# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-14-00262-CR**

PHILLIP GENE HERNANDEZ — APPELLANT

V.

THE STATE OF TEXAS — STATE

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FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1296590D

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## MEMORANDUM OPINION[1]

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A jury convicted Appellant Phillip Gene Hernandez of two counts of aggravated sexual assault of a child under fourteen years of age. The trial court sentenced Appellant to life imprisonment in the penitentiary. In his first point, Appellant contends the trial court erred by allowing Complainant, who was three at the time of the offense and five at the time of trial, to testify because she was

[1]*See* Tex. R. App. P. 47.4.

incompetent. In his second through fifth points, he complains that the trial court erred for various reasons by allowing the forensic examiner to testify. We hold that the trial court erred by allowing the forensic examiner to testify to the extent it allowed her to testify as a second outcry witness as to both offenses but that the error was harmless. We affirm the trial court's judgment convicting Appellant of both offenses.

## I. The Evidence

### A. The Complainant's Stepmother: (1) Complainant Made an Outcry Regarding the Touching of the Anus, and (2) Complainant Repeated the Outcry to Dr. Ota

Complainant's stepmother (Stepmother) testified that on July 20, 2012, when she was helping Complainant with her bath, Complainant resisted sitting in the water, and when Stepmother asked why, Complainant responded, "Daddy put his finger in my butt."[2] At the time, Complainant was not quite three-and-a-half years old. Stepmother said that the next morning, when she attempted to help Complainant in the restroom, Complainant pulled away "as if she didn't trust me to wipe her without hurting her." Stepmother concluded Complainant did not want her to touch the area because it was still tender.

When Stepmother confronted Appellant, she said that Appellant was shocked. Appellant agreed to take Complainant to the hospital. Stepmother

[2]The trial court conducted a pretrial hearing at which Stepmother was determined to be the outcry witness for the incident of the digital penetration of the anus.

testified that at the hospital, Complainant told the doctor, Dr. Floyd Ota, what she had told her the night before. Stepmother testified that she knew nothing about any allegations of oral sex. Stepmother asserted CPS was notified that same day, July 21, 2012.

### B. The CPS Investigator: Complainant Made an Outcry Regarding Fellatio

An investigator (the Investigator) for Child Protective Services interviewed Complainant on July 30, 2012.[3] She described Complainant as "calm." The Investigator added, "[Complainant] was a typical three-year-old. . . . She moved around the room that we were in. And she just said what—what was going on as though it was normal almost." The Investigator determined that when Complainant used the word "cookie," she meant her vagina. The Investigator testified that when she asked Complainant if she had ever touched Appellant's cookie, Complainant moved her head back and forth and said that that was what she had to do to Appellant's cookie. The investigator then demonstrated to the jury what Complainant did for her by making an O shape with her lips and moving her head backwards and forwards.[4]

[3]At a pretrial hearing, the trial court determined that the Investigator was the outcry witness for the incident involving fellatio.

[4]Appellant objected to the prosecutor's describing for the record what the Investigator was doing, and the trial court sustained the objection, but there was no request or instruction to disregard the prosecutor's description. Without the prosecutor's description, however, our record would not reflect what Complainant showed the Investigator or what the Investigator, in turn, showed the jury.

### C. Complainant: (1) She Testifies that She Put Her Mouth on Daddy's Cookie, (2) She said Mommy Told Her it Would be Good if She Said She Put Her Mouth on Daddy's Cookie, and (3) She Denied Anyone Ever Put Anything in Her Butt

Complainant was five at the time of trial. Before the jury, when asked if she knew the difference between the truth and a lie, she moved her head up and down. When the prosecutor used colored markers and asked Complainant whether she (the prosecutor) was lying or telling the truth about which color they were, Complainant correctly identified when the prosecutor was lying and telling the truth.

Complainant testified that Appellant "made me suck on his cookie." She explained that she called the part of the body where a person went pee a "cookie." When Complainant hesitated to answer one of the prosecutor's questions, she admitted being scared. She said Appellant had her touch his cookie with her hands but denied putting her mouth on his cookie. Using dolls, Complainant then pointed to where a girl's cookie and a boy's cookie were. Complainant said Appellant touched her cookie with his finger and that she touched Appellant's cookie with her mouth and that she saw something white come out of Appellant's cookie.

On cross-examination, Complainant denied loving Appellant. When asked who told her not to love her daddy, she responded, "I don't know." When asked if she had talked to her mommy about what she was going to say at trial, she responded, "Yes." When asked if she went over what she was going to say with

her mommy, she answered, "Yes." When asked if her mommy told her what the right and wrong answers would be, Complainant said, "Yes." When asked if anyone had ever put anything in her butt, she answered, "No." Complainant denied that her mommy had told her to say that she had touched her daddy's cookie with her mouth, but she admitted that her mommy had told her it would be good if she did. However, on redirect, Complainant said that her mommy told her to tell the truth.

### D. The Sexual Assault Nurse Examiner: (1) Complainant Indicated Appellant Touched Her Anus, and (2) Complainant's Mother Told the Nurse that Complainant Had Made an Outcry of Fellatio as Well

A sexual assault nurse examiner (the Nurse) examined Complainant on August 29, 2012.[5] The Nurse testified that Complainant identified her genital parts as a cookie and her anus as a booboo. When asked what Complainant told her, the Nurse responded, "[H]er exact words [were,] '[Appellant] is trying to do this.'" The Nurse said Complainant then demonstrated, using her index finger, a jabbing motion back and forth towards the area of her anus and buttocks. The Nurse said that Complainant did not mention oral sex. The Nurse had no physical findings in this case.

