IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0366-17

SAMUEL UKWUACHU, Appellant

v.

THE STATE OF TEXAS

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

YEARY, J., filed a concurring opinion in which KELLER, P.J., and KEASLER, J., joined.

CONCURRING OPINION

In this prosecution for sexual assault, the State introduced a statement made by the complaining witness in the case (hereinafter, "C.W."),[1] in a text message she sent to a friend shortly after the assault occurred. In the message, C.W. told her friend that Appellant "just raped me basically." Appellant then proposed to cross-examine C.W. about portions of the text-message conversation that had transpired before C.W.'s claim that Appellant "raped"

[1] The indictment in this case identified the complaining witness by a pseudonym. TEX. CODE CRIM. PROC. art. 57.02(f). For the sake of confidentiality, I will identify her simply as "C.W."

her. He claimed that the preceding portion of the text-message conversation was necessary to put C.W.'s qualifier, "basically," in proper perspective. The trial court sustained the State's objection. The court of appeals reversed the trial court's judgment, however, and remanded the cause for a new trial, holding that the trial court abused its discretion to exclude the earlier part of the text-message conversation. *Ukwuachu v. State*, No. 10-15-00376-CR, 2017 WL 1101284 (Tex. App.—Waco March 22, 2017) (mem. op., not designated for publication). We granted the State's petition for discretionary review to address whether the court of appeals paid sufficient deference to the trial court's ruling on the admissibility of this evidence. I agree that we should reverse the court of appeals' judgment, but for reasons different than the plurality's.

BACKGROUND

The Facts

Appellant and C.W. were college student athletes—Appellant, an upper-classman, and C.W., a freshman—who shared a class and struck up a friendship. They spent at least two evenings together before the night of the offense. On the first occasion, they had watched a movie on the couch in Appellant's apartment off campus. Appellant claimed that C.W. spent the night with him on that occasion, and that they kissed and engaged in sexual activities such as oral sex, mutual masturbation, including digital penetration, but not "actual sex," i.e., intercourse. For her part, C.W. testified that on this occasion, Appellant had tried to kiss her

and otherwise put the "moves" on her, but that she turned him down,[2] and she denied having spent the night. After that occasion, they joked about what Appellant called their "unfinished business" in text messages. It is undisputed that C.W. eventually did spend a full night at Appellant's apartment, but with the mutual understanding that there would be no sex. Appellant abided by that agreement, and C.W. spent that second night in his bed unmolested.

On the third night—the night of the offense—C.W. had attended a homecoming event with a group of friends, arriving home at about two o'clock in the morning. As per a prior agreement, she sent Appellant a text message to let him know she was home. Her understanding was that they were going to get something to eat or attend another party, but Appellant instead picked her up and drove back to his apartment.[3] When they arrived, they went straight to Appellant's bedroom. According to C.W., within twenty minutes Appellant forced himself on her, pushing her face-down onto the bed, pulling up her dress, and sliding her underwear to the side in order to penetrate her. She screamed, "no" and "stop," but he did not. C.W. noticed that there was a condom on the bedside table, but Appellant did not use it. When it was over, Appellant asked her whether she intended to tell the police, and he insisted that it had not been a "rape." He fell asleep, and C.W. contacted various friends until she eventually found someone to come pick her up from Appellant's apartment.

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[2] A college dean testified that C.W. told her that Appellant had in fact kissed her on this occasion and then tried to have oral sex with her. C.W. denied telling the dean this.

[3] By contrast, Appellant testified that their mutual plan from the beginning was that he would pick her up and take her to his apartment.

Both before and after the sexual assault, C.W. engaged in a stream of text messages with her friend, Celine, beginning about the time C.W. realized that Appellant was taking her to his apartment and continuing even after the assault. In one text message sent after the assault, C.W. told Celine that Appellant had "just raped me basically." Asked by the prosecutor what she had meant by "basically," C.W. responded: "Like, actually, this just happened. This is real. I was just raped." She denied that she had meant to express any uncertainty. Other evidence showed that C.W. made outcry to a number of friends and family members, and to a Sexual Assault Nurse Examiner. In the months following the assault, C.W. exhibited sufficient signs of Post-Traumatic Stress Disorder to warrant such a diagnosis.

