COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00139-CR

DONTRAY WALKER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1397244D

MEMORANDUM OPINION[1]

In seven points, Appellant Dontray Walker appeals his convictions for sexual assault of a child and indecency with a child by contact. *See* Tex. Penal Code Ann. §§ 21.11, 22.011 (West Supp. 2017). We affirm.

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

Background

In 2012, Walker was dating Abby's[2] mother, Laura, and was living in an Arlington apartment with Laura, Abby, and three of Laura's other children. At 15 years old,[3] Abby was the oldest of the four children living in the apartment, and because Laura worked long hours, Abby took on a mothering role to her siblings so that Laura could catch up on sleep when she was home. Although he was unemployed at the time, Walker assisted with family expenses through the disability payments he received from the Veteran's Administration.

I. The initial investigation

According to Abby, in late November 2012, Walker confronted her when he found out she was dating someone and he told her that he "needed to check . . . if something didn't look right" and that Abby "need[ed] to know how [her] body look[ed]." Abby testified at trial that Walker directed her to take off her shorts, which she did, and then he moved her underwear aside, "opened up," and "looked around" her vaginal area.

Abby also described a second incident to the jury that took place a few days later, on December 1. In that incident, Walker returned from taking Laura to work early in the morning, went into Abby's bedroom, picked her up from her bed, and carried her into Laura's empty bedroom. Abby recalled that Walker

[2]In accordance with rule 9.8, we refer to children and family members by aliases. Tex. R. App. P. 9.8(b) & cmt.

[3]By the time of trial, Abby was 18 years old.

directed her to take some allergy medicine, so she did, and then she fell back to sleep. In her testimony, Abby described waking up at some point later to a sensation of pressure in her "chee-chee"[4] area and believed that it was caused by something penetrating her sexual organ. Then, the room "slowly disappeared" and Abby drifted back to sleep until a bit later when she woke up to the feeling of her shorts being pulled up. Although she remembered seeing Walker walk into the bathroom attached to the room, she testified that she could not hear anything and that she fell "right back to sleep again." Finally, at 9:00 a.m., Abby woke up fully. When she went to the bathroom to take a bath that morning, she noticed black pubic hairs in her underwear.

Later that day, Abby told her friend what she could recall about the incident, and that evening, her friend's parents reported the abuse to the police. Officer Chad Haning of the Arlington Police Department (APD) was one of the officers that arrived at Abby's apartment around 1:00 a.m. that night and encountered what he described as a party of nine to 15 people, mostly males, who were intoxicated and aggressive about the police presence. Officer Haning found Abby in her room, where she was sleeping, and Abby told Officer Haning what had happened the previous morning. Then, at Officer Haning's direction, Abby collected the clothes she had been wearing at the time of the assault—a t-shirt, shorts, and underwear—and gave them to Officer Haning; he also collected

[4]Abby identified the female genitalia as a "chee-chee."

the sheets and comforter from Laura's bed. While he was collecting the bedding, Officer Haning noticed a bottle of Hydrocodone pills labeled with Laura's name on one of the nightstands. Officer Haning then escorted Abby and Laura to Cook Children's Medical Center (Cook's) for a sexual assault examination.

A. Sexual assault examination

Abby and Laura arrived at Cook's around 4:00 in the morning on December 2 and each met with Dr. Jayme Coffman, a child abuse pediatrician and the medical director of the CARE team at Cook's. Dr. Coffman interviewed Abby and Laura separately and also performed a physical examination of Abby; she described both interviews and the examination for the jury at trial.

As part of her interview of Abby, Dr. Coffman learned about Abby's medical and sexual history. Abby was a sexually active teenager and reported last having sex with her boyfriend a week before. Abby also informed Dr. Coffman that Laura's former fiancé—who had since passed away—had sexually abused Abby by trying to make her perform acts of oral sex. Abby also described her struggle with depression and self-mutilation, and Dr. Coffman noted the presence of multiple scars on one of Abby's forearms and both of her thighs that were the result of her cutting herself when she was angry or sad, a habit that began in 2008 or 2009. Dr. Coffman testified that, in her experience, it was not uncommon for children who had been sexually abused to self-mutilate as a way to cope with their feelings surrounding the trauma, which sometimes manifested in forms of depression or posttraumatic stress. Indeed, Abby testified

at trial that she had suffered from depression since she was young and "[had] always had mental breakdowns."

