IN THE FIRST COURT OF APPEALS
AT HOUSTON, TEXAS

FRANK NEUMANN, JR.,	§	
Appellant	§	
	§	**CAUSE NO. 01-24-00036-CR**
V.	§	
	§	**TRIAL COURT NO.**
THE STATE OF TEXAS,	§	**23DCR87174**
Appellee	§	

BRIEF OF APPELLANT

Appealed from the 264th Judicial District Court, Bell County, Texas
Hon. Paul L. LePak, presiding

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APPELLANT HEREBY WAIVES ORAL ARGUMENT

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outcry and seven years before trial.

(d) There is no proof or evidence of adult manipulation of the story, and the accusations seem to be voiced in the child's own terminology as provided in the fourth factor, but that in itself raises an issue addressed in the fifth factor concerning ambiguity in the statement.

(e) There is a great deal of ambiguity present in the child's statement if we don't know what the term "private" means to the child; factfinder cannot be assured that a sexual offense had occurred based on the child's statements.

(f) The sixth factor requires consistency with other evidence, but, essentially, however, in this case there was no "other evidence."

(g) It is submitted that a 10-year-old is sufficiently mature (at least there was no evidence otherwise presented) to describe an event that was fabricated, unlike what we might expect from a 5 year-old recounting an experience she hadn't heard about or seen in some form or another.

(h) There was no evidence the 5-year-old victim acted abnormally after the alleged abuse, the eighth factor.

(i) The fact that the child was under a cloud when she made outcry mitigates against a finding of reliability, based on the ninth factor.

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BRIEF OF APPELLANT

TO THE HONORABLE COURT OF APPEALS:

1. IDENTITY OF PARTIES, COUNSEL AND TRIAL COURT

COMES NOW, FRANK NEUMANN, JR**.**, Appellant, who would show the Court interested parties herein are as follows:

FRANK NEUMANN, JR., Young County Jail, 315 North Cliff Drive, Graham, Texas 76450.

BOB BARINA, trial attorney for Appellant, 455 E. Central Expy., Ste 104, Harker Heights, Texas 76548.

TIM COPELAND, appellate attorney for Appellant, P.O. Box 399, Cedar Park, Texas 79613.

DANIEL EGAN and **BRENDON GUY**, Bell County Assistant District Attorneys, P.O. Box 540, Belton, Texas 76548, trial and appellate attorneys, respectively, for Appellee, the State of Texas.

HON. PAUL L. LePAK, Judge Presiding, 264th Judicial District Court, Bell County, Texas

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2. STATEMENT OF THE CASE

On December 6, 2023, Frank Neumann, Jr. was convicted by jury of two counts of aggravated sexual assault of a child under six years of age in Cause No. 23DCR87174. (R.R. 5, p. 48 and *see* **TEX. PENAL CODE §22.021(f)(1) (West Supp. 2014)**. The jury subsequently assessed sentences in each count of life imprisonment in the Texas Department of Criminal Justice's Institutional Division. (R.R. 5, p. 71). The trail court ordered the sentences to be served concurrently. (R.R. 6, p. 7). From those sentences and judgments, Neumann filed due notice of appeal. (C.R. 1, p. 94).

3. ISSUE PRESENTED

The Trial Court abused its discretion when it determined that the outcry statement of the abuse victim who was a 10 year-old child was reliable and therefore admissible as an exception to the hearsay rule.

4. STATEMENT OF FACTS

Indictment

Frank Neumann, Jr. was originally indicted for two offenses of aggravated sexual assault of a child younger than six years of age, first degree felonies under **Texas Penal Code § 22.021(f)(1)**. *See* **TEX. PENAL CODE §22.021(f)(1) (West Supp. 2014)**. Neumann's indictment specifically alleged in Count One that on or about July 18, 2015, Neumann "… did then and there intentionally and knowingly cause the penetration of the sexual organ of A.J. [a pseudonym], a child who was then and there younger than six years of age, by defendant's finger …." (C.R. 1, p. 5). Count Two alleged a similar offense whereby Neumann was alleged to have caused the penetration of the same victim's mouth by Neumann's sexual organ. (R.R. 1, p. 5).

