TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00106-CR

Rudy Martinez, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 426TH JUDICIAL DISTRICT
NO. 71076, THE HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Rudy Martinez, Jr. guilty of aggravated sexual assault of a child for anally raping his niece, M.R., when she was eight years old. *See* Tex. Penal Code § 22.021(a), (2)(B). After hearing further evidence about appellant's abusive conduct toward his ex-wife, the jury assessed appellant's punishment at confinement for life in the Texas Department of Criminal Justice. *See id.* §§ 12.32, 22.021(e). On appeal, appellant complains about the admission of extraneous-conduct evidence during the guilt-innocence phase of trial. Finding no reversible error, we affirm the trial court's nunc pro tunc judgment of conviction.[1]

[1] The original judgment of conviction in this case reflected that appellant was convicted of sexual assault of a child when in fact, due to M.R.'s age, he was convicted of aggravated sexual assault of a child. The trial court subsequently entered a nunc pro tunc judgment reflecting that appellant's conviction was for aggravated sexual assault.

BACKGROUND[2]

The jury heard evidence that M.R.'s parents often left M.R. and her younger sister in appellant's care. On one occasion, when M.R. was eight years old, appellant was babysitting them and M.R. failed to clean her room as instructed. Appellant took her to her mother's bedroom to be punished. M.R. thought she was going to get a spanking. Appellant left the room and returned holding a jar of Vaseline. He bent M.R. over the bed, but instead of spanking her he pulled down her pants, removed his belt, and pulled down his pants. M.R. testified that she felt "a slimy . . . gross thing" touch and then enter her buttocks a few times; it felt "like a slimy force" going "in her butt." At one point, her sister attempted to open the door, but appellant slammed the door closed. Appellant penetrated M.R. "for a minute or two" and then stopped. He pulled up her pants, pulled up his pants, and then the two walked out of the room. M.R. was crying. She immediately told her sister that "[appellant] put it in my butt." Appellant told the girls to "never to speak of what happened." Later that day, on the way to church, M.R. told her dad what appellant had done to her. M.R.'s parents confronted appellant, who denied that anything happened. The incident was never reported to law enforcement and never discussed again until M.R. disclosed the sexual assault—years later—to appellant's wife.

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[2] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

DISCUSSION

Extraneous-Conduct Evidence

During its case-in-chief in the guilt-innocence phase of trial, the State offered evidence of appellant's extraneous sexual misconduct toward his former stepdaughter.[3] In his sole point of error, appellant asserts that the trial court erred in admitting this evidence because it was inadmissible character-conformity evidence.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *Sandoval v. State*, 409 S.W.3d 259, 297 (Tex. App.—Austin 2013, no pet.). A trial court abuses its discretion only if its determination "lies outside the zone of reasonable disagreement." *Martinez*, 327 S.W.3d at 736; *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). A trial court's decision to admit evidence of an extraneous offense is generally within this zone if the evidence shows that (1) an extraneous transaction is relevant to a material, non-propensity issue, and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). If the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, we will uphold that decision. *Id.*; *Sandoval*, 409 S.W.3d at 297.

Texas Rule of Evidence 404(b) prohibits the admission of extraneous conduct ("other crimes, wrongs, or acts") to prove a person's character in order to show that the person acted in

[3] The record reflects that appellant and his wife were divorced at the time of trial, but were married at the time of appellant's alleged sexual misconduct toward his stepdaughter.

conformity with that character. *See* Tex. R. Evid. 404(b). However, extraneous-conduct evidence may be admissible when it has relevance apart from character conformity. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). Extraneous conduct may be admissible for some other purpose, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* Tex. R. Evid. 404(b); *Montgomery v. State*, 810 S.W.2d 372, 387–88 (Tex. Crim. App. 1991) (op. on reh'g). This list is illustrative—the exceptions are neither mutually exclusive nor collectively exhaustive. *See De La Paz*, 279 S.W.3d at 343. Extraneous-conduct evidence may also be admissible to rebut defensive theories raised by the defense. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (rebuttal of defensive theory is "one of the permissible purposes for which [relevant] evidence may be admitted under Rule 404(b)"); *see also Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (recognizing that even defense opening statement opens door to admission of extraneous-offense evidence to rebut defensive theory raised in opening statement). Further, "'Rule 404(b) is a rule of inclusion rather than exclusion.'" *De La Paz*, 279 S.W.3d at 343 (quoting *United States v. Bowie,* 232 F.3d 923, 929 (D.C. Cir. 2000)). "The rule excludes only that evidence that is offered (or will be used) *solely* for the purpose of proving bad character and hence conduct in conformity with that bad character." *Id.* (emphasis added) (citing *Rankin v. State*, 974 S.W.2d 707, 709 (Tex. Crim. App. 1996)).

At trial, after appellant cross examined M.R., the State sought to offer evidence of appellant's sexual misconduct toward his former stepdaughter. During a hearing outside the presence of the jury, the State expressed its intent to elicit the evidence from M.R. and appellant's stepdaughter to rebut appellant's theory that M.R. was fabricating her sexual assault allegations

against appellant.[4] Specifically, the State maintained that the evidence rebutted the defensive theory that M.R. fabricated the allegations to gain attention from her drug-addicted parents or fabricated the allegations to somehow assist appellant's ex-wife who was starting divorce proceedings at the time. The State argued that appellant raised these defensive theories of fabrication in opening statement.

