Reversed and Rendered and Memorandum Opinion filed August 31, 2023

In The

Fourteenth Court of Appeals

NO. 14-22-00399-CR

STATE OF TEXAS, Appellant

V.

ALFREDO CRUZ, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 17-DCR-076512

MEMORANDUM OPINION

A jury found appellee Alfredo Cruz guilty of sexual assault of a child and assessed punishment at five years in prison and a $5,000 fine. *See* Tex. Penal Code Ann. §§ 12.33; 22.011(a)(2). The trial court subsequently granted appellee's motion for new trial, which the State of Texas appealed. Concluding that the trial court abused its discretion when it granted appellee's motion for new trial, we reverse the order granting appellee's motion for new trial and render judgment reinstating the trial court's judgment of conviction and sentence.

BACKGROUND

The complainant moved from El Salvador when she was six years old and came to live with her aunt in Fort Bend County. The complainant's aunt was married to appellee. Several other people also lived at the house, including other family members and family friends. The complainant had known appellee since she was four years old and thought of him as her father.

When the complainant was fifteen years old, she handed a letter to her high school swimming coach. The swimming coach became alarmed at the content and approached the complainant about her concerns. Based on the complainant's response, the swim coach took the complainant to her high school counselor. After talking to the complainant, the police were notified and appellee was arrested.

Appellee was charged with sexual assault of a child by intentionally and knowingly penetrating the complainant's sexual organ with his finger. The State further alleged that the complainant was a child younger than 17 years of age and was not appellee's spouse.

Prior to trial, appellee filed a motion in limine in which he requested that during the guilt-innocence phase of the trial, the State first approach the bench for a hearing before mentioning any extraneous crimes, offenses, bad acts, or violations of the law by appellee. In response, the State argued that the admission of such evidence was mandatory under article 38.37 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 38.37 ("Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters. . . ."). The trial court granted this portion of the motion in limine. The State later requested clarification on the trial court's ruling. After further discussion, the trial court ordered the State

not to mention extraneous offenses in opening argument, and to approach the bench before getting into extraneous offenses during the State's case in chief.

Later during the trial, the prosecutor approached the bench and informed the trial court that he intended to ask the complainant about extraneous acts of abuse by appellee against the complainant. According to the prosecutor, the extraneous bad acts were not acts of assault, but rather constituted grooming behavior. The prosecutor once argued that admission of this evidence was mandatory pursuant to article 38.37 of the Texas Code of Criminal Procedure. Appellee's counsel responded that the proposed testimony should not be allowed because it was not relevant and was more prejudicial than probative. The trial court ruled that the State could inquire into "[t]wo incidents. Period." The prosecutor sought clarification, asking "[o]utside of the offense alleged?" The trial court replied, "[o]utside of the offense. Two period."

The State then asked the complainant if she remembered things happening between her and appellee "that might have felt weird at the time." Appellee objected "based on our previous discussions at the bench." The trial court overruled the objection and granted appellee a running objection. The complainant then described an incident that occurred when she was twelve. According to the complainant, appellee, while the two of them were alone in the kitchen, picked her up so that her legs went around his body. The complainant testified that this seemed strange because appellee was invading her personal space and also because he had never done anything like that before.

The prosecutor then asked the complainant about an incident that occurred in the garage. Appellee's counsel objected that the State's notice of this extraneous offense was untimely. The trial court instructed the prosecutor "[y]ou got two . . . [p]ick another one, as long as you've given notice of it."

The prosecutor proceeded to ask the complainant about the charged offense that took place in her cousin's bedroom when the complainant was fifteen years old. The complainant testified that she was sleeping alone in her cousin's room when appellee awakened her by opening the door. Appellee then came over to the complainant and tried to unzip her pajamas. The complainant tried to fight appellee off, but he pulled the zipper down and touched the complainant's vagina with his hand. The complainant further testified that appellee touched the outside of her vagina and also inserted his finger into her vagina.

