In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00064-CR

ANDRE RENOR EVANS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 19th District Court
McLennan County, Texas
Trial Court No. 2015-1341-C1

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

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

A jury convicted Andre Renor Evans of three counts of trafficking and nine counts of sexual assault of Joanna Holly,[1] a child. After Evans pled true to the State's two enhancement allegations, he was sentenced to life imprisonment on each offense.

On appeal,[2] Evans argues that the evidence is legally insufficient to support the three trafficking convictions and that the trial court erred in (1) admitting hearsay testimony to corroborate the victim's testimony, (2) admitting extraneous-offense evidence during guilt/innocence, and (3) failing to include an instruction that the jury could not consider extraneous-offense evidence in deciding whether Evans acted in conformity with his character in committing the charged offenses.

We find that the evidence was legally sufficient to sustain two out of three trafficking convictions. Although we find that the third trafficking conviction was not supported by legally sufficient evidence, we conclude that the judgment can be modified to reflect a conviction for compelling prostitution. We also find that the trial court did not abuse its discretion in overruling Evans' hearsay objection based on the excited-utterance exception, that Evans failed to preserve his objection related to admission of extraneous-offense evidence, and that the trial court did not err in omitting an extraneous-offense instruction in the guilt/innocence jury charge. Accordingly, we modify Evans' third trafficking conviction to reflect a conviction of compelling prostitution,

[1]To protect her privacy, we use a pseudonym for the child victim. *See* TEX. R. APP. P. 9.10(a)(3).

[2]Originally appealed to the Tenth Court of Appeals in Waco, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedent of the Tenth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

and remand the matter to the trial court to conduct a punishment proceeding. In all other respects, the remaining judgments of the trial court are affirmed.

I. The Testimony at Trial

Holly, who was fifteen at the time of the offenses, was a runaway with no place to call home when she first met Evans. The jury heard much evidence about her troubled childhood, which caused her credibility to become an issue at trial. Holly was removed from her mother's care by Child Protective Services and, when she was six years old, the parental rights of both of her biological parents were terminated. Holly was adopted, but she only lived with her adoptive parents for four tumultuous years.

At trial, Holly testified that she started smoking marihuana, provided to her by her older adoptive brother, at a very young age. Her adoptive father testified that Holly started lying, getting into fights with school staff, and was caught bringing drugs to school when she was eleven years old. Although Holly was in therapy, she began to run away from home. Her adoptive parents placed her at a residential treatment facility in Austin, Texas, from which she also ran away. During that runaway, she was sexually assaulted by several men,[3] but managed to return to the treatment facility "rattled" and "shaking." Holly was also placed in drug treatment programs in San Antonio, Texas, and Florida. After she made an allegedly false allegation that her adoptive father had fondled her breasts, her adoptive parents both decided to voluntarily relinquish their parental rights to Holly. At fourteen years old, she reconnected with her biological father,

[3]All of the men who sexually assaulted Holly either pled guilty to or were convicted of the offense.

eventually moved in with him, but found him dead two months later as a result of his decision to commit suicide. Holly was placed in a juvenile detention center, but managed to run away again.

While on the run, Holly met Evans, who was fifty-one years old at the time of trial. Holly testified that she noticed people at Evans' house who were buying, selling, and using drugs and that she became interested in acquiring drugs for herself. After Evans offered her drugs and a place to live, Holly entered his home, got high, and had sex with him. Holly soon came to understand that the house was "a trap house" where people would come to pay for drugs or sex. According to Holly, Evans began prostituting her for his benefit.

LaQuita Moten, Meghann Gray, and Charidy Walker, all drug-users, confirmed that Evans' home was a place where people could purchase and use drugs and prostitutes. Moten and Gray testified that they started hearing a lot of street chatter about a popular "young, white girl at [Evans' house]," who was described as "fresh meat." Moten said that many men visited Evans to see Holly, and testified, "I saw her in [Evans'] bed one day. I went over there, and people -- dudes were just getting sent in the house to have sex with her. She was laying in the bed butt naked." On this occasion, Moten witnessed three men enter the room, but two exited after determining that Holly was "a baby." According to Moten, Evans was controlling Holly, who he knew was a teenager.

