

AFFIRMED as MODIFIED and Opinion Filed July 1, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00623-CR

No. 05-19-00624-CR

ENRIQUE PERALTA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1875329-S and F-1875330-S**

MEMORANDUM OPINION

**Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Osborne**

Enrique Peralta appeals the trial court's judgments convicting him of aggravated sexual assault of a child younger than fourteen years of age and sexual assault of a child younger than seventeen years of age.¹ The jury found him guilty of both offenses and assessed his punishment at forty years of imprisonment for the aggravated sexual assault of a child offense and twenty years of imprisonment for

¹ Peralta was tried jointly with Quonsha Murphy. *See Murphy v. State*, No. 05-19-00423-CR (Tex. App.—Dallas July 1, 2020 no pet. h.) (mem. op.). While the parties have separate appeals with different legal arguments, these appeals involve the same facts and, for the most part, share a reporter's record.

the sexual assault of a child offense. Peralta raises two issues on appeal arguing: (1) the trial court erred when it denied his motion to introduce evidence of the victim's past sexual conduct; and (2) the trial court's judgment should be modified to delete the language ordering that his sentences be cumulated. We conclude the trial court did not err and the judgment should be modified. The trial court's judgment is affirmed, as modified.

I. FACTUAL AND PROCEURAL BACKGROUND

The victim lived in a small three-bedroom house with Quonsha Murphy, her mother, and Peralta as well as her younger half-sister, Peralta's two sons, and for a time, Peralta's daughter and granddaughter. Murphy worked outside of the home and Peralta stayed at home and received disability checks due to injuries sustained in an automobile accident. On weekends, the victim would be left at home with Peralta while the other children visited with their noncustodial parent or went out with friends.

Peralta sexually assaulted Murphy's daughter, the victim, over several years. The sexual assaults began when the victim was in the middle of the sixth grade and continued until she was fifteen years old and in high school. She described the sexual assaults as painful. The victim said that usually, Peralta used a condom and assaulted her when no one else was home or her younger half-sister was in the shower. The victim did not tell Murphy about the sexual assaults. However, Peralta told the victim that Murphy knew he had been having sex with the victim and that

Murphy was okay with it. The victim related that at one point she had a burning rash in her genital area. She said that Peralta asked her if she thought it was because they had sex and when Murphy took her to the doctor, Peralta gave Murphy instructions not to tell the doctor there was a man in the house.

The victim also told of a time when Murphy and Peralta went “partying” or dancing, drinking, and talking with their friends. When they returned, it was dark outside and the victim, who was drawing in her bedroom, heard the metal door clank shut. The victim stated that the metal door to the house makes a rumbling noise and vibrates when it closes. Then, the victim heard Murphy and Peralta having sex in their bedroom. Right after the victim heard them stop, Murphy appeared completely naked in the doorway to the victim’s bedroom and told the victim that “whatever [Peralta] says goes.” The victim understood this to mean that Murphy knew Peralta was sexually assaulting her. Right after Murphy left the doorway, Peralta came to the victim’s bedroom, told the victim “your mom’s okay with it,” turned out the lights, instructed her to take off her clothes, and proceeded to sexually assault her “rough[ly]” while moaning loudly. According to the victim, Peralta was moaning loud enough for Murphy to hear that he was having sex with her. The victim also stated that she did not hear Murphy leave the house during this sexual assault because she did not hear the dogs bark, the metal door to the house clang shut, or Murphy’s car “crank.”

At school, two teacher's assistants became concerned that the victim might be suffering sexual abuse. In particular, they noticed her hair was unkept, she had a body odor they associated with women not cleaning themselves, and they saw her walk "tightly" on one occasion. When one of the teacher's assistants asked the victim whether someone was "messaging with her," the victim looked down and started crying but did not say anything. One day, the victim, who was fifteen years old at the time, told these teacher's assistants that she was being sexually assaulted. As a result, the victim was taken to the Children's Advocacy Center for a forensic interview at approximately 12:30 p.m. Police officers were sent to the victim's house and they tried to contact Peralta by phone but were not able to reach him.

