IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 0366-17

SAMUEL UKWUACHU, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE TENTH COURT OF APPEALS
McCLENNAN COUNTY

NEWELL, J., filed a concurring opinion in which HERVEY J., joined.

Misunderstandings about the meaning behind what people say have plagued mankind since the birth of language. This case certainly highlights that difficulty, particularly in light of the exclusion of one portion of a text-thread despite the inclusion of another.[1] And while I

[1] *Ukwuachu v. State*, No. 10-15-00376-CR, 2017 WL 1101284 (Tex. App.–Waco March 22, 2017) (not designated for publication).

agree with the rest of the Court that the exclusion of a portion of a particular conversation does not require reversal of Appellant's conviction, I write separately to articulate how I believe the Court should review the claims at issue in this case.

Ultimately, I believe the proper analysis should not focus upon whether the trial court could have understood the conversation at issue to mean one thing or the other. Rather, the focus of the trial court should be on whether the jury could have interpreted the meaning of the conversation for an admissible purpose. Here, the jury could have reasonably interpreted the excluded statements as necessary to explain the remainder of the conversation the jury heard. Conversely, the jury could not have reasonably interpreted the conversation at issue to be about anyone other than Appellant. Consequently, the excluded evidence was admissible in this case. However, the exclusion of that evidence was harmless; therefore I would affirm the conviction.

Facts

Without going into too much detail, this case involves Appellant's sexual assault of a female friend and fellow college athlete. One evening, shortly before the sexual assault, Appellant and the victim spent some time together. Appellant claimed that he and the victim spent the entire

night together and that they had engaged in consensual sexual activity just short of sexual intercourse. The victim denied spending the entire night with Appellant. Further, she testified that Appellant had tried to kiss her and put the moves on her, but she had turned him down. On a subsequent evening, Appellant and the victim spent the night together, but both agreed that there was no sex involved. Finally, on the night of the offense, the victim met up with Appellant thinking that they were going to get something to eat or attend a party. Instead, Appellant drove the victim to his apartment, and, within twenty minutes, Appellant had sexually assaulted the victim.

The central dispute revolves around the trial court's exclusion of a a portion of a text thread between the victim and Celine, one of her friends. The State introduced a portion of the thread that occurred after the sexual assault. This portion of the text-thread included a statement by the victim that Appellant had "just raped me basically." Appellant sought to introduce the portion of the thread that began around the time that the victim realized Appellant was taking her to his apartment and ending shortly before the sexual assault. The text thread at issue, with Celine's responses to the victim in bold, reads as follows:

Are you okay??

Yeasa I'm abouyr to child with Sam
Magee are you?
*where

Okay be careful, wrap it up this time!!

I'm not gonna do anytibg!!

At Taco Bell with Karrie, we about to go to the after party

STFU

Where is it? I think that's where his takigv me
*taking

<u>1920 S. 15th St</u>

Nvm 2nd street

He doesn't wanna go:/

Because he wants to hit

He's not gunna!
He's gunna be Jose lmao
*upset
I'm sober

You think I'm stupid

I am though

Okay

Ima pretend so he won't try to hit

😏

Can't slip

He doesn't seem that virtuous to me. But I'm prbly biased because I don't like him right now

You're right

Preservation

I agree with the Court that Appellant only preserved error regarding his objection that the excluded portion of the conversation thread was admissible under Rule 107, the rule of optional completeness. The State filed a motion in limine based on Rule 412, which the trial court granted. But a ruling on a motion in limine does not generally preserve error.[2] The State received a hearing at the time Appellant sought to introduce the complained-of texts, but at that hearing, the parties focused exclusively upon whether the texts were admissible under Rule 107.[3] Consequently, the State never obtained an adverse ruling on its Rule 412 objection.[4]

Nevertheless, I also agree that the Court must address whether the

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[2] *See, e.g., Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985) (noting that "[f]or error to be preserved with regard to the subject mater of the motion *in limine* it is absolutely necessary that an objection be made at the time when the subject is raised during trial.").

[3] Appellant also argued that the texts were admissible under Rule 106, but Appellant does not appear to have argued on appeal that the evidence at issue was admissible under that rule.

