In The

Court of Appeals

Ninth District of Texas at Beaumont

_____

NO. 09-16-00162-CR

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MATTHEW JAMES FAVORITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 15-22506

MEMORANDUM OPINION

A jury found Matthew James Favorite (Favorite or Appellant) guilty of continuous sexual abuse of a child and assessed his punishment at thirty-seven years' imprisonment. *See* Tex. Penal Code Ann. § 21.02 (West Supp. 2016). In eleven issues, Favorite challenges his conviction. We affirm the judgment as modified.

Background

On June 3, 2015, a grand jury indicted Favorite for the offense of continuous sexual abuse of a child. The indictment[1] alleged, in relevant part, that:

> . . . Matthew James Favorite, hereafter styled the Defendant, on or about the 1st day of September, [2014], and anterior to the presentment of this indictment, in the County of Jefferson and State of Texas, and continuing through on or about November 1, 2014, did then and there intentionally and knowingly during a period that was more than 30 days in duration, commit more than 2 acts of sexual abuse, namely, Indecency with a Child, by touching the genitals and Aggravated Sexual Assault of a Child by Penetrating the Female Sexual Organ and Aggravated Sexual Assault of a Child by Penetrating the Anus, against [D.W.], hereafter styled the Complainant, a child younger than fourteen years of age and at the time, the defendant was older than seventeen years of age, against the peace and dignity of the State.

On January 19, 2016, a jury was selected and sworn. Both the State and the defense presented their cases on January 21, after which the jury commenced its deliberations. On January 21 and 22, the jury sent three notes to the court indicating that the jurors had been unable to come to a unanimous verdict, after which the court responded with the following instructions:

> Your foreman has advised the Court in writing that you are apparently unable to reach a unanimous verdict.

[1] We use initials to refer to the alleged victim and family members. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

> If this jury after a reasonable length of time finds itself unable to arrive at a unanimous verdict, it will be necessary for the Court to declare a mistrial and discharge the jury.
>
> The indictment will still be pending and it is reasonable to assume that the case will be tried again before another jury at some future time. Any such future jury will be impaneled and will likely hear the same evidence which has been presented to this jury. The questions to be determined by the jury will be the same as the questions confronting you and there is no reason to hope that the next jury will find these questions any easier to decide than you have found them. Do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> With these additional instructions you are instructed to continue deliberations in an effort to arrive at a verdict which is acceptable to all members of the jury, if you can do so without doing violence to your conscience.

The jury sent another note on January 22 that read: "In order for us to reach a unan[i]mous decision, someone would have to do violence to their conscience. At this point, nobody is willing to change their decision for any reason." The court discussed the matter with the attorneys as follows:

> THE COURT: We are going to go on the record in 15-22506, Matthew James Favorite, which is present with his attorney and the State's attorneys. We have received a series of messages from the jury that it is deadlocked apparently 11 to 1 for guilt. And Article 37.07 of the Texas Code of Criminal Procedure plainly provides under Section 2 if the jury fails to agree on the issue of guilt or innocence, the judge shall declare a mistrial and discharge the jury and jeopardy does not attach in the case, which means the case would be reset for another trial.
>
> Any objection to us proceeding under the law in that regard at this time?

[State's attorney]: No, Your Honor.

THE COURT: And the defense?

[Defense attorney]: No, Your Honor.

The jury foreperson then confirmed on the record to the court that the jury was deadlocked and that further deliberations would be fruitless, and the following exchange occurred:

THE COURT: Anybody object to a mistrial being granted at this time?

[State's attorney]: Not from the State, Judge.

THE COURT: Defense?

[Defense attorney]: No, Your Honor.

The court declared a mistrial and reset the case. A second trial commenced on April 25, 2016, Favorite pleaded "[n]ot guilty." The jury at the second trial found Favorite "guilty" of continuous sexual abuse of a child and assessed his punishment at thirty-seven years' imprisonment. *See* Tex. Penal Code Ann. § 21.02 (West Supp. 2016). Favorite timely appealed his conviction.

Summary of Testimony at Trial

Testimony of D.W.

D.W. testified at trial that she was born in September of 2005 and that she lives with her mother and her two younger brothers. D.W. explained that her mother

was not married at the time of trial, but her mother and Favorite had been married and that Favorite had lived with them. According to D.W., Favorite usually slept on the couch and her mother slept in her own room.

The State's attorney asked D.W. if Favorite started doing something that made her uncomfortable, and D.W. responded "[h]e started touching me." D.W. explained that, shortly after her ninth birthday, Favorite put his hand on the outside of her "hoo-ha[]" when she was asleep. D.W. agreed that her "hoo-ha" was "right between your legs in the front where you go tee-tee[.]" D.W. testified that, when she woke up, her pants were down and Favorite's hand was on her. According to D.W., Favorite pulled her pants up and covered her up, but she thought something bad had happened and, she felt "weird." D.W. explained that she did not tell anyone what happened because she thought she would get in trouble.

D.W. testified that this happened again the next month and "he did it almost every -- the first weekend of every month." She explained that she woke up with her clothes off and Favorite was "scratching [her] hoo-ha[]" and "moving his finger back and forth . . . [on] [t]he inside and outside." D.W. explained that it felt "weird[]" and that it hurt a little bit. According to D.W., she initially pretended she was asleep, but then she acted as though she had woken up, and when she asked Favorite what he was doing, he told her he was checking on her and seeing what the neighbors were

doing. D.W. explained that she did not tell anyone what happened because she did not want to get in trouble.

