COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JESUS GUADALUPE FRANCO,	§	
		No. 08-18-00040-CR
Appellant,	§	
		Appeal from the
v.	§	
		409th District Court
	§	
THE STATE OF TEXAS,		of El Paso County, Texas
	§	
Appellee.		(TC# 20170D00288)
	§	

O P I N I O N

A jury convicted Appellant Jesus Guadalupe Franco of one count of aggravated family-violence assault with a deadly weapon and one count of family-violence assault with a prior conviction. After Franco pleaded true to the enhancement allegations, the jury assessed his punishment at 80-years' confinement and a $10,000 fine for each count, and the trial court sentenced him accordingly. On appeal, Franco raises three issues challenging his convictions. In his first issue, Franco makes alternative arguments based on the prosecutor's misreading of the indictment in front of the jury: (1) that the misreading rendered his convictions a "nullity" under article 36.01 of the Code of Criminal Procedure; and (2) that the misreading created a fatal variance that rendered the evidence legally insufficient. In his second issue, he argues that his two

convictions violated the multiple-punishments prohibition of the Double Jeopardy Clause of the Fifth Amendment. In his third issue, he argues that the trial court abused its discretion by admitting extraneous-offense evidence in the guilt phase of his trial. We hold that Franco failed to preserve his article 36.01 argument for our review, that he cannot show a material variance based on the prosecutor's misreading of the indictment, that no double-jeopardy violation occurred, and that the trial court properly admitted the extraneous-offense evidence. Finding no error, we affirm.

I. BACKGROUND

Rita Marmolejo, who is the State's complaining witness, met Jesus Guadalupe Franco seven months before the incident at issue. The two spoke over the phone for about two months before they began dating, seeing each other on an almost-daily basis, and eventually spending weekends together. On the night of the charged offenses, Franco texted Marmolejo to invite her out for drinks. Although Marmolejo described that Franco had begun acting somewhat hostile and aggressive towards her, she agreed to go out with him. Marmolejo drove to a gas station where she met with Franco who had walked there on foot. After Franco bought beer from the store, which they initially drank in her vehicle, they later drove to a bar he had suggested. Soon, Franco complained of the bar's atmosphere, so they drove to a second location. While there, Marmolejo took a phone call from her daughter. Franco reacted by telling Marmolejo that he "detested" her.

The two then left the second bar. While they drove in Marmolejo's car, Franco's cell phone rang. When Marmolejo urged him to answer, Franco became angry and cussed at her. Marmolejo then pulled into a 7-Eleven and told him she did not want to be with him anymore. As they remained seated in her car, they argued back and forth about their relationship. Eventually, Marmolejo told him she was going to call the police. She explained that she wanted to scare him

because of his abuse. Instead, her comment angered him even more.

At that point, Franco pulled her hair and struck her arm with his hand, causing her pain. She described that he next sat in his seat "for a little bit" before suddenly jumping on top of her. Although she thought he wanted to kiss her, instead he bit her lip causing blood to spray all over him. When Marmolejo said, "Look at what you did to me," Franco replied, "You got what you deserve." He then exited her car and left on foot. Marmolejo raced into the 7-Eleven straight to the restroom while hiding her face with her hands. Once she saw herself in the mirror, she screamed and cried. Marmolejo described that her lower lip was missing from her face.

After a clerk called 911, paramedics arrived to assist Marmolejo and transport her to a hospital. While on scene, responders testified they noticed blood spattered all over Marmolejo's vehicle about the driver's seat, floorboards, doors, and ceiling. Marmolejo located her bitten-off lip inside the vehicle and placed it in a cup of ice; however, her doctors were unable to re-attach it. The next day after Franco's attack, he was arrested at his home.

At trial, Marmolejo's physician, an oral surgeon who attended to her injury, testified about her resulting condition, the reasons he could not re-attach her lip, and the nature of her recovery generally, to include functional and aesthetic limitations that had remained. Marmolejo herself also detailed her recovery difficulties, explaining that she could not control her drooling and had to drink out of a straw for several months after the assault, that she had to attend physical therapy, and that she was permanently disfigured as a result of Franco having bitten her lip.

Franco testified in his defense. He claimed that he never attacked Marmolejo while at the 7-Eleven and that, instead, he only kissed her while they sat in her vehicle before he left on foot. Ultimately, the jury rejected Franco's version of events and found him guilty of both counts

charged.

