AFFIRMED as Modified; Opinion Filed July 14, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00740-CR

MAURICIO HERNANDEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1333949-M

MEMORANDUM OPINION

Before Justices Lang, Evans, and O'Neill[1]
Opinion by Justice Evans

Mauricio Hernandez appeals from his conviction for aggravated sexual assault of a child under fourteen years of age. Appellant brings two issues complaining about evidentiary rulings the trial court made during the punishment hearing. He also requests that we reform the judgment of conviction to reflect his guilty plea and correct the name of his trial attorney. We modify the judgment as requested and affirm the judgment as modified.

BACKGROUND

Appellant was charged with aggravated sexual assault of a child under fourteen years of age after complainant, the daughter of his girlfriend with whom he was living, gave birth to a 36- or 37-week-old baby in a portable toilet next to a soccer field. Immediately following the birth,

[1] The Hon. Michael J. O'Neill, Justice, Assigned

the baby drowned in the chemically treated water. Appellant pleaded guilty to the aggravated sexual assault charge.[2] A jury assessed punishment at fifty years' imprisonment.[3]

At the punishment phase of trial, the jury heard testimony from appellant admitting he began having sexual intercourse with the complainant after he moved in with complainant's mother and her children. He testified the first time was in August or September 2012, when he was fifty-one and complainant was thirteen. According to appellant, he learned complainant was pregnant on Monday, April 15, 2013. He then obtained what he believed to be morning-after pills on the street "so that [her] period can come."

Appellant gave complainant two pills on Friday and one pill the next morning on Saturday, April 20. Appellant then drove complainant and her brother to their soccer games. During her brother's game, appellant periodically checked on complainant who remained in appellant's truck, sick, "with a stomach ache." Complainant ultimately gave birth in a portable toilet next to the parking lot where the truck was parked. Although appellant admitted to having sex with complainant about three weeks before she gave birth, he testified that he thought she was at the beginning of her pregnancy. According to appellant, had he known complainant was near term, he would not have given her the pills. Defense counsel stipulated to evidence that appellant was the baby's father.

The jury also heard from complainant who testified pursuant to an immunity agreement. According to complainant, she began a sexual relationship with appellant, whom she viewed as a father figure, in May or June of 2012. She reported that over the summer, she and appellant

[2] Appellant was also charged with capital murder of the baby. Shortly after appellant's conviction in this cause, however, the State dismissed the capital murder charge and indicted appellant for injury to a child. Pursuant to a plea agreement, appellant pleaded guilty to injury to a child and was sentenced to twenty years' imprisonment.

[3] The punishment authorized for appellant's first-degree offense is confinement in the Institutional Division of the Texas Department of Criminal Justice for not less than five years or not more than 99 years or life, and possible fine not to exceed $10,000. *See* TEX. PENAL CODE ANN. § 22.021(e) (West Supp. 2015) (defining aggravated sexual assault as first degree felony); *id*. at § 12.32(a) (West 2011) (describing punishment range for first degree felonies).

engaged in sexual encounters almost every day. She informed appellant in October she stopped having her period, but also noted her periods were irregular. She also admitted that she wore clothes that concealed her pregnancy. She testified that she and appellant started talking about the baby about a month before she gave birth. Complainant was afraid that if her mother found out about the baby, appellant would go to jail. According to complainant, about a week before the birth, when complainant's mother became suspicious that she was pregnant, appellant and complainant talked about the baby again. Appellant gave her pills "to help the baby come out faster." On Saturday morning, complainant was in severe pain in the truck in the parking lot of the soccer field and appellant would come to check on her, say he loved her, and then he would leave. She went to the portable toilet next to where the truck was parked three or four times. The last time, she was sitting down and couldn't breathe. The baby came out. Complainant remembers seeing the baby's hand move, but she didn't know what to do to get the baby "out of there." Appellant came back and complainant told him what happened. Appellant hugged her and then went into the portable toilet to clean it.

Other trial witnesses included complainant's mother, complainant's soccer coach and his wife, the nurse who examined complainant after the birth, investigating police officers, and the medical examiner. The State also introduced multiple photographs, including three crime scene photos taken by the police when the baby was found and removed from the portable toilet and three autopsy photos.

