NO. 12-24-00118-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

BRENT WESLEY FAVORS, APPELLANT	***§***	***APPEAL FROM THE 77TH***
V.	***§***	***JUDICAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***LIMESTONE COUNTY, TEXAS***

MEMORANDUM OPINION

Brent Wesley Favors appeals his conviction for continuous sexual abuse of a young child.[1] In three issues, Appellant argues that the evidence is legally insufficient to support the trial court's judgment, the trial court abused its discretion in admitting evidence in violation of Texas Rule of Evidence 403, and the statute under which Appellant was charged and convicted is unconstitutional. We affirm.

BACKGROUND

Appellant was charged by indictment with, among other things, continuous sexual abuse of a child. Specifically, the indictment alleged that the offense, which occurred during a period of more than thirty days in duration—from on or about May 18, 2020, until on or about May 25, 2022—comprised the following predicate offenses committed against R.A., who then was a child

[1] This case was among a group of cases ordered by the Texas Supreme Court to be transferred to this court from the Tenth Court of Appeals. *See* TEX. GOV'T CODE ANN. 73.001 (West Supp. 2024) ("[T]he supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer").

under age fourteen: Appellant (1) intentionally or knowingly caused the penetration of R.A.'s sex organ by his finger and/or (2) with intent to arouse or gratify his sexual desire, engaged in sexual contact with R.A. by touching her genitals. The indictment further alleged that Appellant previously was convicted of felony assault-family violence. Appellant pleaded "not guilty," and the matter proceeded to a jury trial.

At trial, R.A. testified as the State's only eyewitness to the charged offenses. Additional witnesses for the State included R.A.'s mother, W.A., her grandmother, C.C., Kimberly Allen, a sexual assault nurse examiner (SANE), and Dr. Soo Battle, the medical adviser at the Advocacy Center for Crime Victims and Children in Waco, Texas. The State also called B.A., who testified that when she was fifteen years old, Appellant engaged in sexual intercourse with her on multiple occasions.

Ultimately, the jury found Appellant "guilty" of continuous sexual abuse of a young child as charged. The matter proceeded to a bench trial on punishment, at which Appellant pleaded "true" to the enhancement allegation in the indictment. Following the presentation of evidence and argument of counsel, the trial court sentenced Appellant to imprisonment for forty-five years. This appeal followed.

EVIDENTIARY SUFFICIENCY

In his first issue, Appellant argues that the evidence is insufficient to support the trial court's judgment. Specifically, he argues that there is no evidence that the two predicate offenses, as charged, occurred over a period of thirty days or more.

Standard of Review

The ***Jackson v. Virginia***[2] legal sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson***, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979); *see also* ***Escobedo v. State***, 6 S.W.3d 1, 6 (Tex. App.–San Antonio 1999, pet. ref'd). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the

[2] 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979).

essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; *see also* ***Johnson v. State***, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The evidence is examined in the light most favorable to the verdict. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; ***Johnson***, 871 S.W.2d at 186. A jury is free to believe all or any part of a witness's testimony or disbelieve all or any part of that testimony. *See* ***Lee v. State***, 176 S.W.3d 452, 458 (Tex. App.–Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982).

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. ***Rodriguez v. State***, 521 S.W.3d 822, 827 (Tex. App.–Houston [1st Dist.] 2017, no pet.) (citing ***Sorrells v. State***, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011)). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *See* ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Juries are permitted to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. ***Id.*** at 15. Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. ***Id.*** An inference is a conclusion reached by considering other facts and deducing a logical consequence from them, while speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. ***Id.*** at 16.

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." ***Id.***

To meet its burden of proof that Appellant committed the charged offense, the State was required to prove that he, during a period of thirty or more days in duration, committed two or more of the alleged acts of sexual abuse at a time when he was seventeen years of age or older and the victim is a child younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2024). The State need not prove the exact dates of the abuse, only that "there were

two or more acts of sexual abuse that occurred during a period that was thirty or more days in duration." ***Buxton v. State***, 526 S.W.3d 666, 676 (Tex. App.–Houston [1st Dist.] 2017, pet. ref'd).

