Affirmed and Memorandum Opinion filed September 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00534-CR

JOHN LEE DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1364895

MEMORANDUM OPINION

In this appeal from a conviction for aggravated sexual assault of a child, we consider one issue about the admission of hearsay evidence and four interrelated issues of alleged charge error. Finding no reversible error, we overrule all five issues and affirm the trial court's judgment.

BACKGROUND

The complainant, an eleven-year-old girl, described in a handwritten letter how she had recently been abused by appellant, her stepfather. The complainant wrote that she had been babysitting her youngest brother when appellant came into the room and started rubbing the complainant's private area over her clothes. She wrote that appellant removed her clothes, then his own, and "he put his private in [her] bottom and he started humping [her]." In the same episode, appellant "picked [her] up and [laid her] on top of him then he [grabbed her] waist and started bouncing [her] on him."

The complainant also wrote that, in a separate episode, appellant carried her into a room and started grabbing her bottom. When the complainant yelled for her younger brother, appellant stopped.

In the margins of her letter, the complainant wrote that these molestations happened five or six times in the last month.

The complainant delivered the letter to her mother, and in a postscript, she apologized for not telling her mother sooner. The complainant explained that she was scared, embarrassed, and afraid to make her mother upset.

The mother took the complainant to the hospital where she was examined by a nurse. Then, without alerting appellant's suspicions, the mother gathered her other two children and a few belongings and she left her home for good.

At trial, the complainant testified that there were other acts of sexual abuse in addition to what she had described in her letter. The complainant testified that appellant had grabbed her chest, that he had rubbed her vagina through a robe, and that he had put his mouth on her vagina. She also testified that appellant had inserted his penis into her vagina and anus.

The nurse testified that the complainant presented with no signs of physical trauma when she came to the hospital. However, the nurse explained that this absence of evidence did not mean that the abuse did not occur. The nurse said that there may have been no signs of trauma because hormones had made the complainant's skin elastic or because the complainant's body had already healed itself.

Other witnesses testified that appellant had sexually assaulted another child when he was awaiting trial in this case. An officer testified that she was on patrol when she observed a car with its headlights on, parked in a remote area. Upon closer inspection, the officer saw the car rocking back and forth, with no driver in the front seat. The officer found appellant in the backseat with D.J., an unrelated fourteen-year-old girl. D.J. testified that she had agreed to have sex with appellant in exchange for fifty dollars. A forensics expert testified that DNA evidence was collected from D.J., and appellant could not be excluded as a possible contributor of that DNA evidence.

Before the case was submitted to the jury, the defense requested that the State elect the specific conduct that would form the basis of the charge. The State elected the conduct that appellant allegedly put his mouth on the complainant's vagina. The jury convicted appellant as so charged, and punishment was assessed at fifty years' imprisonment.

HEARSAY EVIDENCE

In his first issue, appellant complains about the admission of the letter that the complainant wrote and delivered to her mother. When appellant objected at trial that this letter was hearsay, the State argued that the letter was admissible pursuant to the present-sense impression exception. Now on appeal, the State does not defend the admission of the letter under the present-sense impression exception. Instead, the

State argues that any error in the admission of the letter was harmless because other evidence of the same acts described in the letter was admitted elsewhere without objection. We agree with the State that any error in the admission of the letter was harmless.

To preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). In addition, a party must object each time the inadmissible evidence is offered or obtain a running objection. *Id.* An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection. *Id.*

Here, the complainant provided live testimony without objection about every act discussed in her letter. The nurse provided similar live testimony, describing without objection how the complainant alleged that appellant had grabbed her and tried to insert his penis into her vagina and anus. There was even live testimony about the complainant's reasons for delaying her outcry, which was the subject of the letter's postscript. The contents of the letter were cumulative of this testimony. Because this testimony was given without objection, we conclude that any error in the admission of the letter was harmless.

CHARGE ERROR

In his next four issues, appellant complains of alleged charge error during the guilt phase of trial.

We review complaints of charge error under a two-step process, considering first whether the trial court erred. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we determine that the trial court erred, we then analyze the error for

harm under the procedural framework of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

Appellant's second and third issues pertain to a single instruction addressing extraneous offenses that were allegedly committed against the complainant. That instruction provided as follows:

> You are further instructed that if there is any evidence before you in this case regarding the defendant's committing other crimes, wrongs, or acts against the child who is the complainant of the alleged offense in the indictment in this case, you cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other crimes, wrongs, or acts against the child, if any, and even then you may only consider the same in determining 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, and for no other purpose.