D.W. testified that this happened again the next month, she woke up with her pants down and Favorite was behind her. D.W. explained that Favorite was scratching her "hiney[]," that it felt "weird[,]" and it hurt. According to D.W., when Favorite stopped, he pulled up her pants and told her he was seeing what the neighbors were doing. D.W. explained that around the time of this incident, her mother and Favorite were fighting and Favorite "was getting kicked out of the house a little bit."

D.W. identified State's Exhibit 3 as a picture of scratchings on the wall of her room. D.W. explained that she scratched her wall because she was "afraid of him coming back and doing it again." According to D.W., her mother asked her why she was fighting with her brothers and D.W. responded that it was "because of [Favorite]" and she explained that Favorite had "touched [her] 'hoo-ha.'" D.W. explained that she felt it was okay to tell her mother because Favorite was gone then.

Testimony of Detective Turner

Matt Turner (Detective Turner or Turner), a detective with the Nederland Police Department, testified that he got a referral from CPS on or about February 9, 2015 concerning a potential sexual abuse of a child. Detective Turner explained that

D.W. was the complaining witness and that Turner had a forensic interview with D.W.'s mother, D.F. Turner explained there was no physical evidence to collect in this case, and that sometimes after several months have passed since an incident, there is no physical evidence. Detective Turner testified that he made arrangements for a forensic examination and forensic interview with D.W., and that he sat through the interview with D.W. According to Turner, he also spoke with Favorite, but Favorite did not give him an account of what had happened with D.W.

Testimony of D.F.

D.F., Favorite's wife and D.W.'s mother, testified that in February 2015, she was concerned when she observed Favorite "standing in [her] daughter's room with a partial erection, his pants down and toilet paper in his hand." D.F. explained that, when she saw Favorite in her room, she thought he was masturbating. D.F. explained that she asked Favorite to step out of the room and asked him to explain what he was doing:

> I asked him to step out of the room. He walked out in the hallway. I asked what he was doing. He said he was checking on a noise. I asked why his pants were down. He said they slipped. I said why do you have an erection? He said he didn't. I grabbed it. He did have an erection. He claimed that his pants slipped as he was walking and that further rubbed against him which caused the erection.

D.F. also testified that Favorite told her he picked the toilet paper up off the floor, but that the toilet paper was folded and "completely clean." D.F. testified that Favorite's explanation did not make sense to her.

D.F. testified that D.W. made her outcry to her a few days later. D.F. explained that D.W. was arguing with her younger brothers, and D.F. asked D.W. why she was being mean. According to D.F., D.W. responded that it was because she was mad at Favorite and that Favorite had touched her "hoo-ha[,]" which D.F. explained referred to "[a] girl's private parts, a vagina." D.F. testified that D.W. also told her that Favorite had touched D.W.'s "hiney hole inside and out [] [and] touched her 'hoo-ha,' scratching it on the inside[]" between September and December of 2014. D.F. also explained that D.W. told her that Favorite had touched D.W. on the inside of her vagina and anus.

According to D.F., she "kicked [Favorite] out and filed for a divorce immediately[,]" and after Favorite left their household, D.W.'s attitude and grades improved. D.F. explained that she spoke with Detective Turner, and D.W. underwent an examination by a sexual assault nurse examiner. D.F. testified that D.W. did not change her story about what happened and never said she did not tell the truth. On cross-examination, the defense offered into evidence a copy of a recording of the

outcry conversation between D.W. and D.F. that D.F. had recorded on her phone, the court admitted the recording, and the recording was published to the jury.

Testimony of the Sexual Assault Nurse Examiner (SANE)

B. G. testified that she was a forensic nurse and was trained as a sexual assault nurse examiner (SANE). The SANE testified that she performed an examination of D.W. on February 23, 2015, as a result of a referral by Detective Turner. The SANE explained that, in taking D.W.'s history, D.W. reported that

> . . . her stepfather had been messing with her and that he had been putting his finger inside her front part and her back part. She commented about he had sharp fingernails. She said sometimes he would put his hands inside her pants or panties, and then sometimes it would be with her clothes off.

The SANE explained that if sexual penetration had occurred between September and November of 2014, she would not expect to see either acute or healing trauma in her physical examination of D.W. in February of 2015. The SANE also explained that she did not find any physical injury to D.W.'s genitals or anus and that penetration with a finger does not usually leave any type of injury. After the State rested, the defense also rested without calling any witnesses.

Double Jeopardy

In his first three issues, Appellant raises double jeopardy arguments. Appellant argues in issues one and two that the trial court erred by declaring a

mistrial in reliance on article 37.07 because the Fifth Amendment "preempts or supersedes any contrary Texas statutory provision" and there was no manifest necessity for a mistrial. In Appellant's third issue, he argues that the original intent of the Fifth Amendment was to permit "only [] one trial to one jury, absent riot, insurrection, or a cataclysmic event[,]" irrespective of the doctrine of manifest necessity.

