



COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

DAVID MATTHEW ORTIZ,	§	No. 08-15-00344-CR
Appellant,	§	Appeal from the
v.	§	120th District Court
	§	
THE STATE OF TEXAS,	§	of El Paso County, Texas
	§	(TC# 20140D05092)
Appellee.	§	

**OPINION**

A jury convicted Appellant David Matthew Ortiz of aggravated assault of a family member or person in a dating relationship while using a deadly weapon (alleged here as his teeth, hand, leg, and knee). In the punishment phase of the trial, the jury assessed a forty-year sentence and the maximum possible fine (\$10,000.00). In this appeal, Appellant raises three challenges to the evidence admitted in the punishment phase of the trial. The challenges focus on whether the admission of a juvenile probation file violated Appellant's Sixth Amendment right to confront witnesses and whether the file was admissible under an exception to the hearsay rule. Appellant also claims the trial court allowed improper victim impact testimony. For the reasons noted below, we affirm.

**BACKGROUND**

The jury found Appellant guilty under at least one of twelve application paragraphs in the

jury charge, all of which related to an assault on Jocelyn Lopez on June 14, 2014. The jury was asked to decide if Appellant used a deadly weapon (either his teeth, hand, leg, or knee) to cause serious bodily injury to various parts of Jocelyn's person (her head, ear, face, or body). As Appellant does not challenge his conviction, we recount only so much of the evidence from the guilt-innocence phase as is relevant to the sentence imposed.

Jocelyn lived with Appellant, and was the mother of his two children, aged fourteen months and one month as of the date of the assault. At trial, Jocelyn testified that she had an argument with Appellant over his intention to go out for the evening, rather than stay in to help with their two children. After he left, she put his things outside their apartment and texted to let him know that she had done so. She was later awoken by Appellant banging on the door; she then called the police. Officers arrived and calmed down the situation. They had Jocelyn put Appellant's belongings back in the apartment, and they transported Appellant to an in-law's house.

But Appellant quickly returned to the apartment and began banging on the door and calling Jocelyn on the phone. When she answered the phone, he apologized and said that he only wanted to get his things so he could leave town. When she let him in, he closed and locked the door and windows and began yelling at her. He grabbed her by the head and kneed her in the face. She was curled up on the floor in a fetal position, protecting her head, but soon lost consciousness. She awoke and he started hitting her again on the back and head. He told her she was going to die. She passed out again, then awoke briefly to tend to their fourteen-month-old child who was in the room. Appellant then started striking her again with his fist and knees. He kicked her in the head and then put her in the couple's bed. She next recalled going to the bathroom, and as he came at her again, she grabbed a pair of trimming shears and scissors. She made a couple of strikes on him, and recalled nothing else until she awoke in their bed. At that time, Appellant said he needed

to get her to a hospital.

When Jocelyn was taken to the hospital, a nurse documented some forty injuries, comprised of bruises, abrasions, and bite marks, distributed over most of her body. Almost all of her left ear had been bitten off. The ER physician believed that she was in a state of traumatic shock. Appellant claimed to the ER staff and the police that two strangers--a black man and a white man--had caused the injuries and he intervened to stop the assault. Jocelyn originally told the police much the same story in the ER. Appellant, himself had scratch injuries on his face, chest, arm, and neck. He first claimed the scratches were from some metal object the two assailants had used.

When Jocelyn's family members came to the hospital, Appellant told an investigating police officer not to believe them because they hated him and wanted to get him in trouble. His story about the two other assailants unwound and Appellant was soon arrested for the assault. While in jail, he made several phone calls to a girlfriend (not Jocelyn), his mother, and his stepfather, all of which the State recorded. In some of the recordings, Appellant admitted to the assault and biting Jocelyn's ear off. He attempted to defend the conduct by claiming that he was drunk, or that someone spiked his drink with some "crazy drug," or that Jocelyn started the fight and tried to stab him in the eye, or that he did not remember much of what happened. At trial, Appellant claimed self-defense. In his testimony, he gave a very detailed recitation of the fight, claiming that Jocelyn first attacked him with a screwdriver when he came back home after being out all night. The State rebutted this claim with the jail call recordings, where Appellant claimed to have only a limited recollection of what happened, and what he did say largely contradicted his self-defense theory.<sup>1</sup>

The State proved up Jocelyn's injuries through twenty-four graphic photos, including one

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<sup>1</sup> In one statement, he told his girlfriend that Jocelyn "started talking shit to me and I kicked her ass." In another he states "I couldn't stop myself. I couldn't stop myself."

of her severed ear. By the time of trial, she still had scars around her ear, on her hand, and the back of her leg. She suffered a loss of hearing and at times, had bouts of vertigo. The State also proved up a prior assault where Appellant struck Jocelyn in the face when the couple were outside a local home improvement center. Two witnesses verified her claim that Appellant struck her. The witnesses also testified that Appellant fled when he heard that they had called the police. The jury found Appellant guilty.

