Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00884-CR

Josue Aaron **DELGADO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR2683
Honorable Laura Lee Parker, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 27, 2020

AFFIRMED

After a jury trial, Josue Aaron Delgado was convicted of continuous sexual abuse of young children and was sentenced to seventy-five years of imprisonment. He brings three issues on appeal: (1) whether the evidence is legally sufficient to show that he committed the offense; (2) whether the trial court erred "in limiting defense evidence and cross-examination intended to show a possible bias or motive of the witness, and to correct a false impression left with the jury"; and (3) whether the trial court erred in allowing extraneous-offense evidence to be presented to the jury. We affirm.

BACKGROUND

The indictment in this case alleged that Delgado committed acts of sexual abuse against three children younger than fourteen years of age: Jacob S., Selena G., and Catherina A. All three children are related. Catherina A. and Jacob S. have the same father, but different mothers. Selena G. is their first cousin. They all met Delgado because he was "taken in" as a teenager by their grandparents and was considered by the family to be their uncle.

At the time of trial, Delgado was thirty-eight years of age. He first met the children's grandmother, Yvonne S., when he was sixteen years-old and a junior at a high school in San Antonio. Yvonne S. was his high school teacher. Delgado testified at trial that because his father was physically abusive, he left home and was "taken in" by Yvonne S. and her husband, Eddie S. Delgado lived in Yvonne S. and Eddie S.'s home on-and-off from the time he was sixteen to the time the allegations in this case were made against him.

LEGAL SUFFICIENCY

In reviewing a challenge to the legal sufficiency of the evidence, we examine all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). "The trier of fact is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the evidence so long as it is supported by the record." *Ramsey*, 473 S.W.3d at 809.

"Importantly, sufficiency review does not rest on how the jury was instructed." *Walker v. State*, 594 S.W.3d 330, 335 (Tex. Crim. App. 2020). "Instead, we review whether the evidence supports the elements of the charged crime." *Id*. at 335-36. "Those elements are defined by the hypothetically correct jury charge." *Id*. at 336. "The hypothetically correct jury charge 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 was tried." *Id.*

A person commits the offense of continuous sexual abuse of young children if (1) during a period of thirty days or more, he commits "two or more acts of sexual abuse, *regardless of whether the acts of sexual abuse are committed against one or more victims*"; and (2) at the time each act was committed, he was at least seventeen years old and the victim was a child younger than fourteen years old. TEX. PENAL CODE ANN. § 21.02(b) (emphasis added). An "act of sexual abuse" includes, among other things, indecency with a child and aggravated sexual assault. *Id.* § 21.02(c)(2), (4). A person commits the offense of indecency with a child if he "engages in sexual contact with" "a child younger than seventeen years of age" "or causes the child to engage in sexual contact," or if he "with intent to arouse or gratify the sexual desire of any person" (1) exposes his anus or any part of his "genitals, knowing the child is present," or (2) "causes the child to expose the child's anus or any part of the child's genitals." *Id.* § 21.11(a). A person commits the offense of aggravated sexual assault of a child younger than fourteen years of age if he intentionally or knowingly (1) "causes the penetration of the anus or sexual organ of a child by any means;" (2) "causes the penetration of the mouth of a child by the sexual organ of the actor;" (3) "causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;" (4) "causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor;" or (5) "causes the mouth of a child to contact the anus or sexual organ of another person, including the actor." *Id.* § 22.021(a)(1)(B), (2)(B).

"The legislature created the offense of continuous sexual abuse of a child in response to a need to address sexual assaults against young children who are normally unable to identify the exact dates of the offenses when there are ongoing acts of sexual abuse." *Michell v. State*, 381

S.W.3d 554, 561 (Tex. App.—Eastland 2012, no pet.). Thus, for the evidence to be sufficient to support a conviction of continuous sexual abuse, "[t]he 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) (quoting *Brown v. State*, 381 S.W.3d 565, 574 (Tex. App.—Eastland 2012, no pet.)); *see also Lane v. State*, 357 S.W.3d 770, 773-74 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (stating that factfinder is not required to agree on exact dates that acts of sexual abuse were committed).

