Affirmed as modified and Memorandum Opinion filed August 22, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00140-CR

JOSEPH WAYNE DELK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 90416-CR

MEMORANDUM OPINION[1]

In two issues, appellant Joseph Wayne Delk, appeals his conviction for the offense of Sexual Assault of a Child which resulted in a life sentence. Appellant argues that the trial court erred by admitting two categories of extraneous evidence, both pertaining to prior interactions between appellant and his stepdaughter, the

[1] Justice Bourliot concurs without opinion.

complainant, Alyonza.[2] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Alyonza lived with her mother and stepfather. In early 2020, Alyonza was at a neighbor's house and appeared very nervous and agitated and didn't want to return home. After the neighbor asked what was wrong, Alyonza described how she had been sexually assaulted by her stepfather. The neighbor immediately reported this to Alyonza's mother and to the police.

Based on Alyonza's outcry, appellant was charged with sexual assault of a child. The allegation: that appellant, while photographing Alyonza in lingerie, wet his finger and inserted the finger in her vagina.

Appellant pleaded "not guilty" and his case was tried before a jury in Brazoria County.

In his opening statement, appellant's trial counsel stated: "You're going to hear a tale, a fairytale. . .we're here today, to prove [appellant] did not do what the child says he did." At trial Alyonza would admit that at this time in her life, in addition to being sexually active with the boy in her closet, that she taken photos of herself, made videos of herself naked, and viewed porn sites two to three times a week. Alyonza admitted that when the police interviewed her in reference to the alleged offense and asked her "did [appellant's] fingers go inside your vagina at all?", she responded, "No." In appellant's counsel's closing, he argued that nothing Alyonza said had been corroborated, that she was not credible, and that no one supported her. Indeed, Alyonza was the sole eye-witness to provide any account of the offense. Her mother and Neighbor were the only other witnesses to testify and neither could provide any direct evidence of the offense.

[2] To protect the identity of the victim who was minor at the time of the alleged offenses, we use pseudonyms herein. *See* Tex. R. App. P. 9.10(a)(3).

The jury found appellant guilty of the indicted offense. Appellant attributes this result to the trial court's admission, over his counsel's objection, of the two extraneous offenses, which we refer to here as the "powder and shower" incident, and the "photography sessions".

Powder and Shower Incident

Alyonza testified that a female neighbor living in a house with a domed roof next to their residence died some time prior to May of 2019.

Alyonza was then fourteen years old when she recalls appellant informed Alyonza that the neighbor's brothers had asked him to clean out the house—which was unoccupied—and she agreed to help.

Alyonza testified that during one of these cleanings, Alyonza knelt in front of a hallway closet when some powder fell on her hair and back. She testified that she was uncertain how it fell on her. Appellant was near the closet when this occurred and close enough to make it fall. Alyonza testified that appellant told her not to move and helped her up by her shoulders. Appellant then led her to the bathroom and asked that she remove her t-shirt and jeans, followed by her bra and underwear. Alyonza—uncomfortable but believing she was in danger—allowed appellant to remove her clothing.

Alyonza testified that while she stood naked, eyes open, in the middle of the bathroom, with her arms crossed covering her chest, appellant used a rag to dust off her shoulders, arms, hands, and legs. Alyonza testified that while standing in front of her, appellant "pushed her [legs] apart a little bit with his hands" and started to dust off around her vagina. She testified that she had no reason to believe any powder had fallen near the area between her legs. Alyonza testified that appellant then guided her to the shower, that she had to step up two steps into the

shower, that appellant turned it on for her, asked that she turn around while he ran his hands through her hair. Appellant left the restroom and returned with pajamas and a towel. Alyonza stepped out of the shower naked, dried off, and returned to her house with appellant.

