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COURT OF CRIMINAL APPEALS
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No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SAMUEL UKWUACHU, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

Appeal from McLennan County

* * * * *

**STATE'S PETITION FOR DISCRETIONARY REVIEW**

* * * * *

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## NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Samuel Ukwuachu.

*The case was tried before the Honorable Matt Johnson, 54th District Court, McLennan County, Texas.

*Counsel for Appellant at trial was Jonathon P. Sibley, 801 Washington Avenue, Suite 300, Waco, Texas 76710.

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*Counsel for the State at trial were Hilary LaBorde and Robert Moody, Assistant Criminal District Attorneys, 219 North 6th Street, Suite 200, Waco, Texas 76701.

*Counsel for the State on appeal and before this Court is Sterling Harmon, Chief Appellate Assistant Criminal District Attorney, 219 North 6th Street, Suite 200, Waco, Texas 76701.

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## STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. The State is asking this Court to decide an important issue regarding the scope of the Texas "Rape Shield" law as expressed under Rule of Evidence 412, and its interplay with other rules of evidence. Namely, the purpose of Rule 412 as a rule of exclusion designed to protect victims of sexual assault has been called into question by the opinion of the court below. Determination of this case will require consideration of competing evidentiary doctrines and the proper balance to be struck between them. Discussion will help to clarify these matters and resolve the issues presented.

## STATEMENT OF THE CASE

Appellant pleaded not guilty to the offense of Sexual Assault. He was found guilty at jury trial and sentenced to probation. Appellant presented six points of error on appeal to the 10th Court of Appeals. The court of appeals first overruled Appellant's complaint as to the sufficiency of the indictment, as a finding for Appellant on that point would have afforded greater relief than his other points of error. The court of appeals then found that the trial court had erred in refusing to admit text messages under Rules of Evidence 412 and 107. The court of appeals reversed the conviction and remanded the case for a new trial.

## STATEMENT OF PROCEDURAL HISTORY

On March 22, 2017, the court of appeals reversed appellant's conviction in an unpublished opinion and remanded for a new trial. *Ukwuachu v. State*, 10-15-00376-CR, 2017 WL 1101284 (Tex. App.—Waco Mar. 22, 2017). No motion for rehearing was filed. The State's petition is due on April 21, 2017.

## GROUNDS FOR REVIEW

1. **The court of appeals misapplied the standard of review for admission of evidence under Rule 412 and 107 in a manner that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.**

2. **The court of appeals' failure to conduct a proper harm analysis so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.**

## FACTUAL OVERVIEW

Appellant was indicted for Sexual Assault. (CR I – 7-8). Appellant's opening statement presented the defensive theory of consent. (RR V – 13).

The Complainant had called her friend Brittani, asking to be picked up from Appellant's apartment. (RR V – 26). Complainant appeared to be upset, and she reported that Appellant had raped her. (RR V – 28, 30).

Dr. Cheryl Wooten was a clinical psychologist who had counseled Complainant after the sexual assault. (RR V – 90, 95). Complainant exhibited symptoms warranting a PTSD diagnosis. (RR V – 96). Complainant had remained remarkably consistent in recounting details of the sexual assault.

The first time Complainant spent time with Appellant, he had "tried to do stuff," but Complainant had made it clear to him, through text messages and in person, that "that would not happen again." (RR V – 130). The first time Complainant went to Appellant's apartment, his roommate Peni Tagive was there. (RR V – 132-133). The second time Complainant went to Appellant's apartment, she had spent the night, sleeping in Appellant's bed. (RR V – 143). Nothing had happened with Appellant on that occasion, not even kissing. (RR V – 143).

On the morning of October 20th, Complainant had been at a homecoming party and returned to her apartment. (RR V – 146). Complainant saw Appellant at the party, who told her to call him when she got home. (RR V – 149). After they arrived at Appellant's apartment, Complainant was sitting on the edge of Appellant's bed. (RR V – 154). Appellant came and sat next to her and started getting "touchy and kind of feely." (RR V – 154). Complainant was trying to text her friend Celine Antwi, and Appellant started making more moves. (RR V – 155). Complainant described the escalation of Appellant's advances, culminating

in the sexual assault. (RR V – 155-158). While this was happening, Complainant was screaming, "Stop" and "No." (RR V – 159). She believed that if Tagive or anyone else was there, they would have heard, and she would have expected them to have done something. (RR V – 178-179).

