COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DANIEL TORRES,	§	No. 08-19-00309-CR
Appellant,	§	Appeal from the
v.	§	34th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20190D00908)

O P I N I O N[1]

A jury convicted Daniel Torres of three offenses related to the sexual abuse of Z.S., as follows: sexual abuse of a young child continuous, victim under fourteen, *see* TEX. PENAL CODE ANN. § 21.02; indecency with a child, sexual contact, *see id*. § 21.11(a)(1); indecency with a child, exposure, *see id*. § 21.11(a)(2). Torres brings two issues on appeal. First, he challenges the trial court's admission of testimony from his biological daughter, who was an extraneous offense witness, arguing there were less prejudicial ways of allowing evidence under Article 38.37 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a). Second, he asserts article 38.37 is unconstitutional under the Due Process Clause of the United States

[1] We use initials to protect the anonymity of the complainant and other witness who were both minors during the relevant time period. *See* TEX. R. APP. P. 9.10(a)(3), (b).

Constitution and Article I, Sections 9 and 10 of the Texas Constitution; and its application deprived him of fundamental fairness. Finding no error, we affirm.

I. BACKGROUND

For a period of time during her childhood, Z.S. lived with her mother in a multi-bedroom home along with her brother, sister, two uncles, an aunt, and two nephews. Torres would visit her home frequently because he was a close friend of her two uncles. He often visited for weekends; and occasionally stayed full weeks. Z.S recalled that Torres brought snacks like hot chips; and did favors, like fixing her bike when it needed repair. Growing up, Z.S. thought Torres was another one of her uncles; she referred to him as "my Tio Danny."

When she was approximately five years old, Z.S. experienced behaviors from Torres which caused her to feel "weird in general." At first, he grabbed her chest area and would pinch her nipples. She had long hair that he loved to play with, telling her it was really beautiful. As he played with her hair, she could feel his hard breathing. She thought it was normal. She did not tell anyone at the time; Torres told her it was "what tios do when they really love their nieces." Thinking her other uncles were too busy for her, she believed him. These behaviors occurred every time Torres would visit her home. Around the time Z.S. started fifth or sixth grade, Torres began touching her butt and vaginal area with his fingers and continued to grab and pinch her chest area. Torres would sit Z.S. on his lap and move her butt over his penis. He would also make Z.S. touch and rub his penis; and, once, in their pantry, he pulled his pants open to expose his penis to her.

Z.S. started to figure out that Torres' behavior was not right after learning about inappropriate touching at school. When she spoke to Torres about it, he told her "they don't know anything at school" and "it's healthy to show your love." Z.S. felt awkward and began going to

her room and locking her door when Torres would visit. Torres would then jiggle her doorknob and request she open the door until she eventually opened it. Z.S. soon told her brother, who has Down Syndrome, that she was feeling uncomfortable when Torres came around. But she gave no details and dropped it when he asked her a few questions. By then, she was in fifth or sixth grade. Torres stopped visiting Z.S.'s house after she told one of her uncles and he confronted Torres. No one in her family called the police or reported the outcry.

When Z.S. reached middle school, she told her counselor she had a "family member" that would make her feel uncomfortable. Although she said it was "[a]n uncle," she meant Torres. She gave an interview at the child advocacy center but she was asked, mistakenly, about her uncle Paul, not Torres. She found it hard to speak to random people about the situation; she wasn't ready, she explained. In total, she spoke about the abuse to some degree to her middle school counselor, then to her uncle Paul, and to her mother. The abuse by Torres was finally reported when Z.S. told her high school counselor "everything [she] remembered."

Eventually, a grand jury indicted Torres on one count of continuous sexual abuse of a child under fourteen (Count I), one count of indecency with a child by sexual contact (Count II), and one count of indecency with a child by exposure (Count III). The indictment further charged that Torres committed these offenses against Z.S., and that she was a child younger than fourteen years of age at the time of the incidents described by the charging instrument.

At trial, Z.S., who was then twenty years old, testified to the multiple occasions where Torres would sexually abuse her. Following her testimony, the State then called A.T.—Torres' biological daughter—to testify as an extraneous offense witness. Over Torres' objections, A.T. testified about incidents that occurred when she was a young child, about five or six years old.

