NUMBER 13-18-00537-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JAVIER DE LA ROSA JR., **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 107th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

Appellant Javier De La Rosa Jr. appeals his conviction of murder. *See* TEX. PENAL CODE ANN. § 19.02(b). De La Rosa raises five issues on appeal, which we have renumbered and reorganized: (1) the trial court was without jurisdiction to preside over

this case because the juvenile court never relinquished its original jurisdiction;[1] (2) the trial court improperly sustained the State's challenges for cause during voir dire; (3) the trial court erred in allowing "into evidence recorded jail calls without the proper foundation and translation"; (4) the trial court erred in allowing the State to introduce evidence of an extraneous offense; and (5) the trial court erred in denying his request for mistrial. We affirm.

I. BACKGROUND

On August 25, 2010, seventeen-year-old Tiffany Galvan's body was found on an isolated park trail in Brownsville, Texas by Cameron County park employees. Forty-eight stab wounds covered her face and body. Galvan's mother told police Galvan was last seen with her ex-boyfriend, sixteen-year-old De La Rosa. On August 26, 2010, a warrant was issued for De La Rosa's arrest.

On September 10, 2010, the State filed a "Petition for Discretionary Transfer to Criminal Court," arguing that "because of the seriousness of the offense and the background of the child, the welfare of the community requires that the Juvenile Court waive jurisdiction . . . for the following felony offense(s) and all criminal conduct occurring in said criminal episode:"

> JAVIER DE LA ROSA, JR. on or about August 24, 2010, in the County of Cameron and the State of Texas, did then and there intentionally or knowingly cause the death of an individual, namely, TIFFANY VANESSA GALVAN, by stabbing the victim with a knife, against the peace and dignity of the State, in violation of a penal law of this State, punishable by imprisonment, to-wit: Section 19.02 of the Texas Penal Code.

[1] De La Rosa raises this issue via a supplemental brief, and the State filed a response. Although this Court did not grant De La Rosa permission to file a supplementary brief, in the interest of justice, we will consider the issue. *See* TEX. R. APP. P. 38.7 ("A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe.").

On October 8, 2010, De La Rosa, represented by appointed counsel, submitted a "Waiver of Discretionary Transfer Hearing and Consent to Stipulation." De La Rosa "agree[d] and consent[ed] to the stipulation of testimony, of the social evaluation and investigation, the diagnostic studies and the affidavits of witnesses." On the same day, the juvenile court issued its "Waiver of Jurisdiction and Order of Transfer to Criminal Court."

On January 12, 2011, De La Rosa was indicted for the offense of capital murder. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (providing that a person commits capital murder if "the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat." It was alleged that in the course of "intentionally caus[ing] the death of [Galvan], by stabbing [Galvan] with a knife or an object unknown to the Grand Jury," De La Rosa was also "then and there in the course of committing or attempting to commit the offense of obstruction or retaliation against [Galvan]"; "was then and there in the course of committing or attempting to commit the offense of robbery of [Galvan]"; and "was then and there in the course of committing or attempting to commit the offense of kidnapping [Galvan]."

On March 8, 2012, De La Rosa pleaded guilty to the lesser-included offense of murder pursuant to a plea bargain agreement with the State. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09; TEX. PENAL CODE ANN. § 19.02(b). A trial was held solely on the issue of punishment, and the jury assessed punishment at ninety years' imprisonment with the Texas Department of Criminal Justice's Institutional Division. *See* TEX. PENAL CODE ANN. § 12.32(a).

De La Rosa timely appealed the trial court's judgment to this Court, and on February 12, 2015, this Court affirmed the judgment.[2] *See De La Rosa v. State*, No. 13-12-00368-CR, 2015 WL 601761, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 12, 2015, pet. ref'd) (mem. op., not designated for publication). De La Rosa subsequently filed a *pro se* petition for discretionary review in the Texas Court of Criminal Appeals, arguing that the *Anders* brief filed by former counsel failed to address the previously identified "arguable issues" set forth by this Court. The Texas Court of Criminal Appeals summarily denied De La Rosa's request without written opinion.

De La Rosa then filed a state habeas petition in the United States District Court, Southern District of Texas. *See La Rosa v. Davis*, No. 1:17-CV-0099, 2018 WL 4356748, at *4 (S.D. Tex., Brownsville Div. Sept. 12, 2018) (order). The federal court granted De La Rosa's petition for a writ of habeas corpus "on the basis that he was denied adequate and effective appellate review under the Fourteenth Amendment" and remanded the case back to the district state court "for reentry of judgment upon which time for [De La Rosa] to file a notice of appeal . . . anew." *Id.* at *1, *4.

This appeal followed.