In the punishment phase of the trial, the State admitted evidence of other prior bad conduct. That conduct included: an assault on a schoolmate when Appellant was ten; an act of indecency with a twelve-year old in-law when Appellant was sixteen; possession of marijuana when Appellant was sixteen; a “beer run” some four months before this assault; and a public fight just days before this assault, which included details of Appellant cursing at, and wanting to fight the arresting officers. The State also presented testimony of an assault on Appellant’s girlfriend occurring after Jocelyn’s assault, and his arrest for public intoxication in violation of the terms of his bail bond. We elaborate more on some of that evidence in our discussion below.

Additionally, the State admitted other jailhouse recordings, which included one recording where Appellant coached his girlfriend on how to contact Jocelyn to influence her testimony. Several calls substantiated parts of the events surrounding his assault on the girlfriend. In one call, he contends that his anger management problems stem from his *not* smoking marijuana. The jury assessed a forty-year sentence (within the possible range of five to ninety-nine years or life) and the maximum possible fine of \$10,000.00. TEX.PENAL CODE ANN. § 22.02(b)(1)(West 2011)(defining circumstances when aggravated assault is a first-degree felony); TEX.PENAL CODE ANN. § 12.32(a)(West 2011)(punishment range for first-degree felony).

## **ISSUES ON APPEAL**

Appellant brings three issues on appeal. He first contends that the State violated his sixth amendment right to confront witnesses when it put into evidence the entire contents of Appellant's juvenile probation record, which contains third party accounts of several of Appellant's prior bad acts. Appellant's second issue claims the juvenile probation file is hearsay, and once admitted, the prosecutor elicited details from that record through leading questions. Finally, Appellant's third issue contends that the trial court erred in admitting "victim impact" testimony for one of the prior bad acts proved up in the punishment phase. We address each in turn.

### **THE CONFRONTATION CLAUSE**

In the punishment phase, the State called Appellant's juvenile probation officer. Through her, the State introduced as a business record Exhibits 42 and 43 which collectively comprise Appellant's juvenile probation file. Those exhibits, and the probation officer's testimony, evidenced two prior bad acts and Appellant's failure to complete his juvenile probation.

A police report in the probation file detailed how Appellant, then aged ten, hit another ten-year old (F.E.) while in class, and that later, on the playground, Appellant pushed F.E. down, struck him with his fist, and then kned him in the head. The blows caused F.E.'s face to swell and loosened a tooth. Based on this incident, the State filed a petition alleging delinquent conduct. Appellant participated in a six-month deferred adjudication program for that charge which he successfully completed.

The probation file also contains a second petition asserting delinquent conduct in November 2010 when Appellant was found in possession of less than two ounces of marijuana. He was adjudicated delinquent of that charge and placed on an ankle monitor until his eighteenth birthday. A "Predisposition Report" recites Appellant's history of first using marijuana in the 8th grade, and that by the 10th grade, he was using the drug on a daily basis. The Predisposition report

and other entries in the juvenile probation file reflect considerable discord between Appellant and his mother.

Appellant would run away to avoid parental rules. On one home visit, he became upset and kicked in a dresser, calling his mother “menopause and f---ing bitch.” A psychiatric evaluation reported “severe aggressive behavior towards mother, episodes of running away and also drug and alcohol abuse.” He was verbally and physically aggressive with his siblings.

Appellant anticipated that the juvenile probation would end upon his graduation from high school, but the probation was extended when he failed to complete all of his counseling sessions as required. While on probation, he also failed four drug tests, testing positive for marijuana. Shortly before his eighteenth birthday, a juvenile judge had him detained overnight, and then admitted to the Challenge Attitude Adjustment Program (a ten-day boot camp). He aged out while in that camp, and was released without successfully completing his juvenile probation.

