AFFIRMED as MODIFIED and Opinion Filed August 12, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00766-CR

ARNULFO MALPICA SANCHEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1875093-W

MEMORANDUM OPINION
Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

Appellant, Arnulfo Malpica Sanchez, was convicted of continuous sexual abuse of a child under the age of fourteen and sentenced to thirty-two years' imprisonment. On appeal, appellant claims the trial court abused its discretion by admitting evidence of extraneous offenses and erred by denying his request for a limiting instruction vis-à-vis the burden of proof on these extraneous offenses. The State challenges these allegations and, in a cross-point, seeks modification of the judgment to reflect that appellant was convicted by a jury as opposed to the trial court. We modify the judgment as requested and affirm the judgment as modified.

Background

The facts of the case are well-known to the parties and appellant does not contest the sufficiency of the evidence to support his conviction. Therefore, we issue this memorandum opinion and include only those facts necessary for the disposition of this appeal. *See* TEX. R. APP. P. 47.4.

M.H., a fourteen-year-old child, testified that appellant was her aunt's husband. From the time she was seven and in the third grade until after her sixth grade year when she was eleven or twelve years old appellant sexually abused her by touching her breast and vagina with his hand and her hand, mouth and vagina with his penis. The abuse stopped when she entered middle school. About that same time, M.H. began to exhibit behavioral problems such as skipping classes, drinking alcohol, and smoking marijuana. When M.H.'s mother took her to a police station in an effort to get the police to deal with her behavioral problems, M.H. disclosed the abuse for the first time to an adult.

Extraneous Offenses

In his first issue, appellant claims the trial court abused its discretion by admitting evidence of extraneous offenses because that evidence was more prejudicial than probative. Specifically, appellant complains about the admission of testimony from M.H.'s sister and two cousins that he sexually abused and/or assaulted them during the same time frame that he sexually abused M.H. The State responds that appellant is procedurally barred from complaining on appeal about this

issue because he did not raise the proper objection to this testimony at a hearing outside the presence of the jury, did not object to the admissibility of the extraneous offense testimony at the time it was offered before the jury or, in the alternative, the probative value of the extraneous offense testimony was not substantially outweighed by any danger of unfair prejudice.

Standard of Review

An appellate court reviews a trial court's admission or exclusion of evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court does not abuse its discretion if the decision to admit evidence is within the zone of reasonable disagreement. *Id*.

Extraneous Offenses and Article 38.37

Because an accused must be tried only for the offense charged and not for a collateral crime or for being a criminal generally, extraneous offense evidence is usually not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character. TEX. R. EVID. 404(b)(1) (providing that evidence of "a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character").

For crimes against children, however, the Code of Criminal Procedure permits the admission of extraneous offenses in prosecutions for sexual offenses against a child under the age of seventeen:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:
>
> (1) the state of mind of the defendant and the child; and
>
> (2) the previous and subsequent relationship between the defendant and the child.

TEX. CODE CRIM. PROC. ANN. art. 38.37, § 1(b). In prosecutions for indecency with a child and sexual assault of a child, the statute permits the admission of specifically enumerated extraneous sexual offenses, including those committed against someone other than the child complainant:[1]

> 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.

Id. art. 38.37, § 2(b). Before evidence described by Section 2 may be introduced, the trial judge must:

> (1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and
>
> (2) conduct a hearing out of the presence of the jury for that purpose.

[1] These offenses include sex trafficking of a child; continuous sexual abuse of a young child or children; indecency with a child; sexual assault of a child; aggravated sexual assault of a child; online solicitation of a minor; sexual performance by a child; possession or promotion of child pornography; and any attempt or conspiracy to commit any of these offenses. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1)(A)–(H), (2).

Id. art. 38.37 § 2-a.

However, evidence otherwise admissible under Article 38.37 may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403 (providing that a trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence); *see also Sarabia v. State*, 227 S.W.3d 320, 323 (Tex. App.—Fort Worth 2007, pet. ref'd). When evaluating a trial court's determination under Rule 403, we will reverse "rarely and only after a clear abuse of discretion" because the trial court is in a superior position to gauge the impact of the proffered evidence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999); *Sarabia,* 227 S.W.3d at 323.

When undertaking a Rule 403 analysis, the trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest 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. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). Rule 403

does not require that this balancing test be performed on the record. *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App. —Austin 2001, pet. ref'd). In overruling a Rule 403 objection, the trial court is assumed to have performed a Rule 403 balancing test and determined the evidence was admissible. *Id*.

