TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00154-CR

Quintin Dawson McCleery, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF CONCHO COUNTY, 119TH JUDICIAL DISTRICT
NO. DAFV-16-01945, HONORABLE BEN WOODWARD, JUDGE PRESIDING

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

Quintin Dawson McCleery was charged with assaulting his wife Salena Smart "by intentionally, knowingly, and recklessly impeding the normal breathing or circulation of blood of [Smart] by applying pressure to [her] throat or neck." *See* Tex. Penal Code § 22.01(a) (setting out elements of offense of assault), (b)(2)(B) (elevating offense level from class A misdemeanor to third-degree felony if certain elements are met). In addition, the indictment contained an enhancement paragraph alleging that McCleery had previously been convicted of the felony offense of arson. *See id.* § 28.02(a) (listing elements of offense of arson of "building, habitation, or vehicle"), (d) (providing that offense is, in general, second-degree felony); *see also id.* § 12.42(a) (elevating punishment range for third-degree felony to that of second-degree felony if defendant has previously been convicted of another felony offense). At the end of the guilt-or-innocence phase of the trial, the jury found McCleery guilty of the charged offense. McCleery elected to have his punishment assessed by the district court and entered a plea of true to the enhancement allegation. At the end

of the punishment hearing, the district court sentenced McCleery to thirteen years' imprisonment. *See id.* § 12.33 (setting out permissible punishment range for second-degree felonies). In two issues on appeal, McCleery asserts that the district court erred by admitting into evidence photographs from an earlier assault. We will affirm the district court's judgment of conviction.

BACKGROUND

As set out above, McCleery was charged with assaulting his wife Smart by choking her. During the trial, the State called to the stand several witnesses, including Smart; Chris Clark and Rachel Scott, who were married and allowed Smart and McCleery to live with them for a few months; and Officer Brent Frazier, whom Smart reported the offense to. During Smart's testimony, the State admitted into evidence four photographs of injuries that Smart allegedly sustained during a prior incident in which McCleery assaulted her. Two of the photos show bruises on Smart's jaw, and the other two show bruises on her chest and shoulder.

In her testimony, Smart discussed the assault that was the subject of the indictment in this case as well as other incidents of domestic abuse. Of significance to this appeal, Smart provided details regarding an incident that occurred a few months before the charged offense. Specifically, she related that she told McCleery that he should not drive her pickup because it did not have insurance at the time; that he "started screaming at" her; that he "grabbed [her] and started slamming [her] up against the pickup by [her] collar"; that she managed to get away and run from him; that he grabbed her again and started "choking" her; that she kicked him to get him to stop; that "he jumped on top of [her] and just started whaling on [her] face," her chest, and her stomach; and that he hit her in the jaw so hard that she "blacked out for a minute." Furthermore, Smart related

that she told Officer Frazier about the incident a week after the assault occurred when he drove to her house for an unrelated matter. In her testimony, Smart explained that when Officer Frazier initially asked her how she got those injuries, she stated that she "'got hit by a sheep'" but ultimately admitted that McCleery hit her, and Smart also stated that Officer Frazier drove her to the police station and took photos of the injuries that she sustained during the prior assault. In addition, Smart testified regarding another instance of abuse that occurred a few weeks after the charged offense in which McCleery punched her in the shoulder. Smart recalled that she had to be treated at the emergency room, that McCleery went with her to the emergency room, and that McCleery told her to tell the treating medical staff that she injured her shoulder lifting an air conditioner. After Smart described the other assaults, the State admitted into evidence and showed to the jury the four photos discussed above.

Regarding the charged offense, Smart testified that she tried to but was unable to wake McCleery up one morning for work, that he got mad at her for not waking him up sooner, that "he started screaming at" her, that he called her names, that he threw a tea jug at a cabinet and broke the jug and the cabinet, that he punched a hole in the wall, that she ran into the carport, that he "grabbed [her] around the neck . . . and held it" for "a full two minutes," that she could not breathe, that she "kept tapping at him because [she] couldn't breathe," that she passed out, that he "let [her] drop," and that she "started puking when [she] finally got the air back." Additionally, Smart related that McCleery told her that "he would feed [her] live to hogs" if she "tried to leave him" and that "[i]f I wanted to kill you, I would have. I know how to do that." During her cross-examination, Smart conceded that she did not move out of the house after the incident at issue, that she did not seek medical treatment for any injuries, and that she did not seek a restraining order.

