AFFIRMED; Opinion Filed November 16, 2017.

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-16-00685-CR

UBALDO ZAPUCHE-LANDAVERDE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court

Collin County, Texas

Trial Court Cause No. 380-82911-2014

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill

Opinion by Justice Myers

A jury convicted appellant Ubaldo Zapuche-Landaverde of continuous sexual abuse of a child under the age of 14, two counts of indecency with a child by contact, and one count of indecency with a child by exposure, and assessed punishment of 35 years' confinement on the continuous sexual abuse offense, 15 years' confinement on each of the indecency by contact offenses, and 10 years on the indecency by exposure offense. In two issues, appellant contends there was insufficient evidence for a jury to convict him of the offenses and that certain testimony should have been disallowed because it only served to bolster the State's case. We affirm.

BACKGROUND

The victim in this case, V.B., seventeen years old at the time of trial, testified that she was sexually abused on multiple occasions by appellant, her stepfather. The first instance of

abuse described by V.B. occurred at her home in Celina, Collin County, Texas, when she was about 12 years old. V.B. was playing with her youngest brother in her parents' bedroom. Appellant put her on her brother's toddler bed, started touching her breasts, and removed her clothes. She told appellant not to touch her, but he refused to stop and eventually penetrated her vagina with his penis.

Her mother walked in the room during the assault. Appellant sat beside V.B. and, as she recalled, "that's when his sperm was coming out." V.B. said her mother "saw everything." She slapped V.B. and told her the assault was her fault, accusing her of flirting with appellant. V.B.'s mother took her to the bathroom and tried to "check on [her]." V.B. also testified that, when appellant was sexually abusing her, she noticed she was bleeding. V.B., who had been a virgin, testified she knew nothing about sex at that point, "didn't know what was going on," and that her mother did not see the blood.

The next day, appellant again sexually assaulted V.B. in her parents' bedroom. Asked how often this happened, V.B. testified that it "would happen once a day, or when my mom would go to work." Appellant would usually pretend to leave for work, wait until V.B.'s mother left the house, and then return and assault her. V.B. would tell appellant to stop and threatened to tell her mother, but appellant said her mother would not believe her.

Appellant was a plumber and sometimes took V.B. with him to job locations. V.B. testified that appellant assaulted her at various job sites—vacant houses under construction—in Frisco, Celina, McKinney, and Prosper. This usually occurred on weekends when V.B. was not in school. Appellant would lay her on the floor or force her to bend over and put her hands on the stairs, and would penetrate her vagina with his penis. Appellant also put his mouth on her breasts and vagina during these assaults.

On one occasion, during a shopping trip to Walmart, appellant took V.B.'s little brother

to the restroom, and then he texted V.B. in Spanish to join him there to have sex. V.B. refused and, at appellant's insistence, deleted the text message. This occurred when V.B. was 12 or 13 years old, according to her testimony.

V.B. frequently told appellant to stop the abuse and he would promise, "I will stop. I will stop." The abuse, however, continued. Appellant gave her money, sometimes $20 or $30, "to go shopping," which V.B. regarded as "dirty money." He also told her she was prettier than her mother. Appellant asked V.B. for oral sex, but she refused. She would cover her mouth with her hands to prevent him from kissing her.

After V.B.'s 2014 quinceanera, the celebration of her fifteenth birthday, appellant assaulted her at the Celina ranch of Lyle and Nina Wise, who employed appellant on odd jobs and, over the years, became friends with him and his family. Appellant took V.B. to the ranch to pick up her birthday gift from the Wises, then appellant took V.B. to a storage room on the property and assaulted her. V.B. recalled that the room had "old stuff" like couches and chairs in it. She testified that appellant grabbed her and bent her over a chair, pulled down her shorts and underwear, stood behind her, and penetrated her vagina with his penis. He also groped her breasts. After ejaculating, appellant wiped his penis with toilet paper or a napkin.

