Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-18-00103-CR

JOE ANGEL MENDOZA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 385th District Court
Midland County, Texas
Trial Court Cause No. CR47715

M E M O R A N D U M O P I N I O N

The jury convicted Joe Angel Mendoza of aggravated sexual assault of a child, indecency with a child by contact, and indecency with a child by exposure. *See* TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B), 21.11(a)(1), 21.11(a)(2)(A) (West 2019). The trial court assessed Appellant's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of sixty years for aggravated sexual assault of a child, twenty years for indecency with a child by contact, and ten years for indecency with a child by exposure. The trial court ordered that Appellant's sentences would run consecutively. Appellant challenges his conviction in eight issues. We affirm.

Background Facts

On June 9, 2016, M.A.M. took her six-year-old daughter M.P. and her eight-year-old daughter L.P. to their grandmother's home for a visit. After they arrived, L.P. and M.P. began playing in the yard while M.A.M. did laundry. Appellant lived behind L.P. and M.P.'s grandmother, and he was sitting outside when the girls began playing. Appellant coaxed L.P. and M.P. over to him by offering them candy. Appellant then had L.P. and M.P. sit on his lap.

L.P. and M.P. both testified at Appellant's trial. At the time of Appellant's trial, L.P. was nine years old and M.P. was seven years old. L.P. testified that Appellant touched L.P.'s and M.P.'s "privates" with his hands. L.P. demonstrated on a doll where she considered her privates to be located, and L.P. clarified that Appellant touched her and M.P. in the front and back of their privates. L.P. testified that she saw Appellant put his hand inside M.P.'s shorts. M.P. testified that "[Appellant] touched our bottoms." M.P. further testified that Appellant pulled up her shorts and underwear, touched her bottom, then smelled his fingers and said, "[O]oh."

At some point, L.P. and M.P. got off Appellant's lap and returned to their grandmother's yard. L.P. and M.P. started playing again until they saw Appellant "putting his hand right there where his private was at and rubbing on it." M.P. alerted M.A.M. that something happened at Appellant's home. L.P. initially denied that anything had happened when M.A.M. asked her about it, but M.A.M. testified that L.P. was acting strangely. M.A.M. then observed Appellant beckoning L.P. and M.P. back over to him and simultaneously "touching his genitals." M.A.M. took the girls home and called the police.

Elisha McPeek was the lead forensic interviewer for the Midland Children's Advocacy Center when M.P. and L.P. were brought there in June 2016 to be interviewed. McPeek interviewed L.P. and M.P. after Appellant's alleged assault,

and the State called McPeek as the outcry witness at Appellant's trial. McPeek testified that L.P. and M.P. both said that Appellant offered them candy and made them sit on his lap. L.P. and M.P. both told McPeek that Appellant asked them to have sex with him. L.P. and M.P. also told McPeek that they saw Appellant's penis, which both girls referred to as his "weeny." M.P. said that Appellant's penis "was up." McPeek testified that L.P. told her that she saw Appellant touch M.P. inside M.P.'s vagina and anus. Both girls said that Appellant used his hands to make skin-to-skin contact with their "butt" and their "cookie," which McPeek clarified meant their vaginas. M.P. also told McPeek that Appellant touched M.P.'s "chi-chis," which McPeek clarified meant M.P.'s chest area.

Appellant was charged by a five-count indictment. In Count One, Appellant was charged with aggravated sexual assault of a child for penetrating the sexual organ of M.P. In Count Two, Appellant was charged with aggravated sexual assault of a child for penetrating the sexual organ of L.P. In Count Three, Appellant was charged with indecency with a child by contact by touching M.P.'s breasts. In Counts Four and Five, Appellant was charged with indecency with a child by exposure for showing his penis to L.P. and M.P. The jury found Appellant guilty in Counts One, Three, and Four and not guilty in Count Two. The State abandoned Count Five.

Sufficiency of the Evidence and Motion for Directed Verdict

In his first issue, Appellant challenges the sufficiency of the evidence supporting his convictions. He contends that the evidence was legally and factually insufficient to support his convictions. We review a challenge to the sufficiency of the evidence, whether denominated as a legal or as a factual sufficiency claim, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson*

standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

A person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly "causes the penetration of the anus or sexual organ of a child by any means" and the victim is younger than fourteen years of age. PENAL § 22.021(a)(1)(B)(i), (a)(2)(B). A person commits the offense of indecency with a child by contact if, "with a child younger than 17 years of age," a person "engages in sexual contact with the child or causes the child to engage in sexual contact." *Id.* § 21.11(a)(1). The Penal Code defines "sexual contact" as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child" or "any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person" committed with the intent to arouse or gratify the sexual desire of the person. *Id.* § 21.11(c). A person commits the offense of indecency with a child by exposure

if, "with intent to arouse or gratify the sexual desire of any person," the person "exposes the person's anus or any part of the person's genitals, knowing the child is present," or "causes the child to expose the child's anus or any part of the child's genitals." *Id.* § 21.11(a)(2).

