No. 14-24-00150-CR

In the
Court of Appeals
for the
Fourteenth District of Texas
at Houston

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No. 20-DCR-093956A
In the 240th District Court
Fort Bend County, Texas

———♦———

DALE ARTHUR RICE
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

MANDY MILLER
Attorney for Dale Arthur Rice
9722 Gaston Road, Ste. 150-257
Katy, TX 77494
SBN 24055561
PHONE (832) 900-9884
mandy@mandymillerlegal.com

APPELLANT WAIVES ORAL ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

Appellant waives oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Counsel for the State:

Fort Bend County District Attorney's Office
1422 Eugene Heimann Circle
Richmond, TX 77469

Brian M. Middleton — District Attorney of Fort Bend County

Baldwin Chin and Jason Bennyhoff — Assistant District Attorneys on appeal

Jessica Ramos and Tristyl McInnis — Asst. District Attorneys at trial

Appellant or criminal defendant:

Dale Arthur Rice

Counsel for Appellant at trial:

Larry P. McDougal and Larry P. McDougal, Jr.
809 Houston Street
Richmond, TX 77469

Counsel for Appellant on appeal:

Mandy Miller
9722 Gaston Road, Ste. 150-257
Katy, TX 77494

Trial Judge:

Hon. Surendran K. Pattel

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STATEMENT OF THE CASE

Appellant was charged by indictment with indecency with a child by contact. (CR 7). A jury convicted appellant of the charged offense. (CR 68; RR VII 120). The court sentenced appellant to 12 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 75; RR VIII 34).

STATEMENT OF FACTS

Fran Olsen is appellant's niece through marriage. (RR V 15, 16; State's exhibit 1). Growing up, Fran was very close with appellant and his wife, Kitty[1]. (RR V 17). When Fran was nine years old, she was invited to sleep over at Kitty and appellant's home and then go to Six Flags the following morning. (RR V 23).

Fran was asleep in between appellant and Kitty in their bed. (RR V 24-27; State's exhibit 4). Fran woke up to appellant's hand guiding her hand onto his penis. (RR V 28). Appellant had Fran move her hand up and down on his penis and it "became hard." (RR V 30, 31). At the time, Fran did not understand what happened and fell back asleep. (RR V 33).

[1] Krysten Rice is Fran's second cousin. (RR V 16; State's exhibit 1).

Years later, Fran was with her cousins at the beach, and they began talking about appellant. (RR V 39, 88, 90). A family friend overheard the conversation, which she reported to Fran's mother the following day. (RR V 39, 40, 41, 93).

Mary Hunt and Fran are cousins. Appellant is also Mary's uncle through marriage. (RR VI 93). Mary was close with Kitty and appellant and would sleep over at their home. (RR VI 94, 96). Mary testified that there were times when she would sleep in the bed with appellant and Kitty. (RR VI 100). She would wake up to a feeling of being pulled toward appellant. (RR VI 100). Mary could feel appellant's "private parts touching or rubbing against her butt." (RR VI 100).

Amber Mayes met "Dale Rice" in 1999 when he dated her mother. (RR VI 117). At the time, Amber was nine years old. (RR VI 118). Soon after meeting appellant, Amber and her mother moved from Arizona to Kerrville, Texas to live with appellant. (RR VI 110). Amber testified that appellant abused her several times.

The first time something happened, Amber was playing with another girl in the living room. (RR VI 120, 121). Appellant came into the room wearing only a robe. (RR VI 120, 121). He sat in a nearby chair and watched the girls play. (RR VI 120, 121). Another time, appellant approached Amber in the kitchen when she was by herself. (RR VI 121). Again, appellant was wearing only a robe. (RR VI 121). His lower half was exposed, and appellant asked her if it was the first time she had ever seen a penis. (RR VI 122). Appellant asked if Amber if she wanted to touch his penis. (RR VI 123). Amber

declined, but appellant continued to ask her to touch it. (RR VI 123). Amber poked the top of appellant's penis to appease him. (RR VI 123).