A.T. testified she lived with Torres and her mother, in Cuidad Juarez, Mexico, before they moved to Chaparral, New Mexico. A.T. initially recalled an incident when Torres exposed his penis to her and grabbed her arm. A.T. began crying and, when her mother started calling for her, Torres released her arm to let her go. She also testified that Torres made her touch his penis and would touch her vaginal area with his hand. One incident occurred when they were laying down together "cuddled up," or during family outings like at the park or the movies. These incidents occurred even with others in the room or in proximity. A.T. told her mother about the abuse when she was about five or six years old. Her mother hugged her tightly. After their hug, A.T. remembers she and her mother walking from their home to find help. She recalled she later talked with officers in uniform about the situation.

In addition to A.T.'s testimony, the State introduced into evidence a New Mexico judgment showing Torres was convicted of the offense of attempted sexual contact of A.T. after pleading no contest. Torres confirmed he had no objection to the authenticity of the judgment or that he was the person mentioned in it. The conviction, which was published to the jury, described that Torres had entered a no contest plea to "Attempted Criminal Sexual Contact of a Minor," and he was sentenced to serve eighteen months in the New Mexico Department of Corrections.

For the defense, Torres presented two detectives and his two sons, Cyrus and Angel Torres. The defense's case focused on Z.S.'s delayed outcry, her statements to detectives, and how Torres' sons had viewed only positive interactions between Z.S. and Torres.

The jury found Torres guilty of all three counts as charged and assessed his punishment at confinement for 99 years, 75 years, and 20 years, respectively. This appeal followed.

II. DISCUSSION

A. Extraneous offense testimony and Rule 403

In Torres' first issue, he contends the trial court erred in allowing A.T. to testify in person to extraneous offenses committed by Torres, asserting there were less prejudicial ways of allowing for the admission of such evidence under Article 38.37 of the Code of Criminal Procedure.

Prior to trial, the State noticed its intention to elicit extraneous offense testimony from A.T., and to introduce into evidence Torres' prior conviction in New Mexico for "Attempted Criminal Sexual Contact of a Minor." Later, during trial and outside the presence of the jury, the trial court held a hearing regarding the admissibility of A.T.'s testimony and Torres' related judgment of conviction. During the hearing, Torres proposed certain alternatives in lieu of permitting A.T.'s live testimony. First, Torres proposed a stipulation to his prior conviction from New Mexico in place of A.T. testifying as the victim in the underlying conviction. Torres' counsel argued the jury could be told of the New Mexico conviction without requiring A.T. to testify, commenting it would likely be emotionally difficult for her. In the circumstance that the judgment would already be admitted by agreement, Torres' counsel argued that A.T.'s testimony would then become more prejudicial than probative.

Responding, the State insisted on having A.T.'s live testimony because, even though Torres pleaded guilty to attempted sexual contact of a child, A.T.'s testimony would be more probative showing "way more than attempted" sexual contact had occurred. The trial court interjected it would decide after hearing A.T.'s testimony. On voir dire, A.T. described that Torres was her biological father. She also testified to incidents during her childhood, when she was five or six years old, when Torres exposed his penis to her, touched her vagina, and made her touch his penis.

Following A.T.'s testimony outside the presence of the jury, Torres' counsel asked for a ruling on his objection to her testimony. The trial court responded it would await hearing all the direct and cross-examination testimony of the complainant. The trial court described, "at that point it will be clear . . . the probative value and the necessity of the testimony[.]" Later, after Z.S. concluded her testimony, the State indicated it would next call A.T. to testify in its case-in-chief. Torres objected on the basis that her testimony would be more prejudicial than probative, and that it would not be relevant to proving the charges at issue. More specifically, Torres argued A.T.'s testimony was more prejudicial than probative when presented in testimonial form, as opposed to him stipulating to the admission of the New Mexico judgment.[2] He further asserted A.T.'s testimony was not only not relevant but would violate the Due Process Clause of the United States Constitution and Article I, Sections 9 and 10 of the Texas Constitution.

The State countered the testimony was needed to show defendant's character with children, and that the judgment alone did not expressly describe the conduct which lead to a plea-bargained charge. Overruling the objections, the trial court stated it would allow A.T. to testify. In a last attempt to keep A.T.'s testimony excluded from the case, defense counsel offered to stipulate to and let the State read to the jury the multi-page notice of extraneous offenses given by the State which provided greater detail than what was provided by the judgment alone.[3] The trial court ultimately ruled the defense could not force the State to accept a proffered stipulation, proceeded

[2] The trial court expressed concern that the New Mexico judgment also included a count describing that Torres had committed battery against a household member. The trial court indicated the battery charge did not fall within the list of extraneous offenses admissible under Article 38.37 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1). The State agreed it would excise all mention of the battery charge from the tendered judgment.