Dr. Coffman testified that Abby told her about both of the above-described instances of abuse. First, Abby purportedly told Dr. Coffman that Walker had examined her genital area "for cuts, scars or warts" a few days earlier. Dr. Coffman continued,

> The next thing she told me was that on the morning of December 1st around 6:00 in the morning, he came into her room and then picked her up and took her into her mom and his room. And she said she had put on shorts, then he went to the kitchen and gave her some cold - - or some medicine for her sinuses is the way she worded it. She said she fell asleep, and then she felt something rubbing across her leg. She was in her mom's bed at that point. And then she kind of halfway woke up. She said she couldn't really w[a]ke up all the way, just halfway woke up, and he was pulling up her shorts and underwear at that time. And she said it was around 7:30 in the morning when that occurred.
>
> . . . .
>
> Then she states that she woke up again about 9:40 in the morning. She couldn't wake him up, and then she figured it was too late to go to church anyway. So she took a shower and noticed that her inner thighs and her groin area was moist. And then she noticed some small black hairs down in the genital area. And then around noon, she went to her friend's house and told her friend about what had happened.

Dr. Coffman concluded that Abby had lost consciousness at some point because although Abby knew something had happened, "she had no specific memory of any specific events" because "[s]he couldn't wake up enough to remember."

In addition to performing a general, head-to-toe physical examination, Dr. Coffman examined Abby's genitals for signs of abuse and collected DNA

swabs and a urine sample for testing. Dr. Coffman concluded that her findings from the examination, which included some tears and evidence of healed injuries to Abby's genitals, were consistent with suspected sexual abuse.

Dr. Coffman was concerned when Laura seemed to question whether Abby was telling the truth, and she felt that Laura did not seem protective of Abby. Dr. Coffman's concerns were heightened when she learned that Laura planned to return to the apartment and that Walker was still living there, but Laura and Abby agreed that Abby would stay with a family friend once they left Cook's.

According to Abby, when she and Laura left Cook's just before 7:00 a.m., Laura drove her to a park, where Abby initially told Laura what had happened between her and Walker. But by the end of the conversation, Abby told Laura that none of it had actually happened. At trial, she explained that she had felt Laura did not believe her.

B. Forensic interview

Abby stayed with an aunt for a few days after that, but then she returned to the Arlington apartment, where Walker was still living. Four days after the incident, on December 6, 2012, Laura drove Abby to the Alliance for Children, where Joy Hallum, a forensic interviewer, interviewed her for about an hour.

It was during this interview with Hallum that Abby first publicly recanted her allegations against Walker by telling Hallum that she had made it all up because she wanted to get Walker out of their home and did not like his assumption of a

fatherly role to her. At trial, Abby testified that she had only recanted out of concern for her mother and her siblings. Abby testified that she had been afraid of the possibility that she and her siblings might be split up, or that her relationships with them might be damaged, and that she did not want to cause Laura to worry about them.

Hallum, who was skeptical of Abby's recantation, explained at trial that a child is more susceptible to recanting allegations of abuse if she lives with her abuser because "the child is going to be told or [made to feel] that they need to take that statement back." Hallum, like Dr. Coffman, had concerns about Abby returning to an apartment where Walker was living, although she admitted during cross-examination that she did not know if Walker was living in the same apartment with Abby at the time of the interview.

C. APD investigation

Detective Garth Savage was assigned to the case and continued to investigate it despite Abby's recantation during the forensic interview. He requested DNA testing of the clothing Abby had been wearing at the time of the December 1 incident, DNA testing of the swabs taken by Dr. Coffman, and results of a toxicology test of Abby's urine. Although the results of the swab testing came back negative for the presence of semen, sperm was found on the shorts Abby was wearing on December 1 that matched Walker's DNA profile. Additionally, the results of the urine test were positive for Hydrocodone, indicating that she had taken the drug within the three days before the urine

sample was taken. According to the toxicologist who testified at trial regarding the urine test results, Hydrocodone can cause drowsiness and loss of muscle control.

Detective Savage also interviewed Laura as part of his investigation, and at trial, he indicated that she did not seem concerned for Abby's safety and welfare, nor did she show any concern throughout the investigation. In his view, Laura took Walker's side over that of her daughter.

In the months that followed, Abby recanted her allegations two more times. Abby admitted at trial that, in February 2013, she told a Child Protective Services (CPS) caseworker, Kimberly Jimerson, that she had made up the allegations and described them as "absurd." However, she also testified that she told Jimerson that she could not recall everything that happened during the December 2012 incident because she had fallen asleep and her mind was "scattered."

