IN THE
TENTH COURT OF APPEALS

No. 10-16-00397-CR

DANIEL DAVILA MARTINEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 361st District Court
Brazos County, Texas
Trial Court No. 14-02515-CRF-361

MEMORANDUM OPINION

In eight issues, appellant, Daniel Davila Martinez, challenges his convictions for two counts of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2017). Because we overrule all of Martinez's issues on appeal, we affirm.

I. THE TESTIMONY OF OUTCRY WITNESSES

In his first three issues, Martinez contends that the trial court abused its discretion by admitting the testimony of former Child Protective Services investigator Valerie Perez,

Child Safe forensic interviewer Andrea Aguirre, and child-abuse pediatrician Jennifer Clarke, M.D., as outcry witnesses. With regard to these witnesses, Martinez argues that their testimony constituted inadmissible hearsay and that none of the witnesses qualified as proper outcry witnesses. We disagree.

A. Standard of Review

We review a trial court's admission or exclusion of evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *see Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990) (noting that we review a trial court's decision to admit outcry-witness testimony for an abuse of discretion). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). When considering a trial court's decision to admit or exclude evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Id.* at 391; *see Manning v. State*, 114 S.W.3d 922, 926 (Tex. Crim. App. 2003).

B. Applicable Law

To be admissible under article 38.072 of the Code of Criminal Procedure, outcry testimony must be elicited from the first adult to whom the outcry is made. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2017); *see also Chapman v. State*, 150 S.W.3d 809, 812 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). Article 38.072 requires "that the outcry witness . . . be the first person, 18 years or older, to whom the child makes a

statement that in some discernible manner described the alleged offense" and provides more than "a general allusion that something in the area of child abuse was going on." *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990).

Testimony of a second outcry witness is admissible if it concerns a separate, discrete instance of sexual abuse from the instance testified about by the first outcry witness. *See Hernandez v. State*, 973 S.W.2d 787, 789 (Tex. App.—Austin 1998, pet. ref'd). The outcry testimony of a second witness is not admissible, however, when the witness merely provides additional details regarding the same instance of sexual abuse. *Brown v. State*, 189 S.W.3d 382, 387 (Tex. App.—Texarkana 2006, pet. ref'd) ("[B]efore more than one outcry witness may testify, it must be determined the outcry concerned different events and was not simply a repetition of the same event told to different individuals."); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd) ("[T]he proper outcry witness is not to be determined by comparing statements the child gave to different individuals and then deciding which person received the most detailed statement about the offense.").

C. Valerie Perez's Testimony

Martinez's first issue addresses Perez's outcry testimony. The record reflects that Martinez objected to Perez's testimony, arguing that her testimony was not specific enough to qualify as an outcry witness. With regard to the specificity of outcry testimony, Texas courts have noted the following:

The outcry must in some discernible manner describe the alleged offense; it must be more than just words generally suggesting that something in the area of child abuse occurred. *See Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd). If contested by the defense, the trial court must hold a hearing outside the presence of the jury to determine "'based on the time, content, and circumstances of the statement' whether the victim's out-of-court statement is reliable.'" *Sanchez v. State*, 354 S.W.3d 476, 484-85 (Tex. Crim. App. 2011) (quoting TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2)). The victim must either testify or be available to testify at this hearing. *Id.* at 485.

This Court has observed that "an outcry witness is not person-specific, but event-specific." *Broderick*, 35 S.W.3d at 73; *see Mireles v. State*, 413 S.W.3d 98, 104 (Tex. A0pp.—San Antonio 2013, pet. ref'd); *Josey v. State*, 97 S.W.3d 687, 692 (Tex. App.—Texarkana 2003, no pet.) (mother proper outcry witness for act of oral conduct, but forensic interviewer proper outcry witness for act of digital penetration); *accord Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011)

. . .

This Court has previously rejected the position that to be discernible under Article 38.072, a statement must include a description of "how, when, and where." *See Brown*, 189 S.W.3d at 386. As we stated in *Brown*, "If a child tells someone 'how, when, and where' an offense occurred, this is sufficient to be a proper outcry statement." However, we declined to imply a requirement "that the details of 'how, when, and where' are necessary to constitute a proper outcry statement." *Id.* We see no reason to deviate from our prior precedent, and we disagree with the State's contention that a discernible statement must describe "how, when, and where." Such a requirement would be more restrictive than the discernibility standard announced by the Texas Court of Criminal Appeals. *See Garcia*, 792 S.W.2d at 91. "We instead rely on the well-established rule that, to be a proper outcry statement, the child's statement to the witness must describe the alleged offense in some discernible manner and must be more than a general allusion to sexual abuse." *Brown*, 189 S.W.3d at 386; *see Garcia*, 792 S.W.2d at 91.