[4] *See Smith v. State*, 499 S.W.3d 1, 5-6 (Tex. Crim. App. 2016) (plurality op.) (holding that the defendant had failed to preserve error because he did not obtain an adverse ruling from the trial court).

evidence was inadmissible under Rule 412 because, as I will explain more fully below, I agree with Appellant and the court of appeals that the text-thread was admissible under the rule of optional completeness. Regardless of whether the evidence was admissible under the rule of optional completeness, we must uphold the trial court's decision to exclude the evidence if it is correct under any theory of the law applicable to the case.[5]

Here, Rule 412 was the law applicable to the case because the State had an adequate opportunity to develop a complete factual record related to its alternative theory of exclusion.[6] However, because we can only get to this theory as an alternative theory that the trial court did not rely upon, I disagree that this case provides us an opportunity to address whether Rule 412 limits the rule of optional completeness. I would save that question for a case in which the trial court specifically rules that Rule 412 "trumps" Rule 107. That did not happen here, so there is no reason to engage in that analysis.

Standard of Review

A trial court's decision to admit or exclude evidence is subject to

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[5] *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013).

[6] *Id.* at 90.

the abuse of discretion standard of review.[7] A trial court abuses that discretion if its decision lies outside the zone of reasonable disagreement.[8] Everyone on the Court agrees that this is the proper standard of review.

The problem is that no one can agree on what trial courts can reasonably disagree about. This is because the text-thread at issue in this case is susceptible to multiple different meanings, and we are too focused on trying to figure out what the victim and her friend were actually saying to each other. Trial courts do not always have the luxury of evaluating the admissibility of evidence susceptible to only one interpretation. In the context of authentication, we have made clear that trial courts are not looking for objective truth; we leave it to the fact-finder to decide whether a piece of evidence actually is what the proponent claims it is.[9] In other words, the trial court need not be persuaded that proffered evidence is authentic, but it must determine

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[7] *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010).

[8] *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

[9] *See, e.g., Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012) ("The ultimate question whether an item of evidence is what its proponent claims then becomes a question for the fact-finder–the jury, in a jury trial.").

that a reasonable jury could make that determination.[10]

The same is true regarding determinations of relevancy. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[11] As we have explained, "Evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge towards proving or disproving some fact of consequence."[12] A trial court need not determine whether a particular piece of evidence conclusively establishes a particular fact, only that a reasonable jury could determine that fact with help from that piece of evidence.

With this in mind, the decision to admit or exclude ambiguous statements need only answer whether a reasonable jury could interpret the statements in a particular way. This inquiry is guided by whether a particular rule of evidence is a rule of admissibility or exclusion. If the rule at issue is a rule of admissibility, the trial court must consider whether a reasonable jury could have interpreted the meaning of the

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[10] *Id*.

[11] TEX. R. EVID. 401.

[12] *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004).

statement for an admissible purpose. If the rule at issue is a rule of exclusion, the trial court must consider whether a reasonable jury could interpret the meaning of the statement for an inadmissible purpose.

Rule 107

Rule 107 is a rule of admissibility that permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the adverse party.[13] It is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing.[14] Rule 107 does not permit the introduction of other similar, but inadmissible, evidence unless it is necessary to explain properly admitted evidence.[15]

So, in this case, if reasonable people can disagree about whether the jury could have interpreted the excluded text-thread as necessary to understand the admitted portion of the text-thread and pertaining to the same subject, the trial court erred by excluding it. While there was a short break between the first part of the text-thread and the second, a

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[13] *Walters v. State*, 247 S.W.3d 204, 217-18 (Tex. Crim. App. 2007).

[14] *Id*. at 218.

[15] *Id.*; *see also Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004) ("The plain language of Rule 107 indicates that in order to be admitted under the rule, the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood.'").

reasonable jury could have interpreted the first part of the conversation to be on the same subject as the second part: sexual intercourse with Appellant.[16] While people might reasonably disagree about the meaning behind the statements in the first part of the conversation, I would hold that reasonable people could not disagree that one interpretation of the statement would have required its admission. In this regard, I would affirm the court of appeals' holding that the evidence was admissible under the rule of optional completeness.[17]

Rule 412

As discussed above, we must uphold the trial court's decision excluding the evidence if it is correct under any theory of law regardless of whether the trial court actually relied upon that theory. Unlike the rule of optional completeness, Rule 412, the "rape-shield" rule, is a rule of exclusion. By its own terms, it limits the admissibility of specific instances of the victim's past sexual behavior, with certain, specific

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[16] Notably, even if these two portions of the text-thread are considered two separate conversations, Rule 107 requires the two conversations to be on the same subject, not halves of the same conversation. *See Walters*, 247 S.W.3d at 220 (holding that trial court erred in excluding second call to 911 on the same subject as the first under the rule of optional completeness).

