NO. 01-24-00871-CR

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

ADIDDAS KINGSLEY JOHNSON
APPELLANT

VS.

THE STATE OF TEXAS
APPELLEE

APPELLANT'S BRIEF

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LIST OF PARTIES

The Appellant is Adiddas Kingsley Johnson.

The Appellant's trial counsel are Carla Jean Post and Beverly Deadrick.

The Appellant's appellate counsel is Robert David Miller.

The Trial Judge is The Honorable Justin Gilbert.

The appellate attorney representing the State is Trey Picard, Assistant District Attorney, Brazoria County, Texas.

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PRELIMINARY STATEMENT

On April 7, 2022, Adiddas Kingsley Johnson (Appellant) was indicted for the felony offense of Count One, Two and Three – Indecency with a Child; Criminal Episode in cause number 95192-CR. Also on April 7, 2022, Appellant was Indicted in cause number 95193-CR for the felony offense of Count One – Aggravated Sexual Assault of a Child and Count 2 – Indecency with a Child; Criminal Episode. The two cause numbers were joined into a single trial. On October 30, 2024, a jury found Appellant guilty of Indecency With A Child Counts One, Two and Three in cause number 95192-CR. In 95193-CR, the jury found Appellant guilty of the lesser included offense of Indecency with a Child as to Count One, and Guilty of Indecency with a Child as to Count Two. On the same day the jury assessed a sentence in cause number 95192-CR of 7 years in the Texas Department of Criminal Justice on Count One and Two of the Indictment, and 10 years as to Count Three. In cause number 95193-CR, the jury assessed a punishment of 7 years in the Texas Department of Criminal Justice on Count One and Two. Appellant perfected his appeal on October 30, 2024 as to both cause numbers. (C.R. Vol 1 at 168)

STATEMENT OF FACTS

PRETRIAL PHASE

The trial court held a pretrial hearing based on the admissibility of various jail phone calls between Appellant and Raquel Johnson, as well as a recorded phone conversation between Appellant and Cecil Arnold who was the investigator on the case. (R.R. Vol 4 at 6) At the hearing, the defense objected to State's Exhibit 14 which contained a recorded phone call between Detective Arnold and Appellant. (R.R. Vol 4 at 171) The Defense objected to the admission of State's Exhibit 14 stating the following:

> The objections related to the evidence that the Court has -- we have asked to be taken out of the recordings but the Court has allowed in are pursuant to 38.37 in which Defendant was not given notice within the appropriate time period of State's intention to introduce this particular type of evidence into evidence. And pursuant to 404, that it doesn't fit within a 404 objection and it's prejudicial pursuant to 403. Also included are hearsay objections as hearsay within hearsay, and additionally the Defendant would tell the -- would provide that it is harmful for these to be introduced as a jury could see this as extraneous acts, extraneous bad acts of the Defendant. And includes victim impact -- inappropriate victim impact evidence. Also it will be very harmful. (R.R. Vol. 4 at 7)

The trial court took the objection under advisement and later overruled it, admitting State's 14, subject to certain portions being redacted by agreement between the parties. (R.R. Vol 4 at 171)

TRIAL PHASE

A. State's Witnesses

1. Josh Waldrop

Josh Waldrop testified he is a lieutenant with the Brazoria County Sheriff's Office who is responsible for maintaining technology at the detention center. (R.R. Vol 4 at 21) He explained that the detention center has a system called the Inmate Call Engine which allows for inmates to use a personalized pin number to contact persons outside of the jail. (R.R. Vol 4 at 22) The state then introduced States' Exhibit Number 1 through this witness which consisted of a USB drive containing two jail calls from the Appellant. (R.R. Vol 4 at 24, and R.R. Vol 7 at 5)

2. Raquel Johnson

(Note to the Court: due to the two testifying victims having identical initials, they will be abbreviated by using the first three letters of their first names instead.)

Raquel Johnson testified that she was married to the Appellant for sixteen years. (R.R. Vol 4 at 29) They had two girls together, J.A.Z. and J.A.E., who were the named victims in each respective cause number. (R.R. Vol 4 at 29) She stated that in February of 2022 they lived at Cortland Avion Apartment Complex in the city of Pearland, along with their two daughters. (R.R. Vol 4 at 30) She stated that on February 21, 2022 she had picked up her daughters from Hempstead where they had been staying with their grandmother. She informed the jury at they were there caring for their horses, and later returned home to the apartment in the city of Pearland. (R.R. Vol 4 at 31) When they returned home, the Appellant told J.A.Z. to get in the shower because she smelled bad, to which she did not respond. (R.R. Vol 4 at 37) The Appellant then picked her up over his shoulder and carried her to the bathroom. (R.R. Vol 4 at 38) J.A.Z. started yelling at him and he covered her mouth. (R.R. Vol 4 at 38) Raquel testified that the Appellant carried his daughter into the bathroom and shut the door, and so she subsequently called 9-1-1. (R.R. Vol 4 at 39)

