

Affirmed as Modified and Opinion Filed August 28, 2026



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-24-01382-CR

**KENNETH D. DANIELSON, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 422nd Judicial District Court
Kaufman County, Texas
Trial Court Cause No. 22-00579-422-F**

MEMORANDUM OPINION

Before Justices Goldstein, Miskel, and Lewis
Opinion by Justice Goldstein

Kenneth D. Danielson appeals his indecency with a child conviction. A jury found Danielson guilty, and the trial court sentenced him to life imprisonment. In seven issues, Danielson complains that: 1) the trial court erred in denying his motion to suppress evidence obtained from his cell phone; 2) the underlying search warrant was “invalid due to its overbreadth;” 3) the trial court erred in denying his motion for mistrial after the State violated a motion in limine; 4) the trial court erred in admitting extraneous offense evidence; 5) the trial court erred in denying his motion for a directed verdict; 6) the trial court abused its discretion in denying his motion for mistrial after the bailiff was referred to as a “jailer;” and 7) the time payment fee

assessed must be struck because it was assessed prematurely. As modified, we affirm the trial court's judgment.

BACKGROUND FACTS

In April 2024, Danielson was charged with indecency with a child. Specifically, the indictment alleged that Danielson, “with the intent to arouse or gratify the sexual desire of [Danielson], engage[d] in sexual contact with Landon (a pseudonym),”¹ “by touching the genitals of [Landon], a child younger than 17 years of age.” The indictment further alleged that Danielson had previously been convicted of indecency with a child by contact.

At trial in November 2024, Landon's mother testified that Landon, a son, was the fifth of her six children, and he was seventeen at the time of trial. In October 2022, after Landon had been “getting into trouble at school,” Mother took Landon to a doctor to have him evaluated for “some hyperactivity disorder.” At the beginning of the doctor's appointment, Mother read a questionnaire to Landon and filled out Landon's answers. When Mother came to the question asking if Landon had “ever been sexually abused,” Landon “froze.” This behavior gave Mother “concerns” because she “felt like he was about to tell [her] something that was about to rock our whole world.” In the conversation that followed, Landon was “crying” and “doing a lot of head nodding.” The doctor “walked in almost immediately,” and

¹ We also use the pseudonym “Landon” to protect the identity of the complaining witness who was a child at the time of the alleged offense and younger than 18 at the time of trial.

Mother told Landon it was “going to be okay,” and they would “discuss this further” when they were done with the appointment. When the appointment was over, Mother and Landon talked more, and, based on that conversation, Mother believed Landon had been sexually assaulted. Mother reported the sexual assault to the police. Mother identified Danielson as the person charged with sexually assaulting Landon and testified Danielson is her “step-uncle” and Landon’s “step-great-uncle.” Mother testified that, in 2018, Danielson was living with Mother’s parents, who had a pool at their house.

Landon testified that he often went to his grandmother’s house and “spent a lot of time in the pool.” Danielson lived in the pool house, and he and Landon were “close.” Landon testified Danielson sexually abused him for “[a] while” but Landon did not “fully remember it” although the abuse happened “more than once.” On one occasion, after Danielson took Landon to a Rangers game, Danielson brought Landon back to the pool house and asked Landon to show him Landon’s penis. Danielson “was grabbing” Landon’s penis and “began to stroke it” with his hand. Danielson told Landon to “wait there,” and Danielson got his phone and took a picture of Landon. Danielson’s phone was “an Android and it was black.” After Danielson took the picture, Landon pulled his pants back up.

On another occasion, Danielson and Landon were in the pool house when Danielson taught Landon that “shooting the moon” was “[w]hen you flash your butt.” Landon “thought it was funny,” so he “went in front of the TV and pulled

down [his] pants and said, Shoot the moon.” Again, Danielson told Landon to wait, grabbed his phone, and took a picture.

Landon testified about being at the “doctor’s visit” and feeling like he “couldn’t lie to [his] mom.” When Landon “originally told” Mother about the abuse, they were “still in the office.” Later, as soon as they got in the car, Mother “was like, So I assume it was [Danielson].” Landon confirmed that Danielson abused him and “started breaking down.” Landon told Mother that Danielson used “just his hand” and “took pictures.” Mother asked Landon if he “want[ed] to take this to trial,” and Landon responded that he did.

The State introduced the photographs from Danielson’s cell phone that showed Landon in the manner described in Landon’s testimony. The State also introduced evidence of Danielson’s prior conviction for indecency with a child by contact. At the conclusion of the evidence, the jury convicted him of indecency with a child as charged in the indictment. This appeal followed.

ANALYSIS

First and Second Issues

In his first issue, Danielson argues the trial court erred in overruling his motion to suppress the photographs found on his cell phone. In his second issue, Danielson complains the underlying search warrant was “invalid due to its overbreadth,” Specifically, Danielson argues that, even if the warrant provided authority to seize

Danielson's cell phone, the warrant was still invalid because it lacked particularity. Because of the interrelated nature of these two issues, we address them together.

Prior to trial, Danielson filed a motion to suppress any evidence derived from the evidence seized by police. At a hearing on the motion, defense counsel argued specifically that the search warrant in this case was "invalid" because it "did not allow or authorize the officers to search or seize any of the property." The trial asked counsel if "the issue [was] just that it does not command the search," and counsel stated that was "correct" and clarified that "[i]t commands them to enter but does not authorize any sort of search or seizure." The parties stipulated to the admission of State's Exhibit 1, a copy of the affidavit for evidentiary search warrant, and State's Exhibit 2, a copy of the search warrant itself.