Following her fifteenth birthday, V.B. began a friendship with Victor Garcia, who was then 20 years of age. She met him in 2014 through his younger brother, and appellant had helped Victor get a job; the two worked together. V.B. and Victor spent time together when he came to appellant's house, and they communicated through social media. That summer, Victor and V.B.'s relationship briefly turned romantic and the two had sexual intercourse on one occasion. When their romance ended, the two remained friends.

The last assault by appellant occurred at home after V.B.'s uncle was hospitalized for injuries he sustained in an automobile accident. When the family heard about the accident,

V.B.'s mother went to the hospital, leaving V.B. at home alone with appellant and her two younger brothers. While V.B.'s mother was out of the house, appellant chased V.B. around the house because she would not allow him to touch her. V.B. testified that she made telephone calls to her mother or Victor's mother to "make something up" so that appellant could stop touching her, but he did not leave her alone.

V.B. testified that appellant just touched her "parts" that day. At night, however, V.B.'s mother came home and, before leaving again, told V.B. to lock her bedroom door. V.B. did as her mother instructed. But appellant had a key to her room and he entered, undressed V.B., touched her breasts with his hands and mouth, and penetrated her vagina with his penis and put his mouth on her vagina. After assaulting V.B., appellant left to join his wife at the hospital.

V.B. eventually told Victor and his mother, Silvia, about the abuse. She also told them that she feared she was pregnant and texted Victor a photo of her enlarged abdomen. Victor testified that he and V.B. had sex only once and he had worn a condom. He doubted he had fathered a child. Silvia went to appellant's house to discuss V.B.'s allegations about the abuse and the pregnancy. Appellant told Silvia V.B. was perhaps "making [it] up," and Silvia left.

Appellant called V.B.'s mother and told her about the pregnancy, and V.B. was with her mother when this call took place. She confronted V.B., who said she was no longer pregnant. V.B.'s mother made her take a pregnancy test when they got home, which confirmed V.B. was not pregnant. V.B. testified that she terminated the pregnancy by "taking some pills" she obtained from a pharmacist without a prescription. V.B. could not recall what kind of pills she took or where and how, exactly, she obtained them, testifying that she convinced the pharmacist to give her the pills.

Later that same day, Silvia returned to appellant's house along with Victor and several other family members. The two families argued and shouted at each other. Appellant punched

Victor in the face and threatened to kill him. V.B. was running around the house crying. She was upset because her family was threatening to report Victor to the police and she wanted to leave with Victor and Silvia. Victor and Silvia did not yet know V.B. was not pregnant. The two families separated and, worried appellant would make good on his threat to kill Victor if he ever saw him again, Silvia sent Victor to Mesquite. V.B.'s mother threatened to report Victor to the police and V.B. threatened, in turn, to report appellant's abuse.

Fearing for V.B.'s safety, Victor called the police and reported that appellant was sexually abusing V.B. When Victor first contacted the police, he did not tell them about his sexual relationship with V.B.—he told them they were just friends. But he called the police again a few days later and, during this second conversation, Victor admitted he had a sexual relationship with V.B. Victor said this second call was after V.B.'s mother told Silvia she had reported Victor to the police. Victor was not arrested or charged with a crime. The case against him was referred to the grand jury, which did not indict him.

The same day Victor called the police, on September 10, 2014, Deputy Bruce Ferguson of the Collin County Sheriff's Department went to V.B.'s school and interviewed her. During the interview, she said that she had sex with both Victor and appellant. Ferguson contacted an investigator at the Child Advocacy Center (CAC) and called Child Protective Services (CPS). CPS designated V.B.'s case as a "high priority" and immediately assigned an investigator, Karen Sutherland, who went to the school to interview V.B. Based on that interview, CPS concluded there was possible abuse or neglect and took V.B. to the CAC.

