

COURT OF APPEALS OF TEXAS, SECOND APPELLATE DISTRICT AT FORT WORTH

Joshua Cholico Galindo v. the State of Texas

No. 02-22-00151-CR (Tex. App.—Fort Worth Mar. 23, 2023) (mem. op.) · No. 02-22-00151-CR · Decided March 23, 2023

SUMMARY

The Texas Second Court of Appeals affirmed the judgment adjudicating Joshua Cholico Galindo guilty and revoking his probation. The court held that the trial court had no sua sponte duty under Texas Code of Criminal Procedure article 38.30(a) to appoint an interpreter for Galindo’s defense-witness mother, and that Galindo forfeited his hearsay argument by failing to present an admissibility exception to the trial court.

CASE DETAILS

COURT	Court of Appeals of Texas, Second Appellate District at Fort Worth
WRITING FOR THE COURT	Mike Wallach; Sudderth, C.J.; Kerr, J.; Wallach, J.
JURISDICTION	Texas
DECIDED	March 23, 2023
DOCKET	02-22-00151-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a judgment adjudicating guilt and revoking deferred-adjudication probation after the trial court found the alleged probation violations true and sentenced Galindo to ten years' imprisonment.
STANDARD OF REVIEW	The denial or exclusion of evidence is reviewed for abuse of discretion. A ruling is not reversed unless it lies outside the zone within which reasonable persons might disagree. Preservation of error requires a timely and specific objection or motion and a ruling by the trial court.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Joshua Cholico Galindo v. The State of Texas

TOPICS

- criminal procedure
- evidence
- preservation of error
- appellate procedure
- right to counsel

PRACTICE AREAS

criminal law

criminal procedure

evidence

appellate practice

QUESTIONS PRESENTED

1. Whether Texas Code of Criminal Procedure article 38.30(a) required the trial court to appoint an interpreter for Galindo's defense-witness mother sua sponte when Galindo did not request one.
2. Whether Galindo preserved and established error when the trial court sustained hearsay objections to his testimony about conversations with his attorney.

HOLDINGS

1. Article 38.30(a) did not impose an independent sua sponte duty on the trial court to appoint an interpreter for Galindo's mother, a defense witness, absent a timely request. Because Galindo did not request an interpreter, the trial court did not err.
2. Galindo forfeited his appellate challenge to the exclusion of his testimony because, after the State objected on hearsay grounds, he did not respond or argue that a hearsay exception applied in the trial court. The trial court therefore did not commit reversible error in sustaining the objections.

KEY QUOTATIONS

“Because Galindo did not request an interpreter and the trial court had no duty to appoint one sua sponte under the circumstances presented in this case, there was no error.” (at 7)

“Thus, he has forfeited the error.” (at 9)

FACTUAL BACKGROUND

Galindo was placed on deferred adjudication and probation after pleading guilty to sexual assault of a child. At the adjudication hearing, the trial court found numerous probation violations true, including failure to register as a sex offender, and proceeded to adjudicate guilt and assess punishment. During punishment testimony, Galindo's mother, whose first language was not English, answered many questions despite some difficulty, and Galindo attempted to testify about conversations with his attorney; the trial court sustained the State's hearsay objections, and Galindo did not argue for a hearsay exception or otherwise respond.