Holly testified that she was "[Evans'] girl" and that people were paying him or giving him drugs to have sex with her. Holly believed that she had to comply in order to survive, and she attempted to remain high on drugs in order to continue following Evans' directions. She testified that she could not remember how many people she had sex with, but described the stream of clients

as constant and added that there were periods of time when she did not bother to put clothes on. In addition to her prostitution, Holly testified that she had oral, anal, and vaginal sex with Evans "multiple times," that she had sex with Evans every day that she lived with him, and that she did not have "enough fingers and toes" to count how many times she had sex with Evans.

After five days of abuse, Holly told Evans she was exhausted from having sex "for hours and hours and hours." Her statement angered Evans and prompted a warning from Moten that Evans was known to physically abuse women when he got angry. Moten, who felt sorry for Holly, helped develop a plan for her escape after she told Moten that she had no money and wanted to get away. In the pretext of taking the child to Goodwill, Moten absconded with Holly for two weeks. Holly remained in fear of Evans during this time.

Moten testified that she spoke to Evans, who said that he loved Holly, and Moten decided that it would be best to let Holly speak to Evans so that she could work things out with him and stop living in fear of running into him. Moten took Holly to see Evans, and after a short conversation, Holly decided to spend the night with him. Moten became angry with Holly, could not understand her decision, and left for the night. Moten testified that she was worried about Holly, could not sleep that night, and was determined to retrieve the child from Evans' home the following morning.

Holly testified that, on the night of her return, Evans and Walker injected Holly with heroin, which was not a drug that she chose to use. Gray testified that she visited the home that night to ask Walker for heroin. According to Gray, Walker said she only had enough heroin for herself and Holly and "made the comment that if they got her on heroin that she would do whatever [she

and Evans] wanted." Gray did not believe that Holly was awake enough to consent to taking the drugs. Walker testified that she witnessed Evans having sex with Holly and that she knew Holly was underage. Holly also testified that, although she was passed out at times and did not have a clear recollection of all of the events of that night, she remembered Evans having sex with her that night when she was incoherent.

The following morning, Moten and her cousin, April Ewing, drove to Evans' home to check on Holly. Moten found Holly lying naked in Evans' bed, unresponsive, while Walker was still injecting herself with heroin. Moten testified that, while waiting in the living room for Holly to wake up, Evans admitted to her that he injected Holly with heroin and said, "[T]hese whores going to stop playing with me. That bitch finally got what she [was] asking for." Moten testified that she sat in shock as Evans walked to the front of the house. She called Ewing, who was waiting outside, for help so that they could physically remove Holly from the home. Moten finally managed to wake Holly, told her she was leaving with her, got her dressed, and placed her in Ewing's car. According to Moten, Holly was sick from the heroin and had several puncture wounds on her body.

The State indicted, and a jury convicted, Evans of three counts of human trafficking and nine counts of sexual assault of a child.

II. Only Two Trafficking Convictions Are Supported by Legally Sufficient Evidence

On appeal, Evans does not argue that the evidence is insufficient to support his nine convictions for sexual assault of a child. Instead, with respect to his three trafficking convictions,

he argues only that the evidence is legally insufficient to support the jury's conclusion that he received money in exchange for prostituting Holly.

A. Standard of Review

In conducting our legal sufficiency review, we must "consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact[-]finder could have found the essential elements of the crime beyond a reasonable doubt." *Reyes v. State*, 422 S.W.3d 18, 23 (Tex. App.—Waco 2013, pet. ref'd) (quoting *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). A "review of 'all of the evidence' includes evidence that was properly and improperly admitted." *Id.* (quoting *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001)).

"[I]t is well established that the fact[-]finder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties." *Id.* (citing *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991)). "[I]f the record supports conflicting inferences, we must presume that the fact[-]finder resolved the conflicts in favor of the prosecution and therefore defer to that determination." *Id.* (citing *Jackson*, 443 U.S. at 326). The legal sufficiency "'standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Lucio*, 351 S.W.3d at 894 (quoting *Jackson*, 443 U.S. at 319)).

"Further, direct and circumstantial evidence are treated equally: 'Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence

alone can be sufficient to establish guilt.'" *Id.* (quoting *Hooper*, 214 S.W.3d at 13). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id.* (quoting *Lucio*, 351 S.W.3d at 894 (quoting *Hooper*, 214 S.W.3d at 13)).