When Appellant was finished, Complainant went into the bathroom to call someone. (RR V – 161). She recalled saying that she was "basically raped." (RR V – 163). She explained that what she meant by this was that she was actually raped. (RR V – 163).

At the completion of Complainant's direct testimony, Appellant requested a hearing regarding the text message conversation between Complainant and Celine Antwi. (RR V – 180). The record of that hearing was ordered sealed pursuant to Rule 412. (RR VI).

On the record, the trial court sustained the State's objections with regard to "what I perceive as the first conversation on the text messages." (RR VII – 5). The court elaborated that, "they're separate and distinct topics, separate and distinct conversations." (RR VII – 5-6).

A genital examination of Complainant revealed redness, which was

painful to touch. (RR VIII – 54). There was bleeding of the hymen, the labia minora area was very red and painful to touch. (RR VIII – 55). There was also bleeding at and right above the nine o'clock position and of the posterior fourchette. (RR VIII – 55). There was also a yellow granulation tissue, similar to a scab, indicating that the tissue was undergoing a healing process, consistent with an injury that had occurred earlier that morning. (RR VIII – 55-56).

Dr. William Lee Carter, a psychologist, testified to dynamics of sexual assault. (RR VIII – 87). He had not evaluated either Appellant or Complainant. (RR VIII – 91). His review of the case was consistent with being an opportunistic sex assault. (RR VIII – 99). Dr. Carter viewed Complainant's statement that "I got raped, basically," to mean that she was saying, in a word, that it was rape. (RR VIII – 108).

Appellant re-called Complainant in his case-in-chief. (RR VIII – 124). On cross-examination she sponsored State's Exhibit 10, an email she had written to Bethany McCraw, as a prior consistent statement. (RR XI – 20). The email supported Complainant's testimony that she never told McCraw

that she and Appellant ever kissed, or that Appellant had tried to have oral sex with her. (RR XI – 22).

Appellant called Peni Tagive. (RR XI – 35). Tagive had seen Complainant at the apartment early one morning, and assumed that she had been sleeping in Appellant's room. (RR XI – 45).

Tagive testified that on the night of the offense, he heard Appellant's voice and a female voice, passing through the living room. (RR XI – 51-52). He believed he would have heard someone screaming in Appellant's room, but he did not hear any screaming, resisting or wrestling the rest of the night. (RR XI – 53-54).

The State impeached Tagive's testimony, showing prior inconsistent statements as to the timeline of events and Tagive's phone records showing that he was in different parts of town making calls at the time he claimed to be at the apartment. (RR XI – 58-61).

Appellant called Bethany McCraw regarding her investigative role in the case. (RR XI – 82-83). She was questioned regarding statements Complainant had made reflecting prior consensual sexual activity. (RR XI

– 83-86). At one point, the State objected and the court gave an instruction to disregard McCraw's responses, "as it's not true, and it's not part of her notes…." (RR XI – 85). On cross, the State reiterated with McCraw that nowhere in her notes did it appear that Complainant reported having oral sex with Appellant. (RR XI – 86-88). McCraw also agreed that in Complainant's email, she did not say anything about oral sex. (RR XI – 88). Rather, she wrote, "He tried to kiss me and he tried to touch me in certain places but I brushed him off." (RR XI – 88).

Appellant claimed that the sex was consensual, and that he had had prior sexual relations with Complainant. (RR XI – 92-93). Appellant testified that about a week after they met, he and Complainant had "oral sex." (RR XI – 95). Complainant had stayed the night at his apartment on this occasion and another occasion. (RR XI – 96). Describing the prior encounter, Appellant testified that they had kissed, they had taken off their clothes, and "I sucked on her breasts, I fingered her, and she, uh, masturbated me." (RR XI – 97). This was what Appellant meant by "oral sex." (RR XI – 97). Regarding the charged offense, Appellant testified that

Complainant never said "No," nor did she ever scream. (RR XI – 110). On cross, Appellant was impeached with his prior statement that Complainant "was very vocally into it." (RR XI – 152).

## ARGUMENT AND AUTHORITIES: ISSUE ONE

**The court of appeals misapplied the standard of review for admission of evidence under Rule 412 and Rule 107 in a manner that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision**

Texas Rule of Evidence 412 is unlike other rules of evidence. Whereas the presumption throughout most of the rules of evidence is in favor of admission, the opposite is true with Rule 412. *See, Robisheaux v. State*, 483 S.W. 3d 205, 223 (Tex. App. – Austin 2016, *pet. ref'd*). Because of the prejudice to the victim inherent in evidence of her sexual activity, this Court (along with the Supreme Court) crafted a framework designed to protect victims. In this case, the court of appeals ignored basic rules of evidentiary ruling review and misapplied the Rule 412 framework. As a result, the trial court was held to have abused discretion it was not called upon to exercise.

