Affirmed and Memorandum Opinion filed October 20, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00734-CR

KEVEN DOYLE GILCHRIST, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1429226

M E M O R A N D U M O P I N I O N

Keven Doyle Gilchrist appeals his conviction for aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021 (Vernon Supp. 2016). Appellant contends that the trial court abused its discretion by (1) admitting victim impact evidence at the guilt-innocence phase of trial; and (2) overruling a hearsay objection to evidence of appellant's "failure to keep an interview appointment with police." We affirm.

BACKGROUND

Appellant was indicted for the offense of aggravated sexual assault of a child

younger than 14 years, enhanced with two prior felony convictions. A jury trial on guilt-innocence was held from July 27, 2015, to July 31, 2015, and the punishment phase of trial was held before the trial court on August 7, 2015.

At trial, complainant's father ("Father") testified that he married complainant's mother ("Mother") after complainant was born in 2003. The couple separated in 2009 and divorced in 2011. Mother had custody of complainant after the separation; Mother's sister ("Aunt") helped to take care of complainant. Complainant spent several days and nights each week at Aunt's house, where Aunt lived with appellant and her two children.

Father testified that he noticed a change in complainant in mid-2010. He testified that complainant "stood off a lot," started wetting the bed, and would not allow him to touch her.

In September 2012 when complainant was about nine years old, Child Protective Services investigator Amanda Lee went to complainant's school to interview complainant after Lee was "notified about allegations regarding [complainant]." Thereafter, complainant made an outcry and stated to Children's Assessment Center forensic interviewer Elizabeth Castro and Children's Assessment Center consulting physician Dr. Reena Isaac that she had been sexually abused by appellant while she was staying at Aunt's house. Complainant stated that appellant sexually abused her at Aunt's house the first time when she was about seven years old; and the last time appellant sexually abused her was before complainant went to live with Father in 2012.

Complainant also testified at trial. She confirmed that she stayed at Aunt's house several times a week with Aunt's children and appellant. Complainant testified that appellant started sexually abusing her when she was about seven years old. Appellant would touch her breasts, touch her vagina, and squeeze her

bottom. Complainant testified that she "lost count" how many times appellant touched her breast, vagina, and bottom. She testified that appellant would touch her vagina with his penis and rub her vagina with his hands. She also testified that appellant penetrated her vagina with his penis and made her "suck on" his penis. Complainant claimed that appellant had threatened to kill her father if she told anyone about the sexual abuse.

A jury found appellant guilty of aggravated sexual assault of a child, and the trial court assessed appellant's punishment at 30 years' confinement. Appellant filed a timely appeal.

ANALYSIS

Appellant argues in two issues that the trial court erred by admitting (1) victim impact evidence at the guilt-innocence phase of trial; and (2) hearsay evidence regarding appellant's failure to attend a scheduled meeting with police.

I. Victim Impact Evidence

Appellant argues in his first issue that the trial court erred by admitting victim impact evidence at the guilt-innocence phase of trial because "such evidence was not relevant at the stage where only guilt, not punishment, is determined."

An appellate court reviews the admission of victim impact evidence under an abuse of discretion standard. *DeLarue v. State*, 102 S.W.3d 388, 403 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). If the trial court's ruling is within the zone of reasonable disagreement, the ruling will be upheld. *Id*.

To be admissible, evidence must be relevant. Tex. R. Evid. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and that fact "is of consequence in determining the

action." Tex. R. Evid. 401. When assessing whether particular evidence is relevant, courts must consider the purpose for which the evidence is being introduced. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). It is essential that there be a direct or logical connection between the actual evidence and the proposition sought to be proven. *Id*.

