Affirm and Opinion Filed October 13, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00978-CR

WALTER RAY WILSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F19-00417-J

MEMORANDUM OPINION

Before Justices Molberg, Goldstein, and Smith
Opinion by Justice Molberg

Walter Wilson, appellant, was indicted for indecency with a child by sexual contact. A jury found him guilty of that offense. Appellant then pleaded true to two enhancement paragraphs and the trial court sentenced him to twenty-five years' confinement. He now raises three issues on appeal. First, appellant argues the trial court abused its discretion by admitting testimony about an extraneous offense. Second, appellant argues he was egregiously harmed by the trial court failing to instruct the jury that it must be unanimous about which instance of indecency with a child by sexual contact he was guilty. And third, appellant argues the trial court abused its discretion by admitting a recording of a one-party-consent phone call over

his rule 403 objection. We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

I. BACKGROUND

S.P. and her children moved from California to Dallas for a fresh start after her divorce. They first moved in with appellant, S.P.'s father, before moving into an apartment in Garland in April of 2014. One evening, when S.P. was cooking dinner, her six-year-old daughter, E.P., told her appellant had just touched her inappropriately on the couch. E.P. testified appellant removed E.P.'s pants and touched her vagina with his hands. He used a chair to block S.P.'s line of sight. E.P. put her pants back on and went to tell her mother that appellant touched her. Appellant told S.P. he "was just hugging her." E.P. testified she did not think S.P. understood her because she "was six" and "couldn't talk right yet." S.P. testified that E.P. "said it so nonchalantly that . . . it just kind of moved past. I was moving so fast trying to get things done."

E.P.'s brother, M.P., later convinced E.P. to again tell S.P. what happened. E.P. told S.P. about appellant's abuse in September 2014. S.P. testified that E.P. told her about an instance of inappropriate touching that took place at appellant's house, possibly in the bathroom.

But when S.P. confronted appellant to clarify what happened, he told her, "You remember she told you in the kitchen." Appellant then told S.P. about the incident in the living room. S.P. testified that appellant told her that he and E.P.

were watching TV together. E.P. was sitting in a big "Lazy Boy sofa." At some point, appellant "put his mouth" "on her vagina while [E.P.] was sitting on the couch facing towards the TV but away" from S.P.

Appellant also told S.P. about a second incident that happened in the bathroom. S.P. stated appellant told her that E.P. "was having some type of pain or something in her vaginal area so he checked for her to see" "what was going on." Appellant then gave E.P. a bath and got in the bathtub with her. During the bath, he "touch[ed] her on her vagina." S.P. did not remember all of the details appellant told her, though she remembered that he expressed remorse.

E.P. testified about something that happened with appellant in the bathroom, though she did not say that appellant touched her inappropriately. She testified that once, when she was six years old, appellant locked the bathroom door and got in the bathtub with her when she was taking a bath. He passed the soap to E.P. and wanted her to pass it back, but E.P. felt uncomfortable and got out of the tub. Appellant told her to stay. E.P.'s brother M.P. then knocked on the door, needing to use the bathroom, so E.P. quickly dried off and dressed and let him in.

After E.P. outcried to her, S.P. called the police and spoke with Detective Breanna Valentine. They set up a forensic interview. In the interview, E.P. talked about how appellant touched her "pee-pee" with his finger while they were both in the bathroom. E.P. said appellant took his clothes off and locked the bathroom door. Appellant got in the tub with E.P. and splashed her and played with the soap, though

E.P. said nothing "happened to [her] body in the bath." After they got out of the bath, E.P. said appellant "tapped" her vagina with his finger repeatedly. A copy of the interview was admitted at trial, though it was not played for the jury during trial. The forensic interviewer interviewed E.P. when E.P. was six. The therapist said E.P. gave "some detail" but what she described "wasn't necessarily in sequential order." E.P. "was able to describe what she could see during that time" when she was in the bath with appellant. The therapist testified she did not clarify whether this happened on other occasions.