Pre-Trial Hearing

On December 4, 2023, a pre-trial hearing was conducted under **Texas Code of Criminal Procedure Article 38.072 §2(b)(2)(West Supp. 2019)** to determine the reliability of the complainant's out-of-court statements to her mother, hereafter L.B., as well as to a forensic interviewer with the Child Advocacy Center, Ashley Lomas. (R.R. 5, pp. 202 *et. seq.*). After hearing evidence and argument of counsel, the trial court found the statements to the mother admissible as reliable outcry statements

over Neumann's objection. Ms. Lomas was denied outcry witness status. (R.R. 4, p. 6).

5. SUMMARY OF THE ARGUMENTS

The child victim's statements concerning the alleged offenses did not reach the level of reliability required to be admissible as an exception to the hearsay rule under article **38.072.** The offenses allegedly occurred when the child was 5 years-old, the child was 10 years-old when she made the outcry and 13 years-old at time of trial. Her outcry, when it came, lacked the various indicia of reliability found in a non-exclusive list of factors employed by the courts to test the reliability of such statements. The trial court's ruling otherwise was harmful in a case where credibility was at issue. The ruling had a substantial impact in that it unduly bolstered the victim's allegations which were not otherwise supported by corroborating evidence.

6. BACKGROUND

A.J. was a five-year-old who lived with her mother, L.B., her stepfather (Neumann) and two female siblings from June through December of 2015 in Killeen, Texas. By September 4, 2020, Neumann no longer lived with the family, but L. B. and the girls still lived in Killeen. L.B. testified as an outcry witness that on September 4, 2020, she caught A.J. on her phone in an adult chat room, apparently chatting with a twenty-four-year-old man. (R.R. 4, pp. 32,39). A.J. was sent to bed

and had her phone taken away. L.B. said the next day A.J. told her she wanted to talk to her. L.B. said they went on a car ride to have the conversation. While in the car, A.J. told her mother that when she was five years old, Frank (Neumann) had touched her private part with his fingers, and that he put his private part in her mouth. Neumann also told her, she alleged, that he would kill somebody if she told about it. (R.R. 4, p. 34). A.J. added the abuse occurred when they lived in the "big, red house" in Killeen. ***Id.*** After doing the math, L.B. deduced the abuse had occurred when A.J. was five years old. L.B. contacted the police.

A.J. testified she was thirteen years old in the eighth grade at the time of trial. She repeated for the jury what she told her mother in 2020 almost word for word. In trial, she described a "private part" as the part of the female anatomy "in front" where "the pee comes out." (R.R. 4, p. 61). For the male anatomy, the "private part" is "in the front" as well. ***Id.*** She did not recall how many times the abuse occurred, but she said it happened more than once. (R.R. 4, p. 62). In trial, she added a new detail. She claimed Neumann also tied her up when he abused her. A.J. could not remember if Neumann said anything to her during the abuse except for the threat to kill somebody if she told anyone about the abuse. (R.R. 4, p. 63). On cross, A.J. said she had been in an adult chat group with a twenty-four-year-old man the night

before her outcry. She said her phone was taken away by her mother as a result. (R.R. 4, pp. 65-66).

Ashley Lomas testified she was a forensic interviewer at the Killeen Child Advisory Center in 2020 when she interviewed A.J. at the request of Killeen P.D. (R.R. 4, pp. 74 *et. seq.*). Ms. Lomas was not allowed to disclose what (A.J.) specifically told her "because she had not been designated as an outcry witness." (R.R. 4, p. 75). She described the child's demeanor during the interview as very quiet. She did not notice any red flags for coaching the child. (R.R. 4, p. 103).

Mary Salmond, a S.A.N.E. examiner, testified about the non-acute S.A.N.E. exam she conducted on A.J. in 2020. The history she took from A.J. concerning the alleged abuse essentially mirrored the testimony A.J. gave in court. (R.R. 4, pp. 123-126).

For his part, Neumann denied he ever touched A.J. inappropriately, and he also denied the specific allegations in his indictment. (R.R. 4, p. 151). On cross, he asserted he was never alone with A.J. or the other children in the home (one of whom was his own child with L.B). (R.R. 4, p. 154).

