Opinion issued June 30, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00382-CR

JORGE ARTURO GARCIA FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case No. 1566314

MEMORANDUM OPINION

A jury convicted appellant, Jorge Arturo Garcia Flores, of indecency with a child,[1] and the trial court assessed punishment at five years' confinement. In a single

[1] *See* TEX. PENAL CODE § 21.11.

issue on appeal, appellant contends the trial court reversibly erred by admitting evidence of an extraneous act. We affirm.

BACKGROUND

When Alice[2] was in third grade, she went to De Zavala Elementary School, where appellant was a teacher and worked in the after-school program. During the after-school program, while the children were waiting for their parents to pick them up, appellant would show movies in his classroom. The children would sit on a brightly colored carpet, while appellant sat on a desk or table behind the projector. Alice testified that appellant paid special attention to her and would talk to her more than he did the other students; she thought he was "nice" and "a good teacher."

However, Alice testified that many times that year, appellant would summon her to the back of the classroom, behind the projector showing the movie, where he was sitting on a desk or table. He would pick her up and place her on his lap with her back toward him. Holding her by the hips, appellant would rub his body against Alice's body through their clothes. Alice testified that she could feel appellant's erect penis through his clothes as he pressed it against her buttocks. While doing so, he would stroke her bare legs. If one of the other children happened to turn around, appellant would remind them to face forward, saying, "The movie is in the front."

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[2] For purposes of this opinion, we refer to all minor witnesses by a pseudonym. *See* TEX. R. APP. P. 9.10(a)(3).

Alice testified that she was afraid to tell anyone about it, so she kept it a secret. She tried to come up with reasons not to go to school and would sometimes go in the bathroom during the after-school program to avoid going to appellant's classroom. Although she liked wearing dresses, she started packing pants in her backpack to put on under her skirt.

After finishing third grade, Alice did not see appellant again until she was finishing her sixth-grade year at Deady Middle School. One day in May 2017, appellant was walking down the hall at Deady when she heard someone say "Hi" to her. When she saw that it was appellant, she became frightened, ran to her English teacher, Terrie Leigh, and hid behind her. Leigh testified that Alice, who was usually very mature, was acting "toddler like," and was "afraid, crouched down and just peeking around . . . my body." Leigh had never seen Alice act like that before.

Because Alice indicated that she was afraid of appellant, Leigh took Alice to the principal's office to speak with the principle, Richard Smith. Smith too, noticed a change in Alice's demeanor. Smith testified that Alice usually presented herself as a "tough girl," but she now appeared "very sad and fearful and very withdrawn." Smith had appellant write out a statement regarding what she said had occurred between appellant and her when she was a third-grade student at De Zavala.

Smith then contacted the Houston Independent School District Police Department and the Department of Family and Protective Services. Both agencies

opened investigations. As part of the investigation, Alice repeated her story to Erika Gomez, a forensic interviewer at the Children's Assessment Center, and Jessica Johnson, a special investigator with DFPS. The HISD Police investigation culminated in appellant's being charged with indecency with a child; the DFPS investigation "ruled out" the allegations based on "insubstantial information."

In opening statements at trial, defense counsel referred to Alice as "a troubled young lady," and suggested that her story was fabricated:

> Ladies and Gentlemen, this case is about an event that occurred now a long time ago and you'll find from the evidence that it's impossible that what [Alice] alleges occurred. It just did not occur.
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> * * * *
>
> And as you listen to [Alice] talk to you about her story, I ask you to judge the credibility of the story as it unfolds, judge the credibility of the facts she tells you as you listen to each part and each aspect of the story because each aspect of this story will unfold into different layers. And as the layers unfold, you're going to see that each aspect of it tells you a different part of the story that can't be true. And if those parts aren't true, the whole can't be true, can it?

During cross-examination of Alice, defense counsel also suggested that appellant could not have sexually assaulted her under the circumstances that she described and that aspects of her testimony were implausible.

> [Defense Counsel]: And I thought I heard you say that [appellant] told the students they could not turn around.
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> [Alice]: Yes.

