No. 01-24-00900-CR

In the
Court of Appeals
for the
First District of Texas
at Houston

No. 1683526
In the 179th District Court
Harris County, Texas

JERRY L. DUNCAN
Appellant
V.
THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, Appellant does not request oral argument in this case.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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Hon. Ike Okorafor — Trial Judge (Voir Dire)

Hon. Ana Martinez — Trial Judge (Trial and Punishment)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant was charged by indictment with sexual assault of a child under the age of 17. (CR 50). Appellant pleaded not guilty to the offense and proceeded to trial. (RR3 61-62). The jury returned a guilty verdict and then sentenced Appellant to 20 years confinement in the Institutional Division of the Texas Department of Criminal Justice and assessed a fine of $10,000. (CR 379, 407, 424-26). Appellant filed a timely notice of appeal. (CR 422-23).

STATEMENT OF FACTS

Appellant was charged by indictment with sexual assault of a child under the age of 17 for events that transpired on May 27, 2020. (CR 50). The complainant in this case, T.L., was 16 years old when she started messaging with Appellant on the Snapchat app. (RR4 199-204; RR5 16; State's Exhibit 1). They decided to meet up in late May to hang out; T.L. admitted she was under the impression Appellant was going to give her money. (RR4 69, 206; RR5 47, 77-78). They decided to meet in the parking lot of Panera Bread in Tomball where T.L. worked. (RR4 208-211).

On the evening of May 27, 2020, Appellant approached T.L. in her vehicle. (RR4 213-14). She was initially confused when he got inside her car and then he explained he was her friend from Snapchat. (RR4 215-16). T.L. questioned his age as he had said he was 17 and Appellant did not look like his photograph from Snapchat. (RR4 217-218;

State's Exhibits 2 & 3). Appellant then told her he was 22, when he was actually 31. (RR4 62, 218).

T.L. testified that Appellant instructed her to drive around to the parking lot behind the Academy and told her to get the backset. (RR4 218-21). T.L. said she was too scared to not comply. (RR4 221). Appellant got into the backseat with T.L. and pulled down her pants. (RR4 222-23). He touched her vagina with his hand and mouth. (RR4 224; RR5 8-11). T.L. explained that Appellant put her on his lap and then put his penis inside her vagina. (RRV 12-17, 32-33). She described that he ejaculated and instructed her to clean up with a blanket in her car. (RRV 18-23). T.L. then drove Appellant to a nearby Buffalo Wild Wings to meet his friends. (RR5 23-32; State's Exhibit 37 & 38). She did not share the events of that night with anyone for about a month. (RR5 39-40).

In late June of 2020, T.L. confided in her family members about the incident. (RR3 72-93, 105-29, 133-41). A criminal investigation led to Appellant as the suspect in this case. (RR3 164-85, 188-97; RR5 14-21). Tomball Deputy Thomas testified he reached out to Appellant regarding the allegations and Appellant stated he was out of state at the time of the incident. (RR4 50-54).

The jury viewed video surveillance from Buffalo Wild Wings and Academy from the night of the incident, which contradicted Appellant's statement. (RR4 51-57; States's Exhibits 37 & 38). A buccal swab of Appellant's DNA was taken; DNA analysis of the blanket in T.L.'s car was consistent with a single source DNA profile of a male

individual. (RR8 35-38, 39-42; State's Exhibits 44, 44A, and 54). The DNA profile on the blanket was approximately 47 quadrillion times more likely that it originated from Appellant than an unknown individual; providing strong support that he was the contributor of the DNA on the blanket. (RR4 47, 140-57).

SUMMARY OF THE ARGUMENT

First issue presented on appeal: The trial court abused its discretion by limiting Appellant's voir dire questioning regarding extraneous offenses, causing Appellant to suffer harm.

Second issue presented on appeal: The trial court abused its discretion in admitting evidence of an extraneous offense during punishment, causing Appellant to suffer harm.

FIRST ISSUE ON APPEAL

THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING A VOIR DIRE QUESTION POSED BY DEFENSE COUNSEL REGARDING AN EXTRANEOUS OFFENSE.