This 9-1-1 call was then admitted into evidence as State's Exhibit 13. (R.R. Vol 4 at 40) After placing the phone call, this witness began banging on the bathroom door and heard water running, so she then ran to their master bedroom to grab a firearm. (R.R. Vol 4 at 42) She stated that she did not use the firearm because she heard the bathroom door open and the Appellant call for their other daughter J.A.E. to come into the same bathroom after J.A.Z. exited. (R.R. Vol 4 at 42) Ms. Johnson then proceeded to J.A.Z.'s bedroom where she discovered her looking frozen and covered in water sitting on her bed, and then asked her what happened. (R.R. Vol 4 at 42) J.A.Z. then informed her that the Appellant made her get into the shower with him and wash his body with soap. (R.R. Vol 4 at 43) After the Appellant later went to work she contacted the police a second time after being told by J.A.E. separately that he did the same thing to her. (R.R. Vol 4 at 45) State's Exhibit 1, which was a recorded phone call between this witness and the Appellant in jail after being arrested, was then published to the jury. (R.R. Vol 4 at 48) She stated that the Appellant informed her that he was only in the shower with the girls for hygiene purposes, and was only showing the girls how to clean themselves. (R.R. Vol 4 at 62-63) She finally testified that both girls had been showering independently since they were 6 and 7 years old,

respectively, and that they were 13 and 14 years old at the time of the date alleged on the Indictment. (R.R. Vol 4 at 63)

3. Leah Nunley

Ms. Nunley worked for the Brazoria County Alliance for Children as for forensic interviewer of child victims. (R.R. Vol 4 at 65) She interviewed J.A.E. and J.A.Z. on February 22, 2022 in Pearland. (R.R. Vol 4 at 69) She described both victim's demeanors during the interview, stating that J.A.Z. seemed happy to talk initially but later sounded like she was about to cry, although she did not. (R.R. Vol 4 at 73) With respect to J.A.E., Ms. Nunley stated that she was comfortable talking, but when getting into the ultimate topic at hand her voice got quieter and she seemed uncomfortable. (R.R. Vol 4 at 74)

4. J.A.Z.

J.A.Z. was 17 years old at the time of her testimony, having a birthday of August 6, 2007. (R.R. Vol 4 at 80) Her father was the Appellant, whom she identified in the courtroom. (R.R. Vol 4 at 80) She

had a younger sister who was J.A.E. (R.R. Vol 4 at 81) She stated that she was 14 at the time of the date of offense. (R.R. Vol 4 at 82) J.A.Z. said on the date of the offense she returned from her grandmother's house in Hempstead to their apartment in Pearland where the Appellant resided. (R.R. Vol 4 at 84) She stated that upon returning and taking out the trash, she was confronted by the Appellant who told her to go take a shower. (R.R. Vol 4 at 87) She responded by informing him that she had already showered prior to leaving her grandmother's house, and an argument ensued. (R.R. Vol 4 at 88) The argument culminated in Appellant picking her up, putting his hand over her mouth and carrying her into the bathroom. (R.R. Vol 4 at 89)

After entering the bathroom, Appellant told her to remove her clothes and locked the door. (R.R. Vol 4 at 91) J.A.Z. then stated she disrobed while trying to cover herself, and Appellant told her to remove her hands and proceeded to grab her breast. (R.R. Vol 4 at 94) She then entered the shower, and thereafter Appellant entered the shower as well with no clothing on, and instructed her to begin bathing herself with soap. (R.R. Vol 4 at 95) Appellant then grabbed a washrag and began washing her body, as well as her breasts and private areas. (R.R. Vol 4 at 96-97) She stated that Appellant then touched the outside of her vagina with his

fingers. (R.R. Vol 4 at 97) J.A.Z. then was told to wash Appellant with soap, including his penis. (R.R. Vol 4 at 97-99) Appellant then told J.A.Z. to grab his penis with one hand and his testicles with the other hand. (R.R. Vol 4 at 100)

After an undisclosed amount of time, J.A.Z. stated Appellant exited the shower and called for her sister. (R. R. Vol 4 at 101) J.A.Z. left the restroom without drying off and went to her room and sat on her bed until her mother came in. (R.R. Vol 4 at 102) She remained in her bedroom until the next morning when the police arrived and spoke with her. (R.R. Vol 4 at 104) J.A.Z. never saw her sister J.A.E. with Appellant. (R.R. Vol 4 at 112-113) She stated that this had never happened prior to the night in question. (R.R. Vol 4 at 117)

