COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DANIEL MIJARES,		§	No. 08-21-00195-CR
	Appellant,	§	Appeal from the
v.		§	109th Judicial District Court
THE STATE OF TEXAS,		§	of Andrews County, Texas
	Appellee.	§	(TC# 7940)

O P I N I O N

A jury convicted Appellant Daniel Mijares of aggravated sexual assault of a child and assessed a twenty-two year prison term as punishment. Appellant challenges his conviction in one issue, arguing that the trial court abused its discretion by designating the incorrect outcry witness under article 38.072 of the Texas Code of Criminal Procedure. We disagree and affirm the conviction.

I. BACKGROUND

A. The Crime Alleged and Appellant's Conviction

The victim, who we will simply identify as Child, was eight years old at the time of trial.[1]

[1] In order to protect the identities of the minor victim, we refer to her as "Child" and the child's mother as simply "Mother." *See* TEX.R.APP.P. 9.10 (providing for the redaction of sensitive information, including a minor's name, in a criminal proceeding).

Child lived in a house in Andrews, Texas with Appellant (her step-father), her mother, brother, and sister. Child recalled that one night, after her mother had left the house, Appellant told her "to go in the bed, [and] take off [her] clothes[.]" Then, according to Child, "he put his part, his private part, in my mouth and in my part." Child described her "private" as being "use[d] to use the restroom," and she similarly described Appellant's "private" part.

The State charged Appellant with: (1) one count of aggravated sexual assault of a child by penetrating Child's vagina; (2) one count of aggravated sexual assault of a child by penetrating Child's mouth; and (3) one count of indecency with a child. A jury acquitted Appellant of aggravated sexual assault by penetrating Child's vagina and indecency with a child, but found Appellant guilty of aggravated sexual assault by penetrating Child's mouth. The jury assessed a twenty-two year prison term as punishment.

B. Outcry Witness Hearing

At trial and outside the presence of the jury, the trial court held an outcry witness hearing under TEX.CODE CRIM.PROC.ANN. art. 38.072 to determine the identity of the proper outcry witness. The trial court received testimony from Mother and a forensic interviewer, Radhika Gafur. As we detail below, Child first disclosed the incident to Mother, and then later the same day to Gafur. At the conclusion of the hearing, the State argued that Gafur was the proper outcry witness under article 38.072 because Gafur was the first person to whom Child related the specific details of the time, place, and manner of the abuse. The State further argued that Mother was not the proper witness because Child did not tell her the specific details of Appellant's acts or the time the abuse occurred. Appellant objected to the designation of Gafur as the proper outcry witness, contending instead that Mother was the proper witness because Child told her sufficiently specific details of the oral penetration before the interview with Gafur.

The trial court found Mother's and Gafur's statements reliable and designated Gafur as the article 38.072 outcry witness. Child, Mother, and Gafur testified at trial.

II. DISCUSSION

In his sole issue, Appellant argues that the trial court abused its discretion by designating Gafur as the proper outcry witness under article 38.072, which resulted in the erroneous admission of Gafur's hearsay testimony. Appellant further argues that he suffered reversible harm from the admission of the testimony in the guilt-innocence phase of trial that requires a new trial.

A. 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 v. State*, 354 S.W.3d 476, 484 (Tex.Crim.App. 2011), *citing* TEX.R.EVID. 801(d). Hearsay is inadmissible unless it falls under an exception in Texas Rules of Evidence 803 or 804, or it is allowed by "other rules prescribed pursuant to statutory authority." *Id*., *citing* TEX.R.EVID. 802. One of the "other rules" is found in article 38.072 of the Texas Code of Criminal Procedure, which allows for the admission of certain out-of-court "outcry" statements. *Sanchez*, 354 S.W.3d at 484. Relevant here, that article applies to statements that: (1) describe the alleged offense; (2) were made by a child victim who is younger than 14 years old; and (3) the defendant is charged with certain enumerated offenses. TEX.CODE CRIM.PROC.ANN. art. 38.072, §§ 1, 2(a)(1)(A), 2(a)(2). Aggravated sexual assault of a child is one of those enumerated offenses. *Id*. 38.072 § 1(1). Further, article 38.072 specifically provides that the statement must be one made to the first person, 18 years old or older, other than the defendant, to whom the child made a statement about the offense. *Id*. 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*. 38.072, § 2(b)(2). In addition, the child must testify 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. *Calderon v. State*, No. 08-20-00139-CR, 2021 WL 5027754, at *3 (Tex.App.--El Paso Oct. 29, 2021, pet. ref'd) (not designated for publication).

