**Affirmed and Memorandum Opinion filed March 29, 2016.**

**In the**

# Fourteenth Court of Appeals

**NO. 14-14-00920-CR**
**NO. 14-14-00921-CR**

**LEONARD MARK STOREMSKI, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 263rd District Court**
**Harris County, Texas**
**Trial Court Cause Nos. 1361696 & 1361698**

## M E M O R A N D U M  O P I N I O N

Appellant Leonard Mark Storemski was convicted by a jury of two counts of aggravated sexual assault of a child. Tex. Penal Code § 22.021(a)(1)(B) (West 2015). Appellant challenges both convictions on appeal. First, appellant contends the trial court provided the jury with an erroneous instruction that failed to provide any chronological boundaries for the date of the offenses. Second, appellant argues that the trial court erred in admitting dozens of images of child

pornography, captured from his computer. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was married to D.C. and they had two children—a girl, A.S., and a boy, T.S. After their parents got divorced in November 2011, A.S. and T.S. saw appellant "[e]very weekend, Saturday or Sunday." A.S. and T.S. did not stay with appellant overnight on their visits because he was living in a motel room.

In June 2012, when A.S. was approximately eight years old and T.S. was approximately six years old, they each separately made an outcry of sexual abuse to D.C. D.C. called the police. The children were interviewed and examined at the Children's Assessment Center.

According to the lead investigator on the case, throughout their interviews the children's disclosures about the sexual abuse remained consistent with the original allegations. The investigator filed charges. Appellant was arrested in September 2012. In December 2012, appellant was indicted for aggravated sexual assault of a child under 14 years of age as to each of A.S. and T.S.

T.S. testified that appellant "lick[ed] [his] tail"[1] "a lot" when they were in appellant's motel room. T.S. stated that he saw appellant lick A.S.'s "tutu" [2] "[m]any times." T.S. testified that appellant used his computer to show A.S. and him pictures of naked "[l]ittle kids." A.S. testified that appellant touched the private parts that T.S. and she used for "[p]ottying." Appellant touched their private parts with "[h]is tail" and licked A.S.'s private part with his tongue. Such incidents happened "[l]ots of times" in appellant's motel room. The abuse stopped "[w]hen the day [appellant] get in jail."

[1] A.S. and T.S. referred to penises as "tails."

[2] A.S. and T.S. referred to vaginas as "tutus."

The medical doctor who examined the children testified about their statements about the sexual abuse and the results of their examinations, which were normal but did not rule out abuse. The children's professional counselor testified regarding the children's disclosures about the sexual abuse. She diagnosed both children with PTSD. She believed that they had not been coached.

The State provided appellant with notice of its intent under rule 404(b) of the Texas Rules of Evidence and article 38.37, sections 1 and 2, of the Texas Code of Criminal Procedure to use evidence of his prior convictions and extraneous offenses, including his intentional display of pornographic images and videos in a "reckless" manner around A.S. and T.S. At trial, defense counsel objected to the State's introduction of evidence regarding appellant's possession of child pornography "just to show bad character or perversion." The trial court allowed the State to proceed.

Officer Carmichael with the Houston Police Department testified that the search warrant for appellant's residence at the motel covered items such as computers, cameras, and anything that could store images or videos. Carmichael recovered a desktop, a laptop, and a digital camera. A digital forensic examiner with the Houston Police Department testified regarding his review of appellant's seized desktop computer for child pornography. The examiner discovered child pornography files that had been deleted and others stored in the system as "snapshots." The examiner placed about 40 "typical" "snapshots" on a disk. The State offered this disk into evidence. Defense counsel reurged his original objection and further objected that some of the images were not child pornography. The trial court overruled the objections and admitted the disk. In addition, the forensic examiner provided testimony regarding appellant's Internet search engine queries and websites he visited relating to nude children. The State also presented,

without objection, two documents containing appellant's Internet history, including his search queries for "young" plus "preteens" plus "nude," and "nude" plus "children."

Appellant denied that he ever abused the children or showed them pictures of naked children. Appellant acknowledged that he performed certain Internet searches for medical websites because A.S. was taking showers at the motel and then remaining naked afterward. He claimed the child pornography websites and images were all "popups" caused by a virus. Appellant allowed the children to play games on this same computer. Although appellant stated that D.C. or the children's grandparents coached them "to say things like that," he also testified that the children "told the truth" in court.

The jury convicted appellant of aggravated sexual assault of a child as to A.S. and aggravated sexual assault of a child as to T.S. The jury assessed appellant's punishment at 35 years of confinement for each conviction, with the sentences to run concurrently. On appeal, appellant presents two issues: (1) whether the trial court erred in instructing the jury that the State was not restrained by any chronological boundaries in proving the date of the offenses and (2) whether the trial court erred in admitting prejudicial child pornography images.

