In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00441-CR

GABRIEL FERNANDEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Randall County, Texas
Trial Court No. 25,980-B, Honorable John B. Board, Presiding

June 26, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Gabriel Fernandez, appellant, appeals his conviction for sexual assault.[1] Appellant raises three issues challenging his conviction. We will affirm.

[1] *See* TEX. PENAL CODE ANN. § 22.011 (West Supp. 2017).

Background

Appellant was a neighbor of the complainant, "Anne."[2] One evening in May of 2015, appellant was at Anne's family's home talking to her parents. During the visit, appellant offered Anne a job cleaning a house he had recently put up for sale, and Anne accepted. The following morning, appellant sent Anne a text message asking if he could come over to her house. Anne agreed, assuming appellant was coming to discuss the cleaning job. Anne's parents had left the house for work and Anne, who was nineteen years old at the time, had driven her younger sister to school.

Appellant came to Anne's house and the two engaged in casual conversation in the kitchen and the living room. Anne sat in the middle of the living room couch to play with her two small dogs. Appellant then sat down next to her. As appellant began moving closer to her, Anne moved away. Appellant put his arm around Anne, scratched her back, and told her she was pretty. Then, he grabbed her inner thigh and pulled her toward him. He began kissing her neck and her chest. Anne said "no" and told him "that this wasn't right." He responded that they "were just messing around."

Appellant stood and pushed Anne's shoulders back so that she was lying on her back. Appellant removed Anne's shorts and started unbuckling his pants. He pushed up her sports bra and T-shirt and continued kissing her. Anne did not speak. Appellant inserted his penis into Anne's vagina. He ejaculated, then put

[2] To protect the complainant's identity, we will use a pseudonym. *See* TEX. CONST. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

his pants back on and told her not to tell anyone what had happened. After hugging Anne and telling her she was pretty, appellant left.

Anne called a friend who lived nearby but got no response. She then called her father and told him that appellant had forced himself on her. Her father replied that he was on his way and he left work immediately. Anne's father called 911 and then asked a coworker to notify his wife.

Officers from the Randall County Sheriff's Office quickly arrived at Anne's home and began investigating. Soon thereafter, Anne was taken to the hospital and given a sexual assault exam. Both the sergeant from the sheriff's office and the sexual assault nurse examiner testified that Anne was crying, upset, and vomiting.

Appellant was arrested later that day and charged with sexual assault. Following a jury trial, appellant was convicted and sentenced to twenty years' imprisonment and a $10,000 fine.

Issue One: Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is insufficient to prove that he knew that Anne did not consent to sexual activity.

Standard of Review

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a fact finder in concluding that every element of

the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). When we review all of the evidence under this standard of review, the ultimate question is whether the jury's finding of guilt was a rational finding. *See id.* at 906 n.26. We are required to "defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899.

Applicable Law

A person commits the offense of sexual assault if he intentionally or knowingly causes the penetration of the anus or sexual organ of another person by any means, without that person's consent. TEX. PENAL CODE ANN. § 22.011(a)(1)(A). The sexual assault statute lists several circumstances under which a sexual assault is without consent. *Id*. § 22.011(b). As is relevant to this case, a sexual assault is without the consent of the other person if the actor compels the other person to submit or participate by the use of physical force or violence. *Id.* § 22.011(b)(1).

Sexual assault is marked by the attacker's compulsion, not by the victim's resistance. *Gonzales v. State*, 2 S.W.3d 411, 415 (Tex. App.—San Antonio 1999, no pet.) (citing *Wisdom v. State*, 708 S.W.2d 840, 842–43 (Tex. Crim. App. 1986)). The degree of physical resistance by a victim does not render the evidence insufficient to prove the lack of consent. *Id.* Furthermore, the mere fact that a defendant did not see resistance or hear any outcry during the encounter is no

evidence that the complainant consented to the act. *Hawkins v. State*, 509 S.W.2d 607, 608 (Tex. Crim. App. 1974).

Analysis

Here, appellant admits to having sexual intercourse with Anne, but disputes that the evidence is sufficient to establish that he knew of, yet disregarded, her lack of consent. Appellant argues that there is no evidence, direct or indirect, that he understood Anne did not want to have sex and intentionally had sex with her anyway.