Following the forensic interview, Detective Valentine set up a one-party-consent phone call between S.P. and appellant. A recording of their conversation was admitted at trial. During the call, they discussed appellant inappropriately touching E.P. Appellant said, "The only thing I did is when she told you that time. Downstairs." S.P. responded that she wanted to know exactly what happened. Appellant said, "I just licked her body, man. That's what she told you that day, when she said grandpa licked me." S.P. asked about "the bath thing," and appellant said that he "bathed her and that was it." S.P. pointed out that E.P. said that appellant "touched her down there." Appellant said, "I bathed her. And that's what she told you that night, she told you that night in the chair downstairs." S.P. questioned him, "So you licked her vagina, dad?" Appellant admitted, "Yeah." S.P. asked if it just happened one time. Appellant responded, "Just that time and the time that she was here." S.P. sought to clarify if that was the time appellant took E.P. to Chuck E.

Cheese and she spent the night at his place afterwards. Appellant said, "Yeah." Later in the call, S.P. again sought to clarify whether appellant touched E.P.'s "vaginal area." Appellant responded, "[S.P.], if I had my mouth on her, I had to touch her." S.P. questioned appellant a couple of minutes later: "So you guys were downstairs when you put your mouth on her?" Appellant said, "Yeah." At one point, appellant explained his motivation by saying that it is "something that overcomes me at that time" and that he is "not looking for children." He did not "understand why it is like this with me."

After the trial court ruled appellant opened the door to testimony about other allegations against appellant, S.P. testified about one. She said that, after the police report in this case was filed and word spread about what happened, she heard from her cousin. S.P.'s cousin told her she was "molested" by appellant when she was a young girl.

A therapist at the Dallas Children's Advocacy Center testified she visited with E.P. five years after the alleged incident, following a referral from the district attorney's office. The therapist diagnosed E.P. as having post-traumatic stress disorder with dissociative symptoms. She explained that E.P. and S.P. "both reported sexual abuse in the form of touching by grandpa[,]" so she determined that E.P.'s PTSD was a result of that abuse. The State asked the therapist why a six-year-old might remember an inappropriate touch happening in a particular place but then later, when eleven, remember it happening elsewhere. The therapist answered

that traumatic memories can be "jumbled up" for children. She said the "narrative . . . might not be correct on the time line . . . because those memories weren't stored . . . in a time stamped way that they normally are when the hippocampus is on[.]" She said, too, that a six-year-old is in the "preoperational" stage of development, meaning he or she thinks about things in a "symbolic way." She explained, for example, a child's backpack might be a symbol for school, so when the child sees her backpack she thinks of school even if she is going to her grandparents' house. Thus, she said, "that symbolism piece . . . might change some of that memory piece of that, like ordering it and how it goes into their brain."

The jury found appellant guilty of indecency with a child by sexual contact and, after appellant pleaded true to a prior aggravated robbery conviction from Dallas County, a prior "assault with a deadly weapon likely to produce great bodily injury" conviction from California, and a prior "possession of cocaine for sale" conviction from California, the trial court set punishment at twenty-five years in prison. This appeal followed.

II. ANALYSIS

A. Extraneous-offense testimony

In his first issue, appellant argues the trial court erred by admitting S.P.'s testimony that, after the incident involving E.P. occurred, S.P.'s cousin told her that appellant molested her. On cross-examination, appellant questioned S.P. about actions she took after he was arrested. He then asked her,

> And from that time you're aware that there have been no new allegations or problems connected with him since then, correct?
>
> A Like what?
>
> Q Any allegations of touching your children or anybody else?
>
> A I had my kids.
>
> Q Right. But since he has been – since this incident allegedly happened there have been no – you're not aware of any other person making that claim against him, correct? For any type of touching of children or anything like that? Fair enough?

The State asked to approach, and the court held a hearing outside the presence of the jury to determine whether appellant had "opened the door" to testimony about others who have accused appellant of similar conduct. The State questioned S.P. about her awareness of other accusations against appellant. S.P. stated she knew of two others who had accused appellant of inappropriately touching them when they were children. She learned about one—her sister—when S.P. was twelve. And she learned about the second—involving her cousin—"after this had happened with [E.P.] and I pressed charges." S.P.'s cousin told her that "she had a situation occur between her and [appellant] when she was a child, that he touched her inappropriately, as well."

