Affirmed and Memorandum Opinion filed April 22, 2010

In The

Fourteenth Court of Appeals

NO. 14-09-00075-CR

MICHAEL GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 54th District Court
McLennan County, Texas
Trial Court Cause No. 2008-590-C2

M E M O R A N D U M O P I N I O N

Appellant Michael Garcia appeals his second degree felony conviction for failure to comply with sex offender registration requirements[1] on grounds that: (1) the State made an improper jury argument during the guilt-innocence phase of the trial; (2) the trial court improperly included an anti-sympathy instruction in the jury charge on punishment; and (3) the trial court erred by admitting evidence of extraneous bad acts during the guilt-innocence phase of the trial. We affirm.

[1] Chapter 62 of the Texas Code of Criminal Procedure governs sex offender registration. A person commits a felony offense when he is required to register and fails to comply with any requirement of chapter 62. Tex. Code Crim. Proc. Ann. art. 62.102(a) (Vernon 2006).

Background

Appellant was required to register as a sex offender because of a 1990 conviction for indecency with a child. Appellant registered for the first time with the Waco Police Department on July 10, 2006. He registered 1219 N. 16th Street in Waco as his address, and he stated that he was unemployed. At the time of registration, he received an information package; the sex offender administrative service coordinator, Linda Morcom, went over the information provided in the package with appellant. The information in the package provides that a sex offender must, among other things, update any change of address and change in employment status. Morcom also tells all registering sex offenders that their address for purposes of registration is considered the place "where you lay down your head at night" so "that everybody understands it."

On October 24, 2006, appellant went to the Waco Police Department for a required update. Appellant also went to his annual registration on December 22, 2006. He went to another registration update on February 27, 2007. Each time he visited with the coordinator, he indicated that there was no change in address or employment status.

In September 2006, appellant met Brenda Morales, who lived in Bellmead, Texas with her five children. Between October and December 2006, appellant started sleeping over at Morales's house in Bellmead, and also started bringing his things over to her house. In January 2007, appellant permanently moved in with Morales and slept in her bedroom until she asked appellant to move out in June 2007. During this time, appellant received two letters from his brother at Morales's address. Morales also drove appellant to his place of employment; he was employed as a painter by Ralph Melendez Painting Company. Appellant never told Morales that he was a convicted sex offender. Appellant never registered with the Bellmead Police Department after moving in with Morales.

In June 2007, Waco Police Department Detective Michael Alston was looking for appellant in connection with an alleged sexual assault; he checked the most recently registered address that was in appellant's sex offender registration file. When Alston went to 1219 N. 16th Street in Waco — the address provided for on appellant's

registration — Alston could not locate appellant. Alston was told by appellant's relative, Frank Munoz, that Morales could provide information regarding appellant's whereabouts. Alston went to Morales's place of employment on June 5, 2007. Alston informed Morales that he was looking for appellant because he was accused of sexual assault; Alston also informed Morales that appellant was a registered sex offender. Morales gave Alston the address of appellant's employer — the Ralph Melendez Painting Company.

The Waco Police Department did not have an employer on file, and appellant's registration documents showed appellant was unemployed. When Alston went to Ralph Melendez's paint shop, Alston was given an address at which appellant was working on a paint job. Alston found appellant at the job site. Based on his investigation, Alston sought an arrest warrant for appellant for failing to update his registration with respect to a change of address and a change in his employment status.

Appellant was indicted for failing to comply with sex offender registration requirements on three counts. One count of the indictment alleged that on or about June 15, 2007, appellant intentionally, knowingly and recklessly failed to report in person to the Waco Police Department and provide his anticipated move date and new address as required by article 62.055 of the Texas Code of Criminal Procedure not later than the seventh day before his intended change of address.[2]

Count two of the indictment alleged that on or about June 15, 2007, appellant intentionally, knowingly or recklessly failed to report in person to the Bellmead Police Department, and failed to provide proof of identity and proof of residence not later than the seventh day after changing the address as required by article 62.055 of the Texas Code of Criminal Procedure.[3]

Count three of the indictment alleged that appellant spent more than 48 consecutive hours in Bellmead on at least three occasions, and that appellant

[2] *See id*. art. 62.055(a) (Vernon Supp. 2009).

