MODIFY and AFFIRM; and Opinion Filed May 4, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01396-CR

No. 05-14-01397-CR

JONATHON VILLANUEVA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1400304-T & F-1341450-T

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and Schenck
Opinion by Justice Fillmore

A jury found appellant Jonathon Villanueva (Jonathon)[1] guilty of two counts of aggravated sexual assault of a child under the age of fourteen. *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2015). The trial court assessed punishment of fourteen years' imprisonment in each case. In five issues, Jonathon asserts the trial court erred in admitting testimony of the complainant's therapist during the guilt–innocence phase of trial because it constituted inadmissible victim impact testimony and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, the trial court erred in admitting hearsay evidence during testimony of the therapist and the complainant's mother, and the

[1] In this opinion, we refer to the minor child complainant by her initials. Because appellant and two other witnesses have the same surname, we refer to appellant and those witnesses by their first names.

judgment in each case should be reformed to delete the imposition of a $500 fine. We modify the judgment in each case to delete the fine. As modified, we affirm the trial court's judgments.

Background

Complainant N.V. was ten years of age at the time of her trial testimony. N.V. testified that when she was nine, she lived with her mother Yessenia Villanueva (Yessenia) and her father and Yessenia's husband at the time, Jose Victor Villanueva (Jose). N.V. had not met Jonathon, Jose's son and N.V.'s stepbrother, before he came to live with them in the summer of 2013. N.V. grew to dislike Jonathon and she asked Yessenia and Jose to make Jonathon move out of the home. Yessenia agreed with N.V. and tried to get Jonathon to move out of their home, but Jose did not approve. N.V. indicated Jonathon lived in their home for at least a couple of weeks and perhaps as long as half of the summer.

Jonathon occupied the bedroom that had previously belonged to N.V. N.V. testified that when removing her clothes from that bedroom, Jonathon touched her over her clothes on her "private" body part. An outline drawing of a female was admitted into evidence on which N.V. wrote "privit" and circled the vaginal area to indicate her "private" body part. N.V. told Jonathon to "let me go." N.V. did not tell Yessenia and Jose about this incident the day it occurred because Jonathon indicated to her that if she told her parents, he would do more things to her which made her fearful. Sometime later, N.V. told Yessenia and Jose about this incident.

N.V. testified regarding another incident that occurred in a vehicle driven by Jonathon as they returned home from a Walmart store. N.V. did not want to go to the store with Jonathon, but Jose told her that if she did not go, he would tell Jonathon to do bad things to her. On the way home from the store, Jonathon took her to a "dark place," which N.V. described as a neighborhood with trees. When Jonathon parked the car on the side of a street, N.V. thought the car must have run out of gasoline and she told Jonathon they were not at "our house." Jonathon

unzipped N.V.'s jeans and pulled her jeans and underwear partially down. He then touched her "private" part with his hands on the outside "like in the middle" and placed the tip of his finger in her "private" part. Jonathon also stuck out his tongue and licked her "private" part by moving his tongue up and down. N.V. also testified she saw Jonathon's "private" part. It was nighttime, and Jonathon saw the lights of a house "flicking" on and off; he was scared and drove home. N.V. intended to tell Yessenia and Jose what Jonathon had done to her, but Jonathon told N.V., "Don't tell them or else I'll take you back again and I will do that and we'll stay there," which frightened N.V.

In addition, N.V. described an incident in which Jonathon carried her, moved her up and down, and "his 'private' part touched [her] butt," and an instance in which Jonathon took a photograph of her with his cellular phone that made her uncomfortable. According to N.V., Jonathon photographed her "butt" when she was clothed and laying on her stomach watching television. N.V. screamed when Jonathon took the photograph, and Yessenia said, "Something happened to N.V. I'm going to check." Because Yessenia had told N.V. that she should tell her mother "anytime something happens," N.V. felt safe telling Yessenia about the photograph, and N.V. showed Yessenia and Jose the photograph on Jonathon's phone. When N.V. showed her parents the photograph, Yessenia looked mad and Jose looked happy. N.V. testified that she also told her parents about Jonathon touching her in her "private" and about Jonathon's "private" part touching her "butt" on the occasion when he carried her. Yessenia talked to Jonathon after seeing the photograph, and N.V. testified Yessenia was "not talking nice to him."

After Yessenia talked to Jonathon, N.V. and Yessenia went to the police station. N.V. remembered having an interview with a woman named "Kim" about what had been happening to her, as well as having an examination by a doctor. After going to the police station, N.V. went to Child Protective Services and spoke with a therapist named Sylvia who has helped her.