ANALYSIS

In his first issue, appellant challenges the court's admission of six 8" x 10" color photographs as inflammatory and unduly prejudicial. Three of the photos at issue (State's Exhibits 13, 14, and 15) depict the condition of the baby as she was removed from the portable toilet by a member of the medical examiner's team and immediately thereafter. State's Exhibit

13 is a wide angle shot of a medical examiner crew member removing the baby from the toilet. State's Exhibit 14 is a larger side view of the baby while she was removed from the toilet. The picture depicts the baby covered in toilet waste with her umbilical cord colored bright blue which the medical examiner testified was due to the blue toilet water. State's Exhibit 15 is a wide angle shot of the baby on her back with her placenta and umbilical cord on a white sheet on the ground. The other three photos (State's Exhibit 41, 42, and 43) were from the baby's autopsy. State's Exhibit 41 depicts the baby on her side in the condition she arrived at the medical examiner's office. State's Exhibit 42 shows the baby on her back on a blue tarp after she was cleaned and before the autopsy. State's Exhibit 43 is a view of the baby's stomach organ on a white background after it was removed from her body during the autopsy. Part of the organ is bright blue in color.

Appellant argues that the baby was not the victim of the indicted offense and nothing about her visual depiction in the photos assisted the jury in determining any disputed issue. According to appellant, the photos failed to show anything more than the baby was dead and should not have been admitted in light of his offer to stipulate to the circumstances surrounding her death. He asserts the State offered the photos "only to inflame the jurors with prejudice and emotion and bridge the gaps in the State's case for capital murder."

At a punishment hearing, evidence may be offered by the State and defendant as to any matter the court deems relevant to sentencing, including "the circumstances of the offense for which he is being tried, and notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act." TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (West Supp. 2015). We

review a trial court's evidentiary rulings during the punishment phase using an abuse of discretion standard and will not reverse a ruling that was within the zone of reasonable disagreement. *See Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996).

Under rule 401 of the Texas Rules of Evidence, evidence is relevant if it has any tendency to make a fact more or less probable and the fact is of consequence in determining the action. TEX. R. EVID. 401. The test for relevancy is broader during the punishment phase, because it allows a jury to consider more evidence in exercising its discretion to assess punishment within the appropriate range. *See Murphy v. State*, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988) (op. on reh'g) (superseded on other grounds by TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)). The purpose of a punishment hearing is to allow the jury to assess punishment in accordance with the objectives of the Texas Penal Code. *See Rogers v. State*, 991 S.W.2d 263, 265–66 (Tex. Crim. App. 1999).

Relevant evidence is presumed to be more probative that prejudicial. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). However, the trial court "may exclude relevant evidence if its probative value is substantially outweighed by one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. The burden is on the appellant to demonstrate the damaging nature of the evidence outweighs its probative value. *See Boone v. State*, 60 S.W.3d 231, 239 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The trial court does not abuse its discretion in admitting prejudicial evidence that merely reflects what appellant has done. *See Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995). Among the many factors a court may consider in determining whether the danger of unfair prejudice substantially outweighs the probative value of photographic evidence are the number of exhibits offered, their gruesomeness,

their detail, their size, whether they are in color, whether they are close-up, and whether the body is clothed or naked. *Young v. State* 283 S.W.3d 854, 874 (Tex. Crim. App. 2009).

Evidence concerning the baby's removal from the portable toilet, her condition before the autopsy, as well as her cause of death were both relevant and admissible as same-transaction contextual evidence, where crimes are interwoven or blended with one another, or connected so that they form an indivisible criminal transaction. *See Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005). Here, appellant's desire to hide the result of his crime (complainant's pregnancy), led to complainant giving birth to a live baby that, according to the medical examiner, drowned in a portable toilet. The photos of the baby were also relevant to demonstrate the size and development of the baby and cast doubts on appellant's testimony that he thought appellant was in an early stage of pregnancy. The pictures of the baby's removal from the portable toilet also helped the police officer explain to the jury how he found the baby and describe the removal process. With respect to the autopsy photos, the medical examiner used the photos to help illustrate to the jury his testimony about the baby's appearance and to support opinion about the gestational age of the baby, as well as to support his finding that the baby was born alive, but allowed to drown in the toilet ingesting the blue toilet water in the process.

