Opinion issued February 23, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00072-CR

NO. 01-16-00085-CR

KEITH EDWARD HENDRICKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case No. 1438708, 1438707

MEMORANDUM OPINION

Keith Edward Hendricks was convicted of two counts of aggravated sexual assault and sentenced to confinement for life.[1] In two issues, Hendricks argues that

[1] TEX. PENAL CODE § 22.021.

the trial court erred in admitting evidence of three unadjudicated prior sexual assaults because the evidence was inadmissible under the Rules of Evidence and the Confrontation Clause. We affirm.

Background

In 2013, complainant Jane Doe,[2] a woman in her early twenties with mental illness, became homeless and began staying at a shelter in downtown Houston. One day, she met Hendricks—whom she knew as "Kevin," "Slim," or "Chicago Slim"—and the two went for a walk in Houston's Third Ward.

Hendricks led Doe to an abandoned house, promising to provide her with clothes and cigarettes. Once inside, Hendricks shut the door, instructed Doe to take off her clothes, and threatened to kill her if she did not comply. Hendricks then sexually assaulted Doe, beating and choking her as she faded in and out of consciousness. When Hendricks let her go, Doe ran out of the house and flagged down a motorist, who called 911.

When Officer G. Jackson arrived, he found EMS treating Doe. Jackson observed that Doe appeared "traumatized" and had "fresh" injuries to her face and knees. Jackson asked Doe what happened, and Doe told him that she had been sexually assaulted by a man named "Kevin" or "Slim."

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[2] Complainant will be referred to by a pseudonym, both to protect her privacy and for ease of reading.

EMS transported Doe to the hospital, where she was examined by Tiffany Dusang, a forensic nurse. Dusang observed that Doe had multiple injuries, including bleeding from her ear canal; bruising, abrasions, and scratch marks on her mouth, chin, chest, shoulders, and neck; and numerous vaginal and anal tears. Dusang characterized Doe's injuries as "significant" and consistent with both sexual assault and strangulation.

During its investigation, the State confirmed that Hendricks went by the name "Slim" and lived under the freeway in the Third Ward. A week after the assault, Doe identified Hendricks as her assailant in a photo array. A sample of Hendricks's DNA matched the DNA found on Doe. Hendricks's DNA also matched the DNA found on three other mentally ill, homeless women who had previously reported being sexually assaulted in the Third Ward. We will refer to these women as Doe 2, Doe 3, and Doe 4. Evidence about these three prior sexual assaults was admitted during Hendricks's trial.

The jury found Hendricks guilty of two counts of aggravated sexual assault. After finding an enhancement paragraph true, the trial court sentenced Hendricks to confinement for life. Hendricks appeals.

Rules of Evidence 404(b) and 403

In his first issue, Hendricks argues that the trial court erred in admitting the evidence of his three unadjudicated prior sexual assaults because the prior assaults

were not sufficiently similar to his assault of Doe and because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

A. Applicable law and standard of review

Under Rule 404(b) of the Rules of Evidence, evidence of extraneous crimes, wrongs, and other acts "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." TEX. R. EVID. 404(b)(1). But 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)(2). Even if "the purpose for which it is being offered is permissible under Rule 404(b), it may still be excluded by the trial court under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice." *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003); *see* TEX R. EVID. 403.

"Unfair prejudice" means "a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). "[T]he presumption is that relevant evidence will be more probative than prejudicial." *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990).

We review a trial court's admission of extraneous-offense evidence for an abuse of discretion. *Page v. State*, 213 S.W.3d 332, 337 (Tex. Crim. App. 2006). "A trial court abuses its discretion when its ruling is arbitrary or unreasonable." *Cantu v. State*, 395 S.W.3d 202, 213 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). We will uphold the trial court's ruling as long as it falls within the "zone of reasonable disagreement." *Page*, 213 S.W.3d at 337.

B. Admissibility under Rule 404(b)

We first determine whether the evidence of Hendricks's three prior sexual assaults was admissible under Rule 404(b). The State contends that the evidence was admissible (1) to prove Hendricks's identity as Doe's assailant and (2) to rebut Hendricks's defensive theory that Doe's sexual contact with her assailant was consensual.

