Affirmed and Memorandum Opinion filed July 7, 2020.

In the

Fourteenth Court of Appeals

NO. 14-18-00686-CR

STEVEN ANTHONY DURAN, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 27th District Court
Bell County, Texas
Trial Court Cause No. 75264

MEMORANDUM OPINION

A jury convicted appellant of the first degree felony of aggravated sexual assault for intentionally and knowingly causing the penetration of the mouth of a child, G.W.,[1] by his sexual organ on or about January 1, 2014. Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 22.021(a)(1)(B)(ii), (a)(2)(B), (b), (e), 1993 Tex. Gen. Laws 3586, 3620–21 (former Tex. Penal Code § 22.021(a)(1)(B)(ii), (a)(2)(B),

[1] We use the complainant's initials because she was a minor at the time the offense was committed. *See* Tex. R. App. P. 9.10(a)(3), (b).

(b), (e), since amended); *see* Tex. Penal Code Ann. § 22.011(c) (definition of "child"). The trial court assessed punishment at imprisonment for 20 years, without a fine. Tex. Penal Code Ann. § 12.32. In two issues, appellant challenges the trial court's admission of the testimony of B.B.,[2] who testified that appellant engaged in sexual intercourse with her when she was 13 years old. We affirm.[3]

I. BACKGROUND

When G.W. was approximately ten years old, she lived at an apartment complex where appellant also lived. G.W. testified that, during this period, at appellant's request she performed oral sex on him.[4] No eyewitness testified regarding the acts described by G.W., nor was there any physical evidence directly supporting G.W.'s testimony.

Over appellant's objections, the trial court admitted the testimony of B.B., who testified that she and appellant engaged in vaginal intercourse during a three-year relationship that began approximately ten years before trial, when B.B. was 13 years old and appellant was in his twenties.

II. ANALYSIS

A. As-applied challenge

In his first issue, appellant argues that Code of Criminal Procedure article

[2] *See* Tex. R. App. P. 9.10(a)(3), (b).

[3] The Supreme Court of Texas ordered the Court of Appeals for the Third District of Texas to transfer this case (No. 03-18-00499-CR) to this court. Misc. Docket No. 18-9083 (Tex. June 19, 2018); *see* Tex. Gov't Code Ann. §§ 73.001, .002. Because of the transfer, we decide the case in accordance with the precedent of the transferor court under principles of stare decisis if our decision otherwise would have been inconsistent with the transferor court's precedent. *See* Tex. R. App. P. 41.3.

[4] G.W. also testified that she touched appellant's genitals with her hands and that appellant contacted her "bottom" with his penis, although these acts are not alleged in the indictment.

38.37, as applied in this case in admitting the testimony of B.B., violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV. Appellant raised the following objections to B.B.'s testimony:

> Your Honor, I have one objection to the testimony of [B.B.] coming in under [Code of Criminal Procedure article] 38.37. And it's just simply this is over almost 10 years old before she even says anything about it to any official. And so for that reason, I think it's remote and has no bearing on this case we're trying. So I object to it on that basis.
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> . . . .
>
> Judge, I've made my statement on the 38.37. I understand what the law says, but I also understand that there is a certain amount of doubt raised when somebody waits 10 years to make an official statement or an official complaint about a case like this. And it puts us in a difficult position with a 10-year-old case. So we're going to object on that basis.
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> . . . .
>
> Yesterday we had a hearing concerning the testimony of [B.B.] about an offense that is alleged to have occurred some time ago in Travis County. And at this point, in addition to the objection I made at that time, I want to object under Rule 403, that the evidence presented was—the probative value is outweighed by the prejudicial value and we want to object to it on those grounds. . . . You heard testimony—you heard testimony from the outcry witness on the case we're trying, and you heard her testimony. And they have really no similarity connection. I realize under 38.37, they're entitled to do it, but it's more prejudicial and I object.
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> . . . .
>
> Judge, was my renewal of my objection previously not on the record? I need to get them on the record. I renew the 403 objection and the objection of lack of proof beyond a reasonable doubt that I made prior to the extraneous witness testifying outside the presence of the jury or before she testifies today. I renew the objection.

