COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JAMES ROBERT MAILLART,	§	No. 08-20-00232-CR
Appellant,	§	Appeal from the
v.	§	277th Judicial District Court
THE STATE OF TEXAS,	§	of Williamson County, Texas
Appellee.	§	(TC# 17-2506-K277)

O P I N I O N

The State of Texas charged Appellant James Robert Maillart with one count of indecency with a child by sexual contact (Count I), two counts of aggravated sexual assault of a child (Counts II and III), and one count of indecency with a child by exposure (Count IV). Following a bench trial, the trial court found sufficient evidence to substantiate a finding of Appellant's guilt as to Count I, and as to Count III for the lesser-included offense of indecency with a child by contact.[1] The State dismissed Count II and the court found Appellant not guilty of Count IV. For the reasons explained below, before the trial court entered a judgment of conviction, Appellant entered a no-contest plea and the court placed him on deferred-adjudication community supervision for a

[1] This appeal concerns Appellant's placement on deferred adjudication under trial court case number 17-2506-K277. Appellant was also placed on deferred adjudication in case number 17-2507-K277 for various sexual offenses against the sister of the child victim here, which Appellant appeals under a separate appeal in cause number 08-20-00233-CR.

term of five years and seven months for each count. Appellant appeals from the orders placing him on deferred-adjudication community supervision in eight issues, arguing that the court committed various evidentiary errors during the trial and that the evidence is insufficient to support the trial court's acceptance of his plea and the entry of the deferred-adjudication orders. For the reasons below, we affirm.[2]

I. BACKGROUND[3]

Paula, the victim of the offenses for which Appellant was placed on deferred adjudication in this case, was fourteen years old at the time of trial. Prior to Appellant's commission of the offenses, Paula lived with Appellant, Mother, her brother, and her sister Robin.[4] Appellant is Paula and Robin's father. According to Paula, Appellant was occasionally verbally abusive to Paula and her siblings, and he would sometimes spank them when Mother was not present. In November 2015, Appellant and Mother separated, and they would take turns staying in the family house.

Paula recalled that one time during this period when she was ten years old, she was feeling ill and went to sleep in Appellant's bed. After Paula fell asleep, Appellant got into the bed with Paula and rolled her over, waking her up. Appellant then put his hand under Paula's blanket, raised her shorts, put his hands underneath her shorts and underwear, and used two fingers to touch and rub her "front private part" that she used to "pee." Appellant touched Paula "just on the outside" of her "private part," but he did not touch the inside of her "private part." Paula felt

[2] This case was transferred from our sister court in Austin, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

[3] In the interest of clarity and brevity, we recount in this section only the facts associated with the alleged offenses.

[4] To protect the identities of the involved parties, we refer to them by pseudonyms in place of their true names. *See* TEX.R.APP.P. 9.10.

"uncomfortable" during the incident, which lasted "a couple minutes." Paula began shaking Appellant and telling him to wake up, but Appellant did not indicate that he was awake. After failing to get a response from Appellant, Paula left the bed and went to her own bedroom. Paula did not speak to Appellant or anybody else about what happened that night because she "didn't think that it was bad at the time."

Paula testified that either the next day or a week later, she felt sick again and went into Appellant's bed to sleep. Paula did not feel uncomfortable sleeping in Appellant's bed because she thought the first incident was an "accident." After Paula fell asleep in the bed, she was awakened by a yellow rubber duck, which was normally kept in his dresser drawer, that was vibrating or shaking on the bed; at trial, the State introduced into evidence a rubber duck and photographs of it inside a dresser drawer. Appellant then went under Paula's blanket, shorts, and underwear and caused his "private part" that he uses "[t]o pee with" to contact her "front private part." Appellant's "private part" only touched the outside of Paula's "private part," but it was "a little bit closer to almost being on the inside." Paula did not see Appellant's "private part," but she could tell what it was because she tried pushing it away and it felt "much longer and much thicker" than his fingers. After Appellant continued "rubbing it" for about thirty seconds, Paula pushed Appellant away and tried to wake him up, but his eyes remained closed and he did not wake up. Appellant pulled her closer, and Paula kicked away from Appellant and fell off the bed, causing Appellant to awaken and ask if she was okay. Paula responded that she was okay, and Appellant told Paula to get back in bed, but she left the bedroom and went back to her room.

Paula also recalled a separate incident in which she was watching a movie with Appellant on his bed when Appellant "pulled his private part out of his underwear" and started "shaking" his "private part" by "moving it up and down with his hand" until a "white" and "wet" substance came

out of it. Appellant asked Paula, "Do you want to taste it," and Paula replied, "No," and went back to her room.

According to Paula, these are the only incidents of sexual contact between her and Appellant. Paula subsequently made an outcry to Mother the next time she saw her because Paula "knew that this was very wrong. Because the first time, it was just his hand, but this time, it was his private part, and I knew that wasn't right." Mother was upset when she heard Paula's outcry and took her to the Child Advocacy Center (CAC), where Paula detailed the sexual abuse incidents to law enforcement and Ashley Andary, the CAC's lead forensic interviewer. Paula did not discuss the abuse with her sister Robin, who also testified that Appellant committed acts of sexual abuse against her.

II. DISCUSSION

Appellant challenges the orders of deferred adjudication in eight issues, arguing that the trial court abused its discretion by: (1) designating CAC interviewer Ashley Andary as an outcry witness; (2) allowing Ryan Authier, Paula's therapist, to testify as an expert witness; (3) refusing to admit screenshots of Mother's social-media messages and associated records; and (4) admitting testimonies from various witnesses that contained "backdoor hearsay." Appellant also argues that the evidence is legally insufficient to support the trial court's acceptance of his plea and the entry of the deferred-adjudication orders. Before addressing those issues, however, we first discuss the State's contention that Appellant forfeited his right to appeal through his no-contest pleas to Counts I and III. We address his sufficiency of the evidence claims before considering his other issues.

A. Appellant did not forfeit the right to appeal

Article 44.02 of the Code of Criminal Procedure gives a defendant the right to appeal. But

article 1.14 of that same Code allows a defendant in a non-capital felony case to waive any right secured by law, and generally speaking, "a valid waiver of appeal prevents a defendant from appealing without the trial court's consent." *Monreal v. State*, 99 S.W.3d 615, 617 (Tex.Crim.App. 2003); *see also* TEX.R.APP.P. 25.2(d). The State argues that the no-contest plea effects such a waiver. But "a valid plea of guilty or nolo contendere 'waives' or forfeits the right to appeal a claim of error only when the judgment of guilt was rendered independent of, and is not supported by, the error." *Young v. State*, 8 S.W.3d 656, 667 (Tex.Crim.App. 2000). Stated differently, there is no waiver of the right to appeal when there is some nexus—temporal or otherwise—between the error and the judgment. *See, e.g., Sanchez v. State*, 98 S.W.3d 349, 353 (Tex.App.--Houston [1st Dist.] 2003, pet. ref'd).

Here, Appellant initially pleaded not guilty to all the charged offenses, but agreed to try the case to the judge, and not a jury. In a bench memorandum, Appellant argued that TEX.CODE CRIM.PROC.ANN. art. 42A.102 allowed the court to place him on deferred-adjudication community supervision by making a finding in open court that deferred adjudication was in the best interest of the victim, even in the presence of a not guilty plea.

At a subsequent hearing, the court announced its intent "to defer a finding [of guilt] and put [Appellant] on a deferred adjudication." The State responded that Appellant's not-guilty plea precluded the option of deferred adjudication. The trial court iterated that Appellant would have a right to appeal from the orders placing him on deferred-adjudication community supervision. At the next court setting, Appellant again argued that the court could place him on deferred adjudication even if he pleaded not guilty. The State responded that Appellant would either have to enter a plea of guilty or no-contest to allow the trial court that option. The court then allowed Appellant to withdraw his not-guilty pleas on Counts I and III and enter no-contest *Alford* pleas to

those counts.[5] After Appellant's no-contest pleas to those counts, the court found that the evidence supported a finding of guilt for Count I (indecency with a child by contact), and that the evidence supported a finding of guilt for Count III (aggravated sexual assault of a child), but only for the lesser-included offense of indecency with a child by contact. Having so found, the court found that it was in the best interest of Appellant, Paula, and the community to defer a finding of guilt on each count, and it placed Appellant on deferred-adjudication community supervision.