"The sufficiency of the evidence is measured by reference to the elements of the offense as defined by a hypothetically correct jury charge for the case." *Brock v. State*, 495 S.W.3d 1, 16 (Tex. App.—Waco 2016, pet. ref'd) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "A hypothetically-correct jury charge does four things: (1) accurately sets out the law; (2) is authorized by the indictment; (3) does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability; and (4) adequately describes the particular offense for which the defendant was tried." *Id*. (citing *Malik*, 953 S.W.2d at 240).

To traffic "means to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." TEX. PENAL CODE ANN. § 20A.01 (West Supp. 2016). "A person commits an offense if the person knowingly: . . . (7) traffics a child and by any means causes the trafficked child to engage in, or become the victim of" prostitution, promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution. TEX. PENAL CODE ANN. § 20A.02(a)(7) (West Supp. 2016). Under the Texas Penal Code, prostitution occurs when "in return for receipt of a fee, [a] person knowingly: . . . engages in sexual conduct." TEX. PENAL CODE ANN. §§ 43.01, 43.02 (West 2016). The State's indictment tracked the language of Section 20A.01 and also added

that Evans caused Holly to become the victim of the prostitution offenses "by accepting money for the prostitution of [Holly]."[4]

Evans only questions whether the evidence was legally sufficient to prove that he accepted money for Holly's prostitution.

B. Analysis

Holly testified that, although she did not know how many people she had sex with, she had a constant stream of clients. She explained, "[Y]ou pay [Evans] to have sex with his girl, and his girl was me." She also testified that she witnessed people paying Evans to have sex with her. Holly's testimony that "people" paid Evans money for her prostitution is sufficient to establish that Evans accepted money for Holly's prostitution more than once, i.e., at least twice. The more difficult question is whether the evidence established, beyond a reasonable doubt, that he accepted money for a third instance of Holly's prostitution.

Holly testified that "the exchange of things wasn't always for money. There was also drugs that the exchange was for." Moten testified that, although she did not witness money exchanging hands, she knew that Evans was getting money for prostituting Holly, but did not elaborate further. Moten and Holly both said that Holly never received any money for the prostitution, and neither

[4]The Waco Court of Appeals has written that "if an information alleges an essential element of the offense with more specificity than required, the State must prove the specific allegation," which becomes included in the hypothetically correct jury charge. *Westfall v. State*, 10 S.W.3d 85, 92 n.4 (Tex. App.—Waco 1999, no pet.). In response to a question by the jury asking whether money was the only form of payment that it could consider in the trafficking cases, the trial court stated, "The answer is yes because that's what is alleged." However, the trial court ultimately referred the jury to the charge. The application paragraph of the trial court's charge required the jury to find that Evans had "accept[ed] money for the prostitution of [Holly]." Accordingly, it appears that the State alleged an element of prostitution offenses—receipt of a fee—with more specificity than required. In line with the precedent of the Tenth Court of Appeals, we incorporate the payment of money allegation into the hypothetically-correct jury charge.

spoke to how much money Evans had received. Holly testified that Evans "benefitted" from her prostitution more than three times. When asked whether Evans benefitted a lot more than three times, Holly responded, "[T]he man wouldn't have been high without me." Holly never testified how many times she witnessed Evans receiving money from her prostitution.

A finding that Evans received money three times from Holly's prostitution, in light of the evidence presented, required speculation on the jury's part. *See Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007) (explaining the difference between a reasonable inference, a presumption, and speculation). While "[a] conclusion reached by speculation may not be completely unreasonable, . . . it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.* We conclude that, even viewing the evidence in the light most favorable to the State, the evidence is legally insufficient to prove, beyond a reasonable doubt, that Evans received money from Holly's prostitution more than two times. Thus, we do not believe that a rational jury could have convicted Evans of the third trafficking offense based on the evidence presented.

Consequently, we find there is sufficient evidence upon which a jury could have found Evans guilty of two offenses of trafficking, but not three, and we sustain Evans' first point of error, but only as to the third trafficking conviction.

