Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00525-CR

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RONALD WADE ROBERTS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 32,389

O P I N I O N

Ronald Wade Roberts appeals a conviction for four counts of aggravated sexual assault on the grounds that: (1) the trial court erred by: (a) not disqualifying a juror who had a felony conviction; and (b) admitting inadmissible extraneous offense evidence and doing so without a limiting instruction and despite a lack of notice by the State; and (2) the evidence is legally and factually insufficient to support the conviction. We affirm.

Background

Appellant was indicted for four counts of sexually assaulting his stepdaughter from April 15, 1987 to July 14, 1988, while his stepdaughter was between the ages of 10 and 12. A jury found appellant guilty of all four counts and sentenced him to ten years confinement, probated, for the first three counts and to twenty years confinement for the fourth count.

Juror Disqualification

The first of appellant's six points of error argues that the trial court erred in not disqualifying a juror who had been convicted of a felony. Appellant argues that the juror's felony conviction absolutely disqualified him from serving on the jury and that this disqualification could not be waived by either side.

A challenge for cause may be made by either the State or defense if a potential juror has been convicted of any felony. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(2) (Vernon 1989). No juror will be impaneled when he is subject to a challenge for cause for being convicted of a felony even though both parties consent. *See id.* art. 35.19; *DeBlanc v. State*, 799 S.W.2d 701, 707 (Tex. Crim. App.1990).

However, when a convicted person successfully completes his conditions of probation, a trial judge can enter an order discharging and dismissing his case, which releases the person from all penalties and disabilities resulting from the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20 (Vernon Supp. 1999). Where a trial court enters an order dismissing a conviction following completion of probation, the disabilities under article 35.16(a)(2) are removed. *See Wolfe v. State*, 917 S.W.2d 270, 277 (Tex. Crim. App. 1996).

In this case, the record from voir dire reflects that one of the jurors, Ebey, had previously: (i) been convicted of felony possession of marijuana, (ii) been given a probated sentence, (iii) been discharged from the probation, and (iv) had the cause dismissed. The trial court entered into evidence the order dismissing and discharging Ebey's case, effectively releasing his legal disabilities. Although appellant's trial attorney initially challenged Ebey for cause, and the trial court granted the challenge, appellant's attorney later withdrew the challenge, and Ebey served on the jury.

Because Ebey's order, signifying that he had successfully completed probation and dismissing and discharging his case, was entered and introduced into evidence in the trial court, Ebey was not prohibited from serving as a juror under article 35.16(a)(2). Therefore, appellant's first point of error demonstrates no error by the trial court in allowing Ebey to serve on the jury and is overruled.

Extraneous Offense Evidence

Admission

Appellant's second point of error argues that the trial court erred by admitting extraneous offense evidence in violation of Rule 404(b). Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *See* TEX. R. EVID. 404(b). However, an offense is not tried in a vacuum, and the jury is entitled to know all relevant facts and circumstances surrounding the charged offense. *See Pondexter v. State*, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996). Therefore, where several crimes are so intermixed or connected that they form an indivisible criminal transaction, and full proof by testimony of one cannot be given without showing the others, evidence of the non-charged offenses is "same transaction contextual" evidence which is admissible as an exception to Rule 404(b). *See id*. However, same transaction contextual evidence is admissible only to the extent it is necessary to the jury's understanding of the offense, *i.e.*, only when the offense would make little or no sense without also bringing in the same transaction evidence. *See id*.[1]

In this case, appellant's indictment charged him with: (1) causing the complainant's sexual organ to contact his sexual organ; (2) causing the complainant's anus to contact his sexual organ; (3) causing the

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[1] *Compare Santellan v. State*, 939 S.W.2d 155, 168 (Tex. Crim. App. 1997) (evidence regarding abuse of corpses occurring two days after their murder was same transaction contextual evidence in the trial for those murders); *Cantu v. State*, 939 S.W.2d 627, 636-37 (Tex. Crim. App. 1997) (evidence of sexual assault, robbery, and murder of one victim was same transaction contextual evidence in trial for murder of second victim); *Camacho v. State*, 864 S.W.2d 524, 531-32 (Tex. Crim. App. 1993) (where appellant entered house, shot the homeowner's employee, kidnapped the homeowner's wife and son, and later murdered them, evidence of the kidnapping was same transaction contextual evidence in the trial for murder of the employee); *with Pondexter v. State*, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996) (evidence of appellant's gang affiliations and activities was not same transaction contextual evidence in capital murder case).

complainant's sexual organ to contact his mouth; and (4) causing his sexual organ to penetrate the complainant's mouth. In addition to these particular acts, evidence was also admitted at trial over appellant's objection of: (1) three additional instances of oral contact with the complainant's sexual organ; (2) one instance of anal intercourse; and (3) one instance of sexual intercourse. Each of the extraneous offenses occurred during one of the four episodes of sexual assault for which appellant was indicted. Because they were therefore sufficiently blended or connected with the charged offenses that full proof by testimony of the charged offenses could not be given without showing the others, the extraneous offenses were admissible as same transaction contextual evidence of the charged sexual assaults.

