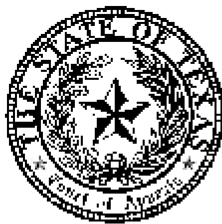
**Affirmed and Opinion filed September 21, 2000.**



**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01312-CR**

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**PASTOR ORELLANA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 184th District Court**
**Harris County, Texas**
**Trial Court Cause No. 741,164**

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## O P I N I O N

Pastor Orellana, appellant, was found guilty by the jury of aggravated sexual assault of a child and sentenced to ten years' imprisonment in the Texas Department of Corrections. He presents one point of error, complaining that the trial court erred in improvidently admitting evidence but then reversing its decision after the evidence already had been admitted. Finding no reversible error under TEX. R. APP. P. 44.2(b), we affirm.

Appellant had periodically resided with his girlfriend, Dolores Vargas, and her four children, one of whom was the complainant, E.V. E.V., age 13, is learning disabled. In the spring of 1996, Dolores had walked into the bedroom and saw appellant on top of E.V., face to face, in bed. When appellant immediately jumped off the bed, Dolores noticed that his pants fly was unzipped.

E.V. told her mother that at an earlier time, appellant had put his "thing" in her "privates," which the mother understood to mean that appellant had put his penis in E.V.'s female sexual organ. E.V. was examined by a physician at Baylor College of Medicine, who testified that injuries to E.V.'s sexual organs suggested a penetrating trauma to her genitalia.

Over appellant's objection, the State was allowed to present testimony that right around the same time that Dolores caught appellant on top of E.V., appellant had held a gun to Dolores' head and told her to move to Mississippi with him. There is no evidence that the incident resulted in criminal prosecution. Appellant's objection was based on the State's failure to provide him notice under TEX. R. EVID. 404(b) of the State's intent to use extraneous offenses other than those arising from the same transaction. The trial court had allowed the testimony in, under the State's assurances that it would prove up proper notice to appellant. When the State subsequently was unable to prove proper notice, the trial court sustained appellant's prior objection to the evidence, but denied appellant's request that the jury be instructed to disregard the testimony. Appellant contends that the trial court committed reversible error in admitting the testimony but then reversing its decision after the evidence was before the jury. We understand appellant's argument as raising reversible error in the admission of the extraneous offense where the State failed to provide proper notice; the point of error addresses procedural, not relevancy, issues.

Although the State argues, without citing any authority, that Rule 404(b) was followed in that proper notice was *sent* to appellant, and that appellant's only objection was that he never *received* it, we do not agree that such a scenario, even if true, would suffice as proper notice under the Rule. It is undisputed that appellant timely and properly requested such notice by the State. The State's position that proper notice was given is not borne out by the record, and admission of the extraneous offense was error.

Having found that there was error in the admission of the extraneous offense before the jury due to failure to give notice, we must determine whether the error is constitutional or of such a nature that could have affected appellant's substantial rights. *See Umoja v. State*, 965 S.W.2d 3 (Tex. App. – Fort Worth 1997). As discussed in *Umoja*, the notice provision of Rule 404(b) is a creature of state law, promulgated by our court of criminal appeals, and is not of constitutional dimension necessitating application of the harmless error rule under TEX. R.

APP. P. 44.2(a). We therefore apply the standard of review under Rule 44.2(b) to determine whether a substantial right is affected. A substantial right is affected when the error had a substantial and injurious effect or influence in determining a jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). As set out in *Umoja*, to make this determination, appellate courts must review the entire record and ascertain whether the error "substantially swayed" the jury, or had a "substantial influence" on the jury's verdict in the context of the entire case against appellant. *Umoja* at 11.

Appellant argues that the error was not harmless, and contends harm is shown by the facts that the admissions ruling was predicated on the actions of the prosecutor; the court failed to prevent the error; the court could have withdrawn the evidence from the jury, and the court could have given the jury an instruction to disregard the evidence.

Dolores testified to finding appellant in bed on top of E.V., with his pants fly unzipped. E.V. testified, using terminology with which she was familiar, that appellant had at an earlier time placed his penis in her vagina. She also testified to seeing "white stuff" coming out of his penis. Medical testimony established a trauma injury to E.V.'s genitalia which injury had not shown in her records prior to the time she resided with appellant. We do not believe, in context of the entire case against appellant, that testimony that he had placed a gun to Dolores' head and ordered her to move out of state with him had a substantial or injurious effect or influence on the jury's verdict such that appellant was deprived of a substantial right. We overrule appellant's point of error.

The judgment is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed September 21, 2000.

Panel consists of Justices Robertson, Sears and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Sam Robertson, Ross A. Sears and D. Camille Hutson-Dunn sitting by assignment.