IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1411-16

JOSHUA JACOBS, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS BOWIE COUNTY

KEASLER, J., delivered the opinion of the Court, in which KELLER, P.J., and HERVEY, YEARY, and WALKER, JJ., joined. YEARY, J., filed a concurring opinion, in which HERVEY, J., joined. NEWELL, J., filed a concurring opinion, in which ALCALA, J., joined. RICHARDSON, J., filed a dissenting opinion. KEEL, J., concurred.

OPINION

Joshua Jacobs was prohibited from asking potential jurors whether, if they knew that he had previously been convicted of a "sexual offense," they could remain impartial in the instant sexual-assault case.[1] The trial judge wanted Jacobs to use the phrase "felony

[1] *Jacobs v. State*, 506 S.W.3d 127, 132 (Tex. App.—Texarkana 2016).

offense," but agreed, on Jacobs's request, to let him refer to prior "assaultive offenses" instead.[2] The court of appeals held that, in so limiting Jacobs, the trial judge offended his constitutional rights.[3] We disagree.

I. FACTS

Twelve-year-old "Victoria Whiteman"[4] (V.W.) told multiple people that Jacobs had "kissed" and "licked" her chest and "put his finger in [her] privates." A nurse examiner found injuries on one of V.W.'s labia consistent with this type of abuse, and Jacobs's DNA was found on V.W.'s nipple. Neither Jacobs nor V.W. could be excluded as contributors to a two-source DNA sample taken from underneath Jacobs's fingernails. Jacobs was charged with aggravated sexual assault of a child by digital penetration of V.W.'s sexual organ.[5]

Unfortunately for Jacobs, this was not the first allegation of sexual misconduct with a child that had been leveled against him. In 2010, Jacobs pleaded guilty to "Felony Carnal Knowledge of a Juvenile," a felony offense (as its name would suggest) under the laws of the State of Louisiana.[6] As a result, Jacobs would almost certainly be assessed an automatic

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[2] *Id.*

[3] *Id.* at 139.

[4] *See* TEX. CODE CRIM. PROC. ch. 57 (allowing the use of pseudonyms in certain sex-offense-related prosecutions).

[5] TEX. PENAL CODE § 22.021(a)(1)(B)(I), (2)(B).

[6] *See* LA. R.S. 14:80.

life sentence if he was found guilty of the instant offense.[7] And, by dint of Article 38.37 of the Texas Code of Criminal Procedure, the jury deciding his guilt or innocence would likely learn of this prior offense and be instructed that they could use it as evidence, not only of his character, but also of any "acts performed in conformity" therewith.[8]

A. Trial

Jacobs therefore quite understandably wanted to identify any potential jurors who, because of an implicit or explicit bias against repeat sexual offenders, would not hold the State to its burden of proving the instant offense beyond a reasonable doubt. To that end, he assembled a series of PowerPoint slides for his voir dire, each bearing the heading, "Innocent UNLESS Proven Guilty."[9] These slides strongly suggested that the State would introduce evidence that Jacobs had previously committed some as-yet-unspecified "unrelated sexual offense."[10] Specifically, the slides asked, with respect to each successive element of aggravated sexual assault, whether the responding juror would, or "would not[,] require the State to prove beyond a reasonable doubt [a particular element], if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?"[11]

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[7] *See* TEX. PENAL CODE § 12.42(c)(2).

[8] *See* TEX. CODE CRIM. PROC. art. 38.37, § 2(b).

[9] *Jacobs*, 506 S.W.3d at 131.

[10] *Id.*

[11] *Id.*

The trial judge, evidently concerned about "poisoning the jury pool and busting the panel," placed the following limitation on Jacobs's voir dire:

> I'm going to allow all six of those questions. I think the only thing I'm going to do, though, is require you to take out that it's a sexual offense. You can substitute felony offense or just offense period, but the fact that it's a sexual offense I'm going to prohibit you from using that language during your voir dire, on those specific questions.

In response to this proposed restriction, Jacobs's counsel proffered the following compromise: "[Given] that the Court is ruling that way, can I use assaultive offense?" To this request, the trial judge assented. So Jacobs conducted his Article 38.37 voir dire by referring primarily to prior "assaultive" offenses. But sometimes he made his point, as the trial judge evidently preferred, by talking about "unrelated offenses" more generally, without any kind of subject-matter qualifiers:

> But here's the important part guys, any unrelated offense[] doesn't change the State's burden of proof. They still have to prove each element beyond a reasonable doubt, okay? No matter what other evidence they put in, the burden of proof doesn't change. It never changes. Does everybody understand that? Okay.

Nobody on the venire panel indicated that they would hold the State to a lesser burden upon a showing that Jacobs had previously committed an "unrelated" offense.

Jacobs was ultimately found guilty of aggravated sexual assault of a child. He pleaded "true" to the prior-offense enhancement, and the trial judge assessed a life sentence.

B. Appeal and Discretionary Review

The Sixth Court of Appeals concluded that the trial judge abused his discretion in

preventing Jacobs from describing the potentially admissible prior convictions as "sexual offense[s]."[12] Citing our 2014 opinion in *Easley v. State*,[13] the court then went on to determine whether this particular abuse of discretion "was a constitutional error or a nonconstitutional error."[14] The court of appeals resolved that issue as follows:

> Jacobs was not allowed to question the jury panel about whether they would require the State to prove all the elements of the charged offense, or if it would find Jacobs guilty of the charged offense if the State only proved a lesser, uncharged offense. By preventing him from asking these questions of the jury panel, the trial court prevented him from determining if any potential juror(s) should be struck for cause. We agree with our sister courts of appeal that having an unqualified veniremember on the jury is a violation of the defendant's right to an impartial jury. Therefore, we find the error in this case is constitutional error that requires a Rule 44.2(a) analysis.[15]

Applying this standard, the court found that the trial judge's error was harmful and reversed Jacobs's conviction.

In its petition for discretionary review, the State does not contest the court of appeals' conclusion that the trial court erred. Instead, the State argues that the court of appeals "was wrong to conclude that the error was constitutional in dimension." We granted the State's petition to review this limited aspect of the court of appeals' opinion.

II. PROCEDURAL ISSUES

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[12] *Jacobs*, 506 S.W.3d at 137.

[13] 424 S.W.3d 535 (Tex. Crim. App. 2014).

[14] *Jacobs*, 506 S.W.3d at 133 (citing, *inter alia*, *Easley*, 424 S.W.3d at 540–41).

[15] *Id.* at 139.

Before we proceed, we wish to make a few brief observations regarding Jacobs's points of error on appeal and the State's ground for discretionary review.