Appellant does not assert that there is an omission of evidence of any of the elements of the charged offenses. Instead, he contends that the evidence supporting his convictions is insufficient because it was conflicting and unreliable. Appellant bases this contention on the fact that the victims gave differing accounts about Appellant's conduct to the various investigators and adults that visited with them around the time of the incident, and also during their testimony at trial. Appellant also contends that the DNA evidence offered at trial "emphatically exonerated" him.

We disagree with Appellant's assessment of the evidence. The uncorroborated testimony of a child victim is alone sufficient to support a conviction for a sexual offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2019); *Chapman v. State*, 349 S.W.3d 241, 245 (Tex. App.—Eastland 2011, pet. ref'd). Furthermore, corroboration of the victim's testimony by medical or physical evidence is not required. *Gonzalez Soto v. State*, 267 S.W.3d 327, 332 (Tex. App.—Corpus Christi–Edinburgh 2008, no pet.); *see Cantu v. State*, 366 S.W.3d 771, 775–76 (Tex. App.—Amarillo 2012, no pet.); *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006).

As set forth above, the State adduced testimony describing acts committed by Appellant constituting aggravated sexual assault, indecency by contact, and indecency by exposure. To the extent that there were any inconsistences or discrepancies in the children's testimony, it was the jury's exclusive role to resolve those inconsistences. We presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. As to any evidence that was lacking in the children's testimony,

McPeek's testimony as the outcry witness produced sufficient facts to supplement their testimony.

With respect to the DNA evidence, we disagree with Appellant's conclusion that the scientific evidence exonerated him. While Appellant was excluded as a contributor of DNA on any sample recovered from M.P. and L.P., this evidence did not necessarily exonerate him of the offenses, particularly the indecency offenses. While the DNA of an unknown male was found on a sample taken from M.P.'s body, this DNA may have been deposited from innocent contact. Additionally, Appellant's DNA expert testified that it is much more likely for the DNA of a female from her vagina to be deposited onto the penis of a male that penetrates her vagina if he does not ejaculate inside of her than for his DNA to be found in her vagina. This same principle would apply to a person that sticks his finger inside of a female's vagina.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt the elements of the offenses for which Appellant was convicted. We overrule Appellant's first issue.

Appellant asserts in his second issue that the trial court erred in denying his motion for a directed verdict. An appeal challenging the denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence, and the same standard of review applies in both instances. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996); *Pollock v. State*, 405 S.W.3d 396, 401 (Tex. App.—Fort Worth 2013, no pet.). Having determined that the evidence is sufficient to support Appellant's conviction, the trial court did not err in denying Appellant's motion for directed verdict. We overrule Appellant's second issue.

Due Process and the Confrontation Clause

In his third issue, Appellant contends that his due process rights were violated because the evidence was inconsistent and "incredibly unbelievable." Appellant argues that the inconsistent evidence caused Appellant to be convicted "on less than proof beyond a reasonable doubt." The Due Process Clause of the Fourteenth Amendment guarantees that no person may be convicted of a criminal offense and denied his liberty unless his criminal responsibility for the offense is proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Alvarado v. State*, 912 S.W.2d 199, 206–07 (Tex. Crim. App. 1995); *see* U.S. CONST. amend. XIV. In addressing his first issue, we have determined that the evidence was sufficient to support Appellant's convictions. Therefore, Appellant was not denied due process of law based on insufficient evidence. We overrule Appellant's due process argument in his third issue to the extent it addresses the sufficiency of the evidence.

Appellant also asserts in his third issue that the trial court violated his right to confront his accuser by permitting M.P. to testify via closed-circuit television. Appellant contends that he was denied his "**ABSOLUTE** constitutional right to confront his accusers." Appellant is essentially challenging the evidentiary basis for the trial court's ruling that permitted M.P. to testify by closed-circuit television.

The State called M.P. to testify at Appellant's trial. She was initially able to answer preliminary questions from the trial court and the prosecutor. When the prosecutor began asking her questions about Appellant's alleged assault, however, M.P. stopped responding. The trial court initially took an early lunch recess that lasted for almost two hours. After the lunch recess, however, M.P. continued having difficulty responding to the prosecutor's questions about the incident. M.P. eventually responded by saying, "I'm too scared. He's staring at me." The State then moved to allow M.P. to testify outside the courtroom via closed-circuit television.

