

NO. 01-24-00211-CR

IN THE
COURT OF APPEALS

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
8/27/2024 4:13:59 PM
DEBORAH M. YOUNG
Clerk of The Court

FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

JONATHAN JAMES LUNA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
of Galveston County, Texas
Cause No. 23CR2483

BRIEF FOR APPELLANT

Greg Russell
711 59th Street
Galveston, Texas 77551
(409) 497-4743
(409) 497-4721
SBN: 17411550

Attorney for Appellant

IDENTITY OF PARTIES AND COUNSEL

Parties and counsel in this case are as follows:

1. Jonathan James Luna, Appellant, represented at trial by John Reed, 2951 Marina Bay Drive, Suite 130-81, League City, Tx. 77573; represented on appeal by Greg Russell, 711 59th Street, Galveston, Tx. 77551.
2. The State of Texas, Appellee, represented at trial by Jennifer Fisher and Erika Mercado, Assistant District Attorneys and on appeal by Jack Roady, Criminal District Attorney for Galveston County, 600 59th Street, Galveston, Tx. 77551.

CITATION TO THE RECORD

Clerk's Record.....	CR (volume & page) CR–Supp. (volume & page)
Reporter's Record	RR (volume & page)
Exhibits.....	(State/Defense & number)

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	1
Statement of the Case	2
Issue Presented	3
Statement of Facts	3-4
Summary of Argument for Issue Number One	4
Argument in Support of Issue Number One	4-12
Conclusion and Prayer	12
Certificate of Service	13
Certificate of Compliance.....	13

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Barshaw v. State</i> , 342 S.W.3d 91, 93 (Tex.Crim.App. 2011).....	22
<i>Burnett v. State</i> , 88 S.W.3d 633, 637 (Tex.Crim.App. 2002).....	22
<i>Ex Parte Welborn</i> , 785 S.W.2d 391, 395 (Tex.Crim.App. 1990).....	18
<i>Henley v. State</i> , 493 S.W.3d 77, 82-83 (Tex.Crim.App. 2016).....	17
<i>Johnson v. State</i> , 490 S.W. 3d 895, 908 (Tex.Crim.App. 2016).....	17
<i>King v. State</i> , 953 S.W.2d 266, 271 (Tex.Crim.App. 1997).....	21
<i>Mays v. State</i> , 318 S. W. 3d 368, 391-92 (Tex.Crim.App. 2010).....	17
<i>Motilla v. State</i> , 78 S.W.3d 352, 356-57 (Tex.Crim.App. 2002).....	23
<i>Plante v. State</i> , 692 S.W.2d 487, 490, n. 3 (Tex.Crim.App. 1985).....	17
<i>Porter v. State</i> , 623 S.W.2d 374, 385 (Tex.Crim.App. 1981) <i>cert. denied</i> , 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982).....	18
<i>Rankin v. State</i> , 953 S.W.2d 740, 741 (Tex.Crim.App. 1995).....	16
<i>Schutz v. State</i> , 63 S.W. 3d 442, 444-45 (Tex.Crim.App 2001).....	22
<i>Whitaker v. State</i> , 286 S.W.3d 355, 363-64 (Tex.Crim.App. 2009)....	23
 <u>STATUTES AND RULES</u>	 <u>PAGE</u>
Texas Code of Criminal Procedure 38.37(1).....	in passim
Texas Penal Code § 25.11.....	4

Texas Rules Appellate Procedure 33.1(a)(1).....	17
Texas Rules Appellate Procedure 44.2(a)(b).....	21-23

NO. 01-24-00211-CR

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

JONATHAN JAMES LUNA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
of Galveston County, Texas
Cause No. 23CR2483

TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

NOW COMES, JONATHAN JAMES LUNA and files this Brief for Appellant.