Before the Sixth Court of Appeals, Jacobs claimed only that his "constitutionally guaranteed right to counsel" was violated by the trial court's voir dire limitation. He cited, in support of this argument, two opinions from this Court discussing the interplay between an accused's "right to counsel" and the trial court's authority "to impose reasonable restrictions on the exercise of voir dire examination."[16] He made no independent claim that the trial court's voir dire limitation ran afoul of a non-constitutional provision of law, such as a statute, rule, or caselaw precedent. Yet the court of appeals cited *Easley* for the proposition that, in the face of Jacobs's claim of voir-dire error, its first task was to determine whether the trial court had erred (by disallowing a proper commitment question),[17] and its second task was to determine whether that error was "constitutional" or not.[18]

This approach misreads *Easley*. *Easley* does not stand for the proposition that any time an appellant complains of an improper voir dire restriction, the reviewing court should classify that error as either "constitutional" or "nonconstitutional."[19] As we shall see, *Easley*

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[16] *McCarter v. State*, 837 S.W.2d 117, 119–20 (Tex. Crim. App. 1992); *Ex parte McKay*, 819 S.W.2d 478, 482 (Tex. Crim. App. 1990).

[17] *See Standefer v. State*, 59 S.W.3d 177, 179–83 (Tex. Crim. App. 2001) (describing proper and improper commitment questions in voir dire).

[18] *See Jacobs*, 506 S.W.3d at 133 (citing *Easley*, 424 S.W.3d at 540–41).

[19] *Contra id.*

rejected the "overly broad conclusion that every restriction on counsel's voir dire presentation violates an accused's right to counsel."[20] It did not upend the elementary rule that, where a harm analysis is appropriate,[21] claims of constitutional error are subject to constitutional harm analysis and all other claims of error are subject to non-constitutional harm analysis.[22] The court below appears to have agreed with Jacobs that the trial court violated Article I, Section 10 of the Texas Constitution.[23] If that is correct, there is only one kind of harm analysis that could possibly apply: the constitutional error standard contained in Rule of Appellate Procedure 44.2(a). To hold otherwise would be to decide that, although the court of appeals found a constitutional violation, it might nevertheless be justified in applying the non-constitutional error standard contained in Rule 44.2(b). This cannot be.

So although the State purports to concede voir-dire error, we perceive the crux of the issue to be whether the trial court committed constitutional error by actually running afoul of one of the two constitutional provisions the court of appeals thought to have been raised by Jacobs on appeal.[24] The upshot of this approach is that if we agree that the trial court

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[20] *Easley*, 424 S.W.3d at 538.

[21] *See Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (acknowledging that some constitutional errors are "categorically immune to a harmless error analysis").

[22] *See* TEX. R. APP. P. 44.2.

[23] *Jacobs*, 506 S.W.3d at 139 ("We agree with our sister courts of appeal that having an unqualified veniremember on the jury is a violation of the defendant's right to an impartial jury. Therefore, we find the error in this case is constitutional error[.]").

[24] *Jacobs*, 506 S.W.3d at 130 n.3 (citing TEX. CONST. art. I, § 10).

violated Jacobs's constitutional rights, we will necessarily affirm the court of appeals' decision to apply the constitutional-error harm standard. But if we disagree that a constitutional violation occurred, we will simply overrule Jacobs's claim of constitutional error and remand the case for the court of appeals to address any remaining issues. We turn now to an examination of the relevant constitutional provisions and their application to this case.

III. ANALYSIS

"In our discretionary review capacity we review 'decisions' of the courts of appeals."[25] In this case, the court of appeals decided that the trial court's limitation impinged either Jacobs's Texas constitutional right to "trial by an impartial jury" or his Texas constitutional right "of being heard by himself or counsel."[26] Because the State has not complained of this approach, we will proceed on the assumption that it was proper. This means, however, that we must analyze the trial court's conduct under both of these constitutional provisions, to ensure that error did not occur under either.

A. Trial by an Impartial Jury

1. Law

The Texas Constitution guarantees that, "In all criminal prosecutions the accused shall

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[25] *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007) (citations omitted).

[26] *Jacobs*, 506 S.W.3d at 130 n.3, 132 (citing TEX. CONST. art. I, § 10).

have a speedy public trial by an impartial jury."[27] The Sixth Amendment to the United States Constitution similarly provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"[28] We have previously noted that "there is no significant textual difference between the two constitutional provisions which would indicate that different standards of protection should be applied."[29] As a result, there is "no reason why the impartial-jury requirements in the two constitutions should be different."[30] "The people of Texas have the authority to provide greater protections to criminal defendants than those provided in the federal constitution. But as to trial by an impartial jury in criminal cases, they have not."[31] What, then, does the Sixth Amendment require when an accused seeks to inquire into a veniremember's potential biases?

The Supreme Court of the United States has long held that a trial judge has broad discretion in the manner it chooses to conduct voir dire,[32] both as to the topics that will be

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[27] TEX. CONST. art. I, § 10.

[28] U.S. CONST. amend. VI.

[29] *Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998).

[30] *Id.*

[31] *Id.*

[32] *E.g.*, *Aldridge v. United States*, 283 U.S. 308, 310 (1931) ("In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked.").

addressed,[33] and the form and substance of the questions that will be employed to address them.[34] There is no doubt that the Constitution places some limits on the trial court's otherwise broad discretion to conduct voir dire.[35] But the instances in which the Supreme Court has said that the Constitution requires, not only that certain topics be covered, but that specific, detailed questions pertaining to that topic be asked, are notably rare. The Fifth Circuit has noted that "[r]acial prejudice and widespread and provocative pretrial publicity have furnished the only grounds accepted to date by the Supreme Court for a constitutional challenge to the trial court's voir dire procedure."[36] Since this summation, the Supreme Court has added that, in capital-punishment cases, the Constitution requires more than "general fairness and 'follow the law' questions" for the purpose of exposing "those in the

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[33] *See, e.g.*, *Ristaino v. Ross*, 424 U.S. 589, 595–598 (1976) (trial judge "acted within the Constitution" when he declined a request, made by a defendant on trial for a cross-racial crime of violence, to question the prospective jurors about racial prejudice).

[34] *See, e.g.*, *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Petitioner in this case insists, as a matter of constitutional right, not only that the subject of possible bias from pretrial publicity be covered—which it was—but that questions specifically dealing with the content of what each juror has read be asked. . . . [W]e hold that the Due Process Clause of the Fourteenth Amendment does not reach this far[.]").

[35] *See, e.g.*, *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973) (trial judge violated the Due Process Clause of the Fourteenth Amendment by refusing to inquire into the possibility of racial prejudice in the venire, in a case permeated with racial issues).

