NO. 12-10-00328-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

DENNIS BOYD PITTMAN, APPELLANT	***§***	***APPEAL FROM THE 241ST***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Dennis Pittman appeals his conviction for engaging in organized criminal activity. In nine issues, Appellant argues that the grand jury selection procedures were unconstitutional, that the trial court erred in excluding testimony, that the trial court erred in allowing a witness to invoke her Fifth Amendment rights, and that the trial court erred in allowing the State to present evidence of an extraneous offense. We affirm.

BACKGROUND

In 2004, two individuals rented a building in Mineola, Texas and, for a short period of time, operated a club where people met to socialize and to have sexual relations. The establishment was called a "Swinger's Club," and the landlord evicted its operators after the nature of the club became known in the community. The State's evidence at trial[1] showed that Appellant caused

[1] Appellant does not challenge the sufficiency of the evidence, and so we will supply facts as they are relevant to the opinion. Three other individuals have been tried for allegations that arise out of the same circumstances. Two convictions were reversed on direct appeal, and one defendant was granted relief on a writ of habeas corpus. *See* ***Kelly v. State***, 321 S.W.3d 583, 587 (Tex. App.–Houston [14th Dist.] 2010, no pet.); ***Pittman v. State***, 321 S.W.3d 565, 576 (Tex. App.–Houston [14th Dist.] 2010, no pet.); ***Ex parte Mayo***, Nos. AP-76,637, AP-76,638, AP-76,639, 2011 Tex. Crim. App. Unpub. LEXIS 695, at *1-2 (Tex. Crim. App. Sept. 14, 2011) (mem. op., not designated for publication).

two young children to touch their sexual organs as part of an ongoing criminal enterprise at the club.

Appellant was charged by indictment with the felony offense of engaging in organized criminal activity, which was alleged to have occurred in the summer of 2004. Prior to trial, Appellant moved to quash the indictment, alleging that the method used to select grand jurors in Smith County is unconstitutional. The trial court overruled Appellant's motion. A trial was held, and Appellant pleaded not guilty. During the trial, there were numerous evidentiary rulings made by the trial court that are the subject of this appeal. In general, the trial court did not allow Appellant to present certain evidence that Appellant suggested would show the children's reports of sexual activities in the club were an invention sparked by the foster parents who had custody of some of the children, or the result of improper and unprofessional interviewing techniques, or some admixture of the two problems. Also, during the trial, the court allowed the State to offer evidence that Appellant had sexually assaulted another child. This evidence was allowed because, the trial court held, the defense attorney opened the door to this kind of evidence in his opening statement by asking, rhetorically, if Appellant had acted like a child molester would act when dealing with the state child protective services investigators.

The jury found Appellant guilty as charged. After a sentencing hearing, the jury assessed a sentence of imprisonment for life. This appeal followed.

SELECTION OF GRAND JURORS

In his first issue, Appellant argues that the method used to select grand jurors in Smith County deprived him of his constitutional right to equal protection.

Applicable Law

Texas law provides for two methods of selecting grand jurors. The first method, called a "key man" system, allows a district court judge to appoint three to five "persons to perform the duties of jury commissioners." TEX. CODE CRIM. PROC. ANN. art. 19.01(a) (West 2005). Those commissioners select the grand jurors. *See* TEX. CODE CRIM. PROC. ANN. art. 19.06 (West Supp. 2012). In doing so, the commissioners "shall, to the extent possible, select grand jurors who the commissioners determine represent a broad cross-section of the population of the county, considering the factors of race, sex, and age." ***Id***.

The other method of selecting jurors is to use the randomized procedure used to select jurors for civil cases. *See* TEX. CODE CRIM. PROC. ANN. art. 19.01(b).

Analysis

Appellant's challenge to the grand jury was not timely. Texas law requires that a challenge to the array of jurors must be made before the "grand jury has been impaneled" and "[i]n no other way shall objections to the qualifications and legality of the grand jury be heard." TEX. CODE CRIM. PROC. ANN. art. 19.27 (West 2005). The court in ***Muniz v. State***, 573 S.W.2d 792, 796 (Tex. Crim. App. 1978), allowed that a motion to quash could be filed before the trial commenced if a "challenge on impanelment is not possible." But the court made clear that the "not possible" hurdle was a high one. It cited as an example a case where the offense was committed after the grand jury was impaneled. ***Id***. (citing ***Ex parte Covin***, 161 Tex. Crim. 320, 322, 277 S.W.2d 109, 111 (Tex. Crim. App. 1955)).

Appellant argues that it was not possible for him to challenge the grand jury prior to its being impaneled because, he asserts, he was indigent and without counsel when the grand jury was impaneled. Appellant did not formally prove either of these assertions, although he asks us to infer them to be true because he was found to be indigent and was appointed counsel shortly after an indictment was returned. Because Appellant has not shown that he could not challenge the array, the trial court was obligated not to consider his late challenge, and he has not preserved this issue for our consideration. *See* TEX. CODE CRIM. PROC. ANN. art. 19.27; ***Muniz***, 573 S.W.2d at 796; ***Caraway v. State***, 911 S.W.2d 400, 401–02 (Tex. App.–Texarkana 1995, no pet.).