STATEMENT OF THE CASE

Appellant was charged by Indictment with the third-degree felony offense of Continuous Family Violence. (CR, 8) The case was tried in the 10th District Court of Galveston County, Texas, the Honorable Kerry Neves, presiding. (RR, 1)

The jury found Appellant guilty, and Appellant elected that the trial court assess punishment which it did at six (6) years in the Institutional Division of the Texas Department of Criminal Justice. (RR 5, 97; CR, 119-122) On February 16, 2024, Appellant timely filed Notice of Appeal in each case. (CR, 93)

ISSUE PRESENTED

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE, DURING GUILT-INNOCENCE AND PUNISHMENT, TO INTRODUCE EVIDENCE THAT APPELLANT COMMITTED NUMEROUS OTHER ASSAULTS AGAINST THE COMPLAINANT, KELLY-ANNE LUNA, NOT CHARGED IN THE INDICTMENT, AND THIS DENIED APPELLANT A FAIR TRIAL AND AFFECTED APPELLANT'S SUBSTANTIAL RIGHTS.

STATEMENT OF FACTS

Appellant, Jonathan James Luna, was charged by indictment with a third-degree felony alleging that he committed Continuous Family Violence pursuant to Texas Penal Code § 25.11.

The indictment read in pertinent part:

“... on or about the 5th day of October, 2022....intentionally, knowingly, or recklessly cause bodily injury to Kelly-Anne Luna, person with whom the defendant had or has had a dating relationship ... by striking Kelly-Anne Luna with an object and/or the defendant's hand, and on or about the 3rd Day of July, 2023,intentionally, knowingly, or recklessly cause bodily injury to Jax Luna, a member of the defendant's family by striking and/or pushing Jax Luna, and the conduct by the defendant occurred during a period that was 12 months or less in duration.”

The first complainant in the Indictment was Ms. Luna, Appellant’s wife, however they had been separated for one and a half years. (RR 4, 153) Ms. Luna testified that on October 5, 2022, Appellant hit her with a broom on her buttocks. (RR 4, 55-56) The League City Police Department took Ms. Luna’s report over the phone, and she simply emailed the League City Police Department photos that she took herself of her alleged injuries and no officer ever met her in person. (RR 4, 36, 57; State’s Exhibit 12) Ms. Luna also sent a photo of a broom to the officer. (RR 4, 37) The officer never spoke to Appellant to get his side of the story. (RR 4, 36)

Ms. Luna testified that she met and married Appellant in 2007 and they conceived five children together, and that their relationship was abusive from the beginning. (RR 4, 41-42) Ms. Luna testified in detail that Appellant assaulted her “too many times to count.” (RR 4, 55)

The second complainant Jax Luna, who was fifteen years old and Appellant's son, testified that on July 3, 2023, he had been at the pool all day with his friend Blythe Komineck. (RR 4, 107-108) According to Jax Luna, after swimming, they went back to the apartment and an argument ensued which resulted in Appellant slapping him and pushing him to the ground and wall couple of times . (RR 4, 110-111) Jax Luna admitted that he used vulgarity towards Appellant, prior to Appellant slapping him. (RR 4, 118)

At the pre-trial hearing the prosecutor convinced the trial court, pursuant to 38.37(1) TCCP, to allow her to admit into evidence numerous extraneous assaultive offenses allegedly committed by Appellant against an *adult witness*, Ms. Luna. (emphasis added):

THE COURT: All right. Anything we need to put on the record --

MS. FISHER: Yes, sir.

THE COURT: -- Ms. Fisher?

MS. FISHER: Under 38.37(1) of the Code of Criminal Procedure allows the State to ask a victim in a family violence related offense questions regarding the nature of their relationship. Unfortunately, your Honor, the nature of the relationship between the Defendant and Victim No. 1, Kelly-Anne Luna, for the past 15 years has been verbally and physically abusive. He has been arrested six different times of assaulting her with two of those being

convictions. So, under 38.37(1), the State is requesting that I can ask Kelly-Anne Luna questions regarding those prior assaults that he's been arrested as long -- or excuse me, as well as the other verbal and physical abuse under 38.37(1) of the Code of Criminal Procedure. That is my Request No. 1, Judge. I do have more.

THE COURT: Okay. All right. Mr. Reed?