In the instant case, the jury was charged as follows:

> [I]f you find from the evidence beyond a reasonable doubt that, during a period that was thirty (30) days or more in duration, to-wit: from on or about the 18th day of May 2020 to on or about the 25th day of May 2022, in Limestone County, Texas, the Defendant, BRENT FAVORS, when he was seventeen (17) years of age or older, did commit two or more of the following acts of sexual abuse against a child younger than fourteen (14) years of age, to-wit:
>
> The Defendant did then and there, intentionally or knowingly cause the penetration of the sexual organ of R.A. by the finger of the Defendant, and at the time R.A. was a child who was then and there younger than 14 years of age;
>
> AND/OR
>
> The Defendant did then and there, with intent to arouse or gratify the sexual desire of the Defendant, engage in sexual contact with R.A. by touching the genitals of R.A., and at the time R.A. was a child who was then and there younger than 14 years of age;
>
> Then you will find the Defendant guilty of the offense of Continuous Sexual Abuse of a Child as alleged in Count I of the indictment[.]

Evidence at Trial

The record reflects that R.A. was born on October 19, 2015. In June 2020, R.A.'s mother, W.A., met Appellant. A short time later, W.A. and R.A. moved in with Appellant. In the years that followed, Appellant and W.A. had two sons together.

W.A. testified that on December 12, 2021, when R.A. was in kindergarten, W.A. observed on Appellant's phone that he had been watching "Stepdaughter porn and petite girls." As a result, she asked R.A. if Appellant had been touching her "na-na," which W.A. explained was R.A.'s word for her vagina. R.A. responded, "Yes," and became upset, at which point W.A. waked up Appellant to confront him. Appellant walked into R.A.'s room and told her, "You must have had a dream. I would never do that. I would never touch a little kid. I have a daughter of my own. You're like my daughter." Appellant then told R.A. and her mother that he would kill them both if they accused him of something that he did not do. According to W.A., the next morning, she woke up late and signed-in R.A. late to school. School records confirmed that R.A. was signed in late on December 13. Around February 10, 2022, after they were evicted from the house in which they were living in Groesbeck, Texas, they moved to another house in Thornton, Texas.

In mid-March 2022, R.A. went to stay with her grandmother, C.C. According to C.C.'s testimony, from March 14, 2022, to May 24, 2022, R.A. would not go anywhere in the house

without C.C. because she was scared. She also slept in the room with C.C. and was wetting the bed. C.C. recounted that, on May 24, 2022, after R.A. finished taking a bath, she told C.C. that Appellant was "messing with her 'na-na.'" C.C. testified that R.A. elaborated that Appellant "took her to school one day and said he had a surprise for her, blindfolded her, and he touched her and put his finger in there again and she said it hurt." C.C. called the police and, on May 25, 2022, took R.A. to the emergency room for an examination by a SANE nurse.

The SANE nurse, Allen, documented her medical examination of R.A. and R.A.'s medical history. According to Allen, R.A. explained to her, "I told Nanna what [Appellant] did to me . . . . He pulled my pants down and stuck his finger in my na-na." R.A. also informed Allen about her initial outcry to W.A. and recalled her and W.A.'s talking about it with Appellant, as well as her being late for school. R.A. also told Allen, "One time, he covered my eyes. He tied my hands. He was taking me to school. He got lost, he thought he could prank me. He hurted me. I told him to stop." When Allen asked R.A. for more details, R.A. shook her head to indicate "no." Allen also documented that when R.A. was asked to point and identify body parts, she identified buttocks as her "butt" or "bottom" and genitals as her "nawnaw." R.A. also told her, "I had a short bed. He pulled my pants down and stuck his finger in my nawnaw. I was awake." When Allen asked R.A. what grade she was in at the time of the assaults, R.A. responded, "Kindergarten, I think." R.A. reported to Allen that Appellant used his finger to touch her. She also explained that these instances of Appellant's sexual abuse of her happened more than three times.

