NO. 12-11-00205-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

VICTOR MANUEL GONZALEZ, APPELLANT	***§***	***APPEAL FROM THE 420TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

Victor Manuel Gonzalez appeals his convictions for two counts of sexual assault of a child and one count of indecency with a child. Appellant raises seven issues on appeal. We affirm.

BACKGROUND

A Nacogdoches County jury convicted Appellant on two counts of sexual assault of a child and one count of indecency with a child. The trial court assessed punishment at twenty years of imprisonment for each count of sexual assault and ten years of imprisonment for the indecency count. The sentences were ordered to run concurrently.

At the time of trial, the complainant, B.P., was sixteen years old. At the beginning of her testimony, B.P. stated that she was in court because her uncle, Appellant, "molested" and "sexually assaulted" her. She testified that she was approximately eight years old when she was first assaulted by Appellant. During this incident, Appellant told B.P. that she would have to do whatever he drew on a computer program. The image Appellant drew depicted B.P. "on [her] knees" and Appellant "on the chair with his pants down." B.P. testified that she did what he drew and put her mouth "on [Appellant's] penis." In explaining how she knew what Appellant wanted

her to do, she stated, "I saw me on my knees and then [Appellant] drew himself all out, like his whole body out and his pants down." B.P. said this incident took place in Appellant's room at B.P.'s grandmother's home in Lufkin, Texas. She testified further that in addition to having her put her mouth on his penis, Appellant would touch her breasts through her clothing.

B.P. also testified that when Appellant moved to Nacogdoches, Texas, the sexual behavior continued. She described an incident that occurred before October 2009 when she was fourteen years old and visiting Appellant at his residence. B.P. explained that she and Appellant were listening to music in Appellant's pickup truck that was parked behind his house when he repeatedly asked her if she wanted to put her mouth on his penis. B.P. testified that Appellant had been "drinking" and "just kept asking and asking, so I did it. And then when I did that, he asked if he could finger me. And I didn't want to, but he just kept asking and asking, so . . . he put his finger inside my vagina." As this was happening, someone came outside to talk to Appellant in his truck, causing Appellant to stop and B.P. to "pull[] [her] pants up."

B.P. testified that Appellant made her put her mouth on his penis "several" times and that when Appellant placed his finger in her vagina, "[i]t hurt me really bad because, you know, I've never done that and that hurts a lot." The prosecutor asked B.P. whether Appellant's digital penetration of B.P.'s vagina was "the first time anything like that had ever happened," and B.P. answered affirmatively. B.P. also testified that on the same night, Appellant had B.P. take off her shorts and touched B.P's anus with his penis. During her testimony, B.P. clarified that she had put her mouth on Appellant's penis on more than one occasion while at Appellant's Nacogdoches house.

B.P. testified that she frequently visited Appellant's house, even though she "knew something was going to happen." She explained that she liked going to Appellant's house because she could get away from her younger siblings. When B.P. would watch television at Appellant's house, Appellant would touch her breasts. B.P. testified that even though she did not want Appellant to touch her breasts and did not want to put her mouth on his penis, she would still have "fun times" with him and they would have a "good laugh."

When asked why she did not tell anyone about what Appellant did to her, B.P. explained that she was afraid nobody in the family would believe her. The only other person who knew about Appellant's behavior before B.P.'s outcry was B.P.'s friend, Stacey. Stacey testified that she never

told anyone about what Appellant did to B.P. because she promised to keep it secret.

Appellant called several witnesses to testify on his behalf, including B.P.'s mother, Linda Gonzalez, who is also Appellant's sister. Gonzalez testified that she supported Appellant because he "should [not] be charged for something he didn't do."

Appellant testified at the end of the guilt/innocence phase and unequivocally denied the charges against him.