[3] The State's Motion on Admissibility of Defendant's Extraneous Offenses Under Article 38.371 and Rule 404(B) and Memorandum in Support provided increasingly graphic details of five incidents involving Torres and A.T.

to overrule all objections, and allowed A.T. to testify live, subject to cross-examination, so the jury could judge for itself her credibility consistent with the jury charge. Again, defense counsel urged the trial court to perform a 403-analysis focusing narrowly on the difference between the prejudicial impact of the live testimony as opposed to a stipulated judgment. The trial court responded, "I think the test weighs in favor of allowing the testimony . . . ."

Following the court's ruling, A.T. testified in front of the jury subject to cross-examination by Torres. When her testimony concluded, Torres re-urged all prior objections to the admission of the New Mexico conviction but stipulated to its authenticity and his identity as the person mentioned in the document. The trial court then overruled Torres' objections and admitted into evidence the New Mexico judgment which solely reflected he was convicted of attempted sexual contact of a minor.

On appeal, Torres asserts the trial court abused its discretion in allowing A.T. to testify. Torres argues, "[w]hile the testimony was authorized under Article 38.37 of the Code of Criminal Procedure, the [trial court] did not properly apply the Rule 403 test as laid out by the Texas Court of Criminal Appeals." Specifically, Torres relies on the balancing test established by *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

1. Standard of Review and Applicable Law

Appellate courts review the trial court's decision on the admissibility of evidence under an abuse of discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). *Knight v. State*, 457 S.W.3d 192, 201-02 (Tex. App.—El Paso 2015, pet. ref'd). Under this standard, the trial court ruling will be upheld so long as it falls within the zone of reasonable disagreement. *Johnson*, 490 S.W.3d at 908. We will not disturb the trial court's evidentiary ruling

if it is correct under any applicable theory of law. *Id*.

Although extraneous offenses generally are inadmissible to prove character conformity under Rule 404(b), such evidence is statutorily admissible in prosecutions for certain crimes—such as those charged in this case—to show character conformity notwithstanding Rule 404(b). *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1)(B) and (C); TEX. R. EVID. 404(b)(1). Article 38.37 of the Texas Code of Criminal Procedure creates an exception to the general rule that extraneous offenses are not admissible to prove a person's character in order to show they acted in accordance with that character. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a), (b); TEX. R. EVID. 404(b); *Carmichael v. State*, 505 S.W.3d 95, 102 (Tex. App.—San Antonio 2016, pet. ref'd). Section 2 of article 38.37 allows evidence that the defendant committed a separate offense to be admitted at trial for any bearing it has on relevant matters, including his character and acts performed in conformity with that character. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1)(B) and (C), (b); *Carmichael*, 505 S.W.3d at 102.

As Torres correctly notes, even if extraneous offense evidence is relevant and admissible under article 38.37, it remains subject to exclusion if its probative value is substantially outweighed and if Rule 403 is raised in the trial court. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b); *see also Jurado v. State*, No. 08-17-00010-CR, 2019 WL 1922757, at *9 (Tex. App.—El Paso Apr. 30, 2019, pet. ref'd) (not designated for publication); *Belcher v. State*, 474 S.W.3d 840, 847 (Tex. App.—Tyler 2015, no pet.); *Sanders v. State*, 255 S.W.3d 754, 760 (Tex. App.—Fort Worth 2008, pet. ref'd). Recognizing that the trial court remains in a superior position to gauge the impact of the evidence, we measure the trial court's ruling against the Rule 403 balancing criteria: (1) the inherent probative force of the evidence along with (2) the State's need for the evidence against

(3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) 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 (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *See Gigliobianco*, 210 S.W.3d at 641-42; *Carrillo v. State*, No. 08-14-00174-CR, 2016 WL 4447611, at *4 (Tex. App.—El Paso Aug. 24, 2016, no pet.) (not designated for publication). At the outset, however, we recognize that Rule 403 favors the admission of relevant evidence, including extraneous offense evidence, and presumes that relevant evidence is more probative than unfairly prejudicial. *De La Paz v. State*, 279 S.W.3d 336, 343 n.17 (Tex. Crim. App. 2009) (citation omitted). On appeal, Torres carries the burden to overcome this presumption and demonstrate that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or of misleading the jury. *Sanders*, 255 S.W.3d at 760.