Photography Sessions

Alyonza testified that after a trip to Florida, when she returned in August of 2019, a package appeared in front of her home. The address had been marked through with a sharpie, did not have her name on it, and appeared to have been previously used. She testified that she brought the package inside, and that appellant told Alyonza that it was hers. Within it, Alyonza discovered mesh, see-through lingerie with a thong bottom, as well as a type-written letter. The letter stated the writer wanted photographs of Alyonza, and—if she failed to comply—that the writer would expose sexual messages that Alyonza had sent to a boy. She testified that appellant devised a plan to provide the photos and use a friend of his, "Spider," who can track those who receive the photos. She agreed to appellant's plan because she believed the individual making the request for lingerie photos is a boy she has been sexting and sending nude photos of herself to.

Alyonza testified that a day later, appellant took Alyonza to the main bedroom where he and Alyonza's mother slept. Alyonza testified that appellant undressed Alyonza and put the lingerie on her. He told her to lie on the bed and covered her face with something similar to a hand towel. Appellant placed Alyonza in sexual positions, including simulating masturbation, as he took multiple photographs of her. Appellant eventually told Alyonza that they were finished, after which Alyonza returned to her bedroom and changed out of the lingerie. Appellant took the lingerie and Alyonza never saw it again.

Alyonza testified that she later received another box, this time containing

stringy, black lingerie. Alyonza stated that she "snapped" and told appellant that she did not want to wear it for pictures. On another occasion, appellant told Alyonza to bring a bathing suit to the next-door house with the domed roof. Appellant and Alyonza went to the bedroom adjacent to the bathroom closet. Alyonza changed into her bathing suit, after which appellant placed a towel over her eyes. He then placed her in sexual positions.

The Primary Offense

Alyonza testified that later in the fall of 2019, appellant told Alyonza that she had received an email stating that the sender wanted more photographs. Alyonza did not know how appellant had obtained her email or password, as she had not given them to him. A few days later, appellant and Alyonza returned alone to the main bedroom. Appellant dressed Alyonza in purple, mesh lingerie with no bottoms, resembling a nightgown, and put a towel over her face. Appellant again positioned Alyonza in sexual poses and photographed her.

At one point, Appellant spread Alyonza's legs apart. Appellant then placed his hands on the outer parts of Alyonza's vagina and spread her vagina apart. Alyonza testified that she felt something wet—which she realized was Appellant's finger—inside her labia. Appellant then slid his finger from the top part of Alyonza's vagina to almost her butt. Alyonza felt uncomfortable and started to cry. Appellant continued to put Alyonza in sexual positions, after which she returned to her room and removed the lingerie. After this incident, Alyonza made an outcry to her next-door neighbor.

Conclusion of Trial and Judgment of Conviction

Appellant pleaded true to the enhancement paragraph, which reflected a federal conviction for an offense substantially similar to the Texas offense of

Possession of Child Pornography. The jury found the enhancement allegation true and sentenced appellant to automatic life imprisonment. The trial court formally sentenced appellant on February 25, 2022, and he filed his notice of appeal on March 1, 2022.

II. ADMISSION OF EXTRANEOUS EVIDENCE

Appellant's two issues are that the trial court erred by admitting extraneous evidence of Alyonza's testimony regarding the "powder and shower" incident, and likewise by admitting extraneous offense evidence of the "photography sessions" where appellant photographed Alyonza in lingerie and bikinis with a towel over her head.

The Article 38.37 Hearing

The trial court conducted a hearing pursuant to Code of Criminal Procedure article 38.37, section 2-a, regarding the admissibility of the extraneous offenses. During the hearing, the State offered testimony from Alyonza about the Powder and Shower incident—where powder fell on her and Appellant brushed her vagina with a rag. Alyonza also testified at the hearing about the multiple photography sessions.

After Alyonza finished testifying, the trial court confirmed that appellant's counsel was objecting that the extraneous offenses were not relevant to the sexual assault allegation and "more prejudicial than probative." Appellant's counsel argued that none of the incidents described were probative as to sexual assault or the act of penetration described in the indictment.

The trial court overruled appellant's objections, determining that these incidents showed how appellant and Alyonza's relationship was "built" and what appellant encouraged Alyonza to do. The court explained that it conducted a

balancing test in making its decision.

