

AFFIRMED and Opinion Filed October 29, 2021



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-00420-CR

**ISRAEL MANUEL RIOS, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1875738-V**

MEMORANDUM OPINION

Before Justices Osborne, Reichek, and Smith
Opinion by Justice Smith

A jury convicted appellant Israel Manuel Rios of continuous sexual assault of a child and sentenced him to twenty-five years' confinement. In two issues, he challenges the admission of extraneous offense testimony and the exclusion of testimony regarding complainant's credibility. We conclude the trial court did not abuse its discretion in admitting extraneous offense testimony and after reviewing the record, error, if any, in excluding credibility testimony was harmless. We affirm the trial court's judgment.

Background

This case involves the sexual abuse of two children, J.R. and complainant. J.R. was not the victim subject to the indictment in this appeal, but rather a victim of an extraneous offense that the State introduced into evidence at trial over appellant's objection. The State presented J.R.'s testimony first to explain the circumstances leading to complainant's outcry. We likewise present the following recitation of relevant facts as presented to the jury, first describing J.R.'s sexual abuse followed by complainant's sexual abuse.

In 2014, J.R. and her family moved in with Amanda Gomez (complainant's mother). At that time, J.R. was eleven years old. Thirteen to fourteen people, along with two dogs, then occupied the 1476 square foot, four-bedroom, two-bathroom home. Appellant, who was Gomez's cousin, was one of these individuals.

One night while several of the children watched movies, appellant asked J.R. to go with him to get snacks. They went to her older brother's room where he often kept snacks in his closet. J.R. went in first and appellant followed behind her. He pulled down her pants and underwear and put his penis inside her buttocks. J.R. testified that thirteen or fourteen people were in the house when it happened, but no one heard, and she did not tell anyone.

Several years later, J.R. told the middle school secretary about the abuse because she worried appellant was going to move into their home and abuse her younger sister.

After J.R.'s outcry, Gomez asked complainant if appellant abused her. She said yes. She said "bad stuff" happened when she was eight or nine years old until she was eleven, which coincided with the time appellant moved out. She also confided in her younger brother, but not until after appellant moved out.

Complainant participated in a forensic interview at the Dallas Children's Advocacy Center. At that time she was twelve years old, and the interview lasted about an hour. The interviewer testified complainant used age-appropriate language, provided sensory details, and the interviewer did not see any red flags that complainant was lying or coached.

Complainant testified she could not remember the first time appellant assaulted her because it all ran together. She thought it happened over fifteen times. She said appellant touched her vagina with his hand many times, and she also performed oral sex at his request. One time, she performed oral sex in a small laundry room. She also testified that he rubbed his penis against her buttocks, and she woke up one night with her pants pulled down and him taking pictures of her buttocks. She explained most of the incidents occurred at night when everyone was home, but no one ever woke up because neither she nor appellant made noise.

The jury found appellant guilty of continuous sexual assault of a child and sentenced him to twenty-five years' confinement. This appeal followed.

Exclusion of Credibility Evidence

In his first issue, appellant argues the trial court abused its discretion by ruling that the entire forensic interview would be admissible if he asked Gomez her opinion regarding complainant's credibility. Appellant has not briefed how the alleged ruling harmed him. The State fails to address whether the ruling was error, but instead argues, "assuming error—without conceding" the trial court erred, any alleged error was harmless.

During the defense case-in-chief, counsel called Gomez as a witness. During her direct examination, counsel asked how many times CPS investigated her home, and she said twice. The State asked to approach the bench, a short bench conference ensued, and then the trial court excused the jury.

Defense counsel argued a CPS report from 2012 indicated that Gomez reported some "behavioral concerns, excessive talking, talking back, getting up without permission" and that "[complainant] fibs a lot." Complainant was seven years old at that time. The trial court acknowledged that defense counsel was seeking to examine Gomez about whether she had an opinion about the truthfulness of the child, and "That's what I'm going to allow you to do." The trial court suggested counsel discuss such testimony with Gomez before putting her back on the stand in front of the jury, which counsel thought was "a wonderful idea."

