

NO. 12-15-00138-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*JUAN MERINO,
APPELLANT*

§ *APPEAL FROM THE 123RD*

V.

§ *JUDICIAL DISTRICT COURT*

*THE STATE OF TEXAS,
APPELLEE*

§ *SHELBY COUNTY, TEXAS*

MEMORANDUM OPINION

A jury convicted Juan Merino of aggravated sexual assault and assessed punishment at imprisonment for sixty years and a \$10,000 fine. In two issues, Appellant challenges comments made by the State during closing argument and the admission of evidence regarding other alleged sexual assaults against the victim. We affirm.

BACKGROUND

The State charged Appellant with aggravated sexual assault of R.C., who was under the age of fourteen years at the time of the assault, by intentionally or knowingly causing the penetration of R.C.'s female sexual organ by Appellant's sexual organ. The assault occurred on or about March 25, 2007. According to the record, Appellant and R.C.'s father were band mates and the band practiced at R.C.'s home. R.C. testified that, when at her home, Appellant sexually assaulted her on several occasions. R.C. reported the assault, but Appellant fled to Mexico. In March 2014, R.C. saw Appellant at the local high school track and contacted the police. She later identified Appellant from a photographic array.¹

¹ The record indicates that the first photographic array contained an older, poor quality photograph of Appellant and R.C. could not make an identification. A second photographic array contained a more recent and better quality photograph of Appellant.

During a police interview, Appellant confessed to sexually assaulting R.C. on one occasion. At trial, Appellant testified that he went to R.C.'s home once in May 2007 to play guitar with her father and that he never met R.C. He claimed to have been confused during his interview with police because the police either did not speak Spanish or did not speak Spanish well enough for him to understand. He denied visiting R.C.'s home in March 2007 and denied sexually assaulting R.C.

CLOSING ARGUMENT

In his first issue, Appellant contends that the State engaged in improper jury argument. Specifically, the State made the following comments during closing arguments:

But during his confession, [Appellant] said “Hey, are we talking about some old allegations or some new allegations?”

And one thing I can talk about in this closing argument is reasonable deductions and conclusions you can draw from the evidence. And I say a reasonable conclusion or deduction you can draw from that is he's wondering which victim we're talking about.

Defense counsel objected on grounds that this argument called for “speculation and assumes facts not in evidence.” The trial court instructed the State to “[k]eep your argument within the evidence[.]” and “limit your argument to rebuttal of what [defense counsel] said.”

Waiver

To preserve error regarding prosecutorial argument, a defendant must pursue his objection to an adverse ruling. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). “The essential requirement is a timely, specific request that the trial court refuses.” *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). When a defendant receives the relief requested but does not request a mistrial, even if the error could not be cured by an instruction to disregard, any error is waived. *Mathis v. State*, 67 S.W.3d 918, 927 (Tex. Crim. App. 2002); *Gleffe v. State*, 509 S.W.2d 323, 325 (Tex. Crim. App. 1974).

The trial court implicitly sustained Appellant's objection to the State's closing argument. However, the record does not indicate that Appellant requested any additional relief, such as an instruction to disregard or a motion for mistrial. Accordingly,

Appellant failed to pursue his objection to an adverse ruling and his complaint is waived. See *Archie*, 221 S.W.3d at 699; see also *Young*, 137 S.W.3d at 69; *Mathis*, 67 S.W.3d at 927; *Gleffe*, 509 S.W.2d at 325; *Robertson v. State*, 245 S.W.3d 545, 547 (Tex. App.—Tyler 2007, pet. ref’d). We overrule Appellant’s first issue.

EVIDENTIARY RULING

In his second issue, Appellant challenges the admission of evidence regarding other sexual assaults against R.C. Appellant contends that the complained-of evidence had no “bearing on relevant matters.” He argues that his culpable mental state was never an issue at trial and that R.C.’s testimony was not sufficiently reliable or corroborated by other evidence. Appellant also argues that admission of the evidence violated Texas Rule of Evidence 403.

Facts

At a hearing outside the jury’s presence, the State informed the trial court that Appellant sexually assaulted R.C. on several occasions before her outcry in March 2007. During the hearing, R.C. testified that Appellant sexually abused her for a couple of months before she contacted law enforcement. R.C. explained that the abuse included oral sex and vaginal and anal penetration. She testified that Appellant threatened to kill her brother if she disclosed the abuse. The State argued that Article 38.37 of the Texas Code of Criminal Procedure authorized admission of this evidence because it related to both the state of mind of Appellant and R.C. and the relationship between them. The State also emphasized its duty to prove Appellant’s intent. Appellant objected on grounds that continuous abuse had not been alleged in the indictment, the proffered evidence both potentially prejudiced Appellant and increased the punishment range, and the State had not proved admissibility under Article 38.37 section 2-a.