SUFFICIENCY OF THE EVIDENCE: COUNT I

In his first issue, Appellant argues the evidence is insufficient to support a conviction for sexual assault of a child as alleged in Count I of the indictment because the State failed to prove penetration beyond a reasonable doubt.[1]

Standard of Review

Under the single sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *see also* ***Brooks v. State***, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

An appellate court is not permitted to supplant its judgment for that of a rational fact finder—no matter how tempting. ***Laster v. State***, 275 S.W.3d 512, 523 (Tex. Crim. App. 2009). As long as the verdict is supported by a reasonable inference, it is within the province of the fact finder to choose which inference is most reasonable. *See* ***id.*** at 523. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. ***Hooper***, 214 S.W.3d at 16. Juries may use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may

[1] Appellant was initially charged with ten counts in the indictment. Prior to trial, the State abandoned its original Counts I, II, III, IV, V, and VIII. The remaining counts were renumbered as Counts I, I, III, and IV. At the close of the State's evidence, a directed verdict of not guilty was rendered on Count IV.

reasonably be drawn from the evidence. ***Jones v. State***, 900 S.W.2d 392, 399 (Tex. App.—San Antonio 1995, pet. ref'd). Finally, a rational fact finder can consider a defendant's untruthful statements in connection with other circumstances of the case as affirmative evidence of guilt. *See* ***Gear v. State***, 340 S.W.3d 743, 747 (Tex. Crim. App. 2011).

The sufficiency of the evidence is measured by the offense as defined by a hypothetically correct jury charge. ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Appellant's sole contention in his sufficiency challenge regarding his conviction for sexual assault of a child is that the State failed to prove the element of penetration beyond a reasonable doubt. Accordingly, we limit our analysis to the issue of penetration.

Applicable Law

An individual is guilty of sexual assault of a child if the actor causes the penetration of the mouth of a child by the sexual organ of the actor, or causes the mouth of a child to contact the anus or sexual organ of another person, including the actor. *See* TEX. PENAL CODE ANN. § 22.011(a)(2)(B), (E) (West 2011). A conviction of sexual assault of a child is supportable on the uncorroborated testimony of the victim of the sexual offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2012). A child is not required to be able to testify about penetration, and is not expected to testify with the same ability and clarity as is expected of mature and capable adults. ***Villalon v. State***, 791 S.W.2d 130, 133-34 (Tex. Crim. App. 1990).

The state may prove penetration by circumstantial evidence. *See* ***id.*** at 133. Evidence of the slightest penetration is sufficient to uphold a conviction so long as it has been shown beyond a reasonable doubt. *See* ***Luna v. State***, 515 S.W.2d 271, 273 (Tex. Crim. App. 1974). Thus, in terms of subsections (a)(2)(B) and (E) of the sexual assault statute, the act of "penetration" must cause an intrusion of the victim's mouth, while "contact" must cause an unintrusive touching, which may or may not precede penetration.[2] *Accord* ***Patterson v. State***, 152 S.W.3d 88, 91-92 (Tex. Crim. App. 2004) (criminal offenses involving exploitation of children cover range of escalating conduct from exposure, to contact, to penetration); ***Valdez v. State***, 211 S.W.3d 395, 400 (Tex. App.—Eastland 2006, no pet.) (act of contact subsumed by penetration).

[2] "A person commits an offense if the person intentionally or knowingly causes the penetration of the mouth of a child by the sexual organ of the actor." TEX. PENAL CODE ANN. § 22.011(a)(2)(B). "A person commits an offense if the person intentionally or knowingly causes the mouth of a child to contact the anus or sexual organ of another person, including the actor." ***Id***. § 22.011(a)(2)(E).

Discussion

Here, the State's indictment alleged penetration, but did not allege sexual assault of a child by contact. Appellant argues that the evidence for Count I is insufficient because the complainant testified only that she put her mouth "on" Appellant's penis. Because B.P. did not testify that Appellant's penis went "in" her mouth, Appellant contends that the State's evidence showed only contact and not penetration.[3]

Here, B.P. qualified as a child under the statute, and her testimony showed that Appellant caused B.P. to place her mouth on his penis. B.P. testified that she was approximately eight years old the first time she put her mouth on Appellant's penis. She testified further that she did so in response to Appellant's instruction that she perform whatever act he drew on a computer program. B.P. later testified that Appellant made her put her "mouth on his penis" several times thereafter, including times when Appellant lived in Nacogdoches.