"The Fifth Amendment to the United States Constitution prohibits a State from twice putting a defendant in jeopardy for the same offense." *Ex parte Brown*, 907 S.W.2d 835, 838 (Tex. Crim. App. 1995) (citations omitted). Jeopardy attaches once a jury has been impaneled and sworn. *Id.* at 839. "Consequently, as a general rule, if, after the defendant is placed in jeopardy, the jury is discharged without reaching a verdict, double jeopardy will bar retrial." *Id.* However, before a defendant can be twice put in jeopardy for the same offense, the original jeopardy must have terminated. *Ex parte Queen*, 877 S.W.2d 752, 754 (Tex. Crim. App. 1994). The failure of a jury to reach a verdict is not an event that terminates jeopardy. *Richardson v. United States*, 468 U.S. 317, 325-26 (1984). If a mistrial was based on manifest necessity, retrial is not barred by jeopardy, and a mistrial following a jury's inability to reach a verdict is justified based on manifest necessity. *See Brown v. State*, 907 S.W.2d 835, 839 (Tex. Crim. App. 1995) (citing *Oregon v. Kennedy*,

456 U.S. 667, 672 (1982)); *State v. Torres*, 805 S.W.2d 418, 422 (Tex. Crim. App. 1991).

Despite the general prohibition against jeopardy-barred trials, there are two exceptions when a criminal defendant may be tried a second time without violating double-jeopardy principles if the prosecution ends prematurely as the result of a mistrial: (1) if the criminal defendant consents to retrial *or* (2) there was a manifest necessity to grant a mistrial. *Pierson v. State*, 426 S.W.3d 763, 769-70 (Tex. Crim. App. 2014); *see also Arizona v. Washington*, 434 U.S. 497, 505-06 (1978). Therefore, where there is manifest necessity for a retrial, a defendant's lack of consent to retrial does not violate double jeopardy.

Appellate Rule 33.1 provides that as a prerequisite to presenting a complaint for appellate review, the record must show that the party "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint[.]" Tex. R. App. P. 33.1; *see also Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). To determine preservation of error under Rule 33.1, the issue is whether the "complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal." *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002)

(citing *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998)); *see also Reyna*, 168 S.W.3d at 177.

The record before us provides no evidence that Appellant preserved error on his double jeopardy issues, but Appellant argues that he was not required to object to a mistrial in order to preserve error on a double jeopardy complaint. Appellant relies upon *Jones v. State*, 586 S.W.2d 542, 544 (Tex. Crim. App. [Panel Op.] 1979), *Muncy v. State*, 505 S.W.2d 925 (Tex. Crim. App. 1974), and *Garner v. State*, 858 S.W.2d 656, 658 n.1 (Tex. App.—Fort Worth 1993, pet. ref'd) for the proposition that "[d]ouble jeopardy issues are jurisdictional, and may be raised for the first time on appeal." Although the cases to which Appellant cites allowed the appellant to raise a claim of double jeopardy for the first time on appeal, the cases do not support his argument that his double jeopardy claim is jurisdictional, nor are we aware of any cases that support his argument. *See generally Jones*, 586 S.W.2d 542; *Muncy*, 505 S.W.2d 925; *Garner*, 858 S.W.2d 656. More recent decisions emphasize that the general rule is that a defendant continues to bear the burden of preserving, in some fashion, a double jeopardy objection at or before the time the issue of his guilt is submitted to the finder of fact, unless the undisputed facts show the double jeopardy violation is clearly apparent from the face of the record and enforcement of the usual rules of procedural default serves no legitimate state interests. *See*

Gonzalez v. State, 8 S.W.3d 640, 642-43 (Tex. Crim. App. 2000); *Pomier v. State*, 326 S.W.3d 373, 385 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *King v. State*, 161 S.W.3d 264, 267 (Tex. App.—Texarkana 2005, pet. ref'd).

A double jeopardy claim may be raised for the first time on appeal only "if two conditions are met: (1) 'the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record'; and (2) 'when enforcement of the usual rules of procedural default serves no legitimate state interest.'"). *See Langs v. State*, 183 S.W.3d 680, 686-87 & n.22 (Tex. Crim. App. 2006) (quoting *Gonzalez*, 8 S.W.3d at 643). Appellant must satisfy both prongs of this test in order to raise his complaint for the first time on appeal. *Id.* Appellant has failed to establish either condition required by *Langs*. *See* 183 S.W.3d at 686-87 & n.22. Therefore, we conclude that the record shows no basis for Appellant to raise a double jeopardy complaint for the first time on appeal.

In his Reply brief, Appellant argues that his trial counsel's failure to object to a mistrial did not waive his right not to be put in jeopardy twice for the same offense. Citing to *Davis v. State*, 164 S.W.2d 686 (Tex. Crim. App. 1947), Appellant argues that a waiver of double jeopardy must be made by the defendant himself. We find *Davis* factually distinguishable, as the court in *Davis* discharged the jury without asking the defendant whether he agreed to a mistrial. *Id.* at 479. In the case at bar,

the trial court expressly asked the parties "Anybody object to a mistrial being granted at this time?" Thereafter, the attorneys representing Favorite and the State both stated they had no objection. Additionally, as discussed below, we further conclude that manifest necessity existed for a mistrial. Double jeopardy does not bar a second trial where there was manifest necessity for a mistrial, even if a defendant does not consent to retrial. *See Pierson*, 426 S.W.3d at 769-70.

Appellant's second issue argues that the trial court abused its discretion in declaring a mistrial because there were legally insufficient grounds for a mistrial. In support of his argument, Appellant states that "there was no manifest necessity for discharge of the jury due to the brief time they deliberated" and that "the trial judge made no findings on the record as to what he had done to actually assess the need for a mistrial, other than that he could due to Article 37.07." Appellant also argues that the trial court failed to consider less drastic alternatives before declaring a mistrial. Appellant suggests that "[i]t is therefore obvious that mistrial was declared for the wrong reasons[.]"

Section 2(a) of article 37.07 provides:

> In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed. If the jury fails to agree on the

> issue of guilt or innocence, the judge *shall* declare a mistrial and discharge the jury, and jeopardy does not attach in the case.

