Affirmed and Memorandum Opinion filed December 14, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00697-CR

RICHARD IRVIN GILMORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1221977

MEMORANDUM OPINION

Appellant Richard Irvin Gilmore appeals his conviction for aggravated sexual assault of a child. In one issue, appellant argues the trial court erred in admitting evidence regarding an extraneous incident involving another child. We affirm.

The complainant is one of appellant's stepdaughters. She alleged that appellant sexually assaulted her repeatedly over a period of at least five years. Appellant denied this allegation, claiming that the complainant fabricated the accusations in retaliation for punishment and because she wanted to live with her aunt, who was less strict. Before trial, the State gave notice that it intended to use evidence that appellant had requested another one of his stepdaughters to perform oral sex on him.

At trial, there were two discussions on the record regarding the admissibility of this testimony. First, appellant's wife (the complainant's mother) testified on direct examination that she knew appellant's character and that he is not "the type of person who would have sex with a child." Immediately after this testimony, the following exchange occurred at the bench:

> *[PROSECUTOR]:* Judge, I didn't object to the last question about what she thought about him with children. I believe that that -- defense has opened the door to the line of questioning, which includes have you heard or did you know that other -- that he has made sexual comments to other females, one of which we have given notice of and intend to use at trial.
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> [*DEFENSE COUNSEL]:* Judge, I don't think have-you-heard questions are appropriate in this type of character evidence because it's not reputation evidence, which is the have-you-heard's test, reputation evidence. This is direct evidence of their opinion of his character. I have a brief on it, if I could.
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> *[THE COURT]:* I guess my question is: Do you have that witness?
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> *[PROSECUTOR]:* I do have that witness and I have a good-faith basis that I'm going to call that witness in rebuttal. That being said, I believe I'm entitled to ask her, because I know the question was not technically allowed to be asked; under the law, I let the question go because I believe that they would have opened the door. And I don't have a copy of [defense counsel]'s brief.
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> *[THE COURT]:* It goes to the ability to ask those questions.
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> *[PROSECUTOR]:* I have to read the opinion and get with --
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> *[THE COURT]:* I know. Because my thought is that what it has done is opened the door to that witness as opposed to asking this witness whether or not she knows about that witness. I think you can ask, Do you know that witness, and I think that -- do you know, whatever her name is.
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> *[PROSECUTOR]:* Okay.
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> *[THE COURT]:* That's kind of my thought.
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> *[DEFENSE COUNSEL]:* Is this a child you're talking about or an adult?

> *[THE COURT]:* If she says, I don't think he would ever do that, you say, Well, did you know he did, blah, blah, blah, doesn't really matter. What it does, though, is probably lets you impeach her credibility by -- impeach that by bringing that witness to say, This is what he did to me.

Nothing more was mentioned on this subject until the next day. The complainant had testified that appellant said he was going to get her pregnant and make her keep having abortions until she had a baby boy. Both appellant and his wife admitted that appellant made that statement, but they claimed it was merely a "sick joke" and that the complainant was not in the room at the time. After appellant's direct examination, the following exchange occurred at the bench:

> *[PROSECUTOR]:* I believe the door's been opened, especially explaining the sick joke on the abortion question, for me to ask him if he had ever said something else to another -- another little girl about something regarding sex. I wanted to approach before and make sure that that was --
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> *[THE COURT]:* Yeah. I don't think you're there yet.
>
> *[DEFENSE COUNSEL]:* I don't see that door open.
>
> *[THE COURT]:* I don't think you're there yet.

Appellant's testimony concluded, and the defense rested. Immediately thereafter, the State began its rebuttal case by calling as its first witness appellant's other stepdaughter, who testified that appellant requested that she perform oral sex on him. Our record does not show that appellant objected, either before or during her testimony. The next day, defense counsel filed the brief he referenced in the first bench exchange, and this brief solely argues that appellant's other stepdaughter's testimony is improper character evidence and therefore inadmissible under Texas Rule of Evidence 404(a).

In his single issue on appeal, appellant argues that the trial court erred in admitting the other stepdaughter's testimony regarding his alleged request for oral sex. To preserve error for appellate review, the complaining party must make a timely, specific objection at the earliest possible opportunity and obtain an adverse ruling from the trial court.

Dixon v. State, 2 S.W.3d 263, 265 (Tex. Crim. App. 1998). Furthermore, the issue raised on appeal must correspond to the objection made at trial. *Id.*

Appellant asserts admitting this testimony was error under Texas Rule of Evidence 404(b) because it does not rebut a defensive theory and under Texas Rule of Evidence 403 because its probative value is outweighed by the danger of unfair prejudice. We reject these arguments for several reasons. To begin with, appellant's objection in the trial court does not correspond with his argument on appeal. His trial objection was focused solely on Rule 404(a), and yet his objections on appeal are based on arguments under Rules 403 and 404(b). These are distinct bases for objection. *See Ho v. State*, 171 S.W.3d 295, 303 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (objection under Rule 404(b) does not preserve error for appellate argument under Rule 403); *Gutierrez v. State*, 85 S.W.3d 446, 454 (Tex. App.—Austin 2002, pet. ref'd) (objection under Rule 404(a) does not preserve error for appellate argument under Rule 404(b)). An objection on one ground will not support an argument on appeal made on a different ground. *See Dixon*, 2 S.W.3d at 265; *Bell v. State*, 938 S.W.2d 35, 54 (Tex. Crim. App. 1996). Even if appellant's objections in the trial court corresponded with his argument on appeal, they were untimely. Appellant did not object before or during the other stepdaughter's testimony, and he did not obtain a running objection or otherwise act to extend his earlier objection to this testimony. *See Dreyer v. State*, 309 S.W.3d 751, 754 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Finally, the trial court did not issue an adverse ruling to appellant excluding this evidence. In the first exchange, the judge gave his "thought" on what appellant's wife's testimony would "probably" allow, and in the second exchange, the trial court stated that "I don't think you're there yet" in response to the prosecutor's arguments that appellant's testimony had opened the door. These statements do not constitute a ruling admitting the testimony. Without an adverse ruling, appellant has not preserved this alleged error for appeal. *See Dixon*, 2 S.W.3d at 265.

Because appellant did not preserve his complaint,[1] we overrule his issue and affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges, Justices Yates, and Senior Justice Mirabal.[*]
Do Not Publish — TEX. R. APP. P. 47.2(b).

[1] We note that even if appellant had preserved error, evidence of extraneous conduct is admissible to rebut a defensive theory of fabrication or frame-up. See Bass v. State, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008); Isenhower v. State, 261 S.W.3d 168, 180–81 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[*] Senior Justice Margaret Garner Mirabal sitting by assignment.