NO. 12-15-00208-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

BRIAN ELRAY GARRETT, APPELLANT	***§***	***APPEAL FROM THE 217TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Brian Garret appeals his conviction for continuous sexual abuse of a young child. Appellant raises five issues on appeal. We affirm.

BACKGROUND

Appellant was charged by indictment with continuous sexual abuse of a young child and pleaded "not guilty." The matter proceeded to a jury trial. At trial, the evidence[1] demonstrated that Appellant's nieces, Mary and Jane Doe,[2] came from Louisiana to live with Appellant, his wife, and his sons after the girls' father was arrested on drug related charges and their mother died of a drug overdose. While living with Appellant and his family, the girls revealed that their father, Appellant's brother, had sexually abused them. Appellant cooperated with authorities in his brother's prosecution and eventual conviction. Appellant paid for the girls to receive private counseling until doing so became prohibitively expensive. During this time, Child Protective Services made a number of visits to Appellant's household to check on the girls' welfare.

[1] Appellant has challenged the sufficiency of the evidence on appeal. It is undisputed that both victims were under fourteen years old at the time of the offense.

[2] We continue to use these pseudonyms employed by the trial court to protect the identity of the child-victims.

One day, Appellant's wife discovered Mary Doe in a closet in their home kissing her younger son. Appellant and his wife disciplined the two children severely. Thereafter, Appellant's wife discovered Mary Doe performing oral sex on her older son in the yard outside of their house. When Appellant's wife consulted Appellant about the matter, he suggested that they handle it "in-house" rather than involving CPS.

Eventually, as a result over concerns regarding physical and sexual abuse of Mary Doe by one of Appellant's sons (John Doe), the two girls were placed in foster care. Thereafter, CPS workers picked up the girls from school and transported them to the Child Advocacy Center of Lufkin, which also is referred to as "Harold's House." On the way to the interview, Jane Doe suddenly stated that Appellant is "a child molester, too." Once at Harold's House, the girls were interviewed concerning the incident between Mary Doe and Appellant's older son. Both girls were questioned regarding whether Appellant had behaved in an inappropriate manner with them and denied any such occurrences. Following the interviews, as CPS workers were transporting the girls back to their foster home, at which point, Jane Doe suddenly volunteered, "my uncle did the same thing to me that [John Doe] did." As a result, the girls were transported back to Harold's House, and further interviews were conducted. During the subsequent interviews, both girls gave detailed accounts concerning Appellant's having sexually assaulted them on several occasions.

At trial, Jane Doe testified that Appellant forced her to perform oral sex on him multiple times. She further described Appellant's ejaculate. Jane Doe stated that Appellant encouraged her to swallow it, telling her that it was good for her. She further stated that Appellant tried to put his penis in her vagina, but that it hurt her too badly.

Mary Doe also testified that Appellant had forced her to perform oral sex on him multiple times. She further testified that Appellant had put his penis in her vagina using a lubricant from a container with a purple cap he purchased at CVS Pharmacy. She stated that Appellant referred to this as a "fit test."

Angelina County Sheriff's Office Detective Patrick Nichols testified that he went to Appellant's home with an arrest warrant for Appellant. Nichols further testified that as he searched the home for Appellant, he observed a container of personal lubricant with a purple cap in an open nightstand drawer in the master bedroom. Because he had listened to Mary Doe's statement concerning Appellant's use of lubricant in her forensic interview, Nichols later went to

CVS Pharmacy and discovered a similar container of CVS brand personal lubricant available for sale.

Sexual Assault Nurse Examiner Norma Sanford testified concerning her physical examination of the two girls. She testified that Mary Doe's hymen resembled that of an adult, sexually active woman. She further testified that this physical characteristic was consistent with her having experienced sexual intercourse using a lubricant.

In addition to other witnesses, Appellant testified on his own behalf. He denied any wrong doing in the matter.

Ultimately, the jury found Appellant "guilty" as charged, and following a punishment hearing, assessed his punishment at imprisonment for fifty-five years. The trial court sentenced Appellant accordingly, and this appeal followed.