## II. ANALYSIS

### A. "On or about" jury instruction

The trial court must give the jury a written charge that sets forth the law applicable to the case. Tex. Code Crim. Proc. art. 36.14 (West 2015); *Celis v. State*, 416 S.W.3d 419, 423 (Tex. Crim. App. 2013). We review a claim of jury charge error using the two-step procedure set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). *Barrios v. State*, 283 S.W.3d 348, 350 (Tex.

Crim. App. 2009). We first determine whether there is error in the charge. *Id.* (citing *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005)). Then, if error is found, we analyze that error for harm. *Celis*, 416 S.W.3d at 423 (citing *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012)).

If there was error and the appellant objected at trial, then we reverse if the error "is calculated to injure the rights of the defendant," which has been defined to mean that there is "some harm" to the accused from the error. *Barrios*, 283 S.W.3d at 350 (quoting *Almanza*, 686 S.W.2d at 171). If the error was not objected to, then it must be "fundamental" to be reversible, meaning we reverse only if the error was so egregious and created such harm that the defendant "has not had a fair and impartial trial." *Id.*

In his first issue, appellant complains the trial court instructed the jury that "no time limits existed at all" with regard to when the offenses were committed. Appellant did not object to the jury charge in either cause. Each jury charge otherwise provided in two separate places, including the application paragraph, that the date of the offense at issue was alleged to have been committed by appellant "on or about the 6th day of May, 2012." The trial court further provided the instruction at issue:

> You are further instructed that the State is not bound by the specific date which the offense, if any, is alleged in the indictment to have been committed, but that a conviction may be had upon proof beyond a reasonable doubt that the offense, if any, was committed at any time within the period of limitations. There is no limitation period applicable to the offense of aggravated sexual assault of a child.

Appellant acknowledges that the State is permitted to prove a date of offense other than the one alleged in the indictment as long as such date is before the presentment of the indictment and within the statute of limitations. *See Klein v.*

*State*, 273 S.W.3d 297, 303 n.5 (Tex. Crim. App. 2008); *Hendrix v. State*, 150 S.W.3d 839, 853 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). There is no limitation period for aggravated sexual assault of a child. Tex. Code Crim. Proc. art. 12.01(1)(B) (West 2015) (applying to section 22.021(a)(1)(B) of the Penal Code).

Here, appellant was indicted on December 18, 2012, for offenses occurring on or about May 6, 2012. Appellant relies on *Taylor v. State*, 332 S.W.3d 483 (Tex. Crim. App. 2011), to argue that the jury charge "greatly expanded the universe of potential dates by failing to include the upper chronological parameter of the date of the indictment."

The defendant in *Taylor* was charged by three separate indictments with aggravated sexual assault. The complainant testified to sexually assaultive conduct committed by the defendant both before and after the defendant's 17th birthday. *Taylor*, 332 S.W.3d at 485–86. Although the indictments alleged the offenses were committed on dates that followed the defendant's 17th birthday, the trial court's charge instructed the jurors that the State was not bound by the specific dates alleged and that they could convict the defendant if the offenses were committed at any time within the period of limitations. *Id.* at 487–88. Further, the charge did not contain a section 8.07(b) instruction; that is, the jurors were not told that the defendant could not be convicted for conduct committed before his 17th birthday. *Id.* at 486; *see* Tex. Penal Code § 8.07(b) (West 2015).

The court of criminal appeals found that, under the circumstances, section 8.07(b) was law applicable to the case on which the trial court had a duty to instruct the jury even in the absence of a request or objection by the defendant. *Taylor*, 332 S.W.3d at 488–89. The *Taylor* court concluded "that a jury charge is erroneous if it presents the jury with a much broader chronological perimeter than

is permitted by law." *Id.* at 488. The court thus held that the absence of a section 8.07(b) instruction, when combined with evidence of the defendant's conduct while he was a juvenile and the instruction that a conviction could be based on any conduct within the limitations period, "resulted in inaccurate charges that omitted an important portion of the law applicable to the case." *Id.* at 489.

We find *Taylor* distinguishable. There, the absence of a section 8.07(b) instruction was "problematic" where the jury "received evidence upon which they were statutorily prohibited from convicting Appellant"—i.e., "repeated testimony regarding Appellant's pre-seventeen conduct." *Id.* at 487. Here, in contrast, there was no evidence presented to the jury that any alleged sexual offense occurred after appellant's December 2012 indictment date. *See Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998) (defendant may assert factual limitations defense by requesting jury instruction "if there is some evidence before the jury"); *King v. State*, 17 S.W.3d 7, 20–21 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (same). Under these circumstances, we cannot conclude that including the presentment date as the "upper chronological perimeter" within the "on or about" instruction was law applicable to the case necessary for the trial court to include in the jury charge. *See Decker v. State*, 894 S.W.2d 475, 480 (Tex. App.—Austin 1995, pet. ref'd) (including presentment date in "on or about" instruction was "essentially informational" where limitations "was not asserted as a defense or otherwise made an issue at trial").

