In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00063-CR

JESSE TYLER RILEY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Randall County, Texas,
Trial Court No. 29,251-B, Honorable John B. Board, Presiding

October 19, 2020

MEMORANDUM OPINION

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

Appellant, Jesse Tyler Riley, appeals from his conviction for aggravated sexual assault of a child younger than 14. Through five issues, he contests the sufficiency of the evidence and the admission of evidence from two witnesses in violation of the rules of evidence and the Texas Code of Criminal Procedure. We affirm.

Issue Five – Sufficiency of the Evidence

We address appellant's fifth issue first because if sustained it would afford him the greatest relief. *See Hutchinson v. State*, 07-19-00389-CR, 2020 Tex. App. LEXIS 7782,

at *2–3 (Tex. App.—Amarillo Sept. 23, 2020, no pet. h.) (mem. op., not designated for publication). Through it, he alleges that the evidence supporting conviction was insufficient because the "physical evidence in the case rebuts [the] assertion" of assault. For instance, there was no trauma to K.'s anus despite the allegation of being raped anally. Or, appellant could not have been standing in the bedroom doorway to beckon K., as she posited, because the door was locked. Or, the tight confines of the trailer house wherein the assault supposedly occurred coupled with no one hearing the event belied that it actually occurred. We overrule the issue.

First, the standard of review we apply here was explained in *Braughton v. State*, 569 S.W.3d 592 (Tex. Crim. App. 2018). Second, the aggravated sexual assault of a child may be established through the uncorroborated testimony of the child victim. TEX. CODE CRIM. PROC. ANN. art. 38.07(a) & (b)(1) (West Supp. 2019); *Marquez v. State*, No. 07-19-00137-CR, 2020 Tex. App. LEXIS 3248, at *1–2 (Tex. App.—Amarillo Apr. 16, 2020, pet. ref'd) (mem. op., not designated for publication); *Ryder v. State*, 514 S.W.3d 391, 396 (Tex. App.—Amarillo 2017, pet. ref'd). Third, to find appellant guilty of aggravated sexual assault as alleged in the indictment at bar, the State had to prove that appellant intentionally or knowingly caused the penetration of the child's anus by appellant's sexual organ as charged in the indictment and as required by section 22.021 of the Texas Penal Code. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i) (West Supp. 2019). This said, we turn to the evidentiary record.

K., a 12 to 13 year old at the time, testified to 1) spending the night with appellant's daughter, 2) awakening to find appellant at the doorway of the bedroom in which they slept, 3) hearing appellant beckoning her to follow him, 4) feeling appellant grab her arm

and being led into the bathroom, 5) appellant disrobing her, placing her on a sink, unsuccessfully attempting to spread her legs, forcing her to the floor, and penetrating her anus with his penis as she was on her hands and knees, 6) being placed in the shower and washed, and 7) appellant directing her to tell no one of what happened. That is some evidence upon which a rational jury could conclude beyond reasonable doubt that appellant committed the offense of aggravated sexual assault as alleged in the indictment. The contradictory "physical evidence" alluded to by appellant simply created issues of fact and credibility for the jury to resolve and assess, respectively. How it resolved or assessed them are matters with which we cannot interfere.

Issues One and Two – Article 38.37 and Rule 403

Through issues one and two, appellant contends that the trial court erred in admitting extraneous testimony of an alleged sexual assault he committed on another minor some 15 years earlier. The testimony fell outside the scope of article 38.37 of the Code of Criminal Procedure, and its prejudicial value far outweighed its probative worth, according to him. We overrule the issues.

A trial judge has wide discretion in admitting or excluding evidence at trial. *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007); *Montgomery v. State*, 810 S.W.2d 372, 378–79 (Tex. Crim. App. 1990) (op. on reh'g). Furthermore, we review the exercise of that discretion under the standard of abused discretion. *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010). That standard precludes us from interfering with the decision so long as it fell within the zone of reasonable disagreement, *id.*, and was correct under any theory of law applicable to the case. *State v. Esparza*, 413 S.W.3d 81, 82 (Tex. Crim. App. 2013); *Ryder*, 514 S.W.3d at 398.

Next, article 38.37, section 2(b) provides: "[n]otwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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." TEX. CODE CRIM. PROC. art. 38.37, § 2(b) (West 2018). Before the evidence may be introduced, however, the trial judge must 1) decide if it will be adequate to support a finding by the jury that the defendant committed the extraneous offense beyond a reasonable doubt and 2) conduct a hearing outside the jury's presence for that purpose. *Id.* art. 38.37, § 2-a; *Rambo v. State*, No. 07-18-00214-CR, 2019 Tex. App. LEXIS 2206, at *3–4 (Tex. App.—Amarillo Mar. 20, 2019, pet. ref'd) (mem. op., not designated for publication).

The required hearing was held by the trial court. During it, C. testified to being 13 years old when she engaged in sexual intercourse with appellant, who directed her not to divulge the event. Appellant was about 19 years old at the time. She further testified to denying its occurrence and explained why she so denied it. Those reasons consisted of her being 13 years old and living in a small town, her mother being in the room when asked by the police about it, and her fearing that the disclosure would cause her trouble.