The trial court held a hearing on the State's motion outside of the presence of the jury. The prosecutor informed the trial court that, during the lunch recess, M.P. told the prosecutor that M.P. was scared because Appellant kept looking at her while she testified. The prosecutor also informed the trial court that M.P. had been able to discuss the incident with her during their previous meetings. M.P. also told the prosecutor that she wanted to testify with her hand by her face to block Appellant from her view. In response, Appellant asserted that the testimony of a psychologist or a psychiatrist should be required to show that M.P. would be traumatized for the rest of her life.

The trial court granted the State's motion for M.P. to testify by closed-circuit television. The trial court found, from its own observations, "that requiring [M.P.] to come back in this courtroom with [Appellant] here, based on what [the prosecutor] said [M.P.] said at the break, may cause [M.P.] serious emotional distress." The trial court further found "that the State's interest in the physical and psychological well-being of the child is sufficiently important to outweigh, at least in this case, [Appellant's] right to be face to face with his accuser when we can provide [Appellant] the means of seeing and hearing and contemporaneously communicating with his lawyer while [M.P. is] testifying."

The rest of M.P.'s testimony took place in chambers with only M.P., the trial judge, Appellant's counsel, the prosecutor, and the court reporter present. Appellant and the jury remained in the courtroom and observed M.P.'s testimony through a closed-circuit television feed. Appellant and his counsel remained in contact via telephone at all times during M.P.'s testimony. When the State resumed questioning M.P. in this setting, M.P. was able to answer questions about the circumstances surrounding Appellant's alleged assault.

The Confrontation Clause, contained in the Sixth Amendment to the United States Constitution, provides in part that, "[i]n all criminal prosecutions, the accused

shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Sixth Amendment "reflects a preference for face-to-face confrontation at trial" and is not absolute. *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)); *Walker v. State*, 461 S.W.3d 599, 605 (Tex. App.—Houston [1st Dist.] 2015, no pet.). At times, however, that preference must "give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)); *Walker*, 461 S.W.3d at 605. We review a trial court's decision to conduct a witness's examination by closed-circuit television under an abuse of discretion standard. *Marx v. State*, 953 S.W.2d 321, 327 (Tex. App.—Austin 1997), *aff'd*, 987 S.W.2d 577 (Tex. Crim. App. 1999).

The Texas Code of Criminal Procedure contains provisions for alternative means to present the testimony of certain child witnesses who would be unable to testify in the presence of the defendant about an enumerated offense. Closed-circuit television is one of those alternative means. CRIM. PROC. art. 38.071. Aggravated sexual assault of a child and indecency with a child are two of the enumerated offenses. *Id.*

Article 38.074 of the Texas Code of Criminal Procedure also contains provisions that pertain to the testimony of a child in a criminal case. *Id.* art. 38.074. Article 38.074, section 3(d) provides that a "court may set any other conditions and limitations on the taking of the testimony of a child that it finds just and appropriate, considering the interests of the child, the rights of the defendant, and any other relevant factors." *Id.* art. 38.074, § 3(d). The State's use of closed-circuit testimony in such cases arises from the fact that the State has a legitimate interest in the protection of child witnesses from the trauma of having to testify in certain kinds of cases. *Marx*, 987 S.W.2d at 580; *Gonzales v. State*, 818 S.W.2d 756, 761 (Tex. Crim. App. 1991).

Under both *Craig* and *Gonzales*, before the trial court can admit closed-circuit testimony, it must find, after a hearing and from the evidence, that (1) the procedure "is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the emotional distress suffered by the child witness in the presence of the defendant is 'more than *de minimis*'" ("more than mere nervousness or excitement or some reluctance to testify"). *Gonzales*, 818 S.W.2d at 762 (quoting *Craig*, 497 U.S. at 855–56); *see also Hightower v. State*, 822 S.W.2d 48, 51 (Tex. Crim. App. 1991). When a trial court makes these specific findings from the evidence, as the trial court essentially did on the record here, then "the Confrontation Clause does not prohibit the use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Hightower*, 822 S.W.2d at 51 (quoting *Craig*, 497 U.S. at 857).