Among other things, the affidavit of William Griffin, an investigator with the Kaufman County Sheriff's office provided the following:

There is in Kaufman County, Texas, a suspected place and premises described and located as follows: [property description]. The residence is a single story structure; a brown brick house with a wooden privacy fence and multiple smaller buildings on the property to include a garage and a work shop. Photograph of the property is below[.] Said suspected place is in possession of stolen property to include but is not limited to: cellular devices containing child pornography and other evidence related to a Continuous Sexual Abuse of Young Child or Children, Texas Penal Code 21.02 case based on information documented in Kaufman County Sheriff Office report 2022-04762 that occurred between the approximate dates of November 2014 to November 2018. Said suspected place, in addition to the foregoing description, also includes all other buildings, structures, places and vehicles on said premises and within the curtilage, if said premises is a residence, which are found to be under the control of the suspected party named below

and in, on, or around which said suspected party may reasonably reposit or secrete property which is the object of the search requested herein.

The affidavit continued by stating it was the belief of the affiant that the “suspected party” had possession of and was concealing in the suspected place, among other things, the following:

a. Visual materials, chats, records, data, and other items pertaining to child erotica, lewd visual material depicting a child, or the employment, authorization, inducement, production, direction, or promotion of a child younger than 18 years of age engaging in sexual conduct or a sexual performance.

b. Information, data, and records pertaining to the access, display, possession, or distribution of child pornography, child erotica, or lewd visual material depicting a child.

c. Information, data, and records pertaining to the search, research, and correspondence regarding the subject matter of child pornography, child erotica or lewd visual material depicting child.

d. Information, data, records, and other user attributes that would tend to establish that a computer, computer system, computer network, electronic storage device, cellular telephone, or other wireless communications device was used to search, solicit, access, display, possess, or distribute child pornography and establish the person(s) who used, accessed, controlled, or owned said device or system.

* * *

h. Computers, computer systems, electronic storage devices, cellular phones, and other wireless communication devices capable of storing digital data or connecting to the internet that may contain the information and records sought in this affidavit or may have been used in the commission of the alleged offense(s).

i. Electronic communications held or maintained in electronic storage by an electronic communication service or remote computing service associated with any computer, computer system, electronic storage device, cellular phone, or other wireless communications device searched or seized pursuant to this affidavit that may contain the

information and records sought in this affidavit or may have been used in the commission of the alleged offense(s).

The affidavit affirmatively stated that

4. Affiant has probable cause for said belief that said property constitutes evidence that the offense described, Continuous Sexual Abuse of a Young Child or Children, Texas Penal Code 21.02, in Paragraph 4, below, was committed and that said suspected party committed the offense described.

The affidavit further stated that Griffin had “reason to believe the foregoing to be true and correct because of offense report number 2022-04 762 and a verbal and written statement from [Landon] during a forensic interview.”

The recitation of facts contained within the affidavit included a description of Landon’s claims that Danielson “photographed [Landon’s] naked body on multiple occasions with a cell phone.” The affidavit requested that “an arrest warrant be issued for” Danielson for the offense of continuous sexual abuse of a young child or children. Further, the affidavit asked for “issuance of a warrant that will authorize affiant and other peace officers to *search* said suspected place and premises for the property described above and to *seize* same.” (emphasis added).

Based upon the affidavit requesting the issuance of a search warrant², the judge found “the verified facts stated by affiant in said affidavit show that affiant has probable cause for the belief he/she expresses therein” and that the “affidavit

² The warrant was styled SEARCH WARRANT (Article 18.02(10), Texas Code of Criminal Procedure). Article 18.02 provides in pertinent part the grounds for issuance of a search warrant, specifically “(a) A search warrant may be issued to search for and seize:… (10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense. TEX. CODE CRIM. PROC. Art 18.02(a)(10).

properly establishes grounds for issuance of this Warrant.” The subsequent search warrant, issued the same day that the affidavit was filed, commanded any peace officer of Kaufman County, Texas, or of the State of Texas, to “enter the suspected place, vehicles, and premises” described in the affidavit and displayed a photograph of the subject property. Below the photograph, without any statement as to what was to be done with the listed items, the warrant repeated the same list of items allegedly concealed in the suspected place as contained in the affidavit. Following the entry into evidence of the affidavit and warrant, the defense rested for purposes of the hearing on the motion to suppress.

The State called Griffin as a witness, and he testified that he sought a search warrant based on Landon’s description of “a cellular device, a cellular telephone pretty specifically to be a gray device, Android-based, that was used to take pictures of him while he was nude by Mr. Danielson.” Griffin had suspicions of multiple offenses committed by Danielson including indecency of a child leading to continuous sexual abuse of a child and the possession of child pornography. Griffin included in his affidavit a “description of the phone, the description of the property to be searched, and the evidence to be seized.” Griffin executed the warrant at the subject property and found and seized, in Danielson’s room at the property, “the cellular device that we were looking for” in plain view on the top of a bookshelf. The trial court admitted photographs of Danielson’s room, the bookshelf, and the

cell phone. After obtaining another search warrant, Griffin was “able to do an extraction” from the cell phone.

After the State rested in the suppression hearing, the defense renewed the argument that the search warrant “never actually commands the officers to search and/or seize anything. There is just a list of things.” As a result, defense counsel argued that the search warrant was invalid.

The State responded that the search warrant affidavit was “incorporated into the warrant,” and the affidavit asked for “permission to enter, it asks for permission to search.” The State argued further that the “warrant and affidavit are submitted together, they are read together, and they are signed together.” In the alternative, the State argued that the warrant commanded officers to enter the suspect premises and, once there, officers saw the cell phone in plain view and knew the cell phone was “the same phone that was described with the contraband that [they] were seeking.” The defense countered that the interpretation “makes the statute irrelevant and ineffectual if we can just expand the Court’s order based on what the officer asks us to do.” Further, defense argued the plain view doctrine does not apply to cell phones “as cellphones in and of themselves are not immediately incriminating.”

