

No. 14-24-00410-CR

**In the Court of Appeals
for the Fourteenth District of Texas**

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Adrian Zapata
Appellant

DEBORAH M. YOUNG
Clerk of The Court

v.

The State of Texas
Appellee

On Appeal from Cause No. 98792-CR
From the 412th District Court of Brazoria County, Texas

Brief for the Appellant

Oral Argument Not Requested

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STATEMENT OF THE CASE

On July 20, 2023 the Appellant, Adrian Zapata, was indicted in Cause No. 98792-CR for the offense of Sexual Assault of a Child - Enhanced alleged to have been committed on or about the 31st day of March 2022 in Brazoria County, Texas (C.R. at 8). Prior to trial, the State filed a STATE'S NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEIOUS, IMPEACHMENT, AND PUNSHMENT EVIDENCE on March 8, 2024 (C.R. at 30-32). Also on March 8, 2024, the State filed STATE'S FOURTH SUPPLEMENTAL NOTICE OF INENT TO USE EXTRANEIOUS OFFENSES AND PRIOR CONVICTIONS (C.R. at 38-39). Thereafter, on May 16, 2024, the State filed STATE'S FIRST AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEIOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE (C.R. at 52-54). Then on May 24, 2024, the State filed STATE'S SECOND AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEIOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE (C.R. at 58-60). Despite the existence of an original notice, first amended notice, second amended notice, and fourth amended notice, there is no record of a third amended notice being filed.

On May 28, 2024, the Appellant entered a plea of not guilty to the offense of Sexual Assault of a Child - Enhanced (III R.R. at 6). Jury selection began and was completed on May 28, 2024 (III R.R. at 8-154). The trial then began on May 29,

2024 and a guilty verdict was returned on May 30, 2024 (IV R.R. at 2 and V R.R. at 92). The punishment phase began on May 30, 2024 and continued to May 31, 2024 when the jury returned a sentence of 35 years confinement in Texas Department of Criminal Justice, Institutional Division (VII R.R. at 162). Trial counsel filed Notice of Appeal on May 31, 2024 and then was allowed to withdraw (C.R. at 90 and 116). Appellate counsel was appointed on June 6, 2024 (C.R. at 141). Appellate counsel filed Notice of Appearance and Notice of Appeal on July 1, 2024 (C.R. at 145)

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney for the Appellant does not request oral argument.

FIRST ISSUE PRESENTED

The trial court committed reversible error by improperly allowing the introduction of evidence of extraneous offenses

STATEMENT OF FACTS

Elizabeth Martinez began a relationship with Adrain Zapata, the Appellant, in 2016 (IV R.R. at 91). When Elizabeth and Adraian started their relationship, she had two children, Aleena Montez and Alize Vasquez (IV R.R. at 91). Adrian, Elizabeth, Aleena, and Alize moved in together and lived in Humble, Texas in December, 2016 while Adrian was working in the Oklahoma oil fields (IV R.R. at 147-148). In 2017, Elizabetha and Adrian had a child together, which they named Adrian Zapata, Jr. (IV R.R. at 91-92). Elizabeth and Adrian were married in 2022 (IV R.R. at 92). Elizabeth found out that Alize Vasquez was pregnant in March 2022 (IV R.R. at 92-93). Alize refused to tell Elizabeth who the father of the child was and provided multiple different accounts of what had happened (IV R.R. at 123 and 154). The family moved to Clute, Texas in March 2022 from Harris County, before moving again to Freeport, Texas in August of 2022 (IV R.R. at 102; 121-122; and 130). On October 31, 2022, Alize gave birth to a child named Elijah Anthony Zapata while living in Freeport, Texas (IV R.R. at 93). In April 2023, while the family was still living at the Freeport address, Adrian was arrested for Indecency with a Child by Exposure based on a report from Elizabeth that she had seen Adrian on top of Alize with no pants on (IV R.R. at 114-115).

