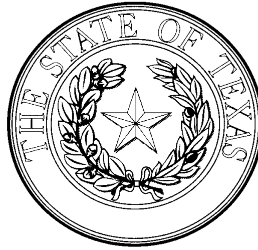
Opinion issued July 13, 2021



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00718-CR

LEONARDO GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Case No. 1564986

MEMORANDUM OPINION

A jury found appellant, Leonardo Gutierrez, guilty of continuous sexual assault of a child pursuant to Texas Penal Code section 21.02 and, after finding an enhancement paragraph true, assessed his punishment at 33 years' confinement. In

two issues on appeal, Gutierrez argues that the trial court erred in admitting certain testimony and that section 21.02 is facially unconstitutional.

We affirm.

Background

Gutierrez was charged with the offense of continuous sexual assault of a child for repeatedly sexually assaulting F.R. (Fay), the daughter of his girlfriend A.J. (Mother).[1] The State also notified Gutierrez that it intended to present evidence of extraneous offenses, namely that he also assaulted two other girls: Fay's sister L.J.R. (Lea), and Fay's cousin K.D. (Kate).

Prior to the start of trial, Gutierrez presented a motion in limine, seeking to prohibit the State from presenting evidence of the offenses committed against Lea and Kate. He argued that allowing such evidence "would essentially be having three cases in one" and would "cause confusion to the jury," and so the "probable value is outweighed by the prejudicial effect." The State clarified that it was seeking to introduce evidence of "two other victims in two additional charged cases . . . under [Texas Code of Criminal Procedure article] 38.37 as probative of [Gutierrez's] relative character trait." The following conversation then occurred:

THE COURT: Are they close enough in time?

[THE STATE]: Your Honor, they are overlapping dates. All female children, all within the same several year

[1] We use pseudonyms to protect the identity of the minors involved with this case.

age range. And for two of them almost identical conduct, for one of them extremely similar conduct.

THE COURT: Well, if it meets that—you know, the criteria for the code with opportunity motion, opportunity motive and all that stuff. I can consider it as we go along. But, yeah, if it meets the criteria, then, obviously, I would allow it.

And—but when we get to that, you can always make an objection and that—or just ask to approach and we can re-discuss it at that time.

Gutierrez objected to the admissibility of the extraneous offenses against Lea and Kate, and the trial court reiterated that extraneous-offense evidence that met the "necessary criteria" could be admitted and that the parties would need to present specific objections when the evidence was offered.

Immediately prior to the start of the trial, but before the jury was present in the courtroom, the State informed the trial court that multiple witnesses "will start getting into my [article] 38.37 things [regarding] all additional offenses" and asked whether the court would "accept a proffer of what the evidence will say and make a ruling as to the admissibility of the other offenses." The trial court agreed to the proffer, and Gutierrez reasserted his previous objection:

[GUTIERREZ]: And, Your Honor, just—I'm just going to lodge an objection, Your Honor, but I understand the Court's ruling.

THE COURT: Well, I think we've covered that one.

[GUTIERREZ]: Yes. Absolutely.

THE COURT: Okay.

[THE STATE]: So I just want to make it very clear, my second complainant will allege that same timeframe, only a two-year age difference, same location. And both were—it was general touching as will my first complainant.

My third complainant will allege genital touching and kissing as well. And is the same age as my first complainant and is a family member of my first complainant.

THE COURT: Within the same timeframe?

[THE STATE]: Yes, Your Honor.

THE COURT: I think it's allowable.

[THE STATE]: Okay. Thank you.

Gutierrez did not assert any additional objections following this ruling.

At trial, Fay testified that she met Gutierrez when she was 10 or 11 years old because he was dating her Mother. He moved in with Mother and her children and then began touching Fay inappropriately. Fay testified that the first incident occurred when she was around 11 years old, while they all still lived in their first apartment. She stated that she fell asleep while watching a movie with her family and woke up when Gutierrez put his hand inside her pants and touched her "in the private." She testified that Gutierrez used his hand to touch her "private area" "a few times" following that initial incident. She also stated that Gutierrez would kiss her "weird," using his tongue, stating, "I would close my teeth, and he would tell me to open them." The final incident occurred after they had all moved to a new

apartment, when Fay estimated that she was 11 or 12 years old. She testified that Gutierrez had sexual intercourse with her and then put his mouth on her "private." Fay stated that it was approximately one year between the first time he touched her and the time he had sexual intercourse with her. Fay eventually confided in her sister, who got help from an aunt, who called the police.

