COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00422-CR

JOHN FRANCES MCNAMARA — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 271ST DISTRICT COURT OF WISE COUNTY
TRIAL COURT NO. CR18298

MEMORANDUM OPINION[1]

A jury convicted Appellant John Frances McNamara of indecency by contact with a child under seventeen years of age and assessed his punishment at ten years' confinement and a $10,000 fine but recommended that he be placed on community supervision. The trial court sentenced Appellant accordingly, suspending imposition of the confinement portion of the sentence

[1]*See* Tex. R. App. P. 47.4.

and placing him on ten years' community supervision. In four issues, Appellant challenges the constitutionality of article 38.37, section 2(b) of the code of criminal procedure and the trial court's admission of extraneous-offense evidence under that statute. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 2(b) (West 2018). Because Appellant did not preserve his complaint that the statute is unconstitutional on its face or prove that the statute as applied violated his rights to due process and because the trial court did not abuse its discretion by admitting the extraneous-offense evidence over Appellant's rule 403 objection, we affirm.

I. BACKGROUND FACTS

A. J.W. Made an Outcry of Childhood Sexual Abuse by Appellant, Her Former Stepfather.

In 1999, Appellant married a woman (Mother) with two young daughters, H.W. and J.W. (collectively, the girls), and a baby boy, and the couple soon had a son together. Appellant and Mother divorced several years later. In 2014, J.W., then almost nineteen years old, reported to the girls' father (Father) and stepmother (Stepmother) that Appellant had sexually abused her when she was young.

B. Father and H.W. Reported to the Police That Appellant Had Sexually Abused Her.

Father called H.W., the complainant in this case, and asked her about J.W.'s statements and whether anything inappropriate had ever happened between H.W. and Appellant. H.W. answered affirmatively, so Father then

reported the allegations to the City of Bridgeport Police Department in Wise County, Texas, because "[e]verything that had taken place had taken place within the Bridgeport area." H.W. spoke to the police later. A grand jury indicted Appellant on one count of aggravated sexual assault by digital penetration of H.W., a child under fourteen years of age, and one count of indecency with H.W., a child under seventeen years of age, by genital contact. The indictment does not allege what Appellant used to touch H.W.'s genitals.

C. During the Guilt-Innocence Phase, the Trial Court Admitted Evidence About Appellant's Alleged Sexual Abuse of J.W. in the State's Case in Chief.

On May 18, 2016, the State filed with the trial court notice of its intent to offer evidence of extraneous offenses and bad acts, including evidence that beginning in January 2000 and continuing through December 2006, Appellant had sexually abused the child J.W. by "touching her breasts, touching her genitals, penetrating her female sexual organ with his finger, contacting his penis to her female sexual organ, and penetrating her female sexual organ with his penis." At a pretrial hearing, Appellant moved to have J.W.'s testimony excluded. Appellant argued that article 38.37, section 2(b) of the code of criminal procedure is unconstitutional as applied. The trial court denied the motion.

D. Both Parties Offered Evidence.

Trial began on August 9, 2016. For the State, Father, H.W., J.W., City of Bridgeport Police Lieutenant Todd Low, a high school friend of H.W.'s, and one of H.W.'s high school coaches testified during the guilt-innocence phase. Mother

and Appellant testified on his behalf. Both H.W., who was twenty-three years old at trial, and J.W., who was twenty years old at trial, testified about separate acts of indecency by contact, with Appellant touching the respective child's genitals with his hand, that had allegedly happened during their childhood. Additionally, J.W. testified about alleged penile-vaginal contact, and H.W. testified about one act of alleged digital penetration.

1. H.W. Testified that the Sexual Abuse Occurred During an Approximate Three-Year Period and in Multiple Wise County Residences.

H.W. testified,

- When she was around seven or eight years old, she was in the living room of the family's Vine Street house, pretending to nap, when she "felt something touch [her] leg." She "peeked back" and saw Appellant "with a flashlight in his hands peeking up [her] shorts";
- Appellant's "hand . . . touched [her] leg because he was moving [her] underwear down";
- "He reached up the shorts to move them down" with his hand;
- He touched her when he moved her underwear;
- She threw up afterwards;
- H.W. was in second and third grades when she lived at Court Circle;
- When the family lived at "the house on Court Circle," H.W. woke up to Appellant "standing over [her] with a flashlight, lifting up [her] shorts";
- The sheet was pulled back and "all [that she] saw pulled up were [her] shorts and [her] underwear";
- Mother told H.W. that she had dreamed it, "[s]o the next time that it happened," H.W. pinched herself and told Mother again, to no avail;

