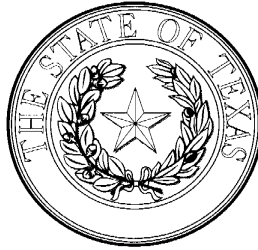


Opinion issued December 20, 2018



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-17-00377-CR

**FIDEL MORALES, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1440354**

MEMORANDUM OPINION

Following his jury trial and conviction for the continuous sexual abuse of his stepdaughter, appellant Fidel Morales challenges the sufficiency of the evidence to support his conviction. He also argues that the trial court abused its discretion by admitting an outcry statement, admitting extraneous evidence regarding his alleged sexual abuse of another child, and denying his motion for a mistrial based on

improper jury argument. Because we conclude that the evidence was legally sufficient and that the trial court did not abuse its discretion in its trial rulings, we affirm.

Background

Appellant Fidel Morales left a number of vulgar and threatening voicemails on his ex-wife's phone, in which he claimed to have sexually abused her twelve-year-old daughter, A.M. The mother asked A.M. about the abuse, but she did not answer. Instead she put her head down and cried. Later, the mother played one of the recorded voicemails for A.M. After hearing the voicemail, she acknowledged that Morales abused her at night but did not elaborate further. The mother immediately contacted police. A.M. was forensically interviewed at the Children's Assessment Center. Morales was charged with continuous sexual abuse of a child.

At trial, the State introduced the testimony of A.M., her mother, the forensic interviewer, and a number of other witnesses. A.M. testified about two specific instances of sexual abuse. She described the first incident as occurring when she was around ten years old. A.M. stated that she was sleeping in a shared room with her brother when Morales walked into the bedroom. She described him sitting on the floor next to her bed, putting his hand under her pants, and touching her inside her "front part." A.M. then described the second incident as occurring when she

was around seven years old. She was watching television in the living room with Morales and her mother. She explained that after her mother fell asleep, Morales started touching her “front part” under her clothing with his hand.

The forensic interviewer testified that A.M. acknowledged the difference between the truth and a lie. A.M. told the interviewer that the abuse continued repeatedly between the second and fourth grade. A.M. described to the interviewer Morales touching “her middle part under her clothing” while everyone else was sleeping.

The State also introduced extraneous evidence that Morales committed a separate sexual offense against J.M., his ten-year-old daughter. J.M.’s mother, who is Morales’s other ex-wife, testified. She stated that after she split up with Morales, J.M. disclosed to her that Morales would lower her underwear, lift up her leg, and touch her from behind with “his part.” J.M. demonstrated a front-to-back motion when describing Morales’s actions.

During the State’s closing argument, the prosecutor argued that the facts of the case did not warrant a conviction for the lesser-included offense of indecency with a child, “which is 2 to 20 years.” Morales promptly objected to the prosecutor’s reference to the punishment range. The trial court sustained the objection and instructed the jury to disregard the statement. Morales moved for a

mistrial, but the trial court denied the motion. The jury retired for deliberation and later returned a guilty verdict.

Morales appeals.

Analysis

Morales raises four issues. He maintains that the evidence is legally insufficient to support the jury's verdict. He also argues that A.M.'s statements to the forensic interviewer were unreliable and inadmissible, and that evidence of his alleged sexual assault of J.M. should not have been admitted. Finally, he argues that the trial court improperly denied his motion for a mistrial because the prosecutor's improper jury argument that referenced the punishment applicable to a lesser-included offense was highly prejudicial and incurable.

I. Sufficiency of the evidence

Morales argues that the evidence presented at trial was legally insufficient to support his conviction for continuous sexual abuse of a child. A person commits the offense of continuous sexual abuse of a young child if, during a period of thirty or more days, a person that is seventeen years of age or older commits two or more acts of sexual abuse against a victim younger than fourteen years of age. TEX. PENAL CODE § 21.02(b). When analyzing the legal sufficiency of evidence, this court views all evidence in the light most favorable to the verdict and determines

whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005).

