COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CHAUNCEY DEANDRE REED,	§	No. 08-19-00283-CR
Appellant,	§	Appeal from the
v.	§	168th Judicial District Court,
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC#20150D00451)

O P I N I O N

Appellant Chauncey Deandre Reed was convicted of one count of continuous sexual abuse of a child younger than 14 years of age. The complaining witness at the time of the assault was the 13-year-old daughter of Appellant's girlfriend. At trial, the child testified about three distinct instances of aggravated sexual assault. In its case in chief, the State also sponsored the testimony of Appellant's biological daughter, aged 10, who testified to similar inappropriate contact between she and Appellant, as well as her younger sister and Appellant. Following a well-contested five-day guilt-innocence trial, the jury returned a guilty verdict.

In this appeal, Appellant contends that article 38.37(2) of the Texas Code of Criminal Procedure--which allows his biological daughter's testimony--is unconstitutional on its face and as applied. Next, Appellant contends the biological daughter's testimony should have been excluded under Rule 403 of the Texas Rules of Evidence. Finally, Appellant contends that the

admission of additional testimony concerning the biological daughters in the punishment phase, in addition to the trial court taking judicial notice of the biological daughter's testimony, was improper. For the reasons noted below, we overrule each of these issues and affirm the conviction below.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Indictment

The State alleged in its indictment that between June of 2014 through October 2014, Appellant committed two or more acts of aggravated sexual assault of a child who was younger than 14 years of age. The indictment names the child victim whom we identify in this opinion as N.F.

B. The Victim's Trial Testimony

At the time of these events, Appellant was dating, and living with N.F.'s mother. N.F. described three specific events that occurred when she was 13 years old. The first occurred when she was sitting on her bed at her apartment while her mother was at work. Appellant came into her bedroom, locked the door, and pushed her down on the bed. He then pulled down her pajama bottoms and underwear, and then penetrated her vagina with his penis. N.F. did not tell her mother about the incident because she did not want to jeopardize their relationship.[1]

The second incident occurred several months later at a family gathering at her apartment. She and Appellant, along with her 2-year-old brother, left the party to get food. N.F. testified that Appellant drove to a "random" house and parked outside. Appellant, motioned for N.F., who was also in the front seat, to sit in his lap (the two-year-old was in the back). N.F. refused, but

[1] N.F. related that a similar incident had occurred several years earlier with an aunt's boyfriend that led to a police report, but nothing ever came of it. Because of that experience and the police involvement, her relationship with the aunt and cousins was affected leaving her to think "Why did I even bother saying anything?"

Appellant then lifted her onto his lap, pulled down N.F.'s pants and underwear, and penetrated her vagina with his penis. N.F. did not tell anybody about this incident because she thought everyone would be on Appellant's side.

The final incident occurred in October 2014, while N.F. was at a party at her apartment. After the guests had left, she was sitting by herself on the couch in the living room watching TV. She believed that her mother and younger brother were asleep upstairs in the apartment. Appellant came downstairs and sat on the couch next to her. Appellant grabbed N.F. and turned her over on her stomach, pulled her pants and underwear down, and unsuccessfully attempted to penetrate her anus with his penis. He then pulled N.F. on top of him and penetrated her vagina with his penis. As he did so, the mother came downstairs and saw what was happening, causing her to become upset and start screaming. Appellant then quickly pushed N.F. off and threw his clothes on "very frantically."

Partially corroborating this last incident, N.F. and her mother then immediately drove to Delila Alston's house who was a friend of the mother. Alston testified at trial that when N.F.'s mother arrived at about 3:00 a.m., she was very upset, and told Alston that she just "saw that bitch [referring to N.F.] riding my man." Alston testified that N.F. had a "frozen" expression on her face and initially did not say anything. Appellant then pulled up to Alston's residence and tearfully stated "I'm sorry. I was drunk. I didn't know." N.F. spent that night at Alston's house, and soon told Alston that it had happened before. Alston believed that the mother did not immediately contact the authorities because she was concerned that it might result in financial harm to her family if Appellant was prosecuted for the sexual abuse.