5. J.A.E.

J.A.E. said she lived at an apartment in Pearland with her mother, Appellant, and sister in February of 2022. (R.R. Vol 4 at 121) She returned to that apartment after staying at her grandmother's house with her sister in Hempstead. (R.R. Vol 4 at 124) Her mother got into an argument with Appellant over where they had been, and she went into her

separate bedroom. (R.R. Vol 4 at 127) J.A.E. stated Appellant does not get along with her grandma in Hempstead, and he gets upset with them every time that they come back from there. (R.R. Vol 4 at 154) After some time passed, she recalled Appellant picking up her sister J.A.Z. and carrying her to the bathroom and heard her screaming. (R.R. Vol 4 at 128) Her mother was in the kitchen and made no attempt to separate them. (R.R. Vol 4 at 156) She heard water running and the bathroom door was never shut. (R.R. Vol 4 at 157) After some time, Appellant walked out of the bathroom, her sister J.A.Z. went into her bedroom, and Appellant then called her to come to the bathroom as well. (R.R. Vol 4 at 129) She stated her sister was in the bathroom with Appellant for approximately 10 minutes. (R.R. Vol 4 at 158)

She stated Appellant had her remove her clothing while he stood in front of the bathroom door. (R.R. Vol 4 at 131) The bathroom door remained open the entire time. (R.R. Vol 4 at 160) She then entered the shower and he got in naked after her. (R.R. Vol 4 at 132) Appellant told her to bathe, but when she did not do a good enough job he grabbed the washcloth and started washing her body. (R.R. Vol 4 at 134) He began washing her, cleaning her private area with his hand and used both hands on her breasts. (R.R. Vol 4 at 137) J.A.E. then stated he massaged her

breasts in a circular motion. (R.R. Vol 4 at 138) Appellant then had her spread her legs "like a starfish" and put his hand onto her vagina and started "moving his hand around." (R.R. Vol 4 at 139) His hand never entered her vagina, and he told her "don't fight back." (R.R. Vol 4 at 140) She began to close her legs but he had her open them a second time. (R.R. Vol 4 at 141) After rinsing off, J.A.E. put her clothes back on and went into the living room. (R.R. Vol 4 at 142) Later that night she saw him and her mother arguing, and saw him push her onto her bed. (R.R. Vol 4 at 143) The next morning she spoke to someone in law enforcement about the event. (R.R. Vol 4 at 144) On the State's redirect, after refreshing her memory by watching her interview with the Children's Advocacy Center outside of the jury's presence, J.A.E. changed her story and stated that Appellant's fingers went inside of her vagina lips, contrary to her earlier testimony. (R.R. Vol 4 at 146-147)

6. Cecil Arnold

Mr. Arnold was a detective for Pearland Police Department investigating child sex crimes in February of 2022. (R.R. Vol 4 at 165) He was handed the case by another detective, reviewed what had already

taken place and scheduled a forensic examination of J.A.E. and J.A.Z. (R.R. Vol 4 at 166) After the two girls were interviewed, he spoke with the Appellant about the allegations on a recorded phone call which was admitted as State's Exhibit No. 14 over objection. (R.R. Vol 4 at 168-171) Appellant was not in custody at that point, and was not informed that the conversation was being recorded. (R.R. Vol 4 at 173)

No investigator attempted to interview J.A.E. or J.A.Z., and the two victims only spoke to Leah Nunley at the CAC Center about the event which took place. (R.R. Vol 4 at 174) No physical evidence from the scene was collected, nor did Detective Arnold ever visit the alleged crime scene. (R.R. Vol 4 at 175) No digital nor technological evidence was collected. (R.R. Vol 4 at 175) A medical examination of the girls was not performed or requested. (R.R. Vol 4 at 176) No attempt was made to discover DNA, blood, semen, or saliva, nor was any attempt made to ascertain whether this type of evidence existed at the apartment in Pearland. (R.R. Vol 4 at 176) The total investigation was approximately 12 hours in length from the time of the initial 9-1-1 call to the time of Appellant being placed in custody. (R.R. Vol 4 at 176) Detective Arnold testified that these types of cases can be finalized in even less time. (R.R. Vol 4 at 176) He stated that he never even talked to the victims in his

investigation. (R.R. Vol 4 at 177) He stated that there was a washcloth which could have contained DNA evidence, but that it was never collected for review. (R.R. Vol 4 at 179) After the phone conversation took place between Cecil Arnold and Appellant, a warrant was issued for Appellant's arrest. (R.R. Vol 4 at 172) The state then rested at the conclusion of his testimony. (R.R. Vol 4 at 181)

B. Directed Verdict

The Defense moved for a directed verdict on the basis that J.A.E. during her testimony had vacillated between whether there was digital penetration or not, first stating that he never penetrated her vagina, but then after re-reviewing her CAC interview she changed her story and stated that his finger went inside her vagina lips. (R.R. Vol 4 at 182) The motion for directed verdict was denied. (R.R. Vol 4 at 182)

C. Defense Witnesses

The Defense rested after the State. (R.R. Vol 4 at 184)

D. Jury's Verdict

The jury found Appellant guilty of Count One, Two and Three: Indecency with A Child in Cause Number 95192-CR. (R.R. Vol. 5 at 52-53)

In Cause Number 95193-CR, the jury found Appellant not guilty of Count One Aggravated Sexual Assault of a child, but guilty of the lesser-included offense of Indecency with a Child by Contact. (R.R. Vol 5 at 53) The jury also found Appellant guilty of Count Two Indecency with a Child in Cause Number 95193-CR. (R.R. Vol 5 at 53)

