Affirmed and Opinion Filed May 22, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00560-CR

JORGE GEOVANY HERNANDEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 59th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 066771

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Lang

Jorge Geovany Hernandez appeals the trial court's judgment convicting him of continuous sexual abuse of a young child or children. The jury found Hernandez guilty and the trial court assessed his punishment at life imprisonment. Hernandez raises five issues on appeal, arguing: (1) the evidence is insufficient to support his conviction; (2) he suffered egregious harm when the trial court included an instruction in the jury charge that allowed the jurors to convict him without reaching a unanimous decision; (3) the trial court erred when it denied his motion to suppress his confession; (4) the trial court erred when it overruled his objection to the testimony of the outcry witnesses because the testimony was not reliable and it was not restricted to the alleged offense; and (5) the trial court erred when it overruled his hearsay objections to the testimony of the sexual assault nurse examiner and the redacted sexual assault examination reports. We conclude the

evidence is sufficient, Hernandez has not shown he suffered egregious harm, and the trial court did not err. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

In 2011, C.G.R. and C.N.W. moved to Texas with their mother and older brother. Their mother met Hernandez at work that same year and they started dating about six months later. Although their mother had introduced Hernandez to her children, she did not allow him to be alone with them until they had dated about a year, when she had to work "the graveyard shift" and needed someone to watch her children during the night. At some point, Hernandez started living with them. During this time, the family lived in a house the girls called the "mouse house," but they lived there for only two months before it was destroyed by fire. According to C.G.R., Hernandez began sexually abusing her when they lived in "the mouse house" and her mother was asleep or at work.

After the fire, the family moved to another house that the girls called "the pool house." They lived there for a year. Next, the family moved to a residence the girls called "the Christmas tree house." The last incident occurred on December 29, 2015, when the family lived at "the Christmas tree house." During that incident, Hernandez tried to force C.G.R. to touch his penis, C.G.R. called for C.N.W.'s help, and the girls tried to push Hernandez away. Later that night, C.N.W. told her mother that she "ha[d] something to tell [her], but would tell her in the morning."

On December 30, 2015, the next morning, while her mother was cooking breakfast, C.N.W. approached her mother and told her that Hernandez "pulls his thing out and tried [sic] to make them touch it," rubbing her hands together to demonstrate. The mother called C.G.R. into the room and asked if what her younger sister said was true. C.G.R. said, "Yes," then sat on the floor appearing to "shut down." At that point, their mother called the police.

After the police arrived, the girls' mother took them to the Child Advocacy Center where they were interviewed by Britney Martin, a forensic interviewer. Martin interviewed C.N.W. first. During the interview, C.N.W. told Martin that one night, she had a nightmare and got into bed with her mother and Hernandez. After her mother left for work, Hernandez pulled her closer, she tried to get away, but he was too strong, and "he puts his no-no spot in her butt." C.N.W. told Martin it happened a lot of times, at multiple places, she was eight years of age when it happened, "it hurt like a rock," and when she wiped her bottom afterward there was white and brown "gooey stuff" on the tissue. Also, she told Martin that Hernandez rubs her tummy a lot and goes down too far, which Martin understood to mean he touched her genitals. In addition, C.N.W. stated that she saw Hernandez's "no-no" spot on multiple occasions. C.N.W. clearly told Martin that Hernandez had instructed her not to tell. Next, Martin interviewed C.G.R. During that interview, C.G.R. told Martin that Hernandez "tries to do the nasty" with her, said "the nasty" was his bad spot and her bad spot together, "rubb[ed] her face and stomach putting his bad spot to her bad spot," had "white gooey stuff" coming out of his "bad spot," and caused her hand to touch his genitals. Martin understood C.G.R. to be describing events that occurred over a period of time.

Also, on December 30, 2018, C.G.R. and C.N.W. were examined by Judith Common, a registered nurse and sexual assault nurse examiner (SANE). C.N.W. told Common that Hernandez "has been doing nasty on [her] pee pee and [her] bottom (where poop comes from). He tries to let us touch him where his pee pee spot is." C.G.R. told Common that, the night before, Hernandez grabbed her and tried to pull out his "bad spot," she told him "no" two or three times, he touched his "no-no" on her stomach, she called her sister for help, Hernandez did "the nasty" before, and the first time he did it she was seven years of age and in the second grade. Common did not observe any trauma or abnormalities to the girls' genital or anal areas, but stated that this is not uncommon as those areas heal quickly.

In addition, on December 30, 2015, Hernandez was arrested. Before he was interviewed, Officer Jose Cuellar read him the *Miranda* warnings in Spanish. Detective John Watt interviewed Hernandez with Officer Cuellar interpreting. During the interview, Hernandez initially denied any inappropriate conduct and, at times, accused the children of lying. However, during the course of the interview, he first admitted to inappropriate conduct with C.G.R. and then, eventually, he also admitted to inappropriate conduct with C.N.W. With respect to C.G.R., Hernandez compared her to a woman, claimed that "she was always trying to find a way to touch and seduce [him]," admitted that C.G.R. had touched his penis about three times and that he penetrated her vagina with his hands, confirmed the grabbing incident where C.N.W. tried to help C.G.R. push him away on December 29, 2015, stated he touched her like you would touch a woman, corroborated that he masturbated and ejaculated in front of her, and related that he touched her private part about ten times, the first time being about a year ago. With respect to C.N.W., Hernandez admitted that one time he grabbed her from behind like a man would grab a woman, "[he] stuck [his penis] inside [her butt]," and "she said it was hurting." Also, Hernandez indicated to Detective Watt that he "wanted help for this."

