AFFIRM; and Opinion Filed January 18, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01124-CR

ROBERT RODERICK STUBBLEFIELD, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 86th Judicial District Court
Kaufman County, Texas
Trial Court Cause No. 14-30574-86-F

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Lang-Miers

After a three-day jury trial during which the 12-year-old complainant and numerous other witnesses testified, appellant Robert Roderick Stubblefield was convicted of continuous sexual abuse of a young child and sentenced to 80 years in prison. During his trial, pursuant to article 38.37, section 2 of the Texas Code of Criminal Procedure, the State introduced evidence of appellant's sexual abuse of the complainant's older sister.[1] On appeal, appellant argues that the admission of this evidence violated his constitutional right to due process for several reasons. We conclude that appellant's specific complaints on appeal were not preserved for appellate

[1] Article 38.37, section 2 allows for the admission of propensity evidence in certain cases involving certain sex crimes against children under 17 years of age. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 § 2 (West Supp. 2016). More specifically, it allows for the admission of evidence that the defendant committed sex crimes against children other than the victim of the alleged offense "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of defendant." *Id.* § 2(b).

review because they do not comport with his arguments at trial. As a result, we resolve appellant's issue against him and affirm.

GENERAL RULES OF ERROR PRESERVATION

Because our decision in this case centers around well-established rules concerning error preservation, we begin by setting forth those rules. Rule 33.1(a) of the Texas Rules of Appellate Procedure provides that a complaint is not preserved for appeal unless it was made to the trial court "by a timely request, objection or motion" that "stated the grounds for the ruling that the complaining party sought from the trial court with *sufficient specificity to make the trial court aware of the complaint*, unless the specific grounds were apparent from the context." TEX. R. APP. P. 33.1 (emphasis added). "The two main purposes of requiring a specific objection are to inform the trial judge of the basis of the objection so that he has an opportunity to rule on it and to allow opposing counsel to remedy the error." *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). In addition, the record must show that the trial court ruled on the complaint or refused a complaining party's request for a ruling. *See* TEX. R. APP. P. 33.1.

There are no hyper-technical requirements to preserve error. *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016). "Instead, a party need only let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him." *Id.* But a complaint on appeal must comport with the complaint made at trial. *See Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014); *see also Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986) ("[I]f an objection made in the trial court differs from the complaint made on appeal, a defendant has not preserved any error for review.").

To determine whether a complaint was preserved for appellate review, we consider the context in which it was made and the parties' and the trial court's shared understanding at that time. *Pena v. State*, 285 S.W.3d 459, 463 (Tex. Crim. App. 2009). "[W]hen the context shows

that a party failed to effectively communicate his argument, then the error will be deemed forfeited on appeal." *Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009). "[A] complaint that could, in isolation, be read to express more than one legal argument will generally not preserve all potentially relevant arguments for appeal." *Id.* at 314. To determine whether a particular legal argument was preserved for appellate review without having been expressly made below, we look for statements or actions on the record that clearly indicate the trial court's and the opponent's understanding. *Id.* at 315–16 ("In cases in which we have held that the trial record indicates that the correct ground for complaint was obvious to the judge and opposing counsel, there have been statements or actions on the record that clearly indicate what the judge and opposing counsel understood the argument to be.").

ISSUE ON APPEAL AND ARGUMENTS PRESENTED

In this case, appellant raises one broad issue on appeal, which he phrases as follows:

> Appellant's constitutional right of due process was violated by the introduction of extraneous unadjudicated sexual offenses committed by appellant against another child pursuant to article 38.37 §(2)(B) of the Texas Code of Criminal Procedure.

Appellant's brief on this issue includes several distinct subarguments. More specifically, in the summary of his argument, appellant states that article 38.37, section 2–a is unconstitutional as applied to him because two "safeguards were not employed in a meaningful way to protect against a violation of constitutional due process"—namely (1) the hearing required under article 38.37, section 2–a(2), in which a trial court must determine whether the State's evidence of a separate offense would be adequate to support a finding that the defendant committed the separate offense beyond a reasonable doubt; and (2) the balancing test under Texas Rule of Evidence 403, which allows a trial court to exclude relevant evidence when its probative value is substantially outweighed by other considerations, including the danger of unfair prejudice.