The prosecutor then asked, "[w]ere there other times that he wouldn't stop?" Appellee objected and at the ensuing bench conference, the trial court expressed concern that the prosecutor's question gave the impression there were a great many additional extraneous acts. The trial court reminded the State that it could enquire into one more extraneous act, but could not "ask if there are any other incidents, and then leave it open for the jury to think there were five, six, seven, eight, nine, ten other incidents." After further discussion, the trial court clarified that "I gave you two, plus the offense making up the charge." Finally, the trial court stated "[p]lease do not open the door to multiple other incidents. You have one more chance, one more of those incidents to talk about." The prosecutor then informed the trial court "the other one that I would offer after this one, since we're up here now, is the very last incident that occurred inside the truck."

The prosecutor resumed questioning the complainant. The complainant testified that appellee stopped touching her vagina when he wanted her to climb on top of him. Appellee again objected. Another bench conference ensued where appellee's counsel argued that she had not received notice of this specific allegation. The prosecutor responded that he expected the complainant to testify that "what happens next is appellee "pulls out his penis and rubs it on her vagina."

At that point, the trial court sent the jury out of the courtroom to continue the discussion.

Once the jury was out, the trial court stated: "[t]he State should have charged this other offense . . . ." The trial court expressed concern that the prosecutor's questioning was more prejudicial than probative. The trial court continued that "we already have the insertion of the finger into the vagina. That is the testimony that is necessary. If the jury believes your witness, that makes the case. And anything of the nature of what you're talking about now would . . . only serve to inflame the jury." The trial court then told the prosecutor that if the prosecutor had "another instance that you would like to go into, the Court would indulge and let you go into that, but not this offense. It should have been charged. If you needed that, it should have been charged."

The prosecutor responded that the incident about which he was currently questioning the complainant was the charged offense. The prosecutor asserted that appellee rubbing his penis on the complainant's vagina was part of the conduct making up the charged offense. Appellee responded that he was not objecting to a lack of notice, but because the State could put on testimony sufficient to prove the charged offense without eliciting testimony about appellee allegedly touching the complainant's vagina with his penis. At that point, the trial court ruled that the State's proposed testimony was admissible because it is the same incident. It then overruled appellee's objection. The trial court then told the prosecutor: "[b]e careful that we be careful. Don't stack. You've got one more. This is one continuous incident. You've got one more, if you need it." When testimony resumed, the complainant described the incident where appellee rubbed his penis against her vagina.

After further questions regarding the complainant's outcry, the State asked

the complainant about "the time that we talked about in your bedroom, did that happen on two other occasions?" Appellee objected and the parties once again approached the bench. The trial court told the prosecutor "Man . . . why did you do that?" The prosecutor responded that he was allowed by the motion-in-limine to go into two other incidents. The prosecutor continued that he had not been allowed to go into the garage incident due to lack of notice, and argued that he was therefore allowed to go into one more extraneous incident. Appellee asserted that the question asked was in contravention of the trial court's ruling on the motion-in-limine and asked for a mistrial. The trial court denied the motion for a mistrial. The trial court expressed a reluctance to give an instruction to disregard the prosecutor's question because it would draw additional attention to the question.

The trial court again expressed concern that the prosecutor had violated the motion-in-limine. The following exchange then occurred:

> Trial Court: But you chose which two incidents to discuss, then - -
>
> Prosecutor: Judge, and the only time that we discuss an incident was in the bedroom. That was it. That was the - -
>
> Trial Court: And the garage.
>
> Prosecutor: Well, nothing happened in the garage. We weren't allowed to go into that.
>
> Trial Court: You're right.
>
> Prosecutor: Or anything in the car. We haven't talked about any other acts.

The trial court continued that "the garage was not an offense. There was no offense there. That was just something we were discussing. So - - and I said after he discussed the one in the bedroom, you have one more time." "But you just said two other occasions, other than what we've already discussed. You had two more incidents of that and that's bad." The trial court then, after clarifying that the complainant had not answered the prosecutor's question, overruled appellee's

objection and then ordered the prosecutor to move on to his next question. The trial court then, sua sponte, stated that it would not give an instruction to disregard the question.

The State then passed the complainant and the trial broke for lunch. After the lunch break, the trial court stated that it was not granting a mistrial because, "there was some confusion or lack of clarity in my instruction as referenced the two incidents that you would be allowed to discuss. But - - however, if you do that again, I may grant a mistrial."