MR. REED: Judge, as noted, it's been a long history between the Complainant and the Defendant. She also has arrests and convictions for assaulting him. So, I think it would go both ways on that, Judge.

MS. FISHER: That is incorrect. She has never been convicted of any crime in the State of Texas or United States of America. Every case that she's been arrested for of allegedly assaulting the Defendant all have been dismissed.

THE COURT: All right. 38.37 is pretty clear, I will allow you to do so.

MS. FISHER: Thank you, your Honor. My second request, because I have given the adequate notice to Mr. Reed under 404 and again under 38.37(1), the State would request that because he has been convicted of assaulting her, excuse me, twice before and I would have a fingerprint analyst, unless Mr. Reed stipulates, that State be allowed to admit those two judgments in the guilt phase.

THE COURT: Mr. Reed?

MR. REED: Judge, I would object to that. He's not on trial for those. That would unfairly prejudice the Defendant, and it would not have probative value as to the indictment we're going to trial on.

MS. FISHER: Again, your Honor, under 38.37(1), the State is allowed to elicit testimony regarding this. Kelly-Anne will be testifying to this and, yes, it is

prejudicial; but according to 404 and 38.37(1), the probative value is not outweighed by the prejudicial value. And, of course, I would be proving this beyond a reasonable doubt through a fingerprint analyst, and it would be up to the jury whether they believe that or not.

THE COURT: Well, getting into the actions and all is one thing, but how does the judgment --

MS. FISHER: It unfortunately goes to the nature of the relationship, which is allowed under 38.37(1).

THE COURT: But you can ask her and she can testify that he was convicted of the assaults, correct?

MS. FISHER: If that's your ruling, yes, sir.

THE COURT: Well, I think I've said you can get into that. I will allow that. I'm just a little concerned about introducing a judgment on top of that. But at the same time, 38.37 says notwithstanding 404 and 405 it comes in.

MS. FISHER: I just want to make sure, Judge, it's 38.37(1) not 38.37.

THE COURT: Oh, I'm sorry. Okay. So, the question then is whether the testimony alone is sufficient or whether you need the judgments to, as the statute says, assist the trier of fact in determining whether he committed the offense and concerning the relationship between the actor and the victim. All right. Okay. I will -- I will allow you to introduce the judgment.

MS. FISHER: Thank you, your Honor. My second request for the second victim, Jax Luna, under 38.37(1), and I've given adequate notice to Mr. Reed, he stated to me that he has seen the Defendant assault his mom for his entire life, slapping, punching, throwing her against the wall, throwing objects. Not only is he a witness to this but also under 38.37(1), the State would be asking, if I'm allowed to ask him, what he's visually witnessed the Defendant do to his mom, who is Victim No. 1.

THE COURT: If it is what he has observed, I think certainly that would be allowed. (RR 2, 4-8)

On direct examination of Ms. Luna, the prosecutor elicited the following testimony:

