**Opinion issued December 29, 2022**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-22-00216-CR**

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**GARY HARLING, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 300th District Court**
**Brazoria County, Texas**
**Trial Court Case No. 87966-CR**

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## MEMORANDUM OPINION

A jury convicted Appellant Gary Harling of the first-degree felony offense of injury to a child and sentenced him to life in prison.[1] In a single issue, Appellant argues the trial court erred by admitting evidence of "multiple instances

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1 *See* TEX. PENAL CODE § 22.04(e).

of extraneous offenses" during the guilt-innocence phase of his trial. We affirm the trial court's judgment.

## Background

Gary Harling ("Appellant") lived with Betty Tedrick and her three children, including B.V., a fourteen-month-old girl. On the afternoon of May 7, 2019, paramedics were dispatched to an apartment in Angleton, Texas with a report of a child not breathing. Upon their arrival, Appellant handed the unresponsive B.V. to a paramedic. B.V. was not breathing appropriately, her eyes were rolling into the back of her head, her body was limp, and she was not moving. B.V., who was in critical condition, was intubated and taken to Memorial Hermann Children's Hospital in Houston, a pediatric trauma center, where she had emergency surgery. She was stabilized and admitted to the intensive care unit, but the damage to her brain was extensive. B.V. passed away two days later.

Appellant first told the paramedics that B.V. had fallen off the top of a slide and hit her head. He also told law enforcement personnel on the scene that B.V. had fallen from the top of the slide, but he later told them that B.V. had fallen from the end of the slide and separately, from the middle of the slide.[2] Appellant's account of events was questionable. The paramedics noted that while it was a

[2] Appellant later gave other versions of how B.V. was injured: He told a Department of Family and Protective Services investigator that B.V. had fallen from a fence on the apartment's patio, and he told an acquaintance that he dropped B.V. inside the apartment.

rainy day, B.V. was clean and dry when Appellant handed her to them. There was also no indication that anyone had been on the playground that day. The slide was covered with water, mulch was at the bottom, and the only footprints the investigating officer saw around the bottom of the slide were his own. In addition, B.V. was wearing a clean, dry onesie when Appellant handed her to the paramedics, suggesting she had not been on the slide. Appellant also told police he tried to give B.V. CPR on a coffee table in the apartment, but the investigating officer found the coffee table was covered in dust, suggesting B.V. had not been on it.

Memorial Hermann Children's Hospital began a Child Abuse and Resource Education ("CARE") investigation for possible child abuse and neglect. The CARE investigative team concluded that B.V.'s injuries were inconsistent with a fall such as the one Appellant described to the police. Dr. Michelle Ruda ("Ruda"), a physician who participated in the CARE investigation, testified that B.V.'s injuries were consistent with "abusive head trauma" from being shaken. Ruda testified that the "constellation of injuries" B.V. sustained could not have been caused by a "simple fall to the back of the head," even if she had fallen onto concrete.

Dr. Roger Milton, the physician who performed an autopsy of B.V., testified that B.V.'s injuries were caused by intentional "blunt head trauma," being moved

"really fast and aggressively," and were inconsistent with a fall from a height of five to six feet or any accidental injuries. Dr. Glen Sandberg, a pathologist who consulted on B.V.'s autopsy, also concluded that B.V. died from a "nonaccidental injury." He testified that it would be "extremely unlikely" to see injuries such as B.V.'s from a "normal household fall."

B.V.'s mother, Betty Tedrick ("Tedrick"), testified that while she was at the hospital, Appellant told her that B.V. had been injured when she fell off the top of a slide. She said he was "very nervous" and told her, "I need you on my side." At that time, she believed the fall was an accident and that the authorities were on "a witch hunt." After the police showed her photos of B.V.'s clean onesie and the muddy playground, she realized Appellant lied about the accident. After she told Appellant she did not believe him, he eventually told her that B.V. had been sitting on a short wall on their patio, he was holding her but let go for a minute, and she fell backwards. Tedrick did not believe that story, because she "didn't see how [B.V.] could fall from such short of a distance and die from it."