PROCEDURAL HISTORY

Galindo pleaded guilty to sexual assault of a child under seventeen in 2019 under a plea bargain and received deferred adjudication and five years' probation. In 2022, the State moved to adjudicate guilt based on alleged probation violations. After a hearing, the trial court found the violations true, adjudicated Galindo guilty, revoked his probation, and imposed a ten-year prison sentence. The court of appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- *Abdygapparova v. State*, 243 S.W.3d 191, 201 (Tex. App.—San Antonio 2007, pet. ref'd)
- *Ochoa v. State*, No. 07-18-00045-CR, 2019 WL 1870108, at *2 (Tex. App.—Amarillo Apr. 25, 2019, no pet.) (mem. op., not designated for publication)
- *Garcia v. State*, 149 S.W.3d 135, 144-45 (Tex. Crim. App. 2004)
- *Balderas v. State*, 517 S.W.3d 756, 777 (Tex. Crim. App. 2016)
- *Miller v. State*, 177 S.W.3d 1, 5 (Tex. App.—Houston [1st Dist.] 2004, no pet.)
- *Ellis v. State*, 99 S.W.3d 783, 789 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)
- *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003)
- *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990) (op. on reh'g)
- *Taylor v. State*, 268 S.W.3d 571, 578-79 (Tex. Crim. App. 2008)
- *White v. State*, 549 S.W.3d 146, 152 (Tex. Crim. App. 2018)
- *Le v. Shamblin*, No. 10-21-00105-CV, 2021 WL 4462519, at *3 (Tex. App.—Waco Sept. 29, 2021, no pet.) (mem. op.)
- *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002)

OPINION

PER CURIAM.

In the Court of Appeals Second Appellate District of Texas at Fort Worth
_____ No. 02-22-00151-CR _____
JOSHUA CHOLICO GALINDO, Appellant V. THE STATE OF TEXAS On Appeal from Criminal
District Court No. 1 Tarrant County, Texas Trial Court No. 1548169D Before Sudderth, C.J.; Kerr
and Wallach, JJ. Memorandum Opinion by Justice Wallach MEMORANDUM OPINION
Appellant Joshua Cholico Galindo appeals from a judgment adjudicating guilt and revoking his
probation.

In two points, Galindo asserts that the trial court abused its discretion by (1) not appointing an interpreter for Galindo's mother, who was called as a defense witness during the sentencing phase of the revocation hearing, and (2) sustaining the State's hearsay objections to Galindo's attempts to testify about certain conversations he had with his attorney.

We will affirm. I. Background In September 2018, Galindo was indicted for sexual assault of a child under 17 years of age. In November 2019, under the terms of a plea bargain, Galindo pled guilty and, in exchange, was granted deferred adjudication and placed on five years' probation.¹ In March 2022, the State filed a motion to proceed with adjudication of guilt, alleging that Galindo had violated numerous terms of his probation.

Galindo pled "not true" to the violations, and the trial court conducted a hearing. The State called three witnesses and offered four exhibits to prove the alleged probation violations. Galindo did not

put on any evidence during his case-in-chief.² 1 In addition, Galindo was ordered to avoid contacting the victim, to register as a sex offender, and to pay a \$500 fine and \$639 in court costs.

Galindo initially called his mother as a witness during his case-in-chief. 2 However, once it became evident that she was only being called for mitigation 2 After both sides rested and closed and presented final arguments on the question of revocation, the trial court found all of the State's alleged probation violations true and adjudicated Galindo guilty.

The trial court then gave each side the opportunity to present evidence concerning punishment. While the State did not put on any additional evidence during the punishment phase, Galindo called two witnesses: his mother and himself. English is not Galindo's mother's first language, and, as exemplified by the following exchanges, she had difficulty answering some questions.

Q: And how good is your English? A: No. Q: (Unintelligible conversation.) A: Yeah, I understand maybe a quarter, you know. Q: How old was [Galindo] when his father left the house? A: I born myself -- I mean, he born myself in the -- in this hospital, and I never -- I never -- he was with me all the time.

However, she was able to answer many of the questions asked by defense counsel, including whether Galindo had finished school, whether he had been employed, whether he had been in trouble in the past, whether he lived with her, and whether he takes drugs or drinks alcohol: purposes, the trial court instructed her to step down and informed Galindo's counsel that he could call her later as a punishment phase witness.

3 Q: Did he finish school? A: He -- yes, he does school. Q: And has he been a working person, having a job? A: Yes, all the time. Q: And has he gotten in trouble other than all of this before? A: No. (Unintelligible conversation.) Q: Does he live with you? A: Yes, sir. Q: And how long has he lived with you? A: All -- all the time when he's worked. Q: Is he taking drugs?