V.B. was also taken to the hospital for a sexual assault exam. V.B. told the sexual assault nurse examiner, Judith Ann Common, that appellant "asked me to go to [the] house where [he] works, he said to get on your knees, and he put his penis in my vagina and put my pants up and we went home." She also told Common that appellant "has been putting his penis in my vagina

since I was nine years old . . . ." Common found no physical trauma during the exam, and no DNA was recovered from the evidence collected from V.B. The nurse examiner testified it was uncommon to find such evidence during a sexual assault examination. Common's written report was also admitted into evidence.

Eligio or "Eli" Molina, a forensic interviewer at the CAC, conducted V.B.'s interview. Molina testified that the center conducts a "blind interview," which means the interviewer is unaware of the specific allegations when he begins the interview—just the child's name, age, and the type of abuse. Molina asked non-leading and open-ended questions and looked for "red flags," such as inconsistencies in the child's account; a lack of general or sensory details; indications someone "coached" the child or told her what to say; and gestures, facial expressions, and body language. According to Molina, V.B. gave him both general and sensory details that were consistent with the type of abuse she was discussing. She used her hands and whole body to describe certain events, did not recant any allegations, and was able to describe in detail sexual encounters with more than one individual and articulate differences between the sexual encounters. Molina recalled that there were instances where V.B. appeared embarrassed or was nervous about what would happen to her.

Molina testified that time or chronological order is difficult for children because time is an abstract concept to them and they are "not really specific on dates, times, and things like that." They tend to best recall events that have recently occurred. Molina also testified that disclosure is a process for child abuse victims and there are various stages of disclosure that a child may go through. Among those stages is the "tentative" stage where the child will "test the waters" and reveal a little information, gauge the listener's reaction to it, and share more information once they feel comfortable.

There were inconsistencies in V.B.'s accounts of the abuse. She told a deputy that

appellant had touched her breasts, buttocks, and vagina on the outside of her clothes. She told Molina that she could not remember the first assault, but told the CPS investigator the first assault occurred while she was watching television with appellant. She said the abuse began when she was 12 or 13 years old, but also that she had been sexually abused since the age of 9. She also gave conflicting accounts of how often the abuse occurred, telling the forensic interviewer that the abuse happened once a month but telling the district attorney that it happened once a year or once a week, and testifying before the jury that the abuse would happen once a day or when her mother went to work.

The same day that V.B. told Deputy Ferguson about the abuse, September 10, 2014, a Collin County Sheriff's Department investigator, Billy Lanier, contacted and interviewed appellant, who voluntarily came to the sheriff's office. Lanier, who did not speak Spanish, spoke to appellant through a translator. The deputy testified that appellant was not under arrest at this time and was free to leave after the interview. He was not detained. During the forty-seven minute interview, appellant admitted to masturbating while his daughter was in the same room and that his wife walked in on him as he ejaculated. But appellant denied exposing his genitals to V.B. while he masturbated, insisting he covered himself with a towel and did not realize she was on the floor next to the bed. Appellant denied that he was aroused by V.B.'s presence and he denied abusing her. The interview, which was recorded, was admitted into evidence and played for the jury.

The evidence also showed V.B. was assaulted by another relative, one of her mother's cousins. During this assault, which occurred at home, the relative attempted to penetrate her vagina with his penis, but V.B.'s mother interrupted the assault. V.B.'s mother slapped her. V.B. testified that the assault by the relative was reported to the police.

The final witness called by the State was Dan Powers, the senior vice president and

clinical director of the CAC, and a licensed sex offender treatment provider. He testified that sex offenders frequently minimize their abuse and this is one of their primary coping mechanisms. Offenders commonly talk about only a small part of what they did or characterize it as an "accidental touch." The motivation for minimization is the fear of going to jail and the loss of the opportunity to continue the abuse. Powers testified that if they know in advance what they are going to be questioned about, they will not appear shocked when they are questioned about the abuse allegations because they will have had time to prepare and "come up with scenarios or stories regarding what they're going to be asked about."