Specifically, at the hearing the trial court found that: (1) testimony that appellant touched Alyonza's vagina with a rag constituted "evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense" and could be admitted for its bearing on "the previous and subsequent relationship between the defendant and the child" and; (2) that evidence that appellant took photographs of Alyonza in a state of undress bore on the relationship between appellant and Alyonza. See Tex. Code of Crim. Proc. art. 38.37, § 1(b)(2).

Standard of Review and Applicable Legal Standards

We review the trial court's decision to admit evidence for abuse of discretion. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007); *McCombs v. State*, 562 S.W.3d 748, 765–68 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Code of Criminal Procedure article 38.37 states, as relevant to the sexual offense in this case, that "evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including . . . the state of mind of the defendant and the child; and . . . the previous and subsequent relationship between the defendant and the child." Tex. Code Crim. Proc. art. 38.37, § 1(b)(1)–(2) (Vernon 2018).

Where the defendant is alleged to have committed an extraneous offense specifically enumerated under Section 2 of Article 38.37, "evidence that the defendant has committed a separate offense . . . may be admitted in the trial of an alleged offense . . . 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." *Id.* art. 38.37, § 2(b). Before evidence under the latter section is admitted, a trial judge must conduct a hearing outside the presence of the jury and determine whether the jury could find that the defendant committed the separate offense beyond a reasonable doubt. *Id.* art. 38.37, § 2-a(1)–(2). When evidence of a defendant's commission of one of the offenses listed in article 38.37, section 2(a) is relevant under article 38.37, the trial court still must conduct a Rule 403 balancing test upon proper objection or request. *Distefano v. State*, 532 S.W.3d 25, 31 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

Courts must balance the inherent probative force of the proffered evidence along with the proponent's need for that evidence against (1) any tendency of the evidence to suggest decision on an improper basis, (2) any tendency of the evidence to confuse or distract the jury from the main issues, (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). These factors may blend together in practice. *Id.* at 642.

A reviewing court presumes that the probative value of relevant evidence substantially outweighs the danger of unfair prejudice from admission of that evidence. *Distefano*, 532 S.W.3d at 31 (citing *Martinez v. State*, 468 S.W.3d 711, 718 (Tex. App.—Houston [14th Dist.] 2015, no pet.)). Where the defendant objects to admission of evidence, it is his burden to show that the danger of unfair prejudice substantially outweighs the probative value. *Id.* (citing *Kappel v. State*, 402 S.W.3d 490, 494 (Tex. App.—Houston [14th Dist.] 2013, no pet.)). In assessing a trial court's balancing decision under Rule 403, a reviewing court

should "reverse the trial court's judgment rarely and only after a clear abuse of discretion." *Id.* (quoting *Kappel*, 402 S.W.3d at 484); *Hicks v. State*, No. 14-18-00794-CR, 2020 WL 3697614, at *5 (Tex. App.—Houston [14th Dist.] Jul. 7, 2020, no pet.) (mem. op., not designated for publication).

Generally, evidence will necessarily be prejudicial to one party or another. *Perales v. State*, 622 S.W.3d 575, 584 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). Exclusion of relevant evidence is necessary only when "unfair" prejudice occurs. *Id.* Prejudice is considered "unfair" if it has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (quoting *Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990) (en banc)). When overruling a Rule 403 objection, a trial court is presumed to have performed a Rule 403 balancing test and decided that the evidence was admissible. *Distefano*, 532 S.W.3d at 31.

A. Did the trial court err in allowing testimony about the "powder and shower" incident over appellant's objection?

We first consider appellant's complaint to the trial court's admission of the "powder and shower" incident, specifically complainant's testimony that appellant removed Alyonza's clothing for her to take a shower to remove an unknown white powder which fell on her.

Appellant objected to the admission of this extraneous offense testimony during the hearing and later objected during the trial under Rule 403 before the trial court admitted the testimony to the jury. Appellant contends on appeal that "the State never demonstrated its particular need for the extraneous offense, nor its particular relevancy to a material issue in Appellant's case."