While the six color 8 x 10 photographs may have been unpleasant for the jurors to see, they represented the reality and results of appellant's crime. *See Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999). Moreover, a photograph is generally admissible if verbal testimony of the matters depicted is also admissible. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997). Appellant did not object to the police officer's testimony about the baby's discovery in the portable toilet and her removal. Nor did appellant object to the medical examiner's testimony about the appearance and condition of the baby, or his testimony that the blue color of the baby's stomach indicated the baby was born alive and that she had swallowed

the chemically treated water before drowning. Accordingly, we conclude that the trial court did not abuse its discretion in concluding the photographs were not more prejudicial than probative. We resolve appellant's first issue against him.

In his second issue, appellant argues the trial court abused its discretion in refusing to admit records of therapy sessions for complainant's mother. Appellant contends the records demonstrate the poor relationship between complainant and her mother, that complainant accused mother's former boyfriend of sexually molesting her, and that, when confronted, the former boyfriend denied the allegation and asserted complainant acted "inappropriately" to him. According to appellant, the records were admissible "for motive and treatment under Texas Rules of Evidence 412(b) and 803(4)" and reveal complainant was consistently trying to retaliate against her mother by seducing her boyfriends and would have mitigated appellant's punishment by "lessening [appellant's] moral culpability."

Appellant does not cite any case that supports the admissibility of an alleged victim's past sexual behavior under either 412 (b) or 803(4) during punishment for the purposes of mitigation and we question whether such evidence has any bearing on the issues relating to punishment or mitigation. *See Molinar v. State*, No. 14–05-00359-CR, 2006 WL 2729664 at *2 (Tex. App.—Houston [14th Dist.] Sept. 26, 2006, pet. ref'd) (not designated for publication). Nevertheless, even if we assume without deciding that the trial court erred in refusing to admit the records, appellant has not shown how he was harmed by their exclusion. In his brief, appellant summarily concludes without discussion or analysis, the exclusion of the therapy records violated his "rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and 14th Amendments to the United States Constitution: and Article 1, sections 3, 10, 13, 15, and 19 of the Texas Constitution."

Appellant pleaded guilty to aggravated sexual assault of complainant and both complainant and appellant testified they had a sexual relationship that began when complainant was thirteen years old. Appellant testified that after he and complainant's mother fought, complainant would comfort him and tell him not to suffer and "mama is mean. She doesn't love you." According to appellant, complainant would also touch his hair and her mother told appellant she did not like complainant to do that.[4] When defense counsel asked appellant whether he understood that it didn't matter how complainant acted towards him or professed her love, nothing gave appellant the right to have sex with her, appellant agreed, "Never." The therapy records indicating complainant alleged sexual abuse against her mother's former boyfriend, which may or may not have been true, established little, if anything, about the offense appellant admitted to or about appellant himself that was not also well-established by other evidence. *See Clay v. State*, 240 S.W.3d 895, 905–06 (Tex. Crim. App. 2007). Accordingly, it is unlikely that the jury would have imposed a punishment less than the fifty years' imprisonment assessed had the therapy records been admitted. We resolve appellant's second issue against him.

In his brief, appellant also requests that we modify the trial court's judgment to reflect that (1) he pleaded "guilty" to the offense with which he was charged, and (2) the name of his trial counsel of record was Theodore A. Beach. The State does not oppose appellant's requests. Where, as here, the record provides the necessary information to correct inaccuracies in a trial court's judgment, we have the authority to modify the judgment to speak the truth. *See* TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). The parties agree, and our review of the record confirms, that appellant pleaded "guilty" to the

[4] Appellant also told the investigating officer that the first time he initiated sex with complainant, but stated the other sexual encounters were initiated by the complainant.

offense of aggravated sexual assault of a child under the age of fourteen and that his defense attorney at trial was Theodore A. Beach. Accordingly, we will modify the judgment as requested by appellant.

CONCLUSION

We modify the judgment of conviction to reflect (1) appellant pleaded "guilty" to the offense of aggravated sexual assault of a child under the age of fourteen and (2) Theodore A. Beach as appellant's trial counsel of record. We affirm the trial court's judgment as modified.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MAURICIO HERNANDEZ, Appellant

No. 05-15-00740-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1333949-M
Opinion delivered by Justice Evans, Justices Lang and O'Neill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

Under the section "Plea to the Offense" the judgment is modified to state "Guilty."

Under the section "Attorney for Defendant" the judgment is modified to state "Theodore A. Beach."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 14th day of July, 2016.