However, Appellant would not prevail if we were to consider his constitutional argument. The Supreme Court has reviewed the Texas "key man" system on several occasions. In ***Smith v. Texas***, 311 U.S. 128, 130–31, 61 S. Ct. 164, 165, 85 L. Ed. 84 (1940), the Court held that "the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable."[2] While the Court found that the

[2] The scheme as it existed at that time is similar to the current method of selecting grand jurors. But the goal of a "cross–section" of the community required only that the jurors were selected from "different parts of the county." ***Smith***, 311 U.S. at 131 n.5, 61 S. Ct. at 165 n.5.

system was facially constitutional, and capable of being carried out in a way that did not violate equal protection, the Court held that the system was unconstitutional as applied in that case because a statistical analysis of the race of jurors who actually served belied a race neutral application of the statute. ***Id***. at 131-32, 61 S. Ct. at 166.[3]

In ***Hill v. Texas***, 316 U.S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559 (1942), the Court reached a similar conclusion, holding that the equal protection clause was violated by a grand jury selection scheme that excluded African Americans from serving. In 1977, the Court again recognized the "facial constitutionality of the key-man" system, while granting relief for an "as applied" equal protection violation. *See* ***Castaneda v. Partida***, 430 U.S. 482, 497, 500–01, 97 S. Ct. 1272, 1281, 1283, 51 L. Ed. 2d 498 (1977); *see also* ***Ovalle v. State***, 13 S.W.3d 774, 778 (Tex. Crim. App. 2000) (citing ***Partida***, 430 U.S. at 497, 97 S. Ct. at 1281) ("The Supreme Court has held that the commissioner-based system, while facially constitutional, is susceptible to abuse.").

Appellant does not make an "as applied" claim in this case. Indeed, Appellant offered no evidence to show that the grand jurors were selected in a discriminatory fashion. Instead, Appellant argues, despite the Supreme Court's rulings to the contrary, that the "key man" system is facially unconstitutional. This is so, he argues, because the statute directs grand jury commissioners to consider race in selecting grand jurors. *See* TEX. CODE CRIM. PROC. ANN. art. 19.06 ("The commissioners shall, to the extent possible, select grand jurors who the commissioners determine represent a broad cross-section of the population of the county, considering the factors of race, sex, and age."). Appellant contends that this is a racial classification that requires strict scrutiny as to whether the policy serves a compelling governmental interest. *See, e.g.*, ***Grutter v. Bollinger***, 539 U.S. 306, 333, 123 S. Ct. 2325, 2342, 156 L. Ed. 2d 304 (2003) ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.") (internal quotation marks and

[3] In the years between 1931 and 1938, despite there being between three to six thousand African American males qualified to serve a grand jurors in Harris County, only five had served, including one individual who had served three times. ***Smith***, 311 U.S. at 129, 61 S. Ct. at 164–65. The Court concluded that this showed racial discrimination had occurred, although it noted that the evidence presented showed the disparity was a result of the jury commissioners not knowing qualified African American individuals. ***Id***., 311 U.S. at 132, 61 S. Ct. at 166.

citation omitted). He also assumes, for purposes of argument, that ensuring a fair cross section of the county population is represented on the grand jury is a compelling governmental interest but argues that the key man system is not narrowly tailored to meet that interest.

No court has sustained a facial challenge to Article 19.06. Appellant argues that this is not important because the cases which hold that the "key man" provision is not unconstitutional address primarily the statute that existed before the race conscious language was added in 1979. There is a certain irony to Appellant's argument inasmuch as the reforms made in 1979 were presumably intended to address what the Supreme Court had recognized as deficiencies in the way the Texas "key man" system was implemented. *See, e.g.*, ***Partida***, 430 U.S. at 497, 97 S. Ct. at 1282 ("Nevertheless, the Court has noted that the system is susceptible of abuse as applied."); Eric M. Albritton, *Race-Conscious Grand Jury Selection: the Equal Protection Clause and Strict Scrutiny*, 31 Am. J. Crim. L. 175, 206-07 (2003) (discussion of legislative history). Nevertheless, we are not persuaded that the "key man" system cannot be used in a constitutional, that is to say nondiscriminatory, way. Based on the record in this case, we do not know how the grand jury commissioners acted to discharge their duty to comply with the statute, or more importantly, how grand jury commissioners act statewide to comply. The statute itself provides no assistance. It simply requires the commissioners to select grand jurors whom the commissioners determine represent a broad cross-section of the population of the county, considering the factors of race, sex, and age. This duty could be discharged, as the Court in ***Partida*** made a step towards suggesting, by the commissioners using some kind of random selection method. *See* ***Partida***, 430 U.S. at 497 n.18, 97 S. Ct. at 1282 n.18. Indeed, the statutory scheme directs that the commissioners be provided with the "last assessment roll of the county," although there is no requirement that the commissioners choose grand jurors from that list. *See* TEX. CODE CRIM. PROC. ANN. art. 19.04 (West 2005).

It could be that commissioners in a given case would impose some kind of an informal quota system.[4] Or it could be that they would take other measures to ensure that the statistical anomalies present in the demographics of their own circle of acquaintances were not replicated in

[4] The Supreme Court has held that a system where not more than one African American person would be selected for each grand jury was impermissible. ***Cassell v. Texas***, 339 U.S. 282, 286–87, 70 S. Ct. 629, 631–32, 94 L. Ed. 839 (1950).

the selection process.[5] *See* ***Cassell v. Texas***, 339 U.S. 282, 290, 70 S. Ct. 629, 633, 94 L. Ed. 839 633 (1950). Appellant brings a facial challenge to the statute, which is a claim that the statute is unconstitutional "on its face" and is a claim that the statute, by its terms, always operates unconstitutionally. *See* ***United States v. Salerno***, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); ***Gillenwaters v. State***, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006) (citation omitted). But it is certainly possible that a commissioner would employ a random system, or a relatively random system–selecting, for example, the first three people on each page produced by the clerk–or simply understand the statute to be an admonition not to discriminate in the selection of jurors. There is no requirement that commissioners not use a random system if they determine that such a system would discharge their duty to find jurors who represent a broad cross-section of the community. In other words, the statute is capable of being implemented in a way that Appellant agrees–random selection–would pass constitutional muster. Accordingly, even if Appellant had preserved this complaint for our consideration, we could not conclude that Article 19.06 is facially unconstitutional.

