Opinion issued July 9, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00652-CR

ERNESTO PEDRAZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1557140

MEMORANDUM OPINION

A jury convicted appellant, Ernesto Pedraza, of sexual assault and the trial court assessed his punishment at 15 years' confinement. In his sole issue on appeal, appellant contends that the trial court erred by permitting the State to

introduce an extraneous offense in violation of Texas Rules of Evidence 404(b)(2) and 403. We affirm.

BACKGROUND

The complaining witness, John,[1] was admitted to Ben Taub Hospital in Houston, Texas, for a heroin overdose. At the time, appellant was working at Ben Taub as a patient care technician. John testified that, while in the hospital, he was in and out of consciousness and suffered some memory loss. John further testified that, while he was in and out of consciousness, appellant sexually assaulted him three times in one day by performing oral sex on him without his permission.

John testified that the first assault occurred after appellant told John that he was his nurse and would be taking him for x-rays. On the way to what he believed was an x-ray room, appellant "pulled [the bed] off" to a side area, closed a privacy screen, and began fondling and performing oral sex on John.

Once in the x-ray room, appellant moved John's bed into the corner of the room and again performed oral sex on him. Although John was drifting in and out of consciousness, he finally "realized . . . that it was actually happening." Appellant stopped performing oral sex only when he heard others approaching.

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[1] We refer to the complainant and the extraneous-offense witness by pseudonyms for their privacy and ease of reading.

After the x-ray, John was moved back to his original location, where, hidden from others by a privacy curtain, appellant performed oral sex on John for a third time.

After the third assault, John was convinced that he was not delusional and he waited until appellant "clocked out," and then told others on the nursing staff and law enforcement what had happened to him. Specifically, John reported that appellant put his mouth on John's penis without his consent.

During direct examination of the State's forensic expert, Jessica Powers, the State introduced evidence about different sources of DNA. Powers explained that it was easier to obtain DNA from some sources of DNA, such as blood and saliva, while DNA left by "shedding" through touch were less likely to leave testable samples. She noted that DNA tests were often done by buccal swabs because the saliva in the mouth made the DNA sample easier to obtain and the saliva held on to the DNA well. She acknowledged that touch DNA, or DNA from skin, could be obtained as well, noting that hard surfaces tend to hold touch DNA better. Powers also noted that contact from skin was less likely to leave testable DNA than contact from saliva. There was also evidence that nurses and patient care technicians should always use gloves when handling patients.

Powers further testified that the penile swab done on John after he reported the assault showed three DNA contributors: himself, appellant, and an unknown

third contributor. The test was also presumptively positive for saliva, but Powers could not conclusively state that that saliva was the source of appellant's DNA on John's penis.

On cross-examination of Powers, appellant raised the issue of whether appellant's DNA could have first been transferred to his gloves and then innocently transferred to John's penis when appellant helped John use a urinal to obtain a urine sample, by asking:

> So if somebody happened to be handling someone's penis and that person was having difficulty going to the bathroom, for example, and another person was handling the penis to try and get this person to leave a urine sample for testing within a hospital not for DNA, but for medical reasons, they might could leave a lot of touch DNA, right?

Defense counsel then had Powers perform a demonstration by putting on a pair of surgical gloves. In doing so, Powers touched her face. Counsel used the demonstration to argue that touch DNA could then be transferred from Powers' face, to the glove, and then to whatever she touched. On redirect, Powers also testified that such secondary transfer contact would leave even less DNA than direct touch contact.

At trial, the State argued that it should be permitted to introduce an extraneous offense, arguing that it was admissible under Texas Rule of Evidence 404(b)(2) to rebut appellant's defensive theory that appellant accidentally touched John's genitals thereby leaving DNA when helping John use a urinal to obtain a

urine sample. The trial court agreed that it was a "tough question," but concluded that "I do think there's been . . . the potential if not misimpression being left with the jury that the State is entitled to clear up about the DNA as well as the lack of opportunity; and I'm gonna let it in after having done the appropriate balancing test."