We review a trial court's determination of whether an outcry statement is admissible under article 38.072 for an abuse of discretion. *Id., citing Garcia v. State*, 792 S.W.2d 88, 92 (Tex.Crim.App. 1990) (en banc). A trial court only abuses its discretion in admitting outcry testimony if its decision falls outside the zone of reasonable disagreement. *Id., citing Gonzales v. State*, 477 S.W.3d 475, 479 (Tex.App.--Fort Worth 2015, pet. ref'd).

B. Specificity

Article 38.072's specificity requirement has been construed to mean that an outcry statement must be "more than words which give a general allusion that something in the area of child abuse was going on." *Id., quoting Garcia*, 792 S.W.2d at 91; *see also* TEX.CODE CRIM.PROC.ANN. art. 38.072, § 2(a)(1)(A). Put another way, the specificity requirement is generally met when a victim sufficiently describes the "how, when, and where" of the abuse. *Calderon*, 2021 WL 5027754, at *3, *citing 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).

During the outcry witness hearing, Mother testified that she was driving with Child, the Child's siblings, and a friend from El Paso to Andrews. On the way, Child told her that on a day that Mother and Appellant had gotten into a fight, Appellant "made [her] … kiss it." Mother pulled the car over to the side of the road and asked Child to explain, and Child said, "Mommy, I told him 'no.' I told him I needed the bathroom, I needed the bathroom." Mother agreed that

Child told her that Appellant "put his thing in her private part" and that Appellant forced Child to take her clothes off and "kiss" his "private part." After the incident, Appellant let Child go to the bathroom and Child repeatedly brushed her teeth.

Child told Mother that the incident occurred "at night," and that Mother was not at the house when it happened, but otherwise did not give a date or time of the year. And Mother testified she did not learn about any of the details of the acts Child was speaking of:

> [State's Attorney]: Other than telling you that he told her to have him -- kiss his thing and put his private in her private, did she go into any detail about the actual acts themselves?
>
> [Mother]: No, not detail -- I don't remember, to be honest, after that.

Mother described herself as crying and "hysterical" during the roadside conversation, and at several junctures in the hearing admitted she did not remember exactly what was said. Child was scared during the conversation and told Mother that Appellant was "going to hurt mommy if she told mommy." Mother then transported Child to a police station, and from there, Child was taken to the rape crisis center where Gafur performed the forensic interview.

Gafur, a forensic interviewer at the Midland Rape Crisis and Children's Advocacy Center (CAC), testified during the same hearing that she interviewed Child. Gafur agreed that to her knowledge, she was the first person to whom Child recounted the sexual abuse "in serious detail." During the interview, Child informed Gafur that "her stepdad put his private part in … her private part and then put his private part in her mouth." The incident occurred in the master bedroom at her house in Andrews, which Child described in detail to Gafur. Child told Gafur that this happened "shortly after her birthday" when she turned six years old, which equated to June or July 2019. During the incident, Child was wearing a set of pink pajamas with a duck on it, which Appellant told her to take off, and Appellant was naked. Two separate occurrences of abuse

happened during the incident, the first of which took place on the bed, and the second on a mattress.