We overrule Appellant's first issue.

EXCLUSION OF EVIDENCE

In his second, third, and fourth issues, Appellant argues that the trial court erred in not allowing him to present certain evidence. Specifically, he asserts that the trial court erred when it prevented him from playing a number of video recordings and from asking his expert witness to express an opinion as to whether the children were fabricating their reports of sexual abuse.

Background

The child witnesses in this case had made previous statements to police and to social workers in the course of the investigation that led to the charges in this case. Appellant sought to offer the recordings of their prior statements during the trial. This evidence was to be offered in

[5] Appellant presented no evidence as to how the commissioners selected grand jurors. This evidence was offered in other grand jury cases. *See*, e.g., ***Cassell***, 339 U.S. 282 at 290, 70 S. Ct. at 633. The trial court took judicial notice that "the district court in Smith County appoints grand jury commissioners, who then meet, put together a list, and from that list assembled by the grand jury commissioner, the grand jury is selected."

conjunction with the testimony of an expert witness who testified about improper interviewing techniques and how false memories could be implanted or created.

The State objected to the tapes being admitted into evidence and played for the jury. The State argued that the tapes contained hearsay and that they were not the kind of hearsay that could be offered to support an expert's opinion. The trial court agreed that the statements on the tapes were hearsay and held they were not admissible as a hearsay exception pursuant to Texas Rule of Evidence 705, which allows an expert, in certain circumstances, to disclose the facts or data underlying his opinion.

Applicable Law

The Sixth Amendment to the United States Constitution guarantees the right to present a defense. *See* ***Washington v. Texas***, 388 U.S. 14, 18, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (citations omitted)); ***Miller v. State***, 36 S.W.3d 503, 506 (Tex Crim. App 2001). The right of a defendant to present evidence is not unlimited, however, and may be subject to reasonable restrictions. *See* ***Potier v. State***, 68 S.W.3d 657, 659 (Tex. Crim. App. 2002) (citing ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). The rules of evidence, for example, do not abridge a defendant's right to present a defense so long as the rules are not "arbitrary" or "disproportionate to the purposes they are designed to serve." ***Potier***, 68 S.W.3d at 659.

The exclusion of evidence is constitutional error when a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering relevant evidence that is vital to his defense; or when a trial court erroneously excludes relevant evidence that is a vital portion of the case and the exclusion effectively precludes the defendant from presenting a defense. ***Ray v. State***, 178 S.W.3d 833, 835 (Tex. Crim. App. 2005) (citing ***Potier***, 68 S.W.3d at 659–62; ***Wiley v. State***, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002)). When evidence is improperly excluded but does not effectively preclude a defendant from presenting a defense, it is disregarded as harmless if the reviewing court can be "fairly assured that the error did not influence the jury or had but a slight effect." ***Ray***, 178 S.W.3d at 836.

Analysis–Recordings

In his third issue, Appellant argues that the trial court erred in excluding the video recordings. Appellant argues that the recordings were not offered for the truth of the matter asserted therein and that they should have been admitted, even if they were hearsay, pursuant to Rule of Evidence 705.

The tapes in question are approximately fourteen interviews of children conducted in the years prior to the trial. Appellant offered these recordings to support the testimony of his expert witness, Dr. Marc Lindberg, that some of the interview techniques used in the tapes were improper. Dr. Lindberg testified that improper interviewing of children could cause false memories in the children. Based on the available research, Lindberg testified that an interviewer could suggest answers to an interviewee by using leading questions, that is questions which contain factual predicates. He suggested that this effect could be compounded when the interviewer was an authority figure, such as a police officer.

Suggestibility or confabulation can also occur, according to Lindberg, when the interviewer reinforces statements made by the children by telling them that they are "doing really good" or by being less effusive when an answer does not conform to what the interviewer expects to hear. Lindberg also described something called the "prestige effect." He did not fully explain that topic, but it appears to occur when an interviewee is made to understand that a respected interviewer believes something to be true. He testified that false memories can come through intentional or unintentional suggestion, confabulation, or coaching. Dr. Lindberg gave examples from academic studies to illustrate these principles and testified that some of the improper interview techniques occurred in the investigation in this case. Dr. Lindberg also testified that having another person present for the interviews was unhelpful. He discussed instances where Margie Cantrell, identified as the foster mother to some of the children, or the child's mother, or another child were present in the interview. Dr. Lindberg also identified interviews that, in his opinion, were conducted professionally.

The State cites ***Valle v. State***, 109 S.W.3d 500, 505 (Tex. Crim. App. 2003), and argues that the recordings are inadmissible hearsay. Specifically, the State asserts that "[i]t cannot be seriously disputed that a videotaped statement, made outside of trial which memorializes an interview between individuals, constitutes a statement that is 'other than one made by the declarant

while testifying at trial' and is thus hearsay evidence by definition." What this argument fails to address is that such a statement is hearsay only if it is offered for the truth of the matter asserted. *See* TEX. R. EVID. 801(d) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). In ***Valle***, the defendant sought to introduce the videotaped statement of his mother. The video recording included statements that the mother "had taken appellant to a psychologist, he was never in any trouble while he was in Cuba, and he was abused by his stepfather." ***Id***. at 507. Although not addressed by the court in ***Valle***, those statements were offered for the truth of the matter asserted, which is what is specifically prohibited by the rule against hearsay.