Questioning of the Venire

Prior to voir dire, defense counsel inquired about questioning the jury about extraneous offenses; he was concerned the State would introduce an extraneous sexual assault. (RR2 16-17). He wanted to voir dire the potential jurors about the possibility of an extraneous offense being presented, and if they could follow the law with respect to it, so he would know which jurors could be fair and impartial in the case. (RR2 16-19). After some discussion, the judge denied the request. (RR2 20).

Later in voir dire, the judge re-evaluated his decision:

> I will change my ruling and allow the defendant to go into extraneous offenses in his voir dire. This ruling is based on the fact that the State has filed the notice that they intend to use extraneous offenses in their case in chief and I do believe, based on my voir dire and the State's voir dire, that this jury panel may have responses to the defense's planned voir dire about extraneous offenses. So, I will allow you to get into that. (RR2 157).

Based on this ruling, the defense attorney asked the jury: "If you were to hear evidence of a previous sexual assault, would you automatically use that as evidence of guilt on the sexual assault case in this particular circumstance, despite what the law says?" (RR2 206-208). The State objected and the judge stated, "This was what I was scared of is that it gets too close into the facts we're here for today, right. I'm not going to allow the jury panel to answer this exact question. If you want, I could reword it and just tell them about extraneous offenses in my own wording. But I just think that it's going to cause a snowball. (RR2 208).

The judge instructed the defense attorney he was not allowed to ask the question. (RR2 211). The judge decided to ask a more general extraneous question, because he believed the question as worded by defense counsel would bust the panel. (RR2 211-12). The judge gave a lengthy explanation about different kinds of extraneous offenses. (RR2 216-28). At one point, when many potential jurors shared they had issues with the standard for evaluating extraneous evidence and would hold it against Appellant, the judge stated to them, "Okay. Before I go on -- and this is why I want to step in. This is my fear. It's all abstract." (RR2 222-23).

Law governing limitations in voir dire

When a defendant challenges the trial court's limitation on the voir dire process, the reviewing court must analyze the claim for abuse of discretion, the focus of which is whether the defendant proffered a proper question concerning a proper area of inquiry. *Caldwell v. State*, 818 S.W.2d 790, 793 (Tex. Crim. App. 1991); *Bolden v. State*, 73 S.W.3d 428, 430 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). A proper question is one that seeks to discover a venire member's views on an issue applicable to the case. *McCarter v. State*, 837 S.W.2d 117, 121 (Tex. Crim. App. 1992); *Stringfellow v. State,* 859 S.W.2d 451, 452 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

In this case, the extraneous sexual assault was admitted at punishment, under Article 37.07. *See* Tex. Code Crim. Proc. art. 37.07, § 3(a)(1) (evidence may be offered by the State and the defendant as to any matter the court deems relevant to sentencing, including other evidence of an extraneous crime or bad act). The State emphasized this offense at punishment to urge the jury to sentence Appellant to the maximum sentence of 20 years, which they did. (RR7 9-10, 22-27, 30).

Bias against the punishment philosophy of jurors is a proper area of inquiry in voir dire for both challenges for cause and peremptory challenges. *Mathis v. State*, 576 S.W.2d 835, 836-37 (Tex. Crim. App. 1979); *Rogers v. State*, 792 S.W.2d 841, 842 (Tex. App.—Houston [1st Dist.] 1990, no pet). Error in the denial of a proper question which prevents the intelligent exercise of one's peremptory challenges constitutes an abuse of discretion. *Stringfellow*, 859 S.W.2d at 452.

The limitation on voir dire was harmful error.

A defense attorney's question to the venire regarding the jury's ability to follow the pertinent law on punishment issues that arise from Article 37.07 is proper. *Jones v. State*, 223 S.W.3d 379, 382 (Tex. Crim. App. 2007). It is an abuse of discretion for the trial judge to restrict defense counsel's question in this regard. *Loredo v. State*, 59 S.W.3d 289, 291-92 (Tex. App.—Corpus Christi – Edinburg 2001, no pet.); *Stringfellow*, 859 S.W.2d at 453-54.

