In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00422-CR

KARL DREYER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 07-01-00642-CR

MEMORANDUM OPINION

Following a jury trial, appellant, Karl Dreyer, was convicted of aggravated sexual assault of a child. Dreyer appeals his conviction arguing that the trial court erred in allowing testimony regarding DNA evidence and an extraneous offense. We affirm the judgment of the trial court.

BACKGROUND

The complainant, S.A.[1], who was fifteen years old at the time of the alleged assault,

[1] For reasons of privacy, we identify the witness by using initials.

testified at trial. At the time of the assault, S.A.'s mother Shelia was living with John Leong.[2] Dreyer was married to Leong's daughter, Christina Dreyer.[3] S.A. testified that on the evening of the assault, she had agreed to babysit for Jessica Leong, Leong's other daughter. S.A. testified that Dreyer dropped Jessica and her baby off at the family's trailer and then left. S.A. stated that she watched the baby, put him to bed, and then watched TV in the trailer until around 1:00 a.m. S.A.'s bedroom was set up in a camper that was next to the family's trailer. S.A. testified that around 1:00 a.m. she returned to the camper to watch a movie and went to bed in the camper around 2:00 or 2:30 a.m.

S.A. stated that some time later Dreyer came into the camper and woke her up. Dreyer asked S.A. where Jessica was and S.A. told Dreyer that Jessica was in the trailer next door. Dreyer sat on S.A.'s bed and started rubbing her leg. S.A. told Dreyer to stop, but he did not. S.A. testified that Dreyer got on top of her and vaginally raped her. S.A. pleaded with Dreyer to stop, but he told her to "shut the f*** up or I [will] kill you and I will kill your family." At one point during the rape, Dreyer had his hands around S.A.'s throat and S.A. testified she could not breathe. She further stated that during the assault Dreyer punched her in the face twice. S.A. testified that Dreyer left the camper around 4:00 a.m.

S.A. stated that she was wearing a tampon during the assault. After S.A. watched

[2] At the time of trial Shelia and Leong were married.

[3] Christina Dreyer was married to Dreyer at the time of trial. Christina was formerly Christina Leong. At the time of the alleged assault, Christina and Dreyer were separated.

Dreyer drive away from the property she left the camper, which was not equipped with a bathroom, and went into a bathroom in the trailer, removed the tampon, and threw it into the trash can. DNA evidence was later obtained from the tampon. S.A. stated that she did not immediately tell her mom about the assault because she was scared. However, S.A. immediately called a friend and told her about the assault. Later the next morning, S.A. spoke with another friend and her friend's mother, who contacted S.A.'s mom and urged her to contact the police about the assault. S.A.'s mom called the police.

Kari Prihoda, a forensic interviewer with Children's Safe Harbor, testified at trial. Prihoda interviewed S.A. three days after the assault. Prihoda testified that at the time of the interview S.A. had some bruising on her face and neck. S.A. told Prihoda that she did not immediately tell anyone about the assault because she felt that she would not be believed. The sexual assault nurse examiner (SANE nurse), Karen Trevino, also testified at trial that there was bruising on S.A.'s face and neck. Trevino testified that she examined S.A. and that her findings were consistent with a violent sexual assault.

Over Dreyer's objection, the jury heard testimony from Jill Pogemiller, a forensic DNA analyst. DNA analysis was done on three items: two tampons (including the one S.A. wore during the assault) and a vaginal swab from S.A. A buccal swab sample was also obtained from Dreyer for comparison. Sperm cells were extracted from both tampons and the vaginal swab. Dreyer was '"included as a possible contributor'" for the sperm DNA profile from these items. Pogemiller testified that they were "unable to pull out . . . a major contributor" from the vaginal swab, however, they were able to pull out

"the major [DNA] contributor" on the two tampons. Pogemiller testified that the major sperm profile obtained from one of the tampons matched the DNA profile obtained from Dreyer's buccal swab.