The court cautioned counsel that if he attacked complainant's credibility then the forensic interview would likely become admissible to rebut the attack of her

credibility despite the “great lengths” taken “to make sure that that’s not played.” The State acknowledged it would “immediately ask that be admitted.”

The court briefly recessed so defense counsel could consult with Gomez. Counsel ultimately abandoned questioning Gomez about complainant’s truthfulness because if the Court was going to allow the video to come in in response, “it would be highly prejudicial to the defendant.” Counsel then continued examining Gomez and subsequently rested his case.

Appellant argues the trial court’s ruling was error because the forensic interview video was not proper rebuttal evidence to Gomez’s proposed testimony regarding complainant’s truthfulness. However, the videotape was never admitted at trial and is therefore not part of the record before us. A court of appeals cannot determine whether a trial court’s ruling was erroneous if it is unable to review the entire relevant record. *Miles v. State*, No. 01-04-00599-CV, 2005 WL 856960, at *4 (Tex. App.—Houston [1st Dist.] Apr. 14, 2005, no pet.) (mem. op., not designated for publication). We must presume the omitted evidence supports the trial court’s ruling and defer to the trial court’s holding that the videotape could properly be admitted. *Id.* (concluding trial court properly ruled an entire forensic interview would be admitted if defendant introduced specific segments to impeach complainant’s testimony when the record did not include a copy of videotaped interview).

Even if the trial court abused its discretion by prematurely ruling the entire forensic interview was admissible as rebuttal evidence and setting aside the fact that the record does not contain the very evidence appellant claims led to his decision to limit Gomez's testimony, a review of the record does not establish harm.

The Court of Criminal Appeals has determined the exclusion of a defendant's evidence will constitute constitutional error only if the evidence forms such a vital portion of the case that its exclusion effectively precludes a defendant from presenting a defense. *See Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002) (en banc); *see also Moses v. State*, No. 05-16-01391-CR, 2018 WL 4042359, at *10 (Tex. App.—Dallas Aug. 23, 2018, pet. ref'd) (mem. op., not designated for publication). The fact that a defendant may not get to present his case to the extent or in the form he desired is not prejudicial when he was not prevented from presenting the substance of his defense to the jury. *Potier*, 68 S.W.3d at 666.

Appellant has not asserted that the trial court's alleged error prevented him from presenting a defense, and our review of the record finds no such support. As such, we apply the standard for non-constitutional error. *See Ray v. State*, 178 S.W.3d 833, 836 (Tex. 2005); *see also* TEX. R. APP. P. 44.2(b).

We disregard non-constitutional error unless it affected the substantial rights of the accused. *See Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). Under the rule, an appellate court may not reverse for non-constitutional error if the court, after examining the record as a whole, has fair assurance that the error did not

have a substantial and injurious effect or influence in determining the jury's verdict. *Id.* We consider all the evidence admitted at trial, the nature of the evidence supporting the verdict, the character of the alleged error, and how the evidence might be considered in connection with other evidence in the case. *Barshaw v. State*, 342 S.W.3d 91, 94 (Tex. Crim. App. 2011). We may also consider the jury instructions, the parties' theories of the case, closing arguments, voir dire, and whether the State emphasized the error. *Id.* The weight of the evidence of the defendant's guilt is also relevant in conducting the harm analysis under rule 44.2(b). *Neal v. State*, 256 S.W.3d 264, 285 (Tex. Crim. App. 2008).

After examining the record, we have fair assurance that error, if any, did not have a substantial and injurious effect or influence in determining the jury's verdict.

During voir dire, defense counsel emphasized that part of his job was to "test the credibility of witnesses" and cross-examine witnesses, including a child, which was "not pleasant, but it's something that has to be done." He told the jury credibility was for the jury to decide, but it was his job to test the credibility of witnesses by asking questions.