Appellant did not have the opportunity to initiate any questioning that might have exposed so much as a negative feeling, much less a challengeable bias, possessed by a potential juror against a prior sex offender. Because of Article 37.07, the prosecutor was allowed to present evidence of an extraneous sexual offense that was attributed to Appellant. But his counsel was not allowed to ask whether knowing Appellant had an extraneous offense would affect the potential jurors' ability to be fair and impartial in rendering their verdict. This was error. *See Jones,* 223 S.W.3d at 382; *Loredo*, 59 S.W.3d at 291-92 (trial court improperly limited the scope of defense counsel's questions regarding Article 37.07 in voir dire); *Stringfellow*, 859 S.W.2d at 453-54 (whether the venire can obey the law with regard to parole law as set forth in Article 37.07 was a proper issue, and thus limiting questioning on this punishment topic was an abuse of discretion).

Appellant was harmed by this limitation. Under Texas Rule of Appellate Procedure 44.2(a), a court of appeals must reverse a judgment of conviction or

punishment unless it determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. P. 44.2(a); *Jones v. State*, 264 S.W.3d 26, 28 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (because the trial court abused its discretion by disallowing defense counsel's proper question, harm is reviewed under Rule 44.2(a)).

This Court must determine whether it can be said that, beyond a reasonable doubt, the trial court's refusal to allow defense counsel to question the venire did not contribute to the punishment in this case. In *Rich v. State*, 160 S.W.3d 575, 577–78 (Tex. Crim. App. 2005), the Court of Criminal Appeals set forth general factors that are "relevant considerations in determining the harm from being denied a proper question to the venire:" (1) any testimony or physical evidence admitted for the jury's consideration; (2) the nature of the evidence supporting the verdict; (3) the character of the alleged error and how it might be considered in connection with other evidence in the case; (4) the jury instructions; (5) the State's theory and any defensive theories; (6) closing arguments; (7) voir dire; and (8) whether the State emphasized the error.

Although the nature of the evidence supporting the verdict was strong, the complained of question was relevant to extraneous evidence presented at punishment. The State's evidence supporting the extraneous sexual assault was weak (see appellant's second issue on appeal). There was no identification by the victim and no DNA or other corroborating evidence presented. The State's theory was that Appellant was a sexual predator who also physically assaulted women. His attorney's voir dire question

related to the one extraneous offense of a sexual nature. The State highlighted this offense in closing argument and urged the jury to give Appellant the maximum sentence, as this demonstrated a pattern of behavior.

This type of error is rarely harmless. *Loredo*, 59 S.W.3d at 293; *Rios v. State*, 4 S.W.3d 400, 404 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (improper restriction on voir dire defies analysis; the only way to determine harm is to ask the jurors the forbidden voir dire question). The judgment should be reversed and the case remanded for a new trial. *Loredo*, 59 S.W.3d at 293-94; *McGee v. State*, 35 S.W.3d 294, 298 (Tex. App.—Texarkana 2001, no pet.) (reversing defendant's conviction because he was prevented from asking relevant questions on voir dire concerning prior convictions).

SECOND ISSUE ON APPEAL

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF AN EXTRANEOUS OFFENSE DURING PUNISHMENT, CAUSING APPELLANT TO SUFFER HARM.

Punishment evidence

The State presented three witnesses during the punishment phase. (RR6 28-78). One was a former girlfriend of Appellant's who testified he physically assaulted her, which led to her ending the relationship. (RR6 29-33). The other two witnesses were a police officer and a victim of sexual assault that the State attributed to Appellant. Their testimony will be outlined in the argument below. (RR6 41-49, 51-73).

The defense also called several witnesses, including Appellant's mother, brother and girlfriend. (RR6 79-84, 86-95, 117-27). Appellant's girlfriend testified that she had

called the police previously when she and Appellant were arguing; she admitted she was untruthful when she initially told police he physically assaulted her. (RR6 86-95). She stated that Appellant had never been violent or sexually aggressive with her. (RR6 87).