On another occasion, appellant and Amber were watching a movie. (RR VI 123, 124). Appellant was sitting on the sofa in his robe, while Amber was on the floor. (RR VI 123, 124). Appellant had Amber sit on his leg. (RR VI 123, 124). Amber felt something on her back. "Looking back," Amber realized the hard thing that she felt was appellant's penis. (RR VI 123, 124). Amber opined that appellant was using her to masturbate. (RR VI 123, 124).

One late night, Amber was watching The Mummy. (RR VI 125). Appellant came into the room and suggested they watch a particular movie on VHS. (RR VI 125). The movie depicted pornography involving oral sex. (RR VI 125). Appellant encouraged Amber to copy what was being shown on the movie and to "[s]uck it like a lollipop." (RR VI 125). Later that same night, Amber was lying in her bed. (RR VI 130). Appellant came into the room and said "that was really bad. I'm really sorry. I shouldn't have done that. Just don't tell your mom, okay.?" (RR VI 130). Amber agreed. (RR VI 130).

In the Fall of 1999, Amber, her mother, and appellant moved into a home. (RR VI 130). If no one was home when the school bus dropped Amber off, she was instructed to walk to appellant's mother's home three doors down. (RR VI 131). Instead, Amber waited outside of her home for someone to return. (RR VI 131). Appellant arrived and put in another pornographic movie for them to watch. (RR VI 131, 132). Again, appellant had Amber perform oral sex on him. (RR VI 132).

Amber recalled one time that appellant digitally penetrated her. (RR VI 134, 135). Amber testified that the oral sex "continued happening" until one day she refused and ran into her room. (RR VI 132, 134). The abuse stopped after that. (RR VI 134).

When Amber was 11 or 12, and after her mother's relationship with appellant ended, she revealed that she had been abused. (RR VI 135, 137, 138). Kerrville Police Department opened an investigation but closed it without any charges being filed. (RR VI 138, 139).

Appellant was charged by indictment with indecency with a child by contact for the act with Fran only. (CR 7). A jury convicted appellant of the charged offense. (CR 68; RR VII 120). The court sentenced appellant to 12 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 75; RR VIII 34).

SUMMARY OF THE ARGUMENT

The State alleged that appellant committed indecency with a child by contact. The trial court permitted the State to also present evidence that appellant sexually assaulted another child 20 years prior by forcing her to perform oral sex on him and by digitally penetrating her one time. The court abused its discretion because the probative value of the extraneous evidence was substantially outweighed by the danger of unfair prejudice.

On redirect examination, the State asked the witness who alleged extraneous sexual abuse "why this has not been easy?" The witness stated because she was not appellant's "first victim." Prior to trial, the State agreed that it would not elicit any testimony from any witness regarding being appellant's "first or last victim." The trial court's cursory instruction to disregard was not sufficient to cure the harm by the witness's statement. The court abused its discretion in failing to grant a mistrial.

APPELLANT'S FIRST POINT OF ERROR

The trial court abused its discretion in finding that the probative value of evidence of extraneous offenses was not substantially outweighed by the danger of unfair prejudice.

The State alleged that appellant engaged in sexual contact with Fran Olsen, a child younger than 17, by causing contact between the hand of Fran Olsen and the genitals of appellant. (CR 7). The trial court permitted the State to also present evidence that appellant sexually assaulted Amber 20 years prior by forcing her to perform oral sex on her and by digitally penetrating her one time.

Extraneous evidence, although relevant, 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 needlessly presenting cumulative evidence. TEX. R. EVID. 403. The trial court abused its discretion in admitting Amber's testimony because

the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

An appellate court reviews a trial court's ruling on the admissibility of evidence of extraneous offenses for an abuse of discretion. *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex. Crim. App. 2013) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)). The court will affirm a trial court's evidentiary ruling that is within the zone of reasonable disagreement and correct under any theory of law. *Pawlak*, 420 S.W.3d at 810.