PUNISHMENT PHASE

Prior to the State's case-in-chief, the Appellant was asked how he wished to plead to the enhancement paragraph of his Indictment, and he pled true to the enhancement paragraph in both cause numbers. (R.R. Vol 6 at 6)

A. State's Witnesses

1. Raquel Johnson

Ms. Johnson testified as to how the case affected her daughters. She stated that J.A.Z. began cutting herself. (R.R. Vol 6 at 11) She stated J.A.E. became self-conscious about her looks. (R.R. Vol 6 at 12) She gave an anecdote about one daughter becoming upset when getting patted down at an airport. (R.R. Vol 6 at 13) The state then rested. (R.R. Vol 6 at 14)

B. Defense Witnesses

1. Dr. Stephen Thorne

Defense called Dr. Thorne, a licensed clinical psychologist who performed a sexual risk assessment of Appellant. (R.R. Vol 6 at 15) He testified that Appellant's test results placed him in the below average

range for sexual recidivism. (R.R. Vol 6 at 26) The Defense then rested. (R.R. Vol 6 at 41)

C. Jury's Sentence

In 95192-CR, Count One and Two, the jury assessed a sentence of 7 years as to each count in the Texas Department of Criminal Justice for Indecency with a Child. (R.R. Vol. 6 at 80) In Count Three of 95192-CR, the jury assessed a sentence of 10 years. (R.R. Vol 6 at 81) The jury did not assess a fine as to any Count.

In 95193-CR, Count One and Two, the jury assessed a sentence of 7 years TDCJ as to each count, and again did not assess a fine. (R.R. Vol 6 at 81)

The trial court then granted the State's motion to stack sentences, stacking Counts One through Three of 95192-CR, and further stacking Counts One and Two of 95193-CR on top of the other three. (R.R. Vol 6 at 88) Thus the total sentence assessed was as follows:

95192-CR:	Count One	7 years TDCJ
	Count Two	7 years TDCJ

	Count Three	10 years TDCJ
95193-CR:	Count One	7 years TDCJ
	Count Two	7 years TDCJ
Total years stacked:		38 years TDCJ

POINTS OF ERROR

POINT OF ERROR ONE:

The Evidence Was Insufficient to Support Appellant's Conviction For Indecency With A Child By Contact.

POINT OF ERROR TWO:

The Trial Court Erred by omitting the category of "Intent" in the extraneous instruction of both Jury Charges during the guilt-innocence phase.

POINT OF ERROR THREE:

The Trial Court Erred by Allowing extraneous portions of the Appellant's phone call with Cecil Arnold to be submitted to the jury.

POINT OF ERROR NO. 1

THE EVIDENCE WAS INSUFFICENT TO SUPPORT APPELLANT'S CONVICTIONS FOR INDECENCY WITH A CHILD BY CONTACT

Appellant contends that the State has not proven its case beyond a reasonable doubt because the State has failed to show beyond a reasonable doubt that Appellant engaged in sexual contact with J.A.E. or J.A.Z., respectively.

The test for reviewing the insufficiency of the evidence where a defendant has been found guilty is for the reviewing court to determine whether, after viewing the relevant evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Brooks v. State**, 323 S.W.3d 893 (Tex. Crim. App. 2010) Thus, the issue on appeal is not whether the appellate court believes the State's evidence or believes that the appellant's evidence outweighs the State's evidence. **Wicker v. State**, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984) The verdict may not be overturned unless it is irrational or unsupported by proof beyond a

reasonable doubt. **Matson v. State**, 819 S.W. 2d 839, 846 (Tex. Crim. App. 1991) The jury, as the sole judge of the facts, is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. **Jones v. State**, 944 S.W. 2d 642, 647 (Tex. Crim. App. 1996)

Section 21.11(a)(1) of the **Texas Penal Code** provides that a person commits the offense of Indecency With A Child By Contact if, with a child younger than 17 years of age, whether the child is the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person engages in sexual contact with the child or causes the child to engage in sexual contact. (West 2025) Sexual contact means any touching of any part of the body of a child, including touching through clothing with the anus, breast, or any part of the genitals of a person if committed *with the intent to arouse or gratify the sexual desire of any person*. **Texas Penal Code** Section 21.11(c)(2) (West 2025) (emphasis added). "The intent to arouse or gratify the defendant's sexual desire may be inferred from a defendant's conduct and all surrounding circumstances." **Ryder v. State**, 514 S.W.3d 391, 396-397 (Tex. App. – Amarillo 2017, pet. ref'd)

In the instant case, the only evidence which shows that Appellant touched the breast or any part of the genitals of his daughter(s) with the intent to arouse or gratify his sexual desire was their testimony alone.

Appellant contends that the following listed evidence so overwhelmingly outweighs the evidence which shows that he committed this felony that the jury's verdict is unsupported by proof beyond a reasonable doubt:

1) Neither J.A.E. nor J.A.Z. testified that Appellant had an erection.
2) There was no coercive behavior on the part of Appellant.
3) There was no testimony of sexual gratification by any party.
4) The investigation was almost non-existent.