Appellant admitted to having had sex with C.W. on the night of the offense, but he testified that it had been consensual. He denied that there had been a condom on the bedside table. He also denied that C.W. had screamed "no" or "stop." Appellant's roommate testified that he had been in his own bedroom at the time of the assault, and he had not heard C.W. scream. The State countered with cell phone records to suggest that the roommate had not yet arrived home by the time of the offense. The jury found Appellant guilty of sexual assault and later assessed his punishment at eight years' confinement in the penitentiary, but it recommended that he be placed on community supervision.

The Rule 412 Hearing

On the day before trial began, the State filed a motion in limine in which it asked that Appellant be required to approach the bench before, among other things, proffering evidence

or making any mention "regarding matters prohibited generally under Rule 412 of the Texas Rules of Evidence."[4] Just before taking C.W. on cross-examination, Appellant approached

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[4] Rule 412 states, in pertinent part:

> **(a) In General.** The following evidence is not admissible in a prosecution for sexual assault, aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault:
>
> > **(1)** reputation or opinion evidence of a victim's past sexual behavior; or
> >
> > **(2)** specific instances of a victim's past sexual behavior.
>
> **(b) Exceptions for Specific Instances.** Evidence of specific instances of a victim's past sexual behavior is admissible if:
>
> > **(1)** the court admits the evidence in accordance with [the procedural requirements of] subdivisions (c) and (d);
> >
> > **(2)** the evidence:
> >
> > > **(A)** is necessary to rebut or explain scientific or medical evidence offered by the prosecutor;
> > >
> > > **(B)** concerns past sexual behavior with the defendant and is offered by the defendant to prove consent;
> > >
> > > **(C)** relates to the victim's motive or bias;
> > >
> > > **(D)** is admissible under Rule 609; or
> > >
> > > **(E)** is constitutionally required to be admitted; and
> >
> > **(3)** the probative value of the evidence outweighs the danger or unfair prejudice.

TEX. R. EVID. 412(a) & (b).

the bench in keeping with the State's motion in limine. Appellant sought to offer the part of the text-message conversation between C.W. and Celine that had taken place before C.W. proclaimed that Appellant "just raped me basically." At the State's request, the parties retired to chambers for an in-camera Rule 412 hearing.[5]

During the Rule 412 hearing, the trial court admitted for record purposes, as Court's Exhibit One, a nine-page print-out of the entire text-message conversation, which occurred over the course of approximately an hour and a half to an hour and forty-five minutes. Defense counsel contended that, since the State had been permitted to introduce the content of the text-message conversation sent *after* the assault, the defense should be able to introduce "the entire conversation" between C.W. and Celine that evening, including the part that was exchanged *before* the assault. Defense counsel took the position that these text messages were admissible because they provided "some context to a potential prior [sexual]

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[5] Section (c) of Rule 412 mandates a certain procedure for determining the admissibility of specific-past-sexual-behavior evidence:

> **(c) Procedure for Offering Evidence.** Before offering any evidence of the victim's past sexual behavior, the defendant must inform the court outside the jury's presence. The court must then conduct an in camera hearing, recorded by a court reporter, and determine whether the proposed evidence is admissible. The defendant may not refer to any evidence ruled inadmissible without first requesting and gaining the court's approval outside the jury's presence.

TEX. R. EVID. 412(c). In essence, the rule itself thus operates like a built-in State's motion in limine. It places an onus on the defendant to always approach the bench before attempting to introduce evidence of a victim's past sexual behavior, as well as an onus on the trial court both to conduct an in-camera hearing and to make an ultimate determination of admissibility.("In camera describes any activity that takes place in the privacy of the judge's chambers." BOUVIER LAW DICTIONARY, DESK EDITION 1267 (Stephen M. Sheppard ed., vol. I, desk ed. 2012).)

relationship . . . that [C.W.] denied" and would explain "the qualification of the rape allegation later on" in which C.W. claimed that Appellant just raped her "basically." Defense counsel contended that the evidence would support the theory that the encounter between Appellant and C.W. was "a consensual deal."[6] Specifically, he focused the trial court's attention on two parts of the earlier conversation, one in which Celine told C.W. to "wrap it up this time" and another exchange in which C.W. and Celine seemed to acknowledge an awareness that Appellant "wants to hit."[7] Defense counsel argued, "I believe *the whole conversation*[8] should . . . come in . . . based on the Rule of Optional Completeness."[9] The State, for its part, contended that the earlier text messages were "absolute hearsay."

