s wrist that concerned her. Monica's own son had a history of cutting himself, and she considered what she saw on M.M. to be a red flag and talked to M.M. about it. During their talk, M.M. made an outcry to her regarding Merida.

Following M.M.'s outcry, Monica and Adan confronted Merida and kicked him out of their home. A report was made to the Collin County Sheriff's Office, and M.M. was taken to the local children's advocacy center for a forensic interview. In early February 2018, a sexual assault nurse also examined M.M.

On April 26, 2018, a grand jury returned an indictment charging Merida with the three counts at issue here. Although we do not recount each of the specific allegations in the indictment, generally, Count I alleged that on or about and between

November 3, 2014 and January 17, 2017, during a period that was more than thirty days in duration and at a time when Merida was over seventeen years of age and M.M. was under fourteen, multiple acts of sexual abuse occurred, including aggravated sexual assault of a child and indecency with a child by sexual contact.

Counts II and III of the indictment alleged that on or about November 3, 2014, Merida intentionally and knowingly, with the intent to arouse or gratify the sexual desire of any person, engaged in sexual contact by touching part of the breast of M.M., a child younger than seventeen years of age, by means of his hand (Count II) and mouth (Count III).

Merida pleaded not guilty and elected to have a jury decide both the guilt-innocence and punishment phases of the trial. During the guilt-innocence phase, the State called six witnesses, including M.M., Monica, the sexual assault nurse who examined M.M., an investigator with the Sheriff's Department (Fernando Robledo), and two employees of the local children's advocacy center. Merida's counsel called four witnesses in the guilt-innocence phase, including Merida, who denied the charges, along with one of his friends, his younger brother, and his sister-in-law.

During the guilt-innocence phase, M.M. testified about multiple acts of sexual abuse by Merida, including sucking on her neck until it bruised her, rubbing her breast with his hands, placing his mouth on her breast and her "private areas," having her place her mouth on his "private area," rubbing her with his hands "where period

comes out," having her touch his "private area" with her hands, rubbing his "private area" on her "private area," and putting his "private area" on and in her "butt hole."[1]

M.M. testified the event regarding her neck occurred when she was ten and that the other events began around the same time. She testified Merida rubbed his "private area" on her "private area" and put his "private area" on her "butt hole" "more than one time."

M.M. testified some of these events happened when Adan and Monica were in Houston, and she cut her wrist after that because she was "scared and sad." She was afraid that Merida "might start going in the front" and told Monica this when she made an outcry.

M.M. continued to live with Adan and Monica until early April 2018, and she then went to live with her mother, about whom M.M. said, "I didn't really know her very well." M.M. kept cutting herself, was sent to a mental hospital, and was later placed in foster care. M.M. was living in a residential treatment center at the time of trial.

Merida waived his right not to testify. On direct-examination, Merida denied the charges and testified he sometimes has erectile dysfunction. He also testified Monica had sexually abused him as a teenager, which Monica denied. On cross-

[1] M.M. testified or nodded affirmatively to indicate that both for herself and for Merida, "private areas" refers to what is used to go to the restroom to "pee."

examination, Merida agreed that he told the investigator who interviewed him that M.M. "is not a liar."[2] When the prosecutor asked Merida, "You think that even though [M.M.] has lost everything – she's lost everything. She doesn't have a home to go home to, but it was all worth it to her to make it up?" Merida said, "Yes."

At the close of the guilt-innocence phase, the jury found Merida guilty of all three counts, and the parties proceeded to the punishment phase. The State called investigator Robledo, who also testified in the guilt-innocence phase. Robledo stated that in his more than one hundred investigations of child sex abuse, "This one affected me more . . . . The graphics that she displayed in her forensic interview was probably one of the worst that I've ever heard." In response to a follow-up question, he stated, "Coming from her age, it was very graphic. And as far as the sexual . . . she explained what he did to her two or three times a week."

In the punishment phase, Merida's counsel called the same three witnesses that had testified before (Merida's younger brother, his sister-in-law, and a friend), and he also called four others, one of whom was Rogelio Villeda, who sometimes provided work for Merida to support his family. During Villeda's cross-examination, the following exchange occurred:

> Q. Did you know that [Merida] actually admitted to abusing his daughter to his Uncle Adan?

[2] In the State's case-in-chief, the investigator testified Merida told him this about five times during his interview.

[DEFENSE COUNSEL]: Objection, Your Honor, assumes facts not in evidence.

[PROSECUTOR]: It's a statement by party opponent, Your Honor. I can get into hearsay with that.

[DEFENSE COUNSEL]: But it didn't make it into the original trial portion.

THE COURT: Sustained.