Delgado in this case was charged with having committed the following acts of sexual abuse during a period that was thirty or more days in duration:

(1) Delgado did intentionally and knowingly cause the mouth of Selena G., a child who was younger than fourteen years of age, to contact Delgado's sexual organ;

(2) Delgado did intentionally and knowingly engage in sexual contact with Selena G., a child younger than fourteen years of age, by touching part of her genitals with the intent to arouse or gratify the sexual desire of any person;

(3) Delgado did intentionally and knowingly engage in sexual contact with Catherina A., a child younger than fourteen years of age, by causing Catherina A. to touch the part of Delgado's genitals with the intent to arouse or gratify the sexual desire of any person;

(4) Delgado did intentionally and knowingly cause the anus of Jacob S., a child younger than fourteen years of age, to contact Delgado's sexual organ;

(5) Delgado did intentionally and knowingly cause the sexual organ of Jacob S., a child younger than fourteen years of age, to contact Delgado's anus; and

(6) Delgado did intentionally and knowingly engage in sexual contact with Jacob S., a child younger than fourteen years of age, by touching part of Jacob S.'s genitals with the intent to arouse or gratify the sexual desire of any person.

Jacob S.

At the time of trial, Jacob S. was thirteen years old. Yvonne S. and Eddie S. are his paternal grandparents. Jacob S. testified he would stay with his grandparents at their house twice a week.

His "Uncle Josue" also lived with his grandparents. Jacob S. testified that when he visited his grandparents, he would stay in a bedroom located in the "far back" of the house. According to Jacob S., while he was in that back bedroom, Delgado, with his hand, touched Jacob S.'s penis. Jacob S. testified this happened more than once. Jacob S. also testified Delgado put his penis into Jacob S.'s anus. According to Jacob S., this also happened more than once. When asked how often Delgado would touch him when he went over to his grandparents' house, Jacob S. answered, "Like, twice a month." Delgado told Jacob S. not to tell anyone because he would get "in trouble." Jacob S. testified his grandparents were in the home when these incidents occurred; they were working inside the house. Jacob S. could not remember exactly how old he was when these incidents occurred, but he estimated he was eight or nine years old. He testified he told his mother, Angela S., about the abuse when he was ten years old. Jacob S., who was born in September 2005, was eight years old in 2013. Thus, he estimated the incidents of sexual abuse occurred in 2013 and 2014.

On April 28, 2016, his mother, Angela S., found out that Delgado had been accused of sexual abuse when Jacob S.'s paternal grandfather, Eddie S., called her and asked her to watch the news. When she learned about the allegations against Delgado,[1] she testified that she "immediately knew" based on Jacob S.'s past behavior. She then talked with Jacob S. about Delgado, and he told her about Delgado sexually abusing him. According to Angela S., Jacob S. had not wanted to tell her about the abuse because he was afraid she would remove his grandmother from his life.

Caroline Briones, a Bexar County forensic interviewer housed at ChildSafe,[2] testified that she interviewed Jacob S. on May 12, 2016 when he was ten years old. According to Briones, Jacob

[1] These allegations were related to Selena G.
[2] ChildSafe is a Bexar County Advocacy Center where children receive services "for all sorts of abuse."

S. appeared to be embarrassed. Jacob S. described having to put his penis into Delgado's anus.[3] He also told Briones that Delgado put his penis into Jacob S.'s anus. Briones testified that Jacob S. gave a period of time over which the sexual abuse occurred. "He couldn't remember if it happened in third grade, but he did say [that the abuse occurred during] fourth grade and through the summer after fourth grade." Briones testified that Delgado was able to provide sensory details: "He talked about things that were said to him, things that he heard from Josue [Delgado]—Uncle Josue, when it—this was happening. He talked about how it felt on his body."

Selena G.

Selena G.'s mother, Allysun G., first met Delgado when she was ten years old and her parents "took in" Delgado. She estimated at trial that she was about five years younger than Delgado and called him "brother." In January 2016, Delgado had been staying with Allysun G. and her family at the home Allysun G. and her husband had just purchased. Delgado was helping Allysun G. and her husband "fix up" the house by building a fence and doing other odd jobs. Allysun G. testified that on January 29, 2016, she and her husband were prepping for a barbecue they were going to have the next day to celebrate the Superbowl. According to Allysun G., six-year-old Selena G. came inside the house from the backyard and said to her "something very disturbing." Allysun G. had been taking care of her best friend's large dogs. The dogs, "Comet" and "Halley," were "horse-playing" with each other in the backyard. The male dog, Comet, was lying down on his back when the female dog, Halley, approached him and began licking his penis. Allysun G. testified that Selena G. thought it was "so funny" and came inside the house to tell her about it. Selena G. said, "Ewww, Halley is licking Comet's peanut, you know, just like the way Josue [Delgado] makes me do." When Allysun G. asked Selena G. what a "peanut" was, she told