Appellant made clear that he offered the evidence for reasons other than the truth of the matter asserted. Counsel specifically said, "[N]ow, we're not offering it for the purpose of the truth of the matter asserted." And counsel also said that "we're offering it to show the techniques and to demonstrate how the question and answering happened, the interplay between the interviewer and the interviewee. That way it can give meaning to the expert."[6]

On appeal, the State argues that there was no issue at trial that the children had made inconsistent statements, but that "Appellant clearly wanted to offer the statements to show that the children made false allegations and not to prove the manner in which they were procured." Appellant cites ***Boyd v. State***, 633 S.W.2d 578, 582 (Tex. App.–Texarkana 1982), *aff'd*, 643 S.W.2d 708 (Tex. Crim. App. 1982), for the proposition that the "operative fact rule" allows out of court statements only when the making of the statement is a fact in issue. That rule did not apply in ***Boyd*** because the out of court statement was "relevant only if it was believed" and was, therefore, hearsay. ***Id***.

By contrast, the interviews here did not depend on their being true or believed and were not offered as an "operative fact." Actually, the State's suggestion that Appellant wished to admit the evidence to show that the children made false allegations is the opposite of the statements being offered for the truth of the matter asserted. By the State's own formulation, the relevance of the statements does not turn on the accuracy of any matter asserted in the interview. Accordingly, the

[6] Counsel also argued, in the alternative, that the videos were admissible as facts or data underlying the expert's opinion pursuant to Texas Rule of Evidence 705(a).

videos were not offered for the truth of the matter asserted, and it was error to exclude them on that basis.

However, Appellant was not harmed by the trial court's decision. Appellant did not identify for the trial court areas on the recordings that were of particular importance or relevance. We have reviewed the hours of recordings submitted by Appellant as his offer of proof. Most of the recordings are simple background interviews with children. Several of the interviews were described as professionally conducted by Appellant's expert witness. There are two broad categories that Appellant likely would have wanted to show to the jury. The first category includes the denials by the children of the kinds of allegations related to the charged offense. Appellant was permitted to play for the jury, and did play for the jury, repeated instances of children denying abuse. These statements were admitted as prior inconsistent statements, and Appellant does not complain that he was not permitted to admit any recordings for this reason.

The other category includes illustrations of what Appellant's expert witness described as improper interviewing techniques. So far as we can tell, and Appellant has not informed us otherwise, the tapes do not show witnesses being coached or being told to make specific allegations about him or anyone else. Instead, according to Lindberg, the interviewing techniques he identified as problematic can cause or result in confabulation or false memories. These recordings contain instances of these kinds of techniques.

For example, one interviewer asked a child, after telling the girl that it was a "tough question," whether "y'all ever have to get up and dance in front of anybody." The child responded that she had not. Later, the interviewer said there was a "big building" that "I think you might have been to before." The interviewer, a Texas Ranger, told the child that he had heard it called "kindergarten," gave details about the place, and told the child that another child had "told me all about it." At this point, another person who is in the room, a woman, said, "It's okay." Thereafter, the interviewer asked the child if she remembered that. The child said it must have been just the other child who had that experience or that it was the other child's imagination. The interviewer told the child that he did not "think it's her imagination, because everything that she's told me I've been able to find something else that said, yeah, that's true. I pretty well believe her."

On another recording, the interviewer tells a male child that they have "talked all about – – a lot of stuff that has gone on, okay," and says, "So very good job, very good job." He then asks the child where the "kindergarten" was located. The child does not respond and a lady, who appears to be Margie Cantrell, tells him to "tell [her] what happened to [him]." After some back and forth, the interviewer says, "Tell me about your house," and the lady says, "They teach you." There was another child present for the interview. Appellant's attorney asked the male child at trial if he felt like the other child on the video was trying to help him remember things and whether "Margie" was "helping [him] remember things in that video." He responded in the affirmative.

The question presented here is whether the trial court's error resulted in Appellant's not being able to present his defense. In the context of the Sixth Amendment right to compulsory process, the improper exclusion of evidence may establish a constitutional violation. *See, e.g.*, ***Ray***, 178 S.W.3d at 835. However, "evidentiary rulings rarely rise to the level of denying the fundamental constitutional rights to present a meaningful defense." ***Id***. In that case, the excluded evidence, the testimony of a fact witness, would have served to "incrementally further [the] defensive theory." ***Id***. But because the exclusion did not "effectively prevent" the defendant from presenting a defense, there was not a constitutional violation. ***Id***.

The examples of interviewing techniques illustrated above were played for the jury as part of the impeachment material allowed by the trial court. Therefore, the jury saw the investigator praising children for making statements, saw third parties and even other children present for interviews, and saw, in one instance, the third party suggest an answer for the child. The jury also saw the investigator tell the child that another child had told him what had happened and that he believed that child. These are the kinds of techniques and errors that Dr. Lindberg identified as being problematic. Because the expert witness was able to testify without reservation about what he observed on the videos and because the jury saw examples of many of the techniques he said were improper, Appellant was not effectively prevented from presenting a defense. In ***Valle***, the court of criminal appeals held that the defendant did not need to present an actual tape of a statement when the expert explained that he relied upon the statement in reaching his conclusions. ***Valle***, 109 S.W.3d at 506. Here, by contrast, Appellant was able to do more because he was able to offer recordings that illustrated at least some of the points his expert's testimony relied upon.

