



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00134-CR

Edward J. **NAVARRO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 15-0482-CR-B
Honorable William Old, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 12, 2017

AFFIRMED

Edward J. Navarro appeals his convictions for aggravated sexual assault, sexual assault, and indecency by contact, arguing that the trial court erred in admitting evidence of extraneous sexual acts with adults. We affirm the judgment of the trial court.

BACKGROUND

Navarro was charged by indictment in counts 1-4 alleging four different acts of aggravated sexual assault of a child (B.N.) on or about May 27, 1998. Counts 5-7 alleged three different acts of aggravated assault of a child (J.N.) on or about May 24, 1999. Count 8 alleged one act of

aggravated sexual assault of a child involving an act between B.N. and J.N. on or about May 24, 1999. Count 9 alleged one act of sexual assault of a child involving B.N. and J.N., on or about May 24, 1999, but was later abandoned by the State. Counts 10-12 alleged sexual assault of J.N. by three different acts on or about May 24, 2000. Count 13 alleged indecency with a child by contact involving A.N. on or about August 10, 2001. Count 14 alleged indecency with a child by contact involving R.R. on or about February 27, 2005. Count 15 alleged indecency with a child by contact involving D.O. on or about September 27, 2015.

At trial, the child complainants—all of whom except one were of adult age at the time of trial—testified regarding the acts charged in the indictment. In addition, Navarro’s ex-wife and former girlfriends testified regarding the charged acts. Two of the former girlfriends had witnessed Navarro assaulting B.N. and had also participated in sex acts with B.N.; at the time of trial, one had been prosecuted for her sexual abuse of B.N. and the other was facing charges for assaulting B.N. The jury found Navarro guilty of counts 1-8 and 10-14, and not guilty of count 15. The jury recommended 99 years’ confinement plus a \$10,000 fine on counts 1-8, and 20 years’ confinement plus a \$10,000 fine on counts 10-14. The trial court granted the State’s motion to cumulate the sentences, and imposed the jury’s recommended sentences, running each sentence consecutively, resulting in a total term of imprisonment of 892 years and a fine of \$130,000. Navarro timely appealed.

DISCUSSION

On appeal, Navarro contends the trial court abused its discretion in permitting State’s witness Caroline Hall to testify about an incident where she observed Navarro engaging in sex acts with other men, and that Navarro then forced her to have sex with one of the men. Navarro argues that the testimony was not relevant to the charged offenses, which all involved children. Navarro further contends that he did not “open the door” to this evidence, and it did not relate to any

defensive theory. He explains that the error was harmful because it was impermissible bad character evidence offered to show that if he had engaged in sex acts with other men, and forced a woman to have sex with another man, then he might engage in sex acts with children.

We review a trial judge's decision to admit or exclude evidence for abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial judge's decision is an abuse of discretion only when it falls outside the zone of reasonable disagreement. *Id.* at 83. An evidentiary ruling will be upheld if it is correct on any theory of law applicable to the case. *Id.* at 93. The first step in determining whether evidence is admissible is to determine whether it is relevant. *Id.* at 83. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. TEX. R. EVID. 401; *Henley*, 493 S.W.3d at 83-84.

Trial Record

B.N. is Navarro's niece. At trial, B.N. testified that when she was a child, she would often spend time at Navarro's house. While she was in elementary school, B.N. endured years of sexual abuse by Navarro, who touched her breasts, placed his mouth on and inserted his fingers into her genitals, engaged in vaginal and anal intercourse with her, and forced her to perform oral sex on him. In addition to this abuse, Navarro also forced B.N. and another young male, J.N., to engage in sexual acts with each other. Navarro took B.N. and J.N. into a playroom, and told J.N. to get on top of B.N. and insert his penis inside her. B.N. also testified that Navarro made her and J.N. "do things to each other." B.N. specified that Navarro forced her and J.N. to perform oral sex on each other and also forced her to have vaginal intercourse with J.N. J.N. corroborated much of B.N.'s testimony at trial. In addition, J.N. testified that Navarro performed oral sex on him and that he performed oral sex on Navarro. Navarro also forced J.N. to perform anal sex.

During opening statements, defense counsel discussed a state expert witness, Dr. William Carter, who would testify to “respond to questions by the prosecution and defense regarding various aspects of child sexual abuse.” Defense counsel continued:

. . . I believe he’s also going to tell you that cross gender switching in these types of cases is extremely rare. Extremely rare. And so these acts that allegedly happened to [J.N.] almost is what makes the story even more unbelievable because those types of things typically don’t happen. I mean, you got somebody — I believe he’ll tell you got somebody who’s actually diagnosed with this type of affliction, a pedophile type of affliction, they typically stay gender specific.

