Affirmed; Opinion Filed November 27, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00740-CR

KURNICUS HAYES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F13-30966-T

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Lang

Following appellant Kurnicus Hayes's plea of not guilty, a jury convicted him of indecency with a child, assessed punishment at five years' confinement, and recommended suspension of that sentence in favor of community supervision. The trial court suspended appellant's sentence and placed him on ten years' community supervision.

In three issues on appeal, appellant contends (1) the trial court erred by overruling his objections to the admission of certain testimony because it constituted hearsay and was more prejudicial than probative and (2) the evidence was insufficient to prove the charged offense beyond a reasonable doubt.

We decide against appellant on his three issues. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

The indictment in this case alleged that in approximately July 2005, appellant, "with the intent to arouse and gratify [his] sexual desire," caused the complainant, E.P., a child younger than seventeen years of age, "to engage in sexual contact by causing the hand of said complainant to contact [appellant's] genitals." During opening statements at trial, counsel for appellant stated to the jury, in part, (1) appellant is "an innocent man"; (2) "[y]ou're going to hear about family dynamics that was fertile ground for this kind of accusation"; and (3) on an occasion when E.P was "upset" because her mother was "angry" at her respecting her behavior, E.P. "made this accusation and no longer was anyone angry with her."

E.P.'s mother, Alecia, testified E.P. was born in 1997. In 2001, when E.P. was approximately four years old, Alecia met appellant and they began dating. Alecia and appellant married two years later, separated in approximately 2008, and were divorced in 2011. Alecia stated that from 2004 to 2008, she and appellant lived with E.P. and their two young sons in a house in Grand Prairie. She testified that during summer 2005, she worked a "temp job" outside the home Monday through Friday from 8 a.m. to 5 p.m. According to Alecia, appellant was unemployed at that time and cared for the children during the day while she was at work. Alecia stated there was ongoing "conflict" in their marriage during that time and the children "were exposed to that." Further, Alecia stated that during that time, she noticed E.P. became "a little bit distant towards [appellant]" and "would also wear a jacket to kind of cover up herself."

Alecia testified that on Mother's Day in 2013, she attended a church service with all three of her children. E.P. was fifteen years old and had not been around appellant for several years. According to Alecia, "the pastor asked for all the kids to come down to get a gift basket and bring it back to all the moms," but E.P. refused to do so. Alecia stated E.P. told her "I don't want people, especially men, to look at me." Then, E.P. started crying. After the service, E.P. was

"very quiet" and told Alecia, "I don't want to talk about it." Alecia dropped off E.P. at her mother's house and went to the grocery store. While at the store, Alecia received a phone call from her mother, who sounded "terrified." Alecia stated her mother told her "it's about what [appellant] has done" respecting E.P. Alecia immediately returned to her mother's house. She stated E.P. was "crying hysterically" and told her what appellant had done. Alecia spoke with E.P.'s biological father later that day and called police the following morning.

On cross-examination, Alecia testified that in approximately 2008, E.P. was interviewed by "Child Protective Services" respecting "an incident of a similar nature, not against [E.P.]." Alecia stated she (1) was not allowed to be present during that interview and (2) does not have reason to believe E.P. made any outcry during that interview. Also, Alecia testified that in high school, E.P. dressed "like a normal teenager" and "had stopped covering herself up." Photographs of E.P. wearing a strapless dress for a school homecoming event were admitted into evidence.

B.L. testified she is nineteen years old and E.P. has been her best friend since sixth grade. B.L. stated that during a sleepover when they were approximately twelve years old, the two of them were sharing secrets and E.P. told her "about what happened." B.L. told E.P. she "felt her pain" because she had a similar experience. B.L. stated they both cried during that conversation. B.L tried to comfort E.P. and told E.P. to tell her mother. B.L. testified she did not tell anyone what E.P. had told her because E.P. asked her to keep it a secret.

On redirect examination of B.L., the following exchange occurred:

> [PROSECUTOR]: [B.L.], that night at the sleepover tell me what your friend [E.P.] told you had happened to her.
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> [APPELLANT'S COUNSEL]: Judge, we're going to object to hearsay.
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> [PROSECUTOR]: Your Honor, it's a prior consistent statement. It's allowed under the hearsay—the hearsay exception, 802.

