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No. PD-1411-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JOSHUA JACOBS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bowie County

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STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Joshua Jacobs.

*The case was tried before the Honorable Bobby Lockhart, Presiding Judge of the 102nd District Court in Bowie County, Texas.

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No. PD-1411-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JOSHUA JACOBS, Appellant

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully urges this Court to grant discretionary review of the above named cause, pursuant to the rules of appellate procedure.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. Despite this Court's best efforts, the standard for assessing the harm of voir dire error continues to cause confusion. The impetus for the proposed questioning in this case, TEX. CODE CRIM. PROC. art. 38.37, can be especially problematic because it makes character conformity relevant in cases involving sexual offenses against children. Conversation will assist the Court in

giving guidance to both the bench and bar.

STATEMENT OF THE CASE

Appellant was convicted of aggravated sexual assault of a child. The court of appeals reversed, holding that he suffered constitutional harm because the trial court limited his voir dire on the jury's duty to hold the State to its burden of proof notwithstanding a prior conviction for a similar offense.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed appellant's conviction in a published opinion on November 10, 2016.[1] This Court granted an extension of time to file the State's petition on December 13, 2016. The State's petition is due January 11, 2017.

GROUND FOR REVIEW

Is it constitutional error to prevent defense counsel from asking a question during voir dire that could give rise to a valid challenge for cause?

ARGUMENT AND AUTHORITIES

In *Easley v. State*, this Court held that erroneous limitations on voir dire are not constitutional *per se* but said there may be instances when the limitation is "so substantial as to warrant labeling the error as constitutional error."[2] In this case, the court of appeals held that "having an unqualified veniremember on the jury is a

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[1] *Jacobs v. State*, __ S.W.3d __, No. 06-16-00008-CR, 2016 Tex. App. LEXIS 12116 (Tex. App.–Texarkana 2016).

[2] 424 S.W.3d 535, 541 (Tex. Crim. App. 2014).

violation of the defendant's right to an impartial jury" and is therefore constitutional error.[3] Is being prevented from asking a question that could lead to a strike for cause always constitutional error?

The error.

Appellant was charged with aggravated sexual assault of a child. Because appellant previously committed a sexual offense against a child, defense counsel wanted to address TEX. CODE CRIM. PROC. art. 38.37 in voir dire. "Notwithstanding Rules 404 and 405, Texas Rules of Evidence," article 38.37 permits the admission of extraneous sexual offenses "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."[4] Defense counsel wanted to ask the panel whether it would hold the State to its burden on everything it had to prove even if evidence of an extraneous sexual offense was proven beyond a reasonable doubt.[5] After discussion, the trial court permitted the questions with one proviso—counsel must refer to the extraneous offense as "assaultive" rather than "sexual."[6]

This was wrong. Despite the trial court's legitimate concern that the statute

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[3] Slip op. at 18.

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

[5] 17 RR Record Ex. 4 contains the proposed PowerPoint slides for voir dire. The relevant portion is appended.

[6] 13 RR 13-15.

invites a consideration of extraneous offenses that is usually prohibited, and other problems experienced whenever prior convictions are mentioned during voir dire,[7] article 38.37 applies to the case. The aspects of the statute that trouble the trial court are precisely why prospective jurors must be asked whether they would ignore the State's burden of proof just because the defendant previously committed a similar offense.[8] A prospective juror who would not hold the State to its burden of proof would be challengeable for cause.[9] The court of appeals was correct to find error. But it was wrong to conclude that the error was constitutional in dimension.

This Court requires "substantial" limitation.

In *Easley*, this Court overruled precedent that held that erroneously limiting voir dire presentation is a *per se* violation of the constitutional right to counsel.[10] However, it said, "There may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis."[11] In that case, defense counsel was prevented from discussing different legal standards of proof and contrasting them with the beyond-a-

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[7] 13 RR 12-13.

[8] This is different from asking jurors if they would consider the extraneous offense when determining whether the State satisfied its burden on an element to which it is relevant. That would be an improper commitment question under the statute at issue.

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

[10] 424 S.W.3d at 541.

[11] *Id*.

reasonable-doubt standard.[12] This Court found the error to be non-constitutional because "the judge's refusal to allow Easley's counsel to compare other burdens of proof did not mean he was foreclosed from explaining the concept of beyond a reasonable doubt and exploring the veniremembers' understanding and beliefs of reasonable doubt by other methods."[13] In other words, the inability to ask a particular question was not a substantial limitation because counsel had an opportunity to otherwise probe the jury on that matter.

Three courts of appeals have adopted a "*per se*" rule.

Paraphrasing *Easley*, the court of appeals said, "Not all instances in which the trial court limits the defendant's voir dire presentation are constitutional error."[14] By "not all" it meant "only" those questions that could lead to a strike for cause. Relying on two other courts of appeals, it held that "having an unqualified veniremember on the jury is a violation of the defendant's right to an impartial jury" and is therefore constitutional error requiring a Rule 44.2(a) analysis.[15] It distinguished *Easley*

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[12] *Id*. at 536.

[13] *Id*. at 541.

[14] Slip op. at 16.

