No. 14-24-00443-CR

In The Court of Appeals
For the Fourteenth District of Texas

Carlos Lobo
Appellant

v.

The State of Texas
Appellee

On Appeal from Cause Number 1545285
From the 487th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT NOT REQUESTED

BreAnna Schwartz
State Bar No: 24076954
P.O. Box 31015
Houston, TX 77231
713.487.9795
BreAnna@SchwartzLegalTX.com
Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Carlos Lobo TDCJ ID: 02510320 Ferguson Unit 12120 Savage Drive Midway, TX 75852-3654
TRIAL PROSECUTORS:	Jennifer McCoy Sarah Dimas Assistant District Attorneys Harris County, Texas
Defense Counsel at Trial:	Jacquelyn Carpenter State Bar No: 24040642 Michael Moore State Bar No. 24032754 Ms. Lynda Jetton State Bar No. 24114838 1310 Prairie Street, 4th Floor Houston, Texas 77002 Tel: 713.274.6700
PRESIDING JUDGES:	Hon. Lori DeAngelo
APPELLANT'S COUNSEL:	BreAnna Schwartz State Bar No: 24076954 P.O. Box 31015 Houston, TX 77231 713.487.9795

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes the brief sufficiently addresses the merits of the case and does not request oral argument.

STATEMENT OF THE CASE

Carlos Lobo was indicted for Continuous Sexual Abuse of a Child on May 18, 2020. (C.R. 75). Jury trial commenced on May 30th, 2024. (1 R.R. 1). On June 6, 2024, the jury found Mr. Lobo guilty as charged in the indictment. (7 R.R. 126; C.R. 447). The same jury assessed punishment at 30 years confinement in the Texas Department of Criminal Justice – Institutional Division. (C.R. 447). Notice of Appeal was timely filed. (C.R. 454).

ISSUE PRESENTED

THE TRIAL COURT ERRED WHEN IT FAILED TO FOLLOW TEX. CODE CRIM. PROC. ART. 37.072, AND DESIGNATED THE INCORRECT OUTCRY WITNESS.

STATEMENT OF FACTS

Carlos Lobo rented a three-bedroom, two-bath home that he shared with his Sister Karen Canales, his niece A.C., Karen's sister, unrelated to Mr. Lobo, Keny Canales, and Keny's son Joseph. (3 R.R. 34; 4 R.R. 5,10). Karen and Keny Canales both

worked long hours, leaving the house for work around 4:15 am and 5:30 am, respectively. (4 R.R. 11-13). A.C. would get herself ready for school and assist Joseph. A.C. felt she and her mother were not close because they rarely saw each other. Mr. Lobo would spend time with the children, taking them to events and movies.

In 2016, A.C. was 13 years old and attending Holub Middle School. (3 R.R. 31). On Monday, February 8, 2016, A.C. asked to speak privately with her English as a Second Language teacher, Linda Martinez. (3 R.R. 78). A.C. told Ms. Martinez that on Saturday, February 6, 2016, Mr. Lobo had entered her room and touched her inappropriately. (3 R.R. 64-66; 82-83). A.C. said Mr. Lobo had gotten into bed with her, exposed his penis and attempted to make her put her hand on his penis, then put his fingers under her clothing and into her vagina. (4 R.R. 94-96). A.C. said she attempted to get away, and Mr. Lobo choked her and told her not to tell anyone. (3 R.R. 112; 4 R.R. 98-102). Later that same day, A.C. spoke with Erika Gomez at the Children's Assessment Center ("CAC"), and also disclosed that around November 27, 2015

Mr. Lobo had entered her bedroom, gotten into bed with her, and touched her vagina and breasts under her clothing. (3 R.R. 114, 118; 4 R.R. 87, 91).

SUMMARY OF THE ARGUMENT

1. The trial court erred when it failed to follow TEX. CODE CRIM. PROC. ART. 37.072, and designated the incorrect outcry witness. Linda Martinez received a significant number of discernable details about the event on February 6th and was the correct outcry witness. The trial court abused its discretion by designating Erika Gomez as the outcry witness for February 6th because Ms. Gomez was the second person given discernable details about the offense.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT FAILED TO FOLLOW TEX. CODE CRIM. PROC. ART. 37.072, AND DESIGNATED THE INCORRECT OUTCRY WITNESS.