N.V. testified that since Jonathon had been arrested, Jose looks at her in a strange way and had not been supportive of her. Jose had been visiting Jonathon in jail. Jose asked N.V. if she could get Jonathon out of jail and told N.V. to lie in court because he wanted Jonathon out of jail. N.V. told Jose she would not lie in court and that Jonathon "did those things to me."

Yessenia testified that she and Jose were divorced at the time of trial. According to Yessenia, her marriage to Jose was violent with constant arguing. In June 2013, Jonathon, who was twenty-three or twenty-four years of age, moved into the home of Yessenia, Jose, and N.V. It was Jose's idea for Jonathon to move in with them; Yessenia did not like the idea and did not agree to it. Jonathon lived with them for four or five months.

According to Yessenia, N.V. told her to be careful of Jonathon because he looked at N.V. in a "strange way." Yessenia asked N.V. what was going on, but N.V. did not tell her. Sometime later, N.V. showed Yessenia and Jose a photograph on Jonathon's cellular phone of N.V.'s "butt" from what appeared to be close range. In the photograph, N.V. was clothed and laying on her bed reading a book. Yessenia did not like the photograph; Jose laughed and said it was nothing. Yessenia told Jose to delete the photograph from Jonathon's phone; Jose took the phone to Jonathon and told him to delete the photograph, but Yessenia does not know if Jonathon did so.

N.V. then told Yessenia and Jose what Jonathon had done to her. N.V. was crying and asked Yessenia to tell Jose to make Jonathon leave their home. Yessenia talked to Jonathon, as did Jose. Yessenia decided to take N.V. to the police station and report Jonathon's conduct. Jose tried to talk her out of going to the police and said he would get an apartment for Jonathon in order to keep Jonathon out of their home. Nevertheless, Yessenia and N.V. went to the police station, and thereafter visited the Dallas Children's Advocacy Center (the DCAC). After

Jonathon was arrested, Jose learned Yessenia had gone to the police station, and he became very angry.

Yessenia testified that Jose told N.V. that he thought she was making up her allegations about Jonathon and that she "had a lot of fantasy in her mind." Jose told N.V. to "tell a little lie" when she went to court. N.V. asked Yessenia why Jose visited Jonathon in jail. N.V. told Yessenia that Jose does not believe her, is not protecting her, and the only thing that exists for Jose is his son and not his daughter. According to Yessenia, other members of Jose's family have spoken to N.V., and N.V. is frightened of Jose and his family.

Yessenia indicated that after the alleged sexual assaults, N.V.'s grades in school declined and she had to attend summer school for the first time. N.V. also required therapy and, according to Yessenia, Jose disagreed with providing N.V. therapy because they "were going to bring a lot of stuff into her mind."

Kimberly Skidmore, a forensic interviewer at the DCAC, testified she interviewed N.V. on September 6, 2013. N.V., who was nine years of age at the time of the interview, made an outcry about sexual abuse against her brother, Jonathon, who had moved into her home. Skidmore testified that during the interview, N.V. was able to provide verbal and nonverbal sensory details. Although she was not able to give a "good time frame," N.V. told Skidmore of a "scary" incident which occurred approximately ten days before the interview in which she and Jonathon had gone to a Walmart store at night. On their way home, they went to a "dark place." In the parked car, Jonathon took N.V.'s pants and underwear off and touched the inside of her "private" with his hand and licked her "private." N.V. described how Jonathon moved his mouth on her "private." N.V. stated she grabbed Jonathon's hand and moved it away and kicked him. N.V. also described another incident in which Jonathon took a photograph of her "butt" with his cellular phone when she was laying clothed on her stomach watching television. N.V. said she

showed the photograph to her parents and told them that they "don't know Jonathon." N.V. told Skidmore Jose did not believe what N.V. was telling him.

Detective JoLynne Lopez of the Sex Crimes and Crimes Against Children Division of the Mesquite Police Department testified that, after being assigned the case, she arranged a forensic interview of N.V. at the DCAC and observed that September 6, 2013 interview by closed-circuit monitor. According to Lopez, during that interview N.V. made an outcry of different types of sexual abuse by her half-brother, Jonathon, during a "rough" time frame of June and August 2013. Lopez's understanding was that Jonathon moved into Yessenia and Jose's home during the summer of 2013, approximately two months before the forensic interview.

Jonathon was arrested for aggravated sexual assault of a child. After Jonathon was arrested, Lopez made several attempts to contact Jose, but Jose was uncooperative. Lopez obtained a warrant for the search of Jonathon's cellular phone, but the phone was damaged and officers were unable to recover photographs from the phone. During the forensic interview, N.V. was able to describe the location of the alleged offenses occurring on the drive home with Jonathon from the Walmart store. Through her investigation, Lopez was able to determine a potential location of these alleged offenses. Lopez indicated on maps admitted into evidence the potential location that she described as dark and having a park in front of it and a wooded area behind it.

