Affirmed and Opinion Filed June 12, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00778-CR

BRADLEY ALLEN KELLER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F16-53364-L

OPINION

Before Justices Bridges, Molberg, and Partida-Kipness
Opinion by Justice Partida-Kipness

A jury convicted appellant Bradley Allen Keller of aggravated sexual assault of a child under fourteen years of age and sentenced him to seventy-five years' confinement. TEX. PENAL CODE § 22.021(a)(2)(b). The victim, L.K., was five years old at the time of the offense. In five issues, Keller contends: (1) the trial court erred by admitting extraneous offense evidence pursuant to article 38.37 of the code of criminal procedure, (2) the trial court erred by failing to exclude the extraneous offense evidence on Rule 403 grounds, (3) the trial court erred by failing to limit the definitions of the culpable mental states of "intentionally" and "knowingly" in the jury charge to the nature of Keller's conduct, (4) the trial court erred by including a

definition of "reasonable doubt" in the jury charge, and (5) the trial court lacked jurisdiction to hear the case because the case was not properly transferred to the court's docket. We overrule Keller's issues and affirm the trial court's judgment.

BACKGROUND

L.K. is Keller's daughter. She was five years old when Keller committed the offense and was seven years old at the time of trial. Keller met L.K.'s mother, P.K., while he was vacationing in Hong Kong in 2007. Keller and P.K. began dating and married in March 2010. L.K. was born in Hong Kong in October 2010.

P.K. testified that Keller watched pornographic movies at home every day, and L.K. may have seen some of the movies while Keller was watching. P.K. also told the jury that Keller was interested in anal sex and wanted to have it frequently with her. She remembered L.K. saw Keller and P.K. having sex on one occasion. L.K. confirmed at trial that one time when they were living in Hong Kong she saw her dad trying "to stick his private in her [mom's] butt." L.K. also testified she saw her dad watching videos that were "gross" where "people were naked" and "people were trying to stick their private in other people's butts."

When L.K. was three years old, P.K. was in the bathroom with L.K. because she was potty training L.K. P.K. could see on L.K.'s face that she was having a difficult time urinating, and L.K. told her that it was very painful because her dad had put something inside where she urinates. P.K. testified that L.K. described Keller putting his penis inside of where she urinates, referring to her vagina. L.K. testified

that she remembered Keller trying to put a reddish-pink toy that looked like a private part into her butt when they were in Hong Kong and that she told her mother about the toy. P.K. called Keller and asked him if this was true. Keller denied it. P.K. waited a day to call the police. But the Hong Kong police did not investigate and did not talk to L.K.

Keller, P.K., and L.K. moved to Texas in April 2015 when P.K. was pregnant with her and Keller's son. Keller and P.K. broke up approximately five months laters. Their son, B.K., was born October 15, 2015. By the time B.K. was born, Keller no longer lived with P.K. and L.K. But Keller spent the night at P.K.'s home two or three nights a week.

The event in question occurred the evening of March 27, 2016 in P.K.'s Dallas home. P.K., L.K., and B.K. were sleeping in P.K.'s bedroom. Keller was sleeping on the couch in the living room. L.K. woke up hungry and asked P.K. to get up and cook something for her, but P.K. refused. According to L.K., she then went to the living room and ate leftover dumplings. L.K. was tired after she finished eating, so she lay down on the couch. L.K. testified that Keller came over to the couch and pulled down her pants and underwear. Keller pulled down his pants and L.K. saw his penis, which she called "his private." L.K. testified that Keller put a "kind of gel" on her butt and then tried to put his private in her butt. The gel got on the shirt L.K. was wearing.

L.K. was able to slip through Keller's legs to stop the assault and went to P.K. in the bedroom. L.K. told P.K. what happened. L.K. testified she told her mother that her dad tried to stick his private in her butt and her mother kept asking her if it really happened. P.K. testified that L.K. woke her up around 11:00 p.m. or midnight and told her that her dad had put the soft gel in the back where she goes "poo-poo" and then he put his penis "where you have bowel movement." According to P.K., L.K. told her that night that Keller put his penis "a little bit in" her rectum. L.K. also showed P.K. that her clothes were wet and told P.K. that "father after finish make my clothes dirty, so he took to wash." P.K. did not call the police that night but did talk to Keller. He denied the accusation and refused to leave that night.