II. DISCUSSION

A. Issue 1: Prosecutor's Misreading of Indictment

In his first issue, Franco presents alternative arguments based on the prosecutor's misreading of the indictment in front of the jury. First, he argues that he is entitled to a new trial because, by misreading the indictment in open court, the State failed to "join" any issue upon which to try him thus rendering his convictions a "nullity" under article 36.01 of the Texas Code of Criminal Procedure. Second, he argues that he is entitled to an acquittal because there was a fatal variance between the evidence at trial and the allegations as read by the prosecutor in open court. In response to Franco's first argument, the State argues: (1) that Franco waived his purported article 36.01 complaint by failing to object in any manner to the prosecutor's misreading of the indictment to the jury; (2) that the prosecutor's misreading of the indictment was not tantamount to a failure to in fact read the indictment and thus did not amount to a violation of article 36.01; and (3) that any error in the prosecutor's misreading was harmless.

In response to Franco's second argument, the State argues that we should reject his claim for the following reasons: (1) his argument is not proper under our hypothetically-correct-jury-charge jurisprudence because "a variance can only occur when there is a discrepancy between the allegations *in* the indictment and the proof offered at trial, not a discrepancy between the *reading* of the indictment and the proof offered at trial"; and (2) even assuming that the purported variance between the misreading of the indictment and the evidence presented at trial could serve as a basis to raise a fatal-variance claim, Franco failed his burden to establish that the variance was material. [Internal quotations omitted].

We hold that Franco waived the first part of his complaint asserting a violation of article 36.01 because he failed to make any objection below on that basis, and we hold that the second part of his complaint is unmeritorious because a claim of legal-sufficiency-variance cannot be based on a comparison between a prosecutor's misreading of a charging instrument and the evidence shown at trial.

1. Underlying Facts[1]

At the commencement of trial once the jury was sworn, the prosecutor, while reading Count II of the indictment charging Franco with committing family-violence assault with a prior conviction, correctly stated that the offense was alleged to have been committed "on or about the 16th day of December and anterior to the presentment of this indictment," but neglected to read aloud the year, "2016," in which the offense occurred as alleged in the indictment.

Despite this misstatement, Franco entered a plea of not guilty immediately thereafter. He never objected to the prosecutor's misreading of the indictment at any point throughout the trial. In addition, the jury charge correctly recited the allegations in the two charged counts as alleged in the indictment.

2. Part 1: Alleged Failure to "Join" Issues under Article 36.01

A prosecutor is required to read an indictment or information to the jury. TEX. CODE CRIM.

[1] Franco's two-part contention in this issue is based on two alleged misstatements by the prosecutor. As for the first misstatement, Franco – citing to the initial reporter's record that was then-filed in this Court at the time he filed his brief – contended that the prosecutor mistakenly read aloud that Franco had committed the aggravated-assault count against Marmolejo "by biting the lip of the defendant with the teeth of the defendant." But after the initial version of the reporter's record was filed with this Court, the court reporter filed a corrected version of the reporter's record showing that the prosecutor did not make this first of the two alleged misstatements. For this reason, we overrule Franco's contention regarding this first alleged misstatement – as no misstatement exists – and do not discuss it further. But, even still, we would also overrule Franco's contention relating to this first alleged misstatement for the same reasons that we overrule the second in our discussion below.

PROC. ANN. art. 36.01(a)(1). The purpose of the requirement is to inform the accused of the charges against him and to inform the jury of the precise terms of the charge against the accused. *Turner v. State*, 897 S.W.2d 786, 788 (Tex. Crim. App. 1995); *Garcia v. State*, No. 08-07-00050-CR, 2009 WL 498031, at *2 (Tex. App. – El Paso Feb. 26, 2009, pet. ref'd) (not designated for publication). Without the reading of the charging instrument and the entering of a plea, "no issue is joined upon which to try." *Turner*, 897 S.W.2d at 788; *Garcia*, 2009 WL 498031, at *2. However, any violation of article 36.01 is waived if no objection was made in the trial court. *See Warren v. State*, 693 S.W.2d 414, 416 (Tex. Crim. App. 1985) (requiring that the defendant raised or "made an issue" of the alleged article 36.01 violation in the trial court in order to raise it on appeal); *Garcia*, 2009 WL 498031, at *2 ("Absent an objection, any violation of Article 36.01 is waived."); *Jetter v. State*, No. 08-98-00307-CR, 2000 WL 1596324, at *7 (Tex. App. – El Paso Oct. 26, 2000, pet. ref'd) (not designated for publication) (holding that the defendant waived any complaint under article 36.01(a)(2) where he failed to make a timely objection to the trial court).