C. Evans' Third Trafficking Conviction Must Be Modified

In *Thornton v. State*, the Texas Court of Criminal Appeals held,

> [A]fter a court of appeals has found the evidence insufficient to support an appellant's conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater

> offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are yes, the court is authorized—indeed required—to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense.

Thornton v. State, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014); *see also Canida v. State*, 434 S.W.3d 163, 166 (Tex. Crim. App. 2014).

"[T]he criteria for deciding if one offense is a lesser-included offense of a greater offense . . . focus[es] only on the defendant's culpability, his conduct, or the harm caused." *Hicks v. State*, 372 S.W.3d 649, 654 (Tex. Crim. App. 2012). "Differences in the level, range, or manner of punishment are irrelevant to that determination." *Id.* Thus, in determining the first question under *Thornton*, we focus solely on whether the jury's findings under the trafficking charge necessarily included findings required to convict Evans of a lesser-included offense.

In order to convict Evans of the trafficking charge in this case, the jury was specifically required to find that Evans:

> 4. did then and there, knowingly traffic by harboring [Holly], a person younger than eighteen (18) years of age;
>
> 5. and cause [Holly], to engage in or become a victim of conduct prohibited by Texas Penal Code Section 43.02 (Prostitution) and/or 43.03 (Promotion of Prostitution) and/or 43.04 (Aggravated Promotion of Prostitution) and/or 43.05 (Compelling Prostitution);
>
> 6. by accepting money for the prostitution of [Holly].

Thus, we look to see whether the offenses listed in Sections 43.02 through 43.05 of the Texas Penal Code constitute lesser-included offenses. Here, we conclude that the offense of compelling prostitution is a lesser-included offense of trafficking.[5]

A person commits the offense of compelling prostitution if "the person knowingly: . . . (2) causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense." TEX. PENAL CODE ANN. § 43.05(a)(2) (West 2016). A person commits prostitution "if, in return for receipt of a fee, the person knowingly: . . . agrees to engage, or engages in sexual conduct." TEX. PENAL CODE ANN. § 43.02(a)(1). "The term 'fee' within the statute means payment in return for professional services rendered." *Steinbach v. State*, 979 S.W.2d 836, 841 n.8 (Tex. App.—Austin 1998, pet. ref'd) (citing *Tisdale v. State*, 640 S.W.2d 409, 413 (Tex. App.—San Antonio 1982, pet. ref'd) (concluding that the term "fee" means "[c]ompensation, often a fixed charge" for services); *see Austin v. State*, 794 S.W.2d 408, 413 n.2 (Tex. App.—Austin 1990, pet. ref'd). However, the offense of prostitution is established "regardless of whether the actor . . . offers or actually pays the fee." TEX. PENAL CODE ANN. § 43.02(b-1). Thus, the "in return for receipt of a fee" language "does not mean . . . that there must be an exchange of money before the offense is completed." TEX. PENAL CODE ANN. § 43.03(a); *Steinbach*, 979 S.W.2d at 841 n.8; *see Austin*, 794 S.W.2d at 413 n.2; *see Pyon v. State*, 663 S.W.2d 159, 160 (Tex. App.—Houston [1st Dist.]

[5]The promotion of prostitution requires an agreement to participate in the proceeds of prostitution or a solicitation of another to engage in sexual conduct with another person for compensation. TEX. PENAL CODE ANN. § 43.03(a) (West 2016). A person commits the aggravated promotion of prostitution if the person "knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes." TEX. PENAL CODE ANN. § 43.04(a) (West 2016).

1983, no pet.) (affirming prostitution conviction where "appellant was bartering sex for champagne").[6] Additionally, "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution." *In re B.W.*, 313 S.W.3d 818, 824 (Tex. 2010) (alteration in original) (quoting *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)).

Here, in the course of convicting Evans of trafficking, the jury necessarily concluded that (1) he knowingly (2) caused Holly, (3) who was under eighteen years old, (4) to commit prostitution by any means. Because all of the elements of compelling prostitution were subsumed within the trafficking submission, the jury necessarily found every element required to convict Evans of the lesser-included offense of compelling prostitution.

