TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00505-CR

Shawn Aric Tolbert, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 426TH JUDICIAL DISTRICT
NO. 72931, THE HONORABLE FANCY H. JEZEK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Shawn Aric Tolbert guilty of two counts of aggravated sexual assault of a child, *see* Tex. Penal Code § 22.021(a)(1)(B), (2)(B), and one count of indecency with a child by sexual contact, *see id.* § 21.11(a)(1), for sexually abusing his stepniece, T.B.P., over a six-year period beginning when she was seven years old. Appellant elected to have the trial court decide his punishment, *see* Tex. Code Crim. Proc. art. 37.07(2)(b), and the trial judge sentenced him to serve 12 years in the Texas Department of Criminal Justice for each offense, ordering the sentences to be served concurrently, *see* Tex. Penal Code §§ 12.32, 12.33. On appeal, appellant challenges the admission of evidence of extraneous sexual offenses, contests the admission of improperly bolstering testimony, complains about the denial of his motion for mistrial, and asserts that he suffered egregious harm due to jury charge error.

BACKGROUND[1]

The State charged appellant with three sexual abuse offenses for conduct perpetrated against T.B.P. when she was a child.[2] T.B.P.'s mother was married to appellant's older brother,[3] and the family attended the church pastored by appellant's father. T.B.P., her older sister, and younger brothers often stayed in appellant's home and, at times, lived there.

T.B.P. testified that in 1993, when she was seven years old and in the second grade, appellant, who was 17 at that time, began to engage in sexual conduct with her. The sexual conduct continued until she moved out of state with her mother and siblings when she was 13 years old. In her testimony, T.B.P. described numerous incidents of sexual abuse during those years, including appellant making her masturbate him, appellant compelling her to perform oral sex on him, appellant performing oral sex on her, and appellant penetrating her sexual organ with his penis. T.B.P. indicated that sometimes appellant's sexual abuse of her involved other children, including her sister, S.P., and her cousin, A.M.[4]

A few years after T.B.P moved away with her mother and siblings, her sister, S.P., dated a man who turned out to be 34 years old. During the course of the criminal investigation of

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[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

[2] At the time of trial, T.B.P. was 29 years old.

[3] Appellant's brother was T.B.P.'s stepfather and the biological father of her two younger brothers.

[4] The record reflects that S.P. is one year older than T.B.P. and A.M. is two years older.

that relationship, a letter S.P. wrote to the man involved was discovered. In that letter, S.P. revealed that she had been sexually molested by her uncle (appellant). This information caused their mother to ask T.B.P. if she had ever been molested. T.B.P., 15 years old at that time, reluctantly disclosed that appellant had sexually abused her. Her mother took her to the authorities investigating the case involving her sister, and T.B.P. told the detective about some of appellant's sexual abuse. The family was informed that the matter would be referred to the Temple police department (the jurisdiction where the abuse occurred) and the family assumed that an investigation would ensue.

Three or four years later, however, T.B.P. and her family learned that the matter had not been pursued by the Temple police. The Temple detective who had initially spoken with them had died shortly after receiving the case, without making any record or report concerning the matter, and the matter was not investigated. At that time, T.B.P., S.P., their mother, and A.M. traveled to Temple to meet with the detective who had replaced the deceased detective as an investigator of crimes against children. The detective interviewed them but no written statements were made. The detective sent a follow-up email to T.B.P. requesting a written statement. T.B.P. emailed back a timeline of events and then a follow-up email asking if she needed to mail the timeline as well. The detective did not respond to T.B.P.'s emails. It is unclear from the record whether the detective received the emails from T.B.P., but the record reflects that, once again, nothing happened with the investigation.

Seven years later, when T.B.P. was an adult, she became frustrated and angry that no investigation concerning appellant's sexually abusive behavior had been conducted. She began a campaign designed to motivate action by law enforcement—publicly making allegations against

appellant on social media and in a series of emails to various public and school officials in Temple. Her efforts attracted the attention of the Temple chief of police who assigned a detective to activate the cold case investigation. As a result of that investigation, appellant was charged with the instant offenses of sexual assault of a child and indecency with a child by sexual contact for sexual acts perpetrated against T.B.P.