Because Appellant was not effectively prevented from presenting a defense, the question that remains is whether we can say with fair assurance that the error did not influence the jury or had but a slight effect. *See* TEX. R. APP. P. 44.2(b); ***Ray***, 178 S.W.3d at 836. Appellant did not identify for the trial court, or for this court, passages in the videos that would have been crucial to his defense. Appellant was permitted to show, without limitation, recordings in which the children contradicted their testimony at trial and other recordings to impeach the children. The recordings that were admitted contain many of the kinds of interviewing situations that Appellant wished to present. Finally, the expert was permitted to testify as to problems that he identified in all of the recordings. In light of all of these considerations, and because we have not found nor has Appellant identified crucial evidence that was wrongly excluded, we are persuaded that the trial court's error did not influence the jury's decision or had but a slight effect. We overrule Appellant's third issue.

Analysis–Expert Opinion

The trial court allowed Dr. Lindberg to testify about scientific studies that concluded certain interview techniques are problematic, that he had reviewed the recordings in this case, and that he concluded the interviewers employed improper techniques. The trial court did not allow Dr. Lindberg to testify that the improper techniques may have resulted in fabrication by the children of the allegations in this case. Appellant asserts, in his fourth issue, that this was error.

Appellant did not offer any support in his opening brief for the admission of the excluded opinion testimony. In his reply brief, Appellant argues, based on ***Ex parte Ard***, No. AP-75,704, 2009 Tex. Crim. App. Unpub. LEXIS 181 (Tex. Crim. App. Mar. 11, 2009) (per curiam) (mem. op., not designated for publication), that an expert witness should be permitted to testify, essentially, that a child's testimony is unreliable because of the interviewing techniques employed. In fact, the ***Ex parte Ard*** decision does appear to support Appellant's argument that such testimony should be allowed. The court of criminal appeals held, in the context of an application for writ of habeas corpus, that trial counsel had not presented the testimony of an expert witness effectively. At the writ hearing, the defendant presented the expert's testimony that there were "several factors and specific events that, in his opinion, should lead a trier of fact to view the reliability of B.C.'s testimony 'very skeptically' and with 'a great deal of scrutiny.'" ***Id***., 2009 Tex. Crim. App.

Unpub. LEXIS 181, at *9. That testimony was not presented at trial, though the expert was called.

However, in a concluding paragraph, the court was more general and described the failure to present a full defense as follows:

> It was Dr. Gottlieb's testimony, however, that was essential to the defense, as it would have provided the scientific underpinning for its case. Dr. Gottlieb was the only defense witness who was in a position to lend credence to the concept of memory implantation and bring professional expertise to bear in order to challenge B.C.'s version of the events. Given the importance of B.C.'s testimony to the State's case and the significance of Dr. Gottlieb's testimony in sustaining the defensive theory, we conclude that there is a reasonable probability that, but for trial counsel's error, the result of the trial would have been different.

Id., 2009 Tex. Crim. App. Unpub. LEXIS 181, at *18.

This formulation does not include a specific application-of-theory-to-fact opinion that the witness was being untruthful or had been coached. Furthermore, it is well established that a witness may not offer an opinion as to whether another witness is telling the truth, and the court of criminal appeals would have addressed that holding if its unpublished ***Ex parte Ard*** decision represented a reevaluation of that precedent. In ***Lopez v. State***, 343 S.W.3d 137, 140-41 (Tex. Crim. App. 2011), for example, the court reiterated that "[d]irect opinion testimony about the truthfulness of another witness, without prior impeachment, is inadmissible as it does more than 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" In that case, the court held that the record did not support a conclusion that counsel had been ineffective for failing to object to opinion testimony about the truthfulness of a child witness. However, the court did not hold that such testimony was admissible, which would have made for a simple analysis. Instead, the court held that there could have been other strategic reasons not to object to the inadmissible opinion testimony. *See* ***id***. at 144.

This same principle has been applied to expert testimony. *See* ***Schutz v. State***, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); ***Pavlacka v. State***, 892 S.W.2d 897, 902 n.6 (Tex. Crim. App. 1994); ***Yount v. State***, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993); ***Vasquez v. State***, 975 S.W.2d 415, 417 (Tex. App.–Austin 1998, pet. ref'd). And this court has reversed a conviction where the State's expert witness offered an opinion as to the truthfulness of a child witness's

account of sexual assault. *See* ***Long v. State***, No. 12-07-00256-CR, 2008 Tex. App. LEXIS 8885, at *31 (Tex. App.–Tyler Nov. 26, 2008, no pet.) (mem. op., not designated for publication).

In sum, the trial court properly disallowed expert testimony that the children in this case had been coached or had fabricated their testimony. The expert testified how those kinds of problems could come to exist, even in innocent circumstances, and testified that he observed those precursors to false memories in the interviews in this case. We do not understand the unpublished ***Ex parte Ard***[7] decision to have overruled the longstanding principle that experts may not offer an opinion on the question of whether a witness is telling the truth. The final step in the analysis of the children's testimony–whether the problems identified by Appellant's expert caused unreliable testimony–is really the determination of whether the children were telling the truth and was a determination for the jury. *See*, *e.g.*, ***Schutz***, 957 S.W.2d at 67-68 ("[T]he credibility or veracity of another witness [is] a determination which lies solely within the province of the jury."). We overrule Appellant's third issue.