A couple of days later, Keller showed up at P.K.'s apartment drunk and banged loudly on the door. P.K. was scared, so she called the police. She told L.K. to tell the police what Keller had done to her in the past. L.K. told the police about the assault from a few days prior and gave them the shirt with the gel on it. L.K. was taken to the Children's Advocacy Center for a forensic interview. The jury was shown the forensic interview at trial. The interview began at 12:10 a.m. on March 31, 2016. L.K. was five years old at the time of the interview and the incident in question. She told the interviewer that her dad always watches porn when he comes to visit her at home. L.K. went on to describe the incident from a few days prior to the interview. She told the interviewer that her dad pulled her pants and underwear down when she was on the couch after she finished eating and "tried to put his boy

part in" her part, where "we poop in. The butt." At other times in the interview, L.K. referred to Keller's penis as his "private" or his "private part." When asked what she meant by "his boy part" and his "private" or his "private part," L.K. said she meant the part he uses to make babies and she also circled the penis on a diagram of a boy's body.

L.K. told the interviewer that when he tried the first time it "didn't work," so he got some jelly. She tried to sit criss cross on the couch but he straightened her legs and turned her around and bent her over the couch. Keller put the jelly on all of her private parts, which she said meant "the pussy and the butt." L.K. said the jelly "opened her butt up a little bit" and also got on her clothes. She also told the interviewer that Keller's private part was "excited." Then, he put his private part a little bit in her butt, and her butt "felt angry" when he did that. L.K. told the interviewer she was able to slide down through Keller's legs to get away from him and go to her mother. L.K. told the interviewer that Keller was angry about that because she wouldn't let him "do it." L.K. also told the interviewer that Keller did that to her a couple of times when they lived in Hong Kong, but this was the only time he did it in Dallas.

Some of L.K.'s statements to the interviewer seemed confused or inconsistent. For example, at one point she stated that she did not feel anything from Keller's body on the hole of her butt because she only felt the jelly. But she also stated that

she could feel his penis on her butt. After the interview, L.K. returned home with her mother.

The police arrested and interviewed Keller that evening. After being given his Miranda rights, Keller agreed to speak to the detective without counsel present. Keller denied trying to put his penis in L.K.'s butt. He told the detective that on the evening in question, L.K. woke up hungry, so he made her some food. According to Keller, while L.K. was eating, he left the room to have sex with P.K. in the bedroom. When they finished, he returned to the living room and saw that L.K. had spilled noodles and soup on her clothes. Keller told the detective he took L.K. to the bathroom to clean her clothes and then took her back to her mother in the bedroom. Keller said he then went outside to smoke a cigarette and when he came back inside, P.K. came out of the bedroom and told him that L.K. had just told her that Keller had tried to stick his penis in her butt. Keller was surprised by this and denied that it happened. He told the detective he has no idea why L.K. would say such a thing, but he thinks she knew he went to have sex with P.K. and became jealous. He insisted his daughter was not telling the truth about what happened.

Keller also told the detective that L.K. would watch movies on his computer and if he logged her into the computer using his password, she would sometimes access and watch pornography on the computer. Keller also admitted that he would watch pornography on his computer when L.K. was in the house, but he would turn it off if she came in the room while he was watching a video. He also told the

detective that he and P.K. talked about sex in front of L.K. Keller did not seem concerned that his five-year-old daughter watched pornographic videos or heard him talk about sex.

Child Protective Services (CPS) was brought into the case after the forensic interview of L.K. The CPS Investigator assigned to the case spoke to L.K. and P.K. at their home. When it was discovered that P.K. had known about the sexual abuse and had not done anything about it, the children were removed from the home and placed into foster care.

A couple of days after L.K. entered foster care, her foster mother took her for a sexual assault examination. L.K. became upset during the rectal examination. The foster mother reported during the examination that L.K. told her that her mother did not believe her about the sexual abuse and she wanted to put jelly in her pants so that her mother would believe her. At trial, the foster mother testified that L.K. specifically denied having put the jelly in her pants but said she wanted to do it so that her mother would believe her. And L.K. told the jury that she never purposely put jelly in her own butt.

During the sexual assault examination, L.K. reported the prior abuse that occurred when she was in Hong Kong as well as the more recent abuse. During the forensic interview at the Children's Advocacy Center, L.K. identified Keller as the person who sexually assaulted her. Keller was indicted on one count of aggravated

sexual assault of a child under fourteen years of age. The jury convicted him, sentenced him to seventy-five years' imprisonment, and this appeal followed.

ANALYSIS

In five issues, Keller complains of the admission of extraneous offense evidence and charge error. He also contends the trial court lacked jurisdiction over the case because it was not properly transferred to the court's docket. We will address each issue in turn.

A. Admission of Evidence of Extraneous Offense

In his first two issues, Keller complains that the trial court allowed L.K. to testify to the prior incident of sexual abuse by Keller when she was three years old and still living in Hong Kong. Keller maintains that the evidence did not meet the requirements for admission under article 38.37 section 2(b) and, even if admissible, the evidence was so prejudicial it should have been excluded under rule 403 of the Texas Rules of Evidence.