Here, the trial court made specific oral findings on the record to support granting the State's motion to allow M.P. to testify outside the courtroom. The trial court's decision was based on its observations of M.P.'s demeanor during her testimony during which M.P. became unable to testify when asked about Appellant's alleged assault. M.P.'s statements during her testimony regarding being scared because Appellant was staring at her, as well as her statements to the prosecutor during the break, support the conclusion that M.P. was unable to testify specifically because of her fear of Appellant rather than a fear of the courtroom atmosphere in general. After M.P.'s testimony resumed from chambers, she was able to more freely and fully communicate about the alleged assault. Further, the trial court had the benefit of being able to observe M.P.'s demeanor during her testimony before

finding that M.P. would suffer more than *de minimis* emotional trauma if she were required to continue testifying in Appellant's physical presence.

We disagree with Appellant's contention at trial that the testimony of a mental health professional was required in order for the trial court to permit M.P. to testify by closed-circuit television. The First Court of Appeals rejected this contention in *Walker*. 461 S.W.3d at 606. The court held in *Walker* that the testimony of the children's mother could be used to meet the requirements of *Craig*. *Id.* at 606–07. We agree with the court's reasoning in *Walker*. We conclude that the prosecutor's description of the emotional effect of M.P. testifying in the presence of Appellant, coupled with the trial court's direct observation of M.P.'s difficulty in attempting to testify about the incident in Appellant's presence, could suffice to make the evidentiary showing required by *Craig*.[1]

On appeal, Appellant cites *Craig* for the proposition that the trial court was required to consider whether a less restrictive method could be used. We disagree with this reading of *Craig*. The majority opinion in *Craig* specifically rejected a requirement for the trial court to consider less restrictive alternatives. 497 U.S. at 859–60.

The record supports the trial court's decision to permit M.P. to testify by closed-circuit television. We conclude that the trial court did not abuse its discretion in finding that M.P. would be traumatized by Appellant's presence during her testimony about the incident. Further, the trial court took adequate steps to ensure the reliability of M.P.'s testimony and to protect Appellant's confrontation rights, while also protecting M.P. from undue trauma. As such, Appellant's Confrontation Clause rights were not violated. We overrule Appellant's third issue.

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[1]Under *Craig*, the trial court is not required to observe the children's behavior in the defendant's presence. 497 U.S. at 859–60. As noted by the Supreme Court, however, this observation by the trial court "could strengthen the grounds for use of protective measures." *Id.* at 860.

Admission of Evidence

In his fourth issue, Appellant argues that the trial court abused its discretion when it admitted evidence of an oral statement that Appellant made after his SANE examination and that was overheard by a hospital employee. Khalil Turner is a clerk at Midland Memorial Hospital. She was working the night Appellant underwent a SANE examination. Turner testified that, as Appellant walked past her, she heard Appellant say, "I got away with it the last time, I'll get away with it this time." Appellant asserts that admitting this evidence violated Texas Rules of Evidence 403 and 404, was hearsay, and "tempts" a guilty verdict based on collateral matters. Appellant also asserts that the admission of Turner's testimony violated the trial court's order granting his motion in limine.

Whether to admit evidence at trial is a preliminary question to be decided by the trial court. TEX. R. EVID. 104(a); *Tienda v. State*, 358 S.W.3d 633, 637–38 (Tex. Crim. App. 2012). We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Id.* (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)).

A ruling on a motion in limine does not preserve error for appellate review. *Thierry v. State*, 288 S.W.3d 80, 87 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (citing *Harnett v. State*, 38 S.W.3d 650, 655 (Tex. App.—Austin 2000, pet. ref'd)). A ruling on a motion in limine is not a ruling on the merits but, rather, is one which regulates the administration of a trial. *Id.* Accordingly, the violation of a ruling on a motion in limine may entitle a party to relief, but any remedy for such violation lies with the trial court, which may hold the litigant or attorney in contempt or use other remedies or sanctions. *Id.* (citing *Brazzell v. State*, 481 S.W.2d 130, 131 (Tex. Crim. App. 1972)).

Under Rule 403, relevant evidence may be excluded if its "probative value is substantially outweighed by a danger of . . . unfair prejudice." TEX. R. EVID. 403. "Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (citing *Montgomery*, 810 S.W.2d at 376); *see Martin v. State*, 570 S.W.3d 426, 437 (Tex. App.—Eastland 2019, pet. ref'd). In reviewing a trial court's determination under Rule 403, a reviewing 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) (quoting *Montgomery*, 810 S.W.2d at 392); *Martin*, 570 S.W.3d at 437.