Before accepting Appellant's no-contest pleas, the court stated, "I want to be clear for the record that I am granting permission to appeal. So I don't want this to affect his ability to appeal." And following the entry of Appellant's no-contest pleas, the court again stated that Appellant had a right to appeal. Moreover, the trial court's certifications of Appellant's right to appeal for Counts I and III state that each case "is not a plea-bargain case, and the defendant has the right of appeal." And nowhere in the record does it suggest that Appellant waived his right to appeal; rather, as part of his pleas, Appellant stated that he "retain[ed] all rights to file an appeal." On appeal, the State argues that there is no nexus between Appellant's appellate claims and the deferred-adjudication orders, and that this Court should not address the merits of Appellant's claims. We disagree.

The record shows that the trial court expressly provided Appellant permission to appeal

[5] *See North Carolina v. Alford*, 400 U.S. 25 (1970). A guilty plea under *Alford* is a plea of guilty without an admission of guilt, and strong evidence of the defendant's guilt is constitutionally required before a court may accept a defendant's *Alford* guilty plea because there is no admission of guilt. *Sewell v. State*, Nos. 14-15-00216-CR, 14-15-00217-CR, 14-15-00218-CR, 14-15-00219-CR, 2016 WL 750059, at *3 (Tex.App.--Houston [14th Dist.] Feb. 25, 2016, no pet.) (mem. op., not designated for publication), *citing Johnson v. State*, 478 S.W.2d 954, 955 (Tex.Crim.App. 1972). Stated differently, an *Alford* guilty plea "is no more than a nolo contendere [plea]." *Id*., *citing U.S. v. Buonocore*, 416 F.3d 1124, 1129-30 (10th Cir. 2005). A plea of nolo contendere (i.e., "no-contest") has the same legal effect as that of a plea of guilty, except that such plea may not be used against the defendant as an admission in any civil suit based on or growing out of the act on which the criminal prosecution is based. TEX.CODE CRIM.PROC. ANN. art. 27.02(5). Neither party raises an argument concerning whether the trial court had the authority to place Appellant on deferred adjudication through his no-contest pleas; as such, and we do not address that question.

from the deferred-adjudication orders at multiple points in the trial. Nothing suggests that the State objected to the trial court's decision to permit Appellant to appeal. Appellant has the right to appeal the issues presented here. *See Alzarka v. State*, 90 S.W.3d 321, 324 (Tex.Crim.App. 2002) (permitting a defendant to appeal from an order placing her on deferred-adjudication community supervision where she pleaded guilty, but the trial court expressly granted permission to appeal, and the parties agreed on the day of her plea that the defendant could appeal); *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex.Crim.App. 1999) (recognizing that a defendant placed on deferred-adjudication community supervision pursuant to a plea of guilty or no contest may raise issues relating to the plea, such as evidentiary sufficiency, in a direct appeal); *Schibi v. State*, 635 S.W.3d 461, 464 (Tex.App.--Eastland 2021, no pet.) (same); *see also Varelasida v. State*, No. 05-18-00187-CR, 2019 WL 1760301, at *3 (Tex.App.--Dallas Apr. 22, 2019, no pet.) (considering defendant's sufficiency of the evidence issue on direct appeal from an order placing him on deferred-adjudication community supervision following the entry of a guilty plea).

B. Sufficiency of the evidence (Issues Seven and Eight)

1. Standard of Review

Under Texas law, the State must offer sufficient proof to support any judgment based on a plea of guilty or no-contest in a felony case tried to the court. TEX.CODE CRIM.PROC. ANN. art. 1.15; *Wright v. State*, 930 S.W.2d 131, 132 (Tex.App.--Dallas 1996, no pet.). The State must "introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same." TEX.CODE CRIM.PROC.ANN. art. 1.15. In reviewing convictions or adjudications established by a plea, we do

not apply the usual *Jackson v. Virginia* standard for legal sufficiency review,[6] which applies only when the federal constitution places the burden on the prosecution to establish guilt beyond a reasonable doubt. *Manuel*, 994 S.W.2d at 661-62 (recognizing that article 1.15 applies to sufficiency of the evidence challenges raised on direct appeal from an order placing a defendant on deferred-adjudication community supervision following the entry of a plea); *Varelasida*, 2019 WL 1760301, at *3 (applying article 1.15 to defendant's sufficiency of the evidence issue on direct appeal from an order placing defendant on deferred-adjudication community supervision following the entry of a no contest plea); *see also Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

Rather, we restrict our review of Appellant's felony pleas of no-contest to determine whether sufficient evidence supports the orders placing him on deferred adjudication under article 1.15. *Wright*, 930 S.W.2d at 132. Sufficient evidence under article 1.15 exists if the supporting evidence embraces every essential element of the charged offense. *Id.*

2. Analysis

The trial court found sufficient evidence to support a finding of Appellant's guilt on Count I of the indictment (indecency with a child by contact). The indictment for that count alleged that with the intent to arouse or gratify his sexual desire, Appellant touched Paula's genitals with his hand.[7] The trial court also found sufficient evidence to support a finding of Appellant's guilt on Count III for the lesser-included offense of indecency with a child by contact. As it pertains to this case, a person commits indecency with a child by contact if, with a child younger than seventeen years of age, whether the child is of the same or opposite sex and no matter if the person

[6] A challenge to the legal sufficiency of the evidence to support a criminal conviction asks whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

[7] *See* TEX.PENAL CODE ANN. § 21.11.

knows the age of the child at the time of the offense, the person engages in sexual contact with the child or causes the child to engage in sexual contact. TEX.PENAL CODE ANN. § 21.11(a)(1).

We find that the State presented evidence that embraces each element of indecency with a child by contact as set forth in Count I. Paula testified that when she was ten years old, Appellant placed his hand underneath her shorts and underwear, and used two fingers to touch and rub the outside of her "front private part" that she used to "pee." The incident stopped only when Paula got out of Appellant's bed and left the bedroom. The State also presented testimonies from multiple witnesses who testified that Paula made outcries of sexual abuse, as well as testimony from her therapist, Authier, who testified that Paula exhibited symptoms consistent with being sexually abused. Paula's testimony that Appellant used his fingers to rub her "private part" embraces each element of indecency with a child by contact, and along with the testimonies from other witnesses constitutes sufficient evidence supports Appellant's no-contest plea as to Count I. *See* TEX.PENAL CODE ANN. § 21.11(a)(1); *see also* TEX.CODE CRIM.PROC.ANN. art. 38.07(a), (b) (a child victim's uncorroborated testimony is sufficient by itself to support a conviction for an offense under Chapter 21 of the Texas Penal Code); *Keller v. State*, 604 S.W.3d 214, 227 (Tex.App.--Dallas 2020, pet. ref'd) (recognizing that a child victim's use of the term "private part" is specific enough to prove an offense of indecency with a child); *Tucker v. State*, 456 S.W.3d 194, 200, 208 (Tex.App.--San Antonio 2014, pet. ref'd) (sufficient evidence supported the defendant's conviction for indecency with a child by contact where the child victim testified that the defendant touched her with his hand "in her private area, between her legs, where she peed.").

As for Count III, Paula testified that Appellant caused his "private part" that he uses "[t]o pee with" to contact her "front private part." What she described as an erect penis touched the outside of Paula's "private part." Appellant continued "rubbing it" for about thirty seconds before

Paula left the bedroom. Paula's testimony is sufficient evidence to support Appellant's no-contest plea as to Count III. *See, e.g., Gonzalez Soto v. State*, 267 S.W.3d 327, 33 (Tex.App.--Corpus Christi 2008, no pet.) (sufficient evidence supported the defendant's conviction for indecency with a child by contact where the child victim testified that the defendant rubbed his penis on her "vaginal area").

Appellant argues that the evidence is legally insufficient to support the court's acceptance of his pleas and its orders placing him on deferred adjudication community supervision, contending that Mother falsely influenced Paula and Robin's allegations of Appellant's sexual abuse. Appellant posits that his troubled marriage to Mother, impending child custody issues between Appellant and Mother, and Mother's substance abuse issues all supported Mother's motive to exert influence over Paula and Robin to pressure them into falsely accusing Appellant of committing the alleged sexual abuse. Appellant also contends that various inconsistencies between Paula and Robin's prior allegations and their trial testimony undermines the sufficiency of the evidence supporting the adjudication.

