NO. 01-24-00189-CR

IN THE COURT OF APPEALS

FOR THE

FIRST DISTRICT OF TEXAS

HOUSTON, TEXAS

DONNIE LEE FOBBS, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

BRIEF FOR THE APPELLANT

TRIAL COURT CAUSE NUMBER 22CR3816
IN THE 10TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

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ORAL ARGUMENT REQUESTED

LIST OF PARTIES

Presiding Judge	Honorable Kerry Neves
Appellant	Donnie Lee Fobbs
Appellee	The State of Texas
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CITATION TO THE RECORD

Clerk's Record ..... CR (volume and page)

Supplemental Clerk's Record ..... SCR (volume and page)

Reporter's Record ..... RR (volume and page)

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Appealed from the 10TH District Court
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Cause No. 22CR3816

BRIEF FOR APPELLANT

TO THE HONORABLE COURT OF APPEALS:

Now comes Donnie Lee Fobbs, by and through his attorney of record Joel H. Bennett, of Sears, Bennett, & Gerdes, LLP, and files this brief.

STATEMENT OF THE CASE

Appellant was charged by indictment with Sexual

Assault of a Child. CR—6. Appellant pled not guilty to the charge and a trial by jury began on February 5, 2024. CR-39; RR2-7. After hearing the evidence and argument of counsel, the jury found Appellant "guilty" as alleged in this indictment. RR4-120, CR-49. Prior to trial, Appellant elected to have the Jury assess punishment and after hearing evidence and argument of counsel on the issue of punishment, the Jury sentenced Appellant to six (6) years in the Texas Department of Criminal Justice—Institutional Division and no fine; the Jury did not recommend community supervision. RR4-155-156 and CR-31, SCR-4. Judgment and Sentence was entered and signed on May 11, 2023, as well as the trial court's certification of Defendant's right to appeal. CR—60-65, 68. Notice of Appeal was timely filed on the same day. CR—70.

APPELLANT'S SOLE ISSUE

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S HEARSAY OBJECTION. REGARDLESS OF THE ADMISSIBILITY OF THE EXTRANEOUS OFFENSE, THE RULES OF EVIDENCE STILL APPLY AND THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO ADMIT EVIDENCE OF AN EXTRANEOUS ALLEGATION OF SEXUAL ASSAULT THROUGH INADMISSIBLE HEARSAY EVIDENCE.

STATEMENT OF FACTS

During the punishment phase of the trial, the State asked Appellant if he knew who C. F. (actual name in the Reporter's Record) and Appellant said he did. RR4-129. The State then asked the following question, "Do you know that C.F. told a detective back in—". RR4-129-130. Appellant interrupted the question and objected on the grounds of hearsay. RR4-130. The State argued that she was only asking if he knew or not. RR4-130. The trial court stated, "38.27 (sic)[CCP] allows us to very limited thing we can get into. Be Careful. Overruled for the moment." RR-130. After the trial court overruled Appellant's objection, the State asked Appellant, "Do you know that back in 2016 she told a Texas City detective that you had sexual relations with her three times when she was 13?". RR4-130.

During re-cross examination of Appellant, the State asked Appellant, "So, you have had two different children say that you sexually assaulted them and they are both liars?" RR4-132. The State actually repeated this same question four times in a row. RR4-132-133.

During final argument, the State argued to the jury

that this other complainant also accused Appellant of sexually assaulting her. RR4-153. During final argument, the State argued, "And you're going to put that person on probation and rehabilitate him? How? Not a monster? When two separate children have alleged that he sexually assaulted them but they are both liars? Two girls who don't know each other, not related, both are liars?". RR4-153.

During pretrial matters, the State informed the trial court that she had given notice of an allegation that Appellant had allegedly sexually assaulted another child, C.F. RR2.-8-9. The State further informed the trial court that she had a witness who was willing to testify that he witnessed this extraneous assault. RR2-9. The State requested to introduce this extraneous offense under Tex. Code Crim. Proc. 38.37 in the case in chief. RR2-9-10.

The defense objected to the introduction of this extraneous offense under Tex. R. Evid. 403. The State informed the trial court that they had an eyewitness available who would testify to the event. RR2-12-13. The trial court pointed out that he was "having trouble

seeing how this is adequate to support a finding by the jury that the Defendant committed this separate offense beyond a reasonable doubt". RR2-13.