> THE COURT: I'll overrule it.
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> [APPELLANT'S COUNSEL]: Your Honor, may I at least put on the record I believe there is an outcry witness who is over 18 years of age and, of course, at this time she wouldn't have been. She said that she was between 12 and 13. So, once again, we're just asking for a running objection that is hearsay.
>
> And, Judge, lastly that the probative value would outweigh—I mean that the prejudicial value would outweigh any probative value.

The trial court overruled appellant's objections and granted appellant a running objection. Then, B.L. testified E.P. "said that her ex-stepdad had showed her his private parts and wanted her to touch him inappropriately." Further, B.L. stated E.P. "is very truthful and she's very down to earth and she wouldn't lie about something like that." Additionally, on re-cross-examination, B.L. testified E.P. told her, "Like [appellant] exposed himself and he wanted her to touch him."

E.P. testified that during the summer of 2005, she was eight years old. Her oldest half-brother was two years old and the other was slightly younger. At that time, her mother worked during the day Monday through Friday and appellant sometimes took care of her and her half-brothers at their home. E.P. testified the incident in question took place on a day when her mother was not at home. E.P. was in her room playing a video game and her brothers were napping. Appellant called her into the bedroom that he shared with her mother. E.P. went into that bedroom and saw appellant sitting upright on the couch in front of the television. According to E.P., appellant was wearing a gray shirt and had a blanket over his lap. Appellant asked her to sit next to him and she did so. They began having a "casual conversation." E.P. testified that at that point, appellant asked her if she was wearing a bra. E.P. thought that was "a little odd" and wondered "[w]hy is he asking me this?" She responded that she was wearing a bra and appellant then "asked to see if I was wearing one." He pulled on one of the straps of her bra, "exposing the skin," and looked at her chest. E.P. stated she had "a very uneasy feeling" and "knew it wasn't right." Then, appellant asked her to put her hand under the blanket. E.P. testified she was "kind of scared," but "was like I'll just do what he says because I don't want any confrontation or

anything." She put her hand under the blanket and felt "skin to skin contact of my hand to his genitals." She stated it was "kind of stickyish skin." Further, she stated appellant "pulled back the blanket to show me what I was touching" and she "actually [saw] his genitals."

E.P. testified she abruptly "just got up and left" because she "knew this couldn't go on anymore." She went into her room and shut the door. She testified she was "mad" and "upset." Approximately five minutes later, appellant knocked on the door to her room. E.P. stated appellant "came in and he apologized for what he did 'cause he knew it was wrong." Additionally, E.P. testified appellant said, "Me and mommy are going through things, but please don't tell her." She answered, "Okay."

E.P. stated she did not tell her mother about the incident at that time because she "knew the violence that was happening between them two, so I didn't want to put her in danger." Further, E.P. stated she "kept it to myself for a while because I was scared of what would happen." When she was in seventh grade, she told B.L. about the incident during a slumber party after B.L. shared a similar incident she had experienced. E.P. did not want B.L. to tell anyone because she was still worried appellant would "come after" her mother.

E.P. testified that approximately three years after the incident in question, CPS spoke with her brothers "about something that happened with them." At that time, CPS interviewed E.P. and asked her if anyone had ever touched her inappropriately. E.P. testified she told CPS "nothing had happened" because she was not "ready to share that" with "a random stranger."

E.P. stated that on Mother's Day in 2013, her mother "kind of got really mad at me 'cause I didn't want to go down there" to the front of the church to pick up a gift. E.P. stated she "was very uncomfortable in front of a lot of guys because I felt like they were looking at me inappropriately" and "[i]t's like they wanted to do something to me." According to E.P., afterwards, her mother "really didn't want to talk to me for the rest of the day." E.P. testified her

grandmother saw she was very upset and asked what was wrong. At that point, E.P. told her grandmother appellant "had looked at my chest and then I had touched his genitals." E.P.'s grandmother "gasped," then called E.P.'s mother. E.P. stated her mother arrived shortly thereafter and "gave me a hug." On the following day, her mother called the police.