Probative value of the evidence and strength of need for the evidence

Appellant argues that evidence of the "powder and shower" incident

provides no value in developing the relationship between Alyonza and the appellant. However, consistent with the trial court's finding, we disagree. Alyonza's testimony of the "powder and shower" incident shows the development of a relationship between appellant and Alyonza characterized by appellant's guised assistance to Alyonza, appellant directing Alyonza and her compliance, and is part of the overall picture of appellant's escalating actions, and how he used Alyonza's fear to make her susceptible to his influence. Thus, the trial court could reasonably find that such evidence would be probative on the development of the relationship.

Appellant also contends on appeal that "the State never demonstrated its particular need for the extraneous offense, nor its particular relevancy to a material issue in Appellant's case." We disagree. With no other witnesses to account for the details of the offense, the State built its case on the testimony of the complaining witness, age seventeen at trial, recalling events that took place nearly three years earlier when she was an adolescent and reporting statements made by appellant that coerced her into compromising situations.

Appellant contends that Alyonza's testimony of other facts obviate the need for the extraneous evidence, and supplied the State with ample evidence (to presumably attempt) to satisfy its burden of proof. With respect its burden of proving appellant's intent, appellant specifically refers to Alyonza's account that appellant had a plan to help her get the emailer—who called himself "Chris Dirty Dan"—from extorting her, specifically by taking more photos of Alyonza, purchasing lingerie for these photoshoots (some of which Alyonza incinerated), assistance from a person named "Spider" whom Alyonza never met, and the wiping and replacing of Alyonza's phone. Appellant contends from such facts that "[t]he jury can easily surmise [appellant's] fraud in these actions", and thus

would not need the extraneous evidence.

Without this extraneous evidence at issue, the State's case—based on a delayed outcry, no medical or physical evidence or other witness to corroborate Alyonza's testimony, coupled with facts solely provided by Alyonza's testimony, that appellant commandeered her email account and presented her with mysterious blackmailer, that appellant initiated a plan to rescue her from the blackmailer by transmitting encrypted photos involving someone Alyonza never met named "Spider" and some discarded lingerie—was susceptible of being perceived as the made-up "fairytale" of an adolescent, presumably to shift attention away from the boy hiding in her closet or photos she had taken of herself and shared with a stranger.

By contrast Alyonza's account that appellant took her to the unoccupied residence next door, potentially orchestrated a situation in which a "chemical" powder fell on her, undressed her, and then used this to touch Alyonza's naked body with a rag, including her vagina is a vivid account that characterized the nature of the evolving relationship with appellant, illustrating appellant's intent and ability to coerce Alyonza, and aided her credibility and reinforced her later description of appellant isolating her for a supposed photography "session" before sexually assaulting her through digital penetration. *West v. State*, 554 S.W.3d 234, 240 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (observing that, without evidence of the extraneous offense convictions, the State's case came down to the word of each complainant against the appellant, where there was no physical evidence or other eyewitness testimony supporting the allegations); *McCulloch v. State*, 39 S.W.3d 678, 681 (Tex. App.—Beaumont 2001, pet. ref'd) (holding that evidence of the appellant's prior sexual assaults committed against the complainant in aggravated sexual assault case showed the appellant's dominance over the

complainant and her fear of him; the appellant's intent and ability to commit the primary offense; and how the complainant was forced to comply).

In short, the State demonstrated the probative value and a strong need for the extraneous-offense testimony from complainant concerning the "powder and shower" incident. This factor weighs in favor of admission.

Tendency of the evidence to suggest decision on an improper basis

Although the extraneous offense—indecency with a child by contact[3]—presents the potential that such evidence would be used to suggest decision on an improper basis, circumstances in this case diminished or mitigate this factor. First, complainant's description of the appellant's acts in the "powder and shower" incident were significantly less serious than the acts she recounted that formed the basis of the indictment. *Buxton v. State*, 526 S.W.3d 666, 691 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The "powder and shower" incident was similar to the indicted offense as involving herself and the form of coercion used by the appellant (e.g., requests to perform acts guised in the form of assistance). Additionally, the trial judge also issued a limiting instruction with respect to the jury's considerations of extraneous offenses—that it could not consider such offenses unless proved beyond a reasonable doubt and that that it could only consider those offenses as they related to "the state of mind of the defendant and the child and the previous and subsequent relationship between the defendant and the child." A reviewing court presumes that a jury followed the trial court's instructions. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). This

