NO. 14-24-00670-CR

IN THE COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

BASKER SELWYN,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

ON APPEAL FROM THE COUNTY COURT AT LAW
NUMBER ONE OF FORT BEND COUNTY, TEXAS
CAUSE NO. 22-CCR-228862

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), the following is a list of all parties to the trial court's judgment and respective trial and appellate counsel:

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Appellant
Basker Selwyn

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STATEMENT OF THE CASE

Appellant was charged by information with indecent assault in Cause No. 22-CCR-228862. (CR 8).[1] On August 7, 2024, following Appellant's plea of not guilty, the case proceeded to trial before a jury. Appellant was found guilty of indecent assault as charged in the information. (CR 54). On August 7, 2024, the court assessed punishment at 365 days in the Fort Bend Couty Jail, probated for 24 months, and a $4,000.00 fine. (CR 59-65).

On August 29, 2024, Appellant timely gave written notice of appeal. (CR 71). The trial court's certification of defendant's right of appeal ensures Appellant has the legal right to appeal. (CR 66). Tex R. App. P. 25.2(a).

Appellant, who is represented by retained counsel, timely files his brief on the merits by the extended deadline of December 23, 2024.

[1] "CR" will be used to reference the Clerk's record, and "RR" will be used to reference the Reporter's Record.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Tex. R. App. P. 39.7, Appellant requests oral argument in this case. This case presents significant issues concerning the sufficiency of the evidence and the admissibility of 30-year-old extraneous acts. Oral argument would significantly assist this Court in the decision-making process.

ISSUES PRESENTED

ISSUE NUMBER ONE

The Evidence Was Insufficient For A Rational Jury To Find Beyond A Reasonable Doubt That Appellant Was Guilty Of Indecent Assault As Charged In The Information.

ISSUE NUMBER TWO

The Trial Court Committed Reversible Error In Admitting Evidence Of Unreported Thirty-Year-Old And Twenty-Five-Year-Old Extraneous Acts Allegedly Committed By Appellant Against The Complainant In Violation Of Rule 404(b) Of The Texas Rules of Evidence.

ISSUE NUMBER THREE

The Trial Court Committed Reversible Error In Admitting Evidence Of Unreported Thirty-Year-Old And Twenty-Five-Year-Old Extraneous Acts Allegedly Committed By Appellant Against The Complainant In Violation Of Tex. Code Crim. Proc. Art. 38.371.

ISSUE NUMBER FOUR

Appellant Was Denied The Effective Assistance Of Counsel At The Guilt-Innocence Stage When Trial Counsel Failed To Object To The Limiting Instructions In The Jury Charge Authorizing Jurors To Consider Evidence Of Appellant's Extraneous Acts And Offenses Committed For Purposes Neither Offered By the State Nor Raised By the Evidence.

STATEMENT OF FACTS

The complainant ("N.D"), lived in Dallas, Texas with her husband of 26 years, Prabahar, and their three adult and teenage daughters. (3RR 14-15). N.D. worked for a pharmaceutical company as the Director of Clinical Data Management. (3RR 15).

N.D.'s older sister Ajanta is married to the Appellant, Basker Selwyn. (3RR 16). Appellant and Ajanta live in Missouri City, Fort Bend County, Texas. (3RR 16-17). N.D. had known Appellant for over 30 years. (3RR 17). N.D. described not being comfortable around Appellant because of the things he had done to her. (3RR 18).

On November 25, 2020, N.D. and her family travelled from Dallas to Houston to celebrate Thanksgiving with Ajenta's family, and to meet her niece's boyfriend. (3RR 18-19). N.D. and her family arrived at Ajanta's home just before midnight. (3RR 19). After arriving they spent time visiting, and eventually went to bed in the upstairs bedroom. (3RR 19-20). N.D. changed into her pajamas, turned the lights off, and went to sleep. (3RR 24). Her three daughters also stayed upstairs but in a different bedroom. (3RR 23).

After falling asleep, N.D. was woken up by someone touching her breasts. (3RR 24). She testified that when she woke up, Appellant was standing next to her with his hand touching her breasts over her clothing. (3RR 24-25). After saying something, he took his hands off and left. (3RR 24).

N.D. was startled and yelled at Appellant, which woke her husband up. (3RR 25). Her husband got up and walked out of the bedroom behind Appellant. (3RR 26). He then returned to the bedroom and comforted her. (3RR 26).

N.D. did not confront Appellant and did not tell anybody the next day. (3RR 27-28). Instead, she stayed for the Thanksgiving celebration and returned home the following day. (3RR 28-29). N.D. testified that Appellant later apologized to her. (3RR 31). N.D. made a report to the police approximately six months later. (3RR 32).

N.D. also alleged a prior incident occurred in 1989 or 1990 when she was living in India. (3RR 34). She was taking a nap and awoke with "his" hands touching her breast over her clothes. (3RR 35). N.D. neither confronted Appellant nor did she report the incident to the police in India. (3RR 37). N.D. testified that Appellant spoke to her several days after the incident and told her not to tell anybody. (3RR 37).