Generally, "an accused may not be tried for some collateral crime or for being a criminal generally." *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991) (quoting *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983)). To that end, evidence of prior crimes, wrongs, or other acts that is otherwise relevant is typically inadmissible to show that the defendant "acted in accordance with the character" or had a propensity to commit the crime. Tex. R. Evid. 404(b) (character evidence generally inadmissible). However, at a trial for indecency with a child by contact, the Code of Criminal Procedure allows the admission of certain extraneous offenses. TEX. CODE CRIM. PROC. ANN. ART. 38.37.

Article 38.37 describes the circumstances in which certain extraneous-act evidence can be admitted:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial

> of an alleged offense described by Subsection (a)(1) or (2) 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)

Indecency with a child by contact is specifically enumerated as one of the offenses to which article 38.37 can be applied. *Id.* § 2(a)(1)(C). Before evidence of any extraneous offense is admitted, the court must first "(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and (2) conduct a hearing out of the presence of the jury for that purpose." *Id.* § 2-a. The State must also provide notice to the defendant of its intent to introduce evidence under article 38.37. *Id.* § 3. The statutory procedures were followed in this case.

However, extraneous-offense evidence is not exempt from the scope of Texas Rule of Evidence 403. Rule 403 states that the "court may exclude relevant evidence 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." TEX. R. EVID. 403. The Court of Criminal Appeals has articulated a four-factor balancing test to determine whether unfair prejudice substantially outweighs the probative value of an extraneous offense under Rule 403:

> (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable - a factor which is related

to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;

(2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way;"

(3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and

(4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

De La Paz v. State, 279 S.W.3d 336, 348-49 (Tex. Crim. App. 2009) (citing *Wyatt v. State*, 23 S.W.3d 18, 26 (Tex. Crim. App. 2000)).

The court also cautioned that Rule 403 "should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of either the defendant or complainant in such 'he said, she said' cases." *Hammer v. State*, 296 S.W.3d 555, 562 (Tex. Crim. App. 2009). "[T]exas law, as well as the federal constitution, requires great latitude when the evidence deals with a witness's specific bias, motive, or interest to testify in a particular fashion." *Id.*

"[S]exually related bad acts and misconduct involving children are inherently inflammatory." *Pawlak*, 420 S.W.3d at 809 (citing *Montgomery*, 810 S.W.2d at 397). Additionally, "it is possible for the admission of character evidence, though not necessarily cumulative, to cross the line from prejudicial to unfairly prejudicial based on the sheer volume of character evidence admitted." *Pawlak*, 420 S.W.3d at 809-10 (*citing*

Mosley v. State, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998); *Salazar v. State*, 90 S.W.3d 330, 336 (Tex. Crim. App. 2002)).

Turning to the record here, the first and second factors of the balancing test weigh in favor of excluding Amber's testimony. Amber could not identify appellant in court as the man who abused her. (RR VI 117). She explained that the perpetrator was "Dale Rice," her mother's boyfriend, he played in a band, and that they lived in Kerrville Texas. (RR VI 117, 118,119). However, the abuse she described occurred nearly 20 years prior to the act alleged by Fran. Remoteness of an extraneous offense can significantly lessen its probative value. *E.g., West v. State*, 554 S.W.3d 234, 239 (Tex. App.--Houston [14th Dist.] 2018, no pet.); *Gaytan v. State*, 331 S.W.3d 218, 226 (Tex. App.--Austin 2011, pet. ref'd); *Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.--Waco 2009, pet. ref'd).

Furthermore, Amber's abuse involved allegations of pornography, oral sex, and digital penetration. These allegedly occurred while Amber's mother was working and over an unspecified, but extended period of time when she was nine years old. Fran testified to one act of abuse that involved appellant causing Fran to masturbate him with her hand. Kitty, Fran's aunt and appellant's wife, was purportedly in the bed next to them when this occurred.