Appellant’s first issue challenges admission of the probation file because it violates the Sixth Amendment’s Confrontation Clause. U.S. Const. Amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”); *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1373, 158 L.Ed.2d 177 (2004)(holding that an out-of-court testimonial statement by a witness, who does not testify at trial, is barred by the Sixth Amendment’s Confrontation Clause unless the witness is unavailable to testify and the accused has a prior opportunity to cross-examine the witness); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)(holding that a chemical analysis report was improperly admitted without the live testimony from the forensic analyst who prepared the report). The State first contends the issue is forfeited, as there was no Sixth Amendment

objection made below.<sup>2</sup> We agree.

In general, to preserve a complaint for appellate review, a defendant must make a timely and specific objection to the trial court. TEX.R.APP.P. 33.1(a); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex.Crim.App. 2009). In making the objection, terms of legal art are not required, but a litigant should at least “let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.” *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992). An objection stating one legal basis cannot support a different legal theory on appeal. *See Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex.Crim.App. 2004)(objection based on Fifth Amendment did not preserve state constitutional ground); *Goff v. State*, 931 S.W.2d 537, 551 (Tex.Crim.App. 1996)(variance in charge objection with contention on appeal waived error); *Bell v. State*, 938 S.W.2d 35, 54 (Tex.Crim.App. 1996), *cert. denied*, 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997)(objection at trial regarding illegal arrest did not preserve claim of illegal search and seizure on appeal). “The purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint.” *Resendez v. State*, 306 S.W.3d 308, 312 (Tex.Crim.App. 2009).

Texas employs a three-tiered classification of error outlined in *Marin v. State*, 851 S.W.2d 275, 279 (Tex.Crim.App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex.Crim.App. 1997). A litigant’s rights are classified either as: (1) “absolute requirements and prohibitions;” (2) “rights of litigants which must be implemented by the system unless expressly waived;” or (3) “rights of litigants which are to be implemented upon request.” *Marin*, 851 S.W.2d

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<sup>2</sup> Appellant objected to these exhibits on the basis of relevance, hearsay, and TEX.CODE CRIM.PROC.ANN. art. 37.07 (West Supp. 2016).

at 279. The Court of Criminal Appeals has several times treated Confrontation Clause complaints under the third tier as a right that a litigant must affirmatively invoke. *See Paredes v. State*, 129 S.W.3d 530, 535 (Tex.Crim.App. 2004); *Wright v. State*, 28 S.W.3d 526, 536 (Tex.Crim.App. 2000); *Dewberry v. State*, 4 S.W.3d 735, 752 & n.16 (Tex.Crim.App. 1999); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex.Crim.App. 1990) (“We hold that in failing to object at trial, appellant waived any claim that admission of the videotape violated his rights to confrontation and due process/due course of law.”), *overruled on other grounds by, Karanev v. State*, 281 S.W.3d 428, 434 (Tex.Crim.App. 2009). We and several other intermediate courts have done the same. *Thomas v. State*, No. 08-14-00095-CR, 2015 WL 6699226, at \*3 (Tex.App.--El Paso Nov. 3, 2015, pet. ref’d)(not designated for publication)(authentication, chain of custody, and Rule 702 objections did not preserve Confrontation Clause objection); *Deener v. State*, 214 S.W.3d 522, 527 (Tex.App.--Dallas 2006, pet. ref’d) (“We conclude the right of confrontation is a forfeitable right—not a waivable-only right—and must be preserved by a timely and specific objection at trial.”); *Robinson v. State*, 310 S.W.3d 574, 577-78 (Tex.App.--Fort Worth 2010, no pet.)(failure to object waived Confrontation Clause claim). In each of these cases, a litigant who failed to raise a proper objection forfeited any right of review.

After carefully reviewing the objections that Appellant made to the juvenile probation file, we find no mention of the Sixth Amendment or the Confrontation Clause. The closest objection complained that the file contained hearsay. A number of courts have held that hearsay objections, however, are not synonymous with an objection raising Sixth Amendment issues. *Paredes*, 129 S.W.3d at 535; *Wright*, 28 S.W.3d at 536; *Rios v. State*, 263 S.W.3d 1, 6-7 (Tex.App.--Houston [1st Dist.] 2005, pet ref’d, untimely filed). As the United States Supreme Court has said, “‘No procedural principle is more familiar to this Court than that a constitutional right,’ or a right of any



other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993), quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677, 88 L.Ed. 834 (1944). We conclude Issue One is forfeited and accordingly overrule it.