At trial, Dr. Carter testified that it was possible for some sexual perpetrators to be interested in children as well as adult men and women, and that it was not uncommon for a sexual perpetrator to abuse both boys and girls.

Caroline Hall dated and lived with Navarro during the time he assaulted B.N. During Hall’s testimony, the State approached the bench and the following exchange occurred:

State: In [the Defense’s] opening statements, [defense counsel] made comments about the cross gender abuse. This witness witnessed the defendant having sex with men and forced — and also forced her to have sex with men. I believe that’s permissible based on [counsel’s] opening statement regarding it being rare for [Navarro] to sexually abuse a male.

The Court: We’re talking about —

Defense Counsel: Those are consensual adults acts, if they happened.

The Court: But they are admissible.

Defense Counsel: They’re not against a child so I think they’re irrelevant.

The Court: I don’t think they’re irrelevant. I’ll allow it.

In the jury’s presence, the prosecutor asked Hall if she ever saw Navarro having sex with other men, and Hall stated that she saw this occur in their home on Stockdale Highway, that two other men were involved, but she only knew one of them, that she saw one of the men engage in anal sex with Navarro, and that Navarro forced Hall to have sex with one of the men. Navarro testified

on his own behalf at trial. In response to Hall's testimony, Navarro explained that he, Hall, and another woman had once engaged in sex together as a "threesome," and that Hall's testimony actually concerned this event.

Analysis

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. TEX. R. EVID. 404(b). However, such evidence is admissible when the extraneous act is: (1) relevant to a fact of consequence in the case aside from its tendency to show action in conformity with character and (2) its probative value is not substantially outweighed by the danger of unfair prejudice. *Banks v. State*, 494 S.W.3d 883, 891-92 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); see TEX. R. EVID. 401, 402, 403, 404(b).

Otherwise inadmissible evidence may become admissible when a party opens the door to such evidence. A party opens the door by leaving a false impression with the jury that invites the other side to respond. *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009); *Daggett v. State*, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005); *Sandoval v. State*, 409 S.W.3d 259, 302 (Tex. App.—Austin 2013, no pet.). In addition, when a defense witness presents a picture that the defendant is not the type of person to commit the charged offense, the prosecution may impeach that witness's testimony by introduction of similar extraneous offenses. *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002) (citing *McIlveen v. State*, 559 S.W.2d 815, 822 (Tex. Crim. App. 1977)); *Roberts v. State*, 29 S.W.3d 596, 601 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); see, e.g., *Garcia v. State*, 308 S.W.3d 62, 67-68 (Tex. App.—San Antonio 2009, no pet.) (by eliciting testimony from defendant on direct examination broadly disclaiming that he had ever sexually assaulted someone, defense counsel opened door for State to cross-examine defendant and to present rebuttal evidence of extraneous offense of same character as charged

aggravated sexual assault). The Court of Criminal Appeals has held that opening statements are sufficient to open the door to the admission of extraneous conduct. *See Bass v. State*, 270 S.W.3d 557, 562 (Tex. Crim. App. 2008); *Powell v. State*, 63 S.W.3d 435, 440-41 (Tex. Crim. App. 2001); *see also Gaytan v. State*, 331 S.W.3d 218, 224-26 (Tex. App.—Austin 2011, pet. ref'd).

Here, Navarro's attorney opened the door to the extraneous conduct during opening statements when she stated that Dr. Carter would testify that cross-gender abuse was extremely rare, thus implying that the allegations against Navarro must be false because the type of incidents the State was going to present—that Navarro sexually assaulted both B.N., a female, and J.N., a male, and that he also forced them to perform sex acts with each other—"just don't typically happen." Hall's testimony was relevant in that it tended to show that Navarro had a sexual interest in both males and females, and also that he tended to force others to unwillingly perform sexual acts. Based on our review of the record, we cannot conclude the trial court's ruling was outside the zone of reasonable disagreement. We thus hold that the trial court did not abuse its discretion in deciding that Hall's testimony was admissible to rebut defense counsel's statement that it was "unbelievable" that Navarro would assault J.N.

CONCLUSION

Based on the foregoing, we overrule Navarro's sole issue on appeal and affirm the judgment of the trial court.

Rebeca C. Martinez, Justice

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