[5]Appellant objected to the Nurse's testimony, but the trial court allowed it. The trial court instructed the jury to consider her testimony for purposes of medical diagnosis and treatment. Appellant does not complain about the Nurse's testimony on appeal.

The Nurse also spoke to Complainant's mother (Mother) for purposes of diagnosis and treatment just in case Complainant had disclosed other information to someone else with whom she felt more comfortable.[6] Mother told the Nurse that Complainant told her that her daddy hurt "her butt hole" and then took her finger to her butt to show Mother. Mother then told the Nurse, "Then she nodded her head and opened her mouth. She said daddy made her do like that on his cookie."[7] [Emphases removed]

**E. The Forensic Interviewer**

Lindsey Dula, the director of the forensic interviewing program at the Alliance for Children (AFC) interviewed Complainant on August 10, 2012. In her career as an interviewer, she had conducted over 6,000 interviews. Dula explained to the jury:

> A forensic interview[er] is a specialized interviewer. It is conducted with somebody who's highly trained to understand the linguistic development of children, the cognitive development of children, and to be able to communicate with children in a non-leading, non-suggestive manner to try to gather information about something a child may have experienced or may have witnessed.

Dula stated that children can be difficult to talk to. She explained,

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[6]The trial court instructed the jury to consider Mother's statements to the Nurse only for the purpose that the Nurse received it, that is, for purposes of medical diagnosis and treatment. On appeal, Appellant does not complain about the admission of Mother's statement to the Nurse or about the trial court's instruction.

[7]Mother did not testify.

> Well, you have to understand a child at that age and their verbal capabilities. You know, they have a vocabulary that is constantly growing. But at that age, it's about 13,000 or 21,000 words. So while that seems like a lot of words, they can't communicate as an adult does. They can't communicate as an older child does. So their understanding of—of words, you have to be very cautious of that and do a lot of clarification.
>
> As an interviewer, you also have to be very conscientious of the vocabulary you use because there may be words they don't understand. And so you have to be very aware of how that balances and trying to make sure that questions are as simple and as clear as you can.

Dula described Complainant as talkative, active, and happy during the interview. Dula said Complainant did not appear to be scared, but she also added Complainant's failure to appear scared did not necessarily mean anything to her; she explained:

> Children of all ages, just like adults, react to things differently in their emotions. Particularly with—in my experience when I see children who have been abused, they all have different coping mechanisms and different reactions to things. So with children that I interview, there may be some that come in and they may cry, but that's actually a rarity. More often we have children that are very matter-of-fact. They could be very happy. They could be giggling in the course of talking to me. And that's all based on different people, different children, and how they react differently in situations.

Dula testified that when she asked Complainant how she was doing, she responded, "[Appellant] put his hand right here," and then pointed to her bottom with her finger multiple times fairly emphatically. Complainant told Dula it happened in her stepsister's room and in the truck. Complainant indicated to Dula that she was crying while in the truck and said to Appellant, "What are you doing?" Complainant then inhaled as if in surprise for Dula. Complainant told

Dula that Appellant went fast and that it hurt. Complainant indicated that her clothes were on, that Complainant told Appellant to leave them on, and that Appellant got mad. Dula said Complainant described how Appellant breathed in and demonstrated an inhalation for her. Complainant denied anyone else had touched her in that location.

Dula testified that later in the interview Complainant talked about putting her mouth on Appellant's cookie. Dula testified that Complainant clarified what she meant by a cookie: "She indicated that's the part that's in front of his body that he uses to go pee and clarified that with the use of anatomical dolls." Dula described Complainant as spontaneous:

> I had asked her if she had seen someone's cookie. She reported that she had seen [Appellant's] cookie. And I asked what it looked like. And she described it how she was describing it. And then I asked her for just additional clarification[,] "What does he do with his cookie?" And at that point that's when she said, "I put my mouth on it," and then she demonstrated. She demonstrated how she put her mouth on it. [Emphases removed.]

When asked to describe what Complainant showed her, Dula responded, "She demonstrated by opening her mouth and then moving her head back and forth."

Dula said that Complainant indicated a "bug" or a "squito" came out of Appellant's cookie. When asked, based on her training and experience with the cognitive abilities of children this age, why Complainant would use those words, Dula answered,

> Well, it could be something about what that felt like as she's describing an act. If there is something in her mouth that she thought felt like a bug or a squito, umm, that's how she described it.

> It could be that if something came out of—in the descriptor of what she's saying is she's talking about something coming out of [Appellant's] cookie and that it felt like that or it was—it was something that was yucky. As a three-year-old to think what something is yucky, it could be a bug. So there could be a variety of reasons of why she would say that. [Emphases removed.]

It was also possible someone else told her that was what it was called. Dula testified that Complainant indicated the bug or squito was in her mouth.

When interviewing a child, Dula testified that there were certain things she looked for. She said she was looking for whether the child could or could not talk about sensory and peripheral details. Dula described a peripheral detail as information outside the incident itself such as the room in which it occurred or the presence of someone else in another room. Dula described a sensory detail as information about what something felt like, what someone said, or how the child reacted. Dula explained that if a child was not able to provide sensory and peripheral details, that concerned her. She explained:

> Because in my experience when you're talking to children who are making statements, they can talk about what they've experienced. And with children who cannot, I have concern regarding why they can't. Whether that is an issue that they did not actually experience it, or they were told that they experienced it, or if there is some other barrier that won't let them communicate what they experienced or witnessed.