Morales acknowledges that the uncorroborated testimony of a child victim is sufficient to support a conviction for aggravated sexual assault and that the State has no burden to produce any corroborating evidence. *See Martinez v. State*, 178 S.W.3d 806, 814 (Tex. Crim. App. 2005). Rather than demonstrating the absence of evidence to support some element of the offense, he merely challenges the credibility of the evidence, characterizing it as “a bare allegation of sexual abuse, made by A.M.”

We do not weigh the credibility of evidence on appeal. The jury is the sole judge of evidence’s weight and credibility. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). It may choose to believe none, some, or all of the evidence presented. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). On sufficiency review, this court must defer to the jury’s credibility determinations. *See id.* We decline Morales’s invitation to substitute our own judgment about the credibility of the evidence for that of the jury. We overrule the challenge to the sufficiency of the evidence.

II. Admissibility of outcry statement

Morales argues that the trial court abused its discretion by admitting A.M.'s outcry statements to the forensic interviewer because the statements were unreliable and improperly introduced through the forensic interviewer. Article 38.072 of the Code of Criminal Procedure authorizes the admission of a child victim's out-of-court statements describing the alleged offense, provided those statements are reliable and offered into evidence by the first adult that the child victim told of the offense. This court will reverse an evidentiary decision only if the trial court abused its discretion. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). "In other words, as long as the trial court's decision was within the zone of reasonable disagreement and was correct under any theory of law applicable to the case, it must be upheld." *Id.*

A party seeking to admit a child's out-of-court statements that describe the alleged offense must show that the statements are reliable and made to the first adult to whom the child victim disclosed the abuse. TEX. CODE CRIM. PROC. art. 38.072, §§ 1, 2. A preliminary hearing outside the presence of the jury is required. *Id.* art. 38.072, § 2(b)(2). At the hearing in this case, the State introduced testimony from A.M.'s mother and its proposed outcry witness, the forensic interviewer.

The mother explained that after her relationship with Morales ended, he began leaving vulgar voicemails on her phone in which he claimed to have sexually abused A.M. Initially, A.M. refused to answer when asked about the truth of the voicemails and instead lowered her head and cried. The mother stated that after A.M. heard one of the voicemails, she admitted that Morales “would force her to do things that she did not want to,” but would not elaborate any further.

The forensic interviewer testified that during the interview at the Children’s Assessment Center, A.M. described Morales putting his hands inside her clothing and touching her vagina. A.M. indicated that the inappropriate touching began when she was in second grade and ended sometime when she was in fourth grade. On cross-examination, the forensic interviewer acknowledged that A.M. previously disclosed Morales’s actions to her mother, but stated that more detail about the abuse was provided during the forensic interview. After the hearing, Morales objected to the interviewer testifying, arguing that the A.M.’s statements were insufficiently reliable under article 38.072. The trial court overruled the objection, and Morales now argues the trial court abused its discretion.

A. Reliability of outcry statement

The reliability of proposed outcry evidence is determined on a case-by-case basis. *Buentello v. State*, 512 S.W.3d 508, 518 (Tex. App.—Houston [1st Dist.]

2016, pet. denied). In making this determination, the trial court's focus is on the time, content, and circumstances of the statements. TEX. CODE CRIM. PROC. art. 38.072, § 2(b)(2). Morales focuses on three factors that he argues demonstrate the statements' unreliability: whether the child made the statements spontaneously, whether the statements were consistent with or corroborated by other evidence, and whether the statements described an event that a child of the victim's age could not be expected to fabricate. *See Buckley v. State*, 758 S.W.2d 339, 343–44 (Tex. App.—Texarkana 1988) (identifying various factors to be considered in evaluating reliability of outcry statements), *aff'd on other grounds*, 786 S.W.2d 357 (Tex. Crim. App. 1990); *see also Torres v. State*, 424 S.W.3d 245, 257 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