- “It” also happened a third time at Court Circle;
- H.W. lived in Rhome when she was in the fourth and fifth grades;
- In the Rhome house, she and J.W. would bathe in the jacuzzi in the master bathroom and then walk back to their bedroom in towels;
- Appellant “would just pretend like he wanted to wrestle, and he’d pick [the girls] up and start wrestling with [them], start tickling [them]. And next thing you know, [H.W.’s] towel had been knocked off,” which made her “uncomfortable”;
- “That happened about four or five times”;
- One time, H.W. “was walking from the bathroom and [Appellant] started wrestling with [her] and he picked [her] up over his head. And whenever he picked [her] up, he sat his hand in between [her] crotch, and that’s whenever his finger entered in [her vagina] and it hurt really, really bad”;
- H.W. was wearing only a towel on that occasion;
- When Appellant picked her up and his hand went between her legs and entered her vagina, it was to arouse or satisfy a sexual desire;
- No touching occurred after the family left Rhome for the house on Lanice Street in Bridgeport, but Appellant continued to go into H.W.’s bedroom all the time, making her feel “very unsafe and very uncomfortable”;
- When H.W. was in the seventh grade, she told a friend and a school counselor “what had happened”;
- The counselor told Mother;
- Mother asked Appellant to leave the house but told H.W. that if she told the police “about this,” “everybody in town” and “everybody in [her] school would know what had happened to [her], and they would all look at her weird”;
- Mother and Appellant reconciled a month later;
- “[M]other had known since [H.W.] was in the second grade what had been happening to [H.W.] and she never did anything about it”;

- When H.W. was in the tenth grade and the family lived in Alford, Appellant left the home permanently a couple of weeks after H.W. caught him either looking through the bathroom window as she was about to undress to shower one night or "staring at [her] naked through [her] bathroom window";

- In the summer of 2014, when she was in Colorado, Father called to ask her "if anything ever happened with [Appellant], if he ever touched [the girls] or anything";

- H.W. told Father "yes, that things had happened" but that she thought that he already knew because Mother had already known;

- Before Father's phone call, H.W. had never discussed with J.W. any "sexual interaction" she had with Appellant;

- H.W. eventually gave a statement to Sergeant Upton of the Bridgeport Police Department; and

- Mother told H.W. that Mother would lose her monthly child support for H.W.'s little brother if Appellant went to prison.

2. Appellant Attacked H.W.'s Credibility on Cross-Examination, and the State Offered Supporting Testimony.

On Appellant's cross-examination of H.W., Appellant emphasized the time that had elapsed between Father's notifying the police and H.W.'s finally talking to them and between the alleged events and the police report. Appellant also questioned her memory and truthfulness regarding the multiple occurrences of indecency and set up an innocent explanation for the conduct supporting her allegations of aggravated sexual assault. Alternatively, he suggested that H.W. was lying because she was angry at Mother.

The State next called H.W.'s high school friend as a witness. The friend testified that H.W. had stayed with the friend's family for two weeks sometime

during their sophomore year because H.W. had not felt safe at home after seeing Appellant looking through the bathroom window at her.

3. J.W. Testified that She Left Home at Eleven Years of Age to Escape Appellant's Sexual Abuse That Began When She Was Four or Five Years Old and That Occurred in Several Wise County Residences.

J.W. testified,

- When she was eleven years old, she moved from Texas to North Carolina to live with Father to escape "the abuse that was going on at home";
- Appellant was the perpetrator;
- When she was around four or five years old and the family lived on Vine Street, Appellant "came into the room that [the girls] shared, and he would remove [J.W.'s] underwear";
- Appellant "would touch [J.W.], and then he would lift up [her] shirt . . . a little bit, and then he would remove [her] underwear or pull them down" and touch her genitalia at some point with his hand, using a poking motion;
- "It was really awkward and uncomfortable";
- J.W. did not say anything; she "just clenched [her] eyes shut";
- The family moved to a house on Court Circle before J.W. began kindergarten;
- The sexual abuse occurred again: Appellant came into the girls' room at night, "again removed [J.W.'s] underwear," and touched her "[i]n [her] genitals";
- Appellant sexually abused her three or four times in the Rhome house; and "there was one instance that" Appellant touched her genitals with his penis;
- The family moved to a house on Lanice Street in Bridgeport from Rhome, and J.W. attended the intermediate school;

- One night, she fell off her bunk bed. Appellant came in, removed her underwear, "and proceeded to look and touch [her] again";

- The family moved to Alford after about a year and a half;

- One night in the Alford house, when she was asleep with her legs crossed "and as close to [her] as [she] could" get them, "Appellant pried [her] legs open so he could take [her] underwear off";

- J.W. pretended to be asleep.

- J.W. first told Mother after Appellant first touched her at the Court Circle house and told her at least five times over the course of the sexual abuse; Mother responded that J.W. "didn't know what [she] was talking about and that that couldn't be happening";

- Mother never helped J.W. with Appellant except by finally allowing her to go live with Father;

- When J.W. was nineteen years old, she told Stepmother that she hated Appellant, Stepmother asked her questions, "and that's when everything came out";

- Stepmother told Father, who then talked to the girls separately;

- J.W. gave a videotaped statement at her local child advocacy center three days later.