[3]During his testimony, Jacob S. was asked whether he remembered "if Josue ever made [him] stick [his] private in [Delgado's] anus." Jacob S. replied, "No."

her mother it was "a boy's private part." Selena G. told her mother that Delgado "would pay her a dollar to lick his peanut" and that she had licked Delgado's "peanut" one time behind the shed in the backyard, which is next to the trampoline. Selena G. told her mother it had been happening since she was four years old. When Allysun G. asked Selena G. why she had not told her about what Delgado had been doing, Selena G. said that if she had told, her grandmother would be in a lot of trouble and that Delgado told her to keep it a secret. According to Allysun G., Selena G. frequently visited her grandparents at their house. She estimated Selena G. was at her grandparents' home while Delgado was also present about forty times a year.

Allysun G. testified that at the time Selena G. told her about licking Delgado's peanut, Delgado was in the backyard. She went outside to confront him about Selena G.'s statements, and he denied having done anything wrong. Allysun G.'s husband told Delgado to leave the home. Allysun G. then called the police and reported the crime.

During his testimony, Jacob S. stated that on one occasion, when Selena G. was six or seven years old, he saw Delgado sexually abuse Selena G. in the back bedroom of his grandparents' home. Through a door that was slightly cracked, Jacob S. saw Delgado "put his private parts in her private parts." Jacob S. clarified that he saw Delgado put his private part in Selena G.'s vagina. Jacob S. testified that Selena G. looked scared. Selena turned six years old in June 2015, and her mother learned of the abuse in January 2016.

Caroline Briones testified she conducted an interview of Selena G. on February 8, 2016. Selena G. was six years old. She referred to Delgado's penis as his "peanut." She was able to accurately describe a penis and drew Delgado's penis with details like pubic hair and the scrotum. Briones testified that Selena G. gave sensory details during the interview. According to Briones, "It seemed to me what she was telling me was based in reality." Briones also testified that when she had interviewed Jacob S., he had told her about seeing Delgado sexually abuse Selena G.

Selena G. was nine years old and in fourth grade at the time she testified at trial. She testified that Delgado would make her lick his "peanut." She clarified that she referred to "a boy's private part" as a peanut. She could not remember how many times she touched Delgado's penis or what grade she was in, but she estimated first or second grade. She testified Delgado gave her money for licking his peanut and that he asked her to keep it a secret. She did know that it happened more than once, estimating "three or more" times. She testified she licked Delgado's peanut behind the shed in her backyard. According to Selena G., Delgado's pants were down, and he said to her, "Can you lick my peanut?" Selena G. said that she "really didn't want to do it at all, and it made [her] very uncomfortable." Selena G. stated that her hands "would be behind [her] back or on his peanut." When asked how she held his "peanut," Selena G. testified, "Well, I had to put—he, like, moved my hands so it would be in the right spot, and I just didn't really like it. So I had—go around his peanut, like overlapping each other." When asked if Delgado had touched her private part or bottom, Selena G. said he had not. Selena G. did not identify Delgado in the courtroom.[4] She testified she had not seen Delgado for two years.

Catherina A.

Like her cousin Selena G., Catherina A. was nine years old and in fourth grade at the time of trial. Her mother, Ciana A., testified that she knew Delgado because he lived with Catherina A.'s grandparents. According to Ciana A., when she needed help with childcare, she would leave Catherina A. with her grandparents at their house. Ciana A. testified that in June 2016, a friend sent her a link to a news story about the allegations against Delgado.[5] Ciana A. talked to Catherina A., who was seven years old at the time. She did not ask Catherina A. directly if Delgado had done

[4] Selena G. was the only witness who, when asked, could not identify Delgado. All the other witnesses, including Jacob S. and Catherina A., identified Delgado in court.
[5] These allegations were related to Selena G.

anything to her. According to Ciana A., Catherina A.'s reaction to her questions raised "red flags." Catherina A. was crying and scared. "She said she didn't remember and asked if she could stop talking about it." Catherina A. also asked if Delgado would get in trouble. The next day, Ciana A. asked the school counselor to speak with Catherina A. The counselor told Ciana A. that she had discussed with Catherina A. "what adults shouldn't be touching and what areas." Later, Ciana A. and Catherina A. sat in the living room to talk. According to Ciana A., Catherina A. was crying and was afraid she was going to be in trouble. She told Ciana A. that Delgado had "made her touch him in his private parts." Ciana A. clarified that Catherina A. was referring to Delgado's penis. Catherina A. said that it had happened at her grandparent's house in Delgado's bedroom. Catherina A. told her that Delgado would give her ice cream and that he told her not to tell anyone because they "would get in big trouble." Ciana A. called the police to report the crime.

