Affirm and Opinion Filed June 28, 2021

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00417-CR
No. 05-20-00418-CR

JQULAN DEVON WRIGHT, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 7
Dallas County, Texas
Trial Court Cause Nos. F18-45651-Y & F16-45586-Y

MEMORANDUM OPINION

Before Justices Schenck, Reichek, and Carlyle
Opinion by Justice Carlyle

A jury convicted appellant JQulan Devon Wright of aggravated sexual assault and injury to a child. The trial court assessed punishment at twenty-five years' imprisonment and six years' imprisonment, respectively, with the sentences to run concurrently.

Mr. Wright challenges the sufficiency of the evidence and contends the trial court erred by designating the forensic interviewers as outcry witnesses and allowing testimony regarding unreliable outcry statements. We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Background

The indictments against Mr. Wright alleged he (1) "intentionally and knowingly cause[d] the contact and penetration of the mouth of L.J., a child, by . . . the sexual organ of defendant, and . . . the child was younger than six years of age," and (2) "intentionally and knowingly cause[d] serious bodily injury to [L.J.] . . . by bending and twisting complainant's arm with defendant's hand."

The evidence at trial showed L.J. was born to Leeane Foster on March 28, 2010. At that time, Ms. Foster was dating Dawniele Johnson, Mr. Wright's sister. Ms. Foster and Ms. Johnson broke up several months later, but maintained an amicable relationship. In July 2015, Ms. Johnson agreed to care for five-year-old L.J. for several months because Ms. Foster was "without a place to stay." Mr. Wright, whom L.J. called "Kuncle," lived at Ms. Johnson's home at that time.

On August 1, 2015, Ms. Johnson took L.J. to the hospital because his right arm was swollen and hurting. X-rays revealed a "complete fracture" in his upper right arm and twelve other fractures in his arms, shoulders, ribs, and pelvic area, some of which appeared to be at least two to three weeks old. Though L.J. told the treating physician he thought his upper-right-arm injury "maybe" happened "when he fell off the bed," the physician determined his injury was not consistent with that type of fall.

Upon his release from the hospital, Child Protective Services (CPS) placed L.J. in foster care with Ms. Johnson's aunt. During the next several weeks, forensic

interviewers from the Dallas Children's Advocacy Center (DCAC) conducted two interviews of L.J. Though they specifically asked L.J. about physical and sexual abuse, he did not make any outcry of abuse during those interviews.

In May 2016, CPS moved L.J. to the home of Ms. Foster's cousin Latasha Turner. A few weeks later, L.J. told Ms. Turner "something had happened while he was living with Dawniele." Ms. Turner talked to Ms. Foster, then contacted police, who arranged for a third DCAC forensic interview on August 22, 2016. In that interview, L.J. described physical abuse by Mr. Wright.

Subsequently, L.J. made "further allegations" to a Dallas assistant district attorney, which resulted in a fourth DCAC forensic interview on March 14, 2018. During that interview, L.J. described sexual abuse by Mr. Wright.

The trial court held a pretrial "outcry hearing" to determine the appropriate outcry witness in each case. DCAC forensic interviewer Bibiana Gutierrez testified at the hearing that during the August 22, 2016 interview, L.J. told her that "Kuncle," whom L.J. described as being "Dawniele's brother," had "hurt him" at Dawniele's home when he was "either five or six years old." Ms. Gutierrez stated:

> He described that Kuncle had spanked him like the way his aunt spanks him and went on to say that he hurt his arms. When he described that, he said that Kuncle had bended his arm all the way back and twisted it. He said that it hurt and it burned.
>
> He also demonstrated to me with his body how he did that. He said that he wasn't able to see because he was looking the other way. He denied that Kuncle told him anything or why he did that to him. . . . He said that he didn't tell anyone that Kuncle did that to him until after he had talked to his mom and said that Kuncle had hurt him.

Ms. Gutierrez also testified:

> Q. As far as you know, you were the first person [L.J.] gave this level of detail to?
> A. Yes.
> Q. Because you don't know what he told his mom?
> A. Correct.
> Q. He had said that he had spoken to his mother and that's why he outcried?
> A. He said that he had talked to his mom and said that Kuncle had hurt him and then talked about how his mom was feeling about him being hurt.
> Q. And did you go into detail about what he told his mom?
> A. I asked what he told Mom, and he said that he told her what happened. And that was his words, that he "told her what happened."

