COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JORGE LUIS HERNANDEZ-PALOMARES,	§	No. 08-15-00312-CR
	§	Appeal from the
Appellant,	§	265th District Court
v.	§	of Dallas County, Texas
THE STATE OF TEXAS,	§	(TC# F-14-32887-R)
Appellee.	§	

O P I N I O N

Following a bench trial, Appellant Jorge Luis Hernandez-Palomares was convicted of the lesser-included offense of aggravated sexual assault of a child, and sentenced to serve a twenty-five year prison sentence. Appellant presents two evidentiary issues for appeal. First, Appellant argues that the trial court abused its discretion by admitting certain outcry testimony. Second, he argues that the evidence at trial was legally insufficient to support his conviction. We affirm.[1]

I. BACKGROUND

In October of 2012, a parent of a fifth grader went to elementary school counselor Regina

[1] This case was transferred to us by the Fifth Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedents of that court to the extent they might conflict with our own. *See* TEX.R.APP.P. 41.3.

Day to report his concerns about the well-being of R.C.[2] due to information he received from his own daughter. Day informed the parent she would follow up with R.C. to ensure her safety. Before the school day ended, Day pulled R.C. out of her fifth-grade class to have a conversation. Day testified at trial that R.C., who was then ten years old, provided her with "several details" that caused her to be concerned. Day notified the school resource officer and R.C. was taken for an interview to the Irving Family Advocacy Center (the center), a crisis intervention and support center. At the center, R.C. met with forensic investigator Patricia Guardiola, who testified at trial about this interview. Guardiola testified that R.C. described a criminal act by informing her of touches of her, on more than one occasion, by Appellant. More specifically, Guardiola testified that R.C. described an incident when she was nine years old when Appellant placed his hand or finger inside her vagina while applying a temporary tattoo on her leg. When Guardiola asked R.C. how she knew Appellant had placed his hand or finger inside her body, Guardiola responded by explaining that R.C. felt his cold hand. Guardiola also testified that R.C. described another incident when she was seven years old. "She talked about being on the bed watching TV and [Appellant] came into the room with a blanket. . . . He got next to her, covered her, and then put his hands inside her pants, inside her underwear, and touched – rubbed the outside of her vagina with his hand."

In June of 2013, Detective Stephen Lee of the Irving Police Department interviewed Appellant with the assistance of an interpreter who translated from Spanish to English, and the interview was recorded. Detective Lee testified "I thought at one point he admitted there was some type of penetration of the sexual organ." Lee asked Appellant how many times he had touched

[2] To protect this complainant's anonymity, the complainant will be referred to as "R.C." *See* TEX.R.APP.P. 9.10(a)(3).

R.C. in a sexual manner and Appellant gave a final answer of twice. Karina Espinoza, who served as the interpreter of Detective Lee's questioning of Appellant, also testified that Appellant was asked "whether or not he used his hand to touch her private part or her vagina?" Espinoza testified that Appellant responded in the affirmative.

At trial, R.C. testified differently than how Guardiola described her earlier interview at the center. Although R.C. recalled speaking with a lady at the center, and promising to tell the truth, she said she did not recall telling Guardiola that Appellant had touched her. On cross-examination, when asked if she might have exaggerated, R.C. responded in the affirmative. R.C. further testified that her mother and sisters missed Appellant, that they would like for him to come home, and that she did not want her brothers growing up without a father.

Appellant was originally charged with continuous sexual abuse of a young child pursuant to Texas Penal Code section 21.02.[3] Appellant waived his right to a jury trial. After a two-day trial, Appellant was found guilty of the lesser-included offense of aggravated sexual assault of a child under fourteen,[4] and sentenced to confinement for twenty-five years. The trial court certified Appellant's right to appeal.

II. DISCUSSION

In his first issue, Appellant contends the court erred in admitting evidence in violation of article 38.072 of the Texas Code of Criminal Procedure. Appellant argues that Counselor Regina Day qualified as the one proper outcry witness, being the first person to whom an outcry was made, not Investigator Guardiola who is the witness the State relied on for this purpose. Regarding this issue, Appellant further argues that the State failed to provide proper notice of the outcry witness

[3] TEX. PENAL CODE ANN. § 21.02 (West Supp. 2016).
[4] TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).

as required by the statute. In a second issue, Appellant argues the evidence at trial was legally insufficient to support his conviction.

