MODIFY and AFFIRM; and Opinion Filed January 18, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00989-CR

ROSICK HILL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F-1171579-K

MEMORANDUM OPINION

Before Justices Fillmore, Brown, and Richter[1]
Opinion by Justice Richter

A jury convicted Rosick Hill of aggravated assault of a child under fourteen years of age, and the trial court sentenced him to fifteen years in prison. In two issues on appeal, Hill contends the trial court erred by (1) overruling his motion to suppress his oral and written statements to the police, and (2) admitting evidence of extraneous sexual assault against someone other than the complainant in this case. In a cross-point, the State contends the judgment should be modified to properly reflect the correct section of the penal code for appellant's conviction, appellant's stipulation to the enhancement paragraph, and the trial court's finding that the enhancement paragraph was true. In addition, on our own motion, we modify the trial court's

[1] The Honorable Martin Richter, Justice of the Court of Appeals for the Fifth District of Texas at Dallas, Retired, sitting by assignment.

judgment to reflect that appellant's conviction requires him to comply with sex offender registration requirements and that the complainant was ten years old at the time of the offense.

The background of the case and the evidence adduced at trial are well known to the parties; thus, we do not recite them here in detail. Because all dispositive issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.2(a), 47.4. We affirm the trial court's judgment as modified.

I. BACKGROUND

E.T. testified that appellant (her second cousin) sexually assaulted her when she was ten years old. She testified that appellant threatened to hurt or kill her if she ever told anyone what he had done to her. He also told her that no one would believe anything she said. E.T. kept the assault a secret for three years. When she was thirteen, she told two other cousins that appellant had raped her. One of her cousins convinced E.T. to tell her grandmother. The police were called and E.T. was referred to the Dallas Children's Advocacy Center to be interviewed. In addition to E.T.'s testimony, the State presented testimony from Violette Tillis, E.T.'s mother, Nakisha Biglow, a Dallas Children's Advocacy Center forensic interviewer, Dr. Matthew Cox, the doctor who performed E.T.'s sexual assault examination, and Amanda Milinarich, E.T.'s therapist.

During the guilt-innocence phase of trial, defense counsel objected to the admissibility of extraneous evidence regarding appellant's prior conviction for harboring a runaway minor and an uncharged sexual assault, both involving sixteen-year-old N.P. The trial court held an article 38.37 hearing outside the presence of the jury to consider the admissibility of the extraneous offense evidence. N.P. testified that appellant repeatedly sexually assaulted her over a three-week period while she was staying at his apartment. Arlington Police Officer Jason Hutson testified that he was dispatched to back up the primary officer investigating a runaway. When

N.P. was found at appellant's apartment, appellant was arrested and placed in Officer Hutson's patrol car to be transported to jail. Hutson testified regarding oral statements appellant made to him, as well as a written statement in which appellant admitted to having consensual sex with N.P. Following argument by counsel, the trial court overruled appellant's objections and allowed the State to present the extraneous evidence to the jury.

Appellant testified in his own defense. He denied sexually assaulting E.T. He also denied sexually assaulting N.P. Although appellant disputed some of N.P.'s testimony, he admitted having a consensual sexual relationship with her.

A jury found appellant guilty of aggravated assault of a child under fourteen years of age. At the punishment phase of trial, appellant stipulated to the prior felony conviction alleged in the enhancement paragraph, and the trial court sentenced him to fifteen years in prison. Appellant filed a motion for new trial which was overruled by operation of law. This appeal followed.

II. DISCUSSION

A. Appellant's Oral And Written Statements

In his first issue, appellant contends the trial court erred by admitting the oral and written statements he made to Officer Hutson after his arrest for the extraneous offense of harboring a runaway. Specifically, appellant contends Officer Hutson deliberately utilized an illegal two-step interrogation strategy to avoid the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), thereby rendering his oral and written custodial statements inadmissible.

