Cause No. 366-80425-2018

THE STATE OF TEXAS,	)	
	)	**IN THE 366TH JUDICIAL**
Plaintiff,	)	
	)	
v.	)	**DISTRICT COURT**
	)	
XXXX XXXX,	)	
	)	**COLLIN COUNTY, TEXAS**
Defendant.	)	
	)	

MOTIONS *IN LIMINE* I-VI

Defendant, XXXX XXXX, moves this Court, *in limine*, to exclude any evidence related to the subjects set forth below and, in support of this motion, he sets forth the following facts and argument:

I. Not to Attempt to Elicit Statements Made by the Witness Out of Court

Often parties attempt to introduce statements during a witness' testimony that the witness made out of court for other than impeachment purposes and argue that this is not hearsay because it is the witness' own statement. This is not the law and such testimony is inadmissible as explained in *Texas Rules of Evidence Manual* § 801.02[5][c] at 861-62:

> Rule 801 (d) enunciates what is sometimes referred to as the "orthodox rule" that a witness's prior out-of-court statements are still hearsay, even if the witness is available for cross-examination. The rationale supporting this view is that, at the time the out-of-court statement was made, the witness-declarant was not subject to cross-examination or under oath, and the fact finder had no opportunity to observe the witness's demeanor and assess his or her credibility.
>
> It might be arguable that the language of Rule 801(d), "while testifying at the trial or hearing," can be interpreted to mean that the testimony of a witness at trial or hearing concerning prior out-of court statements made by the witness is not hearsay. This is not a correct interpretation. Testimony concerning out-of-court statements offered for their truth constitutes inadmissible hearsay even if the declarant of the statements is the witness at trial, unless the out-of-court statements are admissible under an exemption or exception to the rule against hearsay. That interpretation is reinforced

by the fact that Rule 801(e) expressly specifies the limited circumstances in which a witness's prior out -of court statements are admissible as nonhearsay.

II. Not to Attempt to Elicit Testimony that Explicitly or Implicitly Give a Witness' Opinion that the Complainant is Being Truthful

It is well established that it is improper for a witness to offer a direct opinion that a child complainant is being truthful. *See Schutz v. State*, 957 S.W. 2d 52, 59 (Tex. Crim. App. 1997). Nevertheless, the State often attempts to offer such opinions in indirect ways, and it should be precluded before trial from doing so, and its witnesses should be instructed accordingly. Specifically, courts have found the following testimony to be inadmissible:

(1) Testimony that a complainant did not exhibit evidence of fantasizing. *Id*.

(2) Testimony that manipulation was less likely explanation for complainant's allegations. *Id*.

(3) Testimony from an expert testifying about what percentage of children lie about being sexually assaulted. *Wiesman v. State,* 394 S.W.3d 582, 587-89 (Tex. App.–Dallas 2012); *Wilson v. State*, 90 S.W.3d 391, 393 (Tex. App.--Dallas 2002). *See also*, *Yount v. State*, 872 S.W.2d 707 (Tex. Crim. App. 1993) (Holding that Tex. R. Evid. 702 "does not permit an expert to given an opinion that the complainant or class of persons to which the complaint belongs is truthful" and finding that question asking witness how many child sexual abuse claims she "found to be unfounded" was improper.)

(4). Testimony that the complainant was, in fact, abused. *Kirkpatrick v. State*, 747 S.W.2d 833, 838 (Tex. App.--Dallas 1987) ("The only issue in this case was whether the complainant's allegation of sexual abuse was true. The necessary inference from the expert's testimony, "yes, [the complainant] was abused," was that the expert believed that the complainant's version was true and that she had indeed been sexually abused. We hold that such testimony was an improper comment on the complainant's credibility and was therefore, erroneously admitted.")

(5) Testimony regarding how many complainants that witness had counseled over the years that she did not believe were telling the truth. *Simpson v. State*, 1997 WL 24281 (Tex. App.--Dallas May 13, 1997).

