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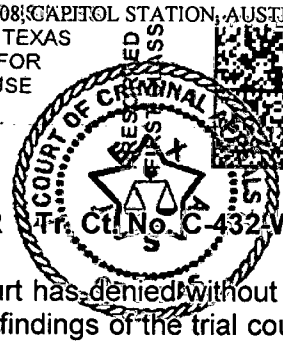


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**9/23/2020**
**MOSIER, CHARLES LEE SR Tr. Ct. No. C-432-W011426-1397476-A WR-90,089-01**

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

CHARLES LEE MOSIER SR
HUGHES UNIT - TDC # 2062833
RT. 2, BOX 4400
GATESVILLE, TX 76597

MIWHAB 76597

Writ No. C-432-W011426-1397476-A

| | | |
|---|---|---|
| **EX PARTE** | § | **IN THE 432nd JUDICIAL** |
| | § | |
| | § | **DISTRICT COURT** |
| | § | |
| **CHARLES LEE MOSIER, SR.** | § | **TARRANT COUNTY, TEXAS** |

**ORDER ADOPTING ACTIONS OF MAGISTRATE AND ORDER OF TRANSMITTAL**

**BE IT KNOWN** that the Court has reviewed the actions taken by Magistrate **Charles P. Reynolds**, sitting for this Court in the above styled and numbered cause, per a specific or standing order of referral, and has reviewed all **ORDERS** contained on the docket in this cause and within the papers filed in this cause and any findings entered.

**IT IS HEREBY ORDERED AND DECREED** that the Court specifically adopts and ratifies the actions taken by said Magistrate on behalf of this Court in compliance with Sections 54.656(a)(4) and 54.662 of the Texas Government Code, as well as Article 11.07 or 11.072 of the Code of Criminal Procedure as applicable.

The Court **FURTHER ORDERS AND DIRECTS**:

1. The Clerk of this Court to file this order and transmit it along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

2. The Clerk of this Court to furnish a copy of this order along with a copy of the Court's findings to Applicant at his currently known address, or to Applicant's counsel if Applicant is represented, and to the Post-Conviction Section of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this 11th day of DEC., 2019.

FILED
THOMAS A. WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS

DEC 11 2019

TIME 12:12

BY DEPUTY

JUDGE PRESIDING

WR-90,089-01
NO. C-432-W011426-1397476-A

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|---|---|---|
| **EX PARTE** | § | **IN THE 432nd JUDICIAL** |
| | § | |
| | § | **DISTRICT COURT OF** |
| | § | |
| **CHARLES LEE MOSIER, SR.** | § | **TARRANT COUNTY, TEXAS** |

**ORDER**

The Court adopts the State's Memorandum, Findings of Fact and Conclusions of Law as its own and recommends that the relief CHARLES LEE MOSIER, SR. ("Applicant") requests be **DENIED.**

The Court further orders and directs the Clerk of this Court to furnish a copy of the Court's findings to Applicant, Mr. Charles Lee Mosier, Sr., TDCJ-ID# 2062833, Hughes Unit, Route 2 Box 4400, Gatesville, Texas 76597 (or to Applicant's most recent address), and to the post-conviction section of the Criminal District Attorney's Office.

SIGNED AND ENTERED this 10th day of December, 2019.

JUDGE PRESIDING

CHARLES P. REYNOLDS
TARRANT COUNTY
CRIMINAL MAGISTRATE

FILED
THOMAS A. WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS

DEC 10 2019

TIME 3:38

BY DEPUTY

D432-W011426-00



**WR-90,089-01**
**NO. C-432-W011426-1397476-A**

| | | |
|---|---|---|
| **EX PARTE** | § | **IN THE 432nd DISTRICT** |
| | § | |
| | § | **COURT OF** |
| | § | |
| **CHARLES LEE MOSIER, SR.** | § | **TARRANT COUNTY, TEXAS** |

# STATE'S PROPOSED MEMORANDUM, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State proposes the following Memorandum, Findings of Fact and Conclusions of Law regarding the issues raised in the present application for Writ of Habeas Corpus.

## MEMORANDUM

CHARLES LEE MOSIER, SR. ("Applicant"), alleges that he is being unlawfully confined because (1) he received ineffective assistance of appellate counsel for counsel failed to raise that it was a Rule 403 error to allow extraneous offense evidence of Applicant's sister (Ground One), (2) the appellate court erred (Ground Two), and (3) he received ineffective assistance of trial counsel (Grounds Three, Four, Five, Six, Seven, Eight, Nine, and Ten). *See* Application, p. 6-16. Specifically, Applicant alleges trial counsel was ineffective for the following reasons:

a. Counsel failed to object to the admission of an extraneous offense allegation and also to the State arguing the jury should punish Applicant for said extraneous offense (Ground Three),
b. Counsel failed to object to the State's expert forensic child interviewer bolstering the complainant's testimony (Ground Four),

c. Counsel failed to object on confrontation grounds to Nurse Wright's testimony (Ground Five),
d. Counsel failed to request a limiting instruction regarding Nurse Wright's testimony (Ground Five),
e. Counsel failed to object to the jury hearing evidence that one of the victims had a tear in her hymen (Ground Six),
f. Counsel failed to present evidence that it was Applicant's son that abused the victims (Ground Seven),
g. Counsel presented the wrong theory to the jury (Ground Eight), and
h. Counsel failed to expose the inconsistent statements of both the victims about the allegations of abuse (Ground Nine).

*See* Application, p. 10-16.

In response to this Court's Order, Applicant's trial counsel, Hon. James Wilson, and Applicant's appellate counsel, Mr. Paul Francis, have filed affidavits addressing Applicant's ineffective assistance of counsel. In light of Applicant's contentions and the evidence presented in the Writ Transcript, the Court should consider the following proposed findings of fact and conclusions of law.

## FINDINGS OF FACT

*General Facts*

1. On April 15, 2016, Applicant was convicted by the jury of continuous sexual abuse of a young child. *See* Judgment, No. 1397476D.

2. The jury sentenced Applicant to fifty years' confinement in the Texas Department of Criminal Justice – Institutional Division. *See* Judgment.

3. The Second Court of Appeals affirmed the trial court's judgment on June 1, 2017. *See Mosier v. State*, No. 02-16-00159-CR, 2017 WL 2375768 (Tex. App. – Fort Worth June 1, 2017, pet. ref'd) (mem. op., not designated for publication).

*Ineffective Assistance of Appellate Counsel (Ground One)*

4. Mr. Paul Francis represented Applicant during the appellate proceedings. *See* Francis Affidavit, p. 1.

5. Mr. Francis did not raise on direct appeal that the extraneous offense was improperly admitted during the punishment phase, in part, because it was reoffered and readmitted without objection. *See* Francis Affidavit, p. 3; [8 RR 8].

6. Mr. Francis did not raise on direct appeal that the State's closing argument during the punishment phase was improper, in part, because there was no objection to the State's closing argument. *See* Francis Affidavit, p. 3; [8 RR 28-37].

7. The jury was given an extraneous offense instruction. *See* Francis Affidavit, p. 3; [CR 152-56].

8. Mr. Francis' affidavit is credible and supported by the record.

9. There is no credible evidence that Mr. Francis' representation fell below an objective standard of reasonableness.

10. There is no credible evidence that the outcome of the appellate proceeding would have been different but for the alleged misconduct.

*Appellate Court Erred (Ground Two)*

11. Applicant complains that the Second Court of Appeals failed to properly review his case. *See* Application, p. 8.

12. Applicant's second ground does not attack his conviction or judgment. *See* Application, p. 8.

*Ineffective Assistance of Counsel*
*(Grounds Three, Four, Five, Six, Seven, Eight, Nine, and Ten)*

13. Mr. T. Richard Alley and Hon. James Wilson represented Applicant during the trial proceedings. *See* Judgment; Wilson Affidavit, p. 1.

14. Mr. Alley died prior to Applicant filing this application for writ of habeas corpus.

15. Mr. Alley was first chair in this case. *See* Wilson Affidavit, p. 2.

16. Hon. Wilson's main job was to keep the paperwork in order, answer any questions from the client at trial, and prepare for punishment. *See* Wilson Affidavit, p. 2.

17. Mr. Alley objected to the extraneous offense evidence both at the article 38.37 hearing and later when it was admitted during the guilt/innocence phase of trial. *See* Wilson Affidavit, p. 2-3.

18. Mr. Alley objected to the extraneous offense evidence under Rules 403, 404, and that article 38.37 was facially invalid. *See* Wilson Affidavit, p. 3.