Based on that, the trial court ruled that "the door has been opened to the allegation concerning the cousin." The court elaborated that it understood defense counsel's question to be asking whether S.P. became *aware* of any other allegations following E.P.'s allegation, not whether any *new incidents* happened after the one

involving E.P. Since S.P. learned about her cousin's allegation after the incidents involving E.P., the court believed defense counsel opened the door to testimony about it. But because S.P. knew about her sister's allegation previously, the court did "not believe the door has been opened to any allegations concerning her sister."

Appellant argued to the court that his question was about whether any new incidents happened after the ones involving E.P. The court pointed out that "the way you asked the question" "you asked if she had heard any allegations." The State agreed with the court and argued the door had been opened and "based on that questioning it would leave the jury with a false impression that the witness is not able to answer that question."

Then, back in the presence of the jury, after appellant's cross-examination, the State said to S.P., "[T]here was a previous question and I'd like to give you a chance to answer it, okay?" Appellant requested a "running objection so we don't have to interrupt." The court stated it recalled "the hearing and the State's request, the Defense's objection that we had, I recall the hearing, the objections and your request made . . . and I understand the Defense's position."

The State asked S.P. if she learned about "another incident with somebody else that your father had touched when they were a child?" S.P. explained that after she filed the police report "and word had gotten through the family" about what was going on, her cousin reached out to her. They spoke on the phone and S.P.'s cousin told her "that when she was a young girl that [appellant] had molested her, as well."

Her cousin "wanted to provide emotional support to me and [E.P.] . . . but she wanted us to know that it had, in fact, happened to her, as well, and so she understood everything that we were going through."

1. Applicable law

We review a trial court's ruling admitting evidence for an abuse of discretion. *See, e.g.*, *West v. State*, 169 S.W.3d 275, 278–79 (Tex. App.—Fort Worth 2005, pet. ref'd). "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). Such evidence, however, may be admissible for another purpose. TEX. R. EVID. 404(b)(2). Otherwise inadmissible evidence "may become admissible when a party opens the door to such evidence." *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). This can happen when a party leaves "a false impression with the jury that invites the other side to respond." *Id*. When one party leaves a false impression, the other party may present evidence to correct that impression. *Houston v. State*, 208 S.W.3d 585, 591 (Tex. App.—Austin 2006, no pet.).

A party may "open the door" to evidence of other acts merely by asking a question. *See Jensen v. State*, 66 S.W.3d 528, 539–40 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (op. on reh'g) ("By cross-examining Jacque about her 'rocky relationship' with appellant, whether the children were scared of appellant, why she left appellant, and the custody battle between them, appellant opened the door to

evidence of other crimes, wrongs, and acts of appellant."); *see also Rudd v. State*, No. 05-07-00447-CR, 2008 WL 2955157, at *4 (Tex. App.—Dallas Aug. 4, 2008, pet. ref'd) (not designated for publication) ("A defendant opens the door by asking a question which creates a false impression that the admission of extraneous offense evidence would correct.").

2. Application

We first consider appellant's defensive theory, which provides context for determining whether appellant left a false impression with the jury. *See Anastassov v. State*, No. 05-19-00396-CR, 2020 WL 4669880, at *6 (Tex. App.—Dallas Aug. 12, 2020, pet. ref'd) (mem. op., not designated for publication) (looking at defense counsel's statements to the jury in determining whether appellant "opened the door" to extraneous-act evidence and noting "appellant's counsel had advanced a defensive theory through his questioning of various witnesses").

Appellant's defensive theory was that the allegations in this case were fabricated by S.P. and were the result of a decades-long conflict between appellant and S.P. In his opening statement, appellant suggested S.P. had a vendetta against appellant, telling the jury, "We believe the evidence is going to show you that [S.P.] has the agenda to do harm here." Defense counsel stated S.P. "is the instigator of all of the statements that [E.P.] is going to say to the forensic interviewer and [the detective]."