Sylvia Morris, a therapist at the DCAC, testified she began therapy sessions with N.V. in February 2014. N.V. had begun therapy at the DCAC in 2013 and had approximately thirteen therapy sessions with Melissa Dobbins, her prior therapist, during the period of October 2013 to February 2014. Before she began therapy sessions with N.V., Morris reviewed Dobbins's file. Based on those records, Morris planned to work on N.V.'s consistent fear of darkness and being alone. Morris also gleaned from Dobbins's records that Yessenia was supportive of N.V., but

that N.V. was confused about Jose because he acknowledged her accusations against Jonathon but asked her to lie and say nothing had happened. Before her first therapy session with N.V., Morris met with Yessenia. Yessenia advised Morris that N.V. was afraid to be alone and to sleep alone, was afraid of the dark, and was struggling in school and having difficult focusing.

Morris talked to N.V. about the alleged sexual abuse in their first therapy session. N.V. said Jonathon had touched her, licked her and "tried to sex [her]." N.V. expressed concern about Jose and did not understand why he acknowledged what had occurred but supported Jonathon and wanted N.V. to lie about it. In their therapy sessions, Morris worked with N.V. on her fear of darkness and being alone and her anger. Morris talked to N.V. about appearing in court for Jonathon's trial. Morris was not concerned about N.V.'s competency to testify at trial; Morris described N.V. as very bright and knowing the difference between "pretend" and "real." N.V. was vocal in therapy that she was going to tell the truth, despite being initially fearful of Jose.

Jose testified that Jonathon lived with him, Yessenia, and N.V. for about eight months. Yessenia told Jose she had called the police because Jonathon had tried to abuse N.V. That night, Jose talked to N.V.; N.V. was confused. Jose asked N.V. if what she was saying Jonathon had done was true, and N.V. looked to Yessenia. Yessenia grabbed N.V. by her arm and "took [N.V.] with her." The following day, Jose again asked N.V. if it was true, and N.V. said Yessenia made it all up and if she did not say what Yessenia told her to say, Child Protective Services would come and pick her up and send her to a place for children.

According to his testimony, when Jose met with the Prosecutor before trial, he told him that N.V. had recanted her allegations against Jonathon and that Yessenia had told N.V. what she was supposed to say with regard to the allegations against Jonathon. Jose testified he told the Prosecutor that Yessenia made up the allegations of sexual abuse of N.V. by Jonathon. Although he acknowledged he had not told the Prosecutor in their meeting, Jose testified that N.V. had

always told him that Jonathon never tried to harm her. Jose stated he never told N.V. to lie in court.

Jose testified the photograph on Jonathon's cellular phone shown to him and Yessenia by N.V. was a "normal photograph," depicting N.V. standing next to a sofa. He also testified there was another photograph in Jonathon's phone of N.V. "sitting down a little, leaning on the sofa."

Jonathon, twenty-four years of age at the time of trial, testified he lived with Jose, Yessenia, and N.V. from October 2012 until he was arrested in September 2013. Jonathon testified he never did anything "sexually" to N.V. He was never alone with N.V. at the home in the eleven months he stayed there, and N.V. never came into the bedroom he stayed in to gather her clothing. According to Jonathon, he never took a photograph of N.V. with his cellular phone at their home; N.V. and Yessenia lied about that. Jose did not tell Jonathon that he had seen a picture of N.V. on Jonathon's phone taken at their home. According to Jonathon, the only photographs he took of N.V. were during a vacation with Jose in Florida. Jonathon testified he had driven N.V. to a Walmart store, but he never stopped on the way home from Walmart.

Jonathon testified that the first he heard of N.V. accusing him of "sexual things" was the day he was arrested. Jonathon told the detective that he did not sexually assault N.V., and he had since told Jose many times that he did not sexually assault N.V. When Jose visited Jonathon in jail, Jose told him that Yessenia made up the accusations against Jonathon. Jonathon testified the idea would have come from Yessenia, who has a great deal of influence over N.V. Jonathon testified Yessenia made up a similar claim against him in 2005, although no one had ever told the Prosecutor prior to Jonathon's testimony that Yessenia had purportedly fabricated a similar accusation against Jonathon in the past.

A jury found Jonathon guilty of aggravated sexual assault of a child under the age of fourteen in Case Number F-1341450-T (knowingly or intentionally causing the penetration of

N.V.'s sexual organ with his finger) and in Case Number F-1400304-T (causing the contact of N.V.'s sexual organ with his mouth). The jury assessed punishment of fifteen years' imprisonment and a $500 fine in each case. The trial court granted Jonathon's motions for new trials on punishment only. Pursuant to a plea agreement, the trial court assessed punishment of fourteen years' imprisonment and no fine in each case. Jonathon filed these appeals of his convictions.

