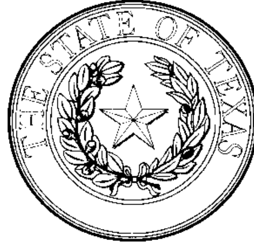
Opinion issued July 23, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00773-CR

JEREMY COLLINS COLLMORGEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 506th District Court
Waller County, Texas
Trial Court Case No. 15-12-15478

MEMORANDUM OPINION

A jury found appellant, Jeremy Collins Collmorgen, guilty of two counts (Count I and Count III) of aggravated sexual assault of a child and assessed appellant's punishment at life imprisonment on both counts, with the sentences to run concurrently, and a $10,000 fine on Count III. In two points of error, appellant

contends that (1) the trial court erred in allowing the admission of unadjudicated extraneous offenses without proper notice from the State and (2) the evidence is legally insufficient to support the jury's finding that he committed aggravated sexual assault of a child. We affirm.

Background

On December 11, 2015, a grand jury indicted appellant on three counts of aggravated sexual assault of a child. Following voir dire, but prior to presentment of the indictment, the State abandoned Count II of the indictment. Appellant pleaded not guilty to Counts I and III.

Maxwell, the complainant, was born on November 4, 2007.[1] Maxwell's mother, Melinda, began dating appellant while Maxwell was still an infant. In September 2012, Melinda and Maxwell moved in with appellant and appellant's parents.

On August 3, 2013, police responded to a report of a domestic disturbance involving appellant and Melinda. Melinda asked her friend, Jessica Turner, if she and Maxwell could stay with her. Child Protective Services ("CPS") subsequently

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[1] To protect the child victim's privacy, we have used pseudonyms to refer to him and his family members. *See* TEX. R. APP. P. 9.10(a)(3); *see also* TEX. CONST. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

placed five-year old Maxwell in Turner's care while Melinda entered a rehabilitation program to seek treatment for drug addiction.

On November 5, 2013, while passing by her daughter's room, Turner heard Maxwell ask her daughter to show him her panties. Turner testified that she called Maxwell into the living room and asked him why he had asked her daughter that question and where he had learned it from. Maxwell replied, "Jeremy showed me." Turner testified that Maxwell became upset, began to cry, and dropped his head in embarrassment. Turner assured him that it was not his fault and that he was not in trouble. Turner stated that Maxwell said he was four years old when these incidents occurred, and that they occurred on multiple occasions. Maxwell told Turner that appellant pulled his own pants down and wiggled himself in front of Maxwell. Maxwell also told Turner that appellant touched Maxwell's genitals, penetrated his anus with a fork, and inserted a twisted piece of paper into his anus. Maxwell told Turner that appellant showed him pictures of naked men and women in a magazine. Maxwell also told Turner that appellant told him "don't tell your mother," and that when Maxwell tried to tell his mother about the abuse, she "wouldn't listen." Turner called CPS and law enforcement that same day.

On November 5, 2013, Deputy Bryan Mace with the Waller County Sheriff's Department talked with Turner. Based on the information Turner provided, Deputy

Mace subsequently interviewed Turner at her home and obtained a written statement from her. He referred the case to his department for further investigation.

Sergeant Sharlonda Rutledge, an investigator with the Waller County Sheriff's Office, was assigned to continue the investigation. After reviewing Turner's written statement, Rutledge scheduled a forensic interview of Maxwell.

On November 25, 2013, Maxwell was interviewed by Belkis Gonzalez, a forensic interviewer at the Fort Bend Children's Advocacy Center ("CAC") in Richmond, Texas. Rutledge watched the forensic interview via closed circuit television. At trial, which commenced on August 20, 2018, Rutledge testified that Maxwell disclosed to Gonzalez multiple acts of sexual abuse that occurred on multiple occasions beginning when he was five years old. Maxwell identified appellant as his abuser and stated that the abuse occurred inside and outside appellant's residence.