Appellant challenged complainant's accusations by eliciting testimony throughout the trial from various witnesses regarding the number of people in the home and the reasonableness of the abuse occurring in such a small home with so many people (and dogs) present. He presented testimony casting doubt on whether appellant lived in the home during certain times when the abuse occurred. Further,

Gomez testified that complainant suffered emotional problems and had been self-harming since fifth grade. Complainant testified she had seen a counselor for depression but admitted she never mentioned the sexual abuse. Thus, the jury heard attacks on complainant's credibility; however, the jury made credibility determinations in favor of the State. Moreover, A child victim's testimony alone is sufficient to support a conviction for continuous sexual abuse of a child or aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC ANN. art. 38.07(a); *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.—Dallas 2017, no pet.). Thus, evidence of appellant's guilt was strong. *See Motilla v. State*, 78 S.W.3 352, 357 (Tex. Crim. App. 2002) (overwhelming evidence of guilt is one factor considered in assessing harm from non-constitutional error).

In addition to complainant's testimony, the jury heard evidence from another victim whom appellant abused in the home during the same time frame, in a small area of the home, and in a similar fashion.¹

During closing argument, defense counsel emphasized the discrepancies between complainant's testimony and the forensic interviewer's testimony regarding the number of times appellant sexually assaulted her. He insinuated that both girls

¹ While complainant did not testify that appellant inserted his penis into her buttocks, she described how he pulled down her pants and rubbed his penis against his buttocks. She also described performing oral sex in a small laundry room, similar to J.R.'s testimony that appellant abused her in a small closet.

had been groomed to fabricate their stories. Again, the jury considered the conflicting evidence but found in favor of the State.

Given the evidence in the record as a whole, there is “fair assurance” that the exclusion of Gomez’s testimony regarding a statement she made several years earlier in an unrelated CPS investigation about complainant’s truthfulness would not have influenced the jury’s verdict or had but a slight effect. *Garcia*, 126 S.W.3d at 927. Accordingly, appellant was not harmed by the trial court’s ruling, and we overrule his first issue.

Admission of Extraneous Offense Evidence

In his second issue, appellant argues the trial court erred by admitting evidence of the extraneous offense sexual assault against J.R. because it was more prejudicial than probative. He alleges the potential for J.R.’s testimony to confuse the jury, which the State presented first, was high and created a substantial risk of a verdict based on the “inherently inflammatory and prejudicial nature of crimes of a sexual nature committed against children.” The State responds that the trial court acted within its discretion by admitting the evidence after conducting a rule 403 balancing test.

Generally, the State cannot provide evidence of prior crimes, wrongs, or other acts to show that a defendant acted in accordance with that character or had a propensity to commit the crime. TEX. R. EVID. 404(b). However, in the context of sexual assault of a child, a different rule applies to recognize that “[t]he special

circumstances surrounding the sexual assault of a child victim outweigh normal concerns associated with evidence of extraneous acts.” *Hill v. State*, No. 05-15-00989-CR, 2017 WL 343593, at *4–5 (Tex. App.—Dallas Jan. 18, 2017, pet. ref’d) (mem. op., not designated for publication). Under article 38.37, the State is allowed to provide evidence of other children the defendant sexually assaulted “for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.” TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b); see *Alvarez v. State*, 491 S.W.3d 362, 367 (Tex. App.—Houston [1st Dist.] 2016, pet. ref’d).

We review a trial court’s decision to admit evidence of extraneous offenses under an abuse-of-discretion standard. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). The trial court does not abuse its discretion unless its decision to admit evidence lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). We uphold the trial court’s evidentiary ruling if it was correct under any theory of law applicable to the case. See *De La Paz*, 279 S.W.3d at 344.

Texas Rule of Evidence 403 provides that a trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confuses the issues, misleads the jury, causes undue delay, or needlessly presents cumulative evidence. TEX. R EVID. 403. Courts have concluded that when

evidence of a defendant's extraneous acts is relevant under article 38.37, the trial court is required, on proper objection or request, to conduct a rule 403 balancing test. *Hinds v. State*, 970 S.W.2d 33, 35 (Tex. App.—Dallas 1998, no pet.); *see also Alvarez*, 491 S.W.3d at 370.