[15] Slip op. at 17-18. *See Hill v. State*, 426 S.W.3d 868, 877 (Tex. App.–Eastland 2014, pet. ref'd), and *Hawkins v. State*, No. 12-13-00394-CR, 2015 Tex. App. LEXIS 10803 at *25-26 (Tex. App.–Tyler Oct. 21, 2015, pet. ref'd). The questions that were prevented from being asked in these two cases both dealt with qualifying the jury on punishment. *Hill*, 426 S.W.3d at 875 (whether some veniremembers could consider the full range of punishment); *Hawkins*, 2015 Tex. App. LEXIS 10803 at *25 (whether potential jurors could consider community supervision).

because the two cases it "specifically overruled" dealt with limitations on questions that could have aided in the exercise of peremptory strikes rather than provided cause.[16]

These courts' conclusions cannot be reconciled with this Court's opinions. As *Easley* reiterated, this Court has held that both the erroneous granting of a State strike for cause and the erroneous denial of a defendant's strike for cause are reviewed for non-constitutional error.[17] Moreover, this Court has addressed the type of error at issue in this case and came to the opposite conclusion. In *Woods v. State*, defense counsel wanted to ask jurors in a death-penalty case whether they could fairly consider the mitigation special issue even if the jury had already answered "yes" to the future dangerousness and anti-parties special issues.[18] If the answer had been

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[16] Slip op. at 17 n.14. In the first,"the court refused to permit him to ask each of the jurors separately if he would require the State to prove the defendant's guilt beyond a reasonable doubt before he would convict and on his refusal to permit counsel to ask each of the jurors as to whether they had any prejudice against the defendant because he is of the negro race, and if they would each try the case and give him the same fair and impartial trial as they would a white man similarly charged." *Plair v. State*, 279 S.W. 267, 268 (Tex. Crim. App. 1925, reh'g denied). In the second, defense counsel was prohibited from probing juror acquaintance with the district attorney. *Carlis v. State*, 51 S.W.2d 729, 730 (Tex. Crim. App. 1932).

[17] *See Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998) ("Exclusion of jurors for impermissible reasons (such as race, sex, or ethnicity) may violate other constitutional provisions, but this case involves no such reason. The error in this case was a mistaken application of Article 35.16(b)(3). It is not of constitutional dimension."); *Johnson v. State*, 43 S.W.3d 1, 2 (Tex. Crim. App. 2001) ("Harm for the erroneous denial of a challenge for cause is determined by the standard in Rule of Appellate Procedure 44.2(b).").

[18] 152 S.W.3d 105, 109 (Tex. Crim. App. 2004).

"no," the juror would have been challengeable for cause.[19] Yet, this Court held that "[t]he appropriate standard of harm is to disregard the error unless a substantial right has been affected[,]" citing Rule 44.2(b).[20] *Woods* was decided before *Easely*, but it is unclear why the result would be any different.

This case appears simple under *Easley*.

Defense counsel told the trial court that the purpose of the desired questions was to tell the jury, "[You] can't convict because you believe the accused is a bad person absent the State proving every element beyond a reasonable doubt, because that would be the impermissible or irrelevant reason to use it."[21] Although appellant did not get to ask the exact questions he wanted, he was able to accomplish that goal.[22] He also asked if the nature of the charged offense would make anyone vote to convict even if the State did not prove all the elements.[23] The only thing defense counsel was prevented from doing was specifying the type of assaultive offense

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[19] *Id*.

[20] *Id*. at 109, 109 n.15.

[21] 13 RR 7-8 (arguing to trial court). *See also* 13 RR 9 ("my position would be that I'm making sure that they can still follow the law, because the law allows that evidence to come -- evidence of sexual offenses to come in, but the State still isn't relieved of their burden. So I'm trying to find out, after I've explained the law to them, find out if they can still follow the law.").

[22] 13 RR 90-96.

[23] 13 RR 96-97. To the extent the potential jurors' answers might have been different had they heard appellant committed a previous *sexual* offense because of the "qualitative difference," slip op. at 16 n.13, this was not an argument made in the trial court and should not be the basis for constitutional error under *Easley*.

appellant previously committed. This limitation was erroneous, but it was not as expansively prohibitive as the court of appeals suggests.

Conclusion

Whether the court of appeals properly applied the recently minted *Easley* standard is an important question of law that this Court should decide.[24] What makes a limitation "so substantial" that it impinges on a constitutional right? Which right—the right to counsel or an impartial jury? What does the analysis look like? Whatever form it takes, it should be more than a determination of whether the prohibited question was geared towards challenges for cause. To hold otherwise would be to embrace the sort of "*per se*" rule that this Court rejected in *Easley*.

[24] TEX. R. APP. P. 66.3(b).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and reverse the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,524 words.

/s/ John R. Messinger
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of January, 2017, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00008-CR

JOSHUA JACOBS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 102nd District Court
Bowie County, Texas
Trial Court No. 14F1096-102

Before Morriss, C.J., Moseley and Burgess, JJ.
Opinion by Justice Moseley

O P I N I O N

As a result of his unlawful contact with a twelve-year-old girl, a Bowie County jury found Joshua Jacobs guilty of aggravated sexual assault of a child.[1] After Jacobs pled true to having previously been convicted of felony carnal knowledge of a juvenile in Louisiana, the trial court imposed the mandatory sentence[2] of confinement for life in the Correctional Institutions Division of the Texas Department of Criminal Justice.