Finding no jury charge error, we overrule appellant's first issue.

**B. Evidence of possession of child pornography**

The State provided appellant with notice of its intent under rule 404(b) and article 38.37, sections 1 and 2, to use evidence of appellant's possession of pornographic images. At trial, the State indicated its intent to call Officer

Carmichael and the digital forensic examiner to testify regarding appellant's possession of child pornography. Discussion then ensued regarding under which section of article 38.37 the State wished to proceed. Because the State indicated that it was proceeding under section 1, not section 2, the trial court did not conduct a separate hearing outside the presence of the jury. *See* Tex. Code. Crim. Proc. art. 38.37, §§ 2(b), 2-a (West 2015) (requiring such hearing where evidence likely to be admitted at trial will be adequate to support jury finding that defendant committed separate offense beyond a reasonable doubt). During this discussion, appellant argued:

> Well, in most cases, Judge, when evidence is introduced, it has some bearing or some impact on the validity of the allegation that the defendant is standing trial on; therefore, if it has that requirement under the Code to impact a decision made by a fact finder as to whether or not the accused was guilty of the accusation, then there must be some tie-in between the extraneous information that's given and the impact that it would have on the jury other than just to show bad character or perversion or any of the other concepts that a jury might derive from the possession and displaying, if accurate, of kiddie porn.

After the trial court ruled that the State could proceed, appellant asked the court to note his exception. Later, when the State offered the disk containing the child pornography images into evidence, appellant again objected: "In relation to [exhibit] 43, Judge, we would object to the images, one in relation to preserving our objection to the original introduction of that type of material in this case under the circumstances of a man charged with aggravated sexual assault of a child."[3]

[3] Although appellant further objected at trial to admission of the images on the disk because some of them were not in fact child pornography, he does not provide any argument or authority specific to that aspect of his objection on appeal. Appellant does not explain how any images did not constitute child pornography, or allege that any particular number or percentage of images on the disk were not child pornography. Nor does appellant contend that any images were instead adult pornography. *See Warr v. State*, 418 S.W.3d 617, 621 (Tex. App.—

The trial court overruled appellant's objections, allowed the evidence, and provided two limiting instructions to the jury, one under rule 404(b) and one under article 38.37, section 1(b). Despite the State's assertion that appellant only preserved an article 38.37—not a rule 404(b)—objection, appellant sufficiently preserved both challenges. *See Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990) (op. on reh'g) ("An objection that such evidence is not 'relevant,' or that it constitutes an 'extraneous offense' or 'extraneous misconduct,' although not as precise as it could be, ought ordinarily to be sufficient under the circumstances to apprise the trial court of the nature of the complaint."). Therefore, we proceed to determine whether the evidence of appellant's possession of child pornography had relevance apart from merely supporting bad character conformity under either rule 404(b) or article 38.37, section 1(b).

An extraneous offense is defined as any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers. *Rankin v. State*, 953 S.W.2d 740, 741 (Tex. Crim. App. 1996). Under rule 404, evidence of other crimes, wrongs, or bad acts is inadmissible if it is offered to prove the character of a person in order to show action in conformity therewith, but it may be admissible for other purposes, such as proof of motive, opportunity, intent, absence of mistake or accident, or to rebut a defensive theory. Tex. R. Evid. 404(b). Article 38.37,

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Texarkana 2009, no pet.) ("Evidence of extraneous sexual activity that simply proves certain propensities toward sexual conduct in general is not admissible."). With regard to the images, the forensic examiner testified that they represented a "sampling" of about 40 "snapshot" images recovered during his search for child pornography on appellant's computer. He found "a couple hundred" more of these types of images that had been deleted. He also testified that appellant's search queries for "nude plus children" were "consistent" with the discovered images. The exhibits containing appellant's search queries and website history were admitted without objection. The trial court, however, did not permit the examiner to testify regarding whether the images met the Penal Code definition of child pornography. Appellant denied having any sexual interest in children. However, appellant acknowledged accessing "pop-up" images of naked children on his computer but he thought he had deleted them.

section 1(b), provides that, notwithstanding rules 404 and 405, evidence of other crimes, wrongs, or bad acts committed by a defendant against a child who is the victim of the alleged sexual assault "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. art. 38.37, § 1(b) (West 2015); *see* Tex. R. Evid. 404, 405. A trial judge has broad discretion in admitting or excluding evidence; only when a trial court has abused its discretion should an appellate court conclude that the ruling was erroneous. *Montgomery*, 810 S.W.2d at 390–91.