7. ISSUE RESTATED

The Trial Court abused its discretion when it determined that the outcry statement of the abuse victim who was a 10 year-old child was reliable and therefore admissible as an exception to the hearsay rule.

8. STATEMENT OF PERTINENT EVIDENCE

Prior to trial, the trial court held an **article 38.072** hearing. *See,* **Texas Code of Criminal Procedure Art. 38.072 §2(b)(2)(West Supp. 2019)**. L.B., the child victim's mother, and Ashley Lomas, a CAC forensic interviewer, both testified. The State argued that both were outcry witnesses, but the trial court found Lomas' testimony to be repetitive of that of L.B., and Lomas was denied outcry witness status. The trial court did allow L.B. to testify as an outcry witness, over Neumann's objection.

L.B. testified in the hearing that A.J. told her (Neumann) touched her privates with his fingers and that he put his private in her mouth. He also allegedly told A.J. that if she told anybody, that he would kill somebody. (R.R. 3, p. 208). L.B. said the statements were made "in the car" on September 5, 2020, when A.J. was ten years-old. A.J. also told her mother the abuse occurred when the family "lived in the big red house" in Killeen when she was five. Further testimony established that the family and A.J. lived in that house for six months in 2015-2016. (R.R. 3, p. 209).

Cross-examination established that A.J. told her mom she wanted to tell her something only after A.J. had been disciplined for being in a chatroom on the phone talking to older people, including aa twenty-four-year-old man. (R.R. 3, p. 210).

9. ARGUMENT

Standard of Review

An appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. ***Mozon v. State***, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999). This includes an issue relating to the admission of an outcry statement. *See* ***Mitchell v. State***, 382 S.W.3d 554 (Tex. App. – Eastland, 2012, *no pet*.). If the trial court's ruling was within the zone of reasonable disagreement, it must be affirmed. ***Montgomery v. State***, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990).

Applicable Law

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." **TEX. R. EVID. 801(d)**. Whether hearsay is admissible at a criminal trial is determined by the **Texas Rules of Evidence** and the **Sixth Amendment** to the federal **Constitution**. Hearsay is inadmissible unless it falls into one of the exceptions in **Rules of Evidence 803** or **804**, or it is allowed "by other rules prescribed pursuant to statutory authority." **TEX. R. EVID. 802**. One of these "other rules" is **article 38.072** of the **Texas Code of Criminal Procedure**. When a

defendant is charged with certain offenses against a child under the age of six (6) or a disabled individual, **Art. 38.072** allows into evidence the complainant's out-of-court statement so long as that statement is a description of the offense and is offered into evidence by the first adult the complainant told of the offenses. Though the terms do not appear in the statute, the victim's out-of-court statement is commonly known as an "outcry," and an adult who testifies about the outcry is commonly known as an "outcry witness." *See* **Article 38.072** of the **Texas Code of Criminal Procedure**.

The focus of an article **38.072** hearing is exceptionally narrow. In ***Holland v. State***, 770 S.W.2d 56 (Tex. App.– Austin 1989), *aff'd,* 802 S.W. 2d 696 (Tex. Crim. App. 1991), the Third Court of Appeals explained that **article 38.072** is concerned only with the reliability of the outcry. The statute allows the trial court to determine on a case-by-case basis if outcry testimony reaches the level of reliability required to be admissible as an exception to the hearsay rule. ***Norris v. State***, 788 S.W. 2d 65, 71 (Tex. App. – Dallas 1990, *pet. ref'd*.).

Various courts have created a non-exclusive list of factors that tend to indicate reliability of an outcry statement. *See* ***Id.*** at 71; ***Buckley v. State***, 758 S.W.2d 339, 343-44 (Tex. App. – Texarkana 1988), *aff'd*, 786 S.W.2d 357 (Tex. Crim. App. 1990). This non-exclusive list includes: (1) whether the child victim testified at trial