Lea and Kate testified regarding Gutierrez's conduct toward them. Lea, Fay's sister, testified that Gutierrez touched her genitals and breasts with his hands and that he did this "a lot." One of these instances of touching occurred when she was around eight years old and was asleep in the bed with him and Mother. She also recounted an occasion during which Gutierrez sat her on his lap so that she could feel his genitals through their clothes, and he had, on one occasion touched her with his genitals. Kate, Fay's cousin, testified that Gutierrez sent her inappropriate text messages starting when she was nine years old, but her mother saw the messages and made Gutierrez stop sending them. Gutierrez also kissed Kate inappropriately, and on one occasion touched her vagina with his hand.

The State also presented Mother's testimony. She testified that Gutierrez first began living with her and her four children in March or April 2016, and they moved to their second apartment in January 2017. Mother testified that Gutierrez was often home with her kids while she worked. She testified that she first learned of the sexual abuse when police came to her apartment, and the children were

removed to stay with other family members. After that night, Mother left Gutierrez so that she could take care of her kids. A few days after she left Gutierrez, Fay confided in her about the abuse.

At that point in Mother's testimony, the State informed the trial court that it "would like to be able to go into what the complainant said" and believed that an "outcry hearing" was required. Outside the presence of the jury, the State questioned Mother to establish that she spoke to Fay about the abuse. Mother testified that she was over 18 years of age at the time she spoke with Fay about the abuse and that, to her knowledge, she was the first person who Fay told "in any detail" about what Gutierrez had done. Mother testified that her older daughter—the person that Fay first spoke to about the abuse—was younger than 18 years of age when she talked to Fay. Gutierrez's counsel asked Mother a couple of questions about the nature of her conversation with Fay. The trial court then ruled, "[O]bviously this is the outcry witness and we will certify her or state for the record that we consider this to be the outcry witness." Gutierrez did not object to this ruling. Mother then testified before the jury that Fay told her that Gutierrez had both molested and raped her.

The trial court charged the jury on the offense of continuous sexual assault of a child, tracking the language of Penal Code section 21.02. The charge also contained instructions on the lesser-included offenses of indecency with a child

and aggravated sexual assault of a child. It specifically instructed the jury that, to find Gutierrez guilty of continuous sexual abuse of a child, the jurors "must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse." Finally, the charge instructed the jury that, to consider extraneous-offense evidence, it was required "to find and believe beyond a reasonable doubt that the defendant committed" the offenses. The jury found Gutierrez guilty of continuous sexual abuse of a child, and it assessed his punishment at 33 years' imprisonment.

Admission of Evidence

In his first issue, Gutierrez argues that the trial court abused its discretion in admitting evidence of extraneous offenses and in permitting Mother to testify as an outcry witness.

Article 38.37 permits the admission of "evidence that the defendant has committed a separate offense [such as indecency with a child or sexual assault of a child] . . . 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. art. 38.37, § 2(b). Before such evidence may be introduced, the trial court 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.

Gutierrez argues that the trial court failed to comply with the procedural requirements of Code of Criminal Procedure article 38.37, section 2-a and, thus, abused its discretion in admitting evidence that Gutierrez had also assaulted Lea and Kate. The trial court, however, did hold a hearing outside the presence of the jury prior to ruling that Lea and Kate's testimony and related evidence was admissible.