[Defense Counsel]: So, and I just want to make sure I understand what you're telling us. What you're telling us is that he would tell you to come in the back and he would tell the entire class that they could not turn around and look in the back?

[Alice]: Yes.

* * * *

[Defense Counsel]: So he told an entire classroom of third grade kids that they could not turn around and then he's sitting on top of the table?

[Alice]: Yes.

[Defense Counsel]: And he's got you up on his lap and he's told these kids they cannot turn around, right?

[Alice]: Yes.

[Defense Counsel]: Okay. And this lasted the entire time of the class until your mom showed up to pick you up.

[Alice]: Yes.

[Defense Counsel]: From the time he started the movie and everybody started watching and he told then not to turn around until the class ended when your mom got there.

[Alice]: Yes.

[Defense Counsel]: Correct. And no kid ever turned around throughout the entire movie, right?

[Alice]: They would, but

[Defense Counsel]: Okay.

[Alice]: He would tell them to look straight.

After Alice's testimony, the State notified the trial court of its intent to call another child, Gina, as a witness during its case-in-chief to testify about a similar experience that she had with appellant while a student at De Zavala. The State argued, and the trial court agreed, that Gina's testimony was admissible under Texas Rule of Evidence 404(b)(2) because counsel had raised a fabrication defense during his opening statement and his cross-examination of Alice. The trial court permitted the State to call Gina and provided the jury with a limiting instruction about her testimony, both during the presentation of the evidence and in the jury charge.

Gina, a sixth-grade student at a different middle school than Alice, testified about an incident that occurred when she was a second-grade student at DeZavala. Gina said that appellant came into her classroom while the students were taking a test and asked her teacher for two students to help him in his kindergarten class. Gina and her friend, Isabel, had finished their tests, so they went with appellant to his classroom and helped him clean up. Appellant then had his kindergarteners sit on a colorful rug and he put on a movie for them to watch. While the children were watching the movie, appellant called Gina and Isabel to the back of them room to thank them. Gina said that appellant "pull[ed] me over and [sat] me on his lap." Gina said that appellant "had his hand under my shirt and started rubbing my back." Gina also testified that appellant started rubbing her legs, and that she held her hands on her skirt to make sure that appellant did not lift it up. Appellant was bouncing

her up and down on his leg; Gina could not feel any other part of his body beside his leg. When appellant tried to get Isabel to sit on his other knee, Gina told him that they had a test; he replied that they were free to go. Gina testified that appellant made her feel "uncomfortable and scared," and she felt like she had to sit on his lap. Gina and Isabel promised one another that they would never tell anyone, but Isabel's mother found out about it when the girls were in the fourth grade. Gina talked to both the principal and the school nurse about it when she was in the fourth grade.

Gina testified that she does not know Alice.

ADMISSION OF EXTRANEOUS CRIMES, WRONGS, OR OTHER ACTS

In his sole issue on appeal, appellant contends that "[i]t was harmful error for the trial court to allow evidence of an alleged extraneous act[.]" Specifically, appellant argues that the testimony by Gina was inadmissible under Texas Rules of Evidence 404(b)(2) and, even if admissible, should have been excluded under Texas Rule of Evidence 403 because its probative value was substantially outweighed by the risk of unfair prejudice. We address each contention, respectively.

Standard of Review and Applicable Law

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Green v. State*, 934 S.W.2d 92, 104 (Tex. Crim. App.

1996). If the trial court's decision was correct on any theory of law applicable to the case, we will sustain it. *Prystash v. State*, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999); *see also Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004) ("If the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment.").

Rule 404(b)

Rule 404(b)(2) allows the use of extraneous-act evidence for purposes other than to show character conformity. TEX. R. EVID. 404(b)(2). The rule lists as examples of such purposes: "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* In addition, the court of criminal appeals has held that extraneous-offense evidence may be admissible to rebut a defensive theory such as fabrication. *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008). The State relies on *Bass* to support the admission of Gina's testimony, while appellant argues that this case is distinguishable. We agree with the State.