The State then called another patient, Paul, who was treated by appellant at Kingwood Emergency Room in August 2016. Paul testified that when he was brought to the hospital by ambulance he was going "in and out" of consciousness. While being triaged, appellant kept touching him and Paul told him to stop. Paul was put into a care room alone, and appellant came by and "put something" in Paul's IV. Paul lost consciousness but later awoke to find appellant touching his genitals. After he pushed appellant away and told him to stop, Paul again lost consciousness. The next time Paul awoke, appellant was performing oral sex on him. Paul grabbed appellant's face and pushed him away, fighting until appellant left. Approximately a week after he was discharged, Paul called the hospital and reported the incident. After investigating the incident, Gail Deaver, the head of risk management at Kingwood Hospital, noticed discrepancies between the event as described by appellant and the video taken from the emergency room that night. Appellant was then fired.

ADMISSION OF EXTRANEOUS-OFFENSE EVIDENCE

In his sole issue on appeal appellant contends that the trial court erred by admitting the extraneous-offense evidence. Specifically, appellant claims that the evidence was not admissible under: (1) Texas Rule of Evidence 404(b)(2) because he did not "open the door" during his cross-examination of the State's witnesses by raising a defensive theory of accident, mistake, or lack of criminal intent, or (2) Texas Rule of Evidence 403 because the extraneous-offense evidence's probative value was substantially outweighed by the risk of undue prejudice.

Standard of Review

We review a trial court's admission of extraneous-offense evidence for an abuse of discretion. *Rankin v. State*, 974 S.W.2d 707, 718 (Tex. Crim. App. 1996) (op on reh'g); *Wolfberg v. State*, 73 S.W.3d 441, 443 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). A trial court does not abuse its discretion if its decision to admit evidence is within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391–92 (Tex. Crim. App. 1991). A trial court's ruling on extraneous-offense evidence is generally within the zone of reasonable disagreement "if the evidence shows that 1) an extraneous transaction is relevant to a material, non-propensity issue, and 2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App.

2009). This Court will sustain a trial court's decision on admissibility of evidence if correct on any theory of law applicable to the case, even when the trial court's underlying reason for the decision is wrong. *Romero v. State*, 800 S.W.2d 539, 543–44 (Tex. Crim. App. 1990) (citing *Spann v. State*, 448 S.W.2d 128 (Tex. Crim. App. 1969)).

Rule 404(b)(2)

Evidence of a person's crime, wrong, or other act is not admissible to prove that person's character in order to show that the person acted in conformity with that character when allegedly committing the charged offense. *See* TEX. R. EVID. 404(b)(1); *see also Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001); *Montgomery v. State*, 810 S.W.2d 372, 386-88 (Tex. Crim. App. 1990) (op. on reh'g). Evidence of other offenses, however, may be admissible when the evidence is relevant to a fact of consequence in the case. *See* TEX. R. EVID. 404(b)(2); *Montgomery*, 810 S.W.2d at 387-88. For instance, evidence of other crimes or wrongs may be admissible if it tends to establish some elemental fact, such as identity, intent, or knowledge; tends to establish some evidentiary fact, such as motive, opportunity, plan, or preparation, leading inferentially to an elemental fact; or rebuts a defensive theory by showing, e.g., absence of mistake or lack of accident. *Montgomery*, 810 S.W.2d at 387–88; *see also* TEX. R. EVID. 404(b)(2). If the trial court determines that the offered evidence has

independent relevance apart from or beyond character conformity, the trial court may admit the evidence and instruct the jury the evidence is limited to the specific purpose the proponent advocated. *See Prince v. State*, 192 S.W.3d 49, 54 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (citing *Montgomery*, 810 S.W.2d at 387-88). This is a rule of inclusion, not exclusion. *De La Paz*, 279 S.W.3d at 343. "The rule excludes only that evidence that is offered (or will be used) solely for the purpose of proving bad character and hence conduct in conformity with that bad character." *Id.*

Appellant, relying on *Robbins v. State*, 88 S.W.3d 256 (Tex. Crim. App. 2002), argues that he did not contest any of the State's claimed reasons for admitting the extraneous offense, i.e. accident, mistake, or intent, but that his cross-examination of the witnesses "merely regurgitated the State's direct testimony confirming the phenomena of touch DNA and the fact that there was a possibility that touch DNA could be transferred this way." Thus, appellant contends that he did not "open the door" to admission of any extraneous offense.

