Affirmed and Opinion Filed March 19, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01069-CR

KERRY C. SMITH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1439292-Q

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Stoddart

A jury convicted Kerry C. Smith of continuous sexual abuse of a child and assessed punishment at twenty-five years in prison. In five issues, Smith contends the evidence is legally insufficient to support the conviction and the trial court erred by overruling his objection to hearsay evidence and denying his motions for mistrial regarding improper questioning by the State. We affirm.

BACKGROUND

Smith, age 41 or 42, met the complainant's mother, Erika, in Missouri when the complainant was six or seven years old. Erika had five children at that time. Smith and Erika eventually married. At the time of trial, Erika had ten children, five from before meeting Smith and five with Smith.

The complainant, J.T., was seventeen at the time of trial. She testified that the abuse began in Missouri when she was in the third grade. The first time was after putting her baby brother to bed, Smith had her lie on top of him while he moved her waist around so that her private area was rubbing his private area. They both were wearing clothes. J.T. also testified that she and her younger sister, J.S.M., would sometimes sleep in their parents' bed. At times when they did so, Smith would rub J.T.'s vagina with his hand over her clothes. J.T. testified Smith touched her vagina over her clothes with his hand more than once while they lived in Missouri.

The family moved to Jackson, Mississippi, the summer before J.T.'s fifth grade year. The touching over her clothes continued, then progressed to Smith rubbing the outside of her vagina under her clothes. During this time, the family visited Smith's brother in Little Rock, Arkansas on weekends and during Thanksgiving or Christmas break. The family slept in a camper behind the house. J.T. testified that Smith abused her almost every night in the back bedroom of the camper. She remembered a time when she was in bed with her siblings and Smith. She was lying with her back next to Smith. He started to rub her vagina with his hand over her clothes. Then he pulled her pants and underwear down, took out his penis and rubbed it against her vagina. On another night, Smith tried to put his penis into her vagina, but stopped when she kept moving around. The next night, Smith tried to put his penis into her anus, but she did not allow it because it was painful.

When J.T. was eleven and entering sixth grade, the family moved to Lancaster in Dallas County, Texas. They lived in a small house on Elm Street and sleeping arrangements were like "musical chairs," with people sleeping in different places from night to night. J.T. described an incident where Smith came into her room at night and took her into the living room. He pulled her pants and underwear down and rubbed his penis against her vagina while facing her. Another time, he took her into the garage and rubbed her vagina over her clothes with his penis. He stopped

when he heard a noise. J.T. also described an incident where Smith took her into his bedroom when no one else was home. He had her sit on the bed, then leaned over her so that she was straddling him. He then rubbed his penis on her vagina over her clothing. During these incidents, J.T. remembered Smith breathing heavily.

Sometime later, J.T.'s grandmother and uncle moved in with them and slept in the living room. J.T. slept in a bed in the dining room, which was separated by a curtain from the living room. Smith climbed into bed with her at night, pulled down her pants and underwear and rubbed his penis against her vagina. Once when he rubbed his penis against her vagina, she felt something "liquidy" come out of his penis. Smith told her to go to the bathroom and clean up. She did not say anything because she did not want to wake her grandmother and uncle.

Afterwards, J.T. began sleeping in a trundle bed in a bedroom with her two younger sisters. Her sisters slept on the top bed and J.T. slept in the bottom bed. Smith would come in at night and lie down behind her. He rubbed his hand on her vagina over her clothes, then he pulled her pants down and rubbed his penis against her vagina. Once, he tried to put his penis inside her vagina, but she kept moving because it was painful. He stopped when they heard her sisters moving on the top bed.

When J.T. was around twelve years old, the family moved into a house on Creekwood in Lancaster. More than once, Smith would get into bed with her, rub his hand over her vagina with his hand, then pull her pants down and put his hand on her vagina. He then pulled his pants down, took J.T.'s hand and made her rub his penis with her hand.

Later, J.T. again began sleeping in the trundle bed with her sisters. Smith would come into the room and get in the bottom bed with J.T. He pulled down her pants and rubbed his penis against her vagina. Sometimes, he would try to turn her over to face him, but she turned away.

J.T. and her siblings would sleep in their parents' room at times, usually when there was a

bad storm. While they were in bed, Smith would rub J.T.'s vagina over her clothes with his hand. He would then slowly pull down her pants and his pants, and rub his penis against her vagina. This type of touching happened more than once.

In January of 2014, when J.T. was fourteen and in the ninth grade, she told her mother on the way to school that Smith had been rubbing his "private area" against her "private area." That afternoon, J.T. heard her mother arguing with Smith and the abuse stopped for about a week. After that, however, Smith began touching J.T.'s vagina over and under her clothes with his hand.