4. J.W. Confirmed Some of H.W.'s Testimony.

J.W. had no eyewitness account of the abuse suffered by H.W. But J.W. did testify:

- When J.W. was in seventh grade, either H.W. told her or J.W. overheard a conversation about the "peeping incident" that occurred when H.W. was in tenth grade and that led to Appellant's moving out of the home; and

- H.W. had also made a comment in 2010 when the girls were arguing about an unrelated matter at Father's house: "[A]t least you weren't touched in your sleep[!]" or "At least [Appellant] didn't touch you at night[!]", "slammed the door in [J.W.'s] face[,] and then went about her business."

5. The Police Interviewed Appellant After Speaking to Father and the Girls.

Lieutenant Todd Low of the Bridgeport Police Department testified that Appellant admitted:

- That he would wrestle with H.W. when she was wearing only a towel but that she wanted to wrestle;
- That H.W. had told her junior high counselor "about him touching her," but Appellant told the officer that he had touched H.W.'s stomach, "she woke up, and it scared her. She had thought something happened"; and
- That he had peered through H.W.'s bathroom window to prevent her from sneaking out when she was in high school and had been forced to move out because of his actions.

Lieutenant Low testified that based on his interview with Appellant and the girls' statements, he believed that Appellant had committed an offense, but the lieutenant admitted that he had asked Appellant only about touching the girls, not penetration.

6. Mother and Appellant Testified for the Defense.

Mother testified:

- She did not know about the girls' allegations that Appellant had sexually assaulted them until Appellant told her in 2014 that the girls had told the police;
- J.W. never told her that she moved in with Father in fifth grade because Appellant had been sexually abusing her;
- Mother did not know about H.W.'s allegation of digital penetration until the Sunday before trial began;
- The girls' actions when they were children never indicated that they had suffered sexual abuse;

- When H.W. was in the seventh grade, she told her school counselor that Appellant "had been in her room and that she was startled and woke up and . . . thought she heard panties snap";

- Mother understood that H.W. was then "accusing [Appellant] of having snapped her panties";

- Mother left the counselor with the impression that Appellant would no longer be around H.W. or her siblings but did not intend the counselor to believe that Appellant would never be back in the home;

- About a month after the meeting with the counselor, Mother, Appellant, and H.W. talked, and H.W. "indicate[d] that she had overreacted and that he had not done anything inappropriate";

- When H.W. was in the tenth grade, Appellant had immediately told Mother about the window-peering incident and that it involved the bedroom window;

- H.W. wrote Mother a note in June 2009, after the window-peering incident and before moving in with Father, in which she stated that she was a virgin and admitted that she had been sneaking out;

- H.W.'s stating that she was a virgin would not be consistent with her digital penetration allegations against Appellant, but on cross-examination, Mother admitted that in her view, digital penetration would not equate to the loss of virginity;

- Appellant was currently paying her $500 in child support for their son's support but would not be able to pay that from jail or prison; and

- She would not commit aggravated perjury for $500.

Mother admitted that (1) when she went to sleep before Appellant, she did not know if he first went to touch one or both girls before coming to bed and (2) she had seen him wrestle with the girls but did not know whether the girls sometimes wore a towel while wrestling. Mother denied ever discouraging H.W. from reporting that Appellant had allegedly sexually assaulted her.

Appellant testified,

- He carried a flashlight for work from 2001 to 2005;
- When he got home from work late, using his flashlight, he "would always go in and make sure the kids were tucked in" and "kiss[] every one of them on the forehead";
- He did not use the flashlight to look or try to look up either girl's shorts;
- He wrestled with all the children;
- The girls did shower and bathe in the master bathroom in Rhome;
- H.W. would cross the living room wearing a towel after her bath;
- She was nine or ten years old at the time;
- "[O]n one occasion, . . . [Appellant] was on the bed wrestling with [the] boys, and [H.W.] jumped in the pile with her towel on, and . . . commenced wrestling with [them]";
- Appellant told Lieutenant Low that once, H.W. jumped on his back while he was wrestling with the other children, her towel came off, and he told her to go get dressed;
- One night, H.W. was uncovered when Appellant kissed her good night, so he covered her up, and "apparently she woke up";
- The next afternoon, Mother called to tell him "that [H.W.] had gone to the school counselor and said that [Appellant] apparently tried to look down her panties because she thought she heard panties snapping";
- He understood that H.W. "made a statement [to the school counselor] that she was startled awake to the sound of underwear snapping";
- "She believed . . . that the panty snapping was a product of [Appellant] trying to look down her underwear";
- He believed the meeting of Mother, H.W., and himself a month later regarding whether he had touched H.W. was "necessary";

- When H.W. was in the tenth grade, he stood on top of the central air conditioning unit one night and looked through her bedroom window to see what she was doing up past bedtime, but she opened the bathroom window, which was three and a half to four feet away, and caught him;
- She was fully dressed at the time; and
- He and Mother had an amicable divorce.