DCAC forensic interviewer Michael Margolis testified at the outcry hearing that he conducted the March 14, 2018 interview in which L.J. made an outcry of sexual abuse. Mr. Margolis stated:

> I started by asking him about the places on his body and if someone ever made him do something to their private part, and he said, "Yes, he just did it for nothing." And it was Kuncle. I asked him, "Did it happen one time or more than one time?" He said, "More than one time. He won't let me sleep, and he makes me touch his middle part and put my mouth on it."
>
> So I asked him to talk about what had happened. He said that he—[L.J.] said that Kuncle woke him up, told him to go into the bathroom. He said that they were in the bathroom, and at first Kuncle peed, and then after that he pushed his head to his middle part, which I established later at the end of the interview that the middle part, I established, was his penis, the place that he uses to pee from. He said, "He pushed my head hard to where I was going to choke." . . . It happened while he was five or six years old.
> . . . .
> Q. As far as you know, were you the first adult over 18 to get all of these details from [L.J.]?
> A. As far as I know, yes.

On cross-examination, Mr. Margolis testified:

> Q. So it stands to reason that [L.J.] told the prosecutor about this sexual assault, sexual abuse before he came to you to talk to you about it?
> A. I know he had to have said something. I don't know the extent of the details he gave.
> Q. You know he said something. We don't know how much of it he said and what of it was different from what he told you, right?
> A. Yes, ma'am.

No other witnesses testified at the outcry hearing. The State tendered to the trial court a copy of notes made by the assistant district attorney whose interview with L.J. precipitated the fourth forensic interview. The notes stated, "[L.J.] started crying and said Kuncle would take him into the bathroom and make him eat his middle part when Kuncle was alone with him. He said it hurt. He said the middle part is the private part."

The State argued at the hearing that Ms. Gutierrez and Mr. Margolis were the proper outcry witnesses in these cases because they were the first persons over eighteen who "got sufficient detail from the child" regarding the offenses. The State contended that what L.J. told the assistant district attorney "is not sufficient for an outcry" because "[a] private part can be several different things."

The defense argued that, with regard to the injury to a child offense, "we just heard that [L.J.] told his mom first what had happened, and then he was taken down to the forensic interview and she interviewed him. He told her what had happened to him again. So the first person in time is going to be Leeane Foster." As to the

aggravated sexual assault offense, the defense contended the assistant district attorney was the proper outcry witness because "Mr. Margolis yesterday just told us the same thing that [the assistant district attorney] wrote in her work-product note about eating his middle part and making him touch his middle part."

The trial court stated, "Based on the witnesses that I have heard from . . . the Court will rule that Michael Margolis is the outcry witness for the aggravated sexual assault case and Bibiana Gutierrez is designated as the outcry witness for the injury case." At trial, both outcry witnesses testified regarding L.J.'s above-described statements to them.

L.J. testified at trial that sometime before he started kindergarten, Mr. Wright "bent my arm back," which "hurted really bad," and he had to wear a cast for a long time. L.J. also stated on direct examination:

> Q. Do you know what I mean when I say "private parts"?
> A. Yes.
> Q. What are the private parts on a boy? What is that called?
> A. I don't know the word.
> Q. Let me ask you this. What does a boy use the private part for?
> A. Number one.
> . . . .
> Q. . . . Okay. Let me ask you this. Did Kuncle ever ask you to do anything to his private part that he uses to go number one?
> A. Yes.
> Q. Can you tell me about that? When was the first time that happened?
> A. I don't remember.
> Q. You don't remember. So tell me what part of your body touched Kuncle's body?
> A. Never.
> Q. Say that one more time?
> A. Never.

Q. Never? Okay. You just told me that Kuncle made you do something to his part of the body that goes number one; is that right?
A. Yes.
Q. So what did he make you do?
A. I don't remember.
Q. You don't remember. It's not really fun to talk about; is it?
A. (Witness shaking head from side to side.)
Q. Make sure you answer out loud. Okay? It's not really fun to talk about, right?
A. No.
Q. Are you nervous, [L.J.]?
A. Kind of.
Q. Kind of. Let me ask you this. Is it that you don't really feel like talking about it or you don't remember?
A. I don't really like it.
. . . .
Q. . . . I know it's hard. Tell me about the first time that Kuncle made you touch his body part where he uses to go No. 1.
A. I don't remember.
Q. But you remember that it happened?
A. Yes.
. . . .
Q. Did you ever touch part of Kuncle's body?
A. Yes.
Q. What did you touch Kuncle's body with?
A. His private part.
Q. What did you touch his private part with?
A. I don't remember.

On redirect examination, L.J. stated:

Q. . . . [B]efore today, have you and I talked before?
A. Yes.
. . . .
Q. . . . Okay. So when we were talking, do you remember telling me about Kuncle putting—you putting your mouth on Kuncle's private part?
A. Yeah.
Q. You do remember? And so I want to talk to you a little bit about that because I know it's not fun to talk about, but I just want to ask you a couple of questions about that. Okay?