DISCUSSION

Appellant raises six points of error in this appeal. In his first three points of error, he challenges the admission of evidence of extraneous sexual offenses admitted pursuant to article 38.37 of the Texas Code of Criminal Procedure. In his fourth point of error, appellant contends that the trial court erred by admitting improperly bolstering testimony. In his fifth point of error, he complains about the denial of his motion for mistrial. Finally, in his last point of error, appellant claims that he suffered egregious harm due to jury charge error.

Admission of Extraneous Sexual Offenses

During the guilt-innocence phase, the trial court admitted the testimony of four witnesses who testified that appellant perpetrated sexual offenses against them when they were children:

- S.P., T.B.P.'s sister, was 30 years old at the time of trial. She testified that appellant sexually abused her when she was in elementary school and middle school, beginning when she was eight years old. She indicated that appellant showed her pornographic materials and engaged in various sexual acts with her, including performing oral sex on her, compelling her to perform oral sex on him, and penetrating her sexual organ with his fingers and sex toys. S.P. stated that these sexual acts happened "multiple times" "at least two to three times per week" over the years before she moved away.

- A.M., appellant's cousin, was 31 years old at the time of trial. She testified that when she was a child appellant performed oral sex on her or made her perform oral sex on him "lots of times," penetrated her sexual organ with his fingers "numerous times," and tried to penetrate her sexual organ with his penis on one occasion. A.M. said that appellant's sexual abuse of her "happened [her] entire childhood" when she lived in Texas.

- A.P., appellant's cousin and A.M.'s brother, was 33 years old at the time of trial. He testified about sexual acts appellant engaged in with him when he was a teenager between the ages of 14 and 16. A.P. described the first sexual encounter that happened when appellant picked A.P. up during the winter school break and took him to his (appellant's) apartment in Dallas. Appellant took A.P. to an arcade to celebrate A.P.'s birthday, gave him beer afterwards, and then later "[taught him] how to massage." The massage started with appellant touching A.P. "everywhere," including A.P.'s penis, and progressed to appellant masturbating A.P. and then performing oral sex on him. Appellant then had A.P. stroke appellant's penis and perform oral sex on him. The Dallas visit lasted about one week, and appellant engaged in sexual acts with A.P. "more than once." A.P. also described a "sex party" with appellant and appellant's girlfriend when A.P. was 16 years old and appellant touched him and performed oral sex on him. When asked about the number of times appellant engaged in sexual activity with him when he was between the ages of 14 and 16, A.P. indicated that he "[knew] it was more than two" but "[couldn't] say if it was 20, though."

- P.D., who was 33 years old at the time of trial, knew appellant and his family from church. He testified that when he was 12 years old his mom worked the night shift and she would occasionally send appellant by to check on P.D. to make sure he was okay. P.D. described an occasion when he was sleeping in his apartment while his mom was at work and appellant, who had a key to the apartment, "came into [P.D.'s] room, woke [him] up, pulled [his] pants down, and grabbed [his] penis and started to ejaculate it or trying to ejaculate it" by grasping his penis "firmly" and moving his hands up and down. P.D. said that he tried to act like he was asleep, and eventually appellant stopped masturbating him and left.

The State offered, and the trial court admitted, the testimony of these witnesses pursuant to article 38.37 of the Texas Code of Criminal Procedure.

Under section 2(b) of article 38.37, in trials for certain enumerated sexual crimes against children, including aggravated sexual assault of a child and indecency with a child by sexual contact, evidence that the defendant has committed one of the child sexual abuse offenses described by the statute against a child other than the victim of the charged offense is admissible "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with that character." Tex. Code Crim. Proc. art. 38.37, § 2(a)(1), (b). Before a trial court can admit such evidence, it must first conduct a hearing out of the presence of the jury to determine whether the evidence likely to be admitted at trial concerning the separate sexual abuse offense will be adequate to support a jury finding that the defendant committed the separate offense beyond a reasonable doubt. *See id.* art. 38.37, § 2-a.