When explaining that she reported the assault more than a month later, Smart testified that on the day that she reported the offense, she had another argument with McCleery in which he got mad at her again for not waking him up early enough after he came home late the night before. Additionally, Smart related that after the argument, she told McCleery that their relationship was "not in an ok place" and that McCleery responded, "[y]ou're not going to leave," and then went to work. Moreover, Smart recalled that when her friend Clark was driving her to her house later that day, she became "absolutely terrified for when he got home" and "had a feeling that . . . this was going to be the bad one," that Clark drove her to the police station, and that she then reported the prior offense.

After Smart testified, Clark was called to the stand and testified that he was friends with Smart and that he started to suspect that McCleery was abusing Smart after Smart "started acting a little bit nervous in [McCleery]'s presence." In addition, Clark stated that while he was driving Smart to her home on the day that she ultimately reported the offense, Smart talked with McCleery on the phone, that McCleery stated that he would be home later that night, and that Smart "broke down into tears." Moreover, Clark recalled that Smart told him that something that made him "afraid for her life," that he drove Smart to her mother's house, that he and her mother told her to file a police report, that Smart stated that "she was scared to," and that she later agreed to allow him to drive her to the police station.

Once Clark finished his testimony, Scott was called to the stand. In her testimony, Scott explained that although she never personally observed McCleery hit or choke Smart, she did see Smart and McCleery argue and described how one time when she was alone with Smart, Smart

showed Scott bruises on Smart's chest, arm, and chin. Moreover, Scott testified that she later confronted McCleery about the bruising and that he "turned down his head and he said, 'It will not happen again.'" When testifying, the State asked Scott to look at the photos that had been previously admitted into evidence, and Scott explained that the photos were of the bruises that Smart had previously shown her and that the bruising looked worse when she saw them in person because the bruises had already started to fade by the time that the pictures were taken.

During its case in chief, the State also called Officer Frazier to the stand. In his testimony, Officer Frazier discussed his interaction with Smart in which he took photos of Smart, and Officer Frazier also testified regarding the subsequent interaction with Smart when she made a report regarding the offense in question. Regarding the day that Smart reported the offense in question, Officer Frazier explained that Smart stated that her husband had beaten "her repeatedly and that she was afraid for her life" and that she filed a written statement about the offense. Regarding the prior interaction with Smart, Officer Frazier related that when he stopped by her house for an unrelated reason, he noticed that Smart's "cheek was yellow and swollen," that he asked her how she had been injured, that she eventually stated that "McCleery had struck her," and that Smart agreed to allow Officer Frazier to take photos of the injuries. On the stand, Officer Frazier reviewed the photos that had been previously admitted into evidence and stated that the photos were the ones that he had taken of Smart's injuries.

Once the State rested, McCleery called to the stand several witnesses, including Kelly Pickett and Laura Davis. Pickett testified that she became romantically involved with McCleery after the offense at issue allegedly occurred, that McCleery moved in with her around the time that

Smart made a report to the police regarding the alleged offense, that she noticed Smart following her home from work about five times, and that she believed that Smart tried to run her over one time when she was standing outside of work. Finally, Davis related that she knew both McCleery and Smart, that she never saw Smart have any of the injuries depicted in the photos, that Smart "was real aggressive towards him," and that McCleery "had to walk on eggshells around her."

After McCleery rested and after the parties presented their closing arguments, the jury found McCleery guilty of the charged offense.

DISCUSSION

In his first issue on appeal, McCleery contends that the district court abused its discretion by overruling his objection to the admission of the four photos because the photos should have been excluded under several of the Rules of Evidence. *See* Tex. R. Evid. 401, 403, 404(b). In his second issue, McCleery argues that the district court abused its discretion by admitting the photos into evidence under article 38.371 of the Code of Criminal Procedure and by overruling his "objection that the evidence was unreliable and irrelevant to show the nature of [his] specific relationship with" Smart. *See* Tex. Code Crim. Proc. art. 38.371.[1]

[1] We note that prior to the start of trial, McCleery filed a motion in limine asking, among other things, that the district court order the State to not refer to the photos. During a pretrial hearing regarding the motion, McCleery argued that the photos should not be admitted into evidence because the injuries depicted in those photos pertained to an incident that occurred "90 days prior to" the charged offense and, therefore, could not "be related to the charge" at issue. In addition, McCleery contended that "[t]he introduction of the photographs [would] be more prejudicial than probative" and would "force [McCleery] to defend against accusations that were never officially reported." In response, the State argued that the photos of prior injuries allegedly caused by McCleery were relevant to whether he committed the offense alleged in the indictment, that the probative value exceeded the potential prejudicial value, that the photos regarding the prior misconduct were