At the conclusion of the hearing, the trial court denied Danielson’s motion to suppress, quoting cited case law for the principle that, in interpreting affidavits and search warrants, he was to “do so in a common sense and realistic fashion and avoid hypertechnical analysis.”

In reviewing a trial court’s ruling on a motion to suppress, an appellate court applies a bifurcated standard of review. *See State v. Hardin*, 664 S.W.3d 867, 871 (Tex. Crim. App. 2022); *State v. Gonzales*, 676 S.W.3d 261, 265 (Tex. App.—Dallas 2023, no pet.). An appellate court gives almost total deference to the trial court’s determination of historical facts. *See Hardin*, 664 S.W.3d at 871; *Gonzales*, 676 S.W.3d at 265. Likewise, an appellate court affords almost total deference to a trial court’s ruling on mixed questions of law and fact if the resolution to those questions turns on the evaluation of credibility and demeanor. *See Hardin*, 664 S.W.3d at 872; *Gonzales*, 676 S.W.3d at 265. And an appellate court reviews the trial court’s legal ruling on a motion to suppress de novo, unless its specific fact findings that are supported by the record are also dispositive of the legal ruling. *See Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013). Here, Danielson challenges the trial court’s admission of photographs found on his cell phone. Thus, our review of this issue is de novo.

A warrant will issue upon probable cause and must particularly describe the place to be searched and the things to be seized. *See* U.S. CONST. amend. IV. “Probable cause exists when, under the totality of circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location.” *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). To comply with the Fourth Amendment, a search warrant must describe the things to be seized with sufficient particularity to avoid the possibility of a general

search. *Diaz v. State*, 604 S.W.3d 595, 605 (Tex. App.—Houston [14th Dist.] 2020), *aff'd*, 632 S.W.3d 889 (Tex. Crim. App. 2021).

The particularity requirement may be satisfied by cross-referencing a supporting affidavit that describes the items to be seized. *Id.* (citing *United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2011)). The affidavit is interpreted in a non-technical, commonsense manner drawing reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *See State v. Elrod*, 538 S.W.3d 551, 554 (Tex. Crim. App. 2017); *Bonds*, 403 S.W.3d at 873.

Read together, a warrant and supporting affidavit satisfy the Fourth Amendment's requirements when they contain facts sufficient to show that (1) a specific offense has been committed, (2) the property or items to be searched for or seized constitute or contain evidence of the offense or evidence that a particular person committed it, and (3) the evidence sought is located at or within the thing to be searched. *See* TEX. CODE CRIM. PROC. art 18.01(c); *Luckenbach v. State*, 523 S.W.3d 849, 854 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

Here, the search warrant affidavit included a description of Landon's claims that Danielson "photographed [Landon's] naked body on multiple occasions with a cell phone." The affidavit requested that "an arrest warrant be issued for" Danielson for the offense of continuous sexual abuse of a young child or children. Further, the affidavit asked for "issuance of a warrant that will authorize affiant and other peace officers to search said suspected place and premises for the property described above

and to seize same.” Both the affidavit and the search warrant contained a list of items and information to be searched, including cellphones that could contain “information and records sought in this affidavit or may have been used in the commission of the alleged offense(s),” and the search warrant affidavit sought the issuance of a warrant that would authorize officers to “seize same.” The search warrant itself referenced the affidavit and stated the judge’s finding “that the verified facts stated by affiant in said affidavit show that affiant has probable cause for the belief he/she expresses therein” and the judge’s belief that “said affidavit properly establishes grounds for the issuance of this Warrant.”

The Court of Criminal Appeals has acknowledged that “the warrant and supporting affidavit must be read together and a determination of validity made according to the totality of circumstances, the yardstick of measurement with the question of probable cause.” *Green v State*, 799 S.W.2d 756, 760 (Tex. Crim. App. 1990) (concerned with a procedural discrepancy relative to date of issuance and its possible effect in causing a mistaken execution upon an innocent third party). In this regard, the *Green* court determined that

The two objectives of the law concerning search warrants are to ensure there is adequate probable cause to search and to prevent a mistaken execution of the warrant against an innocent third party. *Bridges v. State*, 574 S.W.2d 560 (Tex. Crim. App. 1978). These objectives are not furthered by rigid application of the rules concerning warrants; as this Court has previously stated, “(We) are convinced that the rights of society and of the innocent third party can best be protected by evaluating each search warrant individually.” *Id.* at 562. Just as we will evaluate the encompassing issue of probable cause by measuring the

factual sufficiency of an affidavit and warrant by the “Totality of Circumstances” test enunciated in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), so do we review technical discrepancies with a judicious eye for the procedural aspects surrounding issuance and execution of the warrant. To do otherwise would defeat the purpose behind the warrant requirement, and provide protection for those to whom the issue on appeal is not one based upon the substantive issue of probable cause but of technical default by the State.

Id. at 757–58.

Under these circumstances, on this record, reading the search warrant affidavit and the search warrant together, we conclude they satisfied the Fourth Amendment’s requirements and permitted the seizure of Danielson’s cell phone containing photographic evidence of his guilt³. *See* TEX. CODE CRIM. PROC. art 18.01(c); *Diaz*, 604 S.W.3d at 605; *Luckenbach*, 523 S.W.3d at 854. Moreover, although Danielson did not raise his particularity complaint in the trial court, we conclude the warrant was not otherwise invalid because it lacked particularity. *See Diaz*, 604 S.W.3d at 605; *Elrod*, 538 S.W.3d at 554; *Bonds*, 403 S.W.3d at 873. We further conclude that the trial court did not, therefore, err in overruling Danielson’s motion to suppress. *See Hardin*, 664 S.W.3d at 871; *Gonzales*, 676 S.W.3d at 265. We overrule Danielson’s first and second issues.