The State asked the trial court prior to the start of the trial how it wished to consider the admissibility of article 38.37 evidence and suggested that it make a proffer of the anticipated evidence. The trial court agreed, without objection from Gutierrez, that the proffer would be sufficient. The State made a brief statement on the record regarding the anticipated testimony of Lea and Kate. While the proffer was brief, it was sufficient to inform the trial court of the nature of the evidence the witnesses would present so that it could determine whether the evidence was "adequate to support a finding by a jury that the defendant committed the separate offense beyond a reasonable doubt." *Id.* "'Adequate' under section 2-a means legally sufficient." *Romano v. State*, 612 S.W.3d 151, 159 (Tex. App.—Houston [14th Dist.] 2020, pet. filed); *Taylor v. State*, 509 S.W.3d 468, 476 (Tex. App.—Austin 2015, pet. ref'd) ("[S]ection 2–a of article 38.37 requires a trial court to

make a determination regarding the sufficiency of the evidence of an extraneous offense . . . ."). A victim's testimony alone is sufficient to establish the offense of sexual assault of a child or indecency with a child beyond a reasonable doubt. *See* TEX. CODE CRIM. PROC. art. 38.07(a); *Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd); *Cantu v. State*, 366 S.W.3d 771, 775–76 (Tex. App.—Amarillo 2012, no pet.). After hearing the State's proffer, the trial court ruled that the evidence was allowable under article 38.37.

Gutierrez argues that this "informal" proceeding did not satisfy the requirements of section 2-a, but nothing in the language of the statue supports his argument. Section 2-a requires only the trial court 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. Gutierrez has not identified, nor could we find, any authority indicating that the trial court must hear detailed testimony or announce its finding in a particular format.[2] *See Singleton v. State*, — S.W.3d —, No. 14-18-00320-CR, 2020 WL 1881068, at *4 (Tex. App.—Houston [14th Dist.] Apr. 16, 2020, pet.

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[2] Gutierrez cites authority construing other provisions within the Code of Criminal Procedure, such as article 38.22, § 6's provisions requiring a hearing and findings on the voluntariness of a defendant's statement or article 31.04's provision governing change of venue proceedings. These provisions are materially different from article 38.37 and are not persuasive in this context.

ref'd) (observing, in context of complaint of lack of authentication of exhibits, that statute does not require State to put on witnesses during article 38.37 hearing). We conclude that the record does not support Gutierrez's contention that the trial court failed to comply with the requirements of article 38.37 section 2-a.[3]

Furthermore, Gutierrez did not object to the form or content of this hearing, nor did he complain at trial that the State's proffer was insufficient to support the trial court's ruling that the evidence was admissible. His only objection was to the admissibility of evidence of the offenses against Lea and Kate, generally. Thus, to the extent that he is complaining on appeal that the trial court should have conducted the hearing or made its ruling in a different manner, he has waived his complaint on appeal. *See Corporon v. State*, 586 S.W.3d 550, 559–60 (Tex. App.—Austin 2019, no pet.) (holding that appellant's lack of objection to trial court's failure to hold article 38.37 hearing waived review of that complaint on appeal); *Carmichael v. State*, 505 S.W.3d 95, 103 (Tex. App.—San Antonio 2016, pet. ref'd) (holding that, by not objecting during trial, appellant forfeits his complaint that trial court failed to conduct article 38.37 hearing); *see also* TEX. R. APP. P. 33.1(a)(1) (requiring party to make timely and specific objection to preserve complaint for appellate review); *Vasquez v. State*, 483 S.W.3d 550, 554

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[3] In a separate motion to abate, Gutierrez asked this Court to abate his appeal and remand the case to the trial court to hold a hearing to satisfy the requirements of article 38.37, § 2-a. Because we overrule Gutierrez's complaint regarding the admission of the extraneous-offense evidence, we likewise deny this motion.

(Tex. Crim. App. 2016) ("[A] general or imprecise objection will not preserve error for appeal unless 'the legal basis for the objection is obvious to the court and to opposing counsel.'"); *Pena v. State*, 285 S.W. 3d 459, 464 (Tex. Crim. App. 2009) (holding that complaining party must let trial court know what he wants, why he thinks he is entitled to it, and do so clearly enough for judge to understand him when judge can to do something about it).

