

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00460-CR

EDGAR ARTURO SAZO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-08-09212-CR

MEMORANDUM OPINION

Edgar Arturo Sazo pled guilty to the charge of murder. *See* Tex. Penal Code Ann. § 19.02(b)(1) (West 2011). Sazo elected for a jury to assess punishment. During the punishment hearing, Sazo offered evidence of sudden passion. The jury found Sazo guilty of murder, found against Sazo on the special issue of sudden passion, and assessed punishment of thirty years imprisonment. In Sazo's sole issue, he asserts the trial court erred in admitting fifteen photographs of the crime scene, as they were prejudicial because they were cumulative in nature as prohibited by Rule of Evidence 403. *See* Tex.

R. Evid. 403. Sazo generally argues that the trial court failed to conduct a balancing test before admitting these exhibits. We affirm the trial court's judgment.

The admissibility of photographs is within the sound discretion of the trial court. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). We will not disturb the trial court's decision on appeal unless it falls outside the zone of reasonable disagreement. *Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App.), *cert. denied*, 130 S. Ct. 1015, 175 L. Ed. 2d 622 (2009). Rule 403 requires the exclusion of relevant evidence when its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."¹ Tex. R. Evid. 403. Rule 403 presumes relevant evidence will be more probative than prejudicial and thereby favors the admission of relevant evidence. *Gallo*, 239 S.W.3d at 762. "The term 'probative value' refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). "'Unfair prejudice' refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* at 879-80.

¹ Sazo does not cite Rule 401 or Rule 402. Tex. R. Evid. 401, 402. We will only address his Rule 403 claim because Sazo has not adequately briefed any other argument. Tex. R. App. P. 38.1.

We consider several factors in balancing the probative value and prejudicial effect of photographs, including, but not limited to: (1) the number of exhibits offered; (2) their gruesomeness; (3) their detail; (4) their size; (5) whether they are black and white, or color; (6) whether they are close-up; and (7) whether the body depicted is naked or clothed. *Gallo*, 239 S.W.3d at 762. We also consider the availability of other means of proof to the parties and the unique circumstances of each case in determining the probative value of evidence. *Id.*

The trial court is not required to conduct a separate hearing on the Rule 403 issue or announce for the record that it has mentally conducted and completed the balancing test of probativeness versus the danger of unfair prejudice. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997); *Sanders v. State*, 255 S.W.3d 754, 760 (Tex. App.—Fort Worth 2008, pet. ref'd); *Houston v. State*, 832 S.W.2d 180, 184 (Tex. App.—Waco 1992, pet. dism'd). We generally presume that the trial judge engaged in the balancing test when a party invokes Rule 403. *Williams*, 958 S.W.2d at 195; see *Nolen v. State*, 872 S.W.2d 807, 812 (Tex. App.—Fort Worth 1994, pet. ref'd).

Sazo's trial counsel objected to the admission of State's exhibits 6-A through 6-O because the photographs were cumulative and therefore prejudicial. The trial court then heard argument from both sides on the issue and ruled, "I don't see these pictures to be repetitive at all." The trial court admitted the photographs over Sazo's objection. The record does not indicate that the trial court refused to consider Sazo's Rule 403 objection

or that he refused to conduct the requisite balancing test. Rather, we conclude that the trial court necessarily performed the balancing test when it heard Sazo's objection, considered it, and overruled it. The record does not indicate otherwise.

Further, Sazo has not shown how the trial court's decision to admit these exhibits was error. Viewing Sazo's brief liberally, at most he argues that the fifteen exhibits of the crime scene, including photographs depicting the victim's body, were cumulative and thereby caused undue prejudice. We do not agree that the photographs are cumulative. Exhibits 6A, 6B, and 6C are photographs of the roadway near where the victim's body was found. Exhibit 6O is a photograph of a patch of ground. Exhibit 6D is a photograph of the victim's body hidden under brush taken from a distance. Exhibits 6E and 6F are photographs taken at different angles, of the victim's body partially covered in brush, taken closer than exhibit 6D. Exhibits 6G and 6H are close-up photographs of the victim's body. Exhibits 6I, 6J, 6K, and 6L are photographs of different parts and angles of the victim's body with a ruler to show scale. Exhibits 6M and 6N are photographs of different wounds the victim sustained. We agree with the trial court that these photographs are not repetitive. Additionally, none of these photographs are more gruesome than would be expected in this sort of crime. *See Gallo*, 239 S.W.3d at 763. Photographs depicting the nature, location, and extent of a wound have been declared probative enough to outweigh any prejudicial effect they may have on a jury. *Montgomery v. State*, 198 S.W.3d 67, 77 (Tex. App.—Fort Worth 2006, pet. ref'd). As

we presume that the trial court conducted the proper balancing test and that the trial court's determination that the fifteen photographs were not cumulative falls "within the zone of reasonable disagreement[,]" we conclude the trial court did not abuse its discretion in admitting the photographs. We overrule Sazo's sole issue and affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on July 8, 2011
Opinion Delivered August 24, 2011
Do not publish

Before Gaultney, Kreger, and Horton, JJ.