Franco failed to object to the misreading of the indictment, either at trial, in a bill of exception, a motion for new trial, or otherwise. Even assuming that the prosecutor's failure to read aloud the year of the offense was tantamount to a complete failure to read the indictment, Franco's failure to object on the basis that the prosecutor violated article 36.01 waived any complaint on that basis here. *See Warren*, 693 S.W.2d at 416; *Garcia*, 2009 WL 498031, at *2; *Jetter*, 2000 WL 1596324, at *7.

Therefore, we overrule this first part of Franco's first issue presented for review and need not consider the State's alternative arguments on this point.

3. Part 2: Alleged Variance Between Evidence and Allegations in Indictment as Misread by Prosecutor

Under Texas law, we measure the legal sufficiency of the evidence by the elements of the offense as defined by the hypothetically-correct jury charge. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). "Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

But sometimes the words in the indictment do not perfectly match the proof at trial, and a "variance" can occur "whenever there is a discrepancy between *the allegations in the indictment* and the proof offered at trial [emphasis added]." *Id*. However, a claim of legal-sufficiency variance cannot be based on any purported variance between the proof shown at trial and a misreading of an indictment in front of the jury. *See Byrd*, 336 S.W.3d at 246; *see also Leal v. State*, 445 S.W.2d 750, 751 (Tex. Crim. App. 1969) (rejecting the defendant's complaint that "a variance existed between the indictment [a]s read to the jury and the proof of the name of the [complainant]" where, among other reasons, "[t]here was no variance between the allegation in the indictment and the proof").

Franco claims that he can stake out a material variance claim by showing a discrepancy between the allegations as misread by the prosecutor in open court and the proof offered at trial. However, a defendant can demonstrate a legal-sufficiency claim based on a material variance only by showing a "discrepancy between the allegations in the indictment and the proof offered at trial." *Byrd*, 336 S.W.3d at 246. Thus, Franco's claim is not valid or allowed under Texas's hypothetically-correct-jury-charge jurisprudence. *See Byrd*, 336 S.W.3d at 246; *see also Leal*, 445

S.W.2d at 751.

For this reason, we overrule this second part of Franco's first issue presented for review and need not consider the State's alternative argument on this point.

B. Issue 2: Double Jeopardy

In his second issue, Franco argues that his two convictions violated the Double Jeopardy Clause of the Fifth Amendment because, as he contends, he was convicted of two charges, which are both based on the same offense but merely allege alternative manners and means. In response, the State argues that Franco failed to preserve his double-jeopardy claim for review where he failed to lodge any double-jeopardy objection in the trial court and where, under the exception to waiver of such claims established by the Court of Criminal Appeals, he failed to make a showing that a double-jeopardy violation is clearly apparent on the face of the record.[2] The State also responds that, even assuming his claim is not waived, Franco failed to prove his claim where the State procured two convictions for two separate and distinct injuries, each amounting to a separate criminal offense.

We hold that Franco failed to show a double-jeopardy violation here even if he did preserve his complaint for review.

1. Underlying Facts

Count I of the indictment alleged that Franco:

> [O]n or about the 17th day of December, 2016 . . . did then and there intentionally, knowingly, or recklessly **cause serious bodily injury** to Rita Marmolejo **by biting the lip of Rita Marmolejo** with the teeth of the defendant, **and the defendant did**

[2] *See Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000) (explaining that a double-jeopardy claim can be raised for the first time on appeal if the defendant establishes that: (1) the undisputed facts make it clearly apparent that there was a double-jeopardy violation; and (2) enforcement of the usual rules of procedural default serve no legitimate state interests).