Extraneous-offense evidence is "admissible to prove identity only if the identity of the perpetrator is at issue in the case." *Jabari v. State*, 273 S.W.3d 745, 751 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The defendant raises the issue of identity by impeaching the identifying witnesses about "(1) a material detail of the identification; (2) the conditions surrounding the charged offense and the witness's identification of the defendant in that situation; or (3) an earlier misidentification of the defendant." *Thomas v. State*, 126 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

"Where the State uses an extraneous offense to prove identity by comparing common characteristics of the crime, the extraneous offense must be so similar to the charged offense that it illustrates the defendant's 'distinctive and idiosyncratic manner of committing criminal acts.'" *Jabari*, 273 S.W.3d at 752 (quoting *Page*, 213 S.W.3d at 336). The evidence must demonstrate a high degree of similarity between the charged offense and extraneous offense. *Jabari*, 273 S.W.3d at 752. "Without a high degree of similarity, the probative value of the extraneous offense evidence is outweighed by its prejudicial effect." *Id.*

In reviewing the admission of extraneous-offense evidence, we "take into account the specific characteristics of the offenses and the time interval between them." *Id.* "Sufficient similarity may be shown by proximity in time and place *or* by a common mode of committing the offenses." *Id.*

Hendricks raised the issue of identity by impeaching Doe's testimony and other evidence identifying him as her assailant. *Id.* at 751; *Thomas*, 126 S.W.3d at 144. First, Hendricks impeached Doe about two material details of the identification—Hendricks's name and weight—with evidence that Doe told the police that her assailant was a man named Kevin, not Keith, and that he weighed 220 pounds, not 175 pounds. Second, Hendricks impeached Doe about the conditions surrounding the assault and her identification of Hendricks in that situation with evidence that Doe was exhibiting symptoms of mental illness the

day of the assault. Hendricks also raised identity as an issue by questioning the reliability of the DNA evidence identifying him as Doe's assailant, emphasizing that the DNA of another man was found in the swabs taken from Doe and that Doe allegedly had been assaulted by a different man the night before she stated she had been assaulted by Hendricks. We hold that Hendricks raised identity as an issue.

The extraneous-offense evidence demonstrated a strong correlation between Hendricks's assault of Doe and the similar circumstances of his three prior assaults. *See Jabari*, 273 S.W.3d at 752. In each case, a mentally ill, homeless woman alleged that she had been sexually assaulted in the Third Ward by a man matching Hendricks's description or nickname, and Hendricks's DNA matched the DNA found on all three women.

Hendricks contends that extraneous-offenses were not sufficiently similar because they occurred years before the assault of Doe. But "[s]ufficient similarity may be shown by proximity in time and place *or* by a common mode of committing the offenses." *Id.* Here, similarity has been shown by proximity in place (the Third Ward) and by a common mode (sexually assaulting mentally ill homeless women). Because of the high degree of similarity between all four sexual assaults, we hold that the extraneous-offense evidence was admissible under Rule 404(b) to prove Hendricks's identity. We next address whether the probative value

of the extraneous-offense evidence was substantially outweighed by the danger of unfair prejudice.

C. Admissibility under Rule 403

In determining whether the probative value of extraneous-offense evidence was substantially outweighed by the danger of unfair prejudice, we consider: (1) how strongly the extraneous-act evidence tends to make a fact of consequence more or less probable; (2) the potential for the "other crime, wrong, or act" to impress the jury in some irrational but indelible way; (3) how much trial time the proponent needs to develop the evidence of the extraneous offense; and (4) the proponent's need for the extraneous evidence. *Jabari*, 273 S.W.3d at 752–53. Considering these factors, we hold that the trial court's ruling on the admissibility of the extraneous-offense evidence was not outside the zone of reasonable disagreement. *Page*, 213 S.W.3d at 337.

The similarity between the circumstances of Hendricks's prior sexual assaults and his assault of Doe strongly corroborated other evidence that Hendricks was Doe's assailant. The potential for the extraneous offenses to impress the jurors in some irrational but indelible way was relatively low, as the trial court instructed them—both during trial and in the charge—that the evidence of the three other sexual assaults was admitted for the limited purpose of proving identity. *Blackwell v. State*, 193 S.W.3d 1, 15 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) ("The

trial court's instructions to the jury are a factor to consider in determining whether the jury considered the extraneous-offense evidence improperly, i.e., as character conformity evidence, or properly, as evidence to rebut a defensive theory or some other permissible reason under rule 404(b)."). The State spent roughly thirty percent of the guilt-innocence phase of the trial developing the extraneous-offense evidence, which arguably favors excluding the evidence. *See Rickerson v. State*, 138 S.W.3d 528, 532 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (noting extraneous-offense evidence accounted for less than 10 percent of total guilt-innocence record and concluding that weighed in favor of admissibility). Finally, the State had a need for the evidence, as the issues of identity and consent were raised by Hendricks. On balance, these factors supported admissibility.