Eldred v. State, 431 S.W.3d 177, 181, 184 (Tex. App.—Texarkana 2014, pet. ref'd); *see MacGilfrey v. State*, 52 S.W.3d 918, 921 (Tex. App.—Beaumont 2001, no pet.) ("We do not interpret the statute as requiring the child's initial outcry statement to contain specific dates or time frames.").

Outside the presence of the jury, the trial court conducted an article 38.072 hearing, wherein Perez testified that D.R. described sexual abuse perpetrated by Martinez. Perez recounted that D.R. told her that "Daniel Martinez had touched her vaginal area." And when Perez asked if Martinez had ever touched D.R. inappropriately, D.R. "shook her head yes and she started crying" while pointing to her vaginal area. Later, Perez testified that D.R. mentioned that the touching incident occurred when she went to visit Martinez in Bryan, Texas. We find the evidence before the trial court was sufficient to show that D.R. had described a sexual offense in a discernible manner to Perez.[1] *See Garcia*, 792 S.W.2d at 91; *see also Eldred*, 431 S.W.3d at 184. D.R.'s statements were more than simply a general allusion that something in the area of child abuse was occurring. *See Garcia*, 792 S.W.2d at 91; *see also Broderick*, 35 S.W.3d at 73. Therefore, though D.R.'s statements were not lengthy or detailed, they contained sufficient information about the nature of the act and the perpetrator to fall under article 38.072. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072; *Eldred*, 431 S.W.3d at 184 (noting that the discernibility standard in *Garcia* does not

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[1] Here, Martinez was charged by indictment with two counts of aggravated sexual assault of a child. The first count pertained to penetration of D.R.'s sexual organ by Martinez's sexual organ, and the second count involved the penetration of D.R.'s mouth by Martinez's sexual organ.

require the "how, when, and where"); *see also Nino v. State*, 223 S.W.3d 749, 752-53 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (concluding a child victim's outcry statements contained sufficient information about the nature of the act and the perpetrator under article 38.072 when the outcry witness testified that she overheard her son, the victim, tell his brother appellant made him suck it and then saw her son hold his penis when asked, "Suck what?"); *MacGilfrey*, 52 S.W.3d at 920-22 (concluding that the child victim's statements that appellant touched her privates, put his fingers in there, and that it hurt badly while pointing to her vagina was more than a general allusion of sexual abuse). As such, we cannot say that the trial court abused its discretion by admitting Perez's outcry testimony. *See Martinez*, 327 S.W.3d at 736; *see also Garcia*, 792 S.W.2d at 92.

And even if we were to conclude that D.R.'s statements to Perez were not specific enough, we note that improper outcry-witness testimony is harmless when other properly admitted witness testimony sets forth the same facts. *See Allen v. State*, 436 S.W.3d 815, 822 (Tex. App.—Texarkana 2014, pet. ref'd); *Nino*, 223 S.W.3d at 754; *Zarco v. State*, 210 S.W.3d 816, 833 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see also Garcia v. State*, No. 03-14-00269-CR, 2016 Tex. App. LEXIS 4219, at *11 (Tex. App.—Austin Apr. 22, 2016, pet. ref'd) (mem. op., not designated for publication). Therefore, because D.R. later testified that Martinez touched her and had sex with her, any error associated with the admission of Perez's testimony would be harmless. *See Allen*, 436 S.W.3d at 822; *Nino*,

223 S.W.3d at 754; *Zarco*, 210 S.W.3d at 833; *see also Garcia*, 2016 Tex. App. LEXIS 4219, at *11. We overrule Martinez's first issue.

D. Andrea Aguirre's Testimony

In his second issue, Martinez contends that the State did not establish that Aguirre was the first adult to whom D.R. made an outcry and that D.R.'s statements to Aguirre lacked sufficient specificity. Aguirre testified that she interviewed D.R. after D.R. had told Perez that Martinez had touched her. According to Aguirre, D.R. described "penile/vaginal penetration and digital penetration and also oral [and touching] on her breasts" by Martinez. D.R. also noted that Martinez penetrated her mouth with his genitals. D.R. told Aguirre that all of these incidents transpired in "their trailer here in Bryan" and that the sexual contact happened over "a number of years," starting when she was nine or ten years old. D.R. informed Aguirre that she and Martinez had sexual intercourse multiple times and that they only had oral sex once.