³ We note without further discussion that a separate warrant was obtained to forensically extract photographic evidence from Danielson’s cell phone. As there is no challenge to the separate warrant for the contents of the cellular phone, we need not address it here.

Third Issue

In his third issue, Danielson complains that the trial court erred in denying his motion for mistrial after the State violated a motion in limine. Specifically, Danielson complains that “the violation of the motion in limine carried with it a severe prejudicial effect because it identified Danielson as a registered sex offender.”

Prior to the jury being empaneled, the trial court granted Danielson’s motion in limine requiring that, prior to the specific mention of prior convictions or alleged violations of the law, a hearing would be held outside the presence of the jury to determine certain enumerated details of any such prior convictions. As to any extraneous offenses, the motion also requested that the State be instructed not to refer to any extraneous offenses by Danielson in the presence of the jury. Again, prior to any mention of extraneous offenses, the motion requested that a hearing be immediately held outside the presence of the jury to determine, among other things, the purposes for which the extraneous offenses were offered and the relevance of the extraneous offenses.

During Griffin’s testimony, the prosecutor asked him how he could tell that Danielson lived in the subject property. Griffin answered as follows:

Well, first of all, the victim during the forensic interview said that that’s where he lived. And then we were able to confirm that through records checks and the fact that he is a registered sex offender through Kaufman County.

Defense counsel approached the bench, and the trial judge recessed the jury. Outside the presence of the jury, counsel objected as follows:

In this case the witness has just informed the jury that he has a criminal conviction, not only a conviction but a conviction that would result in him being registered as a sex offender, which is more important in this case because of the nature of today's charges. That's a violation of our motion in limine. It's a violation of our client's due process and due course of law rights. I don't understand how any curative instruction can unring that bell. We have to move for a mistrial.

The prosecutor responded that she asked Griffin what information he reviewed in order to determine that Danielson lived in the subject property, and "it was not eliciting that information that was offered by the witness; so therefore, it did not violate the motion in limine by the State." The trial court ruled that the motion in limine had been violated; however, the trial court further determined that exhibits establishing Danielson's prior conviction for indecency with a child younger than fourteen years would be admitted later in the trial. Thus, because the trial court "believe[d] that that evidence [would] ultimately come in under 403," the trial court did not "believe that it's going to prejudice [Danielson] more than those exhibits being admitted." The trial court then denied Danielson's motion for a mistrial.

After the denial of his motion for mistrial, Danielson asked that Griffin's answer be stricken and the jury be instructed to disregard his answer. The trial court stated that it was granting the motion to strike and specified that "the statement was, 'and the fact that he is a registered sex offender through Kaufman County.'" When the jury returned to the courtroom, the trial judge instructed the jury as follows:

When we left, ladies and gentlemen, there was an objection, there was testimony. I sustained an objection, and I am going to instruct you to disregard testimony from this witness. I believe that statement was, and I'm quoting, and the fact that he is a registered sex offender through

Kaufman County. Disregard that statement from this witness. You're instructed to do that.

Later in Griffin's testimony, the State introduced evidence of Danielson's 1998 conviction for indecency with a child younger than fourteen. Griffin testified this was "a registrable offense."

A trial court's grant or denial of a motion in limine is a preliminary ruling and generally preserves nothing for appellate review. *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). Rather, to preserve error as to the subject of a motion in limine, a party must object at the time the subject is raised during trial. *Id.* The preferred procedure for preserving error is (1) a timely, specific objection, (2) a request for an instruction to disregard, and (3) a motion for mistrial. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004).

When, as here, the trial court sustains a defense objection and instructs the jury to disregard improper questioning, the issue is whether the trial court abused its discretion by denying the motion for mistrial. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *see also Balderas v. State*, 517 S.W.3d 756, 783 (Tex. Crim. App. 2016). We will uphold the trial court's ruling if was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000); *see also Hawkins*, 135 S.W.3d

at 77. “Only in extreme circumstances, where the prejudice is incurable, will mistrial be required.” *Hawkins*, 135 S.W.3d at 77; *see also Jenkins*, 493 S.W.3d at 612 (“A mistrial is an extreme remedy that should be granted only if residual prejudice remains after less drastic alternatives have been explored.”).

A mistrial due to an improper question is required only when the question is clearly prejudicial to the defendant and of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *Anderson v. State*, No. 05-16-01157-CR, 2017 WL 5897903, at *6 (Tex. App.—Dallas Nov. 29, 2017, pet. ref’d) (mem. op., not designated for publication). “Ordinarily, a prompt instruction to disregard will cure error associated with an improper question and answer, even one regarding extraneous offenses.” *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000) (per curiam); *see also Young v. State*, 283 S.W.3d 854, 878 (Tex. Crim. App. 2009) (per curiam). We generally presume the jury followed the trial court’s instructions in the absence of evidence it did not. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). The presumption is refutable, but the appellant must rebut the presumption by pointing to evidence in the record indicating the jury failed to follow the trial court’s instructions. *Id.*

In determining whether a prejudicial event was so harmful as to warrant a mistrial, we consider the three factors identified in *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998): (1) the severity of the claimed misconduct, (2) curative

measures, and (3) the certainty of conviction absent the misconduct. *See Ramon v. State*, 159 S.W.3d 927, 929 (Tex. Crim. App. 2004).