Appellant told the jury he took responsibility for the offense and was remorseful. (RR6 146-47, 161-62). He indicated he had no prior convictions and wanted the jury to consider probation. (RR6 147, 153-54). In closing argument, his attorney asked the jury to sentence him to community supervision. (RR7 17, 19-21). The State relied heavily on the extraneous sexual assault and urged the jury to sentence him to the maximum sentence of 20 years. (RR7 9-10, 22-27).

Law governing admission of extraneous offenses

This Court reviews a decision to admit extraneous evidence for an abuse of discretion. *Perkins v. State*, 664 S.W.3d 209, 217 (Tex. Crim. App. 2022). Generally, evidence of extraneous offenses may not be used against the accused in a criminal trial. *Daggett v. State*, 187 S.W.3d 444, 450 (Tex. Crim App. 2005). While such evidence will usually have some probative value, it forces the defendant to defend himself against uncharged crimes as well as the charged offense, and encourages the jury to focus on bad character rather than the proof of a specific crime. *Id*; *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972) (noting that evidence of extraneous offenses is inherently prejudicial, tends to confuse the issues in the case, and forces the accused to defend himself against other charges).

However, the general prohibition against the admission of extraneous offenses to prove a defendant's character or propensity to commit the crime carries with it numerous exceptions. *Daggett v. State*, 187 S.W.3d at 451. During the punishment phase, "evidence may be offered by the State and the defendant as to any matter the court deems relevant to sentencing," including the defendant's prior criminal record and any other evidence of an extraneous crime or bad act. Tex. Code Crim. Proc. art. 37.07, § 3(a)(1). Relevant evidence is evidence tending to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401.

Rule 401 is helpful in determining what evidence should be admissible under Article 37.07, § 3(a), but the definition is not a perfect fit in the punishment phase. *Sunbury v. State*, 88 S.W.3d 229, 234 (Tex. Crim. App. 2002) (*citing Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999). Relevance is a question of what is helpful to the jury to determine the appropriate sentence for the particular defendant. *Rogers*, 991 S.W.2d at 265 (holding that prior convictions are relevant to the determination of the appropriate sentence).

And evidence that is relevant may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Tex. R. Evid. 403. "Unfair prejudice" refers to an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Ex parte Lane*, 303 S.W.3d 702,

715 (Tex. Crim. App. 2009) (quoting *Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993).

Admission of the extraneous sexual assault was harmful error.

During punishment, the State explained they intended to present evidence of an extraneous offense, a 2017 sexual assault where Appellant was the suspect. (RR6 6-11). With regard to this incident, the State wanted to offer the testimony of HPD Detective Johnson and the victim D.A. (RR6 8-10). The prosecutor argued that the circumstances of the extraneous offense were so similar to the charged offense, that it was admissible to show identity. (RR6 20). Tex. R. Evid. 404(b).

Appellant's counsel lodged objections to the evidence under Article 37.07, Rule 404(b) and Rule 403. (RR6 6, 20-22). He further objected that the testimony of D.A. should not be allowed as the State could not demonstrate to the trial court that the offense was attributable to Appellant. (RR6 21-22). The trial court allowed the evidence to be admitted over objections by defense counsel. (RR6 22-23). This was error.

Detective Johnson testified that in 2021 he was assigned a sexual assault case that had occurred in December of 2017. (RR6 43-44). He reviewed the offense report and contacted the victim, D.A. (RR6 44-47). Johnson testified he developed Appellant as a suspect after viewing a national database. (RR6 47). He created a photo array that included Appellant's photograph. (RR6 47). D.A. was unable to make an identification from the photo array. (RR6 47-48).

D.A. testified that she was at a nightclub in Houston on December 3, 2017, and met a man named Jerry. (RR6 52-56). They danced together and then left together with the agreement that they would have sex. (RR6 56-58). They got into the car together and got into the backseat to kiss. (RR6 60). D.A. changed her mind about having sex. (RR6 61). She testified he took off her clothes anyway and forced himself on her, putting his penis inside her vagina. (RR6 61-63).