By analogy to a legal insufficiency challenge, the fact finder (here, the trial court) is the sole judge of the weight of the evidence and of each witness's testimony. *See Bohannan v. State*, 546 S.W.3d 166, 178 (Tex.Crim.App. 2017). It was also within the trial court's province as fact finder to resolve the inconsistencies in the evidence argued by Appellant, and under the proper legal sufficiency review, we infer that the trial court resolved any inconsistencies in the evidence in finding sufficient evidence of Appellant's guilt to support the acceptance of his plea. *Id.*

We as a reviewing court cannot reweigh the evidence or substitute our judgment for that of the trial court's, regardless of any inconsistencies in the evidence or Mother's purported undue influence exercised over Paula and Robin, a theory we treat as impliedly considered and rejected

by the trial court. *See id*.; *see also Tucker*, 456 S.W.3d at 208 (rejecting the notion that the victim's inconsistent testimony rendered the evidence legally insufficient to support his convictions); *Krausz v. State*, No. 03-15-00110-CR, 2017 WL 1532036, at *2-3 (Tex.App.--Austin Apr. 21, 2017, no pet.) (mem. op., not designated for publication) (recognizing that in a legal sufficiency review, a reviewing court cannot reevaluate the weight and credibility of the evidence, but must defer to a trial court's fact-finding role of making credibility determinations, weighing the evidence, and drawing reasonable inferences from the evidence).

In sum, sufficient evidence supports the trial court's acceptance of Appellant's pleas and its orders placing him on deferred-adjudication community supervision for indecency with a child under article 1.15. Appellant's Issues Seven and Eight are overruled.

C. Designation of Outcry Witness (Issue One)

In Issue One, Appellant argues that the trial court abused its discretion by designating Ashley Andary, the lead forensic interviewer at the CAC, as the proper outcry witness under TEX.CODE CRIM.PROC.ANN. art. 38.072.

1. Applicable Law and Standard of Review

Because outcry testimony consists of what the victim told another person, it necessarily implicates hearsay. Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex.Crim.App. 2011), *citing* TEX.R.EVID. 801(d). Hearsay is inadmissible unless it falls into one of the exceptions in Rules of Evidence 803 or 804, or it is allowed by "other rules prescribed under statutory authority." *Id*., *citing* TEX.R.EVID. 802. One of the "other rules" is found in article 38.072 of the Code of Criminal Procedure, which provides for the admission of certain out-of-court "outcry" statements. Relevant here, article 38.072 applies to statements that: (1) describe the alleged offense; (2) were

made by a child victim who is younger than 14 years of age; and (3) the defendant is charged with certain enumerated offenses. TEX.CODE CRIM.PROC.ANN. art. 38.072, § 2(a)(1), (2). Indecency with a child by contact is one of those enumerated offenses. *Id*. at 38.072, § 1(1). Further, article 38.072 specifically provides that the statement must be one made to the first person, eighteen years old or older, other than the defendant, to whom the child made a statement about the offense. *Id*. at 38.072, § 2(a)(3).

Procedurally, the State cannot introduce the statement until the trial court holds a hearing outside the presence of the jury to determine whether the statement is "reliable based on the time, content, and circumstances of the statement." *Id*. at 38.072, § 2(b)(2). In addition, the child must testify at trial or be available to testify at the trial. *Id*. at 38.072, § 2(b)(3). Outcry testimony admitted in compliance with article 38.072 is considered substantive evidence, 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.).

Outcry-witness testimony must be sufficiently specific and reliable to be admissible under article 38.072. *See Calderon v. State*, No. 08-20-00139-CR, 2021 WL 5027754, at *4-5 (Tex.App.--El Paso Oct. 29, 2021, pet. filed) (not designated for publication). Relevant here, article 38.072's specificity requirement has been construed to mean that an outcry statement must be "more that words which give a general allusion that something in the area of child abuse was going on." *Waldrep v. State*, No. 08-19-00027-CR, 2019 WL 6888522, at *4 (Tex.App.--El Paso Dec. 17, 2019, no pet.) (not designated for publication), *quoting Garcia v. State*, 792 S.W.2d 88, 91 (Tex.Crim.App. 1990) (internal quotation marks omitted); *see* TEX.CODE CRIM.PROC.ANN. art. 38.072, § 2(a)(1)(A). Stated differently, the specificity requirement is generally met when a victim sufficiently describes the "how, when, and where" of the abuse. *See Rivera v. State*,

No. 08-19-00136-CR, 2021 WL 3129261, at *4 (Tex.App.--El Paso July 23, 2021, no pet.) (not designated for publication), *quoting Martinez v. State*, No. 05-18-01096-CR, 2020 WL 897247, at *2 (Tex.App.--Dallas Feb. 25, 2020, no pet.) (mem. op., not designated for publication) (internal quotation marks omitted). Moreover, an outcry "is event-specific rather than person-specific" for admissibility purposes, and it is possible to have more than one outcry witness when multiple discrete acts of abuse are alleged to have occurred. *Gibson v. State*, 595 S.W.3d, 321, 326 (Tex.App.--Austin 2020, no pet.), *quoting Lopez v. State*, 343 S.W.3d 137, 140 (Tex.Crim.App. 2011 (internal quotation marks omitted).

We review a trial court's determination whether an outcry statement is admissible under article 38.072 for an abuse of discretion. *Garcia*, 792 S.W.2d at 92. A trial court only abuses its discretion in admitting outcry testimony if its decision falls outside the zone of reasonable disagreement. *Gonzales v. State*, 477 S.W.3d 475, 479 (Tex.App.--Fort Worth 2015, pet. ref'd), *citing Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1991) (op. on reh'g).

2.. *Factual Background*

Over several days, the trial court held what appears to have been an extended outcry-witness hearing under TEX.CODE CRIM.PROC.ANN. art. 38.072 to determine the identities of the proper outcry witnesses as they related to each alleged count. This hearing began during the State's direct examination of Mother, whom the State called to testify in its case-in-chief. During a bench conference that occurred during Mother's testimony, the State posited that although Mother was the first person to whom Paula related an allegation of sexual abuse, Mother was not the proper outcry witness under article 38.072 because the allegation was not specific enough to satisfy article 38.072's requirements. The trial court found that it would receive Mother's testimony to determine the identity of the proper outcry witness, and that it would later rule on the

matter. Appellant further objected to Mother's testimony as hearsay, and the trial court granted Appellant a running objection and deferred its ruling until it had received testimonies from other potential outcry witnesses. Mother subsequently testified that Paula told her, "Mommy, Daddy keeps touching me with his fingers in my hoo-hoo." According to Mother, "hoo-hoo" is "what [Paula] called her private area." Paula also told Mother that she "really [didn't] like it. Can you please make it stop?"

The State later called Terry McKinney, an administrator and guidance counselor at Paula's school. Near the outset of McKinney's testimony, the trial court determined that it would also consider her testimony within the context of an outcry hearing. McKinney testified that her role at the school was to help parents navigate academic, emotional, and spiritual issues, and that she was already familiar with Paula from helping her deal with the death of her coach and pet, as well as her health issues. On November 16, 2015, Mother contacted McKinney to discuss the sexual abuse allegations. During the meeting between Paula, McKinney, and Mother, Paula appears to have made an outcry of sexual abuse, but other than an allegation that Appellant "end[ed] up under [her] blanket" while they were in bed and that Appellant "has touched [her] private parts," the record does not indicate that Paula herself described to McKinney the specific details of the abusive acts alleged in Counts I or III. McKinney recalled that during a previous conversation, Mother may have told her that Appellant was "basically taking advantage of [Paula]," but that Mother had spoken to Paula about the abuse before the November 16, 2015, conversation. The State contended that it was not offering McKinney as an outcry witness.

The State also called Lesley Barbiaux, a CPS supervisor who investigated the alleged sexual abuse against Paula and Robin. As part of the investigation into the abuse against Paula, who had already been interviewed by law enforcement at CAC, Barbiaux contacted Mother.

