

Opinion issued November 10, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00939-CR

NO. 01-09-00940-CR

ROGELIO GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1175222, 1175223**

MEMORANDUM OPINION

A jury convicted Rogelio Gutierrez of sexual assault of a child and aggravated sexual assault of a child, and the trial court assessed his punishment at fifty years' confinement. *See* TEX. PENAL CODE ANN. § 22.011 & 22.021 (Vernon

Supp. 2010). On appeal, Gutierrez contends that the trial court erred by admitting testimony about a privileged communication between a priest and himself and unduly prejudicial testimony from a forensic examiner who interviewed the complainant. We hold that the trial court did not err because the communication between Gutierrez and the priest was not privileged, and the complained-of testimony was not unduly prejudicial. We therefore affirm.

Background

In June 2007, the complainant, R.G., Gutierrez's daughter, alleged that her father had sexually assaulted her on numerous occasions beginning when she was eleven years old. R.G. testified that, when she was a child, Gutierrez showed her how to play poker. If he won the game, Gutierrez spanked her. Over time, Gutierrez started to rub R.G.'s naked bottom with his hands. When she was around eleven years old, he engaged in anal intercourse with her. He forced her to have anal intercourse with him on many occasions while her mother worked at night. By the time R.G. was thirteen years old, Gutierrez forced her to engage in vaginal intercourse with him. Additionally, he put his mouth on her breasts, bottom, and vagina and forced her to put her hand on his penis.

Certain nights, she persuaded him not to have sex with her. On those nights he would punch or spank her while he masturbated. During this abuse, he tied her hands with pantyhose to a ceiling fan. Around the age of eighteen, R.G. convinced

him to stop forcing her to have vaginal intercourse with him. He continued, however, until she was twenty-three years old, to punch her while he masturbated.

One evening, R.G. reported the sexual abuse to Father Michael Minifie, a Catholic priest at her parish. In response, Father Minifie told R.G. that he had a duty to contact the police. He drove R.G. to a Houston Police Department station, where Officer Flucas interviewed her about the abuse. The following day, R.G. told Gutierrez that she had revealed the abuse to Father Minifie. Two days after her outcry to the priest, R.G. also told her mother about the abuse. That day, Gutierrez asked R.G. for forgiveness, claiming he was a changed man and he was good with god. Similarly, when R.G.'s mother confronted Gutierrez, he simply asked her for forgiveness.

In the next days following R.G.'s outcry, Father Minifie became concerned because the police had not yet arrested Gutierrez, and he thought Gutierrez might come on church property, where children were present. As a result, he contacted the legal department of the Archdiocese of Galveston and Houston. Based on their advice, he called Gutierrez. His purpose was to put Gutierrez on notice that he, the parish and the archdiocese knew that someone had accused him of rape and sexual assault. Further, he testified that the purpose of the call was not to provide spiritual advice, and he was not calling in the capacity of a spiritual advisor. He did not mention R.G. by name and spoke of the allegations in only general terms.

In response, Gutierrez neither confirmed nor denied the allegations, but told Father Minifie that he was getting help and had gone to confession with another priest. He said he realized what he did, and he was trying to get his life back on track. He asked Father Minifie twice if he could meet with him, but Father Minifie declined because he said it would be a conflict of interest. Gutierrez responded that he understood why he could not meet with him. Further, he stated that he was reading the Bible and that we needed to reach down and let the Lord take care of this situation. He said, "It hurts, my daughter hurts." Lastly, he asked Father Minifie what was going to happen, and Father Minifie responded that he did not know. At trial, defense counsel objected to Father Minifie's testimony concerning his conversation with Gutierrez on the grounds that it was a confidential communication to a member of the clergy and that the probative value of the testimony was substantially outweighed by its prejudicial effect. The trial court overruled these objections.

Sometime after her outcry to Father Minifie, R.G. visited the Children's Assessment Center, where Aimee McAndrew interviewed her about the sexual assault allegations. At trial, McAndrew testified that R.G. understood the difference between a truth and a lie. She said R.G. gave detailed responses to her questions, and her responses were consistent. R.G.'s demeanor during the interview was very serious, reserved and tearful. Defense counsel objected to

McAndrew's testimony on the ground that the probative value of the testimony about her interview with R.G. was substantially outweighed by its prejudicial effect. The trial court overruled this objection.

Discussion

Clergy Communication Privilege

In his first issue on appeal, Gutierrez contends that the trial court erred in denying his motion to exclude a privileged communication. Specifically, he contends that admitting Father Minifie's testimony about his phone conversation with Gutierrez after R.G.'s outcry was improper because Gutierrez's statements to Father Minifie were privileged under Texas Rule of Evidence 505.