Here, the severity of the claimed misconduct was slight, the trial court undertook curative measures requested by Danielson, and the certainty of Danielson's conviction absent Griffin's complained-of testimony was high. *See id.* Griffin's testimony that Danielson is a registered sex offender came in response to a question concerning the way in which Griffin determined that Danielson lived at the subject residence. While Griffin's testimony did not refer to any prior conviction Danielson might have had, the trial court ruled that the motion in limine had been violated. The trial court further determined that exhibits establishing Danielson's prior conviction for indecency with a child younger than fourteen years would be admitted later in the trial. Thus, because the trial court "believe[d] that that evidence [would] ultimately come in under 403," the trial court did not "believe that it's going to prejudice [Danielson] more than those exhibits being admitted." The trial court then denied Danielson's motion for a mistrial. After the denial of his motion for mistrial, Danielson asked that Griffin's answer be stricken and the jury be instructed to disregard his answer. The trial court complied with Danielson's request by instructing the jury to disregard Danielson's statement. As anticipated, the State later introduced evidence of Danielson's 1998 conviction for indecency with a child younger than fourteen, and Griffin testified this was "a registrable offense." Thus, in addition to Landon's testimony regarding Danielson's sexual assault of Landon

and photographing Landon, the jury had before it the evidence of Danielson's prior indecency with a child conviction. Under these circumstances, we conclude Griffin's complained-of testimony was not so harmful as to warrant a mistrial. *See id.* We overrule Danielson's third issue.

Fourth Issue

In his fourth issue, Danielson argues the trial court abused its discretion when it admitted extraneous offense evidence. Specifically, Danielson complains of the admission of evidence of his 1998 conviction for indecency with a child younger than fourteen. Danielson argues the proper predicate for this evidence was not laid, and the evidence was not relevant. In making this argument, Danielson applies a rule 403 analysis that evaluates whether the evidence's probative value is substantially outweighed by unfair prejudice, the evidence confuses the issues, misleads the jury, causes undue delay, or needlessly presents cumulative evidence. *See* TEX. R. EVID. 403.

We review the trial court's decision to admit evidence of an extraneous offense for an abuse of discretion. *Keller v. State*, 604 S.W.3d 214, 222 (Tex. App.—Dallas 2020, pet. ref'd). If the trial court's ruling is within the zone of reasonable disagreement, there is no abuse of discretion. *Id.* In determining whether the trial court abused its discretion, we may not substitute our opinion for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

By enacting article 38.37, the Legislature created an exception to the general exclusion of character evidence in criminal trials. *See* TEX. CODE CRIM. PROC. art. 38.37; *Miller v. State*, No. 05-22-01309-CR, 2024 WL 322265, at *3 (Tex. App.—Dallas Jan. 29, 2024, no pet.) (mem. op., not designated for publication). Thus, at the trial of a defendant accused of, among other things, continuous sexual abuse of a child, evidence that the defendant committed a separate sex offense against another child may be admissible under section 2 of article 38.37 “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(a)(1)(B), 2(b); *Miller*, 2024 WL 322265, at *3.

The admission of extraneous evidence under article 38.37, section 2(b) does not require that the defendant have been charged with, tried for, or convicted of the separate offense. *Castillo v. State*, 573 S.W.3d 869, 880–81 (Tex. App.—Houston [1st Dist.] 2019, pet. ref’d); *Miller*, 2024 WL 322265, at *3. But before evidence under article 38.37 is introduced, the trial judge must conduct a hearing outside of the jury's presence to “determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt.” TEX. CODE CRIM. PROC. art. 38.37, § 2-a(1); *Miller*, 2024 WL 322265, at *3.

When evidence of a defendant’s extraneous acts is determined to be relevant and admissible under article 38.37, section 2, this evidence nonetheless remains

subject to exclusion under rule 403. *Miller*, 2024 WL 322265, at *4. Under rule 403, the court may exclude otherwise relevant and admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. Rule 403 does not exclude all prejudicial evidence. It focuses only on the danger of “unfair” prejudice. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005).

When undertaking a rule 403 analysis, the trial court must balance the inherent probative force of the proffered item of evidence along with the proponent’s need for that evidence against: (1) any tendency of the evidence to suggest a decision on an improper basis; (2) any tendency of the evidence to confuse or distract the jury from the main issues; (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

Having explained the requirements of rule 403, we next turn to the specific meanings of the rule’s key phrases. The rule’s first key phrase, “probative value,” means more than simply relevance. *Id.* at 641. Rather, “probative value” refers to the inherent probative force of an item of evidence—that is, 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. *Id.*

The rule’s second key phrase, “unfair prejudice,” relates to a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. *Id.* The rule’s third key phrase, “confusion of the issues,” refers to a tendency to confuse or distract the jury from the main issues in the case. *Id.* The rule’s fourth key phrase, “misleading the jury,” concerns the tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds. *Id.* Finally, “the rule’s fifth and sixth key phrases, ‘undue delay’ and ‘needless presentation of cumulative evidence,’ are, we think, self-explanatory and concern the efficiency of the trial proceeding rather than the threat of an inaccurate decision.” *Id.*

The trial court has broad discretion in conducting a rule 403 balancing test, and we will not lightly disturb the decision rendered. *Moreno v. State*, 22 S.W.3d 482, 489 (Tex. Crim. App. 1999). “The balance is always slanted toward admission of relevant evidence because rule 403 carries a presumption that relevant evidence will generally be more probative than prejudicial.” *Rodriguez v. State*, 678 S.W.3d 375, 386–87 (Tex. App.—Dallas 2023, pet. ref’d). “If judicial restraint is ever desirable, it is when a rule 403 analysis of a trial court is reviewed by an appellate tribunal.” *Id.* at 387 (quoting *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990)).