Catherina A. testified at trial that she saw Delgado when she was at her grandparent's house. She said that while she was in Delgado's bedroom, he asked her to touch his private parts; she clarified it was the private part "where his pee comes out." Catherina A. said his pants were down. She felt scared and was afraid to tell anyone. She testified he offered her ice cream and told her not to tell anyone because "something bad would happen to grandma." When asked if she remembered how old she was when Delgado asked her to touch him, she replied, "I think 7." On cross-examination, Catherina A. was asked why she had told the ChildSafe interviewer that she had touched Delgado on top of his clothes. Catherina A. replied that she had "made a mistake when [she] was talking to [the interviewer] because [she] forgot." Catherina A. clarified that she had touched Delgado "under his clothes."

All the witnesses testified that Delgado would "rough house" and wrestle with the children. He also played videogames with them in a back bedroom. Catherina A. said she and the other

children would play "monster" games with Delgado. According to Catherina A., "we would hide somewhere" and try "not to get tagged by the monster."

Delgado's Testimony

Delgado testified in his own defense at trial. According to Delgado, he first moved into Yvonne S. and Eddie S.'s home in 1997. Over the years, he moved in and out multiple times. With regard to the time period alleged in the indictment (August 20, 2011 through January 25, 2016), he testified he lived with them for two months (March and April) in 2012. He moved back into the home in November 2014 and moved out in May or early June 2015. He moved back into the home in December 2015. In late December 2015, he stayed with Allysun G. and her family while he was helping repair their new home. Delgado testified that during the time he was staying with Allysun G. and her family, a couple (Tonya and Joey) were also staying there. Tonya and Joey slept in Selena G.'s bedroom. Delgado slept in the baby's bedroom. Selena G. and her baby brother slept in the master bedroom with their parents.

According to Delgado, while he was in the backyard of Allysun G.'s home, she approached him and accused him "of doing something to her daughter." Delgado testified, "She said that supposedly her daughter went into the kitchen and said that she licked my peanut." Delgado asked her, "What's a peanut?" Allysun G. explained a peanut was a penis. Delgado testified he did not know how to respond and did not know why Selena G. would say that. Allysun's husband then asked him to leave; he got his belongings and left. He then went to Yvonne S. and Eddie S.'s home to discuss the matter with them. He spent the night at their home. The next morning, he left with his belongings.

When asked about Jacob S., Delgado characterized him as a spoiled child. He said that whenever Jacob S. visited his grandparents, Eddie S. would encourage Delgado to play with Jacob S. Delgado testified he would play and wrestle with Jacob S. Delgado admitted that he had hit

Jacob S. more than once in response to Jacob S. hitting him.[6] According to Delgado, "When he's by himself, he won't do that [hit]. But when he's trying to impress the other little boy next door, he goes for spitting in the face and kicking in the groin." Delgado admitted that he had made Selena G. "cry one time for hitting Jacob." Delgado had also hit Selena G. "for disobeying." According to Delgado, Allysun G. had yelled at him once for hitting Selena G. With regard to Catherina A., Delgado testified he saw her two or three times in 2015. He testified he spanked Catherina A. once and got in trouble. Delgado testified he "was reminded she's just a little girl."

Delgado testified that in February 2016, he received a call from a detective in Universal City. He denied the allegations involving Selena G. and gave a statement to the police. He met with the detective again on April 15, 2016. He gave another statement to the police, which was admitted at trial as State's Exhibit 14:

> In December [2015,] I helped Ally and [her husband] move from their Austin home to their Universal City home. In January[,] I moved in temporarily to assist the construction of their fence as well as other odd jobs around the house. I slept in the boy's bedroom[,] and since there was no bed[,] I slept on the floor. The room's door was always open. At the time Ally's friends also came to temporarily stay. After about one week[,] one morning I woke up to what felt like a blow job[.] [A]s I looked down[,] Selena was on me[,] and I hit her hard enough to make her cry. When Ally and Tonya came to investigate[,] I told them that I hit her because she hit me in the groin. Everyone laughed at me not realizing how mortified I was, thinking that getting in trouble for hitting Selena would be better than what I caught her doing. It was normal for the kids to wake me up but not in that fashion. About 5 days passed and [Selena] had her friend (Tonya's daughter) attempt to open the door [to] the restroom to see me change. At first I did not lock the door and then when they actually opened the door[,] I quickly closed the door and leaned my bodyweight against the door to keep it closed. Then I noticed the lock and started locking the door[,] but she continued to try. A couple of days later[,] she caught me urinating in the backyard. Both bathrooms were being used and the master bath as well. I put myself away as soon as I saw her. Selena has rubbed herself against my groin twice to my knowledge when waking me up. Both time I quickly threw her off of me and told her not to. There were several times when I had to text Ally and [her husband] to get the kids off me when I woke up. I do not see the following as sexual contact. However[,] I have come in contact with the children's breasts and groins during wrestling durations. I do blow raspberries on their stomachs. This

[6] Delgado was born in 1980. Jacob S. was born in 2005.