Preliminary questions of admissibility, including questions concerning the existence of a privilege, are for the trial court. *See* TEX R. EVID. 104(a); *see also* *McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993), *overruled on other grounds by* *Granados v. State*, 85 S.W.3d 217 (Tex. Crim. App. 2002). When making a privilege determination, the trial court is afforded broad discretion. *See Welch v. State*, 908 S.W.2d 258, 264 (Tex. App.—El Paso 1995, no pet.). We review the trial court's decision under an abuse of discretion standard, and will reverse a trial court's determination only when “the trial court applied an erroneous legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most

favorable to its legal conclusion .” *Carmona v. State*, 947 S.W.2d 661, 664 (Tex. App.—Austin 1997, no pet.) (quoting *DuBose v. State*, 915 S.W.2d 493, 498 (Tex. Crim. App. 1996)). Should we determine that the trial court abused its discretion in admitting such testimony, we conduct a harm analysis under Rule 44.2(b). TEX. R. APP. P. 44.2(b); *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001) (erroneous admission or exclusion of evidence is not reversible error unless it affects substantial right of defendant; substantial right is affected when error has substantial and injurious effect or influence in determining the jury's verdict).

Texas Rule of Evidence 505 provides that “[a] person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member’s professional character as a spiritual advisor.” TEX. R. EVID. 505(b). “A ‘member of the clergy’ is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.” TEX. R. EVID. 505(a)(1). Under the express language of the rule, the privilege extends only to communications addressed to a clergyman in his professional capacity as a spiritual advisor, not to every private communication made to a clergy member. *Nicholson v. Wittig*, 832 S.W.2d 681, 687 (Tex. App.—Houston [1st Dist.] 1992, no writ). For example, statements made during a disciplinary/administrative

meeting are not communications made for the purpose of obtaining spiritual guidance or consolation and do not fall within the scope of the privilege. *Kos v. State*, 15 S.W.3d 633, 639–40 (Tex. App.—Dallas 2000, pet. ref'd); *Maldonado v. State*, 59 S.W.3d 251, 253 (Tex. App.—Corpus Christi 2001, pet. ref'd).

In *Kos*, the Dallas Court of Appeals said that communications between a clergy member and the defendant were not privileged because the meeting was held for the specific purpose of obtaining information about sexual abuse allegations. 15 S.W.3d at 639–40. The court reasoned that the clergy member wanted to confront the defendant about the charges, the clergy member initiated the meeting, and the defendant did not seek any advice at that time on how he could reconcile himself with the church. *Id.* In *Maldonado*, the Corpus Christi Court of Appeals similarly held that communications during a meeting initiated by a bishop to confront a subordinate about allegations of his inappropriate behavior were not privileged because the meeting was administrative in nature. 59 S.W.3d at 253.

As happened in *Kos* and *Maldonado*, Father Minifie initiated the phone conversation with Gutierrez to put him on notice that he, the parish, and the archdiocese were aware of the sexual assault allegations against him. Father Minifie's motive was concern for the children at his church because the police at that time had not yet arrested Gutierrez. We hold that the trial court reasonably

could have concluded that the phone conversation was not made to Father Minifie in his professional character as a spiritual advisor, and was thus not privileged.

In response, Gutierrez argues that although Father Minifie initiated the conversation for an administrative purpose, the communication is nonetheless privileged because Gutierrez sought spiritual guidance during the phone call. But the trial court reasonably could have concluded that Gutierrez did not expect that his communications would be confidential because Father Minifie had made it clear that he was not communicating with him in his professional character as spiritual advisor. *Cf. Wittig*, 832 S.W.2d at 687 (finding that woman was entitled to expect her communications to clergy person would be confidential, based on his representations about his status as chaplain and his availability to serve her in his spiritual capacity). At the beginning of the call, Father Minifie notified Gutierrez of his administrative purpose for the conversation. Also, when Gutierrez asked to see him, Father Minifie twice refused, stating that it would be a conflict of interest. Finally, although Gutierrez made comments of a religious nature, Father Minifie did not solicit these comments and did not respond to them.

Further, Gutierrez appeared to understand that Father Minifie would not communicate with him in his professional character as spiritual advisor. When Father Minifie refused to meet with him, Gutierrez responded that he understood why he could not. Also, Gutierrez notified him that he had already sought spiritual

advice from another priest, who had heard his confession. We hold that the trial court did not abuse its discretion in overruling Gutierrez's privilege objection.

Rule 403 Objections

In his second and third issues on appeal, Gutierrez contends that the trial court erred in overruling his objections to parts of Father Minifie's and Aimee McAndrew's testimony. He maintains that the complained-of testimony violated Texas Rule of Evidence 403 because it was unduly prejudicial.

Standard of Review

When the trial court rules on a rule 403 objection, we review the court's ruling under an abuse of discretion standard. *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). The test for whether the trial court abused its discretion is whether the action was arbitrary or unreasonable. *Id.* We will not reverse a trial court's ruling that is within the zone of reasonable disagreement. *Id.* at 440. Under Texas Rule of Evidence 401, evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. EVID. 401. There is a presumption of admissibility of relevant evidence. *See* TEX. R. EVID. 402; *Erazo v. State*, 144 S.W.3d 487, 499 (Tex. Crim. App. 2004). The trial court still may exclude relevant evidence under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” TEX. R. EVID. 403. When a trial court balances the probative value of the evidence against the danger of unfair prejudice, a presumption exists that favors the evidence’s probative value. *Feldman v. State*, 71 S.W.3d 738, 754–55 (Tex. Crim. App. 2002).