Here, the trial court conducted a 38.37 hearing outside the presence of the jury. The State first called Sarah Wright, the records coordinator custodian for the Texas Department of Criminal Justice. Wright testified that State's Exhibit 1 was a photograph of Danielson and the judgment on Danielson's guilty plea to a 1998 offense of indecency with a child under 14, and State's Exhibit 1A was "the most accurate pen packet" Wright had in her business records showing the judgment from the 1998 indecency offense and a 2000 judgment on Danielson's guilty plea to the offense of unlawful possession of a controlled substance. The State offered Exhibit 1 for all purposes and Exhibit 1A for record purposes only, and the trial court admitted both exhibits for record purposes only.

The State next called Austin Jones, an investigator with the Kaufman County district attorney's office. Jones testified that he took Danielson's fingerprints on the day of the hearing, compared them with the fingerprints contained in Danielson's pen packet, and determined that the fingerprints matched. Danielson's counsel argued that the evidentiary nature of the State's exhibits "was going to be extremely more prejudicial than it would be probative." The trial court found that, "based on 38.37, the very purpose is that if there is evidence that is character in nature, that the defendant acted in conformity with that if it is a sex of a child offense." The trial court further found that, "based on the case law and based on the statute," the evidence supported a finding of guilt to a jury beyond a reasonable doubt. The trial court then concluded the hearing, and the jury returned to the courtroom.

With the jury present, the State again called Wright to testify. During Wright's testimony, the State offered Exhibit 1 into evidence. Danielson's attorney objected, asking the trial court to "note our objection under 38.37," and argued that an improper predicate had been laid and the exhibit was "not relevant to these proceedings." The trial court sustained the objection "as to relevance."

Following Griffin's subsequent testimony that he was able to "submit this case" after "all of the data had been processed and we were able to look at all of the extractions from the cellphones and the other digital devices," the State re-offered into evidence the exhibits showing Danielson's prior conviction for indecency with a child. The defense, having "already noted our objection for the record," had nothing additional. The trial court admitted the State's exhibits.

At the close of all evidence, the charge was received by and read to the jury, which instructed the jury as follows:

The State may have introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. You cannot consider the evidence of extraneous crimes or bad acts for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such extraneous crimes or bad acts, and even then you may only consider the same for the following purposes:

- 1) To determine the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and for no other purpose; or
- 2) To determine the state of mind of the defendant and the child;
- 3) For its bearing on the previous and subsequent relationship between the defendant and the child; and

- 4) For any bearing it has on the character of the defendant and acts performed in conformity with the character of the defendant.

We turn now to an analysis under the *Gigliobianco* factors.

Inherent probative force of the proffered item of evidence

The extraneous offense committed by Danielson was the same as the charged offense. Because the evidence of prior sexual abuse of a child “was especially probative of Appellant’s propensity to sexually assault children,” the Rule 403 balancing test normally will not favor the exclusion of evidence of the defendant’s prior sexual assaults of children. *Alvarez v. State*, 491 S.W.3d 362, 371 (Tex. App.—Houston [1st Dist.] 2016, pet. ref’d) (quoting *Belcher v. State*, 474 S.W.3d 840, 847 (Tex. App.—Tyler 2015, no pet.)). Although the remoteness of some of the extraneous acts may have somewhat reduced the evidence’s probative value, the fact that the evidence reflected a “continuing course of conduct” supports the trial court’s determination that the extraneous offenses were not too remote to be probative. *Alvaradoflores v. State*, No. 05-24-00309-CR, 2025 WL 1953401, at *4 (Tex. App.—Dallas July 16, 2025, pet. ref’d) (mem. op., not designated for publication). Accordingly, this factor weighs against finding that the trial court abused its discretion by admitting the extraneous-offense evidence.

The proponent’s need for that evidence

While the photographic evidence in this case corroborated Landon’s testimony, the State had ample need for the extraneous evidence to show Danielson

not only took photographs of Landon’s naked body but touched Landon’s genitals with the intent to arouse or gratify Danielson’s sexual desire.

Tendency of the evidence to suggest a decision on an improper basis or confuse or distract the jury

Sexually-related bad acts and misconduct involving children are inherently inflammatory. *Newton v. State*, 301 S.W.3d 315, 320 (Tex. App.—Waco 2009, pet. ref’d). However, the plain language of rule 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial. *Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013). Only “unfair prejudice” provides the basis for the exclusion of relevant evidence. *Montgomery*, 810 S.W.2d at 378.

The trial court’s limiting instruction counter-balanced against the danger of unfair prejudice. *Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (“The impermissible inference of character conformity can be minimized through a limiting instruction.”). In this case, the trial court instructed the jury not to consider extraneous offenses “for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such extraneous crimes or bad acts.” We presume the jury followed these instructions. *Gaytan v. State*, 331 S.W.3d 218, 228 (Tex. App.—Austin 2011, pet. ref’d). Thus, the possibility of the jury’s decision being based on an improper basis was mitigated. Here, these factors weigh against

finding that the trial court abused its discretion by admitting the extraneous-offense evidence.

Time needed to develop the evidence

In considering the time needed to develop the evidence, the more significant issue is whether the jury would be distracted from consideration of the charged offense during the time needed to present the extraneous-offense evidence. *Mechler*, 153 S.W.3d at 441. The time needed to develop the evidence necessarily includes introduction of the evidence, along with cross-examination, redirect examination, and any rebuttal offered by the defense in response to the evidence. *Hart v. State*, 688 S.W.3d 883, 893 (Tex. Crim. App. 2024). The time required to develop the extraneous offense evidence and its admissibility was primarily outside the presence of the jury. The only discussion before the jury was limited to the request to admit the exhibit into evidence, requiring approximately one minute. Such a limited duration is not excessive, and we find nothing in the record to indicate the development of this evidence distracted the jury from consideration of the charged offense. This factor also weighs against finding that the trial court abused its discretion by admitting the extraneous-offense evidence.