Lachelle Rhoads ("Rhoads"), an investigator for the Department of Family and Protective Services, testified that she interviewed Appellant four times. Appellant told her at the hospital that B.V. was injured when she fell from a slide. He said he did not know whether she fell off the top or the bottom of the slide, but he assumed B.V. was too close to the edge. Appellant drew a picture that showed

B.V. going down the slide on her back. A week later, Rhoads sat in on an interview with Appellant and a detective at the Angleton Police Department. During that interview, Appellant was "pretty much consistent with the slide story." Later, Rhoads learned Appellant's story about B.V.'s injuries had changed, so she interviewed Appellant again. During that interview, Appellant admitted to Rhoads that the playground story was not true and he told her that B.V. was injured when she fell off a fence onto the concrete patio.

Stephen Aliyas ("Aliyas"), an acquaintance of Appellant, testified that Appellant told him B.V. was crying and he was walking around with her when he heard a knock on the door. When he opened the door, still holding B.V., she fell. Appellant told Aliyas he picked up B.V. and "was kind of shaking the baby a little and then her—she took a couple of breaths and her eyes kind of rolled back." Appellant told Aliyas he had been feeding the baby hot Cheetos and when a red substance came out of her mouth, he did not know if it was blood or the hot Cheetos.

The jury convicted Appellant and sentenced him to life in prison. This appeal followed.

## Discussion

In one issue, Appellant argues the trial court erred in admitting "evidence of multiple instances of extraneous offenses" during the guilt-innocence phase of trial, which "significantly harmed" him. He argues that any "possible probative value" of the evidence was "substantially outweighed by [the danger of] undue prejudice." The State responds that Appellant waived his issue because he did not include a harm analysis in his brief. The State further argues that even if Appellant preserved the issue, he cannot show admission of the challenged evidence resulted in harm.

### A. Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Osbourn v.* State, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002); *Henley v.* State, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Wilson v. State*, 473 S.W.3d 889, 899 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). A trial judge abuses his discretion when his decision falls outside the zone of "reasonable disagreement." *Henley*, 493 S.W.3d at 83; *see also Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (stating trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree"). Thus, we can reverse a trial court's ruling on evidentiary matters only if the decision was outside the zone of reasonable disagreement.

*Wilson*, 473 S.W.3d at 899–900 (citing *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007)).

The erroneous admission of evidence generally constitutes non-constitutional error, subject to a harm analysis that requires reversal only if the error affected the substantial rights of the accused. TEX. R. APP. P. 44.2(b); *Gonzalez v. State*, 544 S.W3d 363, 373 (Tex. Crim. App. 2018). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). We will not overturn a criminal conviction for non-constitutional error if we have fair assurance after examining the record that the error did not influence the jury or influenced the jury only slightly. *Chaves v. State*, 630 S.W.3d 541, 557 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (citing *Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011)).

**B. Extraneous Offenses**

An extraneous offense is "any act of misconduct, whether resulting in prosecution or not, which is not shown in the charging instrument and which was shown to have been committed by the accused." *Martinez v. State*, 190 S.W.3d 254, 262 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (quoting *Worley v. State*, 870 S.W.2d 620, 622 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)). Texas Rule of Evidence 404(b) prohibits admission of extraneous-offense evidence

during the guilt-innocence stage of trial to prove that a defendant committed a charged offense in conformity with a bad character. TEX. R. EVID. 404(b)(1) ("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."); *see also Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). Such evidence may be admissible, however, when it has "relevance apart from character conformity," such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2); *see also Devoe*, 354 S.W.3d at 469.