Q. [PROSECUTOR]: Would you be surprised if he admitted it to somebody?

A. Well, right now I don't think so, because of the kind of person I know he is.

Overall, Villeda's testimony regarding Merida was positive. For example, Villeda recounted a situation in which Merida had assisted him after his truck broke down, said he believed Merida should receive a sentence that "is just," and agreed that Merida still has a contribution to make to society.

At the close of the sentencing proceedings, the jury returned a verdict assessing punishment at the maximum number of years possible for confinement, giving him life on Count I and twenty years' confinement each on Counts II and III. The trial court entered two judgments consistent with the jury's verdict, one for Count I, and the other for Counts II and III.

Following entry of the judgments, Merida's trial counsel sought and was granted leave to withdraw, and the court appointed Merida new appellate counsel. Merida timely appealed.

ANALYSIS

Merida raises four issues here and asks us to reverse the judgments. We address each of these issues in turn.

Sixth Amendment Confrontation Clause

In his first issue, Merida argues the State's questioning of Rogelio Villeda violated his Sixth Amendment right to confront witnesses because Adan Ortiz did not testify, leaving Merida unable to confront Adan about Merida's alleged admission he abused M.M. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him").

The State argues Merida failed to preserve error on this issue because the trial court did not make any adverse ruling on its first question to Villeda and because Merida's trial counsel failed to object to its second question to Villeda. The State cites *Simmons v. State*, Nos. 05-14-00240-CR & 05-14-00241-CR, 2014 WL 8734028, at *4 (Tex. App.—Dallas Dec. 18, 2014, no pet.) (mem. op., not designated for publication) and rule of appellate procedure 33.1 as support. *See* TEX. R. APP. P. 33.1.

We agree with the State. In *Golliday v. State*, 560 S.W.3d 664, 671 (Tex. Crim. App. 2018), the court concluded that a defendant waived error on his confrontation clause argument in connection with an offer of proof because he "did not clearly articulate a constitutional basis supporting the admission of the excluded evidence at trial." Here, as in *Golliday*, Merida failed to articulate a constitutional

basis supporting his objection to the State's questioning of Villeda, thereby waiving any error. *See* TEX. R. APP. P. 33.1(a); *Golliday*, 560 S.W.2d at 671; *Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005) (when appellant did not make confrontation clause argument to trial court, appellate court erred in reversing conviction on that basis); *Deener v. State*, 214 S.W.3d 522, 527 (Tex. App.—Dallas 2006, pet. ref'd) ("The right of confrontation is a forfeitable right—not a waivable-only right—and must be preserved by a timely and specific objection at trial.") (citing TEX. R. APP. P. 33.1(a)). We overrule Merida's first issue.

Due Process as to State's Leading Questions to Lay Witnesses

In his second issue, Merida argues the leading nature of the State's direct-examination questioning of three lay witnesses—investigator Robledo, Monica, and M.M.—was improper under Texas Rule of Evidence 611 and deprived him of due process. Rather than citing to us any particular questions about which he complains, Merida instead directs us to the entirety of the lay witnesses' testimony.[3]

The State argues Merida inadequately briefed this issue. Though Merida was not required to do so, he did not file any additional brief replying to the State's arguments, and he waived oral argument. Based on the record before us, we conclude his arguments lack merit.[4]

[3] Merida's brief provides an alleged number of times or percentages that the State's lay witnesses answered "yes" or the equivalent to the State's questions. As discussed in part "A" below, this tells us nothing about whether the questions were leading.

[4] We assume but do not decide Merida's briefing was sufficient.

A. General Principles Affecting our Review

To preserve error for appellate review, a party must make a timely, specific objection and obtain an adverse ruling. TEX. R. APP. P. 33.1(a)(1).

A leading question suggests the desired answer to the witness, instructs the witness how to answer it, or puts words into the witness's mouth to then be echoed back to the questioner. *See Rodriguez v. State*, No. 05-18-01448-CR, 2020 WL 881008, at *4 (Tex. App.—Dallas Feb. 24, 2020, no pet.) (mem. op., not designated for publication) (citing *Wheeler v. State*, 433 S.W.3d 650, 655 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *Newsome v. State*, 829 S.W.2d 260, 269 (Tex. App.—Dallas 1992, no pet.)). "The mere fact that a question may be answered by a simple 'yes' or 'no' does not render it an impermissibly leading question." *Rodriguez*, 2020 WL 881008, at *4 (citing *Newsome v. State*, 829 S.W.2d 260, 269 (Tex. App.—Dallas 1992, no pet.)). "It is only when the question suggests which answer is desired, 'yes' or 'no,' that it becomes a leading question." *Id*. Some leading questions are acceptable at the trial court's discretion. *See* TEX. R. EVID. 611(c) (court may allow leading questions on direct examination to develop the witness's testimony); *Wyatt v. State*, 23 S.W.3d 18, 28 (Tex. Crim. App. 2000).