As for the second *Thornton* question, we note that Evans did not argue that Holly's prostitution was not compelled by him, only that he did not receive money as the benefit of the compelled prostitution. Although the evidence was legally insufficient to establish that Evans accepted money in the third trafficking offense, Holly's and Moten's testimony, as recited above, is legally sufficient to demonstrate that Evans knowingly caused Holly to commit prostitution on more than two occasions. Thus, the evidence is legally sufficient to support a conviction for the lesser-included offense of compelling prostitution, which is also a first degree felony offense.

Accordingly, under the direction of *Thornton* and *Candida*, we modify the trial court's judgement of conviction for the third trafficking offense to reflect that Evans was convicted of

[6]Moreover, "there is no requirement under the statute for the defendant to negotiate a price." *Austin*, 794 S.W.2d at 413.

compelling prostitution in that case. We also remand the matter to the trial court for proceedings on punishment.

III. The Trial Court Did Not Abuse its Discretion in Overruling Evans' Hearsay Objection

Next, Evans argues that the trial court erred in allowing Moten to testify about statements Holly made to her over his hearsay objections. The transcript memorializes Evans' objections, the trial court's ruling, and Moten's testimony, as follows:

> A. [MOTEN] We went outside. I got [Holly] in the car. Her being awoke, it just -- she was so sick. She was crying. She had puncture wounds everywhere. She looked at me, and she said . . .
>
> [BY THE DEFENSE]: Objection, hearsay, Your Honor.
>
> Q. (BY [THE STATE]) Let me ask you some questions first . . . .Was she very upset about something that had just happened?
>
> A. Yes.
>
> Q. She was looking at her arms and realizing that she had been injected with heroin. Is that right?
>
> A. Yes, ma'am.
>
> Q. And she was very upset about not knowing what had happened?
>
> A. Yes, ma'am.
>
> Q. And was she in that state in the car? You had just woken her up, and you got her to the car, and she was explaining to you what happened?
>
> A. Uh-huh.
>
> [BY THE STATE]: Your Honor, I would offer these statements as excited utterances.
>
> THE COURT: Admitted.

. . . .

[BY THE DEFENSE]: Your Honor, I'm going to object again. I think they are just trying to get around it. It's still hearsay.

[BY THE STATE]: Your Honor, we're talking about someone who was left overnight to have sex with whoever would come in while she was in a state of unconsciousness, and she's explaining why she made the decision to stay. That is, by definition, an excited utterance.

THE COURT: I overrule the objection.

[BY THE DEFENSE]: Your Honor, I'd like to have a running objection.

THE COURT: You have it.

Thereafter, Moten testified:

> [Holly] said that she willingly allowed [Walker] to shoot her up with 10 units. . . . She said the 10 units knocked her out by her never doing it before. . . . And she said that she recalled [Evans] making the statement when she woke up that, "Damn, baby, . . . that didn't take you long. You knocked me out fast last night." . . . [Joanna] said, "I did not willingly have sex with him last night." And she kept fading in and out, and different dudes was in there, and she didn't know exactly who, sometimes three or four, sometimes it was one all throughout the night. She -- she said that -- but when she got in the car and she saw the puncture wounds, . . . she said, "I allowed them to shoot me with 10 units." She said, "They got the vein the first time, and it knocked me out."[7]

Evans argues that the trial court erred in allowing Moten's testimony about Holly's statements. We review a trial court's decision to admit evidence over objection under an abuse-of-discretion standard and will not reverse that decision absent a clear abuse of discretion. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008) (citing *Zuliani v. State*, 97 S.W.3d

[7]Testifying from her own observation, Moten also said, "This girl had puncture wounds all on her butt cheeks, in her neck. It could have killed this baby. At the end of the day, this is somebody's child, and this girl, she was -- it looked like she had got attacked by ants that just bit her, like, everywhere."

589, 595 (Tex. Crim. App. 2003)). "The trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement." *Id.* (citing *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992)).

"Hearsay statements are not admissible unless they fall within a recognized exception to the hearsay rule." *Id.* (citing TEX. R. EVID. 802). "The excited-utterance exception . . . is one of the recognized exceptions to the hearsay rule." *Id.* "An excited utterance is a statement that relates to a startling event or condition, and it is made when the declarant is still under the stress of excitement caused by the event or condition." *Coble v. State*, 330 S.W.3d 253, 294 (Tex. Crim. App. 2010); *see* TEX. R. EVID. 803(2).

