COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00179-CR

MOTYPHE SHARONE LEWIS APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 432ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1451215R

MEMORANDUM OPINION[1]

In three issues, Appellant Motyphe Sharone Lewis appeals his conviction for continuous sexual abuse of a child. *See* Tex. Penal Code Ann. § 21.02 (West Supp. 2016). We affirm.

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

Background

I. Appellant's relationship with Adriane[2]

Monique met Appellant in July 2008. At the time, she had two children from previous relationships, three-year-old Adriane—the complainant in this case—and two-year-old Alicia. Appellant, Monique, and the two girls began living together in September 2008 in an apartment complex in Arlington. Appellant and Monique had their first child together in 2010, were married in July 2011, and subsequently had two more children together.

Except for a portion of time when the children attended daycare—from August 2012 to February 2013—after Monique and Appellant were married, Appellant was the primary caretaker for the children during the day while Monique worked and attended school.[3] Monique testified that she would be at work "anywhere from 9:30 to 4:00 p.m." during the day, and while she was working, at school, or studying—sometimes she studied outside the apartment because they did not have internet at the time—Appellant watched the children. When Appellant lost his job as a night shift stocking clerk at Wal-Mart in September 2013, Monique took on a second job.

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[2]In accordance with rule 9.10(a)(3), we refer to children and family members by aliases. Tex. R. App. P. 9.10(a)(3); 2nd Tex. App. (Fort Worth) Loc. R. 7.

[3]Until May 2013, Monique was attending Tarrant County College, and in August 2013, she started studying for her bachelor's degree in business administration and management at the University of North Texas.

Shortly after that, in October 2013, Appellant and Monique separated, Appellant moved out of the family apartment, and Appellant's role as primary caretaker of the children during the day ended.

II. Adriane's outcry

Monique testified that, on January 3, 2015, then-nine-year-old Adriane touched Monique's then-three-year-old son, Jamal, inappropriately.[4] Although she did not personally witness the touching, Monique testified that all five of her children were congregated in the living room and when she went into the living room "everybody separate[d], like scatter[ed] out." She continued, "And so at first I really couldn't get anybody to talk, so I started pulling the kids out one by one asking them what happened. And so they were saying that she was, you know, being inappropriate with [Jamal], sexually." She separated Adriane from the other children and described Adriane as "[p]anicked. She was crying, she was shaking. I couldn't get her to speak at all to me for at least 10 to 15 minutes."[5]

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[4]Adriane testified that she touched her brother's "wee-wee" and it made her feel "[w]eird."

[5]According to Adriane, two of her sisters saw her touching her brother and then ran to tell Monique, who was in the kitchen. At first, when Monique confronted Adriane, Adriane denied touching her brother, so Monique went to ask the other children, who all confirmed that Adriane had touched her brother. After that, Adriane admitted touching her brother's "wee-wee" and told Monique she had done it "[b]ecause it [had] happened to [her]." Adriane told her mother that "someone that lived with [them] in the apartment" had done it to her.

Monique asked Adriane where she had gotten the idea to touch her brother inappropriately and, once Adriane calmed down enough to speak, she told Monique that she had learned it from her "Daddy Momo."[6] Monique testified,

> [Adriane] basically told me that while I was in the shower sometimes, he would ask her to come view pornographic material on his cell phone and at that time try to, I guess, help her identify what was—what was going on in the videos. And then at some point after viewing the videos, I guess perform those—those similar acts, to my knowledge is how it was explained.

When asked what specific acts Adriane alleged took place, Monique testified, "[S]he said it was with—I'm sorry—with baby lotion, front penetration, back penetration and oral sex," and subsequently clarified that Adriane alleged Appellant had penetrated her sexual organ and her anus with his penis and had penetrated her mouth with his penis. Monique testified that Adriane was "very embarrassed, very shameful" when she told her mother of the abuse. After hearing Adriane's allegations, Monique went into the living room and cried.

After Adriane's outcry, Monique recalled some things that she had noticed in the past that were odd and that "[made her] wonder." For instance, when Monique returned home from work or school, she sometimes noticed that Adriane smelled of baby lotion, but she had dismissed it, thinking that the children had just been playing with the lotion. Monique also recalled that "a couple of times" she returned home and Appellant had bathed Adriane. This was

[6]Monique and Adriane testified that "Daddy Momo" was what Adriane and Alicia called Appellant.

odd because Monique generally bathed the children when she returned home, but Appellant would explain that Adriane had gotten into "stuff like chocolate bars, or . . . makeup or . . . things along that line." However, when this happened, Appellant would only bathe Adriane, not the other four children.

