# NUMBER 13-14-00650-CR

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI - EDINBURG

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**RAFAEL ADRIAN AGUAYO,** **Appellant,**

**v.**

**THE STATE OF TEXAS,** **Appellee.**

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**On appeal from the 398th District Court of Hidalgo County, Texas.**

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# MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Benavides Memorandum Opinion by Justice Rodriguez**

Appellant Rafael Adrian Aguayo challenges his conviction for continuous sexual abuse of young children, G.L. and M.L. (Count One).[1] *See* TEX. PENAL CODE ANN. §

[1] The jury also found Aguayo guilty of aggravated sexual assault of a child and indecency with a child by contact (Count Two and Count Four) and aggravated sexual assault (Count One from a consolidated case). It found Aguayo not guilty of aggravated sexual assault of a child (Count Three) and aggravated sexual assault of a child (Count Two from a consolidated case). At the punishment phase, the

21.02 (West, Westlaw through 2015 R.S.). The jury assessed punishment at thirty-three years in the Texas Department of Criminal Justice Institutional Division. By three issues, Aguayo contends: (1) the trial court erred in admitting evidence of an extraneous offense; and (2–3) the continuous sexual abuse statute violates the jury unanimity requirements of the United States and Texas Constitutions. We affirm.

## I. Admission of Extraneous Evidence[2]

By his first issue, Aguayo generally contends that the trial court reversibly erred in admitting certain extraneous-offense evidence. Specifically, Aguayo claims that the evidence is inadmissible because (1) the State failed to give adequate notice before trial of the extraneous offense—an alleged stun gun assault against A.L., and (2) the State failed to establish the relevance of this extraneous offense. Aguayo complains about the following portion of the State's notice:

> On March 14, 2013[,] the defendant was arrested for the offense of Aggravated Assault with a deadly weapon. The victim, [A.L.], indicated that the defendant hid in the backseat of her truck and as she entered her vehicle the defendant attempted to use a stun gun to shock her. The defendant caused pain to the victim's left rib area. The defendant fled from the scene and was later located by Edinburg Police Department by a palm tree sitting down with an apparent self[-]inflicted cut to the right side of his neck which was caused by a box cutter that was discovered near the area. The defendant has since been indicted and the case is currently pending in the 398th District Court (CR-1444-13-I).

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State announced that it was only proceeding on Count One and abandoned the remaining counts. The trial court entered judgments of acquittal and judgments of dismissal, as appropriate.

To protect the children's privacy, we refer to the children, G.L. and M.L., and their mother, A.L., by pseudonyms.

[2] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.4.

**A. Standard of Review**

We review a trial court's decision on the admissibility of evidence under an abuse of discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2011); *see Hayden v. State*, 66 S.W.3d 269, 271 (Tex. Crim. App. 2001) (providing that a trial court's determination on whether notice is reasonable is under an abuse of discretion standard). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Martinez*, 327 S.W.3d at 736.

**B. Adequate Notice**

Aguayo first complains that the State failed to provide adequate notice about the stun gun incident because the notice set out that it occurred on March 14, 2013, but the evidence established that the incident occurred on March 24, 2013.

**1. Applicable Law**

Rule 404(b) provides, in relevant part, that evidence of crimes, wrongs, or other acts may be admissible provided that "[o]n timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief." TEX. R. EVID. 404(b). The purpose of the rule 404(b) notice requirement is to prevent surprise and to provide reasonable notice for the defendant to prepare to defend against the extraneous offenses offered by the State. *Hernandez v. State*, 176 S.W.3d 821, 823 (Tex. Crim. App. 2005) (en banc); *Hayden*, 66 S.W.3d at 271–72. The notice requirement is a rule of evidence admissibility. *Hernandez*, 176

S.W.3d at 823. When a defendant makes a request for notice of extraneous offenses under rule 404(b), that request should be in writing and timely served on the prosecution. *Webb v. State*, 36 S.W.3d 164, 177 (Tex. App.—Houston [14th] 2000, pet. ref'd) (op. on reh'g en banc). When a defendant relies on a pretrial motion to request notice of the State's intent to introduce extraneous-offense evidence, "it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule." *Simpson v. State*, 991 S.W.2d 798, 801 (Tex. Crim. App. 1998) (en banc) (quoting *Espinosa v. State*, 853 S.W.2d 36, 39 (Tex. Crim. App. 1993) (en banc) (per curiam)); *see Mitchell v.* State, 982 S.W.2d 425, 427 (Tex. Crim. App. 1998) (en banc) (holding "that when a document seeks trial court action, it cannot also serve as a request for notice").