The incidents came to the authorities' attention when a school counselor learned of and reported the abuse.

C. The Biological Daughter's Testimony

Outside the presence of the jury, the trial court held a hearing to determine the admissibility of testimony from Appellant's ten-year-old biological daughter, T.R., regarding an extraneous sexual offense. *See* TEX.CODE CRIM.PROC.ANN. art. 38.37 (permitting evidence that a defendant has committed certain specified separate offences if the trial judge determines that the evidence will be adequate to support a finding that the defendant committed the separate offense beyond a reasonable doubt). At that hearing, T.R. testified that when she was in the first grade she came to El Paso to visit Appellant. T.R. recalled that while she was staying at his house, Appellant called her into the living room and told her to lie down next to him on the couch. Appellant then pulled down her pants, left his and her underwear on, and "put his male part (i.e., his penis) on [her] back part (i.e., her buttocks)." Appellant then told T.R. to get her younger sister, A.R., and bring her into the living room. T.R. saw Reed pull A.R.'s pants down, but T.R. did not see anything further before she left the room. T.R. did hear A.R. tell Appellant to "stop." Appellant then had both T.R. and A.R. watch a video depicting a "[g]rown boy and girl" who had no clothes on touching each other's "middle parts."

The defense did not cross-examine T.R. during the article 38.37 hearing. At the conclusion of the hearing, the trial court expressly determined that T.R.'s testimony would be adequate to support a jury's finding beyond a reasonable doubt that Appellant "committed the separate offense or act beyond a reasonable doubt." The State presented substantially the same testimony from T.R. during its case-in-chief as it did during the hearing. The defense did not object at any point during the entirety of T.R.'s trial testimony.

D. Appellant's Defense

Appellant testified and denied that each of the events described above ever occurred. His counsel emphasized the implausibility of the claim because from February 2014 until the end of

the year, anywhere from four to ten people were living in N.F.'s mother's apartment, which afforded little privacy. The only event that Appellant partially acknowledged was the incident in October 2014. In his version of events, he was asleep on the couch and was awakened to N.F., who had her pants unbuttoned, and N.F.'s mother who was screaming. Appellant further testified that N.F. has lied in the past over both small and large matters. And a family friend testified that N.F.'s mother was anxious to have the criminal trial conclude so she could seek victim compensation payments.

Regarding his own daughters, he believed that T.R.'s accusations were coerced by T.R.'s biological mother. He testified that he has also engaged in routine text and phone conversations with T.R. since the time of the claimed incident.

E. Jury's Verdict, the Punishment Phase, and this Appeal

The jury found Appellant guilty of the charge as alleged in the indictment. Appellant elected to have the trial court assess punishment, and following several punishment hearings, the court assessed punishment at 48 years' imprisonment. Of the several witnesses who testified in the punishment phase, the State called T.R. and A.R.'s mother. We detail that evidence in our discussion of Appellant's final issue on appeal which specifically challenges the admission of that testimony.

Appellant raises three issues for our review. The first issue contends that article 38.37, which allowed for the admission of T.R.'s testimony, violates the Due Process Clause of the United States Constitution both on its face and as applied. Appellant's second issue claims the trial court erred in admitting T.R.'s testimony because its prejudicial impact greatly outweighed its probative value under Texas Rule of Evidence 403. Finally, his third issue challenges the admission of T.R.'s mother's testimony in the punishment phase of the trial, and that the trial court took judicial notice of T.R.'s earlier testimony. The State responds on the merits to each of these claims, but

also raises forfeiture issues based on the lack of objections at trial.

II. CONSTITUTIONALITY OF ARTICLE 38.37

Evidence Rule 404(b) prohibits the State from using evidence of prior bad acts, wrongs, or crimes "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX.R.EVID. 404(b). But for certain offenses under the Texas Penal Code, including continuous sexual abuse of a child under 14 years of age, article 38.37 statutorily excepts Rule 404(b). In pertinent part, article 38.37 provides:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) [which includes indecency with a child, sexual assault of a child, and continuous sexual abuse of a child] may be admitted in the trial . . . for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

TEX.CODE CRIM.PROC.ANN. art. 38.37 § 2(b). As a protection to the accused, however, before admitting such evidence the trial judge must conduct a hearing outside the presence of the jury to determine whether the evidence "will be adequate to support a finding" that the defendant committed the separate offense beyond a reasonable doubt. *Id*. § 2-a.

