No. 01-24-00828-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
AT HOUSTON

FELIPE ARROYO
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1754900
From the 337th District Court of Harris County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE CASE

On October 14, 2020, Felipe Arroyo was indicted in Harris County, Texas with the offense of continuous sexual abuse of a child. (C.R. at 44). On October 4, 2024, a jury found Appellant guilty of the offense as alleged in the indictment. (8 R.R. at 62-63). On October 24, 2024, the trial court assessed Appellant's punishment at 50 years in the Texas Department of Criminal Justice. (C.R. at 359-361). The trial court certified Appellant's right of appeal and he timely filed his notice of appeal on October 24, 2024. (C.R. at 369-372).

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel does not request oral argument. However, should the State of Texas or the Court request oral argument, Appellant requests the opportunity to participate in oral argument.

ISSUES PRESENTED

I: The trial court violated Texas Code of Criminal Procedure Article 38.05 by informing the venire panel that he thought the backlog of cases in Harris County might only get caught up "when people quit breaking the law."

II: The trial court's comments during voir dire that informed the venire panel he thought the backlog of cases in Harris County might only get caught up when individuals "quit breaking the law" deprived Appellant of due process and an impartial judge, and vitiated Appellant's presumption of innocence.

III: The trial court abused its discretion when it admitted evidence of extraneous acts and offenses even though the State failed to provide timely notice under Texas Rules of Evidence 404(b) and Texas Code of Criminal Procedure 38.37.

STATEMENT OF FACTS

A. Voir Dire

Judge Reagan Clark presided over the voir dire proceedings. (4 R.R. at 23-153). After talking about his background, he continued by explaining how things have been working in Harris County with the Emergency Relief Docket ("ERD"). (4 R.R. at 25-26). He further explained:

> Now, none of the judges in these three courts are elected. They're all retired. It's good for the county because what we do in these courts is try to help out the elected judges. As I'm sure all of you are aware, the criminal justice systems throughout the United States is overburdened with cases. So there's a tremendous backlog. And we're doing what we can here in Harris County with these three courts to help out the other courts to make an effort to reduce the backlog.
>
> *Now, I had a prospective juror ask me one day when we were doing this, he said when do you think you're going to get caught up? And I said, well, when people quit breaking the law I guess is when we'll get caught up.* So until then, we're doing our best to try to reduce the backlog and at least try to keep up with the cases, new cases that are being filed.

(4 R.R. at 27) (emphasis added)

B. Guilt/Innocence Testimony

On the morning of February 1, 2019, M.M. was getting ready for school when she approached her mother, N.L., in her bedroom and disclosed to her mother that the Appellant, her grandfather and N.L.'s father, touched her inappropriately. (6 R.R. at 37). N.L. testified that on that morning M.M. told her, "You know how you always tell me to tell you if anybody ever touches me inappropriately, the wrong way…to tell you." (6 R.R. at 34-35). N.L. asked her what happened, and M.M. told her that her grandfather

touched her inappropriately the day she was with her aunt, N.L.'s sister. (6 R.R. at 34). It was toward the end of the holidays and according to M.M., it was the Monday before going back to school. N.L. had to go back to work that Monday, so she left her with her twin sister. (6 R.R. at 35).

M.M.'s Testimony

M.M.'s outcry started that morning when she was going to go to school. When she came home from school, M.M. testified that she was met at home with police officers. (7 R.R. at 184). That day, she only discussed the last time her grandfather had inappropriately touched her but as the days went on, she ended up disclosing to her mother all the other times her grandfather touched her inappropriately. (7 R.R. at 184).

M.M. testified that when she was younger, her grandparents would pick her up from school frequently starting around Pre-K, as they lived in the same apartment complex with this continuing until she was in elementary school. (7 R.R. at 149). M.M. testified that her grandfather would be the more present one, however, as her grandmother was sick and was normally in bed or the kitchen. (7 R.R. at 150-151). M.M. then testified of all the times she could think of that her grandfather inappropriately touched her.

M.M. testified that most of the inappropriate touching happened in the living room when they were watching TV and it rarely happened in her grandfather's bedroom. (7 R.R. at 151). M.M. testified that her grandfather would touch her with his hands on her chest area and below the waist. (7 R.R. at 152). She also testified that he

would put his hands underneath the bottoms she was wearing and would touch and rub her vagina with his hands for about a minute. (7 R.R. at 153-154). She said she was about six years old when the touching of her vagina started happening. (7 R.R. at 155).[1]

M.M. testified about the first time she remembered her grandfather touching her inappropriately. She said they were watching TV on the couch and no one else was in the room—it was just her and Appellant. (7 R.R. at 160). He started to scooch over closer to her when he started to touch her on her vagina. (7 R.R. at 161). She also recounted that he would also bring her into his office and would touch her there inappropriately. (7 R.R. at 162). M.M. testified there was a time when Appellant almost got caught. (7 R.R. at 164). She recounted that her grandmother was in the kitchen while she and her grandfather were in his office. Her pants were already down along with her belt, and she was standing behind a mini desk so her grandmother could not see. (7 R.R. at 165). Her grandmother opened the door and M.M. stood behind the desk holding her pants so her grandmother could not see. All she asked was what they were doing, they said nothing, and she left. (7 R.R. at 165). M.M. also recounted a time they were in Appellant's office, and he told her to lie down on the floor and to cover her eyes. (7 R.R. at 167). She testified that he told her to close her eyes and open her mouth and he put his genital area in her mouth. (7 R.R. at 168). She said that it lasted about a minute with him jerking his penis in her mouth. (7 R.R. at 169). When asked how many

[1] However, she later testified on cross-examination that it was around four years old when the "creepy stuff" started happening to her with Appellant. (7 R.R. at 197).

times Appellant touched her vagina throughout the years, M.M. responded with "a lot" and recounted another time he touched her inappropriately. (7 R.R. at 171-172). She testified there was a time they were watching TV in the bedroom where the touching would start with a hug and would transition with him going under her shirt to touch her on her chest and then he would proceed to touch her on her vagina. (7 R.R. at 175-178). M.M. testified that from the ages of six to 10, her grandfather probably touched her one to two times a week. (7 R.R. at 179-180). M.M. also testified that Appellant would make her touch his penis with her hand and recounted that occurred about four times. (7 R.R. at 180-182).

M.M. testified about the last allegation involving her grandfather. According to M.M., it was the Sunday before school started on Monday. (7 R.R. at 155). M.M. testified that her mother had dropped her off at her aunt's house and her cousins were there along with her aunt and grandparents. (7 R.R. at 155-156). Her aunt had to take her grandmother to dialysis and could only take a limited number of people since there was not enough space for everyone in the car, so she was left behind with her male cousin and her grandfather. (7 R.R. at 156). M.M. testified that everything was normal in the beginning, as they were all just hanging out in the living room until her cousin had to go to the bathroom. (7 R.R. at 157). When her cousin left for the bathroom, M.M. went to one of the bedrooms because she did not want to be in the living room with her grandfather by herself. (7 R.R. at 157). However, her grandfather followed her into the bedroom, came up behind her and put his hands underneath her short overalls, and

started to touch her anus along with her butt cheeks. (7 R.R. at 158). She testified that she immediately got up and went to the kitchen and pretended to go get some water, and Appellant followed her but went to the living room. (7 R.R. at 158-159). Appellant called M.M. over to the living room, but she continued pretending to get water in the kitchen and then later went to knock on the bathroom door to get her cousin to come out and stood outside the door until he came out. (R.R. at 159). M.M. testified that once her cousin came out, she felt safe again because Appellant would not touch her if her cousin was around. (7 R.R. at 159). M.M. testified this was the last time he touched her, and she was about 10 years old. (7 R.R. at 157).

N.L.'s Testimony

N.L. is M.M.'s mother and Appellant is her father. (6 R.R. at 22). . N.L. testified that she was 18-years old when she married M.M.'s father. (6 R.R. at 23). N.L. became pregnant with M.M. within six months of the marriage; however, they shortly divorced. (6 R.R. at 23). Afterwards, N.L. and M.M. moved in with N.L.'s sister for a few weeks and then moved to her parents' home for a few weeks until she got a place of her own with M.M. (6 R.R. at 24-27).

N.L. testified that M.M. told her the incident happened when she dropped her off at her sister's house. (6 R.R. at 37). M.M. was crying, but her mother told her to calm down, and that they were going to figure it out and talk about it when she got home from school. (6 R.R. at 37). N.L. said that she told M.M. that she believed her. (6 R.R. at 37). N.L. testified that when M.M. came back from school, she was there along

with her now-husband and M.M.'s father. (6 R.R. at 37). N.L. decided to call the police. (6 R.R. at 39).