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[6] Inasmuch as defense counsel argued that this part of the text-message conversations illuminated a past sexual relationship between Appellant and C.W., and inasmuch as he contended that the text-message conversations were relevant to the issue of C.W.'s consent, defense counsel was thus addressing issues directly relevant to the admissibility of the text-message conversations under Rule 412.

[7] I will assume without deciding for purposes of this opinion that the expression "wants to hit" refers to a desire to engage in sexual conduct. I have found no testimony, however, that clearly explains what was actually meant by the use of the phrase.

[8] Emphasis added. Defense counsel never asked the trial court to consider offering some parts of that earlier text-message conversation, but not others. He only requested admission of the entire text-message conversation.

[9] Rule 107 reads, in its entirety:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

TEX. R. EVID. 107.

The first three pages of Court's Exhibit One consists of a text-message conversation between C.W. and Celine that began at 2:16 in the morning, as follows:[10]

Are you okay??

Yeasa I'm abouyr to chill
with Sam

Magee are you?

*where

**Okay be careful, wrap it up
this time!!**

I'm not gunna do anytibg!!

**At Taco Bell with Karrie,
we about to go to the after party
STFU**[11]

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!

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[10] Celine's portions of the text-message conversation are highlighted in bold print.

[11] According to one of the prosecutors, "STFU" is an acronym for "Shut the Fuck Up!"

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

 [12]

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

At the conclusion of the Rule 412 hearing, the parties returned to the courtroom. The trial court announced its conclusion that the first three pages of Court's Exhibit One reflected a conversation that was separate from the parts that came thereafter (including the part

[12] This entry by C.W. in the text-message conversation appears to be what is known as an "emoji." Professor Garner defines the term "emoji" as "an emoticon or other image in [a standardized] set," and he defines "emoticon" as "a combination of typed keyboard characters used . . . to represent a stylized face meant to convey the writer's tone." GARNER'S MODERN ENGLISH USAGE 476 (4th ed. 2014). No testimony was offered to explain why C.W. chose to include this particular emoji or what meaning she meant to convey by including it in her text-message conversation.

containing C.W.'s assertion that Appellant "just raped me basically"). It explained that they were essentially "conversations on absolutely different topics." Although the trial court judge did not expressly invoke Rule 412 when announcing his ruling, he made clear that the first three pages of Court's Exhibit One, which he explained that he perceived as "the first conversation on the text messages," would be excluded. This essentially covered the text-message conversation that occurred between C.W. and Celine during the period of time after Appellant picked C.W. up and took her to his apartment, but before the sexual assault began.[13]

On Appeal

In an unpublished memorandum opinion, the court of appeals reversed. *Ukwuachu*, 2017 WL 1101284, at *3. The court of appeals found that the trial court had ruled "that the messages prior to the offense were not admissible pursuant to Rule 412." *Id*. at *1. Having found that the trial court made a Rule 412 ruling, the court of appeals next held that its ruling was in error. *Id*. at *2. The court of appeals held that Appellant had satisfied an exception to Rule 412's default requirement of inadmissibility because "the text messages were made immediately prior to the offense and appeared to potentially relate to prior occasions where

[13] The trial court ruled that Appellant could introduce any part of the text-message conversation that occurred *after* this point—the last six pages of Court's Exhibit One (including C.W.'s statement that Appellant "just raped me basically," testimony about which was already in evidence). However, at no time did Appellant thereafter offer into evidence any of the latter part of the text-message conversation that the trial court ruled admissible. This case involves the admissibility, therefore, of only the first three pages of Court's Exhibit One, as set out in the text above.

[C.W.] and [Appellant] had engaged in some type of sexual conduct." *Id*. Because they involved C.W. and Appellant, and were offered by Appellant to prove C.W.'s consent, the court of appeals reasoned, they fell within Rule 412(b)(2)(B)'s exception to the usual rule of exclusion. *Id*. The court of appeals next addressed Rule 412(b)(3)'s requirement of a probativeness-versus-prejudice analysis. The court of appeals found the record to be inconclusive about whether the trial court conducted a balancing of probativeness against the danger of unfair prejudice on the record. *Id*. Nevertheless, the court of appeals concluded that the trial court abused its discretion to the extent that its ultimate ruling entailed at least an *implicit* finding that Appellant failed to satisfy his burden to show "that the probative value outweighed the danger of unfair prejudice[.]" *Id*.