In his second issue, Appellant argues briefly that the trial court erred in prohibiting his expert witness from testifying that one particular study concluded that interviewing techniques caused or permitted false claims. It is not clear what the basis of this ruling was, but the expert was permitted to testify at length about the problems of confabulation and suggestibility as a result of interviewing techniques. Consequently, his testimony was not curtailed meaningfully on this subject. There was a lengthy discussion between the attorneys and the court about the expert's testimony. The court was concerned that the expert witness would testify that, for example, "[t]hese techniques or procedures were used in this study or in this literature and they resulted, in let's say, untruthful testimony." The court acknowledged that it did not know if "he [the expert] has a study like that." Appellant, so far as we can determine, did not offer a specific study that was excluded by the court's ruling. And, as we explained, the expert testified at length about the theories in the field of child psychology that related to the accuracy of reports of child sexual assault and memory generally. Accordingly, Appellant has not shown that the trial court's ruling precluded the admission of specific admissible evidence or that the ruling effectively prevented him from presenting a defense. We overrule Appellant's second issue.

[7] Unpublished opinions of the court of criminal appeals "have no precedential value and must not be cited as authority by counsel or by a court." TEX. R. APP. P. 77.3.

EXCLUSION OF EVIDENCE – MARGIE CANTRELL

In his fifth, sixth, seventh, and eighth issues, Appellant argues that the trial court erred in excluding evidence that related to Margie Cantrell. Specifically, Appellant argues that Margie Cantrell should not have been permitted to invoke her Fifth Amendment right not to testify and that her previous statements should have been admitted.[8] He also argues that two witnesses should have been permitted to testify about certain activities by Margie Cantrell. Finally, he argues that he was prevented from showing that another individual committed the offenses he was accused of committing.

Applicable Law–Fifth Amendment Right

The Fifth Amendment of the United States Constitution provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." It is well settled that an individual's constitutional privilege against self–incrimination overrides a defendant's constitutional right to compulsory process of witnesses. *See* ***Bridge v. State***, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986). But it is error for a court to allow a witness to claim a privilege when no right to claim the privilege exists. *See* ***Franco v. State***, 491 S.W.2d 890, 891 (Tex. Crim. App. 1973); *see also* ***Grayson v. State***, 684 S.W.2d 691, 696 (Tex. Crim. App. 1984) (A trial court "cannot compel a witness to answer unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken in asserting the privilege, and that the answer cannot possibly tend to incriminate the witness . . . .").

Analysis–Fifth Amendment Right

In his fifth issue, Appellant argues that the trial court erred in allowing Margie Cantrell to invoke her Fifth Amendment right against self–incrimination. Appellant sought to compel the testimony of Margie Cantrell. However, she invoked her Fifth Amendment right not to incriminate herself and refused to answer any questions. The core of his questioning was his requests to Margie Cantrell that she admit (1) she had misrepresented her qualifications to a Texas foundation for purposes of being permitted to be a foster parent, (2) she had lost her license to be a foster parent in the state of California, (3) she coached children in her care to appear more disabled than they were to get a greater reimbursement, (4) she offered fabricated statements to corroborate

[8] Appellant states in his brief that he does not allege error in the trial court's ruling allowing John Cantrell to invoke his Fifth Amendment right against self-incrimination.

outward manifestations of sexual abuse, (5) she had taken the children in her care to the site of the alleged offense, and (6) she received more than $100,000 for caring for three children for approximately two years.

Margie asserted her Fifth Amendment right in response to each question. In the interests of using less of the trial court's time, her attorney indicated that Margie would assert her right not to testify in response to any question propounded by Appellant's counsel.

Appellant argues that Margie waived her Fifth Amendment privilege because she testified at two previous trials and at a family court hearing. In his reply brief, Appellant cites authority for this proposition. Appellant acknowledges that simply testifying at a previous proceeding need not be a waiver of privilege. He argues, however, that a person seeking to assert a privilege after testifying must show a "new apprehension" that arose between the initial testimony and the testimony the witness seeks to avoid. Appellant cites ***United States v. Allmon***, 594 F.3d 981, 985–86 (8th Cir. 2010), in support of this contention.

By its own language, the ***Allmon*** decision does not support Appellant's argument. In that case, the appellant, who was held in contempt for failing to honor an agreement to testify in other criminal trials, invoked his Fifth Amendment right not to testify because he feared prosecution in the state courts, because he might perjure himself, and because he wished not to testify against his cousins, the defendants. ***Id***. at 985. The court did not accept these arguments. With respect to the fear of future prosecution argument, the court noted that the witness had already given testimony that was "precisely the same" at a previous trial and so no additional jeopardy would accrue by testifying. ***Id***.

This case is different. We have reviewed Margie Cantrell's prior testimony at two previous trials and at a child custody hearing. She was not asked directly if she had coached the witnesses, although she denied in a general way that she had done so. But the questions propounded by Appellant's counsel in this case were essentially requests to admit that she had committed fraud and engaged in a scheme to swindle the child protective services agencies by fabricating charges and by causing children to appear to be more disabled than they were. Cantrell's counsel pointed out that Appellant's counsel was asking her to admit to a number of criminal offenses. While he did not phrase this as a "new apprehension," Cantrell was never asked about these allegations in a previous trial, and so she could not have waived her Fifth

Amendment right to refuse to answer the proposed questions by testifying in the previous proceedings. Nor had she been convicted of a crime related to the allegations made by Appellant's counsel, *see* ***Franco***, 491 S.W.2d at 891 (privilege unavailable where defendant already convicted of charge), and she did not begin to testify and then refuse to continue. *See* ***Stephens v. State***, 59 S.W.3d 377, 380 (Tex. App.–Houston [1st Dist.] 2001, pet. ref'd) (witness may not begin to testify about a transaction and then invoke the privilege).