We review the admissibility of an extraneous offense for an abuse of discretion. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). If the trial court's ruling is within the zone of reasonable disagreement, there is no abuse of discretion, and we will uphold it. *Id.* In determining whether the trial court abused its discretion, we may not substitute our opinion for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

1. Admissibility under Article 38.37

Article 38.37 of the code of criminal procedure permits the introduction of "evidence of extraneous offenses or acts" in certain types of sexual abuse cases, including cases in which the defendant is charged with aggravated sexual assault of a child under the age of fourteen as was the case here. TEX. CODE CRIM. PROC. art. 38.37, § 1(a)(1)(B) (listing assaultive offenses under Chapter 22 of the Texas Penal Code if committed against a child under 17 years of age). Keller was indicted and convicted under section 22.021(a)(2)(b) of the Texas Penal Code. Article 38.37 allows admission of evidence that a defendant committed a separate offense "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." Specifically, section 2(b) provides:

> (b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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.

Id. art. 38.37, § 2(b). Here, the State contends the extraneous offense evidence presented showed Keller committed either indecency with a child under section 21.11 of the Texas Penal Code or aggravated sexual assault of a child under section 22.021(a)(1)(B) of the Texas Penal Code, both of which are separate offenses described by subsections (a)(1) and (a)(2). *Id.* art. 38.37, §§ 2(a)(1)(C), 2(a)(1)(E).

Before such evidence may be introduced at trial, however, the trial judge must comply with section 2-a by:

> (1) determining that 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; and
>
> (2) conducting a hearing out of the presence of the jury for that purpose.

TEX. CODE CRIM. PROC. art. 38.37, § 2-a.

Here, Keller complains evidence of the assault in Hong Kong failed to meet the admission requirement of article 38.37 because (1) L.K. could not have remembered what happened when she was three years old, (2) the State's leading questions of L.K. do not constitute answers to support admission of the evidence, and (3) L.K. did not link her use of the term "private part" to a part of Keller's anatomy and her testimony, therefore, was insufficient to describe prohibited sexual conduct. We overrule each of these complaints.

a. Competency of a child witness

The trial court does not have a duty to conduct a sua sponte preliminary competency examination of a child witness. *Baldit v. State*, 522 S.W.3d 753, 761 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Davis v. State*, 268 S.W.3d 683, 699 (Tex. App.—Fort Worth 2008, pet. ref'd); *see McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998) ("[U]nlike the incompetency to stand trial statute, Rule 601 does not expressly impose upon the trial court the duty to conduct an inquiry on its own motion."). Instead, "[t]he party seeking to exclude the witness from

testifying must raise the issue of competency and "shoulders the burden of establishing incompetency." *Gilley v. State*, 418 S.W.3d 114, 120 (Tex. Crim. App. 2014) (internal citation omitted). At the article 38.37 hearing that was held outside the presence of the jury, Keller did not challenge L.K.'s competency to testify on the basis that it was impossible for her to remember events that happened to her when she was three years old. Keller, therefore, has not preserved this error for review. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (to preserve error for appellate review, the complaining party must make a specific objection in the trial court, obtain a ruling on the objection, and the point of error on appeal must comport with the objection made at trial).

Moreover, even if Keller had preserved error, his claim would be without merit. Generally, every person is presumed competent to testify. TEX. R. EVID. 601(a); *Hogan v. State*, 440 S.W.3d 211, 213 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). However, a person, such as a child, is not competent to testify if, upon examination by the trial court, the court finds that the person "lacks sufficient intellect to testify concerning the matters in issue." TEX. R. EVID. 601(a)(2); *Torres v. State*, 424 S.W.3d 245, 254 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); *Hogan*, 440 S.W.3d at 213. "There is no precise age under which the child is deemed incompetent to testify." *Torres*, 424 S.W.3d at 254; *see also Fields v. State*, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973). Any inconsistent testimony about a specific event might affect the child's credibility, but not her competency. *Torres*,

424 S.W.3d at 255. And the child's inability to testify to collateral matters does not affect the child's competency. *Id.*; *Braden v. State*, No. 05-17-00499-CR, 2018 WL 3725266, at *3 (Tex. App.—Dallas Aug. 6, 2018, no pet.) (mem. op., not designated for publication).

A trial court's determination of whether a child witness is competent to testify will not be disturbed on appeal absent an abuse of discretion. *Torres*, 424 S.W.3d at 254; *Dufrene v. State*, 853 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). An appellate court must review the child's entire testimony to determine if the trial court abused its discretion. *Braden*, 2018 WL 3725266, at *3 (citing *Torres*, 424 S.W.3d at 254). A trial court does not abuse its discretion if its ruling was within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g); *Torres*, 424 S.W.3d at 254.