When questioned whether Dula tried to get Complainant to specify when something happened, she responded, "I did not ask that because asking timeframes for a three-year-old would not be developmentally appropriate." When questioned further, she testified:

> Well, three-year-olds don't give temporal progress to anything that they're reporting. They don't start with a beginning and an end. And when they tell a story, they just talk about—and highlights that jump out to them or that, you know, stay in their memory. So to think that a three-year-old will be able to talk about yesterday, a week ago, or a month ago is unrealistic regarding the cognitive ability for a three-year-old.

She concluded, "[B]road terms like 'it happened in the past,' they wouldn't understand that term. They don't understand the term 'yesterday.' So, again, timeframes for three-year-olds is not good practice to delve into that, because they don't understand the idea of it."

**F. Dr. Ota: No Physical Evidence of Sexual Abuse**

Dr. Floyd Ota testified that he was the pediatric emergency doctor at Cook Children's Medical Center and that he saw Complainant on July 21, 2012. He specifically examined her for rectal pain. He found nothing unusual. Dr. Ota testified that even if sexual abuse was going on, statistically the odds were extraordinarily low that doctors would find any evidence of it.

**G. Appellant**

Appellant testified. He described an acrimonious relationship with Mother. He said, "We very rarely speak because we always have arguments. We've always had arguments." He testified that Mother allowed him to see Complainant after her birth but stopped his visitations once he became involved with another woman. Appellant testified, "She kept on violating my rights as a father to see her." Appellant said that he called CPS on Mother, and Mother responded by "[sticking him] with child support." Appellant said he "automatically got visitations

after that." He testified that he exercised his visitation rights every time he could. Appellant explained that he had taken Mother to court for contempt, and the court placed her on probation for a year because she was not giving him visitation.

Appellant denied ever putting his finger in Complainant's anus. He denied ever having Complainant suck on his penis. He said there was no truth to the allegations. He could not imagine what Complainant was talking about. Appellant testified that Complainant was lying, but he did not know why she was lying.

## II. First Point: Whether Complainant was Competent to Testify

In his first point, Appellant contends that the trial court erred when it determined Complainant, who was only five years old, was competent to testify. Appellant filed a pretrial motion to determine whether Complainant was competent to testify. The trial court conducted a hearing outside the jury's presence regarding Complainant's understanding of her obligation to tell the truth. The trial court ruled that she was competent to testify.

### A. Standard of Review

An appellate court will not disturb a trial court's determination that a child witness is competent to testify absent an abuse of discretion. *Davis v. State*, 268 S.W.3d 683, 699 (Tex. App.—Fort Worth 2008, pet. ref'd). Appellate courts must review the child's responses to the qualification questions as well as her entire testimony to determine whether the trial court's competency ruling constitutes an abuse of discretion. *Id.* A trial court does not abuse its discretion if it acted

within the zone of reasonable disagreement. *Torres v. State*, 424 S.W.3d 245, 254 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

Witnesses are presumed to be competent to testify. Tex. R. Evid. 601(a); *Davis*, 268 S.W.3d at 699. A child is not competent to testify only if, after an examination by the court, the child does not appear to possess sufficient intellect to relate transactions with respect to which they are being questioned. Tex. R. Evid. 601(a)(2); *Torres*, 424 S.W.3d at 254. When a party challenges the competency of a child witness, the trial court will consider whether the child possesses (1) the ability to intelligently observe the events in question at the time of the occurrence, (2) the capacity to remember the events, and (3) the capacity to narrate the events. *Davis*, 268 S.W.3d at 699. The capacity to narrate requires that the child is able to understand the questions asked, frame intelligent answers to those questions, and understand the moral responsibility to tell the truth. *Id.* A child need not understand the "obligation of the oath"; however, the trial court must impress upon the child the duty to be truthful. *Torres*, 424 S.W.3d at 254.

A child's responses may show some conflict and confusion so long as her testimony indicates sufficient accuracy in her recollection; moreover, while inconsistent testimony about a specific event might affect the child's credibility, it does not demonstrate incompetency. *See id.* at 255. Finally, there is no precise age under which a child is deemed incompetent to testify. *Id.*

### B. The Competency Hearing

At the hearing outside the jury's presence, Complainant said she was five years old. When asked if she knew what it meant to tell the truth, she answered, "No."

Thereafter, however, the prosecutor had Complainant identify a marker as green. When the prosecutor asserted the marker was blue, she asked Complainant whether that was the truth or a lie, and Complainant correctly answered, "A lie." When asked why it was a lie, Complainant explained, "Because it's not the truth." She agreed the marker was green, not blue.

The prosecutor then asked Complainant about a second marker that Complainant identified as red. When the prosecutor asserted that the marker was red and asked Complainant whether that was the truth or a lie, Complainant answered, "The truth." Complainant agreed that the prosecutor's assertion was true because the marker was really red.

The prosecutor then asked Complainant about a third marker that Complainant identified as pink. When the prosecutor asserted that the marker was purple, Complainant said that was a lie because the marker was pink.

Complainant then promised "[t]o tell the truth," which she agreed meant that she must tell only what really happened. When asked if she was going to make up stories, she answered, "No."

The trial court found that Complainant was competent to testify. The court also found that Complainant was competent to stand trial for perjury and to be prosecuted and convicted of it.

### C. Discussion

Although Complainant initially said she did not know what it meant to tell the truth, she thereafter repeatedly demonstrated that she understood the difference between the truth and a lie. She then promised to tell the truth. She indicated she understood the importance of telling the truth. *See Davis*, 268 S.W.3d at 699. When testifying at trial, Complainant intelligently responded to the questions. She showed that she possessed sufficient intellect to relate the events about which she was being questioned. *See* Tex. R. Evid. 601(a)(2); *Torres*, 424 S.W.3d at 254; *Davis*, 268 S.W.3d at 699. We hold that the trial court did not abuse its discretion by finding Complainant competent to testify. We overrule Appellant's first point.

