Affirmed as Modified and Opinion Filed May 25, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00387-CR

No. 05-15-00999-CR

PEDRO FIGUEROA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1354250-N; F-1354929-N

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Bridges

Pedro Figueroa appeals his aggravated sexual assault conviction in cause number 05-15-00387-CR and his indecency with a child conviction in cause number 05-15-00999-CR. A jury convicted appellant and sentenced him to thirty years' confinement in cause number 05-15-00387-CR and twenty years' confinement in cause number 05-15-00999-CR. In nine points of error, appellant contends his constitutional right to present a defense was violated when the trial court excluded evidence that a person other than appellant committed the underlying sexual abuse; the trial court abused its discretion in excluding certain evidence; and the judgments should be modified to show the correct name of the presiding judge in both cases, the correct statute in cause number 05-15-00387-CR, and the correct offense in cause number 05-15-00999-CR. As modified, we affirm the trial court's judgments.

In May 2013, appellant was charged by indictment with continuous sexual abuse of E.E., a child younger than fourteen and continuous indecency with D.F., a child younger than fourteen. Appellant is E.E.'s uncle and D.F.'s godfather. In February 2015, the trial court held a hearing at appellant's request outside the presence of the jury before trial began. E.E., twelve years old at the time of trial, testified she met appellant when she was five years old. Appellant "was normal at first" but he "started acting weird" and "talking about weird stuff." Specifically, appellant called E.E. "pretty and cute" and "started touching" E.E. In a playroom in appellant's trailer, appellant used his hands to touch E.E.'s "boobs" in a circular motion. When E.E. was "around 9, 10 years old," appellant took her to his bedroom, took his and E.E.'s clothes off, and put his mouth on her private part. Twice, appellant "use[d] his finger inside [E.E.'s] private part." Appellant also twice "put his private part inside [E.E.'s] private part." Once, appellant made E.E. touch his private part with her hand.

E.E. testified she had an uncle Jose she remembered being around when she was five years old. E.E. was at Jose's house when he touched her "boobs" with his hands. Two times, Jose touched the inside of E.E.'s private part with his private part. E.E. testified Jose was abusing her "during the same time" as appellant. E.E. told her teacher that Jose was touching her when she was ten years old and in the fourth grade. E.E. talked to police and to "Jessie," a therapist at the children's center. When E.E. later learned that Jose had returned to El Salvador, "it got [her] kind of mad" because he had done bad things to her and "nothing was going to happen to him."

Following this testimony, the prosecutor stated E.E. had "distinguished between the two perpetrators" and argued testimony concerning Jose should not go before the jury because it was "not relevant to the charges as it relates to" appellant. Appellant's counsel argued E.E. used similar descriptions to describe the abuse by Jose and appellant, and the jury should make the

determination whether E.E. was "truly abused sexually by Pedro Figueroa or if this was some sort of transference on – in her mind because she needs closure to whatever did happen to her." The trial judge denied appellant's request to introduce evidence of the abuse by Jose but stated he might change his ruling after seeing a video of E.E. being interviewed about Jose. Following a recess, the trial judge stated he had watched the video of E.E.'s interview concerning Jose and did not believe that the allegation or outcry against Jose was relevant or admissible in the case against appellant.

Concerning the indecency charge involving D.F., appellant's counsel stated the situation was "confusing" but it appeared D.F. "outcries to [E.E.] who outcries to teacher about [appellant], but says she did it, too–he touched her, too." However, when D.F. went to her forensic interview, she only talked about Jose and said "that no one else ever touched her and the only person was Jose." The prosecutor responded that D.F. had two forensic interviews. In the second interview, when asked why she did not outcry as to appellant, D.F. said it was "because she was threatened by [appellant] and her family was threatened as well." The prosecutor stated D.F. "felt safe" to tell about appellant at "the second forensic interview after [appellant] had been arrested." The trial judge ruled that evidence regarding Jose was not relevant as to either E.E. or D.F.

With the jury present, E.E. testified she was five years old when she started going over to appellant's trailer. E.E. testified appellant twice touched her "boobs," twice touched her private part over her clothes, twice put his private part inside her private part, and once made her touch his private part with her hand.

