No. 14-24-00644-CR

In the Court of Appeals
for the Fourteenth District of Texas

Tremayne Edward Johnson
Appellant

v.

The State of Texas
Appellee

On Appeal from Cause No. 97542-CR
From the 412th District Court of Brazoria County, Texas

Brief for the Appellant

Oral Argument Not Requested

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Identity of Parties and Counsel

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Judge Presiding	The Honorable Judge Justin R. Gilbert 412th District Court Brazoria County, Texas 111 E. Locust Angleton, TX 75515
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STATEMENT OF THE CASE

On February 2, 2023 the Appellant, Tremayne Johnson, was indicted in Cause No. 97542-CR (C.R. at 8). The two count indictment charged Appellant with one county of Sexual Assault of a Child and with one count of Indecency with a Child by Contact, both alleged to have been committed on or about May 18, 2021 in Brazoria County, Texas (C.R. at 8). The Appellant's trial counsel, Ms. Cheryl "C.W." Swisher filed an Appearance of Counsel with the court on January 23, 2024 (C.R. at 10-11). The record is unclear as to when the Appellant was originally arrested on these charges. Evidence at trial suggests that the Appellant may have been arrested in the State of Virginia and then brought to Texas for trial and the scheduling order filed on January 31 2024 indicated that the Appellant was at that time in custody in Norfolk, VA (C.R. at 14). On June 21, 2014, the State filed STATE'S NOTICE OF INTENT TO INTRODUCE HEARSAY STATEMENT RELATED TO OFFENSES COMMITTED AGAINST A CHILD YOUNGER THAN 14 YEARS OF AGE, which listed two outcry witnesses that the state intended to call at trial (C.R. at 31-33). The first noticed outcry witness was listed as Debra Etzel and a summary of her anticipated testimony was provided; the second noticed outcry witness as Maggie O'Conner and a summary of her expected testimony was also provided (C.R. at31-33). Also on June 21, 2024 the State filed NOTICE OF INTENT TO USE EXTRANEOUS OFFENSES AND

PRIOR CONVICTIONS, which among other things, included notice of additional sexual activities alleged to have occurred between the Appellant and the complaining witness (C.R. at 34-37). On July 16, 2024, Defense counsel filed a MOTION FOR HEARING ON ADMISSIBILITY OF OUTCRY STATEMENT UNDER 38.072 (C.R. at 205-207).

This case was called for trial on August 5, 2024, at which point, the Appellant entered a plea of not guilty to the offenses of Sexual Assault of a Child as alleged in Count I of the indictment and Indecency with a Child as alleged in Count II of the Indictment (II R.R. at 6). Jury selection began and was completed on August 5, 2024 (II R.R. at 11-167). The trial then began on August 6, 2024 (III R.R. at 5). The State presented its case in chief and rested on August 6, 2024, at which time the court broke for the day (III R.R. at 184). The Defense presented its case on August 7, 2024, rested, and the State called a single witness in rebuttal before both sides closed (IV R.R. 2-140). Following a charging conference and closing arguments, the jury went out to deliberate on August 7, 2024). At the end of the day on August 7, 2024, the jury sent out a note asking to review State's Exhibits 1 and 2 (C.R. at 234). The court decided to break for the evening and make the exhibits available when the jury returned the next morning (IV R.R. at 188-191). On August 8, 2024 the jury returned a verdict of guilty on both counts (C.R. 235-246 and V R.R. at 4-7). The punishment phase of the trial began on

August 8, 2024 after the guilty verdicts were received (VI R.R. at 2). Initially the State did not present in any witnesses in punishment (VI R.R. at 7). The Defense presented its case in punishment, then both sides rested and closed before the court broke for lunch (VI R.R. at 8-13). After the lunch break, the State was allowed to reopen evidence without objection from the Defense to call the complaining witness testified in favor of the Appellant at punishment (VI R.R. at 13-19). After charging conference and closing arguments, the jury returned a verdict of 8 years incarceration in each count (VI R.R. at 20-36 and C.R. at 247-253). The Court granted the State's Motion to Stack Sentences and the court ordered that the sentences in this case would be served consecutively (VI R.R. at 46-48). On August 20, Faye Gordon was appointed to represent the Appellant on appeal (VI R.R. at 293). Clayten Hearrell was then appointed to represent the Appellant on appeal on August 26, 2024 (C.R. at 298). Notice of Appeal was timely filed on September 3, 2024 (VI R.R. at 300-301).

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney for the Appellant does not request oral argument.

ISSUE PRESENTED

The trial court committed reversible error by improperly admitting into evidence the forensic interview of the complaining witness, Juvenile T.J.