II. JURISDICTION

De La Rosa maintains the trial court was without jurisdiction to preside over a capital murder indictment because the juvenile court's order only waived original

[2] On April 3, 2013, De La Rosa's initial appellate attorney filed an *Anders* brief and corresponding motion to withdraw. *See Anders v. California*, 386 U.S. 738 (1967); *Kelly v. State*, 436 S.W.3d 313, 318 (Tex. Crim. App. 2014). On January 6, 2014, we issued an order noting that appellate counsel did not have the entire record before he filed his *Anders* brief. Thereafter, we: (1) granted De La Rosa's appellate attorney's motion to withdraw; (2) abated the appeal; and (3) remanded the case to the trial court to appoint a new appellate attorney to review the complete record on appeal. On August 18, 2014, De La Rosa's second appellate attorney filed an *Anders* brief and corresponding motion to withdraw. *See De La Rosa v. State*, No. 13-12-00368-CR, 2015 WL 601761, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 12, 2015, pet. ref'd) (mem. op., not designated for publication). De La Rosa did not file a pro se brief. *See id.*

jurisdiction to the offense of murder—the only offense before the juvenile court at the time; thus, the juvenile court, having never waived its jurisdiction to the offense of capital murder, still retained original jurisdiction.

A. Original Jurisdiction

A person accused of committing a felony offense between his tenth and seventeenth birthday is subject to the exclusive original jurisdiction of a juvenile court. TEX. FAM. CODE ANN. § 51.04(a); *see Moon v. State*, 451 S.W.3d 28, 37 (Tex. Crim. App. 2014).

In order to effectively waive jurisdiction and transfer a juvenile to be tried as an adult, the juvenile court had to find that: (1) the juvenile was alleged to have committed a felony; (2) the juvenile was fourteen years old or older at the time he committed the alleged offense; (3) after a full investigation and a hearing, there was probable cause to believe that the juvenile committed the alleged offense; and (4) that the welfare of the community required criminal proceedings because of the alleged offense's seriousness or the juvenile's background. *See* TEX. FAM. CODE ANN. § 54.02(a)(1)–(3); *Moon*, 451 S.W.3d at 38 (citing *Hidalgo v. State*, 983 S.W.2d 746, 754 (Tex. Crim. App. 1999)); *Matthews v. State*, 513 S.W.3d 45, 56 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). If the juvenile court waives its jurisdiction, then it must specifically state its reasons for doing so in a written order. TEX. FAM. CODE ANN. § 54.02(h); *Moon*, 451 S.W.3d at 49 ("[The juvenile court] should take pains to 'show its work,' as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable."); *see also In re M.G.*, No. 13-18-00294-CV, 2018 WL 6241036, at *3 (Tex. App.—Corpus Christi–Edinburg Nov. 29, 2018,

no pet.) (mem. op.). The burden is on the State "to produce evidence to inform the juvenile court's discretion as to whether waiving its otherwise-exclusive jurisdiction is appropriate in the particular case." *Moon*, 451 S.W.3d at 45.

B. Preservation

Under article 4.18 of the Texas Code of Criminal Procedure:

> A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b),[3] Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.

TEX. CODE CRIM. PROC. ANN. art. 4.18(a). If the defendant enters a plea of guilty or no contest, his motion must be filed and presented before the plea. *Id.* at 4.18(b)(1). If the defendant's guilt or punishment is tried or determined by a jury, he must act before jury selection begins. *Id.* at 4.18(b)(2).

In other words, a juvenile defendant's challenge to a trial court's jurisdiction following a transfer from the juvenile court is waived if the juvenile fails to file a timely written motion. *See id.* at 4.18(a)–(b); *Rushing v. State*, 85 S.W.3d 283, 284 (Tex. Crim. App. 2002); *see generally Ex parte White*, 506 S.W.3d 39, 50 (Tex. Crim. App. 2016) (reaffirming the constitutionality of article 4.18 while acknowledging the severity of article 4.18's potential preclusion of appellate relief); *see also Rios-Barahona v. State*, No. 13-

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[3] Section 8.07(b) provides:

> Unless the juvenile court waives jurisdiction under Section 54.02, Family Code, and certifies the individual for criminal prosecution or the juvenile court has previously waived jurisdiction under that section and certified the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age except an offense described by Subsections (a)(1)–(5).

TEX. PENAL CODE ANN. § 8.07(b).

17-00567-CR, 2019 WL 3952949, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 22, 2019, pet. ref'd) (mem. op., not designated for publication).

Nothing in the record indicates De La Rosa filed a written motion objecting to the trial court's assumption of jurisdiction, as required by article 4.18. *See* TEX. CODE CRIM. PROC. ANN. art. 4.18. De La Rosa has, therefore, waived error. *See* TEX. R. APP. P. 33.1(a); *see Alberty v. State*, 250 S.W.3d 115, 118 (Tex. Crim. App. 2008) ("In this case, appellant did not file a motion claiming the criminal district court lacked jurisdiction. Because he did not file an [article] 4.18 motion, he may not complain on appeal that the trial court lacked jurisdiction."); *Rushing*, 85 S.W.3d at 284; *see also Campos v. State*, No. 14-18-00989-CR, 2020 WL 1528122, at *2–3 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, no pet. h.) (mem. op., not designated for publication) (holding appellant failed to preserve any complaint for appeal where he did not comply with the requirements of article 4.18); *Eguade v. State*, No. 08-15-00268-CR, 2017 WL 3224863, at *3 (Tex. App.—El Paso July 31, 2017, pet. ref'd) (mem. op., not designated for publication) (same); *Robles v. State*, No. 13-02-726-CR, 2004 WL 2335195, at *2 (Tex. App.—Corpus Christi–Edinburg May 20, 2004, no pet.) (mem. op., not designated for publication) (same).