On June 9, 2022, C.C. took R.A. to see Dr. Battle, who was the medical adviser at the Advocacy Center for Crime Victims and Children in Waco, Texas. There, Dr. Battle documented R.A.'s medical history during her exam. R.A. explained to Dr. Battle that Appellant "stuck his finger" in her "na-na," which she described as "uncomfortable."[3] R.A. continued, stating, "One time, when I went to the restroom [and] pulled down my panties, there was red stuff."

About a year later, in June 2023, C.C. took R.A. back to see Dr. Battle because R.A.'s therapist indicated R.A. was ready to return to Dr. Battle for a complete exam. During the subsequent meeting, R.A. informed Dr. Battle:

> One time he [Appellant] was taking me to school and he tricked me and drove me to the woods. And he put something on my face and I couldn't see . . . . He tied something around here, around

[3] Dr. Battle testified that R.A. initially referred to Appellant's act as having occurred in a dream, but as she continued to talk about it, she no longer referred to it as part of a dream.

> my head, and I couldn't see and he tied my hands. He messed with me, like he usually does, in my private part[.]

Dr. Battle asked for clarification about what R.A. meant by "private part," and she testified that R.A.'s response indicated that Appellant contacted her front, genital area. According to Dr. Battle's testimony, R.A. specified as follows:

> "It was here," and she pointed to her front genital area. She said, "It was here and I think he did something back here, too," and she pointed to her butt[.] And I asked her, "Well, what happened in the woods with your front private part?" She said, "He messed with it."

R.A. told Dr. Battle something touched her private part "inside. And it hurt this time[.]" R.A. reported that after this time "in the woods," when she went to school, her panties were red from "[m]aybe blood or a stain."

When R.A. testified at trial, she was eight years old and in the second grade. She testified that when she was in kindergarten, she lived in Groesbeck, Texas at Appellant's mother's house. She further testified that while she lived in that house and was in her bed, Appellant would "mess with her private[,]" which she, at that time, called her "na-na." She stated that it happened more than three times, and when she told W.A. what Appellant was doing to her, Appellant told her and her mother that "it was a dream." During R.A.'s testimony, she explained that she used her "na-na" to go to the bathroom. Later in her testimony, R.A. explained that when she was assaulted in the bed, she felt it in the area where she peed, near the front genitalia.

She testified that when she was living at another house, Appellant took her to school. R.A. continued, "He drove me to the woods on purpose but not deep, deep into the woods, I think, and he would do what he did at night . . . to me." According to R.A.'s testimony, Appellant put something over her eyes, and as R.A. was lying on her back in the back seat, she felt what she "would always feel in [her] bed." R.A. stated that it hurt, and she told Appellant to stop. And although R.A. could not remember if she felt touched on her skin or over her clothes, she recalled that she felt the touch on the hole "where you poop."

Discussion

In his brief, Appellant does not contest the sufficiency of the evidence supporting that he penetrated R.A.'s genitals as alleged in the first, predicate offense. Instead, he argues that there is no evidence that he committed the second, predicate offense as alleged, i.e., engaged in sexual contact with R.A. by touching her genitals. More specifically, he contends that the evidence only

supports that he touched her anus during the incident in the woods and, therefore, the evidence does not support that two or more instances of sexual abuse occurred during a period of thirty days or more. We disagree.

As set forth above, R.A. testified that while they lived at the house in Groesbeck, on more than three occasions Appellant messed with her privates or "na-na." During that time in Groesbeck, R.A. told W.A. what Appellant was doing to her, and W.A. confronted Appellant about it. W.A. testified that this outcry happened in December 2021, before they moved from Groesbeck to Thornton and noted that she signed-in R.A. late to school the next day, December 13.