Jacobs argues on appeal that the trial court erred (1) in enhancing his punishment by using his prior conviction in Louisiana, (2) by unreasonably restricting his voir dire of the jury, and (3) by admitting evidence of his prior conduct in Louisiana during the guilt/innocence phase of his trial in violation of Article 38.37 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2016). We find that the trial court abused its discretion in restricting Jacobs' voir dire, that the error was constitutional in scope, and that the error was harmful, mandating reversal. Because that finding is determinative, we do not reach the other points of error.

I. Jacobs' Voir Dire Was Improperly Restricted

In his second point of error, Jacobs asserts the trial court abused its discretion in restricting him to referring to his prior Louisiana conviction as an "assaultive offense," rather than as a "sexual offense," during his voir dire of the jury panel. Article 38.37, Section 2(b) allows the admission of evidence that the defendant committed a separate sexual offense specifically listed

[1]*See* TEX. PENAL CODE ANN. § 22.021(a)(B)(i) (West Supp. 2016).

[2]*See* TEX. PENAL CODE ANN. § 12.42(c)(2)(A)(i), (B) (West Supp. 2016).

in Article 38.37, Section 2(a)(1) or (2), to be admitted during the guilt/innocence phase "for any bearing the evidence has on relevant matters." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b). Jacobs sought to question the jury panel to determine whether individual members would still require the State to prove each element of the charged offense beyond a reasonable doubt if evidence of an unrelated sexual offense was proven by the State. The trial court barred him from referring to a sexual offense, but allowed him to refer to an assaultive offense instead. Jacobs argues that this was not a reasonable restriction since some panel members might have a substantially different opinion of someone who committed an unrelated sexual offense as opposed to someone who had not done so. Jacobs argues that (due to what he deems an improper restriction of his right to voir dire) he was deprived of his constitutional right to counsel.[3] The State responds by arguing that the trial court did not abuse its discretion because (1) it was seeking to avoid confusing the jury and "poisoning the panel" and (2) Jacobs was seeking a commitment from the jury that it would not be influenced by the facts of the extraneous offense even though Article 38.37 of the Texas Code of Criminal Procedure specifically allows them to be so influenced. We agree with Jacobs.

[3]The Texas Court of Criminal Appeals has noted that although some of its cases have characterized a trial court's unreasonable restriction of a defendant's voir dire as violating a defendant's constitutional right to counsel, it indicates that such characterization is a misnomer; it states, rather, that the most pertinent issue in jury selection is the right to a speedy trial by an impartial jury. *See Hill v. State*, 426 S.W.3d 868, 876 (Tex. App.—Eastland 2014, pet. ref'd) (citing *Easley v. State*, 424 S.W.3d 535, 539–41 (Tex. Crim. App. 2014)). Both of these rights are contained in the same provision of the Texas Constitution. *See* TEX. CONST. art. I, § 10. Because reported cases seem to hold that either objection will suffice to preserve error, it is difficult for us to say that the error has not been preserved. In the interest of justice and in an effort to comply with what we deem to be the current position of the higher court in matters such as this, we construe Jacobs' constitutional complaint to encompass both of these rights.

A. Background

Prior to voir dire, Jacobs submitted to the trial court copies of slides with questions he proposed asking the jury panel. Among those slides were questions and explanations under the heading "Innocent UNLESS Proven Guilty." Included in that series of slides, Jacobs sought to explain the impact of Article 38.37, Section 2(b), as follows:

> Evidence that the defendant has committed a separate unrelated offense described by Chapter 21 of the Penal Code (Sexual Offenses) may [sic] admitted at a trial for aggravated sexual assault of a child for any bearing the evidence has on relevant matters, including the character of the defendant, and action in conformity with character.
>
> But, before you can consider this type of evidence for any reason, you must believe that the allegation is true beyond a reasonable doubt.

That slide was followed by a slide explaining that the State's burden of proof does not change and stating, "You cannot convict because you believe the accused is a bad person, absent the State proving every element beyond a reasonable doubt." Then followed a series of five slides that broke down the State's burden of proof for the charged offense. The first slide asked the jury panel, "Who would not require the State to prove beyond a reasonable doubt that the charged offense occurred in Bowie County, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?" (Question 1).

The same question was asked on subsequent slides, but replacing "occurred in Bowie County" with "occurred on November 25, 2014," (Question 2), and "was committed by . . . Jacobs and that he intentionally or knowingly penetrated the sexual organ of Victoria Whiteman[4] with

[4]At trial, the parties made reference to the name of the child victim as "Victoria Whiteman," and we continue the use of that pseudonym. *See* TEX. R. APP. P. 9.10.

his finger." (Question 3). Jacobs also sought to ask the jury, "Who would require that the State only prove that . . . Jacobs contacted the sexual organ of Victoria Whiteman with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?" (Question 4), and "Who would not require the State to prove beyond a reasonable doubt that at the time the charged offense is alleged to have occurred that Victoria Whiteman was under 14 years old, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?" (Question 5).