Abby recanted again in June 2013 during an interview with Detective Savage. According to Detective Savage, Abby told him, "I was not sexually assaulted by Dontray Walker" and that she had "made the story up." Despite his skepticism of Abby's various recantations, Detective Savage suspended the investigation.

II. The reopened investigation in 2014

Detective Savage reopened the investigation in November 2014 when he was contacted by CPS and told that Abby had made another outcry of abuse. On Halloween of 2014, just before she turned 17, Abby told her best friend that

Walker had been abusing her since 2012, and that friend reported her outcry to the police. Abby testified at trial that Walker had continued living with Laura, Abby, and her siblings in 2012 and 2013, and during that time, she and Walker had discussed sex, Walker had given her sexual "tasks," Walker had touched her breasts multiple times, and after the group moved to another apartment in Grand Prairie in March 2013, they had engaged in sexual intercourse multiple times through October 2014.[5]

Walker was subsequently arrested for sexual assault of a child on December 29, 2014.

A. Walker's cell phone and computer

Laura was also arrested and faced separate charges but was released from jail pending trial. In mid-February 2015, while Walker was still in jail awaiting trial, Laura's attorney contacted Detective Savage and informed him that Laura had found items related to the case on Walker's cell phone that led her to believe there may also be related evidence on his computer, both of which Walker had left in her apartment when he was arrested. Later the same day, Laura delivered the cell phone and computer to Detective Savage.

After Detective Savage obtained a warrant to search the cell phone and computer, Detective Mike Weaver performed a forensic analysis of both.

[5]After this outcry, a second sexual assault examination was performed by a Sexual Assault Nurse Examiner (SANE), and another forensic interview was conducted. No evidence was presented regarding the substance or results of either the examination or the interview.

Detective Weaver testified that he found text messages between Walker's cell phone and a contact labeled with Abby's name. The messages, which were not offered into evidence, included adult pornographic materials and references to "tasks" and to masturbation, according to Detective Weaver. Detective Weaver also found evidence that an application designed to "hide photographs or videos or other types of content" had been downloaded and used on the cell phone.

On the computer, Detective Weaver found adult pornography and two images of Abby. According to Detective Weaver's analysis, someone had attempted to delete the two images of Abby from the computer. Those two images were admitted at trial. The first—State's Exhibit 5—was a photograph of Abby taken from a low angle and depicting her standing with her back to the camera wearing shorts and a tank top. The second photograph—State's Exhibit 6—was described by Detective Weaver as depicting Abby "in a full state of nudity, lying on a bed with her legs spread apart performing essentially what looks to be an act of self-masturbation." Because of the way the second photograph was stored on the computer, Detective Weaver opined that it was the opening frame of a video that had been previously stored on the computer.

III. The verdict

The jury found Walker guilty of two counts of sexual assault of a child, for which he was sentenced to 20 and 16 years' confinement, and one count of indecency with a child, for which he was sentenced to 14 years' confinement.

Discussion

Appellant's seven points on appeal can be grouped into three categories: (1) that the trial court erred in admitting the testimony regarding the sexual assault examination, (2) that the evidence was insufficient to sustain each of the convictions against him, and (3) that the trial court erred in overruling his motion to suppress evidence seized from his cell phone and computer.

I. Admission of testimony regarding sexual assault examination

In his first point, Walker argues that the trial court abused its discretion by allowing Dr. Coffman to testify to Abby's statements to her during the sexual assault examination.

A. Standard of review

We review the admission or exclusion of evidence by the trial court for an abuse of discretion. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). A trial court does not abuse its discretion unless its ruling is arbitrary and unreasonable; the mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Foster v. State*, 180 S.W.3d 248, 250 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.).

B. Hearsay and the medical diagnosis exception

Hearsay is an out of court statement that a party offers to prove the truth of the matter asserted within the statement. Tex. R. Evid. 801(d). Hearsay is

generally inadmissible unless it falls within one of the enumerated exceptions. Tex. R. Evid. 802 (providing general rule against hearsay), 803 (providing exceptions applicable regardless of whether the declarant is available as a witness), 804 (providing exceptions applicable when the declarant is unavailable as a witness).