Dreyer presented testimony from several witnesses at trial. Guy O'Connell, who was living with Dreyer at Dreyer's aunt and uncle's apartment at the time of the alleged assault, testified at trial. O'Connell testified that on the night of the alleged incident Dreyer picked him up from work around 11:00 p.m., and O'Connell and Dreyer drove out to the Leong's trailer. According to O'Connell, he and Dreyer went to the door of the trailer and Jessica answered the door and told Dreyer to return in an hour. O'Connell testified that he and Dreyer "[r]ode around" for about forty-five minutes and then returned to the trailer around midnight and were told again by Jessica to come back later. O'Connell stated that they "killed about 45 minutes" and returned to the trailer "sometime around 1:00 [a.m.] or after 1:00." According to O'Connell, Dreyer asked him to stay in the car, and Dreyer went into the trailer for about twenty or thirty minutes. O'Connell stated he did not see Dreyer go into the camper where S.A. slept. Dreyer then returned to the car, dropped O'Connell off at the apartment around 2:00 a.m., and left. According to O'Connell, he and Dreyer had not been drinking.

Jessica also testified for the defense. Jessica testified that on the day of the alleged incident, she called Dreyer and asked him if he would give her a ride to her dad's trailer. Dreyer dropped Jessica off at the Leong Trailer "around nighttime." Jessica testified that she went in to talk to her dad, who was in bed watching TV, and she fell asleep watching

TV with him. Jessica further testified that sometime later that night she woke up and went into the kitchen to get something to drink. Jessica testified that S.A. was sitting on the couch. Jessica stated that S.A. said "she was about to go hang out with some friends to go to a party." Jessica testified that she laid down on the couch in the trailer and watched TV with S.A. for a while and then "a car pulled up[,]" and S.A. asked her if she wanted to go to a party. Jessica stated that she declined and S.A. told her "[d]on't tell my mom." According to Jessica, when S.A. left the residence it was "pretty early in [the] morning."

Christina Dreyer also testified at trial. Christina testified that at the time of the alleged assault she and Dreyer were separated and Dreyer was staying with his aunt and uncle. Christina testified that her mother called her and told her about S.A.'s allegations and she went to the apartment and confronted Dreyer. After confronting Dreyer, Christina went to her dad's trailer to talk to S.A. Christina testified that she then went back to the apartment and spoke with Dreyer again and that based on her conversations with S.A. and Dreyer she did not believe Dreyer had assaulted S.A. Christina further stated that she did not see any defense scratches on Dreyer. She testified that when she returned to speak with Dreyer the second time, she and Dryer left the apartment and had sex in her grandfather's truck. According to Christina, she then returned to her father's trailer, went inside the bathroom and cleaned up from having sex with Dreyer, and then threw the toilet paper in the trash can. Christina testified that is how Dreyer's DNA must have gotten onto S.A.'s tampon. Christina further testified that S.A. had a reputation for being "a liar."

Following Christina's testimony, the defense presented testimony from several other witnesses and then rested.

In rebuttal and over Dreyer's objection, the State presented extraneous offense testimony from R.M., who testified that she had also been sexually assaulted by Dreyer when she was fifteen years old. R.M. testified that she was asleep at home and she woke up to Dreyer calling her name and tapping her shoulder. She knew who Dreyer was because he lived in the neighborhood. R.M. testified that Dreyer had removed the screen from her bedroom window and crawled inside the window to sit on the window seal. According to R.M., it was late at night and Dreyer asked her to get dressed and come with him. R.M. further stated that when she told Dreyer she could not go with him, he said "if you don't come out, I'm coming in."

R.M. testified that she left with Dreyer, and they walked to a nearby house where he was staying. R.M. testified that at this house Dreyer tried to get her to consume alcohol. R.M. testified that she and Dreyer were "kissing and holding hands[,]" and then Dreyer proceeded to have sexual intercourse with R.M after she told him she did not want to have sex and over her pleas for him to stop. R.M. testified that Dreyer did not stop and that it was painful. R.M. further testified that this was her first time to have sex, and after the assault Dreyer told her to change her clothes because there was a lot of blood on her pants and he didn't want her mother to find out. R.M. testified that Dreyer was nineteen or twenty at the time of the assault. R.M. also stated that Dreyer started "coming to the

window at night," and that they had sex a "handful" of times over a period of several months.

