NO. 12-16-00334-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JOSE DAVID FLORES-CASTRO, APPELLANT	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Jose David Flores-Castro appeals from his conviction for indecency with a child. In three issues, he contends that he was improperly admonished, trial counsel rendered ineffective assistance, and the evidence is insufficient to support his conviction. We affirm.

BACKGROUND

At trial, the complainant testified that she was twelve years old on the night of the offense. She was half asleep when she felt Appellant grab and squeeze her breast. He also kissed her mouth multiple times. When she moved her arm across her chest, Appellant moved her arm and again squeezed her breasts multiple times.

The complainant later told Appellant that she "felt everything." Appellant responded, repeatedly, that he was "so sorry" and he blamed his actions on the fact that he was touched as a child. He told the complainant that they could call the police and tell her mother, but that his children would be taken from him if they told the police. Because she did not want Appellant's young son to not have a father, she decided not to tell the police and she told Appellant "not to do it again." The complainant recorded these events in her journal.

Marnell Caples, an investigator with Child Protective Services, met with Appellant to discuss the allegations. During this meeting, Appellant denied the allegations. Detective Jason

Compton with the Tyler Police Department testified that when he spoke to Appellant on the telephone, he told Compton, "Well, I can tell you right now, that I didn't do it." Appellant also stated he would turn himself in if a warrant was obtained. At that point, Compton had not told Appellant of what offense he had been accused or that he would be arrested.

At the conclusion of trial, the jury found Appellant "guilty" of indecency with a child. The trial court sentenced Appellant to imprisonment for twelve years. This appeal followed.

ADMONISHMENTS

In his first issue, Appellant contends that the trial court improperly admonished him regarding the applicable punishment range. Specifically, he argues that the trial court operated under the mistaken belief that Appellant was ineligible for community supervision.

Analysis

Before voir dire, Appellant informed the trial court of his desire to change his election and have the trial court, rather than the jury, assess punishment. He acknowledged rejecting a ten-year plea offer from the State. The following conversation occurred:

> Trial Court: …is this a 3(g) type of offense, where the only way he could get probation would be from a jury? I haven't reviewed it but --
> Defense Counsel: I don't believe so, Judge.
>
> . . .
>
> Trial Court: It is a 3(g). They changed the number to [42A,] instead of 42.12, like it used to be. Looks like the new statute would be [424.054.] And under Subpart A, Subpart 6 – [42A.054(a)(6).]
> Shows Section 21.11(a)(1) of the penal code, indecency with a child charge, is, in fact, what we used to call a 3(g) type of offense. I guess we're going to have to change our phraseology.
> Which means, now, we have to see, is this a 21.11(a)? Which, looks like it is. That's the only type of offense under 21.11.
> State: And I'll add to that, Your Honor. Under [42A.056,] which is the limitations on jury-recommended community service, if the State's allegations are proven, I believe the evidence will be that the child was under the age of 14.
> And so if the jury found that, he wouldn't be eligible for probation from the jury either. So I don't believe he's eligible from the Court if he's found guilty of the charged offense. I don't believe he'd be eligible from the jury if he's found guilty of the charged offense.
>
> …
>
> Trial Court: It appears, with the State's outline, that it doesn't matter whether the Judge or jury's doing punishment. There's no probation eligibility on the case, is what it seems to be.
> All right. Mr. Flores, you've heard all of this. You understand that? That, apparently, my concern was 3(g) of the old law, which meant that certain cases the jury -- only the jury could give punishment.
> And we always wanted to make sure the Defendant was aware of that before they made that decision to take the punishment decision away from a jury.

> In certain cases, even under the old law, there was certain cases that didn't matter which vehicle -- whether the jury was doing punishment or the Court was doing punishment -- that probation was not an option in certain types of cases. And this is, as the State has pointed out, is one of those.
> So if the jury finds you guilty, you will be going to prison for some term between 2 years and 20 years in the penitentiary and up to a $10,000 fine. That's the range of punishment on this offense. Do you understand that?
> Appellant: Yes, sir.