### **HEARSAY OBJECTIONS AND LEADING QUESTIONS**

Appellant’s second issue challenges admission of the same juvenile probation file as hearsay. He adds to that issue a complaint about how the prosecutor questioned the probation officer over the file. Again, the issue suffers from preservation problems.

After the probation file was admitted, the prosecutor went through the file with Appellant’s probation officer. At times, the prosecutor read aloud various passages from the file, asking the probation officer to agree that the file contained the particular file entry. Often, the prosecutor then went on to ask the probation officer to explain or comment on the file entry. Appellant now contends these questions were leading, but Appellant never made that objection below. The lack of any objection to the leading form of a question waives that complaint. *Cheng v. Wang*, 315 S.W.3d 668, 672 (Tex.App.--Dallas 2010, no pet.); *Myers v. State*, 781 S.W.2d 730, 733 (Tex.App.--Fort Worth 1989, pet. ref’d); TEX.R.APP.P. 33.1(a).

Our evidence rules provide that “[l]eading questions should not be used on direct examination except as necessary to develop the witness’s testimony.” TEX.R.EVID. 611(c). Here, the prosecutor often read a sentence or passage from the file as a way to introduce a topic area he then explored with the witness. The manner of the presenting documentary evidence to a jury is left to the trial court’s discretion. *Wheatfall v. State*, 882 S.W.2d 829, 838 (Tex.Crim.App. 1994)(holding there was no abuse of discretion in allowing prosecutor to read aloud portions of

pen packets and probation records that had already been admitted). Absent some objection calling a problem to the trial court's attention, we could hardly say the trial court abused that discretion.

Appellant did object to the juvenile probation file as hearsay. The State elicited the proper predicate to prove up the file as a "business record" of the probation department, which is an exception to the hearsay rule. Tex.R.Evid. 803(6). We review a trial court's ruling on whether a statement meets an exception to the hearsay prohibition under an abuse-of-discretion standard. *See Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008).

Appellant's specific complaint is that while some of the file meets the business records exception, other entries in the file are "hearsay within hearsay" for which there is no secondary hearsay exception. And true enough, not everything found within a "business record" automatically becomes admissible. As the Texas Court of Criminal Appeals notes:

When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception. Those statements must independently qualify for admission under their own hearsay exception--such as statements made for medical diagnosis or treatment, statements concerning a present sense impression, an excited utterance, or an admission by a party opponent. [Footnotes omitted].

*Garcia v. State*, 126 S.W.3d 921, 926-27 (Tex.Crim.App. 2004); *see also Sanchez v. State*, 354 S.W.3d 476, 485-86 (Tex.Crim.App. 2011)("When hearsay contains hearsay, the Rules of Evidence require that each part of the combined statements be within an exception to the hearsay rule.")<sup>3</sup>.

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<sup>3</sup> The State cites us to *Simmons v. State*, 564 S.W.2d 769, 770 (Tex.Crim.App. 1978) which upheld a trial court's ruling that allowed a probation unit supervisor to testify that the defendant had admitted a drug use problem. The supervisor gained that knowledge from an entry in the file made by another probation officer who had personal knowledge of what was reported. *Id.* Subsequent cases have also allowed probation files to be admitted when "a proper predicate" has been laid. *E.g. Dodson v. State*, 689 S.W.2d 483, 485 (Tex.App.--Houston [14th Dist.] 1985, no pet.). We do not perceive that *Simmons* makes some special rule for probation files. The witness in *Simmons* testified from an entry in a part of the probation department's file that was made by one of its own employees and was shown to be part of its own business.

At trial, however, Appellant never identified which portions of the probation file contained inadmissible hearsay within hearsay. That failing is problematic here because many of the entries from the file were made by the sponsoring witness. Others entries were made by other juvenile probation personnel. Still others were made by police officers, third party witnesses, and court officials. “When an exhibit contains both admissible and inadmissible evidence, the objection must specifically refer to the challenged material to apprise the trial court of the exact objection.” *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex.Crim.App. 1995)(so holding for videotape, of which only some of portions were objectionable); *Brown v. State*, 692 S.W.2d 497, 501 (Tex.Crim.App. 1985)(same for pen packet); *Williams v. State*, 927 S.W.2d 752, 760 (Tex.App.--El Paso 1996, pet ref’d)(same for various court filings, and orders); *Thompson v. State*, No. 08-99-00144-CR, 2000 WL 1476629, at \*2 (Tex.App.--El Paso Oct. 5, 2000, no pet.)(not designated for publication)(same for nursing notes).