We overrule De La Rosa's first issue.

III. JURY SELECTION ERROR

De La Rosa next argues that the trial court committed reversible error when it improperly sustained the State's challenges for cause during jury selection because the two prospective jurors "never stated that they would not be able to follow the law and follow the court's instructions."

A. Standard of Review and Applicable Law

"A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury." TEX. CODE CRIM. PROC. ANN. art. 35.16. "When a prospective juror is shown to be biased against the law, *as a matter of law,* he *must* be excused when challenged, even if he states that he can set his bias aside and be a fair and impartial juror." *Clark v. State*, 717 S.W.2d 910, 917 (Tex. Crim. App. 1986); *Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998) ("[W]hen the venireman is persistently uncertain about his ability to follow the law, we will not second guess the trial court.").

We review the entire record of the voir dire proceedings to determine if the trial court properly granted a challenge for cause, while giving great deference to the trial court's decision. *Gonzales v. State*, 353 S.W.3d 826, 831 (Tex. Crim. App. 2011); *Colburn*, 966 S.W.2d at 517. Therefore, we reverse a trial court's ruling on a challenge for cause only if it is evident the court committed a clear abuse of discretion. *Gonzales*, 353 S.W.3d at 831; *see also Pardo v. State*, No. 04-13-00530-CR, 2014 WL 7183365, at *2 (Tex. App.—San Antonio Dec. 17, 2014, pet. ref'd) (mem. op., not designated for publication).

B. Analysis

During voir dire, the State inquired whether anyone felt they would be unable to "sit in judgment of another due to religious or moral reasons." Challenged prospective jurors, number two and fifty-seven, each professed an inability to assess punishment because of their religious beliefs.

After prospective juror number fifty-two stated he felt to sit on the jury would be to "commit a sin . . . regardless of what punishment" he chose, the State asked if anyone

felt as number fifty-two did. Several prospective jurors responded affirmatively, including number two. Number two stated, "I don't feel comfortable of giving a verdict on it because I don't—God is only the person that knows the truth. . . . [O]nly God knows and he's the only one who should be—," before she was interrupted by the State.

The exchange between the State and prospective juror number fifty-seven was even shorter.[4]

> [State:] Number 57, Ms. Benavides. Do you have an ethical or moral or religious reason that you do not want to sit in judgment of somebody or cannot sit in judgment of someone?
>
> [Number 57:] Religious.

We are confronted with two jurors claiming, however briefly, that their respective religious beliefs preclude them from sitting in judgment against another. Our sister court dealt with a similarly sparse record in *Johnson v. State*. No. 05-05-01237-CR, 2006 WL 3350780, at *8 (Tex. App.—Dallas Nov. 20, 2006, no pet.) (mem. op., not designated for publication). The State challenged a potential juror for cause after the juror indicated in the jury questionnaire that she had a problem sitting in judgment of another and said, "I'm not the judge to place someone [sic]." *Id.* at *8. The appellate court concluded, having given "great deference to the judge because she is present during voir dire and is able to observe the demeanor of the venireperson and hear the tone of her voice," that the trial court did not abuse its discretion in granting the State's challenge for cause. *Id.* at *9. We conclude similarly, particularly persuaded by the trial court's statements on the record here, indicating that it had also listed prospective juror number fifty-seven as a "for cause"

[4] We observe, however, that number fifty-seven, unlike number two, appeared more responsive throughout the voir dire proceedings, answering that she knew one of the witnesses in the case but would be unaffected by their presence, and opining that police should be allowed to arrest and question suspicious persons to determine whether they have "been up to something illegal."

removal. *See Gonzales*, 353 S.W.3d at 831; *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009); *see also Gutierrez v. State*, No. 08-11-00258-CR, 2014 WL 2993787, at *4 (Tex. App.—El Paso June 30, 2014, no pet.) (mem. op., not designated for publication) (noting that "[w]hen a juror states he is unable to sit in judgment of another," that amounts to an expression of prejudice against a finding of guilt, which justifies a challenge for cause); *Johnson*, 2006 WL 3350780, at *8.

Because an articulated inability to assess punishment is a proper ground for a challenge for cause under the code, we hold the trial court did not abuse its discretion in granting the State's challenge for cause and dismissing venire members two and fifty-seven. *See Gonzales*, 353 S.W.3d at 831; *see also Pardo*, 2014 WL 7183365, at *2 (upholding the trial court's dismissal of a venire member under article 35.16 "because he expressed an inability to sit in judgment of another"). We overrule De La Rosa's second issue.

IV. ADMISSIBILITY OF JAIL CALL RECORDINGS

By his third issue, De La Rosa challenges the trial court's admission of inmate telephone call recordings. Specifically, De La Rosa argues that the recordings (1) were not properly authenticated under Rule 901, *see* TEX. R. EVID. 901(a), and (2) were admitted without proper translation. *See id.* R. 1009.

