# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-15-00067-CR**
**NO. 03-15-00089-CR**

**John Joseph Vasquez, Appellant**

**v.**

**The State of Texas, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 390TH JUDICIAL DISTRICT**
**NOS. D-1-DC-13-201949 & D-1-DC-13-3000659,**
**THE HONORABLE JULIE H. KOCUREK, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

A jury found appellant John Joseph Vasquez guilty of indecency with a child by sexual contact and improper relationship between an educator and a student for sexual acts perpetrated against E.M., one of his first grade students, when she was in his class.[1] *See* Tex. Penal Code §§ 21.11(a)(1), 21.12. The jury assessed appellant's punishment at confinement for 16 years in the Texas Department of Criminal Justice for each offense, *see id.* § 12.33, and the trial court

[1] The jury heard evidence that when E.M. was six years old and a student in appellant's first grade class, appellant "did bad things to [her]" on multiple occasions, putting his hand in her underwear and "pick[ing] on [her] butt." Specifically, E.M. explained that appellant put his hand on her back, slid it down her back into her pants and touched her "skin to skin" beneath her underwear. He then put his finger inside her bottom, "inside the part where the poop comes out." E.M. testified that this happened "more than one time" and "felt nasty." Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we do not further recite them in this opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4

ordered the sentences to be served concurrently, *see id.* § 3.03(a). On appeal, appellant complains about the admission of extraneous conduct evidence. Finding no error, we affirm the judgments of conviction.

**DISCUSSION**

The trial court admitted the testimony of T.O., another former first grade student of appellant's who was in the same class as E.M., during the State's rebuttal case in the guilt-innocence phase of trial. T.O. testified that appellant "abused" her when she was a student in his class. She said that on several occasions appellant called her up to his desk so he could give her a hug. When she went up to his desk, he sat behind his desk and placed her between himself and his desk to give her the hug. During the hugs, he put his hands on her back, moved them down her back, and then down to her bottom. He put one hand inside her pants, inside her underwear, and rubbed her bottom. As he rubbed, he touched the cheeks of her bottom but did not touch "the inside part" of her bottom. In his sole point of error, appellant challenges the trial court's admission of T.O.'s testimony.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Sandoval v. State*, 409 S.W.3d 259, 297 (Tex. App.—Austin 2013, no pet.). A trial court abuses its discretion only if its determination "falls outside the zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)); *see Henley*, 493 S.W.3d at 83 ("Before a reviewing court may reverse the trial court's decision, 'it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree.'") (quoting *Taylor v. State*, 268 S.W.3d 571, 579

(Tex. Crim. App. 2008)). A trial court's decision to admit evidence of an extraneous offense is generally within this zone if the evidence shows that (1) an extraneous transaction is relevant to a material, non-propensity issue, and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Texas Rule of Evidence 404(b) prohibits the admission of extraneous conduct (other crimes, wrongs, or acts) to prove a person's character or to show that the person acted in conformity with that character. *See* Tex. R. Evid. 404(b). However, extraneous conduct evidence may be admissible when it has relevance apart from character conformity. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). Extraneous conduct may be admissible for some other purpose, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* Tex. R. Evid. 404(b); *Montgomery v. State*, 810 S.W.2d 372, 387-88 (Tex. Crim. App. 1991) (op. on reh'g). This list is illustrative—the exceptions are neither mutually exclusive nor collectively exhaustive. *See De La Paz*, 279 S.W.3d at 343. Extraneous conduct evidence may also be admissible to rebut defensive theories raised by the defense. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (rebuttal of defensive theory is "one of the permissible purposes for which [relevant] evidence may be admitted under Rule 404(b)"). Further, "'Rule 404(b) is a rule of inclusion rather than exclusion.'" *De La Paz*, 279 S.W.3d at 343 (quoting *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000)). "The rule excludes only that evidence that is offered (or will be used) *solely* for the purpose of proving bad character and hence conduct in conformity with that bad character." *Id.* (emphasis added) (citing *Rankin v. State*, 974 S.W.2d 707,

709 (Tex. Crim. App. 1996)). "'Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court.'" *Id.* at 343 (quoting *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)).