A: No. Q: Is he drinking alcohol? A: No -- Q: Is he spending time -- A: -- not in the house. In addition, while she initially struggled to understand defense counsel's question concerning how long she thought Galindo should be sentenced to prison, she ultimately understood the question and gave a clear answer of one or two years. 4 After his mother finished testifying, Galindo took the stand himself.

Galindo explained that he had failed to register as a sex offender—as required under the terms of his probation—because he had been busy and had suffered anxiety. He also testified that his father was abusive and left home when Galindo was four years old. He admitted to evading arrest and explained that he knew that he had an outstanding warrant and did not want to be arrested.

He testified that he has a four-year-old daughter whom he supports. He also expressed that he should not be sentenced to more than three or four years in prison and that he would prefer a

rehabilitation program. At various points during his testimony, when asked to explain his actions, Galindo attempted to describe conversations he had had with his attorney.

Each time, the State objected on hearsay grounds. Galindo made no response to any of these objections, and the trial court sustained them and excluded the testimony. After both sides rested and closed and presented final arguments on punishment, the trial court sentenced Galindo to ten years in prison. This appeal followed. II. Discussion On appeal, Galindo raises two points.

First, he argues that the trial court erred by not appointing an interpreter for Galindo's mother. Second, he argues that the trial court abused its discretion by sustaining the State's hearsay objections to Galindo's 5 attempts to testify about conversations he had with his attorney. Galindo's arguments lack merit. A. Point One: The Lack of an Interpreter In his first point, Galindo argues that the trial court erred by not appointing an interpreter for Galindo's mother.

Specifically, Galindo asserts that the trial court's failure to appoint an interpreter violated Article 38.30(a) of the Texas Code of Criminal Procedure,³ which provides, in relevant part, as follows: When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for the person charged or the witness.

Tex. Code Crim. Proc. Ann. art. 38.30(a). According to Galindo, Article 38.30(a) imposed an obligation on the trial court to appoint an interpreter for Galindo's mother—even though Galindo never requested one—because it was apparent from her testimony that she had difficulty communicating in English.

However, we reject Galindo's contention that Article 38.30(a) placed any independent duty on the trial court to appoint an interpreter for Galindo's mother—a defense witness—in the absence of a request from Galindo. See *Abdygapparova v. State*, 243 S.W.3d 191, 201 (Tex. App.—San Antonio 2007, pet. ref'd) (recognizing that to 3 Though Galindo's initial brief implies that the trial court's failure to appoint an interpreter also violated the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Texas Constitution, he clarified in his reply brief that his complaint is based solely on Article 38.30(a).

6 be entitled to an interpreter under Article 38.30(a), "(1) the defendant must show an inability to understand English; and (2) the defendant must make a timely request for an interpreter." (emphasis added)); see also *Ochoa v. State*, No. 07-18-00045-CR, 2019 WL 1870108, at *2 (Tex. App.—Amarillo April 25, 2019, no pet.) (mem. op., not designated for publication) (same).

To support the existence of such a duty, Galindo relies upon a line of Texas cases requiring a trial judge to appoint an interpreter when necessary to ensure that the trial proceedings are translated

into a language that the defendant can understand or to enable the defendant to meaningfully cross-examine a material witness. See *Garcia v. State*, 149 S.W.3d 135, 144–45 (Tex.

Crim. App. 2004) (holding a defendant’s Sixth Amendment right to an interpreter must be implemented unless expressly waived if the trial judge is aware that the defendant has difficulty understanding the English language); see also *Balderas v. State*, 517 S.W.3d 756, 777 (Tex. Crim. App. 2016) (“The trial court abuses its discretion when it fails to appoint an interpreter for a material witness whose English skills are so poor that the defendant cannot conduct a meaningful cross-examination.”); *Miller v. State*, 177 S.W.3d 1, 5 (Tex.