In his brief, appellant states that the "error at issue arose from the repeated introduction by the prosecutor of what is commonly called 'victim impact' evidence at the guilt stage of trial." Appellant specifically focuses on the following testimony by complainant's father as being irrelevant victim impact evidence and thus inadmissible:

> [THE STATE:] Now, after all of that occurred, did you see a change in [complainant]?
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Victim impact, therefore it's not relevant.
>
> [THE STATE]: Judge, it goes to the — what this event and the effect it had on this child.
>
> THE COURT: I see that. But what was your objection?
>
> [DEFENSE COUNSEL]: It's not relevant because it's victim impact.
>
> THE COURT: Overruled.
>
> [THE STATE:] Did you see a change in [complainant] — let me back up, actually. Did you see a change in [complainant] before some of this even came out?
>
> [COMPLAINANT'S FATHER:] Yes, I did.
>
> [THE STATE:] And what were some of the things that you noticed before it came out?
>
> [DEFENSE COUNSEL]: Your Honor, I will ask for a running objection to this line of questioning based on it not —
>
> THE COURT: The running objection is granted. Go ahead.
>
> [THE STATE]: I just wanted to make sure that I understood, Your Honor. . . . So, did you notice a change in [complainant] before this

had even come out?

[COMPLAINANT'S FATHER:] Yes, I did.

[THE STATE:] And when did you begin to notice that change?

[COMPLAINANT'S FATHER:] I'd say in 2010 she stood off a lot, and that wasn't typical of my daughter.

[THE STATE:] And did — did those changes — or what other changes did you notice around that time prior to this outcry?

[COMPLAINANT'S FATHER:] That she had started wetting the bed. I couldn't touch her. Whenever I would go pick her up to bring her to my house for visitation, I would pick her up Friday evening. It would typically be Saturday evening before I could get the child to calm down enough to even spend time with me on my visitation. She was just not [complainant] anymore. She wasn't my puddin' anymore.

[THE STATE:] Was that different than how she had been with — or how you had seen her be before that?

[COMPLAINANT'S FATHER:] Yeah. She had an older brother that she could take him out at the front door to get to me first once I got home from work. She could push through that kid just to get to me first. It was an ongoing competition between those two.

[THE STATE:] After this outcry had taken place, after she had finally told somebody, did you notice even more changes that had taken place in [complainant]?

[COMPLAINANT'S FATHER:] Yes, I did.

[THE STATE:] What were some of those changes?

[COMPLAINANT'S FATHER:] That was the first time in a few years that she had actually fallen asleep sitting on the couch with me.

[THE STATE:] What other kinds of changes did you begin to notice?

[COMPLAINANT'S FATHER:] That she — it's like she had a wait [sic] just lifted off of her. She started getting crafty again. She started making cool pictures and — they're like fuzzy little things that you can than [sic] bend up. I don't even know what they're call[ed]. I buy them by the bucket load. I don't know what they're called, but she started making like bracelets and like little necklace charms and things like that. And she would give them to me and I'd have them all

over the place. I love the kid. She's a nut.

[THE STATE:] Did she still express that she was having some difficulty dealing with what had happened?

[DEFENSE COUNSEL]: Objection, Your Honor. This is hearsay.

THE COURT: Sustained.

[THE STATE:] Without going into the contents of what she said, did you notice that she still had difficulty dealing with what had happened to her?

[DEFENSE COUNSEL]: Objection. Leading.

THE COURT: Overruled.

[COMPLAINANT'S FATHER:] Can I answer?

[THE STATE:] Yes, you can answer.

[COMPLAINANT'S FATHER:] Okay. Yes, I noticed quite a bit that she still had issues with what she was going through.

[THE STATE:] What did you notice that caused you concern?

[DEFENSE COUNSEL]: Objection, Your Honor. Victim impact. It's not relevant.

THE COURT: Overruled.

[THE STATE:] You can answer.

[COMPLAINANT'S FATHER:] That she — I told her not to talk to me until she was comfortable talking to me about it. And she would avoid anything dealing with it. And that's whenever I sought out counseling for her.

[THE STATE:] Now, you said that you sought out counseling for her. Do you recall where that counseling was?

[COMPLAINANT'S FATHER:] It was in Pasadena off of Spencer.

[THE STATE:] Do you recall who she actually saw as a counselor?

[COMPLAINANT'S FATHER:] I can't remember her first name, and that's all I ever went by, but it's like Isabelle or —

[THE STATE:] Okay.