After appellant was arrested for harboring a runaway child (N.P.), Officer Hutson handcuffed him, placed him in the back of his police car, and drove him to jail. Hutson did not give appellant a *Miranda* warning. As they drove toward the jail, Hutson started talking to appellant about his relationship with N.P. Appellant initially denied having sex with N.P. but later admitted he had consensual sex with N.P. Hutson testified that at that point, he knew he

was investigating a separate offense of sexual assault of a child. Hutson asked appellant if he would give a written statement, and appellant agreed to do so. The form used for appellant's written statement included a written *Miranda* warning. Hutson testified that he went over the *Miranda* warning with appellant prior to appellant providing his written statement. Appellant was in custody in the back of Hutson's police car when he made his oral and written statements.

On appeal, appellant argues that both statements were obtained as the result of a deliberate, two-step questioning strategy with no curative measures taken prior to the post-warning written statement; therefore, both statements should have been suppressed and not admitted at trial. A "two-step" or "question first, warn later" interrogation occurs when the police interrogate a suspect without giving him his *Miranda* warnings, obtain a confession from him, then give him the *Miranda* warnings, and get him to repeat the confession he made previously. *Missouri v. Seibert*, 542 U.S. 600, 605–06 (2004). The deliberate employment of such a tactic is impermissible in Texas. *See Carter v. State*, 309 S.W.3d 31, 38 (Tex. Crim. App. 2010); *Martinez v. State*, 272 S.W.3d 615, 624 (Tex. Crim. App. 2008). Appellant also argues the admission of involuntary statements in violation of *Miranda* amounts to constitutional error.

In response, the State contends that appellant failed to preserve this issue for appellate review because the issue raised on appeal does not comport with the objections made to the trial court. To preserve a complaint for review on appeal, a party must make a timely, specific request, objection, or motion to the trial court that states the grounds for the ruling sought, and the trial court must rule on the request, objection, or motion. TEX. R. APP. P. 33.1(a); *Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App. 2011). And an appellant's complaint on appeal must comport with his trial objection. *Degar v. State*, 482 S.W.3d 588, 590 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

The record reveals that defense counsel did not present a *Miranda* objection during the article 38.37 hearing. Instead, defense counsel raised the following three objections to the extraneous offense evidence: (1) the defense did not receive sufficient notice of the State's intention to offer testimony by N.P. and Officer Hutson or appellant's written statement from that offense; (2) the State could not prove the alleged sexual assault of N.P. beyond a reasonable doubt; and (3) the evidence was more prejudicial than probative. The trial court overruled defense counsel's objections, ruling that N.P. and Officer Hutson would be allowed to testify at trial and appellant's written statement would be admitted into evidence.

Later during the trial, immediately before Officer Hutson testified before the jury, defense counsel again objected to the admissibility of appellant's written statement. This time, defense counsel argued the written statement should not be admitted because appellant had not been given proper *Miranda* warnings while he was in custody, stating:

> Prior to the State's next witness, I just want to object to State's Exhibit No. 6 [appellant's written statement] being introduced before the jury. Based on the officer's testimony, we believe that Mr. Hill should have been given proper *Miranda* warnings while he was in custody. And based on the fact that he was in custody in the squad car at the time that all of his statements were taken, that all of his statements at that point should not be allowed, even the statements that he wrote on State's Exhibit No. 6, which was his written admissions before an Officer Hutson. He said it was clear that the information that they had was all out of the same transaction, and he was already in custody, and therefore we believe that those statements should not be admitted.

Thus, defense counsel's objection that appellant was not given proper *Miranda* warnings was premised on his assertion that harboring a runaway and sexual assault of the runaway were all part of the same transaction. The State responded to defense counsel's argument, arguing that appellant was in custody for a different offense—harboring a runaway—and received a *Miranda* warning prior to making his written statement that the sexual relationship between appellant and N.P. was consensual. The trial court examined the written statement and overruled defense counsel's objection.