Powers also testified that when a parent or guardian does not believe the child, it definitely affects the child's ability to make an outcry. He added that very often victims love their abusers even though they are being abused. In fact, it is not be uncommon for the child to continue to take family photos with the abuser or to smile for the photographs. When there are multiple abusers, it is important for the child to specifically identify what happened with each of the perpetrators because it helps them separate and focus more on the healing process. Powers explained that not all victims respond emotionally or break down and cry when they disclose abuse because children are individuals and are affected in different ways. Victims may display a "flat affect" if they feel hopeless about their situation or do not see a way out.

Lyle Eugene Wise, the owner of the Celina ranch and a friend of appellant and his family, testified on appellant's behalf. He explained that he had known appellant for a long time, close to a decade, and he denied witnessing any inappropriate behavior between appellant and V.B. at the ranch. He also testified that he thoroughly searched the storage room described by V.B. and found no physical evidence of an assault. There were no napkins, paper towels, or anything like that in the room.

Appellant testified in his defense, admitting he masturbated while his stepdaughter was in

the same room and that his wife walked in on him as he was ejaculating. He admitted that his wife scolded V.B. for being in the same room while he was masturbating. He also testified that his wife was upset with him and hit him, and he saw her hit V.B. Appellant maintained, however, that V.B. could not see him because he was laying on the bed and she was on the floor. Appellant further claimed his genitals were covered by a towel; he was not thinking about V.B. as he masturbated; he never fantasized about her; and he had not touched her. Appellant denied having any sexual contact with V.B. He suggested V.B. made up the allegations against him because her mother threatened to seek sexual assault charges against Victor and because V.B. was upset after learning that appellant was not her biological father.

DISCUSSION

1. Sufficiency of the Evidence

In his first issue, appellant contends there is insufficient evidence for a jury to convict him of the offenses of continuous sexual abuse of a child under the age of fourteen, indecency with a child by contact, and indecency with a child by exposure.

In reviewing the sufficiency of the evidence, we consider all evidence in the light most favorable to the jury's verdict and determine whether 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, 319 (1979); *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014). It remains the factfinder's responsibility to fairly resolve conflicts in the testimony, weigh the evidence, and to draw reasonable inferences from basic to ultimate facts. *Jackson*, 443 U.S. at 319. We do not reevaluate the weight and credibility of the evidence and then substitute our judgment for that of the factfinder. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Instead, we determine whether the necessary inferences are reasonable based on the cumulative force of the evidence when viewed in the light most favorable to the verdict. *See Sorrells v. State*, 343

S.W.3d 152, 155 (Tex. Crim. App. 2011).

A person commits the offense of continuous sexual abuse of a child if, during a period that is thirty or more days in duration, he commits two or more acts of sexual abuse and, at the time of the commission of each act, he is seventeen years of age or older and the victim is a child younger than fourteen years of age. TEX. PENAL CODE ANN. § 21.02(b). Although the exact dates of the abuse need not be proven, the offense requires proof that two or more acts of sexual abuse occurred during a period of thirty days or more. *Baez v. State*, 486 S.W.3d 592, 595 (Tex. App.—San Antonio 2016, pet. ref'd); *see* TEX. PENAL CODE ANN. § 21.02(d).

The statute defines an "act of sexual abuse" as including indecency with a child under section 21.11(a)(1) and aggravated sexual assault under section 22.021. TEX. PENAL CODE ANN. § 21.02(c)(2), (4). The indictment alleged three acts of aggravated sexual assault of a child (penetration of the V.B.'s female sexual organ with appellant's male sexual organ, appellant's finger, and causing V.B.'s female sexual organ to contact appellant's mouth) and one act of indecency with a child (touching V.B.'s genitals with appellant's hand or finger).

A person commits the offense of indecency with a child by contact if, with a child younger than 17, whether the child is of the same or opposite sex, the person engages in sexual contact or causes the child to engage in sexual contact. *Id.* at § 21.11(a)(1). "Sexual contact" includes "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child," if committed with the intent to arouse or gratify the sexual desire of any person. *Id.* § 21.11(c)(1). A person commits the offense of indecency with a child by exposure if the person, with intent to arouse or gratify the sexual desire of any person, exposes the person's anus or any part of the person's genitals, knowing the child is present. *Id.* § 21.11(a)(2)(A). The indictment alleged appellant engaged in sexual contact by touching V.B.'s breast with his mouth; by touching V.B.'s breast with his hand or finger; and that appellant

exposed part of his genitals to V.B. knowing said child was present.