While we do not discount that some argument might have been made urging that some parts of the probation file were hearsay within hearsay, none were made below. And without any specific argument about some specific objectionable document, the trial court was never focused on whether a particular document was generated by someone without a duty to accurately report a matter. Nor was the State accorded any opportunity to offer another hearsay exception. We accordingly overrule Issue Two.

### **VICTIM IMPACT TESTIMONY FOR OTHER BAD ACTS**

In his third issue, Appellant complains that the State admitted victim impact evidence for one of the “other bad acts.” Specifically, the State put on evidence that when Appellant was ten years’ old, he assaulted F.E., a schoolmate. He hit F.E. with his fist in the classroom, and later when on the playground, he knocked F.E. down, and kneed him in the face. The juvenile probation

file contains a police report of the incident, and the witness statements of F.E. and his father. The State called the father to testify at trial, and through him admitted three photographs of F.E.'s swollen face that the father took a few days after the assault. During the father's testimony, Appellant objected that: (1) the father lacked any personal knowledge of the fight; (2) that what his son told him was hearsay; (3) that because the son was not there to testify, Appellant's Sixth Amendment right was violated; and (4) that some of the father's answers were non-responsive. Appellant's complaint on appeal does not carry forward any of these arguments. Instead, Appellant complains about the father's testimony that F.E. was distraught, and that he pulled F.E. out of that school the next school year and sent the boy elsewhere. Appellant directs us to this testimony:

[PROSECUTOR]: When you say that 'he was distraught,' can you tell us exactly a little bit more about what his demeanor was like?

[FATHER]: When I got there, he was sitting down in the lobby. He had an ice pack on his face. His face was swollen and he was crying pretty much hysterically, crying pretty bad.

[PROSECUTOR]: Okay. And because of this incident, did your son stay at Zach White Elementary School?

[FATHER]: He stayed the remainder of the year.

[PROSECUTOR]: Okay. And did he stay there -- did he go to the regular matriculation?

[FATHER]: We ended up sending him to St. Patrick's private school.

[PROSECUTOR]: And may I ask why?

[FATHER]: Just -- I wanted a safer, better environment, better education for him.

[PROSECUTOR]: And so you didn't feel safe with the defendant?

[FATHER]: Not really.

Appellant contends this was improper "victim impact" testimony concerning an extraneous

offense. He grounds the argument on TEX.R.EVID. 401 (relevance) and 403 (more prejudicial than probative) and cites us to *Haley v. State*, 173 S.W.3d 510, 518 (Tex.Crim.App. 2005) and *Cantu v. State*, 939 S.W.2d 627, 637 (Tex.Crim.App. 1997).

Appellant never made a Rule 401 or 403 objection below. He never argued that the above quoted questions were impermissible victim impact testimony. Nor did he object to the above quoted questions at all. Under these circumstances, we view the objection as waived. *Mays v. State*, 318 S.W.3d 368, 391-92 (Tex.Crim.App. 2010)(“Appellant failed to preserve this issue for review because he did not object to the admission of the victim-impact or character evidence at trial.); *Guevara v. State*, 97 S.W.3d 579, 583 (Tex.Crim.App. 2003)(defendant failed to preserve error regarding admission of victim-impact evidence by objecting to the “form” of the question); TEX.R.APP.P. 33.1(a)(1). Appellant argues that the hearsay, Confrontation Clause, and lack of personal knowledge objections sufficiently put the trial court and the State on notice that the witness should be excluded from testifying as he did. But hitting all around a target is not the same as hitting the target. The trial court no doubt understood that Appellant did not want the father to testify, but Appellant still had to provide a proper rationale for excluding the testimony.

Appellant likens the objection here to the objection we found sufficient in *Lefew v. State*, No. 08-06-00105-CR, 2008 WL 162809 (Tex.App.--El Paso Jan. 17, 2008, no pet.)(not designated for publication). In that case, we reversed the punishment assessed based on improper victim impact testimony. *Lefew*, 2008 WL 162809, at \*10. The defendant there had objected to the State going into a murder for which the defendant was never charged. *Id.* at \*3-\*4. Counsel argued that the extraneous bad act was “unrelated,” based on “speculation,” “extremely prejudicial,” and later renewed the objection “to going into the impact” of the murder. *Id.* at \*3-\*4. We concluded the victim impact objection, which is a species of a relevance objection, was made known to the trial

court. *Lefew*, 2008 WL 162809, at \*4. The same is simply not the case here. Appellant never lodged a relevance objection, or anything close to a relevance objection.