D.F., thirteen at the time of trial, testified she was "around seven" when she sometimes slept in appellant's living room overnight. Appellant and his wife slept in the bedroom, but appellant came to the living room while D.F. was sleeping, lay down in bed with her, and

touched her on the legs and "somewhere else." D.F. explained "somewhere else" was the "middle of [her] legs" which D.F. identified as her vagina. The jury subsequently convicted appellant of aggravated sexual assault of E.E. and indecency with D.F., and these appeals followed.

In his first issue, appellant argues the trial court's exclusion of evidence that E.E.'s and D.F.'s initial outcries that Jose, not appellant, abused them violated appellant's constitutional right to present a defense. Specifically, appellant argues the fact that E.E.'s and D.F.'s similar descriptions of the sexual abuse suffered at the hands of Jose and appellant and the description that the abuse occurred at the same time "suggests a strong likelihood that E.E. and D.F. were confused about which person perpetrated each offense." Appellant argues the trial court should have allowed him to "present evidence that he was not the person who committed the offenses alleged in the indictments." In his second issue, appellant argues the trial court abused its discretion in excluding evidence of E.E.'s and D.F.'s initial outcries that "a person other than Appellant sexually abused them."

"Erroneous evidentiary rulings rarely rise to the level of denying the fundamental constitutional rights to present a meaningful defense." *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002) (citing *Potier v. State*, 68 S.W.3d 657 (Tex. Crim. App. 2002)). There are two distinct scenarios in which rulings excluding evidence might rise to the level of a constitutional violation: 1) a state evidentiary rule which categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence which is vital to his defense; and 2) a trial court's clearly erroneous ruling excluding otherwise relevant, reliable evidence which "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Id.* Evidence that an "alternative perpetrator" committed the charged offense falls into the second category. *See id.* at 405-06. In weighing probative value

against Rule 403 counterfactors, courts must be sensitive to the special problems presented by alternative perpetrator evidence. *Id.* at 406. Although a defendant obviously has a right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged alternative perpetrator. *Id.*

"Although it is unclear exactly how much evidence is necessary to sufficiently prove a nexus between the offense and allegedly guilty third party, Texas jurisprudence is clear that evidence of third party guilt is inadmissible if it is mere speculation that another person may have committed the offense." *Roderick v. State*, 494 S.W.3d 868, 875 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (quoting *Dickson v. State*, 246 S.W.3d 733, 739 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). In order for a court to conclude there is a nexus between an alleged alternative perpetrator and the offense-at-issue, there must be something more than evidence that a person other than the criminal defendant was committing similar crimes around the time of the offense-at-issue; the evidence must connect the alleged alternative perpetrator to the specific offense. *Caldwell v. State*, 356 S.W.3d 42, 47 (Tex. App.—Texarkana 2011, no pet.) (quoting *Dickson*, 246 S.W.3d at 741). Moreover, the admission of alternative perpetrator evidence is subject to the Rule 403 balancing test, according to which the trial court must weigh its probative value against its tendency to confuse the issues or mislead the jury, among other potential harms. *See* TEX. R. EVID. 403; *Wiley*, 74 S.W.3d at 406-07; *Roderick*, 494 S.W.3d at 875. Excluding such evidence is not constitutional error unless the evidence "goes to the heart of the defense." *Wiley*, 74 S.W.3d at 405.

Here, the excluded evidence showed that Jose may have been abusing E.E. at the same time as appellant. However, the fact that Jose and appellant were both abusing E.E. at the same

time and E.E. first mentioned the abuse by Jose does not do anything to help appellant's defense. There is no evidence connecting Jose to the abuse appellant committed at appellant's trailer. E.E. testified that Jose abused her at Jose's house in a completely separate offense. Thus, the evidence regarding the abuse by Jose merely showed that someone other than appellant was committing similar crimes around the time of the offense-at-issue; there is no evidence connecting Jose to the offenses with which appellant was charged. *See Caldwell*, 356 S.W.3d at 47; *Dickson*, 246 S.W.3d at 741. The evidence regarding the abuse by Jose was therefore not sufficient to show a nexus between the crime charged and the alleged alternative perpetrator. *See Wiley*, 74 S.W.3d at 405-06.

