In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-18-00413-CR

MARIO RUBIO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 18-07-09865

MEMORANDUM OPINION

Mario Rubio appeals his conviction for sexual assault. *See* Tex. Penal Code Ann. § 22.011(a)(1)(A). In one issue on appeal, Rubio argues that the trial court erred when it admitted evidence of an extraneous offense. For the reasons explained below, we affirm.

Background

Rubio worked as a massage therapist at Massage Heights in The Woodlands. In September 2017, D.H. went to Massage Heights for a deep tissue massage.[1] D.H. testified that she had been a member at Massage Heights for three years when this incident occurred. D.H. stated that although she did not have a preference in massage therapists, she requested Rubio, and he was assigned to give her the massage on that date. D.H. stated that Rubio had been her massage therapist on previous occasions without incident.

D.H. testified that the beginning of her massage with Rubio was "standard." D.H. testified that while lying on her stomach on the massage table, she was draped with a sheet, and Rubio began to massage her glutes. This made her uncomfortable because Rubio massaged her glutes under the sheet, something he had not done in the past. According to D.H., when she turned over to her back, Rubio lifted the sheet "higher than normal[,]" exposing her breast, and making her feel uncomfortable again. D.H. stated that during her chest massage, Rubio made contact with her nipple but it "felt like a mistake." As Rubio massaged her right leg, he moved the sheet higher and exposed her groin area, which was described as her "bikini line[.]" After

[1] We refer to the victims by their initials to conceal their identity. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process[.]").

Rubio finished massaging her right leg, he replaced the sheet and moved to D.H.'s left leg. D.H. stated that Rubio then "moved up towards my thigh area[,] exposing my thigh . . . [and] vaginal area." D.H. stated she felt "air" in her vaginal area because of the sheet's placement on her body by Rubio. D.H. testified that as Rubio massaged her left thigh, his hand touched her vagina two times, including inserting his finger into her vagina. D.H. stated she was "[s]hocked" and "[s]cared," and that she told Rubio "don't do that." D.H. said that Rubio apologized, covered her with the sheet, patted her foot, and ended the massage.

After D.H. left the massage room, she requested to speak to the manager of Massage Heights. D.H. stated that she spoke to the manager, Ashley Brown, and reported Rubio's behavior. D.H. called her husband and then called the police to report Rubio. After speaking with the police, D.H. drove to the hospital to have an examination by a Sexual Assault Nurse Examiner (SANE).

Over defense counsel's objections, the trial court allowed the State to elicit testimony from Brown, the manager of Massage Heights, concerning K.B., another customer of Massage Heights. K.B. had previously called Brown and reported inappropriate behavior by Rubio during a massage session. The trial court gave the jury a limiting instruction about the use of the extraneous offense before eliciting the testimony regarding K.B. from Brown.

Brown testified that she was a supervisor in July 2017, and Rubio was her employee. She stated that in July 2017, K.B. had a massage with Rubio. Afterwards, K.B. called Brown and told her that Rubio "tried to touch her privates" during a massage. K.B. complained that while Rubio massaged her legs, he attempted to touch her sexual organ. K.B. did not fill out a report with Massage Heights documenting her complaint and she did not report Rubio's behavior to the police. Brown testified that she spoke with Rubio about K.B.'s complaint and Rubio denied touching K.B. inappropriately during her massage.

K.B. testified in more detail about the massage. K.B. stated that in July 2017, she went to Massage Heights and Rubio was assigned to give her a massage. According to K.B., the massage began normally but changed when Rubio asked her to turn face up on the massage table. When K.B. turned over, she noticed that Rubio placed the sheet "higher than usual[,]" indicating it was close to her "bikini line[.]" K.B. stated that this made her feel "uncomfortable[.]" K.B. testified that Rubio began to massage her leg, massaging increasingly higher on her leg until he touched the "outer regions of my private parts[.]" Rubio did not penetrate her vagina, but he applied light pressure. K.B. told Rubio to stop and he apologized and finished the massage. K.B. stated that she did not immediately complain to Massage Heights about Rubio but called the next day and reported his behavior to Brown.

After the testimony of several other witnesses, the jury convicted Rubio of Sexual Assault.[2] During the punishment phase of the trial, Rubio pled true to the enhancement paragraphs, and the jury sentenced him to eighteen years of confinement in the Texas Department of Corrections. He timely filed this appeal.