> does involve me raising their shirts and exposing their bellies. Children do squirm and I may have inadvertently had my mouth close to if not on their genital areas, but when this happened I always moved back up to their stomachs.

When asked about this statement, Delgado testified that he always slept in underwear and shorts, and that Selena G. and the other children would come into the room where he was sleeping and jump on him to wake him up. He testified that one morning, Selena G. came into his room while he was sleeping. When he woke up, Selena G. "had her mouth over my clothed erection." Delgado testified that in his police interview, he characterized it as "just suction." The detective then asked, "So like a blow job?" Delgado replied, "Yeah, like a blow job." Delgado testified that sometimes Selena G. "would come in to wake me up by jumping up into the air and landing in a straddle position over my groin area." Delgado testified Selena G. would push on him and "grind[] on [him]." He said he would pick her up and toss her away. He testified both he and Selena G. were clothed.

With regard to the other incident, Delgado testified he was behind the shed by the back fence, urinating, when Selena G. "came around the shed the other way." Delgado said he was "finishing up" and "turned around." He said this incident happened about two or three days before Selena G. made her "peanut" comment to her mother. Delgado denied all the allegations made against him and testified all the witnesses against him were lying.

Analysis

In reviewing all the evidence presented at trial, there is evidence from which a rational factfinder could reasonably find that Delgado, during a period of thirty days or more, committed two or more acts of sexual abuse, as defined by section 21.02 of the Penal Code, "*regardless of whether the acts of sexual abuse are committed against one or more victims*" and that "at the time each act was committed," Delgado was at least seventeen years old and the victims were children younger than fourteen years old. TEX. PENAL CODE ANN. § 21.02(b) (emphasis added). That is,

there was evidence that Delgado committed acts of sexual abuse against (1) Jacob S. in 2013 and 2014; (2) Selena G. between June 2015 and January 2016; and (3) Catherina A. in 2015. There was also evidence that at the time of the acts of sexual abuse, the children in question were younger than fourteen years of age and that Delgado was seventeen years of age or older. In his brief, Delgado points to what he considers to be "problems" with the testimony of certain witnesses. His arguments, however, go to the credibility of the witnesses, which is the exclusive province of the jury. *See Ramsey*, 473 S.W.3d at 809 (explaining the jury "is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the evidence so long as it is supported by the record"). "Likewise, 'reconciliation of conflicts in the evidence is within the exclusive province of the jury.'" *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000) (quoting *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986)). "The jury may choose to believe some testimony and disbelieve other testimony." *Id*. "If there is enough credible testimony to support appellant's conviction, the conviction will stand." *Id*. We hold there is legally sufficient evidence to support Delgado's conviction for continuous sexual abuse of young children.

LIMITING DEFENSE EVIDENCE AND CROSS-EXAMINATION

In his second issue, Delgado argues that he was denied his constitutional right to due process and his right to be confronted with the witnesses against him. According to Delgado, he was not allowed to introduce evidence that Jacob S. had seen a friend of Allysun G. engage in sexual activity. He argues that if this evidence had been allowed, "it would have supplied a possible motive for fabrication of the allegations against [him] and it would have been offered to correct a false impression of the complainant promoted by the prosecution." Delgado specifically points to defense counsel's cross-examination of Jacob S.:

Q: You were asked if you had seen pornography, right?

A: Yes.

Q: And you said no. But you had seen Ally's friends in—having sex in the house?

State: Your Honor, I'm going to object.

Q: Do you remember that?

State: I don't know how that's relevant.

Court: Sustained.

Defense: Your Honor, it is relevant. They brought up whether the child saw pornography.

Court: I have sustained the objection.

After Jacob S. and the next witness finished testifying, defense counsel made the following bill of exception:

> Your Honor, I'll just do a quick bill of exception since we're standing around while they're gathering. . . . Jacob [S.] was on the stand. The question of whether or not he had seen Ally's friend have sex or engage in sex, an objection was lodged, and I was not permitted to go into that question. The question was about two adults having sex and that he saw them having sex, and—and at the age he saw them having sex, which would have been prior to any allegation that Jacob has made about abuse in this case by Josue Delgado.