The prohibition against hearsay finds its roots in the belief that inherent dangers exist in permitting facts to be conveyed through third parties. Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958–59 (1974); Steven Goode, Olin Guy Wellborn III & M. Michael Sharlot, *Texas Practice Series: Texas Rules of Evidence* § 801.1 (3d ed. 2002).[6] The four primary dangers that have been identified are ambiguity, insincerity, faulty perception, and erroneous memory, all of which, it is believed, cannot be overcome through cross-

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[6]As explained—

> First, a belief may be erroneous because it results from a false impression of objective reality—a defect in perception—a lamentably common product of our imperfect physical and psychological faculties. Second, even a true perception may yield a false belief at a later time because of the tricks of human memory: the unconscious scrambling and regrouping of elements drawn from disparate experiences and from fantasies. Third, even an accurate memory of one person may mislead when used as evidence by another, if it is accidentally communicated imperfectly. However carefully focused, our instruments of communication, both verbal and nonverbal, may be clouded by ambiguity and its counterpart, misinterpretation. Finally, a valid memory may be falsified intentionally.

Goode et al., *supra*, § 801.1.

examination of the sponsoring witness but should instead be tested through cross-examination of the declarant himself. Tribe, *supra*, 958–59; Goode et al., *supra*, § 801.1.

But because the law also recognizes that certain categories of hearsay statements are made under circumstances that provide an independent guarantee of trustworthiness, or carry with them circumstantial indicia of reliability, exceptions to the hearsay bar have been carved out. Goode et al., *supra*, § 801.1. Rule 803(4) provides an exception for statements that are made for medical diagnosis or treatment and that describe "medical history[,] past or present symptoms or sensations[,] their inception[,] or their general cause." Tex. R. Evid. 803(4).

The medical diagnosis or treatment exception is "based on the assumption that the patient understands the importance of being truthful with the medical personnel involved to receive an accurate diagnosis and treatment." *Bautista v. State*, 189 S.W.3d 365, 368 (Tex. App.—Fort Worth 2006, pet. ref'd). Because patients are aware that the effectiveness of diagnosis and treatment they receive depends upon the accuracy of the information received by the medical provider, those who seek medical attention have a strong motive not to lie. *Fleming v. State*, 819 S.W.2d 237, 247 (Tex. App.—Austin 1991, pet. ref'd). Thus, it is reasoned, those who seek medical treatment will tend to provide truthful and accurate information. *Sneed v. State*, 955 S.W.2d 451, 454 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd).

However, with regard to children—especially young children—this tacit presumption may be invalid because a child may not "appreciate[] the need to be truthful in her statements to the doctor." *Fleming*, 819 S.W.2d at 247; *see also Taylor v. State*, 268 S.W.3d 571, 590 (Tex. Crim. App. 2008). When considering whether statements made by children to medical providers fall within the hearsay exception, the court of criminal appeals has looked to the analysis of the federal counterpart to rule 803(4) in *United States v. Iron Shell*, which identified a two-part test considering the child's motive and whether it is reasonable for the physician to rely on the information given by the child. *Taylor*, 268 S.W.3d at 590 (discussing *United States v. Iron Shell*, 633 F.2d 77, 83–84 (8th Cir. 1980) (applying Fed. R. Evid. 803(4)), *cert. denied*, 450 U.S. 1001 (1981)).

While the proponent of a statement offered under the medical diagnosis exception must show that the declarant was aware that the statement was made for medical purposes, *id.* at 588–89, she need not do so with magic words such as "diagnosis" or "treatment." *Beheler v. State*, 3 S.W.3d 182, 189 (Tex. App.—Fort Worth 1999, pet. ref'd). This court has previously held, under circumstances similar to those at issue here, that the testimony of a doctor or a SANE to certain statements made during a sexual assault examination were generally admissible under the medical diagnosis exception to the hearsay rule. *See Estes v. State*, 487 S.W.3d 737, 756 (Tex. App.—Fort Worth 2016, pet. granted on other issues); *Beheler*, 3 S.W.3d at 189.

Abby was 15 years old at the time she made these statements to Dr. Coffman. We need not decide whether Abby should be treated as a child, potentially subjecting her statements to the standards discussed in *Taylor*, or as an adult who would be expected to provide truthful statements to a medical provider. Either way, the State's proof satisfied the standards.

C. Application of the medical diagnosis exception

After the prosecutor asked Dr. Coffman, "[W]hat was the first thing that [Abby] told you about what was going on with why she's there?" Walker's counsel objected on the basis of hearsay and the denial of cross-examination.[7] After the trial court overruled the objection, Walker's counsel requested a "continuing objection," which was granted. Thereafter Walker's counsel did not lodge any other objection, nor did he specifically object to any particular statement as falling outside of the medical diagnosis hearsay exception. *See* Tex. R. App. P. 33.1(a)(1)(A) (requiring that a party make a timely objection "with sufficient specificity to make the trial court aware of the complaint" in order to preserve complaint for appellate review); *Sattiewhite v. State*, 786 S.W.2d 271, 283 n.4 (Tex. Crim. App. 1989) (warning that an advocate who lodges a running objection should take pains to make sure the objection complies with the specificity

[7]The objection was phrased, "May we object at this time it's hearsay and denial of cross - - confrontation and cross-examination." Walker has not pursued his right-to-confrontation argument on appeal.

requirements of rule 33.1(a)(1)(A)'s predecessor), *cert. denied*, 498 U.S. 881 (1990).

