

Trial court abused its discretion by admitting parts of a video of a Child Advocacy Center interview with the complainant and her sister. [In the Matter of C.N.](13-2-3)

On March 7, 2013, the Fort Worth Court of Appeals held that parts of victim's interview with Child Advocacy Center representatives should not have been admitted because family code section 54.031 does not allow the playing of a video of an outcry in addition to the outcry witness's testimony and they were also not admissible as a prior consistent statement.

¶ 13-2-3. **In the Matter of C.N.**, MEMORANDUM, No. 02-11-00394-CV, 2013 WL 826353 (Tex.App.-Fort Worth, 3/7/13).

Facts: The complainant, Theresa, testified that she and her sister rode home after school on the bus and that appellant sometimes stayed at her home with them and their little brother until their mother came home. According to Theresa, when she was in third grade, appellant touched her on her private, which is where she goes "pee from," and he touched her underneath her underwear and inside her private. She tried to get away from appellant, but he locked the door to the room they were in; Theresa cried for her sister Donna to open the door with a hanger. Once her sister got her out of the room, Theresa told her what had happened. Theresa's sister corroborated her testimony about Theresa's being in the room with appellant and having to let her out, but she did not remember the door being locked. Theresa was twelve and Donna ten at the time of trial.

Donna was a witness to the circumstances relevant to the offense alleged against Theresa, i.e., she testified about the day Theresa was in the bedroom alone with appellant. Both alleged as-saults took place under similar circumstances, after school when the children were alone in the house. Both girls were interviewed at the Children's Advocacy Center on the same day and were examined by a sexual assault nurse examiner on the same day.

Appellant contends that the trial court abused its discretion by admitting Exhibit 14, which included video of Theresa's and Donna's interviews at the Child Advocacy Center. Appellant argues that Theresa's interview should not have been admitted because family code section 54.031 does not allow the playing of a video of an outcry in addition to the outcry witness's testimony. Tex. Fam.Code Ann. § 54.031 (West Supp.2012). He also argues that neither of the interviews was admissible as a prior consistent statement. See Tex.R. Evid. 801(e)(1)(B).

The State first attempted to admit the video interview of Theresa as outcry evidence in conjunction with the testimony of the forensic interviewer. The trial court was initially reluctant to admit the video in addition to the forensic interviewer's testimony. The trial court decided to take the matter under advisement until it could review the video outside the jury's presence. The trial court ruled that the video of the interview of Theresa was admissible "in lieu of [the interviewer's] testimony about those things that are subject to the outcry statute." The court admonished the State not to play any part of the video that was not related to "what happened." The State later offered the video of Donna's interview under the rule of optional completeness, which the trial court denied.

On the second day of trial, the State reoffered Exhibit 14, consisting of the interviews of both girls. According to the State, because the girls' mother testified on cross-examination that she believed something had happened to Theresa, but not what the State had alleged, the State moved to admit the entirety of both interviews as prior consistent statements to rebut an allegation of recent fabrication. The trial court ultimately admitted the entirety of the interviews of both girls as prior consistent statements, and the video was played for the jury after a nurse testified about her physical examinations of the girls.

We must review whether the remainder of Theresa's interview and all of Donna's interview are admissible as prior consistent statements.

Held: Affirmed, error was harmless

Memorandum Opinion: The content, tone, and tenor of defense cross-examination may “‘open the door’ to the admissibility of a prior consistent statement by an express or implied suggestion that the witness is fabricating her testimony in some relevant respect.” See *Hammons v. State*, 239 S.W.3d 798, 808 (Tex.Crim.App.2007). Because “much of the force of cross-examination depends upon the tone and tenor of the questioning, combined with the cross-examiner's demeanor, facial expressions, pregnant pauses, and other nonverbal cues,” a reviewing court should focus on “the ‘purpose of the impeaching party, the surrounding circumstances, and the interpretation put on them by the [trial] court.’” *Id.* We may also consider clues from the voir dire, opening statements, and closing arguments. *Id.* We must decide, “[f]rom the totality of the questioning, giving deference to the trial judge's assessment of tone, tenor, and demeanor, could a reasonable trial judge conclude that the cross-examiner is mounting a charge of recent fabrication or improper motive?” *Id.* at 808–09. For a prior consistent statement to be admissible, “the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.” *Id.* at 804.