Thus, defense counsel responded in the bill of exception to the State's objection that the testimony would not be relevant. However, on appeal, Delgado does not argue that the trial court erred in sustaining the State's relevancy objection. Instead, he argues that the trial court violated his due process rights and his right to confront witnesses by excluding the testimony in question. Because Delgado's complaint on appeal differs from his argument in the trial court, the State argues he has failed to preserve his complaint for appeal.

Delgado argues he has preserved his issue for appeal because the trial court sustained the State's objection to the testimony he was trying to elicit and because he later made a bill of exception. The court of criminal appeals, however, has held that an appellant under similar circumstances did not preserve error for appellate review. In *Reyna v. State*, 168 S.W.3d 173, 179

(Tex. Crim. App. 2005), the defendant, in an attempt to impeach the victim's credibility, sought to introduce evidence of the victim's prior false allegation of sexual assault and her recantation of that allegation. The trial court sustained the State's objection to the defense's proffered testimony. *Id*. Because the defendant did not argue to the trial court that the exclusion of evidence would violate his rights under the Confrontation Clause, the court of criminal appeals held he had not preserved that issue for appellate review. *Id*. The court of criminal appeals noted that "[a]t first blush, the State's argument" that the defendant had failed to preserve error appeared "to lack merit." *Id*. at 176. The court had previously held, "and the Rules of Evidence make clear, that to preserve error in the exclusion of evidence, the proponent is required to make an offer of proof and obtain a ruling." *Id*. As the defendant "did both these things, he seem[ed] to have preserved error." *Id*. However, the court of criminal appeals explained that "a less common notion of error preservation c[ame] into play in this case, although certainly not a novel one." *Id*. According to the court,

> To the question, which party has the responsibility regarding any particular matter, it is infallibly accurate to answer with another question: which party is complaining now on appeal? This is because in a real sense both parties are always responsible for the application of any evidence rule to any evidence. Whichever party complains on appeal about the trial judge's action must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule in question and its precise and proper application to the evidence in question.

Id. at 177 (quoting Stephen Goode et al., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 103.2 (2d ed. 1993)).

The court of criminal appeals reasoned that, although the defendant had "made an offer of proof describing the excluded testimony," he had "not clearly articulate[d] an argument that the Confrontation Clause demanded admission of the evidence and thus failed to preserve constitutional claims for appeal." *Golliday v. State*, 560 S.W.3d 664, 669 (Tex. Crim. App. 2018) (discussing *Reyna*). Although the defendant "had satisfied the requirements of [Texas Rule of

Evidence] 103, he had not met the error-preservation requirements of [Texas Rule of Appellate Procedure] 33.1." *Golliday*, 560 S.W.3d at 669 (discussing *Reyna*). According to the court, Texas Rule of Appellate Procedure 33.1 and Texas Rule of Evidence 103 "operate together with regard to error preservation." *Id*.

> [B]oth Texas Rule of Appellate Procedure 33.1 and Texas Rule of Evidence 103 are "judge-protecting" rules of error preservation. The basic principle of both rules is that of "party responsibility." We recognized that "the party complaining on appeal (whether it be the State or the defendant) about a trial court's admission, exclusion, or suppression of evidence must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule or statute in question and its precise application to the evidence in question. The issue . . . "is not whether the appealing party is the State or the defendant or whether the trial court's ruling is legally 'correct' in every sense, but whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal."

Reyna, 168 S.W.3d at 177 (quoting *Martinez v. State*, 91 S.W.3d 331 (Tex. Crim. App. 2002)). Thus, because the defendant argued in the trial court that the purpose of admitting the evidence was to attack the victim's credibility and did not argue that the Confrontation Clause demanded admission of the evidence, the court of criminal appeals held his "arguments about hearsay did not put the trial judge on notice that he was making a Confrontation Clause argument." *Id*. at 179. Thus, the court of criminal appeals held that the defendant had not preserved his Confrontation Clause argument for appellate review. *Id*.

Similarly, in this case, Delgado's argument to the trial court did not put the trial court on notice that the Due Process Clause or the Confrontation Clause demanded admission of the evidence in question. *See id.* Thus, he has failed to preserve those arguments for appellate review. *See id*.; *see also Golliday*, 560 S.W.3d at 670 (holding appellant failed to preserve argument for appellate review because he never "put the trial judge on notice that [he was] making a constitutional argument, let alone a Confrontation Clause argument").