The trial court acknowledged that Jacobs could question the jury panel on Article 38.37, but was concerned that referring to the offenses listed in Article 38.37 as sexual offenses, and referring to a sexual offense in Questions 1 thru 5 might be too specific, and that it would run the risk of poisoning the jury panel. The trial court informed Jacobs that it would not have a problem with him referring to an "unrelated felony offense" or an "unrelated offense." Jacobs explained to the trial court that he first addressed the State's burden of proof and that the defendant is presumed innocent until the State proves each element of the charged offense beyond a reasonable doubt, then addressed Article 38.37. He then argued each of the questions were proper commitment questions because they ask if the jury panel can follow the law. Jacobs objected to the trial court forbidding him to refer to "sexual offense" in the questions. After forbidding the use of the phrase "sexual offense" in the questions and explanation of Article 38.37, the trial court agreed that Jacobs could use the term "assaultive offense" instead. During voir dire, Jacobs referenced only

"assaultive offenses" and "an unrelated assaultive offense" in the questions and explanation of Article 38.37.[5]

B. Standard of Review

A "trial court may impose reasonable restrictions on . . . voir dire examination." *Thompson v. State*, 267 S.W.3d 514, 517 (Tex. App.—Austin 2008, pet. ref'd) (citing *Boyd v. State*, 811 S.W.2d 105, 115 (Tex. Crim. App. 1991)). "We review the trial court's decision to limit voir dire under an abuse of discretion standard." *Id.* (citing *Boyd*, 811 S.W.2d at 115). "The trial court abuses its discretion when it limits a proper question concerning a proper area of inquiry." *Id.* (citing *Dinkins v. State*, 894 S.W.2d 330, 345 (Tex. Crim. App. 1995). Further, it is an abuse of discretion when a trial court's "denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges." *Mason v. State*, 116 S.W.3d 248, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (quoting *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989)).

The Texas Constitution guarantees a defendant the right to "trial by an impartial jury" and "of being heard by himself or counsel, or both." TEX. CONST. art. I, § 10. Texas courts have long recognized that "the constitutionally guaranteed right to counsel . . . encompasses the right to question prospective jurors in order to intelligently and effectively exercise peremptory challenges and challenges for cause during the jury selection process." *McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992) (citing *Naugle v. State*, 40 S.W.2d 92, 94 (Tex. Crim. App. 1931)).

[5]On appeal, Jacobs does not assert error in being barred from referring to "sexual offense" in his Article 38.37 explanation.

Consequently, "trial judges should allow defendants much leeway in questioning a jury panel during voir dire." *Id.* at 120 (quoting *Ex parte McKay*, 819 S.W.2d 478, 482 (Tex. Crim. App. 1990)). When the trial court improperly limits a defendant's voir dire examination, it may constitute a violation of the right to counsel. *See Easley v. State*, 424 S.W.3d 535, 538, 541 (Tex. Crim. App. 2014) (overruling *Plair v. State*, 279 S.W. 267 (Tex. Crim. App. 1925), and its progeny to the extent they hold that "erroneously limiting an accused's or counsel's voir dire presentation is constitutional error because the limitation is a *per se* violation of the right to counsel"); *McCarter*, 837 S.W.2d at 119, 122. In addition, when an improper limitation on voir dire prevents a defendant from determining whether a veniremember should be disqualified for cause, the defendant's right to an impartial jury is violated. *Hill v. State*, 426 S.W.3d 868, 877 (Tex. App.—Eastland 2014, pet. ref'd).

First, we must determine whether the trial court abused its discretion by limiting proper questions concerning a proper area of inquiry.[6] If we find that it did, then we must determine whether its error was a constitutional error or a nonconstitutional error. *See Easley*, 424 S.W.3d at 540–41; *Hill*, 426 S.W.3d at 876. The nature of the error will determine our harm analysis under Rule 44.2 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 44.2(a), (b).

[6]Since the trial court allowed the modified questions to be asked, it is apparent that Jacobs was not attempting to prolong voir dire. *See McCarter*, 837 S.W.2d at 121.

C. Analysis

1. The Trial Court Abused its Discretion

In each of the questions Jacobs sought to ask the jury panel, he asked the prospective jurors whether they would resolve an element of the State's case based solely on the State proving an unrelated sexual offense. They were, then, commitment questions. *See Standefer v. State*, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001) ("[A] question is a commitment question if one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question."). While commitment questions are sometimes improper, "[w]hen the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard." *Id.* at 181. For a commitment question to be proper, it must meet two criteria: (1) "one of the possible answers to that question must give rise to a valid challenge for cause," and (2) it "must contain *only* those facts necessary to test whether a prospective juror is challengeable for cause." *Id.* at 182.

In order to obtain a conviction, due process requires the State to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979); *Ladd v. State*, 3 S.W.3d 547, 556–57 (Tex. Crim. App. 1999). A defendant may challenge for cause any juror that "has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely." TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (West 2006). By each of the questions Jacobs wanted to ask, he sought to determine whether the prospective jurors would follow the law and require the State to prove the individual elements of the charged

offense beyond a reasonable doubt if the State had proven an unrelated sexual offense beyond a reasonable doubt. Any potential juror who would not require the State to prove the individual elements of the charged offense if it had proven an unrelated sexual offense would be "challengeable for cause under Article 35.16(c)(2) for having a bias or prejudice against a law applicable to the case upon which the defense is entitled to rely." *See Ladd*, 3 S.W.3d at 558–59.