Tex. Code Crim. Proc. Ann. art. 37.07 § 2(a) (West Supp. 2016) (emphasis added). The United States Supreme Court has held that the double jeopardy clause of the Fifth Amendment does not bar retrial following a deadlocked jury. *See Tibbs v. Florida*, 457 U.S. 31, 42 (1982) ("A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause.") (citing *Washington*, 434 U.S. at 509; *United States v. Sanford*, 429 U.S. 14, 16 (1976) (per curiam); *Johnson v. Louisiana*, 406 U.S. 356, 401-02 (1972) (Marshall, J., dissenting); *Downum v. United States*, 372 U.S. 734, 735-36 (1963); *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *Keerl v. Montana*, 213 U.S. 135 (1909); *Dreyer v. Illinois*, 187 U.S. 71, 84-86 (1902); *Logan v. United States*, 144 U.S. 263, 298 (1892); *United States v. Perez*, 9 Wheat. 579 (1824)). State protections against double jeopardy are conceptually identical to those under the federal constitution. *See Phillips v. State*, 787 S.W.2d 391, 393 n.2 (Tex. Crim. App. 1990) (citing *Ex parte Peterson*, 738 S.W.2d 688 (Tex. Crim. App. 1987); *Ex parte McWilliams*, 634 S.W.2d 815 (Tex. Crim. App. 1982)).

A trial court may in its discretion discharge a jury that has deliberated for such time as to render it altogether improbable that it can agree. *See* Tex. Code Crim. Proc. Ann. art. 36.31 (West 2006). The length of time that the jury may be held for

deliberation rests in the discretion of the trial judge. *See Green v. State*, 840 S.W.2d 394, 407 (Tex. Crim. App. 1992) (en banc) (citing *Montoya v. State*, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989) (en banc)). "The rule is well settled that the exercise of discretion in declaring a mistrial is determined by the amount of time the jury deliberates considered in light of the nature of the case and the evidence." *Nelson v. State*, 813 S.W.2d 651, 653 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (citing *Patterson v. State*, 598 S.W.2d 265, 268 (Tex. Crim. App. [Panel Op.] 1980)); *Beeman v. State*, 533 S.W.2d 799, 800 (Tex. Crim. App. 1976). An appellate court reviews a trial court's ruling on a motion for mistrial for an abuse of discretion. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). We must uphold a trial court's ruling on a motion for mistrial if it was within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)).

"Because it is an extreme remedy, a mistrial should be granted 'only when residual prejudice remains' after less drastic alternatives are explored." *Ocon*, 284 S.W.3d at 884-85 (quoting *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005)). Although requesting a lesser remedy is not a prerequisite to a motion for mistrial, when the movant does not first request a lesser remedy, we will not reverse

the court's judgment if the problem could have been cured by a less drastic alternative. *Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004); *see also Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (concluding that the trial court did not abuse its discretion in denying the appellant's motion for mistrial when the appellant had not requested the less drastic remedy of a continuance). The Court of Criminal Appeals has noted that "[l]ess drastic alternatives include instructing the jury 'to consider as evidence only the testimony and exhibits admitted through witnesses on the stand,' and, questioning the jury 'about the extent of any prejudice,' if instructions alone do not sufficiently cure the problem." *Ocon*, 284 S.W.3d at 885 (quoting *Washington*, 434 U.S. at 521-22 (1978) (White, J., dissenting)).

"Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases." *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005); *see also* Tex. Const. art. V, § 13; Tex. Code Crim. Proc. Ann. arts. 36.29(a), 37.02, 37.03, 45.034-45.036 (West 2006 & Supp. 2016). On appeal, Appellant does not suggest what the trial court should have considered as a "less drastic alternative" in the first trial. Furthermore, the record reflects that Favorite did not object to the mistrial nor did he suggest any less drastic alternatives at trial. A defendant who does not object to the trial judge's sua sponte declaration of a mistrial, despite an adequate opportunity to do so, has impliedly

consented to the mistrial. *See Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, and 09-14-00140-CR, 2014 Tex. App. LEXIS 8542, at *6 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (citing *Torres v. State*, 614 S.W.2d 436, 441-42 (Tex. Crim. App. [Panel Op.] 1981); *Ledesma v. State*, 993 S.W.2d 361, 365 (Tex. App.—Fort Worth 1999, pet. ref'd)).

Presentation of the evidence in the first trial took only one day, after which the jury sent three notes to the court indicating that the jurors had been unable to come to a unanimous verdict. Following receipt of the notes, the trial judge gave an *Allen* instruction.[2] The jury continued its deliberations after receiving the *Allen* instruction, but then returned another note indicating it still could not arrive at a unanimous verdict. The record indicates that the jury foreperson explained to the court that it would be fruitless for the jury to deliberate further.

The court advised the parties on the record that "Article 37.07 of the Texas Code of Criminal Procedure plainly provides under Section 2 if the jury fails to agree on the issue of guilt or innocence, the judge shall declare a mistrial and discharge the jury and jeopardy does not attach in the case[.]" Neither party objected to the

[2] *See generally Allen v. United States*, 164 U.S. 492 (1896) (permitting a supplemental jury instruction that reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that a second jury would find the issue any easier to resolve); *see also Barnett v. State*, 189 S.W.3d 272, 277 (Tex. Crim. App. 2006).

mistrial. We conclude based on the record before us that the trial court did not abuse its discretion in granting a mistrial because the trial court could have reasonably concluded that manifest necessity existed for the mistrial. *See Oregon*, 456 U.S. at 672 ("the most common form of manifest necessity [is] a mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict[]"); *Washington*, 434 U.S. at 509 (a trial judge may declare a mistrial and discharge a genuinely deadlocked jury and double jeopardy does not bar a second trial); *Munguia v. State*, 603 S.W.2d 876, 878 (Tex. Crim. App. 1980) (trial court did not abuse its discretion in declaring a mistrial after the jury communicated there was no chance it could reach a unanimous verdict); *Patterson v. State*, 598 S.W.2d 265, 267-68 (Tex. Crim. App. 1980) (trial court did not err in declaring a mistrial after jury delivered two successive notes indicating it was deadlocked from beginning of deliberations).[3] Additionally, as we previously discussed, Appellant consented to the mistrial. We overrule Appellant's first three issues.