2. Analysis

Although Torres concedes the extraneous offense evidence was authorized under article 38.37, he nonetheless contends that the trial court did not properly apply the balancing test in regard to the particular form of the evidence. That is, whether the probative value of A.T.'s live testimony outweighed its prejudicial impact given other available evidentiary forms of the evidence. In response, the State asserts the elements of the Rule 403 balancing test do not require consideration of one form of evidence over another, that the live testimony was a form that was within the trial court's discretion to allow, and a trial court cannot dictate the form of a party's evidence unless it accomplishes one of the goals in Rule 611. *See* TEX. R. EVID. 611 (giving trial

courts authority to exercise "reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment"); *In re State*, 564 S.W.3d 58, 67 (Tex. App.—El Paso 2018, no pet.).

We agree with the State that the required balancing test does not require a weighing of the form of the evidence as compared to admission of evidence in an alternative form. Because Torres cites no authority for his argument, and we are not aware of any, we reject his invitation to include an additional requirement which focuses on the form alone of the evidence as compared to alternative forms when balancing the criteria. To the extent Torres' first issue complains of the form of the extraneous offense evidence, we overrule his complaint and procced with our established review.

i. Probative Value and Need for the Evidence

The first two balancing factors involve the probative value of the evidence and the proponent's need for the evidence. *Gigliobianco*, 210 S.W.3d at 641. Torres argues A.T.'s testimony was overly prejudicial and not probative to whether the charged offenses against Z.S. had in fact occurred. In comparing A.T.'s testimony with the charged offenses in this case, the offenses include similar charges and show victims who are young children with a familial relationship (or a perceived relationship) with Torres. For these reasons, the testimony from A.T. was probative of Torres' guilt for the charged offense against Z.S., as the evidence established his propensity to commit sexual offenses against children who are part of his household or are members of households where he is frequently invited. Such evidence is of the type that is admissible as authorized by the Legislature. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2;

Caston v. State, 549 S.W.3d 601, 612 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (propensity evidence that a defendant previously committed the same or similar offense for which he is charged is inherently probative, and that article 38.37 removed Rule 404's bar to the use of such evidence to establish a defendant's conformity with a pertinent character trait on a particular occasion).

Additionally, the State's need for the evidence was great as there was no third-party eyewitness or physical evidence corroborating Z.S.'s account of abuse. *Gaytan v. State*, 331 S.W.3d 218, 227 (Tex. App.—Austin 2011, pet. ref'd); *Jurado*, 2019 WL 1922757, at *10. Z.S.'s credibility was integral to the State's case; particularly so given that Torres' primary defensive theory at trial was an attempt to discredit Z.S.'s credibility given her delayed outcry, some inconsistent statements given to police, and Torres' sons having never observed inappropriate interactions between Z.S. and Torres. Because of these circumstances, evidence of a similar nature in similar situations was needed as Z.S.'s credibility was clearly a focal issue in the case. *Caston*, 549 S.W.3d at 612 (holding the extraneous testimony had considerable probative force and the State had a great need for the evidence); *Belcher*, 474 S.W.3d at 848 (holding the extraneous evidence did not violate Rule 403 even where child-complainant's mother had initially doubted the allegations).

We find these factors weigh in favor of admission of A.T.'s testimony.

ii. Unfair Prejudice

Unfair prejudice arises when evidence has an undue tendency to suggest a decision to be made on an improper basis, like an emotional basis. *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990). Torres argues the testimony of A.T. had the tendency to suggest a verdict on an improper basis as it was inherently inflammatory. Here, the extraneous conduct involving

A.T. contains similar facts as those in the charged offenses. A.T.'s testimony showed the sexual assaults by Torres were similar in that he exposed his penis to both girls, Torres would rub his penis against A.T.'s hand and Z.S.'s butt, Torres inserted his fingers into both girls' genitals, and Torres forced both girls to touch his penis.