On appeal, again Walker does not point to any particular statement that he contends falls outside the hearsay exception.[8] Instead, he generally complains about all statements made by Abby during the medical examination. He argues, globally, that there was "no evidence" that the statements were sought for medical purposes or that Abby was aware of any such purpose. Thus, we will consider the admissibility of Dr. Coffman's testimony regarding Abby's statements during the examination as a whole, and we will not focus on any single, specific statement attributable to Abby by Dr. Coffman.

Abby's statements were made in conjunction with an examination conducted in a hospital by medical professionals shortly after Abby had reported a possible sexual assault. Dr. Coffman testified generally to the purpose of sexual assault examinations, explaining the need to obtain accurate personal and medical history and to conduct a physical examination in order to determine whether the child needs treatment, either in the form of medication (such as treatment for sexually transmitted diseases or pregnancy prophylaxis) or a referral to counseling for mental health needs. Dr. Coffman also testified that she discussed Abby's history with her and the need for an evaluation during the

[8]In his brief, Walker does recite as objectionable the excerpt of Dr. Coffman's narrative testimony set forth above—Abby's description of the two incidents that had occurred in the days before the sexual assault examination. But the thrust of his hearsay complaint has broader application.

examination. Abby's testimony demonstrated that she understood the need for the taking of her personal and medical history. She testified that she told the nurses and Dr. Coffman what happened because "[t]hey [needed] to know something around about what happened." *See Beheler*, 3 S.W.3d at 188–89 (explaining that the particular words "diagnosis" or "treatment" are not necessary, but that courts "must look to the record to see if it supports a conclusion that the young child understood why she needed to be honest").

The record here supports the conclusions that Dr. Coffman needed truthful and accurate information to diagnose and treat Abby and that Abby was aware that she needed to give full and accurate information to Dr. Coffman. Thus, Dr. Coffman's testimony generally fell within the parameters of statements made for medical diagnosis or treatment under rule 803(4). *See Estes*, 487 S.W.3d at 756 (holding requirements of 803(4) were met by nurse examiner's testimony to the purpose of the examination as being to "treat" and "diagnose" the complainant); *Beheler*, 3 S.W.3d at 189 (holding requirements of 803(4) were met by SANE's testimony regarding the course of her examinations, her explanation to the complainant of the purpose of the exam, and her testimony to the child's demeanor during the exam). As Walker does not point us to any specific testimony that he contends falls outside the medical diagnosis and treatment exception, our analysis ends here.

For these reasons, we overrule Walker's first point.

II. Sufficiency of the evidence

In his second, third, and fourth points, Walker argues that the evidence was insufficient to support each of the three convictions. Walker specifically argues that Abby's testimony was ambiguous and lacked "any credibility," and that, without Dr. Coffman's "improperly admitted hearsay testimony," there was insufficient evidence to support the convictions.

A. Standard of review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we

determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *See Jenkins*, 493 S.W.3d at 599; *Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Jenkins*, 493 S.W.3d at 599. The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See id.*; *see also Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

B. Sexual assault of a child

To prove sexual assault of a child, the State had to show that Walker intentionally or knowingly caused the penetration of Abby's sexual organ by any means or caused Abby's sexual organ to contact or penetrate the sexual organ of another person, including himself. Tex. Penal Code Ann. § 22.011(a)(2)(A), (C). Walker was charged and convicted of two counts of sexual assault—first, that he penetrated Abby's sexual organ with his own; and second, that he inserted his finger into Abby's sexual organ. Walker argues in his brief that the State failed to prove "each and every" element of sexual assault because (1) Abby's testimony was "ambiguous, at best, and lacked any credibility," and (2) Dr. Coffman's testimony should not be considered because it was improperly admitted.

First, we have held that Dr. Coffman's testimony was not improperly admitted. Nevertheless, even if it had been, we must consider all evidence—including improperly admitted evidence—in conducting a sufficiency review. *Jenkins*, 493 S.W.3d at 599.