N.D. recounted another incident in 1998 when she visited her sister and Appellant at their home in New York. (3RR 37). On that occasion, she slept in that morning after her husband left for his commute to work. (3RR 38). N.D. reported that Appellant came into the room and tried to grab her, so she got off the bed and ran downstairs. (3RR 38). N.D. did not give consent to being touched in either of the two incidents she reported. (3RR 41).

N.D.'s husband, Prabahar Devaraj, had known Appellant for 26 years. (3RR 54). Devaraj had a cordial relationship with Appellant, as was typical of that with a family member. (3RR 55-56). On November 29, 2020, Devaraj drove with N.D. and their children from Dallas to Missouri City for the Thanksgiving holiday. (3RR 56). Their plan was to stay for the weekend and return on Sunday. (3RR 58).

They arrived at the house around 11:00 in the evening and visited with the family. (3RR 57). Shortly thereafter, Devaraj went upstairs to go to bed. (3RR 57-58). A short time later, N.D. came to the room and went to bed. (3RR 58). Devaraj was sleeping on the side of the bed farthest away from the bedroom door. (3RR 60).

Around 3:00 in the morning Devaraj woke up when he heard his wife screaming. (3RR 62). Devaraj sat up on the bed, heard N.D. say, "Get out idiot," and saw Appellant walking toward the door. (3RR 62). Devaraj got out of bed wanting to chase Appellant, but consoled N.D. when she told him what had happened. (3RR 64). N.D. was shaking and shivering, and screamed that Appellant touched her breast. (3RR 65).

The next day Devaraj avoided Appellant and suggested to N.D. that they leave. (3RR 68). Instead, they remained for the Thanksgiving holiday. (3RR 68). Devaraj did not discuss the incident with anyone and avoided any interaction with Appellant. (3RR 68). Devaraj testified that Appellant called him in December and apologized for what occurred the night before Thanksgiving. (3RR 70-71).

In May 2021, Missouri City P. D. Sgt. Audrey Rodriguez was assigned to review a case of indecent assault involving Appellant. (3RR 101). As part of the investigation, she contacted N.D. and her husband, Prabahar Devaraj. (3RR 105-106). Furthermore, as part of the investigation, Rodriguez spoke to Appellant and to his wife. (3RR 107). Appellant denied the allegation of indecent assault. (3RR 108). At the conclusion of the investigation, Rodriguez believed she had probable cause that an offense was committed. (3RR 112).

After the State rested, Appellant's motion for directed verdict was denied. (3RR 119).

The jury returned a guilty verdict on Indecent Assault. (CR 54). The court assessed punishment at 365 days in custody probated for 24 months. (CR 59).

SUMMARY OF THE ARGUMENT

Following Appellant's conviction and sentence for Indecent Assault, he raises four issues on appeal.

In Issue Number One, Appellant complains the evidence was legally insufficient to support the guilty verdict for Indecent Assault under the theory argued by the State; specifically, that the alleged act was committed with the intent to arouse or gratify the sexual desire of Appellant. The State presented no evidence regarding this element, which only allowed the jury to speculate on factually unsupported inferences. Viewed in the light most favorable to the verdict, no reasonable jury could find the essential elements of indecent assault beyond a reasonable doubt.

In Issues Number Two and Three, Appellant complains the trial court committed reversible error in admitting evidence of two extraneous acts allegedly committed by Appellant against the complainant. One was allegedly committed over thirty (30) years prior to trial and the other twenty-five (25) years prior to trial. Neither act was ever reported to the authorities, and neither was corroborated by any witness nor evidence. Neither of these extraneous acts met any of the Rule 404(b) exceptions for which the jury was instructed by the trial court to consider them. Additionally, these decades-old extraneous acts were inadmissible pursuant to Art. 38.371, *infra*., as they did not assist the jury in contextualizing the relationship

between Appellant and the complainant. Given the State's emphasis on them, their erroneous admission affected Appellant's substantial rights.

Finally, in Issue Number Four, Appellant complains he was denied effective assistance of counsel at the guilt-innocence stage because trial counsel failed to object to language in the charge authorizing the jury to consider the extraneous acts for purposes neither offered by the State nor raised by the evidence. The failure to object to language in the charge, that did not limit the jury's consideration of the alleged extraneous acts to the purposes for which they were offered or admissible, was not a reasonable and sound strategy and, thus, was deficient. This error undermined confidence in this trial's outcome.

ISSUE NUMBER ONE (Restated)

> The Evidence Was Insufficient For A Rational Jury To Find Beyond A Reasonable Doubt That Appellant Was Guilty Of Indecent Assault As Charged In The Information.

A. Factual Background

Appellant adopts and incorporates the Statement of Facts set forth at pp. 4-7.

B. Standard of Review

When determining whether there is sufficient evidence to support a criminal conviction, a reviewing court considers the combined and cumulative force of all admitted evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). In a sufficiency inquiry, direct evidence and circumstantial evidence are equally probative. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, the Court shall compare the elements of the crime as defined by a hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014).

The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses, and juries may draw multiple reasonable inferences from the

facts so long as each is supported by the evidence presented at trial. *Jackson*, 443 U.S. at 319; *see Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). The jury is not, however, allowed to draw conclusions based on "mere speculation or unsupported inferences." *See Edward v. State*, 635 S.W.3d 649, 655 (Tex. Crim. App. 2021). Unlike a reasonable inference, speculation is insufficiently based on the evidence to support a finding beyond a reasonable doubt. *See Hooper*, 214 S.W.3d at 16.