No where in the record does either witness testify that Appellant was aroused, had an erection, made any sexual statements or ejaculated. The only thing that the record does support is that Appellant made his daughters get into the shower to bathe after returning home from their grandmothers' house because they stunk. (R.R. Vol 4 at 37) Admitting that Appellant did not get along well with their grandmother, an argument ensued when the daughters returned home, culminating with Appellant physically carrying one daughter to the bathroom. While in the shower,

Appellant grabbed a washrag and began washing her body, as well as her breasts and private areas. (R.R. Vol 4 at 96-97) It was during this time that Appellant came into contact with their breasts and private areas, but there is nothing in the record to support anything other than this being done to clean their bodies. In fact, when J.A.E. did not clean herself properly, Appellant told her to bathe again, and since she did not do a good enough job he grabbed the washcloth and started washing her body himself. (R.R. Vol 4 at 134) During this time there was testimony that the bathroom door remained open, notwithstanding the fact that there were at least two other persons in the apartment when the alleged events took place, those being the mother Raquel and the other daughter.

There was nothing in the record to indicate any type of coercive behavior on the part of Appellant. No threats were made, and it was stated that this was the only time anything "sexual" happened. J.A.E. testified that although he was naked in the shower with her, that "He walks around the house naked" commonly. (R.R. Vol 4 at 134) She denied penetration, although later she changed her story and said there was penetration. This was an important piece of testimony, because Appellant was actually acquitted of Count One in 95193-CR dealing with the accusation of Aggravated Sexual Assault, requiring penetration, meaning

that the jury already had some questions over the validity of this being sexual in nature. The only statement coming from Appellant to J.A.E. was, "in the real world you can't fight back in situations like this." (R.R. Vol 4 at 140) Appellant contends that this was simply a poor mechanism of teaching his daughters a life lesson rather than being done to gratify any sexual desire.

The State failed to provide sufficient evidence to show that Appellant sexually contacted J.A.E. or J.A.Z. with the intent to arouse or gratify his sexual desires. Even the jury itself had reservations over this, as during deliberations they sent out a note to the Court stating that two or more jurors disagreed as to whether Appellant had an erection, to which the Court correctly responded that no responsive testimony was found. (In 95193, see C.R. Vol 1 at 169 as to J.A.E.) (In 95192, see C.R. Vol 1 at 161 as to J.A.Z.)

Lastly, the prosecution produced no proof that this bathing contact by Appellant was done with the intent to arouse or gratify his sexual desires. The State wants to conflate a father's poor mechanism of parenting a child with a sexual assault. However, the prosecutor failed to show that Appellant received any measure of sexual gratification from bathing either daughter.

The investigation, for lack of a better word, was poor. Only 12 hours elapsed from between the time of the initial outcry to when Appellant was placed into custody. The Detective on the case never interviewed either victim, nor even bothered to visit the scene. There were obvious physical items which could have contained evidence which were never collected, such as the washcloth used in the shower. In today's day and age, it's almost unheard of in a criminal trial for technological items of potential evidentiary value, such as cell phones, to not be examined, but that was not even attempted here. Essentially, all that took place was an outcry, followed by a CAC interview, a phone call with Appellant, and then an arrest, all within a few hours, and in Detective Arnold's own words, it could have been done in even less time. It is terrifying to think that an allegation which carries such monumental consequences could be "investigated" and "solved" with so little effort or care, especially in light of a situation where there is no physical evidence of a crime having been committed.

Even when viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact would not have found the essential elements of Indecency with A Child By Contact beyond a reasonable doubt. Therefore, the evidence is legally insufficient to sustain Appellant's convictions for Indecency with Child By Contact.

POINT OF ERROR NO. 2

THE TRIAL COURT ERRED BY OMITTING THE CATEGORY OF "INTENT" IN THE EXTRANEOUS INSTRUCTION OF BOTH JURY CHARGES DURING THE GUILT-INNOCENCE PHASE

When reviewing jury charge error, the degree of harm necessary to require reversal depends on whether the defendant objected at trial. **Kirsch v. State**, 357 S.W.3d 645 (Tex. Crim. App. 2012) If the defendant objected, the inquiry becomes whether "some" harm occurred from the charge error. **Jordan v. State**, 593 S.W.3d 340 (Tex. Crim. App. 2020) "Some" harm means actual harm rather than merely theoretical, and reversal occurs if the error "was calculated to injure the rights of the defendant." **Id. at 347**. If the defendant did not object, the charge error is not preserved and reversal requires a showing of "egregious" harm. **Id. at 346.** Egregious harm requires a showing that the defendant was "deprived of a fair and impartial trial. **Nava v. State**, 415 S.W.3d 289 (Tex. Crim. App. 2013) Errors that result in egregious harm are those that affect the basis of the case or vitally affect a defensive theory. **Ngo v. State**, 175 S.W.3d 738 (Tex. Crim. App. 2005)