A. Statement of Facts

During trial, a hearing was conducted to designate outcry witnesses for two events, one on February 6, and the other on November 27. The State presented two potential outcry witnesses: ESL teacher Linda Martinez, and CAC interviewer Erika Gomez. (3 R.R. 58, 67). Chronologically, A.C. spoke with both women on the same date: first with Ms. Martinez, then with Ms. Gomez. (3 R.R. 32, 78). Specifically, A.C. told Ms. Martinez that Mr. Lobo had done this more than once, and on February 6th he had touched her breasts, her body generally, put his fingers in her vagina, choked her, and had provided her with marijuana on occasion. (3 R.R. 60, 64). Ms. Martinez also wrote a statement for CPS that contained a significant number of details. (3 R.R. 64-66).

Later in the day, A.C. specifically told Ms. Gomez that on February 6th Mr. Lobo touched her breasts, put his fingers in her

vagina, exposed his penis, choked her, and had provided her with marijuana on occasion, and that on November 27 Mr. Lobo had touched her vagina and breasts under her clothing. (3 R.R. 70).

The trial court designated Ms. Gomez as the outcry witness for both instances over the objection of defense counsel. (3 R.R. 73-74).

B. Standard of Review

A trial court's determination whether an outcry statement is admissible under article 38.072 for an abuse of discretion. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990) (en banc). A trial court only abuses its discretion in admitting outcry testimony if its decision falls outside the zone of reasonable disagreement. *Gonzales v. State*, 477 S.W.3d 475, 479 (Tex. App.—Fort Worth 2015, pet. ref'd), citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (en banc) (op. on reh'g).

C. *Requirements for Outcry Testimony*.

Outcry testimony is hearsay that is admissible as a rule "prescribed under statutory authority." *Sanchez v. State*, 354 S.W.3d 484 (Tex. Crim. App. 2011), citing TEX. R. EVID. 802. Article 38.072 of the Texas Code of Criminal Procedure governs the admissibility of outcry statements. TEX. CODE CRIM. PROC. ANN. ART. 38.072, § 1. This statute applies to "statements that describe the alleged offense" and that (1) were made by the child against whom the offense was allegedly committed and (2) were made to the first person, eighteen years of age or older, other than the defendant, to whom the child made a statement about the offense. See id. art. 38.072 § 2(a)(1), (2). The child must have described the alleged offense in some discernable manner and must have given 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).

A second outcry witness only becomes admissible if the complainant alleges more than one instance of sexual assault. Multiple outcry witnesses may testify about separate events of

abuse, but there may be only one outcry witness per event. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011).

D. An Outcry Witness is the First Person Over 18 to Receive Discernable Information about Prohibited Conduct

The Court of Criminal Appeals has construed article 38.072 to apply to the first adult to whom the complainant makes a statement that "in some discernible manner describes the alleged offense." *Garcia v. State*, 792 S.W.2d at 92. This statement must be "more than words which give a general allusion that something in the area of child abuse was going on." *Id*. at 92.

The statements do not have to be hyper-specific and do not have to provide every detail. "The details of 'how, when, and where' while sufficient to be a proper outcry, are not necessary to constitute a proper outcry statement". *Brown v. State*, 189 S.W.3d 382 (Tex. App.— Texarkana 2006, pet ref'd) (The proper outcry witness was told that the defendant "had been making [the complainant] have oral sex with him by putting his penis in her mouth". This statement was missing the when and where,

but nonetheless tracked the statute and was sufficient) *See also Klein v. State*, 191 S.W.3d 766, 780 (Tex. App.—Fort Worth 2006), rev'd on other grounds, 273 S.W.3d 297 (Tex. Crim. App. 2008) (distinguishing *Garcia* and concluding that statements from complainant to teacher, such as "sometimes he messes with me" and that her dad "tickled her and sometimes touched her between her legs with his fingers, and sometimes he used his tongue" were sufficient to identify in a discernible manner the type of sexual abuse that was going on at home).

E. There is No Discretion to Choose a Preferable Outcry Witness

The "first" designation separates 38.072 exceptions from other hearsay exceptions because the predicate for admission includes a temporal element. In order to designate a particular witness, the "first", any witnesses the child spoke to about the allegations before the desired "first" must be definitively eliminated. If a chronologically earlier witness was given discernable detail, the selection process cannot continue to the next person in line.

If the "first" witness designation requires the proponent to show that the child told the desired "first" witness about the allegations in a discernable manner, then it logically follows that the proponent must demonstrate that any chronologically earlier witnesses were definitively not told about the allegations in a discernable manner. If the trial court, as the fact-finder, can say that the earlier witnesses were definitively told about the abuse in a discernable manner, then the trial court cannot properly designate a later witness as the "first".

"The proper outcry witness is not to be determined by comparing the statements the child gave to different individuals and then deciding which person received the most detailed statement about the offense." *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd). There is no provision in article 38.072 that allows for a subsequent witness to testify just because the complainant provides more detail in a different recounting of an event.