The trial continued without further incident regarding extraneous offenses or bad acts. At the conclusion of the evidence, the jury found appellee guilty of sexually assaulting the complainant. Appellee was subsequently sentenced to serve five years in prison.

Appellee filed a motion for new trial arguing that "the trial court committed a material error likely to injure the defendant's rights" when it overruled his objection to the prosecution's question about extraneous offenses that, in appellee's view, had previously been ruled inadmissible. Appellee's motion for new trial asserted that the trial court overruled appellee's objection to the improper question, overruled his request for an instruction to disregard the question, and also denied his request for a mistrial. The State filed a response to appellee's motion for new trial disputing the factual basis for appellee's motion.

The trial court held a hearing on appellee's motion for new trial. Appellee did not present evidence during the hearing. During the hearing, the trial court found "that a material error was committed in allowing the extra testimony of two additional offenses." It then granted the motion for new trial because "it is in the best interest of justice." This appeal by the State followed.

ANALYSIS

In a single issue on appeal, the State argues that the trial court abused its discretion when it granted appellee's motion for new trial.

The granting of a motion for new trial rests within the sound discretion of the trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995); *Moreno v. State*, 297 S.W.3d 512, 520 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). We view the evidence in the light most favorable to the trial court's ruling and uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). "We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable." *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012) (internal quotations omitted). We presume the trial court correctly granted a new trial, and the State has the burden to establish the contrary. *Moreno*, 297 S.W.3d at 520. We will uphold the trial court's judgment if any appropriate ground exists to support it. *Id*.

As a general rule, a trial court will not abuse its discretion in granting a motion for new trial in the interest of justice if the defendant (1) articulated a valid legal claim in his motion, (2) produced evidence or pointed to evidence in the trial record that substantiated his legal claim, and (3) showed prejudice to his substantial rights under the standards found in Rule 44.2 of the Texas Rules of Appellate Procedure. *State v. Herndon,* 215 S.W.3d 901, 909 (Tex. Crim. App. 2007). A trial court does not have the discretion to grant a new trial unless the defendant demonstrates that his first trial was seriously flawed and that the flaws adversely affected his substantial rights to a fair trial. *Id.* Thus, a trial court may not grant a new trial on mere sympathy, an inarticulate hunch, or simply because it believes the defendant received a raw deal or is innocent. *Id.*

In addition, while a judge may grant a motion for new trial in the interest of justice, justice means in accordance with the law. *State v. Thomas*, 428 S.W.3d 99, 105 (Tex. Crim. App. 2014). Also, "in the interest of justice," is not a basis for granting a new trial. *Id.* To obtain a new trial "in the interest of justice," a defendant must articulate a valid legal claim in his motion. *Id.* In other words, "even where a defendant urges a new trial on interest of justice grounds, '[a] motion for a new trial, whether for guilt or punishment, requires a valid legal claim.'" *State v. Vigil*, No. 08-13-00273-CR, 2015 WL 2353507, at *3 (Tex. App.—El Paso May 15, 2015, pet. ref'd) (not designated for publication) (quoting *Thomas*, 428 S.W.3d at 107); *see also Smith v. State*, Nos. 01-12-00661-CR, 01-12-00663-CR, 2013 WL 6729666, at *7–8 (Tex. App.—Houston [1st Dist.] Dec. 19, 2013, pet. ref'd) (mem. op., not designated for publication) (defendant "did not specify in her motion for new trial the reason why the trial court should [have] grant[ed] her a new trial in the interest of justice"). When ruling on a motion for new trial that sets out a valid legal claim, a trial court should exercise its discretion by balancing the defendant's "'interest of justice' claim against both the interest of the public in finality and the harmless-error standard found in Rule 44.2 of the Texas Rules of Appellate Procedure." *Herndon*, 215 S.W.3d at 908. If the defendant's substantial rights were not affected a trial court should not grant a new trial. *Id.* "Granting a new trial on a non-legal or legally invalid reason is an abuse of discretion." *State v. Arizmendi*, 519 S.W.3d 143, 148 (Tex. Crim. App. 2017) (internal quotations omitted).