In its rebuttal case, the State offered the evidence of appellant's extraneous sexually inappropriate conduct with T.O. to rebut appellant's defensive theories, specifically that E.M. was fabricating the allegations and that appellant lacked the opportunity to engage in the alleged conduct.[2] Appellant objected to the admission of the evidence, claiming that he was not asserting a fabrication defense. After several discussions with the parties, and extended consideration by the trial court, the court ultimately concluded that "the door had been opened" and ruled that T.O.'s testimony was admissible. The court observed that the defensive theories of fabrication, motive for E.M. to lie, and lack of opportunity had been "laced" throughout the trial.[3]

Appellant argues that the trial court erred in admitting the extraneous conduct evidence because he did not "open the door" to T.O.'s testimony. His argument, at both trial and on appeal, is premised on his contention that he never asserted a defense of "fabrication" because

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[2] The State first raised the possibility of offering this evidence during its case in chief in the guilt-innocence phase. At that point the trial court concluded that the probative value of the evidence was outweighed by the prejudicial effect and did not allow its admission.

[3] The record reflects that throughout the course of trial, appellant advanced multiple defensive theories. First, he suggested that E.M. "reconstructed her memory" because she was angry at appellant for being "mean" to her when she was in his class (on the occasions when he disciplined her). Similarly, appellant implied that E.M. had a motive to lie because she disliked appellant because "[h]e was real hard on her." Appellant also challenged E.M.'s version of the events, claiming it was physically impossible to perpetrate the alleged conduct as she described, and asserted that he lacked the opportunity to engage in the alleged conduct because he was never alone with E.M. in the classroom as she claimed. Finally, appellant also insinuated that E.M. obtained sexual knowledge from sources other than sexual abuse, such as her older cousins, "inappropriate pictures," or television novellas.

he never called E.M. "a liar" or said that she was intentionally lying. He maintains that his defenses merely challenged her credibility. However, one of appellant's defensive theories suggested that E.M. "reformed" or "reconstructed" her memory because she was angry about the way appellant had treated her when she was in his class.[4]

Appellant's counsel first alluded to the "reconstructed" memory defense during jury selection when questioning the venire panel about whether "children lie about important things" and "might bend the truth or just not tell the truth." In that discussion, counsel asked the panel members, "Do you think it's possible for a child to reconstruct a memory of something that didn't actually happen but there were intervening events that caused the child to reconstruct a memory of something that didn't actually happen?" Appellant then asserted this "reconstructed" memory defense in opening statement when appellant's counsel told the jury,

> If you pay close attention to the evidence, you are going to see how fantastic it is, and you are going to see that things just don't add up. And you are going to need to think about how a child might reconstruct something in their memory from events that happened a couple years before because of the way she was treated by her teacher and how angry she was residually about that even though she seemed to express over the next couple of years that she was happy with him.

Appellant further advanced this "reconstructed" memory defense through cross-examination of the State's witnesses.

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[4] The record reflects that appellant was a strict disciplinarian who yelled at his students occasionally. In his testimony at trial, appellant indicated that strict discipline "grows into a respect or fear" and conceded that his students "were probably afraid."

Appellant does not deny that he presented, among others, the defense that E.M. had "reconstructed" her memory because she was angry about how appellant had treated her when she was his student. However, as noted above, he contends that this defense did not raise a "fabrication" defense. This contention attempts to make a distinction without a difference. While appellant did not explicitly call E.M. "a liar" or use the terms "fabricate" or "fabrication," *see, e.g.*, *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (in prosecution for indecency with child, extraneous offense evidence that defendant had molested two other girls was admissible because it made less probable defense's theory that complainant's allegations were "pure fantasy" and "pure fabrication" as he asserted in opening statement), we do not believe that any specific words are required to assert a fabrication claim. As the trial court noted, the essence of appellant's "reconstructed" memory defense was that E.M. was making untruthful allegations of sexual misconduct because of her negative feelings about appellant stemming from how appellant had treated her when she was his student. Appellant conceded such to the trial court. In fact, during the discussions about the admissibility of T.O.'s testimony, appellant agreed with the trial court's assessment that the defense was "basically . . . fabrication."