After the State put on its rebuttal evidence, the defense re-opened its case in chief and put on testimony by two additional witnesses, including Dreyer. Dreyer denied sexually assaulting S.A. and told the jury that after he brought O'Connell back to his aunt and uncle's apartment complex they hung out in the parking lot for a while. Dreyer explained that after O'Connell went inside the apartment to go lay down, Dreyer made a trip to a corner store and went to Jack in the Box. Dreyer testified that after he left Jack in the Box he got a flat tire and sustained a bent axle. Dreyer walked to an old neighbor's house, then walked to his uncle's house, and his neighbor let him and his uncle borrow the neighbor's car. When Dryer and his uncle returned to the accident scene, DPS was there towing his car. Dreyer testified he was initially detained by DPS, but then released. Dreyer returned to the neighbor's house and went to sleep, and his neighbor brought him to his aunt's apartment the next morning.

The jury convicted Dreyer of aggravated sexual assault and assessed punishment at life in prison. This appeal followed. In three issues, Dreyer argues on appeal that the trial court erred in allowing Pogemiller to testify as an expert witness, violated the confrontation clause by allowing Pogemiller to testify to DNA results which were partially analyzed by someone not present to testify at trial, and improperly admitted the extraneous offense testimony of R.M.

EXPERT TESITMONY

In his first issue, Dreyer argues that the trial court erred in allowing the expert testimony of forensic DNA analyst, Jill Pogemiller because the State failed to show the evidence was reliable pursuant to Rule 702 of Texas Rules of Evidence and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Standard of Review and Applicable Law

We review a trial court's evidentiary ruling for an abuse of discretion. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). A trial court abuses its discretion when the trial court's decision is outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Rule 702 of the Texas Rules of Evidence provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702. Pursuant to Rule 702, "the proponent of expert testimony must show that it is relevant to the issues in the case and is based on a reliable scientific foundation." *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996) (citing *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (1995)). "[E]vidence derived from a scientific theory, to be considered reliable, must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question."

Kelly v. State, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). Before scientific evidence may be admitted, the trial court must conduct a hearing outside the presence of the jury to determine whether the proponent of the evidence has established these criteria. *Id*.

Analysis

Before Pogemiller testified regarding her findings, Dreyer requested a hearing outside the presence of the jury and objected to the reliability of the expert testimony. Dreyer argued, pursuant to *Kelly v. State*, the State could not show the techniques were properly applied on the occasion in question because Pogemiller did not perform all aspects of the DNA testing. Dreyer did not contest the validity of the underlying scientific theory or technique.

During the hearing, Pogemiller testified that the techniques that applied the scientific theory behind DNA analysis were properly applied in this case. When questioned regarding the work she performed in this case, Pogemiller testified that she performed the "DNA analysis," and "all the different aspects of that" on the vaginal swab and the two tampons. According to Pogemiller, technicians performed the serology testing and the DNA extraction on the "reference sample." Pogemiller explained that serology testing means "looking for certain biological fluids such as semen, blood, [and] saliva." By looking at the report, Pogemiller verified that the lab technician's work was observed by a more experienced colleague who also signed off on the work.

Pogemiller explained the steps of DNA testing. She stated that in the first step, extraction, the DNA is isolated from everything else in the sample. In the second step,

quantification, the quantity of DNA in the sample is determined. In the third step, preliminary machinery action amplification ("PCR"), the specific sequences of DNA are multiplied and then separated. The fourth step is capillary electrophoresis, which allows different DNA fragments to be separated by size. During the next step, preliminary chain reaction application, specific pieces of DNA are labeled with florescent dye, which allows the detection of a pattern or profile that can be compared to different samples. The last step is the comparison.