In addition, N.L. testified regarding several allegations regarding the Appellant inappropriately touching her. (6 R.R. at 50). The first incident that she testified to be an alleged incident when her mother and twin sister had left for the store, and she was lying down on her bed watching TV. (6 R.R. at 50). Her father came into the room, laid down next to her, and started touching her breasts, vagina, and butt. (6 R.R. at 50). She recalled being frozen at the time. Appellant then rolled her over and placed a pillow over her head, but she panicked, kicked him in his testicles, and ran out of the room. (6 R.R. at 50). She cannot remember what age she was but testified that she was in elementary school and under 14 years of age. (6 R.R. at 53). N.L. testified no one was home, as her mother and sister left to go to the store, and her older sister was already married and living in Stafford. (6 R.R. at 54).[2]

N.L. testified regarding another alleged incident of Appellant inappropriately touching her, an incident that occurred on a mattress on the floor when she was watching TV. (6 R.R. at 55). Appellant was in his underwear and N.L. testified that he grabbed her arm and put her hand on his penis, over his underwear, and made her massage it and his testicles. (6 R.R. at 55-56). This only happened for a few seconds

[2] On cross-examination, N.L. testified that her sister was four years older. (6 R.R. at 91). When defense counsel inquired whether her sister married at ages 13 or 14, N.L. testified that maybe her sister was living with them at the time of this incident, but that she knew for a fact her sister was not at house at the time of this alleged incident. (6 R.R. at 91).

before she yanked her arm away. (6 R.R. at 57). She also testified that her twin sister was next to her. (6 R.R. at 58).

N.L. also testified that there were multiple times that she remembered her father inappropriately touching her and that his conduct always started with a hug so that he could manage to touch certain parts of her body. (6 R.R. at 59). N.L. also described alleged incidents that occurred when Appellant was teaching her how to drive on three occasions when she was about 15 or 16 years old. (6 R.R. at 59-60). When they would take off, Appellant would begin to hold the steering wheel to help her, but he would eventually start touching her breasts. (6 R.R. at 60). Then Appellant would start caressing her thigh and would eventually try and touch her vagina over her clothes, although there was one alleged incident where he almost went underneath her clothes to touch her vagina. (6 R.R. at 60). N.L. testified that she tried to tell her mother about the touching when she was 10 years old, but her mother cut her off and was not supportive. (6 R.R. at 62-66).

J.V.'s *Testimony*

J.V. is N.L.'s cousin from her father's side. (6 R.R. at 222). She testified Appellant's wife, N.L.'s mother, and M.M.'s grandmother, would watch her after school every day for a few months while she was in elementary school. (6 R.R. at 223). J.V. testified that in 2016 she went over to Appellant's house with his daughter and her children when she was 14 or 15 years old. (6. R.R. at 227-228). She was the last person to walk in and she approached Appellant to greet him with a hug and kiss, which they

normally did in their family. (6 R.R. at 229). Everyone else had already gone into her aunt's room, N.L.'s mother, to greet her because she was sick and bedridden at the time. (6 R.R. at 229). J.V. testified that when she tried to step away after greeting Appellant, he pulled her closer to him, held her between his arms, kissed her on the cheek, and started to move closer to the corner of her mouth. (6 R.R. at 230). He also had his right hand on her back, and he slowly started going toward her bottom and slightly squeezed it. (6 R.R. at 230). She was in shock, so she proceeded to run outside and go to her grandmother's house which was on the same property. (6 R.R. at 231). J.V. testified that she did not tell anyone about what happened until 2020, but had trouble remembering who she told, and had her memory refreshed by the State using an offense report. (6 R.R. at 232).

V.A.'s Testimony

V.A. is also a cousin of N.L. and M.M. (7 R.R. at 117). She lived on the same property that Appellant did where each family had a trailer. (7 R.R. at 118). The middle trailer belonged to her grandmother, and she lived there with her two brothers, grandmother, mother, and father. (7 R.R. at 118). She testified that she would go over to the Appellant's trailer to deliver food for the Appellant and his wife. (7 R.R. at 119). V.A. testified that when she would go over to deliver food, he would be on the couch lying down and would motion for her to come over by holding out his hand. (7 R.R. at 121). He would then pull her over and start reaching for her butt. (7 R.R. at 122). When she would start to pull away, he would hold onto her tighter. (7 R.R. at 123). V.A. could

not testify how many times this happened, but she said it happened a couple of times when she would go over there to deliver the Arroyos food. (7 R.R. at 124). She also testified that he did not touch her in any other way. (7 R.R. at 126). She then told her grandmother she did not want to go over there to deliver food, and when her grandmother asked her why she did not say and started to bring her brother with her. (7 R.R. at 127). V.A. testified this happened around the time she was 6 or 7 years old. (7 R.R. at 125).

E.A.'s Testimony

E.A. testified that she grew up in Brownsville, Texas, and is N.L.'s cousin. (7 R.R. at 217). The Arroyo family would come to visit her family when she was a child. (7 R.R. at 219). E.A. goes on to testify that her first memory of Appellant being inappropriate was when she was about three or four years old. The Arroyos were living in Brownsville at the time and E.A. and her family went to visit them at their apartment. (7 R.R. at 219). According to E.A., N.L. was playing in and out of the bedroom Appellant was lying in; he had said he was tired and wanted to lie down. (7 R.R. at 219). E.A. started playing with N.L. when Appellant called them over to the room to lie down on the bed with him. (7 R.R. at 219). She and N.L. went over to the bed where she says he started tickling them and started touching them on their chest with his hands. (7 R.R. at 220). E.A. testified that she felt that he was intentionally tickling them to touch them. (7 R.R. at 221). She also testified that when the Arroyos were leaving, her parents, who were already inside their vehicle, instructed E.A. and her siblings to say goodbye to the

Arroyos and they obliged. (7 R.R. at 222). E.A. testified that as she approached Appellant to give him a kiss on the cheek goodbye, , he moved his mouth to kiss her on the lips. (7 R.R. at 222).

E.A. also testified to another alleged incident involving the Appellant. They were visiting another aunt in Brownsville, Texas when E.A. was about six or seven years old. (7 R.R. at 222-224). She testified her cousins were sleeping on the floor, she was crying, and Appellant picked her up to calm her down, and started to touch her vagina. (7 R.R. at 223). E.A. testified he was holding her like a baby and using his other hand to touch her vagina. (7 R.R. at 224). She testified that the touching occurred under her pants but over her underwear. (7 R.R. at 226). E.A.'s aunt was on the bed and talking to the Appellant while he was touching E.A. (7 R.R. at 226).

E.A. also testified that when she was about 7 or 8 years old, her family stopped in Houston to visit the Arroyos on their way back from Disney World. (7 R.R. at 226-227). Her family spent the night, and she slept in her cousins' room. (7 R.R. at 227). She described her three cousins on the bed along with herself and her sister. (7 R.R. at 227). E.A. then testified that Appellant entered the room, moved her cousins and her sister to lie down between them, and ended up next to her. (7 R.R. at 228). He then put his arm over her and went down to touch her vagina under her clothing and underwear. (7 R.R. at 228). She also testified that she saw him touch N.L.'s vagina as well. (7 R.R. at 229). E.A. testified that she told her parents what happened when she was about 9

or 10 years old, but her dad did not want them to report it because Appellant's wife was ill and he did not want her to get worse. (7 R.R. at 232-233).

A.B.'s Testimony

A.B. is E.A.'s sister. (7 R.R. at 243). She testified to an alleged incident that she called the "karate incident" where Appellant touched her body in a way she did not like. (7 R.R. at 246). According to A.B. she, along with other children, were in the living room and Appellant wanted to teach karate, and he said to be more flexible he had to do some massages, and that's when he started to touch her inappropriately. (7 R.R. at 246-247). A.B. testified that he started by massaging her inner thighs and legs and moved up his hand to touch her vagina area. (7 R.R. at 247). He also massaged her chest area. (7 R.R. at 248). She believes she was in the third or fourth grade when this incident happened. (7 R.R. at 249).