[COMPLAINANT'S FATHER:] I can't remember her first name. We were always on a first-name discussion, if I called her by her

name.

[THE STATE:] How often would she see this counselor?

[COMPLAINANT'S FATHER:] Typically one time a week.

[THE STATE:] And for about how long — well, those once-a-week sessions, about how long were they?

[COMPLAINANT'S FATHER:] Typically an hour, sometimes an hour-and-a-half. And we went for roughly about eight months.

[THE STATE:] Would you be in those sessions?

[COMPLAINANT'S FATHER:] No. I would sit outside. On occasion, she would want to talk to me and I would step in there and talk to her for a minute.

[THE STATE:] And after those eight months, why did you stop?

[COMPLAINANT'S FATHER:] [Complainant] really wasn't ready to talk about it. I was watching my daughter, basically, just shut down. She — it seemed to me that —

[DEFENSE COUNSEL]: Objection. Speculation.

THE COURT: Overruled.

[COMPLAINANT'S FATHER:] Can I —

[THE STATE:] You can answer. You can finish answering.

[COMPLAINANT'S FATHER:] What I was seeing with my daughter is that it wasn't helping. It was actually making her pull back and become more reclusive. I mean, she wouldn't talk about anything now, much less anything that happened with any of that with counselors. She wouldn't talk to me about that. But then she got to the point she wouldn't talk at all. So, to me — it felt like it was hurting her more and it was becoming more toxic than it was helping.

[THE STATE:] And how — it's been a long time since this came out. How is [complainant] doing today?

[DEFENSE COUNSEL]: Objection, Your Honor. It's not relevant, victim impact.

THE COURT: Sustained.

[THE STATE:] Has [complainant] improved since that time?

[DEFENSE COUNSEL]: Objection, Your Honor. Same question.

It's not relevant.

[THE STATE]: Judge, it's —

THE COURT: Overruled.

[THE STATE:] Has [complainant] improved since that time?

[COMPLAINANT'S FATHER:] She has come out of her shell with me. She knows it doesn't matter. We have a running saying between the two of us. It's: I don't care if you —

[DEFENSE COUNSEL]: Objection. Nonresponsive.

THE COURT: Sustained.

[THE STATE:] What is your saying between the two of you?

[COMPLAINANT'S FATHER:] I don't care if you rob a bank, but you need to tell me. I can't help you unless I know. And, you know, tell me the truth.

[THE STATE:] Does [complainant] talk to you about what happened to her at this point?

[COMPLAINANT'S FATHER:] She doesn't talk to me about the physical part of it. She talks to me about how she feels and how it made her feel and what she has to — when she —

[DEFENSE COUNSEL]: Objection, Your Honor. Irrelevant.

THE COURT: Answer only the question that is asked nothing more. All right.

[THE STATE:] When she talks to you about how it made her feel, what goes through your head at that point?

[DEFENSE COUNSEL]: Objection, Your Honor. Not relevant.

THE COURT: Sustained.

Appellant contends that this testimony constitutes irrelevant victim impact evidence that was not admissible during the guilt-innocence phase of trial. Appellant also contends that victim impact evidence is admissible only during the punishment phase of trial.

Contrary to appellant's assertion, victim impact evidence can be relevant and admissible at the guilt-innocence phase of trial. A complainant's change in

behavior is relevant to allegations of sexual abuse or assault if either occurrence of the sexual assault or consent are disputed because the change in behavior makes it more probable that the alleged abuse or assault took place. *See, e.g.*, *Gonzalez v. State*, 455 S.W.3d 198, 203-04 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (evidence of child's post-traumatic stress disorder was admissible in a case in which the source of the child's trauma — either sexual assault by the defendant or physical abuse by the mother — was disputed); *Yatalese v. State*, 991 S.W.2d 509, 511 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (mother's testimony about her child's transformation from a "normal, regular little girl" to having a "very bad attitude" and "a lot of anger" after the alleged sexual assault was admissible in a case in which the defendant disputed that the assault occurred); *see also Longoria v. State*, 148 S.W.3d 657, 659-60 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (In an aggravated sexual assault case, "testimony regarding the girls' behavior and long-term prognosis would have a tendency to make more or less probable a fact of consequence at the guilt stage; that is, whether appellant committed the crimes at all.").