Abby testified to two specific instances of sexual assault—the November 2012 incident during which Walker "check[ed]" her vaginal area after finding out that she had a boyfriend and the December 2012 incident, when he gave her "allergy medicine," and she passed out to later awaken to a sensation of pressure in her vagina and Walker pulling up her pants. The jury also heard consistent testimony from Dr. Coffman as to Abby's description of the assaults to

her. Additionally, the jury had the benefit of evidence that sperm matching Walker's DNA profile was detected on Abby's shorts, that a bottle of Hydrocodone—a powerful drug that can render a person drowsy and without muscle control—was present on the table beside the bed where Abby claimed the sexual assault had occurred, and that Abby's urine test revealed the presence of Hydrocodone in her system during the time period that Abby claimed the assault occurred.

Although Abby admittedly recanted her allegations multiple times, it was within the jury's purview to weigh those recantations in their consideration of her overall credibility. Such a conflict in the evidence, without more, is not enough to render the evidence insufficient. *See Upton v. State*, 853 S.W.2d 548, 552 (Tex. Crim. App. 1993) (explaining that conflicts in the evidence are for the jury to resolve); *Saldaña v. State*, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd) ("[W]hen a witness recants prior testimony, it is up to the fact finder to determine whether to believe the original statement or the recantation. A fact finder is fully entitled to disbelieve a witness's recantation.") (citing *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991)); *Jackson v. State*, 110 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (noting that a conviction "may rest on hearsay despite the lack of the complainant's testimony or even the complainant's recantation").

On the record before us, the evidence was sufficient to support both convictions for sexual assault. We therefore overrule Walker's second and third points.

C. Indecency with a child

To prove indecency with a child, the State was required to show that, when Abby was younger than 17 years of age, Walker engaged in sexual contact with her or caused her to engage in sexual contact. Tex. Penal Code Ann. § 21.11(a)(1). "Sexual contact" includes the touching of the breast of a child, including through clothing, with the intent to arouse or gratify the sexual desire of any person. *Id.* § 21.11(c)(1). Walker was charged and convicted of committing indecency with a child by touching Abby's breast.

Walker argues that Abby's testimony that Walker touched her breast was ambiguous at best and lacked credibility. Specifically, Walker takes issue with the prosecutor's manner of questioning Abby about the touching and asserts that only the prosecutor actually testified to the touching.[9]

The following exchange addressed Walker's touching of Abby's breast:

> [STATE:] When we talked about the things that would happen over the last 2012, 2014, back in November of 2012 when - - when that happened and what he did to you, do you remember if he touched any other part of your body? Do you remember if he touched your breasts up here?

[9]Walker also takes issue with the admission of Dr. Coffman's testimony, but, as we have already explained above, even if her testimony was inadmissible, we would still consider it in our sufficiency analysis. *Jenkins*, 493 S.W.3d at 599.

[ABBY:] (No audible response.)

[STATE:] Is that a "yes"?

[ABBY:] (No audible response.)

[STATE:] Okay. You got to say it out loud, [Abby].

[ABBY:] Yes.

[STATE:] Did he do that more than once after November of 2012?

[ABBY:] Yes.

[STATE:] All right. Would he do that every time he would have sex with you, or do you remember?

[DEFENSE COUNSEL:] Leading, Your Honor.

[THE COURT:] Sustained.

[STATE:] Do you know when he would do that? Would he do that then, or would he do it other times?

[ABBY:] It would be other times. I mean, when a certain thing like that is done, I have yet, you know, to like remember the actual point in time it was done.

[STATE:] Okay.

[ABBY:] Because things like that is something that's done more than once, more than twice, so - -

[STATE:] Hard to remember specifics - -

[ABBY:] Yes.

[STATE:] - - of how it happened after?

[ABBY:] Yes.

Although Walker complains in his brief that the prosecutor's questions were leading in nature, his only objection to leading during that exchange was

sustained. *See* Tex. R. App. P. 33.1(a)(1)(A); *Little v. State*, 376 S.W.3d 217, 220 (Tex. App.—Fort Worth 2012, pet. ref'd) (noting that, in order to preserve error for appellate review, a party must make a timely and specific objection and receive an adverse ruling from the trial court).

And although Walker characterizes Abby's testimony as "ambiguous," we disagree. *See Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/ambiguous (last visited Nov. 8, 2017) (defining "ambiguous" as "capable of being understood in two or more possible senses or ways"). Her "yes" answer to the prosecutor's question, "Do you remember if he touched your breasts up here?" combined with her "yes" answer to the follow-up question, "Did he do that more than once after November of 2012?" is not susceptible to multiple interpretations. Instead, her testimony unmistakably conveyed the message that Walker had touched her breasts multiple times after November 2012.