Defense counsel's objection and resulting arguments did not indicate to the trial court or the State that he was objecting that the *Miranda* warning was improper because the officer used an illegal two-step interrogation strategy to avoid the requirements of *Miranda*. Instead, defense counsel's argument was based on his assertion that harboring a runaway and sexual assault of the runaway were all part of the same transaction so the statements about sexual assault should not be admitted. That is the argument to which the State responded, and that is the argument considered by the trial court in overruling defense counsel's objection.

We conclude appellant's trial objection does not comport with the issue raised on appeal and he has failed to preserve his complaint for our review. TEX. R. APP. P. 33.1; s*ee Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005); *Degar*, 482 S.W.3d at 590. Furthermore, appellant's general objection regarding *Miranda* warnings was not sufficient to preserve a two-step interrogation complaint for appeal. *See Vasquez v. State*, 483 S.W.3d 550, 553–56 (Tex. Crim. App. 2016) (A general or imprecise objection will not preserve error for appeal unless the legal basis for the objection is obvious to the court and to opposing counsel.). Appellant's first issue is overruled.

B. Extraneous Offense Evidence

In his second issue, appellant contends the trial court erred by admitting evidence of the extraneous sexual assault against N.P. because it was more prejudicial than probative. Appellant was not charged with or convicted of sexually assaulting N.P.; he was only charged with and convicted of harboring N.P., a runaway. Appellant argues that N.P.'s allegations that he sexually assaulted her were never proved beyond a reasonable doubt, were completely unrelated to the charged offense against E.T., and were not similar to or probative of any fact at issue in E.T.'s case. Therefore, according to appellant, evidence of the extraneous offense served only to distract, inflame, prejudice, and otherwise confuse the issue for the jury.

Generally, the State cannot provide evidence of prior crimes, wrongs, or other acts to show that a defendant acted in accordance with that character or had a propensity to commit the crime. TEX. R. EVID. 404(b). However, in the context of sexual assault of a child, a different rule applies to recognize that "[t]he special circumstances surrounding the sexual assault of a child victim outweigh normal concerns associated with evidence of extraneous acts." *Jenkins v. State*, 993 S.W.2d 133, 136 (Tex. App.—Tyler 1999, pet. ref'd). Under article 38.37, the State is allowed to provide evidence of other children the defendant has sexually assaulted "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) (West Supp. 2016); *see Alvarez v. State*, 491 S.W.3d 362, 367 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

Appellant argues that even though the extraneous evidence may be admissible under article 38.37, the trial court should have determined that the evidence was inadmissible under rule 403 of the Texas Rules of Evidence. We review a trial court's decision to admit or exclude evidence of extraneous offenses under an abuse-of-discretion standard. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). The trial court does not abuse its discretion unless its decision to admit or exclude the evidence lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). We will uphold the trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *See De La Paz*, 279 S.W.3d at 344.

Texas Rule of Evidence 403 provides that a trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. Article 38.37 does not explicitly require that the rule 403 balancing test be applied,

nor does it prohibit the trial court from applying that test. *See Alvarez*, 491 S.W.3d at 370; *Belcher v. State*, 474 S.W.3d 840, 847 (Tex. App.—Tyler 2015, no pet.). Nevertheless, courts have concluded that when evidence of a defendant's extraneous acts is relevant under article 38.37, the trial court is required, on proper objection or request, to conduct a rule 403 balancing test. *Hinds v. State*, 970 S.W.2d 33, 35 (Tex. App.—Dallas 1998, no pet.); *see also Alvarez*, 491 S.W.3d at 370; *Belcher*, 474 S.W.3d at 847; *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref'd). Absent an explicit refusal to conduct the balancing test, we presume the trial court conducted the test when it overruled the objection. *Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997) (appellate courts presume trial court engaged in required balancing test once rule 403 is invoked, and the trial court's failure to conduct balancing test on record does not imply otherwise); *Sanders v. State*, 255 S.W.3d 754, 760 (Tex. App.—Fort Worth 2008, pet. ref'd) (rule 403 does not require the balancing analysis be performed on the record).