STATEMENT OF FACTS

The Appellant, Tremayne Johson, and Laquita Ricks high school sweethearts in a committed relationship with one another from about 2008 to 2021 which produced a child identified as the juvenile girl T.J. (IV R.R. at 56 and III R.R. at 41). The Appellant and Ricks raised T.J. together (III R.R. 42-43). Throughout their relationship, there were tough times and fighting (III R.R. 158-160). Some of which was witnessed by T.J. During her childhood, T.J. would spend time both in Texas and in the Appellant's home state of Virginia. The relationship between the Appellant and Ricks eventually ended when Ricks learned of the Appellant's infidelity years earlier based on a statement made to Ricks by T.J. (IV R.R. 62-64) When the relationship dissolved, T.J. went to live with the Appellant for a while before the going back to living with Ricks, her aunt, Raquel Hopkins, and her uncle (IV R.R. 64-67). There was great deal of hurt feelings, resentment, and betrayal in the way that the relationship between the Appellant and Ricks ended. Things were further strained when the Appellant made some inflammatory remarks against Hopkins and her husband on social media (IV R.R. at 52-54). Shortly thereafter, Hopkins questioned T.J. about whether the Appellant had ever touched her.

Although T.J. denied that Appellant had touched her, Hopkins set up a counseling session for T.J. with Debra Etzel. During her session with Etzel, T.J.

made a broad outcry of abuse against her father, the Appellant, which Etzel reported to the authorities (III R.R. 81-106). During investigation of the outcry, T.J. was interviewed by Maggie O'Conner in a forensic interview at the Children's Advocacy Center (CAC). During this interview, T.J. gave a detailed account of various acts of sexual abuse occurring across along period of time alleged to have been committed by the Appellant (State's Exhibit 1). During this time, the Appellant had moved back home to Virginia, unaware that an investigation was proceeding until he was arrested and extradited to Texas to stand trial for the sexual assault of T.J. (IV R.R. at 50-52).

SUMMARY OF ARGUMENT

Issue Presented

The trial court erred by admitting into evidence a copy of the forensic interview of complaining witness, Juvenile T.J. The forensic video was inadmissible hearsay admitted without valid exception. Furthermore, the admission of this video inappropriately bolstered the testimony of Juvenile T.J. and violated Rule 403 of the Texas Rules of Evidence. The Appellant was harmed by the admission of forensic interview and the admission forensic interview was reversible error.

ARGUMENT AND AUTHORITIES

Issue Presented: The trial court committed reversible error by improperly admitting into evidence the forensic interview of the complaining witness, Juvenile T.J.

Relevant Facts

After the State's opening remarks, the defense reserved the opportunity to make opening remarks at the start of their case in chief (III R.R. at 39). Thereafter, the State called to testify Laquita Ricks, Raquel Hopkins, Debra Etzel, and Maggie O'Conner (III R.R. at 41, 68, 81, and 106). Both Debra Etzel and Maggie had previously testified outside the presence of the jury in accordance with the requirements of Section 38.072 of the Texas Code of Criminal Procedure (III R.R. at 6-32).

During cross-examination, Defense Counsel questioned Laquita Ricks about the nature of her relationship with the Applicant, the history of their family, work shifts, her understanding of the allegations, and T.J.'s relationship with Raquel Hopkins (III R.R. at 55-63). Although Defense Counsel rigorously examined Laquita Ricks about her motives against the Applicant and about the circumstances of the outcry, Defense Counsel did not advance a fabrication argument or address the content of the allegations made by T.J. (III R.R. at 55-63). Cross-examination of Raquel Hopkins was similar in nature. During the cross-examination of Raquel

Hopkins, Defense Counsel questioned Raquel Hopkin's attitudes toward the Applicant, the nature of her relationship with the Applicant, the circumstances of statements made by T.J., and Raquel Hopkin's recommendation of a therapist to see T.J. (III R.R. at 72-79). During that cross examination of Raquel Hopkins, Defense Counsel did not go into the details of T.J.'s allegation or allege fabrication by T.J. (III R.R. at 72-79).

Debra Etzel and Maggie O'Conner testified as outcry witnesses (III R.R. at 81 and 106). During cross-examination of Debra Etzel, she was questioned about her role as a counselor, the circumstances of the outcry, additional counseling session following the outcry, and about the process of turning over her notes to the state (III R.R. 81-106). During the cross-examination of Maggie O'Conner, Defense Counsel asked about the influence of school on children, the possibility that children can learn things beyond their age at school, the relationship between T.J. and Raquel Hopkins, at one point asking Maggie whether she asked certain follow up questions of T.J. (III R.R. at 119-123). During the cross examination of both Debra Etzel and Maggie O'Conner, Defense Counsel asked very limited questions about the generic possibility of false allegations of abuse the about the data behind false allegations (III R.R. at 99-100 and 119-120). Both Debra Etzel and Maggie O'Conner gave vague answers about the possibility of a false allegation and provided not statistical data to support either side (III R.R. at 99-100

and 119-120). Very importantly, Defense Counsel never asked about the possibility of T.J. making a false allegation and never argued that T.J. had made any kind or type of false allegation (III R.R. at 99-100 and 119-120). Up to the point where re-direct started with Maggie O'Conner, Defense Counsel had not alleged fabrication by T.J. in any way.