In this case, the trial court conducted the requisite hearing, during which the court heard testimony from S.P., A.M., A.P., P.D. and two additional witnesses, D.D. and T.B.-A.[5] The testimony of the witnesses described extraneous sexual offenses perpetrated by appellant when he was a juvenile as well as when he was an adult. The discussion at the conclusion of the hearing concerned whether the extraneous sexual offenses committed when appellant was a juvenile were admissible under article 38.37.[6] Appellant objected to the admission of the juvenile extraneous sexual offenses, asking that the evidence "be barred as being prejudicial." He did not otherwise

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[5] The record reflects that appellant was 10 years older than T.B.P., 9 years older than S.P., 7 years older than A.M., 6 years older than A.P., 6 years older than P.D., 7 years older than D.D., and 5 years older than T.B.-A.

[6] From the record, it appears that discussions on this issue first occurred between the trial court and the parties off the record as the parties referred to caselaw previously provided to the trial court.

object to the admission of the evidence of extraneous sexual offenses under article 38.37. The trial court made no explicit findings on the record but excluded evidence of appellant's extraneous sexual offenses committed when he was a juvenile.[7]

In his first three points of error, appellant challenges the admission of the testimony of S.P., A.M., A.P., and P.D. about extraneous sexual offenses pursuant to article 38.37. In his first point of error, appellant argues that the admission of the evidence of extraneous sexual offenses violated his constitutional rights to due process and equal protection. In his second point of error, appellant claims that he suffered an ex post facto violation from the admission of this evidence because article 38.37 was not in effect at the time the extraneous sexual offenses were committed. In his third point of error, appellant contends that the trial court abused its discretion by admitting the complained-of evidence because the extraneous sexual offenses were not proven beyond a reasonable doubt at the 38.37 hearing.

To preserve error, a party must timely object and state the grounds for the objection with enough specificity to make the trial judge aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1)(A); *see Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016); *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). While no "magic words" or cite to specific statutes or rules is required to preserve a complaint for appeal, a party must convey the substance of the complaint to the trial court clearly enough to provide the judge and the opposing party an opportunity to address and, if necessary, correct the purported error.

[7] The trial court's ruling also excluded extraneous sexual acts perpetrated against T.B.P., the victim of the charged offenses, for acts committed when appellant was a juvenile.

Ex parte Marascio, 471 S.W.3d 832, 842 (Tex. Crim. App. 2015); *Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App. 2011); *see Smith v. State*, 499 S.W.3d 1, 7–8 (Tex. Crim. App. 2016). The record must make it clear that both the trial court and the opposing party understood the legal basis for the complaint. *Thomas v. State*, 408 S.W.3d 877, 884 (Tex. Crim. App. 2013); *see Pena*, 353 S.W.3d at 807.

At trial, appellant's objection challenged the admission of the evidence of extraneous sexual offenses under article 38.37 for offenses committed when he was a juvenile. Appellant never complained about the admission of the evidence of extraneous sexual offenses committed when he was an adult—either during the 38.37 hearing or when the evidence was admitted during trial. Moreover, in no way did appellant inform the trial court or the State that he was asserting that the admission of the extraneous sexual offense evidence pursuant to the statute violated his constitutional rights to due process and equal protection or that it constituted an ex post facto violation. Nor did appellant complain that the evidence presented at the 38.37 hearing was inadequate to support a jury finding that he committed the extraneous sexual offenses beyond a reasonable doubt. Thus, the record reflects that appellant failed to properly preserve the complaints raised in his first three points of error for appellate review.

Preservation of error is a systemic requirement on appeal. *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016); *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014); *Roberts v. State*, No. 03-14-00637-CR, 2016 WL 6408004, at *8 (Tex. App.—Austin Oct. 26, 2016, pet. ref'd) (mem. op., not designated for publication). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Blackshear v. State*,

385 S.W.3d 589, 590 (Tex. Crim. App. 2012); *Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010); *Roberts*, 2016 WL 6408004, at *8. Accordingly, we overrule appellant's first three points of error.