Anne's testimony at trial contradicts this claim. Anne testified unequivocally that when appellant began touching and kissing her, "I told him no." She also testified, "I had said that this wasn't right." The complainant's testimony that she did not consent to engaging in sexual intercourse with appellant is sufficient, by itself, to establish a lack of consent. *See Everson v. State*, No. 01-07-00510-CR, 2008 Tex. App. LEXIS 4834, at *10 (Tex. App.—Houston [1st Dist.] June 26, 2008, pet. ref'd) (mem. op., not designated for publication).

In addition, Anne testified that she attempted to "scoot away" as appellant advanced toward her while seated on the couch. She stated that she was initially seated in the middle of the three-seat couch, then appellant sat on the right side and "kept scooting closer." In response, Anne moved away until she was in the left seat and appellant was in the middle seat. The sexual assault nurse who treated Anne after the assault testified that Anne told her she had been "really uncomfortable" when appellant sat next to her. Anne told the nurse she wanted to get away and was "grossed out because [appellant] was like my dad's age, but he kept pulling me to him."

The jury also heard evidence from Anne's parents, both of whom spoke with her on the phone shortly after the assault. Anne's father testified that Anne was "hysterical" and "couldn't talk," and Anne's mother described Anne as "bawling hysterically" when she called. The sergeant from the Randall County Sheriff's Office who was dispatched to the home testified that Anne was "shaking and crying uncontrollably" when he arrived and that Anne soon began vomiting. The nurse also testified that Anne was crying, upset, and vomiting at the hospital.

From this evidence, one could infer that appellant knew that Anne was not a willing participant and did not consent to his actions. *See Jackson*, 443 U.S. at 319 (it is the jury's task to draw "reasonable inferences" from the evidence).

Appellant also argues that there was no evidence he compelled Anne by the use of physical force or violence. As the offense was alleged, the State could prove lack of consent by showing that appellant used physical force or violence or threatened physical force or violence to compel Anne to submit. TEX. PENAL CODE ANN. § 22.011(b)(1). "There is no requirement that a certain amount of force be used, only that it is used." *Gonzales*, 2 S.W.3d at 415. Here, there was evidence that appellant used force. Anne testified that appellant grabbed her leg and pulled it close to him, then pushed her shoulders so that she was lying on the couch. This is sufficient evidence to support the finding of physical force in a sexual assault case. *See, e.g., Edoh v. State*, 245 S.W.3d 606, 609 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (evidence sufficient where defendant grabbed complainant's arm, pulled her down, and had sexual intercourse without her consent).

Viewing this evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient to support the jury's decision that Anne did not consent to the sexual act by appellant. We overrule appellant's first issue.

Issue Two: Evidence of Extraneous Offense

In his second issue, appellant asserts that the trial court abused its discretion by admitting extraneous-offense evidence pertaining to an alleged sexual assault involving another woman and by overruling his objection to the admission of that evidence. Appellant argues further that, if the evidence was admissible, its probative value was substantially outweighed by the danger of unfair prejudice to him.

Standard of Review

We review a trial judge's decision on the admissibility of evidence under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). A trial judge's decision will not be reversed if it is within the zone of reasonable disagreement. *Id.*

Applicable Law

Texas Rule of Evidence 404(b)(1) prohibits the admission of extraneous offense evidence to prove a person's character to show that the person acted in conformity with that character. TEX. R. EVID. 404(b)(1). Extraneous offenses may be admissible, however, to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See id.* 404(b)(2); *Montgomery v. State*, 810 S.W.2d 372, 387–88 (Tex. Crim. App. 1991) (op. on reh'g). Also, evidence of extraneous acts may be admissible to rebut defensive theories. *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). "[W]hen the defensive theory of consent is raised in a prosecution for

sexual assault, the defendant necessarily disputes his intent to engage in the alleged conduct without the complainant's consent and [thereby] places his [own] intent to commit sexual assault at issue." *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007) (citing *Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980)). When a defendant contests the issue of consent, the State may introduce evidence of incidents involving the defendant with a similar pattern of behavior in order to show his intent and the lack of mistake regarding the consent of the complainant. *Brown v. State*, 96 S.W.3d 508, 512 (Tex. App.—Austin 2002, no pet.).

Analysis

At trial, appellant's defense was clearly focused on the issue of consent. During voir dire, appellant's attorney characterized the case as, "The man says we had consensual sex, the woman says no." In his opening statement, he asserted that "there is ample evidence that this was an act of consent between two consenting adults." Additionally, in his cross-examination of Anne, appellant's counsel highlighted her silence and stillness during the assault; he argued that there was no evidence of force, violence, or physical trauma, and no evidence that Anne screamed or called 911, all with the aim of implying that she consented to appellant's actions.