Analysis

In his sole issue on appeal, Rubio argues that the trial court erred when it allowed the State to elicit testimony regarding an extraneous offense because an extraneous offense is not admissible unless the defendant raises the issue of "intent, absence of mistake [or] identity of the defendant" which, according to Rubio, did not happen at trial by defense counsel.

We review a trial court's admission of extraneous offense evidence under an abuse of discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). We must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002) (citations omitted). We will not disturb a trial court's ruling if it is correct on any

[2] Several other witnesses testified at trial, but we limit our discussion of the background to only the issues raised by Rubio on appeal,

legal theory of law applicable to that ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Rule 404(b) of the Texas Rules of Evidence provides as follows:

> (1) ***Prohibited Uses.*** 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.
>
> (2) ***Permitted Uses; Notice in Criminal Case***. This 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). The list of enumerated purposes for which extraneous offense evidence may be admissible under Rule 404(b) is neither exclusive nor exhaustive. *Montgomery*, 810 S.W.2d at 388. Extraneous offense evidence may be admissible if it has relevance apart from its tendency to prove a person's character to show that he acted in conformity therewith. *Id.* at 387.

Evidence of other crimes or wrongs may be admissible to rebut a defensive theory. *See Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008); *Moses*, 105 S.W.3d at 626; *Wheeler*, 67 S.W.3d at 887 n.22. To be admissible for rebuttal of a fabrication defense, "the extraneous misconduct must be at least similar to the charged one[.]" *Wheeler*, 67 S.W.3d at 887 n.22. The degree of similarity required for admissibility to rebut a defensive theory is not one of "exacting sameness" as is

required when extraneous offense evidence is used to prove a "defendant's system." *See Dennis v. State*, 178 S.W.3d 172, 179 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

Relevant evidence is generally admissible. Tex. R. Evid. 402. Under Rule 403 of the Texas Rules of Evidence, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. "Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." *Montgomery*, 810 S.W.2d at 380. Once a trial court determines that extraneous offense evidence is admissible under Rule 404(b), the trial court must, upon proper objection by the opponent of the evidence, weigh the probative value of the evidence against its potential for unfair prejudice. *Id*.; *see* Tex. R. Evid. 403. When undertaking a Rule 403 analysis, the 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 v. State, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006); *see also Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). However, if the only value of extraneous offense evidence is to show character conformity, the balancing test required by Rule 403 is obviated because the "rulemakers hav[e] deemed that the probativeness of such evidence is so slight as to be 'substantially outweighed' by the danger of unfair prejudice *as a matter of law*." *Montgomery*, 810 S.W.2d at 387 (quoting *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978)).

The record shows that after the defense's cross examination of Brown during the State's case in chief, the State approached the bench and told the trial court it believed the defense opened the door to testimony regarding an extraneous offense regarding K.B. In support of its argument, the State told the trial court that the defense opened the door to testimony regarding the extraneous offense during its opening statement questioning the complainant's credibility, during its cross examination of Brown when it elicited testimony about Brown saying "saying this is bull shit" without clarification or context, and questioning Brown about the number of massages performed by Rubio, raising by implication that no other customers had complained of improper touching by Rubio. The State argued that because the defense questioned the credibility of D.H., by "either fabrication or

mistake[,]" Rule 404(b) allows the State to rebut that assertion. Defense counsel objected and argued it had a motion in limine regarding this testimony. The defense further contended that the alleged assault on K.B. was different as there was no penetration, K.B. did not call the police, and she returned to Massage Heights after the incident for more services. The defense also argued that allowing Brown or K.B. to testify about the incident infringed on Rubio's constitutional right of presumption of innocence until proven guilty and under Rule 403, the "alleged testimony would clearly be outweighed by the undue prejudice."

The trial court noted during this argument that the notepad defense counsel used while cross-examining Brown had the following handwritten notes: "slipped in," "[o]n the way down[,]" "[m]assage not stopped[,]" "[t]his is bull shit[,]" and "248 services[.]" The trial court stated that in its observation, the defense was arguing "some sort of misunderstanding" on the part of the victim. The trial court also stated that it appeared that the defense was also arguing the defense of fabrication and, by eliciting testimony that Rubio had performed 248 services, implying that D.H. was the first customer to complain, it left the jury with a false impression considering the extraneous offense testimony. The trial court ruled that testimony regarding the assault of K.B. would be allowed under Rule 403 because

any prejudicial effect was not outweighed by the probative value of the testimony. The trial court also gave the jury a limiting instruction regarding the testimony.