Barbiaux's intent was to interview Paula's brother and Robin to determine whether additional abuse had taken place. This interview occurred after Paula had been interviewed at CAC, but the record does not suggest that Paula made an outcry of sexual abuse to Barbiaux.

The State subsequently called Andary to testify, but before her testimony, the prosecutor reminded the trial court that "[w]e've kind of strung out an outcry hearing," and that Andary would testify about what Paula told her as to the acts alleged in Counts III and IV. The State clarified that it was offering Mother's prior testimony about what Paula told her as being the outcry statement that would relate to Count I. Appellant objected to Andary's testimony on the bases of hearsay and that she was the improper outcry witness under article 38.072 because she had told other individuals about the abuse before she spoke to Andary. The trial court stated it would not allow Andary to testify about any act as alleged in Count I, but that Andary could testify about what Paula told her about the acts alleged in Counts III and IV. The trial court also stated that it would consider Andary's testimony only for an outcry hearing.

As part of the outcry witness hearing, Andary testified that she was the lead forensic interviewer at the CAC. Through her investigation into their allegations against Appellant, Andary interviewed Paula. Andary recalled that Paula told her about two incidents of sexual abuse: the first incident concerned "genital-to-genital contact," and the other concerned "masturbation and ejaculation." Regarding the first incident (as alleged in Count III), Paula told Andary that "her daddy touched his private part to her front private part." Paula identified her "front private part" as a word that "sounded like Virginia," which Andary understood as "vagina." Paula told Andary that this incident occurred when they were together in bed when Appellant "used one hand to hold her . . . pajamas open and the other hand to put his private part to her private part, and then he . . . was able to move his private part similar to how she described earlier with

hands." Paula stated that "it was awkward and uncomfortable[,] and . . . was saying, 'Daddy, Daddy, stop.'" Paula stated Appellant's "private part felt squishy, weird, uncomfortable, and firm."

After the final State's witness testified, the trial court ruled that Mother was the outcry witness on Count I and that Andary was the outcry witness on Count III. The court added that it would not consider Barbiaux's testimony for any purpose other than that she arranged for Paula and Robin to go to the CAC.

3. Analysis

Appellant does not contest the trial court's designation of Mother as the proper outcry witness as to Count I (i.e., the allegation that Appellant touched Paula's sexual organ with his fingers). Regarding Count III (i.e., the allegation that Appellant caused his sexual organ to contact Paula's sexual organ), Appellant argues that Andary was not the proper outcry witness because Paula had described the alleged offense to Mother, Barbiaux, and law-enforcement officers before speaking to Andary. However, Appellant does not assert the identity of any particular person who was the proper outcry witness on Count III. The State does not contest that Paula first made a general statement about the sexual abuse to Mother and McKinney, but the State argues that because Paula never told them that Appellant engaged in genital-to-genital contact with her, and because Andary was the first person to whom Paula described the specific details of the genital-to-genital contact alleged in Count III, Andary is the proper outcry witness as to that count.

We find that the trial court did not abuse its discretion by designating Andary as the proper outcry witness as to Count III. Paula first told Mother that Appellant was touching her vagina but did not describe genital-to-genital contact. And the record further suggests that Paula told Mother and McKinney that Appellant had engaged in general acts of sexual abuse, but that Paula did not

describe any act of genital-to-genital contact during their conversation.

Rather, the first person to whom Paula told the details about the act of genital-to-genital contact was Andary. As we set out above, Paula described how Appellant "touched his private part to her front private part." Paula identified her "front private part" in a way to say she was describing her vagina. Paula told Andary where the incident occurred (while sleeping in Appellant's bed) and other specific details, such as how he manipulated her pajamas. Paula added details such as what she felt, how she reacted to the event, and how she told Appellant to stop.

Thus, although Paula's outcry to Andary occurred after she spoke to Mother and McKinney about the abuse, Andary was the first person to whom Paula sufficiently described the details of the act alleged in Count III. For these reasons, we find that the trial court did not abuse its discretion in designating Andary as the appropriate outcry witness as to Count III. *See Calderon*, 2021 WL 5027754, at *4 (holding that a detective was the proper outcry witness because he was the first person to whom the child-victim described the alleged sexual-abuse act in sufficient detail, even though the victim had previously described the general existence of the abuse to her therapist).

Appellant's Issue One is overruled.

D. Expert witness testimony (Issue Two)

In Issue Two, Appellant argues that the trial court abused its discretion by admitting expert testimony from Ryan Authier, a trauma therapist who treated Paula. The essence of the testimony was that Authier's therapy sessions led him to believe that Paula had sustained some past trauma, though he could not tie it specifically to the sexual assault. Appellant complains that the State failed to establish Authier's qualifications and the reliability of his opinion. We find that the trial court did not abuse its discretion by admitting Authier's testimony.

1. Applicable Law and Standard of Review

A trial court's ruling on the admissibility of expert testimony is reviewed for an abuse of discretion. *See Rhomer v. State*, 569 S.W.3d 664, 669 (Tex.Crim.App. 2019). We do not disturb that ruling if it lies within the zone of reasonable disagreement. *Russeau v. State*, 291 S.W.3d 426, 438 (Tex.Crim.App. 2009). A trial court abuses its discretion when its ruling falls outside the zone of reasonable disagreement. *Montgomery*, 810 S.W.2d at 391. Stated otherwise, a trial court abuses its discretion when it acts unreasonably or arbitrarily without reference to any guiding rules or principles. *State v. Hill*, 499 S.W.3d 853, 865 (Tex.Crim.App. 2016).

For expert testimony, those guiding rules and principles are found in the Texas Rules of Evidence, including Rule 702, which provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX.R.EVID. 702. Case law has clarified that for "expert testimony to be admissible under these rules, the proponent of the expert scientific evidence must demonstrate by clear and convincing evidence that the testimony is 'sufficiently reliable and relevant to help the jury in reaching accurate results.'" *Wolfe v. State*, 509 S.W.3d 325, 335-36 (Tex.Crim.App. 2017), *quoting Kelly v. State*, 824 S.W.2d 568, 572 (Tex.Crim.App. 1992). The proponent must prove: (1) the expert is qualified; (2) the testimony is based on a reliable scientific foundation; and (3) the testimony is relevant to the issues in the case. *Wolfe*, 509 S.W.3d at 336; *Vela v. State*, 209 S.W.3d 128, 131 (Tex.Crim.App. 2006). These conditions are often called qualification, reliability, and relevance. *Vela*, 209 S.W.3d at 131.

The trial court serves the role as a gatekeeper and must decide any preliminary challenge

to a witness's qualifications and evidence's admissibility. TEX.R.EVID. 104(a); *Vela*, 209 S.W.3d at 131. In discharging this gatekeeper role, the trial court is vested with the often-difficult task of determining what is irrelevant or is likely to confuse the jury in its decision-making process. *See Coble v. State*, 330 S.W.3d 253, 272 (Tex.Crim.App. 2010). Nonetheless, the trial court's gatekeeping role "does not supplant cross-examination as 'the traditional and appropriate means of attacking shaky but admissible evidence.'" *Wolfe*, 509 S.W.3d at 336, *quoting Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 728 (Tex. 1998).

2. Factual Background

As a witness for the State, Authier testified that he was a clinical therapist who treated Paula. He has a bachelor's degree in psychology, a master's degree in counseling psychology, and is licensed in Texas as a licensed professional counselor. Authier has additional training in equine therapy, eye movement desensitization and reprocessing (EMDR) therapy, and cognitive-behavioral therapy, which according to Authier are established therapies in his field of practice. Authier testified that he had worked for ten years as a therapist, with three of those years at "Spirt Reins," a facility that provides "trauma-focused equine therapy to children and families."