When undertaking a rule 403 analysis, a trial court must balance (1) the inherent probative force of the evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) 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); *see also Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012). We should reverse the trial court's balancing determination "rarely and only after a clear abuse of discretion." *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex. Crim. App. 1990). In addition, because rule 403 permits the exclusion of admittedly probative evidence, "it

is a remedy that should be used sparingly, especially in 'he said, she said' sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

Applying the rule 403 factors, we first consider the inherent probative force of the extraneous evidence along with the State's need for that evidence. Appellant contends the facts of the sexual assault of N.P. are not similar to or probative of any fact at issue in E.T.'s case. We disagree. Appellant sexually assaulted N.P. and E.T., both underage girls, and threatened them with harm if they told anyone what he had done. In the case before this Court, E.T. was the only eyewitness to the offense, there was no physical evidence to support her accusation, and her credibility was clearly the focal issue in the case. Appellant denied the sexual assault occurred and argued that E.T. fabricated her statement. Evidence that appellant sexually assaulted N.P. and threatened to kill her if she told anyone was probative of appellant's propensity to sexually assault and threaten underage girls. Further, the evidence was needed by the State to corroborate E.T.'s account and rebut the defensive theory that E.T. was not credible. The trial court could have reasonably concluded that the inherent probative force of the extraneous evidence, coupled with the State's need for the evidence, was considerable. As for the third factor, there is nothing in the record to indicate that admitting the evidence was so inherently inflammatory that it elicited an emotional response or aroused the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. *See Gigliobianco*, 210 S.W.3d at 641. Appellant does not direct our attention to any particular facts about the sexual assault of N.P. that make such evidence uniquely or unfairly prejudicial. The trial court could have reasonably concluded that the extraneous evidence, while prejudicial, was not unfairly prejudicial.

The fourth factor concerns the tendency of the evidence to confuse or distract the jury from the main issues. Appellant contends that because the sexual assault of E.T. and the sexual

assault of N.P. are not related in time, place, or other details, evidence of the sexual assault of N.P. was "merely a distraction" and should not have been admitted. We have already concluded that the evidence was probative of appellant's propensity to sexually assault and threaten underage girls. Accordingly, there is a low probability the evidence would confuse or distract the jury from the main issues in the case. Further, although the development of the evidence of the extraneous act took some time and more than one witness, it was not so overwhelming as to distract the jury from the charged conduct. The fifth factor concerns a "tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds. For example, 'scientific' evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence." *Id*. The trial court could have reasonably concluded that the evidence here was not prone to this tendency. It was not scientific or technical and it pertained to matters that could easily be understood by a jury. Finally, the evidence regarding the extraneous offense was admitted through the testimony of N.P. and Officer Hutson. Considering the record as a whole, it did not consume an inordinate amount of time or repeat evidence that had already been admitted.

Given our standard of review, the presumption in favor of admissibility, and the factors discussed above, we conclude the trial court did not abuse its discretion by overruling appellant's rule 403 objection and admitting the evidence of his extraneous sexual assault of N.P. *See Hammer*, 296 S.W.3d at 568. We overrule appellant's second issue.

C. Modification Of The Judgment

The judgment contains several errors. Some of the errors were raised by the State in a cross point; some of the errors were not raised by either party. We have the authority to modify an incorrect judgment when we have the necessary data and information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *McCoy v. State*, 81

S.W.3d 917, 920 (Tex. App.—Dallas 2002, pet. ref'd). Our authority to reform judgments is not limited to mistakes of a clerical nature. *See Bigley*, 865 S.W.2d at 27. Nor is it dependent upon the request of a party. *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record." *Id*. at 529.

