AFFIRMED and Opinion Filed November 4, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01162-CR

STACY DAVIDSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-80297-2019

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Reichek
Opinion by Justice Whitehill

A jury found appellant guilty of continuous sexual abuse of a child and aggravated assault of a child. During the punishment phase, the State abandoned the aggravated assault charge and moved forward on the continuous sexual abuse of a child charge. The trial court assessed punishment at sixty years in prison.

In a single issue, appellant argues the trial court erred by admitting evidence concerning sexual activity between appellant and his wife and the presence of sexual lubricant in their home. Because (i) the testimony was relevant to corroborate the complainant's testimony and rebut a fabrication inference and (ii) the danger of

unfair prejudice did not substantially outweigh its probative value, appellant has not shown that the trial court abused its discretion in admitting this evidence. We thus affirm the trial court's judgment.

I. BACKGROUND

Appellant and AE's family were neighbors for many years. From the summer of 2014, when AE was five years old, and into 2015, appellant and his wife babysat AE and her brother on several occasions when AE's mother was out of town and her father worked an evening job. At the time, appellant worked from home while his wife worked outside the home.

AE's father testified he usually dropped the children off around 3:45-4 pm on Fridays and typically, only appellant was home.

AE testified that she didn't take naps at home, but appellant told her to take a nap on the couch whenever he babysat. AE's brother testified only AE was told to take a nap, and that he and appellant's child were told to play upstairs during AE's naptime. AE's mother said she told appellant that AE didn't need to have a nap.

During the times AE was told to take a nap, appellant would have her lay down on the couch, close the blinds, pull down her shorts, put up her knees, spread them apart and start touching or poking her on her private part with his finger. This happened at least three different times. When he touched her his hands "felt like something wet but not like if you squeeze—like, it felt like if you squeezed the finger, like water would come out of it." The prosecutor asked AE if it felt

completely wet or something different. AE testified it "Felt like something different." Appellant would wash his hands before his wife arrived at the house.

State's Exhibit 23, a picture of K-Y Jelly that AE testified was something she saw in appellant's house, was admitted into evidence without objection. AE wasn't sure what it was, but she saw it in appellant's house, specifically in the downstairs guest bathroom drawer or on the counter.

Appellant's ex-wife was asked about her sex life with Appellant. Appellant objected and the trial court excused the jury to hear the parties' arguments.

The arguments concerned evidence of sex toys, K-Y Jelly, and appellant's sex life with his ex-wife. Appellant objected under rule 404, 404(b), 403, and 402. The trial court sustained the objection to the sex toys but overruled appellant's objections to the K-Y Jelly and his sex life with his ex-wife. In so ruling, the trial judge said, "I think the K-Y Jelly is certainly relevant, as is the question of their sexual habits in terms of use of the K-Y Jelly and the frequency. I will certainly find that that is not outweighed by the prejudicial effect that it might have."

II. ANALYSIS

A. Was the complained-of evidence erroneously admitted?

No. Because the subject evidence was relevant to corroborate AE's testimony and rebut a fabrication inference and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting it.

B. Standard of Review and Applicable Law

We review the trial court's decision to admit or exclude evidence, as well as its decision as to whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard. *Gonzalez v. State,* 544 S.W.3d 363, 370 (Tex. Crim. App. 2018).

Under Rule 403, a trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403; *see Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009).

"Rule 403 favors admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002).

Evidence is unfairly prejudicial when it has an undue tendency to suggest an improper basis for reaching a decision. *Reese v. State*, 33 S.W.3d 238, 240 (Tex. Crim. App. 2000).

When conducting a Rule 403 analysis, the trial court must balance:

(i) the inherent probative force of the proffered item of evidence along with

(ii) the proponent's need for that evidence against

(iii) any tendency of the evidence to suggest [a] decision on an improper basis,

(iv) any tendency of the evidence to confuse or distract the jury from the main issues,

(v) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the evidence's probative force, and

(vi) the likelihood that presenting the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). These factors may well blend together in practice. *Id.*

Evidence is relevant if it has any tendency to make the existence of any consequential fact more or less probable than it would be without the evidence. *See* TEX. R. EVID. 401; *Mayes v. State*, 816 S.W.2d 79, 84 (Tex. Crim. App. 1991).

To be relevant, evidence must be both material—that is, it must be offered for a proposition that is of consequence to determining the case—and probative, such that it makes the fact's existence fact more or less probable than it would otherwise be without the evidence. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016).

That is, to be relevant proffered evidence must "have influence over a consequential fact." *Mayes*, 816 S.W.2d at 84. Relevant evidence need not, by itself, prove or disprove a particular fact as long as it provides at least a "small nudge" toward proving or disproving a material fact. *See Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004). In determining relevance, courts must examine the purpose for which particular evidence is being introduced. *Layton v. State*, 280

S.W.3d 235, 240 (Tex. Crim. App. 2009). "It is critical that there is a direct or logical connection between the actual evidence and the proposition sought to be proved." *Id*.

