Affirmed and Opinion Filed July 8, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01496-CR

GABRIEL DAVELLE MERCER BISHOP, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 86th Judicial District Court
Kaufman County, Texas
Trial Court Cause No. 18-10376-86-F

MEMORANDUM OPINION

Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Partida-Kipness

Appellant Gabriel Davelle Mercer Bishop appeals his conviction and life sentence for first degree felony, continuous sexual abuse of a child under fourteen. In two issues, Bishop argues the trial court abused its discretion by denying a motion to suppress his inculpatory statements and admitting evidence of an extraneous offense. We affirm the judgment.

BACKGROUND

In 2018, Bishop's stepdaughter, Brooke[1], accused Bishop of molesting her multiple times from the time she was six or seven years old until she was twelve years old. The abuse occurred when Brooke lived in Texas with her mother and Bishop. Brooke was living with her father and step-mother in Lyle, Washington when she made her outcry. After a law enforcement agency from Washington state forwarded Brooke's outcry to the Kaufman County Sheriff's Department, Detective Jimmy Weisbruch was assigned to investigate her allegations. On May 21, 2018, Bishop was at the Kaufman County Sheriff's Office speaking with an investigator on an unrelated issue. When that interview ended, Detective Weisbruch took the opportunity to meet Bishop. Detective Weisbruch entered the interview room where Bishop was meeting with the other investigator, introduced himself, and asked to speak with Bishop about Brooke's allegations. Detective Weisbruch told Bishop he was not under arrest and he was free to go at any point in time if he chose. Bishop was not in handcuffs and was not under arrest for any charge. Bishop spoke with Detective Weisbruch for about twenty minutes and did not express a desire to leave during the interview. At the end of the interview, Detective Weisbruch offered Bishop the opportunity to come back and take a polygraph test. Bishop agreed that he would be interested in coming back in for a polygraph or to at least speak to

[1] The children's names in this opinion are the pseudonyms used in the trial court and in the parties' briefing to this Court.

someone else. Bishop left the Sheriff's Office on his own, and Weisbruch called Bishop later with the date, time, and location for the scheduled polygraph test and interview. At trial, Bishop conceded that he agreed to be interviewed by Detective Weisbruch at the sheriff's office, it was a voluntary interview, he was not in custody at the time, and he left voluntarily after the interview.

Bishop also testified that, at the end of his interview with Weisbruch, Bishop agreed to come back for another interview later, he consented to do that voluntarily, and agreed to an appointment time. Bishop drove himself to the second interview as scheduled on May 29, 2018. Special Agent Maury Buford of the Texas Department of Public Safety conducted the second interview at the Kaufman County Sheriff's Department. When Bishop arrived, Special Agent Buford went over Bishop's rights with him, informed Bishop he was free to leave at any time, and told Bishop the interview would be audio recorded and video recorded. Special Agent Buford testified that he did not make any promises to Bishop to induce Bishop to lie, and that Bishop insisted he was being truthful, even when Special Agent Buford told Bishop he did not think Bishop was being truthful. Special Agent Buford also testified that Bishop was not in custody while in the interview room and was not in handcuffs at any time that day.

The interview lasted more than four hours, which included the polygraph test[2] as well as a pre-test and post-test interview. Special Agent Buford testified that Bishop was given breaks during the four-hour interview and, after each break, Bishop was given the opportunity to continue speaking. The interview concluded when Bishop said he wanted the interview to end, wanted to leave, and wanted to obtain an attorney. Bishop left the Sheriff's Office on his own following the interview and was not arrested that day.

During the post-test interview with Special Agent Buford, Bishop made four admissions the State sought to introduce at trial. First, Bishop admitted that when Brooke was about ten years old, he accidentally touched her vagina over her clothes when she was sleeping with Bishop and his wife in their bed one night. Bishop asserted that he thought he was touching his wife's vagina but when he rolled her over intending to have intercourse, he realized it was Brooke and immediately stopped. Bishop maintained in the interview and at trial that this was just an accident, he left the bedroom right away, was ashamed, and told Brooke not to tell anyone. Next, Bishop admitted during the post-test interview with Special Agent Buford that he witnessed Brooke masturbating on two occasions. Bishop observed Brooke masturbating on a couch and then, a few months later, he saw her masturbating inside of a closet inside her bedroom. Finally, Bishop told Special Agent Buford that he

[2] The trial court suppressed all evidence related to the polygraph test and, therefore, that portion of the video is not at issue here.

and Brooke engaged in mutual masturbation when she was eleven or twelve years old. According to Bishop, he was playing a video game in the living room on the couch when Brooke came into the living room and began masturbating in front of him. Bishop then began masturbating, and they engaged in mutual masturbation that ended with Bishop ejaculating into his shirt. Bishop told Special Agent Buford that Brooke may have taken it that she could play the video game if she engaged in that sexual activity with him. Bishop asked to end the interview and seek counsel approximately five minutes after making this last admission. The State edited those admissions into five video clips and designated the clips as State's Trial Exhibit 2.