Appellant was convicted of sexually assaulting Complainant at his apartment. After the assault, Complainant locked herself in his bathroom and tried frantically to reach someone for help. She messaged[1] her friend Celine Antwi, told her she had been raped, and asked her to pick her up. It was around 4:00 am.

At the completion of Complainant's direct testimony, Appellant requested a hearing regarding the text message conversation between Complainant and Celine Antwi. (RR V – 180). The record of that hearing was ordered sealed pursuant to Rule 412. (RR VI).

On the record, the trial court sustained the State's objections with regard to "what I perceive as the first conversation on the text messages." (RR VII – 5). The court elaborated that, "they're separate and distinct topics, separate and distinct conversations." (RR VII – 5-6).

The Tenth Court reversed. In one sentence, the court of appeals held that the messages "were made immediately prior to the offense and appeared to potentially relate to prior occasions where the victim and

[1] With the advances in smartphone technology messaging may occur through a multitude of different applications on a phone and may include more or less detail about the time the messages were sent

Ukwuachu had engaged in some type of sexual conduct." (Mem. Op. at *5). It reversed for a new trial.

**Preservation**

The court of appeals did not address preservation.[2] But it did fault the trial court for not placing the balancing test required under a Rule 412 analysis on the record. The State asserts that the reason the Rule 412 analysis was lacking is that Appellant did not properly preserve his Rule 412 claim.

As noted above, Appellant offered the messages under the Rule of Optional Completeness, Rule 107.[3] The Rule 412 hearing was held at the State's request, but the trial court never reached that issue. Instead, it determined the proffered messages were inadmissible hearsay; the delay between the messages showed they were not part of the same conversation. *See, Burks v. State*, 40 S.W. 3d 698, 700-701 (Tex. App. – Waco 2001, *pet. ref'd*).

[2] The State also recognizes that neither party raised preservation in their briefs, however, preservation is a systemic requirement, *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009), that may be raised for the first time in this Court in a PDR. *Wilson v. State*, 311 S.W.3d 452, 474 (Tex. Crim. App. 2010).

[3] The Tenth Court of Appeals recognized the sensitive nature of these messages and was careful not to disclose the content of the messages. Likewise, the State is also concerned with disclosure and therefore will also attempt to discuss this issue without any direct quotation or specific identifying reference to the content of the messages and would ask the Court to order the sealed portion of the record be sent to this Court for review along with this petition.

Examination of the sealed portion of the record will reflect that Appellant never requested a ruling under Rule 412, and never requested a more complete Rule 412 analysis in the alternative. These failures should have resulted in procedural default on admissibility under Rule 412 or, alternatively, the court of appeals' inability to find an abuse of discretion.

**"Abuse of discretion" should be a meaningful standard**

The Tenth Court's analysis of the trial court's Rule 107 ruling ignored basic rules for review. *See, Tillman v. State*, 354 S.W. 3d 425, 435 (Tex. Crim. App. 2011). Beyond failing to show deference, the court of appeals issued a contrary finding that is at odds with the evidence. *See, De la Paz v. State*, 279 S.W. 3d 336, 344 (Tex. Crim. App. 2009).

The Tenth Court's analysis abruptly ends after they disagree with the trial court's finding that the messages constituted two distinct conversations. The State asserts that the matters presented at the *in camera* hearing presented no evidence to support the conclusion that the unadmitted messages "were made immediately prior to the offense"; the individual messages are not time stamped and there is a distinct break

between the two conversations. Instead, the evidence heard by the trial court strongly suggests that they were made earlier in the night before Complainant ever arrived at Appellant's apartment, and that the offense occurred well after that. Moreover, the Tenth Court then failed to address whether the other part of the conversation "is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent" as required by Rule 107. If an abuse of discretion could be found on this record, the gatekeeper becomes a door man.

**A victim's past sexual behavior should be inadmissible unless shown otherwise by the defense.**

Rule 412 makes clear that the admission of a victim's past sexual behavior is the exception, not the rule. The policy served by this presumption of inadmissibility needs no explanation. The Tenth Court's analysis turns this presumption on its head.