Finally, in the body of his brief, appellant expands on his arguments even further. With respect to the hearing required by article 38.37, section 2–a, he makes two specific arguments: (1) "[s]ome may read Section 2–a as having an implicit requirement of a credibility determination of the witness, but there was no such implicit finding by our trial court," and (2) "the trial court, in its determination, did not refer to the Texas Penal Code to determine what, if any, offense was committed by Appellant against the older sister." With respect to the rule 403 balancing test, appellant generally argues that "no meaningful Rule 403 analysis was conducted," and that article 38.37, section 2(b) is "unconstitutional as applied in this case because the Rule 403 analysis was wholly inadequate to protect Appellant's due process rights." But the only factual basis or specific legal argument that he articulates to support these general statements is that the "Rule 403 analysis was *premature*" because the trial court "could not have conducted a meaningful analysis under Rule 403 *until after the alleged child victim was allowed to testify*." (Emphasis added.)

ANALYSIS

Because we conclude that appellant's specific complaints on appeal do not comport with his complaints during trial, we set forth in detail his arguments during trial and the context in which they were made, beginning with a brief description of the offense at issue and appellant's defense theory.

Appellant was charged with sexually abusing his ex-girlfriend's daughter over the course of several years. Appellant was a long-time family friend and dated the complainant's mother (who has a long history of drug abuse) off and on for some time. Appellant's defense theory was that the complainant's allegations were fabricated. For example, during voir dire, his counsel repeatedly told the venire panel that the central issue in this case is "whether there was actually a crime committed or not." Likewise, during closing arguments, his counsel argued,

> [H]as the state even proved beyond a reasonable doubt that there was actually a crime committed in this case? One of the things they told me in the first year of law school, it's really easy for a man to get accused of a sex crime and really hard for a man to prove he's innocent.
>
> . . .
>
> We have no DNA, no semen. We have no independent eyewitness. We have no evidence, physical evidence, whatsoever that there was actually a crime committed. . . .

More than 30 days before trial, the State notified appellant that it intended to introduce evidence of extraneous sexual offenses against the complainant's older sister, who was 14 years old at the time of trial and was the complainant in 2 other cases that were pending against appellant.[2] The notice described the nature of the offenses committed by appellant against the older sister and the time frame during which they occurred:

> a. On or about 01/01/2009, offense of Indecency with a Child Sexual Contact, in Kaufman County, Texas, specifically that: with the intent to arouse or gratify the sexual desire of said defendant, cause "Stacy White," a pseudonym, a child younger than 17 years of age, to engage in sexual contact by causing the said "Stacy White" to touch the genitals of the defendant.
>
> b. On or about 11/20/2012, offense of Indecency with a Child Sexual Contact, in Kaufman County, Texas, specifically that: with the intent to arouse or gratify the sexual desire of said defendant, engage in sexual contact with "Stacy White," a pseudonym, by touching the breast of "Stacy White," a child younger than 17 years of age.

The notice also cited Article 38.37 of the Texas Code of Criminal Procedure and stated that the State intended to introduce the evidence "for its bearing on relevant matters, including, but not limited to the character of the defendant and acts performed in conformity with the character of the defendant."

[2] Article 38.37, section 3 requires the State to give the defendant notice of the State's intent to introduce evidence of extraneous offenses at least thirty days before trial. TEX. CODE CRIM. PROC. ANN. art. 38.37 § 3.

At the end of the first day of trial, the trial court held a hearing outside the jury's presence concerning the State's intent to introduce the evidence described in its notice.[3] At the beginning of the hearing, appellant's counsel stated a few general objections without providing any argument, including that article 38.37 section 2 "denies [appellant] due process." In response, the trial court indicated that it would withhold its ruling until after the evidence was presented.

The complainant's sister then testified that appellant sexually abused her beginning when she was about 7 years old. The first time, he unzipped his pants and made her touch his penis in the back bedroom of an apartment at the Village Apartments where she was living with her mom and sister. After that, when she was about 12 years old, and during the time that she and her mom and sister were living with appellant in a mobile home, appellant put his hands on her breasts "a lot of times." She explained that it occurred when all four of them were in appellant's king-size bed watching movies. Appellant would wait until her mother and sister were asleep, and then reach past her mother and touch her breasts through her clothing. She was too scared to tell anyone at the time because her family had known appellant for a long time and she did not think anyone would believe her. The cross-examination of the complainant's sister by appellant's counsel focused on her credibility. For example, in response to cross-examination questions, the complainant's sister acknowledged that no one else witnessed the touching, and that she was not able to describe appellant's penis. She also acknowledged that CPS investigated the family and did not take any actions as a result:

> Q. Now, do you know if there was ever any Child Protective Service involvement in your case, your family's case?
>
> A. Yes, sir.

[3] Article 38.37, section 2–a provides that before extraneous-offense evidence may be introduced, the trial court must "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 must conduct a hearing outside the presence of the jury for that purpose. TEX. CODE CRIM. PROC. ANN. art. 38.37 § 2–a.