On cross-examination, E.P. testified she and B.L. had talked about the incident in question within the last several days "in preparation for the trial." According to E.P., "we got it together like— 'cause we knew—she was like that was in seventh grade and I had thought it was in ninth grade, but it was in seventh grade."

Jessica Nassau testified that in 2015, she worked as a therapist at the Collin County Children's Advocacy Center and E.P. was one of her therapy clients. Nassau testified "delayed outcry" is not unusual because "[i]t's very common for [a child] to not feel like they have confidence to outcry." Additionally, Nassau stated that during her therapy sessions, E.P. did not "waiver from what had happened or attempt to take any of it back."

Patricia Guardiola testified that in May 2013, she conducted a forensic interview of E.P. at the Dallas Children's Advocacy Center. According to Guardiola, E.P. told her that her stepfather "made her touch his penis" and "looked at her breast." Guardiola stated that in relating the incident in question, E.P. provided sensory details and described seeing appellant's genitals. Additionally, Guardiola stated (1) E.P. was "emotional" and cried at the beginning of the interview and (2) she did not see anything during the interview that gave her "concern for E.P.'s veracity."

Appellant testified E.P.'s allegations are "simply not true." He denied that he ever looked at E.P.'s breasts, caused her to touch his penis, or did anything "sexually inappropriate" respecting E.P. Further, he stated E.P. is "a really good kid" and he does not know why she would make such claims. Additionally, (1) appellant testified that in summer 2005, he was

working twelve-hour shifts from 10:30 a.m. to 10:30 p.m. and was not the "Monday through Friday caretaker of the kids," and (2) tax returns of appellant pertaining to that time period were admitted into evidence.

During closing argument, counsel for appellant stated in part, "Now, [E.P.] remembers talking with [B.L.], but she and [B.L.] don't remember it the same way, and [E.P.] doesn't remember it the same way from the last time she talked about it. . . . The fact of the matter is that it's hard to remember a story that you just put together while you were in the car on the way to the court." Following the jury's finding of guilt and assessment of punishment as described above, this appeal was timely filed.

II. SUFFICIENCY OF THE EVIDENCE

We begin with appellant's third issue, in which he contends the evidence is insufficient to prove the charged offense beyond a reasonable doubt. "We address sufficiency issues first because, in the event they are meritorious, we would render a judgment of acquittal rather than reverse and remand." *Holloway v. State*, Nos. 05-16-00069-CR & 05-16-00095-CR, 2017 WL 3097628, at *2 (Tex. App.—Dallas Jul. 21, 2017, no pet.) (mem. op., not designated for publication) (citing *Benavidez v. State*, 323 S.W.3d 179, 181 (Tex. Crim. App. 2010)).

A. Standard of Review

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); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). It is the factfinder's responsibility to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic to ultimate facts. *See Ruiz v. State*, No. 05-16-00970-CR, 2017 WL 3275996, at *8 (Tex.

App.—Dallas Jul. 28, 2017, no pet.) (mem. op., not designated for publication) (citing *Jackson*, 443 U.S. at 319). We are required to defer to the factfinder's credibility and weight determinations because the factfinder is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Ramseur v. State*, No. 05-16-01303-CR, 2017 WL 4930379, at *2 (Tex. App.—Dallas Oct. 31, 2017, no pet.) (mem. op., not designated for publication) (citing *Jackson*, 443 U.S. at 326). "We do not reevaluate the weight and credibility of the evidence and then substitute our judgment for that of the factfinder." *Ruiz*, 2017 WL 3275996, at *8 (citing *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." *Id.* (citing *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011)). "When the record supports conflicting inferences, we presume the factfinder resolved the conflicts in favor of the verdict and therefore defer to that determination." *Holloway*, 2017 WL 3097628, at *2 (citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