Improper Bolstering

As discussed previously, A.P. testified during the guilt-innocence phase of trial. After detailing appellant's sexual abuse of him, A.P. discussed his failure to disclose the abuse and his aversion to being involved in the eventual criminal investigation of his cousin. He expressed that he had not wanted to be involved in the investigation or the prosecution and, even as he testified at trial, said he still did not want to be involved and did not want to appear to testify at trial—because he loved appellant and appellant "wasn't all nasty"—but did so because he had been subpoenaed.

At one point in his testimony, A.P. described a phone call from appellant during which he agreed, on appellant's request, to recant his statements about appellant.[8] A.P. then testified about subsequently giving a written statement instead of recanting:

Q. So you told your cousin you would [recant]?

A. Uh-huh.

Q. But did you actually ever do that?

A. No.

[8] A.P. received the call from appellant at a point in the investigation after which A.P. had talked to the most recent Temple police detective and detailed some of the sexual offenses that appellant perpetrated against him but before he had given any type of written statement about the abuse.

Q. Why did you tell him you would?

A. Cause I would have. And I was gonna.

Q. But you didn't?

A. No.

Q. At some point do you put something in writing, a statement for [the detective]?

A. Yes.

Q. Why did you do that?

A. Why?

Q. Yes.

A. Because my sister [A.M.] has told in the past. And she was told that she's a liar. And I'm certain if I come and share what happened to me, or my life story, a part of my life, it would prove that she's not lying --

At this point defense counsel objected, asserting that A.P. was "testifying as to the credibility of the other witness." The prosecutor responded that A.P. was giving his reason for providing a written statement to the detective. The trial court overruled the objection, and the prosecutor followed up with A.P.:

Q. So you're telling us why is it that you decided in 2015 to give a written statement.

A. It's in the best interest -- it would help my sister.

In his fourth point of error, appellant asserts that the trial court erred by allowing A.P. to "improperly bolster" the credibility of his sister.

Under case law predating the Rules of Evidence, "bolstering" occurred when one item of evidence was improperly used by a party solely to add credence or weight to earlier, unimpeached evidence offered by the same party. *See Cohn v. State*, 849 S.W.2d 817, 819–20 (Tex. Crim. App. 1993); *Sanders v. State*, 524 S.W.3d 866, 868 (Tex. App.—Beaumont 2017, no pet.); *Riordan v. State*, No. 03-16-00297-CR, 2017 WL 3378889, at *18–19 (Tex. App.—Austin Aug. 4, 2017, no pet.) (mem. op., not designated for publication). The record here reflects that the complained-of testimony was offered to explain why A.P. overcame his previous reluctance to be involved with the criminal investigation against his cousin and gave a written statement instead of recanting his allegations. Although the testimony may have incidentally touched on his sister's credibility, given the reason he overcame his previous unwillingness, the evidence was not offered *solely* to add credence to his sister's testimony. Rather, the testimony was used to explain A.P.'s conduct during the investigation and his motivation for testifying at trial notwithstanding his reluctance. Accordingly, the record does not demonstrate improper bolstering. We overrule appellant's fourth point of error.

Motion for Mistrial

In his fifth point of error, appellant argues that the trial court erroneously denied his motion for mistrial based on the alleged deprivation of his right to present a full defense.

We review the trial court's denial of a mistrial for an abuse of discretion. *Jenkins v. State*, 493 S.W.3d 583, 612 (Tex. Crim. App. 2016); *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). We view the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling. *Ocon v. State*,

284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004); *see Jenkins*, 493 S.W.3d at 612. We do not substitute our judgment for that of the trial court, but rather we decide whether the trial court's decision was arbitrary or unreasonable. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). We must uphold the ruling if it was within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292; *Ocon*, 284 S.W.3d at 884.