In the instant case, Appellant did not object to the jury charge (R.R. Vol 4 at 186) Therefore, the trial must be reversed if there is a showing of egregious harm. As it pertains to this extraneous instruction, the trial court had a "sua sponte duty to instruct the jury on evidence of extraneous offenses in the guilt – innocent charge when such evidence is admitted." **Rodgers v. State**, 180 S.W.3d 716 (Tex.App. – Waco 2005). To determine whether the omission was egregious, the court should evaluate (1) the remainder of the charge for correctness, (2) the strength of the case, (3) the arguments put forth by counsel, and finally any other relevant information in the record. **Almanza v. State**, 686 S.W.2d 157 (Tex.Cr.App. 1985)

Rule 404(b)(2) of the Texas Rules of Evidence states, "…evidence may by admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." **T.R.E. 404** (West 2025) Caselaw has expanded these permissible uses of character evidence to include other matters such as "Rebuttal Evidence." **Moses v. State***,* 105 S.W.3d 522 (Tex. Crim. App. 2003) These other permissible grounds for admitting character evidence were correctly included within the Court's charge in the instant case, therefore the only omission was the word "intent," which

coincidentally was the one category that was the most important to be present in the first place.

In the jury charge under both Cause Number 95192-CR and 95193-CR, the jury was instructed as follows:

> You are instructed that there is testimony before you in the case regarding that the defendant committed alleged criminal acts, other than the offense alleged against him in the indictment in this case. These are called extraneous offenses.
>
> You cannot consider testimony of extraneous offenses for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed any such extraneous offense. Even then you may only consider the same as it relates to the motive of the defendant OR the opportunity of the defendant OR preparation by the defendant OR the plan of the defendant OR knowledge of the defendant OR the identity of the defendant OR absence of mistake by the defendant OR lack of accident by the defendant OR the rebuttal of a defensive theory OR the state of mind of the defendant and the child OR the previous and subsequent relationship between the defendant and the child OR the character of the defendant and acts performed in conformity with the character of the defendant OR same-transaction contextual evidence, if any, in connection with the offense alleged against the defendant in the indictment in this case and for no other purpose. (C.R. Vol 1 at 109-110 in Cause No. 95192-CR)

The language submitted was identical in the charge of both cause numbers. (see also C.R. Vol 1 at 124 in Cause No. 95193-CR)

In the State's case-in-chief, there were references to extraneous offenses in the record which triggered the necessity of a corresponding instruction in the court's charge on guilt – innocence. The Appellant stood trial for Indecency by Contact. There were references to Appellant getting into a physical altercation with the mother of the two victims on the same night, culminating in shoving her down and stumbling onto the bed of one of her daughters. (R.R. Vol 4 at 143) While reference to the same may be somewhat contextual in that it occurred at some point after the incident made basis of this suit, it requires proof of an entirely different set of elements than that of Indecency by Contact. Assuming that reference to the assault was relevant as character evidence under TRE 404(b), it can only be considered by a jury if the elements of that offense are proven beyond a reasonable doubt, and then only for one of the listed purposes in 404.

In addition to testimony regarding Appellant committing an assault on the mother of the children, State's Exhibit 14 was admitted over objection. State's 14 actually contained two separate recordings, one a USB recording of a 9-1-1 phone call to the police, but also a separate recording on a CD which was a recorded phone call between Appellant and Detective Cecil Arnold. (R.R. Vol 4 at 171). On that CD recording

between Appellant and the detective, references were made to Appellant commonly walking around in his home naked in front of his teenage daughters on other occasions, which is certainly outside of the social mores of most persons likely to be on a jury, if not a separate criminal act altogether depending on the circumstances.

Now that it is established that at least one extraneous offense was referred to, applying the four factors above from **Almanza**, it becomes clear that the Appellant suffered egregious harm by the failure to include "intent" as a permissible form of character evidence under Rule 404(b). The jury instruction as to the proper application of the law to extraneous offenses was correct with the exception that the category of "Intent" was omitted, and that just so happened to be the number one issue at stake. The jury was correctly instructed as to the proper application of the other categories of permissible character evidence, and were further instructed that they could only consider the same if they first found that extraneous proven beyond a reasonable doubt. This discrepancy between the burden of proof and it's applicability to other permissible categories of character evidence would have misled the jury on the proper application of the extraneous. Due to the word "intent" being omitted, the jury was **not** instructed that they could only consider the Appellant parading

himself around naked in front of his teenage daughters, to assist them in determining his intent in bathing his daughters, if they first found that this was proven beyond a reasonable doubt. In other words, they were free to use this extraneous for the purpose of ascertaining Appellant's "intent" regardless of whether this extraneous was proven beyond a reasonable doubt. Without including the category of "intent," even if the jury did not believe that it was proven beyond a reasonable doubt that Appellant shoved Raquel Johnson down onto the bed, or that he commonly exposed himself around his home, they could still consider it as evidence of his intent due to the plain language of the Court's Charge. This is tantamount to not having an extraneous paragraph in the first place given that the Appellant's intent was essentially the only issue litigated during guilt-innocence.