The State concedes that appellee articulated a valid legal claim in his motion for new trial. The State goes on to assert that appellee failed to meet the two remaining requirements for a trial court to grant a new trial in the interest of justice. *See Herndon,* 215 S.W.3d at 909 (setting out three requirements for trial

court to grant a new trial in the interest of justice). Even if we assume for purposes of appeal that appellee produced evidence substantiating his legal claim, we still conclude that the trial court abused its discretion when it granted appellee's motion for new trial because appellee has not shown prejudice to his substantial rights as a result of the trial court overruling his evidentiary objection. *Id.*

Errors affecting a defendant's substantial rights are those that have a substantial and injurious effect or influence on the jury's determination of its verdict. *Coble v. State,* 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). When determining the likelihood that the error adversely affected the jury's verdict, we consider the entire record. *Schmutz v. State*, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014). Important factors include the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, whether the State emphasized the error, and whether overwhelming evidence of guilt was present. *Schmutz*, 440 S.W.3d at 39.

Appellee's motion for new trial was based on the State asking the complainant about "the time that we talked about in your bedroom, did that happen on two other occasions?" Appellee objected before the complainant could answer and the trial court instructed the attorneys to approach the bench. While the trial court overruled appellee's objection, it instructed the State to move on to a new question. Appellee did not request an instruction to disregard and the trial court unilaterally decided that it would not give the jury an instruction to disregard the State's question. The State followed the trial court's instruction to move on and immediately passed the witness. As a result, the complainant never answered the question. The State did not broach the subject of extraneous offenses again with any witness during the guilt/innocence phase of appellee's trial. In addition, the State did not mention the subject of extraneous offenses during its closing

argument, instead focusing on the charge against appellee.

Because a prosecutor's questions of a witness are not evidence, the alleged error supporting granting appellee a new trial was the State asking a single, possibly improper, question, which was not answered. *See Ukwuachu v. State*, 613 S.W.3d 149, 157 (Tex. Crim. App. 2020) (stating that prosecutor's questions are not evidence). Turning to the other factors courts consider when reviewing the granting of a new trial, the State did not emphasize the subject of extraneous offenses during the remainder of appellee's trial. During closing argument, the State focused on the complainant's clear, direct testimony detailing the charged sexual assault offense. *See West v. State*, 121 S.W.3d 95, 105 (Tex. App.—Fort Worth 2003, pet. ref'd) ("Here, Dodson's hearsay testimony was not harmful in light of D.M.'s detailed, factually specific testimony concerning the assault."). In addition, in his motion for new trial, appellee's only assertion that he suffered prejudice as a result of the State's unanswered question was that he was convicted and sentenced to prison. In addition to the State's unanswered question, the jury also heard the complainant's testimony describing the sexual assault by appellee. Nothing appellee included in his motion for new trial shows that the jury would have returned a different verdict given this evidence. *See State v. Guilbault*, 644 S.W.3d 727, 737 (Tex. App.—Austin 2022, pet. ref'd) ("Moreover, independent of the field-sobriety tests and Officer Lopez's observations of Guilbault, the jury had evidence showing that Guilbault had a BAC of .087, which met the statutory definition of 'intoxicated' in the Penal Code. Nothing shows that the jury would have returned a different verdict given this evidence.") (internal citation omitted). Because appellee does not have evidence establishing that he suffered harm to his substantial rights, he did not meet his burden in the trial court to show legal entitlement to a new trial. We therefore conclude that the trial court abused its

discretion when it granted his motion for new trial. *See Herndon*, 215 S.W.3d at 907 (stating that a "trial court does not have discretion to grant a new trial unless the defendant shows that he is entitled to one under the law."). We sustain the State's issue on appeal.

CONCLUSION

Because the trial court abused its discretion when it granted appellee's motion for new trial, we reverse the trial court's order granting a new trial, and we render judgment reinstating the judgment of conviction and appellee's sentence.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Zimmerer, Spain, and Poissant.
Do Not Publish — TEX. R. APP. P. 47.2(b).