[3] *See id*.

intentionally, knowingly and recklessly failed to provide Bellmead Police Department with (1) the address of any location in Bellmead at which appellant was lodged during January 2007; and (2) a statement as to whether appellant intended to return to Bellmead during February 2007, as required by section 62.059 of the Texas Code of Criminal Procedure.[4]

A jury found appellant guilty on counts one and two, and found appellant not guilty on count three. The jury assessed appellant's punishment at 20 years' confinement and a $5,000 fine in counts one and two. The trial court ordered the sentences to run concurrently. This appeal followed.[5]

Analysis

I. Improper Jury Argument

In his first issue, appellant argues that the State made an improper jury argument during the guilt-innocence phase of the trial, and that the trial court erred by overruling appellant's objection to the improper argument. Appellant contends that the State's argument was improper because the State suggested "that even if a juror had a reasonable doubt on all three counts, the juror should consider that voting his or her conscience and acquitting Appellant would send a message to violate the registration laws in the future." Appellant points to the following exchange:

> THE STATE: Think about what not guilty means. Okay. If you find him guilty on one thing, we move to the punishment phase. If you find him not guilty on three, you know, all three of them, ask yourselves what that means. Go ahead and do it again. It's not serious. Don't take it seriously, you know. It was just a mistake.

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[4] *See id.* art. 62.059 (Vernon 2006).

[5] This appeal was transferred to the Fourteenth Court of Appeals from the Tenth Court of Appeals. In cases transferred by the Supreme Court of Texas from one court of appeals to another, the transferee court must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. *See* Tex. R. App. P. 41.3.

> DEFENSE COUNSEL: Judge, I'd like to object. She's asking the jury to disregard their obligation to follow the law, or whatever, and consider what it means if they find him not guilty.
>
> THE TRIAL COURT: Move along, please.
>
> THE STATE: I ask you to think about what that kind of verdict would tell this Defendant.

The State argues that appellant failed to preserve his complaint because he did not obtain an adverse ruling from the trial court on his objection; the State argues that the trial court's statement "[m]ove along, please" is not an adverse ruling. The Court of Criminal Appeals has held that "move along" is not an adverse ruling that will preserve error. *See, e.g., Stevens v. State*, 671 S.W.2d 517, 521 (Tex. Crim. App. 1984) (en banc). Therefore, the State correctly asserts that appellant waived his complaint because he failed to secure an adverse ruling. *See id*. However, even if appellant had preserved his complaint, we conclude that the State's closing argument in this case was not improper. The State's argument constituted a proper plea for law enforcement.

Proper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). Even aggressive arguments are permissible as long as the arguments fall within one of the four areas of proper jury argument. *See Berry v. State*, 233 S.W.3d 847, 860 (Tex. Crim. App. 2007).

The following excerpts from the State's closing argument in rebuttal put the isolated statements appellant complains of in the proper context:

> THE STATE: Ladies and gentlemen, I want to remind you of something that the defense attorney told you in opening. When does someone intend to move? This defendant never changed his mailing address. And I ask you, what is the purpose of the law here. When you look up something on a registry, are you looking up to find out what a sex offender's mailing address is? Does anybody care about that? Are we sending them cards? No. We want to know where to find them. Now, if he lived there for 6 months, 180 days, 7 days a week, that's where he was living. That's where he was living. That's where we could find him. Those are the people in Bellmead that should have been able to know, don't let my kids play in

front of that yard, don't let my teenage daughter go down there or my teenage son go down there. Those are the people that need that information, and they don't have it. It is just plain and simple. Okay. Where he was getting his mail doesn't mean anything. Okay. And I ask you to take this back there and look at it. You know, this is — this is not confusing stuff. Where you live and you change your address is not confusing. When you move to another residence, whether it's within the city of Waco or outside, you must tell us seven days before you intend to go — move. What did he move? His stuff, his TV, his bed, his dresser, his rug, his clothes. Brenda told you he moved all his clothes over there.