[3] *See also Katzenberger v. State*, 439 S.W. 566, 570-71 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (no abuse of discretion in declaring a mistrial where jury remained deadlocked after an *Allen* charge); *Ex parte Perusquia*, 336 S.W.3d 270, 276-77 (Tex. App.—San Antonio 2010, pet. ref'd) (trial court did not abuse its discretion in finding manifest necessity for a mistrial after jury sent multiple notes saying it could not reach a unanimous decision after *Allen* charge was given; retrial not barred by double jeopardy).

Sufficiency of the Evidence

Appellant's fourth, fifth, and sixth issues challenge the legal and factual sufficiency of the evidence to support the jury's verdict. Appellant argues that a "substantial part of the State's case had to be concocted[.]" In support of his argument, Appellant notes that Detective Turner and the SANE testified that there was no physical evidence of sexual abuse. Appellant also argues that Favorite's wife (who was D.W.'s mother) had initiated a divorce proceeding, which Appellant suggests "frequently results in step-children originating very unusual [f]antasies about their step-parents[]" such as the allegations against Favorite in this case. According to Appellant, the evidence in this case shows "outside influences, or rehearsal by an adult, or concoction, or rationalization to make events sound more foreboding than they really ever were[.]"

> A person commits the offense of continuous sexual abuse of a child if:
>
> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.

Tex. Penal Code Ann. § 21.02(b). Section 21.02 of the Penal Code defines "act of sexual abuse" as including, among other things, an act that constitutes the offense of

aggravated sexual assault. *Id.* § 21.02(c)(4). A person commits the offense of aggravated sexual assault of a child if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means and the victim is younger than fourteen years of age. *Id.* § 22.021(a)(1)(B)(i), (a)(2)(B) (West Supp. 2016). The State need not prove the exact dates of the abuse, only that "there were two or more acts of sexual abuse that occurred during a period that was thirty or more days in duration." *Brown v. State*, 381 S.W.3d 565, 574 (Tex. App.—Eastland 2012, no pet.); *Lane v. State*, 357 S.W.3d 770, 773-74 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

We now apply only one standard "to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency." *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under a legal sufficiency standard, we review all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *See Temple*, 390 S.W.3d at 360 (citing *Jackson*, 443 U.S. at 318-319). "The jury is the sole judge of credibility and weight to be attached to the

testimony of witnesses." *Id.* We give full deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We may not substitute our judgment for that of the fact-finder concerning the weight and credibility of the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *See Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). A child victim's testimony is sufficient to support a conviction for sexual assault. Tex. Code Crim. Proc. Ann. art. 38.07(b)(1) (West Supp. 2016); *Carr v. State*, 477 S.W.3d 335, 339 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

D.W., the complaining witness, testified that Favorite touched her genitals and anus on several occasions between September and December of 2014. D.W. also testified that she told her mother about the abuse after Favorite had moved out of the household. D.F., D.W.'s mother, testified that D.W. told D.F. that Favorite touched D.W.'s "private parts[.]" We conclude on the record before us that a rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *See Temple*, 390 S.W.3d at 360.

As for Appellant's argument that the lack of evidence of physical injury suggests that the evidence is insufficient to support his conviction, "[t]he lack of physical or forensic evidence is a factor for the jury to consider in weighing the evidence." *See Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). There is no requirement that physical, medical, or other evidence be proffered to corroborate the victim's testimony. *See Sandoval v. State*, 52 S.W.3d 851, 854-55 & n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (medical evidence and corroborating testimony were not necessary to support conviction for aggravated sexual assault of a child). The jury heard testimony from the SANE that she conducted the exam on D.W. about two months after the last alleged sexual assault by Favorite and that, given the nature of the allegations in this case, it is not unusual that there would be an absence of physical injuries.

After a thorough review of the record and giving proper deference to the jury's verdict, based on the evidence and reasonable inferences therefrom, we conclude that the jury was rationally justified in finding the defendant guilty beyond a reasonable doubt of continuous sexual abuse of a child. *Temple*, 390 S.W.3d at 363; *Brooks*, 323 S.W.3d at 912; *Hooper*, 214 S.W.3d at 13. We overrule Appellant's fourth, fifth, and sixth issues.

Extraneous Offense Evidence

In his final five issues, Appellant complains about the trial court's admission of certain extraneous offense evidence. Appellant argues that the trial court erred by describing Favorite's conduct, as testified to by D.F., in its limiting instruction as "indecent exposure," the trial court erred in admitting extraneous offense evidence because the State failed to give thirty days' notice as required under article 38.37 of the Texas Code of Criminal Procedure, the trial court erred in admitting extraneous offense evidence that was more prejudicial than probative, the trial court erred in admitting extraneous offense evidence because there was no valid basis for using it in rebuttal, and the trial court erred in giving a limiting instruction sua sponte, "which constituted a comment on the weight of the evidence."