Gutierrez also argues that the trial court erred in allowing Mother to testify as an outcry witness to statements that Fay made to her about the assault. Code of Criminal Procedure article 38.072 allows the admission of a hearsay statement made to an outcry witness by certain abuse victims, including children under the age of 14 who are victims of a sexual offense. TEX. CODE CRIM. PROC. art. 38.072. Article 38.072 applies to statements that (1) describe the alleged offense, (2) were made by the child against whom the sexual offense allegedly was committed, and (3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense. *Id.* art. 38.072, § 2(a).

The State approached the bench during Mother's testimony and requested a hearing to determine whether Mother could provide a hearsay statement regarding Fay's outcry to her. The trial court heard Mother's testimony that Fay made a statement to her about the abuse and that she was the first person over the age of 18

that Fay told about the abuse. The trial court ruled that Mother was the proper outcry witness and her testimony about Fay's statement was admissible. Gutierrez failed to object to this ruling or to Mother's testimony regarding Fay's outcry on the basis that it was inadmissible hearsay. Accordingly, Gutierrez likewise failed to preserve this complaint for review on appeal. *See* TEX. R. APP. P. 33.1(a)(1); *Pena*, 285 S.W. 3d at 464.

We overrule Gutierrez's first issue.

Constitutionality of Penal Code Section 21.02

In his second issue, Gutierrez asserts that Penal Code section 21.02 is facially unconstitutional because it expressly permits a non-unanimous jury to find a defendant guilty.

The State contends that Gutierrez failed to preserve this issue for review on appeal because he did not raise a complaint regarding the constitutionality of section 21.02 in the trial court. We agree. "Constitutional challenges to statutes, including facial challenges, must be preserved in the trial court and cannot be raised for the first time on appeal." *Alvarez v. State*, 491 S.W.3d 362, 368 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (citing *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009)); *see Ex parte Beck*, 541 S.W.3d 846, 852–53 (Tex. Crim. App. 2017) (discussing "general rule that a facial constitutional challenge must be preserved during the trial proceedings or later attacks will be

forfeited" in habeas context); *Smith v. State*, 463 S.W.3d 890, 896 (Tex. Crim. App. 2015) (distinguishing exception to general rule that facial challenge may not be raised for first time on appeal for situation where "appellant is seeking relief for a conviction of a non-crime under a statute that has already been held to be invalid").

Even if we were to conclude that Gutierrez had preserved his constitutional challenge for review on appeal, we observe that numerous courts of appeals, including this one, have rejected complaints similar to the one Gutierrez makes here and have upheld section 21.02's constitutionality. *See, e.g.*, *Guzman v. State*, 591 S.W.3d 713, 729–31 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *Carmichael*, 505 S.W.3d at 105–06; *Holton v. State*, 487 S.W.3d 600, 605–08 (Tex. App.—El Paso 2015, no pet.); *McMillian v. State*, 388 S.W.3d 866, 872–73 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Jacobsen v. State*, 325 S.W.3d 733, 736–39 (Tex. App.—Austin 2010, no pet.).

In *Guzman*, this Court held that section 21.02 does not violate a defendant's constitutional right to a unanimous verdict. 591 S.W.3d at 730 ("'[T]he commission of two or more acts of sexual abuse over a specified time period—that is, the pattern of behavior or the series of acts—is the element as to which the jurors must be unanimous in order to convict,' and therefore section 21.02 'does not allow jurors to convict on the basis of different elements.'") (quoting *Pollock v.*

State, 405 S.W.3d 396, 405 (Tex. App.—Fort Worth 2013, no pet.)); *see also* *Casey v. State*, 349 S.W.3d 825, 829–30 (Tex. App.—El Paso 2011, pet. ref'd) (holding that predicate offenses in section 21.02(c) constitute alternate manner and means of committing offense of continuous sexual abuse and all involve actual or intended sexual abuse of a child, are all felonies, are all morally equivalent, and are all conceptually similar; thus, section 21.02 does not violate due-process guarantees even though it allows jurors to disagree on manner and means of committing offense).

We overrule Gutierrez's second issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Hightower, Countiss, and Farris.

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