> **then and there use or exhibit a deadly weapon, to-wit: teeth** . . . and the said Rita Marmolejo was . . . a person with whom the defendant has or has had a dating relationship . . . . [emphasis added].
>
> Count II of the indictment alleged, in two paragraphs, that Franco:
>
> [O]n or about the 16th day of December, 2016 . . . did then and there intentionally, knowingly, or recklessly cause **bodily injury** to Rita Marmolejo, a . . . person with whom the defendant has or has had a dating relationship . . . .
>
> [Paragraph A]
>
> **by grabbing or pulling Rita Marmolejo about the hair** with the Defendant's hand . . . [or]
>
> [Paragraph B]
>
> **by striking Rita Marmolejo about the head or face** with the Defendant's hand[.] [emphasis added].

Count II also alleged in both paragraphs that Franco "had previously been convicted of an offense under Chapter 22, Penal Code, against a . . . person with whom the defendant has or has had a dating relationship . . . ."

2. Double-Jeopardy Protections

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. There are three distinct types of double jeopardy claims: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006). In the multiple-punishments context, which is alleged by Franco here, the Double Jeopardy Clause prevents a court from prescribing greater punishment than the Legislature intended. *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015).

How legislative intent is ascertained depends in part on whether the offenses at issue are codified in a single statute or in two distinct statutory provisions. *Id*. The codification of offenses in two distinct statutory provisions is, by itself, some indication of a legislative intent to impose multiple punishments. *Id*. When two distinct statutory provisions are at issue, the offenses must be considered the same under both an "elements" analysis and a "units" analysis for a double-jeopardy violation to occur. *Id*. When only one statute is at issue, the elements analysis is necessarily resolved in the defendant's favor, and only a units analysis remains to be conducted. *Id*.

In this case, both Franco and the State assume that the two offenses at issue are the same under an "elements" analysis. Thus, based on the parties' briefing, we will proceed to a units analysis without an in-depth examination of whether the two offenses are the same under the elements test established in *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932) (setting forth the same-elements test in which a court asks whether each statute at issue requires proof of a fact which the other does not); or whether a presumption of same offenses is rebutted by a showing that the Legislature clearly intended more than one punishment under the list of non-exclusive factors set out in *Ex parte Ervin*, 991 S.W.2d 804, 807, 814 (Tex. Crim. App. 1999) (listing eight non-exclusive factors to analyze whether a presumption in either direction under an elements analysis has been rebutted by a showing that the Legislature "clearly intended" only one or multiple punishments for the offenses at issue in a double-jeopardy claim). [3]

[3] Even though we affirm the trial court's judgment in this instance based on our units analysis, we would also hold that Franco has failed to show that the two offenses for which the jury convicted him are the same under an elements analysis. Franco's conviction for family-violence assault with a prior conviction required the State to prove Franco had been previously convicted of any one of a variety of enumerated offenses committed against a dating, family, or household member, and Franco's conviction for aggravated assault with a deadly weapon causing serious bodily injury required that Franco both caused a serious bodily injury and used or exhibited a deadly weapon. *Compare* TEX. PENAL

3. Units of Prosecution Analysis

Even when the offenses in question are proscribed by a single statute or are otherwise the same under an elements analysis, the protection against double jeopardy is not violated if the offenses constitute separate allowable units of prosecution. *Ex parte Benson*, 459 S.W.3d at 73. Typically, this latter inquiry involves determining such things as whether there were two murder victims, whether a victim who was assaulted on Monday was assaulted again on Tuesday, or whether multiple kinds of sex acts were committed against a victim. *Id*. A units analysis consists of two parts: (1) determining what the allowable unit of prosecution is; and (2) determining how many units have been shown. *Id*.

CODE ANN. § 22.01(a)(1), (b)(2)(A) *with* TEX. PENAL CODE ANN. § 22.02(a)(1), (a)(2). Thus, the statutory provisions setting forth each offense required proof of a fact the other did not, and the two offenses with which Franco was convicted are not the same under an elements test. *See Ex parte Benson*, 459 S.W.3d at 74-76 (holding that the offenses of intoxication assault and felony DWI were different under the same-elements test because each contained an element the other did not where: (1) intoxication assault required proof that the defendant caused serious bodily injury; and (2) felony DWI required proof that the defendant had two prior DWI convictions); *see also Philmon v. State*, 580 S.W.3d 377, 382 (Tex. App. – Houston [1st Dist.] 2019, pet. granted) (holding that the offenses of aggravated assault with a deadly weapon by threatening imminent bodily injury and dating-violence assault by impeding the normal breathing or circulation of the blood of the person were different under the same-elements test because each contained elements the other did not where: (1) the aggravated assault with a deadly weapon required proof that the defendant used a deadly weapon and that the defendant threatened the victim; and (2) the dating-violence assault by impeding breath or circulation required proof that the victim was in a dating relationship with the defendant and that the defendant actually caused bodily injury); *Childress v. State*, 285 S.W.3d 544, 549-50 (Tex. App. – Waco 2009, pet. ref'd) (holding that the Legislature intended to treat dating-violence assault and aggravated assault as separate offenses and that the defendant's convictions for those offenses was not a double-jeopardy violation).