"Mouth" is defined as "the opening through which an animal takes in food and through which sounds are uttered." WEBSTER'S NEW WORLD DICTIONARY 315 (Modern Desk ed. 1979). The mouth, therefore, is a hole or cavity. ***Livingston v. State***, No. 14-06-01031-CR, 2008 WL 2262033, at *2 (Tex. App.—Houston [14th Dist.] May 29, 2008, pet. ref'd) (mem. op., not designated for publication). Thus, the jury reasonably could have inferred that when B.P. placed her mouth "on" Appellant's penis during the incident at B.P.'s grandmother's house, Appellant's penis entered B.P.'s mouth. *See* ***id.***, at *2-3. Based on this inference, the jury reasonably could have concluded that Appellant's conduct was not merely an unintrusive touching, but was penetration. *Accord* ***Patterson***, 152 S.W.3d at 91-92; ***Livingston***, 2008 WL 2262033, at *3; ***Valdez***, 211 S.W.3d at 400; ***Jones***, 900 S.W.2d at 399. Because B.P. used the same language to describe the subsequent incidents that occurred in Nacogdoches, i.e., that Appellant made her put her "mouth on his penis," the jury reasonably could have inferred that Appellant penetrated B.P.'s

[3] Appellant's argument that B.P.'s testimony did not prove penetration is supported by some authority. *See* ***Cinnamon v. State***, Nos., 03-04-00382-CR, 03-04-00383-CR, 03-04-00384-CR, 03-04-00385-CR, 03-04-00386-CR, 03-04-00387-CR, 2006 WL 1358496, at *9 (Tex. App.—Austin May 19, 2006, pet. ref'd) (mem. op., not designated for publication) (evidence insufficient to prove penetration because victim did not testify that penis went "in" mouth). But there is also authority to the contrary. *See* ***Livingston v. State***, No. 14-06-01031-CR, 2008 WL 2262033, at *2-3 (Tex. App.—Houston [14th Dist.] May 29, 2008, pet. ref'd) (mem. op., not designated for publication) (reasonable to conclude victim's placing mouth "on" penis required entering of penis into mouth); ***Rangel v. State***, 199 S.W.3d 523, 543-44 (Tex. App.—Fort Worth 2006), *pet. dism'd, improvidently granted*, 250 S.W.3d 96 (Tex. Crim. App. 2008) (testimony that victim put mouth "on" penis sufficient to prove penetration).

mouth with his sexual organ during these incidents also. *See* ***Livingston***, 2008 WL 2262033, at *3; ***Jones***, 900 S.W.2d at 399-400 (jury could infer penetration or contact from victim's testimony that defendant played "horsey" with her and it hurt when defendant touched his penis to her behind). Therefore, we hold that the evidence is sufficient to show penetration.

Because the State proved penetration, the evidence is sufficient to support Appellant's conviction for sexual assault of a child as alleged in Count I of the indictment. Accordingly, we overrule Appellant's first issue.

EXCLUSION OF TESTIMONY: COUNT II

Appellant was also convicted of indecency with a child as alleged in Count II of the indictment. In his third and sixth issues, Appellant argues that the trial court abused its discretion by excluding the testimony of Irais Moreno and Linda Gonzalez under the general intent of Texas Rule of Evidence 412 because Rule 412 does not apply to cases involving indecency with a child.

Standard of Review and Applicable Law

We review a trial court's decision to exclude testimony for abuse of discretion. *See* ***Mozon v. State***, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999). A trial court's decision will be upheld on appeal if it is correct on any theory of law applicable to the case. ***Romero v. State***, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). A trial court is given the limited right to be wrong, so long as the result is not reached in an arbitrary or capricious manner. ***Montgomery v. State***, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). An abuse of discretion occurs when a trial court's decision is so clearly wrong that it lies outside the zone of reasonable disagreement. *See* ***Gonzalez v. State***, 117 S.W.3d 831, 839 (Tex. Crim. App. 2003).

Reputation or opinion evidence of the past sexual behavior of an alleged victim is not admissible in the prosecution of certain crimes. *See* TEX. R. EVID. 412(a). Texas Rule of Evidence 412 does not apply to cases involving indecency with a child. *See* ***Reyna v. State***, 168 S.W.3d 173, 176 (Tex. Crim. App. 2005). Accordingly, we must review the admissibility of the excluded testimony under other rules of evidence.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. Evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. Furthermore, evidence of a witness's specific instances of conduct may not be inquired into on cross-examination, nor proved by extrinsic evidence for the purpose of impeachment. *See* TEX. R. EVID. 608(b).