CONFRONTATION CLAUSE

In his first issue, Appellant argues that the trial court erred in admitting Sanford's testimony comparing what she observed during her examinations with documentation from the girls' previous SANE examinations following their outcries against their father. Specifically, Appellant argues that this testimony violated his rights under the confrontations clauses of the United States and Texas constitutions.

Standard of Review and Governing Law

In ***Crawford v. Washington***, the Supreme Court held that the Sixth Amendment confrontation right applies not only to in-court testimony, but also to out-of-court statements that are testimonial in nature. ***Wood v. State***, 299 S.W.3d 200, 207 (Tex. App.–Austin 2009, pet. ref'd) (citing ***Crawford v. Washington***, 541 U.S. 36, 51, 124 S. Ct. 1354 1364, 158 L. Ed. 2d 177 (2004)). The Confrontation Clause forbids the admission of testimonial hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross examine the declarant. ***Crawford***, 541 U.S. at 68, 124 S. Ct. at 1374. This is so even if the statement "falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." ***Wall v. State***, 184 S.W.3d 730, 735 (Tex. Crim. App. 2006). Whether a particular out-of-court statement is testimonial is a question of law. ***De La Paz v. State***, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008).

As the proponent of the challenged evidence, it was the State's burden to establish its admissibility. *See* ***id.*** A trial court's ruling admitting or excluding evidence is reviewed for an abuse of discretion. *See* ***State v. Dixon***, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). This means that the ruling will be upheld if it is reasonably supported by the record and is correct under any applicable legal theory. ***Id.*** The trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. ***State v. Ross***, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); ***Guzman v. State***, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We give the trial court almost complete deference in determining historical facts, but we review de novo the trial court's application of the law to those facts. ***Carmouche v. State***, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *see also* ***Wall***, 184 S.W.3d at 742–43; ***Mason v. State***, 225 S.W.3d 902, 907 (Tex. App.–Dallas 2007, pet. ref'd).

Nature of the Statement

We first consider the threshold question for possible Confrontation Clause violations—whether the statement in the first SANE examination report is testimonial or nontestimonial. *See* ***Crawford***, 541 U.S. at 68, 124 S. Ct. at 1374. Whether a statement is testimonial or nontestimonial hinges on the primary purpose of the interrogation. *See* ***Michigan v. Bryant***, 562 U.S. 344, 358–60, 131 S. Ct. 1143, 1155–56, 179 L. Ed. 2d 93 (2011). This is a relative inquiry that depends on the circumstances surrounding the statements. *See* ***id.***, 562 U.S. at 359, 131 S. Ct. at 1156. "Testimonial" statements are those that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *See* ***Wall***, 184 S.W.3d at 735. But when the primary purpose is something other than criminal investigation, "the Confrontation Clause does not require such statements to be subject to the crucible of cross examination." ***Bryant***, 562 U.S. at 361, 131 S. Ct. at 1157.

Generally speaking, statements made for the purpose of medical diagnosis or treatment have a primary purpose other than the pursuit of a criminal investigation. *See* ***id.***, 562 U.S. at 362 n.9, 131 S. Ct. at 1157 n.9; ***Trejo v. State***, No. 13-10-00374-CR, 2012 WL 3761895, at *2 (Tex. App.–Corpus Christi Aug. 30, 2012, pet. ref'd) (mem. op., not designated for publication); *see also* ***Williams v. State***, No. 10-13-00149-CR, 2014 WL 895506, at *3 (Tex. App.–Waco Mar. 6, 2014, pet. ref'd) (mem. op., not designated for publication). However, a statement is testimonial when the circumstances indicate that the interviewer's primary purpose was to establish past events to further a criminal prosecution. *See* ***De La Paz***, 273 S.W.3d at 680.

At trial, Sanford testified concerning the findings from the previous exam conducted by Valerie Murphy, during which Sanford was not present. Murphy did not testify at trial. Sanford testified over objection that she examined Murphy's SANE report and, based on her comparison of that report with her own examination, she concluded that the sexual abuse of Mary Doe had been more recent.

During a voir dire examination outside the jury's presence, Appellant asked Sanford if the main purpose of the SANE examination was to document evidence for use in a criminal prosecution. Sanford answered that the "main reason for doing a SANE exam is to identify the evidence or lack of evidence of trauma or injury and the need for further medical treatment." Sanford acknowledged that if the matter later was the subject of a criminal prosecution, the information could be used in that process. However, she emphasized that criminal prosecution is not the reason she performs the examination.