Before it rested, the State requested that it be allowed to offer evidence of an extraneous offense. The court then conducted a hearing outside the presence of the jury during which the witness, "Brenda," testified that she was sexually

assaulted by appellant in 2006.[3] After conducting a balancing test and determining that the probative value of the evidence outweighed its prejudicial effect, the court concluded that the evidence was admissible for the limited purpose of showing intent, knowledge, or lack of consent. The jury returned and the trial court gave limiting instructions regarding its consideration of Brenda's testimony. The State then called Brenda as its last witness.

Brenda testified that she previously lived in the same apartment complex as appellant. In July of 2006, appellant came to her apartment to talk to her teenaged son, who worked for him. Her son was gone, so she told appellant he could wait there for him to return. When Brenda went to her bedroom for a phone call, appellant followed her into the room. He sat on the floor near her and began rubbing her legs. She told appellant to quit, ended her phone call, and moved toward the door. Appellant grabbed her and pushed her onto the bed. He removed her shorts, pulling her off the bed and onto the floor in the process. He then sexually assaulted her. Brenda testified that she was pushing appellant away, "telling him to quit" and "to please stop" during the assault.

Brenda reported the assault to the police and went to the hospital for her injuries. She testified that when she later called to check on the status of her case, she was told that they had lost her file; consequently, the case was not prosecuted.

This evidence was offered to rebut the defensive theory of consent. Brenda's testimony of a sexual assault committed in her home, by her neighbor (appellant) who gained access to the home by virtue of his status as a friend of a family member, and who followed her into a room where they were alone and assaulted her there, was probative of appellant's intent and the issue of consent. Appellant contends that because Brenda

[3] The witness is referred to by a pseudonym to protect her identity and privacy.

was older, physically resisted appellant more than Anne did, and vocalized her objections more than Anne did, Brenda's circumstances are too dissimilar to Anne's to be relevant. We disagree; the attack on Brenda was under circumstances adequately similar to those described by Anne. Moreover, we note that the Court of Criminal Appeals has held that less similarity is needed to establish admissibility of an extraneous offense when it is offered to establish intent rather than identity. *Plante v. State*, 692 S.W.2d 487, 492–93 (Tex. Crim. App. 1985); *see also Dennis v. State*, 178 S.W.3d 172, 179 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (similarity required to admit extraneous offense evidence to rebut appellant's frame-up defense is less than that required when extraneous evidence is used to show "defendant's system"). Here, the evidence was relevant as it served to make less probable the defensive theory that appellant did not intend to have sex with an unwilling participant. The trial court did not abuse its discretion in admitting the extraneous offense evidence.

In the second part of appellant's second issue, he contends that, even if the evidence of the extraneous offense was admissible under Rule 404(b), it should have been excluded under Rule 403. Evidence may be excluded under Rule 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403. Rule 403 requires the trial court to perform a balancing test of the factors listed in the rule. The factors to consider are: (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable; (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way"; (3) the

time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to her to help establish this fact, and is this fact related to an issue in dispute. *De La Paz v. State*, 279 S.W.3d 336, 348–49 (Tex. Crim. App. 2009) (quoting *Wyatt v. State*, 23 S.W.3d 18, 26 (Tex. Crim. App. 2000)).

As for the first factor, we have already determined that Brenda's testimony made a fact of consequence, i.e., whether appellant acted without consent, more likely. As for the second, we recognize that her testimony had the potential to affect the jury in an emotional way due to the nature of the offense. However, Brenda's testimony was not overly graphic. We also note that immediately before Brenda testified, the trial court gave a limiting instruction on the extraneous offense. The trial court's instruction, given both orally and in the written charge, properly limited the jury's reliance on the extraneous offense evidence to issues of "intent, knowledge, or to rebut the issue of consent . . . and for no other purpose." The third factor examines the time needed to develop the evidence. Here, the State did not devote a significant amount of time to the presentation of the evidence; the trial judge remarked that the direct and cross-examination during the evidentiary hearing was "pretty brief," and accomplished in approximately fifteen minutes out of a three-day trial. The fourth factor requires consideration of the State's need for the extraneous evidence. The evidence was probative as rebuttal evidence against the defensive theory of consent, which was the central issue in the case. Throughout the trial, appellant vigorously asserted that the encounter was consensual. Brenda's

testimony to a similar encounter with appellant strongly served to make the lack of consent more probable.