Furthermore, as he assumes that his two offenses are the same under an elements analysis, Franco has not articulated in his brief how the resulting judicial presumption of different offenses under an elements test would be overcome by a showing that the Legislature clearly intended only one punishment under the *Ervin* factors, and we do not find such a showing obvious here. *See Ex parte Ervin*, 991 S.W.2d at 814; *see also Ex parte Benson*, 459 S.W.3d at 89 ("Even if an analysis of the *Ervin* factors were inconclusive, applicant's double-jeopardy claim would fail, because the presumption established by the offenses having different elements under the *Blockburger* analysis would remain unrebutted."); *Ex parte Maguregui*, No. 08-15-00189-CR, 2016 WL 6427865, at *4 (Tex. App. – El Paso Oct. 31, 2016, no pet.) (not designated for publication) (summarily rejecting defendant's double-jeopardy claim that the Legislature intended two offenses to be subject to only one punishment, even after recognition of the *Ervin* factors, where there was no obvious indication that the Legislature intended for the two offenses at issue to be subject only to a single punishment and where, in any case, the defendant failed to direct this Court to other indicia of legislative intent to the contrary).

Therefore, in addition to our ultimate holding that Franco's double-jeopardy claim fails because two units of prosecution were shown in this case, we would overrule Franco's second issue for this reason, as well.

The first part of the analysis is purely a question of statutory construction and generally requires ascertaining the focus or gravamen of the offense. *Id* at 73-74. As defined by the Court of Criminal Appeals, the gravamen of the offense is the "gist; essence; [or the] substance" of the offense, "[t]he substantial point or essence of a claim, grievance, or complaint", or "the part of an accusation that weighs most heavily against the accused; the substantial part of a charge or accusation." *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) [Internal brackets in original]. The gravamen of an offense can be: (1) the result of the conduct; (2) the nature of the conduct; or (3) the circumstances surrounding the conduct. *Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013). Thus, for example, where the Legislature did not expressly define the unit of prosecution for aggravated assault with a deadly weapon, the Court of Criminal Appeals determined that, because the offense is result oriented, the gravamina of the offense included the victim and the bodily injury that was inflicted. *Hernandez v. State*, 556 S.W.3d 308, 327 (Tex. Crim. App. 2017) (op. on reh'g). And the same has been held for assault causing bodily injury. *See Price*, 457 S.W.3d at 442.

The second part of the analysis—determining how many units of prosecution have been shown—requires an examination of the trial record. *Ex parte Benson*, 459 S.W.3d at 74. It is well-settled that the protection against double jeopardy does not apply to separate and distinct offenses that occur during the same transaction. *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013); *see also Jones v. State*, 514 S.W.2d 255, 256 (Tex. Crim. App. 1974) ("Yet, as fundamental as the protection against double jeopardy is, it has no application where separate and distinct offenses occur during the same transaction."). Furthermore, if the focus of the offense is the result—that is, the offense is a result of conduct crime—then different types of results are

considered to be separate offenses. *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010). Thus, a defendant may be held criminally responsible for two or more result-of-conduct offenses occurring during the same transaction so long as each offense causes a different type of result. *See Villanueva v. State*, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007) (explaining that a defendant could be held criminally responsible, without violating double jeopardy, for "a separate and discrete, or at least incrementally greater, injury" resulting from a separate or additional act beyond the initial act); *cf. Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012) (where the Court of Criminal Appeals, in addressing a legal-sufficiency complaint based on an alleged variance between the charging instrument and the proof for the defendant's charge of aggravated assault by causing serious bodily injury, reasoned, "[h]ad the State pled and proved different injuries, a question might arise as to whether the difference between what was pled and what was proved was significant enough to be material. *Separate crimes of aggravated assault could be based upon separately inflicted instances of bodily injury* [emphasis added].") [Internal footnote omitted].