Rules of Evidence

On appeal, McCleery contends that the district court abused its discretion by admitting the photos into evidence because the photos should have been excluded under Rules of Evidence 404(b) and 403. *See* Tex. R. Evid. 403, 404(b). Regarding Rule 404(b), McCleery argues that when the district court allowed the photos into evidence, the State was improperly allowed to introduce evidence regarding his purported bad character and to show "conduct in conformity with that bad character." *See id.* R. 404(b). Regarding Rule 403, McCleery contends that the evidence should also not have been admitted under that Rule because any probative value of the photos was outweighed by the danger of unfair prejudice. *See id.* R. 403. More specifically, McCleery notes that he was charged with assaulting Smart by choking her and that the photos do not show injuries sustained through choking and were, therefore, not similar enough to warrant admission. As support

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admissible for non-character-conformity purposes, and that the evidence is admissible under article 38.371 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 38.371; Tex. R. Evid. 401, 403, 404(b). During the hearing, the district court made no explicit ruling regarding the photos and instead instructed McCleery to make his objections during the trial. *Cf. Geuder v. State*, 115 S.W.3d 11, 14-15 (Tex. Crim. App. 2003) (providing that "[a] trial judge's grant or denial of a motion in limine is a preliminary ruling only and normally preserves nothing for appellate review").

When McCleery objected to the admission of the photos during the trial, McCleery argued that the photos were not relevant and that the probative value was outweighed by the prejudicial nature of the photos, but McCleery did not specifically assert that the evidence was impermissible character evidence. Moreover, neither party discussed whether the evidence was admissible under article 38.371 of the Code of Criminal Procedure. Accordingly, it does not seem as though McCleery has preserved for appellate review his arguments that the evidence was not admissible under Rule of Evidence 404(b) or under article 38.371 of the Code of Criminal Procedure. *See* Tex. R. App. P. 33.1 (stating that to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"). For purposes of resolving the issues on appeal, we will assume for the sake of argument that those claims were preserved for appellate review.

for this proposition, McCleery points to the fact that the statute governing assault lists as a distinct offense assaults involving the choking of family members and members of the same household. *See* Tex. Penal Code § 22.01(a), (b)(2). Furthermore, McCleery contends that the prior offense was too remote to provide any probative value regarding the charged offense. In addition, McCleery argues that the photos were not "offered to rebut any defensive theories." Finally, McCleery contends that the State did not need the evidence because he "raised no questions about the credibility of the State's witnesses" and because the evidence did not help establish any element of the charged offense.

Under the Rules of Evidence, "[r]elevant evidence is admissible unless" provided otherwise by "the United States or Texas Constitution," "a statute," the Rules of Evidence, or "other rules prescribed under statutory authority," and "[i]rrelevant evidence is not admissible." Tex. R. Evid. 402. Moreover, "[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and if "the fact is of consequence in determining the action." *Id.* R. 401. However, relevant evidence may be excluded "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." *Id.* R. 403. Furthermore, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but this type of "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* R. 404(b). In addition, courts have explained that "extraneous-offense evidence, under Rule 404(b), is admissible to rebut a defensive theory raised in an opening statement or raised by

the State's witnesses during cross-examination." *Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Additionally, although "Rule 404(b) limits the admissibility of specific acts used to show only the defendant's character, and may keep a prosecutor from trying the case not on the charged offense but on the past acts of the accused, it certainly does not block the admission of all relationship evidence." *Garcia v. State*, 201 S.W.3d 695, 703 (Tex. Crim. App. 2006). On the contrary, " in cases in which the prior relationship between the victim and the accused is a material issue, illustrating the nature of the relationship may be the purpose for which evidence of prior bad acts will be admissible." *Id.*

Appellate courts review a trial court's ruling regarding the admission or exclusion of evidence for an abuse of discretion. *See Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside "the zone of reasonable disagreement," *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is "arbitrary or unreasonable," *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). Moreover, the ruling will be upheld provided that the trial court's decision "is reasonably supported by the record and is correct under any theory of law applicable to the case." *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005). In addition, an appellate court reviews the trial court's ruling in light of the record before the court "at the time the ruling was made." *Khoshayand v. State*, 179 S.W.3d 779, 784 (Tex. App.—Dallas 2005, no pet.).