R.A. testified that after they moved from Appellant's mother's house in Groesbeck to another house, there was an occasion when Appellant drove her into the woods and, consequently, she was late to school. W.A.'s testimony establishes that they moved to Thornton to a house both she and R.A. described as having steps and a long driveway around February 10, 2022. The record reflects only one instance when Appellant signed in R.A. late to school, which occurred on March 3, 2022. Accordingly, the event when Appellant drove R.A. into the woods occurred more than thirty days after any of the acts of sexual abuse occurring before December 13, 2021.

R.A. described the events the day Appellant drove her into the woods: she was lying down on her back in the back seat; she described that she "felt what I felt when I was – what I would always feel in my bed." Thus, the jury was entitled to consider her testimony about what occurred when she was lying in her bed at the house in Groesbeck, i.e., that Appellant would "mess with" her "na-na" or vagina, and to determine that she felt the same touch to her vagina during the incident in the woods.

R.A. stated that what Appellant did to her in the woods hurt but could not remember where it hurt her or what she saw. As Appellant points out in his brief, when R.A. said she felt it where she went to the bathroom, the State's attorney asked whether she felt it on the hole where she would pee or the hole where she would poop, and R.A. replied, "I think where – I think where you poop." But in spite of this testimony, R.A. also testified that she felt what she would "always feel in [her] bed," i.e., when Appellant would "mess with" her vagina. The jury was entitled reasonably to interpret these statements as separate instances of touching that occurred during the encounter in the woods. Accordingly, R.A.'s latter testimony does not serve to negate her previous testimony that Appellant touched her vagina during this encounter. Rather, her description of an act of sexual abuse by Appellant's touching her anus reasonably could be construed as an extraneous offense

that was not alleged in the indictment nor presented to the jury for its consideration in the court's charge.

Additionally, other evidence was presented which would support the jury's finding that Appellant touched both R.A.'s genitals and her anus during the incident in the woods on March 3, 2022. The trial court admitted without objection evidence of Dr. Battle's medical examinations of R.A. and the statements she made to Dr. Battle. Particularly, R.A. told Dr. Battle about a day when Appellant took her to school but "tricked" her by driving her into the woods putting something on her face so she could not see. Dr. Battle testified that R.A. said, "It was here," as she pointed to her front genital area, "and I think he did something back here, too," as she pointed to her buttocks. Dr. Battle stated that she asked R.A. what happened in the woods with her front, private part, and she replied, "He messed with it." R.A. described that the touch was "inside" and that "it hurt this time."

We reviewed the record in the instant case in the light most favorable to the jury's verdict. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789. Having done so, we remain mindful that a jury is free to believe all or any part of a witness's testimony or disbelieve all or any part of that testimony. *See* ***Lee***, 176 S.W.3d at 458. Based upon our review of the record, we conclude that, based on the aforementioned evidence, the jury reasonably could have found that Appellant, during a period of thirty or more days in duration, committed two or more acts of sexual abuse as alleged in the indictment, at a time when he was seventeen years of age or older and R.A. was younger than fourteen years of age. *See* TEX. PENAL CODE ANN. §§ 21.02(b), (c). Appellant's first issue is overruled.

ADMISSIBILITY OF TESTIMONY

In his second issue, Appellant argues that the trial court abused its discretion by allowing testimony from B.A. about multiple sexual encounters she had with Appellant when she was fifteen years old because such testimony was inadmissible under Texas Rule of Evidence 403.

Standard of Review and Governing Law

We review the trial court's decision to admit evidence for abuse of discretion. *See* ***Prystash v. State***, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999); ***Montgomery v. State***, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). As long as the trial court's ruling was at least within the zone of reasonable disagreement, the appellate court will not intercede. *See* ***Montgomery***, 810

S.W.2d at 391. Furthermore, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed, even if the trial judge gave the wrong reason for a correct ruling. *See* ***De La Paz v. State***, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

