Affirm and Opinion Filed June 3, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00175-CR

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PASTOR MEDINA LANDAVERDE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 86th Judicial District Court
Kaufman County, Texas
Trial Court Cause Nos. 17-30626-86-F, 17-30627-86-F

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Molberg

A jury convicted appellant of two charges of aggravated sexual assault of a child and sentenced him to life imprisonment on both. In two issues, appellant argues the trial court abused its discretion under rule 403 by allowing complainant and three family members to testify about alleged extraneous acts of sexual abuse by appellant that were not charged here. *See* TEX. R. EVID. 403. Because we conclude admission of such evidence was within the zone of reasonable disagreement, we affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

BACKGROUND

In February 2018, a grand jury returned two indictments charging appellant with aggravated sexual assault of Marcy, who is his niece and second cousin.[1] The offenses were both first degree felonies. *See* TEX. PENAL CODE § 22.021(e).

The original and amended indictments alleged that appellant intentionally or knowingly caused the penetration of Marcy's sexual organ by his finger (17-30626-86-F) and by his sexual organ (17-30627-86-F) when Marcy was a child under fourteen years of age. The amended indictments alleged these events occurred on or about March 31, 2003 and September 1, 2003, respectively.[2] Marcy was six years old on those dates. Appellant was nineteen or twenty.

Appellant pleaded not guilty. The cases were tried to a jury in January 2019.

Overview of Extraneous Acts of Sexual Abuse by Appellant

Before trial, the State notified appellant and the trial court of its intent to present evidence of other extraneous acts of sexual abuse by appellant, including

[1] Marcy is a pseudonym. Appellant is married to Marcy's maternal aunt and is her father's cousin.

[2] A person can commit an offense of aggravated sexual assault of a child in several ways, including by intentionally or knowingly causing the penetration of the sexual organ of a child by any means when the victim is younger than fourteen years of age, regardless of whether the person knows the age of the child at the time of the offense. *See* TEX. PENAL CODE § 22.021(a)(2)(B). Section 22.021 has been amended a number of times, including before, during, and after 2003. Appellant does not present any issues requiring us to examine section 22.021 or its legislative history or text. Since September 1, 1983, when section 22.021 first became effective, it has been a first degree felony to intentionally or knowingly cause the penetration, by any means, of the vagina of a child younger than fourteen years of age. *See* Act of May 29, 1983, 68th Leg., R.S., ch. 977, § 3, 1983 Tex. Gen. Laws 5311, 5312–13, 5315 (codified at TEX. PENAL CODE § 22.021). The current version uses the phrase "sexual organ" rather than the word "vagina." *See* TEX. PENAL CODE § 22.021(a)(1)(B)(i).

acts towards Marcy and three of her cousins, Jane (a female), M.B. (a female), and R.L. (a male).[3]

The State's article 38.37 notice[4] described the evidence of appellant's other acts towards Marcy as repeated acts of indecency with a child by sexual contact by contacting her breast, buttocks, and genitalia and by causing Marcy to touch appellant's genitals, and repeated acts of aggravated sexual assault of a child by penetrating Marcy's sexual organ with appellant's finger and sexual organ and by causing Marcy's mouth to contact appellant's sexual organ.

The notice described the evidence of appellant's acts towards Marcy's cousins as including, among other things, indecency with a child by sexual contact by appellant's touching of Jane's breast, indecency with a child by sexual contact by appellant's touching of M.B.'s breast and genitals, aggravated sexual assault of a child by appellant's penetration of M.B.'s sexual organ with his finger, indecency with a child by sexual contact by appellant's touching of R.L.'s buttocks and genitals, and aggravated sexual assault of a child by appellant's causing contact with and the penetration of R.L.'s anus with R.L.'s finger. *Id*.

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[3] R.L. is Marcy's cousin. Jane and M.B. are sisters and are Marcy's second cousins. Jane is a pseudonym. M.B. and R.L. are the witnesses' initials. M.B. was originally listed in the State's article 38.37 notice under a pseudonym ("Susan") but chose to be identified by her real name at trial. Marcy is roughly ten years younger than Jane, six years younger than M.B., and one year older than R.L.