## III. Points Two Through Five: Appellant's Attacks on the Testimony of the Forensic Interviewer

Appellant's second through fifth points all complain about the trial court's decision to allow the forensic interviewer, Dula, to testify. In his second point, he complains that the trial court erred by allowing testimony from multiple outcry witnesses. Contextually though, his second point is limited to Dula.[8] In his third

[8]For preservation-of-error purposes, Appellant cites only to his objections to Dula. Appellant mentions Stepmother and the Investigator but makes no effort to show where he objected to their testimony and appears to refer to them only

point, he asserts the trial court erred by overruling his request for an instruction to disregard Dula's testimony. In his fourth point, he argues that the trial court erred by overruling his objection to Dula being allowed to testify regarding her opinion of Complainant's truthfulness, which he asserts invaded the province of the jury. In his fifth point, he contends the trial court erred by overruling his bolstering objection to Dula.

### A. Points Two and Three: Appellant's Article 38.072 Arguments

In Appellant's case, before trial started, Stepmother was qualified as the outcry witness for the allegation of digital penetration of the anus. Stepmother proceeded to testify about the digital penetration of the anus. Similarly, before trial, the Investigator was qualified as the outcry witness for the allegation of fellatio. The Investigator also thereafter proceeded to testify about how Complainant made an outcry of fellatio. In his second and third points, Appellant's complaints are that the trial court erred by allowing Dula to testify as an outcry witness as to both offenses in violation of article 38.072 and that after Dula testified, the trial court further erred by not instructing the jury to disregard Dula's testimony for the same reason. *See* Tex. Code Crim. Proc. Ann. art. 38.072 (West Supp. 2016) ("Hearsay Statement of Certain Abuse Victims").

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for the proposition that Dula's testimony was redundant of theirs for purposes of showing Dula was not the first outcry witness for either of the indicted offenses.

### 1. Article 38.072 of the Code of Criminal Procedure

Article 38.072 of the code of criminal procedure allows the first person to whom the child described the offense in some discernible manner to testify about the statements the child made. *Id.*; *see West v. State*, 121 S.W.3d 95, 104 (Tex. App.—Fort Worth 2003, pet. ref'd). An outcry witness is not person-specific but, rather, event-specific. *West*, 121 S.W.3d at 104. Before more than one outcry witness may testify, the outcry must be about a different event and not simply a repetition of the same event as related by the child to different individuals. *Id.* There may be only one outcry witness to the child's statement about a single event, and the proper outcry witness to a single event is the first adult person other than the defendant to whom the child made a statement describing the incident. *Id.*

Hearsay is not admissible except as provided by the rules of evidence or by statute. Tex. R. Evid. 802; *Josey v. State*, 97 S.W.3d 687, 692 (Tex. App.—Texarkana 2003, no pet.). If the requisite conditions are met, article 38.072 of the code of criminal procedure creates an exception to the hearsay rule. Tex. Code Crim. Proc. Ann. art. 38.072; *Josey*, 97 S.W.3d at 692. Article 38.072 provides that in sexual offense cases committed against a child fourteen or younger, statements by the child about the alleged offense to the first person eighteen years of age or older, other than the defendant, about the offense will not be inadmissible because of the hearsay rule. Tex. Code Crim. Proc. Ann. art. 38.072. The trial court has broad discretion to determine whether the child's

statement falls within this hearsay exception. *Josey*, 97 S.W.3d at 692. We will not disturb this exercise of discretion unless the record shows a clear abuse of discretion. *Id.* Put another way, the trial court's decision must not lie outside the zone of reasonable disagreement. *See id.*

**2. The Article 38.072 Hearing**

The trial court had a hearing outside the jury's presence to determine whether Dula would be allowed to testify. The trial court described the hearing as an outcry reliability and "702" hearing. A finding of the reliability of an outcry is one of the prerequisites of allowing an outcry witness to testify under article 38.072. *See* Tex. Code Crim. Proc. Ann. art. 38.072, § 2(b)(2) (stating that "the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement"). The trial court's reference to "702" is to whether Dula would be allowed to testify as an expert. Tex. R. Evid. 702 ("Testimony by Expert Witness").

The prosecutor corrected the judge by stating, "It's outcry reliability as 705, Judge." *See* Tex. R. Evid. 705 ("Disclosing the Underlying Facts or Data and Examining an Expert About Them"). At this juncture, the State appeared to be offering Dula strictly as an expert on the reliability of outcries and not as an outcry witness under article 38.072.

During the hearing outside the jury's presence, Dula and defense counsel engaged in the following exchange:

[Defense counsel:] Okay. And basically the purpose of that is that it's your opinion she's telling the truth, correct?

A. No, sir.

Q. Okay. That isn't it?

A. No, sir.

Q. Okay. Then what—what is—Do you have an opinion, since you're an expert, on anything involving this case?

A. I have an opinion that I interviewed a child who was able to provide sensory and peripheral details about an event that she was describing to me.