Testimony of the February Incident

Appellant's complaints regarding the extraneous offense evidence pertain to certain testimony by D.F. More specifically, D.F. testified that in February 2015, D.F. found Favorite in her daughter's room with his pants down and with a partial erection ("the February incident"). Prior to her testimony, Favorite made an objection and argued that D.F.'s testimony was not admissible under Rule 404 because it concerned a prior bad act and it should be inadmissible because identity, motive, or plan were not at issue. Favorite also argued it was prejudicial under Rule

403. The court overruled the objections and allowed the testimony, explaining as follows:

> THE COURT: . . . Article 38.37, evidence of extraneous offenses or acts. "Notwithstanding," this states, "Rules 404 and 405 of the Texas Rules of Evidence and subject to section 2(a) of this article, evidence that the defendant has committed a sexual offense described herein may be admitted in the trial of an alleged offense described also in here for any bearing the evidence may have on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant."
>
> . . . .
>
> . . . Notwithstanding the Rules of Evidence, 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 bearing and relevant matters, including the state of the mind of the defendant and the child, the previous and subsequent relationship between the defendant and the child. And this refers to the admission of extraneous offenses or acts committed against a child under 17 years of age included under Chapter 21.
>
> So, we are in a trial that this statute provides for under Section 2, continuous sexual abuse of young children or child. So, we're in that case. They are asking to admit evidence of a crime under Chapter 21. Chapter 21 of the Penal Code includes indecent exposure, Section 21.08. A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his acts. This is a crime. This is what the substance of the testimony, I understand, the State wants to admit it for. It is clearly relevant and admissible in spite of your 404(b) argument since that is irrelevant under these circumstances. All right.
>
> [Defense attorney]: Your Honor, we'd also like to object under 403 that this is prejudicial to the defendant.

> THE COURT: The Court will find that the probativeness is not substantially outweighed by prejudice under this particular set of facts. Since the case law is clear and consistent in sexual abuse of children, this type of evidence has its relevance so long as it is reliable for many factors surrounding state of mind, identity, past and subsequent relationship between the parties, all going into the calculus of trying to ascertain the truth in a case such as this for the factfinder.

Standard of Review

We review a trial court's ruling on the admissibility of extraneous offense evidence for an abuse of discretion. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). A trial court does not abuse its discretion if its decision falls within the "zone of reasonable disagreement." *Id*. "If the trial court's decision on the admission of evidence is supported by the record, there is no abuse of discretion, and the trial court will not be reversed." *Marsh v. State*, 343 S.W.3d 475, 478 (Tex. App.—Texarkana 2011, pet. ref'd). Reviewing courts should not substitute their judgment for that of the trial court. *Id.* Also, "a court of appeals 'may not *reverse* a judgment of conviction without first addressing any issue of error preservation.'" *Meadoux v. State*, 325 S.W.3d 189, 193 n.5 (Tex. Crim. App. 2010) (emphasis in original).

"The erroneous admission of extraneous-offense evidence constitutes non-constitutional error[.]" *Pittman v. State*, 321 S.W.3d 565, 572 (Tex. App.—Houston [14th Dist.] 2010, no pet.). An appellate court may not reverse for non-constitutional error if, after examining the record as a whole, the appellate court has "fair assurance

that the error did not have a substantial *and* injurious effect or influence in determining the jury's verdict." *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004) (citing *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998) (emphasis in original); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)); *see also* Tex. R. App. P. 44.2(b). Therefore, even if evidence was admitted by a trial court in error, substantial rights are not affected by the erroneous admission of evidence "'if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'" *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) (quoting *Johnson*, 967 S.W.2d at 417). If the trial court's evidentiary ruling is correct under any applicable theory of law, it will not be disturbed. *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

Admissibility of Extraneous Offense Evidence

Generally, an accused must be tried only for the charged offense and may not be tried for a collateral crime or for being a criminal generally. *Harris v. State*, 475 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *see also* 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.").

Article 38.37, section 1 of the Code of Criminal Procedure, which applies to the prosecution of a defendant for offenses including continuous sexual abuse of a child, provides:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, 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:
>
> (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. Ann. art. 38.37, § 1(b) (West Supp. 2016). Article 38.37, section 2, also applicable to a trial for continuous sexual abuse of a child, provides:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) [including an offense of aggravated sexual assault of a child] may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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); *see also Belcher v. State*, 474 S.W.3d 840, 844 (Tex. App.—Tyler 2015, no pet.) (noting that section 2(b) allows admission of evidence that defendant has committed certain sexual offenses against nonvictims of charged offense). Section 2-a provides as follows:

> Before evidence described by section 2 may be introduced, the trial judge must:
>
> (1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and
>
> (2) conduct a hearing out of the presence of the jury for that purpose.

Tex. Code Crim. Proc. Ann. art. 38.37, § 2-a. The State must give the defendant notice of its intent to introduce article 38.37 evidence in its case in chief not later than the thirtieth day before trial. *Id.* § 3.

Notice of Intent to Use Extraneous Offense Evidence

According to Appellant, the State failed to provide the required thirty-day notice of its intent to use extraneous offense evidence as required by article 38.37. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 3. Appellant failed to make this objection at trial. "To properly preserve an issue concerning the admission of evidence for appeal, 'a party's objection must inform the trial court why or on what basis the otherwise admissible evidence should be excluded.'" *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009) (quoting *Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993) (Campbell, J. concurring)). This objection was not preserved. *See* Tex. R. App. P. 33.1(a)(1)(A); *Belcher*, 474 S.W.3d at 850

(appellant's failure to object at trial to State's lack of notice under article 38.37, section 3, waived the issue for appeal).[4] We overrule Appellant's eighth issue.