Based on our review of the relevant factors, we conclude that the trial court's ruling was not outside the zone of reasonable disagreement. Therefore, the trial court did not abuse its discretion in admitting the extraneous offense evidence over appellant's objection. We overrule appellant's second issue.

Issue Three: Improper Comment

In his third issue, appellant argues that the State impermissibly commented on his failure to testify in violation of the United States Constitution, Constitution of the State of Texas, and the Texas Code of Criminal Procedure. *See* U.S. CONST. amends. V and XIV; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (West 2005) (a defendant need not testify and his failure to testify shall not be alluded to or commented on by counsel).

Standard of Review

A comment on an accused's failure to testify violates the accused's state and federal constitutional privileges against self-incrimination. *Moore v. State*, 849 S.W.2d 350, 351 (Tex. Crim. App. 1993) (Baird, J., concurring) (en banc). The prohibition against a direct comment on the accused's failure to testify is mandatory. *Tovar v. State*, 777 S.W.2d 481, 489 (Tex. App.—Corpus Christi 1989, pet. ref'd).

The Court of Criminal Appeals has explained that challenged comments "must be viewed from the jury's standpoint" and the standard is "whether the language used was manifestly intended or was of such a character that the jury

would necessarily and naturally take it as a comment on the defendant's failure to testify." *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001). If the complained-of remark called the jury's attention to the absence of evidence that only the testimony from appellant could supply, the conviction is subject to reversal. *Garrett v. State*, 632 S.W.2d 350, 353 (Tex. Crim. App. 1982).

Analysis

In closing arguments, the prosecutor stated, "Ladies and gentlemen, you – you got to hear the evidence in this trial, and every single witness that took that stand told you it was without consent. [Anne] was the only person that was there and she told you it was without consent. She told you that she said no." Defense counsel made no objection to the State's argument.

In the context of reminding the jury of the witnesses' testimony on the issue of consent, the prosecutor mentioned "every single witness that took that stand." This group did not include appellant, who exercised his privilege against self-incrimination. Further, the prosecutor characterized Anne as "the only person that was there." Since Anne was obviously not the only person who was there during the assault, this comment signified that Anne was the only person there *who testified about it*. The statement therefore alluded to the absence of testimony from the only other person present during the assault: appellant. In our assessment, the prosecutor's remark impermissibly called the jury's attention to the absence of evidence that only the testimony from appellant could supply. *See Norton v. State*, 851 S.W.2d 341, 346 (Tex. App.—Dallas 1993, pet. ref'd) (prosecutor's comment that "[t]here were only two people out there and we heard from

one of them" is a direct comment on the accused's failure to testify and, therefore, reversible error).

However, appellant did not object to this comment at trial. Generally, to preserve an issue for appellate review, a timely and specific objection is required. TEX. R. APP. P. 33.1(a). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010) (op. on reh'g) (per curiam).

Appellant concedes that the Court of Criminal Appeals has held that an improper comment on the defendant's failure to testify is waived by a failure to object. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). However, appellant claims that in *Cockrell*, the defendant only advanced the argument that his constitutional privilege against self-incrimination was violated; the defendant did not also assert that the challenged comment was prohibited by statute (article 38.08 of the Texas Code of Criminal Procedure). Here, appellant argues that the prosecutor's improper comment violated not only his constitutional privilege against self-incrimination, but also his right to due process and the statutory prohibition of article 38.08. Consequently, appellant urges, no objection was necessary to preserve error.

We disagree. "Almost every right, constitutional or statutory, may be waived by a failure to object." *Salinas v. State*, 88 S.W.3d 677, 683 (Tex. App.—San Antonio 2002, no pet.) (citing *Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986)). Moreover, the Court of Criminal Appeals has reiterated the need for error preservation in cases of improper jury argument. *See Estrada v. State*, 313

S.W.3d 274, 303 (Tex. Crim. App. 2010). Absent an objection to jury argument at trial, nothing is presented for review. *See* TEX. R. APP. P. 33.1(a)(1); *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004).

We conclude that because appellant did not assert any objection to the State's argument at trial, he failed to preserve this complaint for appellate review. We overrule appellant's third issue.

Conclusion

Having overruled each of appellant's three issues, we affirm the trial court's judgment.

Judy C. Parker
Justice

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