Bishop filed a motion to suppress the complete recordings of his statements to Detective Weisbruch and Special Agent Buford. The trial court held a pretrial evidentiary hearing on Bishop's motion to suppress on November 15, 2018. Detective Weisbruch and Special Agent Buford testified for the State. The trial court signed an order denying the motion to suppress on November 19, 2018 and, ten days later, entered written findings of fact and conclusions of law as to that ruling. The trial court concluded that the statements made to Detective Weisbruch were the result of non-custodial interrogation, voluntarily made, and admissible as a matter of fact and law. The trial court further concluded that the statements made to Special Agent Buford were the result of non-custodial interrogation and voluntarily made and, until Bishop's assertion of his Sixth Amendment right to counsel, admissible as a matter of fact and law.

At trial, the State offered State's Exhibit 2 into evidence, which consisted of the five video clips of the admissions made by Bishop during his interview with Special Agent Buford. Defense counsel's response to the offer was "Judge, I will rest on my previous motion on this case - - of this exhibit." The following exchange then took place:

> THE COURT: The one we had the hearing about your objection?
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> MR. HARRIS: That's correct, Judge.
>
> THE COURT: Okay.
>
> MS. BECKHAM: Would you like us to approach to put something on the record, Your Honor?
>
> THE COURT: Yes. Why don't you come up here. I think it needs to be clear what exactly you're objecting about.

During the bench conference, however, Bishop's counsel did not make specific objections to the offer of State's Exhibit 2. Rather, he stated five more times that he was resting on the issues raised in the motion to suppress. The trial court admitted State's Exhibit 2, and Special Agent Buford provided explanatory testimony to the jury about the clips after they were played.

Other witnesses who testified for the State included Leonard Surrell, Jr., an inmate to whom Bishop made admissions, Brooke's mother, Brooke's step-mother, Bishop's cousin, David Scott Stanley, and Brooke. Stanley testified that Bishop anally raped him when Stanley was seven or eight years old and Bishop was thirteen. Bishop objected to admission of Stanley's testimony of an extraneous offense. The

trial court overruled Bishop's objections following an article 38.37 admissibility hearing, and Stanley testified without objection at trial.

Bishop took the stand in his own defense during the guilt-innocence phase of trial. He admitted that he molested Stanley as alleged, but denied Brooke's allegations. Bishop told the jury that he lied to Special Agent Buford when he said he masturbated in front of Brooke and ejaculated into his shirt. Bishop testified that the only true admission he made to Special Agent Buford was that he had mistakenly rubbed Brooke's vagina in bed when he thought he was touching his wife. Bishop confirmed that, at the end of his interview with Detective Weisbruch, he agreed to come back for another interview at a later time, consented to do that voluntarily, agreed to an appointment time, and drove himself there at the scheduled time. Bishop also stated that Special Agent Buford went over Bishop's rights with him, had him sign a consent form, told him the interview would be recorded, and told Bishop he was free to leave at any time. But Bishop also testified that he did not feel like he could leave at any time because Special Agent Buford made Bishop take his keys and wallet out and then sat in between Bishop and his keys and wallet. Bishop also told the jury that he told Special Agent Buford a few times that he wanted to leave, but Special Agent Buford did not act on those requests.

The jury found Bishop guilty of the offense of continuous sexual abuse of a young child and, after hearing evidence during the punishment phase, assessed

punishment at confinement for life. This appeal followed. Bishop also filed a motion for new trial, which was overruled by operation of law.

ANALYSIS

Bishop brings two issues on appeal. First, he complains of the trial court's denial of his motion to suppress State's Exhibit 2, which was comprised of five video clips from his May 29, 2018 interview with Special Agent Buford. Second, he contends the trial court abused its discretion by admitting Stanley's testimony. We address each issue in turn.