Article 38.37 was utilized by the State here to admit the testimony of Appellant's biological daughter, T.R. In his first issue on appeal, Appellant claims that article 38.37 is unconstitutional on its face, and as applied to him. Premised on the Due Process Clause to the United States Constitution, Appellant cites a litany of cases for the general proposition that an accused is entitled to be tried based on the evidence proving the offense charged, and not for character-conformity evidence related to other bad acts. His argument, however, stumbles for two reasons: First it was not preserved below. Second, this Court, along a host of other courts of appeals, have already uniformly rejected the claim.

A. Was the Error Preserved?

Appellant never raised an objection to T.R.'s testimony premised on the unconstitutionality of article 38.37, either on its face or as applied.

In order to preserve error for appellate review, the record must show that "the complaint was made to the trial court by a timely request, objection, or motion" and with "sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context[.]" TEX.R.APP.P. 33.1; *see also Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992) (en banc) (a party must "let the trial judge know what he wants, why he thinks himself entitled to it, and [must] 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."). The fact that the challenge here is premised on a constitutional claim does not alter the equation. "[A] defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute." *Karenev v. State*, 281 S.W.3d 428, 434 (Tex.Crim.App. 2009).[2] The same is true for an "as applied" challenge. *Curry v. State*, 910 S.W.2d 490, 496 (Tex.Crim.App. 1995) (as applied challenge to article 37.01 forfeited when not raised to the trial court); *Garcia v. State*, 887 S.W.2d 846, 861 (Tex.Crim.App. 1994) (en banc) (same).

The need for a trial objection is classically dictated by which of three classes of error are at issue: "(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." *Marin v. State*, 851 S.W.2d 275, 279 (Tex.Crim.App. 1993) (en banc). A litigant can procedurally default the last category of rights by failing to object, but not

[2] A notable exception to this rule provides that a defendant need not preserve error at trial if the defendant was convicted under a statute *already* been held to be invalid. *See Smith v. State*, 463 S.W.3d 890, 896 (Tex.Crim.App. 2015).

the first two. *Id.* Rather, the first category is termed "systemic" and therefore cannot be forfeited nor even validly waived by the parties for appellate-review purposes. *Id*. The second category must be expressly waived. *Id.* Appellant describes his claim as "structural" error, no doubt to blunt a forfeiture claim. The San Antonio Court of Appeals, however, previously rejected a claim that a jury instruction based on article 38.37 constituted "structural error" such that the accused would be relieved from objecting to the instruction at trial. *Baez v. State*, 486 S.W.3d 592, 598 (Tex.App.--San Antonio 2015, pet. ref'd), *cert. denied*, 137 S.Ct. 303 (2016); *see also Baker v. State*, No. 03-18-00240-CR, 2019 WL 1646260, at *3 (Tex.App.--Austin Apr. 17, 2019, no pet.) (mem.op., not designated for publication) (rejecting claim that challenge to constitutionality of article 38.37 was structural error that could be raised for the first time on appeal).

We conclude the error was not preserved and is forfeited.