[36] *King v. Lynaugh*, 850 F.2d 1055, 1059 (5th Cir. 1988) (referencing *Ham v. South Carolina*, 409 U.S. 524 (1973) (racial prejudice), and *Irvin v. Dowd*, 366 U.S. 717 (1961) (provocative pretrial publicity)).

venire who automatically would vote for the death penalty."[37] But, at least outside these areas, "[t]he Constitution does not always entitle a defendant to have questions posed during Voir dire specifically directed to matters that conceivably might prejudice . . . him."[38] Instead, "the State's obligation . . . to impanel an impartial jury generally can be satisfied by less than an inquiry into [the] specific prejudice feared by the defendant."[39]

The Supreme Court has yet to provide an exhaustive list of the circumstances under which a trial court is "constitutionally compelled" to ask specific, rather than general, questions about the veniremembers' ability to remain impartial.[40] But, as noted by several courts of appeals, it has hinted at a formula by which to determine whether the Constitution requires that a given subject be informed by specific questioning. In *Mu'Min v. Virginia*, a case involving pervasive pretrial publicity, the Supreme Court noted: "To be constitutionally compelled, . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."[41] Several circuits have applied this formulation in other contexts,[42] as have various other state

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[37] *Morgan v. Illinois*, 504 U.S. 719, 734–35 (1992).

[38] *Ristaino*, 424 U.S. at 594 (citing *Ham*, 409 U.S. at 527–28).

[39] *Id.* at 595 (citing *Ham*, 409 U.S. at 527–28) (footnote and citations omitted).

[40] *Mu'Min*, 500 U.S. at 425–26.

[41] *Id.*

[42] *E.g.*, *United States v. Whitten*, 610 F.3d 168, 184 (2d Cir. 2010); *Beuke v. Houk*, 537 F.3d 618, 636–37 (6th Cir. 2008); *United States v. Orenuga*, 430 F.3d 1158, 1162–64 (D.C. Cir. 2005); *United States v. Greer*, 939 F.2d 1076, 1085 (5th Cir. 1991).

courts.[43]

In light of *Mu'Min* and the cases applying it, the prevailing standard for assessing whether a trial court's voir dire limitation violates the Sixth Amendment appears to be the following: The trial court retains broad discretion in conducting voir dire, and it does not abuse its discretion by refusing questions that only "might be helpful" in examining the venire for bias.[44] To constitute an abuse of discretion, the trial court's voir dire limitation must "render the defendant's trial fundamentally unfair."[45] Accordingly, per *Jones*, this is the standard that should apply in a comparable claim under the Texas Constitution.[46]

ii. Application

Before the Sixth Court of Appeals, Jacobs's primary argument was that "[s]ome potential jurors might have substantially different opinions of someone with a prior 'sexual offense' conviction as opposed to a prior 'assaultive offense' conviction[.]"[47] But it was Jacobs, not the trial judge, who proposed the adjective "assaultive" in describing the relevant "offenses." The trial judge would have permitted Jacobs to inquire into the veniremembers'

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[43] *E.g.*, *State v. Stanko*, 658 S.E.2d 94, 96–97 (S.C. 2008); *Hayes v. Commonwealth*, 175 S.W.3d 574, 581–87 (Ky. 2005); *People v. Stewart*, 93 P.3d 271, 294–96 (Cal. 2004); *People v. Terrell*, 708 N.E.2d 309, 318–19 (Ill. 1998).

[44] *Mu'Min*, 500 U.S. at 425–26.

[45] *Id.*

[46] *Jones*, 982 S.W.2d at 391.

[47] Appellant's Brief in the Sixth Court of Appeals at 28.

opinions regarding prior "felony" offenses or even unspecified prior "offenses" generally. With this understanding in mind, we note that we have previously addressed a trial-judge-imposed limitation very similar to the one at issue in this case—albeit in a very different context.

In *Johnson v. State*, the defendant "sought to cross-examine two State's witnesses for bias by informing the jury of the specific felony charges—and concomitant ranges of punishment—the witness[es] then faced in Harris County."[48] At the time they testified, the witnesses were under indictment for the offenses of felony-level theft and robbery.[49] But the trial court ordered Johnson to "limit[] his cross-examination to exposing the fact that the witnesses stood accused . . . of certain unspecified 'felonies.'"[50] Johnson argued that this limitation violated his Sixth Amendment right to examine these witnesses for bias, but we were unpersuaded. "[W]ith respect to the 'nature' of the witnesses' alleged offenses," we observed, "[t]he fact that a witness stands accused of (for example) 'felony theft' would not, if presented to the jury, make that witness seem any more prone to testifying favorably for the State than a similarly situated witness who stood accused only of some unspecified 'felony.'"[51] And while we conceded that knowledge of "the range of punishment attendant

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[48] 433 S.W.3d 546, 548 (Tex. Crim. App. 2014).

[49] *Id.* at 549.

[50] *Id.* at 548.

[51] *Id.* at 554.

to a charged offense does have an incrementally greater impact on the jury's ability to assess the witness's motive to alter or fabricate his testimony,"[52] its significance in comparison to the questioning allowed was just that—merely "incremental[]."[53] Because we could not say that "the trial court's limitation so deprived the appellant of an important untrod avenue of examining the witnesses for bias as to leave his overall opportunity for cross-examination ineffective," we found no abuse of discretion, and no Confrontation-Clause violation, in the trial court's ruling.[54]

Although *Johnson* speaks to a different constitutional right, our reasoning is similar here. There is certainly a logical connection between the more-detailed questions Jacobs hoped to ask and the "specific prejudice" he hoped to expose.[55] In this sense, at least, use of the adjective "sexual" may well have proven "helpful" to Jacobs's cause.[56] But under the trial judge's allowed questioning, Jacobs was able to commit every veniremember to the blanket proposition that "unrelated offenses [do not] change the State's burden of proof." This, albeit on a level more general than he might have preferred, was the very "prejudice feared by the defendant,"[57] and the trial judge's ruling permitted Jacobs ample opportunity

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[52] *Id.*

[53] *Id.* at 557.

[54] *Id.*

[55] *Ristaino*, 424 U.S. at 595; *see also Johnson*, 433 S.W.3d at 553.

[56] *Mu'Min*, 500 U.S. at 425.

[57] *Ristaino*, 424 U.S. at 595.

to explore it. Any further specificity would have "tend[ed] only marginally to enhance" Jacobs's ability to explore the veniremembers' biases against repeat offenders.[58] And the trial judge did not abuse his discretion in determining that any marginal benefit Jacobs might gain by this added detail would be outweighed by the risk of exposing the jury to the particular facts of the case before they were sworn. Under these circumstances, we cannot say that the trial judge's limitation "render[ed] the defendant's trial fundamentally unfair."[59]

B. Being Heard by Counsel

There remains the question of whether the trial judge's limitation infringed Jacobs's Texas constitutional right "of being heard by . . . counsel."[60] There was a time in our jurisprudence when we were inclined to treat any limitation on "proper" questioning in voir dire as, not only a *per se* violation of this constitutional right,[61] but also as an error that was immune from harm analysis.[62] Eventually we decided that these kinds of errors were not categorically immune from a harm analysis—yet we continued to view them as implicating

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[58] *Johnson*, 433 S.W.3d at 557.