On May 6, 2014, a school police officer told the school counselor, Rebecca Alexander-Jackson, that J.T. was crying in the cafeteria and "in distress." The counselor took J.T. to her office so they could talk. Once she regained her composure, J.T. told the counselor that Smith was touching her and she wanted it to stop. J.T. eventually explained to the counselor that Smith was touching her vaginal area with his hand.

That afternoon, Sergeant Machelle McAnally of the Lancaster Police Department spoke with J.T. about her complaint. J.T. told McAnally that Smith was touching her butt and "private area" both over and under her clothes and that he put his finger into her private area. The touching was sometimes daily and began when she was age six and living in Missouri.

Yesenia Gonzalez conducted a forensic interview of J.T. at Dallas Children's Advocacy Center. Gonzalez testified that J.T. said the most recent incident was the Thursday or Friday before she talked to the school counselor. J.T. explained that she put her two younger siblings to sleep in their parent's bed and fell asleep with them. She was awoken by Smith touching her vagina underneath her clothes and her breasts with his hand. J.T. told Gonzales about an incident when she was eleven or twelve years old at the house on Elm Street in Lancaster. Smith came into her room, got on top of her, and felt her breasts and rubbed her vagina with his hand. Smith then tried to put his penis into J.T.'s vagina. Gonzalez asked if anything came out of Smith's penis and J.T.

said something liquid came out. J.T. said it was painful when Smith put his penis into her vagina and she noticed some bleeding when she went to the restroom.

J.T. told Gonzales about other incidents at the house on Elm Street where Smith would come into her room at night and take her to the garage or somewhere in the living room where it was dark. He would have her stand against the wall then feel her breasts and touch her vagina both over and under her clothing. Smith kissed her on the neck and mouth, pulled her clothes down and tried to put his penis into her vagina or rub his penis against it. J.T. said the incidents occurred almost every day.

Dr. Matthew Cox examined J.T. and spoke with Erika on May 20, 2014. J.T.'s physical examination was normal, which is not unusual in sexual abuse cases. Cox learned that Erika did not believe the sexual abuse allegations and that J.T. was cutting herself and having suicidal thoughts. A psychologist later diagnosed J.T. with PTSD and major depressive disorder. J.T. was placed in an intensive counseling program and on three different psychotropic medications and an over-the-counter medication.

Smith's mother testified in his defense that she thought it strange that J.T. said the last incident occurred the Thursday or Friday before her outcry because Smith and Erika were with the grandmother in Arkansas for a funeral at that time. Smith denied committing any of the acts J.T. testified about. Smith testified J.T. was always depressed as a child, but she improved when she joined ROTC in high school. Smith explained that the children were not allowed to date until they were sixteen, but he learned from her sister that J.T. had a boyfriend. J.T. made her outcry to the counselor about two weeks after she broke up with her boyfriend. Smith also testified that twelve people were living in the houses in Lancaster and no one was ever alone. Smith testified that to take J.T. to the garage as she testified, he would have to walk through all the rooms and step over several people. He also said the garage was packed full of furniture.

STANDARD OF REVIEW

We review a challenge to the sufficiency of the evidence on a criminal offense for which the State has the burden of proof under the single sufficiency standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014). Under this standard, the relevant question is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2011). This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* Therefore, in analyzing legal sufficiency, we determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Id.* When the record supports conflicting inferences, we presume the factfinder resolved the conflicts in favor of the verdict and therefore defer to that determination. *Id.* Direct and circumstantial evidence are treated equally: circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.*

ANALYSIS

A. Sufficiency of the Evidence

A person commits an offense if during a period of thirty or more days, the person commits two or more acts of sexual abuse against one or more children and at the time of the commission of acts, the actor 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(a). As applicable here, acts of sexual abuse mean indecency with a child (other than touching the breast of a child) under section 21.11(a)(1) or aggravated sexual assault under section 22.021. *Id.* § 21.02(c)(2), (4). A person commits

indecency with a child younger than seventeen years of age if the person engages in sexual contact with the child or causes the child to engage in sexual contact. *Id.* § 22.11(a)(1). Sexual contact means any touching by a person, including touching through clothing, of any part of the genitals of a child if committed with the intent to arouse or gratify the sexual desire of any person. *Id.* § 22.11(c)(1). A person commits aggravated sexual assault if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means, causes the sexual organ of a child to contact or penetrate the sexual organ of the actor, or causes the anus of a child to contact the sexual organ of the actor, and the victim is younger than fourteen years of age. *Id.* § 22.021(a)(1)(B).

The jury heard testimony of multiple acts of sexual abuse committed by Smith against J.T. when she was younger that fourteen and that occurred over a period of more than thirty days. Smith was older than seventeen when these acts were committed. A jury could rationally conclude from all the evidence, including Smith's heavy breathing during the touching and evidence of ejaculation, that the touching was committed with the intent to arouse or gratify Smith's sexual desire. A jury could also rationally conclude from the evidence that Smith intentionally or knowingly caused the penetration of J.T.'s anus or sexual organ by any means, caused her sexual organ or anus to contact Smith's sexual organ, and that J.T. was younger than fourteen years of age at the time.

Smith contends that J.T.'s testimony was inconsistent and she explained details at trial she did not give to Gonzalez or Cox. He argues it would have been impossible for the number of incidents of abuse to occur in a house with twelve people without someone becoming aware of what was happening. Smith disputes that any abuse occurred in a camper in Arkansas based on evidence the family never took the camper to Arkansas and J.T. slept in her uncle's trailer home with his daughter. Smith denied abusing J.T. the Thursday or Friday before her outcry because he

was in Arkansas for a funeral at the time. He maintained that J.T. was depressed because she broke up with her boyfriend and was taking three different psychotropic medications.

The jury heard evidence from Gonzalez that children in sexual abuse cases go through different stages of disclosure of what happened to them. Some children go through all stages, but some stay in a stage forever. Disclosure is a process, not a one-time event. Children will continue to process and may describe more incidents in later interviews. Where the abuse is chronic, the child may not remember "all the peripheral details." Gonzalez explained that in her experience, children describe abuse that occurred in a crowded house or while another person was sitting next to the child or in bed with the child. Smith also testified he was able to have sex with his wife, Erika, while living in the crowded house.

Although there is conflicting evidence in the record, it was for the jury to resolve those conflicts, weigh the evidence, and draw reasonable inferences from the facts. We presume the jury resolved the evidence supporting conflicting inferences in favor of their verdict and defer to that determination. *Clayton*, 235 S.W.3d at 778. Based on the cumulative effect of all the evidence, the jury's necessary inferences are reasonably based on the evidence viewed in the light most favorable to the jury's verdict. We conclude a rational jury could have found the essential elements of the offense beyond a reasonable doubt. Therefore, the evidence is legally sufficient to support the verdict. We overrule Smith's first issue.

B. Hearsay Objection

Smith argues in his second issue that the trial court erred by overruling his hearsay objection to a statement by J.T.'s friend, David Manning.

We review the trial court's ruling admitting or excluding evidence for an abuse of discretion. *See Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). We reverse only when the trial court's decision was so clearly wrong as to fall outside the zone of reasonable

disagreement. *Id.* We uphold the trial court's ruling if it was correct on any theory reasonably supported by the evidence and applicable to the case. *See Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

The State asked Manning to describe a time when J.T. reached out to him in the ninth grade. He testified: "It was maybe in the middle of the night when she had called me and asked me to pick her up because she didn't wanna be at home." Smith objected on the grounds of hearsay. The trial court overruled the objection. Manning then testified that J.T. told him she was uncomfortable and did not want to be at home. She felt like something bad was going to happen and asked if he could pick her up.

The State contends that even if the statement was hearsay, it did not affect Smith's substantial rights and was harmless. *See* TEX. R. APP. P. 44.2(b). We agree.

Under rule 44.2(b), we disregard any error that does not affect the appellant's substantial rights. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). In assessing the likelihood that the jury's decision was adversely affected by the error, an appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. *Id*. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire and whether the State emphasized the error. *Id*. at 518–19. "[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.

J.T. testified extensively about repeated acts of sexual abuse in the home by Smith. Even after J.T. told her mother about the abuse, Smith continued to abuse her. J.T. testified she did not talk to her mother again because she could not trust her mother. After J.T.'s outcry, her mother seemed upset with her and did not believe her. J.T. stayed home from school for two weeks following her outcry and described the period as "awful" because of the way her mother treated her.

After examining the entire record, we have a fair assurance that Manning's single statement that J.T. told him she did not want to be at home did not influence the jury or had but a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). We conclude that any error in overruling Smith's hearsay objection was harmless. We overrule Smith's second issue.

C. Motions for Mistrial

Smith contends the trial court erred by denying his motions for mistrial regarding (1) testimony by the complainant's sister that Smith also abused her; (2) the State's questioning of the complainant's grandmother about whether complainant's mother was a "good mother;" and (3) the State's improper questioning of defendant.

We review the trial court's denial of a motion for mistrial for an abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004); *see also Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). We uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292. "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins*, 135 S.W.3d at 77; *see also Ocon v. State*, 284 S.W.3d 880, 884–85 (Tex. Crim. App. 2009) (mistrial is extreme remedy and

should be granted only when residual prejudice remains after less drastic alternatives are explored). Granting a mistrial is appropriate when error is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Hawkins*, 135 S.W.3d at 77 (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)).

"The asking of an improper question will seldom call for a mistrial, because, in most cases, any harm can be cured by an instruction to disregard." *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd*, 3 S.W.3d at 567). "On appeal, we generally presume the jury follows the trial court's instructions in the manner presented. The presumption is refutable, but the appellant must rebut the presumption by pointing to evidence that the jury failed to follow the trial court's instructions." *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *see also Wood*, 18 S.W.3d at 648 ("A mistrial is required only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors.") (quoting *Ladd*, 3 S.W.3d at 567); *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000) (prompt instruction to disregard will ordinarily cure any prejudice associated with improper question and answer, even one regarding extraneous offenses).

To determine whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) severity of the misconduct; (2) measures adopted to cure any harm from the misconduct; and (3) certainty of conviction absent the misconduct. *See Hawkins*, 135 S.W.3d at 77; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

1. Sister's Testimony

J.T.'s sister, J.S.M., was fifteen at the time of trial. She was in the car when J.T. told her mother about the sexual abuse. J.S.M. was asked what she remembered about the conversation. She testified:

> I just remember [J.T.] telling my mom that she had something — she was telling her — she was, like, do you remember, you know, she said, Do you remember when I told you I had something to tell you? And my mother was like, Yeah, I remember.
>
> And then, that's when she was like, she was like, daddy's been touching me in ways that he's not supposed to, and my mom was like, what do you mean, and she was just like, in a way that you just don't touch your daughter or something like that, and then I saw her looking back.
>
> I remember my mom, she was — she looked at me. She was like, she was — she said a comment about me, looking back, and being in the conversation, and she was like, oh, what did it happen to you too, and I nodded yes.

When the State began asking another question, Smith requested a bench conference. The trial court then excused the jury.

Outside the presence of the jury, Smith argued that J.S.M.'s testimony that it happened to her also could not be cured by an instruction to disregard and requested a mistrial. The trial court denied the motion for a mistrial. When the jury returned, the trial court gave the following instruction:

> Ladies and Gentlemen of the jury, I'm going to ask that you disregard the last question and the last answer that you heard from [J.S.M.]. I'm also gonna [sic] instruct you that if there's any testimony before you in this case regarding the Defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider that testimony for any purpose, unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then, you may only consider the same in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident of the Defendant, if any, in connection with the offense, if any, alleged against him in the indictment in this case and for no other purpose.

Regarding the severity of the misconduct, the prosecutor's question did not call for extraneous offense evidence. Further, the prosecutor informed the judge that the testimony was a surprise and inconsistent with J.T.'s testimony about the conversation and with J.S.M.'s forensic interview with Gonzalez. The prosecutor admonished the witness before her testimony not to discuss other offenses that may have occurred. Defense counsel stated she did not question the integrity of the prosecutor and believed the prosecutor's comments about admonishing the witness.

Regarding curative measures, the trial court promptly and clearly instructed the jury not to consider the question and answer. Questioning then turned to other matters. The trial court further instructed the jury regarding extraneous offense evidence in the jury charge. We presume the jury followed these instructions and have found no evidence that it failed to do so. *See Thrift*, 176 S.W.3d at 224; *Ovalle*, 13 S.W.3d at 783.

Regarding the certainty of conviction, as discussed above, there was ample evidence to establish Smith's guilt. J.T. gave detailed testimony about repeated acts of sexual abuse by Smith over several years. She maintained her testimony despite her mother's disbelief and the impact on the family. Even without J.S.M.'s statement, the jury likely would have found Smith guilty based on the all the evidence.

Based on the record and the curative measures taken by the trial court, we cannot say the court abused its discretion by denying the motion for a mistrial. We overrule Smith's third issue.

2. Grandmother's Testimony

During the cross-examination of J.T.'s grandmother, the State asked about the current whereabouts of J.T.'s mother, Erika. Smith's relevance objection was sustained. The State later asked the grandmother if she agreed that a good mother protects her children. The grandmother agreed. The State then asked:

> Q. And . . . so in your opinion then, is your daughter, Erika a good mom?
>
> A. That's my child. I don't speak — yes.
>
> . . .
>
> Q. And so, even when Erika didn't protect her oldest daughter, [M.Q.] —

At this point, Smith objected and requested a hearing outside the presence of the jury. The trial court excused the jury and conducted a hearing.

The prosecutor informed the judge that Erika's oldest daughter, M.Q., was sexually assaulted when she was twelve by the biological father of J.T., and discussed Erika's conduct

regarding the trial of the biological father and her relationship with him. Smith objected that this case was not against Erika and moved for a mistrial. After a lengthy discussion of matter, the trial court denied the motion for mistrial, but prohibited the State from further questioning about the circumstances surrounding the oldest daughter, M.Q. The trial court stated that a limiting instruction was not appropriate because the matter relating to M.Q. was attributed to Erika, not Smith, but prohibited further questioning about Erika's actions regarding M.Q.

When the jury returned, the State referenced the grandmother's testimony that a good mother protects her children, then asked the grandmother if she would call the police if one of her grandchildren told her someone was touching them inappropriately. The grandmother responded, "I wouldn't have to. I'd call the coroner."

The State argues the misconduct is not severe because the prosecutor explained her belief that the questioning was relevant because the defense indicated by its questioning of witnesses that Erika did not believe J.T. because of J.T.'s mental condition, J.T. was jealous of her siblings, and J.T. recently broke up with her boyfriend.

While the relevance of this evidence is tangential at best, the jury did not hear any evidence that Erika did not protect her oldest child, M.Q. It is unlikely the jury would draw any reasonable inference about Smith's conduct from this vague reference to Erika's conduct. The severity of the misconduct does not indicate the extreme remedy of a mistrial was necessary.

Smith did not request a limiting instruction and the trial court explained that an instruction would not be appropriate in this circumstance. Given the nature of comment and this record, we cannot say the trial court abused its discretion by not emphasizing the matter with an instruction to disregard. In light of the evidence supporting the verdict, the denial of the motion for mistrial was not an abuse of discretion. We overrule Smith's fourth issue.

3. Defendant's Testimony

Smith testified in his own behalf. During cross-examination, the State asked Smith if he remembered the night a week before J.T.'s outcry when he was in the kitchen with Erika while J.T. put her younger sisters, K.L. and K.D., to bed in Smith's room. Smith said he did not remember. The prosecutor then asked:

> Q. And she went and fell asleep in your bed and then you and Erika left the kitchen and went into that room and fell asleep in the bed with [J.T., K.L., and K.D.] correct?
>
> A. No.
>
> Q. Okay. So then help me understand this, if — if Erika remembers that time, how do you not –
>
> [DEFENSE]: I'm sorry. I'm going —
>
> Q. — remember that night?
>
> [DEFENSE]: — to object. This has been discussed, and I think we need to have a hearing out of the presence of the jury, Your Honor, please.

The trial court excused the jury and heard arguments from the attorneys. Smith's attorney requested a mistrial, arguing the prosecutor again sought to interject evidence about J.T.'s mother into the case. When the trial court expressed concern about the purpose of the cross-examination, the prosecutor explained she was referring to a statement by Erika to CPS indicating Erika remembered that night. After further argument about the prosecutor's questioning and whether the State was entitled to impeach Erika, the trial court denied the motion for a mistrial. However, the trial court reminded the prosecutor that Erika was not on trial in this case.

When the jury returned, the cross-examination continued with questions about what Smith heard about J.T.'s outcry to the school counselor. Later in the cross-examination, the prosecutor again asked if he remembered the night when J.T. put her sisters to bed in Smith's room about a week before her outcry. Smith confirmed he did not remember that night.

On appeal, Smith contends the State attempted to impeach him on a collateral matter.

However, Smith did not raise this issue in the trial court and it is not preserved for appeal. *See* TEX. R. APP. P. 33.1(a). From the comments of the prosecutor in the trial court, it appears the State was attempting to impeach Erika, not Smith. The prosecutor's comment about what Erika remembered in this instance, was not severe. The trial court took appropriate curative measures by excusing the jury and instructing the prosecutor to "leave Ms. Erika out of this." Additionally, there is ample evidence to support the conviction absent the misconduct. Balancing these factors, we conclude the trial court did not abuse its discretion by denying the motion for mistrial. We overrule Smith's fifth issue.

CONCLUSION

We conclude the evidence is sufficient to support the jury's verdict and the trial court did not abuse its discretion by denying the hearsay objection and the motions for mistrial. Accordingly, was affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KERRY C. SMITH, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas
No. 05-16-01069-CR V.	Trial Court Cause No. F-1439292-Q.
	Opinion delivered by Justice Stoddart.
THE STATE OF TEXAS, Appellee	Justices Lang-Miers and Fillmore participating.

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

Judgment entered this 19th day of March, 2018.