A. Okay.
Q. So where were you when Kuncle made you put your mouth on his private part?
A. Dawniele's house.
. . . .
Q. So the last question I want to ask you, [L.J.], the things that we're talking about with Kuncle, and you—him forcing you to put your mouth on his private part, did that happen one time or more than one time?
A. More than one.

Following the jury's verdict and the punishment assessment described above, Mr. Wright filed a motion for new trial, which was denied by operation of law.

Analysis

Determination of outcry witnesses

The Texas Code of Criminal Procedure creates a hearsay exception for a child's first outcry to an adult in proceedings in the prosecution of certain offenses committed against a child younger than fourteen. *See* TEX. CODE CRIM. PROC. art. 38.072; *Bays v. State*, 396 S.W.3d 580, 585 (Tex. Crim. App. 2013). For the outcry statement to be admissible, the witness must be the first person over the age of eighteen to whom the child made a statement about the offense. TEX. CODE CRIM. PROC. art. 38.072, § 2(a). The child's statement to the witness must describe the offense "in some discernable manner" and be more than "a general allusion that something in the area of child abuse was going on." *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). In general, the proper outcry witness is the first adult to

whom the child abuse victim describes "how, when, and where" the abuse occurred. *Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd).

We review a trial court's outcry-witness designation for abuse of discretion. *Garcia*, 792 S.W.2d at 92; *Rodgers v. State*, 442 S.W.3d 547, 552 (Tex. App.—Dallas 2014, pet. ref'd). The trial court has broad discretion when deciding whether a witness qualifies as an outcry witness. *Sims v. State*, 12 S.W.3d 499, 500 (Tex. App.—Dallas 1999, pet. ref'd). We will uphold the trial court's ruling if it is reasonably supported by the record, if it is within the zone of reasonable disagreement. *See Garcia*, 792 S.W.2d at 92; *Tear v. State*, 74 S.W.3d 555, 558 (Tex. App.—Dallas 2002, pet. ref'd).

In his first and second issues, Mr. Wright asserts the trial court erred by designating Ms. Gutierrez and Mr. Margolis as the outcry witnesses in these cases. He contends the first persons over eighteen to whom L.J. outcried were his mother and the assistant district attorney.

Though Ms. Gutierrez testified L.J. told his mother, Ms. Foster, "what happened" and that Mr. Wright had "hurt him," the record "is void as to any specific details of the statements" made to Ms. Foster and "as to any description of the alleged offense" made to her. *See Garcia*, 792 S.W.2d at 91. On this record, we conclude the trial court did not abuse its discretion by determining L.J. first described the injury offense in some discernable manner when he told Ms. Gutierrez that Mr. Wright "had bended his arm all the way back and twisted it" and "it hurt

and it burned." *See id*. (concluding no abuse of discretion where trial court determined child's testimony that she told her teacher "what happened" did not amount to more than general allusion regarding abuse); *Hines v. State*, 551 S.W.3d 771, 781 (Tex. App.—Fort Worth 2017, no pet.) (concluding no abuse of discretion where trial court designated forensic interviewer as outcry witness even though child testified she told nurse "what happened" before speaking with forensic interviewer); *see also Le v. State*, No. 05-16-01324-CR, 2018 WL 2001609, at *6 (Tex. App.—Dallas Apr. 30, 2018, no pet.) (mem. op., not designated for publication) (concluding that in absence of evidence clarifying what was said to alleged first witness, trial court did not abuse discretion by ruling based on evidence before it that second adult child spoke with was proper outcry witness).

As to the aggravated sexual assault offense, the assistant district attorney's notes showed L.J. told her Kuncle would "make him eat his middle part," "it hurt," and "the middle part is the private part." During the fourth forensic interview, L.J. told Mr. Margolis (1) Mr. Wright's "middle part" was his penis, "the place that he uses to pee from"; (2) Mr. Wright "makes me touch his middle part and put my mouth on it"; and (3) Mr. Wright "pushed [L.J.'s] head hard" to his middle part, to where L.J. was "going to choke."

The court of criminal appeals has stated that article 38.072 "demands more than a general allusion of sexual abuse," as "[t]he parlance of children is often not exact, and generalities can be misleading." *Garcia*, 792 S.W.2d at 91. Here, the trial

court could have reasonably determined that L.J.'s statements to the assistant district attorney about Mr. Wright's "middle part" were nothing more than a general allusion of sexual abuse. *See Sims*, 12 S.W.3d at 500 (concluding trial court could have reasonably determined that complainant's statement to her mother that appellant "had touched her private parts" was nothing more than general allusion that something in area of sexual abuse was occurring); *Mejia v. State*, No. 05-19-01491-CR & 05-19-01494-CR, 2021 WL 1136762, at *4 (Tex. App.—Dallas Mar. 25, 2021, no pet.) (mem. op., not designated for publication) (concluding trial court did not abuse discretion by determining child's statement that defendant made her touch and rub lotion on his "boy parts" was nothing more than general allusion of sexual abuse). On this record, it would not be outside the zone of reasonable disagreement for the trial court to find Mr. Margolis was the first adult to whom L.J. described the alleged aggravated sexual assault offense in a discernable manner. *See Garcia*, 792 S.W.2d at 91. Thus, the trial court did not abuse its discretion by designating Mr. Margolis as the outcry witness for that offense. *See id*.