The prosecutor began her opening statement by saying that “[t]his is a story about little girls that share secrets and things that are secretive happening behind locked doors. Today you're going to hear from ... a number of different people. You're going to hear that [Donna] told her secret ... a couple different times.” In her opening statement, defense counsel said, “The real secret here is that you're going to be the judges of the credibility of who's telling the truth, who's not telling the truth.” On cross-examination of the girls' mother, the State's first witness, the defense elicited testimony that the mother did not believe “that the secret is true.” But on redirect, the girls' mother testified that the girls told her the same day that appellant had done “something sexual” to them; she just did not believe he had penetrated them. She thought that she and appellant's mother had taken care of things by making sure he never came back over to the house alone with the girls. Defense counsel's cross-examination of Theresa and Donna consisted of asking them to verify details unrelated to the specific allegations, such as who was present at the house the day of the alleged assaults and whether Donna used a hanger to unlock the door. The girls' testimony was inconsistent in this regard.

During closing argument, appellant's counsel again stressed the jury's role in determining credibility, pointing out discrepancies in the alleged dates and the fact that the girls' mother did not believe their secret. Counsel also emphasized the testimony about various cousins who had

lived in the home with the girls. Counsel argued specifically that the girls' testimony was a result of the facts not being thoroughly and accurately investigated and that the forensic interviewer asked leading questions during the interviews, "creating a story ... and that's when [appellant's] name got filled in the blank, basically, of a cousin that fondled two girls."

Here, it is difficult to tell whether counsel's demeanor and questioning suggested to the jury that the girls fabricated their testimony before or after the interviews. Counsel clearly intimated that the girls were coached during the interviews into saying that appellant, as opposed to another person, assaulted them. It appears that counsel's defense as a whole was directed at showing that the girls were mistaken about the details of events, including when they occurred, what exactly happened, and who did it. Counsel appeared to be attacking what the girls said in the interviews as well as at trial. Accordingly, it does not appear that counsel was suggesting that any fabrication occurred after the interviews.

The girls' mother testified that the girls had told her appellant did "something sexual" to them and that she and appellant's mother took care of it. This appears to have happened fairly close in time to the assault of Theresa and the alleged assault of Donna. Several months later, Donna told one of her friends "her secret" about appellant; that friend told her own mother, who went to Donna's teacher. Donna's teacher called CPS, who arranged the interviews, in which both girls stated that appellant assaulted them. Thus, the interviews occurred after both Theresa and Donna had made outcries, specifically about appellant. Accordingly, we conclude and hold that the trial court abused its discretion by admitting the part of Theresa's interview not related to her outcry and the entirety of Donna's interview. See *id.* at 808–09.

However, after viewing the interviews in light of the entire record, we conclude and hold that the error was harmless. Donna's answers during the interview are more descriptive than her trial testimony; however, other evidence, such as the nurse examiner's notes and appellant's social history provided many of the same details. Additionally, the primary details regarding appellant as the perpetrator, that he penetrated both girls, and that they told their friends and their mother are the same as in the interviews. It is well-settled that the improper admission of evidence does not constitute reversible error if the same facts are proved by other properly admitted evidence, especially when the improperly admitted evidence essentially repeats victim testimony. See *Brooks v. State*, 990 S.W.2d 278, 287 (Tex.Crim.App.), cert. denied, 528 U.S. 956 (1999); *Dunn v. State*, 125 S.W.3d 610, 615 (Tex.App.-Texarkana 2003, no pet.); *Matz v. State*, 21 S.W.3d 911, 912 (Tex.App.-Fort Worth 2000, pet. ref'd). Thus, we overrule appellant's second point.

Conclusion: Having overruled appellant's three points, we affirm the trial court's order adjudicating him delinquent.