[3] Arguably, appellant's acts in the "powder and shower" incident constituted indecency with a child by contact, an offense specifically enumerated under Section 2 of Article 38.37. *See* Tex. Penal Code § 21.11(a)(1), (c) (Vernon 2019) (defining indecency with a child as engaging in sexual contact with a child younger than 17 years of age, including "any touching by a person, including through clothing, of . . . any part of the genitals of the child . . . "); See also Tex. Code of Crim. Proc. art. 38.37, § 2(a)(C) (listing indecency with a child).

instruction would have further reduced the possibility that the jury would convict appellant on an improper basis. The instruction lessened the prejudicial impact of this factor. *Buxton v. State*, 526 S.W.3d 666, 691 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Accordingly, this factor slightly favors admission of the extraneous offense evidence.

Tendency of the evidence to confuse or distract the jury from the main issues

Alyonza's testimony was not confusing, but rather it was relevant to appellant's intent for committing the primary offense, and rather than distract from the main issues, the facts tend to provide context in understanding the nature of appellant's relationship with the complainant. Also, any tendency to confuse or distract from the main issue is mitigated here where the extraneous evidence of the "powder and shower" incident was similar to *but less serious* than the charged offense involving digital penetration. *See McCombs v. State*, 562 S.W.3d 748, 767 (Tex. App.—Houston [14th Dist.] 2018, no pet.). This factor favors the admission of the evidence.

Tendency of the evidence to be given undue weight

In light of the presumptions that follow the court's limiting instruction, the record lacks any indication that the jury gave Alyonza's testimony of the "powder and shower" incident undue weight. This factor favors the admission of the evidence.

Likelihood that the presentation of the evidence would consume an inordinate amount of time or merely repeat evidence already admitted

When evaluating this factor, the court may consider actual time or relative number of pages the testimony about the extraneous incident takes up in the reporter's record. *See McCombs*, 562 S.W.3d at 767. Alyonza testified to the "powder and shower" incident over the span of about fifteen pages in the reporter's

record. The testimony of the State's witnesses spanned around 190 pages, including cross-examination. Weighing this brief testimony against the overall testimony by the State's witnesses, we cannot conclude that this evidence consumed an inordinate amount of time. *See id.* (finding that evidence of an extraneous offense in that case—about 33 pages in the reporter's record—did not consume an inordinate amount of time when measured against about 230 pages of total witness testimony). This factor favors the admission of the evidence.

Conclusion

Under the applicable standard of review, we conclude that the trial court did not abuse its discretion in determining that a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence did not substantially outweigh the probative value of the extraneous-offense evidence of Alyonza's testimony of the "powder and shower" incident. Accordingly, we overrule appellant's first issue.

B. Did the trial court err in allowing testimony about the "Photography Sessions" over appellant's objection?

We next consider appellant's complaint to the trial court's admission of evidence of the photography sessions.

Appellant objected to the admission of this extraneous offense testimony during the hearing and later objected during the trial under Rule 403 before the trial court admitted the testimony to the jury. Appellant contends on appeal that "the State never demonstrated its particular need for the extraneous offense, nor its particular relevancy to a material issue in Appellant's case".

Probative value of the evidence and strength of need for the evidence

Appellant argues that evidence of appellant's photography sessions provides no value in developing the relationship between Alyonza and the appellant as the

trial court determined at the article 38.37 hearing; but that it instead provides the jury with a predisposition that appellant is a child predator. We agree with the trial court's determination. Alyonza's testimony of the photography sessions was relevant to show the nature of their relationship both before and leading up to the time of the charged offense. Appellant used the pretext of Alyonza being "blackmailed" by an unknown person to isolate her, place her in sexual positions, and take semi-nude photographs. This then progressed to sexual assault by digital penetration. The earlier incidents involving photography showed the escalating nature of appellant's actions, and how he used Alyonza's fear to make her susceptible to his influence.