Appellant argues that the documentation from Murphy's SANE examination, which formed the basis of Sanford' comparison, was testimonial in nature. We disagree. We recognize, consistent with Sanford's testimony, that law enforcement likely will become involved when a SANE examination concludes that a person has been the victim of sexual assault. However, we cannot ignore the brunt of Sanford's testimony that the primary purpose of her conducting such an examination "is to identify the evidence or lack of evidence of trauma or injury and the need for further medical treatment." Medical records made for the purposes of treatment are non-testimonial. *See* ***Melendez–Diaz v. Massachusetts***, 557 U.S. 305, 312 n. 2, 129 S. Ct. 2527, 2533 n.2, 174 L. Ed. 2d 314 (2009); ***Trejo***, 2012 WL 3761895, at *3; *see also* ***Williams***, 2014 WL 895506, at *3. Thus, we conclude that the trial court was entitled to find that a criminal investigation was neither the "primary purpose" of Sanford's examination nor of Murphy's SANE examination and Murphy's report, on which Sanford based her conclusion, was nontestimonial. *See* ***Trejo***, 2012 WL 3761895, at *3; *see also* ***Williams***, 2014 WL 895506, at *3. Therefore, we hold that the trial court did not abuse its discretion in admitting this testimony over Appellant's objections concerning his right to confrontation. Appellant's first issue is overruled.

ADMISSIBILITY OF OUTCRY WITNESS TESTIMONY

In his second issue, Appellant argues that the trial court abused its discretion by permitting Candace Hartman to testify as an outcry witness because the outcry statements were not reliable based on time, content, and other circumstances.

Standard of Review and Governing Law

A trial court has "broad discretion" in admitting outcry witness testimony. ***Garcia v. State***, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990). We will not reverse the trial court's decision to admit outcry witness testimony unless it falls outside the zone of reasonable disagreement. ***Id.***; ***Tear v. State***, 74 S.W.3d 555, 558 (Tex. App.–Dallas 2002, pet. ref'd).

The Texas Code of Criminal Procedure allows admission of certain hearsay testimony in the prosecution of sexual offenses against minors. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2016). The statute allows a designated outcry witness to testify about a child's disclosure of abuse but requires that the outcry witness be the "first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense." ***Id.*** § 2(a)(3); *see* ***Garcia***, 792 S.W.2d at 91. To qualify, the disclosure must include more than "a general allusion that something in the area of child abuse was going on." ***Garcia***, 792 S.W.2d at 91. It must "in some discernible manner describe[ ] the alleged offense." ***Id.*** This furthers the societal interest in curbing child abuse by preventing the designation of a person who only received a vague suggestion of abuse over a later-in-time person who received a more detailed account of sexual abuse. *See* ***id.***

Before a designated outcry witness may testify about the child's disclosure, the trial court must find, "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." TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2). "The phrase 'time, content, and circumstances' refers to 'the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of that statement.'" ***Broderick v. State***, 89 S.W.3d 696, 699 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd) (quoting ***MacGilfrey v. State***, 52 S.W.3d 918, 921 (Tex. App.–Beaumont 2001, no pet.)).

In such a hearing, the trial court's focus is whether the child's outcry statement is reliable, not whether the outcry witness is credible. ***Sanchez v. State***, 354 S.W.3d 476, 487–88 (Tex. Crim. App. 2011); *see* TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2). The trial court

considers the circumstances of the outcry, not the abuse itself. ***Sanchez***, 354 S.W.3d at 487. Outcry reliability is determined on a case-by-case basis. ***Davidson v. State***, 80 S.W.3d 132, 139 (Tex. App.–Texarkana 2002, pet. ref'd).