Here, L.K. was five years old when she spoke to the forensic interviewer and a seven-year-old, rising second-grader when she testified at trial. The trial court heard her testify outside the presence of the jury and before the jury. The trial court had an opportunity to see L.K. and observe her demeanor, her manner in answering questions, and her apparent possession of or lack of intelligence. Moreover, L.K. consistently described the extraneous offenses that occurred in Hong Kong when she told her mother at the time the offenses occurred and when she described the offenses to the forensic interviewer, the trial court, and the jury. During the article 38.37 hearing outside the presence of the jury, L.K. told the court that while she was living

in Hong Kong, her father took out his private part and put his private part on her private part more than once. She told the jury that she remembered that her father tried to stick his private in her butt when they lived in Hong Kong and also that he tried to put a reddish-pink toy that looked like a private part into her butt when they were in Hong Kong. L.K. also testified that she told her mother in Hong Kong what happened, and her mother called the police. L.K.'s testimony about the Hong Kong offenses was consistent with what she told the forensic interviewer and was corroborated by her mother, who testified that L.K. told her about the offenses when they were in Hong Kong.

After reviewing the entire record, we conclude that had error been preserved as to L.K.'s competency to testify, the trial court would not have abused its discretion by overruling a challenge to L.K.'s competency to testify. We overrule Keller's complaint with respect to L.K.'s competency to testify.

b. Use of leading questions

Next, Keller contends L.K.'s testimony at the article 38.37 hearing was insufficient to show a violation of any of the listed offenses in article 38.37 because the testimony was solicited through leading questions. Specifically, Keller complains that the following exchange between L.K. and the prosecutor, Ms. Baker, is insufficient to meet the admissibility requirements of article 38.37:

> Q:… And did your dad ever do anything to you when you were in Hong Kong?

A: He would try to.

Q: Okay. When you say he would try to what would he try to do?

A: Pull my pants down.

Q: Okay. And when he would pull your pants down what would he do?

A: (no response)

Q: Do you remember if –- would he pull your pants down?

A: (Witness nodding)

Q: Okay. And when he would pull your pants down what would happen next?

A: (no response)

Q: Are you okay? Do you want a tissue?

MS. BAKER: Judge, can we have a minute?

THE COURT: Okay.

(Off the record)

THE COURT: You may proceed.

Q: (By Ms. Baker) [L.K.], do you remember being in Hong Kong?

A: (witness nodding)

Q: Okay. And you said that your dad would do things to you in Hong Kong, correct?

A: Yes.

Q: Okay. And when you say do things did your dad ever take out his private part?

A: Yes.

Q: Okay. And when he would take out his private part what would he do with his private part?

A: (no response)

Q: Do you remember if he put his private part anywhere on your body?

A: (witness nodding)

Q: Okay.

MR. JOHNSON: Judge, I'm gonna object to leading.

THE COURT: Overruled.

Q: (By Ms. Baker) Would he put his private part anywhere on your body?

A: Yes.

Q: Okay. And where would he put his private part on your body?

A: (no response)

Q: [L.K.], where would he put his private part on your body?

A: In my private.

Q: On your private?

A: (witness nodding)

Q: And did this happen more than one time?

A: Yes.

Q: Okay.

MS. BAKER: Nothing further.

Texas Rule of Evidence 611(c) provides that "leading questions should not be used on direct examination except as necessary to develop the witness's testimony." TEX. R. EVID. 611(c). With a child witness, however, a trial court is given some leeway, and the rule against leading questions is relaxed somewhat. *Moon v. State*, 856 S.W.2d 276, 279 (Tex. App.—Fort Worth 1993, pet. ref'd). Further, "the mere

fact that a question may be answered by a simple 'yes' or 'no' will not render it an impermissibly leading question." *Newsome v. State*, 829 S.W.2d 260, 269 (Tex. App.—Dallas 1992, no pet.) (citing *Hodges v. State*, 108 Tex. Crim. 210, 299 S.W. 907, 908 (1927)). "A question is impermissibly leading only when it suggests which answer, yes or no, is desired, or when it puts into the witness's mouth words to be echoed back." *Newsome*, 829 S.W.2d at 269.