Q. Okay. And the purpose of your testimony is to say that you believe it, correct?

A. No, sir.

Q. It's not?

A. No, sir.

Q. So your testimony just concerns reactions to children in general?

A. No, sir.

Q. Okay. Are—Are what you're—This specific child, when she was giving you—telling you her story, is that—

A. I was—I was interviewing her based on allegations, yes, sir.

Q. Okay. In your observations when you were interviewing her, correct?

A. I did have observations during the course of my interview.

Q. Well, what—Is your testimony concerning observations while you were doing the interview?

A. Depending on what the questioning is. I can talk about what I saw her demonstrate, and I can talk about what she reported to me.

At this point, the trial court asked the State for clarification: "Let me ask you this. Are you offering her as an expert witness or as a person who interviewed the child and who has an outcry statement?" The prosecutor gave this response:

> [THE STATE]: There's some outcry things she's going to testify to. And she—Yes, we're actually offering her as an expert in her—based on her training and experience in outcries kids make and how they behave and sensory details and all those things that she's testified to previously in many occasions.

As we understand the State's response, it was still offering Dula as an expert, although the State was acknowledging "some outcry things" would surface during her testimony.

However, by the time the parties presented their final arguments to the trial court regarding whether Dula should be allowed to testify, the State made it clear it was offering Dula both as an outcry witness and as an expert witness:

> As the Court's aware, it's well settled law that . . . disclosures are admissible when—when kids give more details about acts. You can have multiple outcry witnesses involving those disclosures.
>
> And in this case, we have heard details from Ms. Dula that we have not heard—that were [not] given to any other witness. Therefore, those details should be admissible for this jury. And outcry is, no matter whether it's one or three, still an exception to hearsay.
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> As far as Ms. Dula's expert opinions, she is an expert in the cognitive development age of children and how they relate sexual abuse and their understanding of it. And it is well under her expertise to say that in her opinion a child this small knowing those sexual acts, just as she stated earlier, it's either happened to her or she has witnessed it. That does not invade the jury in the ultimate issue.

Accordingly, by this juncture, the State argued that Dula was a permissible outcry witness by virtue of the fact that the outcries she heard contained additional details not previously disclosed and that Dula was an expert witness.

The trial court ruled,

> The Court will determine that she can provide expert testimony in this case. The Court will allow that testimony. With regard to reliability of the out-of-court statement made by the child to her, the Court will find that the statements are reliable based upon the time, content, and circumstances of the statement. And the fact that the child provided this witness with much more detailed statements than she had provided to other outcry witnesses the Court has heard from. So for that reason the Court will allow that testimony in this case also.

The trial court also agreed with the prosecutor that the defense had raised the issue of coaching and that Dula's testimony addressed that as well. The trial court verified that Dula had testified as an expert in forensic interviewing, child development, and children's cognitive abilities many times.

**3. Discussion**

We agree with the State that there can be more than one outcry witness—provided the outcry witnesses heard outcries of different events. *See West*, 121 S.W.3d at 104. That is precisely why Stepmother and the Investigator were allowed to testify as outcry witnesses; Complainant made outcries of different offenses to the two women. Stepmother was the first witness to hear Complainant's outcry of digital penetration of her anus. The Investigator was the first witness to hear Complainant's outcry of fellatio.

The State argues that the outcries to Stepmother and the Investigator were not specific as to "how, when, and where"; therefore, those outcries were not discernible, which makes Dula the proper outcry witness as to both offenses.[9] *See Hanson v.* State, 180 S.W.3d 726, 730 (Tex. App.—Waco 2005, no pet.); *Sims v. State*, 12 S.W.3d 499, 500 (Tex. App.—Dallas 1999, pet. ref'd); *Reed v. State*, 974 S.W.2d 838, 841–42 (Tex. App.—San Antonio 1998, pet. ref'd). *But see Brown v. State*, 189 S.W.3d 382, 386 (Tex. App.—Texarkana 2006, pet. ref'd); *Seeger v. State*, No. 12-09-00145-CR, 2010 WL 2998750, at *3 (Tex. App.—Tyler July 30, 2010, pet. ref'd) (mem. op., not designated for publication). Here, however, Appellant specifically filed a motion requesting an article 38.072 hearing. At the pretrial hearing on Appellant's motion, the State produced Stepmother and the Investigator, and after the hearing, the trial court made both Stepmother and the Investigator the outcry witnesses for the two offenses respectively. Although the trial court did not expressly refer to article 38.072, the entire hearing was conducted in the context of article 38.072. On appeal, it is not Appellant who is asserting the trial court erred by designating Stepmother and the Investigator as the outcry witnesses; it is the State—which successfully sponsored them as its outcry witnesses at trial. "Under the doctrine of invited

[9]The State initially appears to limit this argument to the Investigator and the fellatio outcry. However, the State thereafter addresses the assaults in the stepsister's bedroom and in the truck. Complainant's references to assaults in her stepsister's bedroom and in the truck were in the context of Appellant touching her anus. Accordingly, we construe the State's argument to encompass both Stepmother's and the Investigator's testimony.

error, if a party requests or moves the court to make an erroneous ruling, and the court rules in accordance with the request or motion, the party responsible for the court's action cannot take advantage of the error on appeal." *Willeford v. State*, 72 S.W.3d 820, 823 (Tex. App.—Fort Worth 2002, pet. ref'd). Accordingly, on the basis of invited error, we will not disturb the trial court's designation of Stepmother and the Investigator as outcry witnesses under article 38.072 on the basis that Complainant's outcries to them were not discernible.

For the reasons given below, we disagree with the State that there can be more than one outcry witness regarding the same offense under article 38.072 where both witnesses heard a discernable sexual offense simply because the outcry that the second witness heard contained greater details. "Before more than one outcry witness may testify, . . . the outcry must . . . not simply [be] a repetition of the same event as related by the victim to different individuals." *See West*, 121 S.W.3d at 104.