7. The State Called a Rebuttal Witness Regarding H.W.'s Honesty.

The State called as a rebuttal witness one of H.W.'s high school coaches, who testified that H.W. had a character for truthfulness.

E. The Jury Delivered a Mixed Verdict.

The jury acquitted Appellant of aggravated sexual assault of H.W. via digital penetration but convicted him of committing indecency by contacting her genitals.

II. DISCUSSION

A. Appellant Forfeited His Facial Challenge to Article 38.37, Section 2(b).

In his first issue, Appellant contends that article 38.37, section 2(b) of the code of criminal procedure is unconstitutional on its face because it violates the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex.

Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 262–63 (Tex. Crim. App. 2013). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

Appellant voiced his complaint too late. Appellant complained on the first day of trial, August 9, 2016, that the statute as applied violated his rights to due process under the federal constitution and to due course of law under the state constitution and specifically denied that he was then raising a constitutional challenge to the statute on its face. He did not complain in the trial court that the statute was unconstitutional on its face until he filed his motion for new trial on September 8, 2016. An objection must be made as soon as the basis for the objection becomes apparent. Tex. R. Evid. 103(a)(1); *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016); *Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App. 2011); *see Lackey v. State*, 364 S.W.3d 837, 843–44 (Tex. Crim. App. 2012) (discussing policies underlying the timeliness requirement); *Saldano* v. State, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002) ("We have consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. This is true even though the error may concern a constitutional right of the defendant." (citations

omitted)). Reviewing Appellant's as-applied challenge and his motion for new trial, we conclude that the grounds for his challenge to article 38.37, section 2(b) on its face necessarily became apparent at the same time as the grounds for his as-applied challenge. We therefore hold that Appellant's complaint that the statute is unconstitutional on its face was not timely raised. *See* Tex. R. Evid. 103(a)(1).

Further, the record does not indicate that Appellant presented the motion for new trial to the trial court or otherwise apprised the trial court of his facial challenge to the statute. *See* Tex. R. App. P. 21.6; 33.1(a)(1); *compare Richardson v. State*, 328 S.W.3d 61, 72 (Tex. App.—Fort Worth 2010, pet. ref'd) (holding defendant failed to preserve his constitutional challenge to his sentence by failing to present a motion for new trial to the trial court), *with Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex. Crim. App. 2006) (noting that defendant "filed and presented to the trial court a motion for new trial" containing his constitutional argument).

We therefore hold that Appellant forfeited his constitutional challenge to article 38.37, section 2(b) on its face by raising his challenge too late and by failing to present it to the trial court for a ruling. In an abundance of caution, however, we note that if Appellant had preserved his complaint, we would have joined our sister courts in holding article 38.37, section 2(b) constitutional. *See, e.g.*, *Holcomb v. State*, No. 09-16-00198-CR, 2018 WL 651228, at *2 (Tex. App.—Beaumont Jan. 31, 2018, pet. filed) (mem. op., not designated for

publication); *Buxton v. State*, 526 S.W.3d 666, 685–89 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (op. on reh'g); *Mayes v. State*, No. 05-16-00490-CR, 2017 WL 2255588, at *18–19 (Tex. App.—Dallas May 23, 2017, pet. ref'd) (mem. op., not designated for publication); *Burke v. State*, No. 04-16-00220-CR, 2017 WL 1902064, at *2 (Tex. App.—San Antonio May 10, 2017, pet. ref'd) (mem. op., not designated for publication); *Carrillo v. State*, No. 08-14-00174-CR, 2016 WL 4447611, at *8–9 (Tex. App.—El Paso Aug. 24, 2016, no pet.) (not designated for publication); *Gates v. State*, No. 10-15-00078-CR, 2016 WL 936719, at *4 (Tex. App.—Waco Mar. 10, 2016, pet. ref'd) (mem. op., not designated for publication); *Bezerra v. State*, 485 S.W.3d 133, 139–40 (Tex. App.—Amarillo, pet. ref'd), *cert. denied*, 137 S. Ct. 495 (2016); *Robisheaux v. State*, 483 S.W.3d 205, 209–13 (Tex. App.—Austin 2016, pet. ref'd); *Harris v. State*, 475 S.W.3d 395, 398–403 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *Belcher v. State*, 474 S.W.3d 840, 843–47 (Tex. App.—Tyler 2015, no pet.). We overrule Appellant's first issue.

B. Appellant's As-Applied Challenge to Article 38.37, Section 2(b) Also Fails.

In his second issue, in a discussion of less than two pages, Appellant contends that as applied to him, article 38.37, section 2(b) of the code of criminal procedure violated his fundamental right to a fair trial as guaranteed by the Due Process Clause in the following ways:

- The trial court did not first find—and no evidence would support—a finding that trauma to H.W. compelled the admission of J.W.'s "extraneous propensity testimony";

- The similarity of the alleged extraneous conduct attributed to him by J.W. and the conduct he was charged with committing against H.W. clearly shows that his right to a fair trial was "unduly prejudiced"; and

- The limiting instruction that the trial court gave the jury before deliberations could not and did not alleviate the risk that the jury would find Appellant guilty based on J.W.'s extraneous-offense evidence.