Having concluded that the text messages were not *in*admissible under Rule 412(a)(2), but were instead admissible under the exception described in Rule 412(b)(2)(B), the court of appeals then turned its attention to the question of whether the trial court should have admitted them (presumably over the State's hearsay objection) under Rule 107, the Rule of Optional Completeness. *Id*. The court of appeals determined that the trial court erred to find that there was more than one text-message conversation:

> We find that the text messages were part of an ongoing conversation and that after the State sought to introduce one of the messages, the Rule of Optional Completeness allowed [Appellant] to inquire into any other part of the same subject, which are the messages in question. The trial court's determination that Rule 107 did not apply was an abuse of discretion and therefore, erroneous.

Id. Finally, the court of appeals also concluded that exclusion of the first part of the text

messages caused Appellant harm under the standard for non-constitutional harmless error,[14] and therefore constituted reversible error, "especially when considered with the other alleged errors in the trial of this cause." *Id*. at *3.

We granted the State's petition for discretionary review in order to address the court of appeals' holdings with respect to both Rule 412 and Rule 107. I conclude that the trial court was within its discretion to exclude the evidence under Rule 412. This conclusion obviates the need to determine whether the trial court also abused its discretion to hold the evidence to be inadmissible hearsay despite Rule 107.[15]

ANALYSIS

The Standard of Review

An appellate court reviews a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). A trial court's ruling on evidentiary matters should be upheld so long as it is within the zone of reasonable disagreement. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). Especially in the context of evidentiary rulings, moreover, we have held that a trial court's ruling should ultimately be sustained on appeal if the judge's decision is correct under

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[14] TEX. R. APP. P. 44.2(b).

[15] We granted discretionary review, also, of the State's second ground for review, contending that the court of appeals erred in its harm analysis by taking into consideration "other alleged errors" which it had not yet held to be erroneous. Because of the reversal, the court of appeals in fact found it unnecessary to address Appellant's remaining points of error. *Id*. at *3. Given my analysis of the State's first ground for review—that the court of appeals erred to hold that the trial court abused its discretion to exclude the evidence—I need not address its second.

any theory of law applicable to the case—even if the trial court nominally articulates a different, and/or incorrect, basis for its ruling. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). The prevailing party in the trial court need not have raised the alternative basis for ruling in the court below to justify the appellate court's reliance on the alternatively applicable theory of law. *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013). So long as the appellant was not deprived of an adequate opportunity to develop a complete factual record with respect to the alternative legal theory, an appellate court should affirm the trial court's ruling. *Id*. at 90.

Rules of Evidence 412 and 107

Rule 412, the "rape shield" provision, is primarily a rule of exclusion. It applies in any prosecution for "sexual assault, aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault." TEX. R. EVID. 412(a). It explicitly declares to be inadmissible evidence of a sexual assault victim's "past sexual behavior" when that evidence takes the form of reputation or opinion testimony. TEX. R. EVID. 412(a)(1). It similarly declares inadmissible any evidence in the form of depictions of specific instances of the victim's sexual conduct. TEX. R. EVID. 412(a)(2). But this latter, specific-conduct prohibition comes with explicit and exclusive exceptions. TEX. R. EVID. 412(b). The particular exception at issue in this case involves the victim's prior specific sexual behavior with the defendant that the defendant offers "to prove consent" on the victim's part in the charged offense. TEX. R. EVID. 412(b)(2)(B). Even if the proponent of this evidence can satisfy his burden to

demonstrate its relevance to the issue of consent, however, the evidence must still be excluded unless the probative value of the evidence outweighs the danger of unfair prejudice. TEX. R. EVID. 412(b)(3). And, unlike Rule 403 of the Rules of Evidence, which embodies a presumption of admissibility of relevant evidence even if it has some potential to be unfairly prejudicial,[16] Rule 412(b)(3) tips the scale *against* admissibility of such questionable evidence.[17]

In contrast to Rule 412, Rule 107 is a rule of inclusion. It is meant to make evidence admissible that would otherwise be regarded as objectionable under some other provision, such as the rule against hearsay embodied in Rule 802 of the Rules of Evidence.[18] Rule 107 "permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by an adverse party." Cathy Cochran, TEXAS RULES OF EVIDENCE HANDBOOK 92 (6th ed. 2006). "It is, however, limited by Rule 403, which permits a trial judge to exclude otherwise relevant evidence if its unfair prejudicial

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[16] *See Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g) ("Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial."); TEX. R. EVID. 403 (trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of, *e.g.*, unfair prejudice).