C. Viewed In The Light Most Favorable To The Verdict The State's Evidence Was Legally Insufficient.

Appellant was charged in the information with indecent assault. (CR 8). The information specifically charged that Appellant "… with the intent to arouse or gratify the sexual desire of the Defendant touch the breast of N.D. … and the Defendant acted without [N.D.'s] consent." A person commits the offence of indecent assault if, without the other person's consent, *and with the intent to arouse or gratify the sexual desire of any person*, the person touches the anus, breast, or any part of the genitals of another person. Texas Penal Code § 22.012(a)(1). (emphasis added).[2]

[2] Appellant submits that this element is the gravamen of the offense of indecent assault.

An appellate court is to apply a "rigorous" *Jackson v. Virginia* analysis of the sufficiency of evidence. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); Under the *Brooks*/*Jackson* standard:

> Legal sufficiency of the evidence in a criminal proceeding may be divided into two zones: evidence of such sufficient strength, character, and credibility to engender certainty beyond a reasonable doubt in the reasonable fact finder's mind and evidence that lacks that strength. Appellate review of a jury's verdict of criminal conviction focuses solely on that "either-or" character of evidentiary sufficiency because a defendant is entitled to an acquittal if the evidence lacks the strength.

Brooks, 323 S.W.3d at 918 (Cochran J., concurring). Legal sufficiency is judged not by the quantity of evidence, but by the quality of the evidence and the level of certainty it engenders in the factfinder's mind. *Id*. at 917 (Cochran, J., concurring).

If, based on all the evidence, a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt, due process requires that the conviction be reversed. *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App. 1993). Whether the "necessary inferences [drawn by a jury] are reasonable [is] based upon the combined and cumulative force of all the evidence when viewed in a light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d at 17. Thus, speculation and factually unsupported inferences are not allowed. *Id.* at 15. Speculation, or conjecture, is mere theorizing or guessing about the possible meaning of facts and evidence presented. *Id*. at 16. If circumstantial evidence provides no more than a

suspicion, a jury is not permitted to reach a speculative conclusion. *Louis v. State*, 159 S.W.3d 236, 246 (Tex. App.–Beaumont 2005, pet. ref'd).

Appellant asserts that the evidence is legally insufficient to support the jury's determination that the State's evidence, and particularly the testimony of the complainant, failed to prove beyond a reasonable doubt that the alleged touching was done with the intent to arouse or gratify the sexual desire of any person. The State did not even attempt to have the complainant opine about the reason for the alleged touching. The investigating officer could not even speculate about whether there was proof of the element of intent to arouse or gratify sexual desire. (3RR111-112). Instead, the officer could only give a general opinion that there was probable cause for the charge. (3RR 112-113).

The complainant testified that while she was sleeping, her breast was touched over her clothing. No additional testimony or evidence was provided about the touching or the duration of the touching or any other act occurring during the alleged touching.[3]

It is the function of appellate courts to ensure that no one is convicted of a crime, except upon proof of the elements of the offense beyond a reasonable doubt.

[3] It cannot be overlooked that the complainant's 6-month delay in reporting the incident to law enforcement prevented any type of scene investigation or sexual assault investigation that could have provided independent evidence to either corroborate the allegation or to eliminate Appellant as a perpetrator. (3RR 77, 90).

Skelton v. State, 795 S.W.2d 162, 167 (Tex. Crim. App. 1989). Due process requires no less. A reviewing court must act as a due process safeguard. *See Gollihar v. State*, 46 S.W.3d 243, 245-46 (Tex. Crim. App. 2001). "In the final analysis, as the Supreme Court has put it, criminal substantive due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *United States v. Michelena-Orovio*, 702 F.2d 496, 506 (5th Cir. 1983) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

Viewing the evidence in the light most favorable to the verdict, a rational trier of fact could not have found the essential elements of indecent assault beyond a reasonable doubt. *See Jackson*, 443 U.S. at 307. The legal sufficiency of the evidence is based on due process. *Gollihar*, 46 S.W.3d at 245. Here, given all the evidence, the verdict is unsupported by proof of all the essential elements of the offense charged. The Fourteenth Amendment to the United States Constitution requires that this Court reverse and order an acquittal. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Accordingly, this Honorable Court should reverse the conviction for indecent assault and render a judgment of acquittal. *See Burks v. United States*, 437 U.S. 1, 17 (1978).

ISSUE NUMBER TWO (Restated)

The Trial Court Committed Reversible Error In Admitting Evidence Of Unreported Thirty-Year-Old and Twenty-Five-Year-Old Extraneous Acts Allegedly Committed by Appellant Against The Complainant In Violation Of Rule 404(b) Of The Texas Rules of Evidence.

ISSUE NUMBER THREE (Restated)

The Trial Court Committed Reversible Error In Admitting Evidence Of Unreported Thirty-Year-Old And Twenty-Five-Year-Old Extraneous Acts Allegedly Committed by Appellant Against The Complainant In Violation Of Tex. Code Crim. Proc. Art 38.371.