19. The Second Court of Appeals held that the trial court abused its discretion in admitting the extraneous offense evidence during the guilt/innocence phase of trial but held the error was harmless. *See Mosier v. State*, No. 02-16-00159-CR, 2017 WL 2375768 (Tex. App. – Fort Worth June 1, 2017, pet. ref'd) (mem. op., not designated for publication).

20. Mr. Alley properly preserved the extraneous offense evidence issue for direct appeal.

21. Mr. Alley did not object to the State's reoffering of the guilt/innocence evidence during the punishment phase. [8 RR 8]

22. The State argued, in part, during punishment closing argument as follows:

> We're asking you now to punish him for the rape and sexual abuse of [victim]. We're asking you now to punish him for the rape and sexual abuse of [second victim]. We're asking you now to punish

him for the rape and sexual abuse of his own sister, [extraneous victim].

And we're asking you now to punish him for his criminal record. He's already been to the penitentiary once before. This isn't his first time. And we're asking you to consider that when you're assessing his sentence.

[8 RR 33-34]

23. Hon. Wilson believes that Mr. Alley did not object to the references to the extraneous offense evidence during the State's closing argument because it was a summation of the admitted evidence. *See* Wilson Affidavit, p. 3.

24. Hon. Wilson believes that Mr. Alley did not object to the State's expert forensic child interviewer's testimony because it was not bolstering. *See* Wilson Affidavit, p. 3.

25. Hon. Wilson believes that Mr. Alley did not object to the admission of the SANE exam testimony because he concluded it was not a violation of the Confrontation Clause. *See* Wilson Affidavit, p. 4.

26. Araceli Desmarais conducted the sexual assault exam of one of the victims. [5 RR 176-77]

27. Ms. Desmarais did not testify at trial. [5 RR 177]

28. Nurse Wright reviewed Ms. Desmarais' records regarding the physical examination of the victim but no materials regarding the victim's interview. [5 RR 177-78]

29. Nurse Wright reviewed the photographs taken as part of the sexual assault exam. [5 RR 178]

30. Nurse Wright testified that she formed an opinion based on the photographs and paperwork of the victim's physical examination. [5 RR 179]

31. Nurse Wright testified that she viewed a tear in the victim's hymen on the photographs from the physical examination of the victim. [5 RR 179-80]

32. Counsel concluded that the evidence that the victim's hymen was torn was admissible because it was a medical conclusion and counsel was able to cross-exam the witness regarding the lack of information as to how the hymen had been torn. *See* Wilson Affidavit, p. 4.

33. Mr. Alley never advised Applicant that the SANE exam would not be admitted. *See* Wilson Affidavit, p. 5.

34. The chosen defense strategy discussed with Applicant was to bring out the inconsistencies in the statements of the children. *See* Wilson Affidavit, p. 5.

35. Counsel was not allowed to discuss the activities or involvement of Applicant's son because (1) the State's motion in limine regarding the information was granted and (2) there was never a point in the trial where his son's actions became relevant such that counsel believed the trial court would allow it in. *See* Wilson Affidavit, p. 5.

36. Counsel concluded that there was no admissible evidence of an alternate perpetrator that counsel could have presented in this case. *See* Wilson Affidavit, p. 5.

37. Hon. Wilson found that Mr. Alley conducted a full, complete, and thorough examination of the State's witnesses, including the victims. *See* Wilson Affidavit, p. 5.

38. Hon. Wilson felt that Mr. Alley developed as much relevant and favorable evidence that was possible under the circumstances. *See* Wilson Affidavit, p. 5.

39. Hon. Wilson's affidavit is credible and supported by the record.

40. There is no credible evidence that trial counsel's representation fell below an objective standard of reasonableness.

41. There is no credible evidence that the outcome of the trial proceeding would have been different before for the alleged misconduct.

## CONCLUSIONS OF LAW

*General Writ Law*

1. "We have repeatedly held that the burden of proof in a habeas application is on the applicant to prove his factual allegations by a preponderance of the evidence." *Ex parte Brown*, 158 S.W.3d 449, 461 (Tex. Crim. App. 2005).

2. Relief may be denied if the applicant states only conclusions, and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). "Sworn pleadings provide an inadequate basis upon which to grant relief in habeas actions." *Ex parte Garcia*, 353 S.W.3d 785, 789 (Tex. Crim. App. 2011) (11.072 proceeding).

*Ineffective Assistance of Appellate Counsel (Ground One)*

3. The standard of review for ineffective assistance of appellate counsel claims is the *Strickland v. Washington* test and is the same as the standard for ineffective assistance of trial counsel claims. *Ex parte Jarrett*, 891 S.W.2d 935, 944 (Tex. Crim. App. 1994), *overruled on other grounds, Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997).

4. "To show that appellate counsel was constitutionally ineffective for failing to assert a particular point of error on appeal, an applicant must prove that (1) 'counsel's decision not to raise a particular point of error was objectively unreasonable,' and (2) there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal. An attorney 'need not advance every argument, regardless of merit, urged by the appellant.' However, if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it.' *Ex parte Miller*, 330 S.W.3d 610, 623–24 (Tex. Crim. App. 2009).

5. The Court of Criminal Appeals will presume that counsel made all significant decisions in the exercise of reasonable professional judgment. *See Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992).

6. The totality of counsel's representation is viewed in determining whether counsel was ineffective. *See Cannon v. State*, 668 S.W.2d 401, 404 (Tex. Crim. App. 1984).

7. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record. *See Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).

8. An attorney is under an ethical obligation not to raise frivolous issues on appeal. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436 (1988).

9. An attorney is prohibited from raising claims on appeal that are not founded in the record. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

10. To preserve error for appellate review, an appellant must make a timely, specific objection, at the earliest opportunity, and obtain an adverse ruling. *See* Tex. R. App. P. 33.1.

11. Whether the extraneous offense evidence was improperly admitted during the punishment phase was not properly preserved for review.

12. Because Applicant's issue regarding the extraneous offense evidence during the punishment phase was not preserved for review, counsel properly did not raise it on direct appeal.

13. Whether the State's closing argument during the punishment phase was improper was not properly preserved for review.

14. Because Applicant's issue regarding the State's closing argument was not preserved for review, counsel properly did not raise it on direct appeal.

15. Applicant has failed to prove that his appellate attorney's representation fell below an objective standard of reasonableness.

16. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct "sufficient to undermine confidence in the outcome" is not established. *See Ex parte Saenz*, 491 S.W.3d 819, 826 (Tex. Crim. App. 2016) (citation omitted).

17. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*" *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984) (emphasis added).

18. Applicant has failed to show that there is a reasonable likelihood that the outcome of the appellate proceeding would have been different had appellate counsel raised additional grounds on direct appeal.

19. Applicant has failed to show that there is a reasonable likelihood that, but for the alleged acts of misconduct, the result of the appellate proceeding would have been different.

20. Applicant has failed to prove that he received ineffective assistance of appellate counsel.

21. This Court recommends that Applicant's first ground for relief be **DENIED**.

*Appellate Court Erred (Ground Two)*

22. Because of the "law of the case" doctrine, holdings of the appellate court, including erroneous ones, are ordinarily not subject to review in a subsequent collateral proceeding once the issue has been finally resolved on direct appeal. *Ex parte Schuessler*, 846 S.W.2d 850, 852 (Tex. Crim. App. 1993).

23. Applicant has failed to prove that the Second Court of Appeals' opinion is reviewable in this proceeding.

24. This Court recommends that Applicant's second ground for relief be **DENIED**.

*Ineffective Assistance of Counsel*
*(Grounds Three, Four, Five, Six, Seven, Eight, Nine, and Ten)*

25. The two-prong test enunciated in *Strickland v. Washington* applies to ineffective assistance of counsel claims in non-capital cases. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective assistance of counsel, the applicant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984).

26. The Court of Criminal Appeals "must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he made all significant decisions in the exercise of reasonable professional judgment." *State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008) (citing *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992)).

27. "The proper standard of review for claims of ineffective assistance of counsel is whether, considering the totality of the representation, counsel's performance was ineffective." *Ex parte LaHood*, 401 S.W.3d 45, 49 (Tex. Crim. App. 2013) (citation omitted).

28. "Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *see Kimmelman v. Morrison,* 477 U.S. 365, 383, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) ("To establish a claim of ineffective assistance of counsel, a *habeas* petitioner must 'overcome [a] strong presumption of attorney competence.'" (citation omitted)).

29. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record and "'the record must affirmatively demonstrate' the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

30. An applicant is not entitled to perfect or error-free counsel. Isolated instances of errors of omission or commission do not render counsel's performance ineffective; ineffective assistance of counsel cannot be established by isolating one portion of trial counsel's performance for examination. *McFarland v. State,* 845 S.W.2d 824 (Tex. Crim. App.1992), *cert. den'd,* 508 U.S. 963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993).

31. "Deficient performance means that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Ex parte Napper*, 322 S.W. 3d 202, 246 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 687).

32. "[The] court will not second guess through hindsight the strategy of counsel at trial nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness." *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).

33. "[E]ach case must be judged on its own unique facts." *Davis v. State*, 278 S.W.3d 346, 353 (Tex. Crim. App. 2009).

34. "Under *Strickland,* the defendant must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

35. Counsel is not required to advance every argument; however, if he "fails to raise a claim that has indisputable merit under well-settled law," and the issue would have affected the outcome of the proceeding, counsel is ineffective for failing to raise it. *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (discussing ineffective assistance of counsel on appeal).

36. Failure to file a suppression motion or to object to the admission of evidence does not necessarily constitute ineffective assistance of counsel. *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002).

37. "[T]o successfully assert that trial counsel's failure to object amounted to ineffective assistance, the [defendant] must show that the trial judge would have committed error in overruling such an objection." *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *see Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

38. "When an ineffective assistance claim alleges that counsel was deficient in failing to object to the admission of evidence, the defendant must show, as part of his claim, that the evidence was inadmissible." *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002); *see Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (must prove motion to suppress would have been granted); *Roberson v. State*, 852 S.W.2d 508, 510-11 (Tex. Crim. App. 1993) (without a showing that a pretrial motion had merit and that a ruling on the motion would have changed the outcome of the case, counsel is not ineffective for failing to assert the motion).

39. "[T]he Legislature has determined under art. 37.07, §3 that extraneous offenses and bad acts may be introduced for the purpose of assisting the jury in assessing punishment. *The statute does not provide a time restriction.*" *Fowler v. State*, 126 S.W.3d 307, 310-11 (Tex. App. – Beaumont 2004, no pet.); Tex. Code Crim. Proc. art. 37.07, §3.

40. Applicant has failed to prove that the trial judge would have committed error in overruling an objection to the extraneous offense evidence presented at punishment.

41. Applicant has failed to prove that counsel was deficient for not objecting to the extraneous offense evidence presented during the punishment phase.

42. To be proper, jury argument must fall under one of the following areas (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. *See Todd v. State*, 598 S.W.2d 286 (Tex. Crim. App. 1980); *Dunbar v. State*, 551 S.W.2d 382 (Tex. Crim. App. 1977); *Alejandro v. State*, 493 S.W.2d 230 (Tex. Crim. App. 1973).

43. "The prosecutor was allowed to argue to the jury that they could consider all of the extraneous offenses in determining [Applicant's] punishment. Such an argument is permissible in light of the changes in article 37.07, §3(a) made by the Legislature in 1993." *Arthur v. State*, 11 S.W.3d 386, 393 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd).

44. "Although the jury should not consider acts unless satisfied beyond a reasonable doubt that the defendant is criminally responsible for them, the jury may use the evidence of such crimes or bad acts *however it chooses in assessing punishment.*" *Watts v. State*, No. 14-12-00862-CR, 2014 WL 1516082, at *9

(Tex. App. – Houston [14th Dist.] Apr. 17, 2014, pet. ref'd) (mem. op., not designated for publication) (citations omitted).

45. Applicant has failed to prove that the trial judge would have committed error in overruling an objection to the State's closing argument.

46. Applicant has failed to prove that counsel was deficient for not objecting to the State's closing argument.

47. Applicant has failed to prove that the trial judge would have committed error in overruling an objection to the State's expert forensic child interviewer's testimony.

48. Applicant has failed to prove that counsel was deficient for not objecting to the State's expert forensic child interviewer's testimony.

49. "For an expert's testimony based upon forensic analysis performed solely by a non-testifying analyst to be admissible, the testifying expert must testify about his or her own opinions and conclusions. While the testifying expert can rely upon information from a non-testifying analyst, the testifying expert cannot act as a surrogate to introduce that information." *Paredes v. State*, 462 S.W.3d 510, 517-18 (Tex. Crim. App. 2015).

50. Because Nurse Wright testified as to her own opinions and conclusions based on the photographs from the physical examination, Applicant has failed to prove that the trial judge would have committed error in overruling an objection to Nurse Wright's testimony.

51. Applicant has failed to prove that counsel was deficient for not objecting to Nurse Wright's testimony.

52. Applicant has failed to prove that the trial judge would have committed error in overruling an objection to the evidence that the victim's hymen was torn.

53. Applicant has failed to prove that counsel was deficient for not objecting to the evidence that the victim's hymen was torn.

54. Applicant has failed to prove that evidence that his son abused the victims was admissible.

55. Applicant has failed to prove that counsel's representation was deficient because he did not present evidence that Applicant's son also abused the victims.

56. Counsel's choice of the defense was the result of reasonable trial strategy.

57. Applicant has failed to prove that counsel's cross-examination of the victims constituted deficient representation.

58. Applicant has failed to prove that trial counsel's representation fell below an objective standard of reasonableness.

59. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct "sufficient to undermine confidence in the outcome" is not established. *See Ex parte Saenz*, 491 S.W.3d 819, 826 (Tex. Crim. App. 2016) (citation omitted).

60. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*" *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984) (emphasis added).

61. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel objected differently.

62. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel objected more.

63. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel requested additional limiting instructions.

64. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel attempted to present additional evidence.

65. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel presented a different defensive theory.

66. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel cross-examined the witnesses differently.

67. Applicant has failed to show that there is a reasonable probability that, but for the alleged acts of misconduct, the outcome of the proceeding would have been different.

68. Applicant has failed to prove that he received ineffective assistance of trial counsel.

69. This Court recommends that Applicant's third ground for relief be **DENIED**.

70. This Court recommends that Applicant's fourth ground for relief be **DENIED**.

71. This Court recommends that Applicant's fifth ground for relief be **DENIED**.

72. This Court recommends that Applicant's sixth ground for relief be **DENIED**.

73. This Court recommends that Applicant's seventh ground for relief be **DENIED**.

74. This Court recommends that Applicant's eighth ground for relief be **DENIED**.

75. This Court recommends that Applicant's ninth ground for relief be **DENIED**.

76. This Court recommends that Applicant's tenth ground for relief be **DENIED**.

WHEREFORE, the State prays that this Court adopt these Proposed Findings of Fact and Conclusions of Law and recommend that Applicant's grounds for relief be **DENIED**.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County

JOSEPH W. SPENCE
Chief, Post-Conviction

/s/Andréa Jacobs
Andréa Jacobs
Assistant Criminal District Attorney
State Bar No. 24037596
401 West Belknap
Fort Worth, TX 76196-0201
Phone: 817/884-1687
Facsimile: 817/884-1672
ccaappellatealerts@tarrantcountytx.gov

## CERTIFICATE OF SERVICE

A true copy of the above has been mailed to Applicant, Mr. Charles Lee Mosier, Sr., TDCJ-ID# 2062833, Hughes Unit, Route 2 Box 4400, Gatesville, Texas 76597 on the 2nd day of December, 2019.

/s/Andréa Jacobs
Andréa Jacobs

# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00159-CR**

CHARLES LEE MOSIER SR. — APPELLANT

V.

THE STATE OF TEXAS — STATE

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FROM THE 432ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1397476D

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## MEMORANDUM OPINION[1]

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In a single issue, Appellant Charles Lee Mosier Sr. appeals his conviction for continuous sexual abuse of a child under the age of 14. *See* Tex. Penal Code Ann. § 21.02 (West Supp. 2016). We affirm.

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[1]*See* Tex. R. App. P. 47.4.

## Background

In 2003, four-year old Alex and one-year old Amy[2] were placed in the care of Wendy, their mother's aunt, and Appellant, Wendy's husband, while Child Protective Services (CPS) conducted an investigation of abandonment and neglect allegations against their mother, Macy.[3] Although the record is unclear, it appears that at some point the siblings were permanently placed there, and over the years, the children came to consider their great-aunt and Appellant as their parents. At trial, Amy referred to them as stepparents and called Wendy "Mom." Both children testified that they called Appellant "Dad."