Hernandez was indicted for continuous sexual abuse of a young child or children. Before trial, Hernandez filed a motion to suppress his oral confession to the police, arguing his statement was involuntary. The trial court denied the motion to suppress and signed written findings of fact and conclusions of law. The jury found Hernandez guilty and the trial court assessed his punishment at life imprisonment.

II. SUFFICIENCY OF THE EVIDENCE

In issue one, Hernandez argues the evidence is insufficient to support his conviction. He claims that although the girls testified to sexual abuse during a thirty-day period, there was no independent evidence presented showing he sexually abused them during a period that was greater

than thirty days. He argues that the only evidence concerning the timing and locations of the abuse were vague statements and tying the events of sexual abuse to a house served no purpose "as the end of a stay at one house was immediately followed by the beginning of a stay at the next." The State responds that, although the children could not testify to specific dates, they were able to identify the three homes they lived in and their mother was able to testify when they lived in those homes. Also, the State argues Hernandez admitted that he first touched C.G.R. approximately a year before his interview with the police.

A. Standard of Review

When reviewing the sufficiency of the evidence, an appellate court considers all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *State v. Bolles*, 541 S.W.3d 128, 133–34 (Tex. Crim. App. 2017); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality op.). An appellate court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *See Jackson*, 443 U.S. at 319, 326; *Bohannan v. State*, No. PD-0347-15, 2017 WL 5622933, at *9 (Tex. Crim. App. Nov. 22, 2017); *Brooks*, 323 S.W.3d at 899. All evidence, whether properly or improperly admitted, will be considered when reviewing the sufficiency of the evidence. *See McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam); *Lockhart v. Nelson*, 488 U.S. 33, 41–42 (1988); *Jackson*, 443 U.S. at 319.

B. Applicable Law

A person commits the offense of continuous sexual abuse of a young child or children 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. *See* TEX. PENAL CODE ANN. § 21.02(b) (West Supp.

2017); *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.–Dallas 2017, no pet.). 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. *See* PENAL § 21.02(d); *Garner*, 523 S.W.3d at 271. However, the statute does not require that the jury agree unanimously on the specific acts of sexual abuse the defendant committed or the exact dates when those acts were committed. *See* PENAL § 21.02(d).

Indecency with a child under section 21.11(a)(1) and aggravated sexual assault under section 22.021 are two of the specifically enumerated predicate "acts of sexual abuse" for the offense of continuous sexual abuse. *See* PENAL § 21.02(c)(2)–(3). Under section 21.11 the offense of indecency with a child occurs when a person engages in sexual contact with a child younger than seventeen years of age or causes the child to engage in sexual contact. *See* PENAL § 21.11 (West Supp. 2017). Section 22.021 identifies several alternative means of committing aggravated sexual assault, including intentionally or knowingly penetrating the anus or sexual organ of a child, causing the sexual organ of a child to contact the sexual organ of the defendant, or causing the anus of a child to contact the sexual organ of the defendant. *See* PENAL § 22.021(a)(1)(B) (West Supp. 2017). The testimony of a child victim alone is sufficient to support a conviction for continuous sexual abuse of a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2017); *Garner*, 523 S.W.3d at 271.

C. Application of the Law to the Facts

Hernandez's only complaint is that the State failed to prove that two or more acts of sexual abuse occurred during a period of thirty days or more. The record shows that C.G.R. testified they lived at three houses and Hernandez lived with her family at all three residences. She stated that Hernandez first penetrated her private part with his private part at "the mouse house," she was not sure if anything happened at "the pool house," and the last time he did something was when he

grabbed her, tried to get her to touch his privates, and she called for her sister's help at "the Christmas tree house." Also, she stated that he tried to do something with his privates and her privates a lot. C.N.W. testified that Hernandez lived with them at the three houses for several years and that he showed her his private parts frequently. Also, C.N.W. stated that he grabbed her sister and tried to pull out his bad spot at "the Christmas tree house."

The girls' mother testified that the family lived in a house the girls called the "mouse house" for only two months before a fire destroyed it. After the fire, the family moved to another house that the girls called "the pool house" where they lived for a year. Next, the family moved to a residence the girls called "the Christmas tree house," but they left there before the first month's rent was due after the girls told her of the sexual abuse. Also, their mother stated that during the two-year time span from December 2013 through December 2015, C.G.R. was eight or nine years old and C.N.W. was seven or eight years old.

Martin, the forensic interviewer, testified that C.N.W. told her Hernandez put his penis in her anus a lot of times, at multiple places, she was eight years of age when it happened, and she saw Hernandez's "no-no" spot on multiple occasions. Also, Martin testified that C.G.R. described instances of sexual abuse and that Martin understood C.G.R. to be describing events that occurred over a period of time.

Common, the nurse, testified C.N.W. told her that Hernandez did "his nasty" when they were at the "[Christmas] tree house." Also, Common testified that C.G.R. corroborated her sister's description of the events on December 29, 2015, and told her Hernandez first did "the nasty" when she was seven years of age, in the second grade, and living at a different house. Further, redacted versions of the sexual assault forensic examination reports for both girls were admitted into evidence. On the report for C.N.W., there is the following notation: "PT. Denied contact with [Hernandez] 12-30-15 Admitted contact during LAST 4 yrs."

