NUMBER 13-18-00298-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ALEX DAVILA A/K/A ALEXANDER DAVILA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 377th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Benavides

By one issue, appellant Alexander Davila challenges his conviction for indecency with a child by contact, indecency with a child by exposure, and aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), 21.11(a)(2)(B), 22.021(a)(1)(B). Davila contends that the trial court erroneously admitted extraneous evidence. *See* TEX. R. EVID. 403. We affirm.

I. BACKGROUND

Ten-year-old complainant, J.L., [1] lived with her grandmother and her grandmother's boyfriend, Davila, during weekends. When no one was present, she testified that Davila touched and licked her genital area on multiple occasions. J.L. described that in the first instance, Davila rubbed her back and buttocks, after which Davila placed his hands under her pants and touched her private areas. Davila did not lick her private area the first time, but he did so on subsequent occasions. Davila also watched her get undressed when she was preparing to bathe. In another incident, Davila digitally penetrated her vagina and attempted to penetrate her vaginally with his penis.

J.L.'s teacher, Peter Shure, testified that although he did not initially notice J.L.'s behavior changes, he observed changes the month following the incidents and notified J.L.'s mother. Jennifer Mumphord, a sexual assault nurse examiner, testified that she conducted a forensic examination on J.L. more than ninety-six hours after the last alleged incident occurred and stated that there was no physical evidence of Davila's penetration of her private areas.

The trial court conducted a gatekeeper hearing outside the presence of the jury to determine whether Rebecca Lynn Luna and Mary Dalton Hidalgo could testify about prior alleged sexual assaults committed by Davila. Luna testified that Davila sexually assaulted her in 1992 when she was eleven-years-old and lived in North Carolina. She stated that Davila placed his hands around her shoulder and underneath her underwear to touch her genital area. Hidalgo testified that Davila is the father of two of her children

[1] To protect the identity of the child, we refer to those involved in the case by aliases, as necessary. *See* TEX. R. APP. P. 9.8(b).

and witnessed Davila sexually assault Luna at her residence. She testified that Luna was sitting on Davila's lap while Davila had his hand down Luna's pants. Hidalgo also stated that Davila also committed sexual acts with another ten-year-old girl. Both Davila and Hidalgo left North Carolina after Davila was indicted for "indecent liberties" with Luna. The trial court allowed Luna and Hidalgo's testimony.

The jury found Davila guilty of all three charges. Davila pleaded true to prior felony convictions and was sentenced to life imprisonment in the Texas Department of Criminal Justice–Institutional Division. *See* TEX. PENAL CODE ANN. § 12.42. This appeal followed.

II. ADMISSION OF EXTRANEOUS EVIDENCE

Davila contends that although the evidence is admissible under article 38.37, section 2(b) of the code of criminal procedure, the trial court erroneously ruled that the probative value of Luna and Hidalgo's testimony was substantially outweighed by the prejudicial effect and should not have been admitted under Rule 403 of the Texas Rules of Evidence. *See* TEX. R. EVID. 403; TEX. CODE CRIM. PROC. ANN. art 38.37 § 2(b).

A. Standard of Review

We review a trial court's ruling to admit evidence for an abuse of discretion. *Taylor v. State*, 268 S.W.3d 571, 578–79 (Tex. Crim. App. 2008). A trial judge has broad discretion in admitting or excluding evidence. *Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999). If a trial court's decision falls within the zone of reasonable disagreement, then that decision will not be disturbed. *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996).

When reviewing the trial court's balancing test determination, a reviewing court is to reverse the trial court's judgment "rarely and only after a clear abuse of discretion." *Id*.; *see* *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g) (en banc). We, however, cannot simply conclude "the trial judge did in fact conduct the required balancing and did not rule arbitrarily or capriciously." *Mozon*, 991 S.W.2d at 847 (quoting *Montgomery*, 810 S.W.2d at 392). Instead, we must look at the proponent's need for the evidence, the relevance of the evidence, and whether the prejudice of this evidence outweighs its probative value. *Id.* at 847.

B. Applicable Law

Article 38.37 of the code of criminal procedure permits admission of evidence of other sex crimes committed by the defendant against children other than the victim of the alleged offense "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. ANN. art. 38.37 § 2(b). When evidence of a defendant's extraneous act is relevant under article 38.37, the trial court is still required to conduct a Rule 403 balancing test upon proper objection or request. *Distefano v. State*, 532 S.W.3d 25, 31 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

The trial court may exclude evidence only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, by considerations of undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. Under Rule 403, the trial court considers six factors: (1) the inherent probative force of the evidence along with; (2) the proponent's need for the 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. *See* TEX. R. EVID. 403; *Gigliobianco v. State*, 210 S.W.3d 637, 640–42 (Tex. Crim. App. 2006). It is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice, confusing the issues, or other counterfactors. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). The rule excludes evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Connor v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001).