A. Standard of Review

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012); *see also Longoria v. State*, No. 13-15-00173-CR, 2016 WL 4045510, at *4 (Tex. App.—Corpus Christi–Edinburg July 28, 2016, no pet.) (mem. op., not designated for publication). A trial court abuses its discretion when its decision lies outside the "zone of reasonable

disagreement." *Tienda*, 358 S.W.3d at 638; *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010).

B. Authentication

Rule 901(a) of the Texas Rules of Evidence provides that for a party to satisfy the requirement of authenticating or identifying an item of evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). Rule 901(b) "does not erect a particularly high hurdle" for authentication, *Campbell v. State*, 382 S.W.3d 545, 549 (Tex. App.—Austin 2012, no pet.), and provides a nonexclusive list of methods for authenticating evidence. TEX. R. EVID. 901(b). "Evidence may be authenticated in a number of ways, including by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence." *Tienda*, 358 S.W.3d at 638; *see Butler v. State*, 459 S.W.3d 595, 602 (Tex. Crim. App. 2015); *Mata v. State*, 517 S.W.3d 257, 266 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd).

Moreover, under the rules of evidence, the trial court need not be persuaded that the proffered evidence is authentic. *See id.* R. 104(a); *Tienda*, 358 S.W.3d at 638. Rather, the preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a determination by a reasonable jury that the proffered evidence is authentic. *Tienda*, 358 S.W.3d at 638. "The trial judge does not abuse his or her discretion in admitting evidence where he or she reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified." *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007); *Mitchell v. State*, 419 S.W.3d 655, 659 (Tex. App.—San Antonio 2013, pet. ref'd).

At trial, the State presented testimony from Sergio Moore, a sergeant at the Cameron County Sheriff's Department, Jail Division, to authenticate several recorded inmate telephone calls. Moore testified that, as the custodian of records, he is responsible for the facility's records department and explained the process by which all communications made by inmates at the facility are recorded and screened. Moore described how the telephone recording system works and testified that to make a call, an inmate "is required to state his name." According to Moore, inmates are also visually recorded while they make their phone calls. Moore further testified that the recordings are prepared by a device capable of making accurate recordings. Having reviewed the recordings in this case, Moore stated the recordings on the disc proffered by the State for admission into evidence were accurate representations of the conversations or statements that took place and did not appear to be altered in any way. Moore identified De La Rosa in the courtroom as the individual he observed in the recordings. Moore said De La Rosa was also heard identifying himself in the recording.

Such testimony sufficiently establishes "within the zone of reasonable disagreement" the identity of De La Rosa as the caller in the recordings. *See* TEX. R. EVID. 901(b)(5); *Banargent v. State*, 228 S.W.3d 393, 401 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (concluding inmate telephone recordings were properly authenticated where the officer "demonstrated how the recording system authenticates the accuracy of a digitally recorded inmate telephone call" and "identified appellant's voice as one of the voices on the recordings"); *see also Cortez v. State*, No. 13-17-00362-CR, 2018 WL 4140632, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 30, 2018, no pet.) (mem. op., not designated for publication) (concluding the trial court admitted the videos "within the zone of reasonable disagreement" where "witness testified that they were familiar with

the content of the videos, which truly and accurately represented the events that the officers witnessed").

C. Translation

De La Rosa additionally contends on appeal that the exhibits were admitted "without a proper translation of the portions in a foreign language." With respect to this argument, De La Rosa cites to no case law or statute. Moreover, De La Rosa's objection to the lack of proper, presumably written, translation was not raised until after the exhibits had already been admitted and the State had rested its case.[5] Prior to the admission of the jail calls, De La Rosa objected only to "the foundation and confrontation clause[6]."

To preserve a complaint for appellate review, a party must make a timely, specific objection in the trial court. *See* TEX. R. APP. P. 33.1(a). More specifically, a party's objection must state "the grounds for the ruling that the complaining party sought from the

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[5] During the State's cross-examination of defense witness Maria De La Rosa, De La Rosa's sister, the State published a recorded call for the jury; De La Rosa, after having pleaded guilty to murder but before the commencement of punishment proceedings, was heard saying, "I'm sorry. Kind of not, but—." Maria urged the State to "finish playing the recording" so she could provide an explanation for her brother's statements. De La Rosa interjected, invoking the "rule of optional completeness" and requesting that the "entire recording be played" for the jury. The trial court granted De La Rosa's request and instructed the State to "go ahead and play the whole CD." Following an unspecified period of time, which had elapsed while the exhibit was being played, the trial court interrupted proceedings: "Just a minute. Just a minute, counsel. A lot of this conversation is in Spanish, okay? Do you have a transcript in English?" The State answered affirmatively, providing the trial court with a transcript. De La Rosa re-urged his original Rule 901 objection and raised a new objection "to the transcript."

> [W]e object to the transcript. It's prepared by the District Attorney's Office. We haven't had an opportunity to review it, not by an independent court reporter. We would ask anything related to any of the Spanish testimony then be stricken because they're—they're mandated prior to playing that in order to get it into a proper form, they failed to do so. They have not filed the translation prior to trial.

The court, without issuing a ruling or admitting the State's proposed transcript, instructed the State to "forward to where the English portion of the CD is."