Discussion

In Count II of the indictment, the grand jury alleged that on or about the 15th day of September, 2009, Appellant, "with intent to arouse or gratify the sexual desire of said defendant, intentionally or knowingly engage[d] in sexual contact with B.P. by touching the breast of B.P., a child younger than 17 years of age." B.P. testified that Appellant touched her breasts through her clothes with his hand when he lived in Nacogdoches. Appellant attempted to introduce evidence of B.P.'s prior sexual history through the testimony of Irais Moreno, Appellant's ex-girlfriend, and Linda Gonzalez, B.P.'s mother and Appellant's sister. But the trial court ruled that the testimony should be excluded.

Appellant argues that Moreno's and Gonzalez's testimony would have shown that B.P. was untruthful and left a false impression with the jury when she testified that Appellant's digital penetration of her vagina "hurt me really bad because, you know, I've never done that and that hurts a lot." Moreno and Gonzalez would have testified that B.P. had previously engaged in sexual intercourse with someone, lied to her mother about having sexual intercourse until she thought she was pregnant, and subsequently took precautions for birth control. Appellant argues that the evidence was "relevant to demonstrate that B.P. was not being honest with the jury." We are not persuaded that B.P.'s prior sexual history made it more or less probable that Appellant touched B.P.'s breast. *See* TEX. R. EVID. 401. Moreover, the evidence was properly excluded because it was an attempt to impeach B.P. through the inquiry of specific instances of conduct, which is improper under Rule 608(b). Accordingly, we overrule Appellant's third and sixth issues.

EXCLUSION OF TESTIMONY: COUNT III

In Appellant's second, fourth, fifth, and seventh issues, he states generally that the trial court abused its discretion under Rules 403 and 412 by excluding Moreno's and Gonzalez's testimony of B.P.'s prior sexual activity. These issues pertain to Count III of the indictment (sexual assault of a

child).

Standard of Review

The standard of review for the issues addressed in this section is the same as we applied in reviewing Appellant's third and sixth issues. Because Appellant challenges the trial court's exclusion of testimony, we review the trial court's decision for an abuse of discretion. *See* ***Mozon***, 991 S.W.2d at 846-47. We will reverse for abuse of discretion only if the trial court's decision was so clearly wrong that it lies outside the zone of reasonable disagreement. *See* ***Gonzalez***, 117 S.W.3d at 839.

Second and Fifth Issues

In his second and fifth issues, Appellant argues that B.P.'s testimony "left the impression . . . that her vagina had never been penetrated before." Therefore, he contends that Moreno's and Gonzalez's testimony was constitutionally required because B.P.'s testimony was untruthful and left a false impression with the jury. *See* TEX. R. EVID. 412(b)(2)(E).

Generally, Rule 412 does not permit reputation or opinion evidence of a complaining witness's past sexual behavior in a criminal trial for sexual assault. *See* TEX. R. EVID. 412. The exceptions are when evidence (1) is necessary to rebut or explain scientific or medical evidence offered by the state, (2) is of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the charged sexual behavior, (3) relates to the motive or bias of the alleged victim, (4) is admissible under Rule 609, pertaining to impeachment by evidence of conviction of a crime, or (5) is constitutionally required to be admitted. *See* TEX. R. EVID. 412(b)(2)(A)-(E). Even if the evidence falls under one of the five listed exceptions, its probative value must still outweigh the danger of unfair prejudice. *See* TEX. R. EVID. 412(b)(3); *see also* TEX. R. EVID. 403.

When a state procedural rule does not satisfactorily permit the defense to attack the credibility of a witness, the rule must give way to the constitutional right. *See* ***Davis v. Alaska***, 415 U.S. 308, 319-20, 94 S. Ct. 1105, 1111-12, 39 L. Ed. 2d 347 (1974). The Constitution, however, does not confer a right in every case to impeach the general credibility of a witness through cross-examination about prior instances of conduct. *See* ***id.***, 415 U.S. at 321, 94 S. Ct. at 1112-13 (Stewart, J., concurring); *see also* ***Wheeler v. State***, 79 S.W.3d 78, 88 (Tex. App.—Beaumont 2002, no pet.). Nor does the Constitution confer upon a defendant an absolute "right to impeach the

general credibility of a witness in any fashion that he chooses." ***Hammer v. State***, 296 S.W.3d 555, 562 (Tex. Crim. App. 2009).