The school's resource officer called Murphy at work and gave her a little bit of information as to what was going on but not everything. After receiving the call from the resource officer, Murphy left work as soon as someone was able to replace her. Murphy called Peralta and then took public transportation to the victim's school where she met with the school counselor. During that time, she received a call from Ivannia Frias, an investigator for the Department of Family Protective Services. Eventually, Peralta picked Murphy up at the victim's school. The victim's younger half-sister stated that, after Murphy received the phone call about the victim, Murphy and Peralta picked her and Peralta's children up from school before dismissal time. She stated that Murphy's phone was ringing repeatedly but Murphy did not answer it every time. When Murphy did answer the phone, Peralta gave Murphy

instructions on what to say. According to the victim's half-sister, they drove to Peralta's mother's house where they stayed for a "long time" and, while there, Murphy received a phone call about the victim. Then, Murphy drove with her younger daughter to their house, but when Murphy saw the police she decided to "go another way."

Frias tried to reach Murphy approximately thirty times starting around 12:30 p.m., but her calls were being sent directly to Murphy's voicemail. However, at one point, Murphy answered Frias's call. Frias told Murphy that her child was at the advocacy center and needed her mother. In response, Murphy told Frias that "[she] could keep her. [Murphy] didn't want her."

Approximately six hours after speaking with Frias, Murphy and the victim's half-sister arrived at the child advocacy center. According to Frias and Sergeant Chris Adams of the Dallas Police Department, Murphy was very defensive, and she was concerned about and supportive of Peralta. Frias stated that Murphy did not ask any questions about the victim. The victim and her half-sister were removed from the home and, with Murphy's consent, placed with Murphy's estranged mother. The police also spoke to Peralta at approximately 8:00 p.m. and he stated that "he wasn't coming in." However, Peralta eventually met with the police a few days later and was arrested.

A few days after the victim's outcry, Suzanne Dakil, M.D., performed a forensic examination of the victim which revealed transection injuries or tearing to

her vagina consistent with multiple penetrative acts. The victim also had a bacterial infection that can cause a “fishy” odor and is often associated with sexual activity.

Peralta was indicted for three sexual assault offenses: one charge for aggravated sexual assault of a child younger than fourteen years of age and two charges for sexual assault of a child younger than seventeen years of age. Murphy was indicted for the offense of sexual assault of a child as a party to the offense. Peralta and Murphy were tried jointly and both testified at the trial. The jury found Peralta guilty of the aggravated sexual assault charge and one of the sexual assault charges. It acquitted Peralta of the second sexual assault charge. The jury also found Murphy guilty. The jury assessed Peralta’s punishment at forty years of imprisonment for the aggravated sexual assault of a child offense and twenty years of imprisonment in the sexual assault of a child case.

II. ADMISSION OF EVIDENCE

In his first issue on appeal, Peralta argues the trial court erred when it denied his request to introduce evidence of the victim’s past sexual conduct. He claims the trial court should have allowed testimonial evidence that the victim possessed an unopened condom in her backpack and that Peralta and Murphy did not use condoms. Peralta contends that this evidence was probative of his innocence because it suggested another possible source of the physical evidence of multiple penetrations and “scarring” of the victim’s genitals. And, it rebutted the victim’s testimony that she did not have sexual relations with anyone other than Peralta who

she stated used a condom during the assaults. Peralta maintains that “[a]ny prejudice to the victim of this evidence was minimal.” The State responds that the trial court did not err when it excluded Murphy’s testimony to this effect because the excluded evidence did not prove any instances of the victim’s past, specific sexual behavior and any probative value of the excluded evidence was outweighed by the danger of unfair prejudice.

A. Standard of Review

A trial court’s ruling under Texas Rule of Evidence 412 is reviewed for an abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). The trial court has wide discretion in determining relevant evidence under the rules of evidence. *See id.* at 910.

B. Applicable Law

Texas Rule of Evidence 412 is a “rape shield” law intended to shield a sexual-assault victim from the introduction of highly embarrassing, prejudicial, and irrelevant evidence of prior sexual behavior. *See* TEX. R. EVID. 412(a); *Johnson v. State*, 490 S.W.3d 895, 910 (Tex. Crim. App. 2016); *Boyle v. State*, 820 S.W.2d 122, 147–48 (Tex. Crim. App. 1989) (en banc) (op. on reh’g), *overruled on other grounds by Gordon v. State*, 801 S.W.2d 899, 911 n.13 (Tex. Crim. App. 1990). The admissibility of an alleged victim’s past sexual behavior is subject to a two-part test: (1) the evidence must fall within one of the five enumerated circumstances in rule

412(b)(2); and (2) its probative value must outweigh the danger of unfair prejudice. *See* EVID. 412(b)(2)-(3); *Johnson*, 490 S.W.3d at 910; *Boyle*, 820 S.W.2d at 148.