The trial court was called upon to determine, as to each question asked, "whether the question presents a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures." ***Rogers v. United States***, 340 U.S. 367, 374, 71 S. Ct. 438, 442, 95 L. Ed. 344 (1951). The questions proposed to Cantrell would subject her to criminal jeopardy, or might tend to, as Appellant sought to have her admit that she had violated the law in a number of different ways. A reasonable danger was present, and her disclosures in the previous trials were not the same as the alleged criminal activity about which Appellant wished to inquire. Therefore, her previous testimony did not serve to waive her privilege or to show that her invocation of the privilege in this matter was capricious or without basis. Accordingly, we hold that the trial court did not err in allowing Margie Cantrell to assert her Fifth Amendment right in declining to answer Appellant's questions. We overrule Appellant's fifth issue.

Background–Presentation of Evidence

Appellant sought to introduce the testimony of Kelly Cantrell and Judy Lopez. Appellant represented that Kelly Cantrell would testify that Margie Cantrell once encouraged her to falsely accuse another person of sexually assaulting her. Judy Lopez would have testified, according to Appellant, that Margie Cantrell "requested her assistance in defrauding California welfare authorities" and that Margie Cantrell falsely accused Lopez of assaulting her.

The trial court ruled that Kelly Cantrell's statements would be inadmissible hearsay and excluded them on that basis. The State objected to Lopez's testimony on the basis that no rule of evidence allowed it and, specifically, that Rules 404 and 609 did not permit it. The trial court excluded Lopez's testimony.

On appeal, Appellant argues that the trial court erred with respect to Kelly Cantrell's testimony because that testimony was not offered for the truth of the matter asserted, and therefore, was not hearsay. *See* TEX. R. EVID. 801(d) ("'Hearsay' is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). This argument was not advanced in the trial court. In fact, Appellant almost conceded that the trial court's ruling that the Cantrells could invoke their Fifth Amendment right rendered this testimony inadmissible. The trial court judge, in discussing the matter with counsel, said that the statement "would actually come in as impeachment if she – – if Margie Cantrell denied [making the statement] – – . . . ." Counsel agreed with this statement saying "[w]ell that's correct Judge. We would also offer it to show that Ms. Cantrell has a pattern of engaging in this kind of behavior." Appellant did assert that the statements were "nonhearsay," but he only said that they were "nonhearsay" because Margie Cantrell was unavailable after she invoked her right against self–incrimination, not because they were not offered for the truth of the matter asserted. In short, Appellant never argued, as he does now, that the statements were nonhearsay because they were not being offered for the truth of the matter asserted, and so this issue is not preserved for our review. *See* TEX. R. APP. P. 33.1(a)(1); *see, e.g.*, ***Van Byrd v. State***, 605 S.W.2d 265, 269 (Tex. Crim. App. 1980) (appellant may not offer justification for admission of evidence on appeal that differs from the reason given at trial).[9] Accordingly, and as this issue was presented to the trial court, the trial court did not err in excluding Kelly Cantrell's testimony as hearsay.

We also conclude that the trial court did not err in disallowing Lopez's testimony. Her testimony that Cantrell engaged in fraud and had accused her of assault might tend to show that Cantrell was a dishonest person or that she was willing to falsely accuse Lopez of a crime. There were no specifics as to this testimony to allow the trial court to conclude that this was relevant evidence. Appellant's theory was that the Cantrells incited the children in their care to falsely accuse him of this offense. Whether Margie Cantrell defrauded the California public authorities or falsely accused Lopez of assaulting her, without more, does not tend to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. *See* TEX. R. EVID. 401. Accordingly, the trial court did not err in disallowing Lopez's testimony.

Appellant does not formally advance his argument, raised in his eighth issue, that the trial court's ruling prevented him from asserting that another person committed the charged offenses.

[9] Appellant made an argument with respect to the video recordings that they were not offered for the truth of the matter asserted but did not make such an argument with respect to this testimony.

Appellant does reference the holding of the Fourteenth District Court of Appeals in ***Kelly v. State***, 321 S.W.3d 583, 592 (Tex. App.–Houston [14th Dist.] 2010, no pet.), in which the court held that it was error to exclude evidence that John Cantrell "had been investigated or arrested on sexual assault charges in California." The issues here are different. Appellant complains that the court did not compel Margie to answer questions that would have subjected her to jeopardy or that the trial court improperly excluded witnesses who would testify about Margie's past activities or statements. We have evaluated these arguments. Because the trial court did not err on the issues preserved by Appellant, Appellant has not shown that the court improperly precluded him from presenting any defense, or that he was precluded from arguing that another person committed these offenses. We overrule Appellant's sixth, seventh, and eighth issues.

EXTRANEOUS OFFENSE

In his ninth issue, Appellant argues that the trial court erred in allowing the State to offer evidence that he sexually assaulted his stepdaughter when she was a child.