Much of Authier's experience is in providing therapy to clients who experienced trauma. Providing treatment for people who experienced trauma is part of his field of practice, and that the field has been "well researched" in "[c]opious textbooks that have been written and read, and it's just a very heavy field of research especially in modern psychology." The study of trauma victims' behavior is a legitimate study within his field. Authier keeps up to date with recent studies and trends in modern psychology and the behavior of trauma. Authier based his testimony about his treatment of Paula upon his observations of her, and his testimony relied on the same research and publications he referenced. As to his general methodology, Authier's treatment

typically begins with patients taking a comprehensive intake examination and assessment to determine why the patient needs to be in therapy, defining goals and objectives for treatment, and administering formal measurements to help diagnose mental illness. Using this information, Authier then forms a treatment plan. In this case, Paula was referred to Authier by CAC. Primarily using equine therapy, Authier treated Paula for approximately two years. In Authier's typical sessions with Paula, they would discuss the events of the week before and any issues Paula raised during the check-in. Another therapist and Mother would sometimes be present in these sessions. If Paula needed to discuss her traumatic experiences, she and Authier would have a one-on-one session without Mother's presence. Based on Paula's initial intake session, Authier noted three traumas that occurred within a month of each other: (1) the death of her gymnastics coach; (2) her abdominal surgery; and (3) Appellant's alleged sexual abuse against her.

Authier used equine therapy to address Paula's trauma. If equine therapy was ineffective for Paula in a particular week, Authier would provide traditional talk therapy. Authier and Paula would ride a horse and Authier would use EMDR techniques, which he describes as "riding on horseback in sort of that side-to-side movement while telling the story of your trauma." Authier also provided cognitive-behavioral therapy to Paula, which did not occur on horseback. At the end of each session, Authier and Paula would meet with Mother to discuss the results of the session and any therapeutic homework to be completed during the week.

Appellant objected to the State's intent to offer Authier as an expert witness, and the trial court held a *Daubert*/*Nenno* hearing[8] prior to allowing Authier to testify as an expert. On voir-dire examination, Authier testified that he practiced the "Natural Lifemanship Model" of equine

[8] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Nenno v. State*, 970 S.W.2d 549 (Tex.Crim.App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720 (Tex.Crim.App. 1999).

therapy, which started at Cal Farley's Boys Ranch in West Texas. The Natural Lifemanship Model was transferred to Liberty Hill, where Paula received therapy. Authier had not published, nor was he aware of, any peer-reviewed journal publications for the Natural Lifemanship Model. That specific model, a subset of counseling, does not have a mechanism to determine false positives for identifying trauma; rather, the model assumes that a client has trauma and prescribes methods for treating it. The Natural Lifemanship Model does not allow for the determination of a specific source of a person's trauma, but it rather provided a mechanism to treat trauma regardless of its source or sources. Although Authier was aware of studies supporting the effectiveness of equine EMDR, he could not provide citations to those studies. Authier had not testified before this trial. Appellant argued that the State failed to establish Authier's field of expertise was recognized under *Nenno* and TEX.R.EVID. 702 and 703. Citing *Cohn v. State*, 849 S.W.2d 817 (Tex.Crim.App. 1993), the State responded that the study of trauma victims has been previously held to be a legitimate field of study, and that Authier could testify as an expert because he relied on the principles of his area of practice in treating Paula, his practice was a legitimate field of expertise, and his testimony would fall within that field. The trial court held that it would not admit testimony from Authier on the efficacy of equine therapy, but that it would allow Authier to generally testify as an expert in therapy. In that regard, he could testify about his observations of Paula, her progress during treatment, and whether his observations were consistent with the existence of trauma in Paula.

Authier subsequently testified that Paula exhibited behaviors "that were aligned with commonly accepted symptoms of trauma," such as difficulties with attention and focus, emotion regulation, "occasional blowups" with siblings or peers, hoarding behaviors, and conflicts with Robin, Mother, and peers. Paula also exhibited symptoms of dissociation, which often is a

common symptom of trauma. Although Authier could not attribute the symptoms of Paula's traumas to any particular traumatic event, Paula's exhibited symptoms that were consistent with sexual abuse.

3. Analysis

Appellant challenges Authier's qualification to testify as an expert, as well as the reliability of his opinion. We consider each issue in turn.

a. Qualification

A party offering expert testimony has the burden to show the witness is qualified to testify on the matter in question. TEX.R.EVID. 702; *Penry v. State*, 903 S.W.2d 715, 762 (Tex.Crim.App. 1995). The type of specialized knowledge that qualifies a witness to offer an expert opinion in a particular field may derive from a variety of sources, including the witness's "specialized education, practical experience, a study of technical works or a combination of these things." *Rhomer*, 569 S.W.3d at 669. In addition to having an acceptable background in a particular field, the trial court must determine that the witness's background is "tailored to the specific area of expertise in which the expert desires to testify." *Id., quoting Vela*, 209 S.W.3d at 133. An expert witness is not required to always demonstrate formal training, and the expert may instead gain expertise in a particular field solely through their own personal experience or research. *See Morris v. State*, 361 S.W.3d 649, 656 (Tex.Crim.App. 2011).

In determining whether a trial court abused its discretion in ruling on an expert's qualifications, an appellate court may consider: (1) the complexity of the field; (2) how conclusive is the expert's opinion; and (3) how central is the area of expertise to the resolution of the case. *Rhomer*, 569 S.W.3d at 669-670, *citing Rodgers v. State*, 205 S.W.3d 525, 528 (Tex.Crim.App. 2006); *see also Vela*, 209 S.W.3d at 131. In general, greater qualifications are required for more

complex fields of expertise and for more conclusive and dispositive opinions. *Rhomer*, 569 S.W.3d at 669. However, in areas in which the "expert evidence is close to the jury's common understanding, the witness's qualifications are less important than when the evidence is well outside the jury's own experience." *Rodgers*, 205 S.W.3d at 528.

Appellant argues that the State failed to sufficiently establish Authier's qualification to testify as an expert. We disagree. Authier was sufficiently qualified to testify about trauma-based therapy. Authier's degrees in psychology and counseling psychology, as well as his years of experience practicing as a licensed professional counselor, were tailored to his testimony about the treatment of Paula's trauma. Authier also testified that he had approximately ten years of experience in providing equine therapy, which was one of the types of therapy he provided to Paula. In addition to training in equine therapy, Authier had training in EMDR and cognitive-behavioral therapies, which he also used while treating Paula.

Moreover, Authier's testimony about the behavioral traits exhibited by victims of trauma, while important to corroborate Paula's allegations of sexual abuse, was not of a highly technical or complex nature, and his opinion that Paula exhibited symptoms of trauma (without attributing the particular source of her trauma) was not conclusive or dispositive, so the trial court could view Authier's qualifications as having diminished importance in determining the admissibility of his testimony. *See Rhomer*, 569 S.W.3d at 669; *Roberts v. State*, No. 08-19-00029-CR, 2019 WL 7046756, at *5 (Tex.App.--El Paso December 23, 2019, pet. ref'd) (not designated for publication) (finding that expert testimony on the behavior of sexually abused children, while having bearing on the State's allegations of sexual abuse, was of diminished importance because the testimony was not highly technical or complex).

As explained above, Authier testified on his formal training in the field of trauma-based

therapy, as well as his experiences working in the field. We find that the record contains sufficient information for the trial court to qualify Authier as an expert witness in the field. *See Roberts*, 2019 WL 7046756, at *4-5 (holding that a licensed social worker who testified on her years of training and experience in the field of child sexual abuse was qualified enough to testify on matters in the field).

b. Reliability

Authier's testimony about psychological treatment of trauma victims falls within what would be called the "soft sciences"; as such, the proper analysis for the reliability of Authier's testimony is under the *Nenno* standard. *See id*. at *5 (applying the *Nenno* standard to testimony on the behavioral characteristics of sexually abused children). Under the *Nenno* standard, three reliability questions should be considered: (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony falls within that field; and (3) whether the expert's testimony properly relies on and/or uses the principles involved in the field. *Morris*, 361 S.W.3d at 654-655, *citing Nenno*, 970 S.W.2d at 561; *see also Rhomer*, 569 S.W.3d at 671 (reaffirming the *Nenno* test for determining the reliability of expert testimony outside the field of "hard science").

As for the first *Nenno* prong, the Court of Criminal Appeals has held that the field of study associated with the behavior of trauma victims is a legitimate field of expertise; we therefore find the first *Nenno* prong satisfied. *See Cohn*, 849 S.W.2d at 818; *see also Roberts*, 2019 WL 7046756, at *6 (recognizing research pertaining to the behavioral characteristics of sexually abused children as a legitimate field of study). And as set forth above, Authier's testimony on trauma therapy and his observations of Paula during her therapy fell within that field. Thus, the second *Nenno* prong was satisfied.