The process of proffering evidence to prove an extraneous offense is referred to as a threshold inquiry. *Smith v. State*, 227 S.W.3d 753, 759–60 (Tex. Crim. App. 2007); *Trejo v. State*, 683 S.W.3d 815, 820 (Tex. App.—San Antonio 2023, no pet.). Prior to admitting extraneous evidence, a trial judge should find that it is relevant to punishment and that the prosecution has a good faith basis for its belief that it can prove the crimes or bad acts. *Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996); *Arzaga v. State*, 86 S.W.3d 767, 781 (Tex. App.—El Paso 2002, no pet.). That is, there must be evidence from which a rational jury could conclude the extraneous offense or bad act is attributable to the defendant beyond a reasonable doubt. *Palomo v. State*, 352 S.W.3d 87, 92 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (explaining that the trial court makes the decision on the threshold issue of admissibility by considering whether under the State's proffer, a rational jury could make the finding beyond a reasonable doubt). The trial court was aware of several factors that indicated the State would not be able to do so; thus, it failed in this threshold determination under Article 37.07.

First, in their discussions, the State made it clear to the judge the only link they had tying Appellant to the extraneous offense was DNA evidence. (RR6 9-10). However, the State did not possess or present any DNA evidence with regard to the extraneous offense. (RR6 10). Detective Johnson's testimony about developing Appellant as a suspect in a national database was thus misleading, as there was no follow-up testimony regarding DNA testing or identification. (RR6 47).

Second, the victim in the extraneous case was unable to identify Appellant in a photo array. (RR6 9). She told the jury that she met "Jerry" at the nightclub, but then admitted on cross-examination that when she reported the crime, she didn't report a name to the authorities, indicating she perhaps learned the name later. (RR6 71-73).

Third, the only identification D.A. gave of her assailant was that he was a black man, with short dreads (locs), and was only slightly taller than her; D.A. testified she was 5'4." (RR6 56-57). Appellant is 6'2' which is another indication the State couldn't prove identify of this extraneous offense. (RR7 13-14).

Based on this record, the trial judge abused its discretion by admitting this extraneous offense under Article 37.07. *Smith*, 227 S.W.3d at 759–60; *Mitchell*, 931 S.W.2d at 953. This ruling is outside the zone of reasonable disagreement. *Agbogwe v. State*, 414 S.W.3d 820, 830–31 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

The trial judge similarly erred by admitting the testimony under Rule 404(b) and Rule 403. It is a fundamental tenet of our criminal justice system that an accused may be tried only for the offense for which he is charged and not for being a criminal

generally. *Owens v. State*, 827 S.W.2d 911, 914 (Tex. Crim. App. 1992); Tex. R. App. P. 404(b) incorporates this doctrine by prohibiting the admission of uncharged misconduct evidence that shows nothing more than the accused's general propensity to commit criminal acts. *Id.* Specifically, Rule 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident…

Therefore, in order for evidence of other crimes, wrongs, or acts to be admissible, it must have relevance apart from its tendency to prove character conformity. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990); *Reyes v. State*, 69 S.W.3d 725, 735 (Tex.App.—Corpus Christi – Edinburg 2002, pet. ref'd).

The prosecutor argued that this extraneous offense was admissible under the theory of identity, in that the circumstances of the offenses were so similar, that it could be used to show the modus operandi or identity. (RR6 20). However, this is inconsistent with the way courts treat this type of evidence. The law is clear that raising the issue of identity does not automatically render extraneous offense evidence admissible. *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996).

The traditional rule regarding the admission of such evidence for the purpose of showing identity is that the extraneous offense must be so similar to the offense charged that the accused's acts are marked as his handiwork, that is, his signature must be apparent from a comparison of circumstances in both cases. *Bishop v. State*, 869 S.W.2d

342, 346 (Tex. Crim. App. 1993). The degree of similarity to show identity is higher than for other theories, such as intent or rebutting a defensive theory. *Dennis v. State*, 178 S.W.3d 172, 179 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (degree of similarity required to rebut fabrication defense is not as high as what is required to show identity); *Plante v. State*, 692 S.W.2d 487, 491-93 (Tex. Crim. App. 1985) (evidence to show intent under 404(b) is less than evidence needed to show identity).