**2. Discussion**

The record in this case contains no evidence that Aguayo timely requested notice of extraneous offenses from the State as required by rule 404(b). *See* TEX. R. EVID. 404(b); *Webb*, 36 S.W.3d at 177. Instead, Aguayo sought his notice through a document titled "Motion Requesting Notice of State's Intent to Introduce Extraneous Offenses." He addressed his motion to the trial court. Aguayo's document asked the trial court to order the State to give reasonable notice before trial of its intent to introduce evidence of extraneous offenses as defined in evidentiary rule 404(b). This was a motion seeking the trial court's action; it was not a request for notice. *See Mitchell*, 982 S.W.2d at 427; *Simpson*, 991 S.W.2d at 801 (citing *Espinosa*, 853 S.W.2d at 38–39). And although Aguayo properly filed the motion and provided a copy to the State, the record does not

show that the trial court ruled on the motion. *See Mitchell*, 982 S.W.2d at 427 (citing *Espinosa*, 853 S.W.2d at 38).

Because Aguayo did not submit a rule 404(b) request to the State and because he did not obtain a ruling on his motion, the notice requirements were not triggered, and Aguayo is precluded from complaining about the notice he did receive. We conclude that the trial court did not abuse its discretion in this regard when it admitted the complained-of evidence. *See Martinez*, 327 S.W.3d at 736; *Webb*, 36 S.W.3d at 179.

Nonetheless, we further conclude that the State gave Aguayo reasonable notice of this extraneous offense. *See Hayden*, 66 S.W.3d at 272 (applying the reasonable notice requirement). The State's notice provided specific facts. It set out that Aguayo was arrested following the incident and "has since been indicted and the case is currently pending in the 398th District Court (CR-1444-13-I)." Now, on appeal, Aguayo argues that he was surprised by the testimony about this incident. But having reviewed the record of the hearing that the trial court held outside the presence of the jury, we find no indication of surprise on the part of Aguayo as to the State's notice of the stun gun incident. Any surprise that the record reveals involves testimony A.L. provided about Aguayo's statements made to her while he was in jail. The notice was sufficient to avoid surprise to Aguayo regarding the stun gun incident and to enable him to prepare a defense. *See Hayden*, 66 S.W.3d at 272. We cannot agree that the difference between the date of the incident on the notice and the date revealed by A.L.'s testimony rendered the notice unreasonable.

**C. Relevance and Prejudicial Effect**

By this issue, Aguayo also contends that the State failed to establish the relevance of the extraneous act. He claims that even if the facts of the alleged stun gun incident were true, this evidence did not prove an element of the State's claim of continuous sexual child abuse.[3] Aguayo asserts that evidence of the purported stun gun incident was not relevant beyond the tendency to prove Aguayo's character to show he acted in conformity therewith: it did not prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident regarding the sexual offenses presented. *See* TEX. R. EVID. 404(b). Aguayo also complains that "this extraneous[-]offense evidence was so harmful, unfairly prejudicial, and misleading to the jury, that it affected the jury's ability to render an impartial verdict based on the evidence as it relates to the indictments for which Mr. Aguayo was charged." *See id.* at R. 403.

**1. Applicable Law**

"Extraneous-offense evidence is admissible under both Rules 403 and 404(b) if that evidence satisfies a two-pronged test: (1) whether the extraneous-offense evidence is relevant to a fact of consequence in the case aside from its tendency to show action in conformity with character; and (2) whether the probative value of the evidence is not substantially outweighed by unfair prejudice." *Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006). The first prong of this test requires us to determine (a) whether the evidence is relevant at all under rule 401 and (b) whether the evidence is relevant to something other than a showing of character conformity pursuant to rule 404(b). *See* TEX. R. EVID. 401, 404(b). The second prong requires us to review the rule 403

[3] Aguayo admitted in a statement that he attempted to stun A.L. with a stun gun that he purchased at a flea market. But Aguayo claimed that the stun gun did not work.

prohibition against the admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at R. 403; *Page*, 213 S.W.3d at 336.