* * *

Ladies and gentlemen, I'm not saying he lived there [at Morales's house] for 20 years. I'm saying he lived there for six months period. In that six months, he was supposed to tell us he was there. It's just very simple.

So — and [defense counsel] Mr. Obenoskey said, well, he didn't shut off the bills or he didn't — rent the house to someone else. It wasn't his house that he was at . . . at 1219 North 16th Street. Other people were living there. So what would he be shutting off? Nothing was ever in his name at that house. Okay. He was just staying there with other people none of whom, by the way, you heard from. Okay. I went through everything with the dad. Who were the people who lived there?

* * *

Okay. No respect for the law. Also, he's confused about the change of address. Is he confused about what a job means too? Are you supposed to believe that? He came into Waco P.D. four times. Every time they say, do you need to update your employment; no, I don't have a job. What's clear in this case? Brenda told you he had a job. His boss told you he had a job, and his dad told you he had a job. Okay. This is simple stuff, ladies and gentlemen. Where are you working? Where do you live? Okay. So what's really going on here? He didn't want to tell Brenda he was a sex offender. Okay. And if he had to bring her in to fill out the roommate information, she would have known. Okay. If he told Waco or told Bellmead what his mailing address was and changed it to hers, all of the you-need-to-come-in-and-update-your-registration mail would have been coming to her house and she would have known he was a sex offender. . . .

And so, he didn't want to tell her that and so he didn't update his registration. And by not doing that, he circumvented the entire law that we have in place. . . . And again, where did he get the mail he cared about? Where did his brother mail letters to him? Her house. Why? . . . Because that's where he is going to get them the fastest because that's where he's at. . . . The Defendant told the brother where to mail him mail. Okay. Where

is he getting the mail he cares about? His home. His home was with her.

There's another thing I wanted to point out. He says in the letter that you have to take back with you, I want all of my stuff back. All my big stuff, my bed, the lawn chairs. I mean, he's talking about what happens when a relationship ends and you're breaking up and you want your stuff back because he lived there. Because he moved his stuff in just like the paper says. He moved there.

* * *

And when you're in a serious relationship, you move in together. It's just as simple as that. And he didn't want her to know so he didn't change his mailing address. He didn't tell anybody where to find him because he didn't want her to find out he's a sex offender. But in doing that, he kept us all from knowing where he lives. And that's the purpose of this whole thing.

This isn't a joke, ladies and gentlemen, and I ask you to think about — I know it seems really silly. It's just — I don't think it seems silly. But he's just moved from Waco to Bellmead, it's not that far. Detective Alston found him in about a week. You know, he went to his address. He had to hunt him down. Well, now you know. Waco P.D. doesn't have the time to find where 260 registered sex offenders are in our city. . . . And when he tried to find him, he was not where he was supposed to be. Plain and simple. He had to go to his work. He had to go to his girlfriend's work to find out where to find him. And he ended up finding him on the job that he didn't tell anyone about.

Think about what not guilty means. Okay. If you find him guilty on one thing, we move to the punishment phase. If you find him not guilty on three, you know, all three of them, ask yourselves what that means. Go ahead and do it again. It's not serious. Don't take it seriously, you know. It was just a mistake.

DEFENSE COUNSEL: Judge, I'd like to object. She's asking the jury to disregard their obligation to follow the law, or whatever, and consider what it means if they find him not guilty.

THE TRIAL COURT: Move along, please.

THE STATE: I ask you to think about what that kind of verdict would tell this Defendant. He has not followed the rules. And if you think it's important for him to follow the rules, you need to hold him accountable for what he has chosen to do. And he has chosen to conceal information that we need to get — that he needs to be giving us. Why do we have this law? So the public, so this girl, . . . [A.A.], in this pen pack that he has been convicted of fondling should also be able to know where he's at. And she

> was not able to know that for the six months he was living in Bellmead. Who knows — all of the people out there and her had no idea he was there and he kept that information from us and he has been told over and over again four times, we know where you're at, we need to know where you're working. This is not a joke, and don't let him get away with this.