At a later, unspecified point during the publication of another recording, De La Rosa raised an "objection under Rule 1009 translation of foreign language document" because "[a] big of portion of what we're hearing is still in Spanish." The State responded that it would once more "forward a little bit . . . to the English portion," and the proceedings continued without a comment from the trial court or subsequent objection from De La Rosa.

[6] De La Rosa does not raise this issue on appeal.

trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." *Id.* R. 33.1(a)(1)(A); *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003) ("[I]f, on appeal, a defendant claims the trial judge erred in admitting evidence offered by the State, this error must have been preserved by a proper objection and a ruling on that objection."). Additionally, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. TEX. R. APP. P. 33.1(a)(2); *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004) (en banc); *see also Lara v. State*, No. 13-13-00191-CR, 2014 WL 1633045, at *3 (Tex. App.—Corpus Christi–Edinburg Apr. 24, 2014, no pet.) (mem. op., not designated for publication).

Having reviewed the record and brief, we conclude that this issue has not been preserved for our review. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (stating that "the objection must be made at the earliest possible opportunity" to preserve error); *Castrejon v. State*, 428 S.W.3d 179, 186 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (holding that where appellant did not object to the lack of a written transcript until the State requested to publish the recording to the jury during closing argument, the late objection was insufficient to preserve error).

We overrule De La Rosa's third issue.

V. EXTRANEOUS BAD ACTS

By his fourth issue, De La Rosa avers that the trial court erred in allowing an extraneous offense to be introduced into evidence in contravention of rules 403 and 404(b). *See* TEX. R. EVID. 403, 404. At trial, however, De La Rosa only raised two points of contention, objecting under rules 103(c) and 404(b). *See* TEX. R. EVID. 103, 404. De La

Rosa makes no mention of Rule 403:

> Your Honor, this is an incident that they have given notice of under 404(b). And we object to its introduction under 404(b) on the basis that there's not been a prior showing of the truthfulness or a finding by the Court. And we further move for a hearing under Rule 103(c) requesting that that hearing be done outside the presence of the jury.
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> . . .
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> We acknowledge notice under 404(b), but we do urge that that does not resolve the issue. It's a specific act intended for the purpose of showing character; and, therefore, the Court must exercise the threshold requirement of making a ruling on it and having a hearing under Rule 103(c). And so that having been done, we object—not been done, we object to counsel proceeding with this incident—testimony on this incident.

Rules 103, 403, and 404 are not interchangeable. Rule 103 governs the preservation of error for appeal. TEX. R. EVID. 103; *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009) ("In order to preserve error regarding a trial court's decision to exclude evidence, the complaining party must comply with Rule of Evidence 103 by making an "offer of proof" which sets forth the substance of the proffered evidence."). Meanwhile, Rule 404 regulates admissibility of relevant evidence of other crimes, wrongs, or acts provided it has relevance apart from the tendency to prove conduct in conformity with character, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX. R. EVID. 404; *see Gonzalez v. State*, 544 S.W.3d 363, 370–71 (Tex. Crim. App. 2018). Even if evidence is admissible under Rule 404, it may nevertheless be excluded under Rule 403 if its probative value is substantially outweighed by a danger of unfair prejudice. TEX. R. EVID. 403.

Because each rule has a different purpose and a Rule 403 objection is not implicitly contained in a 404(b) objection, objections made under rules 103 and 404 do not preserve complaints under Rule 403. *Berry v. State*, 233 S.W.3d 847, 857 (Tex. Crim. App. 2007)

(holding a Rule 403 objection was not preserved where only a Rule 404 objection was raised); *see* TEX. R. APP. P. 33.1; *see generally Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993) (requiring objection specificity for appellate review); *see also Ross v. State*, No. 06-18-00174-CR, 2019 WL 2292335, at *3 (Tex. App.—Texarkana May 30, 2019, pet. ref'd) (mem. op., not designated for publication) (holding appellant failed to preserve his Rule 404(b) argument for appeal where he only raised a Rule 403 argument at trial); *Zavala v. State*, No. 13-10-00254-CR, 2012 WL 601412, at *16 (Tex. App.—Corpus Christi–Edinburg Feb. 23, 2012, no pet.) (mem. op., not designated for publication) (assuming, without deciding, appellant preserved error for review under Rule 403, where he stated "I would object, under Rule 403, relevance"). For reasons discussed *supra*, De La Rosa's Rule 403 argument on appeal has not been preserved. *See* TEX. R. APP. P. 33.1.