During the punishment phase of trial, while assessing Appellant's sentence, the trial court made the following statements:

> We talked before your case started, that this was one of those offenses in our statutes that says that, if convicted, the jury can't give you probation. The Court can't give you probation. So if found guilty of such an offense -- and I note on our -- on my copy of the indictment that I was working from, getting summaries and us preparing for trial, that we talked about that this type of charge was an Article 42.12 3(g) offense, which meant the Court couldn't give probation.
> During that discussion, we discussed the fact that it was one the jury couldn't give probation either. We also looked at the new statutes. Which, most of it doesn't go into effect until the 1st of 2017. But, particularly, going to be the new equivalents for anything after the first of the year.
> So the law really hasn't changed. They just changed the provision. So the no-judge probation -- the old 3(g) -- is now in Article 42A.054(a)(6).
> The provision dealing with the no-jury probation is going to be in section -- or article, rather -- 42A.056(4) dealing with this particular type of offense.
> So the Court has considered the full range of punishment. Which, the reason I started where I was means there's no probation. But most of the time, the Courts are required – they're just like juries, if requested and someone's eligible for probation, to consider probation.
> But that's not really before the Court because it's not available, based upon what we reviewed and determined previously -- as well as the Defendant withdrew the probation application before we proceeded to trial….

On appeal, Appellant contends that the trial court improperly admonished him regarding his ineligibility for community supervision. He argues that it was impossible to understand the full extent of potential punishment when he was informed that deferred adjudication community supervision was unavailable. According to Appellant, he never received the opportunity to consider community supervision and received a longer sentence, which demonstrates prejudice. Thus, he maintains that Article 26.13 of the code of criminal procedure requires reversal.

We first note that Article 26.13 requires the trial court to admonish the defendant of the applicable range of punishment before accepting a plea of guilty or a plea of nolo contendere. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (West Supp. 2016). By its express terms, this provision does not apply to pleas of "not guilty." *See* ***id.***; ***Hawkins v. State***, 660 S.W.2d 65, 78 (Tex. Crim. App. 1983). Because Appellant pleaded "not guilty," Article 26.13 does not apply

to this case. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1); *see also* ***Hawkins***, 660 S.W.2d at 78.

Moreover, admonishments are not constitutionally mandated. ***Aguirre-Mata v. State***, 125 S.W.3d 473, 476 (Tex. Crim. App. 2003). According to the court of criminal appeals, "misinformation concerning a matter, such as probation, about which a defendant is not constitutionally or statutory entitled to be informed, may render a *guilty plea* involuntary if the defendant shows that his *guilty plea* was actually induced by the misinformation." ***Brown v. State***, 943 S.W.2d 35, 42 (Tex. Crim. App. 1997) (emphasis added).

Even assuming that this holding applies to a plea of "not guilty," the record in this case does not show any such inducement. On June 20, 2016, at a pretrial hearing, the State informed the trial court that it offered Appellant ten years in prison. Defense counsel told the trial court that he communicated the offer to Appellant, who rejected the offer. Appellant then confirmed his desire to proceed to a jury trial. Jury selection began on October 24. Before jury selection, and during the complained of conversations, Appellant acknowledged having previously rejected the State's offer. The record does not indicate that the offer was still available at that time or was again being presented for acceptance. Thus, Appellant had already rejected the State's plea offer when the trial court made the challenged statements regarding Appellant's eligibility for community supervision. Under these circumstances, the record does not demonstrate that the trial court's statements induced Appellant into rejecting the State's offer, pleading "not guilty," and proceeding with a jury trial. *See* ***id***.; *see also* ***Hudgens v. State***, 709 S.W.2d 648, 649 n.2 (Tex. Crim. App. 1986) (classifying argument that plea of not guilty was involuntary as "untenable"). We overrule issue one.

INEFFECTIVE ASSISTANCE

In his second issue, Appellant argues that his trial counsel rendered ineffective assistance by failing to take any steps to challenge the introduction of extraneous offense evidence.