Pogemiller also testified that machines and equipment are used during the DNA testing process. According to Pogemiller, lab technicians performed all of the lab work, but Pogemiller made all the DNA comparisons. Pogemiller further explained that at their lab, they take a "team approach," and that everyone follows the same training program. All of the lab work is subject to an internal validation process. Pogemiller stated, "It's required that two separate people review [the lab's] work before it gets sent out to the client."

During her trial testimony, Pogemiller testified that as part of her DNA analysis, she was able to ascertain that the DNA was properly extracted. Specifically, Pogemiller stated that with every extraction they run "what is known as a reagent link." Pogemiller explained that a reagent link is a sample that contains no DNA. According to Pogemiller, "we take that sample through the entire process just like with all the other samples . . . to show that none of the reagents or chemicals that we use within that extraction process contains DNA." Pogemiller testified that in this case, "both the reagent blank for the

extraction of the evidence samples, as well as the reference sample, were both clean." Pogemiller further testified that this is an indication that the extraction process was performed correctly.

Pogemiller also testified at trial that the lab takes steps to ensure that contamination does not occur during the DNA testing process. Pogemiller explained that the workstations in the lab are cleaned before and after use with a bleach cleanser. "All of the tools such as forceps or scissors or scalpel . . . are all cleaned with both 10 percent bleach and ethanol, both before and in between each item or if there are multiple stains on an item, even between each stain . . . as well as afterwards to prevent any sort of cross contamination." Significantly, absent from the record is any testimony to suggest that the technicians who performed the lab work deviated from proper protocols or procedures. After hearing Pogemiller's testimony, the trial court overruled Dreyer's objections to the expert testimony.

On the record before us, we find the trial court did not abuse its discretion in overruling Dreyer's challenge to the reliability of Pogemiller's expert testimony. We overrule issue one.

CONFRONTATION CLAUSE

In issue two, Dreyer argues that his Sixth Amendment right to confrontation was violated because the trial court allowed Pogemiller "to testify to DNA results which were partially analyzed by analysts that were not present to testify[.]"

The Confrontation Clause of the Sixth Amendment 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. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that a defendant's right to confrontation under the Sixth Amendment is violated when a witness is permitted to relate out-of-court "testimonial" hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* 541 U.S. at 59; *see also De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008). A statement is testimonial if it was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Crawford*, 541 U.S. at 52.

As set forth above, Pogemiller testified that she did not perform all the lab work on the items that were tested for DNA. According to Pogemiller, technicians performed serology testing on the vaginal swabs and tampons (i.e. testing these items for the presence of biological fluid such as semen), and the DNA extraction and lab work on Dreyer's reference sample. Pogemiller stated that she performed all the DNA comparisons and she testified to her findings at trial. Dreyer argues on appeal that Pogemiller's testimony "from a document that indicated the findings of the analysis from Ms. King[,]" the lab technician who performed the lab work on the reference sample, violated his right to confrontation under the Sixth Amendment. Dreyer does not appear to challenge Pogemiller's reliance on serology testing performed by other technicians.

The United States Supreme Court in *Melendez-Diaz v. Massachusetts*, held that certificates signed by state laboratory analysts, which stated evidence connected to the petitioner was cocaine were testimonial hearsay and their admission violated the petitioner's right to confront the analysts who signed the certificates. 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009). The Court concluded that the certificates were "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact[,]'" specifically, "that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine[.]" *Id*. In this case, no DNA report or other document related to the DNA testing or analysis was admitted into evidence. Rather, Pogemiller testified to her own findings, which were based in part on lab work performed by technicians who did not testify at trial. Therefore, *Melendez-Diaz* does not apply. *See Hamilton v. State*, 300 S.W.3d 14, 21 (Tex. App.—San Antonio 2009, pet. ref'd).

In *Hamilton v. State*, Foster, a forensic scientist supervisor at the Bexar County Criminal Investigation Laboratory, testified regarding serology and DNA analysis performed by another DNA analyst, Graham, on Hamilton's case. *Id*. at 19. Graham screened the physical evidence for biological material and developed a DNA profile for Hamilton and the biological material from the physical evidence. *Id.* He then compared graphs of each DNA profile. *Id*. At trial, Foster testified that Graham's reports reflected that Hamilton's DNA could not be excluded as the donor of the sperm identified on the swabs taken from the complainant. *Id*. at 20. Foster further testified that he reviewed

Graham's work before the report was issued and agreed with the report. Additionally, Foster stated that he conducted his own review of the data. *Id*.