Immediately upon starting re-direct examination of Maggie O'Conner, the state offered into State's Exhibit 1 into evidence, which was identified as a copy of the forensic interview of T.J. (III R.R. at 123-124). The judge inquired asked Defense Counsel if there was any objection and both attorneys acting as Defense Counsel responded "No Objection" (III R.R. at 124). Accordingly, the court admitted State's Exhibit 1 into evidence (III R.R. at 124). Within the same minute as the court announced that State's Exhibit 1 had been admitted, Defense Counsel asked to approach (III R.R. at 124). At the bench, Defense Counsel objected to the admission of State's Exhibit 1 as bolstering and highly prejudicial (III R.R. at 125). The court responded to Defense Counsel saying "You just said no objection. Y'all said no objection. I admitted it." (III R.R. at 125). The court then took a short break, after which State's Exhibit 1, the forensic interview of T.J., was published for the jury (III R.R. at 126).

State's Exhibit 1 is approximately 39 minutes in length (See Exhibit 1). The contents of State's Exhibit 1 were greatly expanded from the summary outcry

testimony provided by Maggie O'Conner, including descriptions of multiple acts of digital penetration, oral penetration, and attempts at vaginal penetration with he Appellant's penis (See Exhibit 1). The acts described in State's Exhibit 1 went far beyond the description of the anticipated testimony of Maggie O'Conner as set out in the State's 38.072 notice (C.R. at 31-33). Additionally, there were multiple points during state's Exhibit 1 where T.J. was seen acting out graphic gestures to describe the alleged abuse (See Exhibit 1 at 11:48 and 13:16). Furthermore, the State's 38.072 notice did not mention the existence of a recording of the forensic interview for the defense to review before trial, nor did the State's filing make any kind of suggestion or provide any notice that there would be an offer by the state to admit a copy of the forensic interview into evidence (C.R. at 31-33).

Once the video concluded, the State called T.J. to testify (III R.R. at 129). During cross examination, T.J. provided testimony very much consistent with what was previously admitted in State's Exhibit 1, with T.J. even mimicking some of the same hand gestures seen in State's Exhibit 1 (III R.R. at 129-159). During cross-examination Defense Counsel carefully avoided raising a defense of fabrication. Defense Counsel asked T.J. about the family dynamics, the last time she saw her father, other men that had access to her, and about a recent viewing of State's Exhibit 1 that had apparently occurred at her home (III R.R. at 159-181). However, at no point did Defense Counsel accuse T.J. of fabrication or of

misleading the jury in her outcry statements, forensic interview, or testimony before the court (III R.R. at 159-181).

The defense case focused primarily on the Appellant's character and his relationship with T.J (IV R.R. at 14-135). The Appellant testified in his own defense, denying the allegations and stating he was stunned to hear T.J. say those things, holding firm to the assertion that he has no idea where the allegations are coming from but maintaining a belief that they must originate from his ex-wife and her sister (IV R.R. at 48-113). After both sides rested and closed, the State made an interesting choice in closing arguments, wherein, instead of asking the jury to remember the testimony they saw live before their eyes of T.J., they instead focused on State's Exhibit 1, specifically imploring the jury to request and review State's Exhibit 1 during their deliberations (IV R.R. at 159). This plea by the State in closing was not unnoticed and the jury ended the first day of deliberations by asking to see State's Exhibit 1 (C.R. at 234). The court complied and had State's Exhibit 1 set up ready for them to review whenever they returned the next morning (IV R.R. at 188).

Authority

A. Standard of Review

The admission of evidence is reviewed by an abuse of discretion standard. *Tillman v. State,* 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). An abuse of

discretion occurs when a trial court acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Montgomery v. State,* 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). A trial court's ruling will be upheld if it is correct under any theory of law. *De La Paz v. State,* 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). The appellate court will not reverse unless the trial court's ruling falls outside the "zone of reasonable disagreement." *Green v. State,* 934 S.W.2d 92, 102 (Tex. Crim. App. 1996).

B. Preservation of Error

In order to preserve error for appellate review based on the improper admission of evidence, the complaining party must make a specific objection and must obtain a ruling on the objection. Tex. R. App. P. 33.1; *see also Wilson v. State*, 71 S.W.3d 346, 349 (Tex.Crim.App. 2002). Such objection must be made timely, generally meaning as soon as the basis of the objection becomes apparent, which is ordinarily before the exhibit is admitted into evidence. *London v. State*, 490 S.W.3d 503, 507 (Tex.Crim.App. 2016); *see also Ethington v. State*, 819 S.W.2d 854, 858 (Tex.Crim.App. 1991); *see also* TEX.R.EVID. 103(a)(1). However in some circumstances, an objection may still be timely even if made after the exhibit has been admitted into evidence, such as an objection made immediately after admission and before publication or testimony about the exhibit. *Johnson v. State*, 747 S.W.2d 451, 453 (Tex.App. – Houston[14th Dist.] 1988, pet. ref'd). Ultimately,

the key consideration is whether the objection was made "at a time when the trial court is in a proper position to do something about it." *quoting Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992). Even after admission of an exhibit, the trial court may still be in a proper position to consider an exhibit if that exhibit has yet to be published or testified about.

