Opinion filed October 31, 2016

In The

Eleventh Court of Appeals

No. 11-14-00291-CR

MANUEL SANCHEZ VIDAURRI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 350th District Court

Taylor County, Texas

Trial Court Cause No. 10749-D

M E M O R A N D U M O P I N I O N

The jury convicted Manuel Sanchez Vidaurri of indecency with a child. *See* TEX. PENAL CODE ANN. § 22.11(a)(2) (West 2011). The jury assessed his punishment at confinement for nine years. Appellant presents three issues on appeal. We affirm.

In Appellant's first issue, he argues that the evidence is insufficient to sustain his conviction. In his second issue, Appellant contends that the trial court erred when

it admitted evidence of Appellant's prior conviction for aggravated sexual assault of a child because it was not relevant or admissible under Rule 404(b) of the Texas Rules of Evidence. In Appellant's third issue, he asserts that the trial court abused its discretion when it admitted evidence of Appellant's prior conviction for aggravated sexual assault of a child because the prejudicial effect outweighed the probative value.

We review the sufficiency of the evidence, whether denominated as a legal or as a factual sufficiency claim, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we examine all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Brown v. State*, 381 S.W.3d 565, 573 (Tex. App.—Eastland 2012, no pet.) (citing *Jackson*, 443 U.S. at 314, 318 n.11, 320).

Twelve-year-old J.R. lived with her mother and Appellant, her stepfather. On the night of September 9, 2012, J.R.'s mother, J.S., called the police because she had found a picture of J.R.'s bottom and anus on Appellant's phone.

Chris Volirakis, a police officer with the Abilene Police Department, responded to the call around 10:14 p.m. Officer Shawn Montgomery and

Officer Milliorn, both with the Abilene Police Department, also responded to the call.

Officer Volirakis testified that, when he arrived, J.S. was hysterical and angry and that she held a cell phone out to him and kept repeating, "Do you see this picture?" The picture was of a girl's bottom and anus. J.S. told Officer Volirakis, "This is a picture of a bottom, and that's a picture of an anus, and this picture is my 12-year-old daughter that is sleeping in her bedroom right now." The picture was on Appellant's cell phone and was time-stamped at 10:06 p.m. J.S. told Officer Volirakis that she had caught Appellant taking the picture while J.R. was asleep.

J.S.'s testimony was not entirely consistent with what she told the police. J.S. testified that she and Appellant had gotten into an argument over his drinking and that Appellant had left the house for a "little bit." Later, when Officer Volirakis saw Appellant at the scene, Appellant appeared to be intoxicated. J.S. testified that, when Appellant returned home, and contrary to what she had told Officer Volirakis, she saw Appellant by J.R.'s bedroom door, not inside J.R.'s bedroom. Her trial testimony also differed from a statement that she had given to the police in which she said that she found Appellant in J.R's bedroom leaning over J.R.'s dresser. At trial, J.S. said that the dresser was another one that they kept in the hall. Additionally, J.S. had told the police that she found Appellant's phone "next to [her] daughter's butt." At trial, however, she said that she grabbed the phone out of his hand while he was in the hallway. She grabbed it out of his hand because she had suspicions that Appellant had a girlfriend. He was "constantly sneaking off all the time or being on his phone," so she grabbed the phone out of his hand to see "what he was doing, who he was talking to." When she grabbed the phone, J.S. saw the picture of the girl's bottom and anus. Because of Appellant's past—Appellant was

convicted of aggravated sexual assault of a child in 1992—J.S. thought that the picture could be of her daughter.

J.R. testified that she did not know that Appellant took her picture. She said that, when she heard her mom crying, she got up to see what was wrong. J.R. stated that she was fully dressed and that her panties were not down.

Under Section 21.11 of the Texas Penal Code, a person commits indecency with a child by exposure if, with the intent to arouse or gratify the sexual desire of any person, the person "causes the child to expose the child's anus or any part of the child's genitals." PENAL § 21.11(a)(2)(B). Appellant argues that the evidence is insufficient because there was no evidence that Appellant "caused" the child's anus to be exposed. Appellant contends that, while he may have captured the exposure on his cell phone, the picture alone does not necessarily prove that he caused the exposure in the first place.