A.B. also testified to another alleged incident where Appellant touched her inappropriately. They were in the master bedroom, and he told her he was going to teach her how to play guitar. (7 R.R. at 255). According to A.B., they sat on the bed, with Appellant behind her, and he placed the guitar on her lap. (7 R.R. at 256). A.B. testified that as Appellant was showing her how to strum the guitar, he started touching her hands and eventually started touching her in other areas. (7 R.R. at 256). She testified that he touched her in her chest area under her shirt but does not remember for how long. (7 R.R. at 256). She also testified that he started to move his hands down to her vagina area and touched her under her clothing. (7 R.R. at 257). A.B. testified that he

tried to insert his finger into her vagina, this hurt, so she told him to stop, but he did not and continued. (7 R.R. at 258). Appellant then stood up and proceeded to grab her hands, placed them inside his pants, and instructed her how to touch him. (7 R.R. at 259). A.B. then testified about another time he was inappropriate with his daughter's bedroom. A.B. testified that he took her to the bed, and he start to kiss her face, and lips and started moving down to her vagina. (7 R.R. at 261-262). She does not remember if his mouth was still or kept moving, but she said she told him to stop. (7 R.R. at 262). She then testified that he then put his penis in her mouth but does not remember how long it was in her mouth or if he was still or moving. (7 R.R. at 263). A.B. then testified that he then moved, got on top of her, and rubbed his penis on her vagina, but did not remember how long this happened. (7 R.R. at 264).

A.B. testified that there were other incidents where Appellant touched her inappropriately and estimated the count to be about 10 times. (7 R.R. at 267). The incidents, according to A.B., started when she was around third or fourth grade and stopped when she was in the fifth grade. (7 R.R. at 267-268). She testified that they ended because her sister told her parents what was going on. (7. R.R. at 268).

C. Procedural History

A grand jury indicted Mr. Arroyo for the offense of continuous sexual abuse of a child on October 14, 2020, under cause number 1677090. (C.R. at 44). Following the indictment, Defense Counsel filed a Request for Discovery, Notice and Disclosure of State's Experts on November 23, 2020. (C.R. at 50-52). On December 20, 2021, the

State filed their First Notice of Intention to Use Extraneous Offense and Prior Convictions. (C.R. at 138-141). That notice contained the extraneous offenses concerning the complainant, M.M., along with three other persons, J.V., E.V., and N.L. (C.R. at 138-141). On March 16, 2022, the case under cause number 1677090 was dismissed, as the case was reindicted under cause number 1754900. (C.R. at 96). [3]

The State filed another set of motions on May 22, 2022, which included a Second Notice of Intention to Use Extraneous Offense and Prior Convictions. (C.R. at 169-172). This notice was identical to the first notice filed on December 20, 2021. Eventually, the case proceeded to trial on September 30, 2024. (C.R. at 188, 193, 215, 264). However, the State filed two Supplemental Notices of Intention to Use Evidence of Prior Convictions and Extraneous Offenses and Bad Acts on that same date. (C.R. at 310-316).

In the First Supplemental Notice, the State alleged 11 additional extraneous offenses and bad acts involving E.B., A.B., V.A., and R.R. spanning from January 1, 1985, to January 1, 1995. (C.R. at 310-313). The Second Supplemental Notice contained two new alleged extraneous offenses and bad acts concerning M.M. on March 23, 201212. (C.R. at 314-316).[4] Appellant was ultimately found guilty on October 4, 2024. (8 R.R. at 63).

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[3] On February 3, 2022, the State's motion to transfer motions and notices from cause number 1677090 to cause number 1754900 was granted. (C.R. at 109).

[4] It is assumed the State meant 2012.

SUMMARY OF THE ARGUMENT

Initially, Appellant contends the trial court shared, unprompted, an anecdote regarding whether he thought Harris County would catch up with the backlog of cases. It was then that the trial court informed the panel "when people quit breaking the law I guess is when we'll get caught up." These comments directly communicated to the panel that the trial court believed that the Harris County courts had a backlog of cases because individuals like the Appellant were breaking the law. As a result, Appellant contends that the trial court's comments violated Article 38.05 of the Texas Code of Criminal Procedure, deprived Appellant of due process and a fair trial, and vitiated Appellant's presumption of innocence. These comments amounted to structural error and in the event this Court believes that they did not, it cannot be said that the trial court's improper comments did not cause Appellant to suffer any harm.

Additionally, Appellant contends that the trial court abused its discretion in admitting evidence related to alleged extraneous offenses from M.M., E.A., A.B., and V.A. over his trial counsel's objections that he received insufficient notice of these extraneous offenses under Rule 404(b) of the Texas Rules of Evidence and Article 38.37 of the Texas Code of Criminal Procedure. The State filed two supplemental notices on the day of jury selection containing extraneous allegations that were not noticed in the State's two prior notices. As a result of the State's tardy notices, defense counsel was surprised that the State sought to admit these extraneous offenses and was harmed as a result of their admission.

ARGUMENT

I. The trial court violated Texas Code of Criminal Procedure Article 38.05 by informing the venire panel that he thought the backlog of cases in Harris County might only get caught up "when people quit breaking the law."

A. Applicable Law and Standard of Review

"[T]he trial court shall maintain and attitude of impartiality throughout the trial." *Ex parte Scott*, 541 S.W.3d 104, 125 (Tex. Crim. App. 2017), quoting *Lagrone v. State*, 84 Tex. Crim. 609, 209 S.W. 411, 415 (Tex. Crim. App. 1919). "[I]t has been often held his views or impressions of the weight of the evidence or upon the issues in the case may be conveyed to the jury as effectively by other means as by charge of the court." *Anderson v.* State, 83 Tex. Crim. 261, 202 S.W. 944, 946 (Tex. Crim. App. 1918). As the Court of Criminal Appeals explained in *Lagrone*:

> To the jury the language and conduct of the trial court have a special and peculiar weight. The law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved. The delicacy of the situation in which he is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret.

Lagrone, 209 S.W. at 415 (internal citations omitted)

"Article 38.05 of the Texas Code of Criminal Procedure prohibits the trial judge from commenting on the weight of the evidence in criminal proceedings or otherwise divulging to the jury [their] opinion of the case[.]" *Proenza v. State*, 541 S.W.3d 786, 791 (Tex. Crim. App. 2017). Article 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

"In evaluating a claimed violation of article 38.05, we first determine whether the trial court's comments were, in fact, improper under the article." *Moore v. State*, 624 S.W.3d 676, 681 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd), citing *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.). "If so, we must determine whether the comments were material." *Id.* "A comment is material if the jury was considering the same issue." *Id.* at 682, citing *Simon*, 203 S.W.3d at 592. "If the comments were both improper and material, we address harm, using the standard for non-constitutional harm set forth in Texas Rule of Appellate Procedure 44.2(b)." *Id*, citing *Proenza*, 541 S.W.3d at 801.

B. Analysis

1. *Appellant's point of error may be considered, as the Court of Criminal Appeals has determined that a violation of Article 38.05 may be raised for the first time on appeal.*

Trial counsel did not object to Judge Clark's comments. Usually, to preserve error for appeal, a litigant must make a timely complaint in the trial court. *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013). However, in *Proenza,* the Court of Criminal Appeals determined that "claims of improper judicial comments raised under Article 38.05 are not within *Marin's* third class for forfeitable rights. Rather, we believe that the right to be tried in a proceeding devoid of improper judiciary commentary is at

least a category-two, waiver-only right." *Proenza,* 541 S.W. 3d at 801. As a result, this issue is properly before this Court.

2. The Trial Court's comments violated Appellant's presumption of innocence and conveyed to the jury his opinion of the case; that Appellant broke the law.

As previously stated, Judge Clark made the following complaint of comments during his voir dire:

> Now, none of the judges in these three courts are elected. They're all retired. It's good for the county because what we do in these courts is try to help out the elected judges. As I'm sure all of you are aware, the criminal justice systems throughout the United States is overburdened with cases. So there's a tremendous backlog. And we're doing what we can here in Harris County with these three courts to help out the other courts to make an effort to reduce the backlog.
>
> *Now, I had a prospective juror ask me one day when we were doing this, he said when do you think you're going to get caught up? And I said, well, when people quit breaking the law I guess is when we'll get caught up.* So until then, we're doing our best to try to reduce the backlog and at least try to keep up with the cases, new cases that are being filed.

(4 R.R. at 27) (emphasis added)

"[T]he U.S. Supreme Court has explained, and [the Court of Criminal Appeals] has reiterated that '[the] principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Rogers v. State*, 664 S.W.3d 843, 489 (Tex. Crim. App. 2022), quoting *Kimble v. State*, 537 S.W.2d 254, 254-255 (Tex. Crim. App. 1976). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."