Further, there is a presumption that relevant evidence is more probative than prejudicial. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). "Probative value" is the measure of how strongly the evidence serves to make more or less probable the existence of a fact of consequence to the litigation, coupled with the proponent's need for that item of evidence. *Gigliobianco*, 210 S.W.3d at 641; *Belcher v. State*, 474 S.W.3d 840, 847–48 (Tex. App.—Tyler 2015, no pet.). Evidence of a defendant's extraneous offense will almost always be prejudicial. *See Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013). The question is whether the prejudicial effect of the testimony is unfair or substantially outweighs its probative effect. *See Wheeler v. State*, 67 S.W.3d 879, 889 (Tex. Crim. App. 2002). "Unfair prejudice" refers to a "tendency to tempt the jury into finding guilt on grounds apart from proof of the offense charged." *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005); *Belcher*, 474 S.W.3d at 847–48.

Article 38.37 Hearing

Prior to the presentation of the State's case-in-chief, the trial court held a hearing outside the presence of the jury to determine the admissibility of extraneous offenses. At this hearing, M.H. testified that appellant touched her on her breast and

vagina with his hand. His penis also touched her hand, mouth and vagina. Appellant would do this to her both in his bedroom and in his truck from which he conducted a business. On many of these occasions, her sister, S.J.H., and her cousins, J.H. and J.A,[2] were also present and subject to the same sexual abuse.

S.J.H., J.H., and J.A., all testified at this hearing[3] that they had been sexually abused and/or sexually assaulted by appellant. The girls all told a similar story: appellant was their uncle; they often went to his house when their mother was working; appellant would sexually abuse them by touching them inappropriately, either with his hand, his penis, or both; these acts often occurred in his bedroom but sometimes in his truck; sometimes the girls would be alone with appellant and sometimes their siblings/cousins would be present. J.H. also testified that appellant penetrated her and "hurt" her in her "private part." Each girl saw appellant sexually abuse/assault the other three girls.

Preservation

At the conclusion of this hearing, defense counsel noted that M.H. was the complainant in this case and the other three witnesses were complainants on pending

[2] Both of M.H.'s cousins have the same initials – J.D. In order to distinguish between the two, the older cousin will be referred to as J.H. and the younger cousin will be referred to as J.A., which is consistent with how appellant refers to the cousins in his brief to this Court.

[3] At the time of trial, S.J.H. was sixteen, J.H. was fourteen, and J.A. was thirteen.

indictments for indecency with a child.[4] Defense counsel then made the following statement to the trial court:

> [BY DEFENSE COUNSEL]: And I understand under 38.37, Section 2 that there is ability to produce evidence at this trial of other offenses, as testified to by . . . (J.H., J.A., and S.J.H) . . . , but the statute limits those for what they can be used for. *And we would object to that coming in without the court giving an instruction to the jury about hearing evidence that Mr. Sanchez my (sic) have previously committed another offense,* and he's not charged with this other offense in this case, and the jury may only consider evidence of such other acts or its tendency, if any, to show the defendant's propensity to engage in this conduct, and even if you consider it, however, the defendant is not on trial for any offenses alleged, except that are alleged in the indictment, and you still must be limited to your verdict on being proof beyond a reasonable doubt on all the elements of the offense alleged in the indictment.
>
> THE COURT: We can do that in the final charge.
>
> [BY THE PROSECUTOR]: The jury charge, I would agree to have all that language.
>
> [BY DEFENSE COUNSEL]: Well, I'm asking before it comes in to instruct the jury ahead of time. That's my request.
>
> THE COURT: We can do it in the charge too.
>
> [BY DEFENSE COUNSEL]: I won't object to that.

(emphasis added).

Appellant did not object to the admissibility of the extraneous offense testimony under Rule 403, nor did he argue that the prejudicial effect of these

[4] Prior to voir dire, defense counsel moved to consolidate these indecency cases with the instant prosecution. The State opposed consolidation and the trial court did not order consolidation.