The State argues that under Article 38.37, the jury is entitled to be influenced by the facts of the unrelated extraneous acts in considering whether the State has proven its case beyond a reasonable doubt. As we have previously pointed out, Article 38.37, Section 2(b), "allow[s] the jury to consider the extraneous offenses '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.'" *Reichle v. State*, No. 06-14-00073-CR, 2015 WL 392846, at *7 (Tex. App.—Texarkana Jan. 30, 2015, pet. ref'd) (mem. op., not designated for publication)[7] (quoting TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b)). By the plain language of the statute, Article 38.37, Section 2(b), only allows the admission (and, therefore, consideration by the jury) of the evidence of the extraneous act for any bearing it may have on "relevant matters." Thus, in regard to the individual elements of the charged offense, evidence of the extraneous offense can only properly be considered in regard to those elements to which it is relevant. Therefore, as to those individual elements of the charged offense to which evidence of the extraneous offense is not relevant, Jacobs is entitled to rely on the State's burden to prove those elements beyond a reasonable doubt without

[7]Although unpublished cases have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

the jury considering the extraneous-offense evidence. If a potential juror would not require the State to prove these elements if it proved the extraneous offense, then the juror would be challengeable for cause. Conversely, for those elements to which the extraneous-offense evidence is relevant, Jacobs is not entitled to rely on the jury making its determination without considering the extraneous-offense evidence. As to the relevant elements, a potential juror who would rely on the proof of the extraneous offense would not be challengeable for cause. Therefore, we must determine whether the questions Jacobs sought to ask involved elements to which evidence of an unrelated offense would be relevant.

Under the relevant statute and the indictment, the State was required to prove that (1) Jacobs, (2) on or about November 25, 2014, (3) in Bowie County, Texas, (4) intentionally or knowingly (5) caused the penetration of the sexual organ of Whiteman, (6) who was younger than fourteen years of age, (7) with his finger. *See* TEX. PENAL CODE ANN. § 22.021(a)(B)(i). Questions 1, 2, and 5 addressed the State's elements regarding the place and date of the offense, and the age of Whiteman at the time of the offense, respectively. Evidence of an unrelated sexual offense would have no relevant bearing on these elements. Therefore, a potential juror who would not require the State to prove any one or more of these elements beyond a reasonable doubt, if the State proved an unrelated sexual offense, would be challengeable for cause. We find that Questions 1, 2, and 5 meet the first prong of the *Standefer* criteria.

Question 3 is a compound question that addressed the State's elements regarding the identity of Jacobs, his mens rea, and whether he penetrated Whiteman's sexual organ with his finger. Article 38.37, Section 2(b), specifically allows evidence of a separate sexual offense to

establish the character of the defendant and acts performed in conformity with his character, as well as any bearing it may have on relevant issues. TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b). Therefore, the jury would be entitled to consider the unrelated sexual offense, infer that Jacobs acted in accord with his character exhibited therein, and determine that Jacobs committed the charged offense intentionally and knowingly. Since this would be legally sufficient evidence of this element of the State's case, a potential juror would not be challengeable for cause by answering in the affirmative to this part of the question. Under this hypothetical, the evidence of the unrelated sexual offense may also be relevant in determining whether the State had proven beyond a reasonable doubt that Jacobs penetrated Whiteman's sexual organ with his finger. For instance, if the victim testified that Jacobs touched her sexual organ, but was equivocal about whether penetration had occurred, a reasonable jury might infer that Jacobs acted in conformity with the character exhibited in the unrelated sexual offense and conclude that penetration had occurred. Since some additional evidence would be needed to establish penetration beyond a reasonable doubt, a potential juror answering affirmatively to this part of the question may be subject to challenge for cause. However, Question 3, a compound question, can be answered affirmatively if a prospective juror would consider the fact of the prior, unrelated sexual offense at least partial support for a finding beyond a reasonable doubt that Jacobs had an intentional or knowing mens rea as to his currently charged behavior. Therefore, because such an affirmative answer might not necessarily support a valid challenge for cause, we find Question 3 does not meet the first prong of the *Standefer* criteria.

Question 4 sought to determine whether, because of the unrelated sexual offense, a potential juror might convict Jacobs of the charged offense based on proof of a lesser, uncharged offense. Jacobs was charged with aggravated sexual assault of a child, which required proof that Jacobs penetrated Whiteman's sexual organ with his finger. In Question 4, Jacobs posed a hypothetical situation in which the State only proved indecency with a child.[8] Question 4 asked, "Who would require that the State only prove that [Jacobs] contacted the sexual organ of Victoria Whiteman with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?"

In this hypothetical, evidence of an unrelated sexual offense would not be relevant in determining whether penetration had occurred, since the State only proved contact. In other words, even if the jury inferred that Jacobs acted in accord with the character evidenced by the unrelated sexual offense, it could not reasonably conclude that penetration occurred when the only other evidence was that it did not occur. Therefore, a potential juror who would only require the State to prove contact in order to convict Jacobs of aggravated sexual assault would have a bias against the law requiring the State to prove all of the elements of the charged offense beyond a reasonable doubt and would be challengeable for cause. We find that Question 4 meets the first prong of the *Standefer* criteria.