In addition to being timely, the objection must also be specific enough to inform the court as the reason why the complaining party believes the evidence should be excluded. *Lankston* at 909. When the complaint is hearsay, a general objection of hearsay is specific enough to require the offering party to either show that the evidence is not hearsay or that an exception to the hearsay rule applies. *Castillo v. State*, 573 S.W.3d 869, 877 (Tex. App. – Houston [1st Dist.] 2019, pet ref'd), citing *Cofield v. State*, 891 S.W.2d 952, 954 (Tex.Crim.App. 1994). An objection of "bolstering" may or may not still be valid even after the adoption of the Rules of Evidence. *Prestiano v. State*, 581 S.W.3d 935, 946 (Tex.App. – Houston [1st Dist.] 2019, pet ref'd). Bolstering is generally considered to be a hearsay objection and may be sufficient to preserve a hearsay issue for review. *State v. Balderas*, 915 S.W.2d 913, 919 (Tex.App. – Houson [1st Dist.] 1996, pet ref'd). All that is actually required for an objection to be adequately specific is for the complaining party "…to let the trial judge know what he wants, why he thinks

himself entitled to it, and to do so clearly enough for the trial judge to understand him." quoting *Lankston* at 909.

C. Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. TEX.R. EVID 801(d); *Bahena v. State*, 634 S.W.3d 923, 927 (Tex.Crim.App. 2021). Hearsay statements are generally inadmissible unless the statement falls withing the parameters of one of the recognized exceptions to the hearsay rule. TEX.R. EVID 802. The Texas Rules of Evidence sets out an entire rule devoted to hearsay exceptions applicable when the witness is available to testify. TEX.R. EVID 803. Additional rules are also recognized as hearsay exceptions, such as the Rule of Optional Completeness. TEX.R. EVID 107. Prior to the adoption of the Rules of Evidence, bolstering was a common objection to some forms of hearsay statements if they were offered in a way that could credence or weight to earlier unimpeached evidence offered by the same party. *Rivas v. State*, 275 S.W.3d 880, 885 (Tex.Crim.App. 2009). Although bolstering is a vague concept that many have begun to no longer recognize, the gravitas of the objection still remains through a combination of Rule 613(c) of the Texas Rules of Evidence and Rule 801(e)(1)(B). TEX.R. EVID 613; TEX.R. EVID 801; *Rivas* at 886-887. Although there are a variety of exception that can apply in certain situations, the

general rule is that out of court statements offered for the truth of the matter asserted are inadmissible, including statements made in a forensic interview.

D. Rule 403

Rule 403 of the Texas Rules of Evidence provides for the exclusion of relevant evidence if it's probative value is substantially outweighed by the danger of unfair prejudice, confusing the issue, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX.R.EVID 403. Even relevant evidence that may meet a specific hearsay exception such as Rule 38.072 of the Texas Rules of Criminal Procedure, may still be subject to restriction under Rule 403. *Rodriguez v. State*, 689 S.W.3d 386, 395 (Tex.App. – Corpus Christi-Edinburg 2024, pet ref'd). Rule 403 favors the admission of evidence and presumes that relevant evidence is more probative than it is prejudicial. *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex.Crim.App. 2006). However, upon timely proper objection from the complaining party, the trial court is required to conduct a balancing test to determine the admissibility of evidence under Rule 403. *Rodriguez* at 395-396. In determining whether to admit evidence subject to a Rule 403 objection, the court balances the following six factors 1) the inherent probative value of the evidence, 2) the State's need for the evidence weighed against any tendency of the evidence to 3) suggest a decision on an improper basis, 4) confuse or distract the jury from the main issues, 5) be given undue weight by a jury, and 6) whether the

presentation of the evidence will consume an inordinate amount of time or be needlessly cumulative. *Gigliobianco v. State*, 210 S.W.3d 637, 641-642 (Tex.Crim. App. 2006).

E. Harm

Any error in the admission of evidence in violation of Rule 801 or Rule 403 of the Texas Rules of evidence will be generally be considered non constitutional error. *Perez v. State*, 562 S.W.3d 676, 691 (Tex.App. – Fort Worth 2018, pet ref'd) *see also Prestiano* at 946. Such error will be disregarded if it did not affect the Appellant's substantial rights. *Mosely v. State*, 983 S.W.2d 249, 259 (Tex.Crim. App. 1998)(op on reh'g), *cert. denied*, 526 US 1070, 119 S.Ct. 1466. 143 L.Ed.2d 550 (1999). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997). However, error will be found to be harmless if there is a fair assurance that the error did not influence the jury or had but a slight affect. *Soloman v. State*, 49 S.W.3d 356, 365 (Tex.Crim.App. 2001).