[17] Cathy Cochran, TEXAS RULES OF EVIDENCE HANDBOOK 364 & 370 (6th ed. 2006) ("Rule 412 reverses the normal balance of probative value versus prejudicial effect. * * * Unlike the general Rule 403 balance that tips toward admissibility, under Rule 412, the defendant must show that the probative value of the evidence outweighs its unfairly prejudicial effect.").

[18] "Hearsay is not admissible unless" some other provision of a rule or statute "provides otherwise[.]" TEX. R. EVID. 802. "Texas Rule of Evidence 107, known as the rule of optional completeness, is such an exception" to the hearsay rule. *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011).

effect . . . substantially outweighs its probative value." *Id*. at 95. Similarly, Rule 107 is limited by Rule 412's prohibition against the admissibility of a sexual assault victim's specific prior sexual behavior. A defendant who cannot establish one of the exclusive Rule 412(b)(2) exceptions to the general rule of inadmissibility, or who cannot also satisfy Rule 412(b)(3)'s additional requirement to show that probativeness overcomes unfair prejudice, cannot gain admission of evidence of "an alleged victim's past sexual behavior" through the back door of Rule 107's Rule of Optional Completeness. In short, what Rule 412 deems inadmissible cannot become admissible merely by operation of Rule 107.[19]

This conclusion that Rule 412(a)'s rule of exclusion controls over Rule 107's rule of inclusion is supported by the text of Rule 412(b), which enumerates the exceptions to Rule 412(a)(2). If Rule 412(a)(2)'s exclusionary principle was meant to be subordinate to other rules of evidence that provide for the inclusion of certain evidence, there would have been no need to add Rule 412(b)(2)(D) to the list of exceptions to Rule 412(a)(2)'s general rule of exclusion. Rule 412(b)(2)(D) provides that evidence of specific instances of a victim's

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[19] This holding would do nothing to compromise a defendant's constitutional rights. A defendant who can establish that evidence of a victim's past sexual behavior "is constitutionally required to be admitted," TEX. R. EVID. 412(b)(2)(E), is entitled to introduce that evidence under the terms of the rule (subject to the requirement that he also show that its probative value outweighs the danger of prejudice, TEX. R. EVID. 412(b)(3), which should not prove too difficult if the evidence truly *is* constitutionally required to be admitted). *See Holmes v. South Carolina*, 547 U.S. 319 (2006) ("[The Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote[.]"). When a defendant has *not* been able to establish *any* of the exceptions to exclusion under Rule 412(b)(2), or has *not* established that the evidence is more probative than prejudicial under Rule 412(b)(3), then Rule 412(a) categorically prohibits admission of the evidence. Appellant has made no argument that exclusion of the text messages compromised his constitutional rights in any way.

past sexual behavior may yet be admitted if it "is admissible under Rule 609[,]" which governs admissibility of evidence of certain criminal convictions to attack a witness's character for truthfulness. If other particular rules of inclusion were meant to take precedence over Rule 412(a)(2)'s general rule of exclusion, there would have been no need to expressly incorporate such a provision among Rule 412(b)'s exceptions.

That Rule 412(a)'s principle of exclusion overshadows other rules of inclusion is also supported by Rule 412(c)'s rigid procedural requirements. *See* note 5, *ante*. Subsection (c) does not leave it to the State to raise an objection to such evidence. Instead, it puts the burden squarely on the defendant to inform the trial court before attempting to introduce such evidence, and requires the trial court to make a ruling. Rule 412 takes pains to assure that, in the absence of one of the specifically listed exceptions to the rule, evidence of a victim's past sexual behavior simply will not be admitted. According to one highly regarded commentator:

> Much of the momentum leading to nearly universal implementation of rape shield laws was the concern that the vast majority of sexual assaults suffered by women went unreported partly because of victims' fears that they themselves would be placed on trial by the defense. This fear was justified because courts typically held that once a defendant claimed consent, he could delve into the victim's most personal sexual behavior. Evidence concerning an alleged rape victim's prior sexual behavior is frequently of very low probative value, but it carries enormously unfair prejudicial baggage.