Gonzalez testified that Maxwell demonstrated that he understood the difference between telling the truth and telling a lie and that he promised to be truthful in the interview. Gonzalez used anatomical drawings of a boy's body to help Maxwell describe what happened to him. Maxwell drew pictures of the item "Jeremy put in [Maxwell's] butt" and of what Maxwell referred to as "butt and pee pee." Gonzalez testified that Maxwell made red markings on the anatomical diagram of the boy's body between the cheeks of the buttocks to indicate that he was touched

"in" the butt. Gonzalez further testified that Maxwell drew a red circle around the penis of the child depicted in the drawing to indicate what he meant when he referred to being touched on his "private." On cross-examination, defense counsel asked Gonzalez whether a child who is scared of a caretaker might tell Gonzalez things in order to please the caretaker. Gonzalez acknowledged that children lie but stated that she asks questions that allow them to tell their own story. When asked whether she believed that a child could hear a story so often that the child actually believes it, Gonzalez stated that it was possible. Maxwell's drawings and a video recording of his forensic interview were admitted into evidence without objection.

Rutledge interviewed Melinda on December 12, 2013. Melinda told Rutledge that she and Maxwell had lived with appellant until August 2013, and that Maxwell and appellant had a good relationship. Melinda also told Rutledge that appellant took care of Maxwell when Melinda went to work. Rutledge testified that Melinda admitted using cocaine and methamphetamine during the time period when she and Maxwell lived with appellant. Melinda told Rutledge that she frequently went in search of drugs, she was often gone for two to three hours, and appellant took care of Maxwell during her "drug runs."

On December 14, 2013, Rutledge called appellant and told him that she needed to speak to him regarding a criminal complaint made against him. On

February 25, 2014, Rutledge interviewed appellant and told him about Maxwell's sexual abuse allegations against him. Appellant denied the allegations.

Following his forensic interview, Maxwell began seeing a therapist. Turner testified that while Maxwell was in therapy, she found pictures that Maxwell had drawn of "males and females and their genitals" and that "he was trying to draw them having sex together." Turner testified that Maxwell became angry and destructive after his disclosure of sexual abuse. Maxwell's behavior in Turner's home became increasingly disruptive and, as a result, Maxwell went to live with his maternal grandmother.

The State called Maxwell to testify. Maxwell stated that he viewed the video of his forensic interview the week before trial and that he told the truth during the interview. He stated that he recalled seeing the portion of the video where he told Gonzalez that appellant had touched his "private" and touched him "back here." Using an anatomically correct doll, Maxwell indicated that when he told Gonzalez that appellant touched his private, he was referring to his penis, and when he told her that appellant touched his back, he was referring to his butt.

Maxwell also recalled telling Gonzalez that appellant put "the things you pick up a steak with" in [his] butt" and that "it hurt." Maxwell remembered telling Gonzalez that appellant penetrated his anus on more than one occasion with the handle of a butter knife and that it caused him "very large amounts of pain" and

bleeding. Maxwell identified the anatomical drawings that he had colored in the forensic interview to indicate that appellant had put the tongs and butter knife "in his butt." Maxwell testified that appellant put his mouth on Maxwell's "private part," and he remembered feeling appellant's teeth. Maxwell identified the drawing where he had circled the penis to indicate where appellant placed his mouth.

Maxwell testified that Melinda witnessed appellant's sexual abuse of him and that he also told her about the incidents of abuse. Maxwell stated that his mother's response was to tell appellant "quit it" or to do nothing about it. When Maxwell told appellant to stop, appellant "said a lot of cuss words to me like the f word." Maxwell identified appellant at trial as the same person who placed his hands and mouth on his genitals and penetrated his anus with tongs and a butter knife.

Fiona Remko, Director of Fort Bend County CAC, testified about the procedures and protocols employed in conducting forensic interviews of children. Remko stated that a child's disclosure of sexual abuse can be purposeful or accidental. When asked whether a child who makes a concerning or inappropriate statement that is overheard by an adult is making an accidental disclosure, Remko replied, "[t]hat is the definition, pretty much, of accidental disclosure." Remko also explained the phenomenon of "script memory." She stated that a child who has been abused on multiple occasions has difficulty isolating a single abusive event. Rather, she stated, the memories of the abuse get jumbled in the child's mind making it

extremely unlikely that the child is going to be able to disclose the abusive events in a linear manner. Remko stated that children do not have perfect recall of traumatic events because trauma negatively affects the ability to remember.