Without this testimony showing how appellant used his role as complainant's stepfather, his position of influence and authority in the house, to manipulate complainant into believing appellant was aiding her while conducting these photography sessions, the jury may have been led to believe the State's allegations were "fairytales" conjured by the complainant or that, in the absence of such contextual evidence, it was "illogical and implausible" that the charged act could have occurred. *See McCulloch v. State*, 39 S.W.3d 678, 681 (Tex. App.—Beaumont 2001, pet. ref'd). Taken with the "powder and shower" incident, the evidence of photography sessions illustrate the evolving nature of their relationship both before and up to the charged offense. Thus, the trial court could have reasonably concluded that this evidence was probative of appellant's state of mind for the offenses at issue as well as the nature of the prior relationship between Alyonza and him.

Appellant presented a fabrication defense, relying on the lack of physical or corroborating evidence to challenge Alyonza's credibility. There was no corroborative medical evidence or testimony from other eyewitnesses. The specific

details of the photography incidents and Appellant's evolving behavior toward Alyonza reinforced her credibility for the jury. It conversely lessened the probability that Alyonza could fabricate such a detailed history of events. *See McCombs*, 562 S.W.3d at 767; *see also West*, 554 S.W.3d at 240. Such testimony further rebutted appellant's argument that Alyonza had fabricated a "fairytale." *See Wheeler*, 67 S.W.3d at 887 n.22; *see Dennis*, 178 S.W.3d at 177–78; *see Bargas v. State*, 252 S.W.3d at 893.

Tendency of the evidence to suggest decision on an improper basis

Although extraneous offense—indecency with a child by contact—presents the potential that such evidence would be used to suggest decision on an improper basis, as we concluded in the first issue, the circumstances in this case diminished or mitigate this factor. First, because complainant's description of the appellant's acts in the "photography sessions" leading up to the offense were significantly less serious than the offense itself. *Buxton v. State*, 526 S.W.3d 666, 691 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The Photography sessions were similar to the indicted offense as involving herself, and the form of coercion used by a the appellant (guised assistance).

Additionally, as noted in the first issue, the trial judge also issued a limiting instruction with respect to the jury's considerations of extraneous offenses—that it could not consider such offenses unless proved beyond a reasonable doubt and that that it could only consider those offenses as they related to "the state of mind of the defendant and the child and the previous and subsequent relationship between the defendant and the child." A reviewing court presumes that a jury followed the trial court's instructions. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). This instruction would have further reduced the possibility that the jury would convict Appellant on an improper basis. This lessened the prejudicial impact of this

factor. *Buxton v. State*, 526 S.W.3d at 691.

Moreover, because the "photography sessions" could be reasonably be regarded as same-transaction contextual evidence, this factor is considerably neutralized. Same-transaction contextual evidence "imparts to the jury information essential to understanding the context and circumstances of events which, although legally separate offenses, are blended or interwoven." *Lopez v.* State, 515 S.W.3d 547, 552 (Tex. Crim. App. 2017) (quoting *Camacho v.* State, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993)). The jury needed this evidence to understand the background for the photography "session" that immediately preceded Alyonza's sexual assault. Without it, the context for the primary offense would have been incomplete. *See Houston v. State*, 832 S.W.2d 180, 182 (Tex. App.—Waco 1992, pet. granted), *pet. dism'd*, 846 S.W.2d 848 (Tex. Crim. App. 1993) (per curiam) ("[T]he State was entitled to prove all of the facts and circumstances surrounding the sexual assault, everything that [the appellant] said and did, including how he used the nude photographs to lure [the complainant] to where she was sexually assaulted and how he tried to use them to get her to submit to the sexual assault.")

Accordingly, this factor favors admission of the extraneous offense evidence.