As noted before, the testimony of a second outcry witness is admissible if the testimony addresses a separate, discrete instance of sexual abuse from the instance testified about by the first outcry witness. *See Hernandez*, 973 S.W.2d at 789. D.R. recounted to Aguirre multiple instances of sexual intercourse, one instance of oral sex, and also the touching of D.R.'s breasts by Martinez's hands and mouth. In other words, Aguirre's testimony addressed separate and discrete instances of sexual abuse that were different from that described by Perez. *See id.* Aguirre did not simply repeat the same

event told by Perez. *See Brown*, 189 S.W.3d at 387. Accordingly, we conclude that Aguirre's testimony as a second outcry witness was admissible at trial. *See id.*; *see also Hernandez*, 973 S.W.2d at 789.

Furthermore, we are not persuaded by Martinez's contention that Aguirre's outcry testimony was not sufficiently specific. In fact, Aguirre's testimony described multiple sex acts committed by Martinez on D.R. and, though not necessarily required, provided a time frame and a location for when and where these acts occurred—when D.R. was nine or ten years old at the family's trailer in Bryan. Accordingly, we find the evidence before the trial court was sufficient to show that D.R. had described an offense in a discernible manner to Aguirre. *See Garcia*, 792 S.W.2d at 91; *see also Eldred*, 431 S.W.3d at 184. D.R.'s statements to Aguirre were more than simply a general allusion that something in the area of child abuse was occurring. *See Garcia*, 792 S.W.2d at 91; *see also Broderick*, 35 S.W.3d at 73. Rather, they contained sufficient information about the nature of the act and the perpetrator to fall under article 38.072. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072; *Eldred*, 431 S.W.3d at 184; *see also Nino*, 223 S.W.3d at 752-53; *MacGilfrey*, 52 S.W.3d at 920-22. As such, we cannot say that the trial court abused its discretion by admitting Aguirre's outcry testimony. *See Martinez*, 327 S.W.3d at 736; *see also Garcia*, 792 S.W.2d at 92. We overrule Martinez's second issue.

E. Dr. Clarke's Testimony

In his third issue, Martinez complains about the following aspects of Dr. Clarke's testimony:

> Dr. Clark[e] testified not only to the specific acts D.R. had allegedly been subjected to, but also to the following statements of D.R.: that the assaults had occurred in Bryan, Texas; that the assaults had occurred in a trailer house . . .; that D.R. had been shown pornography . . .; and that the child talked about having wanted to hurt herself some months back, specifically, that she cut her palm in December, 2013 . . .; she suffered from stomachaches . . .; and, that she believed the incidents were her fault . . . .

During trial, Martinez objected to the aforementioned information in Dr. Clarke's testimony as hearsay; however, in response to the State's questioning, Dr. Clarke noted that the complained-of information was "for the purpose of medical diagnosis and treatment."

The medical-diagnosis exception to the hearsay rule is outlined in Texas Rule of Evidence 803(4) and provides the following:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . .
>
> (4) Statement Made for Medical Diagnosis or Treatment.
>
> A statement that:
>
> (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
>
> (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

TEX. R. EVID. 803(4).

On appeal, Martinez argues that Dr. Clarke's testimony went beyond the scope of Rule 803(4). We disagree. Specifically, Dr. Clarke testified about statements made by D.R. while taking D.R.'s medical history for purposes of medical diagnosis and treatment. Dr. Clarke recalled that D.R. told her that Martinez had raped her in a trailer house in Bryan/College Station, Texas. D.R. recounted that Martinez had sexual intercourse and oral sex with her; that Martinez sucked on her breasts; that Martinez showed her pornography; and that the incidents occurred every other day. D.R. also told Dr. Clarke about other symptoms related to the sexual abuse, including feeling that the abuse was D.R.'s fault, trying to cut her palm, and having stomachaches. Dr. Clarke was concerned about these symptoms because they were signs that D.R. needed "the right counseling and treatment" and possibly "crisis counseling."