Monique reported Adriane's outcry to the police and an investigation ensued. Appellant was eventually arrested and charged with continuous sexual abuse of a child under the age of 14. *See* Tex. Penal Code Ann. § 21.02.

III. The trial

A. Adriane's testimony

Adriane was 10 and in the fourth grade when she testified at trial. According to Adriane, the first time something inappropriate happened was "[i]n the middle of seven or eight," when she was in "[s]econd or third" grade.[7]

Adriane testified that before the abuse would begin, Appellant would tell her that it was "time to get cleaned up," and then he would take her into the living room while the other children were in Monique's room. According to Adriane, Appellant would tie a scarf around her eyes as a blindfold and would also tie her hands in front of her chest.[8] Because her eyes were covered, she was not sure

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[7]On cross-examination, Adriane was asked if the first time that Appellant touched her inappropriately was when she was in the third grade and Adriane answered, "I think so." She could not remember when in the third grade it happened.

[8]Alicia, who was 9 at the time of trial, also testified that Appellant would sometimes tell Adriane, "It's time to clean you up," and to "go get supplies." This,

what he tied her hands with, but she testified that it felt like they were tied with another scarf.[9] Adriane testified that, once her eyes were covered and her hands were tied, Appellant would place her on a cushion on the floor on her stomach and pull down her pants and panties and his pants would be down. She continued,

> Q: Okay. And would anything happen with his wee-wee[10] and your body?
>
> A: I think it was on my back. . . . I'm not sure.
>
> Q: Did anything ever happen with your bottom and his wee-wee?
>
> A: Yes.
>
> Q: What was that?
>
> A: It would be in my hole.
>
> Q: Okay. Is that the hole where you go poop?
>
> A: Uh-huh.
>
> Q: His wee-wee would be in there?

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according to Alicia, meant for Adriane to get a scarf and go to the living room with Appellant while the other children stayed in Monique's room.

[9]Sometimes, Adriane was able to move the scarf so she could see, as she testified, "[W]hen [Appellant] wasn't paying attention, he was looking somewhere else, then I could—the pillow, I would rub my face against it, and then the scarf would come up a little bit."

[10]Adriane testified that she called her private parts her "boobies, too-too and bottom," and that her "too-too" was used to pee and her bottom was used to poop. She testified that she called a boy's private parts a "[w]ee-wee or wiener and bottom," that the "wee-wee" is used to pee, and that the bottom was used to poop.

A: Yes.

Q: What did that feel like?

A: Weird.

Q: And you said—did you say something earlier—and correct me if I'm wrong—about it being slippery or soft?

A: Slippery.

Q: What would? What would feel slippery?

A: His wee-wee.

Q: Would he put anything on his wee-wee.

A: I think he would put the baby lotion on it.

Q: What makes you say that?

A: Because it smelled like it and he would get it.[11]

She also testified that, afterward, "[T]here would be green stuff all over [her] pants, and that's why he had the baby wipes so he can wipe them off."

Adriane testified that on another occasion, Appellant told her it was time to get cleaned up, tied a scarf around her eyes, made her sit on her knees by the couch where he was sitting without his pants on, and asked her, "[D]o you want to eat sausage[?]" before forcing her to put her mouth on his penis. Adriane testified that it felt "[w]eird" and "[s]lippery" and that something "liquidy" came out of his penis and went into her mouth.

[11]Adriane testified that she never saw the baby lotion on Appellant's penis, but could smell it.

Adriane also testified that once, while Monique was in the shower, Appellant showed her a picture or a video on his phone depicting a woman who was turned around with her pants down and Adriane could see the woman's bottom. She testified that she saw "[t]he same thing" on the TV once when Monique was in the shower but that Appellant did not tell her to look at it that time. Rather, she just happened to see it.

According to Adriane, this abuse occurred often:

Q: Did this happen a lot?

A: Yes.

Q: Would it happen every day that he watched you guys?

A: I think so.

Q: And I asked you if it happened more than 10 times, and what did you say?

A: Yes.

Q: Would you say more than 20 times?

A: Not sure.

Q: Would you say that it went on for weeks?