B. Applicable Law

A person commits indecency with a child by contact if the person engages in sexual contact with a child younger than seventeen years of age or causes the child to engage in sexual contact. TEX. PENAL CODE ANN. § 21.11(a) (West 2011).[1] "Sexual contact" includes, among other things, "any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person," if "committed with the intent to arouse or gratify the sexual desire of any person." *Id.* § 21.11(c)(2). "The specific intent required for the offense of indecency with a child may be inferred from a defendant's conduct,

[1] The version of section 21.11 under which appellant was indicted for indecency with a child has been amended. *See* Act of May 23, 2001, 77th Leg., R.S., ch. 739, § 2, 2001 Tex. Gen Laws 1463, 1463 (current version at PENAL CODE § 21.11 (West 2011)). Because the relevant portions of the prior and current statutes do not differ materially, we cite the current version in this opinion.

his remarks, and all of the surrounding circumstances." *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd). Further, the testimony of a child victim alone is sufficient to support a conviction for indecency with a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2016)[2]; *Martinez v. State*, 178 S.W.3d 806, 814 (Tex. Crim. App. 2005); *Lee v. State*, 186 S.W.3d 649, 655 (Tex. App.—Dallas 2006, pet. ref'd).

C. Application of Law to Facts

Appellant contends the evidence is insufficient to prove he committed indecency with a child by contact because (1) "the credibility of the complainant was highly questionable to the point of creating a reasonable doubt with any reasonable jury" and (2) "[i]n contrast, Appellant was unwavering that he did not commit this act nor did he have the opportunity to do so." Specifically, according to appellant,

> [T]here was a conflict between E.P.'s testimony and her prior consistent statement testified to by B.L. B.L. testified that E.P. told her that Appellant exposed himself and caused her to touch him inappropriately. However, E.P.'s testimony was that Appellant pulled her shirt aside, looked at her chest, then had her reach under the blanket and touch his penis. Obviously, there are several differences between those two statements suggesting a reasonable doubt in B.L.'s or E.P.'s credibility. Indeed, both girls' credibility was further questioned when E.P. testified on cross-examination that the girls had discussed their testimony as they rode to court together for Appellant's trial. . . . Clearly, they were trying to get their stories straight. Furthermore, in 2008, after the incident with Appellant, E.P. told Child Protective Services during an unrelated investigation that she had never been touched inappropriately. The cold record itself shows the weak and compromised nature of the State's evidence which should be considered by this Court in its sufficiency analysis.
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> In contrast, Appellant was consistent and adamant that he did not commit the charged offense. Furthermore, he testified and provided tax returns and documentation showing that, contrary to [Alecia's] testimony, he in fact worked full time during the time period in question. As such, he did not have the opportunity to commit the charged offense as maintained by the State. The State's controverted testimony raised enough reasonable doubt that no reasonable jury could have found Appellant guilty of the charged offense.

[2] Article 38.07 provides in part (1) a conviction under chapter 21 of the penal code "is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred" and (2) the requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was seventeen years of age or younger. *Id.*

(citations to record omitted). The State responds the evidence is sufficient to support a finding of guilt as to the charged offense beyond a reasonable doubt.

As described above, the record shows E.P. testified at trial that when she was eight years old, appellant pulled on her bra strap and looked at her chest, then asked her to place her hand under a blanket, where her hand came into "skin to skin contact" with appellant's genitals. Additionally, E.P. stated that approximately five minutes later, appellant knocked on the door to her room, "apologized for what he did," and said to her, "Me and mommy are going through things, but please don't tell her." E.P.'s testimony, alone, was sufficient to support a conviction for indecency with a child. *See* CODE CRIM. PROC. art. 38.07; PENAL CODE § 21.11; *see also Bazanes*, 310 S.W.3d at 40 (specific intent required for offense of indecency with a child may be inferred from defendant's conduct, his remarks, and surrounding circumstances). Further, as to "controverted" or conflicting testimony, it is the factfinder's responsibility to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic to ultimate facts. *See Ruiz*, 2017 WL 3275996, at *8. "We do not sit as the thirteenth juror and substitute our judgment for that of the factfinder by re-evaluating the weight and credibility of the evidence." *Id*. at *9. Rather, "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." *Id*.; *see also Holloway*, 2017 WL 3097628, at *2 ("When the record supports conflicting inferences, we presume the factfinder resolved the conflicts in favor of the verdict and therefore defer to that determination.").