(6) Testimony regarding the factors for truthfulness observed by experts viz-a-viz the complainant. *Edwards v. State*, 107 S.W.3d 107, 115-16 (Tex. App.--Texarkana 2003) (Question "I am asking are there factors that you see there that indicate to you

there's some truthfulness to what she's saying?" was improper); *Sessmus v. State*, 129 S.W.3d 242, 247, 248 (Tex. App.--Texarkana 2004) (After describing the factors for truthfulness, the witness was asked how the complainant "fit into those factors." Held improper).[1]

(7) The different steps taken if a witness who has interviewed the child does not believe the child or different steps taken if a witness who has interviewed the child does believe the child. *Cloud v. State*, 2007 WL 1228630 (Tex. App.--Houst. [1st], Apr. 26, 2007). (Question asking an investigator from the Children's Assessment Center "What happens--what do you do, if you do not believe the child?" was improper.).[2]

8) Testimony from a witness that the complainant "did not exhibit behavior he looks for when determining whether or not a child is making up a story about sexual abuse." *Pena-Ruiz v. State*, 2002 WL 437283(Tex. App.--Houst. [1st] March 21, 2002).

9) Testimony from a witness that nothing in complainant "demeanor" indicated that she was not telling the truth. *Fuller v. State*, 224. S.W. 3d 823 (Tex. App.-Texarkana 2007).

III. Not to Attempt to Elicit Statements Made by the Witness Out of Court Which Are Implied Hearsay

Given that a complainant's statement to another that she was allegedly abused is generally precluded as inadmissible hearsay, the State often gets creative in an effort to convey to the jury that the complainant did, in fact, make those statements to others without directly eliciting the statement. For example, the State will ask a witness, "Did the complainant tell you something that was very upsetting?" Such a back door attempt to introduce hearsay before the jury makes a mockery of the hearsay prohibitions.

Indeed, "[u]nder Texas Rule 801(c), a 'matter asserted' includes not only matters expressly

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[1]It was also held improper for the State to argue in its closing that the complainant was truthful "because he was able to convince all four of these experts he was telling the truth." *Sessmus*, 129 S.W. 3d at 248.

[2]This would preclude asking a witness from a state agency what the agency does if it finds an abuse complaint to be founded or unfounded.

asserted, but also matters that are implied." *Texas Rules of Evidence Manual* § 801.02[4][c] at 856. As noted by one court, '"[w]ere the rule otherwise, the hearsay rule could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions." *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974). Likewise, in *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999), the Texas Court of Criminal Appeals noted that "[i]t is well settled that an out-of-court 'statement' need not be directly quoted in order to run afoul of the hearsay rules."

In sum, questions that invite implied hearsay should be exclude pursuant to Tex. R. Evid. 802 and 403.

IV. Not to Attempt to Elicit Impact Testimony on Complainant's Family Members

The State often asks a complainant's family member to describe the effect that a complainant's outcry had on them in order to build sympathy with the jury. Victim impact evidence such as this is completely irrelevant in the guilt/innocence phase of a trial. *See Miller-El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990); *Garrett v. State*, 815 S.W.2d 333, 337-38 (Tex. App.--Houst. [1st Dist.] 1991). The State should be precluded from offering this evidence *in limine* given that once such emotional evidence is offered before the jury, it will be impossible for the Defendant to 'unring the bell.'

V. Not to Attempt to Elicit Mr. XXXX's Exercise of his Constitutional Right to Counsel

Upon his arrest, Mr. XXXX declined to answer questions by detectives until he could speak with his counsel. It is axiomatic that the State is not allowed to elicit testimony that Mr. XXXX exercised his right to counsel and his right not to speak with investigators as provided under the Fifth and Sixth Amendments to the United States Constitution and Article I, section 10 of the Texas Constitution. *Doyle v. Ohio*, 426 U.S. 610 (1976); *Sanchez v. State,* 707 S.W.2d 575 (Tex. Crim.

App. 1986).

VI. Reference to Extrinsic Offenses

On January 7, 2019, the State filed its Notice of Intention to Use Evidence of Prior Convictions and Extraneous Offenses Under 404(b), 609 and 38.37. In that Notice, the State lists five alleged prior convictions, extraneous offenses, and/or prior adjudications. The defense requests that the State not be allowed to make any reference to such alleged prior convictions, extraneous offenses, and/or prior adjudications without first explaining its theory of admissibility of such items outside the presence of the jury and make no reference whatsoever to any prior convictions, extraneous offenses, and/or prior adjudications not set forth in its Notice.

WHEREFORE, XXXX XXXX respectfully requests this Court to grant his Motion *In Limine* in all parts and instruct the State not to introduce evidence or testimony in violation of the motion and to instruct its witnesses regarding the matters covered by this motion.

Respectfully submitted,

/s/ F. Clinton Broden
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XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on October 3, 2019, I caused a copy of the above document to be served on the Collin County District Attorney's Office, 2100 Bloomdale Rd., Suite 100, McKinney, TX 75071, by electronic filing.

/s/ F. Clinton Broden
F. Clinton Broden