A. Denial of Motion to Suppress

In his first issue, Bishop contends the trial court should not have admitted State's Exhibit 2 because the statements were a product of custodial interrogation and he was not given the required *Miranda* warnings before giving his statement. Although Bishop went to the police station voluntarily, he maintains that he was "in custody" at the time he made the statements because it was clear he was the focus of the officers' investigation. Specifically, Bishop asserts that officers confronted him with Brooke's allegations before and during the interview and indicated they disbelieved Bishop's denial of those allegations. According to Bishop, any reasonable person would have known the officers were focused on securing a statement from Bishop and had probable cause to arrest him. Bishop argues the trial court abused its discretion by denying his motion to suppress the statements because

he did not receive the required *Miranda* warnings prior to making the statements. We disagree.

We review a trial court's denial of a motion to suppress for an abuse of discretion, applying a bifurcated standard of review. *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012). We defer to the trial court's determination of historical facts that are based on assessments of credibility and demeanor. *Id.* We review de novo questions that do not turn on credibility and demeanor, including whether the historical facts constitute custodial interrogation. *Id.* An appellate court reviews the trial court's legal ruling on a motion to suppress de novo, unless its specific fact findings that are supported by the record are also dispositive of the legal ruling. *Holt v. State*, No. 05-14-00914-CR, 2016 WL 3018793, at *7 (Tex. App.—Dallas May 18, 2016, pet. ref'd) (citing *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013); *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006)). An appellate court must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for its ruling. *See State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007) (noting court of appeals correctly stated this rule of law below). Here, Bishop challenges the trial court's conclusion of law that Bishop's statement was not a product of custodial interrogation. Bishop does not challenge any of the court's fact findings related to the denial of the motion to suppress.

Statements made by a defendant during a custodial interrogation are inadmissible if, before making the statements, the defendant did not receive warnings set out in *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), and the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 38.22, § 3(a)(2); *Herrera v. State*, 241 S.W.3d 520, 525–26 (Tex. Crim. App. 2007). The defendant bears the initial burden to prove a statement was the product of a custodial interrogation. *Herrera*, 241 S.W.3d at 526.

"Our construction of "custody" for purposes of Article 38.22 is consistent with the meaning of "custody" for purposes of *Miranda*." *Id.* Generally, four situations may constitute custody:

> (1) the defendant is physically deprived of his freedom of action in any significant way;
>
> (2) a law enforcement officer tells the defendant he is not free to leave;
>
> (3) law enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; or
>
> (4) there is probable cause to arrest the defendant, and law enforcement officers do not tell him he may leave.

Gardner v. State, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009); *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996).

Under the first three situations, the restriction on the defendant's freedom of movement must reach "the degree associated with an arrest" instead of an investigative detention. *Dowthitt*, 931 S.W.2d at 255. Under the fourth situation,

custody is not established unless an officer's knowledge of probable cause is manifested to the defendant and the record demonstrates " 'other circumstances' of the interview, such as duration or factors of 'the exercise of police control over [a suspect],' [that] would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App. 2013) (quoting *Dowthitt*, 931 S.W.2d at 255). Such other factors include whether the suspect arrived at the place of interrogation voluntarily, and whether the suspect's requests to see relatives and friends are refused. *Dowthitt*, 931 S.W.2d at 255–57. "However, the manifestation of probable cause does not automatically establish custody." *Garcia v. State*, 237 S.W.3d 833, 837 (Tex. App.—Amarillo 2007, no pet); *see also Saenz*, 411 S.W.3d at 496. " 'Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue.' " *Saenz*, 411 S.W.3d at 497 (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994)). "[T]he question turns on whether, under the facts and circumstances of the case, 'a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.' " *Ervin v. State*, 333 S.W.3d 187, 205 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (quoting *Nguyen v. State*, 292 S.W.3d 671, 678 (Tex. Crim. App. 2009)). The reasonable person standard presupposes an innocent person. *Dowthitt*, 931 S.W.2d at 254. The subjective intent of law enforcement officials to arrest is irrelevant unless that intent

is somehow communicated or otherwise manifested to the suspect. *Ervin*, 333 S.W.3d at 205; *Dowthitt*, 931 S.W.2d at 254.

Special Agent Buford's interview of Bishop does not fall within any of the *Dowthitt*-described situations. Bishop voluntarily presented himself at the Kaufman County Sheriff's Department to attend a scheduled appointment with Special Agent Buford. He was not wearing handcuffs before or during the interview. Special Agent Buford informed Bishop before questioning him that Bishop was free to leave at any time. Bishop chose to remain at the station and discuss Brooke's allegations for over four hours. During the interview, Special Agent Buford offered Bishop opportunities to take breaks, use the restroom, get a drink of water, or otherwise pause the questioning if Bishop so desired. The interview ended when Bishop asked that it end and he wanted to engage counsel. Bishop left the station at the conclusion of the interview in his own vehicle. Bishop does not dispute these facts, which the trial court specifically found following the hearing on the motion to suppress.