[59] *Mu'Min*, 500 U.S. at 426.

[60] TEX. CONST. art. I, § 10.

[61] *E.g.*, *McKay*, 819 S.W.2d at 483 ("We have consistently held that the right to representation as afforded under Article I, Section 10 of the Texas Constitution includes the right to properly question prospective jurors during voir dire[.]").

[62] *Nunfio v. State*, 808 S.W.2d 482, 485 (Tex. Crim. App. 1991) ("We hold that error in the denial of a proper question which prevents the intelligent exercise of one's peremptory challenges constitutes an abuse of discretion and is not subject to a harm analysis[.]"), *overruled by Gonzalez v. State*, 994 S.W.2d 170, 171–72 (Tex. Crim. App. 1999).

the Texas constitutional right "of being heard" by counsel.[63] But, in a line of cases culminating in *Easley v. State*, we finally and unanimously rejected the "overly broad conclusion that every restriction on counsel's voir dire presentation violates an accused's right to counsel."[64] So, after *Easley*, at least some trial-judge-imposed limitations on voir dire will be found not to "run[] afoul of the Texas Constitution."[65] We cautioned, however, that this conclusion was quite "different from holding that" such errors will never be "of constitutional magnitude."[66] Indeed, we expressly granted that "[t]here may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional" in dimension.[67] But we carefully avoided describing when or how such a constitutional violation might occur, or which constitutional provisions would be implicated by any such limitation.

Easley thus left open the possibility that some limitations of voir dire might violate an accused's Texas constitutional right "of being heard" by counsel. But even if this is so, we would not be inclined to construe that right as being more solicitous of voir-dire questioning than the constitutional provision that speaks most directly to this issue—the

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[63] *Gonzalez*, 994 S.W.2d at 171–72 (Tex. Crim. App. 1999) (citing *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)).

[64] *Easley*, 424 S.W.3d at 538.

[65] *Id.* at 537.

[66] *Id.* at 541.

[67] *Id.*

provision protecting an accused's right to an "impartial jury."[68] The reason for this is simple: "[I]f we were to associate any trial error relative to counsel's ability to ensure the accused is 'heard' at trial, we would be forced to reach the illogical conclusion that nearly every error in a criminal case is of constitutional dimension because the error, in some measure, deprived the accused of his right to counsel."[69] Any reason we might give for construing the right "of being heard" to be more protective of a defendant's ability to pose questions in voir dire than his right to trial by an impartial jury could be applied with equal force to any number of federal or state constitutional protections. We are unwilling to go this far.

So we do not question *Easley*'s statement that "[t]here may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis."[70] But we wish to clarify that neither the Texas constitutional guarantee of "trial by an impartial jury" nor the Texas constitutional guarantee "of being heard" by counsel grants a more expansive right to pose specific questions in jury selection than what is already guaranteed by the federal Constitution. While the right "of being heard" under the Texas Constitution arguably affords some procedural advantages in voir dire that the Sixth Amendment does not,[71] we will not

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[68] TEX. CONST. art. I, § 10.

[69] *Easley*, 424 S.W.3d at 541.

[70] *Id.*

[71] *See, e.g.*, *Jones v. State*, 223 S.W.3d 379, 383 (Tex. Crim. App. 2007) ("[T]he right to be heard at voir dire is a right to *participate* in the proceedings in a certain way.")

construe the former to require more in the way of substantive questioning than the latter.

IV. CONCLUSION

We reiterate that this opinion addresses only the standard to be applied in claims of constitutional error arising from a trial court prohibiting specific questions in voir dire. Other species of constitutional errors occurring in voir dire are unaffected by this opinion.[72] Our holding also leaves undisturbed any caselaw describing how to address claims of non-constitutional voir-dire error.[73] Because Jacobs has claimed only a constitutional violation, we need not take up any such issue today. The court of appeals' judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Delivered: October 10, 2018

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(emphasis in original); *De La Rosa v. State*, 414 S.W.2d 668, 671 (Tex. Crim. App. 1967) ("[T]he right of being heard . . . carries with it the right of counsel to interrogate the members of the jury panel to the end that he may form his own conclusion, after his personal contact with the juror, as to whether in counsel's judgment he would be acceptable to him[.]").

[72] *See supra* note 71.

[73] *See, e.g.*, *Standefer*, 59 S.W.3d at 179–83.

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YEARY, J., filed a concurring opinion in which HERVEY, J., joined.

CONCURRING OPINION

I am much inclined to agree with Judge Richardson that the trial court erred in disallowing Appellant's question during voir dire. Under Article 38.37, Section 2(b), of the Code of Criminal Procedure, his prior conviction for a felony offense involving sexual abuse of a child would be admissible against him at the guilt phase of his trial. TEX. CODE CRIM. PROC. art. 38.37, § 2(b). Pursuant to that statute, the jury would be authorized to consider that prior conviction as so-called "character-conformity" evidence—*some* evidence supporting a finding that Appellant committed the offense charged in this case from the fact that he had

committed a similar offense in the past.[1] *Id.* That "character-conformity" evidence was therefore available for the State to invoke in trying to persuade the jury that Appellant was guilty of the charged offense to a level of confidence of beyond a reasonable doubt. What the jurors were *not* authorized to do, however, was to rely on Appellant's prior conviction as an excuse to find him guilty of the charged offense in the event that the State's evidence failed to convince them of his guilt to that heightened level of confidence—just because he has been convicted of such an offense before. Appellant was entitled to ask proper commitment questions to try to expose any potential juror who failed to appreciate this subtle distinction,[2] and his voir dire questions were explicitly designed to do just that.

But I definitely agree with the Court's conclusion that any such error was not one of constitutional dimension, so as to invoke the less rigorous harm standard provided for in Rule 44.2(a) of the Rules of Appellate Procedure. TEX. R. APP. P. 44.2(a). I also agree with the Court that *we* need not even address the question of non-constitutional error at this juncture. But I do not interpret the Court's opinion necessarily to foreclose the court of appeals from visiting the question of non-constitutional error on remand, should it find such a claim to have been both preserved and fairly raised by Appellant's brief on appeal (about which I

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[1] This is not to suggest that character-conformity evidence that is admissible under Article 38.37 could suffice, by itself, to provide legally sufficient evidence in satisfaction of *Jackson v. Virginia*, 443 U.S. 307 (1979).

[2] "A commitment question can be proper or improper, depending on whether the question leads to a valid challenge for cause. For a commitment question to be proper, one of the possible answers to that question must give rise to a valid challenge for cause." *Woods v. State*, 152 S.W.3d 105, 109 (Tex. Crim. App. 2004) (footnotes omitted).

express no opinion at present). With that understanding, I join the Court's opinion reversing the judgment of the court of appeals and remanding the cause for further proceedings.