On cross-examination, defense counsel asked Remko whether she had ever interviewed a young child who had been coached what to say. Remko testified that she has experienced situations in which a child had been coached but stated that it normally happened with teenagers, not young children. Remko testified that a forensic interviewer can usually spot a child who has been coached because the disclosure of abuse is lacking in detailed, specific information. She further testified that it is "incredibly difficult" for a child to maintain a detailed lie about abuse over time. Defense counsel asked Remko whether it was possible for a child to lie about sexual abuse because the child is afraid of the caregiver or wanted to please the caregiver, and about the length of time it takes for a child who has been repeatedly told something before the child believes it to be the truth. When asked whether she was aware of any studies that had examined whether a child can form a memory about something that they have been told but that did not actually happen, Remko testified that she was not aware of any specific studies.

On re-direct examination, Remko discussed markers or indicators of a child's truthfulness during a forensic interview. She testified that a child who has experienced sexual abuse will be able to describe what it felt like as opposed to a

child who has been coached to say someone touched him. Remko stated that, developmentally speaking, a child Maxwell's age should not have a concept of either oral sex or anal penetration, and that, if he does, it is normally indicative of having experienced something like that himself. Following Remko's testimony, the State rested its case-in-chief.

The defense called appellant's mother, Carolyn Collmorgen, as a witness. Carolyn testified that Maxwell and Melinda began living with appellant in September 2012. She testified that Maxwell called her "Meemaw" and her husband "Pawpaw," and that he called appellant "Daddy." She testified that, on several occasions, Melinda left for days without taking Maxwell with her and that appellant cared for Maxwell during her absence as well as when Melinda was working. Carolyn testified that appellant and Maxwell had a loving relationship and that she never witnessed appellant act inappropriately toward Maxwell. Following Carolyn's testimony, the defense rested.

The State informed the trial court that it wanted to call a rebuttal witness to present evidence of an unadjudicated extraneous offense involving appellant's abuse of a different child. In a hearing outside the presence of the jury, the prosecutor advised the court that it she was offering the extraneous offense evidence under Texas Rule of Evidence 404(b) and to rebut the defensive theory that Maxwell's disclosure of abuse was fabricated. Defense counsel objected to the evidence on the

grounds that permitting the testimony would violate the trial court's standard discovery order, the evidence was not substantially similar to the charged offense, and the probative value of the evidence was substantially outweighed by its prejudicial effect. The prosecutor responded that there was no discovery order in the case. The prosecutor also noted that the State had provided written notice of the proposed extraneous offenses fourteen days before trial, and that defense counsel had actual notice of the extraneous offenses because they were detailed in the offense reports entered into the District Attorney's Office's online discovery management system in April 2016, more than two years before trial. The trial court overruled defense counsel's objections to the extraneous offense evidence, finding that the State had provided reasonable notice before trial of such evidence and that there were substantial similarities between the charged offense and the proffered extraneous offense evidence. At defense counsel's request, the trial court agreed to give a limiting instruction to the jury regarding the extraneous offense evidence.

The State called Kaitlyn as a rebuttal witness. Kaitlyn, who was twenty-four years old at the time of trial, testified that appellant is her stepfather's brother. In 1999, when Kaitlyn was six years old, she lived on the Collmorgen property with her parents, Jordan, her brother who was eight or nine years old, and a younger sibling. Appellant lived on the same property during this time period.

Kaitlyn testified that appellant touched her inappropriately on multiple occasions when she was six years old. She testified that, on one occasion, appellant called her over and asked for a hug. Appellant put Kaitlyn in his lap, reached underneath her nightgown, and touched her vagina and buttocks with his hand. Kaitlyn also testified that she saw appellant touch Jordan inappropriately, and that while walking past Jordan's bedroom, she saw appellant touch Jordan's genital area with his hand. Kaitlyn testified that appellant told her not to tell her mommy or daddy because appellant would go to jail. Kaitlyn immediately told her parents what had happened.