The State reiterated to the trial court that they would bring in an eyewitness to the event. RR2-14. The trial court ruled that, although he did not like it, 38.37 controls and found that it would be admitted. RR2-14. Appellant objected to the court's ruling. RR2-14.

SUMMARY OF ARGUMENT

The trial court committed reversible error in overruling Appellant's hearsay objection. By overruling this objection, the trial court allowed the State to introduce, without any supporting evidence or testimony, that Appellant was accused of an uncharged sexual assault of a child. The State compounded this error by arguing during punishment that Appellant victimized multiple individuals.

ARGUMENT AND AUTHORITIES

Due to the trial court's erroneous ruling regarding a hearsay statement, the State was allowed to improperly introduce and argue that Appellant had victimized a separate child. The State failed to call

any witness or introduce any other evidence to support the second accusation, despite promising the trial court in the pretrial conference that they would call an eyewitness to the event.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *Sanchez v. State, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011), citing Tex.R.Evid. 801*. Hearsay is inadmissible unless it falls into one of the exceptions under *Tex.R.Evid. 803* or is otherwise admissible by statute. *Sanchez, 354 S.W.3d at 484*. See also *Tex.R.Evid. 802*.

A trial court has the discretion to determine whether an out of court statement, is admissible under an exception to the general hearsay exclusionary rule. A reviewing court should not reverse a trial court's decision to admit evidence under a hearsay exception, unless a clear abuse of discretion is shown. *Zuliani v. State, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003)*. An abuse of discretion occurs "only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Id.*

The trial court abused its discretion in permitting the State to introduce the hearsay statement of an alleged complainant that Appellant sexually assaulted her at the age of thirteen on three separate occasions.

The questioning by the State clearly introduced hearsay. Despite the State disingenuous statement that she was only asking if Appellant was aware of the extraneous accusation, the State repeated treated the information as true and argued as much to the jury. The statement introduced was clearly hearsay—an out of court statement made for the truth of the matter asserted.

> "Hearsay is a written or oral statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted; and as such, hearsay is inadmissible evidence unless expressly excepted or excluded from this general rule by statute or the rules of evidence. *See Tex. R. Evid. 801(a), (d), 802*. 'If the out-of-court statement is relevant only if the trier of fact believes that the statement was both truthful

and accurate, then the statement is hearsay.' *Coble v. State*, *330 S.W.3d 253, 290 n.101 (Tex. Crim. App. 2010) (internal quotation omitted); Jones v. State, 466 S.W.3d 252, 263 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd)*. A statement about a statement offered for the truth of the matter asserted is considered hearsay within hearsay." *Debottis v. State, No. 14-22-00884-CR, 2024 WL 629397, at p. 4 (Tex. App. Feb. 15, 2024), pet. ref'd (May 8, 2024)*.(Designated for publication).

The questioning clearly introduced improper hearsay. The question would only be relevant if the statement was truthful and accurate. The State asked a question about a statement, which should be taken as accurate and truthful. Therefore, the question improperly introduced a hearsay statement and Appellants' objection should have been sustained.

The trial court appears to have improperly admitted the statement under *Tex. Code Crim. Proc. 38.37*. The trial court cited this statute in the record when it overruled Appellant's objection. But this statute does

not change the Rules of Evidence or allow otherwise improper evidence in before the jury. That particular section of the Code of Criminal Procedure merely states such extraneous offense is or may be admissible, but does not change how such extraneous offense are to be proven.

Further, the trial court's reliance on *Tex. Code Crim. Proc. 38.37* is misplaced. The controlling statute would be *Tex. Code Crim. Proc. 37.07*. Under this statute, the extraneous offense would be admissible during the punishment phase of the trial (regardless of *Tex. Code Crim. Proc. 38.37)*, conditioned upon the State proving such allegation beyond a reasonable doubt.

Along this same reasoning, even *Tex. Code Crim. Proc. 38.37* requires the trial court to conduct a hearing outside the presence of the jury, prior to the introduction of the evidence, and determine whether the evidence to be admitted would be adequate to support a finding by the jury that the defendant committed the separate offense. See *Tex. Code Crim. Proc. 38.37(2-a)*.

The State argued to the trial court that it was not

hearsay and was only asking Defendant if he was aware of the allegation. This is still introducing a hearsay statement—an out of court statement made for the truth of the matter asserted. The State then belied its claimed reason for asking the question and argued during cross-examination, and further to the jury, that the statement was made and it was a true statement.