The State contends the judgment should be modified to reflect the correct section of the penal code. The record shows appellant was charged with and convicted of aggravated sexual assault of a child under the age of fourteen, which is proscribed in section 22.021 of the penal code. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i), (2)(B) (West Supp. 2016). The judgment, however, erroneously reflects that appellant violated section 22.02 of the tax code. We modify the judgment to reflect the statute for the offense is section 22.021 of the penal code.

The State also contends the judgment should be modified to properly reflect that appellant stipulated to an enhancement paragraph and the trial court found that enhancement paragraph to be true. Appellant's indictment included one enhancement paragraph. The record reflects that appellant testified about his prior convictions at trial, including the conviction detailed in the enhancement paragraph. During the sentencing phase, appellant specifically stipulated to the enhancement paragraph. Nevertheless, the judgment erroneously reflects the plea to the first enhancement paragraph, and the trial court findings on the first enhancement paragraph, to be "N/A." We modify the judgment to reflect appellant's plea to the first enhancement paragraph to be "TRUE" and the trial court's findings on the first enhancement paragraph to be "TRUE."

The judgment incorrectly states that sex offender registration requirements do not apply to appellant and that the age of the victim at the time of the offense was "N/A." Appellant's

conviction for aggravated sexual assault of a child under the age of fourteen is among those defined as a "[r]eportable conviction or adjudication" for purposes of the sex offender registration statute. *See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A) (West Supp. 2016) (stating, in part, that a conviction based on a violation of section 22.021, aggravated sexual assault, is a reportable conviction or adjudication for the purpose of sex offender registration). As a person who has a reportable conviction or adjudication, appellant is subject to the registration requirements of that program. *See* TEX. CODE CRIM. PROC. ANN. art 62.051 (West Supp. 2016). In addition, appellant's offense was necessarily predicated on the victim being a child younger than fourteen years of age on the alleged date of the offense. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i), (2)(B).

Because there is sufficient evidence to support the conviction in this case, and because the State alleged and proved that E.T. was ten years old at the time of the offense, on our own motion we modify the judgment to show that the sex offender registration requirements do apply to appellant and the age of the victim at the time of the offense was ten years. *See* TEX. R. APP. P. 43.2(b); *Asberry*, 813 S.W.2d at 529–30 (appellate court has the authority to modify incorrect judgments sua sponte when the necessary information is available to do so); *see also Lourenco v. State*, Nos. 05-13-01092-CR & 05-13-01114-CR, 2015 WL 356429, at *10 (Tex. App.—Dallas Jan. 28, 2015, no pet.) (not designated for publication) (modifying judgments to show applicability of sex offender registration requirements and that age of victims at time of offense was younger than fourteen years of age because evidence was sufficient to support convictions and because the offense in each case required a showing that the age of the victim was younger than fourteen); *Ruiz v. State*, Nos. 05-12-01703-CR & 05-12-01704-CR, 2014 WL 2993820, at *12 (Tex. App.—Dallas June 30, 2014, no pet.) (not designated for publication) (same); *Medlock*

v. State, No. 05-11-00668-CR, 2012 WL 4125922, at *1–2 (Tex. App.—Dallas Sept. 20, 2012, no pet.) (mem. op., not designated for publication) (same).

CONCLUSION

As modified, we affirm the trial court's judgment.

/Martin Richter/
MARTIN RICHTER
JUSTICE, ASSIGNED

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TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ROSICK HILL, Appellant	On Appeal from the Criminal District Court No. 4, Dallas County, Texas
No. 05-15-00989-CR V.	Trial Court Cause No. F-1171579-K.
	Opinion delivered by Justice Richter.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Brown participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

(1) revise the statute for the offense to state appellant was convicted pursuant to section 22.021 of the Texas Penal Code, and not section 22.02 of the Tax Code;
(2) revise appellant's plea to the first enhancement paragraph to be "TRUE," and the trial court's findings on the first enhancement paragraph to be "TRUE;"
(3) revise to state that sex offender registration requirements apply to defendant; and
(4) revise to state the age of the victim at the time of the offense was ten years.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 18th day of January, 2017.