Affirmed and Opinion filed March 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01035-CR
NO. 14-00-01036-CR

ROBERT VALENTINE, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause Nos. 826,896 and 826,897

O P I N I O N

After a jury trial, appellant, Robert Valentine Jr., was convicted of the felony offenses of indecency with a child and aggravated sexual assault of a child. The jury assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for eight years in the indecency case and fifteen in the aggravated assault case. He raises before us a single point of error contending the trial court erred in refusing to suppress the videotape of an interview he gave at the offices of Children's Protective Services (CPS). We affirm.

Background

Appellant's daughter, T.V., told her school counselor that her father had sexually abused her. The Pasadena Police Department and CPS were immediately notified and began an investigation. CPS caseworker Malita Wilson and Detective T.K. Brinson called appellant and asked him to come to the Children's Assessment Center for an interview. Appellant was not advised of the nature of the allegations against him.

Upon arrival, appellant was seated in a room equipped with sound and video recording capabilities. Detective Brinson gave appellant his *Miranda* warnings and explicitly told him that he was free to leave at any time. After ten minutes, Brinson made an allegation of sexual assault. Appellant immediately asked for a lawyer and requested that the interview end. Brinson left the room and went to a location from which he could see and hear the continuing conversation between Wilson and appellant. Brinson removed the recording tape. The State and appellant disagree about what happened next. Appellant testified that Wilson began conversing with him and said he would be free to go home, but that he would be arrested that evening unless he answered fully and agreed to be interviewed. However, Wilson testified:

> I remember Mr. Valentine asking me what would happen next, and I explained to him again the allegations that his daughter was making against him. And that he was not at that point responding to the allegation because he wanted an attorney and he asked me again what would happen next. And I told Mr. Valentine that we could reschedule an interview so that we could speak with him when he had an attorney and he told me that he wanted to resolve it then. That he wanted to know what was going to happen that day. And again I told him that I would recommend there not be any contact between he and his daughter [T.V.] based on the allegation and he said that he wanted to do what he needed to do at that point. I asked him if he wanted to continue the interview and to continue to answer the questions about the allegations and at that point he said that he did.

Wilson and Brinson testified that Brinson returned to the interview room in order to provide appellant with his business card, whereupon he learned that appellant had indicated

his desire to continue the interview. Brinson reinserted the tape and the three began anew. Within a few minutes, appellant stated: "I think I better have a lawyer at this point." Brinson responded, in essence: "Do you want to talk to us anyhow?" Without addressing Brinson's question, appellant apparently continued talking and no further mention of this reference to a lawyer was made.

Appellant's filed a motion to suppress the videotape based on the violations of *Miranda* and the Sixth Amendment right to Counsel. The trial court denied the request and made the following findings of fact:

> Detective Brinson had probable cause to arrest appellant.
>
> Detective Brinson did not subjectively intend to arrest appellant.
>
> Appellant was never in custody during pertinent time periods.
>
> Appellant was the focus of a sexual assault investigation.
>
> Appellant voluntarily came to the interview and did not know he was under investigation.
>
> Despite appellant's trial testimony to the contrary, appellant had no reasonable basis to believe that he was in custody at any time.
>
> Appellant invoked his right to counsel.
>
> Formal charges against appellant had not been filed, nor was it certain, at the time of the interview, that they would be filed.
>
> No adversarial judicial proceedings had begun.

Based on these findings, the trial court ruled:

> Appellant was not in custody for the purposes of *Miranda* and Article 38.22 of the Texas Code of Criminal Procedure.
>
> Appellant's right to counsel had not yet attached at the time appellant attempted to invoke it.

At trial, the jury viewed the entire videotape, including the early part during which appellant invoked his right to counsel.

Issue

Appellant contends the trial court erred in refusing to suppress the tape. Appellant submits that the taping violated his "*Miranda* right to counsel." *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); TEX CODE CRIM. PROC. ANN. art. 38.22 (Vernon Supp. 2002). Appellant's brief discusses the law of Miranda and the Fifth Amendment, but nowhere explicitly references the Sixth. To the extent appellant's brief raises Sixth Amendment issues, we deem them waived. *See* TEX R. APP. P. 38.1(h). Finally, appellant appears to argue, in what amounts to a distinct issue, that portions of the tape were inadmissible because they violated his Fifth Amendment right to silence. We address this claim in a separate heading below.

Miranda Right to Counsel

Appellant contends the interview at the Child Assessment Center was a custodial interrogation. We disagree. The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *See Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The "reasonable person" standard presupposes an innocent person. *See Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991).

This facts of this case are almost identical to those of *Cagle v. State*, 23 S.W.3d 590 (Tex. App.—Fort Worth 2000, no pet.) (accused not in custody during interview with CPS caseworker). In *Cagle*, as here, appellant drove himself to the interview, appellant was not placed under arrest, was explicitly told that he could leave the CPS office at any time, and did in fact freely leave after the meeting. Under these circumstances, an innocent, reasonable person would not feel restrained to the degree of a formal arrest. *Id.* (citing

Wicker v. State, 740 S.W.2d 779, 784 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 938, 108 S. Ct. 1117 (1988)) (defendant interviewed by caseworker prior to any arrest not in custody). *Compare Garza v. State*, 18 S.W.3d 813 (Tex. App.—Fort Worth 2000, pet. ref'd) (CPS caseworker violates Fifth Amendment rights when called by District Attorney to interview suspect in his jail cell).

Because appellant was not in custody, a *Miranda* warning was unnecessary. *Jones v. State*, 795 S.W.2d 171, 174-75 (Tex. Crim. App. 1990) (Miranda safeguards inapplicable if suspect not in custody). For the same reason, Detective Brinson had no Fifth Amendment duty to abstain from re-initiating contact with appellant after appellant requested a lawyer.

We overrule appellant's first issue.

The Videotape as Improper Evidence of Guilt

In passing, near the end of his brief, appellant claims that playing the tape violated appellant's Fifth Amendment rights because, when offered by the State, appellant's taped request for counsel constituted improper evidence of guilt. *See generally Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991). Appellant failed to specifically object to playing his taped request for counsel on this particular ground.[1] *See Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1999) (trial objection stating one theory may not be used to support another on appeal). No evidence in the record leads us to believe that the trial objections differed in any material respect from those ruled on by the court in the hearing on appellant's pre-trial motion to suppress. Instead, when appellant's trial counsel requested a running objection to appellant's taped testimony, the trial court declined to give a ruling, insisting that counsel lodge any objections not already raised in the suppression hearing. At

[1] On direct examination, Detective Brinson testified in detail, without objection, about reading *Miranda* to appellant and appellant's request for an attorney. Thus, even if we held that appellant had preserved this error, we would hold such error harmless because it was admitted elsewhere without objection. *See Leady v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) (admission of improper evidence harmless if same facts are proved by other proper testimony).

no time after receiving this instruction did counsel lodge an objection that could reasonably be interpreted as a objection to the taped request for counsel as evidence of guilt as found in *Hardie*.

We overrule appellant's second issue.

Accordingly, the judgement below is affirmed.

/s/ Joe L. Draughn
Senior Justice

Judgment rendered and Opinion filed March 14, 2002.
Panel consists of Justices Yates, Edelman, and Draughn.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Joe L. Draughn sitting by assignment.