Rule 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at R. 401. And rule 404(b) provides that an extraneous offense, crime, or act is not admissible as character evidence to show the accused acted in conformity with his character and committed an offense. *See* TEX. R. EVID. 404(b); *Owens v. State*, 827 S.W.2d 911, 914 (Tex. Crim. App. 1992) (en banc); *see also Hernandez v. State*, No. 13-01-804-CR, 2003 WL 22052570, at *4 (Tex. App.—Corpus Christi Sept. 4, 2003, pet. ref'd) (op., not designated for publication). Extraneous-offense evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b). "This list is illustrative, not exhaustive." *Johnston v. State*, 145 S.W.3d 215, 220 (Tex. Crim. App. 2004). For example, extraneous offenses may be admissible to show conduct by a defendant that indicates a consciousness of guilt. *See Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1996) (op. on reh'g). Criminal acts that are designed to reduce the likelihood of prosecution, conviction, or incarceration for the offense on trial are admissible under rule 404(b) as showing consciousness of guilt. *See id*. (citing, *e.g., Brown v. State*, 657 S.W.2d 117, 119 (Tex. Crim. App. 1983) (threats against families of witnesses); *Rodriguez v. State*, 577 S.W.2d 491, 492–93 (Tex. Crim. App. 1979) (threats against witnesses); *Maddox v. State*, 288 S.W.2d 780, 782 (Tex.

Crim. App. 1956) (physical violence against witnesses)).

> A "consciousness of guilt" is perhaps one of the strongest kinds of evidence of guilt. It is consequently a well accepted principle that any conduct on the part of a person accused of a crime subsequent to its commission, which indicates a "consciousness of guilt" may be received as a circumstance tending to prove that he committed the act with which he is charged.

*Torres v. State*, 794 S.W.2d 596, 598 (Tex. App.—Austin 1990, no pet.) (quoting RAY, TEXAS PRACTICE VOL. 2, LAW OF EVIDENCE, § 1538, at 242 (1980)). In other words, such evidence is relevant to prove that the person committed the act with which he is charged. *See id.* at 598–600.

The second prong of rule 403 is not intended to keep out all evidence that tends to prejudice the opponent's case. *See Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) ("All testimony and physical evidence are likely to be prejudicial to one party or the other."); *see also Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *20 (Tex. Crim. App. Oct. 28, 2015) (op., not designated for publication). Instead, rule 403 aims to prevent the admission of evidence that promotes a jury decision on an improper basis. *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (en banc) (op. on reh'g); *see Davis*, 329 S.W.2d at 806 ("It is only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value that Rule 403 is applicable."); *see also Cruz-Garcia*, 2015 WL 6528727, at *20.

**2. Discussion**

During trial, the State sought to introduce evidence through A.L.'s testimony that after Aguayo was released from jail and before trial, he assaulted A.L. with a stun gun. Aguayo objected to its admission on rule 404(b) and rule 403 grounds. The trial court

allowed A.L. to testify about the incident, reasoning that "[a]ll of that seems to be related to the charges and to the offense and . . . relevant to [Aguayo's] conduct with regard[ ] to consciousness of guilt."

**a. Evidence is Relevant Under Rule 401**

First, we determine whether the evidence was relevant under rule 401. Evidence of an alleged aggravated assault, as in this case, is admissible even though it may show the commission of another crime. *See, e.g., McWherter v. State,* 607 S.W.2d 531, 534–35 (Tex. Crim. App. 1980) ("The fact that circumstances of flight incidentally show the commission of another crime does not render the evidence inadmissible."). But before the evidence can be admitted, it must appear that the evidence of the assault has some legal relevance to the case being prosecuted. *See Hodge v.* State, 506 S.W.2d 870, 873 (Tex. Crim. App. 1974) (op. on reh'g).