Admittedly, appellate courts have recognized that extraneous acts of sexual assault on children are "especially probative" of a defendant's propensity to sexually assault children. *Alvarez v. State*, 491 S.W.3d 362, 371 (Tex. App.--Houston [1st Dist.] 2016, pet. ref'd); *Belcher v. State*, 474 S.W.3d 840, 848 (Tex. App.--Tyler 2015, no pet.).

But the lack of similarities between the charged act and the extraneous lessens its probative value. *Cf. Dies v. State*, 649 S.W.3d 273, 285 (Tex. App.--Dallas 2022, pet. ref'd) (Similarities between the charged offense and the extraneous acts admitted strengthened the probative value of the extraneous testimony.); *cf. Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.--Austin 2016, pet. ref'd) (Concluding that although remoteness of extraneous offenses "undermined their probative value," trial court could have reasonably determined that "remarkable similarities" between extraneous offenses and charged offense "strengthened the probative value of the evidence," such that first factor was therefore "neutral" or "at most ... somewhat favors exclusion" (quoting *Gaytan*, 331 S.W.3d at 227)).

The third factor weighs in favor of admission. Evidence of Amber's abuse was presented though only one witness and did not take so much time that the jury would have been unreasonably distracted from the charged offense.

The fourth factor weighs in favor of excluding the evidence. While there was no physical evidence to corroborate Fran's allegation, Fran could remember specific details regarding the time that were confirmed by others. Additionally, Fran's cousin Mary testified to an act of attempted abuse that involved touching her while sleeping in Kitty and appellant's bed. (RR VI 96, 98, 100, 102). This was not a case where several defense witnesses were pitted against a child, claiming that she made up the allegations. *Cf. Wheeler v. State*, 67 S.W.3d 879, 888-89 (Tex. Crim. App. 2002) (Trial court did not abuse its discretion in admitting extraneous evidence over Rule 403 objection. Whether the

charged offense actually occurred was a hotly contested issue. One little girl was "pitted against six defense witnesses whose testimony asserted or implied the events did not occur."). Thus, the State's need for Amber's testimony was not as great as in a "he-said she-said" case with a single victim.

The Rule 403 balancing test weighs in favor of excluding Amber's testimony. Therefore, the trial court abused its discretion in finding that the danger of unfair prejudice caused by the admission of the extraneous acts did not substantially outweigh its probative value. *See e.g., Montgomery,* 810 S.W.2d at 396-97 (Admission of evidence that defendant frequently walked around in front of his daughters naked and with an erection was an abuse of discretion in prosecution of defendant for indecency with a child, his daughters, inasmuch as State had no compelling need for the evidence either to prove specific intent or to shore up testimony of daughters, evidence had only marginal probative value and danger of unfair prejudice was substantial.).

Appellant's first point of error should be sustained, his conviction reversed, and the cause remanded for a new trial.

APPELLANT'S SECOND POINT OF ERROR

The trial court abused its discretion in denying a mistrial after the witness responded to the State's redirect examination that she was not appellant's "first victim."

Prior to trial, the defense filed a Motion in Limine. (CR 26-28). One of the topics listed was "24. Any mention of not being the first or last victim." (CR 28). The State was aware of the defense's motion and agreed to it in its entirety. (RR IV 14).

On redirect examination, the State felt the need to ask Amber "[C]an you explain to the jury why this has not been easy?" Amber responded:

> "Because this is something in my past that I buried and I never thought I would have the chance to do this ever again. And I want to make sure that I do it right this time, and I was -- based on my experience, I was -- sorry. **I was not the first victim, but I should have been the last**."

[Emphasis added] (RR VI 168).

The defense immediately objected and asked the judge to instruct the jury to disregard Amber's statement, which the court granted. (RR VI 168). The court then denied the request for a mistrial. (RR VI 172).