extraneous offenses outweighed their probative value. Rather, appellant asked for appropriate jury instructions and then agreed he would not object to instructions being included in the charge. As a result, appellant has forfeited his complaint about the admission of the extraneous offense evidence under Rule 403. *See* TEX. R. APP. P. 33.1(a)(1) (requiring a party to make a timely and specific objection to preserve a complaint for appellate review); *Bradshaw v. State*, 466 S.W.3d 875, 882 (Tex. App.—Texarkana 2015, pet. ref'd) (holding a defendant forfeited his complaint about the prejudicial nature of extraneous offense evidence under article 38.37 because he did not object on Rule 403 ground at trial); *Keller v. State*, No. 05-18-00778-CR, 2020 WL 3118713, at *9 (Tex. App.—Dallas June 12, 2020, no pet. h.) (mem. op., not designated for publication) (holding that because the defendant did not make a Rule 403 objection before the trial court, the issue of admissibility of extraneous offenses under that rule was not preserved for appeal); *Diaz v. State*, No. 01-18-00636-CR, 2020 WL 2026320, at *4 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020, no pet. h.) (mem. op., not designated for publication) (holding that an issue was not preserved for appellate review because appellant made no Rule 403 objection before the trial court); *Moose v. State*, No. 02-18-00194-CR, 2019 WL 2223585, at *6 (Tex. App.—Fort Worth May 23, 2019, no pet.) (mem. op., not designated for publication) (holding a defendant did not preserve a Rule 403 issue because he did not object on that basis to proffered extraneous offense evidence). As a result, appellant has failed to preserve error under Rule 403.

Probative Value Outweighs Prejudicial Effect

Even if we were to assume that appellant preserved this error for our review, we would not find reversible error.

The evidence at the hearing showed that the sexual abuse of M.H. was inextricably linked to the sexual abuse of her sister and cousins. Each of the four girls was sexually abused by appellant and each girl witnessed the abuse of the other girls.[5] The testimony of S.J.H., J.H., and J.A. provided the jury with the context in which this offense occurred and, as such, was highly probative. *See Bradshaw*, 466 S.W.3d at 883 (noting that the testimony of two other girls who lived in the house with the complainant and were also sexually abused by the defendant provided "valuable context in which [the complainant's] claims could be evaluated by the jury"). The fact that S.J.H., J.H., and J.A. witnessed appellant sexually abuse M.H., and were also sexually abused themselves, made it more likely than not that appellant had sexually abused M.H. as alleged in the indictment. *See Belcher*, 474 S.W.3d at 848 (explaining that the extraneous offense evidence was necessary to the State's case primarily because it was especially probative of the defendant's propensity to sexually assault children).

Appellant claims the trial court should have excluded the extraneous offense testimony because it only served to enforce M.H.'s allegations and unduly suggested

[5] In a pretrial hearing held before voir dire, defense counsel seemed to recognize this as he sought to consolidate the four cases because they essentially rested on the same "factual content."

that the jury reach its verdict based on "merely the number of acts enumerated." But the fact that the extraneous offense testimony served to enforce M.H.'s testimony further supports its probative value under Article 38.37. And it is unclear from appellant's arguments how the number of sexual abuse/assault incidents perpetrated by appellant against the other three girls "unduly" affected the jury's verdict. *See Alvarez v. State*, 491 S.W.3d 362, 366-67, 370-71 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (holding the extraneous offense testimony by the defendant's two nieces, one of whom testified that appellant engaged in sexual intercourse with her "more than [she could] even count," was not unfairly prejudicial under Rule 403). While admission of these extraneous offenses was prejudicial, admission was not unfairly prejudicial because any prejudice was outweighed by the probative value of those extraneous offenses. We overrule appellant's first issue.

Limiting Instruction

In his second issue, appellant claims the trial court erred by denying his request for a jury instruction on the burden of proof applicable to the extraneous offenses admitted at trial under article 38.37. The State responds that the charge includes sufficient instructions on the burden of proof. We agree with the State.

Standard of Review: Jury Charge Error

When evaluating alleged jury charge error, we must first determine whether the charge was erroneous. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). If we find error and appellant objected to that error at trial, as appellant did

in this case, then only "some harm" is necessary to reverse the trial court's judgment. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). However, if we find no error in the jury charge, our inquiry ends. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015).

Objections and Ruling

At the conclusion of the evidence but prior to the charge being read to the jury, defense counsel dictated the following requested charge to the court reporter:[6]

> During the trial you heard evidence of the defendant may have . . . committed an offense against . . . (J.A., J.H., and S.J.H.) . . ., other than the one he is currently accused of in the indictment. You're not to consider that evidence at all unless you find beyond a reasonable doubt that the defendant did in fact commit the offense against . . . (J.A., J.H., and S.J.H.) . . .. Those of you who consider the defendant committed those offenses may consider it. Unless you consider this evidence – or you may consider this evidence, excuse me, you may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offense not alleged in the indictment. You must determine if the state proved all the elements of the offense alleged in the indictment beyond a reasonable doubt.

The State responded that it had "no objection to the charge as is." The trial court denied appellant's requested charge.

[6] Counsel for appellant stated that his requested instruction was made pursuant to "Criminal Pattern Jury Charges 84.3."