As an initial matter, we note that it appears that McCleery may have waived these arguments for appellate review. "'An objection to photographic evidence is waived if the same information contained in the photograph is conveyed to the jury in some other form.'" *Ford v. State*,

919 S.W.2d 107, 117 (Tex. Crim. App. 1996) (quoting *Havard v. State*, 800 S.W.2d 195, 205 (Tex. Crim. App. 1989)). "In addition, a party must object each time the inadmissible evidence is offered or obtain a running objection." *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). A trial court's decision to admit evidence over an objection "will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling." *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).

Although McCleery objected to the admission of the photos during Smart's testimony, McCleery did not request a running objection or object to the portions of Smart's testimony describing the assault that allegedly resulted in the injuries depicted in the photos. Similarly, McCleery did not object to Scott's testimony or Officer Frazier's testimony after the photos had been admitted in which they described the injuries depicted in the photos. Accordingly, it appears that McCleery has waived this issue for appellate review. *See Bell v. State*, No. 11-10-00279-CR, 2012 WL 5351134, at *12 (Tex. App.—Eastland Oct. 31, 2012, pet. ref'd) (mem. op., not designated for publication) (determining that defendant waived issue regarding admission of photographs when defendant failed to object to testimony "about the injuries both prior to and after the admission of the photographs"); *Fernandez v. State*, No. 14-04-00144-CR, 2005 WL 2076492, at *1 (Tex. App.—Houston [14th Dist.] May 3, 2005, pet. ref'd) (mem. op., not designated for publication) (determining that defendant "waived his relevancy objection under Rule 401 because the same information depicted on the videotape was otherwise communicated to the jury").[2]

[2] We note, as stated by one of our sister courts of appeals, that "[t]he Texas Court of Criminal Appeals has held that unobjected-to testimony regarding the same subject matter as that depicted in a photograph does not result in waiver of an objection to the inflammatory nature of the photograph

Even assuming for the sake of argument that this issue has been preserved for appellate review, we would be unable to sustain McCleery's first issue. In his opening argument, McCleery noted that Smart did not make the accusation "until after [McCleery] had left the marital residence and moved in with another woman 47 days after the alleged choking." As set out above, during the trial, testimony regarding other instances of abuse, including one also involving choking by McCleery, and regarding Smart's fear of McCleery and her fear of reporting these incidents to the police was presented to the jury.

Accordingly, we cannot conclude that the district court abused its discretion by determining that photographic evidence of injuries that were allegedly sustained in a prior assault was relevant for the non-character-conformity purpose of rebutting the defensive theory suggested by McCleery that Smart made up the allegations after McCleery left her by showing the nature of the relationship between Smart and McCleery and by providing context for why Smart did not report the offense until more than a month later. *See* Tex. R. Evid. 401, 404(b); *cf. Garcia*, 201 S.W.3d at 697-98, 704 (determining that evidence that defendant "pushed [victim] out of the car" months

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unless the testimony conveys the same aspects of the photograph which would be likely to inflame the minds of the jurors." *Fernandez v. State*, No. 14-04-00144-CR, 2005 WL 2076492, at *1 (Tex. App.—Houston [14th Dist.] May 3, 2005, pet. ref'd) (mem. op., not designated for publication) (citing *James v. State*, 772 S.W.2d 84, 98 (Tex. Crim. App. 1989), *vacated on other grounds by James v. Texas*, 493 U.S. 885 (1989)). Although McCleery did not specifically argue that the photos were inflammatory in nature, the aspect of the photos that might inflame the minds of the jurors was the depiction of the extent of the injuries, but evidence regarding the extent of the injuries was presented through the testimony of the witnesses, including that of Scott who testified that the injuries appeared more severe when she personally observed them than they appeared in the photos. The testimony "conveyed the same imagery as the" photos, and accordingly, McCleery's "failure to object to this testimony waived his Rule 403 challenge to the complained-of" photos. *See id.*

before allegedly murdering her was "admissible under Rule 404(b) for the purpose of illustrating the nature of their relationship").