Moreover, "[a]rticle 37.07(3)(g) of the Code of Criminal Procedure—rather than Rule 404(b)—governs the admissibility of extraneous offense evidence during the punishment phase of trial." *Francis v. State*, 445 S.W.3d 307, 318 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 428 S.W.3d 850 (Tex. Crim. App. 2014); *compare* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (relating to evidence of extraneous offenses introduced during punishment phase of trial); *with* TEX. R. EVID. 404(b) (relating to evidence of extraneous offenses introduced during the guilt and innocence phase of trial); *Mitchell v. State,* 982 S.W.2d 425, 427 n.1 (Tex. Crim. App. 1998) ("Unlike Rule 404(b), Section 3 of Article 37.07 deals exclusively with the admissibility of extraneous offense evidence at the punishment phase of trial."). Article 37.07, §3(a)(1) allows for admission of any evidence the trial court "deems relevant to sentencing," TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1), provided it "is shown beyond a reasonable doubt . . . to have been

committed by the defendant or for which he could be held criminally responsible[.]" *Smith v. State*, 577 S.W.3d 548, 550 (Tex. Crim. App. 2019). "Because there are no discrete fact issues at the punishment phase of a non-capital trial . . . the definition of 'relevant,' as stated in Rule 401 of the Texas Rules of Evidence, does not readily apply to Article 37.07." *Sims v. State,* 273 S.W.3d 291, 295 (Tex. Crim. App. 2008). Rather, relevance during punishment is "simply a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Id.* (internal quotations omitted); *see Ellison v. State*, 201 S.W.3d 714, 719 (Tex. Crim. App. 2006) ("[T]he admissibility of evidence during 'the punishment phase of a non-capital trial is a function of policy rather than a question of logical relevance.'" (quoting *Sunbury v. State*, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002))); *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999); *Tucker v. State*, 456 S.W.3d 194, 210–11 (Tex. App.—San Antonio 2014, pet. ref'd). Accordingly, a trial court has broad discretion in determining the admissibility of evidence presented at the punishment phase of trial. *See Henderson v. State*, 29 S.W.3d 616, 626 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).

Assuming, without deciding, that De La Rosa invoked article 37.07 by objecting under Rule 404(b),[7] we nonetheless find the evidence presented satisfied the relevancy

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[7] Article 37.07 makes reference to Rule 404:

> Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.
>
> (a)(1) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, *and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible*, regardless of whether he has previously been charged with or finally convicted of the crime or act. . . .

See TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (emphasis added).

component of article 37.07 and implicated De La Rosa beyond a reasonable doubt. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1); *Haley v. State*, 173 S.W.3d 510, 514–15 (Tex. Crim. App. 2005) (interpreting 37.07 § 3(a) "to require the burden of proof to be applied to a defendant's involvement in the act itself, instead of the elements of a crime necessary for a finding of guilt); *Apolinar v. State*, 106 S.W.3d 407, 414 (Tex. App.—Houston [1st Dist.] 2003), *aff'd*, 155 S.W.3d 184 (Tex. Crim. App. 2005) (holding that appellant preserved his challenge although he cited only to Rule 404 but argued "the substance of article 37.07" and "it [was] clear that the trial court understood that appellant was speaking of article 37.07"); *see also Leal v. State*, No. 13-11-00011-CR, 2012 WL 1481532, at *4 (Tex. App.—Corpus Christi–Edinburg Apr. 26, 2012, no pet.) ("[Article 37.07] specifically excludes Rule 404 from consideration, if the extraneous act is shown beyond a reasonable doubt.") (mem. op., not designated for publication).

The testimony at issue involves a physical altercation occurring between a female classmate, Roxanne Rodriguez, and De La Rosa. Rodriguez maintained she instigated the fight, it was brief, and after it ended, she was left with a bruised eye. De La Rosa had no injuries. A classmate who witnessed the fight, Adrian Cisneros, testified that De La Rosa told him about the planned fight beforehand. Cisneros stated that he witnessed De La Rosa strike and injure Rodriguez, although De La Rosa was never stuck himself. Cisneros's testimony corroborated Rodriguez's claims.

Contrary to De La Rosa's assertions, "it is irrelevant whether the conduct the offering party is attempting to prove is, or can be characterized, as an offense under the Texas Penal Code." *Haley*, 173 S.W.3d at 514–15. The statutory burden imposed under article 37.07 requires only that the jury "be satisfied beyond a reasonable doubt that the acts are attributable to the defendant." *Id*. at 515. In other words, regardless of whether

the fight was consensual or constituted an assaultive, criminal act, the act remains admissible if it was attributed to De La Rosa beyond a reasonable doubt, and we conclude that it was. *See id.*; *Martinez v. State*, 304 S.W.3d 642, 658 (Tex. App.—Amarillo 2010, pet. ref'd) ("[W]hether an extraneous offense or bad act is established beyond a reasonable doubt is a question of fact for the jury, not a preliminary question of admissibility for the trial court."); *see also Franks v. State*, No. 01-07-00253-CR, 2008 WL 4427665, at *3 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, no pet.) (mem. op., not designated for publication) (finding the jury could find bad act attributable to defendant under article 37.07 § 3(a) where two witnesses testified they observed the bad act).

Moreover, the relevancy bar is relegated to "helpful" under article 37.07. *See Beham v. State*, 559 S.W.3d 474, 479 (Tex. Crim. App. 2018) ("[E]vidence is 'relevant to sentencing,' within the meaning of the statute, if it is 'helpful' to the jury in determining the appropriate sentence for a particular defendant in a particular case.'" (quoting *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007))). In response to the defense's depiction of De La Rosa as a "clean" "child," who committed an isolated horrific act, the State postulated that De La Rosa was a "cold-blooded, premeditated murderer," who had little respect for women.[8] Therefore, we reject De La Rosa's general contention that the bad act was simply not relevant. *See id.*; *Sanders v. State*, 422 S.W.3d 809, 815 (Tex.