In a similar case, we concluded that the following testimony from a doctor satisfied the Rule 803(4) exception to the hearsay rule and, thus, was admissible:

> She told me that he, meaning [Guzman], had taken her to his apartment, that he grabbed her and started kissing her neck and her mouth. She said he then put her on the couch and pulled her skirt up and then grabbed her arms and pulled them to her side and that he then unbuttoned his pants and got on top of her. At that point, she became very tearful and wouldn't talk for a few minutes.

Guzman v. State, 253 S.W.3d 306, 307 (Tex. App.—Waco 2008, no pet.). The doctor in *Guzman* also noted that the complained-of testimony was obtained for a proper diagnosis and appropriate treatment. *Id.*

Similar to *Guzman*, we conclude that the statements made by D.R. to Dr. Clarke were made for the purposes of medical diagnosis and treatment and, thus, qualify under the Rule 803(4) exception to the hearsay rule. *See id.*; *see also* TEX. R. EVID. 803(4); *Beheler v. State*, 3 S.W.3d 182, 189 (Tex. App.—Fort Worth 1999, pet. ref'd) ("The object of a sexual assault exam is to ascertain whether the child has been sexually abused and to determine whether further medical attention is needed. Thus, statements describing acts of sexual abuse are pertinent to the victim's medical diagnosis and treatment."); *Fleming v. State*, 819 S.W.2d 237, 247 (Tex. App.—Austin 1991, pet. ref'd) ("We conclude that the child's statements to [a pediatrician and a mental health therapist] describing the abusive acts and identifying the abuser were reasonably pertinent to medical diagnosis and treatment, and were properly admitted pursuant to Rule 803(4)."). Accordingly, we cannot say that the complained-of testimony exceeded the scope of Rule 803(4), nor can we say that the trial court abused its discretion by admitting the complained-of evidence. *See* TEX. R. EVID. 803(4); *see also Martinez*, 327 S.W.3d at 736. We overrule Martinez's third issue.

II. JURY ARGUMENT

In his fourth issue, Martinez complains that the State's closing argument improperly provided an opinion on the truthfulness of D.R. Specifically, on appeal, Martinez asserts that the State's closing argument was improper under Texas Rule of Evidence 702 and that "[t]he Court of Criminal Appeals has held that Rule 702 does not

permit an expert to give an opinion that the complainant or the class of persons to which the complainant belongs is truthful." *See* TEX. R. EVID. 702.

During closing arguments, the prosecutor made the following argument, which drew an objection:

[The Prosecutor]:	You watch [D.R.] sit up there. You saw the emotion. To believe what he is proposing, you would have to believe that she is such a good actress that she has fooled Valerie Perez, Jennifer Clarke, Andrea Aguirre, hell, myself and Mr. Calvert.
[Defense counsel]:	Object to personal opinion by the State. It's not a proper argument.
THE COURT:	Objection overruled.

To preserve error for appellate review, a complaining party must make a timely and specific objection. *See* TEX. R. APP. P. 33.1(a)(1); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Texas courts have held that points of error on appeal must correspond or comport with objections and arguments made at trial. *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998); *see Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref'd). "Where a trial objection does not comport with the issue raised on appeal, the appellant has preserved nothing for review." *Wright*, 154 S.W.3d at 241; *see Resendiz v. State*, 112 S.W.3d 541, 547 (Tex. Crim. App. 2003) (holding that an issue was not preserved for appellate review because appellant's trial objection did not comport with the issue he raised on appeal).

As shown above, Martinez objected in the trial court to the prosecutor's closing argument on the ground that it was an improper "personal opinion." However, on appeal, Martinez challenges the prosecutor's closing argument under Texas Rule of Evidence 702. Because Martinez's complaint on appeal does not comport with the objection made in the trial court, we cannot say that Martinez has preserved this issue for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *see also Resendiz*, 112 S.W.3d at 547; *Dixon*, 2 S.W.3d at 273; *Wright*, 154 S.W.3d at 241.

III. THE CONSTITUTIONALITY OF ARTICLE 38.37, SECTION 2(B)

In his fifth issue, Martinez complains that the State was allowed to introduce evidence under article 38.37 of the Code of Criminal Procedure. Specifically, Martinez contends that article 38.37, section 2(b) of the Code of Criminal Procedure is unconstitutional because it "violates a defendant's right to due process under the United States Constitution, and to due course of law under the Texas Constitution by depriving him of the right to an impartial jury, by infringing on the presumption of innocence[,] and by lowering the state's burden of proof."