As to Appellant's act of vaginal penetration, Child told Gafur her "private" was what she "used… to pee," and described Appellant's "private" as his penis. Child recounted that "he tried to put it in all the way but only could put it halfway in." The allegation of oral penetration likewise occurred in the master bedroom, and Child recounted that "his private tasted like pee; and he … put his private part all the way in her mouth." Child felt "weird, gross, and uncomfortable," and she gave reasons for experiencing those emotions. During the interview, Child used a water bottle and drawings on a whiteboard to demonstrate how Appellant orally penetrated her. Gafur asked Child if she had told another person about the abuse, and Child related that she had told Mother about the abuse while they were driving from El Paso to Andrews. Gafur maintained that Child "told [Gafur] in more serious detail about what happened, in my interview, to me."

The record shows that Child first informed Mother about the general facts about the abuse, including that Appellant caused oral and vaginal penetration while he and Child were alone at their house in Andrews on a night that Appellant and Mother got into a fight. Yet Child did not tell Mother a particular date or time that the abuse occurred. Instead, the record establishes that Gafur was the first person to whom Child provided sufficient specificity about the particular details of the abuse, and especially the time when the abuse occurred. Child related to Gafur that the incident occurred "shortly after her birthday" in June or July when she was six years old. Child also elaborated on the nature of the oral penetration to Gafur, including that "[Appellant's] private tasted like pee; and he … put his private part all the way in her mouth."

Based on the testimony, we conclude that the trial court's ruling was not outside the zone of reasonable disagreement by concluding that Gafur's testimony, not Mother's, met the specificity requirement under article 38.072. *See Calderon*, 2021 WL 5027754, at *4 (finding that detective

was the proper outcry witness because victim told him the particular details of how, when, and where the abuse occurred, even though victim first told her therapist about the general existence of the abuse); *Rivera*, 2021 WL 3129261, at *4 (finding that victim's sister was the proper outcry witness because victim told her sister the "how, when, and where" of the abuse, even though victim first told her mother about the general existence of the abuse); *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) (finding that child's statement was specific enough to meet article 38.072's specificity requirements where child told mother that defendant put his penis in the child's mouth when she was six years old).

D. Reliability

Article 38.072 further requires that a trial court determine, "based on the time, content and circumstances of the statement, [whether] the outcry is reliable." *Waldrep*, 2019 WL 6888522, at *4, *quoting Sanchez*, 354 S.W.3d at 488; *see* TEX.CODE CRIM.PROC.ANN. art. 38.072, § 2(b)(2). We have described a non-exhaustive list of factors that a court may consider in determining whether an outcry statement is reliable, including:

> (1) whether the child victim testifies at trial and admits making the out-of-court statement, (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate, (3) whether other evidence corroborates the statement, (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults, (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty, (6) whether the statement is consistent with other evidence, (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate, (8) whether the child behaves abnormally after the contact, (9) whether the child has a motive to fabricate the statement, (10) whether the child expects punishment because of reporting the conduct, and (11) whether the accused had the opportunity to commit the offense.

Waldrep, 2019 WL 6888522, at *4-5, *quoting Gonzales*, 477 S.W.3d at 479. Although these factors are helpful, our focus must be on the key issue of whether the trial court properly found the

statement reliable, considering the "time, content and circumstances" under which it was made. *Id*. at *5; *see also Buentello v. State*, 512 S.W.3d 508, 518-19 (Tex.App.--Houston [1st Dist.] 2016, pet. ref'd).

Appellant advances no argument challenging the reliability of Child's outcry to Gafur. Even so, the record reflects that: (1) Child testified at trial and recalled making the outcry to Gafur; (2) Child shared to Gafur that she understood the difference between a truth and a lie when she gave an interview about the abuse; (3) Child's trial testimony corroborated her outcry in the critical details; (4) Child used her own terminology when describing the abuse to Gafur; (5) Child's outcry described the details of the abusive acts with clarity; (6) nothing in the record suggests that Child had a motive to fabricate the allegations; and (7) based on Child's testimony, Appellant had the opportunity to commit the offense while they were living in the house in Andrews.