A. Standard of Review

We review the trial court's admission of outcry testimony under an abuse of discretion standard. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex.Crim.App. 1990). A trial court has broad discretion in determining the admissibility of hearsay exception evidence. *Buentello v. State*, 512 S.W.3d 508, 516 (Tex.App.--Houston [1st Dist.] 2016, pet. ref'd) (citing *Garcia*, 792 S.W.2d at 92). We will reverse only if the trial court's decision falls outside the zone of reasonable disagreement. *Id.* at 516-17 (citing *Garcia*, 792 S.W.2d at 92). If the evidence supports the designation of the outcry witness, we will uphold the trial court's decision. *Cordero v. State*, 444 S.W.3d 812, 815 (Tex.App.--Beaumont 2014, pet. ref'd).

Article 38.072 of the Texas Code of Criminal Procedure provides a hearsay exception in cases involving certain sexual offenses against children under the age of fourteen, or against a person with a disability. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2016). Pertinent to this case, the statutory exception only applies to statements: (1) that describe the alleged offense; (2) were made by the child against whom the charged offense was committed; and (3) were made to the first person, eighteen years of age or older, other than the defendant, to whom the child made a statement about the offense. *Id*. § 2(a)(1)(A)(2)(3). Importantly, the child's statement must describe the alleged offense. *Id*. § 2(a)(1)(A). A statement that meets the statutory requirements is admissible as an exception to hearsay if: (1) on or before the fourteenth day before the date the trial begins, the party intending to offer the statement, notifies the adverse party of its intention to do so; provides the adverse party with the name of the witness through whom it intends to offer the statement; and provides a written summary of the statement; (2) the trial court finds

the statement reliable, based on the time, content, and circumstances of the statement; and (3) the child testifies or is available to testify. *Id.* § 2(b). "As proponent of the evidence, the State ha[s] the burden to satisfy each element of th[e] predicate for admission of the [outcry witness's] testimony pursuant to Art. 38.072 . . . or to provide some other exception to the hearsay rule." *See Long v. State*, 800 S.W.2d 545, 548 (Tex.Crim.App. 1990) (citation omitted).

Preservation of Error

As a preliminary matter, the State contends that Appellant failed to preserve error on his first issue because he did not specify that his hearsay objection made at trial was based on Guardiola not being the proper outcry witness, or that the State failed to provide adequate notice. In *Long v. State*, the Court of Criminal Appeals held that a general hearsay objection preserved error under article 38.072. *Long*, 800 S.W.2d at 548 (finding appellant did not waive his right to appellate review by failing to specifically cite to the statute when the statute pertains only to hearsay statements). In *Long*, the Court explained that a timely made hearsay objection when "raised immediately before the child's mother began to testify as to what her daughter told her," adequately apprised the trial court of the basis of the complaint. *Id.* at 548. Recognizing the burden shift to the State and the adequacy of a hearsay objection, the Fifth Court of Appeals recently held that, "Article 38.072's notice and hearing requirements are mandatory and must be met for an outcry statement to be admissible over a hearsay objection." *McKinney v. State*, No. 05-14-01350-CR, 2016 WL 3963369, at *3 (Tex.App.--Dallas July 18, 2016, pet. ref'd) (mem. op., not designated for publication), *cert. denied*, 137 S.Ct. 1825 (2017) (citing *Long*, 800 S.W.2d at 547).

At the beginning of Guardiola's testimony, Appellant's counsel made a hearsay objection, which the trial court overruled. Thereafter, Appellant's counsel made a second hearsay objection

and renewed this objection when the State requested the court to make a finding that Guardiola qualified as the outcry witness. Following binding precedent established in both *Long* and our sister court, we find Appellant's multiple hearsay objections preserved the issue for review. Because Appellant preserved the first issue, we will next address whether the court abused its discretion in admitting the State's outcry testimony.

B. Issue One: Proper Outcry Witness

In his first issue, Appellant argues that the trial court abused its discretion by admitting Guardiola's testimony as the outcry witness. He argues that Day, the school counselor, was the more proper outcry witness since she was the first person to whom R.C. made a statement about the offense. For qualifying offenses, the outcry hearsay exception applies to statements made by a victim to the first person eighteen years of age or older that describes the alleged offense. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)(3). A proper outcry statement must be more than a general allusion to sexual abuse; the child's statement must describe the alleged offense in some discernible manner. *Brown v. State*, 189 S.W.3d 382, 386 (Tex.App.--Texarkana 2006, pet. ref'd); *Muzolf v. State*, No. 05-15-00892-CR, 2016 WL 2842066, at *1 (Tex.App.--Dallas May 10, 2016, no pet.) (mem. op., not designated for publication). For an outcry statement to meet statutory requirements, the evidence must clearly show that the victim described the alleged offense when making the statement to a qualifying witness. *Garcia*, 792 S.W.2d at 91.