An analysis under Rule 403 includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006); *Martin*, 570 S.W.3d at 437. Rule 403, however, does not require that the balancing test be performed on the record. *Martin*, 570 S.W.3d at 437; *Greene v. State*, 287 S.W.3d 277, 284 (Tex. App.—Eastland 2009, pet. ref'd). In overruling a Rule 403 objection, the trial court is assumed to have applied a Rule 403 balancing test and determined that the evidence was admissible. *Martin*, 570 S.W.3d at 437; *Greene*, 287 S.W.3d at 284.

The first factor focuses on the probative value of the evidence. "'Probative value' refers to the inherent probative force of an item of evidence—that is, 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." *Hernandez*, 390 S.W.3d at 323 (quoting *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007)).

As the Court of Criminal Appeals explained in *Gigliobianco v. State*, "probative value" is more than just relevance. 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). Here, the probative value of Appellant's statement that he will "get away with it this time" was significant as it tended to make it more likely that he, and not some other unknown individual, committed the assault.

The fourth factor focuses on the proponent's need for the evidence, which is related to the probative value of the evidence. As is often the case with sexual offenses against young children, the State's case came down mostly to L.P.'s and M.P.'s versions of the events as they related at trial and what they told others about the offense. There were inconsistencies in their versions of what happened. Additionally, both children were unable to identify Appellant in open court, and Appellant put identity in issue by arguing that another individual committed the assaults. As such, it was reasonable for the trial court to conclude that the evidence had probative value and that the State had a need for it.

The third factor examines the time needed to develop the evidence. Turner's testimony about Appellant's statement spanned only two lines in a reporter's record that was hundreds of pages long. Her entire testimony to the jury spanned less than ten pages of the reporter's record. Accordingly, this factor also weighs in favor of admissibility.

The remaining factor focuses on the evidence's potential to impress the jury in some irrational way. "By its express terms, evidence is not excludable under Rule 403 for merely being prejudicial—the rule applies to evidence that is *unfairly* prejudicial." *Martin*, 570 S.W.3d at 437. Evidence is unfairly prejudicial when it has an undue tendency to suggest an improper basis for reaching a decision. *Reese v. State*, 33 S.W.3d 238, 240 (Tex. Crim. App. 2000); *Martin*, 570 S.W.3d at 437. As explained in *Hernandez*, "[a]ll evidence is prejudicial to one party or the other—it

is only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value that Rule 403 is applicable." 390 S.W.3d at 324.

Appellant's statement had two prejudicial aspects. The second half of his statement, to the effect that he will "get away with it this time," was prejudicial, but it did not suggest a decision on an improper basis because it was directly related to the allegations that Appellant had been accused of committing. The first part of his statement is more problematic because it appears to address an extraneous matter by its reference to "I got away with it the last time." The relevant inquiry is whether this reference was unduly prejudicial to the extent that the danger of unfair prejudice substantially outweighed the statement's probative value. We conclude that the trial court did not abuse its discretion by implicitly resolving this question in the negative.

In summary, the evidence of Appellant's statement was prejudicial as it was tantamount to an admission of guilt for the offense for which he was charged. But the probative value was high for the same reason. Rule 403 contemplates excluding evidence only when there is a "clear disparity" between the offered evidence's prejudice and its probative value. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (quoting *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001)). Considering the standard of review, the presumption favoring admissibility of relevant evidence, and the relevant factors, we cannot conclude that the trial court abused its discretion in overruling Appellant's Rule 403 objection. *See Hammer*, 296 S.W.3d at 568 ("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." (footnote omitted)).

Rule 404(b) prohibits the admission of extraneous-offense evidence at the guilt phase of a trial to prove that a defendant committed the charged offense in conformity with bad character. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim.

App. 2011) (citing TEX. R. EVID. 404(b)). However, extraneous-offense evidence may be admissible when it has relevance apart from character conformity. *Id.* (citing *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003)). Such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2).

At trial and on appeal, Appellant contends that another individual committed the alleged assaults of L.P. and M.P. Thus, Appellant's statement rebuts his theory that another individual committed the offense with which Appellant was charged. The statement is therefore relevant to prove identity, i.e., that it was Appellant and not another individual who assaulted L.P. and M.P. Additionally, the statement indicates a consciousness of guilt, which is another exception to extraneous-offense evidence that is ordinarily prohibited under Rule 404(b). *Hedrick v. State*, 473 S.W.3d 824, 830 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Torres v. State*, 794 S.W.2d 596, 598–99 (Tex. App.—Austin 1990, no pet.). Thus, the trial court did not abuse its discretion by determining that the statement was admissible under Rule 404(b).