and admitted making the out-of-court statement; (2) whether the child understood the need to tell the truth and had the ability to observe, recollect, and narrate; (3) whether other evidence corroborated the statement; (4) whether the child made the statement spontaneously in her own terminology or whether evidence existed of prior prompting or manipulation by adults; (5) whether the child's statement was clear and unambiguous and rose to the needed level of certainty; (6) whether the statement was consistent with other evidence; (7) whether the statement described an event that a child of the victim's age could not be expected to fabricate; (8) whether the child behaved abnormally after the contact; (9) whether the child had a motive to fabricate the statement; (10) whether the child expected punishment by reporting the conduct; and (11) whether the accused had the opportunity to commit the offense. ***Norris***, 788 S.W.2d at 71 (citing ***Buckley***, 758 S.W.2d at 343-44); ***Woodruff v. State***, Nos. 02-11-00337-CR, 02-11-00338-CR, 02-11-00339-CR, 02-11-00340-CR, 02-11-00341-CR, 02-11-00342-CR, 02-11-00343-CR, 2012 WL 3041114, at *9 (Tex. App. – Fort Worth July 26, 2012, *pet. ref'd*) (mem. op., not designated for publication).

Analysis

In the present case, appellant objected to the outcry because it did not possess sufficient indicia of reliability at the time of the trial court's ruling to be admissible

as an exception to the general hearsay rule. ("We're looking at two different things here. The first is the hearing outside the presence of the jury for you to find, if you believe so, that the statement is reliable based on the time, contents, and circumstances of the statement."). (R.R. 3, pp. 226-227).

The offense allegedly occurred when the child was 5 years-old, the child was 10 years-old when she made an outcry and 13 years-old at time of trial. Her outcry, when it came, seems relatively straight forward at first blush, ("he put his fingers in my private and he put his private in my mouth"), but on further examination, it is apparent that the child's statements are not reliable according to a non-exclusive list of factors created by the courts to determine reliability.

The child testified at trial using the same language to describe the alleged abuse she had used when she made outcry to her mother, so at least the first factor is satisfied. As to the second factor, there was no evidence adduced concerning the child's ability, even at 10, to tell the truth and to differentiate between a lie and the truth at the time of the outcry. Neither do we know whether the alleged victim had the ability to observe, recollect and narrate exactly what happened to her, if anything. The narrator of the story is asked to recollect and tell her story some five years after alleged events occurred when she was just beyond a toddler's age. Insufficient evidence was adduced to support a finding on the second factor.

As far as corroborating evidence, the third factor, we may justifiably assume there would be no witnesses to the alleged crime. Notably, however, there was no other circumstantial evidence of the kind that sometimes accompanies this kind of offense, to wit: no illicit photographs in appellant's possession or found on any of his electronic devices, no contemporaneous accusations from other victims that appellant did the same or similar acts to other children in the home or otherwise. There was no showing the alleged perpetrator had a prurient interest in pornography. In short, there was no evidence, circumstantial or otherwise, that corroborated an event that allegedly occurred five years before the outcry and seven years before trial.

As with many of these cases, there is no proof or evidence of adult manipulation of the story, and the accusations seem to be voiced in the child's own terminology as provided in the fourth factor, but that in itself raises an issue, addressed in the fifth factor concerning ambiguity in the statement.

There is a great deal of ambiguity present in the child's statement if we don't know what the term "private" meant to the child. Thus, the child victim's statement was not just short; it also lacked the specificity to assure the court that the child was describing a sexual offense. Without knowing what "private part" meant to the child at the time of the outcry, we have no assurance that the child knew whether a sexual

offense had been committed that she subsequently communicated to her mother. Neither can a factfinder be assured that a sexual offense had occurred based on the child's statements.

The sixth factor requires consistency with other evidence. Essentially, however, in this case there was no "other evidence", as recounted above, unless one counts as "other evidence" the child's statements made to the SANE examiner in the history related to her by a then-ten-year-old victim.

The alleged child victim was ten years old when she made an outcry. It is submitted that a 10-year-old is sufficiently mature (at least there was no evidence otherwise presented) to describe an event that was fabricated, unlike what we might expect from a 5-year-old recounting an experience she hadn't heard about or seen in some form or another. So, the seventh factor weighs against reliability.

There was no evidence the 5-year-old victim acted abnormally after the alleged abuse, the eighth factor. In fact, for 5 years after the alleged abuse, the child's mother had no idea anything untoward had occurred between the child and appellant.