Even when extraneous-offense evidence is admissible under Rule 404(b), it may still be inadmissible under Texas Rule of Evidence 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403 ("The 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."). A Rule 403 analysis considers four non-exhaustive factors: "(1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence." *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005) (citing *Erazo v. State*, 144

S.W.3d 487, 489 (Tex. Crim. App. 2004); *Montgomery v. State*, 810 S.W.2d 372, 389-90 (Tex. Crim. App. 1990)).

As with other alleged evidentiary errors, we cannot reverse a trial court's ruling under Rule 403 or Rule 404 unless the appellant establishes the trial court's error resulted in harm. *See* TEX. R. APP. P. 44.2 (setting forth standards for constitutional and non-constitutional harm); *see also Prible v. State*, 175 S.W.3d 724, 737 (Tex. Crim. App. 2005) (holding even though trial court abused its discretion by admitting autopsy photos over defendant's Rule 403 objection, any error was harmless); *Hernandez v. State*, 577 S.W.3d 361, 369–70 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) (holding that presumed error in admitting evidence of extraneous bad act in violation of Rule 404(b) was harmless); *Lam v. State*, 25 S.W.3d 233, 238 (Tex. App.—San Antonio 2000, no pet.) (holding trial court's error in admitting evidence of defendant's extraneous offense was harmless).

**C. Admission of Extraneous Offenses**

Appellant complains the trial court erred "in permitting the introduction of evidence of multiple instances of extraneous offenses. He argues the admission of "extraneous information" and "extraneous admissions" from three witnesses during the guilt-innocence phase of trial was harmful.

Appellant first complains the trial court erred in admitting certain testimony from Kelly Barbeneaux, the child fatality investigator with the Department of Family and Protective Services, concerning "extraneous information . . . that . . . insinuated that Appellant hated kids or hated those kids." Barbeneaux testified that she spoke with Christian Gable ("Gable"), Appellant's ex-girlfriend, and that Gable told Barbeneaux that Appellant "made the reference, 'I hate those kids,' referring to Ms. Tedrick's kids. It was like a week or two before this incident happened with [B.V.]." This testimony was elicited outside the jury's presence.

Appellant objected to Barbeneaux's testimony on the basis of hearsay and relevancy, and further because it violated Texas Rule of Evidence 403. The trial court sustained the hearsay objection, but overruled the others. The trial court then determined that the testimony would be allowed only if it was elicited directly from Gable. The evidence, however, was never presented to the jury, because the State did not call Gable as a witness during the guilt-innocence phase of trial.[3] Appellant thus cannot establish an abuse of discretion or resulting harm as it concerns this testimony.

[3] Gable testified during the punishment phase regarding Appellant's statement, but Appellant raises no challenge to that testimony.

Appellant also argues the trial court erred in admitting testimony from Aliyas concerning Appellant's relationship with B.V.'s mother. Aliyas testified that:

> [Appellant] didn't want to be with her. He was stuck in Angleton baby-sitting her baby while she was at work, and they didn't – they weren't intimate anymore. They weren't having sex. And you know, just—he's not from there; so, he was stuck. He was stuck watching the baby.

Appellant argues the testimony "was harmful because it tended to show that Appellant had a bad relationship with the victim's mother and insinuated Appellant had a reason to harm" B.V. Appellant objected to this testimony based on Texas Rules of Evidence 403 and 404(b). The trial court overruled the objection.

Finally, Appellant complains about testimony from Kelli Howell ("Howell"), who Appellant dated briefly. She testified that Appellant maintained B.V.'s death was an accident, but that he "specifically said, for all of the trouble that that baby [B.V.] is causing me, I should have killed her." Appellant asserts Howell's testimony was "harmful because it tended to show that Appellant had a reason and insinuated Appellant had a reason to harm the child." Howell also testified that Appellant threatened to kill himself about one week before he was arrested for B.V.'s death:

> There was one time where we were arguing and I wanted the argument to stop and he said, do you just want me to kill myself? And he put my blue butcher knife to his throat. There was another time where he said, I should just kill myself right now. You want me

> to kill myself? And he grabbed a shoelace and tried to hang himself in my closet. And then there was an incident where he hit himself in the head with a dumbbell.[4]

Appellant objected to Howell's testimony under Texas Rule of Evidence 403. The trial court overruled the objection.