Hendricks argues that the State had no need for the extraneous-offense evidence because the State had other compelling evidence relating to the issues of identity and consent, including the testimony of Doe, the testimony of the nurse who examined and treated Doe, the photographs and medical records of Doe's injuries, and the DNA found on Doe's body. Although this evidence reduced the State's need for the extraneous offenses, it did not remove identity as an issue in the case entirely. *See id.*

Considering these factors, we hold that the trial court's overruling of Hendricks's Rule 403 objection was not outside the zone of reasonable

disagreement. *See Jabari*, 273 S.W.3d at 753 (holding that probative value of evidence of extraneous sexual assaults was not substantially outweighed by danger of unfair prejudice when evidence was compelling as to issue of identity, trial court instructed jurors to limit consideration of evidence, victims of extraneous assaults were only witnesses called to testify about offenses, witnesses testimony focused on similar nature of offenses and did not take up significant portion of trial, and State's need for evidence was strong as complainant initially struggled to identify defendant and was impeached by defense). Therefore, we overrule Hendricks's first issue.

Confrontation Clause

In his second issue, Hendricks argues that the trial court erred in admitting the out-of-court statements of the three women who had been sexually assaulted under similar circumstances because the statements were testimonial hearsay and therefore inadmissible under the Confrontation Clause.

A. Applicable law and standard of review

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. Its main purpose is to afford the defendant "the opportunity of cross-examination because that is 'the principal means by which the believability

of a witness and the truth of his testimony are tested.'" *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974)).

Under the Confrontation Clause, if an out-of-court statement is testimonial, the statement is inadmissible unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant. *Langham v. State*, 305 S.W.3d 568, 575–76 (Tex. Crim. App. 2010). Thus, to determine whether the admission of an out-of-court statement violates the Confrontation Clause, we must first determine whether the statement was testimonial. *Vinson v. State*, 252 S.W.3d 336, 338 (Tex. Crim. App. 2008).

Whether a statement is testimonial depends on the primary purpose of the examination during which the statement was made. If the primary purpose was "to establish or prove past events potentially relevant to later criminal prosecution[,]" then the statement is testimonial. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74 (2006). If the primary purpose was to enable the police to respond to an ongoing emergency or to enable medical personnel to diagnose and treat a patient, then the statement is nontestimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 2533 n.2 (2009); *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273.

To determine the primary purpose of the examination, we objectively evaluate the circumstances under which the examination occurred and the statements and actions of the parties. *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 1156 (2011). "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* at 358–59, 1143 S. Ct. at 1155.

If we determine that the admission of an out-of-court statement violated the Confrontation Clause, we must then determine whether the erroneous admission was harmless. *Rubio v. State*, 241 S.W.3d 1, 3 (Tex. Crim. App. 2007). To determine whether the error was harmless, we consider any factor that may shed light on the probable impact of the error on the minds of average jurors, including: (1) the importance of the hearsay statements to the State's case; (2) whether the hearsay evidence was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the hearsay testimony on material points; and (4) the overall strength of the prosecution's case. *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007); *Davis v. State*, 203 S.W.3d 845, 852 (Tex. Crim. App. 2006).

We must reverse the judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a). That is, we must reverse unless

we are convinced, beyond a reasonable doubt, that the erroneous admission "would probably not have had a significant impact on the mind of an average juror." *Davis*, 203 S.W.3d at 852. If there is a reasonable possibility that the error "'moved the jury from a state of non-persuasion to one of persuasion' on a particular issue[,]" then the error was not harmless beyond a reasonable doubt. *Id.* at 852–53 (quoting *Westbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)).

We review de novo the trial court's constitutional legal ruling that the admission of an out-of-court statement did not violate the Confrontation Clause. *Langham*, 305 S.W.3d at 576; *Zapata v. State*, 232 S.W.3d 254, 257 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

B. Analysis

The out-of-court statements of Does 2, 3, and 4 were admitted through (1) the testimony of the medical personnel who examined and treated them and related medical records and (2) the testimony of the officer who investigated the three prior sexual assaults. We consider each category of evidence in turn.