Reviewing the State's argument in its entirety, the record establishes that the State explained the law, the purpose of the law, and the importance of the law to the jury. The State also summarized evidence establishing that appellant violated the registration requirements imposed on him by the law as a convicted sex offender. The State asked the jury to take the registration requirements imposed by law seriously and to not let appellant "get away with" failing to timely register as required by law. Accordingly, based upon our consideration of the State's closing argument as a whole, we conclude that the State's argument was within the permissible limits of a plea for law enforcement. We overrule appellant's first issue.

II. Sympathy Instruction

In his second issue, appellant contends the trial court improperly included the following anti-sympathy instruction in the jury charge on punishment: "Do not let personal bias, prejudice, sympathy or resentment on your part, or any such personal emotion on your part, enter into your deliberations or affect your verdict in this case."

When reviewing allegations of charge error, we must first determine whether error actually exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc). If error is found, we must determine whether it caused sufficient harm to require reversal. *Id*. The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection. *Id*. Jury charge error requires reversal when the appellant has properly objected to the charge and we find "some harm" to his rights. *Id*. (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc), *superseded on other grounds by Rodriguez v. State*, 758 S.W.2d 787)). When the appellant fails to object, as in this case, we will not reverse for jury charge error unless the record shows "egregious harm." *Id*. at 743-44.

Appellant states that "[u]nder article 36.14 of the Code of Criminal Procedure, the judge is required to charge the jury 'setting forth the law applicable to the case.'" Appellant also states that "under the Texas punishment scheme, there is individualized sentencing, *i.e.*, evidence that would yield a sentence tailored to the specifics of the case, and a wide variety of facts may be introduced during the punishment phase, including but not limited to evidence about the background of the accused." Appellant concludes that "to instruct the jury not to consider sympathy *at all* would violate article 36.14 and article 37.07, § 3(a)." (original emphasis).

The Court or Criminal Appeals has held that an anti-sympathy instruction is authorized by article 36.14. *McFarland v. State*, 928 S.W.2d 482, 522-23 (Tex. Crim. App. 1996) (en banc), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998) (en banc). The court stated that as a matter of state law any emotional appeal has "no relevance to the jury's assessment of 'the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant.'" *Id*. at 522 (quoting Tex. Code Crim. Proc. Ann. art. 37.071, §2(e)(Vernon 2006)). Therefore, the court held that "the irrelevance of 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' to the jury's assessment . . . is a component of 'the law applicable to the case' for purposes of instructing the jury under Article 36.14." *Id*. at 523. The analysis in *McFarland* applies with equal force to article 37.07. Accordingly, the trial court's anti-sympathy instruction did not violate articles 36.14 or article 37.07, and the trial court did not err by giving this instruction.

However, even if we were to assume the trial court erred by giving the jury an anti-sympathy instruction, the record does not support a finding that appellant suffered egregious harm.

Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007). In examining the record to

determine whether jury charge error is egregious, we consider the entirety of the jury charge itself, the evidence, including the contested issues and weight of the probative evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole. *Id.* Egregious harm is a difficult standard to meet and must be determined on a case-by-case basis. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) (en banc).

The evidence also established that appellant had convictions for numerous other crimes. Appellant was convicted of resisting arrest and sniffing fumes in 1989. Appellant was convicted of indecency with a child in 1990. Although his sentence was probated for ten years, probation was revoked because he was kicked out of a boot camp program. Appellant's probation officer testified that he was kicked out after he (1) had behavioral problems with staff and other cadets; and (2) threatened to hurt another cadet and then exposed his penis to the cadet. An administrative hearing was held at the boot camp regarding appellant's behavior, and appellant pled guilty to "major disruptive behavior, threatening another cadet, and falsifying information to staff."

