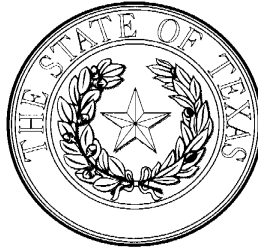


Opinion issued September 2, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00720-CR

CHRISTOPHER IAN HILTON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1576371

MEMORANDUM OPINION

Following a jury trial, appellant Christopher Ian Hilton was convicted of aggravated sexual assault of “John,” the complainant, who was younger than 14 years of age at the time. TEX. PENAL CODE § 22.021(a)(1)(B). He was sentenced to

25 years' imprisonment. Hilton contends that the trial court abused its discretion by admitting images and videos depicting child pornography. We disagree and affirm.

Background

In 2011, six-year-old John attended a summer day camp at which Hilton worked. John had been removed from his mother's and stepfather's custody and was living with his half-brother and his half-brother's grandparents as a foster child. His foster mother enrolled John in the day camp, which he attended most weekdays during the summer of 2011. At trial, John testified that he first saw Hilton at the front desk of the day camp and that at some point later Hilton sexually assaulted him in the locker room. John testified that Hilton was the only adult watching as the boys showered, and he thought Hilton was a counselor. John recalled that Hilton would stand behind the boys in the dry area of the locker room and tell them to come to him. When they did, he would instruct them on different motions he wanted them to do while he digitally penetrated each boy's rectum. John testified that Hilton did this to him on multiple occasions. The first time it happened Hilton approached John from behind. In other instances, he instructed John and the other boys to lie down before inserting his fingers into them. John testified that Hilton rarely spoke while assaulting him, but when he did, he warned the boys that they would be in trouble if they told anyone else "because [they] did

something wrong.” John testified that when the sexual assaults occurred, he felt pleasure but did not understand what Hilton was doing.

John did not tell his foster mother or his CPS caseworker about the abuse. A few months later, John suffered from emotional and behavioral difficulties. His caseworker sought in-patient treatment for him at West Oaks Hospital. His symptoms included an obsession with digging in his rectum. John did not report the sexual assault while at West Oaks. Following hospitalization, John went to live with his grandmother, who adopted him in 2013.

In 2015, John’s grandmother, who testified at trial, confronted him about his habit of digitally penetrating his own rectum. She had observed him doing so for several months. Eventually, John disclosed to her that he learned the act from Hilton, an employee at a day camp. John told his grandmother that Hilton did it to him “five or six times,” as well as to two other boys. John’s grandmother testified that when John told her this, she remembered that Hilton’s former foster mother had sent her a letter from the camp. The letter stated that Hilton, a counselor at the day camp, was under investigation for crimes related to child pornography. John’s grandmother confirmed Hilton’s identity with John and then called law enforcement. John’s grandmother also contacted an attorney about suing the day camp.

John's therapist and a forensic interviewer each testified that John told them a similar account of sexual abuse at day camp. The therapist also testified that John sought treatment for "self-harm behavior," including putting his fingers in his rectum. The therapist testified that the behavior was related to the sexual abuse John endured at day camp.

Records obtained in the investigation showed that John was enrolled in the day camp in summer 2011 and that Hilton was an employee at the front desk. John also identified Hilton in a photo array.

The State introduced evidence without objection that Hilton pleaded guilty to two counts of promotion of child pornography in 2012, based on an offense that occurred in September 2011. He was sentenced to 15 years' imprisonment. A Houston Police Detective testified about his investigation related to those convictions. He testified that he was contacted by police in Illinois, who had accessed an online program through which Hilton was sharing images and videos depicting child pornography. Law enforcement in Illinois sent the detective a collection of the images and videos Hilton had shared. The Houston detective reviewed the videos and photos, obtained a warrant for Hilton's apartment, and executed it in October 2011. Upon arrest, Hilton admitted to having possessed and shared child pornography. The detective testified that he reviewed the child pornography on Hilton's computer, which was seized at the time of arrest. Over

Hilton's objection, the detective described some of the images he received from law enforcement in Illinois and some of the images he found on Hilton's computer. During the detective's testimony, the images were not shown to the jury, but they were admitted into evidence.

During deliberations, the jury asked for and received all of the evidence admitted in the case, including the pornographic images and video from Hilton's previous convictions. The jury also asked to be read testimony from John and his grandmother concerning dates of the outcry and dates of the abuse. The jury found Hilton guilty of sexual assault of a child, and the jury assessed punishment at 25 years' imprisonment.

Admission of Evidence

On appeal, Hilton asserts that the trial court abused its discretion by admitting about twenty photographs and videos of child pornography. Hilton contends that the evidence should have been excluded under Texas Rule of Evidence 403 because it was substantially more prejudicial than probative. *See* TEX. R. EVID. 403. We disagree.

A. Standard of Review and Applicable Law

"We review a trial court's ruling under Rule 403 of the Texas Rules of Evidence for an abuse of discretion." *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex. Crim. App. 2013). The trial court's ruling must be upheld as long as it is within the

zone of reasonable disagreement. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002).