When Amy was 13, both she and Alex moved out of Appellant's house and began living with their mother again. While the record is clear that both children wanted to move to their mother's house, nothing in the record indicates what reason they provided to the adults to explain their motivation to move.[4] However, at trial Amy testified that she wanted to move because she "was tired" of "the same old thing." When asked to clarify what she was tired of that caused her to

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[2]In accordance with rule 9.10(a)(3), we refer to children and their family members by aliases. *See* Tex. R. App. P. 9.10(a)(3); 2nd Tex. App. (Fort Worth) Loc. R. 7.

[3]Alex and Amy's mother was accused of abandonment and neglect of the two children after leaving them in Wendy and Appellant's care for undetermined periods of time.

[4]At trial, Wendy did not indicate that she opposed the move, and she testified that Macy was living in a stable environment at the time the children moved.

want to move out, Amy testified, "getting molested." Alex testified that even though he did not have a "good bond" with his mother, he told Wendy and Appellant that he wanted to move in with her, and they both agreed to let him go. Alex did not specifically attribute his reason for wanting to leave Wendy and Appellant's home to anything other than "I guess I just got tired of living there."

About a month after they had moved, Amy revealed to her maternal aunt Violet that she had been sexually abused, and Violet told Macy. Appellant was charged with one count of continuous sexual abuse of a child under 14 based upon allegations that, on or about September 2, 2007, through August 4, 2012, (1) he caused his penis to contact Amy's sexual organ "and/or" caused his penis to contact Amy's mouth, and (2) he caused his penis to contact Alex's mouth. *See* Tex. Penal Code Ann. § 21.02.

**I. Amy's testimony regarding abuse**

At trial, Amy, who was 14 years old at the time, could be fairly characterized as a reluctant witness. Her testimony was choppy, brusque, and quite often altogether unresponsive. She confirmed at the outset that she was nervous and scared to testify. Many of Amy's answers were limited to "yes" or "no," and at times she had to be reminded to verbalize even those answers in lieu of nodding and shaking her head. Although she was using a microphone, Amy required frequent reminders to "speak up." Over and over, she was asked to repeat her answers so that her voice could be heard and her words

understood.[5] Some of her answers were recorded as "unintelligible." And she frequently responded to questions posed with the answers, "not for sure," or "kind of."

Despite the difficulty in eliciting testimony from Amy, she did testify that the abuse began when she was 10 years old, when Appellant came into her bedroom where she was lying down, held her down by her arms, and tried to take her pants off. According to Amy, on that occasion she resisted. Appellant was not successful in removing her pants, and he told her "not to tell nobody." Then a week or two later, Appellant forced her to perform oral sex on him in the bathroom. In Amy's words, he made her "suck his wiener."[6] Again, he told her, "[D]on't tell nobody." Approximately a week after the bathroom incident, Appellant came into Amy's bedroom, held her down, took off her pants, and "put his penis" into her vagina. Amy testified that Appellant forced her to have sex with him again, but she was "not for sure" how many times it occurred and did not know whether it was more than five times. She did not recount any details of any of the later occurrences but testified that, as before, he warned her "not to tell nobody" that it had happened and threatened that if she did, he would hurt her.

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[5]At various times, both the court reporter and the trial judge indicated on the record that they were having trouble hearing Amy.

[6]Amy identified Appellant's "wiener" as "his private part," which she confirmed was the same thing as a penis.

Amy testified that she told Wendy about the abuse more than once but that Wendy did not believe her.[7]

**II. Alex's testimony regarding abuse**

Alex, who was 17 at the time of trial, stated that he was nervous to testify and demonstrated some reluctance to do so, although he was more articulate and responsive than Amy. He testified that when he was between 12 and 14, he got in trouble in school, and Wendy punished him by "grounding" him, which he described as making him sit on the floor in the corner of Wendy and Appellant's bedroom facing the wall.

At first, both Wendy and Appellant were in the bedroom with him, but at some point, Wendy left and went outside with Amy. According to Alex, Appellant told him to perform oral sex on Appellant. Alex complied.

Some months later, when, according to Alex, he was "14 or 15 years old," Appellant came into the bathroom while Alex was showering and told Alex to perform oral sex on him. Again, Alex complied. Amy testified that she witnessed this incident through the bathroom door that was "cracked" open. Alex testified that Appellant's abuse in this fashion occurred "more than ten" times after he turned 14.

Alex also testified that when he was 16 years old, after he and Appellant watched pornography, Appellant made Alex perform anal sex on Appellant. Alex

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[7]Wendy testified that neither Alex nor Amy ever made an outcry to her about their allegations of abuse against Appellant.

testified that this was the first time that he had engaged in anal sex with Appellant and that it took place on Appellant's bed. Afterwards, Appellant performed anal sex on Alex. Alex testified that this occurred only once and that he never told Wendy—or anyone else except one other person, his aunt's friend—about any of the sexual abuse. Nor did he reveal to anyone the real reason he wanted to move out of Appellant's home. Alex also testified that the incidents of sexual abuse only occurred when he got into trouble and was being punished.[8]

Alex testified that he was present when Amy told Violet about the abuse, but he walked away afterwards because he "didn't want to remember it." He also shared that he was angry with Amy for reporting the abuse because these experiences made him feel "not good," and he "didn't want nobody to know" about them. He stated that Violet did not question him about what happened to him because he "wouldn't talk about it." During his testimony, he stated more than once that he never wanted anyone to know about what had happened to him.

Prior to the State's offering of evidence about abuse that occurred after Alex turned 14 years old, the trial court held a hearing under article 38.37 to determine its admissibility. *See* Tex. Code Crim. Proc. Ann. art. 38.37 (West Supp. 2016) (providing for the admission of extraneous offenses in the

[8]Alex admitted that he got into trouble for breaking into houses, stealing, using marijuana, and fighting at school.

prosecution of certain sexual offenses). The trial court held that the testimony was admissible under article 38.37 and overruled Appellant's subsequent objection under rule 403 on the basis that the evidence would cause confusion for the jury. *See* Tex. R. Evid. 403. And prior to this evidence being presented to the jury, the trial court gave a limiting instruction—

> The jury's instructed that if there's any testimony before you in this case regarding the Defendant having committed bad acts or offenses other than the offense alleged against him in the Indictment of this case, the jury cannot consider that testimony for any purpose unless the jury finds beyond a reasonable doubt that the Defendant committed such other offenses or bad acts, if any were committed, and even then, the jury may only consider the same in determining the motive, the identity of the perpetrator, the state of mind of the Defendant and the child and the previous and subsequent relationship between Defendant and the child.
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> And even then, the jury may only consider that same in determining the things that I've described for you of the perpetrator of the offenses charged in this offense, if any, connected with this charge of the offense in this Indictment and for no other purpose.

**III. Jackie's testimony regarding abuse**

The trial court also admitted testimony from Jackie, Appellant's adult sister, related to extraneous offenses committed by Appellant when he was a teenager and Jackie was a child. As with Alex's testimony regarding extraneous offenses committed when he was older than 14, prior to admission of Jackie's testimony an article 38.37 hearing was held outside the presence of the jury. During that hearing, Jackie testified that one time, when she was between four and six years old, Appellant forced her to perform oral sex on him.

She further testified that she had forgotten about the incident until about ten years later, when she was between 14 and 15 years old and she was visiting in Appellant's home and Appellant reminded her of it. According to Jackie, he asked her, "Do you remember what we used to do as kids?" Jackie testified that when Appellant asked that question, "[I]t just kind of like all just came flooding back in my mind, the memories, everything. And I remember I ran into the hall closet and I told him that if he touched me or if he messed with me, that I would scream to the top of my lungs." According to Jackie, Appellant told her he was "not going to do nothing to [her]," and except for the confrontation, nothing else happened between them. Afterwards, Jackie called her dad and asked him to come get her and take her home, but she did not tell her dad because she "knew what [her] dad would do."

The trial court permitted the testimony under article 38.37 and it was presented to the jury with a limiting instruction, as follows:

> Ladies and gentlemen, you are instructed that if there's any testimony before you in this case regarding the testimony that you've heard [sic], the Defendant having committed bad acts or offenses other than the offense alleged against him in the Indictment in this case, you cannot consider said testimony for any purpose unless the jury finds and believes beyond a reasonable doubt that the Defendant committed such other offenses or bad acts, if any were committed, and even then, you may only consider the same in determining the motive, the identity of the perpetrator, absence, mistake, the state of mind of the Defendant and the child and the previous and subsequent relationship between the Defendant and the child, if any, in connection with the charged offense in the Indictment and for no other purpose.

*See* Tex. Code Crim. Proc. Ann. art. 38.37.