[17] *Ukwuachu*, 2017 WL 1101284 at *2.

exceptions.[18] Relevant to this case, Rule 412 does allow admission of specific instances of the victim's past sexual behavior if those specific instances concern past sexual behavior with the defendant and are offered by the defendant to prove consent.[19] Further, even if the specific instances of past conduct involve the defendant, the evidence must still pass a balancing test. Because Rule 412 involves a rule of exclusion, the trial court was required to determine whether a reasonable jury could have interpreted the excluded portion of the text-thread as related to past sexual behavior between the victim and someone other than Appellant.

Though I agree that there are different ways to interpret the meaning of the conversation, taking the conversation as a whole I do not believe a reasonable jury could have interpreted this conversation as being about anyone other than Appellant. The victim refers to Appellant by name at the beginning of the conversation, and on direct examination she made clear that she was texting her friend while she was in the car with Appellant.[20] Neither Appellant nor the victim disputed that the

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[18] TEX. R. EVID. 412.

[19] TEX. R. EVID. 412(b)(2)(B).

[20] *See, e.g., Butler v. State*, 459 S.W.3d 595, 602 (Tex. Crim. App. 2015) (relying upon the context and content of text messages to establish authentication).

conversation was about Appellant in their testimony. Rather, the State argued at the hearing that the conversation was not about past sexual behavior at all. Consequently, a reasonable jury would have been left to determine whether the conversation indicated that Appellant and the victim had previously had sex. Regardless of how the jury answered that question, though, either answer would not have required exclusion under Rule 412.

As the court of appeals noted, however, the inquiry does not end there.[21] The evidence must also be shown to be admissible pursuant to the balancing test by Rule 412(b)(3). Under this test, even if the conversation could be interpreted as being about past sexual behavior with Appellant, it would only be admissible if the probative value of the evidence outweighed the danger of unfair prejudice.[22]

As the court of appeals observed, it is not apparent from the record whether the trial court actually performed the balancing test required by Rule 412.[23] Indeed, as discussed above, I do not believe the State ever obtained a ruling on its Rule 412 objection. I tend to agree with the court

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[21] *Ukwuachu*, 2017 WL 1101284 at *2.

[22] TEX. R. EVID. 412 (b)(3).

[23] *Ukwuachu*, 2017 WL 1101284 at *2.

of appeals that the excluded evidence was probative on the issue of consent, and that the messages were not particularly graphic.[24]

But I can see how the excluded evidence carried at least some potential to encourage the jury to decide the victim's credibility on an emotional basis. As we have explained, "unfair prejudice" includes the potential that evidence might encourage a jury to render an emotional decision rather than one based upon the evidence. There was at least some risk that if the jury interpreted the conversation as revealing past sexual conduct between Appellant and the victim, the jury could discredit the victim's testimony based upon moral disapproval of her behavior rather than a dispassionate review of the evidence. Yet if this amounts to "unfair prejudice" under Rule 412 then it is difficult to see how past sexual behavior between a defendant and a victim would ever be admissible to prove consent.

Harm

Ultimately, I do not feel it necessary for this Court to conduct the 412 balancing test that the trial court did not perform. Even if we assume that the probative value of the excluded evidence outweighed any

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[24] *Id.*

unfair prejudice, I believe the exclusion of the evidence was harmless. I agree with the court of appeals that the excluded evidence did not prevent Appellant from presenting the substance of his defense to the jury.[25] But I disagree with the court of appeals' finding of harm. Though the central issue in the case was consent, the excluded evidence only tended to prove consent through an implication that Appellant and the victim had consensual sex in the past. As such, it only weakly supported Appellant's defensive theory. The exhibit also carried the potential to reinforce the victim's testimony that she had never had sex with Appellant before and did not want to have sex with him on the day of the offense. I would hold that any error from the exclusion of the evidence did not affect Appellant's substantial rights and should therefore be disregarded.

With these thoughts I concur.

Filed: June 6, 2018

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[25] *See Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002) (holding that the erroneous exclusion of a defendant's evidence is non-constitutional error unless the excluded "evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense").