

Opinion issued February 22, 2018



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00634-CR

RANDY ERNEST HUDSON, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 155th District Court
Austin County, Texas
Trial Court Case No. 2016R-0007**

MEMORANDUM OPINION

A jury convicted appellant, Randy Ernest Hudson, of continuous sexual abuse of a child and assessed punishment at confinement for life. In his sole issue on

appeal, appellant contends the trial court erred by refusing to admit photographs that appellant's expert wished to use for demonstrative purposes. We affirm.

BACKGROUND

During trial, Veronica Sjolander, a nurse, testified that the complainant, K.J., had no injuries when she underwent a physical examination. She further testified that, in many cases, a child who has been sexually abused has no physical signs, stating, "It's rated at about 90 percent of known cases that there is no physical findings, per se, of trauma and no scarring."

When appellant's expert, Dr. Michael Heard testified, he stated that based on the history given by K.J. in this case, he would expect to see some type of physical evidence of sexual abuse. Defense counsel then attempted to ask Dr. Heard whether there was an obvious distinction between a normal physical exam and an abnormal physical exam. At this point, the following exchange took place at the bench:

[Defense Counsel]: I don't want to make a big stink here and then have the Court tell me that I can't get into these, but I would like to present a couple of photographs for the jury so that they understand what the difference could be between a normal exam and an abnormal exam, for demonstrative purposes only.

[Prosecutor]: I think just from my brief glimpse of the photographs, it appears that they may be—especially because they are not specific to this case, they may be unfairly prejudicial in light of their limited probative evidence. So, we would object.

[Trial Court]: Let me see the abnormal one. That's not in this case. I mean—

[Defense Counsel]: But it would be an example of what it would—physical evidence would look like if it were—

[Prosecutor]: I'm talking about they are showing a worst-case scenario.

Trial Court: I'm not going to allow it. I think it is too prejudicial and serves really no purpose.

[Defense Counsel]: Okay. I think have made the—presentation. And I didn't want to do it in from of the jury, just move to introduce the pictures without having a conference with the court first. So, you ruling is these are not admissible.

[Trial Court]: Right.

REFUSAL TO ADMIT PHOTOGRAPHS

In his sole issue on appeal, appellant contends that “the [trial] court erred in sustaining the State’s Rule 403 objection and denying the admission of photographs that Defendant’s expert wished to use as demonstrative aids.” Specifically, appellant contends that his expert should have been permitted to show the jury photographs of unidentified children who had suffered physical injuries as a result of sexual abuse to support his conclusion that the complainant in this case had not suffered such abuse.

Standard of Review and Applicable Law

We review a trial court’s decision to admit or exclude evidence under an abuse of discretion standard. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). We will not reverse a trial court’s ruling unless that ruling falls outside

the zone of reasonable disagreement. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002).

Demonstrative evidence has been described as follows:

Demonstrative or illustrative evidence is an object which replicates or is similar to the real thing but which is admittedly not the very thing itself. *See Herasimchuk, Texas Rules of Evidence Handbook*, Rules 401–403 at 239 (4th ed. 2001). Such evidence has no independent relevance to the case but it is offered to help explain or summarize the witness’s testimony or to put events and conditions into a better perspective. *Id.* at 239. To establish the relevancy of demonstrative evidence, the proponent must first authenticate it. *Id.* at 241. The proponent is then required to establish that the evidence is fair and accurate and that it helps the witness to demonstrate or illustrate his testimony. *Id.* at 241; *see also Simmons v. State*, 622 S.W.2d 111, 113 (Tex. Crim. App. 1981) (demonstrative evidence is admissible if it tends to solve some issue in the case and is relevant, that is, if it sheds light on the subject at hand). An item of demonstrative evidence must be properly identified by showing that the item in question is what its proponent claims as opposed to any idea of speculation, conjecture, or presumption of what the exhibit represents. *Vollbaum v. State*, 833 S.W.2d 652, 657 (Tex. App.—Waco 1992, pet. ref’d). Demonstrative evidence has no probative force beyond that which is lent to it by the credibility of the witness whose testimony it is used to explain. *Herasimchuk*, at 241. The trial court may exclude demonstrative evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See TEX. R. EVID.* 403.

Torres v. State, 116 S.W.3d 208, 213 (Tex. App.—El Paso 2003, no pet.).

Demonstrative evidence is evidence admitted to serve as a visual aid or illustration that meets the tests of relevancy and materiality, as well as the limitations imposed by Texas Rule of Evidence 403. *Baker v. State*, 177 S.W.3d 113, 123 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Analysis

Appellant contends the trial court erred by refusing to admit his expert's demonstrative evidence—photographs of children not involved in this case—to illustrate the difference between a normal physical exam and an abnormal physical exam showing trauma caused by sexual abuse. We disagree.

The trial court's exclusion of the photographs was not an abuse of discretion. Demonstrative evidence is admissible if it "tends to solve some issue in the case" and "sheds light on the subject at hand." *Simmons v. State*, 622 S.W.2d 111, 113 (Tex. Crim. App. 1981). Appellant argued that the photographs were relevant "to help the jury understand what the difference could be between a normal exam and an abnormal exam, and for demonstrative purposes only." However, both appellant's expert and the State's expert agreed that the complainant had a normal physical exam. There was no need for appellant to show the difference between a normal exam and an abnormal exam with photographs of children unrelated to the present case. Thus, the trial court's decision to exclude the demonstrative evidence was not an abuse of discretion.

CONCLUSION

We overrule appellant's sole issue on appeal and affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.

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