[8] According to Sergeant Alvaro Guerra, communications exchanged between Galvan and De La Rosa, obtained during the course of the investigation, indicated Galvan believed she was pregnant with De La Rosa's child. Guerra testified that, one week prior to Galvan's murder, De La Rosa borrowed a classmate's knife. The classmate told officers that De La Rosa admitted to him it was to "kill a girl that he had gotten pregnant." Although an autopsy later revealed Galvan was not pregnant, Guerra noted that the greatest concentration of stab wounds was located on Galvan's abdomen and face.

Forensic Pathologist Norma Jean Farley testified that the autopsy also revealed Galvan sustained several contusions around her eyes and significant blunt force trauma to her head consistent with being "beat about the head with an object []or the hands, or the head being beat into something."

App.—Fort Worth 2014, pet. ref'd) (holding that evidence of a defendant's prior assaults was relevant for purposes of article 37.07).

Accordingly, the trial court did not abuse its discretion in determining this evidence was admissible at the punishment phase. *See Ellison*, 201 S.W.3d at 719; *Henderson*, 29 S.W.3d at 626. We overrule De La Rosa's fourth issue.

VI. DENIAL OF MISTRIAL FOR JURY INFLUENCE

De La Rosa next argues "[t]he State committed reversible error in setting up a memorial to the victim at the entrance to the courthouse during trial," because such act "constitutes an external contact with the jurors." We construe De La Rosa's argument to be a challenge to the trial court's denial of his request for mistrial on these grounds.

A. Standard of Review and Applicable Law

A defendant has a constitutional right "to be tried by impartial, indifferent jurors whose verdict must be based upon the evidence developed at trial." *Howard v. State,* 941 S.W.2d 102, 117 (Tex. Crim. App. 1996), *on reh'g* (Dec. 18, 1996), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535 (Tex. Crim. App. 2014), *and holding modified by Simpson v. State*, 119 S.W.3d 262 (Tex. Crim. App. 2003). When a defendant claims reversible error based on external juror influence, as here, the defendant must show either actual or inherent prejudice. *Id.*; *Parker v. State*, 462 S.W.3d 559, 567–68 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see also Cancino v. State*, No. 13-17-00417-CR, 2019 WL 2049208, at *11 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, no pet.) (mem. op., not designated for publication).

A showing of actual prejudice is made when jurors "actually articulate[] a consciousness of some prejudicial effect." *Howard,* 941 S.W.2d at 117; *Alfaro v. State*, 224 S.W.3d 426, 430–31 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Reyes*

v. State, No. 12-16-00235-CR, 2017 WL 5167555, at *3 (Tex. App.—Tyler Nov. 8, 2017, no pet.) (mem. op., not designated for publication). "To determine inherent prejudice, we look to whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Howard*, 941 S.W.2d at 117 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). There must be a "reasonable probability that the conduct or expression interfered with the jury's verdict." *Id.* Inherent prejudice "rarely occurs and is reserved for extreme situations." *Id.* (internal quotations omitted); *see also Atwood v. State*, No. 14-15-01046-CR, 2017 WL 1103544, at *2 (Tex. App.—Houston [14th Dist.] Mar. 23, 2017, no pet.) (mem. op., not designated for publication).

A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *Archie v. State*, 340 S.W.3d 734, 738 (Tex. Crim. App. 2011); *Stahmann v. State*, 548 S.W.3d 46, 68 (Tex. App.—Corpus Christi–Edinburg 2018), *aff'd* No. PD-0556-18, ___, S.W.3d. ___, ___, 2020 WL 1934894 (Tex. Crim. App. Apr. 22, 2020).

B. Analysis

De La Rosa broadly argues "[t]his external jury influence resulted in actual or inherent prejudice," but does not point to evidence of either. We additionally note that the record here is severely limited.

The following exchange occurred mid-trial:

> [De La Rosa:] Yes, Your Honor. We're outside the presence of the jury, and I tender to the Court Defendant's Exhibits 17 and 18, not for submission to the jury, but for submission to the Court.
>
> [Exhibit] [s]eventeen shows the view as you walk through the front door of the courthouse, through the security. And then out on the side, there's been a memorial erected. I believe that this is the first day that this jury's been exposed to it. I don't think—I'm not sure when it went in, but I don't think it was in while we were in trial last week.

Included in that is a photograph and the name of—and a floral memorial to Tiffany Vanessa Galvan, who is the subject of this matter. We would urge that that's an external contact with the jury, much like news would be and/or contact by a witness and that it has a very high risk of prejudicing them further, creating evidence external to our case, a likelihood that Mr. De La Rosa will be unable to get a fair trial on his sentencing.

And we would first ask that that exhibit—and I'm not sure who placed it there. I believe it was through the District Attorney's Office that that was put out.