Estelle v. Williams, 425 U.S. 501, 503 (1976). "Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right to the 'presumption of innocence,' *i.e.* the right to free from criminal conviction unless the State can prove his guilty beyond a reasonable doubt by probative evidence adduced at trial." *Miles v. State*, 204 S.W.3d 822, 825 (Tex. Crim. App. 2006), citing *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) and *Madrid v. State*, 595 S.W.2d 106, 110 (Tex. Crim. App. 1979). The presumption of innocence is also guaranteed by Texas state law, as "the statute itself arises from a constitutional guarantee, that of a right of a fair and impartial trial." *Miles v. State*, 154 S.W.3d 679, 681 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 204 S.W.3d 822 (Tex. Crim. App. 2006), citing U.S. CONST. AMEND. XIV; TEX. CODE OF CRIM. PROC. ART. 38.03; *Estelle*, 402 U.S. at 503; and *Oliver v. State*, 999 S.W.2d 596, 599 n. 3 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). "The presumption of innocence is a fundamental right, and 'its enforcement lies at the foundation of the administration of our criminal law.'" *Walker v. State*, 469 S.W.3d 204, 208 (Tex. App.—Tyler 2015, pet. ref'd) (citations omitted).

While Judge Clark's comments were not concerned with the admission of evidence, his comments were remarks that conveyed to the jury his opinion of the case, that Appellant broke the law (i.e. committed the crime of which he was accused), violating Appellant's presumption of innocence. See TEX. CODE CRIM. PROC. ART. 38.05 (trial judge should not "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to the jury his opinion of the case."). In

addition, these comments did not come in the context of explaining that potential jurors had to follow the law or even a general discussion of the law. See *Mclean v. State*, 312 S.W.3d 912, 917 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (complained of judicial comments "occurred in the context of his explaining that many people do not believe that prostitution should be a criminal offense, but that, regardless of their personal feelings, jurors have to follow the law") The context of Judge Clark's statements occurred while he was explaining his experience as a judge in Harris County and in ERD courts in Harris County:

> And let me explain to you that you're not in the Criminal Justice Center building, you understand that. You're in what we call the Family Law Center, because years ago that's the only thing that was handled in this building, the family law cases, divorces, adoptions, anything of that nature.
>
> But since we have new judges that have been appointed all the courtrooms over there are taken. So they've made room in this building for what we call the ERD, emergency relief docket courts, and these courts are presided over by retired judge such as myself.

(4 R.R. at 26)

In discussing the existence of the ERD courts, Judge Clark explained that these courts were to address the backlog of cases in Harris County. He then shared, unprompted, an anecdote regarding whether he thought they would catch up from that backlog. It was only then that Judge Clark informed the panel "when people quit breaking the law I guess is when we'll get caught up." (4 R.R. at 27). These comments directly communicated to the panel that Judge Clark believed that the backlogged cases involved individuals like the Appellant who were "breaking the law." This violated

Appellant's presumption of innocence and conveyed to the panel Judge Clark's opinion that Appellant broke the law. "A comment is material if the jury was considering the same issue." *Moore*, 624 S.W.3d at 682. Appellant's guilt or innocence was the material issue that the jury considered and as a result, the comments ran afoul of Article 38.05.

C. Harm

"To constitute harm under article 38.05, the trial court's improper comments must be reasonably calculated to benefit the State or prejudice the defendant's rights." *Moore*, 624 S.W.3d at 682. This error is reviewed under Texas Rule of Appellate Procedure Article 44.2(b). *Proenza*, 541 S.W.3d at 801. "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). "The focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict." *Hankston v. State*, 656 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd), citing *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011). "A conviction must be reversed if this court has 'grave doubt' that the result of the trial was free from the substantial effect of the error." *Id.* "'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced he feels himself in virtual equipoise as to the harmlessness of the error." *Id.*, quoting *Barshaw*, 342 S.W.3d

at 94. When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001). However, the concern is not whether the evidence was sufficient to convict the Appellant. See *Lopez v. State*, 288 S.W.3d 148, 178 (Tex. App.—Corpus Christi-Edinburg 2009, pet. ref'd).

Judge Clark's erroneous comments were made towards the beginning of his voir dire. Although brief, his comments referenced the Appellant's presumption of innocence by pointing to the backlog in Harris County and how it may lessen if people stopped committing crimes. (4 R.R. at 27). Judge Clark spoke of a topic irrelevant to a judge's allowable intervention into voir dire "for purposes of clarification and expedition;" the backlog of cases in Harris County. See *Nicholson v. State*, 577 S.W.3d 559, 567 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd). Judge Clark referenced a general statement on the state of the country and pointed out to the panel the "obvious" state of the country and its backlog of cases in the criminal justice system. He imparted onto to the panel his own opinion that they may catch up only when individuals stop breaking the law. This was an opinion based on an extrajudicial source, and by inference, Judge Clark's experience. See *Liteky v. United States*, 510 U.S. 540, 555 (1994) (Judicial remarks may show bias and lack of impartiality "if they reveal an opinion that derives from an extrajudicial source," and "they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."). Judge Clark did not make these comments with the "manifest intent to benefit the defendant and to protect [Appellant's] rights[.]" *Unkart*, 400 S.W.3d at 101. His opinion prejudged individuals in

Harris County, including the Appellant, as having committed the crimes that the State of Texas alleged against them. These comments "impart[ed] information to the venire panel that…tainted appellant's presumption of innocence[.]" *Soto v. State*, No. 05-01-00589-CR, 2003 Tex. App. LEXIS 2476 at *12 (Tex. App.—Dallas March 25, 2003, no pet.) (mem. op., not designated for publication). Appellant's guilt or innocence was the central issue at his trial, but Judge Clark's comments left the jury with the impression that Appellant broke the law from the very beginning. As a result, the trial court's comments during voir dire had a substantial and injurious effect on the verdict.

II. The trial court's comments during voir dire that informed the venire panel he thought the backlog of cases in Harris County might only get caught up when individuals "quit breaking the law" deprived Appellant of due process and an impartial judge, and vitiated Appellant's presumption of innocence.

A. Applicable Law

The federal and state constitutions guarantee the right to a fair trial. U.S. CONST. AMEND. V and XIV; TEX. CONST. ART. 1, § 10. "Due process requires a neutral and detached hearing body or officer." *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006), citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchinson*, 349 U.S. 133, 136 (1955). "A defendant has an absolute right to an impartial judge at both the guilt/innocence and punishment stages of trial." *Segovia v. State*, 543 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2018, no pet.). "A judge should not act as an advocate or adversary for any party." *Luu*

v. State, 440 S.W.3d 123, 128 (Tex. App.—Houston [14th Dist.] 2013, no pet.). "In Texas, a trial judge must also refrain from making any remark calculated to convey to the jury his opinion of the case." *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003). "Absent a clear showing of bias, a trial court's actions will be presumed to have been correct." *Id.*, citing *Thompson v. State*, 641 S.W.2d 920, 921 (Tex. Crim. App. 1982). "To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party." *Luu*, 440 S.W.3d at 128-129. The entire record is reviewed in making this determination. *Id.* at 129.

"The voir dire process is designed to insure, to the fullest extent possible, that the jury will be intelligent and impartial." *Drake v. State*, 465 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2015, no pet.), citing *Armstrong v. State*, 897 S.W.2d 361, 368 (Tex. Crim. App. 1995) and *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. [Panel Op.] 1978). "The importance in selecting a jury cannot be overestimated in our judicial system since both the State and defendants have an interest in assembling a jury free of bias and prejudice." *Id.*, quoting *Price v. State*, 626 S.W.2d 833, 835 (Tex. App.—Corpus Christi 1981, no pet.).

B. Analysis

1. Appellant may raise this claim for the first time on appeal.

The Court of Criminal Appeals has "explained that 'our system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2)

rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.'" *Garcia v. State*, 149 S.W.3d 135, 144 (Tex. Crim. App. 2004), quoting *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). "[R]ights in the second category 'do not vanish so easily. Although a litigant might give them up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record.'" *Id.*, citing *Marin*, 851 S.W.2d at 280. "Regarding these rights, 'the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court." *Id.* The Court of Criminal Appeals has "characterized *Marin* as holding 'that the general preservation requirement's application turns on the nature of the right allegedly infringed,' as opposed to 'the circumstances under which it was raised.'" *Proenza*, 541 S.W.3d at 796, quoting *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014) and *Ex parte Heilman*, 456 S.W.3d 159, 165-166 (Tex. Crim. App. 2015). "That is, a proper determination of a claim's availability on appeal should not involve peering behind the procedural-default curtain to look at the particular 'circumstances' of the claim's merits within the case at hand." *Id.*