Analysis

A. Preservation of Error – Timeliness of the Objection

The sequence of events that led up to the admission of State's Exhibit 1, the videotaped forensic interview of juvenile T.J. was far from normal. During the State's case in chief, the State called two outcry witnesses, Debra Etzel and then

Maggie O'Conner (III R.R. 81 and 106). Following a brief cross examination of Maggie O'Conner, the State began redirect by having O'Conner identify and authenticate State's Exhibit 1, which the State then offered into evidence (III R.R. at 123-124). Defense counsel responded "No Objection" and the court admitted State's Exhibit 1 into evidence (III R.R. 124). Less than a minute later, before publication had occurred and before any testimony was taken about the contents of State's Exhibit 1, Defense Counsel asked to approach and once at the bench objected to the admission of State's Exhibit 1 as bolstering and highly prejudicial (III R.R. at 125). The court responded to Defense Counsel saying "You just said no objection. Y'all said no objection. I admitted it." (III R.R. at 125). The State was allowed to publish State's Exhibit 1 for the jury (III R.R. at 126). The next witness called to testify after publication of State's Exhibit 1 was the juvenile complainant T.J. (III R.R. at 129).

Even though Defense Counsel's objection was not made until after State's Exhibit 1 had been offered into evidence, the objection was still timely because it was made before publication or testimony about the contents, at a time when the trial court still had an opportunity to consider the objection and rule accordingly. A similar situation was seen in *Mendoza v. State* (2019) wherein Defense Counsel initially made a hearsay objection, then conceded an exception applied, the court admitted the evidence, and then prior to publication, Defense Counsel made a

confrontation clause objection. *Mendoza v. State*, No. 08-17-00230-CR, 2019 WL 6271271, at *4 (Tex. App.—El Paso Nov. 25, 2019, pet. ref'd) (mem. op., not designated for publication). In arriving at its decision, the court in *Mendoza* relied on the long-standing precedent established by cases such as *Lankston v. State* wherein the court found that the objection was timely when made at a time when the trial court was in a position to address the complaint. *Mendoza* at *4 and *Lankston* at 909.

Although several cases have found that objection after admission was not timely, these cases often involved a significant delay or significant event occurring between admission and objection. *See Kirkpatrick v. State*, No. 08-14-00255-CR, 2016 WL 6092961, at *5 (Tex.App.--El Paso Oct. 19, 2016, pet. ref'd)(not designated for publication)(objection was not made until day after admission); *Sanchez v. State*, No. 05-99-01747-CR, 2001 WL 243789, at *2 (Tex.App.--Dallas Mar. 13, 2001, no pet.)(not designated for publication) (witnesses testified about content of exhibits prior to objection); *Joiner v. State*, No. 05-90-01495-CR, 1995 WL 500304, at *8 (Tex.App.--Dallas Aug. 23, 1995, no pet.)(not designated for publication)(objection was made after publication).

In this case, Defense Counsel made their objections before State's Exhibit 1 had been published to the jury, before any witness had testified about the contents of State's Exhibit 1, and less than a minute after the exhibits had been admitted

into evidence. At the point when objections were made in this case, the trial court could have considered the objections of Defense Counsel, reconsidered his ruling, and even reversed his decision without any confusion of the issue or harm to either party. At the point when Defense counsel made their objections, the trial court was still in a position to address their concerns and as such, the objections were timely made in terms of preservation of error for appeal.

B. Preservation of Error – Specificity of the Objection

In order for an objection to be properly preserved, not only does the objection need to be timely, the complaining party must also adequately inform the court of the nature of their complaint. When they approached the court, outside of the presence of the jury, Defense Counsel made two objections, bolstering and highly prejudicial (III R.R. at 125).

Bolstering was once a common objection that complained of the practice of using evidence to prop up the credibility of other evidence previously admitted without impeachment. *Cohn v. State*, 849 S.W.2d 817, 819 (Tex.Crim.App. 1993). What was once called bolstering has now been carved up and codified into a combination of multiple other rules (including part of Rule 801), however, bolstering by its very nature is a hearsay type objection. For that reason, bolstering may or may not be an appropriate objection, depending on the context of the case. In this case, a bolstering objection was made to the admission of an exhibit that

had been identified as a recorded copy of a forensic interview and which was offered before the complaining witness had testified. Such an exhibit is clearly a statement under the definition in Rule 801 of the Texas Rules of Evidence and a bolstering objection applied to this type of exhibit and in the context of this case should have notified the trial court that the nature of the defense objection was hearsay.