[State:] Your Honor, if I can just address the Court very briefly, and [De La Rosa] can continue his argument? I will say that when our case broke last Tuesday for the Court's reasons, we had a crime victim[']s expo that was going on the same day at HEB on Southmost, I believe it was. What happened, Judge, is the following day, the wreaths that were used at the expo were placed in the courthouse as they are arranged right there in the photos, Defendant's Exhibit 17 and 18 that defense counsel has shown the Court. I was unaware that Miss Galvan's wreath was part of that memorial that's down there. It's not—the whole thing is not dedicated to Miss Galvan. I was just recently shown the photo myself. Your Honor, if you want us to, we can remove Miss Galvan's wreath right now and take it back to our office. I agree with [De La Rosa]. I believe that this is the first day that this jury would have been exposed to it, if they've seen it or seen it at all, been exposed to it or seen it at all. But it was not done intentionally to influence this jury one way or another.

[Court:] All right. Then take care of it.

[State:] I can remove it right now. Yes, Your Honor.

[Court:] Until the case is over.

[State:] Yes, Your Honor.

[De La Rosa:] Your Honor, we'd request that the entire presentation be removed until the case is over.

[Court:] Well, whose permission was asked to place all these wreaths there?

[State:] I would have to ask Missy Lopez, if she's here.

. . .

Your Honor, those presentations are usually presented before the court—commissioners, county commissioners court, Your Honor. It's presented to them. They are—they approve or deny. At this point they approved it, Your Honor.

[Court:] Well, you have to also go by the Board of Judges when it comes to courthouse security and courthouse matters, okay? So—especially when we have like this trial here and nobody was reviewing what was placed down there. Nobody was, from the District Attorney's Office, was in charge of what was there, what was not there. So because of that, we have these problems. [State], just take care of it.

[State:] Yes, Your Honor. In the future we will make sure to run it by the Board of Judges. My apologies. It's my responsibility. We'll get it removed.

[De La Rosa:] We move for a mistrial.

[Court:] That will be denied.

One photograph provided for the trial court's consideration depicts over a dozen wreaths laid up against a wall; each wreath purportedly laid in honor of a deceased complainant.[9] The second photograph is a closeup image of a wreath, partially obscured by two larger wreaths, containing a photograph of Galvan. The record, however, does not establish: the length of time the was display present; what precisely the display included; whether the display or wreaths contained accompanying signage; what the proximity of the display was to the jurors; and whether any jurors even saw the display.

[9] The two image exhibits are of poor quality, and it is difficult to ascertain any significant detail.

Based on this limited record, we cannot conclude that the existence of wreaths displayed inside the courthouse at an unknown distance from the courtroom constituted an extraneous influence or inherently prejudiced De La Rosa. *See Howard*, 941 S.W.2d at 117. Several of our sister courts have likewise rejected claims of inherent prejudice where the record of the alleged prejudicial conduct was not well developed. *See Parker*, 462 S.W.3d at 568–69 (holding that the trial court did not abuse discretion in denying motion for mistrial where appellant argued jurors "had to walk through and/or pass" "approximately 60, 70 people wearing purple" to "express their support for the victim" on their way to the jury room); *Davis v. State*, 223 S.W.3d 466, 475 (Tex. App.—Amarillo 2006, pet. ref'd) (determining that the presence of eight uniformed police officers as spectators in the prosecution for capital murder of a state trooper did not constitute evidence of external influence of jurors); *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. App.—Austin 1998), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999) (finding the record did not demonstrate a reasonable probability of influence on the jury's verdict though the defense asserted that spectators wore "large buttons portraying a color photograph of the deceased," because the appellate record did not show where those wearing the buttons were seated or that the "jurors did in fact see the buttons"); *see also Atwood*, 2017 WL 1103544, at *3 (holding no error where the record was "limited," revealing only that the complainant was "wearing a vest that's decorated with all kinds of crime victim saying[s];" that the vest had some sort of "pins or insignia" and "phrases;" that one of the phrases on the vest was "I will not be a victim;" that complainant stood in front of the jury while drawing a diagram and the back of the vest was allegedly "within inches of the jury").

Furthermore, De La Rosa presented no evidence from jurors. Thus, he has made no showing of an "articulated prejudicial effect," required to prove actual prejudice.

Howard, 941 S.W.2d at 117; *Alfaro*, 224 S.W.3d at 430–31; *see also Reyes*, 2017 WL 5167555, at *3 (holding that where appellant argued actual prejudice and "presented no evidence from the jurors," he "made no showing of actual prejudice"); *Vasquez v. State*, No. 03-99-00335-CR, 2000 WL 235156, at *2 (Tex. App.—Austin Mar. 2, 2000, pet. ref'd) (mem. op., not designated for publication) (finding no showing of actual influence where some members of the audience wore buttons baring a photograph of the deceased during trial, and there is no evidence that any juror noticed the buttons).

We hold that De La Rosa has not demonstrated actual or inherent prejudice; thus, the trial court did not abuse its discretion in denying De La Rosa's motion for a mistrial. *See Howard,* 941 S.W.2d at 117; *Parker*, 462 S.W.3d at 567–68; *see also Cancino*, 2019 WL 2049208, at *11. We overrule De La Rosa's last issue.

VII. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
21st day of May, 2020.