In this case, Aguayo was arrested on March 5, 2013. During trial, outside the presence of the jury, A.L. testified that while Aguayo was in jail he called her and asked her "to forgive him," "to drop the charges," and "to go to the psychologist" with him. We note that Aguayo does not complain of the admission of these statements on appeal. But outside the presence of the jury, A.L. also testified that, in response to Aguayo's requests, she told him, "no." The stun gun incident occurred on March 24, 2013, after Aguayo was released from jail on bond.

We cannot conclude that the trial court abused its discretion in finding that testimony regarding this extraneous offense was relevant: it occurred approximately three weeks after Aguayo was arrested for continuous sexual assault of two children, after

A.L. rejected his request to drop the charges while he was in jail, and shortly after Aguayo was released from jail on bond. *See* TEX. R. EVID. 401. The timing of Aguayo's alleged aggravated assault of A.L. after she refused to, among other things, "drop charges," is evidence that has a tendency to make a determination of guilt for the offense in this case more probable than it would be without the evidence. *See id.*; *see also Hodge*, 506 S.W.2d at 873. It has some legal relevance to the case being prosecuted and satisfies the low threshold for relevance imposed by rule 401. *See* TEX. R. EVID. 401; *Hodge*, 506 S.W.2d at 873.

Having established relevance under rule 401, the burden shifted to Aguayo to make an affirmative showing that the assault was not connected with the offense on trial and was instead connected to some other transaction. *See Burks v. State*, 876 S.W.2d 877, 904 (Tex. Crim. App. 1994) (en banc); *Hodge*, 506 S.W.2d at 87. On appeal, Aguayo makes no claim that he showed the assault was connected to some other transaction; we need not review this further. *See* TEX. R. APP. P. 47.1.

**b. Relevant Evidence Serves a Relevant Rule 404(b) Purpose**

Because rule 401 is limited by rule 404(b), we must next determine whether the use of this relevant extraneous-offense evidence serves a relevant purpose—whether listed in rule 404(b) or not—other than to show character conformity. In this case, evidence of the timing of the stun gun incident and Aguayo's earlier phone conversation with A.L., support a finding that Aguayo's alleged assault on A.L., a witness, was motivated, not by his general criminal disposition, but by his desire to avoid prosecution for the charge of continuous sexual assault of a child. *See Ransom*, 920 S.W.2d at 299;

*see also* TEX. R. EVID. 404(b). This evidence clearly falls within the consciousness-of-guilt category and makes evidence of the assault admissible under rule 404(b) on that basis. *See Ransom*, 920 S.W.2d at 299. The trial court did not abuse its discretion in finding that extraneous-offense evidence of the stun gun incident served a relevant purpose under rule 404(b). *See* TEX. R. EVID. 404(b).

**c. Probative Value Over Prejudicial Effect**

Finally, we address Aguayo's claim of prejudice and determine whether rule 403 barred the extraneous-offense evidence. *See* TEX. R. EVID. 403. Aguayo complains that the evidence served to confuse the jury and to divert its attention from the material issues of the case. He contends that this extraneous evidence affected the jury's ability to render an impartial verdict based upon that evidence. But we cannot say that the prejudicial effect of the extraneous-offense evidence substantially outweighed its probative value. *See id.* This is particularly so in light of the unchallenged testimony of the two children and of Aguayo's statement admitting to certain conduct with the children. We cannot conclude that the admission of this evidence promoted a jury decision on an improper basis. *See Montgomery*, 810 S.W.2d at 389; *Martinez*, 327 S.W.3d at 736. Rule 403 does not prohibit admission of the evidence. *See* TEX. R. EVID. 403.

**d. Summary of Relevancy Arguments**

In sum, the trial court's decision to admit A.L.'s stun gun-incident testimony does not lie outside the zone of reasonable disagreement as to its admissibility. *See Johnson*, 490 S.W.3d at 908. The evidence was relevant under rule 401, served a relevant purpose under rule 404(b), and was not more prejudicial than probative under rule 403.

*See* TEX. R. EVID. 401, 403, 404(b). We conclude that the trial court did not abuse its discretion in admitting the evidence. *See Martinez*, 327 S.W.3d at 736.

### D. Disposition of Aguayo's First Issue

Having concluded that the State provided adequate and reasonable notice of its intent to introduce the extraneous-offense evidence about which Aguayo complains and that the evidence was relevant and not more prejudicial than probative, we overrule Aguayo's first issue.