Indicia of reliability that the trial court may consider include (1) whether the child victim testifies at trial and admits making the out-of-court statement, (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate, (3) whether other evidence corroborates the statement, (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults, (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty, (6) whether the statement is consistent with other evidence, (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate, (8) whether the child behaves abnormally after the contact, (9) whether the child has a motive to fabricate the statement, (10) whether the child expects punishment because of reporting the conduct, and (11) whether the accused had the opportunity to commit the offense. ***Norris v. State***, 788 S.W.2d 65, 71 (Tex. App.–Dallas 1990, pet. ref'd). However, these indicia of reliability, while useful, are not a requirement that the court examine the circumstances of the alleged abuse. *See* ***Broderick***, 89 S.W.3d at 699. A child's outcry statement may be held reliable even when it contains vague or inconsistent statements about the actual details of the sexual abuse. ***Id.***

Outcry testimony admitted in compliance with Article 38.072 is considered substantive evidence and is admissible for the truth of the matter asserted in the testimony. ***Duran v. State***, 163 S.W.3d 253, 257 (Tex. App.–Fort Worth 2005, no pet.).

Hartman's Outcry Testimony

A hearing on the reliability of Hartman's outcry testimony was conducted on July 8, 2015. At that hearing, CPS worker Knicole Porter testified concerning Jane Doe's statement that Appellant is "a child molester, too." Porter further testified that she observed by a live video feed the forensic interviews Hartman conducted with both girls and both girls denied that Appellant had engaged in any inappropriate contact with them. But Porter further testified that when Hartman left the room, she observed Mary Doe praying and stating that she needed to tell them that Appellant had done this to her, too. Porter stated that, after the interviews, while she and a coworker were taking the girls home, she told Mary Doe that she heard what she had said and when she was ready to talk about those things, to tell her and she would take Mary Doe back

to Harold's House to talk to Hartman again. Porter further stated that when they stopped to get something to eat, Jane Doe stated, "I'll just tell you now that [Appellant] did the same thing to me that [John Doe] did." Porter testified that they returned the girls to Harold's House for further interviews and she observed both girls relate the details to Hartman regarding Appellant's having sexually abused them.

Hartman also testified at the hearing. Her testimony was largely consistent with Porter's. Hartman further testified regarding the details of Appellant's sexual abuse of Jane and Mary Doe conveyed to her during her subsequent forensic interviews with each of the two girls. Hartman stated she found the girls' statements to be reliable.

Analysis of Reliability Factors

The record in the instant case reflects that both child victims testified at trial. During their testimony, they testified concerning their having made statements to Hartman at Harold's House. Further, Hartman testified that she began the interviews by explaining to each child the importance of telling the truth and the difference between the truth and a lie. Hartman further emphasized that she interviewed the two girls separately, did not ask them leading questions, repeated their answers back to them, and told them to correct her if she was mistaken concerning any answer they gave. Moreover, Porter testified that she watched the interview via closed circuit television. Her testimony concerning the girls' statements corroborated Hartman's testimony.

Further still, the outcry testimonies were not spontaneous. But the evidence reflects that Jane Doe made two generalized spontaneous statements indicating that Appellant may have acted inappropriately with her. Porter testified that she did not ask the girls any further questions about Jane Doe's outbursts, but that the latter statement prompted her to return the girls for additional interviews that day. The record reflects that Hartman asked Mary Doe about the statements she made when she was alone praying in the interview room. But when Mary Doe was not forthcoming with any details relating to those statements, Hartman did not pressure Mary Doe to provide more information apart from telling her that if she had anything further to say, she could come back and talk to Hartman again.

Hartman also testified that both girls were clear and unambiguous during the second set of interviews. According to her, Jane Doe testified concerning oral sex acts she performed on Appellant and described his ejaculating. She also stated that Mary Doe testified concerning her

performing oral sex on Appellant and Appellant's engaging in vaginal sex with her using lubricant. Mary Doe also described Appellant's ejaculating. The evidence reflects that Hartman's testimony concerning the girls' statements is consistent with other evidence. Jane and Mary Doe testified about Appellant's sexual abuse, and the details they related are consistent with Hartman's testimony concerning their statements. Moreover, Sanford's testimony regarding her SANE examination is consistent with Mary Doe's allegations that Appellant recently engaged in vaginal sex with her using a lubricant. Further, Nichols's testimony concerning his seeing a container of lubricant with a purple cap in a nightstand in the master bedroom while at Appellant's home is consistent with Hartman's testimony concerning Mary Doe's statement.