Regarding the admissibility of the photos under Rule 403, courts performing a Rule 403 analysis should balance the following factors:

> (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) (footnote omitted); *see Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) (explaining that "probative value" refers to how strongly evidence makes existence of fact more or less probable and to how much proponent needs evidence and that "unfair prejudice" considers how likely it is that evidence might result in decision made on improper basis, including emotional one). Regarding the admission of photographs, the court of criminal appeals has instructed that courts should also consider, among other things, "the number of photographs, the size of the photograph, whether it is in color or black and white, the detail shown in the photograph, whether the photograph is gruesome, [and] whether the body is naked or clothed." *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). Moreover, reviewing courts should bear in mind that trial courts are given "an especially high level of deference" regarding a determination that evidence should be admitted under Rule 403. *See United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007). "Rule 403 favors the admission of relevant

evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Shuffield*, 189 S.W.3d at 787. "Generally, photographs are admissible if verbal testimony about the matters depicted in the photographs would be admissible and their probative value is not substantially outweighed by any of the Rule 403 counter-factors." *Threadgill v. State*, 146 S.W.3d 654, 671 (Tex. Crim. App. 2004).

When determining the probative value of past criminal behavior, courts should consider "the closeness in time between the extraneous offense and the charged offense" as well as "the similarities between the extraneous offense and the charged offense." *Kiser v. State*, 893 S.W.2d 277, 281 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *see Morrow v. State*, 735 S.W.2d 907, 909-12 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). As discussed above, the other assaults and the offense charged involved the same victim, and according to Smart, McCleery choked her during the charged offense and during the prior assault that resulted in the injuries that were later photographed by Officer Frazier. Moreover, the assaults allegedly occurred within a few months of one another. *Cf. Robinson v. State*, 701 S.W.2d 895, 898 (Tex. Crim. App. 1985) (concluding that four-to-six-month lapse in time was sufficiently small for extraneous offense to have probative value). Even though the photos do not show injuries sustained through choking, the district court could have reasonably determined, as set out above, that the photos were relevant to rebut McCleery's defensive theory that Smart lied about the assault in order to get back at him for leaving her. Accordingly, the district court could have reasonably concluded that the probative value of the photos was high and weighed in favor of admission.

In deciding whether the evidence was needed, courts should consider whether the proponent had other evidence to establish the fact of consequence, how strong the other evidence

was, and whether the "fact of consequence related to an issue that is in dispute." *Erazo v. State*, 144 S.W.3d 487, 495-96 (Tex. Crim. App. 2004). Although other evidence regarding the injuries that Smart allegedly sustained from the prior assault was admitted through the testimony of Smart, Scott, and Officer Frazier, those testimonies were corroborated by the photos. *Cf. Fields v. State*, No. 01-07-00856-CR, 2009 WL 723992, at *7 (Tex. App.—Houston [1st Dist.] Mar. 19, 2009, pet. ref'd) (mem. op., not designated for publication) (explaining that "[b]ecause the State had several witnesses whose testimony was corroborated by the photos of the complainant's and Ngo's bodies[] and because the photos supported testimony as to the manner, time, and place of death, the State demonstrated a need for this evidence"). Accordingly, the district court could have reasonably concluded that the State's need for the evidence either weighed in favor of the admission of the photos or was neutral regarding their admission.

Turning to the potential for the photos to suggest a decision on an improper basis, *see Gigliobianco*, 210 S.W.3d at 641 (stating that evidence might encourage decision on improper basis if it arouses jury's "hostility or sympathy . . . without regard to the logical probative force of the evidence"), we note that the State only sought to admit four photos. Although the photos are in color, appear from the record in this Court to be roughly 8 ½ by 11 inches in size, and are close-up shots showing bruises on Smart's jaw, shoulder, and chest, Smart is wearing clothes in the photos, and the photos show only the injuries that Smart sustained and are not anymore gruesome than would be expected. In fact, although Scott testified after the photos had been admitted into evidence, she pointed out that the photos were taken after the injuries had been healing for some time. For these reasons, the district court could have reasonably determined that the potential for the jury to render a verdict on an improper basis was minimal and that this factor weighed in favor of admission.

Regarding the remaining factors, the district court could have reasonably determined that the jury would not have given an undue weight to the photos and that the admission of the photos would not likely confuse the jury. The photos did not address a complex subject matter, *see id.* (explaining that scientific evidence is type of evidence that might mislead jury not properly equipped to consider probative value), and the testimony presented at trial before the photos were admitted established that the bruising was from a separate assault that allegedly occurred *before* the charged offense. Accordingly, the district court could have reasonably determined that these factors weighed in favor of admission.