The record reflects that appellant was not simply attempting to demonstrate that E.M. generally lacked credibility; rather, the "reconstructed" memory defense asserted that E.M. was making untruthful accusations about specific events—appellant's sexual misconduct toward her—under a specific set of circumstances—her "residual" anger over appellant's strict discipline of her years earlier. Given the record, we cannot say that the trial court's conclusion—that the extraneous conduct evidence was admissible for the non-character-conformity purpose of rebutting

appellant's defensive theory that E.M. had "reconstructed" her memory—"falls outside the zone of reasonable disagreement." *See De La Paz*, 279 S.W.3d at 346–47.

In addition, the trial court also referenced the "doctrine of chances" when it ruled that T.O.'s testimony about the extraneous sexual misconduct was admissible. The "doctrine of chances" is a theory is based on the concept of logical implausibility; it focuses on the repetition of similar or unusual events and the unlikelihood such similar events would occur. *Fox v. State*, 115 S.W.3d 550, 560 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *Plante v. State*, 692 S.W.2d 487, 491–92 (Tex. Crim. App. 1985)); *see De La Paz*, 279 S.W.3d at 347 ("The 'doctrine of chances' tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance.").

Here, the notion that E.M. "reconstructed" or "reformed" her memory because she was angry at appellant for disciplining her becomes considerably less probable when one hears that appellant engaged in similar sexual misconduct with another student in his class during the same time frame. *See, e.g.*, *Dabney v. State*, 492 S.W.3d 309, 317 (Tex. Crim. App. 2016) ("Under the doctrine of chances, Appellant's defense that he found himself in an unfortunate, highly unlikely situation [that he did not know that there was a methamphetamine lab on his property] becomes less credible when presented with evidence that he has been found in that exact same situation before [because officers had previously found a methamphetamine lab on his property]."). By showing that unrelated persons were exploited under circumstances that were both similar and unlikely to be repeated, the evidence supported a finding that E.M. was actually telling the truth, not "reconstructing" or "reforming" her memory because she was angry. *See De La Paz*, 279 S.W.3d at 347 ("Under the 'doctrine of chances,' evidence of such a highly unlikely event being repeated

three different times would allow jurors to conclude that it is objectively unlikely that appellant was correct . . . ."); *see also Robbins v. State*, 88 S.W.3d 256, 268 n.10 (Tex. Crim. App. 2002) (citing authorities for position that "logical improbability" theory creates purely objective inferences that have nothing to do with subjective assessment of defendant's character).

In sum, based on the evidence before it, the trial court could have concluded that the evidence of appellant's extraneous sexual misconduct toward T.O. rebutted the defensive theory presented to the jury that E.M. "reconstructed" or "reformed" her memory because she was upset with appellant for his prior discipline of her. Furthermore, under the "doctrine of chances," the trial court could have found that the fact that appellant committed similar sexual acts against another young child in his classroom, during the same time frame, made it considerably less probable that E.M. had fabricated her allegations. Consequently, the trial court's admission of T.O.'s testimony was not an abuse of discretion. We overrule appellant's sole point of error. *See Henley*, 493 S.W.3d at 93 (trial court's evidentiary ruling will be upheld if correct on any theory of law applicable to case).

## CONCLUSION

Having concluded that the trial court did not abuse its discretion in admitting the complained-of extraneous conduct evidence, we affirm the trial court's judgments of conviction.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: January 31, 2017

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