A: Yes.

Q: Months?

A: Not sure.

Q: Is it fair to say you can't remember because it was so many times?

A: Yes.

B. Adriane's forensic interview

Alexis Chase, a forensic interviewer with Alliance for Children, interviewed Adriane on January 23, 2015, when Adriane was 9 years old. Chase testified that Adriane disclosed sexual abuse to her and that Adriane was able to give sensory, periphery, and very sexually-explicit details, things that, according to Chase, "She should not know." According to Chase, Adriane described "penile-vagina penetration, . . . penile-anal penetration and oral sex," and alleged that Appellant made her touch his "coo-coo"[12] with her hand. Chase expressed that she had no concern that Adriane had been coached.

The recording of the forensic interview was admitted into evidence and played for the jury. In the interview, Adriane initially told Chase that she was "six to seven" when the abuse happened the first time, and then told her that it happened when she was seven and in the second grade. Adriane told Chase, "He would almost do it every day cause our mom had two jobs while I was in second grade." When Chase asked when the abuse ended, Adriane told her, "I'm not sure about that."[13]

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[12]Chase described "coo-coo" as "[Adriane's] word for penis."

[13]After the video was played for the jury, Chase noted that "[c]hildren are not good with dates," unless they can connect an event to "something like a birthday, a holiday, [or] a school vacation." According to Chase, this would "[a]bsolutely" be true in the case of chronic sexual abuse.

C. Adriane's medical records and hospital interview

The State called Dr. Sophia Grant, a pediatrician with Cook Children's Hospital's CARE Team,[14] to testify to her review of Adriane's medical records. Dr. Grant testified that while Adriane was being examined on February 6, 2015, by a Sexual Assault Nurse Examiner (SANE), she told the examining nurse,

> It's been happening a long time with a man named Daddy. His real name is Motyphe. He did it when my mom was at work and my brother or sisters were taking a nap. He pulled down my pants, pulled his down. He laid me down and got on top of me. He kept flipping me over. He put his coo-coo—which is her word for penis—in mine. And she pointed to her genitalia and butt.
>
> Another day he put it in another place, in my mouth. He put a blindfold, but I kept moving it up so I could see a little. He had my arms tied behind me, but my legs were loose. Only one time he tied my legs.
>
> My sister [Alicia] was—she peeked because she never takes a nap. He did it on my mother's [illegible] on my mattress in my room and on the couch.
>
> The first time I was in the second grade. I think I was six or seven. The last time was when my mom stopped going to work. I was still six or seven. He would say if I told, he would come and get me and he will whip me. If I didn't do it, he would whip me and make me stay in my room, and he lied on me.[15]

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[14]The CARE team is a unit at Cook Children's Hospital that evaluates children with allegations of child abuse and neglect.

[15]Both Monique and Appellant testified that they disagreed on how to discipline the children. Whereas Monique was "softer" on the children, she felt that Appellant was "too rough [and] too harsh" in disciplining them. She described his relationship with Adriane in particular as "back and forth. Some days it was good with them; some days were not. It just depended."

> He would show me videos on the TV or on the phone to get me in the mood. They were videos of people naked. Some big people and sometimes videos of kids.
>
> . . . .
>
> He put his poo-poo in my mouth, and some gray stuff came out in my mouth and on my pants, but I spit it out. It got in my butt, too. He would clean it with a wipey. He used to whip us with a belt and bruise us.

Adriane also told the nurse, "There was a little stinging pain, no bleeding," that Appellant used baby lotion, that he fondled her breasts, and that she was forced to touch his penis. She told the nurse that the abuse happened "a lot," and the nurse noted, "last time around her OCT 2013 per Mom."

D. Appellant's testimony in his defense

Appellant testified in his own defense and denied that he ever touched Adriane inappropriately or showed her pornography.