Finally, a statement is hearsay when the declarant makes the statement outside of court and a party offers the statement "in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d); *see Tienda v. State*, 479 S.W.3d 863, 874 (Tex. App.—Eastland 2015, no pet.). Hearsay is inadmissible except as provided by statute or the Rules of Evidence. TEX. R. EVID. 802; *see Tienda*, 479 S.W.3d at 874. Rule 801(e)(2) of the Texas Rules of Evidence provides that a statement is not hearsay if it is offered against a party and is the party's own statement. TEX. R. EVID. 801(e)(2)(A). Thus, a party's own statement, when offered against him, is not hearsay and is admissible. *Trevino v. State*, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999). The only requirements for admissibility of an admission of

a party-opponent under Rule 801(e)(2)(A) is that the admission is the party's own statement and that it is offered against him. *Id.* Appellant uttered the challenged statement, and it was offered by the State against Appellant, the State's opposing party. Accordingly, the statement qualified as an opposing party's statement and was not hearsay by definition. We overrule Appellant's fourth issue.

Motion for a Mistrial

In his fifth issue, Appellant contends that the trial court erred in denying his motion for a mistrial when L.P., who was nine years old at the time of trial, testified that her grandfather said that Appellant was a "bad guy." The testimony came when, in response to an innocuous question by the State asking L.P. if she went "back to [her] grandma's," L.P. stated, "Yes. We went to our grandpa; and then he told us that he was a bad guy, like a bad -- [.]" Appellant's trial counsel objected that the comment violated Appellant's motion in limine and that it referred to an extraneous matter. Trial counsel also requested a mistrial. The trial court denied Appellant's motion for a mistrial, and it instructed the jury to disregard L.P.'s answer.

The prosecutor then asked L.P. if "anything else happen[ed]" before L.P. returned to her grandfather's. L.P. replied, "Well, he stated he was a bad guy[.]" Appellant's trial counsel objected and moved again for a mistrial. The trial court overruled Appellant's second motion for a mistrial. Appellant did not request a second instruction for the jury to disregard the answer, and a second instruction was not given. However, the trial court instructed L.P. not to repeat things during her testimony that other people said. After the trial court gave this instruction, Appellant's trial counsel stated: "Your Honor, just so it's clear on the record, we're objecting to those statements as hearsay."

A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009); *Ladd v. State*, 3 S.W.3d 547,

567 (Tex. Crim. App. 1999). A mistrial is an extreme remedy for a narrow class of highly prejudicial and incurable errors during the trial process. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We review the denial of a motion for mistrial for an abuse of discretion. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). A trial court does not abuse its discretion unless its decision falls outside the zone of reasonable disagreement. *Id.* "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). The determination of whether an error necessitates a mistrial must be made by examining the facts of each case. *Ladd*, 3 S.W.3d at 567.

Appellant contends that "[h]ammering this notion into the jury's head with this frequency . . . caused extreme prejudice to [Appellant]." Appellant asserts that, because the trial court did not declare a mistrial, "the jury obviously felt the statements were proper, true, and correct." We disagree.

A trial court does not abuse its discretion in denying a motion for mistrial if the complained-of event could have been cured by an instruction to the jury. *Lee v. State*, 549 S.W.3d 138, 145 (Tex. Crim. App. 2018). The prosecutor asking an improper question seldom requires a mistrial because any harm can usually be cured by an instruction to disregard. *Ladd*, 3 S.W.3d at 567. Similarly, a witness's inadvertent reference to an extraneous offense is generally cured by a prompt instruction to disregard. *Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998). We conclude that the trial court did not abuse its discretion in denying the motion for a mistrial because L.P.'s statements were not incurable by an instruction to the jury. The statements did not appear to be calculated to inflame the minds of the jury or to be of such a damning character as to make it impossible to remove the harmful impression from the jurors' minds with the instruction to disregard. As noted above, the nonresponsive statements were made by a nine-year-old victim of a sexual assault. We overrule Appellant's fifth issue.

Outcry Witness

In his sixth issue, Appellant argues that the trial court abused its discretion when it permitted McPeek to testify as an outcry witness. Specifically, Appellant asserts that M.A.M. was the proper outcry witness because it was information M.A.M. received from M.P. and L.P. that prompted the investigation, because it was M.A.M. who called the police, and because M.A.M. took M.P. and L.P. to the Children's Advocacy Center. The State contends that L.P.'s and M.P.'s statements to M.A.M. were not sufficiently detailed to describe Appellant's alleged offenses in a discernible manner.