Appellant primarily argues that the State failed to establish the reliability of Authier's testimony under the third *Nenno* prong, pointing to his inability to testify to: (1) the existence of any peer-reviewed publications associated with the type of equine therapy he practiced; (2) the error rate of false positives in his therapy; or (3) whether a particular trauma has a particular source. Although Authier did not testify on the error rates associated with trauma therapy or cite any peer-reviewed publications to support his opinion, and he could not attribute a particular event as being the source of a person's trauma, we find that these considerations were not significant enough to render the trial court's decision outside the zone of reasonable disagreement. The trial court limited Authier's testimony to trauma therapy in general and his observations and treatment of Paula during her therapy. As a result, these considerations did not upend the substance of Authier's testimony. For these reasons, we find that the third *Nenno* prong was satisfied. *See, e.g.*, *Roberts*, 2019 WL 7046756, at *5-6 (holding that an expert's opinion was reliable under the third *Nenno* prong where the expert testified that her opinion was based on the principles she had learned in her training and experience in the field of child sexual abuse); *Castillo v. State*, No. 10-12-00391-CR, 2014 WL 1778421, at *6 (Tex.App.--Waco May 1, 2014, no pet.) (mem. op., not designated for publication) (rejecting a reliability challenge under *Nenno* to the trial court's admission of expert testimony based on a lack of cited peer-reviewed publications, error rates, or information about any experiments or literature, where the State established the expert's years of experience within the field associated with her testimony).

Because the record contains sufficient evidence of Authier's qualifications and the reliability of his testimony and affording proper deference to the trial court's evidentiary decisions and its gatekeeping function, we conclude that the trial court did not abuse its discretion by allowing Authier's testimony about trauma therapy and his observations of Paula during her

therapy.

Appellant's Issue Two is overruled.

E. Exclusion of social-media posts and records (Issue Three)

In Issue Three, Appellant argues that the trial court abused its discretion by excluding screenshots of Mother's social media posts and associated records. He offered those to show Mother's bias or motive to testify and as part of his defensive theory that Mother influenced Paula and Robin to make false allegations of sexual abuse against him. We find that the trial court did not abuse its discretion by refusing to admit the screenshots and records.

1. Applicable Law and Standard of Review

The Sixth Amendment guarantees a defendant the right to confront the witnesses against him. U.S. CONST. AMEND. VI; *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The constitutional right of confrontation includes the right to cross-examine witnesses to attack their general credibility or to show witnesses' possible bias, self-interest, or motives to testify. *Hammer v. State*, 296 S.W.3d 555, 561 (Tex.Crim.App. 2009); *Carroll v. State*, 916 S.W.2d 494, 497 (Tex.Crim.App. 1996). A trial court violates a defendant's right of confrontation if it improperly limits appropriate cross-examination. *Carroll*, 916 S.W.2d at 497.

Appropriate cross-examination includes all avenues reasonably calculated to expose a motive, bias, or interest for the witness to testify. *Id.*; *Virts v. State*, 739 S.W.2d 25, 28-29 (Tex.Crim.App. 1987). The right of an accused to cross-examine a testifying state's witness includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness's credibility. *Virts*, 739 S.W.2d at 29.

Trials involving sexual assault magnify these concerns because the credibility of the

complainant and defendant is a central and often dispositive issue. *Hammer*, 296 S.W.3d at 561. Accordingly, the Court of Criminal Appeals has cautioned that the Rules of Evidence, especially Rule 403, should be used sparingly to exclude relevant and otherwise admissible evidence bearing upon the credibility of either the defendant or complainant in these cases. *Id.* at 562. Yet, the trial court has broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering witnesses, and the injection of cumulative or collateral evidence. *Rohr v. State*, No. 08-12-00219-CR, 2014 WL 4438828, at *3 (Tex.App.--El Paso Sept. 10, 2014, no pet.) (not designated for publication), *citing Lopez v. State*, 18 S.W.3d 220, 222 (Tex.Crim.App. 2000), *and Carroll*, 916 S.W.2d at 498. We review a trial court's decision to limit cross-examination under an abuse of discretion standard. *Id*., *citing Billodeau v. State*, 277 S.W.3d 34, 39 (Tex.Crim.App. 2009), *and Ho v. State*, 171 S.W.3d 295, 304 (Tex.App.--Houston [14th Dist.] 2005, pet. ref'd). A trial court does not abuse its discretion by admitting evidence unless its determination lies outside the zone of reasonable disagreement. *See Jordy v. State*, 413 S.W.3d 227, 231 (Tex.App.--Fort Worth 2013, no pet.), *citing Lozano v. State*, 359 S.W.3d 790, 817 (Tex.App.--Fort Worth 2012, pet. ref'd). The trial court's ruling will be upheld if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Id., citing Ramos v. State*, 245 S.W.3d 410, 418 (Tex.Crim.App. 2008).

2. Factual Background

During Appellant's cross-examination of Mother, he sought to admit Defense Exhibits 42 and 43, which were screenshots of Mother's Facebook messages and associated records. After Mother reviewed the exhibits, she testified that the messages reflected a conversation she had with a friend. In laying a foundation for the admission of the exhibits, Appellant was able to elicit through the Mother's testimony the substance of the messages. One concerned her marital

problems with Appellant and her unwillingness to visit her in-laws on a particular weekend. In the other message, Mother told her friend that she was upset that Appellant had yet to return home, and that he bought an $800 mountain bicycle for Robin's brother without Mother's knowledge. In response, the friend advised Mother to begin setting aside small amounts of cash in anticipation of a future divorce. Appellant re-offered the messages and records, and the State objected that since she had not disagreed with the statements in the messages, she could not be impeached with them as prior inconsistent statements under TEX.R.EVID. 613.[9] The State further argued that the messages and records were irrelevant and contained hearsay. Appellant responded that he was offering them to show Mother's bias or motive to testify as part of his defensive theory, citing as support TEX.R.EVID. 405(b), *Hammer*, 296 S.W.3d at 568, and *Billodeau*, 277 S.W.3d at 42-43. Appellant also argued that the evidence satisfied the hearsay exception for then-existing mental state under TEX.R.EVID. 803(3). The trial court determined that it would not admit the messages and records at that time, reasoning that many messages concerned irrelevant matters and that Appellant had conveyed "the information that [he] want[ed the court] . . . [to have] gotten."

Later in the trial, Appellant re-offered the messages and records, but the trial court again declined to admit the evidence.

3. Preservation

We first address the State's contention that Appellant waived his appellate argument through the following colloquy, which occurred when Appellant re-offered the messages and records in the latter stages of the trial:

> COURT: So -- all right. [Defense Exhibits] 42 and 43, plans to leave the marriage . . . . [W]hat kind of records are these?

[9] Mother did agree that the messages would be a more accurate reflection of the events and her attitudes than her trial testimony.

. . .

> DEFENSE COUNSEL: Consistent with your previous ruling on the previous exhibits about what was -- that you were not going to admit anything about the dislike for [Appellant], in candor to the Court, [Defense Exhibits] 42 and 43 are of the same tone as the other exhibits I sought admission when we talked about earlier, and so these are Facebook records that I think I attempted to introduce in the trial, and you said let's -- let's wait. So --
>
> COURT: Okay.
>
> DEFENSE COUNSEL: So arguably I'm not trying to talk myself out of it, but consistent with what -- what you just ruled earlier --
>
> COURT: What I ruled --
>
> DEFENSE COUNSEL: -- I would tell the Court these would be inadmissible because they do not talk about the children; they only talk about a dislike and anger with [Appellant].
>
> COURT: Okay. Then I'm going to not admit those.

Under TEX.R.APP.P. 33.1(a), an appellate complaint must be preserved by a party's timely and specific objection at trial, as well as an express or implied ruling on the matter by the trial court. Here, the State argues that defense counsel's statement that he "would tell the Court these would be inadmissible" amounted to a withdrawal of his exhibits or a concession that the exhibits were inadmissible, and that Appellant has therefore waived his appellate issue. We disagree. Rather, we construe defense counsel's statement as a simple acknowledgment that the trial court had already ruled that the exhibits were not relevant when Appellant first offered the exhibits. Because the record contains the trial court's initial ruling that excluded the messages, the issue is preserved for our review.