**a. *Pierce v. State***

In *Pierce v. State*, a case upon which the State relies, the complainant told her mother that the defendant had molested her, but the mother was not able to determine the exact nature of the molestation and assumed that the defendant was making the complainant perform oral sex on him. No. 10-09-00320-CR, 2010 WL 2683052, at *2 (Tex. App.—Waco July 7, 2010, no pet.) (mem. op., not designated for publication). As we understand the opinion, the complainant's mother then had the complainant speak with the complainant's cousin, and the

complainant's mother and cousin thereafter spoke on the telephone. *Id.* The complainant's cousin told the complainant's mother that the complainant had told her that the defendant had touched her on the vagina. *Id.* At trial, the trial court allowed the forensic interviewer to testify as the outcry witness, and the defendant argued that this was error because the complainant made her initial outcries to her mother and her cousin. *Id.* at *1. The appellate court cited *Garcia v. State* for the proposition that to qualify as a proper outcry statement, the child must have described the alleged offense in some discernible way and must have more than generally insinuated that sexual abuse occurred. *Id.* (citing 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)). The appellate court held that the trial court did not err because the complainant's statements to her mother and cousin did "not describe the alleged offense in some discernable way." *Id.* at *2. The appellate court noted that the offense for which the defendant was charged was penetrating the complainant's sex organ with his tongue. *Id.*

In *Pierce*, the complainant's mother assumed the offense involved oral sex performed on the defendant, but she was mistaken; the complainant's cousin understood the offense to involve the touching of the complainant's vagina, but she did not know with what the defendant was touching the complainant. In the present case, Complainant's outcries to Stepmother and the Investigator described the offenses in a discernable way. Additionally, in *Pierce*, although the complainant's mother testified, *id.*, there is nothing suggesting the State sought to have her testify as the outcry witness under article 38.072 or that the State

sought to have both the complainant's mother and the forensic interviewer testify as outcry witnesses under article 38.072 to the same offense. *Pierce*, therefore, is distinguishable.

**b. *Rodgers v. State***

In *Rodgers v. State*, another case upon which the State relies, the complainant told his mother that his uncle had been touching him but could not give her any details. 442 S.W.3d 547, 548 (Tex. App.—Dallas 2014, pet. ref'd). The police were called, and that same night, the complainant was interviewed by a forensic interviewer. *Id.* The forensic interviewer testified at trial as the outcry witness. *Id.* On appeal, the defendant argued that the complainant's mother, not the forensic interviewer, should have been the outcry witness. *Id.* at 552. The appellate court identified the outcry witness as the first person '"to whom the child makes a statement that in some discernible manner describes the alleged offense."' *Id.* (quoting *Garcia*, 792 S.W.2d at 91). The appellate court held that the complainant made only general allusions of abuse to his mother and that it was not until he spoke to the forensic interviewer that the allegations became clear. *Id.*

As noted earlier, in the present case, Complainant's statements to Stepmother and the Investigator described the two offenses in a discernable way. Additionally, like in *Pierce*, although it appears that the complainant's mother in *Rodgers* testified at trial, there is nothing suggesting that the State sought to have both the complainant's mother and the forensic interviewer testify

as outcry witnesses for the same offense under article 38.072. We hold that *Rodgers* is distinguishable.

**c. *Josey v. State***

Although not cited by the State, another case illustrates the distinction discussed in *Pierce* is *Josey v. State*. 97 S.W.3d at 687. In *Josey*, the child told his mother about being made to put the defendant's penis in his mouth and about being "fingered." *Id.* at 693. The child went into explicit detail with his mother about the act of oral contact. *Id.* He described to his mother where he and the defendant were when the incident happened, the appearance of the defendant's penis, what words the defendant said during the act, and how the victim felt as a result of the sexual assault. *Id.* In contrast, the child gave no details about being "fingered." *Id.* The child did not explain what he meant by being "fingered," where the incident occurred, or how he felt during or after the act. *Id.* The child first provided the details about the fingering incident to the forensic interviewer. *Id.* Before that, he had made only a general allusion or insinuation that a second sexual assault had occurred. *Id.* The parties agreed that the child's mother was the proper outcry witness for the act of oral contact. *Id.* at 692. The defendant argued that the trial court erred by permitting the forensic interviewer to testify regarding the digital penetration outcry. *Id.* The appellate court held that the trial court did not abuse its discretion because its ruling was within the zone of reasonable disagreement because the trial court properly concluded that the child's first outcry that was more than a general insinuation of sexual abuse of

digital penetration did not occur until he spoke with the forensic investigator. *Id.* at 693.

To the extent "fingering" is ambiguous, we agree with *Josey*. The child might have meant digital penetration or might have meant some other form of touching or groping. In Appellant's case, however, the trial court had already determined that Complainant's outcry to Stepmother was sufficient to make the offense of digital penetration of the anus discernible and her subsequent outcry to the Investigator was sufficient to make the offense of fellatio discernible. Stepmother and the Investigator were the outcry witnesses for those offenses for purposes of article 38.072. There could be no others. *See West*, 121 S.W.3d at 104. We do not read *Josey* for the proposition that a trial court approved both the child's mother and the forensic interviewer as outcry witnesses under article 38.072 for the digital penetration offense. In Appellant's case, the trial court permitted two outcry witnesses under article 38.072—two for each offense.