Evans contends that Holly's statements to Moten were not excited utterances because they "were made hours after the alleged assault occurred." "In determining whether a hearsay statement is admissible as an excited utterance, the court may consider the time elapsed and whether the statement was in response to a question." *Zuliani v. State*, 97 S.W.3d 589, 595–96 (Tex. Crim. App. 2003). "However, it is not dispositive that the statement is an answer to a question or that it was separated by a period of time from the startling event; these are simply factors to consider in determining whether the statement is admissible under the excited utterance hearsay exception." *Id.* at 596. Rather, the critical question is "whether the declarant was still dominated by the emotion caused by the startling event when she spoke." *Coble*, 330 S.W.3d at 294. "Stated differently, a reviewing court must determine whether the statement was made 'under such circumstances as would reasonably show that it resulted from impulse rather than reason and

reflection.'" *Zuliani*, 97 S.W.3d at 596 (quoting *Fowler v. State*, 379 S.W.2d 345, 347 (Tex. Crim. App. 1964)).

The transcript indicates that Holly's statements, which were not responses to questions, were made at a time when she was waking from a drug-induced state, crying, and upset. The trial court could have determined that Holly was startled about both the events of the previous night and the number of puncture wounds on her body, which indicated that Walker and/or others had injected her with heroin multiple times. Although several hours may have passed between her last sexual assault and the time that she made these statements to Moten, we cannot say that the trial court abused its discretion in concluding that Holly's statements, which were related to the events of the previous night, were made when she was still under the stress of excitement caused by those events. Accordingly, the trial did not abuse its discretion in admitting the testimony under the excited-utterance exception.

Finding no error in the trial court's decision to overrule Evans' hearsay objection, we overrule Evans' second point of error.

IV. Evans' Objection to Extraneous-Offence Evidence Was Untimely

Without objection, Moten, Holly, Gray, and Walker testified about the drug activity conducted in Evans' home. Evans' strategy at trial was to question the credibility of these witnesses since they were all drug users. In an effort to assist in this strategy, Evans called his mother, Etta Jean Evans, and his sister, Regina Holleman, to testify.

Etta testified that she visited Evans on a daily basis, but never saw a young female in Evans' home. Etta also testified that she never saw any drugs in Evans' home and knew nothing about

prostitution occurring at the home. Holleman testified that she visited Evans' home two or three times a week for the purpose of checking in on Evans, was familiar with what went on in the home, and had never seen Holly there.

During cross-examination, and without objection from Evans, Holleman testified that more than one law enforcement agency conducted a drug raid on Evans' home, during which she was present. She then volunteered the following information, which did not draw an objection: "I was there when they arrested [Evans] . . . I went to the house when, I guess, the [officers] in the bug trucks with all the ammunition and all the guns . . . were very rude."

The State then offered two photographs of the drug raid, one showing a few armed officers outside of Evans' home, and another showing Evans seated and handcuffed with an officer watching over him. Evans objected to the admission of those photographs on the ground that the State was "going into another offense as far as this case."[8] The trial court overruled Evans' objection to the photographs, but granted him a running objection. Holleman then testified that she never saw any evidence of drug use at Evans' home.

On appeal, Evans argues that the trial court abused its discretion in overruling a Rule 404 objection to the admission of the photographs, which he argues constituted the admission of an extraneous offense. Evans argues that he was harmed because the jury heard evidence that he was a dangerous drug dealer. The State argues that Evans failed to preserve error on this point because his objection was untimely. We agree that error has not been preserved.

[8]Evans also added, "We think it's prejudice and we don't think it's relevant to this offense."

"As a prerequisite to presenting a complaint on appeal, a party must have made a timely and specific request, objection, or motion to the trial court." *Grant v. State*, 345 S.W.3d 509, 512 (Tex. App.—Waco 2011, pet. ref'd) (citing TEX. R. APP. P. 31(a)(1)(A)). "An objection is timely if it is made as soon as the ground for the objection becomes apparent, i.e., as soon as the defense knows or should know that an error has occurred." *Id.* (citing Neal v. State, 256 S.W.3d 264, 279 (Tex. Crim. App. 2008)). "Generally, this occurs when the evidence is admitted." *Id.* (citing *Dinkins v. State*, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995)). "If a party fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and error is waived." *Id*. (citing *Dinkins*, 894 S.W.2d at 355). Moreover, "[a]n error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection." *Newland v. State*, 363 S.W.3d 205, 210 (Tex. App.—Waco 2011, pet. ref'd) (alterations in original) (quoting *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (citing *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("Our rule . . . is that overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.")).

