COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00311-CR

JAYSON NEIL SPARKS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 1403502D

MEMORANDUM OPINION[1]

I. INTRODUCTION

A jury convicted Appellant Jayson Neil Sparks of continuous sexual abuse of a young child and assessed his punishment at thirty years' confinement. In two points, Sparks challenges the trial court's admission of certain testimony and the constitutionality of code of criminal procedure article 102.0186. We will affirm.

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[1]*See* Tex. R. App. P. 47.4.

II. BACKGROUND

A.S. lived with her biological Father Sparks, her Mother, her older sister C.S., and her two younger siblings. One morning, while the rest of the family was still asleep, Sparks instructed then nine-year-old A.S. to come to a downstairs room. A.S. did so, still wearing the pajama shorts that she had slept in, and Sparks told her to "squat." A.S. complied, and Sparks put his hand inside of her shorts and inserted his finger into her vagina, or as A.S. referred to it, her "hole." A.S. told Sparks to stop, and after a few seconds, he removed his hand and returned to bed. A.S. did not tell anyone what had happened.

On another occasion, when Mother was away from home one night, Sparks told then ten-year-old A.S. to come upstairs to his bedroom and to lay down with him, under the covers and in the dark. A.S.'s youngest sibling joined them, but after she left to go use the bathroom, Sparks put his hand under A.S.'s underwear and inserted his finger into her vagina for a few seconds. A.S. stayed in bed with Sparks for the rest of the night and did not tell anyone what had happened.

When A.S. was eleven years old, she and the rest of her family were watching a movie at home one night. According to A.S., when Mother and A.S.'s siblings were asleep, Sparks began to tickle A.S., including along her inner thigh, and "accidentally touched [her] hole" for a few seconds. Sparks later acknowledged that his thumb had actually entered A.S.'s vagina.

A.S. told her grandmother what had happened when Sparks was tickling her, A.S.'s grandmother spoke to Mother, and authorities soon initiated an investigation. CPS interviewed A.S., as did a forensic interviewer at Alliance for Children, and a sexual assault nurse examiner at Cook Children's Medical Center examined A.S, who disclosed the three incidents involving Sparks. A.S., her Mother, and her siblings moved out of the home; A.S. blamed herself for what had happened and was hospitalized for attempting to commit suicide; and Sparks was eventually arrested after voluntarily giving an interview to a detective on the case.

At trial, A.S. recalled a time when Sparks once showed her a glass dildo and asked her if she knew what it was.[2] A.S. told Sparks that it was a sex toy. A.S. also recalled that Sparks had shown her and C.S. how to shave their pubic areas. According to A.S., after they removed their "bottoms," Sparks "demonstrated how to shave on [C.S.] first and then went to [her]." C.S. also testified that Sparks had shown her how to shave her pubic area, although she recalled that she was alone with Sparks at the time. According to the detective who interviewed Sparks, he told her that he had taught A.S. and C.S. how to

[2]Sparks testified that when one of his female friends "mentioned that she'd seen some glass pieces," he removed the sex toy from the freezer and said, "[O]ne kind of like this?" Sparks said that about that time, A.S. walked around the corner and saw Sparks holding it, one of Sparks's friends commented that A.S. knew what it was, and Sparks—apparently skeptical of his friend's remark—asked A.S. if she knew what it was.

wash their private areas and that "he watched them a few times to make sure they were cleaning themselves right."

Sparks denied penetrating A.S.'s vagina with his finger in the downstairs room and in his bedroom, and regarding the last incident that occurred during the movie, he explained that his thumb had accidentally entered A.S.'s vagina because as he was tickling her, she was also moving and scooting all about. Sparks admitted that in addition to wrestling or roughhousing with his daughters, he played an "innocent game" with A.S. in which he would poke the area around her breast and say, "Boob."[3]

III. C.S.'s Shaving Testimony

In his first point, Sparks argues that the trial court abused its discretion by admitting C.S.'s testimony that Sparks shaved her pubic area. He contends that its probative value was substantially outweighed by the danger of unfair prejudice because "[i]t isn't evident exactly what the testimony of [his] shaving lesson for C.S. was meant to prove," the State's need for the evidence was "minuscule," and the evidence "merely served to instill a prejudice or bias in the minds of the jury against Appellant's unique method of parenting."