In 1998, appellant was convicted of aggravated assault. Appellant admitted shooting the complainant in the face after the complainant gave a cigarette to a girl who was at a club with appellant. He served eight years in prison for this conviction. Appellant was convicted of assault on April 3, 2008, for beating Brenda McGrew. Although Alston originally investigated appellant for committing an aggravated sexual assault on McGrew in June 2007, appellant was convicted only of assault because McGrew had "trouble remembering what happened because of her — the beatings she received." The jury was shown numerous photos depicting McGrew after the assault and could see how severely McGrew had been beaten. Appellant admitted assaulting McGrew because, he claimed, she tried to steal his money.

The jury also heard evidence of appellant's gang membership. McLennan County jail book-in technician Crissy Forrester testified that, during his interview with Forrester, appellant stated he was a member of the Texas Syndicate gang. Alston testified that the

Texas Syndicate "is an extremely violent gang." Finally, the jury heard from appellant. Appellant showed no remorse for his past or present crimes. He also continued denying that he moved in with Morales and testified that he did not inform the Bellmead police department of his stay with Morales because he "never stayed there . . . [and] did not live there." Appellant testified, "All I did was go over there and spend the night there, you know. That's not against the law. It didn't say that in my rules, that I couldn't have a girlfriend, I couldn't stay with her now and then."

With regard to his failure to update his employment status, appellant testified that he did not tell the Waco police department he was employed by Ralph Melendez because he did not believe his job was a "steady job." Appellant also stated he did not inform the police "[b]ecause I didn't feel that it was a — major deal where, you know, I would be punished severely for trying to get a job."

Although the State once remarked "Don't feel sorry for him. This isn't the sympathy phase[,]" in light of the evidence described above, the record does not support a conclusion that appellant suffered egregious harm from the challenged jury instruction. We overrule appellant's second issue.

III. Extraneous Bad Acts

In his third issue, appellant argues that the trial court erred by admitting evidence of two extraneous bad acts during the guilt-innocence phase of the trial "which cumulatively harmed the outcome of the trial." The two bad acts appellant complains of are (1) his failure to report his employment; and (2) an accusation of sexual assault. We will address each complaint in turn.

1. Failure to Report Employment

Appellant contends that the trial court erroneously admitted evidence regarding his employment with the Ralph Melendez Painting Company when previously admitted evidence had established that appellant did not update his sex offender registration to indicate that he was no longer unemployed; appellant admits that failing to report employment constitutes a violation of the sex offender reporting requirements. *See* Tex.

Code Crim. Proc. Ann. art. 62.05(c)(6), (7), (g) (Vernon Supp. 2009). Relying on Rule 404(b), appellant objected at trial to the admission of evidence relating to his employment with the Ralph Melendez Painting Company. The trial court allowed appellant's employer Ralph Melendez to testify that appellant was employed by him and gave the jury a limiting instruction regarding the testimony.

We review a trial court's ruling under the Texas Rules of Evidence for abuse of discretion. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009). We consider the ruling in light of what was before the trial court at the time the ruling was made and uphold the trial court's judgment if it lies within the zone of reasonable disagreement. *Id.* If the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial court gave the wrong reason for its correct ruling. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Under Texas Rule of Evidence 404(b), evidence "of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tex. R. Evid. 404(b); *De La Paz*, 279 S.W.3d at 342-43. But it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Tex. R. Evid. 404(b); *De La Paz*, 279 S.W.3d at 343.

Evidence of extraneous bad acts is admissible under Rule 404(b) if the evidence is relevant[6] to a fact of consequence apart from character conformity in "that it tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, *e.g.*, absence of mistake or accident." *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001) (quoting *Montgomery v. State*, 810 S.W.2d 372, 387-88 (Tex. Crim. App. 1990) (en banc)); *see also* Tex. R. Evid. 404(b); *De La Paz*, 279 S.W.3d at 343; *Casey v. State*, 215 S.W.3d

[6] "'Relevant evidence' means evidence having 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." Tex. R. Evid. 401.

870, 879 (Tex. Crim. App. 2007).

Appellant contends that evidence of his failure to report to the Waco Police Department that he was employed was not relevant in determining "whether he intentionally, knowingly, or recklessly did not report moving." He contends this evidence does not "tend to make the existence of the pertinent material fact — *mens rea* regarding not reporting moving . . . more or less probable." Appellant further argues that failing to report to "the police department he had a job does not make it more probable that his not reporting moving was not a mistake or an accident."[7] We disagree.