Thus, the jury had appellant's theory in front of it when defense counsel asked S.P., "since this incident allegedly happened . . . you're not aware of any other person making that claim against him, correct? For any type of touching of children or anything like that? Fair enough?" As the State argues in its brief, appellant left the impression that once S.P. "got what she wanted, the accusations dried up." Accordingly, we conclude the trial court did not abuse its discretion by allowing the State to rebut the false impression left by appellant's question. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (trial court did not abuse discretion in admitting testimony about extraneous offenses when defense counsel "opened the door" by choosing to question witness about extraneous offenses). We overrule appellant's first issue.

B. Unanimity instruction

Appellant argues in his second issue that the trial court erred by failing to include a unanimity instruction in the jury charge. Such an instruction was required, appellant argues, because the State "gave evidence of two specific instances" of appellant sexually contacting E.P. The State concedes error but argues the omission was not egregiously harmful.

1. Charge error

When analyzing a claim of jury charge error on appeal, we first determine whether there was error; if so, we then determine whether the error caused sufficient

harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

"Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed." *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). This means the jury must "agree upon a single and discrete incident that would constitute commission of the offense alleged." *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007). One situation in which non-unanimity may occur is when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple occasions. *Cosio*, 353 S.W.3d at 772. In such a situation, the charge of the court must, to ensure unanimity, "instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented." *Id*.

Appellant was charged with indecency with a child by sexual contact. The jury charge defined sexual contact as "any touching by a person, including touching through clothing, of the anus, breast, or genitals of a child with intent to arouse or gratify the sexual desire of any person." It further instructed that "the State is not required to prove the exact date alleged in the indictment." It defined "on or about the 26th day of May 2014" as "any date prior to the date of the filing of the indictment, July 19, 2019." Then, in the application paragraph, the charge instructed the jury to find appellant guilty if it found

> beyond a reasonable doubt, that [appellant], on or about the 26th day of May, 2014, in the County of Dallas, and State of Texas, did unlawfully, with the intent to arouse or gratify the sexual desire of the defendant, engage in sexual contact with [E.P.], hereinafter called complainant, a child younger than 17 years, by contact between the hand of the Defendant and the genitals of the complainant[.]

The charge also included an instruction telling the jury not to consider testimony about other offenses unless it believed beyond a reasonable doubt that appellant committed them, and even then only for limited purposes. The jury was instructed that its verdict must be unanimous, but, as the parties agree, it was not instructed that it should be unanimous about a particular incident.

The State concedes that the jury charge permitted a non-unanimous verdict given the nature of the evidence in this case. We agree. The jury heard evidence that appellant touched E.P.'s vagina with his hands when she was on the couch, and it heard evidence that he touched her vagina with his hands when they were in the bathroom. It was therefore error to fail to instruct the jury that it must be unanimous about which particular incident it found he committed. *See Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007) (different instances of indecency with a child by contact are "different criminal offense[s] and jury unanimity is required as to the commission of any one of these acts").

2. Egregious harm analysis

Having found error, we must determine whether the error caused sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If appellant objected to the complained-of aspect of the charge, the record

need only show appellant suffered "some harm" from the error to warrant reversal. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). But if appellant failed to object—as here—he will not obtain reversal unless "the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). Egregious harm is a "difficult standard" to meet, and it "must be proved on a case-by-case basis." *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). The "actual degree of harm" is determined from considering (i) the entire jury charge, (ii) the state of the evidence, including the contested issues and weight of probative evidence, (iii) the arguments of counsel, and (iv) any other relevant information revealed by the record of the trial as a whole. *Id*.

a. The jury charge

We first consider the entire jury charge. As described above, the charge included an extraneous-offense limiting instruction. However, such an instruction is "inadequate to instruct the jury that it must unanimously agree on a single incident of criminal conduct that supports the charged offense." *Sullivan v. State*, No. 05-16-01138-CR, 2017 WL 6505861, at *3 (Tex. App.—Dallas Dec. 20, 2017) (mem. op., not designated for publication), *pet. dism'd as improvidently granted*, No. PD-0160-18, 2018 WL 2228333 (Tex. Crim. App. May 16, 2018) (not designated for publication). Since the charge allowed a non-unanimous verdict, "this factor favors finding egregious harm." *See id*.