Although extraneous offenses generally are inadmissible to prove character conformity under rule 404(b), such evidence is statutorily admissible for such purpose in prosecutions for aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC. art. 38.37, § 2; TEX. R. EVID. 404(b). Specifically, under article 38.37, section 2(b), in a prosecution for sexual abuse of a child, the State may introduce evidence of the offense of promotion of child pornography “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.” *See* TEX. CODE CRIM. PROC. art. 38.37, § 2(b). But even if extraneous offense evidence is relevant and admissible under article 38.37, it is subject to exclusion under rule 403.

Rule 403 allows for the exclusion of otherwise relevant evidence when its “probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.” TEX. R. EVID. 403. “Evidence is unfairly prejudicial when it has ‘an undue tendency to suggest that a decision be made on an improper basis.’” *Pawlak*, 420 S.W.3d at 809 (quoting *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (op. on reh’g)). “Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant

evidence will be more probative than prejudicial.” *Montgomery*, 810 S.W.2d at 389; *see also Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009) (stating that Rule 403 “envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value”) (internal quotations omitted).

We measure the trial court’s ruling against the following balancing criteria:

- 1) the inherent probative force of the evidence along with
- 2) the State’s need for the evidence against
- 3) any tendency of the evidence to suggest a 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.

See Gigliobianco v. State, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

“Probative value” is the measure of “how strongly [the evidence] serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent’s need for that item of evidence.” *Gigliobianco*, 210 S.W.3d at 641. ““When the proponent [of an item of evidence has other compelling or undisputed evidence to establish the proposition or fact

that the [item of evidence] goes to prove, the [probative value of the item of evidence] will weigh far less than it otherwise might in the probative-versus-prejudicial balance.” *Id.* (quoting *Montgomery*, 810 S.W.2d at 390).

“Unfair prejudice” refers to a “tendency to tempt the jury into finding guilt on grounds apart from proof of the offense charged.” *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005). “Evidence might be unfairly prejudicial if, for example, it arouses the jury’s hostility or sympathy for one side without regard to the logical probative force of the evidence.” *Gigliobianco*, 210 S.W.3d at 641. “[C]onfusion of the issues” refers to “a tendency to confuse or distract the jury from the main issues in the case.” *Id.* “[M]isleading the jury” refers to “a tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds.” *Id.*

In reviewing the trial court’s balancing test determination, we may reverse the trial court’s judgment “rarely and only after a clear abuse of discretion.” *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1991). We are mindful the rule favors admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007).

B. Analysis

After a hearing outside the presence of the jury, the trial court admitted still images from videos of child pornography taken from Hilton's computer, a video of child pornography, and other photographs of child pornography. A detective testified before the jury and described how he obtained the images as part of a previous investigation of Hilton. He testified that he received seven videos and three images from a detective in Illinois and described them for the jury. He also described nine images that were found on Hilton's computer when he was arrested. In total, about twenty images, still images of videos, or videos were admitted into evidence. While Hilton concedes that the images and videos were admissible under article 38.37 of the Code of Criminal Procedure and relevant to the case, he argues that the evidence was substantially more prejudicial than probative and should have been excluded under Rule 403.

While the evidence was certainly prejudicial, the trial court did not abuse its discretion in admitting it. We begin by acknowledging that sexually related bad acts and misconduct involving children are inherently inflammatory, but the question in a Rule 403 analysis is whether the evidence was *unfairly* prejudicial. *See Pawlak*, 420 S.W.3d at 809, 811 (stating that this type of evidence is inherently inflammatory, but Rule 403 does not allow trial court to exclude otherwise relevant evidence "when that evidence is merely prejudicial"); *Caston v. State*, 549 S.W.3d

601, 613–14 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (stating that extraneous offense testimony regarding child sexual assault was “clearly prejudicial” but not unfairly so under Rule 403). Despite the inflammatory nature of the photographs and videos, the trial court could have reasonably found that the probative value of the evidence was not substantially outweighed by its resulting prejudice.

The probative value of the evidence and the State’s need for it were high. *Gigliobianco*, 210 S.W.3d at 641–42 (listing factors to balance in a rule 403 analysis). Hilton concedes that the images and videos of child pornography and the testimony about them were some proof that he was sexually attracted to young children. Hilton’s possession of pornography was some proof that he was sexually attracted to prepubescent boys. *See Cox v. State*, 495 S.W.3d 898, 904 (Tex. App.—Houston [1st Dist.] 2016, pet. ref’d). Intent to arouse or gratify sexual desire is an implicit element of sexual assault. *Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998).

The probative value of the extraneous offense evidence increased because of its temporal relation to John’s allegations. John was sexually assaulted by Hilton at six years old in the summer of 2011, and Hilton shared child pornography with an undercover detective in September 2011. The child pornography he shared primarily involved rectal penetration of young boys. The extraneous evidence

proved Hilton's interest in sexual acts with young boys of a similar age to John and so "arguably makes it more likely that [Hilton] would commit crimes like those" John described. *Burgess v. State*, No. 05-17-00271-CR, 2018 WL 3322886, at *4 (Tex. App.—Dallas July 6, 2018, pet. ref'd) (mem. op., not designated for publication).