"Relevant evidence" is evidence which has 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. *See* TEX. R. EVID. 401. Relevant evidence generally is admissible and irrelevant evidence generally is inadmissible. *See* TEX. R. EVID. 402. In the prosecution of a defendant for an offense of continuous sexual abuse of a young child, evidence that the defendant committed a separate offense of sexual assault of a child may be admitted for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. *See* TEX. CODE CRIM. PROC. art. 38.37 § 2(a)(B), (D), (b) (West Supp. 2024); *see also* ***Holland v. State***, 702 S.W.3d 836, 842 (Tex. App.–Waco 2024, pet. ref'd) (evidence of defendant's prior sexual assaults of minors was probative of his propensity to sexually assault children); ***Belcher v. State***, 474 S.W.3d 840, 848 (Tex. App.–Tyler 2015, no pet.) (concluding that evidence of prior sexual abuse of children admitted under Article 38.37 § 2(b) "was especially probative of Appellant's propensity to sexually assault children").

But even if extraneous-offense evidence is relevant and admissible under Article 38.37, it is subject to exclusion under Texas Rule of Evidence 403. *See* ***Guedea v. State***, 683 S.W.3d 549, 552 (Tex. App.–Waco 2023, no pet). Under Rule 403 of the Texas Rules of Evidence, even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." TEX. R. EVID. 403. "Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." ***Montgomery***, 810 S.W.2d at 389. Rule 403 requires both trial and reviewing courts to analyze and balance (1) the probative value of the evidence (2) the potential to impress the jury in some irrational, yet indelible, way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. *See* ***Erazo v. State***, 114 S.W.3d 487, 489 (Tex. Crim. App. 2004).

B.A.'s Testimony

In the instant case, B.A. testified that she met Appellant around November 2021 at the house in Groesbeck. According to B.A., in late 2022, when she was fifteen years old and she, Appellant, W.A. and others were about to get into a vehicle to go somewhere, Appellant came to

her as if to give her a hug but in so doing tried to touch her breasts. B.A. said she moved away from Appellant and got into the vehicle.

B.A. also testified that on another occasion around November 2022, Appellant drove her out to some land his family owned called "the Favors." She described the Favors as having a lot of trees and a pond. On the way there, Appellant told B.A. he had sex with a girl she knew, who was sixteen years old at the time. Appellant told B.A that the other girl was "very petite" and he wanted to "try different things;" B.A. had a different body-type and Appellant wanted to compare sex with girls with different figures. According to B.A., she and Appellant powered off their phones, and B.A. performed oral sex on Appellant. Then, B.A. got in the back seat, laid down, and took off her pants and underwear, at which point Appellant got on top of her and had sex with her.[4] Later that same day, Appellant took B.A. back to "the Favors." Once there, B.A. bent over on the back seat of the car on all-fours while Appellant stood outside the vehicle behind her and had sex with her.

B.A. recounted that, about a week later, Appellant took her to another location with a lot of rocks, where they again had sex. B.A. further recalled yet another instance when she was at a house with Appellant, W.A., and two others. She was sleeping in a room by herself but awakened and sent a text to Appellant at 2:00 or 3:00 a.m. to ask him to get someone to bring her a Pepsi. According to B.A., at about 5:00 a.m., Appellant brought her a soda, pulled her boxers down, and started having sex with her. B.A. stated that she heard a noise, and Appellant rushed into the bathroom.

Discussion

In addressing the Rule 403 factors set forth above, Appellant first contends that B.A.'s testimony was of little probative value. We disagree. The sexual acts B.A. described occurred within a year of the instance of abuse in the woods R.A. described in her testimony. Both girls were minors at the time of the incident and spent a great amount of time with Appellant and W.A. Not only did B.A. describe similar instances of sex acts which occurred in wooded areas with her lying in the back seat of Appellant's vehicle, but she, like R.A., described an instance wherein Appellant came into her room late at night, removed her clothes, and penetrated her vagina. B.A.'s testimony is probative of Appellant's character or propensity to commit sexual assaults against

[4] B.A. also testified that some time before this incident, Appellant sent her two videos: one of his penis and another of his having sex with W.A.