Conclusion

Bearing in mind that rule 403 envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value, the trial court could have reasonably concluded that the extraneous

offense evidence should have been admitted. Thus, we cannot say that the trial court abused its discretion in admitting the evidence. *See Keller*, 604 S.W.3d at 222. We overrule Danielson’s fourth issue.

Fifth Issue

In his fifth issue, Danielson argues the trial court erred by denying his motion for a directed verdict. In making this argument, Danielson contends “the State did not prove that Danielson had the intent to arouse or gratify his sexual desire.”

We review the denial of a motion for directed verdict under the same standard as a review of the sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). When reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). We do not resolve conflicts of fact, weigh evidence, or evaluate the credibility of the witnesses as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, we determine whether both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in the light most favorable to the adjudication. *Adelman v. State*, 828 S.W.2d 418, 422 (Tex. Crim. App. 1992).

The factfinder is the sole judge of the witnesses' credibility and the weight of their testimony. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984). The factfinder may choose to disbelieve all or any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Each fact need not point directly and independently to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is enough to warrant conviction. *See Kennemur v. State*, 280 S.W.3d 305, 313 (Tex. App.—Amarillo 2008, pet. ref'd). Circumstantial evidence is as probative as direct evidence and can be sufficient alone to establish an accused's guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). We review all of the evidence in the case regardless of whether it was erroneously admitted. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). "A court's role on appeal is restricted to guarding against the rare occurrence when the factfinder does not act rationally." *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018).

The indictment in this case charged Danielson, "with the intent to arouse or gratify the sexual desire of [Danielson], engage[d] in sexual contact" with Landon by touching the genitals of Landon. Landon testified that Danielson, among other things, asked Landon to show him Landon's penis, grabbed Landon's penis, and "began to stroke it" with his hand. In the context of indecency with a child, the finder of fact can infer the requisite intent to arouse or gratify sexual desire from a defendant's conduct, remarks, and all the surrounding circumstances. *McKenzie v.*

State, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981); *Keller v. State*, 604 S.W.3d 214, 226 (Tex. App.—Dallas 2020, pet. ref’d). No oral expression of intent or visible evidence of sexual arousal is necessary. *Keller*, 604 S.W.3d at 226. Here, the trial court and the jury could have reasonably inferred from Landon’s testimony, the sexual nature of the evidence, and the fact that Danielson committed the offense when he was alone with Landon, that Danielson engaged in the conduct to arouse or gratify his sexual desire and the conduct was not inadvertent or accidental. *See id.* at 226–27. Therefore, the evidence was sufficient to show Danielson had the requisite intent to arouse or gratify his sexual desire, and the trial court did not err in overruling his motion for a directed verdict. *See Williams*, 937 S.W.2d at 482. We overrule Danielson’s fifth issue.

Sixth Issue

In his sixth issue, Danielson argues the trial court “abused its discretion when it denied Danielson’s motion for a mistrial after referring to the bailiff as a jailer.”

At the beginning of trial, the trial court addressed the potential jurors and introduced members of the court’s staff including the district clerk, the court reporter, the court coordinator, and the bailiff. Immediately following these introductions, the trial court stated that “we also have our jailer, I forget your name” who then introduced himself as “Alexander,” and the trial court continued the introduction by stating, “Deputy Alexander. So we’re happy to have him serve as the bailiff as well.” The trial court then explained that the process takes about three

hours, and the court was going to go through the potential jurors' "qualifications, the exemptions, and excuses" before taking a twenty-minute break. After the break, the potential jurors would "have a placard with [their] number on it" and would be seated "in order with [their] number." The attorneys would then have "an hour a piece to talk" to the potential jurors before the jury was selected and sworn. The trial court then administered the oath to the potential jurors and admonished them concerning general juror qualifications. Following these admonishments, jurors came forward one at a time to participate in off the record discussions with the trial court and the attorneys. Several of the potential jurors were thus excused.

At the conclusion of this process, the potential jurors were excused and the trial court asked the parties if they were "ready to proceed with the arraignment outside the presence of the jury." The trial court then read the indictment and asked how Danielson "plead to that charge." Danielson's counsel stated that he "need[ed] to make a record of something prior to us entering our plea." Counsel raised the following objection:

I would ask the Court to note that this is the earliest time I could bring this to the Court's attention outside the presence of the jury without further exacerbating what is we're complaining of. But during introductions of court staff I believe the Court referred to Officer Alexander as the, quote/unquote, jailer in this case.

It would be our position that that, one, suggests to the jury that my client is in fact in custody, which would tend to bias them. We had obtained a pretrial order based on our motion to have him appear outside of jail clothes, in street clothes, for that very purpose. That being the case, we don't believe that's something that can be cured with an instruction, even though certainly we're asking that in addition, again, without

highlighting that to the jury and making it worse. So we're asking for a mistrial and a discharge of this panel.

The trial court responded as follows:

I do believe that Mr. Alexander was referred to as a jailer, but I referred to him after that as the second bailiff. And just for record purposes, the defendant has appeared with a shirt, a dress shirt, button shirt, with a jacket and dress pants. And I don't think that that, me saying that, you know, Ms. Perkins is a court reporter, that the bailiff who was also present – I'll just note for the record that he was not standing over or near the defendant. He was in open court. I did refer to him as the jailer but I also tried to make sure that they understood that he was serving as second bailiff.

The trial court asked the prosecutor if she had anything she wanted to put on the record, and she said she had “[n]othing additional.” The trial court then overruled Danielson's objection “at this time” and denied his motion for mistrial “at this time”. Danielson then entered his plea of not guilty.