The term "probative value" refers to the inherent probative force of an item of evidence which relates to how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. *Gigliobianco*, 210 S.W.3d at 641. "When the proponent of an item of evidence has other compelling or undisputed evidence to establish the proposition or fact that it goes to prove, the probative value of the item of evidence will weigh far less than it otherwise might in the probative-versus-prejudicial balance." *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990) (op. on reh'g).

C. Discussion

Luna and Hidalgo's testimony is particularly probative to the State's case. Luna's testimony contains similarities to J.L.'s testimony because both involve Davila sexually touching a pre-teen girl at his residence. *See* TEX. CODE CRIM. PROC. ANN. art 38.37 § 2(b). J.L. was ten-years-old and Luna was eleven-years-old when Davila committed the acts. The sexual manner which Davila touched Luna and J.L. were also very similar. Luna and J.L. both testified that Davila placed his hands "under the underwear" and touched their genital area multiple times. The testimony provided evidentiary support to demonstrate Davila's similar state of mind against J.L. and Luna. *See McCombs v. State*, 562 S.W.3d 748, 767 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Bezerra v. State*, 485 S.W.3d 133, 140 (Tex. App.—Amarillo 2016, pet. ref'd). The trial court could have reasonably determined that the similarities between the extraneous offenses and the charged offenses strengthened the probative force of the testimony. *See Robisheaux v. State*, 483 S.W.3d 205, 210–20 (Tex. App.—Austin 2016, pet. ref'd). This factor weighs heavily in favor of admissibility.

Davila argues that the time difference of twenty-four years between the extraneous act and the act against J.L. in the indictment diminishes the probative value. Although length of time can diminish probative value, a remote act of sexual assault to a child does not inherently render the evidence inadmissible. *See Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet. ref'd) (concluding that the "remoteness of the extraneous-offense evidence significantly lessens its probative value" but found the twenty-five-year-old extraneous offense admissible). Because the act is not too remote, this factor nevertheless weighs in favor of admissibility.

Their testimony was also reasonably necessary for the State because there were no eyewitnesses nor physical evidence to corroborate J.L.'s testimony. *See Wheeler v. State*, 67 S.W.3d 879, 889 (Tex. Crim. App. 2002). The State argues that Davila raised a defensive theory of fabrication during trial to diminish J.L.'s credibility. Davila cross-examined J.L's teacher who testified he did not notice behavioral problems from J.L. when the incident occurred. Lack of physical evidence may be a basis for needing evidence of extraneous acts. *See Gaytan v. State*, 331 S.W.3d 218, 227 (Tex. App—Austin 2011, pet. ref'd). Rule 403 "should be used sparingly in sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant." *See Robisheaux*, 483 S.W.3d at 221. Therefore, this factor weighs heavily in favor of admissibility.

Davila argues that the admission of extraneous evidence tended to support a decision on an improper basis. Although testimony regarding sexual assault by its nature tends to be inflammatory and can be unfairly prejudicial, the acts that Luna described were no more serious than the acts recounted by J.L. *See id.* at 220. The extraneous acts were similar to the indicted offenses when considering the victim's age and Davila's conduct. *See McCombs*, 562 S.W.3d at 767. This factor weighs in favor of admissibility.

Luna and Hidalgo's testimony did not tend to confuse or distract the jury from the main issues because the incident occurred twenty-four years prior in North Carolina. The testimony was relevant to whether Davila committed the offenses charged in the indictment. *See Robisheaux*, 483 S.W.3d at 220. Further, their testimony did not

consume an inordinate amount of time, when viewed in context of the rest of the trial. *See id.* at 767–68. This factor weighs in favor of admissibility.

There is no indication that the jury gave Luna and Hidalgo's testimony undue weight because the State did not offer any scientific evidence or expert witness testimony concerning the extraneous act. *See Gigliobianco*, 210 S.W.3d at 641. Furthermore, the extraneous offense was not confusing or technical in nature. *See id.* Therefore, this factor weighs in favor of admissibility.

The trial court could have reasonably concluded that it was unlikely that extraneous offense evidence would cause undue delay or needless presentation of cumulative evidence. We have already determined that the testimony did not consume an inordinate amount of time. *See McCombs*, 562 S.W.3d at 767–68. The record does not reflect similar evidence that was already admitted. *See id.* This factor weighs in favor of admissibility.

After balancing the various Rule 403 factors, the trial court could have reasonably concluded that the probative force of the evidence outweighed the danger of unfair prejudice, confusion of the issues, and other countervailing factors. *See Gigliobianco*, 210 S.W.3d at 642–43. Therefore, we conclude that the trial court did not abuse its discretion in overruling Davila's objection to the extraneous evidence testimony. *See id.*

III. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
18th day of July, 2019.