Appellant contends that a trial court's comments that implicate a due process violation of an impartial judge should be determined to be at least a category two *Marin*

right, allowing him to raise his claim for the first time on appeal even without a contemporaneous objection in the trial court. It has long been held that "[t]he law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial." *Proenza*, 541 S.W.3d at 797 n. 71, quoting *Lagrone*, 209 S.W. at 415.[5] In addition, many of the reasons articulated in *Proenza* in determining that an alleged violation of Article 38.05 implicates a category two *Marin* right apply in this instance. In *Proenza*, the Court of Criminal Appeals noted that "*Marin's* description of the adversarial system depends upon, or at the very least assumes, the decision-maker's impartiality." *Id.* at 799. "[T]he utility associated with enforcement of forfeiture never outweighs 'fundamental systemic requirements or…rights so important that their implementation is mandatory absent an express waiver.'" *Id.*, quoting *Marin*, 851 S.W.3d at 280. The Court of Criminal Appeals also acknowledged that "when the trial judge's impartiality is the very thing that is brought into question, *Marin's* typical justification for requiring contemporaneous objection loses some of its potency." *Proenza*, 541 S.W.3d at 799. Other factors that lend in favor of allowing this type of error to be raised for the first time on appeal include the fear that a judge would have an animus or ill will against a

[5] In *Blue v. State*, the Court of Criminal Appeals "granted relief on an improper judicial-comment that was not preserved at trial, though [the Court of Criminal Appeals was] unable to agree on a rationale." *Unkart*, 400 S.W.3d at 100, citing *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2010) (plurality op.). "A plurality of the Court decided that the trial judge's remarks vitiated the defendant's presumption of innocence. Judge Mansfield, who was part of the plurality, also filed a concurring opinion, in which he concluded that the doctrine of procedural default 'does not apply to statements made by a trial judge that rise to the level of fundamental error.' Judge Keasler concluded that the trial judge's remarks were so egregious as to show that he was biased." *Id.*

defendant (and may even retaliate), and allowing the forfeiture regarding improper comments that implicate due process concerns would allow the public to view the proceedings as unfair. *Id.* at 799-800.

Furthermore, the "[t]he United States Supreme Court has determined that when certain constitutional rights are violated, fundamental error occurs." *Williams v. State*, No. 14-19-00979-CR, 2021 Tex. App. LEXIS 9594 at *4 (Tex. App.—Houston [14th Dist.] Dec. 2, 2021, pet. ref'd) (mem. op., not designated for publication), citing *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) and *Williams v. State*, 194 S.W.3d 568, 579 (Tex. App.—Houston [14th Dist.] 2006), *aff'd*, 252 S.W.3d 353 (Tex. Crim. App. 2008). "The United States Supreme Court has determined these fundamental constitutional rights include the right to counsel, *the right to an impartial judge*, the right to not have members of the defendant's race unlawfully excluded from a grand jury, the right to self-representation at trial, and the right to a public trial." *Williams*, 194 S.W.3d at 579 (emphasis added), citing *Fulminante*, 499 U.S. at 309-310. Additionally, "the U.S. Supreme Court has explained, and [the Court of Criminal Appeals] has reiterated that '[the] principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Rogers*, 664 S.W.3d at 489. "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Kimble*, 537 S.W.2d at 255.

In sum, "[t]he law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial." *Proenza*, 541 S.W.3d at 797. This impartiality is one of the foundational blocks of our system and ensures that a defendant receives a fair trial. Based on the foregoing, a trial court's comments constituting constitutional due process error may be reviewed in the absence of a proper objection as the right to a fair trial and impartial judge are at least category-two *Marin* rights. "Regarding these rights, 'the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court." *Garcia*, 149 S.W.3d at 144.

2. *The trial court's comments violated Appellant's right to a fair trial and impartial judge as the trial court's comments infringed on Appellant's presumption of innocence and conveyed to the jury his opinion of the case; that Appellant broke the law.*

Again, Judge Clark made the following complained of comments during his voir dire:

> But since we have new judges that have been appointed all the courtrooms over there are taken. So they've made room in this building for what we call the ERD, emergency relief docket courts, and these courts are presided over by retired judge such as myself.
>
> Now, none of the judges in these three courts are elected. They're all retired. It's good for the county because what we do in these courts is try to help out the elected judges. As I'm sure all of you are aware, the criminal justice systems throughout the United States is overburdened with cases. So there's a tremendous backlog. And we're doing what we can here in Harris County with these three courts to help out the other courts to make an effort to reduce the backlog.

> *Now, I had a prospective juror ask me one day when we were doing this, he said when do you think you're going to get caught up? And I said, well, when people quit breaking the law I guess is when we'll get caught up.* So until then, we're doing our best to try to reduce the backlog and at least try to keep up with the cases, new cases that are being filed.

(4 R.R. at 26-27) (emphasis added)

In discussing the existence of the ERD courts, Judge Clark explained that these courts were to address the backlog of cases in Harris County. He then shared, unprompted, an anecdote regarding whether he thought they would catch up. It was only then that Judge Clark informed the panel "when people quit breaking the law I guess is when we'll get caught up." These comments directly communicated to the panel that Judge Clark believed that the Harris County courts had a backlog of cases because individuals like the Appellant were breaking the law. This violated Appellant's presumption of innocence and conveyed to the panel Judge Clark's opinion that Appellant broke the law. See *Wilson v. State*, 473 S.W.3d 889, 903 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("A trial court's comments do not constitute fundamental error unless they rise to 'such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury.'"), quoting *Jasper v. State*, 61 S.W.3d 413, 420 (Tex. Crim. App. 2001). These comments violated Appellant's due process rights to a fair trial from an impartial judge and vitiated his presumption of innocence. Judicial impropriety was committed. See *Luu*, 440 S.W.3d at 128-129.

C. Harm

Initially, Appellant contends that because the trial court's comments violated his due process rights to a fair and impartial judge, the error in this case was structural error. See *Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008) (A 'structural error' "affect[s] the framework within the trial proceeds, rather than simply an error in the trial process itself" and render[s] a trial fundamentally unfair."). As a result, Appellant contends that the error in this case is not subject to a harmless error analysis. See *Fulminante*, 499 U.S. at 309-310.

However, assuming that a harm analysis must be performed, Appellant contends that the analysis must be done according to Texas Rule of Appellate Procedure 44.2(a). "Constitutional error is harmful unless a reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing TEX. R. APP. P. 44.2(a). "While the rule does not expressly place a burden on any party, the 'default' is to reverse unless harmlessness is shown." *Merrit v. State*, 982 S.W.2d 634, 636 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). "The State has the burden, as the beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard*, 612 S.W.3d at 328, citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall v. State*, 184 S.W.3d 730, 746 n.53 (Tex. Crim. App. 2006).

Judge Clark's erroneous comments were made towards the beginning of his voir dire. He references the Appellant's presumption of innocence while commenting on

the backlog and how it may lessen if people stopped committing crimes. (4 R.R. at 27). Judge Clark spoke of a topic irrelevant to a judge's allowable intervention into voir dire "for purposes of clarification and expedition:" the backlog of cases in Harris County. See *Nicholson*, 577 S.W.3d at 567. Judge Clark referenced the United States as a whole and how it had a tremendous backlog. He imparted onto the panel his own opinion that they may catch up only when individuals stop breaking the law. This was an opinion based on an extrajudicial source, and by inference, Judge Clark's experience. See *Liteky*, 510 U.S. at 555 (Judicial remarks may show bias and lack of impartiality "if they reveal an opinion that derives from an extrajudicial source," and "they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."). Judge Clark did not make these comments with the "manifest intent to benefit the defendant and to protect [the defendant's] rights[.]" *Unkart*, 400 S.W.3d at 101. His opinion prejudged individuals in Harris County, including the Appellant, as having committed the crimes that the State of Texas alleged against them. The trial court's comments "impart[ed] information to the venire panel that…tainted appellant's presumption of innocence[.]" *Soto*, 2003 Tex. App. LEXIS 2476 at *12. Appellant's guilt or innocence of the offense was the central issue at his trial, but Judge Clark's comments left the jury with the impression that Appellant broke the law from the very beginning of the case. As a result, the trial court's comments during voir dire were not harmless beyond a reasonable doubt.

III. The trial court abused its discretion when it admitted evidence of extraneous acts and offenses even though the State failed to provide timely notice under Texas Rules of Evidence 404(b) and Texas Code of Criminal Procedure 38.37.

A. Applicable Law

Under Texas Rules of Evidence 404, the State is entitled to use evidence of other crimes, wrongs or acts for "other purposes" outside of showing action in conformity with character, "provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction." TEX. R. EVID. 404(b). Beyond the notice provisions of the Texas Rules of Evidence, the Code of Criminal Procedure likewise requires that the State "shall give defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial." TEX. CODE CRIM. PROC. ART. 38.37, § 3.

B. Standard of Review

This Court reviews a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Page v. State*, 213 S.W.3d. 337 (Tex. Crim. App. 2006). A trial court does not abuse its discretion unless the ruling falls outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). A trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably. *Id.* at 380.