The other objection stated by Defense Counsel was that the evidence was that the evidence was highly prejudicial. One application of Rule 403 of the Texas Rules of Evidence allows exclusion of the evidence if the probative value of the evidence is substantially outweighed danger of unfair prejudice. The objection of Defense Counsel arguing that the evidence was highly prejudicial points directly to a Rule 403 issue and provided adequate notice to the trial court that the defense was raising a 403 objection.

C. Inadmissible Hearsay

The evidence at issue in this case as State's Exhibit 1 was a video tape of a forensic interview with the complainant. The exhibit was a statement and it was not made during testimony in this case, and as such, was inadmissible hearsay if offered as proof of the matter asserted unless it met a hearsay exception. The proponent of evidence has the burden of establishing its admissibility. *White v. State*, 549 S.W.3d 146-151-152 (Tex.Crim.App. 2018). When the opposing objects,

then the offering party bears the burden of showing that the evidence is either not hearsay or that a hearsay exception applies. *Cofield* at 954. As such, the State had a burden to show that the evidence offered was either not hearsay or that a hearsay exception applied. However, the trial judge overruled the defense objection purely because the defense had said "No objection" a few moments earlier without giving the State an opportunity to explain how the proffered evidence was either not hearsay or subject to a hearsay exception. State's exhibit 1 certainly seems to meet all aspects of the definition of hearsay, so long as it was offered for the truth of the matter asserted, and a review of Rule 802 and Rule 803 does not reveal any listed hearsay exception that would arguably apply to State's Exhibit 1. *See* TEX.R.EVID 802 and TEX.R.EVID 803.

D. Inadmissible Hearsay – Prior Consistent Statement Provision Does Not Apply

A common argument advanced in this type of case is that the evidence is not hearsay because it is not being offered for the truth of the matter asserted. Such was the argument used by the State in the 2019 case of *Castillo v. State* to admit the entirety of a CAC video in a similar type of case. *See Castillo* at 877. In *Castillo*, the State argued that the CAC video (in its entirety) was by definition not hearsay because it was offered as a prior consistent statement under Rule 801(e)(1)(B) to rebut the defensive theory of fabrication. *Castillo* at 878. The court

held that the CAC video offered in *Castillo* did meet the requirements of Rule 801(e)(1)(B) because it failed to meet the timing aspect of the prior consistent statement set out in the *Hammons* (2007) case. *Hammons v. State*, 239 S.W.3d 798, 808-809 (Tex.Crim.App. 2007). According to *Hammon*, a statement offered as a prior consistent statement necessary to rebut an allegation of fabrication must have been taken before the event alleged as motivation for the fabrication occurred. *Hammons* at 809. For example, in *Castillo*, the defense argued that fabrication occurred because the complainant learned that the defendant had been imprisoned for sexual abuse of the complainant's stepsister. *Castillo* at 878. The CAC video in *Castillo* was improperly admitted under Rule 801(e)(1)(B) because the statement was made after the triggering event and in order for it to have been admissible as prior consistent statement it would have to have been made prior to the occurrence of the alleged triggering event that led to the fabrication. *Castillo* at 878.

In Appellant's case State's Exhibit 1 could not have been excepted from the definition of hearsay consistent with Rule 801(e)(1)(B) for two reasons. First, to that point in the trial, the defense had not raised a fabrication defense in any way. The defense had opted to reserve opening statement and made no comment before the State's case that would have alleged fabrication. Both Laquita Ricks and Raquel Hopkins were vigorously questioned about their attitudes towards the applicant, nature of their relationship with the applicant, nature of their relationship

with the complainant, and circumstances of concerning statements, however, the defense did not challenge the content of complainant's statement in any way and in doing so, the defense was very careful not to raise a fabrication argument in the questioning of these witnesses. During the cross examinations of Debra Etzel and Maggie O'Conner the defense questioned them about their function as professionals, the circumstances of the outcries, and about their knowledge of statistics regarding false allegations. However, asking a witness if she knows what percentage of allegations are false is not the same thing as alleging that a particular complainant has made a false allegation, especially when the witness does not provide any information to substantiate that such a phenomenon occurs at all. Since no allegation of fabrication had been made, the exhibit was not admissible under Rule 801(e)(1)(B) as a non-hearsay statement.

Second, even if a fabrication argument had been advanced at that point, the triggering event for the fabrication had already occurred at the point of the CAC interview and the statement was therefore inadmissible under the *Hammon* rule. *Hammons* at 809. During the defense case in chief, the Appellant argued fabrication alleged to have resulted from interference by Laquita Ricks and/or Raquel Hopkins that occurred either when Laquita Ricks found out about the Appellant's infidelity or when the Appellant had posted an inflammatory video about Raquel Hopkins. Both of these events occurred prior to the juvenile

complainant T.J. sitting for the CAC interview that was admitted as State's Exhibit 1. As such, even if the defense had argued fabrication, State's Exhibit 1 still would have been inadmissible under Rule 801(e)(1)(B) because of the timing of the triggering event.