During the investigation, Alize gave multiple conflicting and false statements (V R.R. 40-55). At one point during the investigation, Alize described

become pregnant during an incident of sexual intercourse in parking lot of Lakewoods Apartments which she later told Detective Cantrel she had made up (V R.R. at 40-43 and 50-51). Alize also specifically told Detective Cantrel that Adrian was not Eli's father and that Eli's father was someone from school (V R.R. at 42-43). Alize also admitted that on April 14, 2023 she told officers that she had not had sex with Adrian, that Adrian had not touched her, and that she had not taken anything (V R.R. at 46-47 and 50-53). Additionally, Alize told Officer Jimenez that Eli's conception was her fault and that she felt terrible because he was conceived during an incident at a family bbq when Adrian was completely blacked out from sleeping medicine (V R.R. at 50-53). In preparation for trial, Alize stated that she had talked to multiple different law enforcement officers and met with the prosecutors four times (V R.R. at 53-54).

SUMMARY OF ARGUMENT

Issue Presented

The trial court erred by admitting extraneous offense evidence before the jury during the guilt/innocence phase of the trial. The extraneous offenses admitted at trial were admitted without adequate notice and in violation of Texas Code of Criminal Procedure Section 38.37, Rule 403 of the Texas Rules of Evidence, and Rule 404(b) of the Texas Rules of Evidence. The Appellant was harmed by the admission of extraneous offense evidence and the admission of extraneous offense evidence by the court was reversible error.

ARGUMENT AND AUTHORITIES

Issue Presented: The trial court committed reversible error by improperly allowing the introduction of evidence of extraneous offenses

Relevant Facts

Prior to trial, the State of Texas filed four different notices regarding extraneous offenses under various rules and statutory provisions. On March 8, 2024, filed two separate notices (C.R. at 30-32 and 38-39). One document was entitled STATE’S NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND PUNSHMENT EVIDENCE and the other was titled STATE’S FOURTH SUPPLEMENTAL NOTICE OF INENT TO USE EXTRANEOUS OFFENSES AND PRIOR CONVICTIONS (C.R. at 30-32 and 38-39). Thereafter, two additional notices were filed (C.R. at 52-54 and 58-60). On May 16, 2024, the State filed STATE’S FIRST AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE and on May 24, 2024, the State filed STATE’S SECOND AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE (C.R. at 52-54 and 58-60).

The document filed March 8, 2024 and entitled STATE’S NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND

PUNSHMENT EVIDENCE, provided notice under Rule 404(b) of the Texas Rules of Evidence, Rule 609(f) of the Texas Rules of Evidence, Article 37.07 Section 3(a) and Section 3(g) of the Texas Code of Criminal Procedure, and *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993) that the state intended to offer evidence regarding the offense of Attempted burg building committed September 8, 2015 in Brazoria County, Texas in Cause Number 70455 before the 23rd District Court; evidence that the Appellant fathered a child with Alize Vasquez when she was under 17; evidence that the Appellant was caught by Elizabeth Zapata lying on top of Alize Vasquez with clothing removed; evidence that the Appellant admitted to sexual contact with Alize while under effects of Seroquel before offense date; and evidence that the Appellant admitted to watching Alize Vasquez engaged in self-gratification (C.R. 30-32). This notice did not mention Article 38.37 of the Texas Code of Criminal Procedure (C.R. 30-32). This notice did not mention any other sexual activity between Alize Vasquez and the Appellant, nor did it mention drug use or phone contact between Alize Vasquez and the Appellant in violation of a protective order while the Appellant was in the Brazoria County Jail. This notice was filed only 20 days before trial began.

The document filed on March 8, 2024 and entitled STATE'S FOURTH SUPPLEMENTAL NOTICE OF INENT TO USE EXTRANEIOUS OFFENSES AND PRIOR CONVICTIONS provided notice of an outcry of sexual abuse and

notice under Rule 404(b) of the Texas Rules of Evidence and Articles 37.03, 38.37, and 38.072 of the Texas Code of Criminal Procedure that the State intended to offer evidence related to an outcry of sexual abuse including a March 24, 2022 CPS referral alleging Alize Vasquez was pregnant by the Appellant; a statement made by Alize Vasquez that Eli's father was a boy named Isaiah; a statement by Alize Vasquez to a friend that the Appellant was Elijah's father; and a statement by Alize Vasquez to Clute PD Officer Cantrell that the Appellant made her give sexual favors for an e-cigarette which was later recanted; evidence that there was a warrant for DNA testing; and evidence that DNA testing showed the Appellant was Elijah's father (C.R. 38-39). This notice is considerably different from what might be expected in an outcry notice as it does not identify the outcry witness, the circumstances of the outcry, or a summary of the outcry, but does include factual assertions that were not contained in a statement. This was the only notice filed to mention Article 38.37 of the Texas Code of Criminal Procedure in any way and it does not mention any extraneous sexual activity that would/should be covered by an Article 38.37 notice (C.R. 38-39). This notice was filed only 20 days before the trial began.