The State was also required to prove that Walker touched Abby's breasts with the intent to arouse or gratify his own sexual desire or that of someone else. Tex. Penal Code Ann. § 21.11(c)(1). His intent to arouse or gratify himself through such touching can be reasonably inferred from the evidence of the two sexual assaults, Abby's testimony that they engaged in sexual intercourse regularly after they moved to the Grand Prairie apartment, and his possession of a pornographic photograph of Abby on his computer. *See Ranson v. State*, 707 S.W.2d 96, 97 (Tex. Crim. App.) (holding that the intent to arouse or gratify a

sexual desire can be inferred from the perpetrator's conduct, remarks, and all the surrounding circumstances, including a common pattern of similar acts), *cert. denied*, 479 U.S. 840 (1986); *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd) ("An oral expression of intent is not required; the conduct itself is sufficient to infer intent."); *DeLeon v. State*, 77 S.W.3d 300, 312 (Tex. App.—Austin 2001, pet. ref'd) (noting, in prosecution of indecency by touching a child's breast, requisite intent could be inferred by the jury from evidence of other, similar instances in which appellant touched the child's breast). Based on the record before us, we hold that the evidence was sufficient to support the conviction for indecency with a child. We therefore overrule Walker's fourth point.

III. Motion to suppress

In his final three points, Walker argues that the trial court erred by overruling his motion to suppress the evidence seized from his cell phone and computer. Appellant asserts in particular that the seizures violated the fourth amendment of the U.S. Constitution and his right to due process (point 5), his right to due course of law (point 6), and article 38.23 of the code of criminal procedure (point 7). *See* U.S. Const. amend. IV, XIV; Tex. Const. art. 1, § 9; Tex. Code Crim. Proc. Ann. art. 38.23 (West 2005).

A. Standard of review and applicable law

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex.

Crim. App. 2007); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). In reviewing the trial court's decision, we do not engage in our own factual review. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Best v. State*, 118 S.W.3d 857, 861 (Tex. App.—Fort Worth 2003, no pet.). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000), *modified on other grounds by State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006). Therefore, we give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador*, 221 S.W.3d at 673; *Montanez v. State*, 195 S.W.3d 101, 108–09 (Tex. Crim. App. 2006); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's rulings on those questions de novo. *Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson*, 68 S.W.3d at 652–53.

Stated another way, when reviewing the trial court's ruling on a motion to suppress, we must view the evidence in the light most favorable to the trial court's ruling. *Wiede*, 214 S.W.3d at 24; *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). When the trial court makes explicit fact findings, we

determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those fact findings. *Kelly*, 204 S.W.3d at 818–19. We then review the trial court's legal ruling de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* at 818.

When the record is silent on the reasons for the trial court's ruling, or when there are no explicit fact findings and neither party timely requested findings and conclusions from the trial court, we imply the necessary fact findings that would support the trial court's ruling if the evidence, viewed in the light most favorable to the trial court's ruling, supports those findings. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008); *see Wiede*, 214 S.W.3d at 25. We then review the trial court's legal ruling de novo unless the implied fact findings supported by the record are also dispositive of the legal ruling. *Kelly*, 204 S.W.3d at 819.

We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case even if the trial court gave the wrong reason for its ruling. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003), *cert. denied*, 541 U.S. 974 (2004).

The Fourth Amendment protects against unreasonable searches and seizures by government officials. U.S. Const. amend. IV; *Wiede*, 214 S.W.3d at 24. To suppress evidence because of an alleged Fourth Amendment violation,

the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *Amador*, 221 S.W.3d at 672; *see Young v. State*, 283 S.W.3d 854, 872 (Tex. Crim. App.), *cert. denied*, 558 U.S. 1093 (2009). A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant. *Amador*, 221 S.W.3d at 672. Once the defendant has made this showing, the burden of proof shifts to the State, which is then required to establish that the search or seizure was conducted pursuant to a warrant or was reasonable. *Id.* at 672–73; *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

B. Facts adduced at the motion to suppress hearing

During the trial, the suppression hearing was held outside the presence of the jury. Detective Savage, the sole witness to testify, testified as follows.