## II. UNANIMOUS VERDICT

Aguayo asserts by his second and third issues that the continuous sexual abuse statute, Texas Penal Code section 21.02(d), violates the jury unanimity requirements of the United States and Texas Constitutions. *See* TEX. PENAL CODE ANN. § 21.02(d). He argues that by only requiring unanimity on a broadly defined criminal offense, the statute has allowed the jury to convict him without proof beyond a reasonable doubt as to each instance that comprises the continuous sexual abuse charge.

Texas Penal Code section 21.02(b)(1) provides that "[a] person commits an offense if . . . during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims" *Id.* at § 21.02(b)(1). Section 21.02(d) expressly provides that "members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed." *Id.* at § 21.02(d). The jury must have only agreed unanimously that Aguayo, during a period that is thirty or more days in duration,

committed two or more acts of sexual abuse. *See id.* § 21.02(b)(1), (d). The court's charge instructed the jury accordingly.

Aguayo now challenges the constitutionality of section 21.02. But Aguayo did not raise this complaint to the trial court and thus has not preserved it for our review.[4] *See* TEX. R. APP. P. 33.1(a); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (concluding that a defendant may not raise facial challenge to the constitutionality of statute for first time on appeal); *see also Salinas v. State*, 464 S.W.3d 363, 367, (Tex. Crim. App. 2015) ("A facial attack on the constitutionality of a statute requires . . . that a party establish that the statute in question operates unconstitutionally in all possible circumstances.").

Even had Aguayo preserved error, Texas courts, including this Court, have ruled against Aguayo's position and have upheld section 21.02's federal and state constitutionality. *See, e.g., Holton v. State*, 487 S.W.3d 600, 605–08 (Tex. App.—El Paso 2015, no pet.); *Pollock v. State*, 405 S.W.3d 396, 404–05 (Tex. App.—Fort Worth 2013, no pet.); *Kennedy v. State*, 385 S.W.3d 729, 731–32 (Tex. App.—Amarillo 2012, pet. ref'd); *Casey v. State*, 349 S.W.3d 825, 829 (Tex. App.—El Paso 2011, pet. ref'd); *Martin v. State*, 335 S.W.3d 867, 871–73 (Tex. App.—Austin 2011, pet. ref'd); *Reckart v. State*, 323 S.W.3d 588, 601 (Tex. App.—Corpus Christi 2010, pet. ref'd); *Render v. State*, 316 S.W.3d 846, 857–58 (Tex. App.—Dallas 2010, pet. ref'd); *see also Machado v. State*,

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[4] Claiming he has preserved error on the constitutionality issues, Aguayo directs this Court to a portion of the transcript of the charge conference where Aguayo's counsel, the State's counsel, and the trial court discussed the unanimity requirement, election, and double jeopardy as these legal concepts apply to all counts presented to the jury, not as the continuous-sexual-assault-of-a-child offense alone. Aguayo refers us to no part of the record where he objected that section 21.02(d) violates the jury unanimity requirements of the United States and Texas Constitutions.

No. 02-15-00365, 2016 WL 3962731, at *3–4 (Tex. App.—Fort Worth July 21, 2016, pet. ref'd); *Longoria v. State*, No. 13-12-00226-CR, 2013 WL 5675913, at *5–7 (Tex. App.—Corpus Christi Oct. 17, 2013, no pet.) (mem. op., not designated for publication); *Perez v. State*, No. 05-12-00377-CR, 2013 WL 4568296, at *5–7 (Tex. App.—Dallas Aug. 26, 2013, pet. ref'd) (op., not designated for publication). Aguayo's arguments do not persuade us to abandon our precedent or to differ from the persuasive decisions from other intermediate appellate courts. Based on the rationale in the cases cited above, we conclude that section 21.02 complies with the constitutional requirement of jury unanimity. Aguayo's prosecution under section 21.02 did not violate his constitutional right to a unanimous verdict. We overrule Aguayo's second and third issues.[5]

## III. Conclusion

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
17th day of November, 2016.

[5] To the extent Aguayo asserts sub-issues that could be construed as evidentiary issues, we conclude that they are inadequately briefed. *See* TEX. R. APP. P. 38.1(i).