A 19 year old engaging in sexual intercourse with a 13 year old is a criminal act. *See* TEX. PENAL CODE ANN. § 22.011(a)(2)(A) (West Supp. 2020) (stating that it is an offense for a person to cause the penetration of the anus or sexual organ of a child by any means); *id.* § 22.011(c)(1) (defining a child as a person under 17). Since the testimony of a child alone is enough to prove the assault, C.'s words were enough to

establish that appellant sexually assaulted her. As for appellant's suggestion that the testimony was too incredible to be believed, that was a matter for the jury to decide, not the court. *Stanley v. State*, No. 02-17-00084-CR, 2018 Tex. App. LEXIS 4840, at *17 (Tex. App.—Fort Worth June 28, 2018, pet. ref'd) (mem. op., not designated for publication) (so noting when addressing whether the trial court was obligated to assess the credibility of the witness as part of an article 38.37, § 2-a(1) analysis). So, the fact that C. earlier denied the assault's occurrence and, therefore, rendered her testimony contradictory did not *ipso facto* bar the trial court from admitting the evidence. In short, C.'s testimony satisfied the criteria for admissibility under art. 38.37, §§ 2(b) and 2-a.

As for the allegation that its prejudicial effect substantially outweighed its probative value, it purportedly did so for two general reasons. The first reason concerned whether the testimony was believable due to the remoteness of the assault, C.'s previous denial of its occurrence, and the happenstance of its recent discovery by the State. Such is nothing more than a reiteration of appellant's attack upon the credibility of the witness and weight to assign her words. Again, those were matters for the jury to consider when deciding what weight, if any, to afford the evidence. *Stanley v. State, supra*.

The second concerned its need. Allegedly, the State had enough evidence to convict appellant without C.'s testimony. We find this argument a bit ironic given appellant's earlier contention that all the evidence was insufficient to support conviction. If the evidence were insufficient to support conviction, then logic would suggest that C.'s testimony about appellant engaging in like behavior at an earlier time could only enhance the chances of conviction. That, consequently, elevated the evidence's value and the State's need for it.

Issues Three and Four –Objections to Lynn Jennings

In his third and fourth issues, appellant contends the expert testimony of Lynn Jennings was irrelevant, and, therefore inadmissible. So too was its probative value allegedly outweighed by its prejudicial effect. We overrule the issues.

The State presented the expert witness in question to testify about the conduct of children who have been sexually assaulted and reasons for their "delayed outcry," withholding details, inconsistent stories, and the like. Such testimony has been held relevant. *See Brucia v. State,* No. 05-11-00866-CR, 2012 Tex. App. LEXIS 5844, at *13–16 (Tex. App.—Dallas July 19, 2012, pet. ref'd) (not designated for publication) (concluding that expert testimony about a child's reasons for delaying outcry and withholding details at first was relevant and admissible); *Fletcher v. State*, No. 08-09-00122-CR, 2010 Tex. App. LEXIS 7915, at *14 (Tex. App.—El Paso Sept. 29, 2010, pet. ref'd) (not designated for publication) (overruling appellant's relevance complaint because "Dr. Kellogg's expert testimony regarding patterns of disclosure was relevant to explain the various reasons why children delay making a report of sexual abuse and it was sufficiently tied to the facts of this particular case such that it assisted the jury in resolving a factual issue"). As observed in *Brucia*, a "material issue for the jury's determination [is] whether [the child] was sexually abused." *Brucia*, 2012 Tex. App. LEXIS 5844, at *16. The jury's consideration of the issue could be affected by such factors as a delay before outcrying, the manner in which the child outcried, and the way the details were divulged. *Id.* That applied here.

Jennings endeavored to explain how children act after being sexually assaulted, why they delay in making an outcry, what may eventually trigger revelation of the abuse,

and why their description of the events may differ when speaking to different people. And that K. engaged in such behavior cannot be denied. So, we cannot say that the trial court's decision to deem relevant the expert's testimony fell outside the zone of reasonable disagreement. *See Davis*, 329 S.W.3d at 803 (stating that a trial court abuses it discretion in admitting or excluding evidence when the decision falls outside the zone of reasonable disagreement).

Nor did it abuse its discretion in rejecting appellant's Rule 403 objection. We already found that the trial court had basis to admit the testimony as relevant. Yet, weighing against its admission was its supposed potential to distract the jurors from the evidence at hand and instead assess appellant's guilt or innocence on general notions about the wide-spread nature of child abuse. Sadly, that children fall prey to the sexual proclivities of some adults is a well-known topic. Not well known is the effect such conduct has on children and their revelation of the assault. While an expert may not render an opinion about the truthfulness of the particular victim, he or she can explain behavioral patterns assumed by victimized children. *Lee v. State*, No. 12-19-00265-CR, 2020 Tex. App. LEXIS 7305, at *7–8 (Tex. App.—Tyler Sept. 9, 2020, no pet.) (mem. op., not designated for publication). That explanation assists the fact-finder in assessing whether the child can be believed or whether her conduct is consistent with having been assaulted. Appellant labelled K.'s accusation unbelievable because of her nonchalance immediately after the assault, her withholding outcry for about a month, her inconsistencies about the manner and extent of the assault, and the like. Again, Jennings explaining why children actually victimized by assault may act in ways contradicting the fact of an assault was a means of helping the jury to understand K.'s behavior and assess her credibility. Simply

put, the circumstances were enough to place within the realm of reasonable disagreement the decision that any unduly prejudicial effect of the expert's testimony did not substantially outweigh the testimony's probative value.

Accordingly, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

Do not publish.