Cathy Cochran, TEXAS RULES OF EVIDENCE HANDBOOK 361 (6th ed. 2006). The commentator then added: "Rule 412 . . . represents an explicit public policy decision to eliminate trial practices that frustrated society's interest in the prosecution of sexual crimes."

Id. Such a policy strongly suggests an intent that Rule 412(a)'s principle of exclusion should override any principle of inclusion elsewhere appearing in the Rules.

The court of appeals held that the trial court abused its discretion because the first three pages of Court's Exhibit One were indisputably admissible under *both* a Rule 412(b)(2) exception *and* Rule 107.[20] If the court of appeals was mistaken about the former provision, then it does not matter whether it was correct under the latter. It also does not matter that the trial court did not expressly invoke Rule 412 in ruling on the issue. Appellant had an opportunity to litigate the Rule 412 issue—indeed, that is what the in-camera hearing was all about—and the record is sufficiently well developed to resolve the Rule 412 issue.[21] If the trial court could have concluded that the evidence was inadmissible under Rule 412, then the court of appeals was obliged to uphold its ruling on that alternative basis. This is true regardless of whether the court of appeals correctly held that the evidence could withstand the State's objection to the form of the evidence—hearsay—because of Rule 107's principle of optional completeness. Simply put, Rule 412's rule of exclusion trumps Rule 107's rule of inclusion. And, for the reasons that follow, I conclude that the court of appeals erred to hold that the trial court abused its discretion by concluding that the evidence was

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[20] Even if the evidence was admissible under Rule 412(b)(2)(B), the *form* which the evidence took—*i.e.*, hearsay—might still have made it subject to exclusion. It was therefore necessary for the court of appeals to find the evidence admissible under *both* Rule 412(b)(2)(B) *and* Rule 107 (in order to defeat the State's hearsay objection).

[21] Moreover, the trial court *should* have made a determination of admissibility under Rule 412, as mandated by Rule 412(c). *See* note 5, *ante*.

inadmissible under Rule 412.

Application of Rule 412 in this Case

The court of appeals observed that the text messages at issue "appeared to *potentially* relate to prior occasions where [C.W.] and [Appellant] had engaged in some type of sexual conduct." *Ukwuachu*, 2017 WL 1101284, at *2 (emphasis added). If the text messages *do* relate to prior sexual conduct between C.W. and Appellant, then of course they satisfy Rule 412(b)(2)(B)'s threshold requirement that the evidence relate to specific instances of past sexual behavior between the victim and the defendant. But the court of appeals used the word "potentially" advisedly; the text messages do not *unequivocally* relate to prior sexual behavior between C.W. and Appellant. They could, instead, refer to C.W.'s prior sexual behavior with somebody else. For that matter, they may not refer to past sexual behavior at all. And even if they do unequivocally relate to past sexual behavior between C.W. and Appellant, I disagree with the court of appeals' conclusion that it was outside the zone of reasonable disagreement for the trial court to have concluded that Appellant failed to show that they were more probative than prejudicial, for purposes of Rule 412(b)(3).

Most of the content of the first three pages of Court's Exhibit One does not relate to past instances of C.W.'s sexual conduct at all. To the extent that the pre-sexual-assault text messages may be interpreted to refer to the texters' mutual suspicion that Appellant "wants to hit" C.W.,[22] they make allusion to Appellant's possible aspirations with respect to C.W.'s

[22] *See* note 7, *ante*.

sexual behavior—in the near *future*. In that regard, they may well demonstrate that Celine and C.W. were aware that Appellant hoped to have sex with her that very night. But to that extent the text messages do not refer to C.W.'s sexual behavior in the *past*—or, indeed, to any *actual* sexual behavior at all. The only "potential" allusion to C.W.'s specific *past* sexual behavior in the text-message conversation may be found in Celine's cryptic text: "Okay be careful, wrap it up this time!!" Indeed, Appellant's counsel argued during the Rule 412 hearing that the "wrap it up this time" text message *was* a reference to a potential past sexual relationship between Appellant and C.W. But the particular text message could have meant any number of things in the context of this case.