The State asked Appellant during cross-examination, "So, you had two different children say that you sexually assaulted them and they are both liars?" RR4-132. The State went way beyond its claimed purpose of merely asking if Appellant was aware of another allegation. The State argued with Appellant during cross-examination about the veracity of the statement, even though there was no supporting evidence that any such statement was ever.

Counsel for Defendant only objected at trial to hearsay. He did not object on the grounds of the Violation of the Right of Confrontation. Therefore, in this case, the rule pertaining to non-Constitutional error applies.

"In this case, we apply rule 44.2(b) to

determine whether the trial court's error constitutes reversible error. *Bottenfield, 77 S.W.3d at 359-60; Tex.R.App. P. 44.2(b).* Non-constitutional error must be disregarded unless it affects substantial rights of the defendant. *Johnson v. State, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001).* 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); Hankton v. State, 23 S.W.3d 540, 548 (Tex. App.-Houston [1st Dist.] 2000, pet. ref'd).* A conviction should not be overturned for such error if this court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).*"

Duncan v. State, 95 S.W.3d 669, 672 (Tex. App. 2002).

There can be no fair assurance that the improper admission of the hearsay statement did not influence

the jury. The State repeatedly and improperly argued and asserted Appellant had sexually assaulted a second child. This type of completely unsupported claims was meant to inflame the jury. The State was allowed to state in front of the jury that a separate child told the police that Appellant sexually assaulted her three times. Other than the improper hearsay evidence, no such evidence would be before this jury. The State certainly did not call a single witness to attempt to prove this extraneous offense. They simply relied upon the erroneous hearsay statement.

The jury charge at punishment instructed the jury, "Statements made by the lawyers are not evidence." During its final argument, the State ignored such instruction. The prosecutor took her question and argued to the jury that there was evidence of two different children accusing Appellant of sexual assaulting them. The only mention of the other child was the erroneously admitted statement introduced during the prosecutor's questioning. The very statement to which Appellant objected and the trial court allowed to be introduced. Without the trial court's error, the

questioning by the prosecutor and the improper argument could not have occurred.

It is true that 'any error in admitting evidence is cured where the same evidence comes in elsewhere without objection'. *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984); *Duncan v. State, 95 S.W.3d 669, 672 (Tex. App. 2002)*. But that is not the case here. Despite the State's claim they had an eyewitness available to testify to the extraneous offense, they did not call any such witness. Nor did they call the complainant of the extraneous allegation. The State introduced zero evidence about the extraneous offense. Yet, the State argued that this extraneous complainant should be believed and Appellant sexually assaulted multiple children.

Without any supporting evidence and based solely upon the improper admission of this hearsay evidence, the State argued to the jury that Appellant was a monster. "…And then, he has the audacity to get on that stand and say he's not a monster…" RR4-152. And further, "And you're going to put that person on probation and rehabilitate him? How? Not a monster?

When two separate children have alleged that he sexually assaulted them but they are both liars?" RR4-153.

The Court of Criminal Appeals, almost one hundred years ago, made a simple but profound statement, "The statements contained therein were hearsay. Their admission was error. Where the improper receipt of such evidence is obviously harmful, the error is reversible." *Gunter v. State, 109 Tex. Crim. 408, 410, 4 S.W.2d 978, 979 (1928)*. (Citations omitted). Clearly the standards of review have changed since 1928, but the application to this case is equally apropos.

What could possibly be more harmful at the punishment stage of a trial than the State being allowed to argue to the jury that a defendant sexually assaulted a child without any supporting evidence? Clearly this is wrong. Clearly this was error. Clearly this is harmful.

For all the foregoing reasons, Appellant's Sole Issue should be sustained, the punishment in this case be reversed, and the case remanded for further proceedings.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant, Donnie Lee Fobbs, prays that the Judgment of the Trial Court be reversed and remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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__/s/ Joel H. Bennett_____

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Brief has been served upon the Galveston County Criminal District Attorney's Office on this the ____ day of June, 2024 by email to heather.gruben@co.galveston.tx.us.

__/s/ Joel H. Bennett_____
Joel H. Bennett

Certificate of Compliance

In compliance with TRAP 9.4(i), I certify that the word count in this reply brief is approximately 3004 words.

_/s/ Joel H. Bennett_____
Joel H. Bennett