On cross examination during the reliability hearing, Hartman testified that both girls appeared to be afraid when testifying about Appellant's having sexually abused them. The evidence at trial indicates that both girls were subjected to a "military style" punishment regime.

There also is evidence that Appellant had the opportunity to commit the offense. The record reflects that Appellant took Mary Doe to Houston for certain medical treatments and was alone with her. There also is testimony about Appellant's having been alone in his bedroom with Mary Doe with the door locked. Moreover, Jane Doe testified that one of the incidents happened when she was alone with Appellant in his truck parked near a trail a few miles from their home. Furthermore, the record indicates that Mary Doe behaved abnormally during this time. Specifically, there is evidence of her behaving inappropriately with her two male cousins.

On the other hand, the details the girls related regarding Appellant's sexual abuse are not something girls of their respective ages ordinarily would be expected to be able to understand. However, we cannot overlook the fact that both girls previously were sexually assaulted by their biological father. During his cross examination, Appellant elicited testimony in an apparent attempt to demonstrate that these past experiences with their biological father coupled with their desire to escape Appellant's and his wife's strict punishment regime formed the basis of the girls' motive to falsely accuse Appellant of sexual abuse and remain in foster care.

We have reviewed the record and considered it in light of the applicable factors set forth above. *See* ***Norris***, 788 S.W.2d at 71. Having done so, we conclude that the girls' outcry statements are reliable. Therefore, we hold that the trial court did not abuse its discretion in

admitting Hartman's outcry testimony. *See* ***Garcia***, 792 S.W.2d at 91. Appellant's second issue is overruled.

ADMISSIBILITY OF OTHER STATEMENTS BY JANE AND MARY DOE

In his third issue, Appellant argues that the trial court abused its discretion in admitting testimony that Appellant is a "child molester," because such testimony is hearsay and the testifying witness was not the proper outcry witness. In his fourth and fifth issues, Appellant contends that the trial court abused its discretion in admitting testimony that Appellant "did it, too[,]" because such testimony is hearsay and violates Texas Rule of Evidence 403.

Standard of Review and Governing Law

We review a trial court's decision to admit evidence under an abuse of discretion standard. ***Apolinar v. State***, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005). The trial court abuses its discretion only when the decision lies "outside the zone of reasonable disagreement." ***Id.***

Hearsay statements are generally not admissible unless the statement falls within a recognized exception to the hearsay rule. ***Mick v. State***, 256 S.W.3d 828, 831 (Tex App.–Texarkana 2008, no pet.).

Furthermore, under Rule of Evidence 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403; ***Martinez v. State***, 468 S.W.3d 711, 717 (Tex. App.—Houston [14th Dist.] 2015, no pet.). "Probative value" refers to the inherent probative force of an item of evidence—specifically, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. ***Gigliobianco v. State***, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). "Unfair prejudice" refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. ***Id.*** Evidence might be unfairly prejudicial if, for example, it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. ***Id.***

Harm Analysis

Even if the trial court abused its discretion in admitting the aforementioned testimony, the error is not reversible unless Appellant is harmed. *See* Tex. R. App. P. 44.2(b). The erroneous

admission of evidence is nonconstitutional error. ***Sandoval v. State***, 409 S.W.3d 259, 287–88 (Tex. App.–Austin 2013, no pet.); ***Kirby v. State***, 208 S.W.3d 568, 574 (Tex. App.–Austin 2006, no pet.); *see* ***Casey v. State***, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007); *see also* ***Nino v. State***, 223 S.W.3d 749, 754 (Tex. App.–Houston [14th Dist.] 2007, no pet.) (erroneous admission of outcry testimony). Nonconstitutional error requires reversal only if it affects the substantial rights of the accused. *See* TEX. R. APP. P. 44.2(b); ***Barshaw v. State***, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). We will not overturn a criminal conviction for nonconstitutional error if, after examining the record as a whole, we have fair assurance the error did not influence the jury, or influenced the jury only slightly. ***Barshaw***, 342 S.W.3d at 93; ***Kirby***, 208 S.W.3d at 574.

