

**Affirmed; Opinion Filed April 30, 2018.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-17-00772-CR**

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**NAHUN ENRIQUE GUTIERREZ, Appellant  
V.  
THE STATE OF TEXAS, Appellee**

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**On Appeal from the 366th Judicial District Court  
Collin County, Texas  
Trial Court Cause No. 366-82750-2016**

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**MEMORANDUM OPINION**

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

Nahun Enrique Gutierrez appeals the trial court's judgments convicting him of continuous sexual abuse of a young child and indecency with a child. The jury found Gutierrez guilty of both offenses and the trial court assessed his punishment at thirty-five years of imprisonment for the offense of continuous sexual abuse of a young child and ten years of imprisonment for the offense of indecency with a child. Gutierrez raises two issues on appeal, arguing: (1) the trial court erred when it when it overruled his objection to the designation of the forensic interviewer as the outcry witness; and (2) the evidence is insufficient to support his conviction for continuous sexual abuse

of a young child.<sup>1</sup> We conclude the evidence is sufficient and the trial court did not err. The trial court's judgments are affirmed.

## I. FACTUAL AND PROCEDURAL CONTEXT

In 2015, when L.R. was eight years of age and in the second grade, she lived with her mother, stepfather, older brother, younger half-sister, and Gutierrez, who was her maternal uncle. During that time, L.R.'s mother, stepfather, and half-sister slept in her parents' bedroom, her older brother and Gutierrez shared a bedroom, and L.R. slept on a couch in the living room. In the middle of the second grade when it was warm and cool, Gutierrez would come into the living room after her mother left for work and force L.R. to engage in "S-E-X" on the couch. He would also touch her "boobs" with his hands. This happened every day, except on weekends or when her mother was present in the home. Before her birthday in January, when it was cold and snowing, her father came into the living room and saw Gutierrez hurrying from the room while holding onto his pants. This was the last time the sexual abuse occurred. After this incident, L.R.'s stepfather bought L.R. a bed that was kept in L.R.'s parents' bedroom.

L.R. attended daycare. While at the daycare, Cynthia Erwin, the owner and director, had observed that L.R. had stopping eating breakfast and lunch. Then, in July 2016, L.R. told her friends at the daycare about her sexual abuse. Those girls told one of the teachers who informed Sheila Allen, the assistant director, and then, Allen told Erwin. In response, Erwin met with L.R. in her office. During the meeting, L.R. was wringing her hands and crying. Erwin did not ask L.R. for any details, but listened to what L.R. had to say. L.R. generally told Erwin what was going on and expressed that she was concerned she was pregnant. Although L.R. did not provide

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<sup>1</sup> In the "Issues Presented" section of Gutierrez's brief, his first issue challenges the sufficiency of the evidence and his second issue argues the trial court erred when it when it overruled his objection to the designation of the forensic interviewer as the outcry witness. However, in the "Summary of the Argument" and "Argument" sections of his brief, the numbering of his issues is reversed. The State's numbering of the issues follows Gutierrez's argument section. Accordingly, we address the issues consistent with the numbering in Gutierrez's argument and the State's brief.

details, Erwin was able to guess the nature of what was happening. Erwin asked L.R. if she knew the name of the person who had done this to her and L.R. told her. As a result, Erwin contacted CPS.

On July 6, 2016, L.R. was interviewed by Connor, a forensic interviewer. L.R. told Connor that Gutierrez touched “her boobs.” She also stated that he “used his bad part to touch her bad part.” L.R. conveyed that it hurt and felt weird when Gutierrez’s “bad part” went inside of her. L.R. was having a hard time talking about what had happened, but was able to spell out “sex.” Also, L.R. stated that Gutierrez’s “bad part” felt like “a rock and a worm” and she described white stuff coming out and going all over the place. L.R. told Connor that Gutierrez’s “bad part is used to put into something” and her “bad part is used to pee.” Further, L.R. stated that when it happened, she could feel their stomachs touching and that they were facing each other, Gutierrez’s body would be moving back and forth, his eyes would be closed, and he would make a grunting noise. L.R. stated that Gutierrez told her not to tell anybody, but did not say what would happen if she did. In addition, L.R. told Connor that it happened in the mornings after her mother left for work and occurred every day, except on weekends or when her mother was present in the home. She told Connor the abuse started “in the middle of the second grade when it was kind of warm and cool” and the last time it happened was before her birthday in January when it was “cold and snowing.” LR. told Connor that Gutierrez stopped because her stepfather had come into the room and saw Gutierrez pulling his pants up.

Chris Fontana, a criminal investigator with the Collin County Sheriff’s Office, went to L.R.’s home where he spoke with L.R.’s mother and stepfather. L.R.’s mother gave consent for Fontana to take the couch cushions from the home. Also, Fontana obtained their statements and L.R.’s stepfather corroborated her statement about him seeing Gutierrez leave the living room in

a hurry one morning. Further, DNA testing revealed that Gutierrez could not be excluded as a contributor of the semen stain on the couch cushions.