Q. Roughly, if you can put a number over the 15 years, how many times do you think the Defendant has assaulted you?

A. I don't know.

Q. Too many to count or one or two?

A. I -- too many to count. (RR 4, 55)

Q. And when is the first time, if you remember, the Defendant was physically abusive to you?

A. We were in his parents' kitchen when Jax was a young baby, and he slapped me. I was holding Jax.

Q. Do you remember, was there an argument?

A. I don't remember why. I just remember that.

Q. Okay. And where did he slap you at?

A. On the face.

Q. And do you remember, roughly, maybe a month or year this happened?

A. Jax was on my hip. So, Fall of 2008.

Q. Okay. And do you remember the next time?

A. There was a lot of abuse, and I don't remember the events in order. I apologize.

Q. That's okay. So, let's talk about all this abuse. Can you give the jury some examples of what you were alluding to?

- A. Jonathan has always been very verbally abusive, but he gets irate very quickly. When he gets angry, he loses control and then becomes physical.
- Q. Now, Ms. Luna -- sorry, Kelly, was your marriage and relationship all bad?
- A. No.
- Q. So, you did love him at a certain point?
- A. Of course.
- Q. And if the physical and verbal abuse happened 15 years, and I'm sorry for asking this question, but why didn't you just leave?
- A. Just, at one point, there was more good days than bad, and then, more good days than good, and then, just hell.
- Q. And regarding the physical abuse, I know you said that there was too many times to remember, but can you remember another incident other than the incident with you and with Jax on your hip?
- A. There was an incident at our home in League City where he had struck me and shoved me and I became unconscious at one point. So, I don't know what happened after that.
- Q. Do you remember roughly when this was?
- A. Summer of 2022.
- Q. And have you called the League City Police Department and Harris County on the Defendant regarding assaults?
- A. Yes.
- Q. And to your knowledge, has the Defendant been convicted of those -- some of those assaults?
- A. I don't believe he's been convicted.
- Q. Okay.

A. I think they have all been dismissed or – I don't know. (RR 4, 51-53)

Additionally, on direct-examination of Ms. Luna, the following was elicited:

Q. Kelly, before I go into the screen shots, I know you stated earlier that you've been assaulted so many times you can't remember specific dates, but can you please walk the jury how the Defendant has assaulted you before?

A. He has punched me in the back. He's shoved me, shoved me over our kitchen island. He has slapped me. He has tripped me. And he -- I said "shoved," I'm sorry. Shoved, push.

Q. Okay. And every time you've been assaulted, did you call the police?

A. No.

Q. And why is that? (RR 4, 60-61)

Q. After 15 years of physical and verbal abuse, how has this affected you?

A. I am a completely different person after living in my own personal hell.

Q. And what do you mean by that?

A. When -- when you live with this kind of abuse, you -- you normalize it. You make excuses in your head and adapt to it and -- I'm sorry. (RR 4, 66)

Additionally on direct-examination, the prosecutor elicited the following testimony from Jax Luna:

- Q. And Jax, have you ever seen your dad assault your mom before?
- A. Yes, ma'am.
- Q. Few or many occasions?
- A. Few.
- Q. Okay. And what did you see your dad assault your mom? How did he do that?
- A. I seen him throw things at her and hit her. (RR 4, 116)

Additionally, the prosecutor elicited testimony from a neighbor of the Lunas, Ms. Hopkins, who testified that she witnessed Appellant assault Ms. Luna “more than a handful of times.” (RR 5, 16-19)

In addition to the testimony of all three witnesses who testified regarding Appellant committing extraneous assaults against Ms. Luna, the prosecutor also introduced State’s Exhibit # 12 which was a photo from an alleged extraneous assault when Ms. Luna claimed to have lost unconscious after having been assaulted by Appellant. (State’s Exhibit # 12; RR 4, 58-59)

There were no extraneous offenses allegedly committed by Appellant against Jax Luna. (entire record)

Regarding the October 5, 2022 alleged assault against Ms. Luna, Appellant testified that they were just arguing and nothing physical happened and he did not hit her with a broom. (RR 4, 144)

Regarding the July 3, 2023 alleged assault against Jax Luna, Appellant testified that Jax was being disrespectful to him and called him a “fat ass” and said “f**k you” so Appellant slapped him once in the face. Jax kept following him around the residence saying “f**k you” so Appellant turned around and told him to stop following him. When Jax would not stop following him, Appellant then pushed him into the couch and walked out the front door when Jax shut the door on Appellant’s foot. Appellant then pushed the door open and Jax hit the thermostat. (RR 4, 150-152) Appellant further testified that he was simply attempting to discipline Jax. (RR 4, 156)

On cross-examination of Appellant, the prosecutor elicited the following extraneous offenses:

- Q. You were arrested May 4th, 2008, in Galveston County for Driving While Intoxicated, correct?
- A. Yes, ma'am.
- Q. And you were convicted on May 22, 2009, correct?
- A. Yes, ma'am.
- Q. July 13, 2008, in Galveston County you were arrested –
- Q. On July 13th, 2008, you were arrested in Galveston County for Assault Causing Bodily Injury Family Violence with Kelly-Anne being the victim?
- A. What was the date -- what was the year, I mean?
- Q. 2008.
- A. Oh, yes, ma'am.