Background

In his opening statement, Appellant's counsel made the following statement:

> And let me talk to you a little about Dennis [Appellant] for a minute. I think you are going to hear evidence that Dennis, before these allegations ever came up, Dennis was having a hard time. And you're going to see evidence that CPS went and talked to Dennis about how he was doing, and you're going to see that Dennis was trying to take care of – – he had some boys the same age as these kids. And you're going to see that Dennis said, "I'm not getting it done," basically. "Y'all can put my kids in the Methodist home while I try to get on my feet."
>
> Is that what a child molester does? Does that make sense? Before these allegations surface, if you are someone who they said is pure evil and the mastermind of this club, are you going to take kids that are potential witnesses and potential victims and say, "CPS, take these kids. I'm not getting it done as a parent. I need help"? Is that what you are going to do? No, it's not. It doesn't make sense.

This statement by counsel contains several explicit and implied assertions. First, counsel is stating that the fact that Appellant relinquished his children is not consistent with his being a child molester. He is also asserting that Appellant would try to maintain control over his own children if he was the mastermind of a scheme to sexually assault children. Counsel then invites the jury to conclude that Appellant is not a child molester and not a mastermind of a scheme to sexually assault children because he agreed to have his children taken temporarily.

Later in the trial, the State asked the trial court to allow it to offer evidence that Appellant was the kind of person who would molest children and orchestrate the sexual assault of a child. The State told the court that it had a witness, Appellant's stepdaughter, who was prepared to testify about an incident that occurred around the time Appellant's own children were removed from his home. According to the State, the witness, who was ten or eleven at the time, would testify that Appellant, the child's own mother, and two other people took her into a room and held her down while Appellant had sexual intercourse with her.

The court found that this testimony was relevant to rebut the assertions made by Appellant's counsel in his opening statement and that the probative value of the child's testimony was not outweighed by the danger of unfair prejudice pursuant to Texas Rule of Evidence 403.[10]

Applicable Law

Generally, evidence of extraneous acts, wrongs, or crimes are not admissible to prove the character of the person on trial to show that the person committed the charged act in conformity with his character. *See* TEX. R. EVID. 404(b). However, evidence that would not be allowed under Rule 404(b) may be permitted if the opening statement by the defense "opens the door to the admission of extraneous-offense evidence." ***Bass v. State***, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008). The court in ***Bass*** held that evidence of extraneous sexual assaults was admissible to rebut the defensive theory that the complainant fabricated her allegations against the appellant and to rebut the defensive theory that the appellant was a "real deal" and a "genuine" pastor who would not engage in the "type of conduct alleged in the indictment." ***Id***. We review the admission of such evidence for an abuse of discretion. ***Id***.

[10] Appellant does not challenge the trial court's Rule 403 ruling on appeal.

Analysis

Appellant argues specifically that the ***Bass*** case does not allow the admission of this evidence because the assault on Appellant's stepdaughter was very different from the charged conduct. The charged conduct in this case, in relevant part, is that Appellant caused the sexual organ of a child to contact the sexual organ of another child. Strictly speaking, Appellant is correct that the charged conduct and the uncharged conduct are dissimilar. However, the uncharged conduct, a forcible sexual assault on a child, was not offered or admitted under a traditional Rule 404(b) rationale that it had some similarity to the charged offense. Instead, it was allowed into evidence simply to rebut the assertions of counsel that the evidence showed that Appellant was not a child molester.

This is the second half of the formulation set out by the court in ***Bass***. In that case, the court of appeals held that the admission of other sexual assaults that were similar to the charged conduct in that case was relevant both to rebut allegations of fabrication and to rebut allegations that the defendant was the "real deal" and a "genuine" pastor. ***Bass***, 270 S.W.3d at 563. These are different rationales for admission.

The case of ***Daggett v. State***, 187 S.W.3d 444, 453 (Tex. Crim. App. 2005), which is cited in the ***Bass*** decision, provides an illustration of this point. In that case, the court held that the similarity between the charged and uncharged acts was too attenuated to allow the uncharged acts to be admitted under Rule 404(b). ***Id***. However, the evidence was admissible to rebut assertions that the defendant would not commit such acts. ***Daggett***, 187 S.W.3d at 454 ("The State could introduce evidence of appellant's sexual conduct with Hailey to rebut these sweeping statements disavowing any sexual misconduct with minors.").[11]

It is a close call as to whether counsel's argument that the evidence showed Appellant's actions were contrary to what a "child molester does" was akin to an assertion that Appellant was not a child molester and had never molested a child. Indeed, it was such an insignificant part of defense counsel's presentation that it is reasonable to conclude that he would never have made the assertion if he had anticipated that the trial court would have allowed the kind of testimony that

[11] The court remanded for further consideration because the trial court had admonished the jury to consider the evidence as if it had been admitted both as proof of a plan under Rule 404(b), a theory the court held was inapplicable, and as rebuttal.

followed. Nevertheless, we are unable to hold that the trial court abused its discretion in determining that counsel had made the implicit assertion that his client had characteristics or had done things that were inconsistent with being the kind of person who would sexually assault a child or in allowing the State to rebut that assertion.[12] We overrule Appellant's ninth issue.

DISPOSITION

Having overruled Appellant's nine issues, we ***affirm*** the judgment of the trial court.

SAM GRIFFITH
Justice

Opinion delivered October 31. 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

[12] Appellant did not argue in the trial court that different or less drastic measures could be used to cure any false impression created by counsel's remarks.

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

OCTOBER 31, 2012

NO. 12-10-00328-CR

DENNIS BOYD PITTMAN,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 241st Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 241-1420-07)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.