We conclude that, to the extent some of the questions asked were leading, they were necessary to develop the testimony of a scared, child witness. The record shows that L.K. appeared reluctant to answer the State's questions at the beginning of the hearing and, instead, nodded her head in response or made no response at all. At one point, the prosecutor asked L.K. if she needed a tissue and asked the court to give them a minute, indicating that L.K. had become emotional on the stand. Counsel's statements later in the record show that the State took the witness into the hallway for a break before continuing with the examination. Under these circumstances, we cannot say the trial court abused its discretion or acted outside the zone of reasonable disagreement by permitting the State to ask leading questions during the examination of this young girl. *See, e.g.*, *Padilla v. State*, 278 S.W.3d 98, 106 (Tex. App.—Texarkana 2009, pet. ref'd) (no abuse of discretion to allow State to ask young victim of sexual abuse leading questions where she had to be reminded more than once to speak louder, appeared reluctant to testify in front of a courtroom full of people, was

having trouble remembering events that had occurred over one year before trial, and was eventually overcome with emotion during the direct examination).

Further, the testimony was sufficient for the trial court to determine that the evidence likely to be admitted at trial would be adequate to support a finding by the jury that Keller committed the offense of either indecency with a child or aggravated sexual assault of a child. TEX. PENAL CODE § 21.11 (indecency with a child); TEX. PENAL CODE § 22.021(a)(1)(B) (aggravated sexual assault of a child).

A person commits the offense of indecency with a child under section 21.11 of the penal code if:

> (a) . . . with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person:
>
> > (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or
> >
> > (2) with intent to arouse or gratify the sexual desire of any person:
> >
> > > (A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or
> > >
> > > (B) causes the child to expose the child's anus or any part of the child's genitals.
>
> . . . .
>
> (c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:
>
> > (1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

> (2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

TEX. PENAL CODE § 21.11.

A person commits the offense of aggravated sexual assault of a child under section 22.021(a)(1)(B) of the penal code if the person:

> (B) regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly:
>
> > (i) causes the penetration of the anus or sexual organ of a child by any means;
> >
> > (ii) causes the penetration of the mouth of a child by the sexual organ of the actor;
> >
> > (iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
> >
> > (iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
> >
> > (v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor;

TEX. PENAL CODE § 22.021(a)(1)(B).

L.K. testified at the article 38.37 hearing that, when she lived in Hong Kong with Keller and her mother, Keller did the following on more than one occasion: pulled her pants down, took out his private part, and put his private part either on or in L.K.'s private part. The State is not required to prove that Keller committed the extraneous offense beyond a reasonable doubt at the article 38.37 hearing. Rather, the State had the burden of producing sufficient evidence from which the trial court

could determine that the evidence that was "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. art. 38.37, § 2-a(1). We conclude the State met that burden here.

A child victim's testimony alone is sufficient to support a conviction for aggravated sexual assault of a child or indecency with a child. TEX. CODE CRIM. PROC. art. 38.07; *Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd); *Cantu v. State*, 366 S.W.3d 771, 775–76 (Tex. App.—Amarillo 2012, no pet.). In the context of indecency with a child, the finder of fact can infer the requisite intent to arouse or gratify sexual desire from a defendant's conduct, remarks, and all the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981); *Rodriguez v. State*, No. 05-14-01225-CR, 2015 WL 8729283, at *4 (Tex. App.—Dallas Dec. 11, 2015, no pet.) (mem. op., not designated for publication). No oral expression of intent or visible evidence of sexual arousal is necessary. *Rodriguez*, 2015 WL 8729283, at *4; *see also Connell v. State*, 233 S.W.3d 460, 467 (Tex. App.—Fort Worth 2007, no pet.); *Scott v. State*, 202 S.W.3d 405, 408 (Tex. App.—Texarkana 2006, pet. ref'd); *Gregory v. State*, 56 S.W.3d 164, 171 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd). Here, the trial court and the jury could have reasonably inferred from L.K.'s testimony regarding the extraneous offense, from the sexual nature of the evidence, and from the fact that Keller committed the offense when he was alone with L.K., that Keller engaged in

the conduct to arouse or gratify his sexual desire and the conduct was not inadvertent or accidental. *See Delacruz v. State*, No. 05-14-01013-CR, 2016 WL 1733461, at *8 (Tex. App.—Dallas Apr. 28, 2016, pet. ref'd) (mem. op., not designated for publication). Therefore, the State proved Keller had the requisite intent needed to commit the extraneous offense, and L.K.'s testimony was properly admitted into evidence. We overrule Keller's complaint with respect to the use of leading questions.

c. Use of the term "private part"