In addition, during his interview with Detective Watt, Hernandez admitted that C.G.R. had touched his penis about three times, confirmed the grabbing incident where C.N.W. tried to help C.G.R. push him away on December 29, 2015, and related that he touched C.G.R.'s private part about ten times, the first time being about a year ago.

The testimony of Martin, Common, the girls' mother, and the girls is sufficient to show that the acts of sexual abuse occurred during a period of thirty days or more. While the girls were unable to provide specific dates for when the abuse occurred, they referred to the sexual abuse occurring at different houses and their mother was able to provide a timeline of when they resided at those houses. Also, C.G.R. stated it started when she was seven years of age and in the second grade and her mother stated C.G.R. was nine years of age when she made her outcry. Further, Hernandez admitted that the abuse began a year before the last incident. In addition, testimony at trial showed that Hernandez lived at all three houses with and had access to C.G.R. and C.N.W. for more than a year. Accordingly, we conclude the evidence is sufficient to support Hernandez's conviction. *See Garner*, 523 S.W.3d at 271–72 (mother's testimony that she learned abuse started happening around Christmas time and last act occurred in February, the day before outcry was sufficient to show abuse occurred during a period of thirty or more days); *Michell v. State*, 381 S.W.3d 554, 560–64 (Tex. App.—Eastland 2012, no pet.) (child unable to give specific dates when instances of abuse took place, but was able to tell forensic interviewer where they occurred, the grade she was in at school, and season of year); *Williams v. State*, 305 S.W.3d 886, 889–90 (Tex. App.—Texarkana, 2010, no pet.) (child unable to speak to span of time that instances of abuse occurred, but said it happened every time she stayed with grandmother, and mother said child stayed with grandmother when she worked early, which happened regularly during five-month period alleged in indictment).

Issue one is decided against Hernandez.

III. JURY CHARGE

In issue two, Hernandez argues he suffered egregious harm when the trial court included an instruction in the jury charge that allowed the jurors to convict him without reaching a unanimous decision. He contends the jury charge was defective because it did not require the jury to agree on the specific acts of sexual abuse and the trial court did not require the State to choose what it considered to be the strongest theory of liability. However, he acknowledges that his contention there was jury charge error was not preserved for appellate review. Nevertheless, Hernandez claims that he was egregiously harmed by the allegedly erroneous jury charge because: (1) the entire jury charge was tainted by the error; (2) there was a lack of evidence showing acts of abuse occurred during a period of thirty or more days; and (3) the State sought to prove the abuse occurred over a fifteen month period because the girls said the abuse occurred at three different houses. The State responds that the jurors were not required to unanimously agree on the specific acts of sexual abuse committed. Assuming, without deciding, there was jury charge error, we review the alleged error for egregious harm.

A. Egregious Harm

Article 36.19 of the Texas Code of Criminal Procedure establishes the standard for reversal on appeal when the requirements of article 36.14, which relates to the charge of the court, have been disregarded: "the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of [the] defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." CRIM. PROC. art. 36.19 (West 2006). If the defendant timely objected to the jury instruction, then reversal is required if the appellate court concludes there was some "some harm" to the defendant. *See Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). When the defendant fails to object or states that he has no objection to the jury charge, an appellate

court will not reverse for jury charge error unless the record shows "egregious harm" to the defendant. *See Marshall*, 479 S.W.3d at 843; *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005).

Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis. *See Marshall*, 479 S.W.3d at 843; *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). Neither party bears the burden on appeal to show harm or lack thereof under the egregious harm standard. *See Marshall*, 479 S.W.3d at 843 (citing *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)). Instead, courts are required to examine the relevant portions of the entire record to determine whether the defendant suffered actual harm, as opposed to theoretical harm, as a result of the error. *See Marshall*, 479 S.W.3d at 843. The actual degree of harm must be assayed in light of: (1) the entire jury charge; (2) the state of the evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *See Marshall*, 479 S.W.3d at 843; *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008); *Almanza*, 686 S.W.2d at 171. Errors which result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive. *See, e.g.*, *See Marshall*, 479 S.W.3d at 843; *Taylor*, 332 S.W.3d at 490.

B. Application of the Law to the Facts

First, we review the entire jury charge. As previously stated, section 21.02(b) of the Texas Penal Code states:

> (b) A person commits an offense if:
>
> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of abuse are committed against one or more victims; and

> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age at the time of the offense.

PENAL § 21.02(b).

The definition portion of the jury charge states, in part:

> A person commits an [o]ffense if, during a period that is 30 days or more in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims, and, at the time of the commission of each of the acts of sexual abuse, the person was 17 years of age or older and the victim is a child younger than 14 years of age.

The charge included definitions for an "act of sexual abuse," "indecency with a child," and "aggravated sexual assault." With respect to the jury's need to decide unanimously, the charge stated:

> You are instructed that members of the jury are not required to agree unanimously on which specific acts of sexual abuse, if any, were committed by the defendant or the exact date when those acts were committed, if any. The jury must agree unanimously that the defendant, during a period that was 30 or more days in duration, committed two or more acts of sexual abuse as that term has been previously defined.