A mistrial ends trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Ocon*, 284 S.W.3d at 884; *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). Accordingly, "[a] mistrial is an appropriate remedy only in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Ocon*, 284 S.W.3d at 884 (citing *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004)); *see Williams v. State*, 417 S.W.3d 162, 175 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) ("A mistrial is an extreme remedy and should be exceedingly uncommon."). Whether an error requires a mistrial must be determined by the particular facts of the case. *Jenkins*, 493 S.W.3d at 612; *Ocon*, 284 S.W.3d at 884; *Ladd*, 3 S.W.3d at 567.

Here, the alleged ground for mistrial arose when one of the State's witnesses invoked her Fifth Amendment privilege against self-incrimination. During trial, the State called Jennifer Lafferty, appellant's ex-girlfriend, to testify about witnessing appellant engage in sexual conduct with A.P. when appellant was living with her.[9] The trial court interrupted the State's direct

[9] In his testimony before the jury, A.P. testified that he was involved in "a sex party, kind of, with [him]self, [appellant], and Jennifer." He stated that he touched both appellant's and Lafferty's genitals with his "[h]ands, and penis, and mouth." At the 38.37 hearing outside the presence of the jury, A.P. described the sexual activity among the three of them together, indicating that the oral sex involved everybody's mouth on everyone's genitals and that there was penetration

examination of Lafferty and advised Lafferty of her constitutional right against self-incrimination. When she expressed uncertainty regarding the exercise of that right, the court appointed an attorney to confer with her. After conferring with counsel, Lafferty invoked her Fifth Amendment right not to incriminate herself. Appellant then asked the State to grant Lafferty immunity, which the prosecutor declined to do. Appellant then moved for a mistrial arguing that the inability to cross examine Lafferty would "undercut the defense" because appellant could not respond to A.P.'s testimony and possibly impeach him. The trial court carried the motion and, after further argument the following morning when the trial resumed, denied appellant's motion for mistrial.

In his brief, appellant asserts that a mistrial was required because his intent at trial was to elicit testimony from Lafferty that would have impeached A.P. and that impeachment evidence was "essential" to his case. The trial court's ruling, he contends, "decidedly precluded Appellant from presenting a full defense."

The United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986); *see also* U.S. Const. amends. VI (compulsory process and confrontation of witnesses), XIV (due process). However, a criminal defendant's right to present relevant evidence is not absolute. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."). A defendant's right to present relevant evidence "'may, in appropriate cases, bow to

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of Lafferty's sexual organ. He testified that "[a]t 16 I thought it was a grand ole time" but that as an adult he knew it "to be a[n] orgy."

accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)); *accord Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Briones v. State*, No. 03-09-00628-CR, 2010 WL 2133933, at *3 (Tex. App.—Austin May 27, 2010, no pet.) (mem. op., not designated for publication).

This case demonstrates one such legitimate interest: the Fifth Amendment privilege against self-incrimination. "The scope of the Fifth Amendment is comprehensive, protecting the individual not only against being involuntarily called as a witness against himself in a criminal prosecution, but also permitting him 'not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *In re Medina*, 475 S.W.3d 291, 299 (Tex. Crim. App. 2015) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)); *see Ullmann v. United States*, 350 U.S. 422, 438–39 (1956) (observing that "sole concern [of privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts'") (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)). Any invocation of the Fifth Amendment right must be viewed liberally and in the light most favorable to its legitimacy. *Medina*, 475 S.W.3d at 299 (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

Here, Lafferty properly invoked her Fifth Amendment privilege not to testify and be required to give self-incriminating testimony concerning her sexual activity with appellant and A.P., who was a child at the time. Her constitutional privilege against self-incrimination regarding her commission of sexual crimes against a child—certainly a "legitimate interest in the criminal trial process"—overrode appellant's interest in forcing her to incriminate herself in an attempt to possibly

impeach A.P.'s credibility.[10] *Cf. Bridge v. State*, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986) (recognizing that witness's proper assertion of Fifth Amendment privilege against self-incrimination overrides defendant's constitutional right to compulsory process). Consequently, the situation here—permitting appellant's right to present evidence in his defense to "bow to accommodate" Laffety's Fifth Amendment privilege against self-incrimination—is not an "extreme circumstance" of a "highly prejudicial and incurable error" for which a mistrial is an appropriate remedy. *See Ocon*, 284 S.W.3d at 884. Thus, we cannot conclude that the trial court abused its discretion in denying appellant's motion for mistrial. Accordingly, we overrule appellant's fifth point of error.