Within the confines of his short discussion of this issue, Appellant neither develops his arguments nor directs this court to specific places in the record in support of his contentions. We could properly overrule this issue as inadequately briefed. *See* Tex. R. App. P. 38.1(i); *Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) (citing cases), *cert. denied*, 566 U.S. 1036 (2012); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App.) (stating that the court "has no obligation to construct and compose appellant's issues, facts, and arguments 'with appropriate citations to authorities and to the record'"), *cert. denied*, 555 U.S. 1050 (2008). Nevertheless, because our reading of Appellant's extensive brief persuades us that he has consolidated the discussion of his issues at least in part, in these unique circumstances and in the interest of justice, we shall reach the merits of his second issue.

An as-applied challenge to a statute's constitutionality contends that the statute, "although generally constitutional, operates unconstitutionally as to the claimant because of his particular circumstances. When reviewing the

constitutionality of a statute, we presume that the statute is valid and that the Legislature acted reasonably in enacting it." *Faust v. State,* 491 S.W.3d 733, 743–44 (Tex. Crim. App. 2015) (footnote omitted), *cert. denied*, 137 S. Ct. 620 (2017). Appellant has the burden of establishing that article 38.37, section 2(b) is unconstitutional as applied to him. *See State v. Rosseau,* 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). Article 38.37, section 2(b), which applies to this case because Appellant was on trial for aggravated sexual assault of a child and indecency with a child, *see* Tex. Code Crim. Proc. Ann. art. 38.37, § 2(a)(1)(C), (E) (West 2018), 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) . . . may be admitted in the trial of an alleged offense described by Subsection (a)(1) . . . 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). Other relevant sections of article 38.37 provide,

> Sec. 2-a. 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.
>
> Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

Id. art. 38.37, §§ 2-a, 3.

1. No Trauma Evidence or Finding Compelling the Admission of the Extraneous-Offense Evidence Was Required.

Appellant first complains that the trial court did not first find—and no evidence would support—a finding that trauma to H.W. compelled the admission of J.W.'s extraneous-offense evidence. Article 38.37 contains no such requirement. *See id.* art. 38.37. Appellant's initial argument is premised on his contention that the right to be tried without the use of propensity evidence is fundamental. As the Texas Court of Criminal Appeals reminds us,

> A statute that infringes upon a fundamental right or liberty interest is subject to strict scrutiny, which requires a reviewing court to assess whether the infringement is narrowly tailored to serve a compelling state interest. On the other hand, a statute that infringes upon a non-fundamental right must merely meet the standard of rationally advancing some legitimate governmental purpose.

Schlittler v. State, 488 S.W.3d 306, 313 (Tex. Crim. App. 2016) (citations and internal quotation marks omitted) (relying on *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268 (1997); *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 1449 (1993)), *cert. denied*, 137 S. Ct. 1336 (2017). In addressing due process concerns related to section one of article 38.37, this court has already held that "the right to a trial free of extraneous-offense evidence is [not] equivalent to the recognized fundamental right to a fair trial" and that we therefore apply the rational-basis test, not strict scrutiny. *Gregg v. State*, No. 02-16-00117-CR, 2016 WL 7010931, at *4 (Tex. App.—Fort Worth Dec. 1, 2016, pet. ref'd) (mem. op., not designated for publication). We therefore overrule Appellant's contention that evidence of trauma or a finding of trauma to

H.W. was necessary to trigger a "*compelling* governmental justification" for the admission of evidence of Appellant's alleged extraneous acts against J.W. [Emphasis added.]

2. The Similarity of the Extraneous-Offense Evidence and the Conduct Charged in the Indictment Did Not Unduly Prejudice Appellant's Right to a Fair Trial Because Procedural Safeguards Protected That Right.

Appellant next complains that the similarity of the alleged extraneous conduct attributed to him by J.W.'s testimony and the conduct he was charged with committing against H.W. as supported by her testimony clearly shows that his right to a fair trial was "unduly prejudiced." Due process requires the State to prove every element of the charged offense beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 2788 (1979). In *Gregg*, this court has already pointed out the tensions between the due process risks typically associated with the admission of extraneous-offense evidence—"it is inherently prejudicial, tends to confuse the issues in a case, and forces the accused to defend himself against collateral charges"—and the public policies involved in enforcing laws criminalizing sexual crimes against children. 2016 WL 7010931, at *5. We have also already explained the intrinsic and extrinsic due process safeguards associated with article 38.37:

> Article 38.37 does not lessen the presumption of innocence or reduce the State's burden of proof. Furthermore, the statute provides a number of procedural safeguards . . . to [e]nsure that Appellant's right to a fair trial is protected. The State must give the

> defendant notice of its intent to introduce evidence of an extraneous offense in its case-in-chief not later than the thirtieth day before the date of trial.
>
> [T]he statute [also] provides a procedural safeguard to ensure that . . . the dangers . . . [regarding the use of extraneous-offense evidence]—undue prejudice, confusion of the issues, and the forcing of an accused to defend himself against a collateral charge—are mitigated. . . . [T]he first two concerns about undue prejudice and confusion of the issues are tempered through the interplay of rule 403 in the trial court's determination of whether to permit or refuse admission of the evidence. As to concerns about a jury convicting on the collateral charge, before such evidence can be introduced, the trial judge must conduct a hearing outside of the presence of the jury to "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." Defense counsel is entitled to be fully heard on this matter and may challenge by cross-examination any witness's testimony at the hearing.