Jackie related essentially the same testimony before the jury that she provided at the hearing. Additionally, Jackie explained that when Appellant mentioned his past abuse of her, she was "terrified" that "he might have wanted to have sex with [her]." And, after the confrontation, the abuse "stuck with [her]" and "affect[ed] every aspect of her life." She also added that when she was 16 years old, she told her mother about what had happened but that her mother never contacted the authorities and no investigation was ever conducted.

Jackie testified that she voluntarily came forward after she "heard about what had happened." That was the first time she ever discussed this allegation with authorities, and no one prompted her to do it.

**IV. Investigation into abuse allegations**

Cari Wyatt, a CPS caseworker, testified that on November 16, 2014, she received a referral regarding allegations of abuse made by Amy and Alex. Accompanied by a police officer, Wyatt went to Amy's school the next day and interviewed her regarding the allegations of abuse. Wyatt testified that Amy was "nervous and began to get upset . . . when speaking to [Wyatt]." Based on her interview with Amy, Wyatt referred Amy and Alex to the Alliance for Children for forensic interviews. Wyatt also contacted River Oaks Police Officer Charles Stewart to assist in the investigation.

Charity Henry of the Alliance for Children interviewed Alex and Amy on December 3, 2014. Henry described Amy as being hesitant, yet forthcoming,

and tearful throughout her interview. Henry described Alex as more embarrassed and more hesitant than Amy during his interview. Henry testified that she had no concerns that either child was coached or that either child fabricated any answers during the interviews.

Officer Stewart subsequently referred both children to Cook Children's Medical Center for physical examinations. Donna Wright, pediatric nurse practitioner and Sexual Assault Nurse Examiner (SANE) with Cook Children's Medical Center's Child Advocacy Resource and Evaluation team, testified to her review of medical records of a physical examination of Amy by a different SANE at Cook Children's.[9] Wright testified that Amy's genital examination showed a healed transection or tear to her hymen, the opening to her vagina. Wright concluded that the tear was caused by "blunt force penetrating trauma"—by something penetrating the hymen internally. Beyond determining that the tear occurred more than three to five days prior to the examination, Wright could not determine whether it happened months or even years earlier.

Appellant was subsequently arrested and charged with continuous sexual abuse of Amy and Alex. *See* Tex. Penal Code Ann. § 21.02.

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[9]At the time of trial, the SANE that conducted the physical examinations was no longer working at Cook's. Wright did not testify regarding any medical examination of Alex.

## V. Appellant's defense

Appellant attempted to refute the charges against him with four arguments: (1) that the children were unable to identify key tattoos that were on his body at the time the alleged abuse took place;[10] (2) that Amy could not have observed the instance of oral sex between Alex and Appellant that occurred in the bathroom;[11] (3) that the children accused Appellant of abuse so they could move in with their mom, who was not as strict as Appellant and Wendy;[12] and (4) that he was not living in Arkansas with his family at the time Jackie claimed he abused her.[13] In addition to advancing these arguments through cross-

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[10]According to the evidence, Appellant had an extensive collection of tattoos. Wendy testified to the presence of a tattoo with her name on it in his groin area, just above his penis. Neither child testified about that particular tattoo, although Alex recalled tattoos on Appellant's upper body, and Amy testified about tattoos on his chest, legs, face, hands, and arms.

[11]Wendy testified that contrary to Amy's testimony, Amy could not have observed an incident of oral sex between Alex and Appellant in the bathroom because the bathroom was very small and the door opened into the bathroom. According to Wendy, Alex or Appellant would have noticed Amy looking through the door.

[12]Wendy testified that she and Appellant imposed rules on the children and punished them when the rules were broken. And, according to Wendy, neither child reacted well to being disciplined, and they continued to get in trouble at home and at school. Wendy felt that Macy was not as strict, and, so when the children were at their mother's home, they were not disciplined and got to do what they wanted to do.

[13]Both Appellant's cousin and his sister testified that Appellant could not have molested Jackie as she alleged because Appellant only lived with the family for one day during the relevant time period. Instead, he lived with his cousins for a short period of time and then "went off to Job Corps" for two years.

examination of the State's witnesses, Appellant introduced testimony by Wendy and other family members.

**VI. The jury charge and the jury's verdict**

The jury charge included the following limiting instruction:

> You are instructed that if there is any testimony before you in this case regarding the defendant having committed sexual offenses, if any, other than the offense, if any, alleged against him in Count One of the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same for the following purposes:
>
> 1) To determine the motive, intent, scheme or design, if any, of the defendant;
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> 2) To determine the state of mind of the defendant and the child;
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> 3) For its bearing on the previous and subsequent relationship between the defendant and the child; and
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> 4) For its bearing, if any, o[n] the character of the defendant and acts performed in conformity with the character of the defendant.

The jury found Appellant guilty of continuous sexual abuse of a child under the age of 14 and sentenced him to 50 years' confinement.

**Discussion**

Appellant argues that the trial court erred by admitting Alex's testimony regarding abuse that occurred after Alex turned 14 and Jackie's testimony regarding Appellant's abuse of her when she was a child because the probative value of the evidence was substantially outweighed by a danger of unfair

prejudice and confusion of the issues. Although Appellant has addressed the admission of Alex's and Jackie's testimonies as one issue, we will address the admission of each separately.

**I. Standard of review**

We review a trial court's rulings on evidentiary objections for an abuse of discretion. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). A trial court does not abuse its discretion unless its ruling is arbitrary and unreasonable; the mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Foster v. State*, 180 S.W.3d 248, 250 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.); *see also Jones v. State*, 119 S.W.3d 412, 421–22 (Tex. App.—Fort Worth 2003, no pet.) (recognizing that we will reverse the trial court's determination under rule 403 "rarely and only after a clear abuse of discretion" in light of the trial court's superior position to gauge the impact of the evidence).

**II. Substantive law**

In prosecutions for certain sexual offenses, article 38.37 permits the admission of evidence of other crimes committed by the defendant against the child who is the victim of the alleged offense or evidence that the defendant has committed a separate offense, such as sexual offenses against a child, for the evidence's bearing on "relevant matters." Tex. Code Crim. Proc. Ann. art. 38.37, §§ 1(b), 2(b). When such evidence is determined to be relevant under article

38.37, the trial court is still required to conduct a rule 403 balancing test. *Sanders v. State*, 255 S.W.3d 754, 760 (Tex. App.—Fort Worth 2008, pet. ref'd). In this case, Appellant does not contest the trial court's determination that Alex's and Jackie's testimonies were relevant under article 38.37, but instead limits his argument to their admissibility under rule 403.

Rule 403 provides that the trial court may exclude relevant evidence if its probative value is "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. In balancing probative value and unfair prejudice under rule 403, an appellate court presumes that the probative value will outweigh any prejudicial effect. *Sanders*, 255 S.W.3d at 760. It is therefore the objecting party's burden to demonstrate that the probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

Factors to consider in conducting a rule 403 analysis include the evidence's potential to impress the jury in some irrational but nevertheless indelible way, the time used to develop the evidence, and the proponent's need for the evidence. *Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1991) (op. on reh'g).

**III. Testimony by Alex regarding abuse after the age of 14**

Alex testified that after he turned 14, Appellant forced him to perform oral sex more than ten times and also forced him to engage in reciprocal anal sex.

Appellant objected to the admission of this testimony on the basis of rule 403, arguing in particular that "there [was] a similarity between the alleged acts for the extraneous [offenses and those] within the Indictment, so there's a tremendous possibility for confusion," and that the evidence's probative value was outweighed by the risk of it being unfairly prejudicial. In overruling Appellant's objection, the trial court performed a rule 403 balancing test on the record and found that Alex's testimony would not confuse the jury, but instead would "clarify that information and put the proper perspective of the testimony of the relationship between the victim and the Defendant, and therefore, that would assist the factfinder."

**A. Probative value of the evidence**

Article 38.37 explicitly recognizes that evidence of other crimes committed by the defendant against the child who is the victim of the alleged offense is relevant in depicting the "previous and subsequent relationship between the defendant and the child." Tex. Code Crim. Proc. Ann. art. 38.37, § 1(b)(2); *see also Jones*, 119 S.W.3d at 420. As we have noted, Appellant does not contest the relevancy of this evidence under article 38.37. However, the probative value of evidence is measured by more than simple relevance. In determining the evidence's probative value, the trial court should consider "how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006).

The State argued that Alex's extraneous-offense testimony had strong probative value because it showed Appellant's "continued dominance" over Alex and "exemplified the chronic nature of the continued abuse." We agree that the probative value of this evidence is significant. *See Sanders*, 255 S.W.3d at 761 (assigning probative value to extraneous-offense evidence that depicted appellant's "unnatural attitude and relationship" towards his stepdaughter).