In assessing potential harm, our focus is not on whether the outcome of the trial was proper despite the error, but on whether the error had a substantial or injurious effect or influence on the jury's verdict. ***Barshaw***, 342 S.W.3d at 93–94. We review the entire record to ascertain the effect or influence on the verdict of the wrongfully admitted evidence. ***Id.*** at 93; *see* ***Coble v. State***, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010) (in conducting harm analysis "we examine the entire trial record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence"). We consider all the evidence that was admitted at trial, the nature of the evidence supporting the verdict, the character of the alleged error, and how the evidence might be considered in connection with other evidence in the case. ***Barshaw***, 342 S.W.3d at 94. We also may consider the jury instructions, the parties' theories of the case, closing arguments, voir dire, and whether the State emphasized the error. ***Id.***; ***Morales v. State***, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000).

We must reverse a conviction for nonconstitutional error if we have "grave doubt" about whether the result of the trial was free from the substantial influence of the error. ***Barshaw***, 342 S.W.3d at 94. "'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.'" ***Id.*** (quoting ***Burnett v. State***, 88 S.W.3d 633, 637–38 (Tex. Crim. App. 2002)). "[I]n cases of grave doubt as to harmlessness the [appellant] must win." ***Id.***

In the instant case, the jury heard testimony from both victims in addition to Hartman's outcry testimony. Specifically, the jury heard Jane Doe testify that, on multiple occasions when she was under fourteen-years-old, Appellant forced her to perform oral sex on him and

ejaculated in her mouth. The jury also heard Mary Doe testify that on multiple occasions when she was under fourteen-years-old, Appellant forced her to perform oral sex on him and ejaculated in her mouth. Mary Doe also testified that Appellant penetrated her vagina with his penis using a lubricant. Given the explicit nature of the victims' testimony and other evidence of record, we cannot conclude that the jury's hearing testimony concerning Jane Doe's statement that Appellant is a "child molester" or both girls' vague statements that Appellant "did it, too" had a substantial or injurious effect or influence on its verdict or impacted other evidence.

Moreover, in addition to the victim testimony, the jury also heard other evidence supporting a finding of Appellant's guilt such as Hartman's outcry testimony, Sanford's testimony concerning the SANE examinations, and Nichols's testimony concerning the lubricant he observed, which was consistent with what Mary Doe described in her forensic interview. Of course, Appellant elicited evidence supporting his theory of the case that (1) the girls fabricated the allegations so that they could remain in foster care, thereby avoiding the type of discipline Appellant and his wife imposed on them, and (2) any forensic evidence could have been the result of prior sexual abuse perpetrated by the girls' father. However, considering the evidence as a whole, we conclude that the evidence supporting the jury's verdict was strong and whether the statements at issue were admitted does not strengthen or detract from that evidence.

Further still, in the case of the "did it, too" statement, we note that the trial court instructed the jury that the statement was not being admitted for the truth of the matter asserted, but rather to demonstrate why the girls were returned to Harold's House for more interviews. *See* ***Colburn v. State***, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (appellate court presumes jury followed trial court's instructions); ***Jones v. State***, 264 S.W.3d 26, 30 (Tex. App.–Houston [1st Dist.] 2007, no pet.). Lastly, we note that the State recounted the statements to the jury in its initial closing argument, but did not place any great emphasis on them otherwise.[3]

We have reviewed the entirety of the record. Having done so, we do not have "grave doubt" about whether the result of the trial was free from the substantial influence of the error, if any. *See* ***Barshaw***, 342 S.W.3d at 94. Thus, even if we assume arguendo that the trial court abused its discretion in admitting the two statements at issue, we hold that any such error did not

[3] Later in his closing argument, the prosecuting attorney contended that the State had proved Appellant was a "child molester," but did not specifically refer to Jane Doe's statement. During Appellant's jury argument, his counsel referred to the "children['s] stating 'my uncle was molesting me.'" Later, during his argument that the State had not met its burden of proof, Appellant's counsel stated that certain evidence did not "make [Appellant] a child molester."

affect Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). Appellant's third, fourth, and fifth issues are overruled.

DISPOSITION

Having overruled Appellant's first, second, third, fourth, and fifth issues, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered March 22, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 22, 2017

NO. 12-15-00208-CR

BRIAN ELRAY GARRETT,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 217th District Court
of Angelina County, Texas (Tr.Ct.No. 2014-0324)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.