Q. So you've had—Child Protective Services has been involved in your family's case?

A. Yes, sir.

Q. And so they investigated these allegations, and they didn't see fit to present any charges, did they?

A. No, sir.

. . .

Q. And once again, Child Protective Services investigated your family and there's been no outcome [sic] of sexual abuse, has there?

A. No, sir.

After the complainant's sister testified, appellant's counsel asked the trial court to "withhold [its] ruling" because he could present the testimony of a records custodian from the Village Apartments (where the complainant's sister said the first incident occurred) who would testify that there was no record of the complainant or her family living at those apartments during that time. The trial court asked why that evidence would be relevant, and appellant's counsel responded,

> My argument is if she's incorrect about that, a lot of weaknesses in her story. The bottom line, Judge, I feel like it's not satisfied the requirements that you find for the jury to conclusively prove beyond a reasonable doubt that these allegations by this witness—by this defendant towards this witness meets the requirement. Therefore, this witness should not be allowed to testify.

In other words, appellant's counsel appeared to argue that the sister's testimony was inadmissible under section 2–a(1) because she was not a credible witness, and that the testimony of the records custodian would further undermine her credibility. To support his argument appellant's counsel also noted that the complainant's sister could not describe appellant's penis, and that CPS was "called to investigate" and "found nothing."

In response, the State argued that the girls' mother moved her family around a lot, so the sister may not remember "exactly where she was living at the time." The State also argued that,

given her young age, the sister's credibility was not undermined by the fact that she could not describe appellant's penis. The State also told the trial court that it could present a rebuttal witness from CPS, because CPS did, in fact, "find reason to believe that sexual abuse had occurred." The trial court continued the hearing to the next day and asked the State to "[b]ring CPS in the morning." The trial court asked if there were any further arguments and appellant's counsel stated, "I need a ruling as far as constitutionality," and the trial court told the parties that it would "hold off on its ruling" and to be prepared to argue the next day.

When the hearing reconvened the next day, a CPS investigator testified for the State. The investigator testified that she interviewed the girls and their mother after CPS "received a report that alleged neglectful supervision and sexual abuse" of the girls. After those interviews, "a final determination was made and the case was R.T.B., which stands for reason to believe," that there had been neglectful supervision by the girls' mother and sexual abuse by appellant. There was no further action that CPS could take against appellant because he was not a blood relative, and there was no immediate safety risk to the girls at the time because they were living with their grandmother and appellant was already incarcerated.

After the witnesses testified, appellant's counsel told the trial court that he had a "series of arguments." He then made several general objections without any explanation, including that article 38.37, section 2 "violates [appellant's] rights [to] due process" under the Texas and federal constitutions, and that "under 403, balancing the prejudicial effect [of the sister's testimony] is completely outdone by any relevance it may have to the case." But he appeared to reverse his position concerning whether the complainant's sister's testimony generally satisfied the requirement of section 2–a(1). More specifically, his counsel stated, "I'll concede to the Court that [the sister's testimony] adequately supports a finding beyond a reasonable doubt."

In addition to these general objections, appellant's counsel's primary argument during the second day of the hearing was that the sister's testimony was inadmissible because "[t]hese are unadjudicated offenses," and article 38.37 section 2–a "applies to when someone has actually been adjudicated." In support, counsel argued that evidence of unadjudicated offenses has been admitted only in cases in which "there was the same victim involved . . . with the same defendant," and "[i]n this case, we've got two totally different victim—alleged victims." In response, the State argued that article 38.37, section 2–a does not differentiate between adjudicated and unadjudicated offenses.

After those arguments the trial court stated, "I'm going to overrule your objection and allow the witness to testify." Next, appellant's counsel asked the trial court "to consider making a ruling for this evidence to be barred under 403, the balancing test, on the grounds that it's [sic] prejudicial value outweighs its probative value." The trial court responded, "I'm ruling that it's coming in. So I've done it[.]"

After the hearing, the complainant's sister testified in front of the jury about the sexual abuse described above. Next, a therapist with the Kaufman County Children's Advocacy Center testified for the State. And finally, the complainant testified about being sexually abused by appellant beginning when she was 4 or 5 years old. The first time, appellant came into her room while her mom was gone, put her hand inside his jeans, and made her touch his penis. Next, when she was 7 or 8 years old and living with appellant in his mobile home, appellant sat near her on the couch and put her foot inside his jeans where it touched his penis. When she was about 9 years old appellant tried to touch her crotch, but he stopped because her mom came home. And finally, when she was 10 years old, appellant came into her room one night and penetrated her "private part" with his penis and his finger.