The jury found appellant guilty of the charged offense. Following the punishment phase, the jury assessed appellant's sentence at life imprisonment on Counts I and III, to run concurrently, and a $10,000 fine as to Count III. This appeal followed.

Sufficiency of the Evidence

In his second point of error, appellant contends that the evidence is legally insufficient to support his conviction for aggravated sexual assault of Maxwell as alleged in the indictment. We address this issue first because it seeks the greatest relief. See *Finley v. State*, 529 S.W.3d 198, 202 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (internal citation omitted) (noting reviewing court will first address

issues that, if sustained, require reversal and rendition of judgment, before turning to issues seeking remand).

A. Standard of Review

We review appellant's challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We examine all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318–19; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). An appellate court determines "whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). In viewing the record, direct and circumstantial evidence are treated equally. *Id.* at 13. An appellate court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326.

B. Applicable Law

The statute criminalizing aggravated sexual assault of a child sets forth several distinct offenses. *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999). A person may commit an aggravated sexual assault of a child in several ways, including by intentionally or knowingly (1) causing the penetration of the anus or sexual organ of a child by any means or (2) causing the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor, if the child is younger than 14 years of age, regardless of whether the person knew the child's age. *See* TEX. PENAL CODE § 22.021(a)(1)(B), (a)(2)(B); *Prestiano v. State*, 581 S.W.3d 935, 941 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd). Here, Counts 1 and III of the indictment alleged that appellant did intentionally and knowingly "cause the sexual organ of [Maxwell], a child younger than six years of age, to contact or penetrate the mouth of [appellant]" and "cause the penetration of the anus of [Maxwell] . . . with an unknown object."

C. Analysis

At trial, Maxwell testified that he knew the difference between telling the truth and telling a lie and he promised to answer truthfully the questions asked of him. He acknowledged that he viewed the video of his forensic interview a week prior to trial and that he told the truth during the interview. Maxwell identified the "middle of his body" and his butt as private body parts that no one should touch. He recalled

seeing the portion of the video where he told Gonzalez that appellant had touched his "private" and touched him "back here." Using an anatomically correct doll, Maxwell indicated that when he told Gonzalez that appellant touched his private, he was referring to his penis, and when he told her that appellant touched his back, he was referring to his butt. Maxwell recalled telling Gonzalez that appellant put "the things you pick up a steak with in [his] butt" and that "it hurt." Maxwell also remembered telling Gonzalez that appellant penetrated his anus on more than one occasion with the handle of a butter knife, and he described the acts of penetration as causing him "very large amounts of pain" and bleeding. Maxwell identified the anatomical drawings that he had colored to indicate that appellant had put the tongs and butter knife "in his butt." Maxwell testified that appellant put his mouth on Maxwell's "private part" and he remembered feeling appellant's teeth. Maxwell identified the drawing where he had circled the penis to indicate where appellant placed his mouth.

Appellant argues that the evidence is insufficient because Maxwell is the only source of the allegations against him and none of the State's witnesses saw appellant sexually assault Maxwell. A child sexual assault complainant's uncorroborated testimony, standing alone, is sufficient to support a defendant's conviction. *See* TEX. CODE CRIM. PROC. art. 38.07 (stating conviction for sexual assault is supportable on uncorroborated testimony of victim if victim informed any person, other than

defendant, of offense within year, but requirement does not apply if at time of alleged offense victim was person seventeen years of age or younger); *Martinez v. State*, 178 S.W.3.d 806, 814 (Tex. Crim. App. 2005); *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Thus, Maxwell's testimony alone was sufficient to support appellant's conviction. *See* TEX. CODE CRIM. PROC. art. 38.07(b)(1); *Gonzales v. State*, 522 S.W.3d 48, 57 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (uncorroborated testimony of child victim alone was sufficient to support conviction of aggravated sexual assault of child); *Johnson v. State*, 419 S.W.3d 665, 671–72 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (same). Further, the State has no burden to produce physical or other corroborating evidence; rather, the jury determines the credibility of the witnesses and may "believe all, some, or none of the testimony[.]" *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