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RICHARDSON, J., filed a dissenting opinion.

DISSENTING OPINION

I agree with the holding of the court of appeals, and I would affirm its decision.[1] Because the majority does not, respectfully, I dissent. As I explain below, unlike the majority, I view this case as fitting within the very exception we recognized in *Easley v.*

[1] The court of appeals held that the trial court abused its discretion by restricting Jacobs's voir dire because the questions that Jacobs sought to ask were proper commitment questions. *Jacobs v. State*, 506 S.W.3d 127, 137 (Tex. App.— Texarkana 2016). It further held that, because the trial court's error violated Jacobs's constitutional right to an impartial jury, it was "a constitutional error that requires a Rule 44.2(a) analysis." *Jacobs*, 506 S.W.3d at 139; TEX. R. APP. P. 44.2(a). The court of appeals concluded that, under the Rule 44.2(a) standard, the constitutional error was harmful because the court of appeals could not say beyond a reasonable doubt that the trial court's error did not contribute to Jacobs's conviction. *Id.*

State.[2] The difference between this case and *Easley* is that, in *Easley*, the trial court's erroneous restriction on voir dire did not infringe upon Easley's constitutional right to be heard by counsel or his constitutional right to have an impartial jury because the defendant's counsel was able to ask other questions that gave him the information he needed to pick an impartial jury. In this case, however, the trial court's erroneous restriction on voir dire prevented Jacobs's counsel from asking what he needed to ask in order to be able to select an impartial jury. The reason this erroneous restriction hindered Jacobs's ability to select an impartial jury is because of Texas Code of Criminal Procedure article 38.37, which allowed the State to introduce Jacobs's prior extraneous sexual offense during guilt/innocence.[3]

Jacobs was charged with aggravated sexual assault. His defense counsel asked the trial court if he would be permitted to ask, as part of his voir dire, certain questions of the jury panel related to Jacobs having a prior similar sexual assault offense. Jacobs's counsel expressed to the trial court that, since the State would be permitted to introduce, during guilt/innocence, evidence of a prior extraneous sexual assault pursuant to Article 38.37,

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[2] 424 S.W.3d 535 (Tex. Crim. App. 2014).

[3] Texas Code of Criminal Procedure article 38.37, section 2 applies to sexual related offenses only. In this case, Article 38.37, section 2 allowed, during the guilt/innocence phase of Jacobs's trial, the admission into evidence of a prior sexual offense committed against a different child. A prior assault against a different child (other than a sexual assault) would not have been admissible under Article 38.37, section 2(b).

section 2(b),[4] he wanted to make sure that he would be selecting jurors who would not convict his client if the State did not prove every element of the charged offense beyond a reasonable doubt solely because Jacobs had committed a similar type of sexual assault once before. In other words, defense counsel was trying to eliminate "for cause" any potential juror who believed that "once a child molester, always a child molester" regardless of whether the State proved the charged offense beyond a reasonable doubt.[5] These were proper commitment questions and should have been permitted by the trial court.[6]

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[4] Texas Code of Criminal Procedure article 38.37, section 2(b) provides, in pertinent part, that,

> . . . evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) [sexual offenses committed against a child under the age of seventeen or eighteen] may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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.

[5] The majority states that "it was Jacobs, not the trial judge, who proposed the adjective 'assaultive' in describing the relevant 'offenses.'" Majority Opinion at 12. However, his request to use the term "assaultive" was only in response to the trial judge's ruling prohibiting him from using the term "sexual" to describe the offense.

[6] A commitment question during voir dire is one that commits a prospective juror to resolve, or refrain from resolving, an issue a certain way after learning a particular fact. *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001). For a commitment question to be proper, it must meet two criteria: (1) "one of the possible answers to that question must give rise to a valid challenge for cause," and (2) it "must contain only those facts necessary to test whether a prospective juror is challengeable for cause." *Id.* at 182. A challenge for cause is valid if it seeks to excuse an unqualified juror. Texas Code of Criminal Procedure article 35.16 lists all of the specific "Reasons for Challenge for Cause" that render "[a] juror incapable or unfit to serve on the jury." In this case, any potential juror who would not hold the State to its burden to prove all of the elements of the charged offense beyond a reasonable doubt simply because Jacobs had previously committed a sexual offense would be challengeable for cause under Article 35.16(a)(9) and Article 35.16(c)(2). Under Article 35.16(a)(9), a challenge for cause may be made if "the juror has a bias or prejudice in favor of or against the defendant." TEX. CODE CRIM. PROC. art. 35.16(a)(9). Under Article 35.16(c)(2), a challenge for cause may be made by the defense that a juror "has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely." TEX. CODE CRIM. PROC. art. 35.16(c)(2); *see*

The applicability of Article 38.37 here is critical. Evidence of an extraneous prior offense committed by a defendant is usually excluded during the guilt/innocence phase of trial because such evidence is inherently prejudicial, tends to confuse the issues in the case, and forces the accused to defend himself against collateral charges.[7] However, our Legislature has chosen to make a specific and limited exception to this prohibition. Under Article 38.37, sections 2(a) and 2(b), extraneous prior sexual offenses (not assaultive offenses) committed against a different child (not the complainant) are allowed to be admitted in the guilt/innocence phase of a defendant's trial for a sexual offense against a child.[8] The majority states on page 4 of its opinion that "Jacobs conducted his Article 38.37 voir dire by referring primarily to prior 'assaultive' offenses." This is not accurate. Article 38.37 does not apply to "assaultive" offenses. It only applies when there is a prior sexual

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Harris v. State, No. AP-77,029, 2016 WL 922439, at *5 (Tex. Crim. App. 2016) (not designated for publication) ("A defendant may challenge a veniremember for cause when he or she is alleged to be biased or prejudiced against the defendant or the law on which the State or defendant is entitled to rely. . . . A trial court must excuse the venire member if such a bias or prejudice would substantially impair the juror's ability to carry out his oath and instructions in accordance with the law.") (first citing *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009); and then citing *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002)); *see also Ladd v. State*, 3 S.W.3d 547, 558–59 (Tex. Crim. App. 1999).

[7] *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972); *see also* TEX. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

[8] Under Article 38.37, section 2(b), "Notwithstanding Rules 404 and 405, Texas Rules of Evidence, . . . evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) [sexual related offenses against a child] may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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. art. 38.37 § 2(b).

offense against a child—which is exactly my point.[9] Jacobs was erroneously prohibited from conducting an Article 38.37 voir dire, which kept him from knowing if he was selecting an impartial jury, which he has a constitutional right to do.