Standard of Review

Most of the points of error in this appeal involve admission of evidence at trial. We generally review the trial court's admission of evidence under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). As long as the trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion. *Id*. To preserve error in admitting evidence, a party must make a timely and proper objection and obtain a ruling. TEX. R. EVID. 103(a)(1); TEX. R. APP. P. 33.1(a). The party must object each time the inadmissible evidence is offered or obtain a running objection. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004); *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). "[E]rroneously admitting evidence 'will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.'" *Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010) (quoting *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998)); *see also Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (noting any error was harmless in light of "very similar" evidence admitted without objection). Thus, error in the admission of evidence may be rendered harmless when substantially the same evidence is admitted elsewhere without objection. *See Leday*, 983 S.W.2d at 717–18.

One of the points of error in this appeal involves reformation of the trial court's judgment. Where the record provides the necessary information to correct an inaccuracy in the

trial court's judgment, an appellate court has the authority to reform the judgment. TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd).

Therapist's "Victim Impact" Testimony During Guilt–Innocence Phase of Trial

In his first point of error, Jonathon asserts the trial court erred in admitting Morris's testimony during the guilt–innocence phase of trial. According to Jonathon, the therapist's testimony was inadmissible victim-impact testimony because it was evidence "merely probative" of N.V.'s psychological harm and not evidence probative of the injury that caused the harm. Jonathon asserts that, even if relevant, the probative value of the evidence pertaining to N.V.'s therapy was substantially outweighed by the danger of unfair prejudice.

"Outside of the context of homicide cases, victim-impact evidence is generally defined as evidence regarding 'the physical or psychological effect of the crime on the victims themselves.'" *Martin v. State*, 176 S.W.3d 887, 903 (Tex. App.—Fort Worth 2005, no pet) (quoting *Lane v. State*, 822 S.W.2d 35, 41 (Tex. Crim. App. 1991)). While victim-impact testimony is generally irrelevant at the guilt–innocence phase of trial because it does not tend to make more or less probable the existence of any fact of consequence at that stage, *Longoria v. State*, 148 S.W.3d 657, 659 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd), such testimony can be admissible as a "circumstance of the offense." *Id*. Victim impact testimony is admissible if it "would have a tendency to make more or less probable a fact of consequence at the guilt stage; that is, whether appellant committed the crimes at all." *Id*. at 660.

N.V. had been in therapy since October 2013 following Jonathon's arrest in September 2013. After the trial court overruled defense counsel's objection that Morris's "therapy testimony is immaterial, irrelevant and inflammatory at the guilt/innocence stage, and it's only prejudicial to the accused," Morris testified regarding N.V.'s fear of darkness and being alone, anger, and confusion arising from the assaults and Jose's insistence that she lie and say nothing

had happened. Morris also testified regarding her discussion with Yessenia, in which Yessenia stated N.V. was struggling in school and having difficulty focusing.

On this record, the trial court could have concluded that N.V.'s fear, anger, confusion, struggling in school, and difficulty focusing after the alleged offenses tended to support the assertions the sexual assaults occurred, a disputed fact of consequence to the guilt or innocence determination because Jonathon denied he sexually assaulted N.V. and asserted she fabricated the allegations against him. *See Gonzalez v. State*, 455 S.W.3d 198, 203–04 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (psychotherapist's records admissible at guilt–innocence stage of trial where parties disagreed about cause of complainant's trauma and records tended to show complaint was traumatized and that sexual assault and not maternal abuse caused the trauma; records did not concern complainant's future suffering, but rather documented present harm caused by sexual assault); *Yatalese v. State*, 991 S.W.2d 509, 511 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (where defendant denied assault occurred, trial court did not abuse its discretion by admitting evidence that child-complainant's behavior changed drastically after alleged assault because this evidence tended to support assertion that assault occurred, a disputed fact of consequence to guilt–innocence determination; "A change for the worse in the complainant's behavior after the offense is consistent with a traumatic event having befallen her."); *see also Warren v. State*, 236 S.W.3d 844, 847 (Tex. App.—Texarkana 2007, no pet.) (explaining that if it is contested that offense of sexual assault occurred, then subsequent adverse reaction of victim to occurrence is relevant to show fact of occurrence). While Jonathon argues that Morris's testimony regarding the subjects she addressed with N.V. in therapy were not connected to the alleged assaults, his argument ignores Yessenia's testimony that after the alleged assaults, N.V.'s grades in school declined, N.V. had to attend summer school for the first time, and N.V. required therapy. Morris's complained-of testimony was admissible to show that

the assaults had in fact occurred and rebutted Jonathon's defensive theory that Yessenia fabricated the allegations. *See* TEX. R. EVID. 401; *see also Longoria,* 148 S.W.3d at 660.