On this record, we conclude a rational jury could have found the elements of the charged offense beyond a reasonable doubt. *See Ruiz*, 2017 WL 3275996, at *9. Accordingly, we conclude the evidence is sufficient to support appellant's conviction. *See id*.; *see also Flores v. State*, No. 05-16-00576-CR, 2017 WL 3033414, at *10 (Tex. App.—Dallas Jul. 18, 2017, no

pet.) (mem. op., not designated for publication) (rejecting sufficiency challenge to conviction for aggravated sexual assault of a child because "[t]o the extent [the victim's] testimony was inconsistent and/or vague regarding the details surrounding the offense, this concerned her credibility as a witness, which was a matter for the jury in its role as the sole judge of the weight and credibility of the evidence"); *Gregg v. State*, No. 05-16-00557-CR, 2017 WL 2334239, at *3 (Tex. App.—Dallas May 26, 2017, pet. ref'd) (mem. op., not designated for publication) (concluding jury's decision to believe child sexual assault victim who recanted and then reasserted accusations during trial was not unreasonable); *Moody v. State*, No. 11-15-00087-CR, 2017 WL 3574271, at *4 (Tex. App.—Eastland Aug. 17, 2017, no pet.) (mem. op., not designated for publication) ("inconsistencies" in testimony of child sexual assault victim "do not automatically lower evidence below the required standard").

We decide appellant's third issue against him.

III. APPELLANT'S OBJECTIONS TO TESTIMONY OF B.L.

A. Standard of Review

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. If the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, we will uphold the decision. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016); *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Applicable Law

In order to be admissible, evidence must be relevant. *See* TEX. R. EVID. 402. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. *See Hernandez v. State*, No.

05-16-00599-CR, 2017 WL 2871428, at *5 (Tex. App.—Dallas Jul. 5, 2017, pet. ref'd) (mem. op., not designated for publication) (citing TEX. R. EVID. 401). Further, relevant evidence may be excluded under rule of evidence 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *Id*. (citing TEX. R. EVID. 403). Rule 403 favors the admission of relevant evidence and carries the presumption that relevant evidence will be more probative than prejudicial. *Id*. (citing *Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010)). Also, that rule does not require exclusion of evidence simply because it creates prejudice. *Id*. Rather, it must be shown that the prejudice is "unfair." *Id*. (citing *Martinez v. State*, 327 S.W.3d 727, 737 (Tex. Crim. App. 2010)). The danger of unfair prejudice exists only when the evidence has the "potential to impress the jury in an irrational way" or has "an undue tendency to suggest that a decision be made on an improper basis." *Id*.

When conducting a rule 403 analysis, the trial court must balance (1) the inherent probative force of the evidence and (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest a 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 be needlessly cumulative. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). In practice, these factors may well blend together. *Id*. We should reverse a trial court's balancing determination "rarely and only after a clear abuse of discretion." *Hernandez*, 2017 WL 2871428, at *5 (citing *Montgomery v. State*, 810 S.W.2d 373, 392 (Tex. Crim. App. 1990)). Further, absent an explicit refusal to conduct the rule 403 balancing test, we

presume the trial court conducted the test when it overruled a rule 403 objection. *See Williams v. State*, 958 S.W.2d 186, 195–96 (Tex. Crim. App. 1997).