In *Balboa v. State*, we addressed a similar challenge to article 38.37 and concluded that the statute is constitutional. *See* No. 10-15-00024-CR, 2016 Tex. App. LEXIS 908, at **10-12 (Tex. App.—Waco Jan. 28, 2016, pet. ref'd) (mem. op., not designated for publication). Citing the *Harris* decision from the Fourteenth Court of Appeals, we noted that section 2(b) of article 38.37 was intended to: (1) bring the Texas Rules of Evidence in

line with Federal Rule of Evidence 413(a), which several federal courts have determined does not violate the Due Process Clause of the United States Constitution because it does not implicate a fundamental right; and (2) "'give prosecutors additional resources to prosecute sex crimes committed against children.'" *Id.* at *10 (quoting *Harris v. State*, 475 S.W.3d 395, 401 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)). Moreover,

> a defendant's right to a fair trial is protected by numerous procedural safeguards contained in the statute, including: (1) the requirement that the trial court conduct a hearing before the evidence is introduced to determine whether the evidence will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; (2) defense counsel's right to challenge any witness's testimony by cross-examination at the hearing; and (3) the requirement that the State give defendant notice of its intent to introduce the evidence in its case-in-chief not later than the thirtieth day before trial.

Id. at **10-11 (citing *Harris*, 475 S.W.3d at 402). "And finally, the *Harris* Court explained that section 2 of article 38.37 does not impermissibly lessen the State's burden of proof in this case." *Id.* at *11 (citing *Harris*, 475 S.W.3d at 402-03).

It is also worth mentioning that several other Texas courts have also arrived at the same conclusion—that article 38.37 is constitutional. *See Belcher v. State*, 474 S.W.3d 840, 846-47 (Tex. App.—Tyler 2015, no pet.) (concluding, after explaining the aforementioned safeguards, that the "admission of evidence of Appellant's other sexual crimes and bad acts against children . . . did not deprive Appellant of due process of law, and Article 38.37, Section 2(b) is constitutional"); *see also Bezerra v. State*, 485 S.W.3d 133, 139-40 (Tex. App.—Amarillo 2016, pet. ref'd) (holding that article 38.37, section 2 is constitutional);

Robisheaux v. State, 483 S.W.3d 205, 209-13 (Tex. App.—Austin 2016, pet. ref'd) (holding that article 38.37, section 2 is not unconstitutional on its face).

Here, the record reflects that the safeguards outlined in *Harris*, *Balboa*, and the other cases cited above were followed. Therefore, based on the foregoing, we cannot say that article 38.37, section 2(b) is unconstitutional. *See Bezerra*, 485 S.W.3d at 139-40; *Robisheaux*, 483 S.W.3d at 209-13; *Belcher*, 474 S.W.3d at 846-47; *see also Balboa*, 2016 Tex. App. LEXIS 908, at **10-12. We overrule Martinez's fifth issue.

IV. EXTRANEOUS-OFFENSE EVIDENCE

In his sixth and seventh issues, Martinez complains about the admission of extraneous-offense evidence from M.B., a child who received a kiss on the lips from Martinez when she was thirteen years old.[2] Martinez argues that this evidence should have been excluded under Texas Rule of Evidence 403 and article 38.37 of the Code of Criminal Procedure because the State did not need the extraneous-offense evidence to bolster its case of sexual abuse of D.R. *See* TEX. R. EVID. 403; *see also* TEX. CODE CRIM. PROC. ANN. art. 38.37. We disagree.

A. Texas Rule of Evidence 403

We review the trial court's determination under Rule 403 for an abuse of discretion. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). As long as the

[2] M.B. acknowledged at trial that Martinez's kiss made her feel uncomfortable, and the record reflects that M.B. was very upset to testify about this incident because she did not "want to talk about the subject."

trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion. *See Newton v. State*, 301 S.W.3d 315, 317 (Tex. App.—Waco 2009, pet. ref'd) (citing *De La Paz v. State*, 279 S.W.3d 336, 343-44 (Tex. Crim. App. 2009)).

> Relevant evidence may be excluded under Rule 403 only if its probative value is substantially outweighed by the danger of unfair prejudice. Under Rule 403, it is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. The rule envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value.
>
> Because Rule 403 permits the exclusion of admittedly probative evidence, it is a remedy that should be used sparingly, especially in "he said, she said" sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant.