Even were we wrong about the preservation issue, we doubt there to be error, much less harmful error. During the punishment phase of a trial, “evidence may be offered . . . as to any matter the court deems relevant . . . .” TEX.CODE CRIM.PROC.ANN. art. 37.07, § 3(a)(1)(West Supp. 2016). That evidence may include extraneous offenses, even those that are unadjudicated. *Id.* Such evidence is relevant, and therefore admissible, if it will assist the trier of fact in assessing an appropriate sentence. *Haley*, 173 S.W.3d at 513-15.

The State contends that most of the “victim impact” at issue is admissible. We agree. In the context of extraneous bad acts testimony for victims not named in the indictment, the Texas Court of Criminal Appeals has drawn a distinction between testimony about the impact to the victim, and impacts to the family members of the victim. In *Cantu v. State*, the mother of a murdered girl (not named in the indictment) testified to the impacts of the girl’s murder on the family. 939 S.W.2d at 636. The court held that was error (though not reversible in that case). *Id.* at 637. Conversely, in *Roberts v. State*, 220 S.W.3d 521, 531 (Tex.Crim.App. 2007), the court permitted the victim of a robbery (admitted as an extraneous offense to a murder charge) to testify to the impact of the robbery on her. She had to quit her job, had nightmares, and difficulty sleeping. Distinguishing *Cantu*, the court wrote that “[v]ictim impact’ evidence is evidence of the effect of an offense on people *other* than the victim. The evidence presented here was evidence of the effect of a different offense on *the victim* (of the extraneous offense), and thus is distinguishable from the situation presented in *Cantu*.” [Emphasis in original]. *Roberts*, 220 S.W.3d at 531.

Applying that distinction here, the evidence of the impact on F.E.--including his injury and his immediate reaction--would be admissible. The only possible third party victim impact would

be the parents' cost or inconvenience in having F.E. change schools. It might also include emotional impact of the father, who kept the photos depicting his son's injuries for a decade after the assault. In the context of the evidence in this case, however, that third party family impact is not harmful error.

Any error, other than constitutional error, that does not affect the substantial rights of the accused must be disregarded. TEX.R.APP.P. 44.2(b). A substantial right is affected when the error had "a substantial and injurious effect or influence in determining the jury's verdict." *Whitaker v. State*, 286 S.W.3d 355, 363 (Tex.Crim.App. 2009), quoting *King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997). If the error had no influence, or only a slight influence on the verdict, it is harmless. *Whitaker*, 286 S.W.3d at 362-63. In assessing the likelihood that the jury's decision was adversely affected by the error, we consider the entire record. *Id.* at 363. This court must calculate, to the extent possible, the probable impact of the error on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex.Crim.App. 2000).

Appellant's harm analysis focuses on the several references to the schoolyard assault in the State's closing. The State's prosecutor mentioned the incident several times, but the emphasis was on this event as part of a pattern of Appellant's conduct that made him a danger to society, and not on the fact that the victim changed schools. The act of kneeing another in the face, for instance, was repeated in Appellant's attack on Jocelyn. Nor did Appellant ever object to how the State used of the assault on F.E. in its closing.

Looking at the record as a whole, we conclude on this record that the act for which Appellant was charged was itself sufficiently egregious that it would have overshadowed the victim impact testimony complained of here. Appellant maimed Jocelyn by biting her ear off. Even with the efforts to reattach the ear, she showed permanent scarring and wore her hair to hide

the injury. The photos taken at the time of her hospital admission document the several bite marks on her person, as well the extensive bruising and swelling from the blows. Appellant's attitude, as reflected in the recorded jail calls, could also explain the sentence. Appellant denied his own responsibility for the assault, and attempted to influence the complaining witness's testimony. Finally, the jury may well have accepted the State's theme in the punishment phase of the trial. Appellant was given several chances to alter his course of conduct, such as probation, but he mostly rebuffed those opportunities. The single effect of one family having to put their child in a different school more than ten years ago simply pales in comparison to the other punishment testimony. We overrule Issue Three and affirm the conviction.

August 25, 2017

YVONNE T. RODRIGUEZ, Justice

Before Rodriguez, J., Palafox, J., and Larsen, Senior Judge  
Larsen, Senior Judge (Sitting by Assignment)

(Do Not Publish)