The next step in the *Standefer* analysis is to determine whether Questions 1, 2, 4, and 5 include only those facts necessary to lead to a valid challenge for cause. *Standefer*, 59 S.W.3d at 183. The State argues that referring to "sexual offenses" is too specific and points to our prior

[8]*See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011).

decision in *Reichle*, upon which the trial court relied, arguing that the trial court's ruling barring the use of the term was reasonable. *See Reichle*, 2015 WL 392846, at *7. In *Reichle*, which also involved Article 38.37, Section 2(b), we upheld the trial court's limiting the appellant from discussing the specific facts of the State's enhancement paragraph in his voir dire. *Id.* at *8. We pointed out that "Texas courts allow parties to voir dire 'the jury venire about the law applicable to the enhancement of punishment as long as the explanation is hypothetical and does not inform the jury of any specific allegation in the enhancement paragraph of the indictment.'" *Id.* (quoting *Hanson v. State*, 269 S.W.3d 130, 134 (Tex. App.—Amarillo 2008, no pet.)). However, in *Reichle* the appellant argued that he should have been able to discuss the specific facts of the enhancement paragraph and of the Article 38.37 extraneous offenses. *Id.* In this case, Jacobs did not seek to discuss the specifics of either the enhancement paragraph or of the Article 38.37 extraneous offenses. Rather, Jacobs sought to characterize the Article 38.37 extraneous offenses in a general manner as "sexual offenses" in his explanation of that statute.

Article 38.37 strictly limits the type of extraneous acts that may be introduced in the guilt/innocence phase in the trial of a sexual offense against a child.[9] All of the offenses for which

[9]*See* TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b). Article 38.37, Section 2(b), provides that only "evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) and (2)." *Id.* The offenses described by those subsections are:

> (1) an offense under any of the following provisions of the Penal Code:
>
> (A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);
>
> (B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
>
> (C) Section 21.11 (Indecency With a Child);

evidence of a separate extraneous act may be admitted under Article 38.37, Section 2(b), are sexual offenses against children. Yet, Jacobs only sought to characterize them in a general manner as "sexual offenses." "Sexual offenses" would encompass a wide range of offenses, including those not involving children. Likewise, in his proposed questions, Jacobs did not seek to discuss the specifics of the State's enhancement paragraph. Rather, he only referred in his hypothetical to "an unrelated sexual offense." So long as their explanation is hypothetical and does not inform the jury panel of the specific allegations, both the State and the defendant are entitled to question the panel about the law applicable to the case. *See Hanson v. State*, 269 S.W.3d 130, 134 (Tex. App.—Amarillo 2008, no pet.) (approving the State's use of a display quoting Section 12.42 of the Penal Code, including its title, "Penalties for Repeat and Habitual Felony Offenders"). Because sexual offenses are the only type of offenses allowed to be admitted in the guilt/innocent phase of the trial under Article 38.37, Section 2(b), we find this a proper, and not too specific, characterization and find that Jacobs was entitled to question the jury panel about this law, which was critical to the case.

(D) Section 22.011(a)(2) (Sexual Assault of a Child);

(E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);

(F) Section 33.021 (Online Solicitation of a Minor);

(G) Section 43.25 (Sexual Performance by a Child); or

(H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or

(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(a)(1), (2) (West Supp. 2016).

The State also argues that allowing the use of "sexual offense" would be confusing to the jury. The State does not explain how the use of a proper characterization of the offenses allowed to be admitted by Article 38.37, Section 2(b), would be confusing to the jury.[10] We also fail to see how the use of "sexual offense" would be confusing.

Finally, the State argues that allowing the use of "sexual offense" would risk poisoning the jury panel. While this may be a valid concern, it must be balanced against the defendant's constitutional right to a fair trial by an impartial jury. Generally, evidence of extraneous offenses by the defendant would not be admissible in the guilt/innocence phase of the trial to prove his character and that he acted in accord with that character on a particular occasion. TEX. R. EVID. 404(a)(1); *Graves v. State*, 452 S.W.3d 907, 913 (Tex. App.—Texarkana 2014, pet. ref'd). So, in most cases, there is not a concern that an extraneous act would impact whether a juror would require the State to prove each element of the charged offense beyond a reasonable doubt. However, the Legislature has decided that evidence of extraneous acts described as certain sexual offenses against children may be admitted for that purpose in cases governed by Article 38.37, Section 2(b). This creates a legitimate concern on the part of the defendant that a juror may not require the State to prove each element of the charged offense beyond a reasonable doubt once he hears evidence of the extraneous act. Since it is only evidence of sexual offenses that are allowed to be admitted, the defendant has a right to voir dire the jury panel referring in a general manner

[10]The State does not contend, nor did the trial court find, that the questions were confusing.

to sexual offenses, which is a proper statement of the law applicable to the case.[11] *See Hanson*, 269 S.W.3d at 134.[12,13]

For these reasons, we find that Questions 1, 2, 4, and 5 included only those facts necessary to lead to a valid challenge for cause. Therefore, we find that these questions were proper commitment questions. *See Standefer*, 59 S.W.3d at 182–83. Since these questions, as proposed by Jacobs, were proper questions concerning a proper area of inquiry, we find that the trial court abused its discretion in barring Jacobs their use in his voir dire.