As noted, there was no error concerning Barbeneaux's testimony, because the testimony was not introduced during the guilt-innocence phase of trial. As it concerns the testimony from Aliyas and Howell, there was no error because their statements were not statements about extraneous offenses. "To constitute an extraneous offense, the evidence must show a crime or bad act, and that the defendant was connected to it." *Lockhart v. State*, 847 S.W.2d 568, 573 (Tex. Cr. App. 1992) (citing *Harris v. State,* 738 S.W.2d 207, 224 (Tex. Crim. App. 1986)). The evidence must include "some sort of extraneous *conduct*" by the defendant. *Castillo v. State*, 59 S.W.3d 357, 361 (Tex. App.—Dallas 2001, pet. ref'd) (emphasis in original) (citing *Moreno v. State,* 858 S.W.2d 453, 463 (Tex. Crim. App. 1993)). Statements about a defendant's thoughts of wrongdoing "are merely inchoate thoughts." *Id.* (citing *Moreno*, 858 S.W.2d at 463) (holding "inchoate thoughts" concerning defendant's desire to kidnap and kill were not extraneous offenses in absence of conduct that "could constitute a bad act or wrong, much less

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[4] Appellant does not complain on appeal about the admission of the testimony regarding his threats to hurt himself.

a crime"). The testimony from Aliyas and Howell, about which Appellant complains, does not involve extraneous conduct.

Even if the trial court committed error in admitting this evidence, Appellant does not prevail on his point of error. To challenge the admission of evidence on appeal successfully, an appellant must demonstrate both that the trial court abused its authority in admitting the evidence and that the error was harmful. *Wilson*, 473 S.W.3d at 901; *Edwards v. State*, No. 01-20-00064-CR, 2020 WL 6435769, at *2 (Tex. App.—Houston [1st Dist.] Nov. 3, 2020, no pet.) (mem. op., not designated for publication) (holding that for reversal, appellant must demonstrate trial court abused discretion in admitting out-of-court statements and that error was harmful); *see also Linney v. State*, 401 S.W.3d 764, 783 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (holding defendant's "conclusory statement that the cumulative harm of the trial court's errors adversely affected his substantial rights [was] insufficient to maintain his burden to adequately brief the point of error") (citing TEX. R. APP. P. 38.1(i)); *White v. State*, No. 01-20-00238-CR, 2022 WL 2674214, at *8 (Tex. App.—Houston [1st Dist.] July 12, 2022 (mem. op., not designated for publication) (holding "conclusory, cursory allegations of harm . . . are insufficient to meet the requirements of Rule 38.1"); *Alohaneke v. State*, No. 01-18-00102-CR, 2019 WL 6314899, at *8 (Tex. App.—Houston [1st Dist.] Nov. 26, 2019, pet. ref'd) (mem. op., not designated for publication) (holding defendant waived

complaint regarding admission of exhibits because brief lacked substantive analysis or citation to authorities to show he was harmed by admission).

Appellant has not established harm. Appellant argues that the admission of evidence from the three witnesses was erroneous and resulted in harm, but he does not explain why or how the evidence resulted in harm. In one paragraph, he argues that:

> Given this testimony of the three witnesses, the lack of brevity of the testimony about the extraneous offenses and statements when considered alongside the scope of the entirety of the guilt-innocence phase of trial, the conclusion that can be made is that the admission of the three witnesses had a substantial and injurious effect or influence in determining the jury's verdict. The trial court erred, appellant suffered harm.