**d. *Hernandez v. State***

The State further relies on *Hernandez v. State*, a case out of our court. No. 02-08-00478-CR, 2010 WL 1854150 (Tex. App.—Fort Worth May 6, 2010, no pet.) (mem. op., not designated for publication). In *Hernandez*, the complainant told Melissa Harrell that the defendant made her "suck the sickness out" of his private area and that the incidents occurred in her bedroom and in a laundry room. *Id.* at *1. The complainant then spoke with a CPS investigator and told her that the defendant made her touch or hold his penis, perform oral

sex on him, and lick his private area in her bedroom, in the defendant's bedroom, and in the laundry room. *Id.* The complainant also told the CPS investigator that the defendant touched her vagina with his hand, mouth, and penis more than once in his bedroom and in the laundry room. *Id.* Accordingly, the outcry to the CPS investigator was considerably broader than the outcry to Harrell.

After Harrell testified, the defendant objected to the CPS investigator testifying to the same matters as Harrell. *Id.* at *2. The trial court overruled the defendant's objection, but it also stated that it would permit the CPS investigator to testify "concerning different matters that were not related to the first outcry witness." *Id.* The trial court was effectively saying that the CPS investigator was the first outcry witness to the new matters.

Thereafter, however, when the CPS investigator testified about both the matters that Harrell had related and about the new matters, the defendant never objected. *Id.* We held that the defendant had not preserved his complaint. *Id.*

We thereafter addressed the merits and concluded that even if the defendant had preserved the error, the trial court did not abuse its discretion because the CPS investigator described different offenses, in greater numbers, and in an additional location. *Id.* at *3. As to those offenses, the CPS investigator was the first outcry witness. What we did not address was, assuming error was preserved, whether it was error for the CPS investigator to testify as to the same matters as Harrell. We have no dispute with *Hernandez* to the extent it held that the complained-of error was not preserved and to the

extent it held that assuming error was preserved, there was no error when the CPS investigator testified as to outcries not covered by the outcries that Harrell had heard.

**e. *Brown v. State***

Appellant cites *Brown v. State* for the proposition that Dula was not a proper outcry witness. 189 S.W.3d at 382. In *Brown*, it was undisputed that the first outcry witnesses were the complainant's father and his girlfriend. *Id.* at 385. A counselor with the Child Advocacy Center subsequently interviewed the complainant. *Id.* at 384. The State called the counselor as "an outcry witness to narrate and explain . . . the videotape of her interview with [the complainant as it] was played for the jury." *Id.* at 385. The appellate court held that the counselor was not the proper outcry witness under article 38.072 of the code of criminal procedure. *Id.* "[T]he proper outcry witness is not to be determined by comparing the statements the child gave to different individuals and then deciding which person received the most detailed statement about the offense." *Id.* at 386. "Article 38.072 contemplates allowing the first person to whom the child described the offense in some discernible manner to testify about the statements the child made." *Id.* The appellate court held that the trial court abused its discretion by allowing the counselor to testify and by admitting the videotape of that interview. *Id.* at 387.

### 4. Disposition on Points Two and Three

#### a. The Trial Court (1) Erred by Allowing Dula to Testify as a Second Outcry Witness Under Article 38.072 on Both Offenses, (2) Did Not Err by Allowing Dula to Testify Regarding Offenses to Which the Complainant Had Not Previously Made an Outcry, and (3) Did Not Err by Allowing Dula to Testify as an Expert

Appellant's primary complaint in this case is about Dula's testimony to the extent it covered the same offenses that Stepmother's and the Investigator's testimony covered. Unlike in *Hernandez*, Appellant here preserved his error. Appellant requested and was granted a running objection. Although Dula's testimony provided more detail regarding the offenses, that additional information was unnecessary to discern the nature of the two offenses. *See Brown*, 189 S.W.3d at 386. "[T]he proper outcry witness to a single event is the first adult person other than the defendant to whom the victim made a statement describing the incident." *West*, 121 S.W.3d at 104. "[T]here may be only one outcry witness to the victim's statement about a single event . . . ." *Id.* In Appellant's case, the trial court allowed two outcry witnesses as to both offenses in violation of article 38.072. We agree with Appellant that the trial court erred to the extent it allowed Dula to testify as a second outcry witness under article 38.072 on both offenses. *See Brown*, 189 S.W.3d at 385. To the extent the trial court allowed Dula to testify as a second outcry witness under article 38.072 both as to the digital-penetration-of-the-anus offense and the fellatio offense, we hold that the trial court erred.

The Complainant's outcry to Dula regarding the touching of her anus indicated that it had occurred on two occasions—once in her stepsister's bedroom and once in a truck. Because Appellant was indicted for only one incident of touching Complainant's anus, Dula's testimony necessarily encompassed a second incident about which Complainant had not previously made an outcry. To the extent Appellant is complaining about Dula's testimony regarding a new offense, Dula was the first outcry witness as to it, and Appellant never objected to it as an extraneous offense. *See* Tex. R. Evid. 404(b); *West*, 121 S.W.3d at 104. To the extent Dula testified as an outcry witness regarding additional sexual offenses, we overrule that portion of Appellant's second and third points.

Dula testified in two capacities. She testified as an outcry witness under article 38.072 and as an expert witness. On appeal, Appellant does not attack Dula's testimony as an expert. Any complaint as to those portions of Dula's testimony is not preserved. *See* Tex. R. App. P. 33.1. To the extent Dula testified as an expert witness, we overrule that portion of Appellant's second and third points.

**b. The Error was Harmless**

Having determined that the trial court erred, we now apply a rule 44.2(b) harm analysis. Tex. R. App. P. 44.2(b); *West*, 121 S.W.3d at 104. A reviewing court must deem an error harmless if, after reviewing the entire record, the court is reasonably assured the error did not influence the jury's verdict or had but a

slight effect. *West*, 121 S.W.3d at 104. If the same or similar evidence is admitted without objection during trial at another point, the improper admission of the evidence will not constitute reversible error. *Id.* at 104–05.