Appellant specifically recounted that in January 2012, during an unrelated Child Protective Services (CPS) investigation, Adriane had denied any sort of sexual abuse. According to Appellant, CPS came to their apartment in January 2012 after Adriane told her teacher that Monique had left a bruise on her when she gave Adriane a spanking. As part of the investigation, Adriane was interviewed and a recording of that interview was admitted into evidence and played for the jury. During the interview, Adriane was asked if anyone had touched her private parts or made her touch their private parts, and if anyone had

showed her pictures of someone's private parts, to which Adriane answered, "No."[16]

Appellant described himself as a "big kid," and he testified that he and the children "played a lot" and would play video games together and wrestle. He admitted that, especially after he lost his job in September 2013, taking care of the children was "stressful," saying, "I was outnumbered, a lot of kids, wouldn't be—on top of the fact of me and [Monique] not agreeing on, you know, how to discipline and pretty much how to raise the kids. It was hard." He felt that Adriane resented him and testified, "It would be things she'd say to me and to her siblings. She would sometimes mention things to her mom—her mom, you know, blow it off like it's just something kids say, but I did feel like she was . . . [t]hat she resented me, yes." He also testified that

> [Adriane] would act out when she didn't get her way, so she did little disgusting things like she'll blow . . . blow her nose purposely on my blanket. She would spit - - spit on her hands, rub them on her face, rub them on her sisters' and brother's face.
>
> She would urinate on herself a little bit or not wipe herself when she goes to the bathroom.

Appellant testified that he initially "blew off" the investigation into Adriane's allegations against him, explaining, "[T]hroughout the years I've been with [Adriane], it was nothing new, so I kind of blew it off . . . . I was like it's - - you

[16]Adriane did, however, tell the investigator that she was afraid of Appellant.

know, it's - - it's [Adriane], you know. I'm not surprised." Appellant felt that Adriane had made up the allegations.

IV. The jury's verdict

The jury found Appellant guilty and sentenced him to 70 years' confinement.

Discussion

Appellant brings three issues on appeal. In his first issue, Appellant argues that the evidence is insufficient to support his conviction. In his second issue, Appellant complains of the trial court's admission of Adriane's interview with Chase. In his third issue, Appellant complains of the admission of Adriane's medical records.

I. Sufficiency of the evidence

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.").

In order to be convicted of continuous sexual abuse of a child, the defendant must be found to have committed two or more acts of sexual abuse against a child or children under the age of 14 "during a period that is 30 or more days in duration." Tex. Penal Code Ann. § 21.02(b). Appellant's argument in his brief is unclear, but he appears to argue that there was insufficient evidence to show that two acts of sexual abuse took place over a period of more than 30 days.

When Adriane was asked at trial about when the abuse began, she answered "in the middle of seven or eight" and when she was in the "second or third grade." When asked by Chase in her forensic interview, she initially said she was "six to seven" when the abuse started but then said that it was when she was seven and when she was in the second grade. Finally, she told the SANE at Cook's, "The first time I was in the second grade. I think I was six or seven."

Adriane was seven years old when she entered the second grade in August 2013. Monique testified that the children stopped attending daycare earlier that year, in February 2013, at which time Appellant took over caring for

the children during the day while Monique worked and went to school full time. In August 2013, when Appellant lost his night-shift job at Wal-Mart, Monique took on a second job and was home even less than before.

Although Adriane did not provide any dates on which the abuse occurred, Adriane testified that “the same thing happened over and over,” that it happened “often,” and that it happened more than ten times. When asked if there were “several different incidents when nasty things happened,” Adriane said, “Yes.” When asked if it would happen “every day that he watched you guys,” Adriane replied, “I think so.” When Adriane was examined by Cook’s CARE team, she told the SANE, “It’s been happening a long time with a man named Daddy. . . . He did it when my mom was at work and my brother or sisters were taking a nap.” Adriane told Chase that it happened “a lot of times” and that “[h]e would almost do it every day cause our mom had two jobs while I was in second grade.”

At trial, Adriane did not remember when the last time the abuse took place, but when she was asked, “Is it fair to say you can’t remember because it was so many times?” she replied, “Yes.”

Adriane did, however, tell the SANE at Cook’s, “The last time was when my mom stopped going to work. I was still six or seven.” And the SANE noted in her records, “last time around her OCT 2013 per mom.”

The offense of continuous sexual abuse was created “in response to a need to address sexual assaults against young children who are normally unable to identify the exact dates of offenses when there are ongoing acts of sexual

abuse." *Baez v. State*, 486 S.W.3d 592, 595 (Tex. App.—San Antonio 2015, pet. ref'd) (citing *Michell v. State*, 381 S.W.3d 554, 561 (Tex. App.—Eastland 2012, no pet.)), *cert. denied*, 137 S. Ct. 303 (2016); *see also Dixon v. State*, 201 S.W.3d 731, 736–37 (Tex. Crim. App. 2006) (Cochran, J., concurring) (recognizing the difficulties in prosecuting sexual offenses committed against young children because young children may not "be able to differentiate one instance of sexual exposure, contact, or penetration from another or have an understanding of arithmetic sufficient to accurately indicate the number of offenses").