- Q. February 28, 2009, you were again arrested for Assault Causing Bodily Injury Family Violence against Kelly-Anne Luna in Harris County, which is the judgment that we saw this morning?
- A. Yes, ma'am.
- Q. Okay. And you said you were just a young kid; so, you thought it was just a traffic ticket?
- A. Correct.
- Q. Okay. But you never assaulted her?
- A. No, ma'am.
- Q. On March 8th, 2009, in Harris County you were arrested for Assault Causing Body Injury Family Violence against Kelly-Anne Luna; is that correct?
- A. Correct.
- Q. August 4th, 2013, in Jefferson County you were arrested and convicted of Driving While Intoxicated, Second?
- A. Yes, ma'am.
- Q. July 13th, 2018, in Galveston County you were arrested for Assault Impeding Breath With Previous Conviction against Kelly-Anne Luna?
- A. Yes, ma'am.
- Q. July 29th, 2020, in Galveston County you were arrested for Assault Family Member With Previous Conviction, which was reduced, which is the judgment; is that correct?
- A. Yes, ma'am.
- Q. And then, of course, you were again arrested on November 21st, 2022, of Assault Causing Bodily Injury With Previous Conviction, which is one of the cases that we're here today?
- A. Yes, ma'am.

- Q. But, again, as you stated, you would never put your hands on a woman?
- A. Correct.
- Q. Okay. You stated on October 5th, 2022, that actually Kelly-Anne was the one who assaulted you?
- A. I said that?
- Q. During direct examination.
- A. Oh, okay. Yes, ma'am.
- Q. Okay. How did she assault you on that day?
- A. Which day was this?
- Q. October -- October 5th, 2022.
- A. Oh, pushing me, hitting me, like she always done. She drinks wine and starts hitting me. She gets mad.
- Q. Okay.
- A. It's like a normal thing. (RR 4, 159-161)

SUMMARY OF ARGUMENT FOR ISSUE NUMBER ONE

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE, DURING GUILT-INNOCENCE AND PUNISHMENT, TO INTRODUCE EVIDENCE THAT APPELLANT COMMITTED NUMEROUS OTHER ASSAULTS AGAINST THE COMPLAINANT, KELLY-ANNE LUNA, NOT CHARGED IN THE INDICTMENT AND THIS DENIED APPELLANT A FAIR TRIAL.

Despite the fact that 38.37(1) only applies to children under the age of 17 or a person younger than 18, the trial court agreed with the prosecutor's argument and allowed the prosecutor, pursuant to 38.37(1), to introduce into evidence numerous other extraneous assaults allegedly committed by Appellant against Ms.Luna, who was an adult and Appellant's wife, in the guilt-innocence and punishment phase of trial. This affected Appellant's substantial rights.

ARGUMENT IN SUPPORT OF APPELLANT'S ISSUE NUMBER ONE

An extraneous offense is defined as any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers. *Rankin v. State*, 953 S.W.2d 740, 741 (Tex. Crim. App. 1995). The analysis of the admissibility of extraneous conduct is the same whenever the extraneous conduct reflects adversely on the character of the defendant, regardless of whether that conduct might give rise criminal liability. *Plante v. State*, 692 S.W.2d 487, 490, n. 3 (Tex. Crim. App. 1985).

As a prerequisite to presenting a complaint for appellate review, the record must show that "the complaint was made to the trial court by a timely request, objection, or motion" stating "the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. 33.1(a)(1), TRAP. When

an appellant does not object to the admission of evidence, he fails to preserve the issue for review. *Mays v. State*, 318 S. W. 3d 368, 391-92 (Tex. Crim. App. 2010).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. A reviewing court will uphold the trial court's ruling if it is reasonably supported by the evidence and is correct under any theory of law applicable to the case. *Johnson v. State*, 490 S.W. 3d 895, 908 (Tex. Crim. App. 2016).