On appeal, Hamilton argued that the DNA reports prepared by Graham were testimonial hearsay and violated his right to Confrontation under the Sixth Amendment. *Id*. at 20-21. The court in *Hamilton* held that Graham's reports of her DNA analysis were testimonial, therefore, the trial court erred in allowing Foster to testify as to Graham's findings. *Id* at 21; *see also Cuadros-Fernandez v. State*, 316 S.W.3d 645, 657-58 (Tex. App.—Dallas 2009, no pet.) (holding expert report and notes regarding DNA analysis were testimonial). As to Foster's testimony regarding his own conclusions, the court recognized that *Melendez-Diaz* did not address the question of whether an expert witness who offers his opinion based in part on lab work performed by another violates the Confrontation Clause. *Hamilton*, 300 S.W.3d at 21. The *Hamilton* court found significant that the Court in *Melendez-Diaz* specifically declined to hold that everyone whose testimony is relevant to establishing authenticity of a sample or accuracy of testing equipment must testify in person. *See id*. In *Hamilton*, the court quoted the following passage from *Melendez-Diaz*:

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "it is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid*., from *United States v. Lott*, 854 F.2d 244, 250 (C.A. 7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to

> decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. *See infra*, at 2250-2551, 2552.

Id. (quoting *Melendez-Diaz*, 129 S.Ct. at 2532 n.1). The *Hamilton* court concluded, "[t]his passage indicates the Supreme Court would hold records or information created by personnel that play a role in the analysis that leads to the expert's opinion are not testimonial." *Id*. The court held that Foster's opinion, "based on data generated by scientific instruments operated by other scientists, did not violate the Confrontation Clause." *Id*. at 22. The Court then held that Hamilton was not harmed by the erroneous admission of Foster's testimony regarding Graham's findings. *Id*.

In the present case, Dreyer argues that the issue in this case is tantamount to the first issue in *Hamilton* where the court determined that the findings of the non-testifying expert were testimonial. The State argues that following the reasoning in *Hamilton*, Pogemiller's reliance on the reference sample DNA profile extracted by Allison King had no impact on Dreyer's ability to cross-examine Pogemiller regarding Pogemiller's analysis and conclusions. We agree with the State. In this case, no DNA report was admitted into evidence and Pogemiller did not testify regarding the findings of another analyst. Pogemiller testified that she performed all the DNA comparisons in this case, and she testified regarding her own findings. As recognized by the Court in *Melendez-Diaz*, not everyone whose testimony is relevant to establishing authenticity of a sample or accuracy of a testing device is required to testify at trial. *Melendez-Diaz*, 129 S.Ct. at 2532 n.1.

Dreyer was given the opportunity to cross-examine Pogemiller regarding her analysis and conclusions. We overrule issue two.

EXTRANEOUS OFFENSE

In his third issue, Dreyer argues that the trial court erred in allowing the extraneous offense testimony of R.M. over Dreyer's objection. After a hearing outside the presence of the jury, the trial court overruled Dreyer's objection to R.M.'s testimony.

Standard of Review and Applicable Law.

We review a trial court's decision to admit evidence under an abuse of discretion standard. *Montgomery*, 810 S.W.2d at 391 (noting trial court "has the best vantage from which to decide" admissibility questions). We must uphold the trial court's admissibility ruling when that decision is within the zone of reasonable disagreement. *Id.*; *see also Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). "An appellate court would misapply the appellate abuse of discretion standard of review by reversing a trial court's admissibility decision solely because the appellate court disagreed with it." *Powell*, 63 S.W.3d at 438.

Under Rule 404(b) of the Texas Rules of Evidence, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tex. R. Evid. 404(b). However, such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" *Id*. Courts have held that evidence of other crimes or wrongs may be admissible to rebut a defensive theory.