A. Factual Background

During its case-in-chief, the State elicited evidence of two extraneous offenses/acts allegedly committed by Appellant. The first extraneous act involved Appellant allegedly touching the breast of N.D. some 30 years prior to the instant allegation. (3RR 34-37). The second extraneous act involved Appellant allegedly trying to grab N.D. while she was sleeping roughly 25 years prior to the instant allegation. (3RR 37-41).[4]

Appellant argued that the admission of this extraneous misconduct violated Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Art. 38.371. (2RR 6-9). The court ruled that the two extraneous offenses/acts would be admissible. (2RR 10-11).

[4] Neither alleged act was ever reported to authorities nor subject to any investigation. Furthermore, no corroborating evidence or witness existed. (3RR 37).

Appellant re-urged his objection prior to opening statement, and when the State offered the evidence in its case-in-chief. (3RR 4, 33).

B. Standard of Review

Rule 404(b) codifies the fundamental tenet of our criminal justice system that the accused must only be tried for the offense with which he is charged and not for being a criminal generally. *Owens v. State,* 827 S.W.2d 911, 914 (Tex. Crim. App. 1992). "Because extraneous offense evidence carries with it the inherent risk that a defendant may be convicted because of his propensity for committing crimes generally-i.e., his bad character - rather than for the commission of the charged offense, courts have been reluctant to allow evidence of an individual's prior bad acts or extraneous offenses." *Owens,* 827 S.W.2d at 914. Aside from the inherent prejudice that extraneous offenses carry and the fact that they may tend to confuse the issues, such evidence carries with it the additional danger that the accused may be called upon to defend himself against crimes not alleged in the indictment. *Turner v. State,* 754 S.W.2d 668, 672 (Tex. Crim. App. 1988); *See Johnston v. State,* 145 S.W.3d 215, 219 (Tex. Crim. App. 2004) ("[T]he law has, for centuries, rejected such evidence because it injects 'dangerous baggage of prejudice, distraction from the issues, time consumption, and hazard of surprise.'").

The fact that the State offers evidence for a purpose other than character conformity, or any of the other purposes in Rule 404(b), does not, in itself, make the

evidence admissible. *Sandoval v. State,* 409 S.W.3d 259, 298 (Tex. App. – Austin 2013, no pet.). As the proponent of the evidence, the burden is on the State to show that the extraneous offense evidence is admissible. *Turner,* 754 S.W.2d at 673. Ultimately, the trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010).

C. Argument and Authorities

1. The Prohibition Against Extraneous Acts Embodied in Rule 404(b)

When the State offered evidence of the extraneous offenses/acts Appellant allegedly committed, the State – the proponent of this evidence – failed to shoulder its burden of showing that the extraneous offenses were admissible, or as the trial court would ultimately instruct the jury, for any of the seven listed Rule 404(b) exceptions. As recounted below, the State failed to shoulder this burden. The jury could not consider the extraneous offenses for any Rule 404(b) exceptions, therefore it was a clear abuse of discretion to allow the testimony.

Identity

Appellant did not contest the issue of identity. The extraneous offenses, therefore, were inadmissible on this basis. *See DeLeon v. State*, 77 S.W.3d 300, 312 (Tex. App. – Austin 2001, pet. ref'd) (extraneous offenses inadmissible to show identity where "identity was never in issue").

Intent and Knowledge

It was incumbent on the State to prove beyond a reasonable doubt that Appellant acted with the intent to arouse or gratify the sexual desire of any person. Because Appellant never put his intent in issue, this evidence was inadmissible under either of these exceptions. *See Jackson v. State*, 320 S. W.3d 873, 855 (Tex. App. – Texarkana 2010, pet. ref'd) ("Because Jackson never contested intent, the extraneous offense evidence was inadmissible under Rule 404."); *Nelms v. State*, 834 S.W.2d 110, 113-14 (Tex. App. – Houston [1st Dist.] 1992, pet. ref'd) (because defendant's knowledge was not placed in issue, admission of extraneous offense under this exception was abuse of discretion). And because jurors could infer Appellant's requisite intent from his conduct, the extraneous offenses were inadmissible under this theory. *See Rankin v. State*, 974 S.W.2d 707, 719 (Tex. Crim. App. 1998) ("Where the State's direct evidence…clearly shows the intent element of the crime and that evidence is uncontradicted by the defendant and not undermined by cross-examination of the State's witnesses, the offer of other crimes is unjustified.")

Motive

Motive is not an essential element of a criminal case and need not to be proven to sustain a conviction. *Bush v. State*, 628 S.W.2d 441, 444 (Tex. Crim. App. 1982). The admissibility of extraneous offenses under this theory usually requires the

accused's motive to relate or pertain to other acts by the accused against the complainant in the primary offense. *Foy v. State*, 593 S.W.2d 707, 708-009 (Tex. Crim. App. 1980). Because the State made no attempt to show a relation between the extraneous offense and Appellant's motive when this evidence was first offered, the evidence was inadmissible under this exception. *See Lopez v. State*, 288 S.W.3d 148, 165-66 (Tex. App. – Corpus Christi 2009, pet. ref'd) (extraneous offense inadmissible to prove defendant's motive).