The trial court permitted introduction of the evidence, but noted that R.C.’s testimony was “not real specific[]” and expressed an anticipation that her testimony before the jury would be more detailed. When she testified before the jury, R.C. explained that Appellant would enter her room and touch her, which included oral sex, vaginal penetration, and anal penetration. During his own testimony, Appellant denied having vaginal intercourse, anal intercourse, or oral sex with R.C.

Standard of Review

We review a trial court's evidentiary rulings for abuse of discretion. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We will not reverse unless the trial court's ruling falls outside the "zone of reasonable disagreement." *Oprean*, 201 S.W.3d at 726.

Texas Code of Criminal Procedure Article 38.37

In a trial of a defendant for offenses such as aggravated sexual assault, extraneous acts committed by the defendant against the child victim are admissible for their bearing on relevant matters. TEX. CODE. CRIM. PROC. ANN. art. 38.37 § 1 (West Supp. 2015). Relevant matters include both the state of mind of the defendant and child, as well as the previous and subsequent relationship between the defendant and child. *Id.*²

Appellant was charged and convicted under section 22.021 of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2015). Under Article 38.37, evidence that he sexually assaulted R.C. on occasions other than the charged offense is relevant to both the state of mind of Appellant and R.C. and the previous relationship between them. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 § 1; *see also Bargas v. State*, 252 S.W.3d 876, 900 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (evidence of other incidents of sexual abuse by defendant against victim relevant to state of mind of defendant and victim and previous and subsequent relationship between them); *Ernst v. State*, 971 S.W.2d 698, 700 (Tex. App.—Austin 1998, no pet.) (same). R.C.'s testimony did not require corroboration, and we give wide latitude to testimony offered by child victims. *Newby v. State*, 252 S.W.3d 431, 436-37 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *see* TEX. CODE CRIM. PROC. ANN. art. 38.07(a), (b)(1) (West Supp. 2015). R.C.'s testimony regarding other instances of sexual abuse Appellant committed against her was admissible under Article 38.37.

² Appellant contends that the parties applied the incorrect version of Article 38.37 at trial. According to the indictment, the offense occurred in March 2007. The statute has since been amended, but the current version of the statute does not contain changes that are material to whether the trial court properly admitted the complained-of evidence in this case. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2015).

Texas Rule of Evidence 403

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. When evidence of a defendant's extraneous acts is relevant under Article 38.37, the trial court must still "conduct a Rule 403 balancing test upon proper objection or request." *Belcher v. State*, 474 S.W.3d 840, 847 (Tex. App.—Tyler 2015, no pet.). The opponent of extraneous-offense evidence must ask the trial court to exclude the evidence under Rule 403 on grounds that the probative value of the evidence is substantially outweighed by, for instance, the danger of unfair prejudice. *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990).

Appellant generally objected to R.C.'s testimony, in part, on grounds that it created potential prejudice. The record does not demonstrate that Appellant argued the evidence was more prejudicial than probative or otherwise raised a specific Rule 403 objection. Accordingly, he waived his Rule 403 complaint. *See id.*

Nevertheless, the record also contains other testimony, to which Appellant did not object, that Appellant sexually assaulted R.C. on other occasions. *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("[O]verruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."). Additionally, R.C. testified that Appellant penetrated her vaginally with his penis. This testimony is sufficient to support Appellant's conviction for aggravated sexual assault as alleged in the indictment, without reference to the extraneous-offense evidence. *See Bargas*, 252 S.W.3d at 888. Thus, even had Appellant preserved his complaint, any error in admission of the extraneous-offense evidence is harmless. *See* TEX. R. APP. P. 44.2. The trial court did not abuse its discretion by admitting R.C.'s testimony regarding extraneous offenses into evidence. We overrule Appellant's second issue.

DISPOSITION

Having overruled Appellant's two issues, we *affirm* the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 18, 2016.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 18, 2016

NO. 12-15-00138-CR

JUAN MERINO,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 123rd District Court
of Shelby County, Texas (Tr.Ct.No. 14CR19,231)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.