EXTRANEOUS OFFENSES

In his third issue, Delgado argues the trial court erred in admitting evidence of extraneous offenses. Specifically, Delgado complains of testimony offered by Brianne F. and Sierra C. Twenty-eight-year-old Brianne F. testified that she knew thirty-eight-year-old Delgado because he lived next door to her growing up. Brianne F. testified Allysun G. was her best friend, and she lived next door to Allysun G. from 1994 to 2000. According to Brianne F., when she was between the ages of seven to ten, Delgado was in the Army and was an adult. She was "playing in the woods" when Delgado "picked [her] up and turned [her] upside down and his penis was out of his pants and erect." Brianne F. testified his penis was "really close to [her] face and he would tell me not to look at it and don't tell anyone or pretend like [she] didn't see that." Brianne F. testified there was another incident when he was in his bedroom "on the computer looking at child porn and he asked [her] to come sit on his lap while he had an erection and look at child porn with him." When asked how she knew it was child pornography, Brianne F. testified that the girls depicted "weren't even developed yet." She remembered that the website was "Lolita.com or .org." According to Brianne F., there were also three or four other incidents where Delgado "would be in his room and [his penis] would just always be out and erect." Finally, Brianne F. testified about another "instance when [she and Delgado] were in his room and he would play tickle [her] and his—like, his face would be towards [her] feet. So his penis was closer to [her] face and he just pretended like it wasn't out, and it wasn't really close to [her]. And he would just tell [her] not to look at it and—and things like that." Brianne F. testified that the first time she told anyone about Delgado was when she saw a social media post about the allegations in the instant case.

Sierra C., Brianne F.'s sister, also testified. She is five years younger than Brianne F. According to Sierra C., she would follow her sister to Allysun G.'s house next door. She testified that at the time in question, Delgado was an adult and was in the military. Sierra C. stated that

Delgado "would open his door and [would be] touching himself inappropriately, masturbating with the door wide open, knowing there are people in the home." Sierra C. testified,

> And on several occasions he would invite me into his room, have me lay down with him, watch TV, and proceed to place himself over me with his head facing my feet and he would tickle me and his penis would be exposed and erect [in front of] my face, inches from my face.

According to Sierra C., she was four or five years old. When asked how many times he had exposed himself to her, Sierra C. responded, "Multiple times. Three, four, five. I mean, multiple times." Sierra C. testified Delgado would tell her not to look at it and would ask her why she was looking at it. Sierra C. testified, "How could I not, though? It was in my face. How could I not look at it?" She testified he was aroused at the time. Sierra C. did not tell anyone about Delgado until she was at a family gathering and "it came to light that [her] sister as well had—this same thing had happened to her."

Article 38.37 provides that in a trial of a defendant for continuous sexual abuse of a child or young children, the State may, notwithstanding Texas Rules of Evidence 404 and 405, introduce "evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2)"[7] TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2. Thus, in cases like the one before us, Article 38.37 "permits the introduction of evidence in a trial of a defendant for the enumerated sexual crimes against children that the defendant has committed certain offenses against a *nonvictim* of the charged offense." *Price v. State*, 594 S.W.3d 674, 679 (Tex. App.—Texarkana 2019, no pet.) (quotation omitted) (emphasis in original). However, before such evidence may be introduced, the

[7] Subsection (a)(1) lists the following offenses in the Penal Code: section 20A.02, if punishable as a felony of the first degree under section 20A.02(b)(1) (Sex Trafficking of a Child); section 21.02 (Continuous Sexual Abuse of Young Child or Children); section 21.11 (Indecency with a Child); section 22.011(a)(2) (Sexual Assault of a Child); sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child); section 33.021 (Online Solicitation of a Minor); section 43.25 (Sexual Performance by a Child); or section 43.26 (Possession or Promotion of Child Pornography). *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1). Subsection (a)(2) includes "an attempt or conspiracy to commit an offense described by" subsection (1). *See id.* art. 38.37, § 2(a)(2).

trial court must conduct a hearing outside the presence of the jury to determine whether the evidence "likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2-a. Moreover, the admission of evidence under article 38.37 is limited by Texas Rule of Evidence of 403, "which permits admission of evidence as long as its probative value is not substantially outweighed by its potential for unfair prejudice." *Price*, 594 S.W.3d at 680 (quotation omitted). When conducting a Rule 403 balancing test, the court

> must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006). In any given case, "these factors may well blend together in practice." *Id*. at 642.