Id. at 318-19 (internal citations & quotations omitted). Furthermore,

> [A] trial court, when undertaking a Rule 403 analysis, must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest 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. Of course, these factors may well blend together in practice.

Id. at 319 (internal citations omitted).

Here, the extraneous-offense evidence was probative to rebut Martinez's defensive theory of fabrication. And to be admissible for rebuttal of a fabrication defense, "the extraneous misconduct must be at least similar to the charged one." *Wheeler v. State*, 67 S.W.3d 879, 887 n.22 (Tex. Crim. App. 2002). Although some similarity is required, the

requisite degree of similarity is not as exacting as necessary when extraneous-offense evidence is offered to prove identity by showing the defendant's "system" or modus operandi. *Dennis v. State*, 178 S.W.3d 172, 179 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). The testimony of M.B. regarding the extraneous-offense evidence is similar to how Martinez began his sexual abuse of D.R. Accordingly, this factor weights slightly in favor of admissibility. *See Newton*, 301 S.W.3d at 317-18, 320.

Additionally, the record reflects that there were no eyewitnesses and no physical evidence available to corroborate D.R.'s testimony. *See Dennis*, 178 S.W.3d at 181; *Wheeler*, 67 S.W.3d at 889. Martinez attacked D.R.'s testimony during cross-examination and during his closing argument. Therefore, given this and the need for the State to rebut Martinez's fabrication defense, the trial court could have reasonably concluded that the State's need for the extraneous-offense evidence was "considerable." *See Gigliobianco v. State*, 210 S.W.3d 637, 642 (Tex. Crim. App. 2006). Thus, this factor weighs in favor of admissibility.

"Extraneous-offense evidence of this nature does have a tendency to suggest a verdict on an improper basis because of the inherently inflammatory and prejudicial nature of crimes of a sexual nature committed against children." *Newton*, 301 S.W.3d at 320 (internal citations omitted). However, this tendency is somewhat counterbalanced by the trial court's limiting instruction to the jury both before M.B. testified and in the

jury charge. *See id.* Nevertheless, the State admits on appeal that this factor weighs slightly in favor of exclusion.

With regard to the final factors, we note that the extraneous-offense evidence was both relevant and contextual to whether or not Martinez sexually assaulted D.R.; that M.B.'s testimony was understandable, did not contain confusing or technical information, and was not especially graphic as to have a tendency to be given undue weight by the jury; and that the presentation of the evidence was minimal considering it only comprised nine pages out of a total of 208 pages of testimony. As such, we find that the final three factors weigh in favor of admissibility. *Id.* at 319.

A review of the Rule 403 factors shows that all but one of the factors weigh in favor of admissibility. Given this and the presumption that Rule 403 should be used sparingly in "he said, she said" sexual-molestation cases, we cannot say that there is a "clear disparity" between the danger of unfair prejudice posed by the extraneous-offense evidence and its probative value; accordingly, we conclude that the trial court did not abuse its discretion by admitting the complained-of extraneous-offense evidence over Martinez's Rule 403 objection. *See id.* at 318-22. We overrule Martinez's sixth issue.

B. Article 38.37 of the Code of Criminal Procedure

Next, Martinez asserts that M.B.'s testimony should have been excluded under article 38.37 of the Code of Criminal Procedure because the factfinder could not have concluded that he committed the extraneous offense beyond a reasonable doubt.

Assuming without deciding that the trial court erred in admitting the complained-of extraneous-offense evidence over Martinez's article 38.37 objection, we cannot say that the error affected Martinez's substantial rights. Specifically, we note the following:

> The erroneous admission of extraneous act evidence is non-constitutional error that must be disregarded unless it affected appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). Erroneously admitted evidence does not affect substantial rights when the appellate court examines the record as a whole and can fairly assess that the error did not adversely influence the jury or had only a slight affect. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In making this assessment, the presence of overwhelming evidence supporting appellant's guilt is a factor in determining whether the erroneously admitted evidence was harmful. *See id.* at 357-58.

Bezerra, 485 S.W.3d at 143.

Here, D.R. testified specifically about the sexual assaults perpetrated by Martinez. In particular, she described how Martinez put his penis in her vagina more than ten times when she was between the ages of nine and twelve and that Martinez put his penis in her mouth. Furthermore, the testimony of Aguirre and Dr. Clarke was consistent with D.R.'s trial testimony. Accordingly, the record contains overwhelming evidence of Martinez's guilt.