The document filed on May 16, 2024 and entitled STATE'S FIRST AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE provided notice under Rule

404(b) of the Texas Rules of Evidence, Rule 609(f) of the Texas Rules of Evidence, Article 37.07 Section 3(a) and Section 3(g) of the Texas Code of Criminal Procedure, and *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993) that the state intended to offer evidence regarding the offense of Attempted Burglary of a Habitation, Indecency with a Child on April 14, 2023, and evidence that the Defendant used drugs with Alize Vasquez without any information regarding a date range or location (C.R. 52-54). This notice failed to mention Article 38.37 of the Texas Code of Criminal Procedure and was filed only 12 days before trial began.

The document filed on May 23, 2024 and entitled STATE’S SECOND AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEIOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE provided notice under Rule 404(b) of the Texas Rules of Evidence, Rule 609(f) of the Texas Rules of Evidence, Article 37.07 Section 3(a) and Section 3(g) of the Texas Code of Criminal Procedure, and *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993) that the state intended to offer additional evidence regarding not previously noticed that the Appellant performed oral sex on Alize Vasquez at some point between 2018 and 2020 in Harris County, Texas, and that the Appellant and Alize Vasquez engaged in vaginal, oral, and anal intercourse on several different

occasions at undefined locations from 2021 to 2022 (C.R. at 58-60). This notice did not mention Article 38.37 and was filed only 5 days before the trial began.

During the guilt/innocence phase of the trial, the state called Elizabeth Martinez to testify (IV R.R. at 90). Prior to her testimony, the court held a 38.37 hearing outside the presence of the jury regarding an extraneous offense alleged to have occurred on April 14, 2023 (IV R.R. at 90). During that hearing, Elizabeth Martinez testified that on April 14, 2023, she arrived home to find Adrain and Alize on the couch, with Adrian on top of Alize (IV R.R. at 95). Elizabeth first testified that when she found them, they had no clothes on and then testified that they had no pants (IV R.R. at 95). Elizabeth testified that she took a picture of them with her phone and confronted Adrian, and then left the house (IV R.R. at 97). During this incident, Elizabeth claimed that Adrain was high and that Alize was so high on drugs that she could hardly stand (IV R.R. at 99 and 108). Elizabeth left the home where Adrian and Alize remained together and called 911 (IV R.R. at 100-101). During cross examination, while still outside the presence of the jury, Elizabeth testified first that Adrian was behind Alize and then testified that Adrian had been on top of Alize (IV R.R. at 105). Elizabeth further testified that, to her, it appeared as though Adrian was having sex with Alize from behind (IV R.R. at 113). Officers from Freeport police arrived and arrested Adrian for the charge of Indecency with a Child by Exposure (IV R.R. at 114-115). Defense counsel

objected to Elizabeth Martinez's testimony about April 2023 incident under 404b, 403, and 38.37 (IV R.R. at 131-132). The objection was overruled with the court finding that the evidence was likely to be admitted at trial.

Officer Williams was also called to testify regarding the incident on April 14, 2023, and testified that Officer Williams testified he responded to residence on April 14, 2023 for a sexual assault call (IV R.R. 183-184). Upon arrival, he made contact with the A and asked what had happened that night (IV R.R. at 184-186). Williams stated that the Appellant told him that he found Alize masturbating on the couch when he got out of the shower, so he walked over to watch (IV R.R. at 186). A body cam recording of the officer's conversation with the Appellant was admitted into evidence as exhibit 15 (IV R.R. at 186-188). During the course of the Appellant's statement recorded on exhibit 15, he admits prior sexual intercourse with Alize (IV R.R. at 189). While at the scene Alize Vasquez was upset, uncooperative, and refused to even give her name (IV R.R. at 193-194). During investigation at scene, Elizabeth did not mention seeing Adrian and Alize having sex (IV R.R. at 196-197). Officers contacted the oncall DA and Adrian was not arrested for sexual assault or for indecency by contact (IV R.R. at 200-201). Defense counsel objected to Officer Williams testimony about April 2023 incident under Rule 404(b) of the Texas Rules of Evidence, Rule 403 of the Texas Rules of Evidence, and Article 38.37 of the Texas code of Criminal Procedure (IV R.R. at

184). Defense counsel also objected to Williams body cam under Rule 404(b) of the Texas Rules of Evidence, Rule 403 of the Texas Rules of Evidence, the confrontation clause, Article 38.22 of the Texas Code of Criminal Procedure, and Article 38.23 of the Texas Code of Criminal Procedure (IV R.R. at 187-188).