[4] *See* TEX. CODE CRIM. PROC. art. 38.37, § 3.

The notice indicated the events involving Marcy's cousins occurred on or about January 1, 2001 (Jane), on or about June 5, 2002 (M.B.), and on or about October 2010 (R.L.). The acts involving Marcy ranged from roughly 2002 to 2012.[5]

The relation between the victim's ages, dates of abuse, and the trial date is as follows:

- Extraneous event involving Jane (who was 31 years old at trial):
  13 years old at time; event occurred about 18 years before trial.

- Extraneous event involving M.B. (who was 27 years old at trial)
  11 years old at time; event occurred about 17 years before trial.

- Extraneous event when Marcy's abuse began:
  4 or 5 years old at time; event was about 17 years before trial.

- Charged events involving Marcy (who was 21 years old at trial):
  6 years old at time of both events, about 16 years before trial.

- Extraneous event involving R.L. (who was 20 years old at trial):
  7 or 8 years old at time; event occurred about 8 years before trial.

- Extraneous event when Marcy's abuse ended:
  14 years old at time; event was about 7 years before trial.[6]

[5] Marcy testified appellant's abuse of her began when she was four or five years old and continued until she was around fourteen, a period that would have been from as early as Spring 2001 through as late as Spring 2012. It is unclear from Marcy's testimony when the extraneous event involving oral sex occurred during that roughly ten year period or how old she was, so we have not included it in the bulleted list above.

[6] Marcy testified that when she was fourteen, appellant came into her room in the middle of the night wearing nothing but a white towel. She had testified earlier that he would often come into the room during the night before abusing her, and as she heard him approach, she covered herself from head to toe with a blanket and felt that she was "not going to let this happen anymore." When he entered, he tugged on the blanket, and she got up from the bed and pushed him away. He then ran out of the room and into the bathroom and never abused her again. Although it is unclear any crime occurred then, article 38.37 section 1(b) states evidence of appellant's "*other* crimes, wrongs, or *acts* . . . *shall be admitted* for its bearing on relevant matters." *See* TEX. CODE CRIM. PROC. art. 38.37, § 1(b) (emphasis added).

The trial court conducted an article 38.37 hearing outside the presence of the jury before trial began. *See* TEX. CODE CRIM. PROC. art. 38.37, § 2-a. The court determined the required notice had been provided and, after hearing Jane, M.B., and R.L. testify, the court ruled their evidence would be allowed, finding it adequate to support a jury finding that appellant committed the separate offenses. *Id*. Appellant made no objections.

The court then held a brief recess, and when the proceedings resumed, the court discussed appellant's motion in limine, and appellant argued the court should exclude evidence of the extraneous acts of abuse involving Marcy that were not charged in the indictments because such evidence was more prejudicial than it was probative. Appellant objected on rule 403 and 404 grounds. *See* TEX. R. EVID. 403, 404. The court overruled those objections.

Jury Trial

Appellant was then arraigned, and he pleaded not guilty to both charges. Following opening statements, the State and appellant presented evidence through various witnesses and exhibits. The exhibits consisted of two hand-drawn floorplans of certain locations, as well as multiple photographs of various witnesses and family members. The State called Marcy, her mother, her brother, and her cousins Jane, M.B. and R.L. as witnesses, and appellant's counsel called appellant's wife, boss, co-worker, brother, and appellant. Several of the witnesses testified about matters not directly impacting this appeal, and there is no need to include that information

here. Generally, though, appellant's witnesses provided positive testimony about appellant, describing him as a hard worker, a good employee, and an excellent father.

Appellant's Running Objection
to Extraneous Acts Testimony by Jane, M.B., and R.L.