Finally, Keller argues that L.K.'s use of the term "private part" was too vague to prove an offense because she did not link that term to a specific body part. We disagree. First, L.K. did link the term "private part" to a specific body part, namely, Keller's penis, when she circled the penis on a diagram of a male body and told the interviewer that was what she referred to as her father's private part. Further, the term "private part" is sufficiently specific to prove an offense of aggravated sexual assault of a child or indecency with a child. The court of criminal appeals has stated that "we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults." *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990). Accordingly, Texas cases regularly uphold convictions although the child-complainant's language is childlike rather than technical or sophisticated. *See, e.g., id.* at 134–35 (reference by child to "where I pee" sufficient, with use of anatomically correct dolls, to identify her sexual organ,

and "with the one he pees" sufficient to identify the defendant's sexual organ); *see also Thomas v. State*, No. 05-96-00295-CR, 1998 WL 2364, at *3 (Tex. App.—Dallas Jan. 6, 1998, pet. ref'd, untimely filed) (mem. op., not designated for publication) (holding child victim's testimony that defendant stuck his "private part" between her legs and moved it, making her "private part" feel "dry," was sufficiently detailed to allow the jury to reasonably conclude that penetration occurred and to prove aggravated sexual assault). And, as our sister court noted, "'[p]rivate area' is an obvious euphemism for the part of the human body where the genitals are located" and, as such, "[c]ourts have long applied the understood meaning to such words." *Proctor v. State*, No. 09-04-00489-CR, 2005 WL 2035865, at *1 (Tex. App.—Beaumont Aug. 24, 2005, no pet.) (mem. op., not designated for publication) (citing cases, including *Thomas v. State*, 399 S.W.2d 555, 556 (Tex. Crim. App. 1966) (use of the term "privates" was "sufficient to sustain allegation in the indictment that he placed his hand against her 'sexual part, to wit; the vulva'") and *Ball v. State*, 289 S.W.2d 926, 928 (Tex. Crim. App. 1956) (evidence of touching "privates" satisfied allegation of contact with vulva)). Indeed, even the court of criminal appeals in days of old used the term "private parts" to describe a man's sexual organ rather than using the word penis. *See, e.g., Stevens v. State*, 134 S.W.2d 246, 246–47 (Tex. Crim. App. 1939) ("Without detailing further the story she gave, it is sufficient to say that her description of what took place and her conclusion that his private parts penetrated hers, at least, raises a question of fact for the jury to pass on as to whether or not the

penetration actually took place."). There is no merit to Keller's argument regarding L.K.'s use of the term "private part," and we overrule his complaint regarding its use.

For these reasons, we conclude the trial court did not abuse its discretion by admitting L.K.'s testimony regarding the extraneous offenses. We overrule Keller's first issue.

2. Admissibility Under Rule 403

In his second issue, Keller contends that, even if the extraneous offense evidence was admissible under article 38.37, it should have been excluded under Rule 403 of the Texas Rules of Evidence because the probative value of the evidence was substantially outweighed by its prejudicial effect. Keller failed to preserve this issue for appellate review.

Texas Rule of Evidence 403 authorizes a trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. "When evidence of a defendant's extraneous acts is relevant under Article 38.37, the trial court still is required to conduct a Rule 403 balancing test *upon proper objection or request*." *Distefano v. State*, 532 S.W.3d 25, 31 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (emphasis added); *Diaz v. State*, No. 01-18-00636-CR, 2020 WL 2026320, at *4 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020, no pet. h.) (mem. op., not

designated for publication) (same) (citing *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref'd)); *Hill v. State*, No. 05-15-00989-CR, 2017 WL 343593, at *4 (Tex. App.—Dallas Jan. 18, 2017, pet. ref'd) (mem. op., not designated for publication) (same). However, even when the trial court admits extraneous offenses pursuant to article 38.37, an appellant must object at trial that the probative value of the extraneous offense is substantially outweighed by the risk of undue prejudice to preserve a Rule 403 complaint on appeal. *Diaz*, 2020 WL 2026320, at *4 (issue not preserved for appellate review because appellant made no Rule 403 objection before the trial court); *Moose v. State*, No. 02-18-00194-CR, 2019 WL 2223585, at *6 (Tex. App.—Fort Worth May 23, 2019, no pet.) (mem. op., not designated for publication) (defendant did not preserve Rule 403 issue because he "did not object to [the complainant's extraneous offense evidence] on the basis of rule 403 in the trial court . . . he argued only that her testimony was irrelevant and that there was insufficient evidence to prove the offense of which she complained").

Here, Keller's counsel objected that L.K.'s testimony concerning the extraneous offense should not be admitted because (1) L.K.'s testimony was factually insufficient to convince a jury beyond a reasonable doubt that an offense occurred as required by article 38.37(2)(a), (2) there was no testimony from L.K. about a criminal act because "touching my private part" is insufficient as a matter of law to prove a criminal act, and (3) L.K. was answering leading questions. Keller

made no objection pursuant to Rule 403. Because Keller made no Rule 403 objection before the trial court, the issue is not preserved for appeal. TEX. R. APP. P. 33.1.