Standard of Review and Applicable Law

An appellant complaining of ineffective assistance must satisfy a two-pronged test. *See* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also* ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). Under the first prong, the appellant must show that counsel's performance was "deficient." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at

2064; ***Tong***, 25 S.W.3d at 712. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. The appellant must show that "counsel's representation fell below an objective standard of reasonableness." ***Id***. 466 U.S. at 688, 104 S. Ct. at 2064; ***Tong***, 25 S.W.3d at 712. Absent evidence of counsel's reasons for the challenged conduct, we assume a strategic motivation if one can be imagined, and we will not conclude that challenged conduct is deficient unless it was so outrageous that no competent attorney would have engaged in it. ***Garcia v. State***, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

Under the second prong, an appellant must show that the "deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064; ***Tong***, 25 S.W.3d at 712. Prejudice requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. The appellant must establish both prongs by a preponderance of the evidence or the ineffectiveness claim fails. ***Tong***, 25 S.W.3d at 712.

Review of trial counsel's representation is highly deferential. ***Id***. We indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065. The appellant bears the burden of overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Id***.; ***Tong***, 25 S.W.3d at 712. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. ***Bone v. State***, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). The record on direct appeal is rarely sufficiently developed to fairly evaluate a claim of ineffectiveness. ***Id***. at 833.

Analysis

In this case, the State charged Appellant with indecency with a child, alleging that, with the intent to arouse or gratify his sexual desire, Appellant engaged in sexual contact with the child complainant by touching her breast. During her testimony, the complainant stated that Appellant had also pressed his pelvic area against her leg and his pelvis began moving "up and down." She further testified that Appellant placed one finger over her underwear and then

touched inside her anus. On appeal, Appellant maintains that the charged offense was "minor when compared to the extraneous actions alleged by the victim, and trial counsel was ineffective in failing to do anything to exclude, or at least limit, its introduction."

Under section two of Article 38.37, evidence that the defendant committed a separate offense may be admitted at trial for any bearing it has on relevant matters, including the defendant's character and acts performed in conformity with that character. TEX. CODE. CRIM. PROC. ANN. art. 38.37 § 2(a)(1)(C), (b) (West Supp. 2016). Nevertheless, 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 extraneous acts are 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.); *see* ***Hitt v. State***, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref'd). A Rule 403 balancing test considers (1) the inherent probative force of the evidence; (2) the proponent's need for the evidence; (3) any tendency of the evidence to suggest a decision on an improper basis, to confuse or distract the jury from the main issues, or to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (4) 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).

Assuming, without deciding, that counsel's performance was deficient, the record does not indicate that any such deficient performance prejudiced the defense. The extraneous offense evidence was not of a technical or confusing nature. Nor did the evidence take an inordinate amount of time to present or repeat previously admitted evidence. *See* ***id***. In the jury charge, the trial court instructed the jury as follows:

> You are instructed that if there is any evidence before you in this case alleging that Defendant committed an offense other than the offense alleged against him in the indictment in this case, you cannot consider said evidence, if any, for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offense, if any were committed.

Additionally, probative value refers to "the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence[.]" ***Id.*** at 641. In this case, the challenged evidence was relevant to whether

Appellant abused the complainant. *See* ***Bezerra v. State***, 485 S.W.3d 133, 141 (Tex. App.—Amarillo 2016, pet. ref'd) (finding evidence of previous sexual assaults against another child probative of fact that defendant's actions toward the complainants were not innocent); *see also* ***Robisheaux v. State***, 483 S.W.3d 205, 221 (Tex. App.—Austin 2016, pet. ref'd) (evidence of extraneous offense relevant to whether defendant abused complainant); ***Belcher***, 474 S.W.3d at 847 (extraneous offense probative of defendant's propensity to sexually assault children); TEX. R. EVID. 401 (relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence . . . and the fact is of consequence in determining the action"). Because of the inherently inflammatory and prejudicial nature of sexual offenses against children, extraneous offense evidence has a tendency to suggest a verdict on an improper basis. ***Newton v. State***, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet. ref'd). Nevertheless, the trial court's limiting instruction in the jury charge somewhat counterbalances the danger of unfair prejudice. *See* ***id***. We presume that the jury followed the trial court's instructions. *See* ***Resendiz v. State***, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003). Under these circumstances, there is not such a clear disparity between the degree of prejudice of the challenged evidence and its probative value as to warrant exclusion under Rule 403.[1] *See* ***Hammer v. State***, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

Accordingly, the record does not show a reasonable probability that, but for counsel's performance, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; *see also* ***Tong***, 25 S.W.3d at 712. Because Appellant cannot satisfy both prongs of ***Strickland***, we overrule issue two. *See* ***Tong***, 25 S.W.3d at 712.