App.—Houston [1st Dist.] 2004, no pet.) (extending *Garcia*’s reasoning to require an interpreter when necessary to allow the defendant to confront a material witness). Under *Garcia* and its progeny, the trial court’s duty is rooted in the Sixth Amendment’s “Confrontation Clause.” U.S. Const. amend VI; see *Garcia*, 149 S.W.3d at 145; see also *Balderas*, 517 S.W.3d at 777; *Miller*, 177 S.W.3d at 5.

However, as *Galindo* concedes, because his mother was a 7 defense witness, the Confrontation Clause is not implicated here. See *Ellis v. State*, 99 S.W.3d 783, 789 (Tex. App.—Houston [1st Dist.] 2003, pet. ref’d). Thus, the line of cases upon which *Galindo* relies is distinguishable.

Because *Galindo* did not request an interpreter and the trial court had no duty to appoint one sua sponte under the circumstances presented in this case, there was no error. We overrule *Galindo*’s first point. B. Point Two: Hearsay Objections In his second point, *Galindo* asserts that the trial court erred by sustaining the State’s hearsay objections to *Galindo*’s attempts to testify about conversations he had with his attorney.

4 This argument is without merit. We review a trial court’s decision to admit or exclude evidence under an abuse of discretion standard. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003); 4 *Galindo* also appears to rely upon the following additional exchange during cross-examination for which there was no objection or court ruling to support his second point: Q: I mean, you were just too busy, right?

Got a lot of stuff going on, right? A: No. I didn’t report also because I had – – I had asked my lawyer on that advice, and he said – – Q: I don’t know what your lawyer said. Okay. A: Okay. Sounds good. However, because this exchange involves no objection by *Galindo*, it provides no basis for his appellate complaint. See Tex. R. App. P. 33.1. 8 *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex.

Crim. App. 1990) (op. on reh’g). We will not reverse a trial court’s decision to admit or exclude evidence unless the record shows a clear abuse of discretion. *Zuliani*, 97 S.W.3d at 595. An abuse of discretion occurs only when the trial court’s decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id.* Hearsay is not admissible except as

otherwise provided by statute, the rules of evidence, or “other rules prescribed under statutory authority.” Tex. R. Evid.

802. “Once the opponent of hearsay evidence makes the proper objection, it becomes the burden of the proponent of the evidence to establish that an exception applies that would make the evidence admissible in spite of its hearsay character.” *Taylor v. State*, 268 S.W.3d 571, 578–79 (Tex. Crim. App. 2008).

The proponent of the evidence generally must prove the applicability of a hearsay exception by a preponderance of the evidence. See *White v. State*, 549 S.W.3d 146, 152 (Tex. Crim. App. 2018). On appeal, Galindo argues that his testimony concerning his conversations with his attorney should have been allowed because it falls within the state-of-mind exception to the hearsay rule.

See Tex. R. Evid. 803(3). However, Galindo never made this argument—or, indeed, any argument as to why his hearsay testimony should be admitted—to the trial court. Thus, he has forfeited the error. See Tex. R. App. P. 33.1(a); *Le v. Shamblin*, No. 10-21-00105-CV, 2021 WL 4462519, at *3 (Tex. App.—Waco Sept. 29, 2021, no pet.) (mem. op.) (holding appellant had waived argument on appeal that hearsay exceptions applied because she had made no such argument in the 9 trial court); see also *Wilson v. State*, 71 S.W.3d 346, 349 (Tex.

Crim. App. 2002) (admonishing that for error to be preserved, the appellant’s “point of error on appeal must comport with the objection made at trial”). We overrule Galindo’s second point. III. Conclusion Having overruled both of Galindo’s points, we affirm the trial court’s judgment. /s/ Mike Wallach Mike Wallach Justice Do Not Publish Tex. R. App. P. 47.2(b) Delivered: March 23, 2023 10