Morales argues that A.M.'s statements were not spontaneous. He contends that because A.M. repeatedly denied the abuse and only made the statements after her mother played one of his vulgar voicemails, the circumstances surrounding her disclosure were “inherently suggestive.” Nothing in the record indicates that A.M. repeatedly denied that the abuse happened. Indeed, A.M.'s mother testified at the evidentiary hearing that A.M. initially denied the abuse. But on cross-examination she clarified that A.M. did not affirmatively deny the abuse but simply said nothing, lowered her head, and cried. Within the scope of its discretion, the trial

court could have concluded that a child lowering her head and crying when asked if she was sexually abused did not equate to an affirmative denial of the abuse. The trial court also reasonably could have concluded that A.M.'s response was the result of embarrassment or fear, especially to the extent the testimony established that she was afraid to disclose the abuse.

Morales also argues that A.M.'s statements were unreliable because "this case consists of a bare allegation . . . with no other physical, medical, or scientific evidence to corroborate it." "But neither corroboration nor physical evidence is required for an outcry statement to be determined reliable." *Buentello*, 512 S.W.3d at 519. "Furthermore, when a lengthy period of time passes between an assault and a child's outcry, little weight should be given to the lack of physical evidence in determining whether the outcry was reliable." *Id.* (quoting *Naranjo v. State*, No. 06-03-00056-CR, 2004 WL 420145, at *2 (Tex. App.—Texarkana Mar. 9, 2004, pet. ref'd)). When A.M. made her statement, two years had passed since the last alleged incident of abuse. Even ignoring the fact that Morales corroborated A.M.'s statements with the voicemails he left on the mother's phone, the trial court reasonably could have concluded that the lack of physical evidence had little to no bearing on the reliability of A.M.'s statements.

Morales next contends that A.M.'s statements were unreliable because the statements did not confirm every detail of the voicemails he left on the mother's phone. A.M.'s failure to address various details of Morales's own lurid claims of abusive behavior is not equivalent to confirming or denying that the claims happened. The trial court reasonably could have concluded that the fact that A.M. did not specifically confirm every explicit detail of his voicemails did not constitute content or circumstances that rendered the entire outcry unreliable. *See* TEX. CODE CRIM. PROC. art. 38.072, § 2.

Finally, Morales maintains that because A.M. was "not so young an age that she would not be expected to fabricate" the allegations, her statements should be deemed unreliable. But that is the extent of his argument. He identifies no motive or reason for why A.M. would fabricate the allegations. We conclude that the trial court reasonably could have concluded, based on the time, content, and circumstances surrounding A.M.'s outcry, that her statements were reliable.

B. Identity of outcry witness

Morales next argues that the trial court abused its discretion by allowing the State to introduce A.M.'s outcry statement through the forensic interviewer, who he contends was not the first adult to whom A.M. made a statement about the abuse, as was required. *See* TEX. CODE CRIM. PROC. art. 38.072, § 2(a)(3)

(requiring admissible outcry statements to have been “made to the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense or extraneous crime, wrong, or act”). The State responds that Morales never made this argument at trial, but instead affirmatively stated that he was not challenging the forensic interviewer as an outcry witness.

The record confirms the State’s assertion. To preserve an issue for appeal, “a timely objection must be made that states the specific ground of the objection, if the specific ground was not apparent from the context.” *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015). Before arguing to the trial court that A.M.’s statements were unreliable, Morales acknowledged that the forensic interviewer was “a legitimate second outcry witness.” His improper-outcry-witness argument therefore was not preserved. Because the trial court’s decision to admit A.M.’s statements did not lie outside the “zone of reasonable disagreement,” *Winegarner*, 235 S.W.3d at 790, we overrule Morales’s outcry-witness issue.

III. Extraneous evidence

Morales argues that his alleged sexual assault of J.M. was improperly admitted into evidence because its probative value was greatly outweighed by the risk of unfair prejudice. He also attempted to raise a constitutional challenge to the provision of the Code of Criminal Procedure that authorized the use of the

evidence, but that issue has been waived due to his failure to raise it in the trial court. *See Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009).

Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. TEX. R. EVID. 403. To analyze evidence under Rule 403, a trial court balances:

(1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence 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 636, 641–42 (Tex. Crim. App. 2006). This court has held that the Rule 403 analysis favors admissibility and presumes that relevant evidence will be more probative than prejudicial. *Buxton v. State*, 526 S.W.3d 666, 690 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

The probative value of the allegation that Morales sexually abused J.M. came from its tendency to show his propensity to sexually abuse children. TEX. CODE CRIM. PROC. art. 38.37. Generally, propensity evidence is considered to generate unfair prejudice and is therefore inadmissible under Rule 404. *See Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999). However, with article

38.37, the Legislature changed that general rule for cases such as this one that involve the sexual abuse of a child. *Burke v. State*, 371 S.W.3d 252, 257 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd, untimely filed). Accordingly, in analyzing the probative value of this evidence, the focus should be on the similarities of the extraneous act to the charged offense and on the State's need for the evidence. *See Gigliobianco*, 210 S.W.3d at 641–42.

Morales makes a conclusory argument that the extraneous evidence of the alleged abuse of J.M. bore little resemblance to the charged offense, the alleged abuse of A.M. The State argues that the two allegations were very similar. The State notes that in both alleged offenses, Morales lived with the victims and inappropriately touched their genitals in a nearly identical manner at night while other family members were sleeping. And in both cases, Morales had a significant relationship with the child victim; A.M., his stepdaughter, was allegedly abused by him between the ages of about seven and ten; and J.M., his biological daughter, was about nine or ten during the abuse. We conclude that the record supports the trial judge's evidentiary ruling and the implied determination that the two allegations were significantly similar.

Morales also challenges the State's need for the evidence, which he characterizes as minimal. In evaluating a proponent's need for extraneous

evidence, the inquiry focuses on the strength of other evidence available, if any, to demonstrate the same fact of consequence that relates to an issue in dispute. *Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1998). Morales relies upon a number of precedents that held that a defendant may be convicted of sexual abuse against a child on the child’s testimony alone. But the need inquiry is not, as Morales suggests, limited to whether a conviction without the evidence would have survived a challenge to the sufficiency of the evidence. Rather, evidence may be needed to assist in rebutting a defense theory—as was the case here. *See Dennis v. State*, 178 S.W.3d 172, 179 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d).

The State had Morales’s voicemails to establish the relevant fact of consequence. But Morales attacked the voicemails’ evidentiary value by arguing to the jury that he fabricated their contents out of anger and that A.M. was simply lying when she said that he abused her. The trial court reasonably could have concluded that the State needed the extraneous evidence to rebut Morales’s defense. *See id.*

Morales also argues that the probative value of the extraneous evidence was outweighed by the significant risk of unfair prejudice. He maintains that the extraneous evidence was highly prejudicial because it was propensity evidence and

because it distracted the jury from the charged offenses by taking a significant amount of time to develop. That the allegations involving J.M. were propensity evidence does not make the evidence unfairly prejudicial. As discussed above, by enacting article 38.37, the Legislature carved out an exception to the general rule against propensity evidence when, like here, the charged offense involves the sexual abuse of a child.

Moreover, Morales has failed to substantiate his argument that the State spent an inordinate amount of time introducing the extraneous evidence. *See Runnels v. State*, 193 S.W.3d 105, 107 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (“The party opposing admissibility bears the burden of showing that the unfair prejudice substantially outweighs the evidence’s probative value” and that the trial court abused its discretion.); *see also State v. Dixon*, 151 S.W.3d 271, 274 (Tex. App.—Texarkana 2004) (“To establish an abuse of discretion, the appealing party must show that the trial court’s ruling lies outside the ‘zone of reasonable disagreement.’”), *aff’d*, 206 S.W.3d 587 (Tex. Crim. App. 2006). He contends that the extraneous evidence involved numerous pages of testimony and required five witnesses’ testimony, but the record reveals that the testimony concerning the extraneous offenses was not unduly lengthy. Of the roughly 391 pages of trial testimony before the jury, the testimony describing the J.M.’s sexual abuse took up

about thirty-five pages. *See Bruxton*, 526 S.W.3d at 692 n.8 (excluding testimony that “did not provide any details as to appellant’s sexual abuse” of the extraneous-evidence victim in determining the time spent on State’s development of extraneous evidence). And during closing argument, the prosecution only briefly mentioned the extraneous offense. In light of the presumption favoring the admissibility of relevant evidence and our affirmation of the trial court’s probative-value finding, we conclude that Morales has failed to carry his burden on appeal to demonstrate that the trial court abused its discretion when it allowed the extraneous evidence to be used at trial. *See Runnels*, 193 S.W.3d at 107; *see also Dixon*, 151 S.W.3d at 274.