Relevant evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403. Rule of evidence 403 "favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Hayes v. State,* 85 S.W.3d 809, 815 (Tex. Crim. App. 2002). "Unfair prejudice" does not arise from the mere fact that the evidence injures a party's case, because virtually all evidence that a party offers will be prejudicial to the opponent's case. *Casey v. State*, 215 S.W.3d 870, 883 (Tex. Crim. App. 2007). Evidence is "unfairly prejudicial" only when it tends to have some adverse effect on a defendant beyond tending to prove the fact or issue that justifies its admission into evidence. *Id.*

When the admissibility of evidence is challenged under rule of evidence 403, a trial court must perform a balancing test to determine if the probative value of the evidence is substantially outweighed by its prejudicial effect. TEX. R. EVID. 403. In conducting a rule 403 analysis, a trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State,* 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006) (identifying six factors to be balanced under rule 403 but recognizing "these factors may well blend together in practice"); *see also Hernandez v. State,* 390 S.W.3d 310, 324 (Tex. Crim. App. 2012). We should reverse the trial court's balancing determination "rarely and only after a

clear abuse of discretion." *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999) (quoting *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990)).

The first two *Gigliobianco* factors involve the probative value of the evidence—how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation coupled with the proponent's need for that item of evidence. *Gigliobianco*, 210 S.W.3d at 641. In this case, the inherent probative force of Morris's testimony was substantial; Morris's testimony tended to make more probable the existence of a fact of consequence—that the assaults occurred—and rebutted Jonathon's defensive theory that the allegations were fabricated. Further, the State's need for the evidence was substantial precisely because Jonathon denied the offenses occurred and contended the allegations were fabricated. Morris's testimony was clear regarding N.V.'s account of what Jonathon had done to her, thus Morris's testimony would assist the jury in determining whether N.V.'s testimony regarding what Jonathon had done to her was credible, particularly in light of Jonathon's denial of the accusations and his defensive theory that the allegations had been fabricated. *See Wheeler v. State*, 67 S.W.3d 879, 889 (Tex. Crim. App. 2002). These factors weigh in favor of admission of the evidence.

As to the third factor, there is nothing in the record to indicate admission of the evidence would be so inherently inflammatory that it would tend to elicit an emotional response and impress a jury in some "irrational and indelible way," *id.*, or "lure the factfinder into declaring guilt on a ground different from proof specific to the offense[s] charged" of sexual assaults of a child. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997). This factor weighs in favor of admission of the evidence.

The fourth and sixth factors concern the tendency of the evidence to confuse or distract the jury from the main issues and the amount of time consumed by the presentation of the evidence. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997) (factors look to

the "time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense") (citing *Montgomery*, 810 S.W.2d at 389–90). We have already concluded the evidence was probative of a fact of consequence—whether the alleged complaints of sexual assault actually occurred. In light of the probative nature of the evidence, there is a low probability the evidence would confuse or distract the jury from the main issues in the case. Further, the State needed relatively little time to develop the testimony. Of the testimony elicited over an entire day of trial, Morris's testimony consists of fourteen pages in the trial transcript. These factors weigh in favor of admission of the evidence.

Finally, the fifth factor concerns a "tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds. For example, 'scientific' evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence." *Gigliobianco*, 210 S.W.3d at 641 (internal citation omitted). The evidence at issue here was not prone to this tendency, as it pertained to matters that could easily be understood by a jury. This factor weighs in favor of admission of the evidence.

The rule 403 factors weigh in favor of admission of Morris's testimony. *See id*. at 641–42. We cannot conclude the trial court erred by determining the probative value of the evidence was not substantially outweighed by any risk of unfair prejudice in admitting the evidence. *See De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009) (as long as trial court's ruling is within the zone of reasonable disagreement, there is no abuse of discretion) (quoting *Montgomery*, 810 S.W.2d at 391). Accordingly, we conclude the trial court's admission of Morris's testimony at the guilt–innocence stage of trial was within the zone of reasonable disagreement and therefore did not constitute an abuse of discretion. *See Tillman*, 354 S.W.3d at 435. We resolve Jonathon's first point of error against him.

Hearsay Evidence During Therapist's Testimony

In his second point of error, Jonathon asserts the trial court erred in admitting hearsay evidence during Morris's testimony. Jonathon contends Morris's testimony concerning the content of records of N.V.'s prior therapist and the substance of statements made by N.V. and Yessenia to Morris constituted inadmissible hearsay. "Hearsay" is an out-of-court statement that is offered in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). Hearsay is inadmissible except where allowed by statute or rule. TEX. R. EVID. 802.