The prosecutor gave Appellant notice of “Amended Notice of Intent to Introduce Notice of Intent to Introduce Extraneous Offenses and Bad Acts” and listed the following six extraneous assaults allegedly committed by Appellant against Ms. Luna:

1. Assault Causing Bodily Injury Family Violence, 7/13/08.
2. Assault Causing Bodily Injury Family Violence, 2/28/09.
3. Assault Causing Bodily Injury Family Violence, 3/8/09.
4. Assault Impeding Breath-Previous Conviction, 7/13/18.
5. Assault Family Member with Previous Conviction, 7/29/20.
6. Assault Family Member with Previous Conviction, 11/21/22. (CR – SUPP, 11),

It is well settled in Texas that an accused shall not be tried for some collateral crime or for being a criminal generally. *Porter v. State*, 623 S.W.2d 374, 385 (Tex. Crim. App. 1981), *cert. denied*, 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982). Since the concern that an accused not be tried for some collateral crime or for being a criminal generally, testimony concerning an extraneous offense is admissible only in limited circumstances. *Ex Parte Welborn*, 785 S.W.2d 391, 395 (Tex. Crim. App. 1990).

The prosecutor relied, and the trial court ruled, that article 38.37(1), TCCP, authorized the admission of all these extraneous assaults allegedly committed by Appellant against Ms. Luna. (RR 2, 4-5)

However, 38.37(1) provides, in relevant part:

Sec. 1. This article applies to a proceeding in a prosecution of a defendant for an offense under the following provisions of the Penal Code, ***if committed against a child under 17 years of age ... or a person younger than 18 years of age.*** (emphasis added)

The exhaustive list of extraneous offenses allegedly committed by Appellant against Ms. Luna was improperly admitted since Ms. Luna was clearly not under the age of eighteen. The prosecutor's reliance and the trial court's ruling, that article 38.37(1) authorized all of these extraneous offenses was entirely incorrect.

All the extraneous offense evidence which was erroneously admitted by the trial court, allowed the prosecutor to paint Appellant at trial as a drunk, serial wife beater.

The prosecutor spent more time presenting evidence regarding these extensive alleged extraneous offenses than she did presenting evidence regarding the instant offense.

Although Appellant testified that he would never put his hands on a woman, this testimony was subsequent to the prosecutor admitting the majority of these alleged extraneous offenses in her case in chief, thus requiring Appellant to defend against this previous elicited extraneous evidence admitted by the trial court.. (RR 4, 144)

The previous alleged assaults that Ms. Luna testified to should not have been admitted in Appellant's trial. It was extremely prejudicial to Appellant while on trial for Continuous Family Violence, for the jury to hear during guilt-innocence, that Appellant assaulted Ms. Luna "too many times to count."

These alleged previous assaults were mentioned numerous times throughout the trial and in fact, considerably more time was devoted by the prosecutor in putting on evidence of these alleged extraneous assaults than she devoted to the assaults alleged in the indictment.

The prosecutor mentioned these additional alleged extraneous assaults seven times during her opening statement:

- For past fifteen years Ms. Luna has been dealing with abuse. (RR 4, 14).
- Cycle of violence.
- She will tell of all of the assaults.
- Photos from prior assaults.

- Arrested numerous times and convicted twice.
- 15 years of abuse.
- Jax will testify to the abuse of his mom as well. (RR 4, 14-16)

The prosecutor introduced State's Exhibits # 2 & 3, which were two prior judgments showing Appellant had been convicted twice of assaulting Ms. Luna and one of the judgments was for assault with a ***previous conviction***, thus the jury was informed of three prior convictions. (emphasis added) (RR 4, 24) Furthermore, the prosecutor told the jury that # 3 was a felony. (RR 4, 30)

The prosecutor mentioned these additional alleged extraneous assaults, that were not contained in the indictment, seven times in her closing argument:

- Defendant has not been held accountable for 15 years. (RR 5, 46)
- Ms. Luna has been dealt with this for 15 years x 3. (RR 5, 59-60, 64)
- Defendant has been convicted twice. (RR 5, 63)
- Ms. Luna went over all the assaults so many times. (RR 5, 64)
- Defendant has never been held accountable. (RR 5, 66)

For the jury to hear this testimony while on trial for this Continuous Family Violence offense was extremely prejudicial – the probative value of admitting these numerous other assaultive offenses was substantially outweighed by the unfair prejudice.