Although we acknowledge this type of testimonial evidence can be prejudicial, nonetheless, we do not find it was unfairly prejudicial. *Wells v. State*, 558 S.W.3d 661, 670 (Tex. App.—Fort Worth 2017, pet. ref'd). The prejudicial nature of the testimony arises from the fact that the testimony was particularly probative to show Torres' propensity to commit sexual offenses against children who are members of his family or of a family of close friends who treat him as if he is a member of their family. *See id*. Here, although the inflammatory nature of the offenses against both children was nearly equivalent, the extraneous offense evidence was highly probative because it showed Torres' propensity to sexually abuse children in a family relationship. *See Belcher*, 474 S.W.3d at 848 (finding even though the challenged testimony pertaining to an extraneous offense was more "repugnant and inflammatory" than the evidence surrounding the charged offense, the probative value in showing the defendant's propensity to sexually assault children was so great that is was not outweighed by the danger of unfair prejudice); *Carrillo*, 2016 WL 4447611, at *5 (finding no unfair prejudice when same conduct occurred in the extraneous offense as the charged offense).

We find this factor also weighs in favor of admission of A.T.'s testimony.

iii. Confusion of the Issues, Undue weight, and Cumulative Evidence

The final factors in the balancing test require determining whether the evidence has any tendency to confuse or distract the jury from the main issues of the case, whether the jury could

give the testimony undue weight, and whether presentation of the evidence would take up an excessive amount of time or be repetitive. *Gigliobianco*, 210 S.W.3d at 641-42. A.T.'s testimony was straightforward and was not likely to confuse the jury as it concerned substantially the same issues as the charged offense. *Jurado*, 2019 WL 1922757, at *10. It is not likely the jury would be misled because the testimony did not contain any scientific evidence. *Gigliobianco*, 210 S.W.3d at 641-42 (explaining scientific evidence might mislead a jury when they are not properly equipped to judge probative force of the evidence). Additionally, the trial court provided a jury instruction for the extraneous offense evidence that instructed the jury on the limited purpose it could consider the extraneous evidence. Lastly, A.T.'s testimony was not repetitive and did not take up an inordinate amount of time.[4] *Gigliobianco*, 210 S.W.3d at 641-42; *Price v. State*, 594 S.W.3d 674, 681 (Tex. App.—Texarkana 2019, no pet.). On this record, we conclude the last factors also favor admission.

Having balanced the Rule 403 factors, we conclude the trial court could have reasonably determined that the probative value of the extraneous offense evidence was not substantially outweighed by the countervailing factors. The trial court's admission of A.T.'s testimony regarding Torres' past sexual abuse was not a clear abuse of its broad discretion nor outside the zone of reasonable disagreement. *Wells*, 558 S.W.3d at 670; *Jurado*, 2019 WL 1922757, at *10.

We overrule Torres' first issue.

B. Constitutionality of 38.37

[4] Torres argues the State spent more time on direct examination with A.T. than it did with Z.S. However, when looking at the entire testimony of both witnesses, A.T.'s testimony comprised thirty-eight pages of transcript out of approximately 300 pages of total testimony during the trial. In any event, *Gigliobianco* does not call for a direct comparison as proposed by Torres, and we do not adopt it here.

We next address Torres' argument that article 38.37 is unconstitutional—facially and as applied to him—as it "violates due process because it permits trial courts to admit evidence of prior crimes solely for the purpose of impugning the character of the defendant and prejudicing the jury against the defendant" and alleviates the burden on the State to prove each element of the charged offense. He further asserts the testimonial evidence of A.T. was so inflammatory as to deprive Torres of fundamental fairness.

1. Standard of Review and Applicable Law

We review whether a statute is facially constitutional under a *de novo* standard of review. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When constitutionality is challenged, we presume the statute is valid and the legislature did not act unreasonably or arbitrarily in enacting it. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). The challenging party bears the burden to establish the statute is unconstitutional. *Ex parte Lo*, 424 S.W.3d at 15.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law. U.S. CONST. amend. V. The Due Process Clause requires the State prove each element of the charged offense beyond a reasonable doubt. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Generally, the State must not try the accused for a collateral crime or for being a criminal generally but must only try an accused of the charged offense. *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991).

Evidence of extraneous offenses are generally inadmissible "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). However, the enactment of Article 38.37 of the Code of Criminal Procedure created a statutory exception to Rule 404(b). TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1)(C),

(b). Specifically, article 38.37, section 2(b) states:

> (b) 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) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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 procedural safeguard, the trial court must first determine that the evidence will be adequate to support a finding by the jury that the defendant committed the prior offense beyond a reasonable doubt and conduct a hearing on that matter. *See id*. § 2-a(1-2).