The relevant criteria for determining whether the prejudice of admitting the evidence substantially outweighs its probative value include the following: (1) the probative value of the evidence; (2) the potential the evidence has to impress the jury in an irrational but nevertheless indelible way; (3) the time needed to develop the evidence; and (4) the proponent’s need for the evidence to prove a fact of consequence. *Mechler*, 153 S.W.3d at 440. If the record reveals one or more of these considerations led to a risk that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, then an appellate court should conclude the trial court abused its discretion in admitting the evidence. *Reese v. State*, 33 S.W.3d 238, 241 (Tex. Crim. App. 2000).

Father Minifie’s Testimony

After the trial court overruled Gutierrez’s clergy privilege objection, Gutierrez objected that Father Minifie’s testimony about his phone conversation with him violated Texas Rule of Evidence 403. The trial court overruled this objection.

We first examine the probative value of this evidence. The testimony about the phone conversation is relevant as to whether Gutierrez committed the offense. According to the testimony, Gutierrez made a number of statements after Father Minifie informed him of the sexual assault accusations. He stated that he was getting help and that he had come to understand what he did. Further, he said he went to confession and talked with another priest. He also mentioned that he was trying to get his life back on track and wanted to get right with the Lord. Finally, he stated, “It hurts, my daughter hurts.” These statements indicate that Gutierrez was repentant, and a jury could conclude that they show consciousness of guilt.

Next, the testimony likely did not impress the jury in an irrational way. Rule 403 focuses only on the danger of unfair prejudice and the tendency to tempt the jury into finding guilt on grounds apart from proof of the offense charged. *Mechler*, 153 S.W.3d at 440. While the testimony was prejudicial to Gutierrez, it did not tempt the jury to find him guilty on improper grounds. Additionally, the testimony was brief. The record of the trial proceedings was in about three volumes, and the disputed testimony took up about four pages of those volumes. Finally, the State’s need for the testimony was significant because it served to refute Gutierrez’s claim that R.G. fabricated her sexual assault allegations against her father. *See Flannery v. State*, 676 S.W.2d 369, 370 (Tex. Crim. App. 1984) (holding that State is entitled to present evidence for rebuttal purposes that tends to

refute defensive theory of accused). On applying the factors to this case, we find that the trial court did not abuse its discretion by ruling that Father Minifie's testimony about his conversation with Gutierrez did not violate rule 403.

Aimee McAndrew's Testimony

Gutierrez also contends that the trial court erred in overruling his rule 403 objection to the testimony of Aimee McAndrew, who interviewed R.G. at the Children's Assessment Center about her sexual assault accusations. Specifically, Gutierrez argues that the testimony was irrelevant except to introduce inadmissible "backdoor" hearsay, which the State relied on in its closing argument.¹ Because he neither objected to McAndrew's testimony on hearsay grounds nor made any objection to complained-of statements made by the State during its closing argument, Gutierrez did not preserve error on these issues. *See* TEX. R. APP. P. 33.1(a); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (holding that objection stating one legal theory may not be used to support different legal theory on appeal). We, therefore, review his 403 objection to McAndrew's

¹ Gutierrez cites two statements made by the State during closing arguments. First, the State said, "Two things sometimes I forget to say in closing argument and things that juries always ask for in these cases, the police report and the Children's Assessment Center video are hearsay. So they are not admissible in a Court of law. So I don't want you going back there wondering well, we'd like to see a video. It's just not admissible in a Court of law. So we can't give it to y'all." Later, the State said, "And you heard that [R.G.] gave Officer Flucas details, and she wrote it in her report. Don't you know, ladies and gentlemen, if those details were anything but consistent that you would have heard about that from defense attorney?"

testimony without regard to his arguments about inadmissible hearsay and statements made by the State during its closing argument.

McAndrew's testimony was probative as it served to rebut Gutierrez's claim that R.G. fabricated her allegations and, thus, that she was not credible. First, the testimony described R.G.'s demeanor when she reported the sexual assault allegations to the authorities. McAndrew testified R.G. was very serious, reserved and tearful during the interview. Additionally, she said that R.G. gave detailed responses to her questions, and her responses were consistent throughout the interview. Next, the testimony likely did not impress the jury in an irrational way. In her testimony, McAndrew discussed only how she generally conducts her interviews for the Children's Assessment Center, and how R.G. behaved during the interview. The testimony did not tempt the jury to find Gutierrez guilty on improper grounds. *See Mechler*, 153 S.W.3d at 440. Additionally, the testimony was brief. Following defense counsel's rule 403 objection, McAndrew's testimony took up about eleven pages of the trial transcript. Finally, the State's need for the testimony was not great because Officer Flucas later testified at trial to R.G.'s demeanor in reporting the offense to the authorities. Although the need for the evidence was not great, we find on applying the 403 factors to this case that the trial court did not abuse its discretion by ruling that McAndrew's testimony did not violate rule 403.

Conclusion

We hold that the trial court did not err in admitting the complained-of evidence because the communication between Gutierrez and Father Minifie was not privileged, and the testimony of Father Minifie and McAndrew was not unduly prejudicial. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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