In addition, notwithstanding rule 404, evidence of an extraneous offense committed by a defendant against a child victim is also admissible for its bearing on relevant matters, including the state of mind of the defendant and the child and the previous and subsequent relationship between them. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 (Vernon Supp. 1999). In this case, because the indicted and extraneous offenses occurred repeatedly between appellant and his stepdaughter over a period of nearly two years, the extraneous offense evidence is relevant to the state of mind of appellant and the complainant and of the relationship between them before and after the incidents. Therefore, this evidence is also admissible under article 38.37, and appellant's second point of error is overruled.

Lack of Notice

Appellant's third point of error argues that the trial court erred by not requiring the State to give specific notice of its intent to introduce the extraneous offense evidence and the purposes for which it would be introduced.

Upon timely request by a defendant in a criminal case, the State must give reasonable notice in advance of trial of its intent to introduce evidence of an extraneous offense other than that arising in the same transaction. *See* TEX. R. EVID. 404(b); TEX. CODE CRIM. PROC. ANN. art. 38.37 § 3 (Vernon Supp. 1998). Because we have determined in response to point of error two that the complained of extraneous offense evidence was same transaction contextual evidence, it was not subject to the notice requirement in rule 404(b). Therefore, point of error three fails to demonstrate that the trial court erred in failing to exclude it for lack of notice, and is overruled.

Lack of Limiting Instruction

Appellant's fourth point of error argues that: (a) the limiting instructions given by the trial court upon admitting the extraneous offense evidence and in the jury charge were inconsistent;[2] and (b) appellant was refused an instruction in the charge on punishment that the jury should not consider extraneous offense evidence unless it believed beyond a reasonable doubt that appellant committed the extraneous offense.

As to the first contention, because appellant's objection to the limiting instruction in the jury charge did not complain of its alleged inconsistency with those given upon admission of the evidence, that complaint is not preserved for our review.[3] As to the second contention, evidence that is admissible as same transaction contextual evidence is not subject to the requirement of a limiting instruction. *See Camacho v. State*, 864 S.W.2d 524, 535 (Tex. Crim. App. 1993). Because we concluded in response to point of error two that the complained of extraneous offense evidence was same transaction contextual evidence, appellant was not entitled to a limiting instruction on it. Therefore, point of error four fails to demonstrate error by the trial court and is overruled.

Sufficiency of Evidence

Appellant's fifth and sixth points of error challenge the legal and factual sufficiency of the evidence to prove that the offense alleged in count four of the indictment occurred on or about April 15, 1987 or that it was committed within the applicable ten year statute of limitations.

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Gale v. State*, 998 S.W.2d 221, 223 (Tex. Crim. App. 1999). A factual sufficiency review takes into consideration all of the evidence and weighs that which tends to prove the existence of the fact in dispute against the contradictory

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[2] Appellant contends that the instructions given when the evidence was admitted limited the jury's consideration to the prior and subsequent relationship between appellant and his stepdaughter, appellant's state of mind, the naturalness or unnaturalness of the stepparent/child relationship, and context of this particular relationship whereas the court's charge also included consideration of the evidence with regard to motive, opportunity, plan, and intent.

[3] *See, e.g., Trevino v. State*, 991 S.W.2d 849, 854-55 (Tex. Crim. App. 1999) (overruling a complaint on appeal which did not comport with the objection at trial).

evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury's verdict will be upheld unless it is so against the great weight of the evidence that it is clearly wrong and unjust. *See id.* at 272.

The primary purpose of specifying a date in the indictment is not to notify the accused of the date of the offense but rather to show that the prosecution is not barred by the statute of limitations. *See Garcia v. State*, 981 S.W.2d 683, 686 (Tex. Crim. App. 1998). Therefore, when an indictment alleges that a crime occurred "on or about" a certain date, the State can rely upon an offense occurring on a date other than the one specifically alleged so long as the date proven is anterior to the presentment of the indictment and within the statutory limitation period and the offense relied upon otherwise meets the description of the offense contained in the indictment. *See Yzaguirre v. State*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997).[4]

A statute of limitations claim is a defense that the defendant will forfeit if it is not asserted at or before the guilt/innocence stage of trial. *See Floyd v. State*, 983 S.W.2d 273, 274 (Tex. Crim. App. 1998).[5] In this case, the first time appellant raised any statute of limitations defense was in his motion for new trial. Because appellant did not raise his statute of limitations claim before or during trial, this defense was waived. *See id.* at 273-744 (holding that raising failure to prove that offense occurred within five year limitations period for first time in amended motion for new trial was not timely and therefore forfeited this defense). Therefore, appellant's fifth and sixth points of error are overruled, and the judgment of the trial court is affirmed.

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[4] Thus, constitutional notice requirements do not require an indictment to specify the precise date on which the charged offense occurred or to provide a narrow window of time within which it must have occurred. *See Garcia*, 981 S.W.2d at 685-86.

[5] Before trial, a defendant may assert the statute of limitations defense by filing a motion to dismiss under Article 27.08(2) of the Texas Code of Criminal Procedure. *See Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998). At trial, a defendant may assert the defense by requesting a jury instruction on limitations if there is some evidence before the jury that the prosecution is limitations-barred. *See id.*

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).