B. The Claim Has Been Squarely Rejected

Moreover, even were we to consider the issue, this Court and a host of other Texas courts of appeals have uniformly upheld the constitutionality of article 38.37 against due process challenges. In the past several years, this Court has written three extensive opinions explaining why article 38.37 survives a due process challenge. *See Torres v. State*, No. 08-19-00309-CR, 2021 WL 3013307, at *8 (Tex.App.--El Paso July 16, 2021, no pet. h.) (not designated for publication); *Jurado v. State*, No. 08-17-00010-CR, 2019 WL 1922757, at *3-5 (Tex.App.--El Paso Apr. 30, 2019, pet. ref'd) (not designated for publication); and *Carrillo v. State*, No. 08-14-00174-CR, 2016 WL 4447611, at *8-9 (Tex.App.--El Paso Aug. 24, 2016, no pet.) (not designated for publication). Moreover, the thirteen other Texas courts of appeals have all upheld the constitutionality of article 38.37 against due process challenges. *Buxton v. State*, 526 S.W.3d 666, 689 (Tex.App.--Houston [1st Dist.] 2017, pet. ref'd); *Perez v. State*, 562 S.W.3d 676, 687 (Tex.App.--Fort Worth 2018, pet. ref'd), *cert. denied*, 140 S.Ct. 236 (2019); *Robisheaux v. State*,

483 S.W.3d 205, 213 (Tex.App.--Austin 2016, pet. ref'd); *Burke v. State*, No. 04-16-00220-CR, 2017 WL 1902064, at *2 (Tex.App.--San Antonio May 10, 2017, pet. ref'd) (mem. op., not designated for publication); *Mayes v. State*, No. 05-16-00490-CR, 2017 WL 2255588, at *19 (Tex.App.--Dallas May 23, 2017, pet. ref'd) (mem. op., not designated for publication); *Hill v. State*, No. 06-15-00168-CR, 2016 WL 3382195, at *4 (Tex.App.--Texarkana June 17, 2016, pet. ref'd) (mem. op., not designated for publication); *Bezerra v. State*, 485 S.W.3d 133, 140 (Tex.App.--Amarillo 2016, pet. ref'd), *cert. denied*, 137 S.Ct. 495 (2016); *Holcomb v. State*, No. 09-16-00198-CR, 2018 WL 651228, at *3 (Tex.App.--Beaumont Jan. 31, 2018, pet. ref'd) (mem. op., not designated for publication); *Martinez v. State*, No. 10-16-00397-CR, 2018 WL 2142742, at *6 (Tex.App.--Waco May 9, 2018, no pet.) (mem. op., not designated for publication); *Belcher v. State*, 474 S.W.3d 840, 847 (Tex.App.--Tyler 2015, no pet.); *Chaisson v. State*, No. 13-16-00548-CR, 2018 WL 1870592, at *5 (Tex.App.--Corpus Christi Apr. 19, 2018, pet. ref'd) (mem. op., not designated for publication); *Harris v. State*, 475 S.W.3d 395, 403 (Tex.App.--Houston [14th Dist.] 2015, pet. ref'd).

After carefully reviewing Appellant's brief, we are unpersuaded of the need to overturn our own precedent on this question and continue to rely on our reasoning as set out in *Jurado*, *Torres*, and *Carrillo*. Appellant's Issue One is overruled.

III. RULE 403

Appellant next challenges the same testimony under Texas Rule of Evidence 403. That rule allows a trial court to exclude otherwise relevant evidence if its probative value is substantially outweighed by one or more of the following: "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX.R.EVID. 403. In a proper Rule 403 analysis, the trial court must balance the inherent probative force of the proffered item of evidence, along with the proponent's need for that evidence, against (1) any tendency of

the evidence to suggest decision on an improper basis, (2) any tendency of the evidence to confuse or distract the jury from the main issues, (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex.Crim.App. 2006). The gist of Appellant's argument is that the incident described by T.R. did not involve penetration and was otherwise dissimilar from that described by N.F., and it should not have been admitted.