Jonathon complains about the following testimony of Morris concerning the records of N.V.'s prior therapist, Melissa Dobbins:

> [Prosecutor]: Before you got with [N.V.], did you review [Dobbins]'s file?
>
> [Witness]: Yes.
>
> [Prosecutor]: What were some of the issues that you were looking at treating [N.V.] for?
>
> [Witness]: Consistent things of fear, fear of being alone, fear of the dark, just a lot of separation – just very fearful to be alone.
>
> [Prosecutor]: What about were there any issues with family members as well?
>
> [Witness]: She had a supportive mother. Her father – it was very confusing for [N.V.], because her father would ask her to lie and say nothing happened.
>
> [Defense Counsel]: Objection. Objection, hearsay, Judge. It's hearsay, Your Honor.
>
> The Court: Overruled.
>
> [Witness]: It was very confusing for [N.V.] because she loves her mother, she loves her father, but she just got confusing messages from her father, acknowledging something happened but asking her to say nothing happened.
>
> [Prosecutor]: And these were issues that took place that you saw the therapy records from October to February; correct?
>
> [Witness]: Correct.

On appeal, Jonathon argues the trial court erred by admitting Morris's above-quoted testimony concerning information in Dobbins's records because it is hearsay. Jonathon argues the medical diagnosis exception to the rule against hearsay does not apply because the record does not establish that telling the truth was a vital component of the particular course of therapy or treatment involved and N.V. understood that vital component. Rule of evidence 803(4) provides an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." TEX. R. EVID. 803(4). This exception to the hearsay rule is based on the assumption that the patient appreciates that the effectiveness of the treatment may depend on the accuracy of the information provided to the medical personnel involved. *Fleming v. State*, 819 S.W.2d 237, 247 (Tex. App.—Austin 1991, pet. ref'd).

We need not determine whether the trial court erred in admitting Morris's testimony that, based on a review of Dobbins's records, she intended to treat N.V. for fear of darkness and being alone, because Jonathon did not make a timely objection at trial to that testimony. He raised an objection to the following question and answer relating to Jose asking N.V. to lie about the alleged assaults, but that did not preserve error with respect to the prior question. To preserve his complaint for appellate review, the record must show that Jonathon made an objection each time the allegedly objectionable evidence was introduced. *See* TEX. R. APP. P. 33.1(a); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015) (purpose for requiring timely, specific objection is to inform trial judge of basis of objection and affording him an opportunity to rule on it and affording opposing counsel an opportunity to respond to the complaint); *Scaggs v. State*, 18 S.W.3d 277, 291 (Tex. App.—Austin 2000, pet. ref'd) (to preserve error for appellate review, counsel must object every time allegedly inadmissible testimony is offered). Without an

objection to the question about Morris's intended treatment of N.V. based on review of Dobbins's records, Jonathon waived his complaint regarding the answer to that question. Further, Morris testified without objection later in the trial that she treated N.V. concerning her fear of darkness and being alone. It is well-established that "erroneously admitting evidence 'will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.'" *Coble*, 330 S.W.3d at 282 (quoting *Leday*, 983 S.W.2d at 718); *see also Valle*, 109 S.W.3d at 509 ("An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection."). Therefore, error, if any, in admitting Morris's testimony that Dobbins's records supported treatment of N.V. for her fear of darkness and being alone will not result in reversal because the same or substantially similar evidence was admitted elsewhere during trial without objection.

We also need not determine whether the trial court erred in admitting Morris's testimony about a reference in Dobbins's records to Jose asking N.V. to lie about the alleged assaults. In unobjected-to testimony prior to Morris's testimony, N.V. testified Jose supported Jonathon and had not been supportive of her, and Jose told her to lie about the assaults because he wanted Jonathon to get out of jail. To preserve his complaint for appellate review, the record must show that Jonathon made an objection each time the allegedly objectionable evidence was introduced. *See* TEX. R. APP. P. 33.1(a); *Douds*, 472 S.W.3d at 674; *Scaggs*, 18 S.W.3d 277 at 291. Therefore, error, if any, in admitting Morris's testimony about a reference in Dobbins's records to Jose asking N.V. to lie about the alleged assaults will not result in reversal because the same or substantially similar evidence was admitted elsewhere during trial without objection. *Coble*, 330 S.W.3d at 282; *Valle*, 109 S.W.3d at 509.