Texas Rule of Evidence 801(e)(1)(B) "gives substantive, non-hearsay status to prior consistent statements of a witness offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *Hammons v. State*, 239 S.W.3d 798, 804 (Tex. Crim. App. 2007) (citing TEX. R. EVID. 801(e)(1)(B)); *see also* TEX. R. EVID. 613(c) ("Unless Rule 801(e)(1)(B) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility."). Reviewing courts employ a four-prong test to determine whether a prior consistent statement is admissible under Rule 801(e)(1)(B): (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony by the opponent; (3) the proponent must offer a prior statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the alleged motive to falsify arose. *See Hammons*, 239 S.W.3d at 804; *Bosquez v. State*, 446 S.W.3d 581, 585 (Tex. App.—Fort Worth 2014, pet. ref'd); *Ester v. State*, No. 05-07-01215-CR, 2008 WL 2514344, at *5 (Tex. App.—Dallas June 25, 2008, no pet.) (not designated for publication). "The rule sets forth a minimal foundation requirement of an implied or express charge of fabrication or improper motive." *Hammons*, 239 S.W.3d at 804. "[T]here need be only a suggestion that the witness consciously altered his testimony in order to permit the use of earlier statements that are generally consistent with the testimony at trial." *Id*. "[A] reviewing court, in assessing whether the cross-examination of a witness makes an implied charge of recent fabrication or improper motive, should focus on the "purpose of the impeaching party, the surrounding circumstances, and the interpretation put on

them by the [trial] court." *Id*. at 808. "Courts may also consider clues from the voir dire, opening statements, and closing arguments." *Id*.

C. Application of Law to Facts

1. Texas Rule of Evidence 801(e)(1)(B)

In his first issue, appellant asserts the trial court abused its discretion by admitting B.L.'s "hearsay testimony" that E.P. said "her ex-stepdad had showed her his private parts and wanted her to touch him inappropriately" as a prior consistent statement pursuant to rule of evidence 801(e)(1)(B). Specifically, appellant contends rule 801(e)(1)(B) is inapplicable because the defense "had not questioned E.P.'s veracity or alleged a recent fabrication at that point in the trial" and "did not impeach B.L. or any other witness up to that time regarding recent fabrication of the statement."

The State argues "[t]he trial court did not abuse its discretion when it allowed hearsay testimony after a challenge to the victim's veracity although the victim had not testified at the time." According to the State, (1) "the trial court observed defense counsel's attack on E.P. during opening statement and on cross-examination of witnesses"; (2) "[a]s the evaluator of the tone, tenor and demeanor, the trial judge was in a position to evaluate the implied, subtle and overt, charges of recent fabrication by the defense at the time of B.L.'s testimony"; and (3) "the defensive theory came full circle" during closing argument when "defense counsel argued E.P. and B.L. made up the whole story in the car on the way to the courthouse." In support of those assertions, the State cites excerpts from the testimony and argument described above.

Even assuming without deciding that the hearsay testimony in question was not admissible under rule 801(e)(1)(B), improper admission of hearsay evidence is non-constitutional error that must be disregarded if it does not affect substantial rights. *See Garcia v. State*, 126 S.W.3d 921, 927–28 (Tex. Crim. App. 2004); *White v. State*, 256 S.W.3d 380, 384

(Tex. App.—San Antonio 2008, pet. ref'd); *see also* TEX. R. APP. P. 44.2(b). It is well established that the improper admission of evidence does not constitute reversible error if the same or similar facts are proved by other properly admitted evidence. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Anderson v. State*, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986) ("If the fact to which the hearsay relates is sufficiently proved by other competent and unobjected to evidence . . . the admission of the hearsay is properly deemed harmless and does not constitute reversible error."); *Smith v. State*, No. 05-10-01642-CR, 2012 WL 2926201, at *3 (Tex. App.—Dallas Jul. 19, 2012, pet. ref'd) (not designated for publication) ("[e]rroneously admitted evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."). "In other words, error in the admission of evidence may be rendered harmless when 'substantially the same evidence' is admitted elsewhere without objection." *Smith*, 2012 WL 2926201, at *3 (quoting *Mayes v. State*, 816 S.W.2d 79 88 (Tex. Crim. App. 1991)).

The record shows that subsequent to B.L.'s testimony at trial, E.P. testified without objection that when she was eight years old, appellant (1) pulled on her bra strap and looked at her chest; (2) asked her to place her hand under a blanket, where her hand came into "skin to skin contact" with appellant's genitals; and (3) "pulled back the blanket to show me what I was touching" and she "actually [saw] his genitals." Additionally, Guardiola testified without objection that during a forensic interview, E.P. (1) told her that her stepfather "made her touch his penis" and "looked at her breast" and (2) described seeing appellant's genitals. On this record, we conclude any error by the trial court in admitting the testimony of B.L. in question pursuant to rule 801(e)(1)(B) was harmless. *See id.*; *see also Maloy v. State*, No. 06-09-00093-CR, 2010 WL 2705161, at *4 (Tex. App.—Texarkana Jul. 9, 2010, no pet.) (mem. op., not designated for publication) (improper admission of evidence pursuant to rule 801(e)(1)(B) was

harmless error where child sexual assault victim's subsequent testimony "essentially repeated" the complained-of statements).