Complaint regarding unreliable outcry statements

In his third issue, Mr. Wright contends the trial court "erred by allowing Michael Margolis to testify about the complaining witness's outcry statements which were unreliable based on time, content and circumstances." According to Mr. Wright, "It is highly suspicious that after living with his mother's cousin for a year and a half and after denying in three separate interviews that nothing sexual

happened between him and the Appellant, L.J. then makes an outcry of sexual abuse 2½ years later."

To preserve a complaint for appellate review, the record must show that the party presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a)(1); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Obella v. State*, 532 S.W.3d 405, 407 (Tex. Crim. App. 2017); *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010) (op. on reh'g).

The record does not show Mr. Wright asserted an objection at the outcry hearing or during trial regarding the unreliability of L.J.'s statements to Mr. Margolis. Thus, Mr. Wright's third issue presents nothing for this Court's review. *See* TEX. R. APP. P. 33.1(a)(1); *Creech v. State*, No. 05-09-00762-CR & 05-09-00763-CR, 2011 WL 1663040, at *3–5 (Tex. App.—Dallas May 4, 2011, pet. ref'd) (error not preserved where objection at trial related to designating proper outcry witness and complaint on appeal pertained to reliability of complainant's outcry statement).

Sufficiency of evidence to support aggravated sexual assault conviction

In reviewing evidentiary sufficiency, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v.*

Virginia, 443 U.S. 307, 319 (1979). This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id*.; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015).

A person commits aggravated sexual assault if the person intentionally or knowingly causes the penetration of the mouth of a child under fourteen by the sexual organ of the actor. TEX. PENAL CODE § 22.021(a)(1)(B)(ii), (a)(2)(B). If the child is younger than six at the time that offense is committed, the minimum term of imprisonment is twenty-five years. *Id*. § 22.021(f)(1). "Penetration of the mouth . . . occurs whenever an object parts the lips and passes into or through them." *Prestiano v. State*, 581 S.W.3d 935, 942 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd).

In his fourth issue, Mr. Wright asserts the evidence is insufficient to support a conviction for aggravated sexual assault of a child under six. He contends L.J. "never testified that Appellant penetrated his mouth with Appellant's sexual organ." He also asserts that though an outcry statement alone can support a conviction, "the outcry statement that Mr. Margolis testified to is not reliable and, therefore, should not have been admitted."

We concluded above that Mr. Wright did not preserve error regarding exclusion of L.J.'s statements to Mr. Margolis based on unreliability. Outcry testimony admitted pursuant to article 38.072 "is considered substantive evidence, admissible for the truth of the matter asserted in the testimony." *Rodriguez v. State*,

819 S.W.2d 871, 873 (Tex. Crim. App. 1991); *accord Bays*, 396 S.W.3d at 581 n.1. Mr. Margolis testified L.J. stated that when he "was five or six years old," Mr. Wright forced him to put his mouth on Mr. Wright's penis and pushed L.J.'s head hard, to where L.J. "was going to choke." From that testimony, a rational jury could draw a reasonable inference that Mr. Wright caused his penis to penetrate L.J.'s mouth. On this record, we conclude the evidence is sufficient to support Mr. Wright's aggravated sexual assault conviction. *See Murray*, 457 S.W.3d at 448–49 ("When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination.").

We affirm the trial court's judgments.

/Cory L. Carlyle//
CORY L. CARLYLE
JUSTICE

200417f.u05
200418f.u05
Do Not Publish
TEX. R. APP. P. 47.2(b)

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JQULAN DEVON WRIGHT, Appellant	On Appeal from the Criminal District Court No. 7, Dallas County, Texas Trial Court Cause No. F18-45651-Y.
No. 05-20-00417-CR V.	Opinion delivered by Justice Carlyle. Justices Schenck and Reichek participating.
THE STATE OF TEXAS, Appellee	

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

Judgment entered this 28th day of June, 2021.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JQULAN DEVON WRIGHT, Appellant	On Appeal from the Criminal District Court No. 7, Dallas County, Texas Trial Court Cause No. F16-45586-Y.
No. 05-20-00418-CR V.	Opinion delivered by Justice Carlyle. Justices Schenck and Reichek participating.
THE STATE OF TEXAS, Appellee	

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

Judgment entered this 28th day of June, 2021.