Opinion issued July 28, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00629-CR

DAVID ERNEST WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1473600

MEMORANDUM OPINION

After a bench trial, appellant David Ernest Williams was convicted of indecency with a child. *See* TEX. PENAL CODE § 21.11. The court found an enhancement for a prior conviction for aggravated sexual assault of a child to be "true," and as a consequence it was required to sentence Williams to life

imprisonment. *See id.* § 12.42(c)(2). Williams appeals, arguing that the trial court violated his due process rights by admitting evidence pursuant to Texas Code of Criminal Procedure Article 38.37, which authorizes the admission of evidence of extraneous offenses or acts.

Because the challenged evidence was admissible despite Article 38.37, we do not address Williams's facial constitutional challenge to that provision, and we affirm the trial court's judgment.

Background

Appellant David Ernest Williams attended a family member's birthday party. Several children were in attendance and stayed in the den while the adults were in the living room. Williams sat down in one of the chairs in the den, unzipped his pants and "stuck his penis out." He then had multiple children at the party sit on his lap. One of the children reported the incident to her parents, who filed a police report and took the child to the Children's Assessment Center.

Williams was charged with committing indecency with a child. He filed a pretrial brief in which he preemptively objected to the admission of prior bad acts under Article 38.37, section 2 of the Texas Code of Criminal Procedure. He then waived his right to a jury trial and proceeded to trial before the court. The record reflects that the bench trial proceeded in two phases, one focused on determining guilt or innocence, and the other for punishment.

At trial, the State elicited testimony from several witnesses who claimed Williams had molested them in prior incidents. Before the first witness on this subject testified, Williams raised his objection to admitting this evidence under Article 38.37:

> Counsel: . . . Judge, I'm going to object. Again, this is under 38.37. I filed a trial brief for that.
>
> Court: The Court has read the defense's trial brief and unfortunately, as the statute is written, after a hearing before the jury—but obviously if I find it not to be of the threshold, then I will disregard it; but I think they are entitled to put it on.

Williams explained the substance of his constitutional claims for the record, and the court overruled the objection. The State clarified that it intended to submit the first witness's testimony under both Article 38.37 and Texas Rule of Evidence 404(b), specifically for "intent and lack of mistake or accident." Williams renewed his objection under Article 38.37 for each witness who testified to prior bad acts.

The State alleged an enhancement due to a prior felony conviction for aggravated sexual assault of a child. The court found the enhancement "true" and sentenced Williams to life imprisonment. Williams appealed.

Analysis

Williams argues that Article 38.37, section 2(b) of the Texas Code of Criminal Procedure is facially unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. He claims

that the admission of prior bad acts during the guilt–innocence phase of trial was for the purpose of proving general character propensity toward criminal behavior, and this violated his right to be tried only for the offense charged rather than for being a criminal in general. The State responds that because this was a bench trial, there was no guilt–innocence phase but rather a unitary proceeding with a recess, and the evidence in question was admissible because it was relevant to sentencing.

Article 38.37, section 2 applies exclusively to prosecutions for a specific set of sexual or assaultive offenses against minors. *See* TEX. CODE CRIM. PROC. art. 38.37, § 2(a). In such a trial, evidence of a separate offense under those same provisions is admissible "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." *See id.* art. 38.37, § 2(b). The Code provides:

> 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.

Id. art. 38.37, § 2-a.

In contrast, the rules of evidence generally prohibit the admission of evidence of a "crime, wrong, or other act . . . 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). Nevertheless, the evidentiary rules permit admission of such evidence for other proper purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.*

Neither Article 38.37 nor Rule 404(b) applies to limit the introduction of evidence offered for purposes of assessing punishment:

> 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 . . . .

TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1). Evidence of extraneous offenses is therefore admissible when a court assesses punishment. *See id.*

When challenging the constitutionality of a statute, it is "incumbent upon an accused to show that he was convicted or charged under that portion of the statute the constitutionality of which he questions." *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 909 (Tex. Crim. App. 2011) (quoting *Ex parte Usener*, 391 S.W.2d 735, 736 (Tex. Crim. App. 1965)). Without this showing, any constitutional

determination would be a prohibited declaratory judgment. *Id.* at 909–10. This court does not determine the constitutionality of a statute "unless such a determination is absolutely necessary to decide the case in which the issue is raised." *Salinas v. State*, 464 S.W.3d 363, 366 (Tex. Crim. App. 2015).

The statute that authorizes a bifurcated criminal trial only applies to a trial before a jury. TEX. CODE CRIM. PROC. art. 37.07, § 2(a); *see also Barfield v. State*, 63 S.W.3d 446, 449 (Tex. Crim. App. 2001). The Court of Criminal Appeals has noted that the statute has "no application to a trial before the court on a plea of not guilty." *Barfield*, 63 S.W.3d at 449–50 (quoting *Courtney v. State*, 424 S.W.2d 440, 443 (Tex. Crim. App. 1968)). "Therefore, even if a trial court employs procedures characteristic of bifurcation, a bench trial remains a unitary trial punctuated by a recess in the middle." *Ferguson v. State*, 313 S.W.3d 419, 424 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

In a nonjury trial, "the decision of the court . . . is not fixed until it renders judgment on guilt and punishment after all the evidence and arguments have been heard." *Barfield*, 63 S.W.3d at 451. This is why in a nonjury trial, "evidence that is introduced at the 'punishment' stage of trial is considered in deciding the sufficiency of the evidence to prove guilt." *Id.* at 450.

The State argues that Williams cannot show he was convicted under Article 38.37 because a bench trial is a unitary proceeding and the evidence in

question was relevant punishment evidence. We agree that the evidence in question properly was admitted pursuant to Article 37.07 as evidence of Williams's character and prior criminal record. *See* TEX. CODE CRIM. PROC. art. 37.07. While the record appeared to reflect a trial bifurcated into separate guilt–innocence and punishment proceedings, it was in fact a unitary proceeding. *See Ferguson*, 313 S.W.3d at 424. As a result, the trial court was free to consider "punishment" evidence at any point during the trial in this case. *See Barfield*, 63 S.W.3d at 450.

Furthermore, the State also proffered the challenged evidence pursuant to Rule 404(b). Williams has offered no argument that it would have been an abuse of the trial court's discretion to admit the evidence under this rule. *See Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). On this record, Williams has not shown that the trial court did not admit the evidence properly under either Rule 404(b) or Article 37.07. Therefore, he has not met his burden to show that he was convicted as a result of the operation of Article 38.37, which he challenges as unconstitutional. *See Lykos*, 330 S.W.3d at 909. We conclude that any constitutional analysis of the statute as applied to this case would be a prohibited declaratory judgment, and we overrule Williams's sole issue. *See id.* at 909–10.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Higley, Bland, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).