As noted above, any deficiencies in the depth of the trial court's Rule 412 consideration can be laid at Appellant's feet. But if the court of appeals assumes it was completely performed, it should have shown the trial court

deference on factual matters. Most glaringly, the Tenth Court's conclusion that the unadmitted message "appeared to potentially relate" to past sexual behavior with the defendant, almost builds in a zone of reasonable disagreement. *see Tex. R. Evid.* 412(b)(2)(B). If the best one can argue about a statement of a victim's sexual history is that it might could possibly be about the defendant, there is necessarily a large potential that it is just a statement describing the victim's promiscuity.[4] That conflicts directly with the general rule. Moreover, a proper hearing urged by the proponent of the evidence might have revealed what Appellant's trial testimony did---the apparent potential relationship was nonexistent because he disclaimed the sort of behavior with the victim the proffered message supposedly alludes to. Additionally, the Complainant denied any prior sexual contact with Appellant. This is also why any error would be harmless under Rule of Appellate Procedure 44.2(b).

Rule 412 serves too important a purpose to be reviewed in this fashion. Victims need to be protected. This is especially true where the

[4] Because the record is sealed, the State must be vague in this public filing.

case, like this one, may be in the local and national news media and thus have the potential to impose additional embarrassment to a victim of sexual assault or subject a victim to ridicule or harassment.

Rule 412 purposefully favors exclusion based on very real policy considerations. Although this opinion is unpublished, the case garnered extraordinary attention and so will the court's reasoning[5]. The issues presented in this petition are thus important to protect victims at trial and to encourage them to come forward.

The Tenth Court should not have reached the Rule 412 balancing test issue without first giving consideration of preservation and a complete, deferential review of the threshold admissibility question under Rule 107. The trial court was correct to avoid unnecessary discussion of the victim's alleged sexual history.

On the merits of Rule 412's application, the court of appeals should have either 1) analyzed the probative and prejudicial effects under an abuse of discretion standard, fully explaining why the trial court would

[5] This offense involved parties and witnesses attending Baylor University and thus makes retrial extremely difficult as potential witnesses have graduated and relocated all over the world.

have abused its discretion had it found that the probative value did not outweigh the prejudicial effect, or 2) abated the appeal to allow the trial court to supplement the record with its own determination. *LaPoint v. State*, 225 S.W. 3d 513 (Tex. Crim. App. 2007).

Because the court of appeals' decision failed to properly analyze whether the trial court abused its discretion in excluding the evidence and instead substituted its own judgment, this Honorable Court should grant review of this issue.

## ARGUMENT AND AUTHORITIES: ISSUE TWO

**The court of appeals' failure to conduct a proper harm analysis so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.**

The Tenth Court correctly found that any error in the exclusion of the evidence resulted in non-constitutional error and was subject to the standard of Rule 44.2(b). (Mem. Op. at *7). *Walters v. State*, 247 S.W. 3d 204 (Tex. Crim. App. 2007). In reviewing harm, the court of appeals improperly considered "other alleged errors in the trial of this case." (Mem. Op. at *8). By considering alleged errors that have not been found

erroneous, the analysis by the court of appeals improperly and artificially increased the effect of the harm in their finding of the single error in this case. Thus the court of appeals' consideration of unanalyzed errors as a basis for reversible error was improper and should be reviewed by this Court. *Chamberlain v. State*, 998 S.W. 2d 230, 230 (Tex. Crim. App. 1999)

Additionally, the court of appeals failed to consider the undisputed fact that both Complainant and Appellant denied any prior sexual intercourse. By Appellant's own admission, there had been no prior sexual intercourse; and the Complainant denied any prior sexual contact with Appellant, therefore, any error by the exclusion of the messages would be rendered harmless[6]. The court of appeals' opinion also failed to identify the strong evidence of forcible sexual assault including medical testimony and injuries that were consistent with Complainant being sexually assaulted by Appellant. *Motilla v. State*, 78 S.W. 3d 352, 355 (Tex. Crim. App. 2002). When reviewing the entirety of the record in comparison with

[6] Without reference to the sealed record, the State would assert that these admissions by Appellant himself would either diminish the probative value of the excluded evidence or diminish him own credibility, either way the error would not have affected the substantial rights of Appellant.

the excluded evidence, any error did not influence the jury, or had but a slight effect. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

## PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, reverse the court of appeals decision and remand the case so that the court of appeals can consider Appellant's remaining points of error.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the Microsoft Word 2010 word count tool the applicable portion of this document contains 3,053 words.