In addition to the complainant and her sister, the State's other witnesses at trial included the complainant's mother's pastor, the complainant's mother's boyfriend, a forensic interviewer at the Kaufman County Children's Advocacy Center, and a nurse who performed the complainant's sexual assault examination.

After considering all of appellant's arguments at trial, including the context in which they were made and what the record clearly indicates about the trial court's and the parties' shared understanding of the arguments at the time, we conclude that appellant's complaints on appeal do not comport with his arguments at trial.

First, with respect to article 38.37 section 2–a, the only similarity between appellant's arguments at trial and on appeal is his general reference to a "due process" violation. An objection that a statute violates the constitutional right to due process is more specific than an even more general objection that a law is "unconstitutional." *See generally Alvarez v. State*, 491 S.W.3d 362 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) ("An objection that the law is 'unconstitutional' does not allow the judge to understand the party's legal argument and thus avoid any error."). But "a complaint that could, in isolation, be read to express more than one legal argument will generally not preserve all potentially relevant arguments for appeal." *Resendez v. State*, 306 S.W.3d at 314. Instead, "[o]nly when there are clear contextual clues indicating that the party was, in fact, making a particular argument will that argument be preserved." *Id.*; *see also Vasquez*, 483 S.W.3d at 554 ("[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.") (internal quotation omitted).

In this case, the statements and actions on the record indicate that the only legal basis for appellant's due process objection that was obvious to the trial court was his ultimate argument that the complainant's sister's testimony was not admissible under article 38.37 section 2–a

because it concerned "unadjudicated offenses." On appeal, appellant uses the phrase "unadjudicated offenses" in his brief—but his specific argument is not that article 38.37, section 2–a precludes the admission of unadjudicated offenses. Instead, he argues that article 38.37, section 2–a violated his constitutional right to due process because the trial court admitted the sister's testimony without making a "credibility finding," and without "determining what particular offense, if any, was committed by appellant against the sister." These arguments are materially different from what he argued to the trial court. Stated differently, there is nothing in the record to show that appellant made the trial court aware of his complaint that he was entitled to any finding or determination that was not made below. *See Vanquez*, 483 S.W.3d at 554 (concluding complaint on appeal was not preserved because legal basis for objection was not obvious to the trial court or the State).

Second, with respect to the rule 403 balancing test, appellant generally argued at trial that the probative value of the sister's testimony was outweighed by its prejudicial effect. On appeal, however, he argues that it was per se premature to balance the probative and prejudicial effect of the sister's testimony until after the complainant testified. Again, these arguments are different, and there is nothing in the record to show that appellant made the trial court aware of his complaint that a 403 balancing test concerning extraneous-offense evidence is per se premature and improper until after the complainant testifies.

Having determined that appellant's complaints on appeal do not comport with his arguments at trial, we conclude that appellant's issue on appeal was not preserved for appellate review. *See, e.g.*, *Resendez*, 306 S.W.3d at 313 ("[W]hen the context shows that a party failed to

effectively communicate his argument, then the error will be deemed forfeited on appeal."). As a result, we resolve appellant's issue against him.[4]

CONCLUSION

We resolve appellant's issue against him and affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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TEX. R. APP. P. 47.2(b)

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[4] In its response brief, the State argues that we should resolve appellant's complaint on appeal against him because "[a]ltough defense counsel asked for and received a running objection to [the complainant's sister's] testimony," counsel did not object again when this exchange occurred later, during the complainant's testimony:

> Q. [W]hat happened after you told your mom about the abuse?
>
> A. The next day we went to our church and told our pastor and our pastor had a cop come up there and then my mom had to talk to him. And then a couple -- it was two days after that, we asked my sister and she said, yes, he had done something to her, too.

In other words, the State argues that any error in admitting the sister's testimony was harmless because her testimony was cumulative of other evidence admitted elsewhere without objection. Error in the admission of evidence may be rendered harmless when "substantially the same evidence" is admitted elsewhere without objection. *Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *see also Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (noting any error was harmless in light of "very similar" evidence admitted without objection). But in this case the running objection was not limited to the complainant's sister's testimony. Instead, appellant's counsel requested and received a running objection "on this issue and [the complainant's sister's] testimony." As a result, the running objection included the admission any of evidence under article 38.37, section 2–a concerning separate offenses committed by appellant against the complainant's sister.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ROBERT RODERICK STUBBLEFIELD, Appellant

No. 05-15-01124-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 86th Judicial District Court, Kaufman County, Texas
Trial Court Cause No. 14-30574-86-F.
Opinion delivered by Justice Lang-Miers.
Justices Bridges and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 18th day of January, 2017.