Jacobs did not have the opportunity to initiate any questioning that might have exposed so much as a negative feeling, much less a challengeable bias, possessed by a potential juror against a prior sex offender. Because of Article 38.37 section 2, the prosecutor was allowed to present evidence, during the guilt/innocence phase of the trial, of Jacobs's prior sexual-assault-of-a-child offense.[10] However, Jacobs's counsel was not allowed to ask during voir dire if knowing that Jacobs had a prior sexual-assault-of-a-child offense would affect the potential jurors's ability to be fair and impartial in rendering their verdict of guilt or innocence. Jacobs was therefore precluded from identifying veniremembers who would be challengeable for cause based on their bias against a repeat child sex offender. Gauging the veniremembers's reactions to Jacobs having a prior "assaultive" offense did not (and would not) reveal any bias or prejudice toward Jacobs for having a prior sexual assault conviction. Since the type of prior assaultive offense was the key to whether Jacobs's prior sexual offense would have been admissible during guilt/innocence, the type of prior offense was also the key to revealing whether, knowing

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[9] *Supra* n.8.

[10] *Supra* n.3.

such information, the potential jurors could or could not have been fair and impartial toward a defendant who was a repeat child-sex-offender.

I do not agree with what seems to be the use of an "estoppel"-type of reasoning to support the majority's holding. Jacobs's attorney only requested using the term "assaultive" because the trial court judge had already denied Jacobs's request to use the term "sexual" to describe the prior offense.

Significantly, the State conceded that the trial court's restriction of Jacobs's voir dire was erroneous.[11] The State's petition and supporting brief challenged only the second and third decisions made by the court of appeals—asserting that the trial court's error was non-constitutional and harmless under Rule 44.2(b). However, the majority does not respond directly to the arguments that were made by the parties in their briefs to this Court. Rather, the majority analyzes "the trial court's conduct" under the constitutional provisions guaranteeing a trial by an impartial jury and the right to be heard by counsel "to ensure that error did not occur under either."[12] However, in this case, both parties agree that error occurred, and they have limited their dispute before this Court to the harm analysis.[13]

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[11] The State argues, "[t]he court of appeals was correct to find error. But it was wrong to conclude that the error was constitutional in dimension." State's Petition for Discretionary Review at 4.

[12] Majority Opinion at 8.

[13] It is true that our review of an appellate court decision is a matter within our discretion. But as a matter of course, we do not generally address questions that are not raised in the petition for discretionary review. *See Zamora v. State*, 411 S.W.3d 504, 508 n.1 (Tex. Crim. App. 2013); *Batiste v. State*, 888 S.W.2d 9, 10 n.1 (Tex. Crim. App. 1994); *Haughton v. State*, 805 S.W.2d 405, 407 n.1 (Tex. Crim. App. 1990).

I also do not agree with the majority's use of federal law as controlling the issue before us. Historically, federal voir dire has been solely the province of the trial judge, not the attorneys, and thus harm attributable to trial court error is not assessed in the same way. The majority's reliance on federal and out-of-state case law[14] seems misplaced. The majority states that, "[t]o constitute an abuse of discretion, the trial court's voir dire limitation must 'render the defendant's trial fundamentally unfair.'"[15] However, this rule of law has never been our state standard of review whereby we determine if a trial court's limitation on voir dire is harmful error. We have held that, in resolving a claim of trial court error due to its limiting of voir dire questioning, a reviewing court must first determine if the trial court's ruling was an abuse of discretion.[16] In such a review, a trial court's ruling limiting voir dire may be an abuse of discretion if it is arbitrary or unreasonable,[17] or if the appellant was

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[14] Majority Opinion at 10-13, nn.43-44, 55-57.

[15] *See Id.* at 12 (citing to *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991)).

[16] *Hernandez v. State*, 390 S.W.3d 310, 315 (Tex. Crim. App. 2012); *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002); *Rios v. State*, 122 S.W.3d 194, 197 (Tex. Crim. App. 2003); *Skinner v. State*, 956 S.W.2d 532, 542 (Tex. Crim. App. 1997); *Nunfio v. State*, 808 S.W.2d 482, 485 (Tex. Crim. App. 1991); *Smith v. State*, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985).

[17] *See Ratliff v. State*, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985) (a trial court has the right to impose "reasonable restrictions"); *Whitaker v. State*, 653 S.W.2d 781, 781 (Tex. Crim. App. 1983) (holding that the trial court's restriction of the voir dire examination was not unreasonable and did not constitute an abuse of discretion); *Clark v. State*, 608 S.W.2d 667, 670 (Tex. Crim. App. 1980) (holding that the trial court abused its discretion when it imposed an arbitrary time limitation on defendant's voir dire).

precluded from proffering a proper question regarding a proper area of inquiry, which he was in this case.[18]

I therefore disagree with the majority's reference to the case of *George Alarick Jones v. State* as dictating that the federal standard "should apply in a comparable claim under the Texas Constitution."[19] *Jones* does not support that assertion. The appellant in *Jones* argued that the trial court erred by granting the State's challenge for cause. This Court stated that, to show error, the appellant must show either that the trial judge applied the wrong legal standard in sustaining the challenge, or the judge abused his discretion in applying the correct legal standard.[20] This Court held in *Jones* that "it is clear that the trial court erred in granting the State's challenge of veniremember Snyder for cause."[21] We then stated in *Jones* that we must decide "whether the error is constitutional or otherwise, because the standard of review for errors of constitutional dimension is different from the standard for other errors."[22] Therefore, *Jones* is actually consistent with what the court of appeals did in this case, which

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[18] *See Barajas*, 93 S.W.3d at 38; *Skinner*, 956 S.W.2d at 542 ("The propriety of the question which the defendant sought to ask is determinative of the issue.") (citing *Nunfio v. State*, 808 S.W.2d at 484; *Green v. State*, 934 S.W.2d 92, 106 (Tex. Crim. App. 1996)).

[19] Majority Opinion at 12 ("per *Jones*") (citing *George Alarick Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998)).

[20] *Jones*, 982 S.W.2d at 388.

[21] *Id.* at 390.

[22] *Id.* at 390-91 (citing TEX. R. APP. P. 44.2).

was to first determine error, and if error is found, to then assess harm as either constitutional or non-constitutional under Rule 44.2.[23]

I therefore do not view this stair-step approach as a "misread[ing]" of *Easley v. State*.[24] *Easley* did not condemn the approach of first determining error and then determining harm under Rule 44.2. That particular point was actually not addressed in *Easley*, since the trial court's voir dire limitation was treated as an error.[25] I also do not agree with the majority's statement that "*Easley* does not stand for the proposition" that error should be classified as "'constitutional' or 'nonconstitutional.'" As I read *Easley*, that is exactly the issue this Court addressed—whether the voir dire "error" rose "to the level of constitutional

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[23] Texas Rule of Appellate Procedure 44.2 addresses how to evaluate "Reversible Error in Criminal Cases":

> (a) *Constitutional Error.* If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.
>
> (b) *Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

[24] *See* Majority opinion at 6; 424 S.W.3d 535 (Tex. Crim. App. 2014).