Additionally, the State offered as exhibit 14 jail calls and text messages between Alize Vasquez and the Appellant that occurred while the Appellant was confined in Brazoria County Jail. A 38.37 hearing was had regarding two portions of jail calls but those portions were not identified on the record (V R.R. at 26-27). The first section discussed DNA testing and Adrian's request for a picture of the baby while the second section discussed the baby's features that looked like Adrian (V R.R. at 27). Judge ruled that those two specific sections do not implicate 38.37 at all because they are evidence of the offense he is being tried for (V R.R. at 28). Defense renewed objection to extraneous evidence (V R.R. at 28). Defense made additional objections under Rule 404(b) and Rule 403 of the Texas Rules of Evidence (V R.R. at 28). The two calls were eventually identified as ending in 43 and ending in 22 but the time segments to be played were not identified at that time (V R.R. at 31). Defense counsel objected to State's 14, a copy of jail call recordings between Alize Vasquez and the Appellant, under foundation, Rule 403 of the Texas Rules of Evidence, Rule 404(b) of the Texas Rules of Evidence, and Article 38.37 of the Texas Code of Criminal Procedure (V R.R. at 22). The calls

contained conversations about coke and sexual intercourse, to which defense also specifically objected under Article 38.37 of the Texas Code of Criminal Procedure (V R.R. at 23-24). Defense counsel stated he did not have adequate notice (V R.R. 23-24). Defense counsel admitted to being in possession of the calls for longer than five days but so was the state and notice was provide under Article 38.37 of the Texas Code of Criminal Procedure (V R.R. 24). The State published text messages between Alize and Adrian from 9/27, 9/28, and 9/29 (V R.R. at 34-36). The state published a section of the call from 7/6 that ran from the beginning of the call until the 4 minute and 51 seconds mark (V R.R. at 36). The state then published a section of a call from August 7, 2023 that ran from the 10 minute and 29 seconds mark to the 11 minutes and 9 seconds mark (V R.R. at 37). Elizabeth Martinez testified that there was a protective order against the Appellant while he was in the jail (IV R.R. at 143).

In summation, there are two areas of extraneous evidence that were improperly admitted. First, extraneous evidence was admitted regarding a sexual incident on April 14, 2023 in the form of testimony from Elixabeth Martinez, a photo admitted as State's Exhibit 13, testimony from Officer Williams, and the body cam video of Officer Williams admitted as State's Exhibit 15. The State never provided notice to the defense under Article 38.37 of any intention to use this evidence at trial and what notice that was provided was deficient under Article

38.37 of the Code of Criminal Procedure. Second, the jail calls and text messages admitted into evidence constituted evidence of the criminal offense of violation of protective order and/or of the offense of Improper Contact with Victim under Section 38.111 of the Texas Penal Code. No notice whatsoever was provided of the State's intent to introduce evidence regarding violation of protective order or Improper Contact with Victim.

Authority

A. Standard of Review

The admission of evidence is reviewed by an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). An abuse of discretion occurs when a trial court acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). A trial court's ruling will be upheld if it is correct under any theory of law. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). The appellate court will not reverse unless the trial court's ruling falls outside the "zone of reasonable disagreement." *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996).

B. Article 38.37 of the Texas Code of Criminal Procedure

Article 38.37 of the Texas Code of Criminal Procedure governs the admission of certain evidence of extraneous offenses. TEX.CODE CRIM. PROC.