In *Williams v. State*, the indictment alleged that the abuse occurred from September 2007 through January 2008. 305 S.W.3d 886, 888 (Tex. App.—Texarkana 2010, no pet.). In her outcry, the child told her mother that the abuse occurred "just about every time [she] went out there [to the appellant's home]." *Id.* The mother testified that she would drop the child off at the appellant's home regularly during the five-month period when she would go to work at 5:30 a.m. *Id.* at 888–90. The child testified at trial that the abuse occurred "more than twice," and told the forensic interviewer and the SANE that the acts occurred "more than once." *Id.* at 890. The Texarkana court held that "a rational trier of fact could have found that [the appellant] committed two or more acts of sexual abuse over a span of thirty or more days" based on this evidence. *Id.*; *see also Brown v. State*, No. 03-16-00011-CR, 2017 WL 876029, *4–5 (Tex. App.—Austin Feb. 28, 2017, pet. filed) (mem. op., not designated for publication) (stating that

the evidence of continuous sexual abuse of a child was sufficient when it established that the abuse started shortly after the child moved in with the appellant's mother in July 2011, the last act occurred shortly before the appellant moved in with someone else in October 2011, and that "numerous acts of sexual assault" and indecency were committed by the appellant); *Machado v. State*, No. 02-15-00365-CR, 2016 WL 3962731, at *3 (Tex. App.—Fort Worth July 21, 2016, pet. ref'd) (mem. op., not designated for publication) (acknowledging that most of the remaining evidence was weak concerning when the abuse occurred but holding that the record "contains evidentiary puzzle pieces that the jury could have carefully fit together" to determine abuse occurred over period of 30 or more days); *Jimenez v. State*, No. 07-13-00303-CR, 2015 WL 6522867, at *3–4 (Tex. App.—Amarillo Oct. 26, 2015, pet. ref'd) (mem. op. on reh'g, not designated for publication) (holding evidence was sufficient to support continuous sexual abuse conviction when the child described multiple incidences of sexual abuse and established Christmas 2008 as the date of one of them; although the timeline was unclear, nothing in the child's testimony suggested that the abuse occurred in a compressed time period within 30 days of Christmas 2008).

Here, the jury could have rationally concluded that the abuse began at some point after February 2013, when Adriane was seven years old, the children stopped attending daycare, and Appellant began taking care of them daily. They could have also rationally concluded that the abuse continued on a frequent basis—as Adriane said, "over and over," "every day," "more than ten times," and

"over a long time"—until approximately October 2013, when Appellant moved out of the family apartment. Nothing about Adriane's testimony suggests that the acts of sexual abuse were of a limited duration or occurred within a narrow window of time. Although her testimony may have been imprecise as to dates, Adriane testified that it happened frequently—daily even. The sexual abuse was such a routine occurrence that Appellant developed a code to describe it and to communicate to Adriane when it was about to happen. When he said it was "time to get cleaned up," Adriane knew that Appellant was going to blindfold her with a scarf and sexually abuse her in some manner. This code was repeated often enough that even Adriane's younger sister had figured out that those words signaled that Adriane would go get a scarf and that then Adriane and Appellant would go into the living room while the rest of the children stayed in Monique's room. All of this testimony, taken together, constitutes sufficient evidence to prove that the abuse occurred over a period of 30 days or more. *See Williams*, 305 S.W.3d at 888; *see also Machado*, 2016 WL 3962731, at *3; *Jimenez*, 2015 WL 6522867, at *4. We therefore overrule Appellant's first issue.

II. Admission of videotaped interview

In his second issue, Appellant argues that the trial court abused its discretion by admitting the video recording of Chase's interview of Adriane.

We review a trial court's rulings on evidentiary objections 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.); *see also Jones v. State*, 119 S.W.3d 412, 421–22 (Tex. App.—Fort Worth 2003, no pet.) (recognizing that an appellate court will reverse the trial court's determination under rule 403 "rarely and only after a clear abuse of discretion" in light of the trial court's superior position to gauge the impact of the evidence).