Jonathon also complains that Morris's testimony concerning Yessenia's statements to her was inadmissible hearsay because the medical diagnosis exception to the rule against hearsay

does not apply. *See* TEX. R. EVID. 803(4). With regard to this complaint, Jonathon relies on the following testimony:

> [Prosecutor]: So when you met with [Yessenia], what were some of the issues that needed to be addressed?
>
> [Witness]: She also shared–I heard from [N.V.] but I also heard separately from –
>
> [Defense Counsel]: Can we have an objection, a running objection on all the hearsay, Your Honor?
>
> The Court: On all hearsay?
>
> [Defense Counsel]: Yes.
>
> The Court: You'll have to do it individually.
>
> [Defense Counsel]: Okay. Objection again, hearsay, but I'll have –
>
> The Court: Overruled.
>
> [Defense Counsel]: – keep coming up every question.
>
> [Witness]: Okay. In the parent consult [Yessenia] shared [N.V.] was afraid to sleep by herself. [N.V.] was afraid of the dark. [N.V.] was afraid to be alone.
>
> [Prosecutor]: What about issues with her school?
>
> [Witness]: [N.V.] was struggling more with school. She was having difficulty focusing.

We need not determine whether the trial court erred in admitting the purportedly inadmissible hearsay statements that there had been a decline in N.V.'s school grades since the alleged assaults and that N.V. was afraid of darkness and being alone. In unobjected-to testimony prior to Morris's testimony, Yessenia testified that after the alleged assaults, N.V.'s grades in school declined and she had to attend summer classes for the first time. Further, Morris testified without objection that in therapy sessions, she worked with N.V. on her anger and fear of darkness and being alone. Therefore, error, if any, in admitting Morris's testimony that Yessenia told her of the decline in N.V.'s school grades and N.V.'s fear of darkness and

being alone will not result in reversal because the same or substantially similar evidence was admitted elsewhere during trial without objection. *Coble*, 330 S.W.3d at 282; *Valle*, 109 S.W.3d at 509.

In this point of error, Jonathon also complains of admission into evidence of the purportedly inadmissible hearsay statements N.V. made to Morris and contends the medical diagnosis exception to the rule against hearsay does not apply. *See* TEX. R. EVID. 803(4). Jonathon cites the following testimony of Morris concerning this complaint:

> [Prosecutor]: Did [N.V.] talk to you about specifically the abuse during the first session?
>
> [Defense Counsel]: Judge, objection. Any response would be hearsay and also bolstering. It's not an outcry witness, Your Honor.
>
> The Court: Overruled.
>
> [Witness]: She was clear about things that Jonathon had done to her.
>
> [Prosecutor]: Like what?
>
> [Witness]: If I – my best recollection, she said things such as, "He tried to sex me."
>
> [Defense Counsel]: Objection. Hearsay, Your Honor.
>
> The Court: Overruled.
>
> [Prosecutor]: You may continue.
>
> [Defense Counsel]: May I have a running objection so as not to be up and down continually?
>
> The Court: Yes.
>
> [Defense Counsel]: Thank you, Judge.
>
> [Witness]: That he licked her, touched her and "tried to sex me."
>
> [Prosecutor]: What about was there any concern – did [N.V.] express any concern about her father?

> [Witness]: Yes, there were various things. Again, she loved her father. She didn't understand why he acknowledged what happened but then supported Jonathon and wanted her to lie. It was just very confusing.

Here, again, we need not determine whether the trial court erred in admitting Morris's testimony that N.V. described to her the nature of the alleged assaults and stated Jose asked her to lie about the alleged assaults. Without objection, N.V. testified Jose supported Jonathon and had not been supportive of her, and Jose told her to lie in court because he wanted Jonathon to get out of jail. Further, in unobjected-to testimony prior to Morris's testimony, N.V. testified concerning what Jonathon had done to her, including touching her "private" part with his hands, placing his finger in her "private" part, and licking her "private" part by moving his tongue up and down. Therefore, error, if any, in admitting Morris's testimony that N.V. described to her the nature of the alleged assaults and stated Jose asked her to lie about the alleged assaults will not result in reversal because the same or substantially similar evidence was admitted elsewhere during trial without objection. *Coble*, 330 S.W.3d at 282; *Valle*, 109 S.W.3d at 509.

We resolve Jonathon's second point of error against him.

Hearsay Evidence During Yessenia's Testimony

In his third point of error, Jonathon asserts the trial court erred in admitting certain testimony of Yessenia concerning hearsay statements made by Jose. Specifically, Jonathon complains on appeal of the following portion of Yessenia's testimony:

> [Prosecutor]: What things would Jose say to [N.V.] about this case?
>
> [Defense Counsel]: We'll have to object to hearsay, Judge.
>
> The Court: Sustained.
>
> [Prosecutor]: Your Honor, it goes to state of mind of the witness and [N.V.]. It's not for the truth of the matter asserted, but goes to their state of mind.
>
> The Court: Overrule the objection.
>
> [Prosecutor]: You can answer the question.