Opportunity

Evidence of an extraneous offense under Rule 404(b) exception of opportunity is admissible where the accused claims that he lacked the opportunity to commit the offense, or it was impossible for him to do so. *Powell v. State*, 63 S.W.3d 435, 438-39 (Tex. Crim. App. 2001). Because Appellant had not contested this issue when the extraneous offenses were initially offered, the evidence was inadmissible under this exception. *See Sandoval*, 409 S. W.3d at 299 ("[T]he extraneous conduct was not relevant to the uncontested issue of opportunity.")

Common Scheme or Plan

This exception "allows admission of evidence to show steps taken by the accused in preparation for the charged offense." *Daggett v.* State, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005). But this Court has acknowledged the Court of Criminal Appeals' sentiments that evidence is not admissible under this exception "if the

proponent is unable to articulate how an extraneous act tends to prove a step toward an ultimate goal or overarching plan." *Pittman v. State*, 321 S.W.3d 565, 573 (Tex. App. – Houston [14th Dist.] 2010, no pet.), citing *Daggett*, 187 S.W.3d at 452). Because the State failed to prove that Appellant's mere "commission of other similar offenses, without more" constituted a legitimate "plan or scheme" and not just a subterfuge for the admission of propensity-type evidence," the evidence was inadmissible under this exception. *See Daggett*, 187 S.W.2d at 451-52 (holding repetition of the same act or same crime does not show a "plan" under Rule 404(b), but merely "equals the repeated commission of the same criminal offense offered obliquely to show bad character and conduct in conformity). The State never articulated how this testimony tended "to prove a step toward an ultimate goal or overarching plan" on Appellant's part. In fact, there was no evidence of any such plan or preparation on Appellant's part. Accordingly, the extraneous acts were inadmissible under this exception. *See Pittman*, 321 S.W.3d at 573.

2. The Extraneous Acts Were Inadmissible Under Rule 404(b)

Two over-arching principles guide this Court's resolution of this issue. First, as the proponent of this evidence, it was the State's burden to show the extraneous offenses were admissible over Appellant's Rule 404(b) objection. *Turner*, 754 S.W.2d at 673. Second, and perhaps most important of all, while the jurors were instructed, they could consider these extraneous acts only for the myriad of reasons

set out in Rule 404(b), as set out below, none of these reasons can justify the admission of these inherently prejudicial extraneous acts.

Simply stated, as the proponent of this evidence, the State failed to show that this evidence fell within any of the Rule 404(b) exceptions for which it was admitted. Appellant never claimed his conduct was a mistake or an accident, the evidence did not raise the issues of opportunity or preparation, and when, as here, intent can be readily inferred from the act itself, extraneous offenses are inadmissible as a subterfuge to show intent. *See DeLeon*, 77 S.W.3d at 312 (extraneous offense inadmissible to show intent, motive, or absence of accident or mistake). This evidence was not admissible as part of some "common scheme or plan" and was just "a subterfuge for the admission of propensity-type evidence." *See Daggett*, 187 S.W.3d at 451-52 (extraneous offense not admissible under the "common scheme or plan" exception). The admission of this extraneous offense was an abuse of discretion. *See Webb v. State*, 36 S.W.3d 164, 181 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd) (en banc) ("Because the court failed to identify any legitimate reason for allowing evidence of this extraneous offense and our independent review of the record reveals none, we find it was an abuse of discretion for the trial court to admit evidence of it.").

3. The Inadmissibility of the Extraneous Offenses Pursuant to Tex. Code Crim. Proc. Art. 38.371

In the alternative, the State proffered that the extraneous acts were admissible pursuant to Tex. Code Crim. Proc. Art. 38.371.[5] Article 38.371 applies in family-violence cases and permits the introduction of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense. *See McDonnell v. State*, 674 S.W.3d 694, 701 (Tex. App. – Houston [1st Dist.] 2023, no pet.). However, Article 38.371(c) does not permit the presentation of character evidence that otherwise would be inadmissible under the rules of evidence. *Id*.

"Areas of relevant and admissible extraneous-offense evidence that complies with Article 38.371," and that serve non-character-conformity purposes in compliance with Rule 404(b), "include evidence that: (1) explains why a victim of domestic violence is unwilling to cooperate with prosecution; (2) confirms the victim's initial - and later recanted - statements to police; or (3) contextualizes the nature of the relationship between victim and assailant." *See Id*.

As the proponent of the evidence, it was incumbent on the State to show that the alleged extraneous acts were relevant to assist the trier of fact in determining whether Appellant committed the offense, which it did not do. In general, the

[5] The jury charge contained a written instruction consistent with Art. 38.371. (CR 50).

familial relationship between Appellant and N.D. was not probative of any disputed fact, therefore, in no way could it assist the trier of fact determine whether Appellant committed the offense.

In particular, N.D. was fully cooperative with the prosecution, so the State did not need this evidence to explain why N.D. was unwilling to cooperate with them. Second, this case did not involve a recantation by N.D, so again the State did not need the evidence to confirm N.D.'s report to the police or to explain a recantation. Finally, 30-year-old extraneous acts in no way helped the jury contextualize the nature of N.D.'s and Appellant's relationship, or for that matter any familial relationship.[6]

The extraneous acts evidence only served to prove that Appellant acted in conformity with his character, and thus was inadmissible. Accordingly, the trial court abused its discretion in admitting evidence of unreported decades-old extraneous acts.