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[10] A grant of testimonial immunity substitutes for the Fifth Amendment privilege. *See Ullman v. United States*, 350 U.S. 422, 439 (1956) ("Once the reason for the privilege [against self-incrimination] ceases, the privilege ceases."). Thus, "[t]he grant of the immunity is the only way to compel testimony after a valid invocation of the Fifth Amendment." *Butterfield v. State*, 992 S.W.2d 448, 450 (Tex. Crim. App. 1999). However, the decision whether to grant a witness immunity from prosecution lies with the prosecutor, not the trial judge. *Brown v. State*, No. 05-90-01556-CR, 1993 WL 460047, at *12 (Tex. App.—Dallas Nov. 10, 1993, pet. ref'd) (mem. op., not designated for publication) (citing *Norwood v. State*, 768 S.W.2d 347, 349 (Tex. App.—Corpus Christi 1989), *pet. dism'd as improvidently granted*, 815 S.W.2d 575 (Tex. Crim. App. 1991)); *see Autry v. Estelle*, 706 F.2d 1394, 1402 (5th Cir. 1983) (recognizing that Texas law gives prosecutor, not trial judge, right to initiate grants of immunity). A trial court does not have the authority to grant immunity to a witness over the State's objection or to order the State to do so. *Norwood*, 768 S.W.2d at 349–50; *see Ross v. State*, 486 S.W.2d 327, 328–29 (Tex. Crim. App. 1972), *overruled on other grounds by Walters v. State*, 359 S.W.3d 212 (Tex. Crim App. 2011) (holding that trial court could not have granted immunity to witness without joinder of State); *see also United States v. Chagra*, 669 F.2d 241, 258 (5th Cir. 1982) ("[A] district court does not possess the statutory, common law, or inherent authority either to grant use immunity to a defense witness over the government's objection or to order the government to do so."). Here, the prosecutor declined to grant Lafferty immunity. Thus, the trial court could not compel her to testify without violating her Fifth Amendment right against self-incrimination.

Jury Charge Error

In his sixth point of error, appellant asserts that he suffered egregious harm from the trial court's erroneous limiting instruction in the jury charge regarding consideration of the extraneous sexual offenses admitted during the guilt-innocence phase.

We review alleged jury charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017); *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). The degree of harm required for reversal depends on whether the jury charge error was preserved in the trial court. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g) (setting forth procedure for appellate review of claim of jury charge error). Appellant concedes that he did not object at trial to the limiting instruction given in the jury charge regarding consideration of extraneous offenses. Thus, any jury charge error was not preserved, and reversal is required only if the error, if any, was "fundamental" in that it was "egregious and created such harm that the defendant was deprived of a fair and impartial trial." *See Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); *Almanza*, 686 S.W.2d at 171. Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Arteaga*, 521 S.W.3d at 338; *Villarreal*, 453 S.W.3d at 433.

A trial court is statutorily obligated to instruct the jury on the "law applicable to the case." *See* Tex. Code Crim. Proc. art. 36.14; *Arteaga*, 521 S.W.3d at 334. The court's duty to instruct the jury on the "law applicable to the case" exists even when defense counsel fails to object

to inclusions or exclusions in the charge. *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 486 (Tex. Crim. App. 2011). The trial court is "ultimately responsible for the accuracy of the jury charge and accompanying instructions." *Vega*, 394 S.W.3d at 518 (quoting *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007)); *Taylor*, 332 S.W.3d at 488.