Additionally, we emphasize that the trial court instructed the jury, both orally and in the charge, that it could only consider the complained-of extraneous-offense evidence if they believed beyond a reasonable doubt that Martinez committed the act. *See id.* (citing *Vega v. State*, 255 S.W.3d 87, 105 (Tex. App.—Corpus Christi 2007, pet. ref'd) ("Generally, we presume the jury follows the trial court's instructions and that a limiting instruction

cures any harm.")). Based on the foregoing, we conclude that any error in the admission of the complained-of extraneous-offense evidence over Martinez's article 38.37 objection did not affect his substantial rights to justify reversal. *See id.* at 144. We overrule Martinez's seventh issue.

V. THE ADMISSION OF A VICTIM IMPACT STATEMENT

In his eighth issue, Martinez asserts that the trial court abused its discretion by admitting victim-impact evidence from the victim of an enhancement conviction during the punishment phase of trial. Specifically, Martinez argues that K.M., the victim of Martinez's prior conviction for sexual assault of a child, testified in the form of victim-impact evidence when "[s]he told the jury that she is fearful every day, that she has six children that she barely lets out of her sight because of what happened to her."

During the punishment phase of a trial, a trial court may admit any matter it deems relevant to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2017); *see Lindsay v. State*, 102 S.W.3d 223, 227 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). The circumstances of the offense are relevant to sentencing and may be considered by the trier of fact in determining the punishment to be assessed. *Jagaroo v. State*, 180 S.W.3d 793, 798 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). "'Victim impact evidence is evidence of the effect of an offense on people *other* than the victim.'" *Smith v. State*, 238 S.W.3d 512, 515 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (emphasis in original) (quoting *Roberts v. State*, 220 S.W.3d 521, 531 (Tex. Crim. App. 2007)). When the evidence

involving the extraneous offense is from the victim of that extraneous offense, evidence about the effect of that offense on the victim is not victim-impact evidence and, thus, is admissible. *Id.* (citing *Roberts*, 220 S.W.3d at 531).

During the punishment phase of trial, K.M. testified that Martinez sexually assaulted her when she was in high school and that Martinez was later convicted of that offense. K.M. also described the effect Martinez's actions have had on her when she noted that she is fearful for her six children and that she rarely lets them out of her sight. Because the complained-of evidence describes a different offense for which K.M. was the victim, we cannot say that the evidence was victim-impact evidence; therefore, we cannot conclude that the trial court abused its discretion by admitting the complained-of extraneous-offense evidence through the testimony of K.M. regarding the effects Martinez's sexual assault of her had on her life. *See Roberts*, 220 S.W.3d at 531 ("The evidence presented here was evidence of the effect of a different offense on *the victim* (of the extraneous offense), and thus is distinguishable from the situation presented in *Cantu*. The evidence was admissible." (emphasis in original)); *see also Smith*, 238 S.W.3d at 515 (concluding that clinical records were admissible to show appellant's commission of unadjudicated offenses against appellant's daughter, who was not named in the indictment, because the records described how appellant's daughter was affected by appellant's violence against her, this evidence of bad acts was admissible under article 37.07, section 3(a)(1) of the Code of Criminal Procedure, and because the evidence is not

victim-impact evidence given that appellant's daughter was the victim of the assaults). We overrule Martinez's eighth issue.

VI. Conclusion

Having overruled all of Martinez's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
*(Chief Justice Gray concurring with a note)
Affirmed
Opinion delivered and filed May 9, 2018
Do not publish
[CRPM]

*(Chief Justice Gray concurs in the judgment of the Court to the extent it affirms the trial court's judgment and provides the following note. A separate opinion will not issue. Chief Justice Gray does not join the opinion. Chief Justice Gray specifically disagrees with the Court's determination that the first issue does not present error. The testimony of Perez as an outcry witness was error. Perez's testimony regarding the alleged outcry testimony was nothing more than a general allusion that something in the nature of sexual abuse had occurred. This is particularly evident when you examine the statements made to Perez as compared to those made to Aguirre. But if Perez was the proper outcry witness for the scope of sexual assaults involving the touching of the vagina, then Aguirre was erroneously allowed to testify in expansive detail about many assaults already testified to by Perez as the outcry witness. Simply providing more descriptive testimony does not authorize two outcry witnesses to the same sexual assaults. Nevertheless, Chief Justice Gray concludes the error in the admission of Perez's testimony was harmless.)