During his cross-examination of Chase, Appellant's counsel attempted to emphasize a conflict between Adriane's testimony at trial and statements she had made in her interview. Adriane had testified that she did not see Appellant put his penis in the baby lotion bottle but that she knew he had used baby lotion because she could smell it.[17] The following exchange took place between Appellant's counsel and Chase:

> Q: Ms. Chase, have you reviewed the video of the interview?
>
> A: I have.
>
> . . . .
>
> Q: Okay. Do you remember [Adriane] telling you that she saw Daddy Momo put his penis into a baby lotion bottle and that that made the bottle hairy?

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[17]One of Appellant's arguments in his defense was that he could not have left hair in the baby lotion container because he has shaved his pubic hair since he was 14 or 15 years old (he was 32 at the time of trial).

A: I don't think those were the words that she used.

Q: Okay. Do you recall the words she used?

A: Let me reference my notes.

> What I have is that it was like a bottle, he took the top off, like baby lotion, squeezed and rubbed it in there and made it hairy.

. . . .

Q: Well, all right. If I heard you correctly, did it—did she seem to be saying that he put his penis into the baby lotion bottle?

A: That's what it appeared.

Q: What were the words you used again?

A: Squeezed it, rubbed it in there.

Shortly after this exchange, Appellant's counsel passed the witness. On redirect, the State offered State's Exhibit 1, the video recording of the forensic interview of Adriane. Appellant's counsel objected, arguing,

> It's hearsay. In addition, it's bolstering. The—it was a statement given without the opportunity for the child to be cross-examined, and, therefore, it's prejudicial, and, therefore, we object to the admission of the item.

The State responded that the recording was now admissible under the rule of optional completeness because Appellant's counsel had opened the door by asking Chase specific questions "which were asked and then answered by the victim in this case." The State added that Appellant's counsel's questions of Chase had "left a false impression with this jury in terms of what exactly was said or wasn't said by the victim." The trial court overruled Appellant's objection and admitted the recording, and it was played for the jury.

On appeal, Appellant specifically argues that the admission of the video recording violated rule 403 and that videotaped interviews are not admissible as outcry statements under article 38.072. *See* Tex. R. Evid. 403; *Bays v. State*, 396 S.W.3d 580, 592 (Tex. Crim. App. 2013) (holding article 38.072 is limited to live testimony of outcry witness and does not apply to child's videotaped statement). The State argues that Appellant failed to properly preserve his objections to the admission of the video recording.

Appellant's objection to hearsay was sufficient to preserve an initial article 38.072 complaint. *Long v. State*, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990). But Appellant did not offer any response to the State's argument that the video was admissible under the rule of optional completeness and still does not respond to that argument on appeal. *See* Tex. R. Evid. 107 (providing that, where a party introduces part of a recorded statement, an adverse party may inquire into any other part on the same subject). Rule 107 operates—like article 38.072—as an exception to the hearsay rule, *Walters v. State*, 247 S.W.3d 204, 217–18 (Tex. Crim. App. 2007), and, by failing to respond to the State's argument, Appellant has forfeited his complaint, *see Bledsoe v. State*, 479 S.W.3d 491, 495 (Tex. App.—Fort Worth 2016, pet. ref'd) ("Although Bledsoe's general hearsay objection would preserve his complaint for appellate review in most cases, the State identified the hearsay exception on which it relied in response to Bledsoe's objection; therefore, Bledsoe was required to further object that the invoked exception did not apply.").

Likewise, Appellant's counsel's objection that the evidence was "prejudicial" is not enough to preserve a rule 403 argument. *See Montgomery v. State*, 810 S.W.2d 372, 377–78 (Tex. Crim. App. 1990) (op. on original subm'n) ("[V]irtually all evidence proffered by a party to a lawsuit will be prejudicial to the opposing party."); *Checo v. State*, 402 S.W.3d 440, 451 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (holding 403 objection was not preserved where it failed to identify which of the five grounds for exclusion was being argued).

Even if we were to assume, without deciding, that Appellant preserved his objections and to make the additional assumption that the trial court abused its discretion in admitting the video recording, any such error was harmless. Error in the admission of evidence in violation of Rule 403 is generally not constitutional error, *see, e.g.*, *Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000), so rule 44.2(b) applies. Tex. R. App. P. 44.2(b) ("Any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). Conversely, an error does not affect a substantial right if we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In making this determination, we review the record as a

whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may also consider the jury instructions, the State's theory and any defensive theories, whether the State emphasized the error, closing arguments, and even voir dire, if applicable. *Id.* at 355–56.