C. Analysis

Before voir dire started, Defense approached the bench and brought to the trial court's attention the two extraneous notices the State filed on the morning of trial. Defense Counsel notified the court with the following:

> [Defense]: This morning I got a notice, or a text from my co-counsel saying that the State had filed another notice from the State with an additional three 38.37 people that they wanted to call. In looking at the statute of 38.37, it says that the State shall give the defendant notice of the State's intent to introduce in the case-in-chief evidence described by Section 1 or Section 2 not later than the 30th day before the date of the defendant's trial.
>
> We'd been relying on this notice that we received prior to yesterday in order to develop our strategy and develop the themes of our case, and have in good faith done so. The State seems to contend that because they had notes from these other people on their portal and in their discovery that that gives notice, but that doesn't tell us their intent to use those particular extraneous people to come and testify at the trial.
>
> [The Court]: So let me interrupt you a second. You knew of these three new offenses, you knew of them; is that correct? You just didn't have notice that they were going to use them during the trial.
>
> [Defense]: Correct. And that would have been something that they could have given us 30 days ago, but – they've also known about 'em. And they've known about 'em, in fact, I think since a bail hearing when they brough 'em in to talk at a bail hearing that was I think – when was that, February?
>
> [State]: January.
>
> [Defense]: January. A January bail hearing, that they had talk to 'em then. So they've known about 'em, the State knew about 'em and the State I'm sure is well aware of 38.37 and is notice of requirements, yet on the eve of trial they decide to throw this out there.

(4 R.R. at 4-5).

This exchange, between the Court, Defense Counsel, and State continued, but ultimately, Defense Counsel objected on the following grounds and orally motioned for continuance:

> [Defense]: In the case given by the State, *Bobby Ray Heyden v. State of Texas*, in its analysis mentions that the *Buchanan v. State* case that we've given to your Honor to review, and it says that same holding, that they held the opinion—the open file policy was not sufficient to comply with the rule. Even if the State's open file contain a document describing the extraneous offense in question, we could not conclude that the mere opening of its file satisfies the requirement of giving notice of intent to introduce such evidence.
>
> And that's been our issue this morning, is that we couldn't imbue from their open file policy their intent to do whatever they want to with it. So we do claim that if the State is allowed to bring in these other three additional people that it is a surprise to us and we would at this time ask the Court to grant more time for us to prepare, as we have prepare our defense around the notice that was given to us prior to this morning.

(4 R.R. at 15-16).

The State responded that it gave sufficient notice, but did not oppose giving defense counsel more time. (4. R.R. at 16-17). However, the trial court denied the oral motion and found that there was substantial compliance and no surprise to the Defense. (4 R.R. at 17).[6] Defense counsel also objected to testimony under 404(b):

> [Defense]: Judge, we're objecting, again, if it's offered under 404(b), we're objecting under 404(b)(2) on the notice in criminal cases. The prosecutor must provide reasonable notice before trial if they intend to introduce such evidence, other than arising in the same transaction as its case-in-chief, and we feel that we have not been given proper notice. It was just part of an open file, but not given official notice, which is required.

[6] The notes from the District Attorney's Office are included within the appellate record. (10 R.R. Court's Exs. 1-5).

(7 R.R. at 31-32).

By lodging their objections outside of the presence of the jury and before the testimony was heard, Appellant preserved error for appeal. *See* TEX. R. APP. P. 33.1(a) and TEX. R. EVID. 103(b). The trial court did not express any confusion about the nature of defense counsel's complaint, going so far as to respond that the State "substantially complied" under the specific circumstances. (4 R.R. at 19).

1. *The State was required to give notice of its intent to use evidence of prior convictions and extraneous offenses and bad acts for impeachment purposes in a timely manner.*

Under Texas Rules of Evidence 404, the State is entitled to use evidence of other crimes, wrongs or acts for "other purposes" outside of showing action in conformity with character, "provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction." TEX. R. EVID. 404(b). Beyond the notice provisions of the Texas Rules of Evidence, the Code of Criminal Procedure likewise requires that the State "shall give the defendant notice the state's intent to introduce in the case in chief evidence described by Section 1 or 2 no later than the 30th day before the date of the defendant's trial." TEX. CODE CRIM. PROC. ART. 38.37, § 3.

Because the Rules of Evidence do not define what constitutes "reasonable notice" in advance of trial, courts must determine whether notice is reasonable on a case-by-case basis. *See Sebalt v. State*, 28 S.W.3d 819, 822 (Tex. App.—Corpus Christi

2000, no pet.); *Patton v. State*, 25 S.W.3d 387, 392 (Tex. App.—Austin 2000, pet. ref'd). At least one factor that appellate courts have employed in determining whether notice was reasonable or not is when the State acquired knowledge of the bad act. In other words, if the State acquired knowledge of an extraneous offense on a Friday for a trial on Monday, notice would not be unreasonable when immediately given to defense counsel. *See Francis v. State*, 445 S.W.3d 307, 318-19 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 428 S.W.3d 850 (Tex. Crim. App. 2014).

In regard to 38.37, the amount of time a court deems reasonable is not up to interpretation as it explicitly says, "no later than the 30th day before the date of the defendant's trial." TEX. CODE CRIM. PROC. ART. 38.37, §3. Courts have said that the purpose of the Art. 38.37 notice provisions are to "enable the defendant to meet the evidence of extraneous offenses" courts must consider "whether the lack of notice surprised the defendant or adversely affected his ability to mount an effective defense." *Lara v. State*, 513 S.W.3d 135, 142-43 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

2. *The State did not give Defense notice of its intent to use* any *of the extraneous offenses until the day of trial.*

Before trial, defense counsel filed a motion requesting "discovery, notice and disclosure of state's experts." (C.R. at 51-52). In addition, the motion requested the State to "provide written notice, at least ten days before trial, of its intent to us any evidence or testimony regarding the matters described in Rules 404(b) and 609(f) of the Texas Rules and Article 37.07 of the Code of Criminal Procedure." (C.R. at 51-52).

This request for notice was filed well in advance of trial on November 23, 2020. *Id.* By filing this request, the defense fulfilled its obligation under Rule 404(b) of making timely request for notice of other crimes, wrongs, or acts. In addition, "[a] defendant need not request an article 38.37 notice from the State; he is automatically entitled to it." *Jeansonne v. State*, 624 S.W.3d 78, 97 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (citations omitted).

In response to the defense's request for notice, the State filed a Notice of Intention to Use Extraneous Offenses and Prior Convictions. (C.R. at 138-142). The original notice indicated that they would introduce eight extraneous offenses involving M.M. dating to May 23, 2012, one extraneous offense involving J.V. dating to March 4, 2019, two extraneous offenses involving E.V. dating to May 23, 2012, and two extraneous offenses involving N.L. dating to April 18, 2005, all in Harris County, Texas. *Id.* Over time, a second notice was filed by the State on May 22, 2022, containing the same extraneous offenses as indicated in the original notice. (C.R. at 169-172). No notices were filed from May 22, 2022 *until* September 30, 2024, the day jury selection was supposed to begin. The two supplemental notices were the first formal indications the defense received of the State's intent to use *13* extraneous offenses involving M.M. and four other individuals—E.B., A.B., V.A., and R.R. (C.R. at 310-317).

3. The State's notices were not timely and unreasonable under the circumstances for the case given that State knew of these extraneous offenses in January—eight months prior to trial.

Each case must be evaluated under its own unique facts and circumstances. *Francis*, 445 S.W.3d at 318-319. Under the circumstances of the present case, the State's belated notice of its intent to use Appellant's numerous extraneous offenses cannot be reasonable, as the State had known of these offenses eight months in advance of trial yet did not apprise the defense of its intent to use these extraneous offenses involving four additional witnesses, three of whom testified, until the day of trial when jury selection was supposed to commence.[7] This was also a case that had been pending since 2020 with plenty of time to allow the State to do provide timely notice.

In *Hernandez v. State,* 914 S.W.2d 226 (Tex. App.—Waco 1996, no pet), the Court of Appeals evaluated a complainant regarding unreasonable late notice under Rule 404(b). The prosecutor in *Hernandez* notified the defense of its intent to use the statement of a witness who claimed to have seen the defendant punch the complainant several weeks before the defendant was arrested for murdering the complainant. *Id.* The witness claimed to have seen the defendant punch the complainant in late August of 1993, while the defendant was accused of murdering the complainant on September 5, 1993. *Id.* at 235-237. The State notified the defense of its intent to use this extraneous act of punching the complainant only three days before trial was set to begin while acknowledging that information about the extraneous punching had been contained in its file. *Id.* at 233-34.

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[7] R.R. ultimately did not testify.