While appellant objected to B.B.'s testimony, he did not do so on constitutional grounds, as required to preserve an as-applied challenge. Tex. R. App. P. 33.1(a) (general rule for preservation of error); Tex. R. Evid. 103(a)(1)(B); *see Curry v.*

State, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) ("specific, timely objection" at trial required to preserve as-applied constitutional challenge).[5] We overrule appellant's first issue.

B. Rule 403

In his second issue, appellant contends that the trial court abused its discretion in admitting B.B.'s testimony because its probative value was substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403. Under Code of Criminal Procedure article 38.37, section 2(b), notwithstanding Texas Rules of Evidence 404 and 405, and subject to article 38.37, section 2-a, evidence that a defendant has committed certain extraneous offenses against a child may be admitted in the trial of a defendant for indecency with a child "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." Tex. Code Crim. Proc. Ann. art. 38.37, § 2(b). However, even when evidence of a defendant's extraneous acts is otherwise relevant and admissible under Article 38.37,[6] the trial court is required to conduct a Rule 403 balancing test upon proper objection or request. *See Distefano v. State*, 532 S.W.3d 25, 31–32 (Tex. App.—Houston [14th Dist.] 2016,

[5] In his reply, appellant makes two arguments that he adequately preserved his issue that article 38.37, as applied to him in this case, violates the Due Process Clause. U.S. Const. amend. XIV, § 1. First, Appellant argues that his as-applied challenge does not require an objection for preservation purposes. However, as the court of criminal appeals has explained, "'[a]s applied' constitutional claims are subject to the preservation requirement and therefore must be objected to at the trial court in order to preserve error." *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014). Second, Appellant argues that his trial objections that B.B.'s testimony was unduly prejudicial under Rule 403 were sufficient to preserve his as-applied due-process challenge. However, appellant never mentions "due process" or even "unconstitutional" in his objections, which accordingly do not satisfy the requirement that appellant raise a "specific" objection to preserve an as-applied challenge. *See* Tex. R. App. P. 33.1(a).

[6] Appellant does not argue that B.B.'s testimony was not admissible under Code of Criminal Procedure article 38.37.

pet. ref'd). Appellant argues that the balancing test weighs in favor of excluding B.B.'s testimony.

We review the trial court's decision to admit evidence for abuse of discretion. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). If the trial court's decision is within the zone of reasonable disagreement and is correct under any theory of law applicable to the case, it must be upheld. *Id.* Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). The rule envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value. *Id.*

1. Probative value

When undertaking a Rule 403 analysis, "'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." *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). Here, B.B.'s testimony demonstrates that appellant engaged in sexual acts with a child (as defined by Penal Code section 21.11) other than G.W. "[E]vidence that a defendant has sexually abused another child is relevant to whether the defendant sexually abused the child-complainant in the charged case." *Caston v. State*, 549 S.W.3d 601, 612 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *see Gaytan v. State*, 331 S.W.3d 218, 228 (Tex. App.—Austin 2011, pet. ref'd) (evidence that defendant committed extraneous sexual offenses against two other children was "straightforward and directly relevant to the only issue in the case, namely whether [defendant] abused [complainant]").

Appellant argues that the probative value of B.B.'s testimony is diminished because the conduct B.B. testified about occurred approximately ten years before

trial and was dissimilar to the conduct testified about by G.W. *See West v. State*, 554 S.W.3d 234, 239 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("Remoteness can lessen significantly the probative value of extraneous-offense evidence."); *cf. Gaytan*, 331 S.W.3d at 227 (inherent probative value of extraneous-offense evidence bolstered when it was "remarkably similar" to complainant's testimony). These factors may lessen the inherent probative value of the evidence without necessarily requiring its exclusion. *See West*, 554 S.W.3d at 239–40 (explaining that "remoteness is but one aspect of an offense's probativeness" and concluding that evidence that defendant had previously committed unspecified "lewd or lascivious" acts with two juveniles 29 to 30 years prior to trial was admissible).[7]