During his opening statement, appellant's counsel made the following comments to the jury:

> . . . What we believe the evidence is going to show is slightly different than that of the prosecution. We believe some of the witnesses will say those things, but when we cross-examine them, they are going to say other things too.
>
> [Appellant] wasn't really the beloved uncle. They are going to admit, the mother and the father, because they were, as the prosecutor mentioned, on drugs most of the time. I believe the evidence will show crack or cocaine.
>
> They didn't discipline their daughter, but they would take their daughter to [appellant] to get her whoopings. And [appellant] had been doing that for years. And actually that might cause some resentment on the daughter. You also heard the name Kathleen Maxwell.
>
> You are going to hear evidence that the victim in this case and Kathleen are very good friends and Kathleen was in the process or in the preliminary stages of going through a divorce with [appellant].
>
> And then you're going to hear each of the witnesses testify about what they're going to testify. And when people lie, they can't keep their story straight.
>
> . . .

[4] The State first offered the evidence during M.R.'s testimony to rebut the defensive theory of fabrication as well as to explain why M.R. reported the sexual assault to the police when she did, years after the assault. Subsequently, the State offered the testimony of appellant's stepdaughter, who testified about the incidents of appellant's sexual misconduct toward her.

> You're going to hear all the testimony about, well, [M.R.] has had a rough life. But you're also going to hear testimony that she was raised by two drug addicts. And common sense tells you after you're being raised by a drug addict, you're not getting the nurturing that you need. And when you grow up, the person you become, well, who do you become when you're raised by someone that's not giving you love, affection and attention that you need.

At the hearing, appellant argued against the admission of the extraneous-conduct evidence, asserting that it did not properly rebut a defensive theory because his defense was not fabrication but that M.R. was lying. Conflating a general credibility attack with fabrication or lying, appellant asserted, "[The evidence] doesn't rebut anything that's proper. Our defensive theory is that she's lying."[5] The trial court admitted the evidence "for [the] limited purpose of rebutting the defense's theory."[6]

On appeal, appellant acknowledges that extraneous-conduct evidence is admissible to rebut a defense of fabrication. *See Bass*, 270 S.W.3d at 563. However, he maintains that "a careful examination of the opening statement . . . by counsel for [appellant], fails to reveal the defensive theories urged by the State upon seeking admission of the extraneous offenses." Thus, according to appellant, the trial court abused its discretion by admitting the evidence to rebut a defensive theory "never put forth by [appellant]."

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[5] The Court of Criminal Appeals has recognized the distinction between a general credibility attack, which does not allow for rebuttal with extraneous-conduct evidence, with a fabrication defense, which permits such rebuttal evidence: "[N]o one suggested that any of these three witnesses is generally a liar, generally untruthful, or generally not worthy of belief. These were not attacks upon the witnesses or appellant for having a bad character for truthfulness; these were accusations of lying about a specific type of event—the occurrence of a drug delivery—under a specific set of circumstances." *De La Paz v. State*, 279 S.W.3d 336, 346 (Tex. Crim. App. 2009) (footnote omitted).

[6] The trial court subsequently gave a limiting instruction to the jury that the extraneous-conduct evidence was to be considered "strictly for the limited purpose of rebutting a defensive theory which has been addressed by the defense in opening statement."

We disagree. Appellant's opening statement can reasonably be understood as presenting the defensive theory that M.R. was lying, suggesting several motives for fabricating the allegations. Appellant's counsel inferred that M.R. was lying because: (1) she resented appellant's discipline of her, (2) she was close with appellant's wife and wanted to assist her in the divorce proceedings against appellant, or (3) she sought attention from her neglectful drug-addicted parents. The fact that appellant's counsel did not explicitly state in his opening statement that M.R. was lying or more directly describe a motive for fabrication does not mean that he did not raise the defense of fabrication. *See Gaytan v. State*, 331 S.W.3d 218, 225 (Tex. App.—Austin 2011, pet. ref'd) (observing that *Bass* court did not suggest that "magic words" are necessary to advance theory of fabrication). It is at least subject to reasonable disagreement whether appellant's opening statement advanced a defensive theory of fabrication. *See id.* at 225–26. Further, based on appellant's opening statement as well as defense counsel's representations to the court during the hearing, it is subject to reasonable disagreement whether the extraneous-conduct evidence was admissible for the noncharacter-conformity purpose of rebutting the defensive theory of fabrication.[7] *See De La Paz*, 279 S.W.3d at 346–47; *Bass*, 270 S.W.3d at 563. Consequently, we cannot say that the trial court's admission of the complained-of extraneous-conduct evidence was an abuse of discretion. We overrule appellant's single point of error.

[7] Again, appellant's counsel explicitly told the trial court during the hearing, "Our defensive theory is that she's lying." Counsel also responded to the State's proffer of the evidence by inquiring, "[H]ow does it rebut a defensive theory other than we're saying she's lying[?]"

CONCLUSION

Having concluded that the trial court did not abuse its discretion by admitting the evidence of appellant's extraneous sexual misconduct with his stepdaughter, we affirm the trial court's nunc pro tunc judgment of conviction.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: February 24, 2016

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