The application paragraphs of the jury charge stated, in part, the following with respect to the offense of continuous sexual abuse of a child or children:

> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that the defendant, JORGE HERNANDEZ, in Grayson County, Texas, did then and there, during a period that was 30 or more days in duration, to wit: from on or about December 29th, 2013 through December 29th, 2015, commit two or more acts of sexual abuse against a child younger than 14 years of age, namely C.G.R. **and/or** C.N.W., to wit: the defendant, with the intent to arouse or gratify the sexual desire of the defendant or C.G.R., engaged in sexual contact with C.G.R., by touching the genitals of C.G.R.; the defendant intentionally or knowingly caused the penetration of the sexual organ of C.G.R. with the defendant's finger **and/or** sexual organ; the defendant intentionally or knowingly caused the anus of C.N.W. to contact the sexual organ of the defendant; **and/or** the defendant intentionally or knowingly caused the penetration of the anus of C.N.W. with the defendant's sexual organ, then you will find the defendant guilty of Continuous Sexual Abuse of a Young Child as charged in the indictment.

(Emphasis added). Following the application paragraph on the charged offense, there were three alternative lesser-included offenses for aggravated sexual assault of a child. The State did not

object to the charge and Hernandez made "a general objection for record purposes as to the unanimity issue, if in fact, the lesser-includeds [sic] are reached, but that's it."

Hernandez argues the use of "and/or" in the application paragraph "no doubt" caused the jury confusion and "there is no assurance that any juror correctly understood what the State was required to prove, as the elements of the offense were hopelessly jumbled." He also claims the State should have been required to choose its strongest theory of lability. Although the application paragraph did use "and/or," the statute for the offense required the jury to find Hernandez committed two or more acts of sexual abuse, regardless of whether the acts of abuse were committed against one or more victims. *See* PENAL § 21.02(b). Section 21.02(c) specifically enumerates the acts of sexual abuse. *See Price v. State*, 434 S.W.3d 601, 606 (Tex. Crim. App. 2014). Indecency with a child under section 21.11(a)(1) and aggravated sexual assault under section 22.021 are two of the specifically enumerated predicate "acts of sexual abuse" for the offense of continuous sexual abuse. *See* PENAL § 21.02(c)(2)–(3).

Second, we review the state of the evidence. We have already examined the evidence admitted for the jury's consideration when we reviewed the sufficiency of the evidence and concluded that the evidence was sufficient.

Third, we review the argument of counsel. With respect to the unanimity of the jury, the State argued during closing:

> Unanimity of the jury on particular acts. On Page 3 of the Jury Charge that y'all were read, you are instructed that members of the jury are not required to agree unanimously on which specific act of sexual abuse, if any, were committed by the defendant, or the exact dates when those were committed. You just must agree unanimously that the defendant, during a period that was 30 more days in duration, committed two or more acts as previously defined.
>
> Now, what that means, folks, practically speaking, for the same [sic] of argument let's say you six gentleman believe that the defendant penetrated the anus of [C.N.W.], but you don't believe he penetrated the sexual organ of [C.G.R.] with his penis. You think you believe his confession. You say, ["No"], I think he penetrated the sexual organ of [C.G.R.] multiple times with his finger. Let's say you guys

> don't believe the defendant penetrated the anus of [C.N.W.] with his sexual organ, but you do believe that over the course of a year he penetrated [C.G.R.]'s sexual organ with his penis on multiple occasions. You see what I'm saying? You guys are all in agreement and you should find him guilty because you don't have to all agree on which particular act. All you have to agree on is that two or more acts occurred 30 days apart.
>
> So, don't get caught up if some of you don't believe one didn't happen or one did. Figure out which ones you believe, and if each and every one of you can say, well, I believe at least two occurred 30 days or more apart over the course of the time that's alleged in the indictment, then you guys are unanimous. Go ahead and come back with a guilty verdict.

Defense counsel's argument did not address unanimity as to the specific acts of sexual abuse, but focused on whether the evidence showed the acts occurred thirty or more days apart. Further, the statute does not require that the jury agree unanimously on the specific acts of sexual abuse the defendant committed or the exact dates when those acts were committed. *See* PENAL § 21.02(d).

Having reviewed the entire record, we conclude that assuming, without deciding, there was jury charge error, Hernandez did not suffer egregious harm.

Issue two is decided against Hernandez.

IV. MOTION TO SUPPRESS

In issue three, Hernandez argues the trial court erred when it denied his motion to suppress. He claims that the trial court's findings of fact are not supported by the record. Also, he argues that the trial court's conclusions of law are incorrect because the warning he received did not substantially comply with the required "right to terminate" warning. In addition, Hernandez claims that the accuracy of the language translation is a significant factor. The State responds that the warning conveyed the exact meaning of article 38.22 in slightly different language and was sufficient to comply with the requirements of the statute.

A. Standard of Review

In reviewing a trial court's ruling on a motion to suppress, an appellate court applies a bifurcated standard of review. *See Wilson v. State*, 311 S.W.3d 452, 457–58 (Tex. Crim. App. 2010); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). An appellate court gives almost total deference to the trial court's determination of historical facts, but conducts a de novo review of the trial court's application of the law to those facts. *See Wilson*, 311 S.W.3d at 458; *Carmouche*, 10 S.W.3d at 327. As the sole trier of fact during a suppression hearing, a trial court may believe or disbelieve all or any part of a witness's testimony. *See Wilson*, 311 S.W.3d at 458; *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). An appellate court examines the evidence in the light most favorable to the trial court's ruling. *See Wilson*, 311 S.W.3d at 458; *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). A trial court will abuse its discretion only if it refuses to suppress evidence that is obtained in violation of the law and that is inadmissible under Texas Code Criminal Procedure article 38.23. *See Wilson*, 311 S.W.3d at 458.