"[A] defendant may always offer evidence of a pertinent character trait—such as truthfulness—of any witness." ***Id.*** at 563. But the witness's general character for truthfulness may be shown only through reputation or opinion testimony. TEX. R. EVID. 608(a); ***Hammer***, 296 S.W.3d at 563. "A witness's general character for truthfulness or credibility may not be attacked by cross-examining him (or offering extrinsic evidence) concerning specific prior instances of untruthfulness." ***Id.***

We disagree with Appellant's contention that admission of the excluded testimony was constitutionally required under Rule 412. Rule 412 does not prohibit an accused from impeaching or attacking the credibility of a witness at trial, nor does it prevent an accused from presenting his defense. Appellant's defense was that B.P. was lying, and he was not prohibited from presenting this defense at trial.

Appellant called six witnesses and testified in his own behalf. Among the witnesses Appellant called to testify was Appellant's friend, Ariel Hernandez. Hernandez described Appellant's relationship with B.P. as "[not] that close," and testified that he never saw Appellant act inappropriately or B.P. act unusual when he was around them. Christian Camacho, another friend of Appellant's, testified that Appellant's relationship with B.P. was "pretty normal" and that he never saw Appellant do anything inappropriate. Camacho testified that he was "shock[ed]" when he learned of the charges against Appellant. Appellant's nephew and B.P.'s cousin, Jose Vasquez, also testified that he never saw Appellant act inappropriately with B.P.

Linda Gonzalez was Appellant's last witness to testify before Appellant took the stand. In her testimony, Gonzalez explained that she did not support her daughter and that Appellant "should [not] be charged for something he didn't do." Upon taking the stand, Appellant testified that B.P. was his niece, a "real good friend," and that they were "close." Appellant told the jury that he was never alone with B.P. "outside" and that he was "embarrassed" by the charges brought against him. When asked whether he engaged in any of the conduct alleged in the indictment, Appellant consistently answered in the negative.

Appellant had the opportunity to correct the alleged false impression left by B.P.'s testimony by cross-examining her at trial. Appellant was not entitled to correct the alleged false

impression by calling other witnesses. *See* ***Wheeler v. State***, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002) ("opponent must correct the 'false impression' through cross-examination of the witness who left the false impression, not by calling other witnesses to correct that false impression"). The proffered testimony from Moreno and Gonzalez was an attempt to impeach or attack B.P.'s credibility in direct violation of Rule 608(b). *See e.g.*, ***Mixon v. State***, No. 05-92-02427-CR, 1993 WL 524747, at *4 (Tex. App.—Dallas 1993, pet. ref'd) (not designated for publication). Therefore, the trial court did not err in excluding the testimony. Accordingly, we overrule Appellant's second and fifth issues as they pertain to Rule 412.

Fourth and Seventh Issues

In his fourth and seventh issues, Appellant contends that Moreno's and Gonzalez's testimony was relevant because it would have shown that B.P. had previously engaged in sexual intercourse. That, he contends, would have cast doubt on the truthfulness of her testimony regarding Appellant's digital penetration of her vagina.[4] More specifically, he sought to discredit B.P.'s testimony that she had "never done that and that hurts a lot," and her confirmation that the night Appellant digitally penetrated her vagina was the first time anything like that happened. *See* TEX. R. EVID. 402.

As previously stated, relevant evidence may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. *See* TEX. R. EVID. 403. "Probative value" refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. ***Casey v. State***, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007).

"Unfair prejudice" refers to a tendency to suggest a decision on an improper basis, e.g., evidence may be unfairly prejudicial if it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. ***Id***. at 879-80. It is presumed that the probative value of relevant evidence exceeds any danger of unfair prejudice. ***Hammer***, 296

[4] Appellant argues in his fourth and seventh issues that Moreno's and Gonzalez's testimony would have related to the issue of "whether or not [B.P.] was being truthful in her testimony that Appellant committed sexual offenses against her." We construe the arguments contained in Appellant's fourth and seventh issues as pertaining to the offense of sexual assault by digital penetration as alleged in Count III of the indictment.

S.W.3d at 568. Rule 403 envisions exclusions of evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." ***Id***.