In the jury charge, the trial court instructed the jury concerning the extraneous sexual offenses admitted as follows:

> You are instructed that if there is any testimony before you in this case regarding the Defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the intent, knowledge, motive, preparation or plan of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment in this case, or to rebut the defensive theory of the defendant, if any, or for its bearing on the state of mind of the defendant and the child or the previous and subsequent relationship between the defendant and the child and for any bearing the evidence has on relevant matters, including the character of the defendant and the acts performed in conformity with the character of the defendant.

Appellant argues that he suffered egregious harm because the limiting instruction told the jury that it could consider the extraneous offense evidence to determine appellant's intent, knowledge, motive, preparation, or plan when the State did not offer the evidence of extraneous offenses for those purposes and the court did not allow the admission of the evidence for any of those purposes.

The complained-of language is consistent with the admission of extraneous offense evidence admitted pursuant to Rule 404(b) of the Texas Rules of Evidence, which provides that evidence of "a crime, wrong, or other act" may be admissible for a purpose other than character

conformity, including to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *See* Tex. R. Evid. R. 404(b)(2). But in this case, the extraneous offense evidence was admitted pursuant to article 38.37. The extraneous offenses committed against T.B.P. (i.e., those offenses not alleged in the indictment) were offered and admitted pursuant to section 1(b), which provides that evidence of "other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child." *See* Tex. Code Crim. Proc. art. 38.37, § 1(b). The extraneous offenses committed against S.P., A.M., A.P., and P.D. were admitted pursuant to section 2(b), which, as previously discussed, allows evidence of a defendant's extraneous sexual offenses committed against other children to 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 id.* art. 38.37, § (2)(b). A review of the limiting instruction in the jury charge in this case demonstrates that the trial court's instruction regarding consideration of the extraneous offense evidence also included instructions consistent with these statutory provisions.

It appears that appellant is suggesting that the language relating to consideration of extraneous offense evidence for Rule 404(b)(2) purposes was superfluous and, thus, rendered the instruction erroneous. However, given that the limiting instruction also contained language instructing the jury that it could consider the extraneous offense evidence for the purposes set forth

in article 38.37—the procedural provision under which the evidence was admitted, we conclude that the jury charge was not erroneous because of the limiting instruction.

Moreover, even assuming the inclusion of the complained-of superfluous language does constitute error in the jury charge, we cannot conclude that it caused appellant egregious harm. First, as noted above, the limiting instruction also instructed the jury that it could consider the extraneous offense evidence for the appropriate purposes set forth in article 38.37. We presume that the jurors understood and followed the court's instructions in the jury charge absent evidence to the contrary. *Taylor*, 332 S.W.3d at 492; *Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002); *Roberts*, 2016 WL 6408004, at *16.

More importantly, however, the extraneous offense evidence in this case was admitted for all purposes because appellant did not request a limiting instruction when the evidence was admitted. "A failure to request a limiting instruction at the time evidence is presented renders the evidence admissible for all purposes and relieves the trial judge of any obligation to include a limiting instruction in the jury charge." *Williams v. State*, 273 S.W.3d 200, 230 (Tex. Crim. App. 2008); *see Rago v. State*, No. 03-13-00798-CR, 2015 WL 9591347, at *2 (Tex. App.—Austin Dec. 31, 2015, no pet.) (mem. op., not designated for publication). Here, when the evidence of appellant's extraneous sexual abuse offenses was introduced, appellant did not ask the trial court to instruct the jury that it could consider the evidence of the extraneous sexual offenses for only limited purposes, including the purposes set forth in article 38.37. Thus, the evidence regarding the offenses was admitted for all purposes, *see Delgado*, 235 S.W.3d at 251 ("Once evidence has been admitted without a limiting instruction, it is part of the general evidence and may be used for all purposes.");

Hammock v. State, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001) ("Because appellant did not request a limiting instruction at the first opportunity, the evidence was admitted for all purposes."), and the jury was permitted to consider it for any purpose. Consequently, we conclude that the jury charge, even if erroneous as appellant suggests, did not cause appellant egregious harm.

We overrule appellant's sixth point of error.

CONCLUSION

Having overruled appellant's six points of error, we affirm the trial court's judgments of conviction.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: December 22, 2017

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