The extraneous offense was not sufficiently similar to the charged offense. The charged offense involved Appellant contacting a child on social media, pretending to be much younger, communicating electronically, and then meeting up for the promise of money. T.L. identified Appellant. The extraneous offense involved two adults who met at a nightclub and then decided to have sex, and then D.A. changed her mind. She did not identify Appellant. The only similarity is that the sexual conduct occurred in a car. This is not enough to be admissible under Rule 404(b). *See Bishop,* 869 S.W.2d at 346 (acts testified to by ex-wife were not so unusual and distinctive and so nearly identical to the charged offense as to amount to the signature of the defendant); *Avila v. State*, 18 S.W.3d 736, 741 (Tex. App.—San Antonio 2000, no pet.) (although the two offenses share some similarities, we find those similarities are not substantial enough to warrant the admissibility of the extraneous conduct testimony).

In addition to similarity, remoteness is another factor to consider when analyzing identity under Rule 404(b). *Reyes v. State*, 69 S.W.3d at 740. The extraneous offense occurred in December of 2017, and the charged offense occurred in May of 2020, a

period of about 2 years and 5 months (or 29 months). As a general rule, the greater the time period between the charged offense and the extraneous offense, the greater likelihood of error in admitting evidence of the extraneous offense. *See Reyes v. State*, 69 S.W.3d at 740 (reversed, 7 months); *Collazo v. State*, 623 S.W.2d 657, 648 (Tex. Crim. App. 1984) (reversed, one year); *James v. State*, 554 S.W.2d 680, 683 (Tex. Crim. App. 1977) (reversed, 33 months).

The lack of similarity and remoteness of the extraneous offense heightens the conclusion that the danger of unfair prejudice substantially outweighed the probative value of the evidence. Tex. R. Evid. 403; *Reyes v. State*, 69 S.W.3d at 741.

Admission of this extraneous offense harmed Appellant because it resulted in an increased sentence. Tex. R. App. P. 44.2(b); *Webb v. State*, 36 S.W.3d 164, 181 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (when extraneous evidence is erroneously admitted, it is reviewed for non-constitutional error, which is reversible if it affected the appellant's substantial rights). A substantial right is violated when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). And when an appellate court is unsure whether the error affected the outcome, the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict. *Webb*, 36 S.W.3d at 182.

The extraneous offense was relied upon heavily by the State. Two of their three punishment witnesses were called to provide evidence about it and the State

emphasized it in their closing argument. (RR6 41-50, 51-68; RR7 9-10, 22-27). It was the only extraneous evidence that was sexual in nature. And Appellant was probation eligible, not having any prior convictions. (RR6 147, 153-54). The State asked for the maximum sentence of 20 years and received it. (RR7 27, 30). Thus, appellant can show he was harmed by the erroneous admission of this evidence. *See Ex Parte Lane*, 303 S.W.3d at 719-20 (appellant was harmed by admission of extraneous offense at punishment when she received the maximum sentence); *Ex Parte Rogers*, 369 S.W.3d 858, 864-65 (Tex. Crim. App. 2012) (in context of ineffective assistance of counsel, the admission of sexual assault extraneous evidence in punishment phase was prejudicial to applicant where he received the high end of the available punishment).

The sentence should be vacated so that the trial court may conduct a new punishment proceeding.

CONCLUSION

It is respectfully submitted that there is reversible error to justify appellant's conviction and sentence be overturned.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on April 1, 2025, has 4,455 words based upon a word count under MS Word.

/S/ JESSICA AKINS
Jessica Akins

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument on April 1, 2025 to counsel for the State of Texas via electronic mail at:

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/S/ JESSICA AKINS
Jessica Akins

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