"Confusion of the issues" refers to the tendency to confuse or distract the jury from the main issues in the case. ***Casey***, 215 S.W.3d at 880. "Misleading the jury" refers to a tendency of an item of evidence be given undue weight by the jury on other than emotional grounds. ***Id***. "Undue delay" and "needless presentation of cumulative evidence" concern the efficiency of the trial proceeding. ***Id***.

Moreno's testimony would have shown that B.P. engaged in sexual intercourse with someone, but that was the only information B.P. gave her. Gonzalez's testimony would have shown that B.P. lied to Gonzalez about not having sexual intercourse until she thought she was pregnant, and that B.P.'s stepmother placed B.P. "on birth control." Appellant's argument is that the excluded evidence focuses on whether B.P. was truthful about her prior sexual history. But the fact of consequence here is not B.P.'s prior sexual history; instead, it is whether B.P.'s testimony that Appellant digitally penetrated B.P.'s vagina was true.

Under the facts before us, evidence of B.P.'s prior sexual history would not make it more or less probable that B.P.'s testimony was untrue. When read in context, B.P.'s testimony that "I've never done that" and her confirmation upon questioning that "that was the first time anything like that had ever happened" referred to Appellant's digital penetration of B.P.'s vagina. Thus, Moreno's and Gonzalez's testimony regarding B.P.'s sexual intercourse with someone else was not relevant and had no bearing on the ultimate determination of Appellant's guilt or innocence. *See* ***Williams v. State***, 27 S.W.3d 599, 602 (Tex. App.—Waco 2000, pet. ref'd). Therefore, this evidence has little or no probative value except to show B.P.'s purported promiscuity, which is an evidentiary use that is strictly prohibited by Rule 412. *See* ***Hammer***, 296 S.W.3d at 570. Accordingly, we overrule Appellant's fourth and seventh issues as they pertain to the admissibility of the evidence under Rule 403.

Prior Inconsistent Statements

In the remaining portion of his second, fourth, fifth, and seventh issues, Appellant indirectly argues that Moreno's and Gonzalez's testimony revealed a prior inconsistent statement made by B.P.

A "prior inconsistent statement" is a prior statement made by a witness that is inconsistent

with that witness's testimony at trial. *See* TEX. R. EVID. 613(a); ***Cantu v. State***, No. 13-10-00047-CR, 2012 WL 664939, at *3 (Tex. App.—Corpus Christi, Mar. 1, 2012, pet. ref'd) (mem. op., not designated for publication). Rule 613(a) permits a party to impeach a witness with a prior inconsistent statement. *See* TEX. R. EVID. 613(a); ***Lopez v. State***, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002). The rationale for permitting such impeachment is to show that the witness speaks out of both sides of her mouth and that her testimony is unreliable. Cathy Cochran, *Texas Rules of Evidence Handbook* 638 (5th ed. 2003). To qualify for admission under Rule 613(a), the trial court must be persuaded that the statements are indeed inconsistent. ***Lopez***, 86 S.W.3d at 230. Thus, for Moreno's and Gonzalez's testimony to be admitted as a prior inconsistent statement, Appellant was required to establish that B.P.'s prior statements were inconsistent with her trial testimony. Specifically, Appellant points to B.P.'s testimony describing Appellant's digital penetration as having "hurt me really bad because, you know, I've never done that and that hurts a lot." He contends that this testimony is inconsistent with her prior statement that she had previously engaged in sexual intercourse and thought she was pregnant at one time.

As stated above, B.P.'s statement, when read in context, refers only to digital penetration of her vagina. Therefore, neither Moreno's nor Gonzalez's testimony would have contradicted B.P.'s statement regarding Appellant's digital penetration. Thus, the trial court's decision to exclude Moreno's and Gonzalez's testimony was not outside the zone of reasonable disagreement. *See* ***Gonzalez***, 117 S.W.3d at 839. The trial court did not err in concluding that Rule 613 did not authorize admission of the testimony. Accordingly, we overrule the remaining portion of Appellant's second, fourth, fifth, and seventh issues.

DISPOSITION

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

BRIAN HOYLE
Justice

Opinion delivered September 28, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

SEPTEMBER 28, 2012

NO. 12-11-00205-CR

VICTOR MANUEL GONZALEZ,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 420th Judicial District Court
of Nacogdoches County, Texas. (Tr.Ct.No. F1017583)

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.

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