F. The State Proved Ms. Martinez was the Correct Outcry Witness for the February 6th Incident

The State charged Mr. Lobo with committing continuous sexual abuse of a child, by committing aggravated sexual assault of a child on February 6, and indecency with a child on November 27. (C.R. 75.). The offense only needs be described in a "discernable manner," and A.C.'s recounting of the incident to Ms. Martinez went well beyond "discernable manner" and into very specific detail. (3 R.R. 60, 64). In fact, A.C. provided so much detail that Ms. Martinez could not even recall all of the details she was provided and had included in her statement to CPS. (3 R.R. 64-66).

Looking only at the details Ms. Martinez provided in her testimony during the hearing at trial, she was given sufficient information to be deemed the "first" outcry witness. The details A.C. told Ms. Martinez statutorily cover all the required elements for aggravated sexual assault of a child. Ms. Martinez was informed of the "who, where, and how" of the offense. *See* TEX. PEN. CODE § 22.02.

There were even more details in the statement Ms. Martinez provided to CPS, such as A.C. providing her with the daily household schedule to explain why she was alone with Mr. Lobo as well as details about her attempts to resist. (3 R.R. 64-66; C.R. 203-204). Ms. Martinez did not need to recall these auxiliary details to be deemed the "first" outcry witness, but she certainly could have had her memory refreshed with her prior statement should that have been necessary.

G. The Trial Court Erred by Selecting Erika Gomez as the Outcry Witness for February 6.

The Trial Court may not pick a preferred outcry witness. The statute mandates that the outcry witness must be the first eligible person who was told in discernable detail about the offense. In this instance, that person was Ms. Martinez. Ms. Gomez may have received additional details about the incident and refreshed her memory with her notes prior to the hearing to aid her testimony, but this is not the standard for outcry designation.

Similarly, there is no ability to promote a secondary outcry to primary just because they were told about more than one incident.

Erika Gomez was the proper outcry for the November 27th incident because Ms. Martinez did not have details beyond the February 6th incident being a subsequent assault. However, this only results in the State needing to present two outcry witnesses to the jury; they may not be consolidated.

The trial court provided no reasoning for its erroneous decision to designate Ms. Gomez as the outcry for both events. (3 R.R. 74).

This error affected Mr. Lobo's substantial rights. The Court of Criminal Appeals has explained that "the focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict." *Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011). "A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error. 'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the

harmlessness of the error.' '[I]n cases of grave doubt as to harmlessness the petitioner must win.'" *Id.* This Court must review everything in the record in reaching this determination. *Id.*

The State's insistence on using Ms. Gomez's testimony over Ms. Martinez signals that they know this testimony is important and carries a significant weight to the jury. Ms. Gonez was trained to testify about child abuse allegations. Ms. Gomez was the first witness to describe the events to the jury, which described the events in detail. Ms. Gomez describes the incident to the jury, that A.C. screamed and cried and tried to get away, that Mr. Lobo had held her down and put his fingers inside her vagina, touched her breasts, choked her and told her not to tell anyone. (3 R.R. 111-115). The State then uses Ms. Gomez's ability to testify as outcry as a way to deliver credibility assessments to the jury. Ms. Gomez tells the jury that she does not believe A.C. was coached or being anything but truthful, which is far more impactful testimony when she can also recount the specific details of A.C.'s statement to her. In its closing argument, the State discusses Ms. Gomez's

testimony before mentioning any testimony by A.C. and focuses on Ms. Gomez saying "nothing in that interview suggested coaching or a taint of her [disclosure]." (7 R.R. 102).

This Court should have grave doubt as to whether the error was harmless. "[I]n cases of grave doubt as to harmlessness the petitioner must win." *Barshaw*, 342 S.W.3d at 94. This Court should find reversible error and remand this case for a new trial.

CONCLUSION AND PRAYER

For the reasons stated above, Mr. Lobo prays that this Honorable Court sustain his points of error, reverse the judgement of conviction entered below, and either issue an acquittal, or remand the cause for a new trial.

Respectfully submitted,

BreAnna Schwartz
State Bar No: 24076954
P.O. Box 31015
Houston, TX 77231
713.487.9795
BreAnna@SchwartzLegalTX.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

BreAnna Schwartz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 2,758 words printed in a proportionally spaced typeface.

BreAnna Schwartz

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Case Contacts

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Jessica Caird	24000608	caird_jessica@dao.hctx.net	3/27/2025 9:51:36 AM	NOT SENT