Appellant's first issue is decided against him.

2. Texas Rule of Evidence 403

In his second issue, appellant contends the trial court erred by overruling his objection to B.L.'s "hearsay testimony" described above because it "was more prejudicial than probative" and therefore should have been excluded pursuant to rule of evidence 403. Specifically, according to appellant, (1) "[t]he admission of this statement was cumulative and improper bolstering of the victim's testimony"[3]; (2) "[w]ithout this statement, the jury was left to consider only E.P.'s testimony and Appellant's testimony denying the entire incident"; (3) "B.L.'s testimony would certainly have been considered by the jury and put more weight on the victim's testimony"; and (4) "it was extremely prejudicial since there were many years since the witness heard the original statement from the victim."

The State responds "the testimony elicited from B.L. was not so prejudicial as to outweigh the probative value of the statements." According to the State, the testimony in question "was sought to refute a claim of fabrication" and "was not cumulative."

When conducting a rule 403 analysis, the first two factors we consider are the probative force of the evidence in question and the proponent's need for that evidence. *Gigliobianco*, 210 S.W.3d at 641. The record shows E.P.'s credibility was disputed at trial. The evidence in question bore on that disputed matter and demonstrated consistency as to what she had told others. Accordingly, the first two *Gigliobianco* factors weigh in favor of admission of the evidence. The remaining four *Gigliobianco* factors pertain to consideration of unfair prejudice.

[3] To the extent appellant complains on appeal of "bolstering," he "never complained to the trial court about the alleged bolstering effect of the testimony and therefore has failed to preserve error on that ground." *Bowman v. State*, No. 05-10-01253-CR, 2012 WL 2444908, at *4 (Tex. App.—Dallas June 28, 2012, pet. ref'd) (mem. op., not designated for publication).

See id. at 641–42. Because the testimony in question pertained to facts testified to by other witnesses respecting only the charged offense, there was low probability of "any tendency of the evidence to suggest a decision on an improper basis" or "any tendency of the evidence to confuse or distract the jury from the main issues." *See id*. at 641; *see also Dilg v. State*, No. 07-13-00160-CR, 2014 WL 458019, at *4 (Tex. App.—Amarillo, Jan. 29, 2014, no pet.) (mem. op., not designated for publication) (evidence of crime no more heinous than charged offense was not likely to inflame or distract jury). As to "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," the evidence in question was not scientific or technical and pertained to matters that could easily be understood by a jury. *See Hill v. State*, No. 05-15-00989-CR, 2017 WL 343593, at *5 (Tex. App.—Dallas Jan. 18, 2017, pet. ref'd) (mem. op., not designated for publication). Therefore, the trial court could have reasonably concluded the evidence in question was not prone to that tendency. *See id.* Additionally, the complained-of testimony consisted of only one sentence and thus did not "consume an inordinate amount of time." *See Gigliobianco*, 210 S.W.3d at 641. Finally, although the testimony in question pertained to facts shown by other evidence, i.e., the testimony of E.P. and Guardiola, the presentation of the same facts through several witnesses bore on the matter of consistency therefore was not "needlessly cumulative." *See id*. at 642. On this record, we conclude the trial court did not abuse its discretion by overruling appellant's rule 403 objection and admitting the evidence in question. *See Henley*, 493 S.W.3d at 83.

We decide appellant's second issue against him.

IV. CONCLUSION

We decide against appellant on his three issues. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KURNICUS HAYES, Appellant

No. 05-16-00740-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-30966-T.
Opinion delivered by Justice Lang, Justices Evans and Schenck participating.

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

Judgment entered this 27th day of November, 2017.