AFFIRMED; Opinion Filed June 29, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00135-CR

TEDDYBEAR MONROE KERNS, Appellant
V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F-1776646-K

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

A jury convicted Teddybear Monroe Kerns of indecency with a child by contact, and the trial court assessed punishment at twenty years' confinement. In two issues, appellant asserts the trial court abused its discretion in admitting evidence of appellant's sexual abuse of two other children. We affirm the trial court's judgment. Because all issues are settled in the law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Appellant was charged by indictment with the offense of aggravated sexual assault of a child for allegedly penetrating the sexual organ of three-year-old K.L. with his finger and several objects. TEX. PENAL CODE ANN. § 22.021(a)(2)(B). Appellant pleaded not guilty and elected to have a jury determine his guilt or innocence.

The evidence presented to the jury established the following. In 2017, K.L. and her one-year-old brother, A.J., lived with their grandmother, T.F., in an apartment in Dallas. Due to her work schedule, T.F. arranged for Bridgette Kerns, her former neighbor and appellant's mother, to babysit the children at her nearby house. Bridgette babysat the children from July to September 2017. At that time, appellant was 40 years old and lived with his mother. Appellant claims to be intellectually disabled. On appeal, he does not assert his disability affected the judgment in this case. T.F. interacted with appellant many times while appellant and his mother lived at the apartment complex. Appellant often played with the resident children who congregated outside. T.F. found appellant to be "a little odd, a little different."

One evening in September 2017, a couple of weeks after Bridgette stopped babysitting the children, K.L. and A.J. were sitting on the couch next to T.F. when K.L. told A.J. to "stop pulling my dress up like [appellant] does." Concerned, T.F. asked K.L. what she meant, and she told T.F. that appellant sometimes pulled up her

dress. T.F. asked K.L if appellant had touched her, and K.L. said he had. T.F. asked where he touched her, and K.L. pointed to her vagina. T.F. then asked K.L. whether appellant had touched her on the inside of her panties or on the outside, and K.L. told her on the outside. K.L. also told T.F. that Bridgette told appellant "to stop because that was nasty." T.F. contacted the police.

K.L., who was five years old at the time of trial, testified by closed-circuit television. K.L. provided no information about appellant's sexual abuse. She denied playing with someone named "Teddy" and refused to look at a picture of appellant or identify him.

Kimberly Skidmore, a forensic interviewer with the Dallas Children's Advocacy Center, conducted a forensic interview of K.L. During the interview, K.L. identified an anatomical drawing of a female sex organ. Skidmore asked K.L. if anyone had ever touched her inappropriately, and K.L. indicated, among other things not relevant here, that appellant had touched her inappropriately. Skidmore asked K.L. to elaborate, and K.L. told her that when she was at appellant's house, appellant pulled her dress up and touched her vagina. K.L. recalled she was wearing a church dress and pretty purple and green panties when he touched her. K.L. also told Skidmore that appellant took her dress and panties off and started touching her with his hands, and when she told him to stop, he said "no." K.L. pointed to the anatomical drawing and said appellant stuck a pencil in her and it hurt. K.L. later

corrected herself and told Skidmore the object was a crayon, not a pencil. Skidmore did not believe K.L. had been coached.

Dallas Police Detective Anthony Whitaker investigated the case. He observed K.L.'s forensic interview and interviewed T.F. He also conducted a recorded interview of appellant, which was admitted into evidence and published to the jury. In the interview, appellant described how he used a Dallas Cowboys pen to tickle K.L. all over and demonstrated how he would run the pen up and down her legs and arms, but "never took her panties down" and "never went that far;" it was always on top of her clothes. He admitted touching K.L.'s private part maybe once while using the pen, but it was on top of her panties. He admitted taking K.L.'s panties off once, but explained he only did so to change her because she had soiled herself, and he touched her butt and inside her vagina with his finger when he wiped her because it was sliding.

Appellant told Detective Whitaker about one time when he was fixing K.L.'s dress, and his mother told him "don't do that because it's wrong," He described and demonstrated the incident, gesturing that K.L. was standing between his legs facing him while he was trying to hug her, and K.L. moved his hands down to her butt. He stated, "My mom caught me, caught it, and said, 'Stop that, you know it's wrong.'" Appellant admitted that he had an erection during this incident.

Appellant repeatedly blamed K.L. for telling him to touch her "all over," including several prohibited locations. He repeatedly stated that K.L. told him a

number of times to take her panties down, but he never did. He stated K.L. told him to put the pen inside her, but he only touched her panties with the pen, and he did not insert it. He denied ever putting a crayon, pencil or pen in K.L.'s vagina. Appellant admitted that he sometimes gets an erection when he tickles girls, and he got them on occasion when he tickled K.L. Appellant repeatedly denied ever touching K.L. under her clothes.

Over counsel's objection, Detective Whitaker was allowed to testify about his investigation into allegations against appellant regarding two other children, D.H. and B.J., who lived in the same apartment complex with appellant and K.L. Detective Whitaker testified that appellant had engaged in playing "cops and robbers" with the victims, which entailed him putting the girls against a fence and searching them. Detective Whitaker conducted a search of appellant's house, during which he took pictures of the Dallas Cowboys pen and the house and seized appellant's cell phone, a utility knife, a PlayStation console gaming system, and a video of the Elizabeth Smart story, which is a story about a child abduction. Detective Whitaker testified that the utility knife he seized was mentioned by both D.H. and B.J. in their interviews and identified photos of the knife that were admitted into evidence.

Prior to allowing D.H. and B.J. to testify, the trial court conducted a hearing, outside the presence of the jury, to determine if the evidence of extraneous sexual offenses appellant allegedly committed against D.H. and B.J. would support a jury

finding that appellant committed the offenses beyond a reasonable doubt. Appellant stated that he had no objections under Article 38.37 of the code of criminal procedure, governing evidence of extraneous offenses in cases involving sexual offenses against children. A chief investigator with the Dallas Children's Advocacy Center testified about the allegations of sexual abuse committed by appellant against D.H., when she was eight years old, and B.J., when she was nine years old. Appellant objected to the evidence on the basis of Rule 403 of the Texas Rules of Evidence, arguing the evidence of his actions against D.H. and B.J. were more prejudicial than probative.[1] The trial court overruled appellant's objection and allowed D.H. and B.J. to testify.

Through their testimony, D.H. and B.J. established the following. At one time, appellant lived in the same apartment complex with them. They played with him and other people at the apartments. There was a time when D.H. and B.J. were riding bikes and appellant told them that if they did him a favor he would give them five dollars. Appellant led them to a gate that surrounded the apartment complex and ordered them to place their hands on the gate. Appellant pulled out a knife and told them to do whatever he said and not to tell anyone. Appellant held B.J.'s arms to the gate. D.H. was scared and wanted to run home. D.H. told appellant to get off

[1] Appellant also objected to the evidence on the bases of due process, the Fifth and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 13 and 19 of the Texas Constitution, as well as section 1.04 of the code of criminal procedure. Appellant does not raise these objections on appeal, and therefore, they will not be discussed here.

of B.J. Appellant touched both of the girls over their clothes on their private parts. The incident ended when appellant's mother came around the building, and appellant quickly put the knife away. On another occasion, the girls were playing tag with appellant, and D.H. went to appellant's apartment to pet his dogs. Appellant told B.J. to follow him, and when she said "no" and started backing up, appellant pulled out a knife and told B.J. to put her hands on the apartment complex gate. Appellant started touching B.J. under her underwear with his hand outside her private area. B.J. stayed at the gate because she was scared of the knife and felt like appellant was going to kill her if she tried to get away. Appellant stopped touching B.J. when D.H. came out of the apartment, and B.J. ran home.

The trial court included a limiting instruction in the jury charge on the extraneous offense evidence and instructed the jury on both the charged offense and the lesser-included offense of indecency with a child by contact. *See* TEX. PENAL CODE ANN. § 21.11. The jury found appellant guilty of the lesser-included offense of indecency with a child by contact. Appellant elected to have the trial court assess punishment. It assessed punishment at twenty years' confinement. This appeal followed.

DISCUSSION

Appellant contends the trial court abused its discretion in admitting evidence of his sexual offenses against D.H. and B.J. because, while relevant, it was more prejudicial than probative and should have been excluded under Rule 403.

We review a trial court's decision to admit or exclude evidence of extraneous offenses under an abuse of discretion standard. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). As long as the trial court's decision was within the zone of reasonable disagreement and is correct under any theory of law applicable to the case, it must be upheld. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). This is so because trial courts are usually in the best position to make the determination as to whether certain evidence should be admitted or excluded. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007).

In a prosecution for an offense committed under chapter 21 of the penal code, such as the one here, section 2(b) of Article 38.37 of the code of criminal procedure allows for the admission of evidence that the defendant committed sex crimes against children other than the victim of the alleged offense "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b). Before extraneous-offense evidence may be introduced, the trial court must determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt and must conduct a hearing outside the presence of the jury for that purpose. *Id.* art. 38.37, § 2-a.

When evidence of a defendant's extraneous acts is relevant under article 38.37, section 2(b), the trial court is still required to conduct a Rule 403 balancing test upon proper objection or request. *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref'd). Rule 403 authorizes a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403.

A Rule 403 analysis requires consideration of the following: (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

Rule 403 does not require that the balancing test be performed on the record. *Hitt*, 53 S.W.3d at 706. In overruling a Rule 403 objection, the trial court is assumed to have performed a Rule 403 balancing test and determined the evidence was admissible. *Id.* In reviewing the trial court's balancing determination under Rule 403, an appellate court is to "reverse the trial court's judgment rarely and only after

a clear abuse of discretion." *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999).

We note that relevant evidence is presumed to be more probative than prejudicial. *Williams v. State*, 958 S.W.2d 186, 196 (Tex. Crim. App. 1997). The probative value of extraneous offense evidence in sexual abuse of children cases is presumptively very high, and the Rule 403 balancing test normally will not favor the exclusion of evidence of the defendant's prior sexual assaults of children. *See Belcher v. State*, 474 S.W.3d 840, 848 (Tex. App.—Tyler 2015, no pet.); *see also* David J. Karp, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHICAGO-KENT L. REV.15, 19, 31 (1994).

Appellant contends that compelling evidence of his guilt was presented through his own recorded interview, T.F.'s testimony, and Detective Whitaker's testimony, so the probative force and the State's need for the extraneous-offense evidence was minimal.

Especially in cases like this, where the complainant and only eyewitness is very young, there is no physical evidence to support the statements the complainant made to the forensic interviewer and others, the complainant's credibility is a focal issue in the case, and the case being one of "he said, she said," the evidence that the accused sexually abused other children has considerable probative force quite apart from its tendency to show character or propensity to offend. *See Alvarez v. State*,

491 S.W.3d 362, 371 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *Belcher*, 474 S.W.3d at 848. Moreover, D.H.'s and B.J.'s testimony tended to contradict appellant's contention that he did not intend to illegally touch K.L. *See Taylor v. State*, 920 S.W.2d 319, 322 (Tex. Crim. App. 1996).

The evidence that appellant sexually abused D.H. and B.J. in addition to K.L. was clearly prejudicial to his case, but the question in a Rule 403 analysis is whether the evidence was *unfairly* prejudicial. *See Bradshaw v. State*, 466 S.W.3d 875, 883 (Tex. App.—Texarkana 2015, pet. ref'd) (noting that Rule 403 does not allow exclusion of otherwise relevant evidence when evidence is merely prejudicial). The focus of Rule 403 is to assure that the danger of *unfair* prejudice is not substantially outweighed by the probative value of proffered evidence. Given Article 38.37 was designed, at least in part, to allow the State to introduce evidence of the accused's prior or subsequent bad acts to show the accused's propensity to commit the charged offense, the calculus of what is unfair and what is probative has materially changed.

Appellant argues the evidence that he used a knife during his assaults of B.J. and D.H. made the offenses "more heinous" than his crime against K.L. and would have caused the jury to be unable to properly limit its consideration of the evidence. The jury's verdict, however, demonstrates the weakness of appellant's argument: the jury did not convict appellant of the greater offense of aggravated sexual assault of a child and instead convicted him of the lesser-included offense of indecency with a child by contact. Appellant admits that the recorded interview with Detective

Whitaker "is compelling evidence in and of itself of the crime for which [he] was convicted." Appellant has failed to establish that the presence of a knife in the extraneous offenses caused the jury to be unable to properly limit its use of the evidence to its proper consideration. Thus, we conclude the probative force of the evidence and the need to establish appellant committed the charged offense and to counter the attacks on K.L's credibility weighed in favor of the admission of D.H.'s and B.J.'s testimony.

As to whether D.H.'s and B.J.'s testimony concerning other acts suggested an improper basis for decision or created a risk of confusion of issues, in that the jury might convict for the prior conduct, rather than the charged conduct, those risks were addressed by the trial court's instruction that the jury not consider D.H.'s and B.J.'s testimony unless it believed appellant committed the acts they alleged beyond a reasonable doubt and then to consider the testimony only for the enumerated purposes. We presume that the jury follows the trial court's instructions in the manner presented. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). An appellant may refute this presumption, but he must rebut it by pointing to evidence that the jury failed to follow the instruction. *Id.* Appellant has not identified any such evidence in this case. Therefore, the trial court could have reasonably concluded that the jury would not give D.H.'s and B.J.'s testimony undue weight and that their testimony would not confuse the issues.

Moreover, D.H.'s and B.J.'s testimony was not repetitive and did not consume an inordinate amount of time. The guilt-innocence phase of trial lasted only two days, the case was relatively simple and straightforward and did not necessitate lengthy testimony, D.H.'s testimony is contained in 23 pages of the trial transcript and B.J.'s testimony is contained in 16 pages of the trial transcript, which totals more than 300 pages, and the State did not place undue emphasis on the extraneous offense evidence. *See Le v. State*, 479 S.W.3d 462, 471 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Having considered the relevant factors, we conclude that the trial court reasonably could have determined that the prejudicial effect of D.H.'s and B.J.'s testimony did not substantially outweigh its probative value. We therefore conclude that the trial court did not abuse its discretion in overruling appellant's Rule 403 objection to D.H.'s and B.J.'s testimony. We overrule appellant's first and second issues.

CONCLUSION

We affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TEDDYBEAR MONROE KERNS, Appellant	On Appeal from the Criminal District Court No. 4, Dallas County, Texas Trial Court Cause No. F-1776646-K.
No. 05-19-00135-CR V.	Opinion delivered by Justice Schenck. Justices Molberg and Nowell 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 29th day of June, 2020.