2. The Trial Court's Error Was Harmful

Not all instances in which the trial court limits the defendant's voir dire presentation are constitutional error. *Easley*, 424 S.W.3d at 541. In *Easley*, the Texas Court of Criminal Appeals overruled two of its prior cases to the extent they held that "erroneously limiting an accused's or

[11]This situation is distinguishable from those cases that are only concerned with voir dire regarding possible enhancement of punishment in exploring a potential juror's ability to consider the full range of punishment. *See, e.g., Barnett v. State*, 344 S.W.3d 6, 20 (Tex. App—Texarkana 2011, pet. ref'd). Discussing the specifics of the enhancement paragraph has been held to be "the functional equivalent of reading to the jury panel the enhancement paragraph to the jury [sic]," which would be a violation of Article 36.01(a)(1) of the Code of Criminal Procedure. *Frausto v. State*, 642 S.W.2d 506, 508 (Tex. Crim. App. [Panel Op.] 1982); *see* TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1) (West 2007).

[12]As we have discussed, a potential juror who would not require the State to prove each element of the charged offense beyond a reasonable doubt, if an unrelated sexual offense was proven, would be challengeable for cause.

[13]For these same reasons, we find that the trial court requiring Jacobs to refer to an unrelated "offense," "felony offense," or "assaultive offense," rather than "sexual offense," was unduly restrictive. First, this is an incorrect statement of the law, which only allows evidence of separate sexual offenses and infringes on Jacobs' right to question the jury panel on the law applicable to the case. In addition, there is a qualitative difference between referring to a generic offense, felony offense, or assaultive offense and referring to a sexual offense. A potential juror who may have no problem requiring the State to prove each element of the charged aggravated sexual assault of a child beyond a reasonable doubt if evidence of an unrelated theft or fight with a security officer is shown may not necessarily require the State to carry its burden of proof if evidence of an unrelated sexual offense is proven. Depriving Jacobs of the ability to determine whether a potential juror would not require the State to carry its burden of proof based on the law applicable to the case improperly restricts him from determining whether the potential juror has a bias against the law and is challengeable for cause. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (West 2006).

counsel's voir dire presentation is constitutional error because the limitation is a *per se* violation of the right to counsel." *Id.* at 537, 541.[14] However, the court also made it clear that "[t]here may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis." *Id.*; *see* TEX. R. APP. P. 44.2(a). Therefore, under *Easley*, "the proper analysis is not to apply a per se rule to a voir dire error but to determine if the error is substantial enough to [be constitutional error] warrant[ing] a Rule 44.2(a) analysis; if not, then the error is reviewed under Rule 44.2(b)." *Hill*, 426 S.W.3d at 875.

If the error is nonconstitutional error, we disregard the error and affirm the judgment unless the appellant's substantial rights are affected. TEX. R. APP. P. 44.2(b); *Easley*, 424 S.W.3d at 542–43). If the error is constitutional error, we must reverse the judgment unless we "determine[] beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a).

In *Hill*, the defendant asked individual veniremembers a hypothetical question to determine whether they could consider the full range of punishment. When asked, juror number 27 answered that he could not consider the minimum sentence of fifteen years, and he was excused for cause. When the defendant attempted to ask the question to additional veniremembers, the State objected, and the trial court did not allow the defendant to ask the question to the remaining veniremembers. Ultimately, three veniremembers were seated on the jury who had never been asked a question to

[14]In the cases specifically overruled by *Easley*, the trial court limited only the individual questioning of veniremembers, and the questions only sought to determine if the defendant should use his peremptory challenges, not whether the veniremember could be challenged for cause. *Easley*, 424 S.W.2d at 537–38. Here, Jacobs was denied asking his questions to the entire jury panel and sought to determine if any of the veniremembers could be challenged for cause.

determine if they could consider the entire range of punishment. *Hill*, 426 S.W.3d at 876. In determining that this was a constitutional error, the Eastland Court of Appeals explained:

> Defense counsel is entitled to ask the veniremembers the question of whether they could consider the full range of punishment, and if the trial court prevents counsel from doing that, then defense counsel may not be able to discern if a juror should be struck for cause because he is unqualified. A veniremember is disqualified if he has prejudged the case or cannot follow the court's instructions. To have such an unqualified veniremember . . . on the jury is a violation of the defendant's right to an impartial jury. We find that the error in this case is a constitutional violation that requires a Rule 44.2(a) analysis.

Id. at 877 (citations omitted); *see also Hawkins v. State*, No. 12-13-00394-CR, 2015 WL 6166583, *9–10 (Tex. App.—Tyler Oct. 21, 2015, pet. ref'd) (mem. op., not designated for publication) (finding constitutional error when trial court refused to allow defendant to question jury panel about whether it could consider community supervision).

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

[15]If the only disallowed questions were regarding the place and date of the offense, and the age of the victim at the time of the offense, we might not find that this was constitutional error since these could be established, at least in this case, with undisputed evidence. However, Question 4 addresses the fundamental issue of whether a potential juror would convict Jacobs of the charged offense if the State only proved a lesser, uncharged offense.