Appellant's arguments about the sufficiency of the evidence focus largely on V.B.'s credibility or conflicts in the evidence. He contends V.B. was not a credible witness and that no rational trier of fact could have found him guilty beyond a reasonable doubt based on her testimony. Appellant argues V.B.'s testimony was incredible because her accounts of the abuse were absurd or contained insufficient detail, and her testimony about the pregnancy and how she terminated it was implausible. Appellant maintains the jury should have concluded V.B. and Victor manufactured the instant allegations so that V.B. could leave her parents to be with Victor, and to preempt any sexual assault charges against Victor for his sexual relationship with V.B.

The jury heard V.B. testify in detail regarding the abuse she suffered. She provided detailed testimony regarding the events leading up to the assaults and the assaults themselves. She described the locations where they took place, what she was doing before they occurred, what appellant did to her, and what happened afterwards. Although she could not recall with precision the number of assaults or how frequently they occurred, the trier of fact could have concluded this was a product of her youth, not due to any lack of veracity. As Molina testified, children have difficulty grasping the abstract concept of time and have trouble providing an accurate chronology of events. They are "not really specific on dates, times, and things like that," and tend to best recall events that have recently occurred.

The testimony of the child victim alone is sufficient to support a conviction for continuous sexual abuse of a child or indecency with a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07; *Jones v. State*, 428 S.W.3d 163, 169 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Lee v. State*, 186 S.W.3d 649, 656 (Tex. App.—Dallas 2006, pet. ref'd). A child victim is not required to be specific about the dates the abuse occurred. *See Dixon v. State*, 201 S.W.3d 731,

736 (Tex. Crim. App. 2006); *Vazquez v. State*, Nos. 05–12–00548–CR, 05–12–00549–CR, 2013 WL 5614300, at *5 (Tex. App.—Dallas Oct. 14, 2013, no pet.) (mem. op., not designated for publication). It is not often that a child knows, even within a few days, the date she was sexually assaulted. *See Sledge v. State*, 953 S.W.2d 253, 256 n. 8 (Tex. Crim. App. 1997).

Appellant argues that V.B.'s account of the pregnancy and how she terminated it is incredible or nonsensical. But he points to no evidence refuting her testimony. Moreover, as the State points out, even if one assumes it was untrue, the jury could have concluded V.B. said she was pregnant because she thought it was the only way to escape appellant's abuse. Appellant also argues V.B.'s story makes no sense because she never would have voluntarily accompanied her stepfather to job sites if he was, indeed, abusing her at those locations. Yet, V.B. never said she went with appellant voluntarily. In fact, after explaining that she accompanied her father on weekends, usually Saturdays, because that was when she was out of school, V.B. testified, "And I would tell my mom that I would—I don't want to go, and she would just still make me go."

Additionally, appellant's admissions support V.B.'s allegations. He acknowledged that he was masturbating while his stepdaughter was in the same room. He also admitted that his wife walked in on him as he was ejaculating and that she scolded V.B. Appellant insisted V.B. could not see him, that he was covered by a towel, he was not aroused by the child's presence, and that he never touched her, but the jury heard testimony from Dan Powers regarding how sexual offenders tend to minimize their offenses. The jury could have reasonably concluded appellant was not being truthful and V.B.'s account of what happened was more credible. It could have reached the same conclusion regarding V.B.'s other allegations. She provided detailed testimony about the abuse, did not waiver in her accusations despite pressure from her

family,[1] and, as explained by Molina, gave both general and sensory details when describing appellant's abuse.