In his second issue, appellant argues that the trial court "erred by admitting voluminous exhibits of prejudicial pornographic images." Appellant acknowledges T.S. testified appellant had shown A.S. and him pictures of naked "little kids" but contends there was no evidence that any of the 40 pornographic images were the same or similar to the ones allegedly shown. Appellant asserts that article 38.37 only permits pornographic images actually shown to the complainant, *see Sarabia v. State*, 227 S.W.3d 320, 323 (Tex. App.—El Paso 2007, pet. ref'd), and that T.S.'s testimony was too vague for the images to be probative. The State responds that—even assuming that none of the child pornography "snapshots" from appellant's computer were ever seen by T.S. or A.S. or even similar to the ones appellant allegedly showed to them—the images were probative of appellant's intent to arouse and gratify his own sexual desire via children and therefore admissible under 404(b).

*Sarabia* supports the State's position. The *Sarabia* court considered whether two contact sheets containing several photographic images depicting child pornography compiled from computer discs found during the search of the defendant's residence were admissible pursuant to rule 404(b). 227 S.W.3d at

323–24. Although there was no evidence that the complainant had seen the photos on the contact sheets, the *Sarabia* court concluded the trial court had not abused its discretion by admitting them:

> "Intent to arouse or gratify sexual desire" is an implicit element of aggravated sexual assault of a child. *Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998) ("[T]he Legislature did not intend that the 'intent to arouse and gratify' requirement be excluded from proof of the elements of aggravated sexual assault."). . . . Thus, the two contact sheets, which depict underage boys engaged in sex, were admissible under rule 404(b) because they tend to show Appellant's intent or motive to arouse or gratify his sexual desire via underage boys. *See Jones* [*v. State*], 119 S.W.3d [412,] 422 [(Tex. App.—Fort Worth 2003, no pet.)] (holding extraneous offenses admissible under rule 404(b) to show appellant's intent to arouse or gratify his sexual desire via underage girls). The trial court admitted the contact sheets with an instruction limiting the jury's consideration of the evidence to noncharacter-conforming purposes. *See id.* at 421 (citing *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001)).

*Sarabia*, 227 S.W.3d at 323–24.

Here, appellant was charged with aggravated sexual assault of a child, and the intent to arouse or gratify sexual desire is an implicit element of this sexual offense. *See* Tex. Penal Code § 22.021; *Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998); *Sarabia*, 227 S.W.3d at 323–24. Intent may be inferred from circumstantial evidence, "such as acts, words, and the conduct of the appellant." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). In cases involving sexual offenses against children, a defendant's possession of or viewing of child pornography is relevant circumstantial evidence of intent to arouse or gratify his sexual desire. *See Sarabia*, 227 S.W.3d at 324; *see also Lawrence v. State*, No. 03-14-00192-CR, 2015 WL 4464912, at *3 (Tex. App.—Austin July 16, 2015, pet. ref'd) (mem. op., not designated for publication) ("Accordingly, the

evidence establishing that the computers had been used to search for and download images and videos of underage girls having sex was 'admissible under rule 404(b) because [it] tend[ed] to show Appellant's intent or motive to arouse or gratify his sexual desire via' underage girls."); *Barto v. State*, No. 13–13–00384–CR, 2014 WL 895511, at *4 (Tex. App.—Corpus Christi Mar. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (child pornography images probative of intent in continuous sexual abuse of child case); *cf. Lewis v. State*, 676 S.W.2d 136, 139–40 (Tex. Crim. App. 1984) (noting that "evidence is admissible if it establishes either the probability that the accused committed the offense or that he paid unnatural attention, or displayed an unnatural attitude toward the victim, or had lascivious intent toward the victim" in permitting nude photographs of child victim in indecency case); *Darby v. State*, 922 S.W.2d 614, 620–22 (Tex. App.—Fort Worth 1996, pet. ref'd) (magazine containing sexually explicit photographs of young female posing with teddy bear probative of intent in case where defendant had indecency victim pose with teddy bear). Further, the trial court provided a rule 404(b)-limiting instruction to the jury. *See Sarabia*, 227 S.W.3d at 324. We conclude, therefore, that the trial court did not abuse its discretion in overruling appellant's objection.[4]

Appellant further argues that these images should have been excluded as unfairly prejudicial under rule 403. The State argues that appellant failed to preserve any rule 403 unfair prejudice objection. Based on our review of the record, we agree. *See Montgomery*, 810 S.W.2d at 388 ("extraneous offense" objection on its own does not suffice to preserve rule 403 objection); *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (specific rule 403 objection must be raised to preserve error).

[4] Because the evidence was properly admissible under rule 404(b), we need not determine whether it also was admissible under article 38.37. *See* Tex. R. App. P. 47.1.

Therefore, we overrule appellant's second issue.

## III. CONCLUSION

Accordingly, we affirm the trial court's judgments.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Busby, and Brown.
Do Not Publish — TEX. R. APP. P. 47.2(b).