/s/ Sterling Harmon
STERLING HARMON
Chief Appellate
Assistant Criminal District Attorney

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 20th day of April, 2017, the State's Petition for Discretionary Review was served electronically through the electronic filing manager or e-mail on the parties below.

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# APPENDIX

**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-15-00376-CR**

**SAMUEL UKWUACHU,**

**Appellant**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

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**From the 54th District Court**
**McLennan County, Texas**
**Trial Court No. 2014-1202-C2**

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## MEMORANDUM OPINION

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Samuel Ukwuachu appeals from a conviction for the offense of sexual assault. TEX. PENAL CODE ANN. § 22.011 (West 2011). In six issues, Ukwuachu complains that the trial court erred by allowing the State to reference the cell phone records of his roommate during its cross-examination of his roommate and his roommate's friend, that the indictment was defective, that evidence of an extraneous offense was improperly admitted, that his due process rights were violated due to an abuse of the grand jury process by the State, and that text messages between the victim and a friend of hers the

night of the alleged offense were improperly excluded pursuant to Rule 412 of the Rules of Evidence. Because we find that the trial court erred by disallowing the admission of evidence pursuant to Rule of Evidence 412, we reverse the judgment of conviction and remand this proceeding for a new trial. Because the issue regarding the sufficiency of the indictment would result in greater relief for Ukwuachu, we will address that issue first.

**INDICTMENT**

In his third issue, Ukwuachu complains that the indictment against him is facially insufficient for failing to allege the manner and means in which the lack of consent was obtained. Ukwuachu did not file a motion to quash the indictment prior to trial.

"The sufficiency of an indictment is a question of law." *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). "[T]o comprise an [information] within the definition provided by the constitution, an instrument must charge: (1) a person; (2) with the commission of an offense." *Cook v. State*, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995). "[A] written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective." *Duron v. State*, 956 S.W.2d 547, 550-51 (Tex. Crim. App. 1997). If the State fails to allege an element of an offense in an indictment or information then this failure is a defect in substance. *Studer v. State*, 799 S.W.2d 263, 268 (Tex. Crim. App. 1990). The accused must object to substance defects before trial begins; otherwise the accused forfeits his right to

raise the objection on appeal or by collateral attack. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) ("If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding."); *Duron*, 956 S.W.2d at 550-51. Because Ukwuachu did not file a motion to quash the indictment in this proceeding, this complaint has been waived. We overrule issue three.

**TEXT MESSAGES**

In his sixth issue, Ukwuachu complains that the trial court erred by failing to admit a series of text messages between the victim and a friend of hers made immediately prior to the offense.[1] The trial court did admit a series of messages between the victim and that same friend that took place very shortly after the offense. Ukwuachu sought to have the entire series of messages admitted into evidence in order to support his defense that the victim consented to sexual intercourse. The State requested that the trial court conduct a hearing pursuant to Rule 412 of the Rules of Evidence to determine the admissibility of the messages. The trial court conducted an in camera hearing at which only the parties and their attorneys were present. The trial court found that the messages prior to the offense were not admissible pursuant to Rule 412. The trial court also found that there

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not discuss the facts except as necessary to understand this opinion. TEX. R. APP. P. 47.3.

was enough of a break in between the messages that they did not constitute one conversation pursuant to Rule 107 of the Rules of Evidence (Rule of Optional Completeness).

Rule of Evidence 412 applies in prosecutions for sexual assault, aggravated sexual assault, or for attempts to commit sexual assault or aggravated sexual assault. Rule 412(a) absolutely prohibits opinion or reputation evidence of the past sexual behavior of an alleged victim in these prosecutions. Under Rule 412(b), however, evidence of specific instances of past sexual behavior may be admitted when three conditions are met. First, the procedural requirements of paragraph (c) and (d) concerning the in camera hearing and the sealing of the record must be satisfied. Second, the proponent of the evidence must establish that the evidence of specific instances of the victim's sexual behavior fall into one of the five categories set forth in Rule 412(b)(2). Third, under Rule 412(b)(3), the probative value of the offered evidence must outweigh the danger of unfair prejudice. Even if the evidence falls within the enumerated categories of Rule 412(b)(2), the court must further find that its probative value outweighs the danger of unfair prejudice. *See Holloway v. State*, 751 S.W.2d 866, 869-70 (Tex. Crim. App. 1988). Simply put, if the evidence falls within any of the exceptions itemized in Rule 412(b)(2) and its probative value outweighs the danger of unfair prejudice, it is admissible. *See Boyle v. State*, 820 S.W.2d 122, 148-49 (Tex. Crim. App. 1989).