We review a trial court's decision to allow leading questions for an abuse of discretion. *See Rodriguez*, 2020 WL 881008, at *4 (citing *Hernandez v. State*, 643 S.W.2d 397, 400 (Tex. Crim. App. 1982); *Wyatt*, 23 S.W.3d at 28). Usually, an abuse of discretion cannot be shown unless a defendant can demonstrate he was

unduly prejudiced by virtue of such questions. *Rodriguez*, 2020 WL 881008, at *5 (citing *Wyatt*, 23 S.W.3d at 28; *Hernandez*, 643 S.W.2d at 400).

In his brief, Merida does not discuss or identify for us any specific questions or sets of questions directed to any of the three lay witnesses to support his second issue. Instead, Merida generally characterizes the nature of the State's questioning to all three witnesses as "calculated," "deliberate," and "planned or contrived to accomplish a purpose," and he argues the sheer volume of leading questions caused the rendition of an improper judgment because the jury was not allowed to hear potential inconsistencies in their statements. We address each witness below.

B. Investigator Robledo

Merida asserts that investigator Robledo answered "'yes' or the equivalent" to more than sixty-eight percent of the State's questions.[5] Even if he were correct in that calculation, that information tells us nothing about whether or not the questions were leading. *Rodriguez*, 2020 WL 881008, at *4. Additionally, Merida made no timely objections, obtained no adverse rulings, and did not assert below that the State's questions to investigator Robledo were leading or that they violated due process. As a result, Merida failed to preserve error on this issue as it concerns investigator Robledo. *See* TEX. R. APP. P. 33.1(a).

[5] Merida asserts that investigator Robledo answered in this manner to 105 of approximately 154 questions posed to him by the State.

C. Monica

Merida asserts that Monica answered "'yes' or the equivalent" to more than sixty-seven percent of the State's questions to her.[6] As with his arguments regarding investigator Robledo and M.M., Merida argues the State's leading questions were improper and deprived him of due process. However, he failed to make any timely objections or obtain any adverse rulings below regarding due process, and as a result, he failed to preserve error on his due process argument in connection with Monica's questioning. *See* TEX. R. APP. P. 33.1(a).

As to his arguments regarding the State's leading questions to Monica, Merida timely objected to the State's questions only once on that basis:

> Q. When [M. M.] was seven, eight or nine, did she tell you about something that happened that -- about her dad waking her up in the middle of the night?
>
> A. Yes.
>
> Q. What did she tell you?
>
> A. She --
>
> [DEFENSE COUNSEL]: Objection as to leading, Your Honor.
>
> THE COURT: Overruled.
>
> Q. [PROSECUTOR] What did she tell you?
>
> A. The next day after she came back from school, she said that her dad had woken her up and told her to go and clean her legs. She had

[6] Merida asserts that Monica answered in this manner to ninety-eight of approximately 147 questions posed to her by the State.

> some white stuff on her legs. And she was confused about what it was and why her dad would wake her up to go and clean that off.

We conclude the trial court did not abuse its discretion in overruling Merida's leading objection because the question to which he objected was not leading. *See Rodriguez*, 2020 WL 881008, at *4 (leading question is one suggesting the desired answer to the witness, instructing witness how to answer, or putting words into the witness's mouth to be echoed back to the questioner).

Even if the trial court had erred, Merida has not shown he was unduly prejudiced, given that the forensic investigator provided similar but even more explicit testimony without any objection by Merida. *See Rodriguez*, 2020 WL 881008, at *5 (need showing of undue prejudice); *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (any error in admitting evidence is "cured where the same evidence comes in elsewhere without objection") (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003).

We overrule Merida's second issue on the State's questioning of Monica.

D. State's Questioning of M.M.

Finally, we turn to Merida's objection regarding the State's questioning of M.M., who was twelve years old at the time of her testimony. As with the two other lay witnesses, Merida objects that the State's questioning of M.M. was leading and

deprived him of due process. Merida asserts that M.M. answered "'yes' or the equivalent" to more than fifty-six percent of the State's questions to her.[7]

As with the other two lay witnesses, Merida did not make any timely objections or obtain any adverse rulings below regarding due process, and as a result, he failed to preserve error on that issue. *See* TEX. R. APP. P. 33.1(a).

Merida did obtain a running objection to the State's leading questions to M.M., but in his brief, he fails to cite to us any specific questions that he maintains were improper or that unduly prejudiced him. In contrast, the State discusses some of its own questions to M.M. in its own brief, and the State made substantive arguments regarding the propriety of those questions under the circumstances.