Although generally admissible, relevant evidence may nevertheless be excluded under rule 403 if its probative value is substantially outweighed by the

[3]The trial court broke for lunch at the conclusion of Sparks's direct examination, but Sparks never returned to court, so the State never had an opportunity to cross-examine him. Although the trial proceeded and concluded in his absence, Sparks was eventually brought before the trial court for sentencing.

danger of unfair prejudice. Tex. R. Evid. 403. "Unfair prejudice does not arise from the mere fact that evidence injures a party's case," because "[v]irtually all evidence that a party offers will be prejudicial to the opponent's case, or the party would not offer it." *Casey v. State*, 215 S.W.3d 870, 883 (Tex. Crim. App. 2007). Rather, evidence is "unfairly prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justifies its admission into evidence." *Id.* To exclude evidence under rule 403, there must be a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001). We balance (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Jenkins v. State*, 493 S.W.3d 583, 608 (Tex. Crim. App. 2016); *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012), *cert. denied*, 134 S. Ct. 823 (2013).

As Sparks observes, "this was a classic case of he-said/she-said"—A.S. accused Sparks of inserting his finger into her vagina, and Sparks denied doing so—and A.S.'s testimony was the only direct evidence of Sparks's guilt. The State therefore elicited testimony from both the detective who interviewed Sparks and a director from Alliance for Children that Sparks had groomed A.S. by engaging her in numerous activities that ranged from wrestling, tickling, and playing the "Boob" game to introducing sex toys, observing A.S. and C.S. wash their private areas, and shaving both A.S.'s and C.S.'s pubic areas. As the

detective explained, and as the progression of activities implies, grooming "is where you take innocent touches and they become more sexual, testing the boundaries of the child, and also desensitizing the child for greater access . . . , to where they can go further each time." *See Morris v. State*, 361 S.W.3d 649, 667 (Tex. Crim. App. 2011) (describing forms of grooming). The grooming evidence that Sparks shaved C.S.—probative of Sparks's relationship with A.S., his state of mind, or even a plan—consequently functioned to discredit Sparks's credibility and testimony while circumstantially reinforcing A.S.'s. The probative value of the evidence was high, and the State's need for it was substantial.

As for the other factors, the time needed to develop the evidence was minimal, and although the jury may have considered the evidence distasteful, it was not of the type that has the tendency to suggest a decision on an improper basis. *See Casey*, 215 S.W.3d at 882–83.

The probative value of the evidence that Sparks shaved C.S. far outweighed any potential danger of unfair prejudice. The trial court did not abuse its discretion by overruling Sparks's rule 403 objection. We overrule his first point.

IV. FACIAL CONSTITUTIONALITY OF ARTICLE 102.0186

The judgment of conviction assessed court costs against Sparks in the amount of $679. Of that amount, $100 is earmarked for the county's child abuse prevention fund, as prescribed by code of criminal procedure article 102.0186. *See* Tex. Code Crim. Proc. Ann. art. 102.0186 (West Supp. 2016) (requiring

persons convicted of continuous sexual abuse of a young child to pay costs of $100 towards county's "child abuse prevention fund"). In his second point, Sparks argues that article 102.0186 violates the Texas Constitution's separation of powers clause because contributing funds to a child abuse prevention program, "while undoubtedly laudable," does not represent a legitimate criminal justice purpose. *See Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015) ("[I]f the statute under which court costs are assessed . . . provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause.") (footnote omitted), *cert. denied*, 136 S. Ct. 1188 (2016). We recently resolved this recycled issue contrary to the position that Sparks advocates, and we do not care to revisit it now. *See Ingram v. State*, 503 S.W.3d 745, 749 (Tex. App.—Fort Worth 2016, pet. ref'd). We overrule Sparks's second point.

V. CONCLUSION

Having overruled Sparks's two points, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 24, 2017