In *Bass*, the Texas Court of Criminal Appeals held that a defense opening statement may open the door to the admission of extraneous-offense evidence to rebut defensive theories presented in that opening statement. *Id.* at 563. Bass was a pastor accused of sexually assaulting a teenager on church property. *Id.* at 558. In

his opening statement, he claimed the teenager's allegations were "pure fantasy" and "pure fabrication." *Id.* He, "as a pastor and minister," was "the real deal and the genuine article." *Id.* After the teenager testified, the trial court permitted the State to present the extraneous-offense evidence during its case-in-chief, which showed that appellant had sexually assaulted two other girls in his church office. *Id.* at 558–59.

The court of criminal appeals held that it was "at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for the noncharacter-conformity purpose of rebutting appellant's defensive theory that the complainant fabricated her allegations against him and of rebutting the defensive theory clearly suggesting that appellant, as a 'real deal' and 'genuine' pastor, would not engage in the type of conduct alleged in the indictment." *Id.* at 563. In so holding, the court noted that "[b]y showing that the victim's allegations are less likely to be fabricated, the evidence directly rebuts the defensive claims and has logical relevance aside from character conformity." *Id.*

Appellant argues (1) that "the circumstances in *Bass* were completely different than the circumstances in [appellant's] trial" and that "[t]he opening statement by the trial counsel for [appellant] did not reach as far or come remotely close to the open[ing] statement made by the attorney for *Bass*." Appellant also argues (2) that Gina's testimony did not "involve sexual misconduct" by appellant

because Gina did not testify that she could feel appellant's genitals through her clothes like Alice did. We address each contention.

A. Appellant's opening statement

During opening statements, appellant's counsel argued as follows:

> Ladies and Gentlemen, this case is about an event that occurred now a long time ago and you'll find from the evidence that ***it's impossible that what [Alice] alleges occurred. It just did not occur.*** I think that the evidence will show that [Alice] is a troubled young lady, but the evidence will show that it's not as a result of anything that happened with [appellant]. I don't know what it is. And it's not my burden to show you what it is.
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> * * * *
>
> But the evidence will show in this case that, I think, she is a troubled young lady. But you won't find any evidence that's as a result of anything that [appellant] did. It's just a simple fact that she has some trouble going on somewhere in her life. As I said, you're the sole judges of the credibility of the evidence, credibility of the witnesses. And as you listen to [Alice] talk to you about her story, I ask you to judge the credibility of the story as it unfolds, judge the credibility of the facts she tells you as you listen to each part and each aspect of the story because each aspect of this story will unfold into different layers. And as these layers unfold, you're going to see that ***each aspect of it tells you a different part of the story that can't be true***. And if those parts aren't true, the whole can't be true, can it? And if the whole can't be true, [appellant] cannot be guilty of a crime.

Appellant argues that this opening statement did not "open the door" to the extraneous-act evidence offered by the State because it did not raise a defense that Alice fabricated her story.

Our sister appellate court from Austin has considered and rejected a similar argument. *See Gaytan v. State,* 331 S.W.3d 218, 224-26 (Tex. App.—Austin 2011, pet. ref'd). During opening argument, Gaytan's attorney argued:

> The defense in this case is real simple: this didn't happen . . . . What the evidence is going to show is that [C.R.] got mad at Frank because he wouldn't play with her anymore [sic]. She made this statement [alleging abuse] and there's no evidence to support it . . . the story changes and grows and cracks and there's no physical evidence."

Id. at 224. On appeal, Gayton's counsel attempted to distinguish *Bass* by arguing that he had not advanced a fabrication defensive theory. *Id.* at 225. The court of appeals noted that, while counsel had not used the words "pure fantasy" or "pure fabrication," such "magic words" were not necessary to raise a fabrication defense. *Id.* Because counsel provided a motive for the victim's allegations [he would not play with her], pointed out that there was "no evidence" to support her allegations, and alleged that her "story changes and grows and cracks," the existence of a fabrication defense was "at least subject to reasonable disagreement" and the trial court did not abuse its discretion by admitting extraneous-offense evidence in the State's case-in-chief to rebut the suggestion of fabrication by appellant during opening statements. *Id.*