Appellant argues that the trial court's refusal to instruct the jury as he requested was harmful because, without this instruction, the jury was allowed to consider any extraneous offense without regard to the burden of proof.

The Jury Charge

The trial court's jury charge contained the following language on the State's burden of proof:

> *The prosecution has the burden of proving the defendant guilty* and it must do so by proving each element as charged *beyond a reasonable doubt*, and if it fails to do so, you must acquit the defendant. However, it is not required that the prosecution prove guilt beyond all possible doubt; it is only required that the prosecution's proof exclude all reasonable doubt concerning the defendant's guilt.

(emphasis added). The trial court's jury charge further contained the following language on extraneous offenses:

> You are instructed that *you may not consider the defendant's commission of crimes, wrongs or acts not alleged in the indictment, unless you first find and believe from the evidence beyond a reasonable doubt that the defendant committed such crimes, wrongs, or acts.* Even then, you may only use that evidence for the limited purpose for which it was admitted, as instructed below.
>
> You are instructed that if there is any evidence before you in this case regarding other crimes, wrongs, or acts committed by the defendant against . . . (M.H.) . . . , you may consider such evidence for its bearing on relevant matters, including the state of mind of the defendant and . . . (M.H.) . . . and the previous or subsequent relationship between the defendant and . . . (M.H.) . . .
>
> You are instructed that if there is any evidence before you in this case that the defendant committed the separate offenses of Continuous Sexual Abuse of a Child, Indecency with a Child, Aggravated Sexual Assault of a Child against . . . (J.H., J.A., and S.J.H.) . . ., you may

> consider such evidence for its bearing on relevant matters, including the character of the defendant, and acts performed in conformity with the character of the defendant.

(emphasis added).

The Jury Charge Adequately Instructed on the Burden of Proof

A trial court must include a limiting instruction in the jury charge on the State's burden of proof for an extraneous offense when such a charge is requested by the defendant. *Delgado v. State*, 235 S.W.3d 244, 246 (Tex. Crim. App. 2007). Here, while the trial court denied appellant's requested charge, appellant received an adequate instruction on the State's burden of proof regarding the extraneous offenses.

The trial court instructed the jury that it could only consider the extraneous offenses if it first found from the evidence, beyond a reasonable doubt, that appellant committed those extraneous offenses. Further, the trial court instructed the jury that it could only consider the extraneous offenses for the specific purposes set out in article 38.37, *i.e.*, the state of mind of the defendant and the child; the previous and subsequent relationship between the defendant and the child, the character of the defendant and acts performed in conformity with the character of the defendant. CRIM. PROC. art. 38.37, §§ 1(b) and 2(b). As a result, the trial court's charge both explained the purposes for which the jury could consider the extraneous offense evidence and required the jury to find those offenses occurred beyond a reasonable doubt before considering the extraneous offenses for those allowable purposes. *See*

Dounley v. State, No. 05-19-00036-CR, 2020 WL 415930, at *4 (Tex. App.—Dallas Jan. 27, 2020, pet. ref'd) (mem. op., not designated for publication). Consequently, the trial court did not err by denying appellant's requested jury charge.

Because we conclude there was no error in the charge, we do not conduct a harm analysis. *Cortez*, 469 S.W.3d at 598. We overrule appellant's second issue.

Modification of Judgment

In a cross point, the State asks this Court to modify the judgment to reflect that appellant was convicted by a jury rather than by the trial court.

The record affirmatively reflects that appellant was convicted by a jury. The written judgment, however, is incorrectly titled "Judgment of Conviction by Court – Waiver of Jury Trial." The judgment also fails to contain a field entitled "Verdict of Jury." The judgment also incorrectly contains a field entitled "Terms of Plea Bargain: 32 years TDC;" no plea bargain was operative. Further, the judgment does not contain a field entitled "Punishment Assessed By."

We have the authority to modify an incorrect judgment when the evidence necessary to correct that judgment appears in the record. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the trial court's judgment to read "Judgment of Conviction by Jury." The judgment is also modified to add a field entitled "Verdict of Jury" with the notation "Guilty."

The judgment is further modified to add a field entitled "Punishment Assessed By" with the notation "Trial Court."

Conclusion

As modified, we affirm the trial court's judgment.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)
190766F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ARNULFO MALPICA SANCHEZ, Appellant	On Appeal from the 363rd Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1875093-W.
No. 05-19-00766-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and
THE STATE OF TEXAS, Appellee	Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The title of the judgment is modified to read "Judgment of Conviction by Jury;" a field entitled "Verdict by Jury" with the notation "Guilty" is added; and a field entitled "Punishment Assessed By" with the notation "Trial Court" is added.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered August 12, 2020