art. 38.37. Article 38.37 is a special rule that supersedes Rule 404(b) of the Texas Rules of Evidence and makes admissible certain extraneous offenses that Rule 404(b) does not. *Jeansonne v. State*, 624 S.W.3d 78, 95 (Tex.App. – Houston [1st Dist.] 2021, no pet.). This article applies to the trial of certain offenses including Sexual Assault wherein the alleged victim is under 17 years of age. Section 1 of the article allows for the admission of extraneous evidence regarding other crimes, wrongs, or acts against the child who is the alleged victim of the offense that they are on trial for. Section 2 allows for the admission of extraneous evidence regarding other crimes such as sexual assault of a child and indecency with a child during the trial of certain offenses, including the offense of Sexual Assault wherein the victim is under 17 years of age. Section 3 dictates that the State shall provide notice of the State’s intent to use evidence described by Section 1 and Section of the Article not later than the 30th day before the date of trial. Section 2-a dictates that before admitting such evidence the trial court shall hold a hearing outside the presence of the jury to determine whether the evidence likely to be admitted at trial is sufficient to support a finding that the extraneous offense was committed beyond a reasonable doubt. Both Section 1 and Section 2 include a special caveat that this evidence may be admitted “notwithstanding Rule 404 and Rule 405 of the Texas Rules of Evidence. TEX.CODE CRIM. PROC. art. 38.37.

A defendant is automatically entitled to notice under Article 38.37 and need not request notice. *Jeansonne* at 97. Before evidence may be admitted under Article 38.37, the trial court must hold a hearing outside the presence of the jury and find that there is sufficient evidence for the jury to find the commission of the extraneous offense beyond a reasonable doubt. *Guevarra v. State*, 667 S.W.3d 422, 441 (Tex. App. – Beaumont 2023, pet ref’d). The point of the notice requirement of Article 38.37 is to avoid surprise and allow the Defendant to mount an effective defense. *Hernandez v. State*, 176 S.W.3d 821, 825-826 (Tex. Crim. App. 2005).

C. The Texas Rules of Evidence

Rule 403 of the Texas Rules of Evidence prohibits the admission of evidence wherein the danger of unfair prejudice is substantially outweighs the probative value of the evidence. Rule 404(b) of the Texas Rules of Evidence addresses the admission of extraneous offense evidence offered to show character in conformity therewith. Even if evidence is admissible under Article 38.38 of the Texas Code of Criminal Procedure, it is still subject to exclusion if the probative value is substantially outweighed by the prejudice to the Defendant. *Wells v. State*, 558 S.W.3d 661, 669 (Tex. App. – Fort Worth, 2017 pet ref’d). The express language of Article 38.37 states that the provisions therein are “notwithstanding Rule 404 and Rule 405 of the Texas Rules of Evidence.

D. Harm Analysis

Any error in the admission of evidence under either Article 38.37 of the Texas Code of Criminal Procedure or Rule 404(b) of the Texas Rules of Evidence would be considered non-constitutional error. *Pena v. State*, 554 S.W.3d 242, 248 (Tex. App. – Houston [14th District] pet ref'd). Error, if any, will be found to be harmless unless it had a substantial injurious effect or influence in determining the jury's verdict. *Pena* at 248.

Analysis

A. The April 14, 2023 Incident

During the State's case in chief, Elizabeth Martinez was called to testify about an incident she witnessed between Alize Vasquez and the Appellant at her home on April 14, 2023 (VI R.R. at 90). During a hearing outside the presence of the jury, Elizabeth essentially testified that on this date, she had come home to find the Appellant behind Alize Vasquez, on the couch, with their pants off, having sex. Elizabeth further testified that she took a picture of the Appellant and Alize before running out of the house and calling 911.

The only notice provided pretrial which mentioned Article 38.37 in any way was the STATE'S FOURTH SUPPLEMENTAL NOTICE OF INTENT TO USE EXTRANEOUS OFFENSES AND PRIOR CONVICTIONS filed on March 8, 2024 (C.R. 38-39). This notice, the only notice that cited 38.37 in any way, did not provide notice regarding the events of April 14, 2023 (C.R. 38-39). The events of

April 14, 2023 were vaguely noticed by the STATE’S FIRST AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE filed May 16, 2024 and the STATE’S SECOND AMENDED NOTICE OF INTENT TO USE *CAMACHO*, EXTRANEOUS, IMPEACHMENT, AND PUNISHMENT EVIDENCE filed May 23, 2024. (C.R. at 52-54 and 58-60). Both of these documents notice intent to introduce under evidence under 404(b) of Indecency with a Child committed against Alize Vasquez on April 14, 2023. The account provided by Elizabeth Martinez during the 38.37 hearing described a sexual assault occurring from a position behind the victim. The account that she provided in the 38.37 hearing was substantially different from what she told officers on the scene when they arrested the Appellant for Indecency with a Child by Exposure. At no point prior to trial did the defense receive notice in any form that Elizabeth Martinez would testify that she had seen the Appellant in the act of committing sexual assault of a child against Alize Vasquez.

