the Jasuta / Schulman report

Volume 32, Number 16 ~ Monday, April 29th, 2024 (Report No. 1,511)

TIBA's Case of the Week

Fourteenth Court of Appeals

Case Name: ***Joel Contreras Olvera v. The State of Texas***

- **OFFENSE**: Aggravated Sexual Assault of a Child
- **COUNTY**: Harris
- **C/A CASE No**. 14-23-00209-CR
- **DATE OF OPINION**: April 23, 2024 **OPINION**: Chief Justice Tracy Christopher
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 262nd D/C; Hon. Reagan Clark
- **LAWYERS**: Daucie Schindler (Defense); Victoriano Flores (State)

(**Background Facts**): When she was seventeen years old, the complainant disclosed to her mother that, many years earlier, she had been inappropriately touched by Appellant, who is her uncle. The complainant made this disclosure in general terms, without specifically identifying where or how the touching had occurred. The mother contacted authorities, and the complainant later gave a more detailed statement to a detective. The complainant told the detective that Appellant had abused her multiple times over the years. The first incident of abuse occurred when she was eight or nine years old, when he tried to put his penis in her anus. On subsequent occasions, Appellant put his penis in her mouth, he forced her to touch his penis with her hand, and he fondled her vagina over her clothes. Despite these several instances of sexual abuse, Appellant was indicted on a single charge of unlawfully causing the complainant's anus to contact his sexual organ. Appellant pleaded not guilty to that charge, and his case proceeded to a trial by jury.

[§§ **294.01 Hearsay & Confrontation / Exceptions / Outcry Testimony (Proper Outcry Witness)**]: The complainant was twenty-one years old at the time of trial, and she was the first witness to take the stand. She testified that the charged incident began when Appellant chased her around a dining table, picked her up, and carried her to a guest room, where he pinned her face down on the bed and removed her skirt and underwear. The complainant said that Appellant then tried to penetrate her anus with his penis, but that he let her go when she requested to use the restroom. She also said that the attempted penetration was very painful, and that it caused a tear, which in turn caused her to bleed for months because the tear would reopen whenever she did use the restroom. The complainant explained that she did not timely report the abuse because she was

in shock that it had even occurred. She gave similar statements regarding the other instances of abuse, explaining that she was too embarrassed to say anything, or she feared that she would not be believed, or she was afraid that a disclosure would cause a rift in the family. The complainant said that she finally came forward because she came to believe that Appellant might abuse even younger children. The detective testified after the complainant left the stand. Over a defense objection, the trial court had previously found in a hearing conducted outside the presence of the jury that the detective qualified as an outcry witness. The detective accordingly testified about the complainant's outcry statements from her initial interview. Those statements were consistent with the complainant's trial testimony, though they were not nearly as detailed. At the end of the outcry hearing, the defense argued that the purpose of having an outcry witness was to protect a child from the trauma of having to testify about a sensitive matter in open court. The defense then argued that the detective should not be designated as an outcry witness because his testimony would not spare a child from testifying, since the complainant was already an adult. The defense further argued that the detective could not qualify as an outcry witness because, at the time of her outcry, the complainant was more than seventeen years of age -- and in the defense's view, the complainant was not a child for purposes of the outcry statute. The trial court overruled these arguments and allowed the detective to testify as an outcry witness

Holding: Appellant argues that the trial court abused its discretion by designating the detective as an outcry witness because, according to him, the outcry statute permits such a designation only when, at the time of the outcry, the child declarant is under the age of seventeen, which was not the situation here. The State counters that the outcry statute has no such qualification. To settle this disagreement, we must engage in a matter of statutory interpretation, which is a purely legal question. See ***Druery v. State***, 412 S.W.3d 523 (Tex.Cr.App. 2013)(see ☙, Vol. 21, No. 44; 11/04/2013). *** Nothing in this text expressly requires the declarant to have been under the age of seventeen at the time of the outcry, as Appellant has argued. The text merely states that the declarant must have been "the child ... against whom the charged offense ... was allegedly committed." *** Because there was affirmative evidence that the complainant here was seventeen years old at the time of her outcry, she qualified as a child declarant under the statute, and the trial court did not abuse its discretion by designating the detective as the outcry witness.

Sidebars

(**Stan Schneider**) I am not sure if CJ Christopher is correct. Her opinion has PDR written all over it. Article 38.072(1) refers to offense committed against a child. Section 2 refers to statements made by that child. It could be argued that statements by the alleged victim no matter how old the child may be, are considered outcry statements and thereby admissible even if the statements are made after the victim turns 18.

(**John G. Jasuta**) Couple this with the absolute destruction of the excited utterance rule and away we go!

(**David A. Schulman**) Since my two "evidence" gurus, Judge Cathy Cochran, and Jerry ("J.W.") Howeth have left us and I cannot call to get their opinions, I'll have to admit that

I may have fully understood "outcry" law in the very early years of my practice . . . but then everything changed. It seems that every time there is a complicated outcry question, the "if it benefits the State" rule gets invoked, either directly or indirectly.

[**323 Court's Charge / Lesser Included Offenses**]: During the charge conference, the defense requested an instruction on a lesser-included offense. The trial court noted that "indecency by exposure" was already included, but asked what evidence demonstrated contact. Specifically, the trial court stated, "*there's not any evidence in the record with regard to her genitals being touched in connection with the indicted charge, and it's got to be a lesser included offense of what's in the indictment. Now, the extraneous act, where she did say that her vagina was touched, he's not charged with that. He's only charged with what's in the indictment, and I think indecency by exposure is in evidence. So I think that's the proper lesser included offense*." The trial court indicated that the request for the instruction was denied, "*unless you can convince me otherwise*." On appeal, Appellant argues that the trial court reversibly erred by denying his requested instruction on the lesser-included offense of indecency by contact. The State responds that this issue is not preserved.

Holding: We agree with the State. *** To preserve a complaint that the trial court erred by refusing to submit an instruction on a lesser-included offense, the defendant must point to the specific evidence that negates the greater offense but supports the lesser offense, unless such specific evidence is manifest. See ***Williams v. State***, 662 S.W.3d 452 (Tex.Cr.App. 2021)(see , Vol. 29, No. 20; 05/31/2021). *** The evidence in support of the requested lesser-included offense was not manifest here, as Appellant testified that he never assaulted the complainant or touched her in an inappropriate manner. And when the trial court prompted the defense for any evidence that might support the requested instruction, the defense supplied none. (Similarly on appeal, no such evidence has been cited in Appellant's brief.) By not alerting the trial court to the specific evidence in support of his requested instruction, Appellant failed to preserve any error in the trial court's refusal to include that instruction in the jury charge.