Jane, M.B., and R.L. testified about appellant's acts of abuse towards them as they had previously described when testifying in the article 38.37 hearing. We describe their testimony in our analysis section below. Although appellant made no objections to such testimony in the article 38.37 hearing, when each of them testified to the jury, appellant sought and obtained a running objection based in part on rule 403. *See* TEX. R. EVID. 403.

Appellant's Failure to Object at Trial
to Extraneous Acts Testimony from Marcy

In contrast, although appellant objected to the admission of Marcy's testimony of extraneous acts of abuse when arguing his motion in limine, he did not object or request a running objection to Marcy's trial testimony. We describe her extraneous acts testimony in our analysis section below.

Marcy's Testimony Regarding Charged Offenses

With regard to the charged offenses, Marcy testified about appellant's digital penetration of her vagina.[7] She also testified about his penetration of her vagina

[7] Referring to appellant, Marcy testified, "he kept patting my back in a way of, like, trying to get me to go back to sleep and when he kept patting my back, he would go into my pants, unbuckle my pants, go into my pants and then touch my vagina with his fingers." She also testified that both in her home and in his,

with his penis, stating the first time he did this, he moved his penis "back and forth" then pushed her off of him and he ejaculated onto the floor, but she did not know what that was at the time. She told the jury this was painful and caused her to bleed.

She testified these acts would generally occur in the room where she and her younger brother were sleeping in the same bed. Her brother is five years younger than her, and she is protective of him. She said appellant would come into the room and do these things while her brother was still asleep.

When asked if she wanted to tell someone, she said, "I was afraid." She explained she was afraid her family was "going to split up" and was "just afraid to speak up." She also stated, "He told me if I was to have said something, he was going to do something to my brother." She explained, "Sometimes when I was younger, when I tried pushing him off of me . . . then he would grab me and tell me if I didn't do it, something was going to happen to my brother."

Appellant's Testimony

Appellant waived his right not to testify and testified at trial during the guilt-innocence phase. He agreed that certain details were true about what Marcy and her cousins said, including that he lived in the same place as Marcy for a certain time, sometimes slept in the location under the bar as she described, that Jane and M.B.

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he would penetrate her "with his finger," including when she was around six and including under the bar where the first act of abuse occurred.

visited the family after arriving from Colorado, and that Marcy and her brother stayed with him and his wife in their trailer after he and his wife moved nearby.

However, appellant denied engaging in any of the abuse that Marcy, Jane, M.B., or R.L. testified about. He testified, "I haven't done anything what they're accusing me of." When asked why he thought they would make up the abuse, he answered, "I couldn't tell you" and "I don't know why." Also, for reasons that became clearer during closing argument, appellant's counsel asked appellant and his wife about certain alleged abnormalities on appellant's genitalia, which appellant described as "knobs" that grew larger over time. He described one such abnormality as being "the size of the ball of the eye," though he acknowledged on cross-examination that this was not how his wife described it and then stated, "I'm not lying to you. I have one. They could examine me." He agreed the abnormalities were not that big in 2003 but were growing in size.

Court's Charge in Guilt-Innocence Phase

The court's charge included the following instructions:

> You are further instructed that if there is evidence before you concerning alleged offenses against a child under seventeen years of age other than the complainant 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, and then you may consider said evidence for any bearing the evidence has on relevant matters.
>
> The State may have introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. You cannot consider the evidence of extraneous crimes or bad acts for any

> purpose unless you find and believe beyond a reasonable doubt that the defendant committed such extraneous crimes or bad acts, and even then you may only consider the same in determining the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and for no other purpose.

Counsel's Closing Arguments in Guilt-Innocence Phase

Witness credibility was the primary focus of counsel's closing arguments. Appellant's counsel questioned Marcy's credibility because of her long delay in disclosing the abuse and because she described appellant's penis as simply a "normal" penis rather than mentioning any of the abnormalities that appellant or his wife testified about. Counsel told the jury they could consider that in determining whether or not reasonable doubt existed.