> [Witness]: He told her that what Jonathon was doing to her was not true and that she was making up things, that she had a lot of fantasy in her mind.

An exception to the hearsay rule exists for statements regarding a declarant's then-existing state of mind, emotion, sensation, or physical condition. *See* TEX. R. EVID. 803(3). Rule of evidence 803(3) provides that the following is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

TEX. R. EVID. 803(3).

Jonathon argues that Yossenia's testimony concerning Jose's statements is not admissible under the rule of evidence 803(3) state-of-mind exception to the hearsay rule because the exception does not permit use of a declarant's statement to show state of mind of someone other than the declarant. We need not determine whether Yessenia's testimony was admissible as an exception to the hearsay rule under rule of evidence 803(3). After Yessenia's testimony, Skidmore testified without objection that N.V. conveyed to her Jose's statement he did not believe N.V.'s accusations of assault by Jonathon. To preserve his complaint for appellate review, the record must show that Jonathon made a timely objection each time objectionable evidence was introduced. *See* TEX. R. APP. P. 33.1(a); *Douds*, 472 S.W.3d at 674; *Scaggs*, 18 S.W.3d at 291. Therefore, error, if any, in admitting Yessenia's testimony that Jose told N.V. she was fabricating accusations against Jonathon will not result in reversal because the same or substantially similar evidence was admitted elsewhere during trial without objection. *Coble*, 330 S.W.3d at 282; *Valle*, 109 S.W.3d at 509.

On appeal, Jonathon also contends the following testimony of Yessenia was objectionable:

[Prosecutor]: Did Jose talk to [N.V.] about the court case, coming to court?

[Witness]: Yes.

[Prosecutor]: And what did he say in regards to coming to court?

[Witness]: He told [N.V.] that when she comes to court, to tell a little lie.

Jonathon did not object at trial to this testimony. To preserve his complaint for appellate review, the record must show that Jonathon made an objection each time the allegedly objectionable evidence was introduced. *See* TEX. R. APP. P. 33.1(a); *Douds*, 472 S.W.3d at 674; *Scaggs*, 18 S.W.3d at 291. Without an objection to the question about what Jose told N.V. concerning "coming to court," Jonathon waived his complaint regarding the answer to that question. Further, prior to Yessenia's testimony, N.V. testified without objection that Jose told her to lie in court about the alleged assaults. Therefore, error, if any, in admitting Yessenia's testimony will not result in reversal because the same or substantially similar evidence was admitted elsewhere during trial without objection. *Coble*, 330 S.W.3d at 282; *Valle*, 109 S.W.3d at 509.

We resolve Jonathon's third point of error against him.

Reformation of the Judgments

In his fourth and fifth points of error, Jonathon asserts the judgments should be modified to delete a $500 fine in Case Number F-1341450-T and Case Number F-1400304-T. The State agrees the judgments should be so modified.

The jury originally assessed punishments of fifteen years' imprisonment and a $500 fine in Case Numbers F-1341450-T and F-1400304-T. The trial court granted Jonathon's motions for new trials on punishment only. Pursuant to an agreement, the trial court assessed punishments of

fourteen years' imprisonment with no fine in each of the cases. However, the judgments in the cases each reflect a fine of $500 was assessed.

Where, as here, the record provides the necessary information to correct inaccuracies in the trial court's judgments, we have the authority to reform the judgments to speak the truth. *See* TEX. R. APP. P. 43.2(b); *Asberry*, 813 S.W.2d at 529–30. Our review of the record confirms that no fine was assessed by the trial court as punishment in Case Number F-1341450-T or Case Number F-1400304-T.

We resolve Jonathon's fourth and fifth points of error in his favor. Accordingly, we modify the judgments in Case Numbers F-1341450-T and F-1400304-T to reflect that no fine was assessed.

Conclusion

The judgments in Case Number F-1341450-T and F-1400304-T are modified to delete the $500 fine. As modified, the judgments are affirmed.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JONATHON VILLANUEVA, Appellant

No. 05-14-01396-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas,
Trial Court Cause No. F-1400304-T.
Opinion delivered by Justice Fillmore,
Justices Stoddart and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to delete the $500 fine.

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 4th day of May, 2016.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JONATHON VILLANUEVA, Appellant

No. 05-14-01397-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas,
Trial Court Cause No. F-1341450-T.
Opinion delivered by Justice Fillmore,
Justices Stoddart and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to delete the $500 fine.

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 4th day of May, 2016.