When undertaking a rule 403 analysis, a trial court must balance (1) the inherent probative force of the evidence along with (2) the proponent's need for that evidence against any tendency of the evidence (3) to suggest a decision on an improper basis, (4) to confuse or distract the jury from the main issues, (5) to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of 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). We should reverse the trial court's balancing determination "rarely and only after a clear abuse of discretion." *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex. Crim. App. 1990). In addition, 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." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

Here, the record indicates the trial court conducted an article 38.37 hearing, conducted a rule 403 balancing test, and ruled that a jury could find the extraneous

offense occurred beyond a reasonable doubt and was relevant under rule 403. Appellant does not challenge the admissibility of the extraneous evidence under article 38.37, but instead argues the inadmissibility of the evidence under rule 403.

We first consider the inherent probative force of the extraneous evidence along with the State's need for the evidence. Appellant argues the State did not have a particular need for the evidence because he did not suggest complainant was lying or that she fabricated the allegations. Thus, appellant asserts J.R.'s testimony was unnecessary because complainant's testimony alone satisfied the elements of the offense. We disagree.

Appellant's defense was in fact that the allegations were untrue. He presented evidence suggesting the assaults could not have occurred in a small home with so many people and dogs present. Further, the assaults of J.R. and complainant occurred during the same period of time in the same residence, but appellant presented evidence indicating he did not live in the home during the relevant timeframe. Without DNA or medical evidence supporting complainant's accusations, the case became a "he said she said case." In these situations, courts routinely conclude this factor weighs in favor of the State. *See, e.g., Hammer*, 296 S.W.3d at 561–62 (noting "[s]exual assault cases are frequently 'he said, she said' trials in which the jury must reach a unanimous verdict based solely upon two diametrically different versions of an event, unaided by any physical, scientific, or other corroborative evidence"); *Hill*, 2017 WL 343593, at *5; *Robisheaux v. State*,

483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet. ref'd). Thus, the trial court could have reasonably concluded the inherent probative force of the extraneous evidence, coupled with the State's need for the evidence, was considerable.

There is nothing in the record indicating that admitting the evidence was so inherently inflammatory that it elicited an emotional response or a decision on an improper basis. J.R.'s allegations against appellant, while not the same, were no more serious than those complainant alleged against him. *See Robisheaux*, 482 S.W.3d at 220 (concluding that although testimony might have tendency to suggest decision on improper basis, such potential was ameliorated because sexual misconduct discussed was no more serious than allegations forming basis of indictment). Sexually related bad acts and misconduct involving children are inherently inflammatory; however, the plain language of rule 403 does not allow such exclusion of otherwise relevant evidence when the evidence is "merely prejudicial." *See Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013). Indeed, all evidence against a defendant is, by its very nature, prejudicial. *Id.*

While we agree the development of the extraneous offense evidence took some time and more than one witness, it was not so overwhelming as to distract the jury from the charged conduct. *See Hill*, 2017 WL 343593, at *5. To the extent appellant argues the extraneous offense potentially confused the jury because the State began its case-in-chief by presenting such evidence, appellant has not cited to any authority supporting its claim that presenting a case in chronological order,

which the State did here to explain the events leading to complainant’s outcry, results in jury confusion. Further, the jury charge included an instruction regarding extraneous offense testimony, which we presume the jury followed, further mitigating the potential for any juror confusion or improper use of the evidence. *See Hurst v. State*, No. 05-19-00747-CR, 2021 3233868, *7 (Tex. App.—Dallas July 29, 2021, no pet.) (mem. op., not designated for publication).

Finally, nothing in the record indicates the jury might have given undue weight to the evidence without being equipped to evaluate the probative force of the evidence, such as in the case of scientific evidence, that might mislead a jury. *See Gigliobianco*, 210 S.W.3d at 641. Rather, J.R.’s testimony concerned matters easily comprehensible by laypeople, and appellant has not cited evidence to the contrary.

After considering the record, deferring to the standard of review that favors admissibility of such evidence, and the factors discussed above, we conclude the trial court did not abuse its discretion by admitting the extraneous sexual assault against J.R. We overrule appellant’s second issue.

Conclusion

We affirm the trial court’s judgment.

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TEX. R. APP. P. 47.2(b)
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/Craig Smith/

CRAIG SMITH
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ISRAEL MANUEL RIOS, Appellant

No. 05-20-00420-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F-1875738-V.
Opinion delivered by Justice Smith.
Justices Osborne and Reichek
participating.

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

Judgment entered October 29, 2021