Appellant's counsel also questioned why Jane, M.B., and R.L. did not disclose their abuse earlier and used the word "collusion" in connection with their reports.

Verdicts and Sentencing

The jury found appellant guilty on both charges and sentenced appellant to life in prison on both.

STANDARD OF REVIEW

Appellant argues the trial court erred under rule 403 in admitting the extraneous acts evidence involving Jane, M.B., R.L., and Marcy. *See* TEX. R. EVID. 403. We review the court's ruling under an abuse of discretion standard and will reverse a trial court's rule 403 determination "rarely and only after a clear abuse of discretion." *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). As long

as the ruling is in the "zone of reasonable disagreement," we will affirm. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009).

In *Duntsch v. State*, 568 S.W.3d 193 (Tex. App.—Dallas 2018, pet. ref'd), we stated:

> Texas Rule of Evidence 403 allows for the exclusion of otherwise relevant evidence when its probative value "is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403; *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). Further, the rule envisions exclusion of evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). When conducting a rule 403 analysis, courts 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).

Id. at 216.

In a "he said, she said" case involving sexual assault, rule 403 should be used "sparingly" to exclude relevant, otherwise admissible evidence that might bear on the credibility of the defendant or complainant. *Hammer*, 296 S.W.3d at 562.

ANALYSIS

Appellant raises two issues in this appeal, arguing that the trial court should have excluded the extraneous acts evidence involving Jane, M.B., and R.L. in his first issue and the extraneous acts evidence involving Marcy in his second issue.

Both parties argue the *Gigliobianco* factors weigh in their favor. *See Gigliobianco*, 210 S.W.3d at 641–42. In appellant's view, the extraneous events were too remote, too dissimilar from the charged offenses, took too long to develop, and—for R.L.'s event and one of Marcy's extraneous events—too extreme. In the State's view, the probative value and need for the evidence was great, considering appellant's pattern of abuse, Marcy's delayed outcry, and the lack of any physical evidence or witnesses to Marcy's abuse. The State also disputes appellant's characterization of the last four *Gigliobianco* factors, particularly his representations concerning how long the extraneous evidence took to develop. Finally, the State argues the trial court properly minimized any prejudice that might have been caused by the extraneous evidence by instructing the jury on its use.

As we discuss below, we conclude the trial court did not abuse its discretion in admitting the evidence. *See De La Paz*, 279 S.W.3d at 343–44. We also conclude appellant failed to preserve error on his second issue.

Extraneous Acts Evidence Regarding Jane, M.B., and R.L.

Jane and M.B. traveled from Colorado for a visit with Marcy's family one summer around 2001 or 2002, when Jane was about thirteen and M.B. was about

eleven.[8] They stayed with Marcy's family for about a week. During their visit, Jane and M.B. slept in the living room with others, including appellant. Jane testified that one night, appellant reached under the covers and grasped her breast when she was sleeping on the couch and while others were in the room.

M.B. also slept on the couch during that trip, and M.B. testified that while she did so, appellant touched her stomach, reached up and rubbed and grasped her breasts, then unbuckled and unzipped her pants and started putting his hands inside her pants. She testified that she "fake woke up," asked him what was going on, and he said it was just a dream and he was moving her around because she was sleep talking. M.B. testified she went back to sleep and appellant tried again, but this time, he put his fingers inside her vagina and moved his fingers.

R.L. testified appellant touched him inappropriately one night when he was around 7 or 8 years old and was sleeping on the floor in appellant's room. He testified appellant's wife and a female child were also asleep in the room. R.L. was awakened with appellant "spooning" him, rubbing on his back, stomach, and then his buttocks. Appellant then moved to the front, rubbing and playing with R.L.'s genitalia, first over his clothes and then under them. R.L. also testified appellant rubbed his penis in between R.L.'s buttocks. R.L. felt appellant's finger in between

[8] The exact date of the abuse involving Jane and M.B. is unclear. Jane would have been thirteen years old in the summer of 2001; M.B. would have been eleven in the summer of 2002. The two acts of abuse occurred when they were in Texas together on a family trip.

his buttocks, and appellant grabbed R.L.'s hand, balled his four fingers into a fist, and made R.L. stick his thumb in his own butt and then suck his own thumb. R.L. felt appellant breathing heavily on the back of his neck, and he felt appellant ejaculate on his lower back.