However, Maxwell's testimony was corroborated by other evidence as well. Turner, the State's first outcry witness, testified that when she asked Maxwell whether appellant had touched his body, Maxwell gestured toward his genitals and anus.[2] Maxwell told her that appellant touched his genitals, penetrated his anus with

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[2] Article 38.072 of the Texas Code of Criminal Procedure allows the admission of a hearsay statement made to an outcry witness by certain abuse victims, including children under the age of fourteen who are victims of a sexual offense. *See* TEX. CODE CRIM. PROC. art. 38.072.

a fork, and inserted a twisted piece of paper into his anus. Turner stated that Maxwell told her that the sexual abuse occurred on multiple occasions. Gonzalez, the State's second outcry witness, identified and authenticated the video recording of her forensic interview of Maxwell, the anatomical drawings she used during the interview, and a copy of the drawings Maxwell made of the items appellant "put in his butt"" and of what Maxwell referred to as "butt and pee pee." The recording was admitted into evidence and published in its entirety to the jury. Gonzalez testified that Maxwell made red markings on the anatomical diagram of the boy's body between the cheeks of the buttocks to indicate that he was touched "in" the butt. She testified that Maxwell also drew a red circle around the penis of the child depicted in the drawing to indicate what he meant when he referred to being touched on his "private."

Based on the evidence presented, and viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could have found beyond a reasonable doubt that appellant committed the offense of aggravated assault of a child as alleged in the indictment. *See Gonzales*, 522 S.W.3d at 57. We overrule appellant's second point of error.

Admissibility of Evidence of Extraneous Offense

In his first point of error, appellant contends that the trial court erred in admitting Kaitlyn's testimony without proper notice from the State.

A. Standard of Review and Applicable Law

We review 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. *Id.* If the trial court's decision to admit or exclude evidence is correct under any theory of law applicable to the case, it must be upheld. *See Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007).

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) (emphasis omitted). In general, extraneous offense evidence may not be admitted "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1); *Batiste v. State*, 217 S.W.3d 74, 84 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Rule of Evidence 404(b)(2) provides that "[o]n timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief." ned that "upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction." TEX. R. EVID. 404(b)(2).

As a general rule, the State is entitled to present on rebuttal any evidence that tends to refute a defensive theory and the evidence introduced to support that theory. *See Flannery v. State*, 676 S.W.2d 369, 370 (Tex. Crim. App. 1984); *Davis v. State*, 979 S.W.2d 863, 867 (Tex. App.—Beaumont 1998, no pet.). The possibility that such rebuttal evidence may encompass extraneous offenses or acts on the part of the defendant does not preclude its admission into evidence. *Yohey v. State*, 801 S.W.2d 232, 236 (Tex. App.—San Antonio 1990, pet. ref'd).

Article 38.37 of the Texas Code of Criminal Procedure acts as an exception to Rule 404(b) for certain crimes against children. Article 38.37 provides:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2–a, evidence that the defendant has committed a separate offense described by subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

TEX. CODE CRIM. PROC. art. 38.37, § 2(b). Section 3 provides that "[t]he state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial." *Id.* art. 38.37, § 3.

B. Analysis

Appellant argues that the trial court erred in allowing Kaitlyn to testify regarding an unadjudicated extraneous offense because the State failed to provide

him with thirty days' notice of its intent to introduce the evidence as required under Texas Code of Criminal Procedure article 38.37 § 3.