Extraneous offense evidence offered under article 38.37(2) is also subject to the balancing test under Rule 403 "if the defendant lodges a timely Rule 403 objection before it is admitted." *Howell v. State*, No. 09-16-00441-CR, 2018 WL 3371777, at *3 (Tex.App.--Beaumont July 11, 2018, no pet.) (mem. op., not designated for publication). And because Rule 403 might be premised on one or more of five factors, to properly preserve error, a litigant should specify under which basis they are objecting. *Watson v. State*, No. 08-19-00026-CR, 2020 WL 4581888, at *4 (Tex.App.--El Paso Aug. 10, 2020, pet. ref'd) (not designated for publication); *Page v. State*, No. 02-17-00019-CR, 2017 WL 4819404, at *3 (Tex.App.--Fort Worth Oct. 26, 2017, pet. ref'd) (mem. op., not designated for publication) ("[a] general objection that evidence should not be admitted under rule 403 is not sufficient to preserve error because it fails to identify for the trial court which of the five distinct grounds for excluding evidence listed in the rule is being argued as a basis for exclusion."). Here, there was no Rule 403 objection at all, much less one that asserted any of the distinct five grounds under the rule.

"Whether evidence is admissible under Rule 403 is within the sound discretion of the trial court." *Burke v. State*, 371 S.W.3d 252, 257 (Tex.App.--Houston [1st Dist.] 2011, pet. ref'd) (untimely filed). Because the trial court was never asked to exercise its discretionary function to

balance the Rule 403 interests, there is nothing for this Court to review. *See Wood v. State*, 18 S.W.3d 642, 646 n.2 (Tex.Crim.App. 2000) (objection to authentication of exhibit, but not to Rule 403, preserved nothing for appellate review under Rule 403); *Nelson v. State*, 864 S.W.2d 496, 499 (Tex.Crim.App. 1993) (en banc) (failure to make Rule 403 objection failed to preserve issue for appellate review); *Brock v. State*, 495 S.W.3d 1, 12 (Tex.App.--Waco 2016, pet. ref'd) (same); *Watson*, 2020 WL 4581888, at *4 (same). And although Appellant contends his Rule 403 claim raises structural error, the admission or exclusion of evidence is a *Marin* category three error that requires an objection. *See Saldano v. State*, 70 S.W.3d 873, 889 (Tex.Crim.App. 2002) (en banc) ("We have consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence."). While Appellant directs us to several authorities where structural error has been identified, none involve the admission of character-conforming evidence under article 38.37. Accordingly, we conclude that Appellant's second issue is forfeited.[3]

IV. PUNISHMENT PHASE EVIDENCE

Appellant elected to have the trial court assess the punishment. His third issue complains that during the punishment phase of the trial, the trial court admitted testimony from T.R. and A.R.'s mother and took judicial notice of T.R's guilt-innocence testimony. The gist of his challenge is that the mother's testimony lacked personal knowledge, was based on hearsay, and was admitted in violation of the procedure found in article 37.07 of the Texas Code of Criminal Procedure. Relatedly, Appellant argues that the trial court could not take "judicial notice" of A.R.'s testimony under Texas Rule of Evidence 201(a) during the punishment phase.

[3] Appellant concludes his discussion under Issue Two by also claiming the evidence was not relevant under TEX.R.EVID. 402. A relevance objection was also not made below and suffers the same fate as the Rule 403 claim.

A. The Challenged Testimony

The State called T.R. and A.R.'s mother, Angela Reed, who testified that she was married to Appellant for six years prior to their divorce. When the State asked Angela if Appellant had molested her daughters, she replied, "Yes." But the trial court sustained the defense's immediate "speculation" objection to that question. The trial court then added that it was taking "judicial notice" of T.R.'s testimony.[4] At that point, the defense objected to the mention of an extraneous offense "without any gatekeeping function to see if the state can prove this beyond a reasonable doubt." The trial court responded that it had already heard T.R.'s testimony in the article 38.37 hearing, and during trial. Based on those two opportunities to hear the child testify, the court stated, "she established an extraneous bad act in my opinion and assessment that would have been beyond a reasonable doubt for the jurors had there been a special finding." With that, the trial court permitted Angela to continue testifying.

Appellant's counsel then objected that because the court took judicial notice of the child's testimony, the transcript of T.R.'s testimony would be the best evidence of the event, and not the second-hand recitation by the biological mother. In response, the trial court noted that it did not know what the extent of Angela's testimony might be and invited defense counsel to lodge individual objections to specific questions. The trial court assured the parties that "if inadmissible evidence comes in I'm going to disregard it[.]"