To determine the admissibility of this evidence under rule 403, the trial court was to consider (1) the inherent probative force of the evidence and (2) the State's need for it and then balance that against (3) its tendency to suggest decision on an improper basis, (4) its tendency to confuse or distract the jury from the main issues, (5) its tendency to be given undue weight by a jury that has not been equipped to evaluate its probative force, and (6) the likelihood that its presentation will consume an inordinate amount of time or merely repeat evidence already admitted. *See Gigliobianco*, 210 S.W.3d at 641–42.

In considering the first two factors, the trial court could have reasonably concluded the probative force and the State's need for the evidence from Jane, M.B., and R.L. was great and weighed in favor of its admission. Even though the extraneous acts occurred many years before trial (8 years before trial for R.L., 17 or 18 years before trial for M.B. and Jane), the charged offenses also occurred many years before trial (16 years before trial for the charged events involving Marcy). Thus, the extraneous and charged events were not remote in their temporal relationship to each other. Also, while appellant maintains the events are dissimilar from the charged offenses, the extraneous acts each of them testified about, including

R.L., revealed a remarkably similar pattern of how, when, and where appellant accomplished his acts of sexual abuse, even though the specific nature of the abuse he performed varied and increased in severity over time.

This pattern, coupled with the severity of the charged offenses, demonstrates why the trial court could have reasonably concluded the extraneous act involving R.L. was necessary and probative. The charged offenses included both digital penetration and penile penetration of Marcy's vagina when she was six years old. The extraneous act involving Jane involved touching of a thirteen year old's breast, and the extraneous act involving M.B. involved touching and penetration of an eleven year old's vagina. While both of those events were certainly probative regarding the charged offense of digital penetration, they were less severe than the charged offense of penile penetration.

However, the extraneous act involving R.L. showed a propensity to abuse even younger children in a manner that included physical contact with appellant's penis and in which he ejaculated on or near them in the process. Thus, considering appellant's denial of the charged offenses involving Marcy, the trial court could have reasonably concluded the extraneous act involving R.L. was probative and necessary for the State, particularly in regard to the charged offense of penile penetration of Marcy's vagina when she was six years old.

As to the remaining four factors, to the extent the trial court concluded they weighed against exclusion of the evidence, the court could have reasonably

concluded they did so only slightly. On the third factor, while extraneous acts involving sexual offenses against children are inherently inflammatory,[9] the potential for an improper decision was lessened by at least two facts.

First, the charged acts involving Marcy were either more or comparably egregious to the extraneous events involving Jane, M.B., and R.L. *See Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet ref'd) (noting that the potential for a decision on an improper basis was reduced when the extraneous acts were no more serious than the allegations forming the basis for the indictment). At oral argument, appellant maintained that the specific details involved in R.L.'s event (particularly with regard to his thumb) put this evidence "over the top" in a rule 403 analysis. While we agree that R.L.'s event was more egregious in nature than Jane's and M.B.'s events, it was no more egregious than the charged offense of penile penetration involving Marcy. Even if it were, rule 403 would not necessarily require its exclusion.[10]

Second, the trial court instructed the jury regarding the proper use of the extraneous act evidence, and we "generally presume the jury follows the trial court's

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[9] *See Montgomery v. State*, 810 S.W.2d 372, 397 (Tex. Crim. App. 1990) (en banc) ("Both sexually related misconduct and misconduct involving children are inherently inflammatory.")