As to the strength of the case, the evidence at trial was weak. There was no scientific evidence or expert testimony regarding any form of physical proof of abuse. The alleged act occurred only on the one occasion. No sexual assault examination was performed. There were discrepancies between the two victims as to whether the bathroom door was closed, which was problematic due to the fact that their mother Raquel Johnson was in the apartment right down the hallway during the

incident. J.A.E. denied that penetration occurred, but then changed her story on the stand after the State confronted her with her prior interview with the Children's Advocacy Center. There were no other testifying eye-witnesses at trial. Very little investigation was done. Cecil Arnold who was the lead investigator essentially testified that he set up an interview for J.A.E. and J.A.Z. after getting referred the case, had a phone conversation with Appellant, and then applied to secure a warrant for his arrest. Based on the weakness of the case, this weighs heavily in favor of finding harm.

As to arguments put forth by counsel, virtually the entire defensive theory of the case was predicated on the word "intent." Both the State and Defense essentially agreed about everything that took place between Appellant and his daughters, but their disagreement was whether this was done to gratify his or their sexual desires. In the State's closing argument, they commented upon this by stating "I think the only element that there is even an argument about is the intent. Because he keeps wanting to say this wasn't a sexual thing, it wasn't with the intent to arouse or gratify his sexual desire." (R.R. Vol 5 at 33) They continued, stating, "You're allowed to infer intent by the Defendant's actions and his words. And I think that when you look at this in context it is a father that physically

forced his two teenage daughters to disrobe and get into a shower with him while he was naked." (R.R. Vol 5 at 34) The Defense argued that Appellant's behavior was done essentially to teach his daughters a lesson, stating, "You have to go further than that. He talked. The words he said, were they sexual? No. Was that sexual? Like 'these aren't your breasts.' This, you know, this happens in the world. That's not getting off talk." (R.R. Vol 5 at 39) Even the jury had concerns about the element of "intent" due to the fact they asked questions during their deliberations about whether Appellant was erect or not.

Therefore, based on evaluation of the four categories from **Almanza**, not only did harm occur by failure to include the word "intent" in the instruction on extraneous offenses, but it rose to the level of egregious harm because it undermined the entire defensive theory as it pertained to sexual gratification. This type of error resulted in egregious harm because it affected the basis of the defense's case by vitally affecting the defensive theory that there was no "Intent," making it provable by the introduction of extraneous bad acts which were not required to be proven beyond a reasonable doubt per the Court's charge.

POINT OF ERROR NO. 3

THE TRIAL COURT ERRED BY ALLOWING EXTRANEOUS PORTIONS OF THE APPELLANT'S PHONE CALL WITH CECIL ARNOLD TO BE SUBMITTED TO THE JURY.

Evidence of extraneous offenses or bad acts that a defendant may have committed normally cannot be introduced to show that the defendant acted in conformity with his asserted criminal nature and therefore committed the crime for which he is on trial. **Montgomery v. State**, 810 S.W. 2d 372, 386 (Tex. Crim. App. 1990) Rule 404(b) of the Texas Rules of Evidence provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident…." **Rule 404(b) Tex. Rules of Evid.** (West 2025)

Rule 403 of the Texas Rules of Evidence provides that even if the evidence is relevant, the court may exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. **Tex. Rules of Evid. 403** (West 2025) "The general rule is that the defendant is to be tried only for the offense charged, not for any other crimes or for being a criminal generally. However, evidence of extraneous

acts of misconduct may be admissible if (1) the uncharged act is relevant to a material issue in the case, and (2) the probative value of that evidence is not significantly outweighed by its prejudicial effect." **Segundo v. State**, 270 S.W.3d 79, 87 (Tex. Crim. App. 2008)

An appellate court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard. **Torres v. State**, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002) A trial court's ruling will not be reversed unless it falls outside the zone of reasonable disagreement. **Torres**, at 760.

An extraneous offense is "any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers." **Rankin v. State**, 953 S.W.2d 740, 741 (Tex. Crim. App. 1996) In general, extraneous offense evidence is inadmissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **Tex. Rules Of Evid.** 404(b)(1) (West 2025)

However, for crimes against children, such as Indecency with A Child, the Texas Code of Criminal Procedure provides:

> Notwithstanding Rule 404 and 405, Texas Rule of Evidence… evidence that the defendant has committed a separate offense [such as Indecency With A Child] may be admitted in the trial of an alleged offense [of Indecency With A Child] for any bearing the

> evidence has on relevant matters, including the character of the defendant…Before the evidence may be introduced, the trial judge must: (1) determine the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt, and (2) conduct a hearing out of the presence of the jury for that purpose.