On appeal, Delgado argues the trial court erred in determining the evidence of extraneous offenses was admissible. For support, he cites to rule 403. We review a trial court's ruling on the admissibility of extraneous offenses for abuse of discretion. *Price*, 594 S.W.3d at 679; *Bradshaw v. State*, 466 S.W.3d 875, 878 (Tex. App.—Texarkana 2015, pet. ref'd). "A trial court does not abuse its discretion if the decision to admit evidence is within the 'zone of reasonable disagreement.'" *Price*, 594 S.W.3d at 679 (quoting *Bradshaw*, 466 S.W.3d at 878). A trial court does not abuse its discretion if its "decision on the admission of evidence is supported by the record." *Id*. (quoting *Bradshaw*, 466 S.W.3d at 878). In considering whether the trial court abused its discretion, an appellate court may not substitute its own decision for that of the trial court. *Id*.

At the hearing outside the jury's presence, Brianne F. and Sierra C. testified to the same incidents as they testified to at trial before the jury. Delgado argues the extraneous offenses were irrelevant because they were remote in time to the allegations in the indictment. We disagree. Evidence of a separate sexual offense against a child admitted under Article 38.37 is probative on the issues of intent and a defendant's character or propensity to commit sexual assaults on children. *See Price*, 594 S.W.3d at 680; *Bradshaw*, 466 S.W.3d at 883. The testimony presented here was especially probative of Delgado's propensity to sexually assault children who visited the house where he was living. The evidence also showed a pattern of behavior by Delgado of putting his erect penis in the faces of little girls. Thus, we conclude this factor weighed strongly in favor of admission.

With regard to the second factor, the proponent's need for the evidence, the young complainants in this case testified about acts of sexual abuse that occurred when they were very young children. There was no biological evidence or third-party eyewitnesses to the alleged incidents. Further, the credibility of the young complainants and their memories were challenged by the defense. Thus, the State had considerable need for the evidence. As the court of criminal appeals has explained, "[t]rials involving sexual assault may raise particular evidentiary and constitutional concerns because the credibility of both the complainant and defendant is a central, often dispositive, issue." *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009). "Sexual assault cases are frequently 'he said, she said' trials in which the jury must reach a unanimous verdict based solely upon two diametrically different versions of an event, unaided by any physical, scientific, or other corroborative evidence." *Id*. at 561-62. "Thus, the Rules of Evidence, especially Rule 403, should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of either the defendant or complainant in such 'he said, she said' cases." *Id*. at 562. We conclude the second factor also weighed in favor of admission.

With respect to the third factor, we recognize that the inherently inflammatory and prejudicial nature of evidence of Delgado's extraneous sexual offenses against children does tend to suggest a verdict on an improper basis. *See Price*, 594 S.W.3d at 681. Therefore, the third factor weighed against admission.

As to the fourth factor, any tendency of the evidence to confuse or distract the jury from the main issues, the jury in this case was charged with determining whether Delgado had committed the acts of sexual abuse against Jacob S., Selena G., and Catherina A. as alleged in the indictment. The trial court mitigated the tendency of the extraneous-offense evidence to confuse or distract the jury from the main issues at trial by giving the jury a limiting instruction before Brianne F. and Sierra C. testified. Additionally, the trial court gave a limiting instruction in the jury charge. Because the jury was redirected to the main issues in the case, we conclude the fourth factor weighed in favor of admission. *See Price*, 594 S.W.3d at 681.

"The fifth factor refers to evidence such as highly technical or scientific evidence that might mislead the jury because it is not equipped to weigh the probative force of the evidence." *Id.* The evidence of extraneous offenses presented in this case "was neither scientific nor technical and pertained to matters, including victim credibility, that could easily be understood by a jury." *Id.* Thus, we conclude the fifth factor weighed in favor of admission.

As to the last factor, the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted, Brianne F.'s testimony before the jury is only ten pages of the reporter's record; Sierra C.'s testimony is five pages. Thus, the presentation of the extraneous-offense evidence did not consume an inordinate amount of time. We conclude the last factor also favored admission.

After having balanced the Rule 403 factors, we hold the trial court could have reasonably concluded that the probative value of the extraneous-offense evidence was not substantially

outweighed by the danger of unfair prejudice and the other factors in the rule. Therefore, we hold the trial court did not abuse its discretion in admitting the extraneous-offense evidence.

CONCLUSION

Having overruled all three issues presented by Delgado, we affirm the judgment of the trial court.

Liza A. Rodriguez, Justice

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