Moreover, the allegation of conduct in Hong Kong was relevant to rebut the defense's theory that the complainant's later allegations were fabricated. As such, had Keller raised a Rule 403 objection to the admission of the extraneous offense evidence below, we conclude the trial court would not have abused its discretion by overruling the objection because the evidence falls within the "zone of reasonable disagreement." *See Montgomery*, 810 S.W.2d at 391; *see also Beam v. State*, 447 S.W.3d 401, 404–05 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (Rule 403 "favors admissibility of relevant evidence, and there is a presumption that relevant evidence will be more probative than prejudicial"); *Cornelious v. State*, No. 05-18-00274-CR, 2019 WL 1236409, at *5 (Tex. App.—Dallas Mar. 18, 2019, no pet.) (mem. op., not designated for publication) (extraneous offense evidence relevant to rebut theory of fabrication and decision to admit not an abuse of discretion because it fell within zone of reasonable disagreement); *Dennis v. State*, 178 S.W.3d 172, 181 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (same). We overrule Keller's second issue.

B. Definitions of Intentionally and Knowingly

In his third issue, Keller asserts that aggravated sexual assault of a child is a nature of conduct offense, and that the trial court erred by failing to limit the culpable

mental states of "intentionally" and "knowingly" to the nature of Keller's conduct. Keller complains of the following definitions in the charge:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> A person acts knowingly, or with knowledge, with respect to the nature of his conduct, or with respect to the circumstances surrounding his conduct when he is aware of the nature of this conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct, when he is aware that his conduct is reasonably certain to cause the result.

Keller did not raise his objection in the trial court.

We review complaints of jury charge error by first determining whether error exists. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If error exists, we must determine whether the error caused sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). When, as here, an alleged jury charge error was not objected to, we reverse only if an error was "so egregious and created such harm that the defendant has not had a fair and impartial trial." *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). Egregious harm consists of errors affecting the very basis of the case or depriving the defendant of a valuable right. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013). We assess harm in light of "the entire jury charge, the state of the evidence (including the contested issues and the weight of probative evidence), the arguments of counsel,

and any other relevant information revealed by the record of the trial as a whole." *Id.*

Because Keller did not object to the definitions of intentionally and knowingly in the trial court, he must show that the definitions, even if erroneous, caused egregious harm. *See Almanza*, 686 S.W.2d at 171. As such, we need not address whether the instructions were erroneous because, even if we assume the charge was erroneous, Keller has not established that he was egregiously harmed.

On appeal, Keller does not argue that the instructions caused egregious harm. Instead, he contends only that the egregious harm standard is unworkable and this Court should automatically reverse when the charge is erroneous. By failing to provide any argument or authority with respect to any alleged harm caused by the definitions of intentionally and knowingly included in the jury charge, Keller has waived any error on this issue. *See* TEX. R. APP. P. 38.1(i); *see also Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000) (appellant waived complaint that trial court failed to include jury instruction regarding voluntariness of his statements to police by failing to cite cases addressing that issue and failing to include harmless error analysis in brief).

Moreover, we find no egregious harm under this record. Keller denied any touching or penetration of L.K. As a result, his culpable intent was not a contested issue and he, therefore, could not suffer egregious harm from the charge even if we were to find the definitions erroneous. *See Jones v. State*, 229 S.W.3d 489, 494 (Tex.

App.—Texarkana 2007, no pet.) (holding that the defendant's intent, "while it was a part of the State's required proof, was not a contested issue and consequently [the defendant] could not be egregiously harmed by the definition of the intentional and knowing state of mind"); *see also Martinez v. State*, No. 11-13-00080-CR, 2015 WL 1322315, at *6 (Tex. App.—Eastland Mar. 20, 2015, pet. ref'd) (mem. op., not designated for publication).

Further, the application section of the jury charge correctly instructed the jury because it followed the language of the statute and, as such, the jury charge caused no egregious harm even if we were to conclude the definitions of intentionally and knowingly were erroneous. *See Reed v. State*, 421 S.W.3d 24, 30 (Tex. App.—Waco 2013, pet. ref'd) ("When the application paragraph correctly instructs the jury on the law applicable to the case, this mitigates against a finding of egregious harm."); *see also Martinez*, 2015 WL 1322315, at *6 (citing *Reed*); *Serrato v. State*, No. 05-18-01071-CR, 2019 WL 3229167, at *3–5 (Tex. App.—Dallas July 18, 2019, no pet.) (mem. op., not designated for publication) (no egregious harm where application paragraph required jury to find that appellant engaged in conduct with the requisite intent, and intent was not a contested issue at trial).