It is true that "in Texas a simple plea of not guilty usually does not make issues such as intent a relevant issue of consequence for purposes of determining the admissibility [of an extraneous offense] under Rule 404(b)." *See Robbins*, 88

S.W.3d at 260. However, a defendant, through cross-examination,[2] may raise the issue of whether the defendant acted with the requisite criminal intent. *See id.* at 261.

In *Robbins*, the defendant suggested through cross-examination of prosecution witnesses that the victim's death was not the result of an intentional act by appellant, but that the victim could have died from Sudden Infant Death Syndrome and the bruises on the victim's body could have been caused by incorrectly performed CPR efforts to save her life rather than from an intentional act by appellant. *See id*. at 258.

During its discussion about whether evidence of prior injuries to the infant victim while in the defendant's care was relevant to the element of intent, the Court of Criminal Appeals considered it "crucial" that the defendant went beyond a simple plea of not guilty by advancing theories that would explain the infant's death. *See id.* at 261. The Court concluded that, through vigorous cross-examination and the presentation of defensive theories, the defendant put at issue his intent: "[W]e cannot say that the trial court would have been outside the zone

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[2] A defendant may also "open the door" to extraneous offenses through opening statements. *See Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) ("Our case law supports a decision that a defense opening statement . . . opens the door to the admission of extraneous-offense evidence . . . to rebut the defensive theory presented in the defense opening statement"). However, in this case, appellant waived the right to make an opening statement.

of reasonable disagreement to have decided that the relationship evidence was relevant to [defendant's] intent." *See id.*

Thus, the issue we must decide is whether appellant's cross-examination of the State's witnesses "merely regurgitated" the State's evidence or whether it went further and contested elements of the State's case, specifically here, the element of intent.

Appellant was charged with sexual assault. As applied to appellant, "[a] person commits an offense if the person intentionally or knowingly causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor[.]" TEX. PENAL CODE § 22.011(a)(1)(C). The State argues that the extraneous offense evidence was admissible on the issues of accident or mistake, intent, and consent. Specifically, the State contends that appellant's defensive theory was that he accidentally touched John's penis, thereby transferring his DNA to John, when helping John use a urinal to produce a urine sample.

Intent is a contested issue for purposes of justifying the admission of extraneous offense evidence if the required intent for the subject offense cannot be inferred from the act itself or if the defendant presents evidence to rebut the inference that the required intent existed. *Hudson v. State*, 112 S.W.3d 794, 803 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). Here, the required intent could

not be inferred from the mere act of touching John's penis because the touching must occur without John's consent, which appellant contested.

Appellant's cross-examination of the State's forensic expert, Powers, raised the issue of his intent through the following questioning:

> So if somebody happened to be handling someone's penis and that person was having difficulty going to the bathroom, for example, and another person was handling the penis to try and get this person to leave a urine sample for testing within a hospital not for DNA, but for medical reasons, they might could leave a lot of touch DNA, right?

Based on this questioning during cross-examination, the defensive theory put forth by appellant was that, when he accidentally touched John's penis he had no criminal intent, but acted in accordance with John's consent to medical treatment. This questioning contests both John's consent, as well as whether the touching was accidental or intentional or with criminal intent. Put another way, appellant did not act with the requisite criminal intent if he had John's consent to touch his penis as a part of John's legitimate medical treatment. Likewise, accidentally touching John's penis during legitimate medical treatment would implicate the issue of appellant's criminal intent. *See Johnston v. State*, 145 S.W.3d 215, 222 (Tex. Crim. App. 2004) (noting extraneous offense evidence admissible when "a defendant admits the conduct, but raises a defense of 'it was an accident,' or 'it was inadvertant'"); *Johnson v. State*, 932 S.W.2d 296, 302 (Tex.

App.—Austin 1996, pet. ref'd) ("Intent is most clearly in issue when the defendant argues that the charged offense was unintentional or the result of an accident").