We believe that same is true in this case. While appellant did not allege a motive for why Alice would fabricate a story against him personally, he did imply that she made up the story because she was a "troubled young lady." Appellant also

asserted that there was "no evidence" that appellant did anything to cause Alice to make her allegations, and he pointed out that her story "can't be true" and "if the whole can't be true, [appellant] cannot be guilty of a crime." The defendant in *Gayton* alleged in opening that "this didn't happen," while appellant in this case alleged in opening that "it just did not occur." Both cases rested on the defense that the child witness was fabricating a story against the accused.[3]

Thus, we conclude that "it is at least subject to reasonable disagreement" as to whether the statements made by appellant in opening suggest that Alice was fabricating her allegations; thus the trial court did not abuse its discretion by admitting the extraneous-act evidence to rebut the suggestion of fabrication. *See id.* (citing *Bass* 270 S.W.3d at 563); *see also De La Paz v. State*, 279 S.W.3d 336, 348–49, 350 (Tex. Crim. App. 2009) (holding that evidence of other "buy-bust" drug deals was allowed under Rule 404(b) when appellant's defensive theory was that

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[3] If there is any question that fabrication is the defense pursued by appellant, we note that during closing, appellant argued:

> At De Zavala Elementary School, [Alice] told you that it happened every day, every day from the minute she walked into the after-school program until the minute her mother arrived. That's not credible. That's not believable.
>
> She told you that [appellant] told a classroom full of elementary school kids don't turn around while he sat on a table and put a child on his lap and forcibly pushed her on his lap. That's not credible. It's simply not believable.

State's witnesses were lying about the instant drug deal to please prosecution); *Powell v. State*, 63 S.W.3d 435, 438–40 (Tex. Crim. App. 2001) (holding in indecency-with-a-child prosecution that defendant's opening statement that he lacked opportunity to molest complainant opened the door to rebuttal extraneous-offense evidence that defendant had molested others under almost identical circumstances); *Carroll v. State*, No. 02-18-00477-CR, 2020 938189 (Tex. App.—Fort Worth Feb. 27, 2020, no pet.) (mem. op., not designated for publication) (following *Bass* and holding that defendant "opened the door" to extraneous-offense testimony by presenting fabrication defense); *Riddle v. State*, No. 02-18-00388-CR, 2019 WL 3334429 (Tex. App.—Fort Worth July 25, 2019, no pet.) (mem. op., not designated for publication) (holding that "trial court was within the zone of reasonable disagreement when it allowed the State to introduce the challenged extraneous-offense evidence because it rebutted [the defendant's] defensive theory of fabrication"; *Moore v. State*, 04-12-00043-CR, 2013 WL 86592, (Tex. App.—San Antonio 2013, pet. ref'd (mem. op., not designated for publication) (following *Bass* and *Gayton* and holding that defendant's opening statement raised fabrication theory and that "trial court did not abuse its discretion in concluding that the extraneous-offense evidence was admissible to rebut [defendant's] fabrication theory"); *Slutz v. State*, No. 07-08-0434-CR, 2009 WL 3488439 (Tex. App.—Amarillo 2009, pet. dism'd) (mem. op., not designated for publication) (holding that

defendant raised fabrication defense in opening statement and that trial court properly admitted extraneous-offense evidence, which "had relevance apart from character conformity").

It is at least subject to reasonable disagreement about whether appellant's opening statement advanced a defensive theory of fabrication; thus, the trial court did not abuse its discretion by allowing the State to present extraneous-act evidence. *See Bass*, 270 S.W.3d at 563.

B. Extraneous evidence not sufficiently similar

Appellant, citing *Aguillen v. State*, 534 S.W.3d 701, 711–12 (Tex. App.—Texarkana, no pet.), also argues that the extraneous evidence should not have been admitted because "it must at least [and did not] involve sexual misconduct of some sort." Appellant seems to argue that because Gina did not feel appellant's penis when she sat on appellant's lap, and Alice did, the two occurrences are not sufficiently similar.