Appellant asserts that Counselor Regina Day qualified as the proper outcry witness over Guardiola because she had earlier-in time contact with R.C., and their conversation included sufficient details of an offense to meet statutory requirements. Appellant asserts that the State purposefully instructed Day not to reveal or describe the content of what R.C. said to her to avoid

having her meet the statutory elements. Instead, while testifying Day merely described removing R.C. from class and arranging for her to be interviewed at the center.

Although Day's testimony itself lacked a description of the alleged offense, Appellant asserts that other witnesses place Day in the position of being the first witness over eighteen years of age that meets the statutory elements of an outcry witness. Specifically, Appellant asserts that Detective Lee testified that his investigation showed that the "initial outcry" was made to school personnel. And secondly, he claims that the State asked R.C., "Do you remember telling [the school counselor] that your dad would touch you where you pee?" Appellant argues that testimony from Day, Detective Lee, and R.C. all support the conclusion that Day more properly met the statutory requirements over Guardiola. We do not agree.

Guardiola's testimony about R.C.'s statements revealed more detail concerning elements of the alleged offense. Guardiola testified that R.C. described two incidents involving Appellant touching her inappropriately. First, she testified that R.C. described an incident in the bathroom wherein R.C. explained how Appellant placed his hand or finger inside her vagina. Second, she also testified that R.C. described an incident while in bed wherein R.C. demonstrated the motions of Appellant's hand when he touched her vagina. We find this evidence supports the trial court's designation of Guardiola as the outcry witness over Day because Guardiola was the first person to whom the child described the alleged offense in a discernible manner. *Garcia*, 792 S.W.2d at 91. R.C. responded to questioning from the State by stating that she had no recollection of making statements regarding the offense to Day. Moreover, there is no testimony from R.C. or Detective Lee as to R.C. describing any details of the offense to Day beyond a general allusion of sexual abuse. *See Hayden v. State*, 928 S.W.2d 229, 231 (Tex.App.--Houston [14th Dist.] 1996, pet. ref'd) (no evidence that complainant described details of alleged abuse to the first person who was

told about the abuse).

1. Notice

Next, Appellant contends Guardiola's testimony included inadmissible hearsay statements made by R.C. He argues that the State failed to comply with all notice requirements to establish an article 38.072 exception. Article 38.072, section 2(b)(1) requires that the party intending to offer an outcry statement must notify the adverse party, at least fourteen days before trial, of the name of the witness through whom it intends to offer such a statement and a written summary of the statement. TEX. CODE CRIM.PROC. ANN. art. 38.072, § 2(b)(1). As a hearsay exception, article 38.072 applies only when the procedural requirements are met. *Bays v. State*, 396 S.W.3d 580, 591 (Tex.Crim.App. 2013); *see also Long*, 800 S.W.2d at 548.

The State responds in their brief that written notice was given on June 9, 2015. Appellant responds by stating that he was "not served with notice as required under 38.072." The record before us does not indicate the manner of how service was provided as all four methods described—hand-delivered, mailed, electronically mailed, or faxed—were left unchecked on the State's pleading. Moreover, the State does not respond on appeal with clarification of how or when the State provided the required information to Appellant. Thus, we find that the State failed to meet its burden to establish compliance with the statutory requirements of notice and, consequently, the trial court erred in admitting hearsay testimony. *See Gabriel v. State*, 973 S.W.2d 715, 719 (Tex.App.--Waco 1998, no pet.) (finding trial court erred in admitting outcry statements where State's letter giving notice was not included in the trial court record, and thus, not reviewable on appeal); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(1)(A)-(C).

2. Harm

Having found that the notice requirement under article 38.072 was not satisfied, we must

next determine whether the error harmed Appellant. *Brown*, 189 S.W.2d at 388; *McKinney*, 2016 WL 3963369, at *14. The improper admission of hearsay is a non-constitutional error. *McKinney*, 2016 WL 3963369, at *6. A non-constitutional error is disregarded as a harmless error if the error did not affect the appellant's substantial rights. TEX.R.APP.P. 44.2(b); *Gabriel*, 973 S.W.2d at 719. An appellant's substantial rights are affected when the error had a substantial or injurious effect or influence in determining the verdict. *McKinney*, 2016 WL 3963369, at *6 (citing *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex.Crim.App. 2011)). We will not reverse a conviction if, after examining the record, we are reasonably assured that the error did not influence the verdict or had but a slight effect. *Cordero*, 444 S.W.3d at 820; *Delapaz v. State*, 228 S.W.3d 183, 202 (Tex.App.--Dallas 2007, pet. ref'd).