Gutierrez was indicted for one count of continuous sexual abuse of a young child and one count of indecency with a child. During the trial, the trial court held a hearing to determine the outcry witness. During that hearing, Erwin testified that L.R. told her something bad was happening, but did not go into detail. Erwin testified that L.R. did not tell her which part of Gutierrez's body touched her, did not use the word sex or spell it out, only that he would come to her and do "bad things." After Erwin was released, the State informed the trial court that it had told defense counsel that if Erwin was recalled to testify, the State anticipated Erwin would state that L.R. thought she was pregnant and this led Erwin to believe what L.R. was telling her was sexual in nature. Later, the trial court acknowledged on the record that it had been brought to the trial court's attention that L.R. related to Erwin her concern that she was pregnant and the trial court had considered this information when determining that Connor was the proper outcry witness. Connor testified as the outcry witness. The jury found Gutierrez guilty of both offenses and the trial court assessed his punishment at thirty-five years of imprisonment for the offense of continuous sexual abuse of a young child and ten years of imprisonment for the offense of indecency with a child.

## **II. SUFFICIENCY OF THE EVIDENCE**

In issue two, Gutierrez argues the evidence is insufficient to support his conviction for continuous sexual abuse of a young child. Specifically, he challenges the element of the offense requiring that, during a period that is thirty or more days in duration, he committed two or more acts of sexual abuse. He claims the testimony of L.R. in terms of the frequency and timing of the abuse was unclear and inconsistent. The State responds that L.R.'s description of the changing seasons and evidence of Gutierrez's access to L.R. for an extended period of time was sufficient

to support his conviction. Also, the State contends that Gutierrez ignores the testimony and evidence of other witnesses.

### ***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, \_\_\_, 2017 WL 4675659, at \*4 (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; *Bohannon 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 child if, during a period that is thirty or more days in duration, he commits two or more acts of sexual abuse and, at the time of the commission of each act, he is seventeen years of age or older and the victim is a child younger than fourteen years of age. *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).

The statute defines an “act of sexual abuse” as including aggravated sexual assault under section 22.021. *See* PENAL § 21.02(c). Section 22.021 identifies several alternative means of committing aggravated sexual assault, including intentionally or knowingly causing the sexual organ 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*

Gutierrez’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 L.R. testified that the sexual abuse occurred when Gutierrez was living at her home, she slept on the couch in the living room, and she was in the second grade. She stated it stopped after the time her stepfather walked into the living room and saw Gutierrez leave “pulling his pants up.” After that, her stepfather bought her a bed that was kept in the bedroom where her mother, stepfather, and younger sister slept. Connor, the forensic interviewer testified that L.R. told her the sexual abuse occurred when she was eight years of age and in the second grade. According to Connor, L.R. stated the sexual abuse began “in the middle of the second grade when it was kind of warm and cool, and that it ended before her birthday [on January 25] when it was cold and snowing.” Connor stated that L.R. reported that the abuse “happened every day, except on weekends” or when her mom was present in the home. L.R.’s stepfather testified that Gutierrez lived with his family for months and moved out of their home in the hot season, which was months after he walked into the living

room where L.R. slept on the couch and saw Gutierrez hurrying into his room while holding onto his pants. L.R.'s older brother testified that Gutierrez lived with them for "about like six months."

Connor's testimony regarding L.R.'s outcry, plus the testimony of the other witnesses is sufficient to show that the acts of sexual abuse occurred during a period of thirty days or more. While L.R. was unable to provide specific dates for when the abuse occurred, she referred to the abuse occurring at her home when Gutierrez was residing there and she slept on the couch in the living room, the grade she was in at school, the changing of the seasons, and that the abuse occurred before her birthday in January. She also stated that the abuse occurred every day, except on weekends or when her mom was present in the home. Further, testimony at trial showed that Gutierrez lived in the home with and had access to L.R. for months. Accordingly, we conclude the evidence is sufficient to support Gutierrez'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 two is decided against Gutierrez.

### **III. OBJECTION TO THE OUTCRY WITNESS**

In issue one, Gutierrez argues the trial court erred when it overruled his objection to the designation of Connor, the forensic interviewer, as the outcry witness. Gutierrez claims the State

agreed that Erwin, the director of the daycare, was the proper outcry witness and L.R. made specific allegations of sexual assault to Erwin before talking to Connor. The State responds that Connor was the first person to whom L.R. disclosed discernable details describing her sexual abuse. Also, the State argues that L.R.'s statements to Erwin merely amounted to an allusion of abuse.