The purpose of the notice requirements of Article 38.37 and Rule 404(b) are to avoid surprise and provide the defense an opportunity to mount a defense. The events of April 14, 2023 were not mentioned in any way in the only 38.37 notice filed by the State and the description of the events that was included in the 404(b) notice was substantially different from the testimony provided by Elizabeth

Martinez outside the presence of the jury and then again in front of the jury. There is no way that Defense counsel could have seen the stark divergence between the limited notice provided and the testimony actually proffered at trial. As such, admission of testimony regarding the events of April 14, 2023, including the photograph admitted as State's Exhibit 13 and the video admitted as State's Exhibit 15, was error by the trial judge.

B. Jail Communication Between the Appellant and Alize Vasquez

The trial court also admitted evidence in the form of recorded jail calls between the Appellant and Alize, text messages from jail between the Appellant and Alize, and testimony from Elizabeth Martinez that she had to change Alize's phone number multiple times because she caught her talking to the Appellant in jail while she had a protective order against him. Section 1 of Article 38.37 of the Texas Code of Criminal Procedure covers extraneous crimes committed against a victim of sexual assault that is under 17 years of age. Violation of a Protective Order is a criminal offense under Section 25.07 of the Texas Penal Code that may occur when a defendant has contact with a victim during a time period in which he has notice that such contact is prohibited. TEX. PENAL CODE ANN. §25.07. Article 38.37 of the Texas Code of Criminal Procedure would require that the State provide notice of intent to introduce evidence of violation of a protective order at least 30 days prior to trial without request by Defense counsel. Section 38.111 of

the Texas Penal Code criminalizes making contact with the victim of sexual assault of a child while confined in a correctional facility for the offense of sexual assault of a child, except under express conditions which are not present in this case. TEX. PENAL CODE ANN. §38.111. Improper contact with a victim is another offense against the victim Alize Vasquez which would require the State to provide notice of intent to introduce that evidence under Article 38.37 of the Texas Code of Criminal Procedure.

None of the four notices filed by the State in this case provided any notice of the State's intent to introduce extraneous evidence regarding the contact between the Appellant and Alize Vasquez in violation of protective order or in violation of the improper contact statute. This lack of notice is particularly flagrant given that the state had prepared exhibits containing the recordings and text messages to present at trial and, without doubt, must have settled on the intention of introducing these extraneous criminal acts at some point well before the trial date. At trial defense counsel objected to admission of this evidence under Article 38.37 and under Rule 404(b). The State addressed the objection by seeking to justify the admission of the underlying evidence inside the communications, however, the State never addressed the fact that the mere act of contact, with or without a protective order in place, was an extraneous crime in and of itself for which the

State never provided notice and against which the defense could not have been expected to prepare a defense.

C. Harm Analysis

The harm in this case from admission of extraneous evidence from April 14, 2023 and from the improper jail communications cannot be understated. The prosecution repeatedly emphasized both extraneous episodes in closing argument. (V R.R. at 75-77 and 90-91). The prosecutor even went so far as to play one of the recordings to the end of his final closing argument (V R.R. at 90). That tape, the very existence of which was an unnoticed extraneous offense, was so important in this case that the State chose to conclude their presentation of evidence with it. The State's reliance on that evidence along with the excessive amount of testimony spent on the events of April 14, 2023, are indicative of a substantial injurious effect against the Appellant.

D. Conclusion

The trial court admission of evidence regarding the incident on April 14, 2023 and jail communications between the Appellant and Alize Vasquez despite woefully inadequate or completely nonexistent notice was well beyond the zone of reasonable disagreement such that it did constitute an abuse of discretion. This abuse of discretion deprived the defense of the ability to mount a defense and led

to a substantial injurious effect against the Appellant. As such, this case should be reversed and remanded.

PRAYER

For these reasons, the Appellant, Adrian Zapata, urges the court to reverse the conviction this matter and enter a judgment of acquittal, or in the alternative, remand for further proceedings consistent with the protection of the constitutional and statutory rights.

Respectfully Submitted,

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Certificate of Compliance

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/s/ Clayton Hearrell
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