Complaints Relating to the February Incident

Appellant's seventh issue argues that the trial court erred by describing Favorite's conduct during the February incident as "indecent exposure" because the testimony was not clear regarding whether Favorite actually exposed himself and "there is also the possibility that no extraneous bad act or offense occurred." Appellant suggests that D.F. "may have jumped to conclusions" about the February incident and that other plausible explanations of the event were possible. Appellant's tenth issue argues that the trial court erred in admitting extraneous offense evidence because "there was not a valid basis for using it in rebuttal." According to Appellant, "cases construing Rule 404(b), T.R.E. should be used to determine the admissibility of extraneous bad acts or offenses under Article 38.37."

Prior to D.F.'s testimony, the trial court conducted a hearing outside the jury's presence to determine whether D.F.'s testimony satisfied the requirements of article

[4] *See also Cathcart v. State*, No. 05-15-01176-CR, 2017 Tex. App. LEXIS 35, at *13 (Tex. App.—Dallas Jan. 4, 2017, pet. ref'd) (mem. op., not designated for publication) (complaint that State failed to give notice under article 38.37 is forfeited if not raised in the trial court); *Campbell v. State*, No. 02-15-00018-CR, 2015 Tex. App. LEXIS 12592, at *5 n.3 (Tex. App.–Fort Worth Dec. 10, 2015, no pet.) (mem. op., not designated for publication) (failure to assert an objection at trial implicating article 38.37, section 3's notice requirement waived the issue for appellate review).

38.37. D.F. testified that she observed Favorite standing in D.W.'s room where D.W. was sleeping, Favorite's pajama pants were pulled down, and Favorite had an erection. D.F. further testified that the February incident caused her to be concerned and upset.

Favorite was charged with the continuous sexual abuse of a child under section 21.02 of the Penal Code, an offense to which article 38.37 applies. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 1(a)(1)(A); Tex. Penal Code Ann. § 21.02. Therefore, under section 1(b) of article 38.37, evidence of other crimes or wrongs committed by the defendant against the alleged child victim "*shall* be admitted for its bearing on relevant matters[.]" *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 1(b) (emphasis added). We conclude that the trial court did not abuse its discretion in allowing D.F.'s testimony pertaining to the February incident because the testimony met the requirements under article 38.37, section 1(b) of the Texas Code of Criminal Procedure.

Furthermore, section 2 of article 38.37 also applies. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 2(a)(1)(B) (section 2 applies where the defendant is tried for continuous sexual abuse of a child under section 21.02 of the Penal Code). Therefore, evidence that the defendant committed a separate offense included in Chapter 21 of the Penal Code may be admitted "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." *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 1(a)(1)(A), § 2(b); Tex. Penal Code Ann. § 21.08 (codifying the offense of indecent exposure).[5]

The trial court conducted a hearing outside the presence of the jury and did not abuse its discretion in overruling the objection. The complained-of evidence was admissible under section 1(b) and section 2. The evidence was relevant to show Favorite's state of mind and the relationship between Favorite and the alleged victim. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 1(b). The defense offered no witnesses nor any other evidence concerning the February incident, and the jury was instructed that evidence of indecent exposure could be "admitted and considered by

[5] The Court of Criminal Appeals has held that the offense of indecent exposure is a lesser included offense of indecency with a child by exposure. *See Ex parte Amador*, 326 S.W.3d 202, 208 (Tex. Crim. App. 2010); *see also* Tex. Penal Code Ann. § 21.11(a)(2) (West 2011). For the offense of indecency with a child by exposure, the child victim need not be aware of the exposure. *See Amador*, 326 S.W.3d at 207, 208 (explaining that the offense of indecency with a child by exposure . . . "holds the defendant culpable even if the person (the child) towards whom the exposure is directed is not 'offended or alarmed' by the defendant's act[]" and "[i]n the case of indecency with a child, [] it is the society that is 'offended or alarmed' by the fact that its children should be subjected to such exposure[]"); *Uribe v. State*, 7 S.W.3d 294, 297 (Tex. App.—Austin 1999, pet. ref'd) (upholding a conviction for indecency with a child by exposure even though the child did not see the defendant's genitals)); *Breckenridge v. State*, 40 S.W.3d 118, 128 (Tex. App.—San Antonio 2000, pet. ref'd) ("[S]ection 21.11(a) does not require proof that the victim actually saw the accused's genitals.").

the jury, if proven beyond a reasonable doubt[].” We presume the jury followed the court’s instruction. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).

Extraneous offense evidence admissible under article 38.37 need not meet the requirements of Texas Rule of Evidence 404. *See Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006) (“Article 38.37 lists the specific offenses for which evidence of extraneous offenses or acts are admissible without having to meet the requirements of Rule 404”); *Bezerra v. State*, 485 S.W.3d 133, 141 (Tex. App.—Amarillo 2016, pet. ref’d) (explaining that article 38.37 removes the Rule 404 bar to the admission of propensity evidence). We find no error by the trial court in admitting D.F.’s testimony concerning the February incident, and we reject Appellant’s argument that D.F.’s testimony concerning the February incident was inadmissible because there was no basis for its use as rebuttal evidence. We overrule Appellant’s seventh and tenth issues on appeal.

Complaint Pertaining to Rule 403

In his ninth issue, Appellant contends that the extraneous offense evidence was inadmissible under Rule 403. When extraneous offense evidence is relevant under article 38.37, a trial court must still conduct a Rule 403 balancing test upon proper objection or request. *See Belcher*, 474 S.W.3d at 847; *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref’d). Evidence that is admissible may

nonetheless be inadmissible under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, or needless presentation of cumulative evidence. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007); *see also* Tex. R. Evid. 403. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will generally be more probative than prejudicial. *See Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). Rule 403 also requires that relevant evidence be excluded only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001).