4. Analysis

Appellant argues that the exhibits were relevant to establish the marital discord and impending divorce between himself and Mother, which he contends undergirded Mother's bias or

interest to testify against him. Appellant further contends that he offered the evidence under the same theory as sanctioned by *Hammer* and *Billodeau*: to support a defensive theory which we presume to be that Mother was motivated by self-interested objectives to influence Paula and Robin to fabricate the allegations of sexual abuse by Appellant.

But the trial court's exclusion of the evidence here does not conflict with the holdings in either *Hammer* or *Billodeau.* In *Hammer*, the trial court excluded testimony and documentary evidence that the child victim was angry with her father. 296 S.W.3d at 567. The trial court also excluded evidence that suggested that the victim previously had lied about being sexually assaulted to conceal from her father that she had sex with her boyfriend. *Id.* Finally, the court excluded evidence showing that the victim was so distraught by her father taking her to be examined for sexual assault that she threatened suicide and was admitted to a state hospital. *Id.* She was released from the hospital shortly before her father allegedly assaulted her. *Id.* at 567. The Court of Criminal Appeals held that the trial court erred by prohibiting the defense from: (1) cross-examining the victim with the medical records; (2) offering the records into evidence if the victim had denied their accuracy; and (3) offering another witness's testimony that the victim told her that the sexual activities that night were with another person. *Id.* at 569. The court further reasoned that the evidence, which was closely related in time to the offenses and directly relevant to the victim's animus toward the defendant, was more probative than prejudicial in establishing her motive to testify and thus admissible under TEX.R.EVID. 403. *Id.*

In *Billodeau*, the court held that the trial court erred by excluding evidence that the child victim in an aggravated-sexual-assault prosecution was angry with the defendant for taking back a toy that the defendant had given him, which formed the defensive theory that the victim had falsely accused the defendant of sexual assault. 277 S.W.3d at 42-43. The court held that such

evidence supported the defensive theory that the victim's motive in accusing the defendant of the offense was "rage and anger" when his desires were thwarted. *Id*. at 42.

Unlike *Hammer* and *Billodeau*, Appellant was able to cross-examine Mother on the contents of the messages that supported his defensive theory (i.e., that Mother's marriage to Appellant was failing, and that she was frustrated with Appellant's medication use, and his purchase of a bicycle for Robin's brother). As such, there was no outright denial of the right to cross-examination on those topics. Mother acknowledged on cross-examination that she had made the statements contained within the messages. Because Appellant cross-examined Mother on the contents of the messages, and because she did not deny the statements, the trial court did not err by preventing Appellant from admitting the evidence for impeachment purposes. *See* TEX.R.EVID. 613(b)(4).

As the trial court noted, a portion of the messages refer to matters completely unrelated to the trial, such as Mother's diet, recipes, books, the children's schedules, and other irrelevancies. And even the portions of the messages that potentially supported the notion that Mother could have influenced Robin to fabricate the allegations concerned Mother's, not Robin's, testimony. This tenuous connection between Mother's animus toward Appellant and the possibility that Robin fabricated her outcry contrasts with *Hammer* and *Billodeau*, where the excluded impeachment evidence was directly connected to the victim's fabrication of sexual abuse allegations against the defendants.

For these reasons, we conclude that the trial court did not abuse its discretion by excluding the messages and records. *See, e.g.*, *Hernandez v. State*, No. 03-13-00186-CR, 2014 WL 7474212, at *5 (Tex.App.--Austin Dec. 30, 2014, no pet.) (mem. op., not designated for publication) (distinguishing *Hammer* when the defendant failed to establish the relevance of the

excluded evidence to his defensive theory, or that he was denied the right of cross-examination); *James v. State*, No. 03-12-00462-CR, 2014 WL 2957751, at *6 (Tex.App.--Austin June 27, 2014, pet. ref'd) (mem. op., not designated for publication) (same).

5. Harm Analysis

Even if the trial court abused its discretion by excluding the evidence, we find that any error was harmless. As noted above, Mother's testimony about the contents of the messages and records was cumulative of the contents of messages and records, and she expressly acknowledged that she made the statements contained within the messages. And the trial court—the fact finder in this case—stated that although it was not admitting the messages, Appellant had already conveyed the "the information that [he] want[ed the court] . . . [to have] gotten." We construe this statement as an acknowledgment that the court understood the substance of Appellant's defensive theory on Mother's animus toward Appellant, which it impliedly rejected given its finding of evidence to substantiate his guilt on two of the alleged counts. As such, assuming that the trial court erred by excluding the evidence, any error would have been harmless. *See* TEX.R.APP.P. 44.2(b).

Appellant's Issue Three is overruled.

F. Hearsay issues (Issues Four, Five, and Six)

Finally, Appellant argues in Issues Four, Five, and Six that the trial court abused its discretion by admitting testimony containing "backdoor hearsay" from: (1) Terry McKinney, a school administrator who worked at Paula's school; (2) Lesley Barbiaux, a CPS investigator; and (3) Ryan Authier, Paula's therapist. We consider each witness's testimony in turn.

1. Applicable Law and Standard of Review

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter

asserted." *Sanchez*, 354 S.W.3d at 484, *citing* TEX.R.EVID. 801(d). Hearsay is inadmissible unless it falls into one of the exceptions in Rule of Evidence 803 or 804, or it is allowed by "other rules prescribed under statutory authority." *Id*., *citing* TEX.R.EVID. 802. Under Rule 801(a), "statement" is defined as: (1) a verbal or written expression; or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression." TEX.R.EVID. 801(a).

Even if the out-of-court statement itself is not introduced, the hearsay rule may apply if the testimony allows the jury to ascertain the purport of the statement; this type of evidence is known as "backdoor hearsay." *See Schaffer v. State*, 777 S.W.2d 111, 113-14 (Tex.Crim.App. 1989). Whether testimony constitutes backdoor hearsay "turns on how strongly the content of the out-of-court statement can be inferred from the context." *Head v. State*, 4 S.W.3d 258, 261 (Tex.Crim.App. 1999). The court must decide whether the evidence compels an "inescapable conclusion" that the testimony is being offered to prove the substance of an out-of-court statement. *Id*. at 261-62, *quoting Schaffer*, 777 S.W.2d at 114 (internal quotation marks omitted). Stated differently, backdoor hearsay exists when "the State's *sole intent* in pursuing [a] line of questioning is to convey to the jury the contents of the out-of-court statements." *Id*., *quoting Schaffer*, 777 S.W.2d at 114 (emphasis original, internal quotation marks omitted).

We review the trial court's admission of evidence, including evidence purportedly containing hearsay, under the same abuse of discretion standard set forth above. *Saavedra v. State*, 297 S.W.3d 342, 349 (Tex.Crim.App. 2009).

2. Terry McKinney

a. Factual background

Terry McKinney, an administrator at Paula's school, testified that she met with Paula and

Mother to discuss the sexual-abuse allegations.[10] McKinney recalled that, as a mandatory reporter, she was required after the meeting to report the existence of sexual abuse to CPS, and that she did so in this case. Appellant objected to McKinney's testimony, claiming that it contained backdoor hearsay. McKinney subsequently testified that upon Mother's instigation, Paula told McKinney about the sexual abuse, including that Appellant had touched her "privates." McKinney recalled that after the meeting, she did not have "any misunderstanding or doubt as to the nature of this disclosure by Paula" and she contacted CPS to report the abuse.

Following McKinney's testimony, the trial court held that it was not going to consider McKinney's testimony for any purposes other than that CPS contacted her and got involved ("I'm not going to consider . . . any of the information she gave because I don't . . . think there was any detailed information, so I'm not going to consider her testimony.").

b. Analysis

Appellant contends that the trial court erred by allowing the State to elicit backdoor hearsay from McKinney when the prosecutor asked, "Did you have any misunderstanding as to the allegation," and McKinney responded, "None whatsoever, which caused me to call CPS."[11]

Assuming, without deciding, that the trial court erred by admitting this testimony, we find that any error was harmless. An appellate court must disregard a non-constitutional error that does not affect a criminal defendant's "substantial rights." TEX.R.APP.P. 44.2(b); *Casey v. State*, 215 S.W.3d 870, 884-85 (Tex.Crim.App. 2007). Under that rule, an appellate court may not reverse for non-constitutional error if the court, after examining the entire record, has a fair

[10] The trial court considered McKinney's testimony in the context of an outcry hearing under TEX.CODE CRIM.PROC.ANN. art. 38.072 that occurred "outside the presence of the [hypothetical] jury." Put differently, the trial court at first received the entirety of McKinney's testimony, independent of its fact-finding role, for the limited purpose of determining its admissibility.