To establish intent when it is contested, the State may "introduce other transactions involving the appellant in its case-in-chief[.]" *Plante v. State*, 692 S.W.2d 487, 490 (Tex. Crim. App. 1985); *Irvin v. State*, No. 01-15-00139-CR, 2016 WL 3947085, *4 (Tex. App.—Houston [1st Dist.] July 19, 2016, pet. ref'd) (mem. op., not designated for publication). Once a defendant's intent to commit the offense charged is at issue, "the relevance of an extraneous offense derives from the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." *Brown v. State*, 96 S.W.3d 508, 512 (Tex. App.—Austin 2002, no pet.). The doctrine applies when there is a similarity between the charged and extraneous offenses, because "highly unusual events are unlikely to repeat themselves inadvertently or by happenstance." *De La Paz*, 279 S.W.3d at 347. "Modus operandi may also encompass the 'doctrine of chances' theory to show lack of consent, motive, and the manner of committing an offense." *Casey v. State*, 215 S.W.3d 870, 881 (Tex. Crim. App. 2007). "[E]vidence of a remarkably similar act might be admissible to prove the corpus delicti (the crime itself), intent, or lack of consent under 'the

doctrine of chances.'" *Daggett v. State*, 187 S.W.3d 444, 453 n.18 (Tex. Crim. App. 2005).

Here, the charged offense and the extraneous offense bore remarkable similarities. Both involved patients treated by appellant in an emergency room who were either unresponsive or "in and out" of consciousness and both patients testified that they awoke from unconsciousness to find appellant had placed them in a secluded location and was performing oral sex on them without their permission. The two events were approximately one year apart, occurred at different hospitals at which appellant worked, and the two patients did not know one another.

Nevertheless, appellant argues that this Court cannot consider the "doctrine of chances" in regard to appellant's intent because the State did not argue it at trial. We disagree. We must affirm the trial court's evidentiary ruling if it is correct on any theory applicable to the ruling. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). Indeed, we must uphold the trial court's ruling "even if the trial judge gave the wrong reason for the right ruling." *De La Paz*, 279 S.W.3d at 344.

Because appellant placed his intent at issue with questioning suggesting an accidental touching for purposes of legitimate medical reasons, we cannot say that the trial court was outside the zone of reasonable disagreement in deciding that the

extraneous offense evidence was so similar as to be relevant on the issue of appellant's intent. *See Robbins*, 88 S.W.3d at 261.

Accordingly, we overrule the portion of issue one challenging the admission of the extraneous offense under Texas Rule of Evidence 404(b)(2).

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 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-offense testimony to show appellant's intent. The similarity of the extraneous offense to the charged offense, under the doctrine of chances, made it more likely that appellant's touching of John's penis was intentional and without consent, rather than accidental during legitimate medical treatment. The State's need for the testimony is apparent. Without the extraneous-offense testimony, and because there were no eyewitnesses other than the complainant who was in-and-out of consciousness, the State had little to counter appellant's theory that he was providing legitimate medical treatment by touching John's penis. While the State had physical evidence of appellant's touching of John, i.e., the DNA evidence, it had no uncontested evidence of appellant's intent. But, with the aid of Paul's testimony, the State was able to show that appellant had the opportunity to abuse appellant and that he had a history of moving unconscious or semi-conscious patients to remote or secluded areas of the hospital to perform oral sex, all of which was consistent with John's description of the abuse, making appellant's legitimate-touching-for-a-medical-reason defense 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, *see Montgomery v. State*, 810 S.W.2d 372, 397 (Tex. Crim. App. 1990) (op. on reh'g), 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. 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). Indeed, in closing argument, the prosecutor emphasized to the jury the limited purpose for which it could consider the extraneous offense. And, there is nothing in the record 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.

Paul, the extraneous-offense witness, was just one of twelve witnesses brought by the State. There are four volumes of reporter's record from the State's case-in-chief, and Paul's testimony constituted just 18 pages. Of that 18 pages, only 13 pages are discussing the event that occurred between appellant and Paul at the hospital. As such, Paul'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 Paul'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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