E. Inadmissible Hearsay – Rule of Optional Completeness Does Not Apply

Rule 107 of the Texas Rules of Evidence, commonly known as the Rule of Optional Completeness, may allow a party to introduce additional evidence regarding a partial statement admitted into evidence as needed to explain the statement or assist the jury in understanding the part of the evidence offered by the opponent. TEX.R.EVID 107. This rule of evidence has been used to allow for the admission of either part of or all of a CAC video if the admission of the video is necessary to correct a false impression with the jury. This argument was the grounds that the court in *Castillo* actually used to find the CAC video in that case had been properly admitted into evidence. *Castillo* at 878-879. However, the 107 argument in *Castillo* is easily distinguished from Appellant's case. In *Castillo*, the court specifically noted that Defense Counsel "called into question all material aspects of complainants allegations." *Castillo* at 878. Even from his opening statement, before any evidence had been presented, Defense Counsel told the jury that the complainant had repeatedly changed her story, including a specific

assertion that the complainant had repeatedly changed her story during the forensic interview. *Castillo* at 878-879. Defense Counsel maintained that attack claiming the complainant had been inconsistent during cross examination of the complainant and during cross examination of the detective on the case. *Castillo* at 879. On cross examination the detective on the case disagreed with Defense Counsel's characterization and testified that the complainant was consistent in her forensic interview. *Castillo* at 879. Given the accusations of Defense Counsel and the differing characterization of the evidence by the detective, the court found it necessary to admit the video into evidence so that the jury could determine whether or not the complainant had been consistent in her forensic interview. *Castillo* at 879. The court further noted that under Rule 107, only the portion of the video necessary to explain the confusion or assist the jury in understanding should be admitted, which in *Castillo* happened to be the entire video because Defense Counsel made nonspecific claims of contradiction were throughout the interview. *Castillo* at 879. Appellant's case is easily distinguished from *Castillo*.

In Appellant's case, Defense Counsel was very careful not to make an allegation of fabrication. Defense Counsel even reserved for opening prior to their case and delicately handled each witness without engaging them on the substance of the complainant's statement or whether the statement was fabricated. During the cross of Maggie O'Conner, Defense Counsel asked whether O'Conner had

received training related to the statistics of false allegations and whether their office does follow ups to see what ends up happening in cases. O'Conner was allowed to testify freely to each question without any assertion that the allegations in this case were false. O'Conner was asked several questions related to the complainants description of the timing of the outcry, family dynamics, boys/men with access to the complainant, influences at school, and her last encounter with her father. At each point, O'Conner was allowed to testify fully as to the contents of the complainant's statement without accusation or even questioning whether the complainant's account was consistent or inconsistent. At the conclusion of O'Conner's testimony, there was no purpose for admission of State's Exhibit 1 under Rule 107. Even when the complainant later testified, the complainant was not questioned about her consistency or accused of fabricating her account; even in the Defense's case in chief, at no point was there an accusation the complainant was inconsistent during her interview. Rule 107 simply does not apply to Appellant's case and could not have been used to admit State's Exhibit 1.

F. Rule 403 – Probative Value Substantially Outweighed by Danger of Unfair Prejudice

Rule 403 is an evidentiary rule of exclusion which presumes relevant evidence to be admissible but allows for that evidence to be held inadmissible, regardless of whether it would be otherwise admissible by a different rule, if the

probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Shuffield* at 787 and TEX.R.EVID 403. Upon timely objection to the admission of evidence under Rule 403, the trial court is required to conduct a balancing test to determine whether the evidence should be admitted. *Rodriguez* at 395-396. In determining whether to admit evidence subject to a Rule 403 objection, the court utilizes the six *Gigliobianco* factors, by balancing the first two factor against the counterbalance of the remaining four factors. *Casey v. State*, 215 S.W.3d 870, 883 (Tex.Crim.App. 2007). The first two factors are the inherent probative value of the evidence and the State's need for the evidence. In a vacuum and without consideration to the complainant's later testimony, the probative value of State's Exhibit 1 may be very high, however, that probative value is something less than the complainants in court testimony before the jury and subject to cross examination. For that reason, the State did not even need State's Exhibit 1 because the jury could have based their verdict on the testimony of the complainant who testified to every element of the offense. As such, the probative value was actually low and so was the State's need for the evidence.

The low value of these two factors must be considered against he four counter factors. The Appellant would argue that, in comparison to the complainant's testimony, State's Exhibit 1 could slightly suggest a decision on improper basis because State's Exhibit 1 was not subject to cross examination. The

fourth does not weigh against the State as State's Exhibit 1 was only 39 minutes in duration. The sixth factor does weigh against the State because although not likely to confuse the jury as it was consistent though more graphic than the evidence presented by the complainant and was needlessly cumulative of what turned out to ultimately be the evidence in this case. Factor five though weighs heavy in favor of the Appellant. State's Exhibit 1 was likely to be given undue weight because of the complainants admissions at trial regarding memory issues and because of the graphic gestures and arm movements contained in State's Exhibit 1. The State's argument for admission is weak and the some of the counterbalancing considerations are strong. This balancing test should have been conducted and the trial court should have found in favor of the Appellant, denying admission of State's Exhibit 1.