Turning to the proponent's need for the evidence, the Court of Criminal Appeals of Texas has explained that exclusion on Rule 403 grounds "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." *Hammer*, 296 S.W.3d at 568. Appellant argues that the testimony of Shawn Prather, who managed the apartment complex where appellant and G.W. lived during the relevant time period, corroborated G.W.'s testimony, thereby lessening the State's

[7] Appellant cites *Bachhofer v. State*, in which the Court of Criminal Appeals of Texas determined that an extraneous offense occurring four years before trial was too remote to be admissible when there were no intervening incidents. *See* 633 S.W.2d 869, 872 (Tex. Crim. App. 1982). *Bachhofer* has been distinguished on the grounds that the case predates the former 1986 Texas Rules of Criminal Evidence (replaced by the 1998 Texas Rules of Evidence) and accordingly was "tried under common law principles, 'which tended to favor exclusion of evidence.'" *Prince v. State*, 192 S.W.3d 49, 55 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (quoting *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990) (explaining that former Texas Rules of Criminal Evidence "favor the admission of all logically relevant evidence")); *see Cole v. State*, 839 S.W.2d 798, 801 (Tex. Crim. App. 1990) (noting that "the Texas Rules of Criminal Evidence were promulgated with an awareness that the new Rules may, at times, overturn pre-Rules decisions"); *Gonzales v. State*, 838 S.W.2d 848, 863 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) ("We doubt that *Bachhofer* is a good law today, after the enactment of [Texas Rule of Criminal Evidence] 404.").

need for B.B.'s testimony. While Prather testified that he had some "concerns" about G.W. and that G.W.'s brother described to Prather some "physical contact" that Prather found "disturbing," Prather did not offer any specific testimony supporting G.W.'s account, and certainly did not provide relevant eyewitness testimony concerning the acts alleged by G.W. In the absence of testimonial or physical evidence corroborating G.W.'s account, the State's need for the extraneous-offense evidence provided by B.B. "weighs strongly in favor of admission." *Gaytan*, 331 S.W.3d at 227.

2. Unfair prejudice

Under Rule 403, the probative value of the evidence is weighed against the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Tex. R. Evid. 403. "'[U]nfair prejudice . . . refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Gigliobianco*, 210 S.W.3d at 641. Evidence that appellant previously abused a child is inflammatory and can be unfairly prejudicial. *See West*, 554 S.W.3d at 240. The acts testified to by B.B., however, are arguably no more inflammatory than those alleged in the indictment, a factor that may lessen the prejudicial effect of such extraneous-effect evidence. *See id.* at 241.

The remaining factors do not weigh in favor of exclusion. B.B.'s straightforward testimony was not likely to confuse the ultimate issues for the jury to decide, nor was the jury likely to have been "misled" by B.B.'s testimony for Rule 403 purposes. *See Gigliobianco*, 210 S.W.3d at 641 (explaining that "'scientific' evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence"). Finally, B.B.'s testimony spanned only 15 pages of the reporter's record of the trial and did not duplicate other evidence, and accordingly

was not unduly lengthy or needlessly cumulative. *See* Tex. R. Evid. 403.

This examination of the Rule 403 factors presents a mixed bag. The relevance of B.B.'s testimony was mitigated by its remoteness in time and dissimilarity to G.W.'s testimony; the State had an appreciable need for such extraneous-offense evidence, given the he-said-she-said nature of the proceedings; the claims that appellant had abused another child, while inflammatory, were arguably no worse than the allegations in the indictment. Under these circumstances, we cannot say that the trial court's ruling falls outside of the zone of reasonable disagreement, which is the limit of our review. *See Winegarner*, 235 S.W.3d at 790. We overrule appellant's second issue.

III. CONCLUSION

We affirm the trial court's judgment.

/s/ Charles A. Spain
Justice

Panel consists of Justices Christopher, Spain, and Poissant.
Do Not Publish — TEX. R. APP. P. 47.2(b).