As Texas Rule of Evidence 611(c) provides, the trial court may allow leading questions on direct examination when necessary to develop a witness's testimony. TEX. R. EVID. 611(c). "With a child witness, however, a trial court is given some leeway, and the rule against leading questions is relaxed somewhat." *Keller v. State*, No. 05-18-00778-CR, 2020 WL 3118713 (Tex. App.—Dallas June 12, 2020, no pet. h.) (citing *Moon v. State*, 856 S.W.2d 276, 279 (Tex. App.—Fort Worth 1993, pet. ref'd)).

Though he was not obligated to, Merida did not reply to the State's substantive arguments or characterizations regarding M.M.'s reluctance or hesitancy in

[7] Merida asserts that M.M. answered in this manner to 160 of approximately 283 questions posed to her by the State.

testifying on direct examination. Based on our own review of M.M.'s testimony, we find the State's characterizations of such to be consistent with the record. To the extent the State's questions to M.M. were leading, we conclude that leading was necessary under the circumstances to develop M.M.'s testimony. Merida has failed to identify for us any impermissibly leading questions to M.M. and has failed to demonstrate he was unduly prejudiced by them. Thus, we conclude the trial court did not abuse its discretion in allowing the State to ask M.M. leading questions under the circumstances, and we overrule Merida's second issue.

Due Process as to Outcry Witnesses

In his third point of error, Merida argues the trial court denied him due process by failing to determine the reliability of M.M.'s outcry statements to Monica and the forensic interviewer and complains that he was "harmed because two outcry witnesses, Monica and the forensic interviewer, were allowed to recite in different detail what [M.M.] said happened."

The State argues Merida failed to preserve error because he failed to object below to the lack of a reliability finding and failed to obtain an adverse ruling on Monica and the forensic interviewer both testifying about a single event. The State also argues Merida's argument is inadequately briefed and, in any event, admission of such evidence was harmless, when M.M. also testified about the same details.

To preserve error for appellate review, a party must make a timely, specific objection and obtain an adverse ruling. TEX. R. APP. P. 33.1(a)(1). Further, to

preserve error regarding a court's failure to conduct an article 38.072 hearing,[8] the appellant must have actually requested the hearing. *Pietrzak v. State*, No. 05-01-01687-CR, 2002 WL 31957883, at *5 (Tex. App.—Dallas Jan. 23, 2003, no pet.) (not designated for publication) (citing *Cates v. State*, 72 S.W.3d 681, 698 (Tex. App.—Tyler 2001, no pet.)). Here, there is no indication in the record that Merida requested a 38.072 hearing, and, when given the chance to request one, Merida declined it:

> [PROSECUTOR]: Do we need to have a hearing or is my notice enough for you?
>
> [DEFENSE COUNSEL]: The notice should be – is sufficient.
>
> [PROSECUTOR]: Okay.
>
> THE COURT: Are we ready for the jury?
>
> [PROSECUTOR]: Yes.

Also, when the trial court discussed the outcry witnesses with counsel outside the presence of the jury, Merida's expressed concerns had nothing to do with reliability, only bolstering. In response to those concerns, the trial court indicated she would allow both Monica and the forensic interviewer to testify as to different details. Although Merida complains that the trial court should not have allowed them to do so, Merida made no additional objections when the State questioned Monica or the forensic interviewer about M.M.'s outcry statements.

[8] *See* TEX. CODE CRIM. PROC. art. 38.072, § 2(b)(2).

Under these circumstances, we conclude Merida failed to preserve error on this issue. *See* TEX. R. APP. P. 33.1(a)(1); *Pietrzak*, 2002 WL 31957883, at *5; *see also Rodriguez v. State*, 762 S.W.2d 727, 731 (Tex. App.—San Antonio 1988), *pet. dism'd, improvidently granted*, 815 S.W.2d 666, 667 (Tex. Crim. App. 1991) (en banc) (per curiam) (defendant waived error by failing to object to absence of hearing outside the presence of the jury on admissibility of outcry witness testimony).

Cumulative Effect of Alleged Constitutional Violations

In his fourth issue, Merida argues reversal is warranted because the cumulative effect of alleged constitutional violations led to an unfair trial resulting in his life sentence. In light of our conclusions on Merida's other issues, there is no need to perform such an analysis. TEX. R. APP. P. 47.1.

CONCLUSION

We affirm the trial court's judgments.

/Ken Molberg/
KEN MOLBERG
JUSTICE

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TEX. R. APP. P. 47.2

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IVAN ORTIZ MERIDA, Appellant	On Appeal from the 401st Judicial District Court, Collin County, Texas
No. 05-19-00306-CR V.	Trial Court Cause No. 401-81221-2018.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Molberg. Justices Bridges and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 18th day of June, 2020.