4. <u>These Non-Constitutional Errors Affected Appellant's Substantial Rights Pursuant to Tex. R. App. P. 44.2(b)</u>

"By its very nature, an improperly admitted extraneous offense tends to be harmful. It encourages the jury to base its decisions on character conformity, rather than evidence that the defendant committed the offense with which he or she has

[6] Interestingly, N.D. had never told her husband of twenty-six years about either of these alleged incidents. (3RR 78-79).

been charged." *Jackson*, 320 S.W.3d at 889. Because the State emphasized these extraneous acts in the rebuttal portion of its summation when defense counsel was powerless to respond (3RR 144-45), this Court must necessarily harbor "grave doubts" that these errors affected Appellant's substantial rights under Tex. R. App. P. 44.2(b). *See Aguillen v. State*, 534 S.W.3d 701, 713 (Tex. App. – Texarkana 2017, no pet.) ("[T]he extraneous-offense evidence of Aguillen's physical assaults of E.O.'s sisters was substantially more prejudicial than probative and, thus, harmful when erroneously admitted."); *Lopez*, 288 S.W.3d at 179 ("Unsure whether the admission of the extraneous acts affected the jury's verdict, we are obligated to treat the error as harmful."); *DeLeon*, 77 S.W.3d at 316 ("We do not harbor 'grave doubts' but have no doubt that the error was harmful as having a substantial and injurious effect and influence in determining the jury's verdict.").

The judgement of conviction entered below must be reversed and the cause remanded for a new trial.

ISSUE NUMBER FOUR (Restated)

> Appellant Was Denied The Effective Assistance Of Counsel At The Guilt-Innocence Stage When Trial Counsel Failed To Object To The Limiting Instructions In The Jury Charge Authorizing Jurors To Consider Evidence Of Appellant's Extraneous Acts And Offenses Committed For Purposes Neither Offered By the State Nor Raised By the Evidence.

A. Statement of Facts

Trial counsel did not request that the charge limit the jury's consideration of the extraneous offenses for the purpose of showing Appellant's or N.D.'s state of mind or their previous and subsequent relationship under Art. 38.371. Counsel did not object to the portion of the charge authorizing jurors to consider evidence of the extraneous offenses for seven Rule404(b) exceptions, on the grounds the evidence was inadmissible under all seven exceptions or because the State did not offer it for any of these purposes. (3RR 126).

B. The Standard of Review: Ineffective Assistance of Counsel Claims

Appellant was entitled to the effective assistance of counsel at the guilt-innocence stage of his trial. *Ex parte Saenz*, 491 S.W.3d 819, 826 (Tex. Crim. App. 2016). To be entitled to relief, Appellant must first show that trial counsel's performance was deficient in that it fell below an "objective standard of reasonableness … under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 698 (1984). "Prevailing norms of practice as reflected in the American Bar Association standards and the like ... are guides to what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("[W]e have long referred [to these ABA Standards] as guides to determining what is reasonable."). As the ABA Standards make clear, "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all

avenues leading to facts relevant to the merits of the case." 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, commentary pp. 4-5.

In the rare case in which trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. *Massaro v. United States*, 538 U.S. 500, 508 (2003); *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). When the record is silent as to trial counsel's strategy, a reviewing court can conclude the defendant received ineffective assistance if the challenged conduct served no strategic purpose and was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Appellant must then show that counsel's deficient conduct was prejudicial - but for counsel's errors, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 692. This Court's principal concern is whether Appellant was afforded a fair trial resulting in an outcome worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 430 (1995). The prejudice Appellant must show is by less than a preponderance of the evidence because, as the Supreme Court has explained, "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 n. 9 (2004); *see also Strickland,*

466 U.S. at 694-96 ("The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). A single error by counsel can warrant a finding of ineffective assistance. *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005).

C. Strategic Decisions Uninformed by a Reasonable Investigation are not Entitled to Deference

Trial counsel must have a firm command of the facts of the case and the governing law before he can render reasonably effective assistance of counsel. *Ex parte Lilly*, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983). Any claimed tactical decision by counsel is entitled to deference only if it is the product of *informed* decisions; this Court's "principal concern" is not whether challenged conduct was strategic, "but rather whether the investigation supporting [his] decision ... was *itself reasonable*. Because there is a "crucial distinction between strategic judgments and plain omissions," *Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992), this Court is "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999).