Tendency of the evidence to confuse or distract the jury from the main issues

To the extent any of the photography sessions constituted an extraneous "offense" while similar, these were less serious than the acts that formed the basis of the charged offense, e.g., conduct involving digital penetration. *See McCombs v. State*, 562 S.W.3d 748, 767 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Alyonza's testimony was not confusing, but rather it was relevant to appellant's intent for committing the primary offense, and rather than distract from the main issues, the facts tend to provide same-transaction contextual evidence in

understanding the nature of appellant's relationship with the complainant. This factor favors the admission of the evidence.

Tendency of the evidence to be given undue weight

Nothing in the record shows that that the jury gave this evidence any undue weight. The jury instructions limited what purposes the jury could have considered such testimony for and the presumption that the jury followed these instructions has not been rebutted. The testimony regarding these incidents was relatively straightforward; it showed how appellant progressively manipulated Alyonza over time, provided necessary context for the primary offense, and rebutted appellant's fabrication defense; and the jury was "equipped to evaluate the probative force of this evidence." *See West*, 554 S.W.3d at 241. This factor favors admission of the extraneous offense evidence.

Likelihood that the presentation of the evidence would consume an inordinate amount of time or merely repeat evidence already admitted

When evaluating this factor, the court may consider actual time or relative number of pages the testimony about extraneous incident takes up in the reporter's record. *See McCombs*, 562 S.W.3d at 767. Alyonza testified to the photography sessions incident over the span of about thirty-three pages in the reporter's record. The testimony of the State's witnesses spanned around 190 pages, including cross-examination. Weighing this testimony against the overall testimony by the State's witnesses, though it required an appreciable part of the trial, more than 1/6 of the State's case, we cannot conclude that this evidence consumed an inordinate amount of time. *See id.* (finding that evidence of an extraneous offense in that case—about 33 pages in the reporter's record—did not consume an inordinate amount of time when measured against about 230 pages of total witness testimony). This factor weighs somewhat against admission. *Coleman v. State*,

No. 14-19-00237-CR, 2021 WL 4736969, at *3–5 (Tex. App.—Houston [14th Dist.] Oct. 12, 2021, pet. ref'd)(not designated for publication)(finding that extraneous evidence constituting about "one-fifth of the total time spent on the State's case-in-chief. . .weighed somewhat against admission of the evidence").

Conclusion

Under the applicable standard of review, we conclude that the trial court did not abuse its discretion in determining that a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence did not substantially outweigh the probative value of the extraneous-offense evidence of Alyonza's testimony of the photography sessions. Accordingly, we overrule appellant's second issue.

III. REFORMATION

The State asks that the court modify the Nunc Pro Tunc Judgment of Conviction by Jury, ("Judgment") filed for record on March 28, 2022. The trial court found that the federal offense of possession of material involving the sexual exploitation of minors was substantially similar to Texas's offense of possession of child pornography, and appellant pleaded true to this enhancement paragraph. The jury found the enhancement paragraph true and sentenced appellant to life imprisonment. But the judgment indicates no plea or finding with regard to an enhancement paragraph.

Without objection from appellant, the State requests that this court modify the judgment to reflect what actually occurred below. This Court has the power to modify the judgment of the trial court to make the record speak to the truth, so long as the matter is called to this Court's attention and this Court has the necessary information to make the modification. Tex. R. App. P. 43.2(b), 43.6; *see Turner v. State*, 650 S.W.3d 803, 809 (Tex. App.—Houston [14th Dist.] 2022, no pet.)

(modifying judgment to reflect correct plea and finding for an enhancement paragraph). These requisites having been satisfied, we modify the judgment to reflect (1) Appellant's plea of true to the enhancement paragraph and (2) the jury's finding that the enhancement paragraph was true.

III. CONCLUSION

Finding the State's request proper we order that the March 28, 2022 Nunc Pro Tunc Judgment of Conviction by Jury Court be modified to reflect (1) appellant's plea of true to the enhancement paragraph and (2) the jury's finding that the enhancement paragraph was true. Having overruled appellant's two issues, we affirm the trial court's judgment as modified.

/s/ Randy Wilson
Justice

Panel consists of Chief Justice Christopher, Justice Bourliot and Justice Wilson. (Bourliot, J., concurring without opinion).

Do Not Publish — Tex. R. App. P. 47.2(b)