To assert an issue on appeal, an appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities." TEX. R. APP. P. 38.1(i). An issue is waived on appeal if the appellant "does not adequately brief that issue, i.e., by presenting supporting arguments and authorities." *Wilson*, 473 S.W.3d at 901; *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000) (holding appellant inadequately briefed points that were not supported by argument and authorities as required by Rule 38.1). Mere conclusory statements, without a citation to authority, result in briefing waiver. *Vuong v. State*, 830 S.W.2d 929, 940 (Tex. Crim. App. 1992) (holding argument waived in absence of "specific constitutional provision, statutory authority, or case

law" to support claim); *Swearingen v. State*, 101 S.W.3d 89, 100 (Tex. Crim. App. 2003) (holding error waived when appellant failed to apply law to facts); *see also Alvarado v. State*, 912 S.W.2d 199, 210 (Tex. Crim. App. 1995) (stating point of error that is inadequately briefed "presents nothing for our review.").

Appellant does not cite to the record, cite to any legal authority, or advance any argument in support of his harm allegations. He merely concludes, without any meaningful analysis, that he was harmed by the erroneous admission of evidence. This constitutes briefing waiver. We considered this issue in *Chaves v. State*, 630 S.W.3d 541 (Tex. App.—Houston [1st Dist.] 2021, no pet.). In that case, the defendant, having been convicted of aggravated assault of a family member, complained of the admission of two exhibits during the punishment phase of his trial. *Id.* at 544, 556. We concluded the defendant waived his challenge on appeal because he did not adequately brief his assertion that the alleged error resulted in harm. *Id.* at 557–58. We held the defendant's brief was inadequate when he "provide[d] only two conclusory sentences, without citation to authority, asserting that he 'suffered harm as a result of the trial court's admission of' [two exhibits] because 'the recordings were on the jury's mind while they deliberated.'" *Id.* at 558. The brief "containe[ed] no argument, explanation, substantive analysis, or citation to authorities to show that he was harmed by the trial court's purported erroneous admission of the State's exhibits." *Id.*

We recently held similarly in *White v. State*, No. 01-20-00238-CR, 2022 WL 2674214 (Tex. App.—Houston [1st Dist.] July 12, 2022 (mem. op., not designated for publication) that the defendant had not adequately briefed the issue of harm. In *White*, a jury convicted the defendant of murder and sentenced him to fifty years' incarceration. *Id.* at *1. During the trial, the court admitted two out-of-court statements made to law enforcement by a witness to the shooting. *Id.* at *4. The defendant argued on appeal that he was denied his Sixth Amendment right to confrontation by the admission of the statements, and that alternatively, the statements should have been excluded as hearsay. *Id.* We held the defendant waived his challenge to one of the statements because his brief failed "to address in any way how [the defendant] was harmed by its admission, an element he is required to establish on appeal." *Id.* at *7 (citing *Edwards v. State*, No. 01-20-00064-CR, 2020 WL 6435769 (Tex. App.—Houston [1st Dist.] Nov. 3, 2020, no pet.) (mem. op., not designated for publication)). We noted the defendant did not "cite to the record, identify the applicable standard for assessing harm, make a substantive argument, or provide any supporting legal authority to explain how or why the admission of [the eyewitness'] statements resulted in harm." *Id.* at *8. At most, the defendant provided "conclusory, cursory allegations of harm which are insufficient to meet the requirements of Rule 38.1." *Id.*

The same is true here. Appellant did not make any substantive arguments or provide supporting legal authority to explain how or why the admission of the statements at issue resulted in harm. As in *White*, Appellant made only "conclusory, cursory allegations of harm" that do not satisfy the requirements of Rule 38.1. *See id.* at *8. Because Appellant did not adequately brief the issue of harm, we hold he waived the issue and presented nothing for our review. *See Chaves*, 630 S.W.3d at 558; *Cardenas*, 30 S.W.3d at 393.

We overrule Appellant's sole issue.

## Conclusion

We affirm the trial court's judgment.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Kelly, Rivas-Molloy, and Guerra.

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