The Court of Criminal Appeals has echoed these sentiments, holding that, "A decision that counsel defends as trial strategy might nonetheless be objectively

unreasonable; the magic word strategy does not insulate a decision from judicial scrutiny." *Ex parte Saenz*, 491 S.W.3d at 829. A sound trial strategy is informed by a *reasonable* investigation into the facts and controlling authority. *See Robertson v. State*, 187 S.W.3d 475, 484 (Tex. Crim. App. 2006) (claimed tactical decision to elicit testimony about defendant's inadmissible prior convictions was unreasonable where it was informed by counsel's failure to understand well-settled law). A strategy born of a misunderstanding of the law is "a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam). If counsel's challenged conduct did not produce at least some conceivable benefit, it is not objectively reasonable. *See Moore*, 194 F.3d at 615 ("*Strickland* does not require deference to those decisions of counsel ... that do not serve any conceivable strategic purpose."). The failure to object to the jury instruction could not have been the product of a reasonable trial strategy, as counsel's strategy was to exclude these extraneous acts in their entirety. Controlling case law supports the conclusion that the challenged conduct was objectively deficient under the first prong of *Strickland*. *See e.g, Ex parte Varelas* 45 S.W.3d 627, 632 (Tex. Crim. App. 2001) (trial counsel's admission that his failure to object or request instructions on the State's burden of proof regarding extraneous offenses and restricting the jury's use of them to the limited purposes for their admission was

not the result of any sound trial strategy sufficient to show his challenged conduct was objectively deficient under the first prong of *Strickland*).

1. The Prohibition Against Extraneous Acts Embodied in Rule 404(b)

Rule 404(b) codifies the fundamental tenet of our criminal justice system that the accused must only be tried for the offense with which he is charged and not for being a criminal generally. *Owens*, 827 S.W.2d at 914 . "Because extraneous offense evidence carries with it the inherent risk that a defendant may be convicted because of his propensity for committing crimes generally - i.e., his bad character - rather than for the commission of the charged offense, courts have been reluctant to allow evidence of an individual's prior bad acts or extraneous offenses." *Id.* Aside from the inherent prejudice that extraneous offenses carry and the fact that they may tend to confuse the issues, such evidence carries with it the additional danger that the accused may be called upon to defend himself against crimes not alleged in the indictment. *See Turner*, 754 S.W.2d at 672; *see also Johnston*, 145 S.W.3d at 219.

The fact that the State offers evidence for a purpose other than character conformity, or any of the other purposes in Rule 404(b), does not, in itself, make the evidence admissible. *Sandoval,* 409 S.W.3d at 298. As the proponent of the evidence, the burden is on the State to show that the extraneous offense evidence is admissible. *See Turner*, 754 S.W.2d at 673.

D. Appellant's Right to Legally Correct Limiting Instructions in the Jury Charge

Tex. Code Crim. Proc. Art. 36.14. requires the trial court to provide jurors with "a written charge distinctively setting forth the law applicable to the case." *Smith v. State*, 577 S.W.3d 548, 552 (Tex. Crim. App. 2019). This responsibility includes instructing the jury that it may only consider evidence admitted for a limited purpose, for that specific purpose, and for no other reason. *Porter v. State*, 709 S.W.2d 213, 215 (Tex. Crim. App. 1986). An erroneous or incomplete jury charge jeopardizes a defendant's right to a jury trial because it fails to guide the jury in its fact-finding function. *Jenkins v. State*, 468 S.W.3d 656, 671 (Tex. App. – Houston [14th Dist.] 2015, pet. dism'd). When the jury charge does not contain an accurate description of the law, "the integrity of the verdict is called into doubt." *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

As part of the trial court's ministerial duty pursuant to Art. 36.14, Appellant was entitled to a jury charge that correctly limited the jury's consideration of evidence which was admitted for a limited purpose, to the sole purpose or purposes for which it was admitted. *See Speer v. State*, 890 S.W.2d 87, 98 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd); *see also Lane v. State*, 822 S.W.2d 35, 40 (Tex. Crim. App. 1991) ("One purpose of limiting instructions ... is to ensure that the jury does not make use of admitted evidence for an impermissible purpose."). It is well

settled that the trial court errs if the limiting instruction provided in the charge authorizes jurors to consider evidence of an extraneous offense for a purpose or purposes neither offered by the State nor raised by the evidence over the defendant's objection. *See e.g., Daggett,* 187 S.W.2d at 454 ("Because Hailey's testimony was admissible only to rebut appellant's blanket statement of good conduct with minors, the trial court should have given the jury an instruction that it could use that testimony *only* in assessing appellant's credibility, not as proof that he committed the charged offense or as any proof of some 'plan' to have a sexual relationship with Brittany.") (emphasis in original); *Abdnor v. State*, 808 S.W.2d 476, 478 (Tex. Crim. App. 1991) (trial court erred in denying requested instructions limiting consideration of extraneous offense to explaining inconsistent statements); *Pederson v. State*, 237 S.W.3d 882, 888 (Tex. App. – Texarkana 2007, pet. ref'd) (trial court erred in denying requested jury charge limiting consideration of extraneous offense to limited purpose for which it was admitted); *Speer*, 890 S.W.2d at 98 (same).

Viewed through the prism of well settled authority, and for all of the reasons recounted below, trial counsel's challenged conduct - which they have admitted was not informed by a sound trial strategy - clearly fell below an objective standard of reasonableness that constituted objectively deficient performance under the first prong of *Strickland*.