2. Facial Challenge

The State first asserts that Torres' objections to constitutionality was not a facial challenge to the constitutionality of the statute and he cannot make a facial challenge for the first time on appeal. The State contends that Torres' objections pertained only to the admission of A.T.'s testimony. Throughout trial, counsel made it clear that he was not contesting whether Torres' prior conviction should be admitted under article 38.37 but that the live testimony of A.T. violated his constitutional rights. The State argues that through Torres' concession that the prior conviction could be admitted through article 38.37, he was not challenging the facial validity of the statute. *Harris v. State*, 475 S.W.3d 395, 400 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Even so, we cannot otherwise sustain the challenge to the statute's constitutionality.

Thirteen Texas courts of appeals, including this Court, have upheld the constitutionality of article 38.37, section 2, in the face of due process challenges. *Buxton v. State*, 526 S.W.3d 666, 689 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *Gusman v. State*, No. 02-18-00157-CR, 2018 WL 3060213, at *3 (Tex. App.—Fort Worth June 21, 2018, pet. ref'd) (mem. op., not

designated for publication); *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); *Jurado*, 2019 WL 1922757, at *5; *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*, 474 S.W.3d at 847; *Chaisson v. State*, No. 13-16-00548-CR, 2018 WL 1870592, at *5 (Tex. App.—Corpus Christi-Edinburg Apr. 19, 2018, pet. ref'd) (mem. op., not designated for publication); *Harris*, 475 S.W.3d at 403.

Among these decisions, it has been recognized that article 38.37 brings the Texas Rules of Evidence closer to Federal Rule of Evidence 413(a). *Caston*, 549 S.W.3d at 609; FED. R. EVID. 413(a) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant."); *see also* FED. R. EVID. 414(a) ("In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant."). *Caston*, 549 S.W.3d at 609. Along with the Legislature's purpose, this Court, along with our sister courts, has held article 38.37 does not reduce the State's burden of proof or

defendant's presumption of innocence. *Jurado*, 2019 WL 1922757, at *4. The State is still required to prove each element of the charged offense beyond a reasonable doubt, but the statute creates an additional exception to the prohibition of admission of extraneous offense evidence in certain cases involving sexual abuse of a child. *Jurado*, 2019 WL 1922757, at *4. Additionally, a defendant's rights are procedurally protected. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2–a(1), (2), 3. For these reasons, we must follow the established precedent of this Court and our sister courts and conclude that article 38.37 is facially constitutional.

3. As-Applied Challenge

Furthermore, our review of the record shows the State was still required to prove each element of continuous sexual abuse of a child, indecency with a child by sexual contact, and indecency with a child by exposure beyond a reasonable doubt and the statute did not shift the burden of proof. *Jurado*, 2019 WL 1922757, at *5. First, the trial court charged the jury on the constitutional requirements of presumption of innocence and the State's burden of proof properly. The trial court also charged the jury with the following instruction regarding its ability to consider the extraneous offense:

> You are instructed that if there is any testimony before you in this case regarding the Defendant having committed bad acts or wrongs other than the offenses alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other bad acts or wrongs, if any was committed. This does not alter the State's burden of proof because the State is still required to prove every element of the indicted offenses beyond a reasonable doubt. In addition, the law does not allow extraneous offense evidence to be offered as substantive evidence of guilt of the indicted offense, but may be considered to determine the character of the defendant, but may be considered to determine the character of the defendant and acts performed in conformity with the character of the defendant, if any. The jury may not convict a defendant of the indicted offense solely on its determination beyond a reasonable doubt that the defendant committed an extraneous-sexual offense.

Torres has not guided us to any authority providing that he had a fundamental right to a trial free from the introduction of extraneous offense evidence. Our review of the record and the statutory provision itself does not support Torres' argument that the burden of proof on the State was alleviated. Torres has failed to establish article 38.37 is unconstitutional as applied to him as the State was still required to prove each element of the three charged offenses and the burden was not shifted to him to prove he was not guilty of that charged offense. *Carrillo*, 2016 WL 4447611, at *9; *Jurado*, 2019 WL 1922757, at *5. For these reasons, we conclude that Article 38.37 of the Texas Code of Criminal Procedure is constitutional and Torres' constitutional right to due process was not violated. Accordingly, Torres' second issue is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

GINA M. PALAFOX, Justice

July 16, 2021

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

(Do Not Publish)