EVIDENTIARY SUFFICIENCY

In issue three, Appellant challenges the sufficiency of the evidence to support his conviction on grounds that the evidence merely raises a suspicion of guilt, and the complainant's testimony does not support a finding of "sexual conduct" or demonstrate Appellant's intent to arouse or gratify his sexual desires.[2]

[1] We also note that a Rule 403 balancing test need not be conducted on the record. *See* ***Sanders v. State***, 255 S.W.3d 754, 760 (Tex. App.—Fort Worth 2008, pet. ref'd).

[2] In his brief, Appellant maintains that the evidence is both legally and factually insufficient. However, the court of criminal appeals has held that the "***Jackson v. Virginia*** legal-sufficiency standard is the only standard that a

Standard of Review and Applicable Law

When reviewing the sufficiency of the evidence, we determine whether, considering all the evidence in the light most favorable to the verdict, the jury was rationally justified in finding guilt beyond a reasonable doubt. ***Brooks v. State***, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. ***Id***. We give deference to the jury's responsibility to fairly resolve evidentiary conflicts, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing the accused's guilt. ***Id***.

A person commits indecency with a child by contact if the person engages in sexual contact with the child or causes the child to engage in sexual contact. TEX. PENAL CODE ANN. § 21.11(a) (West 2011). "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: (1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or (2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person. ***Id***. § 21.11(c) (West 2011). "The specific intent required for the offense of indecency with a child may be inferred from a defendant's conduct, his remarks, and all of the surrounding circumstances." ***Bazanes v. State***, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd).

Analysis

At trial, the jury heard the complainant testify that, when she was twelve years old, Appellant grabbed and squeezed her breast in the middle of the night. When she tried to cover her chest with her arm, Appellant moved her arm out of the way and again squeezed her breasts. The complainant's testimony, standing alone, is sufficient to support the jury's finding that Appellant, with the intent to arouse or gratify his sexual desire, engaged in sexual contact with the child complainant by touching her breast. *See* ***id***.; *see also* TEX. CODE. CRIM. PROC. ANN. art. 38.07 § (a) (West Supp. 2016). It was not necessary that Appellant verbally express intent to arouse or gratify his sexual desires. *See* ***Bazanes***, 310 S.W.3d at 40.

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reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." ***Brooks***, 323 S.W.3d at 895.

Moreover, the jury heard the complainant's testimony that, after Appellant touched the complainant, he persuaded her not to tell her mother or the police so that his young son would not lose his father. Additionally, the jury heard evidence that Appellant denied any wrongdoing, and offered to turn himself in should a warrant be obtained, before Detective Compton had advised Appellant of the alleged offense or that he would be arrested. When determining Appellant's intent, the jury was entitled to consider these actions, as intent can also be inferred from an appellant's conduct after the offense. *See* ***Williams v. State***, 305 S.W.3d 886, 891 (Tex. App.—Texarkana 2010, no pet).

As sole judge of the weight and credibility of the evidence, the jury could reasonably infer that Appellant acted with the intent to arouse or gratify his sexual desire. *See* ***Brooks***, 323 S.W.3d at 899; *see also* ***Hooper***, 214 S.W.3d at 13; ***Bazanes***, 310 S.W.3d at 40. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the jury could find, beyond a reasonable doubt, that Appellant committed indecency with a child. *See* ***Brooks***, 323 S.W.3d at 899; *see also* TEX. PENAL CODE ANN. § 21.11(a), (c). Because the evidence is legally sufficient to support Appellant's conviction, we overrule his third issue.

DISPOSITION

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

GREG NEELEY
Justice

Opinion delivered August 23, 2017.
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

AUGUST 23, 2017

NO. 12-16-00334-CR

JOSE DAVID FLORES-CASTRO,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th District Court
of Smith County, Texas (Tr.Ct.No. 007-0511-16)

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.

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