E. Trial Counsel's Challenged Conduct was Objectively Deficient

1. Failure to Object to the Overly Expansive Limiting Instructions In the Jury Charge Containing Seven Rule 404(b) Exceptions

Trial counsel did not object to that portion of the trial court's charge that authorized jurors to consider the extraneous offenses Appellant committed for all seven Rule 404(b) exceptions on the grounds the evidence was inadmissible under any of these theories. Neither did he request that the charge limit the jury's consideration of this evidence solely to show the state of mind of Appellant and N.D. and their previous and subsequent relationship under Art. 38.371. Trial counsel's failure to object to the trial court's charge authorizing jurors to consider the extraneous acts Appellant committed for those seven Rule 404(b) exceptions, and his failure to seek a proper limiting instruction restricting consideration of this evidence was objectively deficient performance. *See Ex parte Varelas*, 45 S.W.3d at 632 ("[W]e conclude that trial counsel's performance was deficient for failing to request ... limiting instructions regarding the extraneous act evidence admitted at applicant's trial.").

F. Trial Counsel's Deficient Performance Prejudiced Appellant

Appellant is not tasked with demonstrating that he would have been acquitted but for trial counsel's series of unprofessional errors to warrant a finding that he suffered prejudice. *Everage v. State*, 893 S.W.2d 219, 222 (Tex. App. - Houston [1st

Dist.] 1995, no pet.). The prejudice Appellant must show is *by less than a preponderance of the evidence* because, "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. at 82 n. 9; s*ee also Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (per curiam). It is axiomatic that even a single error on trial counsel's part can be sufficient to warrant a finding of prejudice. *See Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013) (trial counsel's one error sufficient to undermine court of appeals' confidence in outcome of proceeding); *Branch v. State*, 335 S.W.3d 893, 904 (Tex. App. – Austin 2011, pet. ref'd) ("The dissent suggests that the defense attorneys' failure to object ... could be overlooked because by and large, [they] rendered effective assistance ... throughout the trial. However, the court of criminal appeals has stated otherwise.").

In determining whether trial counsel's deficient conduct prejudiced Appellant, this Court presumes, absent contrary evidence this record lacks, "that jurors followed the trial court's explicit instructions to the letter." *Casanova v. State*, 383 S.W.3d 530, 543 (Tex. Crim. App. 2012). This Court must presume, therefore, that jurors improperly considered the extraneous offenses for all seven Rule 404(b) exceptions "to the letter." *See Palmer v. State*, 222 S.W.3d 92, 96-97 (Tex. App. – Houston [14th Dist.] 2006, pet. ref'd) (jurors presumably followed erroneous limiting

instruction that they had to find victim's prior accusation false beyond a reasonable doubt before they could consider it in weighing her credibility).

First, trial counsel's deficient conduct prejudiced Appellant because the trial court's legally infirm and overly-expansive limiting instructions made the State's case significantly more persuasive by providing the jury with additional, albeit unwarranted reasons, to consider the extraneous acts and offenses, and made Appellant's case significantly less persuasive, the hallmark of prejudice. *See Kyles v. Whitley*, 514 U.S. at 430.

Second, the importance of the extraneous acts and offenses to the State's case is manifest. When, as in the instant case, an impermissibly expansive instruction is given to lessen the prejudice from the extraneous offenses, any prejudice from the introduction of such evidence is unabated. *See Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). Accordingly, it was critical that "the law applicable to the case" that the trial court was obligated to provide jurors pursuant to Art. 36.14 was a correct statement of the law applied to the facts of the extraneous acts and offenses.

The Court of Criminal Appeals has long made clear, "It is not the function of the charge merely to avoid misleading or confusing the jury; it is the function of the charge to lead and to prevent confusion. A charge that does not apply the law to the facts fails to lead the jury to the threshold of its duty: to decide those fact issues." *Williams*, 547 S.W.2d at 20. Because counsel's deficient conduct irreparably

hamstrung the trial court in discharging this ministerial duty, Appellant suffered prejudice. *See Owens v. State*, 916 S.W.2d 713, 719 (Tex. App. – Waco 1996, no pet.) (had counsel asked for a proper limiting instruction, trial court would have been obligated to provide it to jurors).

While this Court cannot declare with certainty whether at least one juror would have struck a different balance as to Appellant's guilt or innocence in these matters, given the series of critical and prejudicial errors at issue, *Strickland* dictates that certainty is not the standard to which this Court holds itself. Indeed, the "reasonable probability" that *Strickland* embodies does not require certainty, let alone a showing that it is "more likely than not" that a different outcome would have occurred at the guilt-innocence stage. *See Porter v. McCollum*, 558 U. S. at 275-76. Because trial counsel's deficient conduct was sufficient to undermine this Court's confidence in the outcome of the guilt-innocence stage of trial, it is constrained to reverse Appellant's convictions. *See Ex parte Saenz*, 491 S.W.3d at 833 (counsel's deficient conduct at the guilt-innocence stage sufficient to undermine appellate court's confidence in the outcome); *Ex parte Overton*, 444 S.W.3d 632, 641 (Tex. Crim. App. 2014) (same).

The judgments of conviction entered below must be reversed and the case remanded for a new trial.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays to the Honorable Court to consider each issue raised herein, reverse the convictions and render an acquittal, or remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9 of the Texas Rules Appellate Procedure, the undersigned counsel of record certifies that the brief contains 7680 words.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via e-mail delivery through eFile.TXCourts.gov to Jason Bennyhoff, Fort Bend County District Attorney's Office, on this the 12th day of December 2024.

/s/ Steven J. Lieberman
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