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). A trial court has broad discretion to determine the admissibility of outcry evidence, and we will not disturb its determination as to the proper outcry witness absent a showing in the record that the trial court clearly abused its discretion. *See Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990); *Smith v. State*, 131 S.W.3d 928, 931 (Tex. App.—Eastland 2004, pet. ref'd). We will uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Montgomery*, 810 S.W.2d at 391.

Article 38.072 of the Texas Code of Criminal Procedure governs the admissibility of outcry-witness testimony. CRIM. PROC. art. 38.072. The statute creates an "outcry exception" to the hearsay rule in prosecutions for sex-related offenses committed against a child younger than fourteen years of age. *See id.* § 1. Article 38.072 provides that outcry testimony from the first person, eighteen years of age or older, other than the defendant, to whom the child makes a statement describing the alleged offense will not be inadmissible because of hearsay, subject to certain procedural requirements. *See id.* § 2(a)–(b).

The outcry exception applies "only to statements that . . . describe . . . the alleged offense." *Id.* § 2(a)(1)(A). The statement "must be more than words which

give a general allusion that something in the area of child abuse was going on." *Garcia*, 792 S.W.2d at 91; *see Michell v. State*, 381 S.W.3d 554, 558 (Tex. App.—Eastland 2012, no pet.). To be admissible, the statement must describe the offense in some discernible manner. *Garcia*, 792 S.W.2d at 91; *Michell*, 381 S.W.3d at 558.

Also, for the outcry exception to apply, Article 38.072 requires that (1) on or before the fourteenth day before proceedings begin, the party intending to offer the statement (a) notifies the adverse party of its intent to offer the outcry statement, (b) provides the name of the outcry witness through whom it intends to offer the statement, and (c) provides a written summary of the statement; (2) the trial court holds a hearing outside the presence of the jury to determine whether the statement is reliable; and (3) the child testifies or is available to testify at the proceeding. *See* CRIM. PROC. art. 38.072, § 2(b).

We note that Appellant was tried for three offenses. The first two counts in the indictment charged him with aggravated sexual assault of a child, a first-degree felony, by alleging that he intentionally or knowingly penetrated the sexual organ of M.P. (Count One) and L.P. (Count Two). *See* PENAL § 22.021(a)(1)(B)(i), (e). Count Three of the indictment charged Appellant with indecency with a child by contact, a second-degree felony, by touching M.P.'s breasts. *See id.* § 21.11(a)(1), (c)(1), (d). In Counts Four and Five, Appellant was charged with indecency with a child by exposure, a third-degree felony, for exposing his genitals to L.P. (Count Four) and M.P. (Count Five). *See id.* § 21.11(a)(2)(A), (d).

The State provided Appellant with notice of its intention to use hearsay statements of L.P. and M.P. under section 2(b) of Article 38.072. The State's notice listed both M.A.M. and McPeek as potential outcry witnesses, but the State only called McPeek as an outcry witness at Appellant's trial. Appellant objected to McPeek testifying as an outcry witness based upon the notice listing M.A.M. as the

outcry witness.[2] In response, the prosecutor argued that the statements made to M.A.M. did not sufficiently describe the alleged offenses to qualify as outcry statements, making McPeek the first adult to whom L.P. and M.P. made a qualifying outcry. The prosecutor also asserted that M.A.M. could only qualify as an outcry witness for the offenses of indecency by exposure. We agree with the State.

Hearsay testimony from more than one outcry witness may be admissible under Article 38.072 if the witnesses testify about different events. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011) (citing *Broderick v. State*, 35 S.W.3d 67, 73–74 (Tex. App.—Texarkana 2000, pet. ref'd)). Thus, admissible outcry witness testimony is event-specific, not person-specific. *Eldred v. State*, 431 S.W.3d 177, 181–82 (Tex. App.—Texarkana 2014, pet. ref'd); *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). Because designation of the proper outcry witness is event-specific, when a child is victim to more than one instance of sexual assault, it is possible to have more than one proper outcry witness—so long as the outcries concerned different events and not simply repetition of the same event told to different individuals. *Robinett v. State*, 383 S.W.3d 758, 762 (Tex. App.—Amarillo 2012, no pet.); *Brown v. State*, 189 S.W.3d 382, 387 (Tex. App.—Texarkana 2006, pet. ref'd).