Where the trial court has made express findings of fact, an appellate court views the evidence in the light most favorable to those findings and determines whether the evidence supports the fact findings. *See State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017); *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). An appellate court then proceeds to a de novo determination of the legal significance of the facts and will sustain the trial court's ruling if it is correct on any theory of law applicable to the case. *See Rodriguez*, 521 S.W.3d at 8 (appellate court then proceeds to a de novo determination of legal significance of fact); *Valtierra*, 310 S.W.3d at 447 (will sustain trial court's ruling if it is supported by record and correct on any theory of law applicable to case).

B. Applicable Law

Article 38.21 of the Texas Code of Criminal Procedure provides that a defendant's statement may be used against him "if it appears that the same was freely and voluntarily made without compulsion or persuasion." *See* CRIM. PROC. art. 38.21 (West 2005); *Delao v. State*, 235 S.W.3d 235, 239 (Tex. Crim. App. 2007). The determination of whether a statement is voluntary is based on an examination of the totality of the circumstances surrounding its acquisition. *See Delao*, 235 S.W.3d at 239; *Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997); *see also Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991).

A statement may be deemed "involuntary" under three different theories: (1) failure to comply with article 38.22, section 6; (2) failure to comply with the dictates of *Miranda* as codified and expanded in article 38.22, sections 2 and 3; or (3) failure to comply with due process because the statement was not freely given as a result of coercion, improper influences, or incompetency. *See Oursbourn v. State*, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008); *Wolfe v. State*, 917 S.W.2d 270, 282 (Tex. Crim. App. 1996). A statement may be deemed involuntary under one, two, or all three of these theories. *See Oursbourn*, 259 S.W.3d at 169.

Article 38.22, section 3(a)(2) provides that no oral statement of an accused made as a result of custodial interrogation is admissible against him in a criminal proceeding unless, *inter alia*, prior to the statement but during the recording he is given the warning in section 2(a). *See* CRIM. PROC. art. 38.22 § 3(a)(2) (West Supp. 2017). Pursuant to section 2(a), the warning must inform a defendant of the following:

> (1) [H]e has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time[.]

CRIM. PROC. art. 38.22, § 2(a).

Under section 3(e)(2), the warning is sufficient if the accused was given the warning in section 2(a) or its fully effective equivalent. *See* CRIM. PROC. ART. 38.22 § 3(e)(2). Courts have long held that there is not one singularly correct form of the required warnings and that substantial compliance with article 38.22 and *Miranda* is sufficient. *See, e.g., Florida v. Powell*, 559 U.S. 50, 60 (2010); *Bible v. State*, 162 S.W.3d 234, 240 (Tex. Crim. App. 2005); *Nonn v. State*, 41 S.W.3d 677, 679 (Tex. Crim. App. 2001); *Rutherford v. State*, 129 S.W.3d 221, 224–25 (Tex. App.—Dallas 2004, no pet.). When determining whether the defendant received warnings that conveyed the fully effective equivalent of the warnings set forth in the statute, a court need not examine the words used "as if construing a will or defining the terms of an easement." *See Powell*, 559 U.S. at 60 (discussing *Miranda* warnings). A warning that conveys the same meaning as the statute is sufficient to comply with the statute even if the warning uses slightly different language than the language in article 38.22. *Penry v. State*, 691 S.W.2d 636, 643 (Tex. Crim. App. 1985); *Eddlemon v. State*, 591 S.W.2d 847, 850 (Tex. Crim. App. 1979); *Williams v. State*, 883 S.W.2d 317, 319–20 (Tex. App.—Dallas 1994, pet. ref'd). A failure to administer an article 38.22 warning is reversible error, but an incomplete warning may be sufficient for substantial compliance. *See Rutherford*, 129 S.W.3d at 224; *State v. Subke*, 918 S.W.2d 11, 14 (Tex. App.—Dallas 1995, pet. ref'd).

C. Application of the Law to the Facts

First, we address Hernandez's argument that the trial court's findings of fact are not supported by the record. The trial court made written findings of fact and conclusions of law. In the trial court's findings of fact, the trial court found, in part, that:

> 8. [Hernandez] was informed that he could waive [h]is right to remain silent and his right to ask for an attorney and could proceed to answer questions or make any comment he wished, and if he decided to answer questions he could stop anytime and retake/reclaim his right to ask for an attorney.

During the pretrial hearing on Hernandez's motion to suppress, Officer Cuellar testified he handed Hernandez a cellular phone that displayed the five required warnings in Spanish. He also stated that he told Hernandez "you can stop, retake/reclaim your right to ask for an attorney, so . . . [] he was informed that he could stop at any time and he can ask for an attorney." Also, a transcript of the video recording of the police's interview of Hernandez was admitted into evidence. The transcript states that Office Cuellar said, "#5 You can waive your right to remain silent and your right to ask for an attorney and you could proceed to answer questions and you can stop anytime you wish and retake/reclaim your right to ask for an attorney."