Following this exchange, Angela testified that after she became aware that Appellant had molested her daughters, she caught her eldest daughter watching pornography and learned that the child was inappropriately touching herself. Angela testified that the younger daughter had

[4] At the close of all the punishment phase testimony, the trial court also stated that it was taking judicial notice of all the guilt-innocence phase testimony and the jury's finding of guilt on the offense charged.

engaged in self-harm, had nightmares, attempted to commit suicide, had to be placed in a psychological treatment center, and on one occasion she tried to burn her house down.

Only two specific objections were made to Angela's testimony. She had learned from another parent that the elder daughter was "touching herself." Appellant's counsel moved to disregard that claim because his questioning established that it was necessarily based on hearsay. The trial court responded that it was considering that testimony only for the purpose of its impact on the parent, and not for the truth of the matter asserted. Appellant's counsel also sought to show that other events described, such as the younger daughter trying to harm herself and burn the house down, were not based on personal knowledge. Angela testified, however, that she personally saw the child try to ignite papers doused in oil in a household sink. She also witnessed the child pinching herself to the point of inflicting pain.

B. Applicable Law and Standard of Review

The Texas Code of Criminal Procedure allows the fact finder to consider a broad range of matters in assessing punishment. The Code provides:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

TEX.CODE CRIM.PROC.ANN. art. 37.07 § 3(a)(1). At the opening of the punishment phase of the case, the trial court noted the scope of this provision and declared its intent to "take arguments after I listen to evidence if either of the parties or the lawyers believe that evidence that is being tendered is not appropriate as punishment in this case[.]" Other than as we note above, no other

specific objections were made to Angela's testimony, or the consideration of A.R.'s trial testimony.

We review a trial court's ruling on the admission of evidence under the abuse of discretion standard. *See McGee v. State*, 233 S.W.3d 315, 317 (Tex.Crim.App. 2007); *Gossett v. State*, No. 08-11-00227-CR, 2013 WL 3943108, at *3 (Tex.App.--El Paso July 31, 2013, no pet.) (not designated for publication). A trial court does not abuse its discretion by admitting evidence unless its determination lies outside the zone of reasonable disagreement. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex.Crim.App. 2016). The trial court's ruling will be upheld if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Ramos v. State*, 245 S.W.3d 410, 418 (Tex.Crim.App. 2008). Erroneously admitted punishment phase testimony must also be harmful to warrant reversing the judgment. *Haley v. State*, 173 S.W.3d 510, 518 (Tex.Crim.App. 2005). The erroneous admission of evidence is non-constitutional error that requires reversal only if it has a substantial and injurious effect or influence on the verdict. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex.Crim.App. 2018); TEX.R.APP.P. 44.2(b).

C. The Gatekeeper Function

Appellant objected at the outset of Angela's testimony that the trial court had not performed a "gatekeeper" review of her testimony. Assuming without deciding that Appellant's objection was sufficient to preserve error, we find it without merit.

When a jury assesses punishment, the trial court serves as a gatekeeper for punishment phase evidence, first deciding if it meets one of the predicates of article 37.07. *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex.Crim.App. 1996) (en banc). The jury then assesses the significance, if any, of the evidence. *Id.* When the trial court assesses the punishment, however, the court necessarily performs both functions, and thus the court "may hear evidence of an extraneous offense or bad act to determine its relevance, but the trial court must then find that the offense or

bad act was proven beyond a reasonable doubt before considering that evidence in assessing punishment." *Blum v. State*, No. 05-04-01268-CR, 2005 WL 2038184, at *1 (Tex.App.--Dallas Aug. 25, 2005, pet. ref'd) (not designated for publication), *citing Ortega v. State*, 126 S.W.3d 618, 622 (Tex.App.--Houston [14th Dist.] 2004, pet. ref'd), and *Williams v. State*, 958 S.W.2d 844, 845 (Tex.App.--Houston [14th Dist.] 1997, pet. ref'd).