As reflected in our second footnote, the outcry statement to M.A.M. was only made by L.P. L.P.'s outcry to M.A.M. only addressed the offense of indecency with a child by exposure. Thus, we disagree with Appellant's contention on appeal that M.A.M. was the proper outcry witness for all offenses because she was the first outcry witness. Because McPeek was the first adult to whom L.P. and M.P. made statements sufficiently describing the alleged offenses of aggravated sexual assault

[2]The State's notice provided as follows concerning the summary for M.A.M.'s outcry testimony: "[L.P.] told [M.A.M.] that [Appellant] showed [L.P.] and [M.P.] his 'weenie.' [L.P.] said that [Appellant] started touching [M.P.'s] butt while he was touching himself."

and indecency with a child by contact, McPeek was a proper outcry witness under Article 38.072. As such, the trial court did not abuse its discretion when it permitted McPeek to testify as an outcry witness. We overrule Appellant's sixth issue.

Jury Argument and Related Pretrial Motion

In his seventh issue, Appellant argues that the trial court abused its discretion by denying his pretrial motion requesting that the trial court order the State to stay within the acceptable parameters of proper closing argument. Appellant contends that a trial court abuses its discretion if it fails to grant a motion that requires the State to comply with applicable law. However, Appellant cites no authority that supports the filing of a motion of this type, and we have found none. Appellant's motion is essentially a motion in limine with respect to closing argument. A trial court's denial of a motion in limine is a preliminary ruling only and normally preserves nothing for appellate review. *Geuder v. State*, 115 S.W.3d 11, 14–15 (Tex. Crim. App. 2003). For error to be preserved with regard to the subject of a motion in limine, an objection must be made at the time the subject is raised during trial. *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). We conclude that the denial of Appellant's motion to regulate closing argument is not cognizable on appeal. We overrule Appellant's seventh issue.

In his eighth issue, Appellant asserts that the prosecutor made improper closing argument in multiple instances. Permissible jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008); *Cannady v. State*, 11 S.W.3d 205, 213 (Tex. Crim. App. 2000). Even when an argument exceeds the permissible bounds of these approved areas, it is not reversible unless the argument is extreme or manifestly improper, violates a mandatory statute, or injects into the trial new facts harmful to the accused. *Wesbrook v. State*, 29

S.W.3d 103, 115 (Tex. Crim. App. 2000). "The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial." *Id.* (citing *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997)). We must "review the argument in the context of the entire argument and not in isolation." *Sennett v. State*, 406 S.W.3d 661, 670 (Tex. App.—Eastland 2013, no pet.).

The first allegation of improper jury argument occurred when the prosecutor argued that one of the child victims "has spent two years trying to forget what the Defendant did to her that day." Appellant objected to this argument on the basis that "[i]t's an invasion of the jury's province" for the State to claim that Appellant "did" something. Appellant also asserted that the argument was outside the four parameters of acceptable closing argument. Appellant asserts on appeal that this statement was outside the evidence because "[t]here was never any evidence of continuing trauma or 'trying to forget' anything about that day." We disagree.

The argument that the child victims have been trying to forget the abuse committed upon them by Appellant is a reasonable deduction from the evidence. *See Brown*, 270 S.W.3d at 570. Furthermore, the prosecutor prefaced this argument by referring to M.A.M.'s testimony that "they have spent years trying to forget this." We also disagree that the prosecutor's argument invaded the province of the jury to determine Appellant's guilt from the evidence. We agree with the prosecutor that this argument is a reasonable deduction from the evidence.

Appellant also complains on appeal that the prosecutor argued, "And you should find him guilty because he did this. Because you know he did this and because he knows he did this." Appellant objected to this testimony on the basis that it alluded to Appellant's right to remain silent. In response, the prosecutor asserted that the argument related to the statement from Appellant that was in evidence. Another instance occurred when the prosecutor argued, "He knows he did

this." Appellant objected to this argument on the basis that "[s]aying what the Defendant knows or doesn't know" is outside the evidence.

In determining whether the State's comment constituted an impermissible reference to the accused's failure to testify, the language must be viewed from the jury's standpoint and the implication must be clear. *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001). The test is whether the language used was "manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify." *Id.*; *see Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007). Paramount to the analysis is the context in which the comment is made. *Bustamante*, 48 S.W.3d at 765; *Cruz*, 225 S.W.3d at 548–49. In this instance, the prosecutor's arguments can reasonably be construed as a summation of the evidence and a reasonable deduction from the evidence based on Turner's testimony that she heard Appellant say, "I got away with it the last time, I'll get away with it this time." Therefore, the prosecutor's arguments were not outside the evidence and did not impermissibly comment on Appellant's failure to testify. Accordingly, the trial court did not err in overruling Appellant's objections to the prosecutor's closing argument. We overrule Appellant's eighth issue.

This Court's Ruling

We affirm the judgments of the trial court.

May 29, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[3]
Willson, J., not participating.

JOHN M. BAILEY
CHIEF JUSTICE

[3]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.