[10] *See Kimberlin v. State*, No. 05-18-00018-CR, 2019 WL 1292471, *1, 3 (Tex. App.—Dallas Mar. 21, 2019, no pet.) (mem. op., not designated for publication) (affirming admission of two extraneous events involving rape in a case involving a charged offense of indecency with a child based on touching of a child's breast and stating, "We acknowledge the extraneous offense evidence was of a more serious nature than the charged offense; however, after balancing the rule 403 factors, we conclude the trial court did not abuse its discretion by admitting [the] testimony.") (citing *Fisk v. State*, 510 S.W.3d 165, 175 (Tex. App.—San Antonio 2016, no pet.)).

instructions in the manner presented." *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (en banc) (citations omitted). Thus, in light of the record here, the trial court could have reasonably concluded that if the third factor weighed against admission, it did so only slightly.

As to the fourth and fifth factors, we conclude the evidence was unlikely to confuse or distract the jury from the main issues and was unlikely to leave the jury ill-equipped to evaluate its probative force, particularly in light of the court's instructions.

Finally, as to the sixth factor, the presentation of the extraneous evidence from Jane, M.B., and R.L. did not take an inordinate amount of time or merely repeat evidence already submitted. The guilt-innocence phase took three days, with a transcript consisting of two volumes of testimony encompassing three hundred sixty-six pages. Jane's and R.L.'s entire testimony encompasses twenty-eight pages each, while M.B.'s entire testimony encompasses twenty-four. This factor did not weigh in favor of exclusion. *See Kimberlin*, 2019 WL 1292471, at *4 (extraneous events testimony from two witnesses encompassed a total of forty-eight pages of a two-volume record of the guilt-innocence phase; thirty-two of those pages involved testimony regarding more serious offenses than the one charged).

In support of his position that the trial court should have excluded the extraneous acts evidence involving Jane, M.B., and R.L. under a rule 403 analysis, appellant cites *Bachhofer v. State*, 633 S.W.2d 869 (Tex. Crim. App. [Panel Op.]

1982), *Perez v. State*, 562 S.W.3d 676 (Tex. App.—Fort Worth 2018, pet. ref'd), *cert. den.*, 140 S.Ct. 236 (2019), *Robisheaux*, 483 S.W.3d at 220, *Gaytan v. State*, 331 S.W.3d 218 (Tex. App.—Austin 2011, pet. ref'd), *Newton v. State*, 301 S.W.3d 315 (Tex. App.—Waco 2008, pet ref'd), *Curtis v. State*, 89 S.W.3d 163 (Tex. App.—Fort Worth 2002, pet. ref'd), and *Reyes v. State*, 69 S.W.3d 725 (Tex. App.—Corpus Christi–Edinburgh 2002, pet. ref'd).

As those citations reflect, only *Bachhofer* is binding on this court. However, as the Third Court of Appeals noted in *Robisheaux*, 438 S.W.3d at 218, and earlier in *Corley v. State*, 987 S.W.2d 615, 620–21 (Tex. App.—Austin 1999, no pet.), *Bachhofer* "was decided before enactment of Rules of Evidence, which favors admission of evidence, and under common-law principles, which favored exclusion of evidence." *See also Gonzales v. State*, 838 S.W.2d 848, 863 (Tex. App.—Houston [1st Dist.] 1992), *pet. dism'd, improvidently granted*, 864 S.W.2d 522 (Tex. Crim. App. 1993) (en banc) (per curiam) ("We doubt that *Bachhofer* is good law today, after the enactment of rule 404.").

As to the other cited cases, only *Perez*, *Curtis*, and *Reyes* reach the conclusion that appellant argues here, i.e. that a trial court abused its discretion in admitting evidence of extraneous offenses. All three cases are distinguishable. *Perez* determined that the trial court had abused its discretion in admitting evidence of extraneous events that occurred more than fifty years before trial and were remote in time when compared to the dates of the charged offenses. *See Perez*, 562 S.W.3d

at 690–91. *Curtis* determined the trial court abused its discretion in admitting evidence of an extraneous sexual assault where the extraneous event occurred twelve years prior to the charged offense, the defendant did not contest his sexual relationship with the victim in the charged offense, and intent was not a hotly contested issue at trial. *See Curtis*, 89 S.W.3d at 172–73, 175. Finally, *Reyes* concluded that the trial court abused its discretion in admitting evidence of an extraneous event meant to establish identity, where the extraneous and charged offenses involved a number of dissimilarities that the court found significant. *See Reyes*, 69 S.W.2d at 739–41. We decline to apply those cases here.