children. *See* ***Holland***, 702 S.W.3d at 842; ***Belcher***, 474 S.W.3d at 848. Moreover, B.A.'s testimony about Appellant's telling her he wanted to experience sex with different body types is probative of Appellant's motive and intent. *See* TEX. R. EVID. 404(b). Further, B.A.'s testimony about Appellant's driving her to the Favors property and her description of that property tends to corroborate R.A.'s description of Appellant's driving her into the woods and is probative of Appellant's plan to take the young girls to a remote location to commit acts of sexual abuse. *See* ***id.*** Not only was B.A.'s testimony highly probative, the State's need for the evidence was great. R.A. was the only eyewitness to the charged offenses, and there was no physical, medical evidence to corroborate her testimony. Thus, B.A.'s testimony was crucial to corroborate R.A.'s testimony, particularly in light of testimony recounting Appellant's suggestion that any such encounter with R.A. must have been something she dreamed and Appellant's assertion during the outset of his opening statement that R.A. was coached by C.C. to make the allegations against Appellant to aid in her attempt to gain custody of R.A. *See, e.g.*, ***Powell v. State***, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001) (trial court reasonably could determine that extraneous offense evidence indicating that such offenses committed in similar way had noncharacter conformity relevance where it rebutted appellant's defensive theory that he had no opportunity to commit offense because he never was alone with complainant).

Appellant further argues that the trial court's admission of B.A.'s testimony led to confusion of the issues and allowed the jury to by misled. Once again, we disagree. While extraneous offense evidence has the tendency to arouse hostility toward a defendant and to suggest a verdict on an improper basis due to the inherently inflammatory and prejudicial nature of crimes of a sexual nature committed against children, when a trial court gives the jury a proper limiting instruction regarding the extraneous offense, it lessens the prejudicial impact. *See* ***Banks v. State***, 494 S.W.3d 883, 894 (Tex. App.–Houston [14th Dist.] 2016, pet. ref'd). Here, the trial court instructed the jury both generally as to extrinsic offenses and specifically as to B.A.'s testimony in its charge as follows:

> You are instructed that if there is any testimony before you in this case regarding the Defendant having committed offenses, if any, other than the offenses 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 for its bearing on relevant matters, including the state of mind of the Defendant and the alleged victim, R.A, and the previous and

> subsequent relationship between the Defendant and the alleged victim, R.A., if any, in connection with the offenses, if any, alleged against him in the indictment in this case, or in determining proof of motive, opportunity, intent, preparation, plan or knowledge, if any, in connection with the offense, if any, alleged against him in the indictment in this case and for no other purpose.
>
> You are instructed that if there is any evidence before you concerning alleged offenses against a child under seventeen (17) years of age, other than the complainants alleged in the indictment, such offense or offenses, if any may only be considered if you believe beyond a reasonable doubt that the Defendant committed such other offense or offenses, if any, then you may consider said evidence for any bearing the evidence has on relevant matter, including the character of the Defendant and acts performed in conformity with the character of the Defendant.

We presume the jury follows the trial court's instructions. ***Resendiz v. State***, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003).

Additionally, although the testimony might have had a tendency to suggest a decision on an improper basis because it pertained to a previous sexual assault of a minor, the prejudicial nature of such testimony can be ameliorated by the fact that the testimony from B.A. concerning Appellant's sexual misconduct discussed actions that were no more serious than the allegations forming the basis for the indictment. *See* ***Robisheaux v. State***, 483 S.W.3d 205, 220 (Tex. App.–Austin 2016, pet. ref'd.). We acknowledge that B.A.'s testimony describes Appellant's sexual assaults against her as consisting of full, vaginal penetration and intercourse. Nonetheless, Appellant was charged in the instant case with penetration of R.A.'s sexual organ with his finger and touching her genitals. The fact that the charged offenses do not involve the same extent of vaginal penetration in R.A.'s case does not render the allegations in this case any less serious than the acts about which B.A. testified, particularly in light of the fact R.A. was approximately eight to ten years younger than B.A. at the time of Appellant's respective sexual acts committed against the two girls.