**B. Potential to impress the jury in an irrational way**

In his brief to this court, Appellant relies upon our prior decision of *Martin v. State*, in which we held that evidence of extraneous offenses that are more heinous in nature than the charged offenses can have a "significant potential" to impress the jury in some irrational but nevertheless indelible way. 176 S.W.3d 887, 897 (Tex. App.—Fort Worth 2005, no pet.); *see also Jones*, 119 S.W.3d at 422–23 (indicating the extraneous acts were less heinous than evidence related to the charged offense and determining the emotional weight of that evidence was not likely to create such prejudice in the minds of the jurors that they would have been unable to limit their consideration of evidence to its proper purpose). But Appellant does not demonstrate how the extraneous-offense testimony by Alex was any more heinous than the evidence of the charged offenses.

In addition to both children testifying that they were forced to perform oral sex on Appellant before they turned 14, Amy testified that Appellant forced her to engage in vaginal sex on multiple occasions before she turned 14. Appellant does not explain how this is any less serious a crime than Alex's testimony

regarding one incident of anal sex abuse or the continuous oral sex abuse after he turned 14. *Martin* is therefore inapplicable. While we recognize that evidence of "sexually related misconduct and misconduct involving children [is] inherently inflammatory," *Montgomery*, 810 S.W.2d at 397, we disagree with Appellant's assertion that the evidence of extraneous offenses committed against Alex had a significant potential to impress the jury in some irrational but nonetheless indelible way. This factor weighs in favor of admission of the evidence. *See Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet. ref'd) (holding any potential to suggest a decision on an improper basis was ameliorated somewhat by the fact that the extraneous-offense testimony was "no more serious than the allegations forming the basis for the indictment").

**C. Time spent developing the evidence**

Approximately 12 of 40 pages, or just under a third, of Alex's direct testimony were spent developing the evidence of abuse that took place after he turned 14. Although the prosecutor mentioned the anal sex allegation once in her closing argument, she also reminded the jury that Appellant was not on trial for that offense. This factor therefore weighs in favor of the admission of the evidence. *See Jones*, 119 S.W.3d at 423.

**D. State's need for the evidence**

In prosecutions of sex-based offenses committed against children, the State's need for extraneous-offense evidence is frequently based on a lack of physical evidence or eyewitness testimony to the charged offense. *See*

*Robisheaux*, 483 S.W.3d at 220 (holding that the State's need for evidence weighed strongly in favor of admission because, without it, the State's case was reduced to only the testimony of the complainant); *Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet. ref'd) (holding State's need for extraneous-offense evidence was "considerable" where there were no eyewitnesses and no physical evidence available to corroborate the complainant's testimony in child sex abuse prosecution).

The State argued that it had a great need for the extraneous-offense evidence because, even thought it had direct testimony from Alex and Amy about the abuse, it is clear from the record that both teens were embarrassed and reluctant to testify. As explained above, Amy was especially reluctant to answer questions and often when she did so, her response was inaudible.

The State also used the extraneous-offense evidence to rebut Appellant's arguments that the children had fabricated the allegations of abuse so that they could move in with their mother and escape the stricter rules imposed by Appellant and Wendy. *See Robisheaux*, 483 S.W.3d at 220 (noting that the State's need for extraneous-offense evidence was high where appellant argued that complainant had fabricated her allegations); *Jones*, 119 S.W.3d at 423 (noting that "the State needed the evidence because Jones argued that the charged offense never occurred, or that G.V. fabricated the whole incident").

Because the State's need for the evidence of continued abuse against Alex after he turned 14 was significant, this factor weighs in favor of its admission.

**E. Risk of confusion**

Confusion of the issues refers to "a tendency to confuse or distract the jury from the main issues in the case." *Gigliobianco*, 210 S.W.3d at 641. For example, evidence that "consumes an inordinate amount of time to present or answer . . . might tend to confuse or distract the jury from the main issues." *Id.* As we have noted above, the State did not spend an inordinate amount of time presenting Alex's testimony to the extraneous offenses, nor do we view his testimony as the sort that might have confused or distracted the jury from the main issues. *See id.* at 642 (holding evidence of breath-test results were not confusing or distracting as they related directly to the charged offense). Rather, the evidence was relevant to illustrate the continued relationships and cycle of abuse occurring in the household against both Amy and Alex, an acceptable purpose under article 38.37. This factor therefore weighs in favor of admission of the testimony.

**F. No error**

Having determined that each of the relevant factors weighs in favor of admission of Alex's testimony to extraneous offenses committed after he turned 14, we hold that the trial court did not abuse its discretion by admitting such evidence. We therefore overrule the first part of Appellant's sole issue.

## IV. Testimony by Jackie regarding abuse as a child

Jackie testified to two separate events. First, Jackie testified that Appellant forced her to perform oral sex on him when she was between four and six years old. According to Jackie, after he ejaculated in her mouth, she began to feel like she was going to get sick and started to "[run] to the bathroom, and [Appellant] kind of held [her] there because he thought [she] was going to go tell [her] mom." This happened only once and, according to Jackie, she blacked out all memories of it for about ten years and told no one about it until after the second incident.

Jackie testified that the memory suddenly returned one day when she was 14 or 15 years old and Appellant asked her, "Do you remember what we used to do as kids?" According to Jackie, when Appellant said that, it triggered her memory and at that moment, she testified,

> I thought that he was going to try to do something more to me, especially because I was older, I guess, I felt like that he - - as if - - I don't know. I felt like he might have wanted to have sex with me that day, and that terrified me.

So, according to Jackie, she ran to a closet and locked herself inside. When asked how Appellant reacted to this, Jackie testified:

> I'm - - something about I'm not - - I'm not going to mess with you or whatever. And then that's when he walked into his bedroom. And I told him, you know, if he messed with me, I was going to scream to the top of my lungs, because if he wasn't going to mess with me, why did he even bring that up to me? Why - - why? And that's how I feel.

Jackie testified that after this second incident, she told her mother about what had happened, including the earlier event of abuse, but her mother never contacted the authorities, and no investigation was ever conducted.

Appellant raised three objections to Jackie's testimony under rule 403, arguing that: (1) the two incidents were too remote, (2) the evidence of the first incident would risk confusion of the issues because of its similarity to acts alleged by Alex and Amy, and (3) any probative value of Jackie's testimony was substantially outweighed by the risk of undue prejudice. The State argued that the evidence was relevant to show that Appellant "like[d] to receive oral sex from young children."

The trial court found that Jackie was "highly credible" and that her testimony was relevant to establish a pattern of behavior by Appellant. Addressing Appellant's argument of remoteness, the trial court noted,

> And despite the fact that there has been a, you know, approximate 30-year period of time—because she is 37 now. She describes the events happening when she was approximately four or five years old, or something in that range, and that makes it over 30 years ago. It's still pertinent because . . . the alleged facts with related to the events now, the parallels are very similar.
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> And therefore, under a 403 analysis, the probative value substantially outweighs the prejudicial effect given the fact that the credibility of the witness, the accusations that are presently before the jury, for them to make the determinations of the fact, and the tenor of the case presented by the State and the Defense insofar as cross-examination.

### A. Probative value and the remoteness of Jackie's allegations

Section two of Article 38.37 explicitly recognizes that evidence of other certain sexual offenses committed by the defendant against someone other than the complainant is admissible "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." Tex. Code Crim. Proc. Ann. art. 38.37, § 2(b). Again, Appellant does not contest the trial court's determination that Jackie's testimony was relevant under article 38.37, but rather argues that her testimony should have been excluded under rule 403. We therefore must examine its probative value, or "how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Gigliobianco*, 210 S.W.3d at 641.

On appeal, the State argues that Jackie's testimony, when combined with that of Alex and Amy, established a "modus operandi" or "habit" of "forcing children to fellate him." Therefore, the State contends, the evidence was highly probative and its probative value was not substantially outweighed by its prejudicial value. *See* Tex. R. Evid. 403. However, the State's argument glosses over the troublesome remoteness aspect of Jackie's testimony. Jackie, who was 37 at trial, testified that Appellant forced her to perform oral sex when she was between four and six years old—approximately 25 years before the alleged abuse against Alex and Amy and more than 30 years before the trial in this case.

Perhaps more glaringly, the State fails to address the significant differences between the conduct described in Jackie's testimony and the allegations made by Alex and Amy. Nevertheless, we will address these issues.