Appellant's other citations support the State's position, not his own. *See Gaytan*, 331 S.W.3d at 226–28 (trial court did not abuse its discretion in admitting evidence of extraneous acts occurring more than twenty-five years before trial); *Newton*, 301 S.W.3d at 321–22 (trial court did not abuse its discretion in admitting evidence of extraneous acts occurring twenty-five years before charged offenses, even when half of the applicable factors weighed in favor of exclusion); *Robisheaux*, 483 S.W.3d at 221 (trial court did not abuse its discretion in admitting evidence of extraneous acts occurring twelve years before charged offenses and fourteen years before trial).

We conclude the admission of the evidence involving Jane, M.B. and R.L. was in the zone of reasonable disagreement and was not an abuse of discretion. *See De La Paz*, 279 S.W.3d at 343–44. We overrule appellant's first issue.

Extraneous Acts Evidence Regarding Marcy

In his second issue, appellant argues the trial court erred in admitting the extraneous acts evidence involving Marcy, who testified about two specific acts of sexual abuse that were not charged in the indictments—one involving the first time appellant touched her inappropriately, and the other involving oral sex.[11]

Marcy testified appellant first touched her inappropriately when she was about four or five years old. This occurred early one morning as she walked towards the kitchen, where her mother was cooking, and towards the bar area, where appellant usually slept and was lying down under a blanket. As she approached, he motioned for her to come lie down with him, which she did, and he began touching her, first in "a way of showing love towards someone" and then moving to her vagina, where he touched the outside of her underwear. When asked if it was just her vagina that he touched that day, she said, "That day it started where it was the hugging of it. It was more like on the chest area, but it just focused on my vagina area." She testified that this event ended when her mother came around the corner, saw her there, and asked her to get up.

Marcy also testified that appellant made her engage in oral sex, though it is unclear from the record when this occurred or how old she was when this happened:

[11] Marcy also testified about the last bulleted event in our "background" section above ("extraneous event when Marcy's abuse ended"), but appellant did not complain in his brief or at oral argument about the admission of evidence regarding that event, so we do not discuss it further here.

Q. Were there any other sex acts that he perpetrated on you?

A. Yes, ma'am. There was a time where he was – he was standing up and he asked me to give him oral sex.

Q. How did he ask you?

A. It was more like he grabbed my hand and he pushed me towards him and I knew that it was his penis because I could feel it on my face and when I tried pushing him off, he slapped my face and I didn't want him to hurt me anymore. So I continued.

Q. What did you continue to do?

A. Well, I -- I began giving him oral sex.

Q. Did you know what that was at the time?

A. No, ma'am.

Q. What -- what did you do exactly?

A. I -- I just -- whenever it was done, he went to the wall that -- the wall to the closet and the door and he was in that corner. I don't know what he was doing but then after a short time, then he would leave to his room.

Q. In other words, what part of his body was inside your mouth?

A. His penis.

Like the evidence involving Marcy's cousins, appellant argues the trial court should have excluded this evidence under rule 403 because it was too remote, too dissimilar, and, on the oral sex event, too extreme. Appellant also argues the State spent too much time developing this evidence.

Before addressing these arguments, we consider whether appellant preserved error.[12] Appellant argues he did so, and the State does not dispute this. We conclude otherwise. Appellant objected to Marcy's extraneous acts evidence only in the context of his motion in limine, but not at trial. *See Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) ("A motion in limine, however, is a preliminary matter and normally preserves nothing for appellate review. For error to be preserved with regard to the subject of a motion in limine, an objection must be made at the time the subject is raised during trial.") (citing *Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985)); TEX. R. APP. P. 33.1(a).[13] Thus, appellant failed to preserve error, and we overrule appellant's second issue on that basis.