If neither the occurrence of the sexual abuse or assault nor consent are disputed, then a complainant's emotional state or demeanor generally is not relevant to guilt or innocence. *See Brown v. State*, 757 S.W.2d 739, 740-41 (Tex. Crim. App. 1988) ("evidence concerning the victim's two suicide attempts, weight gain, job loss, fear of being outside and loss of confidence, all of which occurred in the eight months between the rape and the trial" was not relevant and not admissible because the defendant disputed that he was the rapist, not that complainant had been raped).

Here, the defense disputed the occurrence of the alleged sexual abuse. The defense contended that complainant had been coached by Aunt to lie about

appellant sexually abusing her. The defense argued that sexual abuse by appellant had been suggested to complainant by Child Protective Services investigator Amanda Lee and that, according to experts who testified at trial, children are "very suggestible" because they want to please authority figures. The defense argued that complainant was not credible, lied, changed her story, was "tainted from the very beginning," and was "contaminated."

The defense emphasized the absence of medical evidence; it also claimed complainant's testimony was not credible and "her allegations of sex, they don't add up." The defense tried to link any trauma and behavioral changes that complainant experienced to her parents' divorce rather than sexual abuse. Defense counsel stated as follows: "This whole entire ploy, [appellant] touched me, was supposed to be so devastating to the parents that it brought them together. And it didn't work. And if this didn't work, then nothing would. So, she's finally at a point where she's started dealing with it."

Based on the record before us, we conclude that the trial court acted within its discretion admitting evidence that complainant's behavior had changed after appellant started sexually abusing her because this evidence tended to support the assertion that the abuse occurred — a disputed fact of consequence. Because evidence of complainant's behavioral changes is probative of a disputed fact that is of consequence to the determination of appellant's guilt or innocence, the evidence is relevant and properly was admitted into evidence during the guilt-innocence phrase.

Substantially similar evidence regarding complainant's behavioral changes was presented to the jury without objection on relevancy grounds.[1] Dr. Reena

[1] Appellant's running objection to Father's testimony does not constitute an objection to similar testimony of Dr. Isaac. "A running objection when requested by defense counsel and

Isaac, who was the consulting physician and performed a sexual assault examination and evaluation of complainant, testified without objection that Father provided complainant's medical and behavioral history. Dr. Isaac testified that Father said complainant "had some problematic history with regard to sexual abuse." Dr. Isaac testified that Father said complainant "had suffered some behavioral issues or [Father] had noted some behavioral changes. Specifically, bedwetting, anger, and not wanting to come to his home. Those were just some of the issues that he had recognized." Dr. Isaac also testified that Father was concerned about complainant's "social withdrawal;" complainant had trouble sleeping; and complainant cried easily.

This testimony was elicited without objection from appellant that it was irrelevant victim impact evidence. Thus, even if we assume for argument's sake that Father's testimony about complainant's behavioral changes constituted irrelevant and inadmissible victim impact evidence, any alleged error in its admission would have been harmless. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) ("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.").

Appellant further contends that "the State also slipped more tidbits of victim impact evidence into its guilt-stage case. Most notably, Dr. Isaac's notes referred to 'some behavioral changes,' specifying 'bedwetting, anger, and not wanting to

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granted by the trial court does not preserve error when another witness testifies to the same matter without objection." *Scaggs v. State*, 18 S.W.3d 277, 292 (Tex. App.—Austin 2000, pet. ref'd); *see also Sattiewhite v. State*, 786 S.W.2d 271, 283 n.4 (Tex. Crim. App. 1989) ("We found no support in the case law for a proposition that a running objection on a particular matter would preserve error *whenever that matter was brought up again in the trial*, and regardless of what witness brought it up or what time it was brought up."); *Ross v. State*, 154 S.W.3d 804, 811-12 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (finding running objection during one witness's testimony "relieved [defendant] of having to reassert his objection while [witness] testified" but did not preserve error regarding additional testimony on the same subject from other witnesses).