1) No Past Sexual Behavior. First, it may well be that Celine's text message was not meant to refer to any past sexual behavior on C.W.'s part. In light of the fact that C.W. had spent at least one previous night in Appellant's apartment, during which (both parties agree) there was no sexual behavior, it might have been intended simply to caution C.W. ("be careful") not to risk spending another night with Appellant, trusting that he will be a gentleman again ("wrap it up this time!!"). If this is indeed all that Celine meant, then her sentence invokes neither Rule 412(a)'s principle of exclusion, nor any of Rule 412(b)'s exceptions. By this interpretation, Rule 412 would have no bearing on the admissibility of the text messages at all.[23] The only questions for the trial court would be whether the text

[23] For that matter, Celine's text might have had an altogether different and esoteric meaning, having nothing to do with sexual behavior with Appellant or anyone else, that would have been apparent only to Celine and/or C.W. Rule 412 would not be implicated in that case either.

messages were relevant to any issue in the case, whether they would indeed constitute objectionable hearsay as the State contended, and, if so, whether Rule 107 would overcome the State's hearsay objection.[24]

2) Past Sexual Behavior with Appellant. Second, Celine's text message might well refer to previous sexual behavior between C.W. and Appellant, as the court of appeals found to be "potentially" the case. Indeed, "wrap it up this time" could conceivably constitute an advisory to C.W. that she be sure to make Appellant wear a condom if she has sex with him *again*. This would be consistent with Appellant's claim that they had engaged in some sexual conduct in the past. But it would conflict with C.W.'s claim that she had always resisted Appellant's sexual advances in the past. If this interpretation holds, then the court of appeals may be correct that Appellant has satisfied Rule 412(b)(2)(B)'s initial criteria of admission of specific-past-sexual-behavior evidence. The text messages might serve to corroborate Appellant's claim that he had prior sexual relations with C.W., which would have some relevance to the question of whether their undisputed sexual encounter on the night of the offense was consensual. The question for the trial court would then become whether Appellant also demonstrated a level of probative value that outweighs the danger of unfair prejudice, under Rule 412(b)(3).

3) Past Sexual Behavior with a Third Party. Third, Celine's text message could just

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[24] The trial court might also have been called on to determine whether the evidence, though not governed by Rule 412, was nevertheless subject to Rule 403's balancing test, and possibly more prejudicial than probative under that provision. *See* note 26, *post*.

as well be construed to be an allusion to past sexual encounters between C.W. and some other consenting partner, not Appellant, in which she had neglected to use protection. In that event, even though the sexual behavior with someone other than Appellant might have been consensual, any evidence of that past sexual behavior would fail to satisfy Rule 412(b)(2)(B), and would be absolutely inadmissible under the terms of Rule 412(a)(2).[25] Under this interpretation, the trial court would not have to resort to Rule 412(b)(3)'s explicit requirement that probativeness must outweigh prejudice in order to declare the evidence inadmissible. Rule 412(a)(2) automatically presumes that the evidence is more prejudicial (at least to the victim) than probative—as a matter of law.

The proponent of challenged evidence generally has the burden of establishing its admissibility, by a preponderance of the evidence. *Vinson v. State*, 252 S.W.3d 336, 340 & n.14 (Tex. Crim. App. 2008). In the context of this case, that means it was Appellant who was required to shoulder the burden to demonstrate the admissibility of the pre-sexual-assault text-message evidence despite Rule 412's general rule of exclusion. It was his obligation to establish that Celine's text message related to past sexual behavior between himself and C.W., that it was probative on the issue of consent by C.W. on the occasion of the alleged sexual assault, and that it was more probative than unfairly prejudicial. Because the burden

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[25] This assumes, of course, that Appellant would be unable to establish any of the *other* exceptions under Rule 412(b)(2)—that the evidence he proffers "is necessary to rebut or explain scientific or medical evidence" offered by the State, "relates to the victim's motive or bias[,]" "is admissible under Rule 609[,]" or "is constitutionally required to be admitted[.]" TEX. R. EVID. 412(b)(2)(A), (C), (D) and (E), respectively. He made no attempt to do so in this case. *See* note 19, *ante*.

was his, any ambiguity in the evidence must operate to his detriment.