b. The state of the evidence

Though there were ambiguities and inconsistencies, the evidence tended to show the possibility of two incidents of sexual contact by touching. E.P. testified appellant touched her vagina while she was on a couch or chair in the living room. Furthermore, although S.P. testified appellant told her that he "put his mouth" on E.P.'s vagina in the living room, appellant said in the recorded phone call that "if I had my mouth on her, I had to touch her." It is unclear if he meant he "had to touch her" because he was touching her with his tongue or if he meant that in the course of licking her, he also touched her with his hand. But S.P. testified that appellant told her, separately, during a bath, he touched E.P.'s vagina. This is more consistent with what E.P. said in her forensic interview, when she said appellant touched her vagina while she was in the bathroom. Additionally, appellant seemed to indicate there were two incidents when, in response to S.P.'s question about whether it happened just once, he said, "Just that time and the time that she was here."

The jury's guilty verdict meant it rejected appellant's defensive theory. As discussed in the point of error above, appellant argued that E.P.'s allegations originated with S.P. His theory was fabrication, and he suggested that any admission in his phone call with S.P. of sexual activity with E.P. was not true but was made only to hurt S.P. Appellant's theory was therefore that he committed no acts of indecency with a child by sexual contact. In determining appellant's guilt, the jury thus had an "all or nothing decision." *See Sullivan*, 2017 WL 6505861, at *4.

We also note that it is "relevant to the egregious harm analysis to inquire about the likelihood that the jury would in fact have reached a non-unanimous verdict on the facts of the particular case." *Jourdan v. State*, 428 S.W.3d 86, 98 (Tex. Crim. App. 2014). Given the state of the evidence, a non-unanimous verdict was unlikely. It is unlikely that some jurors believed the incident in the living room happened beyond a reasonable doubt but the incident in the bathroom did not and that other jurors believed the opposite. The only eyewitness, in-court testimony was E.P.'s. She testified appellant touched her vagina in the living room. Moreover, the only clear admission appellant made in the one-party-consent call was regarding an incident in the living room. He said, "The only thing I did is when she told you that time. Downstairs." The time E.P. told S.P. was the time in the living room. Though appellant then said on the phone call that he licked her, he also said he "had to touch her." Considered in light of E.P.'s testimony, the jury could have understood that to mean appellant also touched E.P. with his hands. When asked about "the bath thing," appellant said he "bathed her and that was it."

Thus, for the jury to have failed to be unanimous, some jurors must have had a reasonable doubt about that incident but nevertheless believed beyond a reasonable doubt that an incident of touching happened in the bathroom. The evidence supporting a bathroom incident included E.P.'s forensic interview and S.P.'s testimony that appellant told her he touched E.P. while she was taking a bath. We

think it unlikely for jurors to have believed this less direct evidence but not E.P.'s testimony at trial or appellant's admission during his call with S.P.

What is more likely is the jury believed both incidents happened beyond a reasonable doubt or it believed there was really just one incident of indecency with a child by sexual contact. The latter possibility was supported by the testimony of the therapist from the children's advocacy center, who testified about how trauma can affect the brain of a young child. "Because the entire record fails to show actual harm to appellant, this factor weighs against a finding of egregious harm." *See Arrington v. State*, 451 S.W.3d 834, 844 (Tex. Crim. App. 2015).

c. The arguments of counsel

We next consider counsels' arguments to the jury. During its first closing argument, the State pointed out "the extraneous offense language" in the charge. The prosecutor referred to the admission of licking as "a different offense," but did not make any clarifying statements about the two incidents of touching:

> [D]uring the testimony you not only heard sweet [E.P.] get up here and tell you about what happened to her, you heard in the forensic that it happened in the bathroom, you hear during testimony it happened on a couch and then you heard from the Defendant's own mouth a little bit of a different offense. So you heard some touching from [E.P.] and you heard about some mouth to vagina contact that happened from the Defendant's mouth.
>
> You also heard from [S.P.] about a cousin that she found out had made an allegation or who had come out to her and said that the same things had happened to her.
>
> So those types of things, things that aren't necessarily included in the indictment, those are called extraneous offenses. So when you're

> considering those things go back to this page and read the ways that you are able to consider those things and use them in your deliberations in order to determine whether you believe he's guilty of [sic] not guilty of this offense.

The prosecutor again drew a distinction between "contact between the mouth" and then "one or more occasions" when appellant contacted E.P.'s genitals with his hand. The prosecutor pointed out that the State "didn't charge [appellant] with contact between the mouth, his mouth and her vagina. We charged him with what [E.P.] is saying, with what [E.P.] has always said." She continued, "Now, do I believe that other incident also occurred? Absolutely, and you can believe that, too, based on what you heard. And you can use that to determine whether or not you believe he also used his hand to touch her on one or more occasions."

The State also at times seemed to suggest that there was just one incident of touching, arguing as follows:

> Now, when [E.P.] testified she told you about an incident on the couch, that he touched her vagina while she was on the couch. And you heard in her forensic interview that that touching occurred in the bathroom. But the context, the touch itself, the who and the what remained the same.

The State elaborated that E.P.

> had that traumatic event and so her brain is having a hard time figuring out what happened first and when it happened. But she knows she was six years old, she knows it was her grandpa and she knows that he touched her vagina, and that is what we've alleged in our indictment.

But shortly afterwards, the prosecutor argued that two incidents of touching happened:

> I submit to you, ladies and gentlemen, that that touch happened in the bathroom, that touch happened on the couch. And while on the couch not only did he touch her vagina but he also licked her vagina.

Defense counsel in closing argued that the basis for reasonable doubt was "the fact that [E.P.'s] original outcry was [appellant] touched her in the bathroom. Now all of a sudden, five years later, it's shifted to the couch[.]" Defense counsel argued that from "the origin," "it was about a bathroom incident." Appellant pointed to the forensic interviewer's testimony that E.P. outcried about inappropriate touching in the bathroom and on the toilet. He then argued that we "don't know anything about when this couch allegedly – when this couch incident took place." Appellant continued, "That's one of the problems in their case. They can't prove how old she was or when it took place or any other facts about the couch because we have no other proof of it."

In its second closing argument, the State argued that appellant, S.P., and E.P. "all say sexual abuse, regarding the touching of [E.P.'s] vagina, happened." The State pointed out E.P.'s testimony was not the first time the couch incident was mentioned, as appellant argued. Instead, the prosecutor argued that, when appellant said "that time down the stairs when you were cooking that she came and told you something," "that's the couch incident."

Considered as a whole, arguments did not clarify matters, but they also did not exacerbate the charge error. While the arguments were not clear about which incident of touching the jury should have been unanimous about, neither the State

nor appellant told the jury that it need not be unanimous. Thus, this factor does not weigh in either direction. *See Arrington*, 451 S.W.3d at 844 ("[N]either the State nor appellant told the jurors that they must be unanimous about which criminal episode constituted each offense, nor were they told that they need not be unanimous. This factor, therefore, weighs neither for nor against finding egregious harm.").

d. Other relevant factors

Appellant and the State agree nothing else in the record needs to be considered in determining whether appellant suffered actual harm as a result of the charge error. Having reviewed the record, we agree.

e. Consideration of the four factors

The only factor here that weighs in favor of finding egregious harm is the jury charge and its lack of an instruction requiring the jury to be unanimous about a particular incident of indecency with a child by sexual contact. The state of the evidence weighs against finding egregious harm, and the parties' arguments weigh neither for nor against such a finding. Accordingly, we conclude the charge error did not cause appellant actual, egregious harm. *See Arrington*, 451 S.W.3d at 845 (no egregious harm when the "only factor that weigh[ed] in favor of finding egregious harm [was] the consideration of the jury instructions"). We overrule appellant's second issue.

C. Recorded phone call

Finally, appellant argues that the trial court abused its discretion by admitting the recording of the one-party-consent phone call between appellant and S.P. He argues, as he did at trial, that its probative value was substantially outweighed by the danger of misleading the jury and confusing the issues.

The trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion; that is, it should be upheld as long as it was within the "zone of reasonable disagreement." *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). Under rule 403, the trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *See* TEX. R. EVID. 403. "Probative value" refers to an item of evidence's probative force: how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation, coupled with the proponent's need for that item of evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). Prejudice is "unfair" when evidence, though relevant, has the capacity to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Manning v. State*, 114 S.W.3d 922, 928 (Tex. Crim. App. 2003) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)). "Confusion of the issues" refers to a tendency to confuse or distract the jury from the main issues in the case. *Gigliobianco*, 210 S.W.3d at 641. "Misleading the jury"

refers to a tendency of an item of evidence to be given undue weight by the jury "on other than emotional grounds"—for example, scientific evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence. *Id*. Finally, "undue delay" and "needless presentation of cumulative evidence" concern the "efficiency of the trial proceeding rather than the threat of an inaccurate decision." *Id*.

In conducting rule 403 analysis, a trial court

> must balance (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, 210 S.W.3d at 641–42.

Texas law "favors the admissibility of all relevant evidence." *Kesterson v. State*, 997 S.W.2d 290, 292 (Tex. App.—Dallas 1999, no pet.). Further, we presume relevant evidence to be more probative than prejudicial. *Id*. "Because Rule 403 permits the exclusion of admittedly probative evidence, it is a remedy that should be used sparingly, especially in 'he said, she said' sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant." *Woodland v. State*, No. 05-19-00174-CR, 2020 WL 1862126, at *3 (Tex. App.—Dallas Apr. 14, 2020, no pet.) (mem. op., not designated for

publication) (citing *Hammer v. State*, 296 S.W.3d 555, 568–69 (Tex. Crim. App. 2009)).

Here, the trial court could have concluded the phone call had considerable probative force. Appellant admitted in the phone call to sexual contact with E.P. Even if he only clearly admitted to licking E.P.'s genitals, that admission made the complainant's allegation of touching more likely.

Moreover, the trial court could have concluded the State's need for the evidence was compelling. E.P. was the only eyewitness to the offense. There was no physical evidence supporting her claim. And the details of her allegation changed over time. E.P.'s credibility was therefore "a focal issue in the case." *See Kerns v. State*, No. 05-19-00135-CR, 2020 WL 3496363, at *4 (Tex. App.—Dallas June 29, 2020, no pet.) (mem. op., not designated for publication). Beyond E.P.'s testimony, her interview, and testimony based on E.P.'s outcry and interview, the only other evidence of this offense came from S.P.'s testimony about what appellant admitted to her. Yet appellant's theory of the case was that S.P. was behind E.P.'s allegations. Thus, the State needed the phone call to corroborate not just E.P.'s testimony but S.P.'s, too.

On the other hand, the phone call had some potential to suggest a decision on an improper basis or distract the jury from the main issue in the case. After all, appellant was charged with touching E.P.'s genitals with his hand, but in the phone call, he only clearly admitted to licking her genitals. Given E.P.'s two different

accounts of where appellant touched her vagina and the ambiguity of whether there were two separate incidents of touching, it is possible the jury threw up its hands and convicted appellant because he admitted in the phone call to licking E.P.'s vagina—a crime with which he was not charged. However, the danger of this possibility must have "substantially outweighed" the probative value of the phone call for it to be inadmissible under rule 403. *See* TEX. R. EVID. 403. Since, as discussed above, that probative value was significant, we conclude the trial court acted within the "zone of reasonable disagreement" in admitting the call over appellant's rule 403 objection. *See Beham*, 559 S.W.3d at 478. Appellant's final issue is overruled.

II. CONCLUSION

We affirm the trial court's judgment.

/Ken Molberg/
KEN MOLBERG
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
190978F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WALTER RAY WILSON, Appellant	On Appeal from the 194th Judicial District Court, Dallas County, Texas
No. 05-19-00978-CR V.	Trial Court Cause No. F19-00417-J.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Molberg. Justices Goldstein and Smith participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 13th day of October, 2021.