If the evidence of the victim's prior sexual behavior is not relevant, it is properly excluded. *See* EVID. 402, 412(a). Under rule 412(b)(2) the evidence must: (a) be necessary to rebut or explain scientific or medical evidence offered by the prosecutor; (b) concern past sexual behavior with the defendant and be offered by the defendant to prove consent; (c) relate to the victim's motive or bias; (d) be admissible under rule 609;² or (e) be constitutionally required to be admitted. *Id.* R. 412(b)(2). A trial court errs if it excludes defensive evidence that might offer an alternative explanation for the State's scientific or medical evidence that suggests the victim has been sexually assaulted. *Todd v. State*, 242 S.W.3d 126, 129 (Tex. App.—Texarkana 2007, pet. ref'd). However, the defendant's contrary evidence must directly address and clearly contradict the State's scientific or medical evidence. *Id.* at 129–30.

In addition to finding that the evidence falls within one of the five enumerated circumstances in Rule 412(b)(2), it must also be shown that the evidence is admissible pursuant to the balancing test required by Rule 412(b)(3). *See* EVID. 412(b)(3). Under rule 412(b)(3), the burden falls on the proponent of the evidence to show that the probative value of the evidence outweighs the unfair prejudice. *See*

² Rule 609 relates to the admissibility of impeachment by evidence of a criminal conviction. EVID. 609.

id. at R. 412(b)(3). The function of the balancing test of Rule 412(b)(3) is generally consistent with that of Rule 403. *Compare* EVID. 403 *with* EVID. 412(b)(3); *see also* *Robisheaux v. State*, 483 S.W.3d 205, 223–24 (Tex. App.—Austin 2016, pet. ref’d). However, unlike the general balancing test under Rule 403, which weighs in favor of the admissibility of evidence, the balancing test under rule 412(b)(3) weighs against the admissibility of evidence. *Compare* EVID. 403 *with* EVID. 412(b)(3); *see also* *Boyle*, 820 S.W.2d at 148 n.9; *Robisheaux*, 483 S.W.3d at 223–24.

C. Application of the Law to the Facts

At trial, Dr. Dakil testified that the victim had an abnormal sexual assault exam. She observed a “transection injury” resulting in “no hymen” on the posterior of the vaginal wall. With this type of injury, the hymen tissue is “cut all the way to the base . . . [and] typically does not heal” and “ends up being sort of a permanent scarred cut.” Dr. Dakil stated this type of injury is consistent with multiple penetrative acts and is considered a chronic injury. Although Dr. Dakil stated that the tearing to the victim’s hymen was consistent with repeated sexual abuse, she also stated that she did not know what caused those multiple penetrations. Also, Dr. Dakil found that the victim had bacterial vaginosis, which is “oftentimes seen in kids . . . that are sexually active . . . and it does result in [a fishy] odor.”

Peralta wanted to elicit testimony from Murphy that, about two weeks after the victim’s outcry, Murphy found an unopened condom in the victim’s backpack and that Peralta and Murphy did not use condoms. During the trial, a Rule 412

hearing was held to determine the admissibility of this testimony. Peralta argued this evidence was admissible under Rule 412(b)(2)(A) because it provided an alternative explanation for the medical findings by showing that the victim was sexually active with persons other than Peralta even though she testified that she had not had sex with anyone else. The State argued that evidence of an unopened condom in a child's backpack does not mean that the child is sexually active nor does it rebut the medical findings. Also, the State pointed out that Murphy's purported testimony was that she found the unopened condom in the victim's backpack two weeks after the victim's outcry, but the victim was removed from the home the day of her outcry, took her backpack to her grandmother's home, and never returned to Murphy and Peralta's home. Further, the State argued that the probative value of the evidence did not outweigh its unfair prejudice. The trial court ruled that the evidence was not admissible under Rule 412(b)(2)(A).