come to his home.'" Insofar as appellant contends Dr. Isaac's testimony was inadmissible victim impact evidence, no such contention was preserved for appellate review. Appellant failed to object to any of Dr. Isaac's testimony on relevancy grounds; thus, the argument is waived. *See* Tex. R. App. P. 33.1(a); *Valle*, 109 S.W.3d at 509 ("To preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection.").

Accordingly, we overrule appellant's first issue.

II. Hearsay

Appellant contends in his second issue that the "trial court erred in overruling a hearsay objection to improper evidence of [appellant]'s failure to keep an interview appointment with police" in Chicago. Appellant points to the following testimony by Investigator Armando Tamez:

> [THE STATE:] And after speaking with [T.D.], did you attempt to speak to the person that the allegation was against?
>
> [TAMEZ:] Yes, sir. I believe on September 24th, 2012 were my first chances or attempts to contact the defendant.
>
> [THE STATE:] Did you have difficulty contacting him?
>
> [TAMEZ:] Yes. I had several numbers that I had researched and obtained, and I tried calling different phone numbers with negative results at that time.
>
> [THE STATE:] When you attempted to contact him, did you — or I'm sorry. When you actually did contact the person that the allegations were against, who was that person?
>
> [TAMEZ:] [Appellant].
>
> [THE STATE:] When you contacted [appellant], did you tell him what the allegations were?
>
> [TAMEZ:] Yes, sir, I did.
>
> * * *
>
> [THE STATE:] And where did he say that he was?

[TAMEZ:] He said he was in Chicago.

[THE STATE:] Did he say what he was doing there?

[TAMEZ:] He said he was there with his son, sir.

[THE STATE:] And did he agree to meet with you at a later date?

[TAMEZ:] He agreed to meet with the Chicago Police Department when that option was offered to him.

[THE STATE:] Now, when he agreed to meet with the Chicago Police Department, did you contact the Chicago Police Department?

[TAMEZ:] Yes, sir, I did.

[THE STATE:] And was a meeting set up?

[TAMEZ:] I believe it was, sir.

* * *

[THE STATE:] When was the meeting set up?

[TAMEZ:] September 26th, 2012.

* * *

[THE STATE:] Okay. So, the next day did you speak to the Chicago P.D.?

[TAMEZ:] Yes, sir.

[THE STATE:] And had the meeting with the defendant taken place?

[DEFENSE COUNSEL]: Objection, Your Honor. Speculation and hearsay.

THE COURT: Overruled.

[THE STATE:] Had the meeting, in fact, taken place?

[TAMEZ:] No, sir.

[THE STATE:] And had the defendant actually shown up for the meeting?

[TAMEZ:] No, sir.

[THE STATE:] Did you attempt to — once you learned that he had not, in fact, shown up for the meeting, did you contact — attempt to contact the defendant?

[TAMEZ:] Yes, sir.

> [THE STATE:] Did you contact him at the same number you talked to him at the day before?
>
> [TAMEZ:] I tried him at the same number.
>
> [THE STATE:] Were you able to contact the defendant?
>
> [TAMEZ:] No, sir.

To preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection. *Valle*, 109 S.W.3d at 509. Further, a party must object each time the inadmissible evidence is offered or obtain a running objection. *Id*. An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection. *Id*.

Appellant argues that the trial court erroneously admitted "evidence of [appellant]'s failure to keep an interview appointment with police." However, Tamez testified without objection that appellant had not "actually shown up for the meeting." Therefore, any alleged trial court error in the admission of "evidence of [appellant]'s failure to keep an interview appointment with police" was cured in this case. *See id*. at 509-10.

Accordingly, we overrule appellant's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Christopher and Jamison.
Do Not Publish — Tex. R. App. 47.2(b).