In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-19-00292-CR
NO. 09-19-00293-CR
NO. 09-19-00294-CR
NO. 09-19-00295-CR
NO. 09-19-00296-CR

RICHARD MICHAEL HILL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause Nos. 18-10-13615-CR, 18-10-13616-CR, 18-10-13618-CR,
18-10-13619-CR, 18-10-14180-CR

MEMORANDUM OPINION

A jury convicted appellant Richard Michael Hill of four charges of indecency with a child by exposure and one charge of indecency with a child by sexual contact. In trial cause number 18-10-14180-CR, the jury assessed Hill's punishment at twenty years of confinement for the offense of indecency with a child by sexual

contact and assessed a $10,000 fine. In trial cause numbers 18-10-13615-CR, 18-10-13616-CR, 18-10-13618-CR, and 18-10-13619-CR, the jury assessed Hill's punishment at confinement for ten years and a fine of $10,000 for each of the exposure offenses. The trial court ordered that the sentences would run consecutively. We affirm the trial court's judgment of conviction in each cause.

In his sole issue in each case, Hill complains about the admission of extraneous offense evidence. Hill contends that the trial court erred in allowing J.N. to testify regarding an alleged extraneous offense during the guilt-innocence portion of his trial. According to Hill, J.N.'s testimony tainted all five of his cases by forcing Hill to not testify on his behalf. We review a trial court's admission of extraneous offenses or acts under an abuse of discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). We must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002).

Rule 404(b) of the Texas Rules of Evidence provides that evidence of a crime, wrong, or other act is not admissible to prove a person's character to show that the person acted in accordance with the character on a particular occasion, but it may be admissible for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . ."

Tex. R. Evid. 404(b)(2). The list of enumerated purposes for which an extraneous offense may be admissible under Rule 404(b) is neither exclusive nor exhaustive. *Montgomery*, 810 S.W.2d at 388. Evidence of extraneous acts may be admissible if it has relevance apart from its tendency to prove a person's character to show that he acted in conformity therewith. *Id*. at 387. However, the fact that evidence of extraneous acts is introduced for a purpose other than character conformity does not, standing alone, make the evidence admissible. *See Webb v. State*, 36 S.W.3d 164, 180 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Proffered evidence must also be relevant to a fact of consequence in the case. *Id*. Evidence is relevant if it tends to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. Tex. R. Evid. 401.

Rule 403 of the Texas Rules of Evidence provides as follows: "The court may exclude relevant evidence if 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. "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. Once a trial court determines that extraneous offense evidence is admissible under Rule 404(b), the trial court must, upon proper

objection by the opponent of the evidence, weigh the probative value of the evidence against its potential for unfair prejudice. *Id*.; *see* Tex. R. Evid. 403.

> [A] Rule 403 analysis[] must balance (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 637, 641-42 (Tex. Crim. App. 2006); *see also Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). However, if the only value of extraneous offense evidence is to show character conformity, the balancing test required by Rule 403 is obviated because the "rulemakers hav[e] deemed that the probativeness of such evidence is so slight as to be 'substantially outweighed' by the danger of unfair prejudice *as a matter of law*." *Montgomery*, 810 S.W.2d at 387 (quoting *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978)).

We will not overturn a conviction if, after an examination of the record as a whole, we have fair assurance that the erroneous admission of extraneous-offense evidence either did not influence the jury or had but slight effect. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). When the trial court provides a limiting instruction regarding the jury's consideration of extraneous offense

evidence, we presume that the jury followed the trial court's instructions. *See Renteria v. State*, 206 S.W.3d 689, 707 (Tex. Crim. App. 2006).

The record shows that the State proffered J.N.'s testimony under Rule 404(b) outside the presence of the jury. J.N. testified that she is Hill's adopted sister, and that she met Hill when she was thirteen years old. J.N. testified concerning two incidents that occurred in Illinois when she was seventeen years old. J.N. explained that the first incident occurred when she was on the couch with Hill, and J.N. explained that Hill put his hand down her pants and put his fingers inside her vagina. J.N. testified that the next morning, Hill came into her bedroom while she was in bed, pulled off her covers, touched her breast with his hand, and masturbated on the side of her bed. According to J.N., she saw Hill's penis while he was masturbating.

The trial judge initially determined that he was not going to allow the extraneous-offense testimony under Rule 404(b). The prosecutor argued that she was offering the extraneous offenses under Rule 404(b) for the purpose of proving Hill's intent to arouse or gratify his sexual desire and to rebut the defensive theory raised during opening statements and cross-examination that the current and out-of-state allegations were false. The prosecutor argued that four of the five out-of-state victims, who are all related to Hill, were ready to testify regarding the acts of sexual abuse that Hill had committed against them. Defense counsel argued that the Illinois allegations were distinct in significant ways and that it would be highly prejudicial

to allow evidence concerning the allegations to be admitted. Defense counsel maintained that he was only using the Illinois allegations to show that the children were indirectly manipulated into making the current outcries because one witness had used the Illinois allegations to create the negative inference that Hill was a pedophile.

After considering the arguments of counsel regarding the admissibility of the extraneous offense evidence, the trial court allowed J.N. to testify concerning one allegation, but the trial court found that J.N.'s and the other witnesses' testimony concerning allegations that involved penetrative contact was too prejudicial under Rule 403. Before J.N. testified at trial, the trial court instructed the jury that it could not consider J.N.'s testimony unless it found beyond a reasonable doubt that the defendant committed such other crimes and that it could only use J.N.'s testimony regarding other crimes, wrongs, or acts to determine the intent of the defendant, if any, in connection with the offense alleged in the indictment and for no other purpose. J.N. testified that she was Hill's adopted sister and that when she was seventeen years old, Hill came into her bedroom while she was in bed, pulled off her covers, touched her breast, and masturbated over her while he was standing on the side of her bed. The record shows that in each case, the trial court's charge instructed the jury that it could not consider testimony regarding crimes, wrongs, or acts other than the charged offense unless it found beyond a reasonable doubt that the

defendant committed such other crimes. The trial court likewise instructed the jury that it could only consider extraneous offense evidence "in determining the motive, opportunity, intent, knowledge, and identity of the Defendant[.]"

Based on the record as a whole, we conclude that the extraneous offense evidence was relevant to show intent, and the trial court did not err by so concluding. *See* Tex. R. Evid. 404(b)(2); *Montgomery*, 810 S.W.2d at 387. In addition, we conclude that the trial court properly performed the balancing test required by Rule 403. *See* Tex. R. Evid. 403; *Gigliobianco*, 210 S.W.3d at 641-42. The trial court did not err by implicitly determining that the evidence did not tend to suggest deciding the case on an improper basis, or confuse or distract the jury, and the evidence did not consume an inordinate amount of time or merely repeat previously admitted evidence. *See Gigliobianco*, 210 S.W.3d at 641-42. Furthermore, the trial court gave the jury a limiting instruction, and we presume that the jury followed the trial court's instructions. *See Renteria*, 206 S.W.3d at 707. After examining the record as a whole, we have fair assurance that the admission of extraneous-offense evidence either did not influence the jury or had but slight effect. *See Taylor*, 268 S.W.3d at 592. Accordingly, we overrule Hill's sole issue and affirm the trial court's judgments in each case.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on July 15, 2020
Opinion Delivered July 29, 2020
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.