4. Two Units of Prosecution

Franco argues that the two charged offenses were the "same" because "the gravamina of the charged offense[s] . . . are the same victim and bodily injury to that victim[.]" However, this interpretation of the gravamina for his charged offenses fails to account for the fact that it is *each discrete injury*—as opposed to the mere fact that the victim suffered *some bodily injury*—that comprises the gravamina of a bodily-injury-based assaultive offense. *See Hernandez*, 556 S.W.3d at 327; *Price*, 457 S.W.3d at 442; *see also Villanueva*, 227 S.W.3d at 749; *cf. Johnson*, 364 S.W.3d at 298.

Although occurring during the same transaction, Franco's two charged offenses were committed by his infliction of two distinct injuries through two easily-distinguished acts: (1) serious bodily injury resulting in permanent disfigurement to Marmolejo's lip and protracted loss of its functioning caused by Franco biting it; and (2) regular bodily injury resulting in pain caused by Franco grabbing Marmolejo's hair or striking her arm with his hand. As both charged offenses were result-of-conduct crimes, the State could hold Franco criminally responsible for each distinct result—i.e., each unit of prosecution—flowing from each of his two distinct assaultive acts. *See Villanueva*, 227 S.W.3d at 749; *cf. Johnson*, 364 S.W.3d at 298; *see also Lovell v. State*, No. 08-02-00112-CR, 2004 WL 362592, at *6 (Tex. App. – El Paso Feb. 26, 2004, pet. ref'd) (not designated for publication) (where this Court held that there was no multiple-punishments double-jeopardy violation clearly apparent on the face of the record where, based on the same beating of the victim: (1) the defendant was convicted for one count of aggravated assault with a deadly weapon as a party to the offense committed by his co-defendant's conduct in hitting the victim on the head with a VCR; and (2) the defendant was convicted of one count of the lesser-included offense of assault, rather than the charged second count of aggravated assault, based on his acts of striking the victim with his hands and feet).

Thus, two units of prosecution served as the bases of the two offenses for which the jury convicted Franco, and his double-jeopardy claim fails because the two offenses for which he was convicted are not the same under a units analysis. *See Ex parte Benson*, 459 S.W.3d at 73. Consequently, we overrule Franco's second issue presented for review.

C. Issue 3: Introduction of Extraneous-Offense Evidence under Article 38.371

In his third issue, Franco argues that the trial court abused its discretion by admitting

extraneous-offense evidence in the guilt phase of his trial because its only relevance was as character-conformity evidence.

In response, the State argues that: (1) the complained-of incidents did not amount to criminal conduct and thus did not come under the ambit of Rule 404(b); (2) the incidents were relevant to illustrate the nature of Franco's and Marmolejo's relationship under article 38.371 of the Texas Code of Criminal Procedure; and (3) error, if any, was harmless.

We hold that, even assuming the complained-of acts amounted to conduct falling within the ambit of Rule 404(b), the extraneous-offense evidence was admissible under article 38.371.

1. Underlying Facts

At trial, Marmolejo testified that Franco committed each of the following acts at various times throughout their relationship: (1) Franco would try to control her by preventing her from leaving his mother's house, and he would sit on top of her and then try to kiss her; (2) Franco would not leave her alone at a 7-Eleven, prompting some bystanders to call the police; (3) Franco threw her to the ground outside a school; (4) Franco threw her to the ground outside a public library; and (5) on the night of the charged offenses, Franco said he wanted to go out to a bar to fight with some guys.[4] At trial, Franco objected to the State's introduction of these acts in front of the jury on the basis that they were inadmissible under Rule 404(b) because they lacked any relevance aside from showing that he acted in conformity with his character. The trial court overruled Franco's objection.

[4] Although Franco also complains on appeal about Marmolejo's testimony regarding an additional incident during which Franco became aggressive and threw her perfume on the floor, the trial court sustained Franco's objection to that incident at trial and ordered that it be stricken from the record. Thus, we need not address the admissibility of this additional incident.