During the trial, Detective Watt testified that after receiving the *Miranda* warnings, Hernandez waived his rights. Also, Detective Watt stated that it was his understanding that Officer Cuellar told Hernandez "he could stop answering any questions he wanted" and he thought that was the same as stating "you have the right to terminate this interview at any time." In addition, Olga Stecker, the licensed interpreter who translated the video recording of Hernandez's interview testified. On cross-examination, she testified that in her review of the video recording the defendant did not say he was confused or did not understand the question that was being asked of him. This was the only question defense counsel asked Stecker during cross-examination. Hernandez did not present any evidence challenging her translation of Hernandez's police interview from Spanish to English or showing that Office Cuellar's Spanish translation was faulty or problematic. Further, a portion of the video recording of Hernandez's police interview was published to the jury.

After reviewing the record, in accordance with the applicable standard, we conclude the trial court did not abuse its discretion because the evidence supports the trial court's factual rendition.

Second, we review Hernandez's complaint that the trial court's conclusion of law is incorrect because he was not advised of his right to terminate the interview. *See* CRIM. PROC. art. 38.22 § 2(a)(5). He claims that the officer's warning did not substantially comply with article 38.22, section 2(a)(5), which required the officer to warn him that "he has the right to terminate the interview at any time" because "advice that one can 'stop' answering questions to request an attorney is not the same as mention of 'the right to terminate the interrogation' for any reason." In its written findings of fact and conclusions of law, the trial court concluded, in part:

17. [Hernandez's] post 38.22 confession met all requirements of 38.22.

In this case, Hernandez was told by Officer Cuellar, "You can waive your right to remain silent and your right to ask for an attorney and you could proceed to answer questions and you can stop anytime you wish and retake/reclaim your right to ask for an attorney." Several courts, including this Court, have addressed substantial compliance as it applies to the "right to terminate" warning and concluded that similar language substantially complied with the required warning. *See White v. State*, 779 S.W.2d 809, 826–27 (Tex. Crim. App. 1989) (warning advising "[if] you desire to make a statement or answer questions, you have the right to stop at any time" substantially complied with article 38.22); *Kiser v. State*, 788 S.W.2d 909, 912 (Tex. App.—Dallas 1990, pet. ref'd) (warning on statement advising "I may stop this questioning at any time and request a lawyer" substantially complied with article 38.22); *Hernandez v. State*, 952 S.W.2d 59 (Tex. App.—Austin 1997) (warning advising "[y]ou have the right to finish this interview at any moment you so wish" substantially complied with article 38.22), *vacated and remanded on other grounds by* 957 S.W.2d 851 (Tex. Crim. App. 1998); *Parra v. State*, 743 S.W.2d 281, 285–86 (Tex. App.—

San Antonio 1987, pet. ref'd) (acknowledgement of warning stating "if I decide to talk with anyone, I can, and that I can stop talking to them at any time I want" substantially complied with article 38.22); *see also Reyes v. State*, No. 12-16-00235-CR, 2017 WL 5167555, at 2 (Tex. App.—Tyler Nov. 8, 2017, no pet.) (mem. op., not designated for publication) (warning advising "[you can] decide at any time to exercise the right and not answer any questions or make any statement" substantially complied with article 38.22); *McGowan v. State*, No. 12-12-00056-CR, 2013 WL 1143240, at *3–4 (Tex. App.—Tyler March 20, 2013, no pet.) (mem. op., not designated for publication) (warning advising "[you can] decide at any time to exercise the right and not answer any questions or make any statement" substantially complied with article 38.22); *Speed v. State*, No. 11-02-00199-CR, 2003 WL 22211264, at *4 (Tex. App.—Eastland, Sept. 25, 2003, pet. ref'd) (not designated for publication) (warning on statement advising "I can decide to talk with anyone and I can stop talking to them at any time I want" substantially complied with article 38.22). *But see Hughes v. State*, No. 13-09-00267-CR, 2010 WL 1138447 (Tex. App.—Corpus Christi March 25, 2010, no pet.) (mem. op., not designated for publication) (warning that defendant had right to "stop answering questions at any time" did not substantially comply with article 38.22 because it did not advise of right to completely terminate interview or to stop questioning). We conclude that the trial court did not err when it concluded the warnings given to Hernandez met all the requirements of article 38.22 because, although the warning given was not exactly as it appears in article 38.22, section 2(a)(5), it substantially complied with the statute.

Accordingly, we conclude the trial court did not err when it denied Hernandez's motion to suppress. Issue three is decided against Hernandez.

V. OBJECTION TO OUTCRY TESTIMONY

In issue four, Hernandez argues the trial court erred when it overruled his objection to the testimony of the outcry witnesses because of "the [trial] court's questionable determination . . .

about the reliability of the testimony" and "it was not restricted to the alleged offense." He contends that "the trial court mentioned none of the eleven factors in announcing its ruling, but merely stated his conclusion. Without application of the rigorous reliability test, however, a trial court can too easily dispense with the protection otherwise afforded by the hearsay rule." The State responds that the trial court heard testimony and made its ruling carefully. Also, the State argues that Hernandez has failed to set out which parts of the outcry statements were extraneous.