Here, the trial court had already performed the gatekeeper function for T.R.'s testimony that supported the existence of the extraneous offense. The trial court expressly stated at the conclusion of the punishment phase of the trial that it found T.R.'s testimony "compelling" and that "after assessing credibility, demeanor and content, my conclusions of what occurred to her are with appropriate legal certainty as she testified." Appellant does not challenge that conclusion.

Angela was essentially asked if she was aware of the date when the extraneous offense occurred, and then asked to contrast her daughter's behavior before and after that date. Regarding her testimony, the trial court understood its dual role and alerted both sides that it would listen to the testimony and then entertain a motion to disregard objectionable answers. Other than for the hearsay objection we describe above, Appellant did not ask the trial court to exclude any other testimony. As to the one hearsay objection made, the trial court did not receive the answer for the truth of the matter asserted. We conclude that the trial court did not err in performing its gatekeeping function or in admitting any of the testimony of Angela.[5]

[5] Other examples show that the trial court properly performed its gatekeeper function. The trial court noted that it was aware of additional pending charges against Appellant, but that it was not going to take any of those matters into consideration unless the State presented evidence of them. And when the prosecutor asked a character witness whether she was aware that Appellant "raped" four specifically named children (other than N.F., T.R., A.R.) the trial court specifically stated it intended to disregard those questions because simply asking the question was not proof of anything. Similarly, when the prosecutor argued in closing that "We all know that in these cases there's no rehabilitation" the trial court stated that it was not going to consider that claim because the State had presented no evidence to substantiate it.

Moreover, for any question to which an objection was lodged, the answer had no substantial effect on the outcome of the punishment phase of the trial. In the trial court's explanation of its sentence, it did not mention any of Angela's testimony, much less any of her specific answers. Rather, the trial court while acknowledging the extensive character testimony offered by Appellant, drew its attention to the testimony concerning the specific charge, and the credible description of conduct by T.R. Thus, any error respecting Angela's testimony would not meet the harm standard. TEX.R.APP.P. 44.2(b).

D. Judicial Notice

Appellant also complains that the trial court could not take "judicial notice" of T.R.'s testimony. Under Texas Evidence Rule 201, a trial court either on its own, or upon request of a party, may take judicial notice of an "adjudicative fact." TEX.R.EVID. 201(a), (c). Adjudicative facts cannot themselves be subject to any controversy or reasonable dispute. *Kubosh v. State*, 241 S.W.3d 60, 64 (Tex.Crim.App. 2007). Appellant contends that because T.R.'s testimony was controverted by his own testimony, it could not be an adjudicative fact, and thus could not be judicially noticed. We conclude that the complaint is more a problem of semantics than substance.

T.R.'s guilt-innocence testimony had been admitted at the guilt-innocence phase of the trial without objection. By operation of law, all evidence admitted during the guilt-innocence phase of trial is also admitted before the fact finder at the penalty phase, and the fact finder may consider all the guilt-innocence evidence in assessing a defendant's punishment. *Atkinson v. State*, 404 S.W.3d 567, 572 (Tex.App.--Houston [1st Dist.] 2010, pet. ref'd); *Wright v. State*, 212 S.W.3d 768, 776 (Tex.App.--Austin 2006, pet. ref'd). There is no requirement that the State re-offer the evidence admitted at guilt-innocence for it to be considered at punishment. *Trevino v. State*, 100 S.W.3d 232, 238 (Tex.Crim.App. 2003) (en banc); *Buchanan v. State*, 911 S.W.2d 11, 13

(Tex.Crim.App. 1995). By stating that it was taking judicial notice of the prior testimony, the trial court was doing no more than acknowledging what had already occurred by operation of law. Nothing in the record suggests that the trial court placed any special weight on T.R.'s testimony because it took judicial notice, as opposed to simply considering the testimony as presented. And any error in taking judicial notice of T.R.'s guilt-innocence testimony was harmless because the testimony was already before the court.

Appellant's third issue is overruled.

VII. CONCLUSION

Having overruled all three of Appellant's issues, we affirm the conviction and sentence below.

JEFF ALLEY, Justice

November 18, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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