Appellant has not identified any harm that resulted from the trial court's error, if any, in admitting the video recording. And in our review of the record, including the video recording, it does not appear that anything significant admitted through the video recording was not also admitted through Adriane's direct testimony at trial, Chase's testimony at trial, Dr. Grant's testimony at trial, and the admission of Adriane's medical records. Adriane described the abuse in detail in her testimony before the jury, and although Appellant asserts that her statements to Chase in the recorded statements were "inconsistent in parts" with that testimony, he does not point to any specific inconsistencies, nor have we found any material inconsistencies. And after the interview was shown to the jury, Chase testified without objection to what Adriane told her during the interview. Finally, as we have described above, Dr. Grant testified to, and the medical records reflected, Adriane's description of the abuse to the SANE nurse during her examination.

Having reviewed the entire record, we conclude that any error in the admission of the video recording of the forensic interview did not have a substantial or injurious effect on the jury's verdict and did not affect Appellant's substantial rights. *See King*, 953 S.W.2d at 271; *see also Cline v. State*, No. 13-11-00734-CR, 2013 WL 398916, at *6 (Tex. App.—Corpus Christi Jan. 31, 2013, no pet.) (mem. op., not designated for publication) (holding admission of recording of forensic interview was harmless where complainant provided same account of abuse in her trial testimony); *Mick v. State*, 256 S.W.3d 828, 832 (Tex. App.—Texarkana 2008, no pet.) (holding admission of recording of forensic interview was harmless where it was cumulative of complainant's testimony to abuse); *Matz v. State*, 21 S.W.3d 911, 912–13 (Tex. App.—Fort Worth 2000, pet. ref'd) (same). Thus, we disregard the error, if any, and overrule Appellant's second issue. *See* Tex. R. App. P. 44.2(b).

III. Admission of medical records

In his final issue, Appellant argues that Adriane's medical records were improperly admitted because a custodian of records did not testify in support of their admission.

We review a trial court's rulings on evidentiary objections for an abuse of discretion. *Tienda*, 358 S.W.3d at 638. 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*, 180 S.W.3d at 250; *see also Jones*, 119 S.W.3d at 420 (recognizing that we will reverse the trial court's determination under rule 403 "rarely and only after a clear abuse of discretion" in light of the trial court's superior position to gauge the impact of the evidence).

Appellant provides no support for his argument. The business records exception to the hearsay rule provides that records "of a regularly conducted activity" are not excluded by the hearsay rule when the following conditions are "shown by the testimony of the custodian *or another qualified witness*,"

(A) the record was made at or near the time by—or from information requested by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity; and

(C) making the record was a regular practice of that activity.

Tex. R. Evid. 803(6) (emphasis added).

The State met the requirements of the rule with the testimony of Dr. Sophia Grant, a pediatrician with Cook's CARE Team. Dr. Grant testified that the medical records, labeled as State's Exhibit 2, were made at the time of the examination of Adriane—a regular practice of Cook's and the CARE Team—and were made by a person with knowledge of the event and kept in the regular course of Cook's business. She further testified that she reviewed and signed off on the medical records shortly after the examination was conducted and the records were created.

Dr. Grant was a "qualified witness" to prove up the medical records. *See Simmons v. State*, 564 S.W.2d 769, 770 (Tex. Crim. App. [Panel Op.] 1978) (finding sufficient predicate for rule 803(6) when a supervisor, without personal knowledge of a probation report's contents, testified that the party making entries in the report had personal knowledge of the facts reported); *Burchfield v. State*, No. 02-09-00283-CR, 2011 WL 56049, at *5 (Tex. App.—Fort Worth Jan. 6, 2011, pet. ref'd) (mem. op., not designated for publication) (holding senior toxicologist was qualified witness to authenticate toxicology report even though she was not the custodian of the records); *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (noting that requirements of rule 803(6) are met so long as the testifying witness has personal knowledge of how the record was prepared). The trial court therefore did not abuse its discretion in admitting the medical records and we overrule Appellant's third issue.

Conclusion

Having overruled each of Appellant's three issues, we affirm the judgment of the trial court.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: GABRIEL, SUDDERTH, and KERR, JJ.

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

DELIVERED: June 22, 2017