Moreover, contrary to Bishop's contentions, law enforcement officers could both focus their investigation on Bishop and interview him at the sheriff's department without conclusively establishing "custody" for purposes of article 38.22. *See Stansbury*, 511 U.S. at 323 (noting that the focus of the investigation may be on the defendant at the time of the interview without the defendant finding himself in a custodial situation requiring *Miranda* warnings). Under these circumstances and in light of the reasonable person standard set out in *Stansbury* and *Dowthitt*, we

conclude that Bishop was not in custody for purposes of article 38.22 at the time he made the oral statements. Because we conclude, based on the objective factors presented in this case, that a reasonable person in Bishop's circumstances would not have believed, at the time of the statements, that law enforcement officers were restraining his freedom of movement to the degree associated with a formal arrest, we conclude Bishop's statements were not the result of custodial interrogation. As a result, article 38.22 did not apply to the statements, and the trial judge did not err in denying Bishop's motion to suppress and admitting the statements at trial. We do not address whether the statements were voluntary because Bishop does not dispute the voluntariness of the statements on appeal and such a review is unnecessary where Bishop failed to meet his burden to establish that the statements were made during a custodial interrogation. We overrule Bishop's first issue.

B. Admission of Evidence of Extraneous Offense

In his second issue, Bishop contends evidence of his prior abuse of his cousin was improperly admitted. Outside the presence of the jury, the State presented Stanley as a prior victim of sexual abuse by Bishop under Article 38.37 of the Texas Code of Criminal Procedure. During the admissibility hearing, Stanley, who was twenty-nine years old at the time of trial, testified that Bishop sexually abused him when he was seven or eight years old and Bishop was thirteen. The offense occurred at Bishop's residence, which was next door to Stanley's grandparent's house in Kemp, Texas. Bishop took Stanley into the master bedroom and told Stanley that he

wanted to play a game with him. Bishop had Stanley pull his pants down. Then Bishop took his penis out, said it would be fun, and then inserted his penis into Stanley's anus. After a couple of minutes, Bishop pulled his penis out of Stanley's anus and Stanley saw a white substance on Bishop's penis. Stanley asked what the white substance was, and Bishop told him not to worry about it. Stanley testified that he asked Bishop what was going on, and Bishop again told him not to worry about it, that he did not have to tell anybody what happened, and then Bishop left. Stanley told the trial court that he did not tell anyone what happened because of fear of hurting his family and the stigma of breaking up his family. He came forward when he heard that Bishop had been arrested for child abuse and decided he needed to tell someone what happened to him to make sure Bishop is "not a predator out on the streets anymore."

Following this testimony, the State moved that Stanley be permitted to testify during the guilt-innocence phase as to the extraneous offense under Article 38.37. Bishop's counsel made the following objections:

> Yes, Judge. First of all, we're disputing the fact that they've established proof beyond a reasonable doubt. There's no independent witness; no DNA sample preserved. We've got some spoliation of evidence in addition to violation of due process, violation of statute of limitation, right to a jury trial.
>
> So aside from all that, the witness cannot positively identify what time of year it happened, cannot positively identify who was this other person who was in the residence at the time. So that's in addition to the 23-year delayed outcry.

> So we submit that he would not be an appropriate witness under Texas Code of Criminal Procedure, Article 38.37.

The trial court ruled that Stanley would be allowed to testify because the evidence would be adequate to support a finding by the jury that Bishop committed the separate offense beyond a reasonable doubt.

Stanley's testimony at trial about the offense was substantially the same as his testimony at the Article 38.37 hearing. He did, however, provide additional sensory details about the sexual assault and the struggles it caused him to endure with his sexuality through high school and later in his marriage. Bishop made no objections to Stanley's trial testimony.

On appeal, Bishop primarily argues that the trial court abused its discretion by admitting this testimony because the probative value of the evidence was outweighed by the danger of unfair prejudice and confusion under Rule 403 of the rules of evidence and the admission of the testimony affected Bishop's substantial rights. Bishop also states in a single paragraph that he contends the admission of Stanley's testimony "under Article 38.37, violated his due process rights and was not in accord with due course of law" based on the objections made in the Article 38.37 hearing. We first address the challenge to the trial court's ruling under Article 38.37.