[25] *Easley*, 424 S.W.3d at 541 ("While erroneous, the judge's refusal to allow Easley's counsel to compare other burdens of proof did not mean he was foreclosed from explaining the concept of beyond a reasonable doubt and exploring the venire members' understanding and beliefs of reasonable doubt by other methods.")

magnitude" or was a "non-constitutional error."[26]

According to our decision in *Easley,* a trial judge's erroneous refusal to allow defense counsel to ask proper questions of veniremembers is generally considered non-constitutional.[27] However, we acknowledged in *Easley* that "there may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis."[28] I agree with the court of appeals that this case represents such an exception. The trial judge's erroneous limitation on Jacobs's voir dire under the facts of this case warranted labeling his error as constitutional because it hampered Jacobs's ability to exercise what would have been valid challenges for cause, and thus hindered Jacobs's ability to select an impartial jury.

The majority relies on *Johnson v. State*[29] to support its reasoning. However, *Johnson* did not involve a restriction on voir dire. It involved a restriction on cross examination. In

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[26] *Easley*, 424 S.W.3d at 539-540 (citing *Jones* 982 S.W.2d at 388) ("After finding the judge erred in granting the State's challenge, we were confronted with determining the nature of this error under Texas Rule of Appellate Procedure 44.2"). Unlike in this case, where Jacobs prevailed in the court of appeals on the issue of constitutional versus non-constitutional error, the court of appeals in *Easley* held that the erroneous limitation on voir dire was non-constitutional and harmless. Hence, Easley would have no-doubt argued, just as Jacobs did in this case, that the error was constitutional since, to argue that the error was non-constitutional would be an argument in favor of the State's position. Yet, the majority limits its analysis because Jacobs "made no independent claim that the trial court's voir dire limitation ran afoul of a non-constitutional provision of law, such as a statute, rule, or precedent." My question is, why would he when, to do so, would run counter to his legal position?

[27] *Easley*, 424 S.W.3d at 541.

[28] *Id.* at 541.

[29] 433 S.W.3d 546 (Tex. Crim. App. 2014).

Johnson, this Court held that the defendant's right to confrontation was not violated simply because the trial court did not allow defense counsel to question the State's witnesses about what kind of first degree felony was pending against them.[30] Our holding in *Johnson* made sense because a witness's tendency to testify favorably for the State would be the same regardless of whether the witness had a pending first degree felony theft or a pending first degree felony robbery. It is the length of a potential sentence stemming from a pending felony hanging over a State witness's head—not necessarily the type of felony—that affects whether that witness might be inclined to testify favorably for the State. In that situation, it makes sense to conclude that the type of felony is irrelevant to the issue of bias on the part of the witness. But in this case, it is the type of prior offense—i.e., sexual—committed by Jacobs that decides whether that prior offense is admissible under Article 38.37, section 2.

The State gave formal notice of its intent to introduce evidence of the prior sexual offense pursuant to Article 38.37 section 3. Since the State was able to, and did, introduce evidence of the prior sexual assault in its case in chief,[31] and since the State would have therefore been permitted to address such topic on voir dire, which it would have been, then

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[30] *Johnson*, 433 S.W.3d at 557-58.

[31] The State relied heavily on the prior Louisiana sexual offense in its opening statement, in its case-in-chief, and in its final argument. The prosecution began opening statement calling Jacobs a "repeat offender," and describing the details of the prior Louisiana offense to the jury. The State's first witness was the victim of the prior Louisiana offense. And, the State argued in closing that the jury could use the evidence of Appellant's prior Louisiana offense "to determine the character of the defendant and if he was acting in conformity with that character. His character is that he is a sexual predator, and he preys on little girls."

the defendant should also have been permitted to voir dire as requested. Jacobs was entitled to know whether the potential jurors would still hold the State to its burden of proof in spite of such evidence.

An error that infringes on a constitutional right is a constitutional error.[32] "When confronted with a constitutional error, a reviewing court must analyze the error under Rule 44.2(a)."[33] A defendant's right to an impartial jury is a constitutional right.[34] An impartial jury is one that does not favor a party or individual due to the emotions of the human mind, heart, or affections.[35] Our case law is well established that, essential to the Sixth Amendment guarantee of a trial before an impartial jury is the right to question veniremembers in order to intelligently exercise challenges for cause to identify unqualified jurors.[36] A juror with a

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[32] *See, e.g.*, *Snowden v. State*, 353 S.W.3d 815, 818 (Tex. Crim. App. 2011) ("When a prosecutorial remark impinges upon an appellant's privilege against self-incrimination under the constitution of Texas or of the United States, it is error of constitutional magnitude.") (citing *Canales v. State*, 98 S.W.3d 690, 695 (Tex. Crim. App. 2003) and *Bustamante v. State*, 48 S.W.3d 761, 764 (Tex. Crim. App. 2001)).

[33] *Snowden*, 353 S.W.3d at 818.

[34] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence [*sic*]."); TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. . . and shall have the right of being heard by himself or counsel, or both. . . .").

[35] *Durrough v. State*, 562 S.W.2d 488, 490 (Tex. Crim. App. 1978).

[36] *Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004) ("Constitutional provisions bear on the selection of a jury for the trial of a criminal case.") (first citing U.S. CONST. amend. VI; then citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), then citing *Raby v. State*, 970 S.W.2d 1, 10 (Tex. Crim. App. 1998); then citing *Linnell v. State*, 935 S.W.2d 426, 428 (Tex. Crim. App. 1996); and then citing *Dinkins v. State*, 894 S.W.2d 330, 344–45 (Tex. Crim. App. 1995) (some citations omitted)); *see also Armstrong v. State*, 897 S.W.2d 361, 363 (Tex. Crim. App. 1995) (holding that the

bias or prejudice against the defendant or against any law applicable to the case, who would decide the case based on such bias rather than holding the State to its burden to prove the charged offense beyond a reasonable doubt, is an unqualified juror.[37] Why would it not logically follow, then, that, if a trial court judge places a restriction on a defendant's ability to select such impartial jurors, as the judge did in this case, such erroneous restriction would be a constitutional error?

The majority believes that the trial judge was "evidently concerned" that if the jury had been informed that Jacobs had a prior sexual offense, the jury pool would be "poison[ed]" and he would have to "bust[] the panel."[38] However, when the right to select a fair and impartial jury clashes with a judge's concern over being able to obtain a qualified jury due to there being highly sensitive and polarizing issues involved in the case, the solution is not to restrict the attorneys from asking legitimate voir dire questions (that may validly eliminate unqualified jurors). Rather, the solution (such as is done in capital death cases) is to bring in a supplemental panel. Obviously, excusing potential jurors who have preconceived opinions about certain topics (such as the death penalty or repeat sexual offenders) is the whole purpose behind being able to ask such questions.