See Bass v. State, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008); *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003); *Wheeler v. State*, 67 S.W.3d 879, 887 n.22 (Tex. Crim. App. 2002). For example, courts have held evidence of an extraneous offense proper in sexual assault cases to rebut a defensive theory of fabrication or that the defendant is being framed by the complainant. *See Bass*, 270 S.W.3d at 563. In *Bass*, the Court of Criminal Appeals noted that "[t]he issue does not necessarily turn on the type of defense presented, but on whether the extraneous-offense evidence has noncharacter-conformity relevance by, for example, rebutting a defensive theory or making less probable defensive evidence that undermines an elemental fact." *See id*. at n.8. To be admissible for rebuttal of a fabrication or '"frame-up"' defense, "the extraneous misconduct must be at least similar to the charged one[.]" *Wheeler*, 67 S.W.3d at 887 n.22; *see generally Bass*, 270 S.W.3d at 562-63. The degree of similarity required for admissibility is "not one of exacting sameness" as is required when extraneous offense testimony is used to prove a "defendant's system." *See Dennis v. State*, 178 S.W.3d 172, 179 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

Relevant evidence is generally admissible. Tex. R. Evid. 402. Applying a presumption of admissibility of relevant evidence, trial courts generally favor admission of evidence in close cases. *See Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007) (citing *Montgomery*, 810 S.W.2d at 389). Under Rule 403 of the Texas Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues." Tex. R. Evid.

403; *see Montgomery*, 810 S.W.2d at 389. Therefore, when evidence is found to be relevant under Rule 404(b) and the defendant objects under Rule 403, the court must weigh the probative value of the evidence against its potential for "'unfair' prejudice--that is, . . . its 'tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Montgomery*, 810 S.W.2d at 389 (quoting FED. R. EVID. 403 advisory committee's note). To make this determination, the trial court must balance the following factors: (1) how compellingly evidence of the extraneous misconduct serves to make more or less probable a fact of consequence, (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way[,]" (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense, and (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., whether the proponent has other probative evidence available to him to help establish this fact, and whether the fact relates to an issue in dispute. *See id*; *see also Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997) (en banc).

Analysis

Dreyer's theory at trial, evident from the beginning of the trial, was that S.A. was lying about the sexual assault. In voir dire, defense counsel questioned the potential jurors asking, "[s]hould we make it a law that whatever a child says, we just believe at face value," and asking a potential juror if the reason such would be a bad law is "because we all know that children sometimes don't always tell the truth." When defense counsel

cross-examined S.A., he asked her whether she had ever told anybody this really didn't happen. Defense counsel asked S.A. whether she knew the difference between telling the truth and a lie. S.A. admitted on cross-examination that when she was fifteen she told lies from time to time to try and get out of trouble. Defense counsel further questioned S.A. in an attempt to establish a motive for S.A. to fabricate the alleged assault. Counsel questioned S.A. about whether people were nicer to her at school after the alleged assault and whether her family treated her any differently after the alleged assault. Defense counsel asked S.A. whether her mother thought she was just trying to get attention when she told her mother about the alleged assault.

At trial, Dreyer presented evidence to support his theory that S.A. fabricated the story and was trying to frame him. Jessica Leong, called by the defense, testified at trial that she saw S.A. leave the trailer "early in the morning" on the night in question to attend a party. Jessica further testified that S.A. is "very conniving and deceitful." When asked how Dreyer's semen could have gotten onto S.A.'s tampon, Jessica responded, "[h]ow can you be sure that it was her tampon." When counsel responded "[b]ecause she said it was," Jessica stated, "[w]ell, [S.A.] says a lot of stuff."