Id. at *5–6 (citations omitted).

Our sister courts have likewise pointed out these safeguards in examining the due process effects of section 2(b). *See, e.g.*, *Caston v. State*, No. 01-16-00260-CR, 2017 WL 3298320, at *7–8 (Tex. App.—Houston [1st Dist.] Aug. 3, 2017, no pet.); *Robisheaux*, 483 S.W.3d at 212–13, 217; *Harris*, 475 S.W.3d at 402. Further, they have explained that the State's burden at trial and the quantum of evidence required for conviction remain the same despite section 2(b). "[T]he State is still required to prove every element of the charged offense beyond a reasonable doubt." *Caston*, 2017 WL 3298320, at *8 (internal quotations omitted) (relying on *Harris*, 475 S.W.3d at 402). While section 2(b) "enlarges the scope of [admissible evidence], [it] leaves untouched the amount or degree of proof required for conviction." *Id.* (quoting *Baez v. State*, 486 S.W.3d

592, 600 (Tex. App.—San Antonio 2015, pet. ref'd)). We therefore reject Appellant's second contention.

3. The Trial Court Did Not Give a Limiting Instruction, and the Instruction on Burden of Proof It Did Give Did Not Reduce the State's Burden to Prove the Charged Offense.

In his third as-applied argument, Appellant contends that the "limiting instruction" the trial court gave did not and could not insulate him from a guilty verdict based on J.W.'s extraneous-offense evidence. The procedural safeguards described above also protect against a verdict based only on the extraneous-offense evidence. *See Caston*, 2017 WL 3298320, at *7–8; *Robisheaux*, 483 S.W.3d at 212–13, 217; *Harris*, 475 S.W.3d at 402; *accord Gregg*, 2016 WL 7010931, at *5. Appellant was indicted for conduct against H.W., and the jury charge properly focused the jury's attention on acts against H.W. and the State's burden of proof:

> [I]f you believe from the evidence beyond a reasonable doubt, that [Appellant] on or about the 15th day of January, 2003, in the County of Wise, and State of Texas, did then and there, with the intent to arouse or gratify [his] sexual desire[,] knowingly engage in sexual contact with [H.W.] by touching the genitals of [H.W.], a child younger than 17 years and not [Appellant's] spouse . . . , then you will find [him] guilty of the offense of Indecency with a Child Sexual Contact as charged in Count II of the indictment.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the Defendant not guilty of Count II of the indictment.

Further, the trial court did not give a limiting instruction; it gave an instruction on the burden of proof. *See Jackson v. State*, 992 S.W.2d 469, 477–78 (Tex. Crim. App. 1999). Too, all the text of the challenged instruction except

the first sentence had been requested by Appellant. The challenged instruction provides,

> [Appellant] is on trial solely on the charge or charges contained in the indictment. In reference to evidence, if any, that [he] has previously participated in transactions or acts, other than but similar to those which are charged in the indictment in this case, you are instructed that you cannot consider such other transactions or acts, if any, for any purpose, unless, during your deliberations, you find and believe beyond a reasonable doubt that [he] participated in such transactions or committed such acts, if any.

While Appellant did not waive his constitutional complaint by submitting the jury instruction, he cannot complain about the wording that he requested. *See Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999) ("[T]he law of invited error estops a party from making an appellate error of an action it induced."), *cert. denied*, 529 U.S. 1102 (2000). The first sentence emphasized that the jury was to focus on the charges alleged against H.W. when determining whether Appellant was guilty, and the remainder was in alignment with the statute. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 2(b).

Finally, we overruled Appellant's facial challenge to the statute in his first issue; for the same reasons, we do not address the revamped facial challenge discussed within this issue. We reject Appellant's third argument.

4. Appellant Has Not Established That Article 38.37, Section 2(b) Is Unconstitutional as Applied to Him.

Having rejected his three arguments, we overrule Appellant's second issue.

C. The Trial Court Did Not Abuse Its Discretion by Admitting J.W.'s Extraneous-Offense Evidence Over Appellant's Rule 403 Objection.

In his third issue, Appellant contends that the trial court abused its discretion by admitting J.W.'s extraneous-offense evidence over his rule 403 objection. We review a trial court's ruling under rule 403 for an abuse of discretion. *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex. Crim. App. 2013).