Rule 404(b)

Based on the record before us, we conclude that the extraneous offense evidence was admissible under Rule 404(b) to rebut the defensive theories of fabrication and mistake, and the trial court's ruling fell within the zone of reasonable disagreement. *See* Tex. R. Evid. 404(b); *Dabney v. State*, 492 S.W.3d 309, 317 (Tex. Crim. App. 2016) ("[W]e stated in *De La Paz*, Rule 404(b) is a rule of inclusion rather than exclusion—it excludes only evidence that is offered solely for proving bad character and conduct in conformity with that bad character."). In *Dabney*, the Texas Court of Criminal Appeals explained that the 404(b) exception applies when the defense presents a theory that opens the door for rebuttal.

> While Rule 404(b) requires the State to provide notice of other crimes, wrongs, or acts it plans to introduce in its case-in-chief, there is an exception to this notice requirement when the defense opens the door to such evidence by presenting a defensive theory that the State may rebut using extraneous-offense evidence.

492 S.W.3d at 317.

Here, the parties vigorously disputed whether the defense opened the door to rebuttal testimony under 404(b). The record establishes that the trial court's determination that the extraneous offense testimony was relevant to rebut the

defensive theories of mistake of fact or fabrication fell within the zone of reasonable disagreement. Therefore, the trial court did not abuse its discretion when it admitted extraneous offense evidence under 404(b). *See id*. at 318; *see also* Tex. R. Evid. 404(b).

Rule 403

We must next examine if the trial court abused its discretion under Rule 403—whether the evidence of the extraneous offense was more prejudicial than probative. *See* Tex. R. Evid. 403; *Gigliobianco*, 210 S.W.3d at 641–42. Our review of the record shows that the trial court could have reasonably concluded that the testimony about the extraneous offense was probative since the defense challenged the credibility of the witnesses, Rubio alleged any touching of D.H. was a mistake, that the testimony made no suggestion to the jury to decide the case on an improper basis or otherwise confuse the issues, and that it did not take an inordinate amount of time to introduce the evidence. *See id.*

Rubio argues that the two incidents are not similar because he did not penetrate K.B. with his finger, and she did not report him to the police. Therefore, because the incidents are not similar, the trial court abused its discretion under Rule 403 by allowing the testimony as it was more prejudicial than probative. K.B. and D.H. testified to similar events. Both described being exposed when asked to turn

over, both stated that the sheet was placed too high near their "bikini line[,]" and both testified that in the process of Rubio massaging their leg, he touched their vagina. *See Distefano v. State*, 532 S.W.3d 25, 33 (Tex. App.—Houston [14th Dist.] 2016, pet ref'd) (determining a trial court did not err when it allowed testimony about a similar extraneous offense when the hallmarks of the assault were the same, with the main difference being the defendant did not complete the assault in one incident). Here, the trial court could have reasonably concluded that the similarities in the testimony about the assault "strengthened the probative force of the evidence." *Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet ref'd); *see also Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet ref'd) ("The extraneous-offense evidence was probative to rebut [the appellant's] defensive theory of fabrication[, and] . . . the extraneous-offense evidence is sufficiently similar to the charged offense to have probative value on this issue.").

Additionally, the trial court provided a limiting instruction regarding the testimony about K.B., and we must assume that the trial court's limiting instruction further diminished any prejudicial reverberations from the testimony. *See Fowler v. State*, 553 S.W.3d 576, 585 (Tex. App.—Texarkana 2018, no pet.). Balancing the factors of our Rule 403 analysis, we determine that the trial court's decision to allow the extraneous offense testimony under Rule 403 fell within the zone of reasonable

disagreement. *See Ryder v. State*, 581 S.W.3d 439, 453–54 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (weighing 403 factors such as "(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[,]" and determining that the trial court's decision was within the zone of reasonable disagreement).

Therefore, we overrule Rubio's sole issue on appeal and affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on December 27, 2019
Opinion Delivered June 24, 2020
Do Not Publish

Before Kreger, Horton and Johnson, JJ.