The questions Jacobs's counsel sought to ask would not have merely provided

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jury selection process is designed to insure that an intelligent, alert, disinterested, impartial, and truthful jury will perform the duty assigned to it).

[37] TEX. CODE CRIM. PROC. art. 35.16(a)(9), (c)(2).

[38] *See* Majority Opinion at 3.

information that would have assisted him in exercising peremptory challenges. Clearly, the fact that a proffered question would "be of some use in exercising peremptory challenges" does not mean that such a question is compelled by the constitution.[39] But here, Jacobs was trying to get information that would have given rise to a valid challenge for cause, not just to assist him in exercising peremptory challenges. That is what made Jacobs's voir dire questions proper commitment questions, and that is why the trial court's error in not allowing him to ask these questions impinged his constitutional right to select an impartial jury, and that is why the error was a constitutional error. As such, I agree with the unanimous decision by the Sixth Court of Appeals. Because the majority does not, respectfully, I dissent.

FILED: October 10, 2018

PUBLISH

[39] *Mu'Min v. Virginia*, 500 U.S. 415, 424-25 (1991).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1411-16

JOSHUA JACOBS, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS BOWIE COUNTY

NEWELL, J., filed a concurring opinion in which ALCALA, J., joined.

For the most part, I agree with the Court's analysis. Specifically, I agree with the Court's legal conclusion that in most cases, though not all, errors regarding a limitation of voir dire are non-constitutional. But I disagree with the Court that we have to decide whether this is one of those rare cases in which the voir dire error is constitutional. Instead, I disagree with the court of appeals' conclusion that Appellant's proposed

voir dire questions in this case were valid commitment questions. Because I do not believe the trial court abused its discretion in keeping Appellant from asking his proposed questions, I would save for another case and another day the debate about which harm-analysis standard is appropriate.[1]

As the court of appeals correctly observed, even though a trial court should grant defendants great leeway in questioning the jury, we review a trial court's decision to limit voir dire under an abuse of discretion standard.[2] Whether a particular question amounts to an improper commitment question requires a three-step analysis.[3] The first step is to determine if the question is a commitment question.[4] The second is to determine if the question only includes those facts that lead to a valid challenge for cause.[5] The third step is to consider whether the question included only "necessary facts."[6]

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[1] The only question presented to this Court for review assumes the existence of error. Consequently, I regard the question of error as subsumed within the issue granted in light of the fact that the court of appeals reached that conclusion in its decision below.

[2] *Jacobs v. State*, 506 S.W.3d 127, 132 (Tex. App.—Texarkana 2016).

[3] *Lee v. State*, 206 S.W.3d 620, 621 (Tex. Crim. App. 2006).

[4] *Lydia v. State*, 109 S.W.3d 495, 497 (Tex. Crim. App. 2003).

[5] *Id.*

[6] *Lee*, 206 S.W.3d at 622.

Here, Appellant sought to question the jury about how it would react if the State proved that Appellant had previously committed an unrelated sexual offense. As the court of appeals correctly observed, Jacobs sought to ask "the prospective jurors whether they would resolve an element of the State's case based solely on the State proving an unrelated sexual offense."[7] The court of appeals held that these questions were valid commitment questions that would have led to a valid challenge for cause because Appellant was entitled to a jury that would not be biased by the prior offense in evaluating the evidence.[8] More specifically, the court of appeals explained that proof that Appellant had committed an unrelated sexual offense was not relevant to certain elements of the offense, such as the date of the offense or where the offense was committed.[9] Had the offense been committed and tried before our Legislature's passage of Section 2(b) of Article 38.37, I might have agreed.

But the State is correct that the terms of Article 38.37 allow the jury to consider the facts of an unrelated extraneous act in considering whether the State has proven its case beyond a reasonable doubt.

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[7] *Jacobs*, 506 S.W.3d at 133.

[8] *Id.*

[9] *Id.* at 134-35.

Section 2(b) of Article 38.37 sets out in relevant part:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, . . . evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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.[10]

This statute gives broad license to the State to introduce evidence of previous sexual offenses committed by a defendant to prove the defendant's guilt. Significantly, the evidence can be admitted to prove the offense under a theory of character conformity. That is, a jury could conclude that Appellant committed the offense in this case based upon evidence that he had done it, or something like it, before. In that way, a previous sexual offense committed by Appellant would be relevant to every element of the offense because it could be used to establish that Appellant committed the crime as alleged in the indictment.

It is startling to consider the scope of the license provided by this statute. However, the court of appeals does not appear to have adequately accounted for that scope in determining that Appellant's questions were proper commitment questions. For example, the court of

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[10] TEX. CODE CRIM. PROC., art. 38.37 § 2(b).

appeals determined that questions focused on the time and location of the offense were proper because the unrelated sexual offense was not relevant to those allegations without also considering whether character conformity provided that relevance.[11] When the court of appeals did address a possible character conformity theory, it nevertheless limited the applicability of that theory. The court of appeals essentially required the unrelated sexual offense to establish a *modus operandi* by requiring the acts of the previous offense to mirror those of the present offense.[12] But the *modus operandi* theory of admissibility is only required when an extraneous offense cannot be used to show character conformity.[13]

In this case, Appellant essentially sought to commit the venire members to assess his guilt without considering evidence of his prior sexual offense. Prior to the enactment of Article 38.37, the jury could not consider a prior sexual offense on a theory of character conformity to

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[11] *Jacobs*, 506 S.W.3d at 134.

[12] *Id.* at 135 (holding that proof of a lesser, uncharged offense would not be relevant to prove penetration).

[13] *See Owens v. State*, 827 S.W.2d 911, 915 (Tex. Crim. App. 1992) (noting that evidence of a defendant's particular *modus operandi* is a recognized exception to the general rule precluding extraneous offense evidence because the *modus operandi* evidence tends to prove a material fact at issue, other than propensity).

prove guilt.[14] That was law Appellant would have been entitled to rely upon. And Appellant's questions would have been proper commitment questions under those circumstances because they could have revealed a potential venire member's inability to follow that law.

But after the passage of Section 2(b) of Article 38.37, that is no longer the law. I see little conceptual difference between the questions proposed by Appellant in this case and a defendant asking "could you be fair and impartial if the victim is nine years old?" in an indecency case involving a nine-year-old victim.[15] In *Barajas v. State*, we held that the latter question was improper.[16] If a trial court could properly prohibit that question, then the trial court's limitation of Appellant's voir dire was equally proper.

With these thoughts, I concur.

Filed: October 10, 2018

Publish

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[14] *See, e.g., Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011) ("Evidence of extraneous offenses is not admissible at the guilt phase of a trial to prove that a defendant committed the charged offense in conformity with a bad character.").

[15] *Barajas v. State*, 93 S.W.3d 36, 37-38 (Tex. Crim. App. 2002).

[16] *Id.* at 41-42.

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