Accordingly, we hold that, even assuming without deciding that the definitions contained errors, those errors did not egregiously harm Keller. For these reasons, we resolve Keller's third issue against him.

C. Reasonable Doubt Instruction

In his fourth issue, Keller contends that the trial court committed structural error by providing the jury with a definition of "reasonable doubt" in violation of the holding in *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000). Keller did not raise this objection to the jury charge at trial. We are required, however, to consider all alleged charge errors on appeal "regardless of preservation in the trial court." *Kirsch*, 357 S.W.3d at 649. In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Id.* If error did occur, whether it was preserved determines the degree of harm required for reversal. *Id.* Keller, however, argues that reversal is required without a harm analysis because the error is structural. A constitutionally deficient reasonable-doubt instruction constituting structural error is not subject to a harm analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993); *Mendez v. State*, 138 S.W.3d 334, 339 (Tex. Crim. App. 2004). No such structural error, however, is present here. *See Olivas v. State*, 202 S.W.3d 137, 145 (Tex. Crim. App. 2006).

Here, the court's charge included the following instruction as part of the court's instructions on presumptions and burden of proof:

> It is not required that the prosecution prove guilt beyond all possible doubt; it is only required that the prosecution's proof exclude all reasonable doubt concerning the defendant's guilt.

Keller contends that sentence constitutes a definition of "reasonable doubt" that the Texas Court of Criminal Appeals has forbidden trial courts from providing in a jury charge.

Keller's argument is contrary to established law. We and other courts have held that this instruction "'simply states the legally correct proposition that the prosecution's burden is to establish appellant's guilt beyond a reasonable doubt and not all possible doubt.'" *Wilson v. State*, No. 05-18-00801-CR, 2019 WL 3491931, at *3 (Tex. App.—Dallas Aug. 1, 2019, no pet.) (mem. op., not designated for publication) (collecting cases and quoting *O'Canas v. State*, 140 S.W.3d 695, 702 (Tex. App.—Dallas 2003, pet. ref'd)). The language at issue merely instructs the jury that it is the State's burden to prove the elements of the crime for which Keller was charged beyond a reasonable doubt. We conclude the instruction did not constitute jury charge error, and we overrule Keller's fourth issue.

D. Jurisdictional Challenge

In his final issue, Keller contends that the trial court lacked jurisdiction because the case was originally presented for indictment in a different trial court, and there were no written orders transferring the case to the court that tried the case and rendered judgment. This argument is also contrary to established law.

"When a defendant fails to file a plea to the jurisdiction, he waives any right to complain that a transfer order does not appear in the record." *Wilson*, 2019 WL 3491931, at *4 (citing *Lemasurier v. State*, 91 S.W.3d 897, 899 (Tex. App.—Fort

Worth 2002, pet. ref'd); *Mills v. State*, 742 S.W.2d 831, 834–35 (Tex. App.—Dallas, 1987, no writ)). Keller did not file a plea to the jurisdiction in this case. He, therefore, waived this complaint.

Further, even if Keller had preserved his complaint for our review, this Court has considered and rejected this argument on numerous occasions, and we do so again today. *See Bourque v. State*, 156 S.W.3d 675, 678 (Tex. App.—Dallas 2005, pet. ref'd) (cases returned by a grand jury are not necessarily assigned to the court that impaneled the grand jury); *Wilson*, 2019 WL 3491931 at *4 (collecting cases).

Moreover, nothing in the record suggests that the indictment was filed in any other court or appeared on any other docket before it was filed in Criminal District Court No. 5. On the contrary, the record shows that the grand jury was empaneled in the Criminal District Court No. 7, but the case was filed in Criminal District Court No. 5 following the return of Keller's indictment. Because the record reflects Keller's case was first filed in the Criminal District Court No. 5, no transfer orders from the Criminal District Court No. 7 were required. *See Bourque*, 156 S.W.3d at 678. Criminal District Court No. 5 had jurisdiction to hear Keller's case and render judgment. We overrule Keller's fifth issue.

CONCLUSION

For these reasons, we overrule all five of Keller's issues. Accordingly, we affirm the trial court's judgment.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

Publish
TEX. R. APP. P. 47.2(b)
180778F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRADLEY ALLEN KELLER, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F-1653364-L.
No. 05-18-00778-CR V.	Opinion delivered by Justice Partida-Kipness. Justices Bridges and Molberg participating.
THE STATE OF TEXAS, Appellee	

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

Judgment entered this 12th day of June, 2020.