Lastly, Appellant makes no argument that the amount of time needed for the State to develop B.A.'s testimony took an undue amount of time. Indeed, B.A.'s trial testimony comprises only forty pages of reporter's record which consists of hundreds of pages.

We reiterate that Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial. *See* ***Montgomery***, 810 S.W.2d at 389. Based on the foregoing, we conclude that the trial court reasonably could have determined that the probative value of B.A.'s testimony was not substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 403. Therefore, we hold that the trial court did not abuse its discretion in permitting B.A. to testify. Appellant's second issue is overruled.

CONSTITUTIONALITY OF TEXAS PENAL CODE, SECTION 21.02

In his third issue, Appellant raises both a facial and "as applied" challenge to the constitutionality of Texas Penal Code, Section 21.02. However, Appellant acknowledges that he did not first make this challenge in the trial court. A facial challenge to the constitutionality of a statute must properly be preserved in order to be raised on appeal. *See* ***Karenev v. State***, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). This same issue has been raised in the Tenth Court of Appeals and was rejected. *See* ***Pruitt v. State***, No. 10-15-00033-CR, 2016 WL 555957, at *1 (Tex. App.–Waco Feb. 11, 2016, pet. ref'd) (mem. op., not designated for publication) (holding that appellant's facial challenge to Section 21.02 was not preserved and that Court of Criminal Appeals has held that defendant may not raise for first time on appeal facial challenge to constitutionality of statute).[5] Similarly, an "as applied" challenge cannot be raised for the first time on appeal. *See* ***Sony v. State***, 307 S.W.3d 348, 352 (Tex. App.–San Antonio 2009, no pet.) (citing ***Curry v. State***, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995); ***Garcia v. State***, 887 S.W.2d 846, 861 (Tex. Crim. App. 1994)).

But even had Appellant preserved the issue for appeal, the outcome would not differ. The question from which Appellant's constitutional challenge arises is whether the specific acts of sexual abuse enumerated in the statute are elements of the offense or merely are the manner and means by which one of the elements is accomplished. If they are elements, then jury unanimity is a requirement; if they are manner and means, then jury unanimity is not required.[6] *See* ***Holton v. State***, 487 S.W.3d 600, 606 (Tex. App.–El Paso 2015, no pet.). Other courts of appeals which addressed this issue held that the acts of sexual abuse listed in the statute are not elements of the offense; rather, the elements of the offense on which the jury must agree unanimously are the "commission of two or more acts of sexual abuse over a specified time period—that is, a pattern of behavior or the series of acts. *See* ***id.***; *see also* ***Pollock v. State***, 405 S.W.3d 396, 404 (Tex. App.–Fort Worth 2013, no pet.); ***McMillian v. State***, 388 S.W.3d 866, 872 (Tex. App.–Houston

[5] As noted above, this case was transferred to this court from the Tenth Court of Appeals. Accordingly, we may decide the case in accordance with the precedent of the Tenth Court of Appeals under principles of stare decisis. *See* TEX. R. APP. P. 41.3.

[6] Under the Texas Constitution, jury unanimity is required in felony cases and, under Texas statutes, unanimity is required in all criminal cases. ***Ngo v. State***, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005). However, this does not mean that the jurors must agree unanimously that the defendant committed the crime in one, specific way. *See* ***Landrian v. State***, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008). Instead, jurors only are required to agree unanimously on each "element" of the offense, and not on the "manner and means" by which the defendant committed the offense. *See* ***Jefferson v. State***, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006).

[14th Dist.] 2012, no pet.). Thus, while a jury must agree unanimously that the "series" of acts was committed within the specified time frame, the jury is not required to unanimously agree on which specific acts the defendant committed. *See* ***Jacobsen v. State***, 325 S.W.3d 733, 737 (Tex. App.–Austin 2010, no pet.). Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 21, 2025.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 21, 2025

NO. 12-24-00118-CR

BRENT WESLEY FAVORS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 77th District Court
of Limestone County, Texas (Tr.Ct.No. 15753-A)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED, and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.