Unfair prejudice does not mean simply that the evidence injures the opponent's case. *Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999). "Rather[,] it refers to 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Id.* (quoting *Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993)). The Rule 403 balancing factors include, but are not limited to, the following: (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. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield*, 189

S.W.3d at 787. The trial court is presumed to have engaged in the required balancing test under Rule 403 once a party objects on the ground of Rule 403 and the trial court rules on the objection, unless the record indicates otherwise. *See Williams v. State*, 958 S.W.2d 186, 195-96 (Tex. Crim. App. 1997). The party opposing admission of the evidence bears the burden to demonstrate that the danger of unfair prejudice substantially outweighs the probative value. *See Kappel v. State*, 402 S.W.3d 490, 494 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Appellant's brief does not include an analysis of the Rule 403 balancing factors. *See* Tex. R. App. P. 38.1(i). The trial court expressly concluded on the record that "the probative[] [value] is not substantially outweighed by prejudice under this particular set of facts." We presume that the trial court performed a Rule 403 balancing test and determined the evidence was admissible under Rule 403. *See Distefano v. State*, No. 14-14-00375-CR, 2016 Tex. App. LEXIS 1289, at *5 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, pet. ref'd) (citing *Belcher*, 474 S.W.3d at 847-48; *Hitt*, 53 S.W.3d at 706). Appellant has not overcome the presumption that the trial court conducted a balancing test, and we overrule Appellant's ninth issue on appeal.

In his eleventh and final issue, Appellant argues that the trial court's "sua sponte limiting instruction" was an improper comment on the weight of the evidence. We read Appellant's brief as a complaint about the limiting instruction that the trial court included pertaining to the offense of indecent exposure. Appellant argues it assumed the truth of a controverted fact and was "egregiously harmful" because it was not initiated or requested by the State or the defense.[6]

The jury charge included the following instruction:

> Evidence of another crime, wrong or act committed by the defendant against the child who is the victim of the alleged offense has been alleged in the testimony, namely, Indecent Exposure, and can be admitted and considered by the jury, if proven beyond a reasonable doubt, 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, and for no other purposes.
>
> A person commits the crime of Indecent Exposure if (s)he exposes any part of his/her genitals with intent to arouse or gratify the sexual desire of any person; and (s)he is reckless about whether another is present who will be offended or alarmed.

[6] We also note that, while not presenting it as a distinct issue on appeal, Appellant argues that the limiting instruction the trial court gave was not adequate under *Huizar v. State*, 12 S.W.3d 479 (Tex. Crim. App. 2000). *Huizar* pertained to section 3(a) of article 37.07, and it does not apply to Appellant's issues in this matter. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) (West Supp. 2016) (use of evidence of prior criminal record in punishment phase of trial); *see generally Huizar*, 12 S.W.3d 479. Appellant's evidentiary issues on appeal pertain to the guilt-innocence phase of trial, not the punishment phase of trial. In addition, Appellant did not make an objection based on *Huizar* at trial, and therefore, he did not preserve error on this point. *See* Tex. R. App. P. 33.1.

A trial court may include a limiting instruction regarding an extraneous offense when the instruction has been raised by the evidence. *See Esparza v. State*, No. 14-15-00897-CR, 2016 Tex. App. LEXIS 13605, at *8 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, no pet.) (trial courts are not prohibited from including an extraneous offense instruction raised by the evidence even if the defendant objects); *cf. Beam*, 447 S.W.3d at 406-07; *Irielle v. State*, 441 S.W.3d 868, 880 (Tex. App.—Houston [14th Dist.] 2014, no pet.). While "there is always a potential that the jury may be unfairly prejudiced by the defendant's character conformity[,]" "this impermissible inference can be minimized through a limiting instruction." *Beam*, 447 S.W.3d at 404. "We generally presume a jury followed a trial court's instruction regarding consideration of evidence." *Sifuentes v. State*, 494 S.W.3d 806, 817 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

Appellant did not make this objection at trial. Therefore, he did not preserve error. *See Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013) ("Ordinarily, a complaint regarding an improper judicial comment must be preserved at trial."). As Appellant failed to preserve error, we may not consider this ground for reversal unless the error is fundamental error such that egregious harm resulted therefrom. *See* Tex. R. App. P. 33.1(a); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) ("[I]f no proper objection was made at trial and the accused must claim

that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial' – in short 'egregious harm.'"); *Lyle v. State*, 418 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2013. no pet.). To determine whether egregious harm resulted, we examine "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171. Appellant must have suffered actual, rather than theoretical, harm. *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986). Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. *See Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). The trial court gave the jury a limiting instruction consistent with the Rules of Evidence and article 38.37. Considering the record as a whole, we find no egregious harm. We overrule Appellant's eleventh issue.

Modification of Judgment

On review of the record, we observed that the written judgment of conviction in this case contains a non-reversible clerical error. The judgment of conviction states that the "Statute for Offense" is "22.02 PC[.]" However, the applicable

statutory provision for the offense charged is "21.02 PC[.]" We are authorized by the Texas Rules of Appellate Procedure to render the judgment the trial court should have rendered. *See* Tex. R. App. P. 43.2, 43.3; *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993) (holding that the court of appeals has the power to modify judgments to correct clerical errors). Accordingly, we modify the judgment to reflect that the "Statute for Offense" is "21.02 PC[.]"

Having overruled all of Appellant's issues, we affirm the judgment of the trial court as modified.

AFFIRMED AS MODIFIED.

_____

LEANNE JOHNSON
Justice

Submitted on February 1, 2017
Opinion Delivered June 21, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.