Rule 403 provides that "[t]he [trial] court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. A trial court may exclude extraneous-offense evidence that is relevant and admissible under article 38.37 if the opponent raises rule 403 and objects that the evidence's probative value is substantially outweighed by one or more of the dangers listed in rule 403. *See Wells v. State*, No. 02-16-00209-CR, 2017 WL 6759029, at *5 (Tex. App.—Fort Worth Dec. 28, 2017, pet. filed); *Belcher*, 474 S.W.3d at 847.

Appellant objected under rule 403, mentioned "the six-part balancing test," and cited *Gigliobianco v. State*, 210 S.W.3d 637 (Tex. Crim. App. 2006). We therefore treat his complaint as arguing all the listed dangers of rule 403. *See* Tex. R. Evid. 403. Our court has recently explained how we review the trial court's rule 403 ruling:

> Recognizing that the trial court was in a superior position to gauge the impact of the evidence, we measure the trial court's ruling

> against the rule 403 balancing criteria: (1) the inherent probative force of the evidence along with (2) the State's need for the evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) 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 (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. At the outset, however, we recognize that rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will generally be more probative than prejudicial. It is Appellant's burden to overcome this presumption and demonstrate that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or of misleading the jury [or by the other dangers listed in rule 403].

Wells, 2017 WL 6759029, at *5 (citations omitted).

1. The State Needed the Extraneous-Offense Evidence Because It Was Stronger in Detail and Volume Than H.W.'s.

Rule 403's "first key phrase, 'probative value,'" indicates "the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Gigliobianco*, 210 S.W.3d at 641. When the State has "other compelling or undisputed evidence to establish" what the extraneous-offense evidence "goes to prove," the value of the extraneous-offense evidence is much less than it otherwise would be on balance. *Id.* (internal quotation marks omitted) (relying on *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990) (op. on reh'g)).

Appellant argues that the State had other convincing evidence to establish his guilt of the offenses against H.W. because H.W. testified "and she capably

did so at length." As the State notes, however, no physical evidence was available to prove that Appellant sexually abused H.W. Further, while J.W. testified about a general statement H.W. had made regarding the sexual abuse several years after it occurred, no one witnessed the abuse, and Appellant's defense was that it did not happen and that H.W. was either lying or mistaken. Also, in only one instance in her testimony did H.W. use a concrete term to describe Appellant's sexual abuse—"he picked [her] up, he sat his hand in between [her] crotch, and that's whenever his finger entered in and it hurt really, really bad"—and clarifying that she was referring to "in [her] vagina." J.W.'s testimony, on the other hand, was consistently concrete over reports of multiple incidents:

- He would "touch her genitalia at some point with his hand, using a poking motion,"
- He "again removed [J.W.'s] underwear" and touched her "[i]n [her] genitals"; and
- "The same [thing] that happened in the other house [happened in Rhome], except there was one instance that he put his genitals on [hers]."

While H.W.'s testimony about the offenses against her, coupled with Father's, J.W.'s, and Lieutenant Low's testimony about them, was sufficient to support a conviction for indecency by contact, the State needed J.W.'s testimony to support jury inferences that the touching H.W. described vaguely for the most part was the same kind of illegal, sexual contact that J.W. described concretely. *See* Tex. Penal Code Ann. § 21.11 (West Supp. 2017). Also, the State needed other

evidence of child sexual assault to add support to the limited proof of the aggravated sexual assault count it alleged (but ultimately failed to prove), given the "wrestling" context and Appellant's defense. *See id.* § 22.021(a)(1)(B)(i), (iii) (West Supp. 2017).

2. J.W.'s Extraneous-Offense Evidence Was Not Unduly Prejudicial.

Rule 403's "second key phrase, 'unfair prejudice,' refers to a tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." *Gigliobianco*, 210 S.W.3d at 641. Apart from the penile-vaginal contact, all the contact J.W. described as having been inflicted on her by Appellant was the same sort of contact involved in the conduct that Appellant was charged with committing against H.W. The evidence of alleged penile-vaginal contact with J.W. may at first glance seem unduly prejudicial, given that Appellant's penis was not involved in the indicted counts involving H.W., but forcible digital penetration was involved in the allegations involving H.W., and the two types of aggravated sexual assault of a child—penile-vaginal contact and vaginal penetration by any means—are both first-degree offenses. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (iii), (e). We therefore conclude that J.W.'s extraneous-offense evidence was not unfairly prejudicial. *See Belcher*, 474 S.W.3d at 848 (holding evidence that defendant had anal and vaginal intercourse with his daughter for four years, beginning when she was four years old, was "highly prejudicial" and "was more repugnant and inflammatory" than the

digital penetration of another child with which he was charged but was "especially probative" of his propensity to sexually assault children).