[11] This statement, which does not appear in the record, seems to be a paraphrase of McKinney's actual testimony made by Appellant's trial counsel.

assurance that the error did not have a substantial and injurious effect or influence in determining the verdict. *See Casey*, 215 S.W.3d at 884-85. In doing so, we consider: (1) the character of the alleged error and how it might be connected to other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence showing guilt; and (4) whether the State emphasized the complained-of error. *Bagheri v. State*, 119 S.W.3d 755, 762-63 (Tex.Crim.App. 2003).

As discussed above, the State introduced other evidence supporting Appellant's guilt for the charged offenses, including Paula's testimony describing the details of the sexual abuse. Although McKinney's decision to call CPS following her conversation with Paula could be construed to support both her credibility and an inference of Appellant's guilt, McKinney's testimony did not form a critically significant portion of the State's case. Finally, the State did not heavily rely on her testimony in arguing Appellant's guilt in its written closing argument. Thus, the State did not emphasize the purported error.

We conclude that even if there was error in the admission of McKinney's testimony it did not affect Appellant's substantial rights or have a substantial and injurious effect on the outcome of the trial. Any error was harmless. *See* TEX.R.APP.P. 44.2(b).

Appellant's Issue Four is overruled.

3. Lesley Barbiaux

a. Factual background

Lesley Barbiaux, a CPS supervisor who investigated the sexual abuse, testified that she interviewed Paula's sister, Robin, at the family home. Barbiaux recalled that she at first did not believe that anyone other than Paula had been abused but changed her mind after speaking to the other children. Appellant objected that this statement contained backdoor hearsay. The trial

court said that it would consider Barbiaux's testimony in the context of an outcry hearing. When the prosecutor asked Barbiaux whether there was a reason to continue her investigation after Robin was interviewed at CAC, Appellant again objected based on backdoor hearsay. The trial court asked the prosecutor if the State was going to call the police officer. The prosecutor replied it would. The trial court responded, "Okay. Let him answer that," and the prosecutor abandoned the initial question and instead asked Barbiaux what she did after the CAC interview, and Barbiaux responded that she spoke to Mother and Paula and Robin's uncle.

Later in the trial, the trial court stated, "I'm not going to consider any information that Ms. Barbiaux gave, other than the fact that she . . . arranged for . . . the other children . . . to go to the CAC."

b. Analysis

Appellant argues that the trial court erred by admitting Barbiaux's backdoor hearsay statement about why there was reason to continue the CPS investigation after speaking to Robin. But as recounted above, the record shows that Barbiaux never answered the prosecutor's question that prompts Appellant's complaint on appeal, and the prosecutor moved on to another topic when the trial court instructed him to do so. As such, Barbiaux never provided the complained of testimony, and because the alleged error is unsupported by the record, we cannot consider Appellant's factual allegations. *See Lemanski v. State*, No. 2-03-347-CR, 2004 WL 1636246, at *1 (Tex.App.--Fort Worth July 22, 2004, no pet.) (mem. op., not designated for publication); *see also Ex parte Preston*, 833 S.W.2d 515, 519 (Tex.Crim.App. 1992) (op. on reh'g) ("Assertions in an appellate brief that are unsupported by the record will not be accepted as fact."), *quoting Vanderbilt v. State*, 629 S.W.2d 709, 717 (Tex.Crim.App. 1981).

Further, assuming without deciding that the trial court had erred by admitting Barbiaux's

complained of testimony, we find that any error would have been harmless because the trial court expressly stated that it did not consider the testimony in deciding the case. The trial court necessarily had to hear Barbiaux's testimony to determine its admissibility. But nothing in the record indicates that the trial court admitted the testimony or considered it to determine Appellant's guilt, let alone that the testimony was harmful enough to have affected his substantial rights. As a result, we presume that the trial court disregarded any complained of testimony. *See Garza v. State*, 126 S.W.3d 79, 83 (Tex.Crim.App. 2004) (recognizing that a trial court is presumed to disregard inadmissible evidence if the court is asked to decide the merits of the case).

Thus, even if there was support in the record for Appellant's complaint, we find that any purported error was harmless. *See* TEX.R.APP.P. 44.2(b).

Appellant's Issue Five is overruled.

4. Ryan Authier

a. Factual background

As explained in greater detail above, the trial court allowed Ryan Authier, Paula's therapist, to testify as an expert witness on trauma therapy and his treatment of Paula. On direct examination, the State asked Authier to read from Paula's treatment records about what she told him during treatment about the nature of the sexual abuse. Appellant objected on the basis of hearsay, and the State responded that because the question called for a description of Paula's statement about the cause of her past and present psychological symptoms, Authier's testimony fell within the Rule 803(4) hearsay exception (statement-made-for-medical-diagnosis-or-treatment). TEX.R.EVID. 803(4). The trial court admitted Authier's testimony about what Paula told him during treatment, but excluded any other person's statements about Paula's treatment. Authier subsequently testified that Paula described the sexual abuse that Appellant committed as

one of the sources of her trauma.

b. Analysis

We find that Authier's testimony did not constitute backdoor hearsay, or hearsay to which an exception does not apply. As noted above, backdoor hearsay exists when a party pursues a line of questioning for the sole intent of conveying to the fact finder the contents of the out-of-court statements. *Head*, 4 S.W.3d at 262, *citing Schaffer*, 777 S.W.2d at 114. Our review of the record fails to demonstrate that the State offered Authier's testimony to prove Paula's out-of-court statement that Appellant sexually abused her. The State had other corroborating testimony from an outcry witness, and of course, Paula testified to the details of the events herself.

In any event, the statement fell within the Rule 803(4) hearsay exception which permits the admission of an out-of-court statement made for purposes of medical diagnosis of treatment and describes medical history, past or present symptoms, their inception, or their general cause. *See* TEX.R.EVID. 803(4). Paula's out-of-court statements to Authier, a licensed professional counselor, were made for the purpose of diagnosis or treatment, and they described Appellant's sexual abuse as one of the causes of her trauma. Thus, the trial court did not abuse its discretion by admitting the testimony under Rule 803(4). *See Taylor v. State*, 268 S.W.3d 571, 588 (Tex.Crim.App. 2008) (holding that licensed professional counselors qualify under rule 803(4) as medical professionals who may testify regarding out-of-court statements made for the purposes of medical diagnosis or treatment).

Even if Authier's testimony constituted backdoor hearsay, any error was harmless. Although the State relied more heavily on Authier's testimony in its closing arguments than the other witnesses' testimonies recounted above, the trial court received Paula's detailed, unobjected-to testimony on the details of Appellant's acts of sexual abuse. Because Paula's testimony about

the details of the sexual abuse tended to establish the same ultimate fact as Authier's testimony (i.e., that Appellant committed the sexual abuse), we are reasonably assured that any error in admitting his testimony did not influence the outcome of the trial or had but a slight effect. We therefore disregard any purported error. *See* TEX.R.APP.P. 44.2(b); *Taylor*, 268 at 593 (holding that the trial court's erroneous admission of hearsay evidence from a licensed professional counselor on what the child victim told him about the defendant's sexual abuse was harmless because the State introduced testimony from other witnesses tending to corroborate her allegations); *Anderson v. State*, 717 S.W.2d 622, 627 (Tex.Crim.App. 1986) (holding that any error in admitting hearsay testimony was harmless where "the fact to which the hearsay relate[d was] sufficiently proved by other competent and unobjected to evidence . . ."); *West*, 121 S.W.3d at 104-05 (holding that any error in admitting a mother's hearsay testimony about what a child victim told her over a sexual assault was harmless given the child victim's detailed, factually specific testimony on the assault).

Appellant's Issue Six is overruled.

III. CONCLUSION

The trial court's orders placing Appellant on deferred adjudication are affirmed.

JEFF ALLEY, Justice

March 31, 2022

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

(Do Not Publish)