The excluded evidence of an unopened condom purportedly found in the victim's backpack after she had been removed from Murphy and Peralta's home does not bear a plausible link to the State's medical evidence. Peralta does not explain how this evidence rebuts or explains the scientific or medical evidence offered by the State. *See Todd*, 242 S.W.3d at 129–30 (defendant's contrary evidence must directly address and clearly contradict State's scientific or medical evidence). To the extent that Peralta contends it shows the victim was sexually active with someone else, which presumably he contends explains the multiple

penetrative acts, we disagree. An unopened condom purportedly found in the victim's backpack two weeks after she was removed from the home is not evidence of past sexual behavior with another. Nor does it provide evidence of "specific instances" of past sexual behavior. *See* EVID. 412(b). Similarly, the evidence that Peralta and Murphy did not use condoms when they had sex does not bear a plausible link to State's medical evidence. It simply does not rebut or explain the medical evidence. The alleged fact that Peralta and Murphy did not use condoms does not provide evidence of "specific instances" of past sexual behavior or contradict the victim's testimony that Peralta usually used a condom when he had sex with her.

We conclude Peralta has failed to directly address or clearly contradict the State's medical evidence and thereby overcome the high hurdle he faced in establishing the relevancy of the victim's alleged past sexual behavior. Also, we conclude that Peralta has failed to establish that the probative value of this excluded evidence outweighed any unfair prejudice to the victim that would have been caused by its admission. The trial court did not err when it denied Peralta's request to introduce evidence of the victim's past sexual conduct.

Issue one is decided against Peralta.

III. MODIFICATION OF THE JUDGMENT

In his second issue on appeal, Peralta argues the trial court's judgments should be modified to delete the incorrect cumulation order in the judgments because they do not accurately reflect the trial court's oral pronouncement. First, he contends that

the trial court ordered that the forty-year sentence in the aggravated sexual assault case run immediately followed by the twenty-year sentence in the sexual assault case. However, the judgments are in the reverse with the twenty-year sentence beginning immediately followed by the forty-year sentence. Second, Peralta argues the judgment in the sexual assault case does not contain a cumulation order. Peralta does not argue the trial court's decision to cumulate his sentences was improper.³ The State concedes that the cumulation orders are incorrect because they do not comport with the trial court's oral pronouncement. However, the State does not agree with Peralta's requested relief. Rather, the State contends that the cumulation orders should be modified to reflect the trial court's oral pronouncement.

After the jury assessed Peralta's punishment, the State requested that the trial court impose consecutive or cumulative sentences. The trial court held a hearing on the matter and granted the State's request. It ordered that the forty-year sentence in the aggravated sexual assault case would run first, followed by the twenty-year sentence in the sexual assault case. Both judgments state that Peralta's sentences will run consecutively. However, only the trial court's judgment in the aggravated sexual assault case contains a cumulation order. The judgment in the sexual assault case does not contain a cumulation order.

³ See TEX. PEN. CODE ANN. § 3.03(b)(2) (permitting trial court to order sentences to run consecutively when defendant convicted of an offense under § 22.011 or § 22.021 and the victim is a child younger than seventeen years of age).

An appellate court has the authority to modify an incorrect judgment to make the record speak the truth when it has the necessary information to do so. *See* R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (en banc); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). We conclude the trial court’s final judgments should be modified to include cumulation orders that correctly state the forty-year sentence in the aggravated sexual assault case will run first followed by the twenty-year sentence in the sexual assault case. *See* R. APP. P. 43.2(b); *Bigley*, 865 S.W.2d at 27–28; *Asberry*, 813 S.W.2d at 529–30.

Issue two is decided in Peralta’s favor.

IV. CONCLUSION

The trial court did not err when it denied Peralta’s request to introduce evidence of the victim’s past sexual conduct. The trial court’s final judgments are modified to correctly state that the forty-year sentence in the aggravated sexual assault case will run first followed by the twenty-year sentence in the sexual assault case.

The trial court's judgments are affirmed as modified.

/Leslie Osborne/

LESLIE OSBORNE
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

190623F.U05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ENRIQUE PERALTA, Appellant

No. 05-19-00623-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F-1875329-S.
Opinion delivered by Justice
Osborne. Justices Schenck and
Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

the trial court's final judgment is modified to correctly state the forty-year sentence in the aggravated sexual assault case (trial court cause no. F-1875329-S) will run first followed by the twenty-year sentence in the sexual assault case (trial court cause no. F-1875330-S)

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered July 1, 2020



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ENRIQUE PERALTA, Appellant

No. 05-19-00624-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F-1875330-S.
Opinion delivered by Justice
Osborne. Justices Schenck and
Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

the trial court's final judgment is modified to correctly state the forty-year sentence in the aggravated sexual assault case (trial court cause no. F-1875329-S) will run first followed by the twenty-year sentence in the sexual assault case (trial court cause no. F-1875330-S)

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered July 1, 2020