G. Abuse of Discretion

An abuse of discretion occurs when a trial court acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Montgomery* at 380. In this case, the trial court summarily dismissed Defense Counsel's objection, saying "You just said no objection. Y'all said no objection. I admitted it." (III R.R. at 125). Although the court's statements were factually correct, the court still sat in a position to consider Defense Counsel's complaint and make an appropriate ruling. Instead, the court declined to consider their objections because less than a

minute prior and before publication had occurred, Defense Counsel had said the words "No objection." A trial court's ruling will be upheld if it is correct under any theory of law. *De La Paz v. State* at 344. The appellate court will not reverse unless the trial court's ruling falls outside the "zone of reasonable disagreement." *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996). Essentially the court in this case did not consider Defense Counsel's objections because he found them to be untimely. The law holds that the objection would be timely so long as it is made at a point where the court is still in position to address their complaint. To overrule their objection in this way, without considering the merits of the objection, is contrary to legal theory surmised in this brief. With regard to hearsay, upon objection the burden of demonstrating admissibility should have shifted back to the proponent of the evidence, and with regard to Rule 403 the court was required to stop and consider the balancing test prior to ruling. Because there is no legal theory that would have allowed the court to overrule these objections without consideration of their merit, the court acted arbitrarily and in so doing committed an abuse of discretion.

H. Harm Analysis

Since the complained of error in this case is nonconstitutional, the Appellant must show that the evidence had a substantial and injurious effect or influence in determining the jury's verdict. *King* at 271. A proper harm analysis requires the

court to consider, the following nonexclusive factors: 1) the character of the alleged error and how it might be considered in connection with other evidence; 2) the nature of the evidence supporting the verdict; 3) the existence and degree of additional evidence indicating guilt; 4) whether the State emphasized the complained-of error; 5) the trial court's instructions; 6) the theory of the case; and, 7) relevant voir dire. *Cook v. State*, 665 S.W.3d 595, 599 (Tex.Crim.App. 2023).

Applying those factors to this case we see that the character of the admitted evidence, the first factor would strongly indicated substantial harm because the character of the evidence being a forensic interview of a child would likely be considered more reliable than the complainant's in court testimony, because of passage of time, if nothing else, and would have the effect of supplanting the complainant's in court testimony without cross examination. Second, the nature of the evidence was a graphic rendition of a child sexual assault complete with hand gestures and arm movements mimicking the abuse which was likely considered more reliable than the complainants in court testimony because she testified to having problems remembering certain things and as such the second factor would strongly indicate a substantial injurious effect. Third, the only other direct evidence implicating the Appellant was the complainant's own testimony. This case did not involve any physical evidence, admissions by the Appellant, or other witness testimony to corroborate complainant's claim, as such the other evidence

was weak in comparison to the admitted exhibit and the third factor strongly indicates harm. The fourth consideration strongly indicates harm because of the heavy emphasis that the State placed State's Exhibit 1 in closing argument. One of the most interesting nuances of this case came during the first half of the State's close when the prosecutor implored the jury to request and review State's Exhibit 1 (IV R.R. at 159). At one of the most crucial points of the trial, the State did not ask the jury to recall what they had heard form the witness stand but rather asked them to request and review State's Exhibit 1, and the jury evidently listened to the State's request because the jury asked to be provided with State's Exhibit 1 during their deliberations (C.R. at 24). This emphasis by the State strongly favors a finding of substantial harm. Factors five, six, and seven do not appear to favor either side. Nothing in the charge or voir dire would have protected the Appellant from harm, nor would it have benefited the state. Factors one through four strongly indicate a finding of substantial harm and factors five through seven benefit neither party.

The law on harm also indicates that error will be found to be harmless if there is a fair assurance that the error did not influence the jury or had but a slight affect. *Soloman* at 365. One common type of assurance would be a limiting instruction given to the jury at the time of admission of the evidence or in the charge. No such instruction was given in this case because the trial court did not

consider the merits of the objection. However, even if the court had, it is unlikely that a suitable insurance could have been crafted to allow for admission and prevent substantial harm. As such, the court should hold the harm analysis strongly in the Appellant's favor.

Conclusion

State's Exhibit 1 was clearly inadmissible hearsay admitted because the trial court mistakenly dismissed Defense Counsel's objection as untimely which constituted an abuse of discretion and caused substantial harm to the Appellant.

PRAYER

For these reasons, the Appellant, Tremayne Johnson, urges the court to reverse the conviction this matter and enter a judgment of acquittal, or in the alternative, remand for further proceedings consistent with the protection of the constitutional and statutory rights.

Respectfully Submitted,

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