Appellant cross-examined V.B. and the other witnesses, and the jury made its credibility determinations. The trier of fact was the exclusive judge of the weight and credibility of the evidence. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015). We do not sit as a "thirteenth juror" and reweigh or realign the evidence. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our task here is to determine if the jury could have rationally found the essential elements of the offenses beyond a reasonable doubt. Having viewed the evidence in the appropriate light, we conclude a rational jury could find the essential elements of the offenses beyond a reasonable doubt. We therefore overrule appellant's first issue.

2. Testimony of Dan Powers and Judith Ann Common

In his second issue, appellant alleges the trial court erred by allowing a State's expert witness, Dan Powers, to testify "because his purpose was only to bolster the State's case and he lacked professional qualifications to testify as [an] expert." Appellant also argues the trial court erred by admitting evidence from the sexual assault nurse examiner who performed V.B.'s exam, Judith Ann Common, because she likewise bolstered the State's case.

We examine a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id*. at 83.

Appellant made no objection as to Powers' expert qualifications. Indeed, as the exchange set out below shows, he expressly stated he had no issue with his qualifications:

> [DEFENSE COUNSEL]: Judge, I would object to him testifying as an expert witness.

[1] V.B. testified that she had received messages from relatives in Mexico who were telling her that, "[I]f your stepdad doesn't get out of jail, we're not going to leave you alone."

> He knows nothing about the case, he hasn't seen anybody, and I don't see where he's giving us anything more than common sense that we already know.
>
> I don't see where he brings any specialized expertise that's going to help the jury. All these things that he's talking about is stuff that most of us would understand with common sense, and he can't even tie that in any manner, shape, or form as some kind of diagnosis or some kind of—based on some kind of evaluation of anybody here.
>
> So I would argue that his help in these scenarios are really not that that would be needed by an expert.
>
> And I think, in the end, it's just bolstering the State's case, Judge.
>
> THE COURT: No objections as to qualifications?
>
> [DEFENSE COUNSEL]: Just qualifications? No, Judge.
>
> THE COURT: Okay. The objection is overruled.

Preservation of error for appellate review requires a timely and specific trial objection. TEX. R. APP. P. 33.1(a)(1). By stating he had no objection to Powers' qualifications, appellant failed to preserve any complaint regarding Powers' qualifications to testify as an expert. *See, e.g., Holmes v. State*, 248 S.W.3d 194, 200 (Tex. Crim. App. 2008).

Appellant objected to Powers' testimony on bolstering grounds, but he did not object to Common's testimony on that basis. During a hearing held out of the jury's presence, Common testified that part of her responsibility as a sexual assault nurse examiner was to take down the victim's statements as true; they believed their patients and did not make judgments regarding whether or not they were being honest. Appellant objected to Common offering such testimony before the jury, and the trial court ruled Common could not testify concerning the truth or non-truth of the information she received. But appellant lodged no bolstering objection to Common's testimony. Therefore, he failed to preserve any bolstering complaint as to Common's testimony. *See Sessums v. State*, 129 S.W.3d 242, 249 (Tex. App.—Texarkana 2004, pet. ref'd) (speculation objection to expert's testimony did not preserve bolstering complaint for appellate review).

Regarding the issue of bolstering as to Powers, bolstering is "any evidence the *sole*

purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantially contributing 'to make the existence of [a] fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.' " *Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993) (quoting former version of Texas Rule of Evidence 401). Powers' testimony was not bolstering. It was circumstantial evidence from which the jury could reasonably conclude V.B.'s and appellant's behavior was consistent with that of a victim and abuser, and that V.B.'s testimony regarding what happened was more plausible. Evidence that corroborates the story of another witness, "in the sense that it has an incrementally further tendency to establish a fact of consequence, should not be considered bolstering." *Id*. at 820. Thus, we conclude the trial court did not abuse its discretion by overruling appellant's bolstering objection. We overrule appellant's second issue.

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

UBALDO ZAPUCHE-LANDAVERDE, Appellant

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THE STATE OF TEXAS, Appellee

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Opinion delivered by Justice Myers. Justices Francis and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 16th day of November, 2017.