First, we agree that, on its face, Jackie's testimony, when added to the testimony of Alex and Amy, tends to suggest a general proclivity by Appellant toward coercing children to perform oral sex upon him. However, we do not agree that the probative value of this evidence was significant. The State cites to *Bradshaw v. State* in support of this argument, but the extraneous-offense evidence in *Bradshaw* provided context that Jackie's testimony here simply does not provide. 466 S.W.3d 875, 877 (Tex. App.—Texarkana 2015, pet. ref'd) (finding no error in the admission of evidence of two extraneous acts of sexual misconduct committed by the appellant). In *Bradshaw*, the extraneous acts were committed against two girls that lived in the same house where the appellant lived with the complainant. *Id.* at 883. In holding the evidence did not violate rule 403, the court noted that because the extraneous-offense evidence and the evidence of abuse of the complainant took place in the same home, the extraneous-offense evidence provided "valuable context in which [the complainant]'s claims could be evaluated by the jury." *Id.* at 883–84. Furthermore, all three children in *Bradshaw* made a collective outcry to another family member, so the extraneous offense evidence also "illuminat[ed] the circumstances" of the complainant's outcry of abuse. *Id.* at 883. Jackie's testimony is simply not comparable to that offered in *Bradshaw*.

We also cannot ignore the considerable time gap between the extraneous offense and the offenses with which Appellant was charged. While remoteness does not per se destroy the probative value of an extraneous offense, it is certainly a factor to be considered. *Linder v. State*, 828 S.W.2d 290, 297 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (op. on reh'g). After all, "the passage of time allows things and people to change." *Gaytan v. State*, 331 S.W.3d 218, 226 (Tex. App.—Austin 2011, pet. ref'd); *cf. Ex parte Miller*, 330 S.W.3d 610, 620–21 (Tex. Crim. App. 2009) (discussing rationale behind remoteness limitation on impeachment evidence used to attack witness's character). Thus, Texas courts have long acknowledged that a substantial gap in time between the occurrence of extraneous offenses and the charged offense will weaken the probative value of the extraneous-offense evidence. This is especially true in cases, such as this, where there is no final conviction for the extraneous offense and there are no other intervening similar offenses. *See Bachhofer v. State*, 633 S.W.2d 869, 872 (Tex. Crim. App. [Panel Op.] 1982) (holding, in prosecution of indecency with a child, that evidence of extraneous offense four years prior to instance alleged as basis for prosecution was inadmissible because of remoteness, coupled with no evidence of other intervening similar offenses and no final conviction for the extraneous offense). *But see Corley v. State*, 987 S.W.2d 615, 620–21 (Tex. App.—Austin 1999, no pet.) (noting that cases such as *Bachhofer* were decided under common-law principles, which favored

exclusion of evidence, and before the rules of evidence were enacted, which favor the admission of evidence).

Because intervening misconduct by the defendant acts to "narrow the gap" between the extraneous and charged offenses, any evidence of intervening misconduct should be taken into account. *Curtis v. State*, 89 S.W.3d 163, 174 (Tex. App.—Fort Worth 2002, pet. ref'd); *Lang v. State*, 698 S.W.2d 735, 737 (Tex. App.—El Paso 1985, no pet.). For instance, in *Lang*, the court of appeals did not reverse the appellant's conviction because his "particular modus operandi was alive and operative" through the intervening period, as evidenced by his conduct. *Lang*, 698 S.W.2d at 737. Here we have no evidence of intervening misconduct by Appellant that would indicate his "modus operandi" of "forcing children to fellate him" was operative during that time. *See id.*

Here, Jackie did not testify that intervening misconduct actually occurred. In the second circumstance, a decade later, she "*thought* that he was going *to try* to do something more to [her]"; she "*felt like he might have wanted* to have sex with [her] that day." [Emphasis added.] This does not rise to the level of evidence of intervening misconduct. At best, it signifies that Jackie believed it was possible that he wanted to have sex with her. With regard to this second incident, we agree with Appellant that the dangers of unfair prejudice from this evidence substantially outweighs its probative value.

And, as Appellant points out, we must also consider the significant differences between the allegations made by Jackie and those made by Alex and

Amy. *Cf. Robisheaux*, 483 S.W.3d at 219–20. In *Robisheaux*, our sister court determined that, although the remoteness of evidence of extraneous sexual offenses committed by the appellant twelve years before the charged offense "undermine[d its] probative value," the "remarkable similarities" between the offenses strengthened the evidence's probative force. *Id.* There, the extraneous-offense evidence consisted of testimony that the appellant had a sexual relationship with a young girl from the time she was 13 until she was 15, that he would take her to secluded areas to have sex with her, that he would not wear a condom, and that he encouraged her to smoke marijuana during their encounters. *Id.* at 219. Similarly, the evidence of the charged offenses consisted of testimony that the appellant started assaulting the victim when she was 13 and the abuse continued until she was 14; that the offenses took place in secluded areas—the appellant's apartment, a creek bed, a hotel in another town, and his truck—that he did not wear a condom; and that he offered her marijuana and cocaine during their encounters. *Id.* at 219–20. Thus, the court reasoned, the factor of remoteness was either neutral or reduced to only slightly in favor of exclusion. *Id.* at 220; *see also Gaytan*, 331 S.W.3d at 227 (holding remoteness was tempered by evidence of similarities to the extent it only "somewhat favor[ed] exclusion"); *Newton*, 301 S.W.3d at 320 (same).

We do not have such similar facts present here. While Jackie's testimony is similar in that she alleged that Appellant forced her to engage in oral sex, an act that both Amy and Alex testified Appellant forced them to perform, the

similarities end there. Jackie testified that the abuse occurred only once, whereas the abuse allegations regarding Alex and Amy were of a continual nature.

Another significant difference is Jackie's age at the time the alleged extraneous offense occurred and the ages of Alex and Amy at the time they were abused. Jackie testified that Appellant forced her to perform oral sex when she was between four and six years old. Here, although Alex and Amy were both under the age of five at the time they were placed into Appellant's home, they were both at least ten years old before the first act of abuse occurred.

Texas law also recognizes progressive degrees of gravity related to conduct involving sexual offenses against a child based upon a child's maturity level. *See* Tex. Penal Code Ann. § 21.16 (West Supp. 2016) (providing that offense of voyeurism is a state jail felony if the victim is a child younger than 14 years of age), § 22.021(f) (West Supp. 2016) (providing, in conviction for aggravated sexual assault, for minimum punishment to be increased to 25 years when victim is younger than six years of age or if the child is younger than 14 years of age and the actor commits the offense in a certain manner), § 43.25(c) (West 2011) (providing that offense of sexual performance of a child is a felony of the first degree if the victim is younger than 14 years of age and a felony of the second degree if the victim is younger than 18 years of age); *see also id.* § 21.11 (West 2011) (providing elements of indecency with a child under the age of 17), § 22.011(c)(1) (defining a "child" as an individual under the age of 17 for

purposes of offense of sexual assault). Because Jackie was at a particularly young age at the time Appellant allegedly abused her, Appellant's alleged conduct with her was more heinous, a factor to consider in determining the tendency of Jackie's testimony to impress the jury in an irrational manner. *See Martin*, 176 S.W.3d at 897 (recognizing that evidence of extraneous offenses that are more heinous in nature than the charged offenses can have a "significant potential" to impress the jury in some irrational but nevertheless indelible way).

Finally, there is a significant difference in Appellant's age when Jackie was abused and when he abused Alex and Amy. Appellant was a teenager—between the ages of 15 and 18—when he allegedly abused Jackie. Comparatively, Appellant was middle-aged at the time the alleged abuse occurred against Alex and Amy. As stated above, "the passage of time allows things and people to change," and what a man might have done in his teenage years is not necessarily probative of what he would do in his forties. *See Gaytan*, 331 S.W.3d at 226; *Miller*, 330 S.W.3d at 620–21 (finding it improbable, in the context of a claim of ineffective assistance of counsel, that a trial court judge would have admitted evidence of an isolated eighteen-year-old event to prove propensity toward violent behavior had it been offered by trial counsel).

On the whole, the remoteness, the lack of intervening misconduct, Appellant's age at the time the alleged offense against Jackie occurred, and the significant differences between Appellant's abuse of Jackie and his abuse of Alex and Amy weigh against admission of Jackie's testimony.

**B. Time spent on the evidence**

The State spent less than ten pages developing Jackie's testimony on direct examination.[14] This factor therefore weighs in favor of admission of the evidence. *See Jones*, 119 S.W.3d at 423; *cf. Booker v. State*, 103 S.W.3d 521, 536 (Tex. App.—Fort Worth 2003, pet. ref'd) (noting third *Montgomery* factor weighed in favor of excluding extraneous offense when trial time spent proving extraneous offense exceeded time spent proving charged offense).