Dreyer's wife, Christina, also testified on behalf of the defense and stated that S.A. had a reputation for being a "liar." Christina stated that after speaking with S.A. and Dreyer about the allegations, she believed Dreyer. Although other items, such as a bed sheet and two pillow cases, were collected by the police, only the vaginal swab and tampons were tested for DNA. Therefore, there was no DNA evidence that directly linked

Dreyer to the camper. Dreyer presented testimony from Christina, which implied that S.A. may have obtained Dreyer's seminal fluid from tissue Christina put in a trash can in the trailer following sexual relations with Dreyer, or that Dreyer's DNA may have inadvertently passed to the tampons in the trash can from Christina's tissue. In closing argument, Dreyer focused on the fact that no DNA evidence linked him to the camper and that "they didn't test the female DNA on the tampons," implying that the tampons may not have even been S.A.'s. Counsel reiterated the theory that S.A. may have fabricated the story about the assault for sympathy or to avoid getting in trouble for sneaking out to attend a party.

Based on the record before us, we conclude it is at least subject to reasonable disagreement whether the extraneous offense evidence was admissible for the non-character conformity purpose of rebutting Dreyer's defensive theory that S.A. fabricated the story against Dreyer.[4] By introducing the testimony of R.M., the State was

[4] The jury charge included the following limiting instruction:

> You are instructed that if there is any testimony before you in this case regarding the defendant's having committed other crimes, wrongs, or bad acts other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other crimes, wrongs, or bad acts, if any were committed, and even then you may only consider the same as proof of the state of mind of the defendant and the child, and the previous and subsequent relationship between the defendant and the child or you may only consider the same in determining the motive, opportunity, intent, preparation, plan, or knowledge, of the defendant, if any in connection with the offense alleged against the defendant in the indictment in this cause, if one was committed, and for no other purpose.

trying to show that the defense's claim of fabrication or frame-up was less probable. By showing the allegations were less likely to be fabricated, the extraneous offense evidence rebutted Dreyer's defensive theory and had relevance apart from character conformity.[5] *See Bass*, 270 S.W.3d at 562-63.

We also conclude the trial court did not abuse its discretion in overruling Dreyer's Rule 403 objection. Given Dreyer's sole defensive theory of fabrication or frame-up, the inherent probative force of R.M.'s testimony strongly served to make the existence of a fact of consequence to the litigation more probable. Additionally, because the State also presented DNA evidence against Dreyer, the extraneous offense evidence did not have a large potential to impress the jury in an irrational way nor did the State spend a significant amount of time presenting R.M.'s testimony. The State had a need for R.M.'s testimony because there was no DNA evidence that linked Dreyer to the camper and there was no DNA evidence that verified the tampons had come from S.A. R.M.'s testimony served to

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We note that defense counsel did not object to the limiting instruction.

[5] Though Dreyer does not contest the similarity between the charged offense and the extraneous offense, we note that while they differ in several respects, the extraneous offense is "at least similar to the charged one." *See Wheeler*, 67 S.W.3d at 887 n.22. In both instances Dreyer had forced vaginal intercourse with fifteen year old girls. In both instances Dreyer entered the girl's bedroom quietly at night while she was sleeping. In both instances Dreyer knew the victim. In both instances Dreyer began nonviolently and became more aggressive as the assault ensued. Therefore, we conclude the assaults were sufficiently similar to be admissible as rebuttal evidence. *See, e.g., Newton v. State*, 301 S.W.3d 315, 318 (Tex. App.—Waco 2009, pet. ref'd) (noting extraneous offense sufficiently similar where both victims of sexual assault were the defendant's step-daughters, both were around ten years old, the defendant did not threaten either of them, and defendant abused both of them over a period of years.).

undermine the defensive theories aimed at punching holes in the weight of the DNA evidence. Considering each of the Rule 403 factors, the trial court's Rule 403 determination does not present one of the rare instances in which a clear abuse of discretion has occurred requiring reversal. *See Montgomery*, 810 S.W.2d at 392 (citing *United States v. Massitt*, 784 F.2d 590, 597 (5th Cir. 1986)). The trial court's determination that any unfair prejudice does not outweigh the probative value of this evidence is within the zone of reasonable disagreement. *Id*. at 391. We overrule issue three. We affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on October 21, 2010
Opinion Delivered January 19, 2011
Do not publish

Before Gaultney, Kreger, and Horton, JJ.