Because the trial court's error in admitting the extraneous offense evidence over Appellant's objection implicates the Rules of Evidence rather than a Constitutional right, it is subject to the "substantial right" harm analysis under Rule 44.2. Tex. R. App. P. 44.2(b) ("any . . . error . . . that does not affect a substantial right must be disregarded"). A substantial right of Appellant was violated if, viewing the record as a whole, the error had a substantial injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

In the case at bar, I do not see how it could be argued that allowing the jury to hear that Appellant committed numerous other assaults against the complainant when Appellant is on trial for an assault, did not have a "substantial injuries effect or influence the jury's verdict."

The trial court abused its discretion in allowing the prosecutor, pursuant to 38.37, TCCP, to present this evidence that Appellant allegedly committed other numerous assaults against Ms. Luna and this did affect Appellant's substantial rights. *See* TEX. R. APP. PROC. 44.2(b); *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002).

It is conceivable that Appellant would not have been convicted had the jury not been allowed to hear evidence that Appellant allegedly committed other assaults against Ms. Luna.

The reviewing court reviews error under the non-constitutional harm analysis of Rule 44.2(b), disregarding the error unless it adversely affects a defendant's substantial rights. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex.Crim.App. 2011). Neither the defendant nor the State bears the burden of demonstrating harm; instead, the reviewing court assess harm after reviewing the entirety of the record, including the evidence, jury charge, closing arguments, voir dire, and any other relevant information. *Schutz v. State*, 63 S.W. 3d 442, 444-45 (Tex.Crim.App. 2001). Overwhelming evidence of guilt is a relevant factor in any Rule 44.2(b) harm analysis. *Motilla v. State*, 78 S.W.3d 352, 356-57 (Tex.Crim.App. 2002); *Whitaker v. State*, 286 S.W.3d 355, 363-64 (Tex.Crim.App. 2009)

In this case at bar, the only evidence that Appellant assaulted the complainant, Ms. Luna, with a broom was testimony from the complainant herself. Admitting evidence that Appellant allegedly committed numerous additional assaults against the Ms. Luna did affect Appellant's substantial rights and contributed to his conviction and punishment. The jury hearing that Appellant allegedly assaulting Ms. Luna "too many times to count" and introducing two prior judgments, had a substantial or injurious affect on the jury verdict.

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant prays that the judgment of the trial court be reversed and judgment of acquittal be entered or in the alternative that appellant will be granted a new trial or that appellant's sentence will be set aside and for such other and further relief to which appellant may be justly entitled.

Respectfully Submitted,

/S/ Greg Russell
Greg Russell
Attorney At Law
711 59th Street
Galveston, Texas 77551
(409) 497-4743
(409) 497-4721 Fax
SBN: 17411550

CERTIFICATE OF SERVICE

As Attorney of Record for Appellant, I do hereby Certify that a true and correct copy of the above and foregoing document was this date provided to the Attorney for Appellee, by email/e-file service to Mr. Jack Roady, District Attorney of Galveston County at the offices of the District Attorney of Galveston County, Texas, 600 59th Street, Galveston, Tx. 77551, on the 27th day of August 2024.

/s/ Greg Russell
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I do hereby certify that this brief is in compliance with rule 9.4(i) of the Texas Rules of Appellate Procedure because it is computer generated, and its relevant portions contain 3,273 words.

/s/ Greg Russell
Attorney for Appellant

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Greg Russell

Bar No. 17411550

greg@gnrlaw.com

Envelope ID: 91389116

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Appellant's Brief

Status as of 8/27/2024 4:31 PM CST

Associated Case Party: Jonathan Luna

Name	BarNumber	Email	TimestampSubmitted	Status
Greg Russell		greg@gnrlaw.com	8/27/2024 4:13:59 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Rebecca Klaren		rebecca.klaren@co.galveston.tx.us	8/27/2024 4:13:59 PM	SENT