Laura's attorney contacted Detective Savage in mid-February 2015 and informed him that Laura had found something related to the case on Walker's cell phone. Laura subsequently delivered Walker's cell phone and computer to Detective Savage and told Detective Savage that both had been left in her apartment when Walker was arrested. Laura also told Detective Savage that she had accessed Walker's Google account on his cell phone, where she found a drop box containing text messages. Laura attempted to forward some of the messages to herself and take screenshots of the messages to save them. Detective Savage did not ask Laura if she had obtained Walker's permission to

look at the contents of his cell phone or computer. While Laura was in Detective Savage's presence, she accessed the contents of the cell phone to look up the name of the folder where the messages were stored.

When Detective Savage asked Laura about the texts that she had seen on the cell phone, Laura also revealed to Detective Savage that she had discovered a fake Instagram account on the cell phone. Detective Savage was under the impression that Laura had access to the computer because "[i]t[was] a family computer that[was] in the house."

Once he took custody of the cell phone and computer, Detective Savage accessed the cell phone and put it in "airplane mode" to prevent any "destruction of evidence from any outside source." Detective Savage then obtained search warrants allowing APD to search the contents of both. Detective Savage testified that neither he nor anyone else from APD to his knowledge looked at any of the content on the cell phone until after he had secured the search warrant.

The trial court denied the motion to suppress and made findings on the record that there was "no evidence before the Court that the cell phone and the computer were seized illegally by [Laura]. The only testimony before the Court is that those items were in her possession and that she turned them over to the police and that she had the passwords to those items."

C. Application

Walker does not dispute that Detective Savage obtained a warrant to search the contents of the cell phone and the computer. Rather, Walker's

argument focuses on Laura's access of the cell phone and computer and her delivery of same to Detective Savage.

Walker argues in summary fashion that, because Laura did not have his permission to deliver the computer and cell phone to law enforcement, any evidence found on them—especially the two photographs of Abby—should have been suppressed in accordance with article 38.23. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a). However, it was Walker's burden to first establish standing to challenge the admission of the evidence by showing he had a "legitimate expectation of privacy" in the computer and cell phone. *See Rakas v. Illinois*, 439 U.S. 128, 148, 99 S. Ct. 421, 433 (1978); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). "To carry this burden, the accused must normally prove: (a) that by his conduct, he exhibited an actual subjective expectation of privacy, i.e., a genuine intention to preserve something as private; and (b) that circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable." *Villarreal*, 935 S.W.2d at 138.

We examine the circumstances in their totality, but various factors that have been considered in determining whether an individual established an actual subjective expectation of privacy include (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some

private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. *Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002) (citing *Villareal*, 935 S.W.2d at 138), *cert. denied*, 538 U.S. 927 (2003). While these factors are more applicable to a discussion of an expectation of privacy in a place rather than in an object such as a computer hard drive or cell phone, they remain instructive here. *See Miller v. State*, 335 S.W.3d 847, 855 (Tex. App—Austin 2011, no pet.).

Walker did not establish that he had a subjective expectation of privacy in the computer. Although Walker asserts in his brief that the computer belonged to him, Detective Savage determined, based on his conversation with Laura, that the computer was considered a "family computer" in their apartment. Even if his assumption was flawed, the evidence showed that Walker did not exercise complete dominion or control over the computer—Laura had access to the computer and knew the password needed to access its contents. There was no evidence that Walker attempted to limit anyone's access to the computer or that he forbade Laura, Abby, or the other three children in the apartment from accessing it.

Likewise, Laura knew the password to Walker's cell phone and it was left in her possession. There was no evidence of Walker's subjective expectation of privacy in the cell phone.

Based on the record before us, and considering the totality of the circumstances, we cannot conclude that the district court abused its discretion in

determining that Walker did not establish a reasonable expectation of privacy in the computer or cell phone. *See id.* (holding officer did not have subjective expectation of privacy in thumb drive that he left unattended in common area of law enforcement office, without any external identifying information, and did not protect with a password, encryption, or by storing in a locked case); *see also United States v. Barth*, 26 F.Supp.2d 929, 936 (W.D. Tex. 1998) (explaining individual's reasonable expectation of privacy can be destroyed if his conduct or activity or the circumstances of the situation significantly lessen his reasonable expectation of privacy by creating a reasonably foreseeable risk of intrusion by private parties).

Because Walker has failed to establish that he had a legitimate expectation of privacy in the cell phone and computer, he has no standing to challenge the seizure of that evidence. We therefore overrule Walker's final three points.

Conclusion

Having overruled each of Walker's seven points, we affirm the trial court's judgment.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; MEIER, J.; and KERRY P. FITZGERALD (Senior Justice, Retired, Sitting by Assignment).

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Tex. R. App. P. 47.2(b)

DELIVERED: November 16, 2017