We disagree with Appellant. The evidence established that the picture of J.R.'s bottom and anus was on Appellant's cell phone. Further, upon Officer Volirakis's arrival, J.S. was hysterical and angry, and she insisted that the officer look at the picture on the cell phone. J.S. told Officer Volirakis, "This is a picture of a bottom, and that's a picture of an anus, and this picture is my 12-year-old daughter that is sleeping in her bedroom right now." J.S. told Officer Volirakis that she found the phone on the bed next to J.R.'s bottom. J.S. testified at trial that she grabbed the phone from Appellant's hand because she was suspicious of him and then found the picture of J.R. Although there are conflicts between J.S.'s trial testimony and the oral and written statements that she gave to the police, the factfinder is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Factfinders are permitted to draw reasonable inferences from direct or circumstantial evidence. *Hooper v. State*, 214 S.W.3d 9, 14 (Tex. Crim. App. 2007).

Additionally, "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.* at 13. Therefore, it is a reasonable inference that Appellant caused J.R.'s anus to be exposed. Accordingly, viewing all of the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found all of the elements of the offense of indecency with a child beyond a reasonable doubt. Thus, the evidence is sufficient to support Appellant's conviction. Appellant's first issue is overruled.

In Appellant's second and third issues, he argues that the trial court abused its discretion when it admitted evidence of Appellant's prior conviction for aggravated sexual assault of a child. Specifically, Appellant argues that the evidence was not relevant or admissible under Rule 404(b) and that the prejudicial effect outweighed any probative value under Rule 403 of the Texas Rules of Evidence.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). We will reverse a trial court's ruling only if it is outside the "zone of reasonable disagreement." *Id.*

Rule 404(b) of the Texas Rules of Evidence prohibits the admission of evidence of extraneous offenses in order to prove that, on the occasion in question, the defendant acted in conformity with the character demonstrated by the other bad acts. TEX. R. EVID. 404(b); *Santellan v. State*, 939 S.W.2d 155, 168 (Tex. Crim. App. 1997). Rule 404(b) provides that evidence may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. TEX. R. EVID. 404(b)(2). Evidence of an extraneous offenses is admissible if relevant to a fact of consequence apart from the tendency to show conduct in conformity with character. *See Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). The exceptions under Rule 404(b)

are neither mutually exclusive nor collectively exhaustive. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

At trial, the State offered evidence of Appellant's prior conviction for aggravated sexual assault of a child. The State argues that the evidence is admissible to show intent, absence of mistake, and plan in light of J.S.'s testimony. The State asserts that intent was an important factor to show the arousal and gratification component of the charge of indecency with a child.

We agree with the State. Evidence of an extraneous offense is admissible to prove the element of intent in a case in which intent is an essential element of the offense and cannot be inferred from the act itself. *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983). Appellant was charged with indecency with a child by exposure. The offense of indecency with a child requires the "intent to arouse or gratify the sexual desire of any person." PENAL § 22.11(a)(2). J.S. testified that she found a picture of J.R.'s bottom and anus on Appellant's cell phone. However, J.R. had no knowledge of Appellant pulling her panties down or taking her picture. Accordingly, the trial court could have reasonably concluded that the evidence of Appellant's prior conviction for aggravated sexual assault of a child was admissible to supply the intent element in the charge for indecency with a child by exposure. *See Morgan v. State*, 692 S.W.2d 877, 881 (Tex. Crim. App. 1985). We hold that the trial court did not abuse its discretion when it admitted the evidence under Rule 404(b). Appellant's second issue is overruled.

Even if evidence is admissible under Rule 404(b), Rule 403 provides that the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403; *see Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009). A trial court is presumed to have engaged in the required balancing test when

Rule 403 was invoked. *Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997) (citing *Santellan v. State*, 939 S.W.2d 155, 173 (Tex. Crim. App. 1997)). An analysis under Rule 403 includes, but is not limited to, the following factors: (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. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012).

We conclude that the trial court did not abuse its discretion when it determined that the evidence of Appellant's prior conviction was admissible under Rule 403 because the evidence was not substantially outweighed by its prejudicial effect. Because it is sometimes difficult—as it was in this case—to show intent in an indecency-with-a-child case, the probative value of the evidence and the State's need for the evidence may be high. The State's only other evidence of intent consisted of a picture of J.R. on Appellant's cell phone. Further, we do not believe that the evidence had a tendency to confuse or distract the jurors in an irrational way, and the time needed to develop the evidence was brief. Accordingly, Appellant's third issue is overruled.

We affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

October 31, 2016

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.