Tex. Code Crim. Proc. art. 38.37§2(b) (West 2025)

Section 4 of Article 38.37 of the Texas Code of Criminal Procedure also provides that it does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law. Thus this article is an exception to Rule 404(b) for certain cases involving children and eliminates the necessity of showing that the evidence falls within an enumerated exception under Rule 404(b) of the Texas Rules of Evidence. **Hitt v. State**, 53 S.W.3d 697, 705 (Tex. App. – Austin 2001, pet. ref'd) For this type of evidence to be admissible under Article 38.37, Section 2(b), the defendant need not have been charged with tried for, or convicted of the separate offense. **Castillo v. State**, 573 S.W.3d 869, 880-881 (Tex. App. – Houston [1st Dist.] 2019, pet. ref'd)

However, even though Article 38.37 acts as an expansion to the admissibility of evidence of extraneous offenses in cases of crimes against children, it is still subject to a Rule 403 balancing test, just like

proffers of extraneous conduct offered under Rule 404. **Bradshaw v. State**, 466 S.W.3d 875 (Tex. App. –Texarkana 2015, pet. ref'd).

Appellant contends that the trial court erred in admitting portions of State's Exhibit 14, the recording of a phone conversation between Appellant and Detective Arnold, because those portions were not relevant under a 403 balancing test. In **Montgomery,** testimony was admitted about the appellant frequently walking around nude in front of his children with an erection. **Montgomery v. State,** 810 S.W.2d 372, 393 (Tex. Crim. App. 1990). The Appellant in *Montgomery* even went further, as other testimony was admitted regarding that Appellant making statements to his children such as "Give me your hot love," and "You and I were made for each other," amongst other things. *Id.* In finding that admitting his act of nudity was not relevant, the Court reasoned, "In the instant case the testimony needed no shoring up. The two complainants corroborated one another…Appellant's cross-examination of these witnesses was brief and inefficacious…We conclude that the State had no compelling need to show that appellant frequently walked around naked, with an erection, in the presence of his children, either to prove specific intent or to shore up testimony of the complainants. **Id. at 397.** Furthermore, the Court reasoned:

> Inherent probativeness and inherent prejudice also weight in favor of exclusion. Though relevant, such evidence has only marginal probative value. By contrast, the danger of unfair prejudice from such testimony is substantial. Both sexually related misconduct and misconduct involving children are inherently inflammatory. Many in our society would condemn appellant for his conduct whether they believed it showed sexual arousal directed at his children, an undifferentiated sexual arousal imprudently displayed, or simply an incidental erection coupled with a damnable nonchalance. In any event there was a grave potential for decision on an improper basis, as jurors may have lost sight of specific issues they were called upon to decide and convicted appellant out of a revulsion against his parental demeanor. **Id.**

In the instant case, the extraneous statements submitted to the jury are even less probative than the statements submitted in *Montgomery* and should never have been admitted under a 403 balancing test. On this roughly hour long recording in State's Exhibit 14, Appellant discussed with the Detective numerous pertinent things about his lifestyle, stating how he was a "naturist," a "freeist." He stated that he is very comfortable with himself. He stated on this recording around the 18 minute mark about how he normally would walk around the kids naked in the house. He went on to say, "I like the way the wind hitting my skin […] It's a sense of nourishment to me." He was questioned by Cecil Arnold, who asked, "Yeah, so the kids talk about you will normally walk around the house

naked, but that's normal," to which Appellant responded, "Right." He further justified his lifestyle by stating around the 40 minute mark on the recording about how "people are comfortable with their bodies, like nudist camps and stuff like that […] but to understand why I am naked is, this is comfortable to me giving me a breath of fresh air. This is my freedom."

Appellant's position is that walking around naked in front of one's teen aged daughters, even without an erection, is most certainly an act that many in society would consider to be deplorable, and the prejudice created by the admission of the same is extremely high, while it's probative value is very small. Similar to in **Montgomery**, "In the instant case the testimony needed no shoring up. The two complainants corroborated one another. Appellant's cross-examination of these witnesses was brief and inefficacious. He did not challenge the children's stories." **Id at 397**. And as held there, the State had no compelling need to "show that appellant frequently walked around naked […] in the presence of his children, either to prove specific intent or to shore up testimony of the complainants." **Id.** Admission to the jury of Appellant's nudity on other occasions not only operated to confuse the issues, but also would have undoubtedly inflamed the passions of the jurors due to their disagreement with his parenting style and lackadaisical, laissez-faire

notions of modesty, thereby creating the very real danger that they would convict him based on their dislike of his attitude and choices rather than sexual perversion. This is exactly the type of propensity evidence that Rule 403 is designed to prevent from introduction, and it was error to admit the same.

CONCLUSION

For the reasons stated, Appellant prays the Court to reverse and acquit or in the alternative to reverse and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 8,301 words as determined by the Word program used to prepare this document.

Robert David Miller

CERTIFICATE OF SERVICE

I do hereby certify that on this the 10th day of April 2025, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the District Attorney of Brazoria County, Texas, at bcdaeservice@brazoriacountytx.gov.

Robert David Miller

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