The State sought to introduce Kaitlyn's extraneous offense testimony under Rule 404(b) in its rebuttal case and not pursuant to Code of Criminal Procedure article 38.37. After both sides rested, and outside the presence of the jury, the prosecutor made a proffer of Kaitlyn's anticipated testimony and argued that the State intended to offer the evidence under Rule 404(b) and to rebut the defensive theory that Maxwell's disclosure of abuse was fabricated. The record shows that, on cross-examination, defense counsel asked Gonzalez whether a child who is scared of a caretaker might tell Gonzalez things in order to please the caretaker and whether Gonzalez believed that a child could hear a story often enough that he actually believes it is true. Similarly, defense counsel asked Remko whether she had ever had a young child coached about what to say in a forensic interview. She also asked Remko whether it was possible for a child to lie about sexual abuse because the child is afraid of the caregiver or wanted to please the caregiver, and about the length of time it takes for a child who has been repeatedly told something before the child believes it is the truth. Because defense counsel's questions to Gonzalez and Remko raised the defensive theory of fabrication, the State was entitled to rebut that theory even if the statement included extraneous acts or offenses. *See Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980). Thus appellant was not entitled to thirty

days' notice of the State's intent to introduce the extraneous offense evidence under article 38.37.[3]

Appellant also contends that the lack of proper notice affected his trial strategy and prevented him from mounting a proper defense. He argues that the State sought to introduce evidence that appellant sexually assaulted Kaitlyn and Jordan in 1999 when Kaitlyn was six years old. He further argues that, in her meeting with Kaitlyn before trial, the assistant district attorney learned that Kaitlyn also claimed to have been molested by appellant between the ages of twelve and fourteen. He argues that the State's written notice and amended notice, filed only fourteen days and twelve days before trial, respectively, deprived him of the opportunity to subpoena CPS records to investigate Kaitlyn's allegations and to develop a defense.

The record shows that, on August 6, 2018, the State provided written notice of its intention to introduce the extraneous offenses Kaitlyn testified about at trial. The notice provided to appellant corresponded to discovery information that had been uploaded to the District Attorney's Office's online discovery management system more than a year before trial began. Specifically, it detailed appellant's abuse

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[3] Further, we note that article 38.37 requires the State to provide thirty days' notice of its intent to introduce extraneous offense evidence in its *case-in-chief*. *See* TEX. CODE CRIM. PROC. art. 38.37, § 3 (emphasis added). Here, it is undisputed that the State offered Kaitlyn's testimony after both sides rested and specifically to rebut the defensive theory of fabrication.

of Kaitlyn when she was six years old and of Jordan when he was eight or nine years old. There was no need for defense counsel to issue a subpoena for records that the State had already provided her.

Appellant also complains that the State's lack of notice related to Kaitlyn's allegations that appellant abused her when she was between twelve and fourteen years of age deprived him of the chance to subpoena records from CPS for the period of time Kaitlyn was in CPS care from the age of sixteen. However, during the punishment phase, Kaitlyn, who was twenty-four years old at the time of trial, testified that she never disclosed appellant's abuse of her when she was between twelve and fourteen years old until she met the prosecutor in preparation to testify. Thus, there were no CPS records to subpoena related to these abuse allegations. Importantly, we also note that Kaitlyn did not testify in the guilt-innocence phase about appellant's abuse of her when she was between twelve and fourteen years old.

In sum, we conclude that the State was not required to provide thirty days' notice under Code of Criminal Procedure article 38.37 of its intent to introduce extraneous offense evidence because the State offered the evidence to rebut the defensive theory of fabrication and not in its case-in-chief. The State provided notice fourteen and twelve days before trial and defense counsel could have subpoenaed CPS but elected not to do so. Further, the State had already provided defense counsel with copies of Kaitlyn's CPS records related to her abuse at the age of six and, thus,

there was no need to subpoena those records. With regard to the allegations related to appellant's abuse of Kaitlyn when she was between twelve and fourteen years old, no CPS records exist because Kaitlyn did not disclose the abuse until shortly before trial. Finally, the record shows that Kaitlyn did not testify about these later abuse allegations in the guilt-innocence phase of trial. Therefore, the trial court did not abuse its discretion in admitting the extraneous offense evidence in the State's rebuttal case. *See Winegarner*, 235 S.W.3d at 790. Accordingly, we overrule appellant first point of error.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).