John's credibility was critical to the State's case. John was the only eyewitness. Because he did not tell anyone about the abuse for years after it occurred, there was no physical evidence to corroborate his story. The State's other witnesses, including law enforcement personnel, therapists, relatives, and interviewers, all had John's account of the abuse. *See Cox*, 495 S.W.3d at 906–08 (stating need for evidence was great given disparity between two victims' stories and reluctance of younger victim to testify). Hilton's attacks on John's credibility were a large part of the defense's theory. Hilton attempted to undermine John's credibility, portraying his contemporaneous civil lawsuit against the camp as a money-making scheme led by his grandmother. The admission of depictions of child pornography that showed Hilton's sexual interest in children rebutted Hilton's theory that John was not telling the truth.

To the extent Hilton argues the State's need for the evidence was diminished by the fact that his convictions for promotion of child pornography were admitted into evidence, we cannot agree. The photographs provided visual evidence of about

twenty images of child pornography found on Hilton's computer, something a copy of a judgment could not do. *Burgess*, 2018 WL 3322886 at *5. Hilton was sharing the images during the same time that John alleged abuse by Hilton. A Houston police detective testified that after law enforcement in Illinois discovered information that Hilton was sending child pornography files over the internet, he obtained a search warrant for Hilton's apartment. Hilton was arrested and admitted to possessing and sharing child pornography. The detective found numerous pornographic images and videos on Hilton's laptop, and he summarized ten of them for the jury. Each depicted digital or genital "anal penetration of boys about the same age" as John. He also testified that the vast majority of the pornographic images Hilton possessed depicted prepubescent boys. The images were not published to the jury but were included in the evidence provided to them during deliberations. The first two factors, the probative force of the evidence and the State's need for the evidence, weigh in favor of admission. *Gigliobianco*, 210 S.W.3d at 641-42.

The remaining factors do not show that the probative value of the evidence was substantially outweighed by its prejudicial effect or by its tendency to mislead the jury. As we previously stated, evidence that Hilton possessed child pornography was prejudicial, but not unfairly so. Appellant relies on *Pawlak*, where the Court of Criminal Appeals held that the trial court's admission of 10,000

pornographic images, some involving children, was erroneous to rebut a defensive theory. 420 S.W.3d at 810. But the facts of Hilton's case are more similar to our analysis in *Cox*. In *Cox*, we noted the potential of 2,000 images of pornography to inflame the jury, but we held that that potential was outweighed by the evidence's probative value, the State's need for the evidence, and the fact that the evidence did not take long to present. *Cox*, 495 S.W.3d at 909. We distinguished the facts from *Pawlak*, where a smaller number of pornographic images could have been admitted limiting the prejudicial effect. *Id.* at 908. In *Cox*, any excess prejudicial effect based on volume was minorly incremental. *Id.* at 908–09.

The State's need for the evidence in this case is similar, if not greater, than the need in *Cox*, given that John was the only witness, he was a child, and he reported the abuse several years after it occurred. *See Cox*, 495 S.W.3d at 907 (stating State needed evidence both because one victim was five years old at time of trial and was too young to testify fully and because images were relevant to defendant's intent with 13-year-old child). In this case, the State sought admission of approximately twenty images as opposed to more than 2,000. The detective described the images for the jury.* *See Burgess*, 2018 WL 3322886 at *3 (upholding admission of fifteen photographs). Hilton concedes that the admission of the evidence and testimony related to it were not time consuming. *Gigliobianco*,

* The detective did not testify before the jury to the total number of images found on Hilton's computer.

210 S.W.3d at 641–42 (stating that Rule 403 balancing test considers time required to present evidence).

There is nothing in the record to indicate the evidence distracted the jury from the main issues of the case or was given undue weight because the jury was ill equipped to evaluate its probative force. The jury heard from numerous witnesses over the course of the three-day trial. The detective’s descriptions of the photos were a small portion of the testimony the jury heard. The testimony describing the photos is 7 pages out of more than 500 pages of trial testimony. The majority of the witnesses were related to John’s outcry and the investigation of sexual assault allegations he made. The jury’s questions during deliberations suggest that the jury was not confused or distracted by the child pornography evidence. The jury’s questions focused on testimony from John and his grandmother regarding the timing of the allegations and outcry. There is nothing in the record to indicate that the evidence suggested a decision on an improper basis.

We conclude that the trial court’s decision to admit the images and videos in this case fell within the zone of reasonable disagreement. *Wheeler*, 67 S.W.3d at 888. We therefore conclude the trial court did not abuse its discretion by admitting the evidence. *See Cox*, 495 S.W.3d at 909 (upholding admission of 2,000 images and videos of child pornography in prosecution for similar crimes); *Burgess*, 2018 WL 3322886 at *5. We overrule Hilton’s sole issue.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

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