IV. Mistrial based upon improper jury argument

Finally, Morales argues that the trial court improperly denied his motion for a mistrial following the prosecutor’s improper argument that invited the jury to consider the applicable range of punishments for the charged offense and the lesser-included offense. When an improper jury argument is “so prejudicial that expenditure of further time and expense would be wasteful and futile,” a mistrial is appropriate. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004) (en banc). We review a trial court’s refusal to grant a mistrial for an abuse of discretion. *Id.*

A prosecutor may not discuss the range of punishments applicable to the charged offense and the lesser-included offense during the guilt-innocence phase of a trial because it encourages the jury to convict on the basis of the amount of punishment and not on the factual basis. *See McClure v. State*, 544 S.W.2d 390, 393 (Tex. Crim. App. 1976). The objectionable portion of the State's argument about the jury charge was as follows:

The State: Now within there it also talks about lesser-included offense. And it's important to talk about the lesser-included offenses because we talked about that in jury selection. If any facts are raised that warrant a lesser-included offense they go into the jury charge and that's what you see in there about the indecency. But here is the thing you don't get there because this isn't one time. This is two times at least within more than 30 days so we don't even get to the indecency. He doesn't get the benefit of a lesser charge of indecency. He doesn't get the benefit of a lesser charge of indecency with a child which is 2 to 20 years.

The Defense: Your Honor, objection. Outside the record.

The Court: Sustained.

The Defense: Jury be instructed to disregard.

The Court: Jury will disregard the last statement of the prosecutor.

The Defense: Respectfully move for mistrial.

The Court: Denied.

The State: He doesn't get that benefit.

In determining whether a trial court abused its discretion by denying a request for a mistrial, we analyze the severity of the misconduct's prejudicial effect, the curative measures taken by the trial court, and the likelihood that the defendant would have received the same sentence absent the misconduct. *Hawkins*, 133 S.W.3d at 77. The trial court reasonably could have concluded that the prejudicial effect of the prosecutor's improper reference to the applicable punishment for the lesser-included offense was minimal. The prosecutor's argument was isolated within the context of a proper argument that the facts did not warrant a conviction for the lesser-included offense. *See Davis v. State*, 329 S.W.3d 798, 821 (Tex. Crim. App. 2010).

Although Morales argues that the prosecutor repeated the argument after the trial court sustained his objection, the trial court reasonably could have concluded that the prosecutor was not reiterating that Morales did not deserve the benefit of a two-to-twenty-year sentence but that he did not deserve the benefit of being convicted of the lesser-included offense under the facts of the case. The trial court immediately sustained Morales's objection to the argument and instructed the jury to disregard the statement, and we presume that instruction was effective. *See Wesbrook v. State*, 29 S.W.3d 103, 116 (Tex. Crim. App. 2000). Further, it is

unlikely that Morales would have not received the same conviction and sentence absent the improper argument. The facts alleged in this case were that Morales repeatedly touched A.M. inappropriately at night while other members of the household were sleeping or away. A.M.'s testimony supported that allegation, was corroborated by Morales's voicemails, and was consistent with the extraneous evidence regarding J.M. Under these circumstances, the trial court reasonably could have concluded that its instruction minimized the risk of unfair prejudice, and we conclude, based on the record, that it is unlikely Morales would have received a different sentence or conviction had the prosecutor not referenced the applicable punishment range. Accordingly, we overrule Morales's challenge to the denial of a mistrial.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Massengale, and Brown.

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