A. Standard of Review

An appellate court reviews a trial court's decision to admit outcry-witness testimony for an abuse of discretion. *See Garcia v. State*, 792 S.W.2d 88, 91–92 (Tex. Crim. App. 1990); *Buentello v. State*, 512 S.W.3d 508, 516–17 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). An appellate court will not reverse a trial court's decision to admit outcry-witness testimony unless it falls outside the zone of reasonable disagreement. *See Garcia*, 792 S.W.2d at 91–92; *Buentello*, 512 S.W.3d at 516–17. Even if the trial court gives a wrong or insufficient reason for its ruling, a trial court's evidentiary ruling will not be disturbed if it is correct under any applicable theory of law. *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

B. Applicable Law

Article 38.072 of the Texas Code of Criminal Procedure concerns the admissibility of certain hearsay evidence in specified crimes against a child younger than fourteen years of age or with a disability. *See* CRIM. PROC. art. 38.072 (West Supp. 2017). The legislature enacted article 38.072 because it is often traumatic for children to testify in a courtroom setting, especially about sexual offenses committed against them. *See Martinez v. State*, 178 S.W.3d 806, 810–11 (Tex. Crim. App. 2005). The child's statement to the adult is commonly known as the "outcry" and the adult who testifies about the outcry is known as the "outcry witness." *See Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). Outcry testimony admitted pursuant to article 38.072

is considered substantive evidence, admissible for the truth of the matter asserted in the testimony. *See Bays v. State*, 396 S.W.3d 580, 581 n.1 (Tex. Crim. App. 2013); *Martinez*, 178 S.W.3d at 811; *see also Buentello*, 512 S.W.3d at 518; *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.—Fort Worth 2005, no pet.).

Article 38.072 applies to out-of-court statements that: (1) describe the alleged offense; (2) are made by the child; and (3) are made to the first person, eighteen years of age or older, other than the defendant, to whom the child made a statement about the offense. *See* CRIM. PROC. art. 38.072 § 2(a); *Bays*, 396 S.W.3d at 581 n.1. Also, article 38.072 requires that: (1) on or before the fourteenth day before proceedings begin, the adverse party is (a) notified of the State's intent to offer the outcry statement, (b) provides the name of the outcry witness the State intends to offer, and (c) provides a written summary of the statement; (2) the trial court holds a hearing to determine whether the statement is reliable; and (3) the child testifies or is available to testify. *See* CRIM. PROC. art. 38.072 § 2(b); *Bays*, 396 S.W.3d at 581 n.1.

The focus of an article 38.072 hearing is exceptionally narrow. *See Sanchez*, 354 S.W.3d at 487. In such hearings, the trial court determines whether the child's outcry statement is reliable, not whether the outcry witness is credible. *See Sanchez*, 354 S.W.3d at 487–88; *Buentello*, 512 S.W.3d at 518. Article 38.072(2)(b)(2) requires that "the trial court find, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement" and this is the only relevant question at the hearing. *See* CRIM. PROC. art. 38.072 § 2(b)(2); *Sanchez*, 354 S.W.3d at 487. The phrase "time, content, and circumstances" refers to the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of the statement. *See Buentello*, 512 S.W.3d at 517–18; *Broderick v. State*, 89 S.W.3d 696, 697–98 (Tex. App.—

Houston [1st Dist.] 2002, pet ref'd). Outcry reliability is determined on a case-by-case basis. *See Buentello*, 512 S.W.3d at 518.

By overruling a defendant's objection to the evidence and concluding the outcry statement is admissible, a trial court impliedly finds the outcry statement reliable as required by article 38.072. *See Villalon v. State*, 791 S.W.2d 130, 136 (Tex. Crim. App. 1990); *Gabriel v. State*, 973 S.W.2d 715, 718 (Tex. App.—Waco 1998, no pet.). After conducting an article 38.072 hearing, a trial court is not required to make written findings of fact regarding the reliability of the outcry statement. *See Villalon*, 791 S.W.2d at 136; *Gabriel*, 973 S.W.2d at 718.

C. Application of the Law to the Facts

Based on the argument in his brief, we understand Hernandez's complaint on appeal to be that the trial court erred when it failed to articulate on the record the reasoning or rationale for its ruling that the outcry statements were reliable. Specifically, Hernandez appears to contend the trial court was required to apply and articulate on the record its analysis of the *Buckley* factors, which enumerate eleven indicia of reliability, when he argues "the trial court mentioned none of the eleven factors in announcing its ruling, but merely stated his conclusion." *See Buckley v. State*, 758 S.W.2d 339, 343–44 (Tex. App.—Texarkana 1988), *aff'd on other grounds*, 786 S.W.2d 357 (Tex. Crim. App. 1990). In his brief, Hernandez does not specify what evidence he believes caused the trial court's reliability determination to be "questionable" or describe which parts of the outcry statements related to extraneous offenses. Further, Hernandez does not point us to any authority requiring the trial court to explain the rationale for its determination that an outcry statement is reliable.

The record shows the trial court held a pretrial hearing to determine the admissibility of the outcry statements. The girls' mother and Martin, the forensic interviewer, testified at the hearing about the girls' outcries for two different events. At the conclusion of the hearing, the trial

court specified which statements were admissible from each witness and stated, "when I say I'm allowing those paragraphs, I'm finding the statements are reliable based upon the time, content, and circumstances of the statement[s] and that . . . both children are available to testify." Hernandez objected to the trial court's ruling, stating, in part, his objection was "based on it[']s hearsay [sic] wouldn't be saved by the outcry statute. . . . Also, that it's duplicative. It's going to cause the jury confusion." The trial court overruled the objections. Further, Hernandez does not argue nor did we find in the record that he requested the trial court to make written findings of fact. *See Villalon*, 791 S.W.2d at 136 (trial court not required to make findings on reliability of outcry statement); *Gabriel*, 973 S.W.2d at 718 (same).