A mistrial is an appropriate remedy in extreme circumstances for a narrow class of highly prejudicial and incurable errors. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). A mistrial halts trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). A mistrial is required when an improper question or reference is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003), *cert. denied*, 542 U.S. 905, 124 S.Ct. 2837, 159 L.Ed.2d 270 (2004).

Appellate courts review a trial court's ruling on a motion for a mistrial for an abuse of discretion. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007); *Hawkins*,

135 S.W.3d at 77. A trial court abuses its discretion only when its decision is so arbitrary and unreasonable that no reasonable view of the record could support the ruling. *Webb*, 232 S.W.3d at 112; *State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007). Similarly, an appellate court reviews a trial court's ruling on a defendant's objection to inherently prejudicial external juror influence for an abuse of discretion. *See Alfaro*, 224 S.W.3d at 430 (reviewing denial of motion for mistrial based on inherent prejudice for abuse of discretion).

The defense was concerned with one of the State's witnesses informing the jury that she was not appellant's "first or last victim." (CR 28). Through the Motion in Limine, the State was put on notice to either steer clear of this or approach the bench prior to eliciting any such testimony. Nevertheless, the State asked an irrelevant question about the difficulty Amber had in coming forward with her allegations. The question, and Amber's response, was clearly calculated to inflame the minds of the jurors. *See Boyde v. State*, 513 S.W.2d 588 (Tex. Crim. App. 1974) (Conviction reversed when State asked police officer if he was satisfied that appellant was guilty); *Lucas v. State*; 378 S.W.2d 340 (Tex. Crim. App. 1964) (Mistrial should have been granted when State asked witness question that implied that appellant had previously been charged with drug possession); *Tate v. State*, 762 S.W.2d 678 (Tex. App.--Houston [1st Dist.] 1988, no pet.) (Trial court abused its discretion in not granting mistrial after State asked witness "isn't it a fact that you went and scored some heroin" with the defendant). Similarly, the trial court here abused its discretion in denying the requested mistrial.

The harm analysis is built into the determination of whether the trial court abused its discretion by denying a mistrial. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). Amber's comment left the jury with the false impression that there were additional victims of appellant out there that the jury was not aware of. Not only is there nothing in the record to support this, but the State had also previously been warned about eliciting any testimony that a witness was not appellant's "first or last victim." (CR 28). *See Tate*, 762 S.W.2d at 681-82 (Harm noted and reversal required despite court's instruction to disregard when prosecutor purposefully violated court order and was the instigator in putting evidence before the jury he knew to be inadmissible.). By the time Amber made the comment, the proverbial bell had been rung and the cursory instruction to disregard could not cure the damage.

Appellant's second point of error should be sustained, his conviction reversed, and the cause remanded for a new trial.

CONCLUSION

The trial court abused its discretion in failing to exclude the extraneous evidence of sexual assault and in denying the defense's request for a mistrial when that same witness claimed that she was not appellant's "first victim." Appellant's conviction should be reversed the cause remanded for a new trial.

Respectfully submitted,

Mandy Miller
MANDY MILLER
Attorney for Dale Arthur Rice
9722 Gaston Road, Ste. 150-257
Katy, TX 77494
SBN 24055561
PHONE (832) 900-9884
mandy@mandymillerlegal.com

CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on August 27, 2024, has 4,594 words based upon a word count under MS Word.

Mandy Miller
Mandy Miller

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument to counsel for the State of Texas via eservice on August 27, 2024, at:

Baldwin Chin
Fort Bend County District Attorney's Office
Baldwin.chin@fortbendcountytx.gov

Mandy Miller
Mandy Miller

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MML Paralegal on behalf of Mandy Miller
Bar No. 24055561
paralegal@mandymillerlegal.com
Envelope ID: 91367942
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Baldwin Chin		baldwin.chin@fbctx.gov	8/27/2024 11:58:11 AM	SENT