Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NOS. 14-99-00381-CR
14-99-00382-CR

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MICHAEL VICTOR WALTERS, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause Nos. 788,077 & 788,078

O P I N I O N

In this appeal, appellant, Michael Walters, challenges his convictions of two counts of aggravated assault of a child. Appellant brings two points of error, claiming the trial court erred by allowing improper admission of (1) extraneous offense evidence, and (2) impeachment evidence. We affirm.

I.
Factual Background

Appellant is the grandfather of the two children he was convicted of molesting. The two children, a seven year old boy and his six year old sister, stayed with the appellant on weekends while their mother worked. One night, the mother discovered her daughter masturbating, and when she asked her where she learned to do that, the girl told her "PaPa." The mother questioned both her son and daughter, and they both confirmed that their grandfather, repeatedly, touched their "privates" with his hands, mouth and penis when they stayed at his home.

At the guilt stage of the trial, the daughter and mother testified during the State's case-in-chief. However, one of appellant's defensive theories consisted of demonstrating the molestation never occurred by the children's lack of fear of the appellant and their willingness to continue spending weekends with him. In response to this theory, the State called Christina Barger to the stand. Appellant's first point of error concerns her testimony.

II.
Extraneous Offense Evidence

Our analysis of appellant's first point of error contains two parts: first, we will address whether the State's evidence was admissible; second, we will address whether admitting this evidence was unduly prejudicial to the appellant.

A. Admissibility

Since long before the passage of the Texas Rules of Evidence which sometime work to preclude admission of evidence of extraneous offenses, trial courts have allowed otherwise inadmissible evidence when the evidence is admissible to rebut a defensive theory. *See Creekmore v. State*, 860 S.W.2d 880, 892 (Tex. App.—San Antonio 1993, pet ref'd); *see also Mendiola v. State*, 995 S.W.2d 175, 178 (Tex. App.—San Antonio 1999, pet. granted). This is still viable law. *See id.* To that end, when one accused of sexually assaulting a child

challenges the credibility of the complainant, proof of similar acts may be admissible, under TEX. R. EVID. 404(b), to rebut the challenge if the evidence logically serves that purpose. *See Montgomery v. State*, 810 S.W.2d 372, 394 (Tex. Crim. App.1990); *see also Owens v. State*, 827 S.W.2d 911, 917 (Tex. Crim. App.1992) (evidence of extraneous acts between a defendant and a third party admissible to rebut defensive theory that defendant was being framed); *see also Ballard v. State*, 464 S.W.2d 861, 862-63 (Tex. Crim. App. 1971) (extraneous sex offenses admissible to rebut defendant's assertion that he did not "mess around with little children"). By raising a defensive theory, the defendant opens the door for the State to offer rebuttal testimony regarding an extraneous offense if the extraneous offense has common characteristics with the offense for which the defendant was on trial. *See Mendiola*, 995 S.W.2d at 178.

Here, appellant's trial counsel repeatedly questioned each of the State's witnesses and its own as to whether the children showed any fear of their grandfather or hesitancy about visiting him. For example, when questioning the children's mother, appellant asked:

Q. Now did the children show any reluctance to go visit him?

A. No.

Q. Did they seem to enjoy their visits with him?

A. Yes.

Q. Were they happy when you picked them up?

A. Yes.

Q. Or when they came home regardless of how they got there?

A. Yeah.

Appellant asked these same questions of the mother's roommate and two defense witnesses. This line of questioning was intended to demonstrate, by the children's willingness to see their grandfather, that the molestation never occurred. As such, these questions constituted an

attack on the children's credibility and opened the door for the State to offer rebuttal testimony regarding a similar extraneous offense. Accordingly, the State introduced the testimony of Christina Barger.

Ms. Barger testified that she was a friend of the appellant's daughter and, on occasion, spent the night at appellant's house. One night, when she was in seventh grade, Barger awoke with the appellant rubbing her breasts. Barger testified that although this incident occurred, she still visited appellant's daughter at appellant's home, showed no fear of appellant, and also spent the night on other occasions. With Barger's testimony, the State rebutted the defensive theory by showing another instance of a child's willingness to visit and sleep at appellant's house despite having been molested by him. Thus, this evidence was relevant and admissible as rebuttal evidence. *See* TEX. R. EVID. 401 (evidence is "relevant" that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); *see also Montgomery*, 810 S.W.2d at 394.

B. Rule 403 Balancing

A finding of relevancy and admissibility under the Rules of Evidence, however, is not the end of our inquiry. Although Rule 403 favors the admission of relevant evidence and carries the presumption that relevant evidence will be more probative than prejudicial, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See Jones v. State*, 944 S.W.2d 642 (Tex.Crim.App.1996); *see also Rankin v. State*, 974 S.W.2d 707, 711 (Tex. Crim. App. 1996). Rule 403 acts as a further check on the admissibility of evidence. In other words, even though extraneous evidence meets all the requirements for admissibility under 404(b), the trial court may disallow it as excessively prejudicial. *See id.* The court is not required to prohibit such evidence. The court must, however, engage in the balancing test of Rule 403 if a proper Rule 403 objection is made. *See id.*; *see also Montgomery*, 810 S.W.2d at 388.

At trial, appellant objected that the evidence of his fondling Barger was unfairly prejudicial. On appeal, he insists it is unfairly prejudicial because it allowed the jury to convict him based on his molestation of Barger as well as his grandchildren. His first trial ended in a mistrial because the jury deadlocked; therefore, appellant argues, the State introduced Barger's testimony to bolster an otherwise weak case by prejudicing the jury with extraneous offense evidence. The State responded at trial and on appeal that Barger's testimony was being offered to show the children's state of mind, not the appellant's, and that the evidence's probative value outweighed its prejudicial nature.