We review the denial of a motion for mistrial under an abuse of discretion standard and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292; *see also Becerra v. State*, 685 S.W.3d 120, 127 (Tex. Crim. App. 2024) (“We review a trial court's denial of a motion for a mistrial . . . under an abuse of discretion standard.”). Under this standard, we do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable. *Becerra*, 685 S.W.3d at 127. A trial judge abuses his discretion when no reasonable view of the record could support his ruling. *Id.*

A motion for mistrial must be both timely and specific. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). A motion for mistrial is timely only if it is made as soon as the grounds for it become apparent. *Id.*

Here, the record shows the trial court's reference to Alexander as a "jailer" occurred at 8:44 a.m., and Danielson raised his objection at 9:19 a.m. The grounds for the motion for mistrial occurred approximately a half hour before the objection. During this time, the trial court swore in the venire panel, went through all of the potential jurors' "qualifications, the exemptions, and excuses." After having resolved the excuses with counsel, the trial court excused the remaining venire panel for twenty minutes. Outside the presence of the jury, the trial court read the indictment to Danielson prior to asking for his plea to the charge. Thus, although the grounds for Danielson's motion for mistrial became apparent during the trial court's introductions of court staff, Danielson failed to move for a mistrial until the trial court swore in the venire panel; finished questioning the potential jurors on "qualifications, exemptions and excuses"; and released the remaining venire members, read the indictment, and asked how Danielson "plead to that charge" against him. Notwithstanding counsel's request that the court "note that this was the earliest time I could bring this to the Court's attention outside the presence of the jury," the plain record does not support the assertion. On this record, and under these circumstances, we conclude Danielson's motion for mistrial was untimely and failed to preserve his complaint for appellate review. *See id.*

Moreover, even if we were to apply the *Mosley* mistrial factors to the trial court's "jailer" comment, we would conclude the trial court did not abuse its discretion in denying Danielson's motion for mistrial. *See Becerra*, 685 S.W.3d at 127. The record shows (1) the claimed misconduct was not severe: the trial court merely identified Alexander as "our jailer" who served "as the bailiff as well" and did not identify any link between Alexander's duties at the court and Danielson, and the trial court further made "note for the record that [Alexander] was not standing over or near the defendant. He was in open court"; (2) the trial court did not adopt curative measures due to the lateness of Danielson's objection and his failure to request curative measures but "tried to make sure that [the venire panel] understood that he was serving as the second bailiff"; and (3) Danielson's conviction absent the alleged misconduct was virtually certain: Landon's graphic testimony was sufficient to establish all elements of the charged offense. *See Ramon*, 159 S.W.3d at 929. We overrule Danielson's sixth issue.

Seventh Issue

In his seventh issue, Danielson argues the \$15 time payment fee must be struck because it was assessed prematurely. The State agrees imposition of a time payment fee before the appellate mandate issues is premature. *See Dulin v. State*, 620 S.W.3d 129, 133 (Tex. Crim. App. 2021).

The trial court's bill of costs in this case assessed a \$15 fee for "Time Payment Fee CCP 102.030 (Assess if setting up payment plan)." The bill of costs reflects a

\$290 balance due for “Total Court Costs,” including the \$15 time payment fee. Although it does not specifically mention the time payment fee, the judgment, signed November 20, 2024, imposes court costs in the full amount of \$290.

The pendency of an appeal stops the clock for purposes of the time payment fee. *Id.* Consequently, the imposition of the time payment fees in Danielson’s case is premature. *Id.* In order to make clear that the judgment’s assessment of \$290 in court costs is not an immediate imposition of the time payment fee, under the heading “Court Cost: \$290.00,” we modify the judgment to delete the time payment fee as premature and correct to read: “Court Cost: \$275.00.”

Such deletion is without prejudice to future assessment if, more than thirty days after the mandate issues, Danielson fails to completely pay any fine, court costs, or restitution that he owes. *See Dulin*, 620 S.W.3d at 132–33 (trial court’s assessment of time-payment fee during pendency of appeal is premature because appeal stops the clock and suspends defendant’s obligation to pay court costs); *Pippin v. State*, No. 02-24-00444-CR, 2025 WL 2088330, at *2 (Tex. App.—Fort Worth, July 24, 2025, no pet.) (same); *Vasquez v. State*, No. 05-20-00432-CR, 2021 WL 4726523, at *1–2 (Tex. App.—Dallas Oct. 11, 2021, no pet.) (mem. op., not designated for publication) (same).⁴ We sustain Danielson’s seventh issue.

⁴ We note that there is a distinction with a difference between when the Time Payment Fee is required to be assessed under 102.030 and the date the court cost must be paid under that judgment. We further note that the judgment provides 747 days of total jail time credit and, under the heading “Total Jail Time Credit,” provides that “If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter

CONCLUSION

We modify the judgment as follows:

We delete the provision “Court Cost: \$290.00” and substitute the following provision:

Court Cost: \$275.00 with time payment fee assessed consistent with applicable law.

A Time Payment Fee of \$15.00 may be assessed should any fine, court costs, reimbursement fees, or restitution remain unpaid on the 31st day from the date the appellate mandate issues. In accordance with the trial court’s judgment, any fines, court costs, reimbursement fees, and restitution are to be paid without unnecessary delay to the District Clerk’s office, or any other office designated by the Court or the Court’s designee, upon Kenneth D. Danielson’s release from confinement.

As modified, we affirm the trial court’s judgment.

/Bonnie Goldstein/

BONNIE LEE GOLDSTEIN
JUSTICE

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days credited below.” The judgment does not provide when or in what amount time served credit will be applied to the current assessed court costs.