In *Aguillen*, the court held that the defendant's physical abuse of two sisters was not sufficiently similar to the sexual abuse of a third sister, thus not relevant to the charged offense or admissible as extraneous-offense evidence. *Id.*

The same is not true here. In this case, both Alice and Gina testified that appellant called them to the back of the room while he was showing the class a movie and had them sit on his lap. Both described the same room where the events

occurred; a classroom with a colorful carpet for children to sit on, a projector, and a desk or table upon which appellant sat behind the projector. Their descriptions of the events are basically identical, but for the fact that Alice could feel appellant's penis on her buttocks and Gina could not. There is no requirement that both girls testify to a chargeable offense for the extraneous act to be admissible. Indeed, rule 404(b) does not require an extraneous "crime," but refers to another "crime, wrong, or *other act*." TEX. R. EVID. 404(b)(1).[4]

We overrule appellant's objections to the admission of the extraneous evidence under rule 404.

Rule 403

Rule 403 allows a trial court to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *Id.* Admission of relevant evidence is favored, and we therefore presume that relevant evidence will be more probative than prejudicial. *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002). Evidence that is unfairly

[4] We also note that *Aguillen* was interpreting art. 38.37, §2(b) of the Texas Code of Criminal Procedure, under which extraneous sexual offenses against children may be admitted, even for purposes of showing character conformity, but also requiring "evidence that the defendant has committed a separate *offense*." TEX. CODE CRIM. PROC. art. 38.37, §2(b) (emphasis added).

prejudicial 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).

When a rule 403 objection is made, 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 a 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).

We have already explained the relevance of the extraneous-act testimony to undermining appellant's fabrication defense. Gina's testimony, which described an event very similar to the allegations alleged by Alice, lent support to Alice's factual description of how appellant would call a child to the back of his classroom to sit on his lap while the other children watched a movie. The State's need for the testimony is apparent. Without the extraneous-act testimony, the State had little to counter appellant's implications that Alice was a troubled teen girl who had made up allegations that "just did not occur." The State had no physical evidence of appellant's contact with Alice. But, with the aid of Gina's testimony, the State was

able to show that appellant had the opportunity to abuse Alice and that he had a history of asking young girls to sit on his lap during movie time, all of which was consistent with Alice's description of the abuse, making appellant's defense of fabrication less likely. The trial court therefore did not abuse its discretion by determining that these factors weighed in favor of admitting the testimony.

While we understand the inherently inflammatory and indelible nature of sexually related misconduct against children, *see Montgomery v. State*, 810 S.W.2d 372, 397 (Tex. Crim. App. 1990) (op. on reh'g) (holding that extraneous-act evidence that defendant appeared naked, with an erection, in front of children, violated rule 403), we disagree with appellant's assertion that, in this case, the testimony influenced the jury in an irrational way or suggested a decision on an improper basis. First, we note that, despite the similarity between events involving Gina and Alice, Gina did not allege that appellant committed an offense against her. Thus, the jury could have considered that, based on Gina's testimony, appellant might have held children on his lap, but he did not do so illegally. As such, the extraneous-act evidence did not necessarily indicate the commission of an offense. Second, we note that the trial court included a proper limiting instruction in the jury charge, and without evidence otherwise, we presume the jury followed the instructions of the trial court. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). And, there is nothing to suggest that the jury was not equipped to

properly evaluate the probative value of the evidence. We therefore view these factors as also weighing in favor of admitting the testimony.

Gina, the extraneous-act witness, was just one of eight witnesses brought by the State. There are three volumes of reporter's record from the State's case-in-chief, and Gina's testimony constituted just 28 pages. Of that 28 pages, only 15 pages are discussing the event that occurred during the movie. As such, Gina's testimony did not take an inordinate amount of time or confuse or distract the jury from the main issues of the case. These factors also weigh in favor of admitting the testimony.

Accordingly, we hold that the trial court acted within its discretion by overruling appellant's Rule 403 objection to Gina's testimony.

Having overruled both appellant's Rule 404(b) and 403 objections, we also overrule issue one in its entirety.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.

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