Even if we assume that the evidence of the abuse by Jose had some marginal relevance, that proffered evidence cannot survive the balancing test under Rule 403. *See id.* at 407. The probative value of this testimony was slight because of the highly speculative nature of appellant's theory that Jose's separate abuse somehow led E.E. to "transfer" Jose's actions onto appellant. *See id.* The testimony did, however, present a great threat of "confusion of the issues" because it would have forced the State to disprove the nebulous allegation that perhaps E.E.'s testimony concerning the abuse committed by appellant was a lie fabricated when E.E. became "mad" that Jose escaped to El Salvador and E.E. realized "nothing was going to happen to him." *See id.* This side trial might have led the jury astray, turning the focus away from whether appellant – the only person whose actions were on trial – abused E.E. *See id.* It also presented a threat of "unfair prejudice," as it would invite the jury to blame an absent, unavailable, unrepresented person for the sexual abuse for which appellant was charged. *See id.* "Such speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice." *Id.* (quoting *United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998)).

Appellant has failed to show how the trial judge's ruling was erroneous, much less so clearly erroneous that it violated his constitutional rights. This evidence was, at best, only marginally relevant. It was highly speculative. The Jose evidence is precisely the type of emotionally-freighted but speculative evidence that trial judges properly exclude under Rule 403, whether offered by the State or by the defendant. *See id.* at 408. We conclude appellant was not deprived of his constitutional right to present a defense because the trial judge did not abuse his discretion in excluding testimony concerning the abuse by Jose under Rule 403. We overrule appellant's first and second issues.

In his third, fourth, and fifth issues, appellant argues the trial court abused its discretion in excluding evidence of E.E.'s and D.F.'s initial outcries that "a person other than Appellant sexually abused them" because that evidence was admissible under rules of evidence 412 and 613. However, appellant did not make these arguments to the trial judge. Rule 33.1 provides that, as a prerequisite to presenting a complaint for appellate review, the record must show that the party "stated the grounds for the ruling that [he] sought from the trial court with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.1; *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). So it is not enough to tell the judge that evidence is admissible. *Reyna*, 168 S.W.3d at 177. The proponent, if he is the losing party on appeal, must have told the judge why the evidence was admissible. *Id.* Because he did not raise the outcries' admissibility under rules of evidence 412 and 613 to the trial judge, we conclude appellant waived the complaints made in his third, fourth, and fifth issues.

In his sixth, seventh, eighth, and ninth issues, appellant argues the judgments in these cases should be modified to reflect the correct name of the presiding judge, the judgment in cause number 05-15-00387-CR should be modified to state the correct offense statute, and the judgment in cause number 05-15-00999-CR should be modified to state the correct name of the

offense. The State agrees the judgments should be so modified. This court has the power to correct and reform the judgment of the court below to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and the nature of the case may require. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). We sustain appellant's sixth, seventh, eighth, and ninth issues.

As modified, we affirm the trial court's judgments.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PEDRO FIGUEROA, Appellant

No. 05-15-00387-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1354250-N.
Opinion delivered by Justice Bridges.
Justices Lang-Miers and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

Under the heading "Judge Presiding:," "Hon. Fred Tinsley" is deleted, and "Hon. Gary Stephens" is substituted.

Under the heading "Statute for Offense:," "21.021 Penal Code" is deleted and "22.021 Penal Code" is substituted.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered May 25, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PEDRO FIGUEROA, Appellant

No. 05-15-00999-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1354929-N.
Opinion delivered by Justice Bridges.
Justices Lang-Miers and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

Under the heading "Judge Presiding:," "Hon. Fred Tinsley" is deleted, and "Hon. Gary Stephens" is substituted.

Under the heading "Offense for which Defendant Convicted:," "INDECENCY WITH A CHILD/CONTINUOUS" is deleted, and "INDECENCY WITH A CHILD" is substituted.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered May 25, 2017.