As stated in *Gabriel*, "[t]he purpose of article 38.072's notice requirement is to prevent a defendant from being surprised at trial by testimony about the victim's outcry statements." *See Gabriel*, 973 S.W.2d at 719-20. An error in admitting outcry testimony is harmless if the defendant was not surprised or if the record contains the same or similar evidence that was admitted at another point in the trial. *Cordero*, 444 S.W.3d at 820; *McKinney*, 2016 WL 3963369, at *15. For example, in *Zarco v. State*, the court did not find harm because of the lack of notice where the appellant failed to make any argument at trial or on appeal of actual surprise. *Zarco v. State*, 210 S.W.3d 816, 833 (Tex.App.--Houston [14th Dist.] 2006, no pet.). In *Gabriel*, the court did not find harm where outcry witness testimony was improperly admitted because the defendant's attorney had the opportunity to cross-examine victim and the victim's mother, the defendant's attorney did not complain about a lack of notice, and the record reflected the admission of the same evidence by other witnesses and did not reflect that the defendant was surprised. *Gabriel*, 973 S.W.3d at 719.

The record here does not show that Appellant's trial counsel was surprised by Guardiola's testimony. He objected on a different basis and never mentioned being surprised. Appellant's trial counsel requested that the court limit Guardiola's testimony to the complaints of R.C. alone, and not include statements regarding an extraneous offense. He asserted those statements were irrelevant. The trial court ruled in Appellant's favor on the restriction stating, "she is qualified to testify under the law as an outcry witness; however, for purposes at this point I would like to limit it to the alleged complainant as far as the outcry." Appellant's trial counsel also had the opportunity to *voir dire* and cross-examine Guardiola on foundational issues. Notably, Appellant's trial counsel did not express that any lack of notice prejudiced Appellant.

In addition to the lack of surprise, the record contains other evidence similar to R.C.'s outcry statement that was admitted without objection. For example, Detective Lee testified without objection about Appellant describing the same bathroom incident that Guardiola described as having heard about from R.C. Additionally, the videotaped interview of Appellant includes his own admissions describing the same bathroom incident as well as the other incident in the bedroom. Because there is no indication of actual surprise and because similar evidence was admitted, we conclude the State's failure to provide notice was harmless. Appellant's first issue is overruled.

C. Issue Two: Legal Sufficiency of Evidence

In his second issue, Appellant argues the evidence was legally insufficient to support his conviction When determining the legal sufficiency of evidence, we must view all of the evidence in the light most favorable to the verdict and determine whether a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex.Crim.App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781,

61 L.Ed.2d 560 (1979)). In determining the legal sufficiency of the evidence, we consider all the evidence in the trial record, including inadmissible evidence. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex.Crim.App. 2013). If the evidence is insufficient to support the verdict, we must reverse and enter an order of acquittal. *Buentello v. State*, 512 S.W.3d 508, 516 (Tex.App.--Houston [1st Dist.] 2016, pet. ref'd).

It is the exclusive role of the fact finder "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences[.]" *Buentello*, 512 S.W.3d at 516. We may not "re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the fact-finder." *Hernandez. v. State*, 268 S.W.3d 176, 179 (Tex.App.--Corpus Christi 2008, no pet.) (citing *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex.Crim.App. 1999)). "Contradictory evidence will not diminish the legal sufficiency of the evidence that supports the verdict." *Buentello*, 512 S.W.3d at 516. We must presume the fact finder resolved conflicts in favor of the verdict and defer to that determination. *Id.*

Here, Appellant was convicted of aggravated sexual assault of a child. TEX. PENAL CODE ANN. § 22.021. Pursuant to Section 22.021, a person commits the offense of aggravated sexual assault of a child if that person intentionally or knowingly causes the penetration of the anus or sexual organ of a child younger than fourteen years of age by any means. *Id.* § 22.021(a)(1)(B)(i)(2)(B). Investigator Patricia Guardiola testified that R.C. gave an interview in which she described an incident occurring in a bathroom when she was nine years of age in which Appellant placed his hand or fingers inside her vagina. Additionally, in his own statement introduced at trial through an audio video interview conducted by Detective Lee, Appellant stated he placed his hand on R.C.'s vagina while he and she were in a bathroom together. Together, this testimony provides sufficient evidence for a rational trier of fact to find beyond a reasonable doubt

that Appellant sexually assaulted R.C., who was then a child under fourteen years of age. R.C.'s inability to recollect any prior statements she had given does not diminish the legal sufficiency of the remaining evidence. *See Buentello*, 512 S.W.3d at 516. Accordingly, we find the evidence is legally sufficient to support Appellant's conviction and overrule Appellant's second issue.

III. CONCLUSION

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

GINA M. PALAFOX, Justice

September 27, 2017

Before McClure, C.J., Rodriguez, and Palafox, JJ.

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