Considering the above factors, we conclude that the trial court reasonably found Gafur's outcry testimony to be sufficiently reliable under article 38.072. Thus, the trial court did not abuse its discretion by designating Gafur as the proper outcry witness. *See Waldrep*, 2019 WL 6888522, at *5-6 (finding outcry witness's testimony sufficiently reliable where the victim related specific details of the abuse consistent with the victim's trial testimony, other evidence corroborated the victim's outcry, and there was no evidence that the outcry witness manipulated the victim into making a false statement).

E. Harm Analysis

Finally, even if we were to find that the trial court abused its discretion by admitting Gafur's outcry testimony at trial, any error would have been harmless. The erroneous admission of evidence, including outcry witness testimony, is considered a non-constitutional error. *Calderon*, 2021 WL 5027754, at *6; *Waldrep*, 2019 WL 6888522, at *6, *citing West v. State*, 121

S.W.3d 95, 104 (Tex.App.--Fort Worth 2003, pet. ref'd). Under TEX.R.APP.P. 44.2(b), we may only reverse a conviction based on non-constitutional error that affected Appellant's substantial rights. *Calderon*, 2021 WL 5027754, at *6. Non-constitutional error is harmless if, after reviewing the entire record, the court is reasonably assured the error did not influence the jury's verdict or had but a slight effect. *Id.* Moreover, if the same or similar evidence is admitted without objection at another point during the trial, the improper admission of the evidence will not constitute reversible error. *Id*.

Appellant argues that Gafur's testimony "contained far more details than [Mother's] testimony," and thus it was not so like Child's testimony as to render Gafur's testimony cumulative of Child's properly admitted testimony. Gafur's testimony before the jury did contain more particular details of the abuse than Child's testimony. These additional details included Child's recollection about her physical sensation of being orally penetrated and the Child's explanation that she participated in the act because she was scared that Appellant would hit Mother if she did not. Unlike Child, Gafur also described the physical positions that Appellant and Child were in when Appellant penetrated her, the duration of the incident, and the particular room in the house that the abuse occurred.

But Child's guilt-innocence testimony contained sufficient information to establish the elements of the offense, including: (1) her approximate age at the time; (2) specific statements that Appellant made that night; (3) specific actions that Appellant took in penetrating her mouth and vagina; (4) what she was wearing during the incident; (5) how she felt at the time; (6) why she did not try to stop Appellant; (7) what she recalled telling her Mother, Gafur, and a police officer about the incident; and (8) how the event affected her eating and schoolwork after the incident. Although Gafur's testimony contained some details about the incident not in Child's testimony,

the critical facts of when, how, and where the abuse occurred were contained within Child's testimony before the jury.

Moreover, the defense introduced Mother's written statement into evidence. This allowed the State to then have Mother read to the jury portions of the statement, including that Child was told to "kiss his thing"; that "he told [her] not to say anything"; and that Child brushed her teeth after the incident. The State also presented, without objection, a photograph of a whiteboard with Child's drawing from her interview with Gafur, which contained Child's handwritten statements. These statements are largely cumulative of some of Gafur's testimony that Child did not testify to, including Gafur's testimony that Child felt "weird," and that Appellant's penis tasted like "pee."

Although Gafur's testimony contained some details not presented elsewhere at trial, her testimony was largely corroborated through other properly admitted evidence, including Child's testimony. Thus, we are reasonably assured that any error in admitting the testimony would not have influenced the jury's verdict or would have had only a slight effect. *See Waldrep*, 2019 WL 6888522, at *6 (stating that any error in admitting outcry witness testimony would have been harmless because several other witnesses testified that victim had made similar outcries to them, and because victim provided factually specific testimony about the abuse).

Appellant's Issue One is overruled.

III. CONCLUSION

The trial court's judgment supporting Appellant's conviction is affirmed.

September 12, 2022

JEFF ALLEY, Justice

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

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