Here, the trial court would have been justified in determining that the pre-sexual-assault text-message evidence was inadmissible because it *could* have referred to past sexual behavior between C.W. and someone other than Appellant, in which case it would have been inadmissible under Rule 412(a)(2). Alternatively, the trial court could have found that, even though the evidence "potentially" related to a prior sexual encounter between C.W. and Appellant, it was not shown to have been probative on the issue of consent, or even to have been more probative than prejudicial. Indeed, one thing that might have led the trial court to conclude that the evidence was unfairly prejudicial is that, given the ambiguity of Celine's text message ("wrap it up this time!!"), a jury might yet have inferred that it alluded to a sex partner other than Appellant. Also, even if the trial court concluded that the evidence did relate to previous sexual behavior between C.W. and Appellant, and that it was therefore relevant to the issue of consent, it did not serve to clearly elucidate what C.W. meant, later in the text-message conversation, when she said that Appellant had raped her "basically," and that, consequently, its probative value was marginal at best. In that event, the trial court reasonably could have determined that Appellant failed to rebut Rule 412(b)(3)'s general presumption of unfair prejudice by a preponderance of the evidence, and excluded it on that basis.[26] Such a ruling would not have been beyond the zone of reasonable disagreement.

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[26] As for the general issue of consent, it is true that the text-message conversation seemed to indicate knowledge on C.W.'s part that Appellant would likely attempt to have sexual relations with her again, and yet she went with him anyway. But the text messages also depicted a continued determination on her part to resist his advances. For this reason, as well, the probative value of the

Absence of a Limited Proffer

Finally, as I have already observed, the part of the text-message conversation that was subject to exclusion pursuant to Rule 412 was less than the entire three pages of Court's Exhibit One that were excluded by the trial court. There were indeed parts of that text-message conversation that were not subject to exclusion pursuant to Rule 412 because they had no tendency to relate to possible past instances of C.W.'s sexual conduct. If I were to examine the propriety of the exclusion of those other parts of the text-message conversations alone, I might well conclude that exclusion of those other parts would have been an abuse of discretion by the trial court.[27] But Appellant made no offer of proof in which he proposed to introduce all of the first three pages, or selected parts, of the text-message conversation *not including* the text that arguably referred to CW's past sexual behavior, *i.e.*, "Okay be careful, wrap it up this time."

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evidence to bolster Appellant's claim of consent was, the trial court could have found, also marginal. Even if the danger of unfair prejudice to C.W. from the text messages was minimal, the trial court might still have found it outweighed the probative value. Indeed, even had the trial court determined that Rule 412 did not apply at all, it might still have ruled that the probative value with respect to the issue of consent was outweighed by the danger of unfair prejudice, as a function of Rule 403. *See Henley v. State*, 493 S.W.3d 77, 93 (Tex. Crim. App. 2016) (applying the "correct-on-any-theory-of-law-applicable-to-the-case" principle to hold the trial court could have excluded evidence, assuming it was relevant, because it was more prejudicial than probative under Rule 403).

[27] The second sentence of Rule 107 permits the introduction of an "other . . . conversation . . . that is necessary to . . . allow the trier of fact to fully understand the part offered by the opponent." TEX. R. EVID. 107. *See also* Cathy Cochran, TEXAS RULES OF EVIDENCE HANDBOOK 94 (6th ed. 2006) ("The second sentence of the rule permits the introduction of other types of evidence to clarify the opponent's evidence."). To the extent that the earlier text messages suggest that C.W. was aware of Appellant's likely desire to have sex with (*i.e.*, "hit") her, their admission may well be "necessary . . . to allow the jury to fully understand" what she really meant when she later used the qualifier "basically" in her assertion that Appellant "just raped me basically."

We have held that, "[w]hen a trial judge is presented with a proffer of evidence containing both admissible and inadmissible statements and the proponent of the evidence fails to segregate and specifically offer the admissible statements, the trial court may properly exclude all of the statements." *Willover v. State*, 70 S.W.3d 841, 847 (Tex. Crim. App. 2002). In the course of the in-camera Rule 412 hearing, Appellant insisted repeatedly that he wanted to offer the *entire* text-message conversation, and never offered to segregate out the "wrap it up this time" remark—indeed, he insisted that the whole conversation be admitted, specifically *including* that remark. Because the only proffer by the defense concerning the text messages at issue in this case contained references to potential past sexual conduct by C.W. that the trial court did not abuse its discretion to exclude pursuant to Rule 412, the trial court also did not abuse its discretion to exclude the entire first three pages of Court's Exhibit One.

CONCLUSION

For these reasons, I would hold that the court of appeals erred in concluding that the trial court abused its discretion to exclude the evidence under Rule 412. On that basis, I concur in the plurality's judgment reversing the judgment of the court of appeals and remanding the cause for disposition of Appellant's remaining points of error.

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