Stepmother testified that Complainant told her that Appellant had put his finger in her anus and repeated the same outcry to the doctor. The Investigator testified that Complainant demonstrated how she put her mouth on Appellant's penis. The Nurse testified that Complainant told her that Appellant touched her anus. The Nurse said that Mother told her that Complainant had told her (Mother) about Appellant's touching "her butt hole" and that Mother then also showed her (the Nurse) how Complainant had shown her (Mother) how Appellant had made her put his penis in her mouth. To the extent that Dula added a few more details regarding the offenses, in the context of the whole trial, their value was *de minimis*.

As a five-year-old child testifying before the jury and, perhaps more importantly, before Appellant, Complainant gave conflicting answers on whether fellatio had occurred and denied Appellant had touched her anus. The jury nevertheless convicted Appellant on both counts. This suggests that the jury believed Complainant's initial outcries to Stepmother and the Investigator. Complainant's subsequent outcries to the Nurse, Dr. Ota, Mother, and, admittedly, Dula were consistent. There was no evidence suggesting Complainant, who was only three years old at the time of her initial outcries, had been exposed to pornography. It is inconceivable how a child of three could

describe these offenses other than by being the victim of them. Appellant was the only person Complainant identified as engaging in sexual behavior with her. Dula was able to add details, but her testimony did not fundamentally change the dynamics of a three-year-old child describing behavior that should be alien to three-year-old children. Although some evidence hints at possible coaching by Mother before Complainant testified at trial, there is nothing suggesting any possible coaching before the outcries to Stepmother and the Investigator.

We are reasonably assured that the error in admitting Dula's outcry testimony regarding the two offenses alleged in the indictment did not influence the jury's verdict or had but a slight effect. *See* Tex. R. App. P. 44.2(b); *West*, 121 S.W.3d at 105. We overrule the remainder of Appellant's second and third points.

**B. Point Four: Dula Did Not Testify as to the Ultimate Issue**

Regarding Appellant's fourth point, our review of Dula's testimony does not show that she testified as to the ultimate issues. Rather, she testified regarding the difficulties inherent in communicating with very small children. Complainant was only three years old when she made her outcries, and she was only five years old when she testified. Dula explained how a child might behave in a normal or even happy manner while discussing such serious matters. Dula described how she looked for coaching. She explained how a young child was not capable of specifying precise times. Dula addressed how a small child would not have the vocabulary or the experience to accurately describe certain

activities. In Complainant's case, she used some words that could be explained and other words that were less-easily explained, and the testimony showed that in other instances, Complainant did not use words at all but pantomimed what she had experienced. We overrule Appellant's fourth point. *See Cantu v. State*, 366 S.W.3d 771, 778 (Tex. App.—Amarillo 2012, no pet.) ("The testimony did not convey the interviewer's opinion as to whether the child was telling the truth. The testimony indicated only that she believed the allegations came from the child rather than from someone telling the child what to allege."); *Charley v. State*, No. 05-08-01691-CR, 2011 WL 386858, at *5 (Tex. App.—Dallas Feb. 8, 2011, no pet.) (mem. op., not designated for publication) ("[The witness] testif[ied] that [the child] was able to provide sensory details, which she earlier had said were 'very important' because if a child is coached, they will not be able to give such details."); *Reynolds v. State*, 227 S.W.3d 355, 366 (Tex. App.—Texarkana 2007, no pet.) ("Reviewing the entire record, [the witness's] statements were appropriate because she was explaining how she interviews children and the steps taken to ask nonleading questions and allow [children] to tell their own story.").

**C. Point Five: Dula's Testimony was Not Bolstering**

In Appellant's fifth point, he contends Dula's testimony constituted bolstering. In *Cohn v. State*, two siblings testified that they had been sexually molested. 849 S.W.2d 817, 817 (Tex. Crim. App. 1993). A psychiatrist who had

visited with the children testified regarding their demeanor over a "bolstering" objection. *Id.* at 818. The court of criminal appeals wrote:

> "Bolstering" may perhaps be understood a little more precisely to be any evidence the *sole* purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing "to make the existence of [a] fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Accordingly, evidence that corroborates another witness'[s] story or enhances inferences to be drawn from another source of evidence, in the sense that it has an incrementally *further* tendency to establish a fact of consequence, should not be considered "bolstering."

*Id.* at 819–20 (citation omitted). The court continued,

> [The psychiatrist's] testimony that the children exhibited anxiety behaviors is circumstantial evidence that *something* traumatic happened to them. That this evidence in some small measure corroborates the children's own testimony that appellant sexually molested them does not make it any less relevant—in fact, quite the opposite. Of course, like all corroborating evidence, because it is consistent with the children's story, it also has a tendency to make their testimony more plausible. But we should not for that reason exclude it . . . .

*Id.* at 820.

Dula's testimony enabled the jury to put a small child's outcries into some kind of context, given the child's limitations in vocabulary and cognitive development. We overrule Appellant's fifth point.

## IV. Conclusion

We held there was error in a portion Appellant's second and third points, held the error was harmless, and overruled those portions on that basis. We overruled the remaining portions of Appellant's second and third points and

overruled his first, fourth, and fifth points in their entirety. Accordingly, we affirm the trial court's judgment convicting Appellant of both offenses.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: GARDNER, WALKER, and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: September 15, 2016