A trial judge has broad discretion in admitting or excluding evidence. *See Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex.Crim.App. 1999). A trial judge, however, may exercise her discretion in excluding evidence only when 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. *See id.*; *see also* TEX. R. EVID. 403. In 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." *See Montgomery*, 810 S.W.2d at 389. The trial court's ruling must be measured against the relevant criteria by which a Rule 403 decision is made. The reviewing court must look at the proponent's need for the evidence in addition to determining the relevance of the evidence. *See id.* at 392-93. The relevant criteria in determining whether the prejudice of an extraneous offense outweighs its probative value include:

> (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;

> (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.

See Montgomery, 810 S.W.2d at 389-90; *see also Phelps v. State*, 5 S.W.3d 788, 795-96 (Tex. App. —San Antonio 1999, no pet. h.).

First, Barger's testimony made the fact of appellant's molestation of his grandchildren more probable. Barger's testimony allowed the jury to hear evidence of a family friend who was molested by the appellant and remained willing to return to the appellant's home. It also demonstrated that the defense's other witnesses were not aware of any problem between Barger and appellant despite the fact that appellant had molested her. Because there was no physical evidence of the molestation of the children, their credibility was key. Therefore, the behavior of another victim of the appellant who was fondled by the appellant, remained friendly with appellant and his family, and who spent other nights at this home despite the molestation, is relevant to the behavior of the grandchildren. Therefore, Barger's testimony made the fact of appellant's molestation of his grandchildren more probable.

Second, the rebuttal testimony did not increase the likelihood that the jury would render an irrational verdict. As the State pointed out at trial, appellant's fondling of Barger did not involve penetration, so it did not have the inflammatory potential that perhaps a more invasive molestation might. Therefore, the jury was less likely to have found appellant guilty based on an irrational reaction to Barger's testimony. Third, Barger's testimony took little time; thus, the jury's attention was distracted from evidence of the indicted offense for a very short period of time.

Finally, the State's need for this evidence was great. Although the State also put on rebuttal evidence through the testimony of the children's therapist, the therapist was only able to speculate as to the children's lack of fear or hesitancy concerning visits to their grandfather. In contrast to the theoretical suppositions offered by the therapist, Barger offered testimony of her actual experiences with and emotional responses to appellant. Therefore, this probative

evidence, explaining the children's apparent willingness to visit their grandfather despite his repeated molestations, related to a disputed issue underlying the defensive theory challenging the children's credibility. In other words, Barger's testimony was used to show that molested children do not always fear their molester, thereby rebutting appellant's defensive theory. As such, it was relevant, admissible, and not unduly prejudicial. Based on our analysis of the foregoing factors, we can not say the trial judge clearly abused his discretion by allowing the proffered rebuttal testimony. Accordingly, we overrule appellant's first point of error.

III.

Impeachment Evidence

In his second point of error, appellant complains the State impeached his testimony by improperly questioning him about remote convictions for possession of a controlled substance and theft. Both convictions occurred in the mid-eighties; therefore, appellant argues, they are inadmissible unless the trial court determines the probative value outweighs their prejudicial effect. *See* TEX. R. EVID. 609(b); *see also Hernandez v. State*, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). We do not reach the merits of appellant's argument because it has been waived on appeal.

The reporters record contains this exchange concerning appellant's prior convictions:

Q. [The State] And are you the same Michael Victor Walters who on January 13, 1986, was found guilty of the felony offense of possession of a controlled substance here in Harris County, Texas?

A. [Appellant] That was 20 years ago, yeah.

Q. Let me finish, sir. In the 179th District Court of Harris County, Texas?

A. Yes, ma'am, back in the '80s.

Q. In 1986?

A. '85.

Q. Were you convicted in 1986?

A. Yes, ma'am, I served probation.

Q. Are you the same Michael Victor Walters who, on January 13, 1986, was found guilty of the offense of theft in County Court No. 2 in Harris County, Texas?

A. No, ma'am. I was charged with receiving stolen goods –

[The Court] Mr. Walters, I'll admonish you one more time. Please listen to the questions that are asked and answer only those questions. Do not volunteer information. Do you understand, sir?

[Defense counsel] Objection. This is improper impeachment anyway.

A defendant must make a timely objection to preserve an error in the admission of evidence. *See Dinkins v. State*, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995) (citing *Johnson v. State*, 878 S.W.2d 164, 167 (Tex. Crim. App. 1994)). An objection should be made as soon as the ground for objection becomes apparent. *See Johnson v. State*, 803 S.W.2d 272, 291 (Tex. Crim. App. 1991). Therefore, if a question clearly calls for an objectionable response, a defendant should make an objection before the witness responds. *See Webb v. State*, 480 S.W.2d 398, 400 (Tex. Crim. App.) *rev'd on other grounds*, *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed2d 330 (1972). If he fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and error is waived. *See Girndt v. State*, 623 S.W.2d 930, 934 (Tex. Crim. App. 1981). Here, because the State's questions included the dates of the prior convictions, the ground for objecting to the questions regarding both convictions was immediately apparent. Appellant, however, answered both questions before lodging an objection and, further, failed to present the trial court or this Court with a legitimate reason to justify his delay. Therefore, appellant's second point of error is waived.

Accordingly, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 27, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Norman R. Lee sitting by assignment.