We would reach the same conclusion, however, even if appellant had preserved error. As support for his position, appellant cites three of the same cases he cited in connection with the extraneous events involving Jane, M.B., and R.L. *See Robisheaux*, 483 S.W.3d at 220; *Gaytan*, 331 S.W.3d at 227; *Newton*, 301 S.W.3d

[12] *See Ford v. State*, 305 S.W.3d 530, 532–33 (Tex. Crim. App. 2009) ("Preservation of error is a systemic requirement on appeal. If an issue has not been preserved for appeal, neither the court of appeals nor this Court should address the merits of that issue. Ordinarily, a court of appeals should review preservation of error on its own motion, but if it does not do so expressly, this Court can and should do so when confronted with a preservation question."); *see also Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010) (noting the erosion of the court's prior holding in *Tallant v. State*, 742 S.W.2d 292 (Tex. Crim. App. 1987) and stating, "now it is the duty of the appellate courts to ensure that a claim is preserved in the trial court before addressing its merits.").

[13] *See also McCoy v. State*, 10 S.W.3d 50, 54 (Tex. App.—Amarillo 1999, no pet.) ("any complaint concerning the admission was waived by appellant's failure to object to the same or similar evidence admitted at another point in the trial") (citing *Massey v. State*, 933 S.W.2d 141, 149 (Tex. Crim. App. 1996); *Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991) (en banc)).

at 320. As we discussed in the prior section, these cases support the State's position, not appellant's. *See Robisheaux*, 483 S.W.3d at 221 (trial court did not abuse its discretion in admitting evidence of extraneous acts occurring twelve years before charged offenses and fourteen years before trial); *Gaytan*, 331 S.W.3d at 226–28 (trial court did not abuse its discretion in admitting evidence of extraneous acts occurring more than twenty-five years before trial); *Newton*, 301 S.W.3d at 321–22 (trial court did not abuse its discretion in admitting evidence of extraneous acts occurring twenty-five years before charged offenses, even when half of the applicable factors weighed in favor of exclusion). Further, those cases are distinguishable on this issue because they involved extraneous evidence regarding third persons, not the same victim.

Although it is not binding on the Court, if appellant had preserved error, we would be inclined to apply the same reasoning and reach the same conclusion as our sister court did in *Ryder v. State*, 581 S.W.3d 439 (Tex. App.—Houston [14th Dist.] 2019, no pet.), which presented the same type of rule 403 issue presented here.[14] There, the court considered whether the trial court erred in admitting evidence of ten other extraneous acts of abuse of the same victim involved in the offense being tried, which, like here, involved alleged aggravated assault of a child. *See id*. at 443, 451–52. After considering the evidence and balancing the rule 403 factors, the court

[14] In *Ryder*, the appellant preserved error on his rule 403 issue by making a timely objection and obtaining a ruling. *See Ryder*, 581 S.W.3d at 451 n.4.

concluded the trial court "acted within the zone of reasonable disagreement" when it determined the probative value of the evidence was not substantially outweighed by its prejudicial effect. *Id*. at 452–54.

Because appellant failed to preserve error, we need not analyze the substantive issues any further. *See* TEX. R. APP. P. 47.1.

We overrule appellant's second issue.

Alleged Harm

Though he does not list this as a separate issue for our review, appellant also argues in his brief that the trial court's alleged errors harmed his substantial rights, thus justifying reversal. Because we find no error, we do not address this issue.

CONCLUSION

We affirm the trial court's judgments.

/Ken Molberg/
KEN MOLBERG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PASTOR MEDINA LANDAVERDE, Appellant	On Appeal from the 86th Judicial District Court, Kaufman County, Texas
No. 05-19-00175-CR V.	Trial Court Cause No. 17-30626-86-F.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Molberg. Justices Bridges and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 3rd day of June, 2020.

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