Next, we determine whether this error did not, beyond a reasonable doubt, contribute to the conviction. In our analysis, we "take into account any and every circumstance apparent in the record that logically informs [our] determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.'" *Snowden v. State*, 353 S.W.3d 815, 822 & n.31 (Tex. Crim. App. 2011) (citing TEX. R. APP. P. 44.2(a) and noting that "[t]here is no set formula for conducting a harm analysis that necessarily applies across the board, to every case and every type of constitutional error").

In reviewing the record, we note that the State relied heavily on the unrelated sexual offense in its opening statement, in its case-in-chief, and in its final argument. The State began its opening statement with:

> Good morning. The evidence that you're going to hear in this case you will never forget the rest of you lives. Joshua Jacobs is a repeat offender, and the evidence you are going to hear is that he has been previously convicted in the State of Louisiana for a similar offense that brings us to Court today.

The State then described the anticipated testimony of the victim of the unrelated sexual offense in detail. The State focused on the unrelated sexual offense for almost half of its opening statement. In its case-in-chief, the first witness called by the State was the victim of the unrelated sexual offense. Also, in its closing argument, the State addressed the unrelated sexual offense both in its opening and rebuttal arguments. We also note that Jacobs' defensive theory was that although he may have touched Whiteman inappropriately, he was not guilty of aggravated sexual assault. In his opening and closing arguments, he stressed that there was no DNA evidence that he penetrated her sexual organ and that Whiteman's statements were inconsistent, and he argued that the evidence would show that he was only guilty of indecency with a child. In his cross-examination

of witnesses, Jacobs established that Whiteman initially did not accuse Jacobs of penetration and that she mentioned it in response to a question from the police. Additional cross-examination showed that Whiteman subsequently told the interviewer at the Children's Advocacy Center that Jacobs put his hands inside her shorts and only said his hand went into her privates when directly asked by the interviewer. At trial, Whiteman testified very briefly, and for the most part simply answering, "Yes" to the State's questions. Regarding the incident, Whiteman's entire testimony was to respond, "Yes" to two questions from the State: "[D]id [Jacobs] put his mouth on your chest?" and "[D]id he put his hands or his fingers in your private area?"

Considering the weight that the State placed on the unrelated sexual offense, the defensive theory that Jacobs was guilty only of indecency with a child, and the equivocal nature of Whiteman's statements and testimony regarding whether there was penetration, we cannot say beyond a reasonable doubt that the trial court's error did not contribute to Jacobs' conviction. Therefore, we sustain Jacobs' second point of error.

Jacobs has not challenged the sufficiency of the evidence supporting his conviction. Therefore, our sustaining Jacobs second point of error requires reversal of the trial court's judgment and remand of the cause for a new trial. In light of our ruling, we need not address Jacobs' first and third points of error.

We reverse the judgment of the trial court and remand this cause to the trial court for a new trial.

Bailey C. Moseley
Justice

Date Submitted: October 6, 2016
Date Decided: November 10, 2016

Publish

Innocent UNLESS Proven Guilty

Presumption of Innocence.
What is it?

Innocent UNLESS Proven Guilty

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

Innocent UNLESS Proven Guilty

Evidence that the defendant has committed a separate unrelated offense described by Chapter 21 of the Penal Code (Sexual Offenses) may admitted at a trial for aggravated sexual assault of a child for any bearing the evidence has on relevant matters, including the character of the defendant, and action in conformity with character.

But, before you can consider this type of evidence for any reason, you must believe that the allegation is true beyond a reasonable doubt.

Innocent UNLESS Proven Guilty

This type of Evidence does not change the State's Burden of Proof.

The State still has to prove all elements of the offense.

You cannot convict because you believe the accused is a bad person, absent the State proving every element beyond a reasonable doubt.

Innocent UNLESS Proven Guilty

Who would not require the State to prove beyond a reasonable doubt that the charged offense occurred in Bowie County, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

Innocent UNLESS Proven Guilty

Who would not require the State to prove beyond a reasonable doubt that the charged offense occurred on November 25, 2014, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

Innocent UNLESS Proven Guilty

Who would not require the State to prove beyond a reasonable doubt that the charged offense was committed by Joshua Jacobs and that he intentionally or knowingly penetrated the sexual organ of Victoria Whiteman with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

Innocent UNLESS Proven Guilty

Who would require that the State only prove that Joshua Jacobs contacted the sexual organ of Victoria Whiteman with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

Innocent UNLESS Proven Guilty

- For example Indecency with a Child.
  1. A person
  2. With a child under 17 years of age
  3. Engages in sexual contact of the child
  4. With the intent to gratify the sexual desire of any person

Sexual Contact means the touch of a child, including through clothing, of the anus, breast, or any part of the genitals of a child.

Innocent UNLESS Proven Guilty

Who would not require the State to prove beyond a reasonable doubt that at the time the charged offense is alleged to have occurred that Victoria Whiteman was under 14 years old, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

Innocent UNLESS Proven Guilty

The State still has to present evidence that convinces each juror that each element was committed beyond a reasonable doubt.

And you must presume Joshua innocent for the entire trial. You must presume him innocent, unless during deliberations, you determine that the State has proven each element beyond a reasonable doubt.

Innocent UNLESS Proven Guilty

You are required not to reach any judgment on the case of any kind until you retire for deliberation.

If a particular piece of evidence is admitted at trial, that you view as strong, you still must presume Joshua innocent through the entirety of trial.