In this case, the text messages were made immediately prior to the offense and appeared to potentially relate to prior occasions where the victim and Ukwuachu had engaged in some type of sexual conduct. We find that the messages in question would fall within the exception listed in Rule 412(2)(B) because the evidence "concerns past sexual behavior with the defendant and is offered by the defendant to prove consent." TEX. R. EVID. 412(b)(2)(B).[2]

The inquiry does not end there, however. The evidence must also be shown to be admissible pursuant to the balancing test required by Rule 412(b)(3). The function of the balancing test of Rule 412(b)(3), where the trial court balances the probative value against the danger of unfair prejudice, is generally consistent with that under Rule 403, although the tests do differ. TEX. R. EVID. 403. Under Rule 403, the opponent of the admission of the evidence bears the burden of showing that the danger of unfair prejudice substantially outweighs the probative value of the evidence. Under Rule 412(b)(3) the burden falls on the proponent of the evidence, in this case, Ukwuachu, to show that the probative value of the evidence outweighs the unfair prejudice. The general balancing test under Rule 403 weighs in favor of the admissibility of evidence, while Rule 412(b)(3) weighs against the admissibility of evidence. *See Boyle*, 820 S.W.2d at 148 n.9.

[2] Because we recognize that we are not the final authority to determine the admissibility of this evidence, we have intentionally avoided a detailed discussion or recitation of the content of the text messages.

It is not apparent from the record whether the trial court actually performed the balancing test required by Rule 412(b)(3). However, our review of the messages in question demonstrates that the probative value of the messages outweighed any unfair prejudice. The messages were probative on the issue of consent and were not particularly graphic nor did they paint the victim in a negative light. We find that Ukwuachu met his burden to demonstrate that the probative value outweighed the danger of unfair prejudice, and the trial court abused its discretion in finding otherwise.

**RULE OF OPTIONAL COMPLETENESS**

Rule of Evidence 107 states that "[i]f a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject." The text messages in question started when the victim was letting her friend know that she and Ukwuachu were not coming to a Homecoming party and continued during the time the victim was in Ukwuachu's apartment. There was a short break in the messages during the time that the victim stated that the offense occurred and resumed almost immediately thereafter, resulting in the message that the State introduced during the victim's testimony where she texted her friend that Ukwuachu had "basically raped [her]." We find that the text messages were part of an ongoing conversation and that after the State sought to introduce one of the messages, the Rule of Optional Completeness allowed Ukwuachu to inquire into any other part of

the same subject, which are the messages in question. The trial court's determination that Rule 107 did not apply was an abuse of discretion and therefore, erroneous.

**HARM**

Having found that the trial court erred by excluding the messages in question pursuant to either Rule 107 or Rule 412, we must determine whether this error was harmful. The erroneous exclusion of a defendant's evidence generally constitutes non-constitutional error unless the excluded "evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002). Here, the evidence excluded did not prevent Ukwuachu "from presenting the substance of his defense to the jury." *See id*. at 666. We therefore apply the harmless error standard of Rule 44.2(b) of the Texas Rules of Appellate Procedure. *See id*. at 662.

Rule 44.2(b) provides that any non-constitutional error which does not affect substantial rights must be disregarded. *See* TEX. R. APP. P. 44.2(b). Substantial rights are not affected by the erroneous exclusion of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

In assessing the likelihood that the jury's decision was adversely affected by the error, we consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict,

and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla*, 78 S.W.3d at 355. Neither party has the burden to prove harm from an error. *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). It is the duty of the reviewing court to assess harm from the context of the error. *Id*.

We have reviewed and considered everything in the record using the appropriate standards. We find that because consent was the central issue in the proceeding, we cannot say that we have a fair assurance that the erroneous exclusion of the text messages did not affect the outcome of this proceeding, especially when considered with the other alleged errors in the trial of this cause. We sustain issue six.

**CONCLUSION**

Having found that the exclusion of the text messages was erroneous and their exclusion harmed Ukwuachu, we reverse the judgment of conviction and remand this proceeding for a new trial. Because we have found this error to constitute reversible error, we do not reach issues one, two, four, or five. TEX. R. APP. P. 47.1.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and remanded
Opinion delivered and filed March 22, 2017
Do not publish
[CR25]