Here, evidence that Evans was a drug dealer was repeatedly admitted without objection at trial. Before the photographs were offered into evidence, Holleman had already testified, without objection, that law enforcement agencies had conducted a drug raid on Evans' home, that the officers were carrying weapons, and that Evans was arrested as a result of the raid. All of the evidence Evans later objected to merely provided more detail of the unobjected-to extraneous offense. The subsequently admitted evidence did not raise any additional extraneous offenses.

Because Evans failed to object to the testimony regarding the extraneous offense when it was first offered, we find that Evans' objection was untimely and that he failed to object to substantially similar evidence previously admitted at trial. Accordingly, we overrule his third point of error.

V. There Was no Error in Failing to Include an Extraneous-Offense Instruction in the Jury Charge During Guilt/Innocence

Last, Evans argues that the charge on guilt/innocence should have instructed the jury that it could not consider evidence of extraneous offenses in determining that he acted in conformity with his character. "A claim of jury-charge error is reviewed using the procedure set out in *Almanza*." *Riggs v. State*, 482 S.W.3d 270, 273 (Tex. App.—Waco 2015, pet. ref'd) (citing *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). "If error is found, we then analyze that error for harm." *Id.* (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)).

Here, we find that the trial court did not err in omitting an extraneous-offense instruction during the guilt/innocence phase of Evans' trial. Our reasoning and conclusion are both guided by the Texas Court of Criminal Appeals' holding in *Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007). In that case, the court explained that, while Article 37.03 requires the trial court to "sua sponte instruct the jury at the punishment phase . . . that the State must prove any extraneous offenses beyond a reasonable doubt," a defendant is not necessarily entitled to a limiting instruction regarding extraneous offenses in the guilt/innocence charge. *Id.* at 252. The court wrote:

> [I]f a defendant does not request a limiting instruction under Rule 105 at the time that evidence is admitted, then the trial judge has no obligation to limit the use of that evidence later in the jury charge. This doctrine is a sensible one because

> otherwise a jury might sit through most of a trial under the mistaken belief that certain evidence is admissible for all purposes when, in fact, it is not. Once evidence has been admitted without a limiting instruction, it is part of the general evidence and may be used for all purposes. . . . Taking the cases together, then, a limiting instruction concerning the use of extraneous offense evidence should be requested, and given, in the guilt-stage jury charge only if the defendant requested a limiting instruction at the time the evidence was first admitted.

Id. at 251 (footnotes omitted) (citations omitted).

In this case, Evans failed to object to a majority of the extraneous-offense evidence, never requested a limiting instruction at the time the extraneous evidence was admitted, never requested any limiting instruction in the jury charge, and never requested any burden-of-proof instruction concerning the extraneous offense in the jury charge. *See id.* at 253. Accordingly, we conclude, as did the court in *Delgado*, that there was "no statutory or legal requirement to give[, sua sponte,] *any* [jury] instructions concerning the use of extraneous offenses absent a timely request." *Id.* at 253. In other words,

> Even if a limiting instruction on the use of an extraneous offense would have been appropriate here under Rule 404(b), the trial judge had no duty to include one in the jury charge for the guilt[/innocence] phase because appellant failed to request one at the time the evidence was offered. Because the trial judge had no duty to give *any* limiting instruction concerning the use of an extraneous offense in the guilt-phase jury charge, it naturally follows that he had no duty to instruct the jury on the burden of proof concerning an extraneous offense.

Id. at 254 (citations omitted). Simply put, there was no error. We overrule Evans' last point of error.

VI. Conclusion

We modify Evans' third trafficking conviction to reflect a conviction of compelling prostitution, and we remand the matter to the trial court to conduct a punishment proceeding. In all other respects, the remaining judgments of the trial court are affirmed.

Ralph K. Burgess
Justice

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