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 continuous sexual assault of a child under the age of fourteen as was the case here[3]. TEX. CODE CRIM. PROC. art. 38.37, § 1(a)(1)(A) (listing sexual offenses under Chapter 21 of the Texas Penal Code if committed against a child under 17 years of age). 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). 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. We conclude the State met that burden here.

We review the admissibility of an extraneous offense for an abuse of discretion. *Keller v. State*, – S.W.3d –, 2020 WL 3118713, *4 (Tex. App.—Dallas

[3] Bishop was indicted and convicted under section 21.02 of the Texas Penal Code.

June 12, 2020, no pet. h.) (citing *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. *Keller*, 2020 WL 3118713 at *4. In determining whether the trial court abused its discretion, we may not substitute our opinion for that of the trial court. *Id.* (citing *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)).

Here, Bishop complains that Stanley's testimony was insufficient to establish beyond a reasonable doubt that the assault occurred and, as such, failed to meet the admission requirement of article 38.37. Bishop bases this argument on the lack of third party witnesses to the assault, the length of time between the assault and the outcry, the lack of physical evidence of the assault, and the inability of Bishop to be tried for the offense and defend against the allegation due to the expiration of the statute of limitations. Bishop provides this Court no legal authorities to support his contention that Stanley's testimony alone would be insufficient for a jury to determine Bishop committed a separate offense against Stanley for purposes of admissibility under Article 38.37.

A person commits the offense of sexual assault of a child if, regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means. TEX. PENAL CODE § 22.011(a)(2).

A person commits an offense of indecency with a child if, with a child younger than 17 years of age . . . 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.

TEX. PENAL CODE § 21.11(a). "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(c).

A victim's testimony alone is sufficient to support a conviction for sexual assault of a child under section 22.011 or indecency with a child under section 21.11 of the penal code. 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 (quoting *Scott v. State*, 202 S.W.3d 405, 408 (Tex. App.—Texarkana 2006, pet. ref'd)); *see also Connell v. State*, 233 S.W.3d 460, 467 (Tex. App.—Fort Worth 2007, no pet.); *Gregory v. State*, 56 S.W.3d 164, 171 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd).

Here, Stanley's testimony established that sexual contact occurred when Bishop inserted his penis in Stanley's anus, and that Stanley was a child when the contact occurred. The trial court and the jury could have reasonably inferred from Stanley's testimony regarding the sexual nature of the offense, and from the fact that Bishop committed the offense when he was intentionally alone with Stanley, that Bishop 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 Bishop had the requisite intent needed to commit the extraneous offense, and Stanley's testimony was properly admitted into evidence. *See Shimp v. State*, No. 11-16-00234-CR, 2017 WL 6395520, at *6 (Tex. App.—Eastland Dec. 14, 2017, no pet.) (mem. op., not designated for publication) (court acted "well within the 'zone of reasonable disagreement' when it admitted" testimony under Article 38.37 from victim

regarding sexual assault that occurred twenty years earlier when victim was ten years old). Moreover, Bishop admitted he committed the assault on Stanley. We conclude the trial court acted well within the zone of reasonable disagreement when it admitted Stanley's testimony, and we overrule Bishop's complaint with respect to admission of the testimony under Article 38.37.

2. Admissibility under Rule 403

On appeal, Bishop also argues that Stanley's testimony 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. Bishop 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 is still required to conduct a Rule 403 balancing test *upon proper objection or request.*" *Diaz v. State*, No. 01-18-00636-CR, 2020 WL 2026320, at *4 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020, no pet. h.) (emphasis in original) (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); *Distefano v. State*, 532 S.W.3d

25, 31 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (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." *Keller*, – S.W.3d –, 2020 WL 3118713 at *9.; *Diaz*, 2020 WL 2026320, at *4 (issue not preserved for appellate review because appellant made no Rule 403 objection before the trial court).

Here, Bishop's counsel made no objections to Stanley's testimony at trial and did not object based on Rule 403 during the Article 38.37 hearing. The issue is, therefore, not preserved for appeal. TEX. R. APP. P. 33.1.

CONCLUSION

We conclude the trial court did not abuse its discretion by admitting Bishop's statements to Special Agent Buford or by admitting Stanley's testimony of Bishop's prior sexual abuse. Accordingly, we overrule Bishop's appellate issues and affirm the trial court's judgment.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GABRIEL DAVELLE MERCER BISHOP, Appellant	On Appeal from the 86th Judicial District Court, Kaufman County, Texas
No. 05-18-01496-CR V.	Trial Court Cause No. 18-10376-86-F.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Partida-Kipness. Justices Osborne and Pedersen, III participating.

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

Judgment entered this 8th day of July, 2020.