3. J.W.'s Extraneous-Offense Evidence Did Not Distract, Confuse, or Mislead the Jury.

Rule 403's "third key phrase, 'confusion of the issues,'" alludes to the evidence's likelihood to confuse the jury or to distract them from the case's central issues. *Gigliobianco*, 210 S.W.3d at 641. "The rule's fourth key phrase, 'misleading the jury,'" involves the likelihood that a jury will accord evidence too much weight for some reason not involving emotion. *Id.* None of J.W.'s extraneous-offense evidence was technical or likely to mislead the jury, and it was relevant to whether Appellant committed indecency by contact and aggravated sexual assault against H.W. *See Buxton*, 526 S.W.3d at 692; *Robisheaux*, 483 S.W.3d at 220.

The chronology of the trial helped prevent distraction. The jury knew who the complainant was from the beginning of trial. In the State's opening statement, the prosecutor began, "Ladies and gentlemen, I've read the indictment to you. This case is about failure, failure, failure to H.W." While he mentioned J.W. and implied that Appellant had sexually abused her too, the prosecutor focused on the evidence pertaining to H.W.'s allegations. Defense counsel also told the jury, "My client's not on trial for anything dealing with J.W." Father testified first. Although he mentioned J.W.'s sexual abuse outcry before mentioning his follow-up conversation with H.W. in which she revealed that

something "inappropriate" had happened to her at Appellant's hands, those events happened in that chronological order: J.W. made her outcry before Father discovered that H.W. had also been allegedly sexually abused. His testimony was brief and general, giving no details about the allegations. Next, H.W. testified about Appellant's conduct toward her. Then, a character witness briefly testified to confirm H.W.'s story about the peeping incident when she was in high school. Next, J.W. testified about Appellant's alleged conduct toward her, supporting H.W.'s testimony. We conclude that J.W.'s testimony did not tend to confuse or distract the jury or to encourage them to give it too much weight. *See Buxton*, 526 S.W.3d at 692; *Robisheaux*, 483 S.W.3d at 221.

4. J.W.'s Extraneous-Offense Evidence Did Not Waste Too Much Time or Repeat Already Admitted Evidence.

Rule 403's "fifth and sixth key phrases, 'undue delay' and 'needless presentation of cumulative evidence'" focus on how efficient the trial is, not the risk of an erroneous verdict. *Gigliobianco*, 210 S.W.3d at 641. Pertinent to this topic but in his discussion of his fourth issue, Appellant contends,

> J.W.'s "propensity" testimony for the State, excluding re-direct examination, includes 24 pages in the reporter's record . . . . The volume of J.W.'s propensity testimony, even when excluding [her] reports of alleged sexual abuse admitted through the testimony of other witnesses for the State, constituted approximately 3/7 or 42% of the first-hand "fact witness" testimony presented by the State during the guilt phase.

Taking that contention as true, approximately 300 pages of testimony were taken in the three-day guilt-innocence trial involving fairly simple elements,

meaning J.W.'s propensity testimony accounted for less than 10% of the testimony. J.W. did not duplicate H.W.'s testimony because each girl testified about her own alleged sexual abuse at Appellant's hands, and there was no indication that he ever sexually abused them in the same episode. Finally, although the prosecutor spent about a third of his closing argument referring to J.W., most of those references referred to the girls as a unit—"they" and "them." We therefore conclude that the State did not take too much time to develop J.W.'s extraneous-offense evidence, did not place too much emphasis on it when compared to evidence of crimes against only H.W., and did not merely repeat the same evidence. *See Distefano v. State*, 532 S.W.3d 25, 33–34 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Buxton*, 526 S.W.3d at 692; *Robisheaux*, 483 S.W.3d at 221.

5. Appellant Failed to Overcome the Presumption That the Evidence Is More Probative.

Balancing all the factors, we hold that the trial court did not abuse its discretion by determining that the probative value of J.W.'s extraneous-offense evidence was not substantially outweighed by the risk of "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403, *see Buxton*, 526 S.W.3d at 692.

6. We Overrule Appellant's Embedded Constitutional Complaints.

As to Appellant's argument in this issue that rule 403 does not recognize character conformity as a justification for admissibility, the rule does not

specifically exclude evidence on that ground, and article 38.37—which he has failed to prove unconstitutional on its face or in its application—specifically approves its admission. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 2(b); Tex. R. Evid. 403; *see Carrillo*, 2016 WL 4447611, at *4. We reject Appellant's constitutional complaints restated in this issue for the same reasons we overruled his first two issues. We overrule Appellant's third issue.

D. We Have Not Sustained Any of Appellant's Issues, So We Do Not Analyze Harm.

In his fourth issue, Appellant contends that he was harmed by the trial court's constitutional and nonconstitutional errors alleged in the remainder of his brief. Because we have overruled Appellant's three issues complaining of error, we do not reach a harm analysis. *See* Tex. R. App. 44.2, 47.1. We overrule Appellant's fourth issue.

III. CONCLUSION

Having overruled Appellant's four issues, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

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DELIVERED: May 17, 2018