C. The *Gigliobianco* Factors Applied

After the trial court ruled that the evidence was admissible, appellant's ex-wife testified they had sex infrequently—only once or twice a year, and then only in the upstairs master bedroom. They used K-Y jelly when they had sex, and she found K-Y jelly in the master bedroom, downstairs guest bathroom, and under the couch where AE took her naps.

We note at the outset that the evidence is relevant. *See Brown v. State*, 381 S.W.3d 565, 578 (Tex. App.—Eastland 2012, no pet.) (evidence of lubricant relevant in child sex abuse case). And applying the *Gigliobianco* factors to this case, we conclude that appellant has not shown that the evidence's probative value was substantially outweighed the danger of unfair prejudice. *See Gigliobianco*, 210 S.W.3d at 641–42. In considering the evidence's inherent probative force, we consider how compellingly it tends to make a fact of consequence more or less probable. *See Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) ("probative value" refers to how strongly evidence makes existence of fact more or less probable).

Here, AE testified about the K-Y jelly without objection. The ex-wife's testimony provided context. That the lubricant was found in locations other than the

location where appellant and his ex-wife had sex, including under the couch where AE was assaulted, tends to make appellant's commission of the offense more probable. The infrequency of appellant's sexual relations with his wife also shows that the K-Y jelly downstairs was not for use with her.

AE testified that appellant's hands were wet when he assaulted her, she saw appellant go into a downstairs bathroom—the same one where she saw the K-Y jelly, and that she heard appellant wash his hands after assaulting her. This testimony shows that appellant used the lubricant to facilitate the offense.

Moreover, appellant's ex-wife's testimony was strongly probative because it corroborated AE's testimony and rebutted appellant's suggested inference of fabrication. For example, in appellant's opening statement, he told the jury:

> I don't have to prove that [AE] is a liar . . . I will say that she is wrong. I don't know why. But I don't have to prove that she is lying. I don't have to prove that she is mistaken. They have to prove that she is credible.

Appellant also said that AE's parents wanted him convicted and that the "story changed" after his ex-wife told a friend why she thought the charges were false. Furthermore, on cross-examination, appellant asked AE where the K-YJelly was in the downstairs bathroom and why she was looking in the drawers. Thus, from opening statements, appellant challenged AE's credibility and implied that her claims were fabricated.

In addition, appellant's opening statement and cross-examination of AE, together with the fact that there was no physical evidence establishing the assault

shows the State's need for the evidence was strong. Therefore, the first two *Gigliobianco* factors weigh heavily in favor of the evidence's admission. *See Gigliobianco*, 210 S.W.3d at 641–42.

As to the third factor, we are not persuaded that the evidence had the potential to cause unfair prejudice. Unfair prejudice may be created by the tendency to prove some adverse fact not properly at issue or to unfairly excite emotions against the defendant. *Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1991).

Appellant argues that the testimony tended to create sympathy for AE and that the jury would interpret the infrequency of sexual relations with his wife as an indication that he is a child molester. But appellant does not explain how his sexual relations with his ex-wife might engender sympathy for AE. Nor does he explain the supposed nexus between the frequency or infrequency of marital relations and child molestation. Indeed, the State never argued that there was such a relationship to the charged offense. This factor is neutral at best.

As to the fourth and fifth factors, we do not perceive how the evidence would confuse or distract the jury, and the evidence was not of a scientific or technical character such that it might have been given undue weight by an untrained jury. *See Gigliobianco* 210 S.W.3d at 641–42.

Finally, the testimony at issue comprised only five pages out of approximately 365 pages of testimony and was not repetitive. The State's questions to the ex-wife focused on who was using, or more specifically, not using, the K-Y jelly and its

specific placement in the downstairs bathroom and under the couch where AE was assaulted. Those were questions only the ex-wife could address. Thus, analysis of the sixth factor demonstrates that the evidence did not consume an inordinate amount of time. *See id.*

The evidence may have been prejudicial; that is the nature of evidence. Rule 403, however, contemplates excluding evidence only when there is a "clear disparity" between the offered evidence's prejudice and its probative value. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (quoting *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001)).

Considering the standard of review, the presumption favoring admissibility of relevant evidence, and the *Gigliobianco* factors, we cannot conclude that the trial court abused its discretion in overruling appellant's Rule 403 objection. *See Hammer*, 296 S.W.3d at 568 ("Because Rule 403 permits the exclusion of admittedly probative evidence, it is a remedy that should be used sparingly, especially in 'he said, she said' sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant."(footnote omitted)).

III. Conclusion

We resolve appellant's sole issue against him and affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STACY DAVIDSON, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-19-01162-CR V.	Trial Court Cause No. 380-80297-2019.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Whitehill. Justices Pedersen, III and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 4, 2020