We conclude the trial court was not required to explain its rationale for determining the outcry statements were reliable. *See Villalon*, 791 S.W.2d at 136; *Gabriel*, 973 S.W.2d at 718. Nevertheless, contrary to Hernandez's contention, the trial court did articulate its findings on the record when it stated it found the statements reliable "based upon the time, content, and circumstances of the statement[s]" and the girls' availability to testify.[1]

Issue four is decided against Hernandez.

VI. HEARSAY OBJECTION

In issue five, Hernandez argues the trial court erred when it overruled his hearsay objection to the testimony of Common, the nurse, and the redacted sexual assault examination reports. He claims that, although Texas Rule of Evidence 803(4), an exception to the rule against hearsay permitting statements made for medical diagnosis or treatment, applied to the girls' statements made to Common, it did not apply to the portion of the report that contains Common's out-of-court statements. He claims that he was harmed because this error was not cumulative and it

[1] In *Sanchez*, the Texas Court of Criminal Appeals held that "trial courts [should] decide the reliability of an outcry [statement] based *only* on the time, content, and circumstances of the statement." *Sanchez*, 354 S.W.3d at 489 (emphasis added). We express no opinion as to the continued applicability of the *Buckley* factors, which enumerate eleven indicia of reliability.

certainly affected the jury's determination of guilt. The State responds that Hernandez's objection at trial fails to comport with his argument on appeal and he does not set out what statements did not fall under the medical diagnosis and treatment exception.

Hernandez's argument it not clear as to whether he is appealing the trial court's overruling of his hearsay objections to Common's testimony where she read portions of her sexual assault examination reports, the admission of the redacted sexual assault examination reports into evidence, or both. Hernandez does not complain on appeal the trial court erred when it overruled his objection based on *Crawford*.[2] We liberally construe his brief to argue error with respect to both the admission of Common's testimony and her reports over his hearsay objection.

A. Non–Constitutional Error

The erroneous admission of evidence is non-constitutional error. *See Gonzalez v. Stat*e, No. PD-0181-17, 2018 WL 1736689, at *8 (Tex. Crim. App. Apr. 11, 2018); *Taylor v. State*, 268 S.W.3d 571 (Tex. Crim. App. 2008). Pursuant to rule 44.2(b), "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). A substantial right is affected if the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010); *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). If the error did not influence the jury or had but a slight effect, the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). An appellate court should examine the record as a whole when conducting a harm analysis. *See Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002). Also, it is well established that the erroneous admission of evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. *See Smith v. State*, 499

[2] *Crawford v. Washington*, 541 U.S. 36 (2004).

S.W.3d 1, 6 (Tex. Crim. App. 2016); *Coble*, 330 S.W.3d at 282; *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 in the admission of evidence was harmless in light of "very similar" evidence admitted without objection). In other words, error in the admission of evidence may be rendered harmless when substantially the same evidence is admitted elsewhere without objection. *See Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *Castillo v. State*, 79 S.W.3d 817, 827 (Tex. App.–Dallas 2002, pet. ref'd).

B. Application of the Law to the Facts

Assuming, without deciding, the trial court erred when it overruled Hernandez's hearsay objections to Common's testimony and the admission of the redacted sexual assault examination reports, we review whether those alleged errors harmed Hernandez. The record shows that the State asked Common to read the sexual assault history given to her by the girls, which were statements made for the purpose of medical diagnosis. Hernandez objected that it was hearsay and a violation of his right to confrontation under *Crawford*. The trial court overruled the objections stating, the testimony was admissible pursuant to rule 803.4. Then, Common read the portions of her reports containing the sexual assault history given to her by the girls. At the conclusion of this testimony, the State offered the two sexual assault examination reports into evidence. Hernandez renewed his earlier objections with respect to the admission of the reports. The trial court sustained the objections with the exception of the history portion of the reports, instructing the State to redact the remainder the reports' contents. Later that day, the State offered the redacted versions of the sexual assault examination reports into evidence and Hernandez stated he had "no objection." The redacted reports were admitted into evidence and contained the history of assault previously testified to by Common.

To the extent Hernandez complains that the trial court erred when it overruled his objection to Common's testimony where she read portions of her sexual assault examination reports, even if the trial court erred when it denied Hernandez's objection to Common's testimony, we conclude that Hernandez was not harmed because the redacted sexual assault examination reports contained substantially similar evidence and were admitted without objection. To the extent Hernandez complains that the trial court erred when it overruled his objection to the admission of the redacted sexual assault examination reports into evidence, he affirmatively stated that he had "no objection" to the admission of the redacted reports, so he has failed to preserve that complaint for appeal. *See* TEX. R. APP. P. 33.1.

Issue five is decided against Hernandez.

VII. CONCLUSION

The evidence is sufficient to support Hernandez's conviction. Assuming, without deciding, there was jury charge error, Hernandez has not shown he suffered egregious harm. The trial court did not err when it denied Hernandez's motion to suppress and objection to the outcry testimony. Even if the trial court erred when it admitted the nurse's testimony and reports, Hernandez was not harmed by the alleged error.

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

JORGE GEOVANY HERNANDEZ,
Appellant

No. 05-17-00560-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 59th Judicial District Court, Grayson County, Texas
Trial Court Cause No. 066771.
Opinion delivered by Justice Lang. Justices Myers and Stoddart participating.

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

Judgment entered this 22nd day of May, 2018.