1. Testimony of medical personnel and related medical records

The medical personnel who treated the three women all testified that they questioned the women about the sexual assaults to accurately diagnose them and to provide them with appropriate medical care. For example, the nurse who treated

Doe 2 testified that he took down her patient history "verbatim" without "paraphras[ing] any word" and "use[d] that [history] for a diagnosis and treatment." The nurse who treated Doe 3 testified that she wrote down what Doe 3 said "as accurately as possible . . . ." She explained that such information is important because it helps her "make a nursing diagnosis" and determine "how to treat" the patient. Likewise, the physician who treated Doe 4 testified that the patient's history helps him provide the "most accurate treatment" and that "all of the[] notes" in the patient's history are "significant" for treatment purposes.

The testimony of the medical personnel who treated these three women indicates that the primary purpose of examinations was to facilitate their diagnosis and treatment. *See Melendez-Diaz,* 557 U.S. at 312 n.2, 129 S. Ct. at 2533 n.2 (stating that "medical reports created for treatment purposes" are not testimonial); *cf. Beheler v. State,* 3 S.W.3d 182, 189 (Tex. App.—Fort Worth 1999, pet. ref'd) (holding that because "[t]he object of a sexual assault exam is to ascertain whether the child has been sexually abused and to determine whether further medical attention is needed[,] . . . statements describing acts of sexual abuse are pertinent to the victim's medical diagnosis and treatment").

Because the primary purpose of the medical examinations was to diagnose and treat the three women, their out-of-court statements made during their medical examinations were not testimonial. *See Melendez-Diaz,* 557 U.S. at 312 n.2, 129 S.

Ct. at 2533 n.2. Thus, the trial court did not err in admitting the testimony of the medical personnel and the medical records they prepared.

2. Testimony of Officer Moreno

Officer Moreno investigated the sexual assaults of all three women and testified about the statements these women made to him. Specifically, Moreno testified that each woman alleged that she had been sexually assaulted in the Third Ward by a man known as "Slim."

The record indicates that when Moreno questioned these women, there was no ongoing emergency; the assaults had already occurred and the women were no longer in immediate danger. *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273. The reason he took their statements was to further his investigation of their alleged assailant. In other words, the primary purpose of his interviews of the women was "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822, 126 S. Ct. at 2273–74. The statements the women made to Moreno were testimonial, and their admission violated the Confrontation Clause. *See Vinson*, 252 S.W.3d at 341; *Wall v. State*, 184 S.W.3d 730, 744–45 (Tex. Crim. App. 2006). Therefore, we must determine whether the erroneous admission was harmless beyond a reasonable doubt. *Rubio*, 241 S.W.3d at 3.

Officer Moreno's testimony was important to show that all three women identified their assailant by the name of "Slim." The only other evidence that any

of the women identified her assailant by the name of "Slim" was in Doe 3's medical records, which noted that she called her assailant "Chicago Slim" when providing her patient history.

However, other than the issue of Hendricks's nickname, Moreno's testimony was largely cumulative of other evidence. The medical records of the three women and the testimony of the medical personnel who treated them also showed that all three women were mentally ill, homeless women who alleged that they had been sexually assaulted in the Third Ward. All of this evidence was corroborated by DNA evidence, which matched Hendricks's DNA with the DNA found on each woman.

Even without Moreno's testimony, and, going further, even without the other evidence of the extraneous offenses, the State presented compelling evidence of Hendricks's guilt. Doe initially identified Hendricks by the name of "Slim" and Hendricks admitted that he went by the name "Slim." Doe also identified Hendricks in a photo array and at trial. Doe testified in detail about the sexual assault. Her testimony was corroborated by the testimony of the responding officer, the testimony of the nurse who examined and treated her, the photographs and medical records documenting her injuries, and the DNA found on her body, which matched the DNA sample taken from Hendricks.

In light of all this, we are convinced, beyond a reasonable doubt, that the erroneous admission of Officer Moreno's testimony probably would not have had a significant impact on the mind of an average juror. *Davis*, 203 S.W.3d at 852. We overrule Hendricks's second issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Massengale, Brown, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).