Although Smart testified regarding the injuries that she sustained during the prior assault, the district court could have reasonably determined in light of the fact that the State only sought to admit four photos that the presentation of the evidence would not consume an inordinate amount of time or be unduly repetitive. In fact, although testimony regarding the photos did not occur until after the district court made its ruling, we note that the trial record in this case is several hundred pages in length, that the State's questioning of Smart regarding the photos constituted approximately three pages, and that the State's questioning of Scott, Officer Frazier, and Davis about the photos constituted less than two pages for each witness. *See Fields*, 2009 WL 723992, at *6 (noting that "[o]nce the trial court ruled in favor of admissibility of the photos, the State proceeded through each series of photos expeditiously" and that, therefore, "factor weighs in favor of admissibility of both sets of photos").

In light of the preceding, we cannot conclude that the district court abused its discretion by determining that the photos should not be excluded under Rule 403.

For the reasons previously given, we overrule McCleery's first issue on appeal.

Article 38.371

In his second issue on appeal, McCleery contends that the photos should not have been admitted under article 38.371 of the Code of Criminal Procedure.[3] That provision applies to, among other offenses, assaults committed against "a person whose relationship to or association with the defendant is described by" the Family Code. Tex. Code Crim. Proc. art. 38.371(a); *see also* Tex. Fam. Code § 71.003 (providing that term "'[f]amily'" includes individuals related by affinity); Tex. Gov't Code § 573.024(a)(1) (stating that individuals are related by affinity if "they are married to each other"). Moreover, the provision states that for these types of prosecutions, "subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense . . . , including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim" and that the provision "does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law." Tex. Code Crim. Proc. art. 38.371(b)-(c).

When presenting his arguments on appeal, McCleery asserts that when the legislature recently enacted this statute, *see* Act of May 31, 2015, 84th Leg., R.S., ch. 1086, § 1, art. 38.371, 2015 Tex. Gen. Laws 3732, 3732 (amended 2017), it "did not . . . obviate the necessity that . . . the

[3] As set out earlier in footnote 1, it does not appear that McCleery preserved for review any argument regarding article 38.371, but in the interests of resolving this issue on appeal, we are assuming for the sake of argument that this issue has been preserved.

evidence must still be relevant." Further, McCleery urges that "'the nature of the relationship' between McCleery and his wife does not make more or less probable the fact that he hit her on one occasion and then, 90 days later, choked her until she fell unconscious." As support for this, McCleery again references the fact that the statute governing assault lists assault by strangulation separately from the more general type of assault, *see* Tex. Penal Code § 22.01(a), (b)(2), and then urges that "[p]hotographic evidence of an assault of one kind is not necessarily indicative of a relationship characterized by an assault of another kind." Finally, McCleery contends that even if the evidence was admissible under article 38.371, it would still be "subject to a 403 balancing test" and further asserts that he has already "demonstrated that photographic evidence of the first assault was so prejudicial . . . that it should have been excluded."

As an initial matter, we note that due to the recency with which this statute was enacted, we have been unable to find any case law setting out the scope of evidence that may be admitted under this particular statute. In fact, only one appellate court case has even cited the provision and that court determined that evidence showing the prior relationship between the defendant and the victim "was admissible" under that provision but explained in its ruling that it need not decide in that case whether the provision "should be treated as a substantive change to the rules of evidence." *See Mapolisa v. State*, No. 05-16-00711-CR, 2017 WL 2952994, at *5 & n.3 (Tex. App.—Dallas July 11, 2017, pet. filed) (mem. op., not designated for publication). The language of the statute indicates that the legislature intended, at minimum, to sanction the admission of "evidence regarding the nature of the relationship between the actor and the alleged victim" that may be admitted under the Rules of Evidence. *See* Tex. Code Crim. Proc. art. 38.371(b), (c);

see also Hines v. State, 75 S.W.3d 444, 447 (Tex. Crim. App. 2002) (noting that when construing statutes, "the reviewing court should start its analysis by looking at the plain language of the statute in question" and that "[i]f the statute is clear and unambiguous, the plain meaning of its words should be applied"). In light of our prior conclusion that the district court did not abuse its discretion by concluding that the photos were admissible under the Rules of Evidence, including under Rule 403, we similarly conclude that the district court did not abuse its discretion by admitting the photos into evidence under article 38.371 as "evidence regarding the nature of the relationship between" McCleery and Smart. *See* Tex. Code Crim. Proc. art. 38.371(b).

For these reasons, we overrule McCleery's second issue on appeal.

CONCLUSION

Having overruled McCleery's two issues on appeal, we affirm the district court's judgment of conviction.

David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: October 20, 2017

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