2. Standard of Review

A trial court's ruling on the admissibility of extraneous offenses is reviewed under an abuse-of-discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). As long as the trial court's ruling is within the zone of reasonable disagreement, we will uphold the ruling. *Id*. at 343-44. Furthermore, we will uphold the trial court's ruling if it is correct on any theory of law applicable to the case. *Id*. at 344.

3. Applicable Law

Generally, extraneous-offense evidence is not admissible at the guilt phase of trial to prove that a defendant committed the charged offense in conformity with his own bad character. TEX. R. EVID. 404(b)(1); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). But extraneous-offense evidence may be admissible when it has relevance apart from character conformity. TEX. R. EVID. 404(b)(2); *Devoe*, 354 S.W.3d at 469.

Article 38.371 of the Code of Criminal Procedure provides an avenue for the admissibility of "evidence regarding the nature of the relationship between the actor and the alleged victim" to assist the trier of fact in determining whether a defendant committed certain family-violence-related offenses as follows:

> (b) In the prosecution of an offense described by Subsection (a) [in which the victim and defendant share a dating, family, or household relationship], subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.
>
> (c) This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.

TEX. CODE CRIM. PROC. ANN. art. 38.371(b), (c). This Court recently observed, "article 38.371 shows on its face a legislative determination that 'testimony or evidence regarding the nature of the relationship between the actor and the alleged victim' is automatically one of the contemplated and non-exhaustive 'relevant facts and circumstances'" admissible under the article. *Fernandez v. State*, --- S.W.3d ---, No. 08-17-00217-CR, 2020 WL 831907, at *13 (Tex. App. – El Paso Feb. 20, 2020, no pet.) (not yet published).

4. Application

Even assuming all of the extraneous acts at issue constituted bad acts falling within the ambit of Rule 404(b), each act served to show the jury an example of Franco's controlling and aggressive behavior that defined his relationship with Marmolejo. And the Legislature has determined under article 38.371 that the nature of the relationship itself is a permissible, non-character-conformity purpose for which evidence is admissible. *See* TEX. CODE CRIM. PROC. ANN. art. 38.371(b); *Fernandez*, --- S.W.3d ---, 2020 WL 831907, at *13; *see also* TEX. R. EVID. 404(b)(2) (providing a non-exhaustive list of permissible purposes for which evidence of a crime, wrong, or other act may be admissible despite the prohibition against use of character-conformity evidence). Thus, the extraneous acts had relevance apart from character conformity, namely, to show the "nature of the relationship" between Franco and Marmolejo. *See* TEX. CODE CRIM. PROC. ANN. art. 38.371(b). The trial court therefore did not abuse its discretion in admitting the extraneous-act evidence in this case because it was relevant to something aside from character conformity. *See* TEX. R. EVID. 404(b)(2); *Devoe*, 354 S.W.3d at 469.

Consequently, we overrule Franco's third and final issue presented for review and need not

consider the State's alternative arguments on this point.[5]

III. CONCLUSION

The trial court's judgment is affirmed.

GINA M. PALAFOX, Justice

June 15, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

(Do Not Publish)

[5] After making his arguments as to why this Court should find that the extraneous-offense evidence was irrelevant and therefore inadmissible, Franco asserts that, even assuming the evidence was relevant, "a trial court should nonetheless exclude such evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." Immediately after this brief assertion, Franco cites the Rule 403 balancing factors, but he does not otherwise provide any additional citations or argument for how this Court should conduct any analysis under Rule 403. *See* TEX. R. EVID. 403. Instead, Franco merely argues, "the extraneous-offense evidence was substantially more prejudicial than probative and **thus, harmful when erroneously admitted** [emphasis added]."

Based on the lack of citation or further argument to Rule 403 in this portion of his brief, we construe Franco's assertions in this regard as an argument on harm analysis, as he does not elsewhere in his brief argue as to how he was harmed by, as he contends, the trial court's admission of irrelevant extraneous-offense evidence, and we do not construe his brief as raising a separate Rule 403 argument regarding the admission of the extraneous-offense evidence. Furthermore, as he acknowledges in his brief to this Court, he never lodged an objection that the complained-of extraneous-offense evidence was inadmissible under Rule 403 and, instead, objected only to the relevance of the evidence.

Ultimately, based on our holding that the trial court did not abuse its discretion in admitting the evidence at issue, we need not address Franco's harm analysis in our resolution of this issue.