**C. Need for the evidence**

The State again argues that it needed Jackie's testimony because of the reluctance with which Alex and Amy testified and in order to rebut Appellant's claims of fabrication. While we agreed with this argument as it related to the admission of Alex's extraneous-offense testimony, we find it more difficult to agree with this same argument with regard to the need for Jackie's testimony, especially given that the abuse Jackie testified to occurred twenty-five years before Appellant allegedly abused again.

In determining the force of the State's need for this evidence, we look to whether the State, as the proponent, had other probative evidence available to it to help establish a fact related to an issue in dispute. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999) (citing *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997), *cert. denied*, 535 U.S. 982 (2002)). Here, there

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[14]However, as we discuss below, the State spent an inordinate amount of its closing argument stressing Jackie's testimony.

were two witnesses—Alex and Amy—to the abuse in this case. Amy testified that she saw one incident of abuse on Alex, and Alex testified to the continued abuse after he turned 14. Physical evidence—of blunt-force trauma to Amy's sexual organ—was present in Amy's medical examination. And their sexual abuse allegations were not made until the alleged goal and motivation to lie—the desire to move to a more lenient home environment—had already been achieved. Therefore, we disagree with the State's assertion that it had a significant need for Jackie's testimony. *See Martin*, 176 S.W.3d at 897 (holding that the State had little need for evidence of extraneous offenses because other facts, such as description of other instances of abuse, evidenced defendant's intent to arouse or gratify his sexual desire). This factor therefore weighs in favor of the exclusion of Jackie's testimony.

**D. The trial court erred but the error was harmless**

Having weighed the applicable factors, we conclude that the trial court abused its discretion when it found that the danger of unfair prejudice and confusion of the issues did not substantially outweigh the probative value of Jackie's testimony to extraneous offenses. *See id.*; *see also* Tex. R. Evid. 403.

Having found error, we now conduct a harm analysis to determine whether the error calls for reversal of the judgment. Tex. R. App. P. 44.2. Error in the admission of evidence in violation of rule 403 is generally not constitutional. *See, e.g., Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000). If the error is not constitutional, we apply rule 44.2(b) and disregard the error if it did not affect

Appellant's substantial rights. Tex. R. App. P. 44.2(b) ("Any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), *cert. denied*, 543 U.S. 1154 (2005). A substantial right is affected 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) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). Conversely, an error does not affect a substantial right if we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may also consider the jury instructions, the State's theory and any defensive theories, whether the State emphasized the error, closing arguments, and even voir dire, if applicable. *Id.* at 355–56.

As discussed above, the jury had the benefit of Alex and Amy's testimony to the abuse, albeit reluctant at times, including Alex's testimony to the abuse that continued after he was 14. Both identified Appellant as the person who abused them, and Amy testified that she witnessed at least one instance of

abuse committed against Alex. And although Appellant attempted to undermine their claims by arguing that they were fabricated as a means of escaping his strict rules, the uncontradicted testimony established that the first outcry—other than Amy's claimed outcry to Wendy, which Wendy denied took place—did not occur until the children had already moved out of Appellant's house. Yet, rather than focus on the strength of this evidence during closing argument, the State spent much of its time addressing Jackie's extraneous-offense evidence.

The amount of time the State dedicated to Jackie's testimony during closing argument is concerning, but we do note that the State tempered its remarks by reminding the jury that Appellant was not on trial for abusing Jackie. And some of the State's comments were in rebuttal to Appellant's attacks on Jackie's credibility:

> Apparently, according to the testimony of his sister and his cousin, their family can account for the Defendant's whereabouts every day of his existence in the early and mid '80s. I want you to think about that—those statements for a second, and you decide are those statements reasonable. Are they even rational? Do they make sense? Are they credible?

However, the State went on to argue that Jackie's testimony was reliable on the basis that she was a "child trauma victim":

> Let's talk about [Jackie] for a minute.
>
> Go back to jury selection when Jim explained to you how you are the judge of credibility. And there's different perspectives on who's credible, how you decide if someone is credible. And it usually takes more than a few minutes to decide someone's credibility.

> But I submit to you there are situations where you can decide someone's credibility in a much shorter period of time. In this case, I believe child trauma victims fit that description exactly.
>
> We heard testimony from [Jackie] about how when she was between the ages of four and six, she was forced to perform oral sex on the Defendant when he was in his mid to late teens.
>
> Was there anything unreliable about her testimony? Was there anything about the answers that she gave to my questions that made her seem somehow not credible in your eyes?
>
> I want you to think about this: She contacted our office unsolicited only after she found out that this man had victimized two more children in the same family.
>
> I want you to think about this: What benefit does this woman have to come here and put herself on public record in front of a room full of strangers and put her personal, humiliating history out to bear? What benefit does that serve her? I want you to think about it.

And the State used Jackie's testimony to reinforce its theme that Appellant "likes to get blow jobs from little kids."

In the reporter's record, seven paragraphs of the State's initial closing argument were devoted to Jackie's testimony. Comparatively, the prosecutor spent one paragraph discussing the substantive allegations made by Amy and three sentences discussing the extraneous act testified to by Alex.[15]

In its rebuttal argument, the State further emphasized Jackie's testimony:

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[15]The remainder of the initial closing argument made by the State was dedicated to discussing the jury charge, the logistics of handling questions or requests for evidence by the jury during deliberations, and asking the jury to render a guilty verdict.

[Jackie] saw it through because it was the truth even though she had people in her own family, people that she thought loved her, lined up against her on this, and they tried to talk her out of it.

Don't do this, circle the wagons like the rest of us; help us protect this child molester over here. She stood up and said, No, that's not right, because he did it to two other children, and I can't live with that in my conscience anymore.

And she came in here and told you the truth, and because of that, we know something now as clear as day, the Defendant likes to get blow jobs from little kids. It's vulgar. I'm sorry. But this case has a lot of details that I just can't get around. And I can't sugarcoat that.

This man likes to get oral sex from little kids.

. . . .

[Jackie] drove all the way from Arkansas. She doesn't have an axe to grind against this defendant. She just believes in the truth. And it cost her a lot to come in here and do that yesterday, but yet her family—you know, I guess it's a hard position to be in when you're—it is a hard position to be in when you're being put in a position to have to choose sides.

But, you know, ladies and gentlemen, unless you are connected to the hip like a Siamese twin to your brother or your cousin, you can't come in here and swear under oath that you know where he was every moment of every day since 1983. I refuse to believe it, and you should, too. It's not reasonable.

I'm here to tell you that I couldn't tell you places my wife has been in the last 30 days because I'm not with her 24 hours a day. I trust her to come home just like I do at the end of the night and have dinner as a family. But I'm not going to swear under oath that I know exactly where she is every given second of the day. And I'm certainly not going to say that about one of my brothers and sisters from 1983. It's not reasonable.

But we must also consider the limiting instructions that the trial court gave to the jury regarding this evidence. A limiting instruction regarding the consideration of extraneous-offense evidence was given concurrently with the

admission of Jackie's testimony,[16] an instruction similar to one the jury had already heard in advance of Alex's testimony regarding extraneous offenses. A third limiting instruction was included in the jury charge. We generally presume, in the absence of indications otherwise, that the jury followed the trial court's instructions, including limiting instructions regarding certain testimony. *Adams v. State*, 179 S.W.3d 161, 165 (Tex. App.—Amarillo 2005, no pet.).

Having reviewed the entire record, we conclude that the trial court's error in admitting Jackie's testimony to the extraneous offense did not have a substantial or injurious effect on the jury's verdict and did not affect Appellant's substantial rights. *See King*, 953 S.W.2d at 271. Thus, we disregard the error. *See* Tex. R. App. P. 44.2(b).

We therefore overrule the remainder of Appellant's sole issue.

**Conclusion**

Having overruled both parts of Appellant's sole issue, we affirm the judgment of the trial court.

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[16]We note that the trial court's instruction regarding Jackie's testimony followed the language of section 1 of article 38.37, which applied to Alex's extraneous-offense testimony, rather than section 2 of article 38.37, which applied to Jackie's extraneous-offense testimony and permitted the jury to consider her testimony for "its bearing, if any, of the character of the defendant and acts performed in conformity with the character of the defendant." Tex. Code Crim. Proc. Ann. art. 38.37. Neither party complains of this discrepancy, nor does it change our analysis of the harmless nature of the trial court's error in admitting Jackie's testimony.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

MEIER, J., concurs without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: June 1, 2017