In his opening statement, appellant told the jury that he "never intended to change [his] address." During cross-examination of sex offender administrative service coordinator Linda Morcom, appellant challenged the specificity and clarity of the registration requirements provided in the information packet. Appellant established that the terms "residence" and "move" were not defined in the information package and implied the terms were subject to conflicting interpretations. Appellant's argument and strategy at trial raised the issue of whether appellant had the requisite intent to violate the registration requirement, and it raised the defense of mistake or accident.

Appellant's intent, and correspondingly the absence of mistake or accident, was a

[7] We note that Melendez testified only that appellant worked for him as a painter, and that he did not know appellant was a sex offender when he hired appellant. At that time, evidence of appellant's employment already was before the jury because Alston testified earlier during trial that he found appellant at a job after Morales gave him information about appellant's employer. Also, the fact that appellant failed to inform the Waco Police Department that he was no longer unemployed, even though he went several times to the Police Department to update his registration, was elicited earlier in the trial during Alston's testimony. Alston testified, without objection, that when he was looking for appellant in June 2007, appellant's registration indicated that he was still unemployed. Alston also testified, without objection, that based on his investigation he sought two arrest warrants for appellant "[o]ne for failure to update his registration as far as an address change and the other was failing to update his registration as far as employment." Appellant waived his complaint that the trial court improperly admitted evidence regarding his employment because he failed to object when Alston testified about his employment and failure to register his employment. *See* Tex. R. App. P. 33.1(a); *see also Hughes v. State*, 878 S.W.2d 142, 156 (Tex. Crim. App. 1992) (en banc) (As a general rule, a complaint regarding improperly admitted evidence is waived if the same evidence is introduced elsewhere during trial without objection.). Even if appellant had preserved his complaint, we conclude that the trial court did not err in admitting evidence regarding his employment.

fact of consequence in this case. *See Sattiewhite v. State*, 786 S.W.2d 271, 284 (Tex. Crim. App. 1989) ("evidence which reflects on the issue of the intent of the accused is admissible"). Evidence of appellant's employment and his failure to report his employment status was relevant because it tended to establish an elemental fact — the intent to not report his move and change of address to the Bellmead Police Department — and it tended to rebut a defensive theory by showing an absence of mistake or accident.

The fact that appellant did not inform the Waco Police Department of his employment was some evidence establishing appellant's intent to violate the registration requirements by not informing the police department he had moved to Bellmead. Evidence by itself need not prove or disprove a particular fact of consequence; however, it is sufficient if the evidence provides a small nudge towards proving or disproving a fact of consequence. *See Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004).

In this case, the extraneous evidence was relevant to proving a fact of consequence beyond mere action in conformity with bad character. *See* Tex. R. Evid. 404(b). Accordingly, we reject appellant's contention that failing to report to "the police department he had a job does not make it more probable that his not reporting moving was not a mistake or an accident;" and that the evidence does not "tend to make the existence of the pertinent material fact — *mens rea* regarding not reporting moving . . . more or less probable."

The trial court did not err in admitting evidence regarding his employment when previously elicited evidence had established that appellant did not update his sex offender registration to indicate that he was no longer unemployed.

2. Accusation of Sexual Assault

Appellant contends that the trial court erroneously allowed Morales to testify that appellant had been accused of sexually assaulting another woman. Appellant claims that the admission of this evidence violated Texas Rules of Evidence 404(b) and 403.