The Waco Court of Appeals ultimately held "[w]e do not believe that a 404(b)-response filed on a Friday afternoon is an adequate or reasonable appraisal of extraneous offenses for a trial beginning the following Monday morning." *Id.* at 234. Thus, under the circumstances presented in *Hernandez*—specifically, where evidence of an extraneous offense being known for several months before trial was present in the State's file in advance of trial long enough that the State expected the defense to discover it on its own—three days' notice was not adequate or reasonable under Rule 404(b). *Id.*

Similarly, the Austin Court of Appeals held in *Neuman v. State,* 951 S.W.2d 538 (Tex. App.—Austin 1997, no pet.), that notice of the State's intent to use an extraneous bad act provided on the morning that jury selection began was not reasonable. In *Neuman*, the defendant was accused of driving his pickup truck into a car driven by his wife. The State had obtained at some point before trial a recording of a phone call between the defendant and the complainant, where the defendant made threats to the complainant one month before the offense. *Id.* at 539. The defense was not given any notice of the State's intent to use this extraneous bad act of threatening the complainant until the morning voir dire began. *Id.* at 539-40. It was the State's argument both before the trial court and the court of appeals that because there was an "open file policy" and the State's file contained information about the phone call, sufficient notice had already been provided to the defense. *Id.*

As was the case in *Hernandez,* the Austin Court of Appeals was unmoved by this argument, stating that "[t]o hold the State complied with the rule 404(b) notice requirement under the circumstances presented would effectively nullify the rule." *Id.* at 540. This reaffirms the notion that if the State is aware of information so far in advance of trial it expects that the defense should be able to uncover it without notification from the State, sending formal notice to the defense mere days before the start of trial is not reasonable.

Here, the extraneous offenses that the State utilized spanned from 1985 to 1995 involving three different witnesses excluding the complainant. (C.R. at 310-317). No notice was given to the defense of the State's intent to use these specific extraneous offenses in its case-in-chief until September 30, 2024; the day jury selection was to begin. *Id.* Because the State had considerable advanced knowledge about the additional witnesses and alleged offenses, it was unreasonable for the State to wait until the day of trial to transmit notice of its intent to use these numerous extraneous offenses to the defense.

The trial court mentioned on the record that because the defense was aware of the extraneous offenses and should have come as no surprise, the State's notice was substantial. (4 R.R. at 17). However, the request for notice filed by the defense specifically made mention of the State providing "written notice, at least ten days before trial, of its intent to use any evidence or testimony regarding the matters described in Rules 404(b) and 609(f) of the Texas Rules and Article 37.07 of the Code of Criminal

Procedure." (C.R. at 138-141). If the request for notice filed by the defense was sufficient to trigger the "timely request" provision of Rule 404(b) and Code of Criminal Procedure article 37.07—as is evident by the fact that the State responded to this request—then the State was not free to pick and choose which provisions of the request for notice it would comply with. *See Brown v. State,* 880 S.W.2d 249, 252 (Tex. App.—El Paso 1994, no pet.) (failure to give notice of intent to use prior convictions for impeachment after a timely request for such information amounted to "a clear case of discover abuse").

Additionally, the State and trial court erroneously relied on *Lara*. According to the State, in *Lara*, the court held that because the State provided an email to the defense notifying them of an extraneous offense it was going to introduce in trial, this gave the defense sufficient notice. (4 R.R. at 7). The State argued because it provided defense counsel with an open file that contained the extraneous offenses on January 10, 2024, it sufficed as proper notice following 38.37. *Id.* However, *Lara'* is distinguishable.

In *Lara,* the defendant "argued only that the State should not be allowed to introduce extraneous offense evidence because it failed to give appellant notice under Article 38.37 of all the extraneous offenses it intended to introduce at trial"—particularly later-disclosed instances of sexual abuse by one of the witnesses. *Lara*, 513 S.W.3d 135 at 140. The defense had already received notice of this particular witness and two instances of sexual abuse by the appellant. *Id.* at 138. While there was not an official notice, the State did email defense counsel about the later disclosed extraneous

offenses and titled the email "Brady Disclosure." *Id.* at 142. This email was sent on April 1, 2015, and after receiving this specific email with the new disclosures, defense counsel filed an unopposed motion to continue April 7, 2015, citing the new allegations that were not previously disclosed. *Id.* The jury trial was held on June 1, 2015. *Id.* The court of appeals in *Lara* concluded that defense counsel did not object in trial to the admission of extraneous offenses because the State did not provide proper notice under Rule 404(b) and thus did not preserve their Rule 404(b) notice argument for appellate review. *Id.* at 140 (citations omitted).

Here, appellant objected to the admission of extraneous offense evidence under 38.37 *and* 404(b) as he was given insufficient notice that the State intended to us the extraneous offenses. As noted previously, defense counsel objected to the extraneous offenses coming in prior to voir dire, and before every extraneous offense hearing. (4 R.R. at 4). Appellant also objected to improper notice under Rule 404(b) prior to and during V.A.'s 404(b) hearing as also stated above, thus preserving error on both Rule 404(b) and Texas Code of Criminal Procedure Article 38.37. (7 R.R. at 31-32). This is different than *Lara*, where appellant only preserved error regarding Article 38.37 and not Rule 404(b). *Lara*, 513 S.W.3d at 140. In addition, the State in *Lara* provided the defendant with the original notice on March 10, 2015, along with an email notifying defense counsel of later-disclosed allegations on April 1, 2015 after State interviewed witness on March 26, 2015. *Lara*, 513 S.W.3d at 141-142. Trial commenced on June 1, 2015—well within the time of at least 30 days before trial as required by 38.37. *Id.* Here,

two notices were issued in 2021 and 2022. (C.R. at 138-141, 169-172). The State's open file indicated numerous extraneous offenses on January 10, 2024. (4 R.R. at 6-7). However, there was no indication of an email exchange or acknowledgement of these new offenses. (4 R.R. at 10). Two supplemental notices were filed on the day of jury selection on September 30, 2024. (C.R. at 310-316). This gave the State plenty of time to file notices as they did before, but they decided to surprise defense counsel on the day of trial once defense had relied on the previous notice filed in 2022. (C.R. at 169-172). Defense counsel also expressed their frustration over trying to communicate with the State over witnesses:

> [Defense:] ..I emailed Ms. Wrobleske the other day, I think Saturday, Friday or Saturday in regards to this case who she's planning to call. I didn't receive a reply back. I texted personally Ms. Oxford on Saturday. She wasn't working Saturday. She explained that to me. She said she'd dive into it Sunday, and that's fine, but there's been ample opportunity to put this forward.

(4 R.R. at 13-14).

Hayden, which the State also relied upon, is another case that deals with the question of what is proper notice. (4 R.R. at 8). In *Hayden,* defense counsel requested from the State notice of extraneous offenses under Rule 404(b). *Hayden v. State,* 66 S.W.3d 269 (Tex. Crim. App. 2001). The State, in turn, responded by designating that a certain witness would testify, but did not specify what extraneous offenses would be discussed, gave defense counsel copies of several witness statements that involved descriptions of extraneous offenses; however, the record did not reflect when the State

gave the defense copies of the witness statements. *Id.* at 270. At trial, defense counsel objected to testimony from a particular witness because there was no notice with the State arguing that they provided proper notice because they handed over the witness's statements along with others. *Id.*

The Court also pointed to *Buchanan v. State* where "we held that an open file policy was not sufficient to comply with the rule. Even if the State's open file contains a document describing the extraneous offense in question, we could not conclude that the "mere opening of its file…satisfies the requirement of giving notice 'of intent to introduce' such evidence." *Id.* at 271 citing *Buchanan v. State,* 911 S.W.2d 11 (Tex. Crim. App. 1995). Additionally, the Court questioned "whether the State's delivery to defense counsel of witness statements concerning the extraneous offenses may be sufficient notice of the State's intent to introduce the extraneous offenses in question." *Id.* "Whether the delivery of witness statements constitutes reasonable notice depends in part on the timing of that delivery. If the State gave the statements to the defense shortly after receiving the request for notice, the implicit statement is: 'These are the extraneous offenses that we intend to offer in the case-in-chief.' The longer the time lapse between the receipt of the notice and the delivery of the witness statements, the less likely that the recipient will conclude, 'This is the evidence that responds to my request.'" *Hayden,* 66 S.W.3d at 272.