We know that the alleged child victim had been caught in a deception the night before the outcry. Whether the fact that she faced punishment for that deception was reason enough to deflect might be an open question, but the fact that the child

was under a cloud when she made outcry mitigates against a finding of reliability, based on the ninth factor.

In the present case, we are reminded that the child victim in this case was in trouble with her mother when she made an outcry. Her phone had been taken away, and she had been grounded because she had been in an adult chatroom on her phone without permission. She had not only deceived her mother before discovery, but apparently, she had demonstrated the acumen to pass herself off as an older girl to adults with whom she had been communicating, including a 24-year-old man. Fabrication of a story of abuse could reasonably be expected to have shifted the focus of any resulting punishment headed her way. Whether the outcry indicated the alleged victim's recognition of the need to tell the truth when she had not been honest with her mother about her on-going relationships, or at the very least, adult conversations in which she had engaged, is, it is submitted, an open question.

In sum, the non-exclusive list of factors that the courts find indicate reliability of an outcry statement, is in short supply here. Most of those factors weigh against the admissibility of the victim's out of court statements in this case. It follows the trial court abused its discretion by admitting the complained-of statements in the face of that conclusion, and its decision to allow the admission of such evidence, as a result, falls outside the zone of reasonable disagreement.

Harm

If the trial court abused its discretion in admitting the testimony, it must still be evaluated under rule of appellate procedure **44.2(b).** ***Bittick v. State***, 680 S.W.3d 405 (Tex. App. – Fort Worth, 2023, *pet. filed* Jan. 24, 2024) (The erroneous admission of evidence is harmful only if it affects the defendant's substantial rights, meaning that "it has a substantial and injurious effect or influence in determin[ing] the jury's verdict." ***Gonzalez v. State***, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018) and *see* **TEX. R APP. 44.2(b).** In analyzing harm, a reviewing court considers, among other things, "(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 supporting the verdict; and (4) whether the State emphasized the error." ***Macedo v. State***, 629 S.W.3d 237, 240 (Tex. Crim. App. 2021); *see* **Gonzalez**, 544 S.W.3d at 373 (similar); ***Haley v. State***, 173 S.W.3d 510, 518-19 (Tex. Crim. App. 2005) (listing considerations in harm analysis, including "any testimony or physical evidence ..., the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, ... the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire and whether the State emphasized the error"). "If we

have a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect, we will not overturn the conviction." ***Gonzalez***, 544 S.W.3d at 373.

Here, the jury was confronted with a classic "he said-she said" dilemma. The child victim asserted the abuse occurred. The defendant denied it. The jury was charged with deciding who it believed. Thus, any evidence adding weight to one side of the scales, or the other was significant. The jury heard the child's version of events – almost word for word – three times, from the child, from her mother, and from a S.A.N.E. report. Said enough times, a thing can become true as evidenced by the current debate in our country's political arena.

The first three factors in deciding harm reflect concern with the nature of evidence of guilt. In other words, what other evidence supports or corroborates guilt in this case? The short answer is there is no other supporting or corroborating evidence. Rather, the outcry only repeated what the victim herself testified to. And, while counsel is fully aware that a victim's testimony is itself sufficient to support a verdict, it remains that no statute mandates there must be an outcry witness. And, allowing one to testify regardless of unreliability of the underlying statement is harmful to an appellant because it adds wight to a victim's accusation in the eyes of the jury. If it didn't, the State wouldn't bother to present the testimony. The outcry

testimony in this case affected the defendant's substantial rights; it had an injurious effect or influence in determining the jury's verdict.

10. PRAYER

WHEREFORE, Mr. Neumann prays that this Court of Appeals reverse the judgment of the trial court in each count and remand same for retrial, and he also prays for such other and further relief to which he may justly be entitled.

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11. CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 9

On March 21, 2024, a true and correct copy of the above and foregoing was served on Brendon Guy, Bell County Asst. District Attorney, P. O. Box 540, Belton Texas 76513 in accordance with the Texas Rules of Appellate Procedure, and that the brief of appellant is in compliance with Rule 9 of the Texas Rules of Appellate Procedure and that portion which must be included under Rule 9.4(i)(1) contains 3054 words.

/s/ Tim Copeland
Tim Copeland