After the State had called Morales as a witness in this case, appellant called

Morales to testify again the next day. During Morales's direct-examination, defense counsel elicited the following testimony:

> DEFENSE COUNSEL: After . . . [appellant] was arrested in this matter, you continued to correspond with him, correct?
>
> MORALES: Yes.
>
> DEFENSE COUNSEL: And the truth is that you believed that he cheated on you, correct?
>
> MORALES: Yes.
>
> DEFENSE COUNSEL: Okay. . . . and in one of those letters that you wrote to him, or whatever, you told him that he would feel the pain for cheating on you; is that correct?
>
> MORALES: By losing me, yes.
>
> THE STATE: Judge, at this point I'm going to object to hearsay of the letter. If it's not being used to impeach her, then I'm going to object to any reading of the letter unless there's a prior inconsistent statement in that letter.
>
> DEFENSE COUNSEL: That's what I'm trying to clarify.
>
> THE COURT: Nothing has been offered at this point in time, so I'm not going to rule at all.
>
> DEFENSE COUNSEL: Let me clarify that. You believe that . . . [appellant] cheated on him?
>
> MORALES: Well —
>
> DEFENSE COUNSEL: Or you.
>
> MORALES: I had already kicked him out.
>
> DEFENSE COUNSEL: Okay.
>
> MORALES: When I asked him if it was true about what Detective Alston told me, that he assaulted someone, he told me he denied it. But I didn't believe it.
>
> DEFENSE COUNSEL: Were you mad at him for that?
>
> MORALES: I was upset. I was more upset because I didn't know he was a sex offender and he was living in my house with my teenage daughters.
>
> DEFENSE COUNSEL: And were you mad at him about that?
>
> * * *
>
> DEFENSE COUNSEL: In your letter to him you said that he would feel the

pain; is that correct?

MORALES: I mean, I said he would feel the pain because he lost me. I mean, even before. Not because he was with that girl.

On cross-examination, Morales testified as follows:

THE STATE: Ms. Morales, . . . [Defense Counsel] asked you if you kicked him out because — and you said something about you asked him if he assaulted somebody?

MORALES: Yes. . . . Detective Alston went to my job on that Friday and told me that during the time he was gone that he sexually assaulted someone.

DEFENSE COUNSEL: Judge, I'm going to — that's hearsay.

THE STATE: Judge, he opened the door to this whole chain of events of why she kicked him out.

THE COURT: I'll overrule the objection.

THE STATE: Now, . . . [Defense Counsel] asked you if you were mad at him because he cheated on you. Can you explain to the jury what you mean when you say he cheated on you? What happened.

MORALES: Because when he was trying to get back with me — I mean, after he went to jail, he wrote me and told me that he never did anything wrong, that everybody is going to see that he was innocent. And to me — I mean, I wasn't going to take him back because that's just like cheating on me.

THE STATE: Innocent of what? What's just like cheating on you?

MORALES: When he assaulted that girl.

THE STATE: Okay. What are you talking about when he assaulted that girl?

DEFENSE COUNSEL: Judge, I'm going to object. This is getting into extraneous offenses not before the Court.

Outside the presence of the jury, defense counsel objected to Morales testifying about the alleged sexual assault, and argued that it constituted a violation of Rules 404(b) and 403.

THE COURT: Well, I — I'm going to overrule the defense's objections.

THE STATE: All right. Now, Ms. Morales, when the defense attorney was asking you about being mad about him cheating on you, what was the — what was he talking about? What happened?

MORALES: I was more mad of [sic] him trying to get back at [sic] me

knowing that he sexually assaulted somebody and him saying that he didn't do it. But to me that's like cheating.

THE STATE: Okay. When did you learn of this new sexual assault?

MORALES: It was January — June the 5th.

THE STATE: Was it when Detective Alston came to your job?

MORALES: Yes.

Rule 33.1 of the Texas Rules of Appellate Procedure provides that an objection must be timely and sufficiently specific to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1)(A); *Berry*, 233 S.W.3d at 857. Appellant's objections under Rules 404(b) and 403 were untimely because they were made after Morales had already testified several times regarding the alleged sexual assault. *See Berry*, 233 S.W.3d at 857 (complaint that admission of evidence of "hidden pregnancies" constituted error was waived because objection was untimely when it was made after witness "had already testified that there were other hidden pregnancies."). Because appellant did not make a timely objection under either rule, he failed to preserve any alleged error. Accordingly, we overrule appellant's third issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

Do Not Publish — Tex. R. App. P. 47.2(b).