This is at the heart of our present case, and what differs from *Hayden.* This case was originally indicted on October 14, 2020, and Defense counsel filed "Request for

Discovery, Notice and Disclosure of State's Experts" on November 23, 2020. (C.R. at 50-52). The State filed Notice of Intent to Use Extraneous Offenses and Prior Convictions on December 20, 2021. (C.R. at 138-141). The case was dismissed and then re-indicted on January 14, 2022. (C.R. at 109). The State filed another notice on May 22, 2022 titled "State's Notice of Intention to Use Extraneous Offenses and Prior Convictions." (C.R. at 169-172). After multiple resets and the granting of a State's Motion for Continuance, the case was set for trial on September 30, 2024. (C.R. at 212). The State argued that the extraneous offenses were detailed in their open file and thus this sufficed notice for defense. (4 R.R. at 7). However, because there was eight months in between the statements given by these witnesses involving extraneous offenses, defense counsel was likely to conclude that the notes offered from the District Attorney responded to his extraneous offense request. *Hayden,* 66 S.W.3d at 272. The State had more than plenty of time to fulfill defense counsel's request for notices under Article 38.37 and Rule 404(b). Furthermore, the State had already filed two extraneous offense notices, so the State was aware of the correct procedure and adequate notice. Instead, they chose to surprise defense counsel on the day of jury selection to disclose 13 additional extraneous offenses, most of which were introduced at Appellant's trial. "The mere presence of an offense report indicating the State's awareness of the existence of such evidence does not indicate an 'intent to introduce' such evidence in its case in chief…Rule 404(b) requires the State to give notice of intent to introduce such evidence 'in [its] case in chief[.]". *Buchanan,* 911 S.W.2d at 15. In other words, an "open file" does

not constitute sufficient notice. *Id.* Even by *Hayden* standards, because there was an abundant time lapse between the delivery of the extraneous offenses was quite long, this does not provide reasonable notice. The State does not get to have its cake and eat it too.

D. Harm

Appellant suffered harm due to insufficient and unreasonable notice of extraneous offenses under 404(b) and 38.37. A violation of the notice provision of Rule 404 is subject to non-constitutional harm standard under Rule 44.2(b) of Texas Rules of Appellate Procedure. *See Hernandez v. State*, 176 S.W.3d 821, 825 (Tex. Crim. App. 2005). The same is true under Article 38.37. *Lara*, 513 S.W.3d at 142-143 ("Error in admitting evidence in violation of the notice provision of Article 38.37 is non-constitutional error."). "[Rule 404(b)'s] purpose is to avoid unfair surprise and to enable the defendant to prepare to answer the extraneous-offense evidence." *See Apolinar v. State*, 106 S.W.3d 407 (Tex. App. 2003), *aff'd*, 155 S.W.3d 184 (Tex. Crim. App. 2005); *Roethel v. State,* 80 S.W.3d 276, 282 (Tex. App.—Austin 2002, no pet.); *Nance v. State,* 946 S.W.2d 490, 493 (Tex. App.—Forth Worth 1997, pet. ref'd). "To determine harm in light of that purpose, we analyze whether and how the notice deficiency affected appellant's ability to prepare for the evidence." *Apolinar*, 106 S.W.3d at 414*; Roethel,* 80 S.W.3d at 281-82.

"The Austin Court of Appeals has stated the test as follows: the appellate court examines the record to determine whether the deficient notice 'resulted from

prosecutorial bad faith' or 'prevented the defendant from preparing for trial,' the latter inquiry including whether the defendant was surprised by the substance of the evidence and whether the lack of notice affected his ability to prepare cross-examination or mitigating evidence." *Id.* The deficient notice in Appellant's case prevented the defendant from preparing for trial because the defendant was surprised by the substance of the evidence and the lack of notice affected his ability to prepare cross-examination or mitigating evidence. "Thus, we will not conclude an error is harmful unless it had substantial and injurious effect or influence in determining the jury's verdict." *See Lara*, 513 S.W.3d at 142-143*; Hernandez,* 176 S.W.3d at 824-25; *Villarreal v. State*, 470 S.W.3d 168, 176 (Tex. App. 2015). ("The purpose of requiring the State to provide notice regarding its intent to use evidence of other crimes is to prevent the defense being surprised, …and to allow the 'defendant adequate time to prepare for the State's introduction of the extraneous offenses at trial …'").

While objecting to the supplemental notices the State filed on the morning of trial, defense counsel expressed how they relied on the previous notice of extraneous offenses filed by the state to prepare for trial:

> [Defense]: …So we do claim that if the State is allowed to bring in these other three additional people that it is a surprise to us and we would at this time ask the Court to grant more time for us to prepare, as we have prepared out defense around the notice that was given to use prior to this morning.

(4 R.R. at 16)

Defense counsel also expressed their surprise at the amended supplemental notices that the State filed and how it hindered how prepared they were for trial. The last notice that was filed by the state was two years old and contained extraneous offenses involving the complainant, M.M., along with extraneous offenses involving J.V., E.V., and N.L. (C.R. at 169-172). The supplemental offenses involved 13 new extraneous offenses—two which involved later disclosed extraneous offenses by M.M., the complainant, and four new witnesses with various extraneous offenses—E.B., A.B., V.A., and R.R. (C.R. at 310-316). E.B., A.B., and V.A. ultimately testified. This completely deviates from the previous notice and left defense at a loss over their case as expressed on the record. Besides M.M., the complainant, these numerous other extraneous offense witnesses bombarded the defense on the day of trial, when they had just prepared for the original four witnesses.

Defense counsel admitted that he was aware of the extraneous offenses that were in the State's open file. However, defense counsel had tried to email and text the State to solidify their witness list without much fruition and he was unaware that the State planned to introduce such evidence during Appellant's trial and objected accordingly. (4 R.R. at 10). As the case in *Lara* points out, "if reevaluation of trial strategy was required, appellant could have requested a continuance." *Lara*, 513 S.W.3d at 143. Defense counsel made such a request, one that was unopposed by the State,. (4 R.R. at 14-18). Appellant also pointed out that his trial strategy was dependent and relied on the State's original notice:

> [Defense]: We'd been relying on this notice that we received prior to yesterday in order to develop our strategy and develop the themes of our case, and have in good faith done so. The State seems to contend that because they had notes from these other people on their portal and in their discovery that that gives notice, but that doesn't tell us their intent to use those particular extraneous people to come and testify at the trial.

(4. R.R. at 4-5)

In addition, one of the witnesses identified in the new notice of extraneous offenses, V.A., testified to alleged bad acts committed by the Appellant that were not specifically referenced within the notes provided by the District Attorney's Office, or even outlined in the First or Second Supplemental Notices of Extraneous Offenses filed at the start of trial.

V.A. testified that she would go over to the Appellant's trailer to deliver food for the Appellant and his wife. (7 R.R. at 119). V.A. testified that when she would go over to deliver food, Arroyo would be on the couch lying down and would motion for her to come over by holding out his hand. (7 R.R. at 121). He would then pull her over and start reaching for her butt. (7 R.R. at 122). Appellant's hand would move in an up and down and circular motion. (7 R.R. at 122). When she would start to pull away, he would hold onto her tighter. (7 R.R. at 123). V.A. could not testify how many times this happened, but she said it happened a couple of times when she would go over there to deliver the Arroyos food. (7 R.R. at 124). She also testified that he did not touch her in any other way. (7 R.R. at 126). However, the notes from the District Attorney did not mention Appellant's hand moving in a circular and in an up and down motion on V.A.'s

butt. (10 R.R. Court's Ex. 1). Instead, the notes spoke of Appellant's touching V.A.'s thighs and at most mentioned that Appellant's hand moved towards V.A.'s buttocks. (10 R.R. Court's Ex. 1). As a result, the District Attorney's notes would not have provided Appellant's trial counsel with specific notice of the extraneous offense testimony offered by V.A. Finally, the information related to V.A. contained in the State's First and Second Notice of Intention to Use Evidence of Prior Convictions and Extraneous Offenses and Bad Actions did not mention these alleged prior bad acts. (C.R. at 310-317). The notices relevant to V.A. spoke of Appellant touching V.A's genitals, breasts, and thighs, none of which V.A. spoke of at trial. (C.R. at 311, 315). In fact, at trial V.A. testified that Appellant did not touch her in any other way. (7 R.R. at 126). As of result of the State's tardy notice, V.A. testified to prior extraneous bad act that wasn't even specifically notice and not specifically enumerated within the District Attorney's notes.

Finally, the State emphasized the extraneous offenses within their closing arguments. (8 R.R. at 18-19, 21, 55-57). Based on the record before the court, it can be concluded that Appellant was harmed by the lack of notice under 38.37. *See McDonald v. State,* 179 S.W.3d 571 (Tex. Crim. App. 2005); *Hernandez,* 176 S.W.3d at 825-26.

PRAYER

Appellant, Felipe Arroyo, prays that this Court reverses the lower court's judgment and remand this case for a new trial. Mr. Arroyo also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on Jessica Caird of the Harris County District Attorney's Office on April 25, 2025 to the email address on file with the Texas E-filing system.

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