This instruction closely tracks the language of Article 38.37, Section 1(b) of the Texas Code of Criminal Procedure, which authorizes the admission of otherwise inadmissible evidence.

Appellant argues that the instruction is erroneous because it does not limit the jury's consideration of extraneous-offense evidence to the statutory reasons enumerated under Article 38.37, Section 1(b). He also argues that the instruction erroneously invites the jury to determine for itself what matters are "relevant," which is normally a legal question reserved to the trial court.

These arguments are without merit. Appellant did not request a contemporaneous instruction when the extraneous-offense evidence was introduced. By failing to request a limiting instruction during the trial, the evidence was admitted for all purposes, and the trial court was not required to give any limiting instruction

in its charge. *See Beam v. State*, 447 S.W.3d 401, 406 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Even so, the trial court's instruction does not stray from Article 38.37, Section 1(b); the two reasons enumerated under that statute are the same two reasons that the jury was instructed to consider. And because the jury was instructed that it could consider the extraneous-offense evidence for those two reasons "and for no other purpose," there is no risk that the jury considered the evidence for some other reason it deemed relevant.[1]

Appellant's fourth and fifth issues pertain to an instruction that addressed the extraneous offense allegedly committed against D.J., a child who was not the complainant of the charged offense. This separate instruction, which tracked the language of Article 38.37, Section 2(b), provided as follows:

> You are further instructed that if there is any evidence before you concerning alleged offenses against a child under seventeen years of age, other than the complainant alleged in the indictment, such offense or offenses, if any, may only be considered if you believe beyond a reasonable doubt that the defendant committed such other offense or offenses, if any, then you may consider said evidence for any bearing

[1] The Pattern Jury Charge recommends a different instruction:

> During the trial, you heard evidence that the defendant may have committed wrongful acts against [*name*] not charged in the indictment. [*If requested, include description of specific acts.*] The state offered the evidence to show the state of mind of the defendant and the child [and/or] the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against [*name*]. Those of you who believe the defendant did the wrongful act may consider it.
>
> Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose[s] described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property § 84.19 (2016).

> the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Appellant raises similar complaints about this instruction. He argues that the instruction was erroneous because it did not limit the jury's consideration of the extraneous-offense evidence to the reasons that evidence was admissible under Article 38.37, Section 2(b). He also complains that the instruction, as written, permitted the jury to consider the evidence for any purpose that it decided was relevant.

Again, these arguments lack merit. Appellant did not request a limiting instruction at trial. Also, Article 38.37, Section 2(b) authorizes the admission of extraneous-offense evidence "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." The trial court's instruction contains the exact same statutory language. Although the trial court did not instruct the jury that the statutory reason was the only reason for which the evidence could be considered (making it different from the previous instruction addressed in issues two and three), the instruction still tracked the language of the statute, and generally speaking, an instruction that tracks the language of a statute is "a proper charge on the statutory issue." *See Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994); *see also Harris v. State*, 475 S.W.3d 395, 403 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (rejecting argument that Article 38.37, Section 2(b) was unconstitutional).

Appellant argues that a better instruction would have omitted any mention of "relevant matters," but he does not demonstrate how the given instruction, if erroneous, was harmful.[2] He merely suggests that there is no way of knowing

[2] The Pattern Jury Charge also recommends a different instruction, but it does not omit

whether the jury considered the evidence for the statutory reason given or for some other reason the jury independently determined was relevant.

Based on the charge and record as a whole, we do not perceive how appellant could have suffered harm by the bare mention of "relevant matters." Generally, extraneous-offense evidence is inadmissible at trial because evidence of character or propensity "is said to weigh too much with the jury." *See Robbins v. State*, 88 S.W.3d 256, 262 (Tex. Crim. App. 2002) (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948)). But that concern does not apply in cases like this, where the law specifically allows the jury to consider certain extraneous-offense evidence for the purpose of character conformity. *See* Tex. Code Crim. Proc. art. 38.37, § 2(b). The charge here allowed the jury to consider the extraneous-offense evidence involving D.J. for that purpose. Appellant does not identify, and we cannot imagine, any reason weightier than the one already given in the charge for which the jury could have considered that evidence. *See Baez v. State*, 486 S.W.3d 592, 597–99 (Tex. App.—San Antonio 2015, pet. ref'd) (rejecting argument that similarly worded charge amounted to structural error).

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reference to "relevant matters":

> During the trial, you heard evidence that the defendant may have committed [an offense/offenses] [against [*name of extraneous victim*]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against [*name of extraneous victim*]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.
>
> You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must determine if the state proved all the elements for the offense alleged in the indictment.

Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property § 84.19 (2016).

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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