#### ***A. Standard of Review***

An appellate court reviews a trial court's outcry witness designation for an abuse of discretion. *See Garcia v. State*, 792 S.W.2d 88, 91–92 (Tex. Crim. App. 1990); *Rodgers v. State*, 442 S.W.3d 547, 552 (Tex. App.—Dallas 2014, pet. ref'd); *Sims v. State*, 12 S.W.3d 499, 500 (Tex. App.—Dallas 1999, pet. ref'd). Trial courts have broad discretion when deciding which witnesses qualify as outcry witnesses. *See Sims*, 12 S.W.3d at 500.

#### ***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 TEX. CODE CRIM. PROC. ANN.* 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 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. To be a proper outcry statement, the child’s statement must describe the alleged offense in some discernable manner and must be more than a general allusion to sexual abuse. *See Garcia*, 792 S.W.2d at 91; *Rodgers*, 442 S.W.3d at 552; *Sims*, 12 S.W.3d at 500. If the State presents evidence that a person is a proper outcry witness, the burden to rebut this evidence then shifts to the defendant. *See Garcia*, 792 S.W.2d at 91–92; *Eldred v. State*, 431 S.W.3d 177, 184 (Tex. App.—Texarkana 2014, pet. ref’d); *see also In re Z.L.B.*, 102 S.W.3d 120, 123 (Tex. 2003) (applying standard to juvenile trials).

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.

### ***C. Application of the Law to the Facts***

On appeal, Gutierrez’s challenge involves the identification of the outcry witness, not whether the State complied with the procedural aspects of the statute. In particular, Gutierrez contends that Connor was not a proper outcry witness because L.R. had already revealed the details of the offense to Erwin.

During the trial, Erwin testified that in July 2016, she met with L.R. in her office. During the meeting, L.R. was wringing her hands and crying. Erwin did not ask L.R. for any details, but listened to what L.R. had to say. L.R. generally told Erwin what was going on. Although L.R. did

not provide details, Erwin was able to guess the nature of what was happening. Also, Erwin asked L.R. if she knew the name of the person who had done this to her and L.R. told her. As a result, Erwin contacted CPS.

After Erwin testified, the trial court held a hearing to determine whether Connor was the outcry witness. During that hearing, Erwin testified that L.R. told her something bad was happening, but did not go into detail. Erwin stated that L.R. did not tell Erwin which part of Gutierrez's body touched L.R. and did not use the word sex or spell it out. Rather, L.R. stated only that Gutierrez would come to her and do "bad things." However, it was also acknowledged that L.R. told Erwin she thought that she was pregnant and this led Erwin to believe what L.R. was telling her was sexual in nature.

In contrast to Erwin's testimony, Connor testified that L.R. told her: Gutierrez touched "her boobs"; "used his bad part to touch her bad part"; it hurt and felt weird when Gutierrez's "bad part" went inside of her; Gutierrez's "bad part is used to put into something" and her "bad part is used to pee"; stuff came out of Gutierrez's "bad part"; when it happened, Gutierrez's body would be moving back and forth; Gutierrez would moan; Gutierrez told her not to tell anybody; it happened more than one time and every time her mom left for work; the first time it happened was before her birthday when it was kind of hot and cold in the middle of the second grade and the last time it happened it was cold and snowing; and Gutierrez stopped because her stepfather had come into the room and saw Gutierrez pulling his pants up. At the conclusion of Connor's testimony, Gutierrez objected to Connor as the outcry witness, arguing that, even though L.R. gave a more vivid and detailed account to Connor, Erwin was the proper outcry witness because it was obvious from the testimony that L.R. made an outcry of sexual abuse to Erwin. The trial court overruled Gutierrez's objection, concluding that Connor was the proper outcry witness and Connor testified as the outcry witness at trial.

Article 38.072 requires a description of the offense. *See* CRIM. PROC. art. 38.072 § 2(a). The offense in this case is continuous sexual abuse of a child younger than fourteen years of age. *See* PENAL § 21.02. Erwin testified that L.R. told her generally what was going on, did not provide any details, and identified the person who had done these things to her. Also, the State informed the trial court that L.R. had expressed a concern to Erwin that L.R. was pregnant. Further, Erwin stated she was able to guess the nature of what was happening. Although Erwin may have inferred what L.R. meant during their discussion, L.R.’s lack of explanation at the time does not serve to describe the alleged offense of continuous sexual abuse. It was not until L.R. spoke with Connor that she made her allegations of sexual abuse and it became clear that the sexual abuse involved multiple incidents of abuse occurring for a period of thirty days or more. The trial court could have reasonably concluded that L.R.’s statements to Erwin were nothing more than a general allusion that sexual abuse was occurring. *See, e.g., Shaw v. State*, 329 S.W.3d 645, 653 (Tex. App.—Houston [14th Dist.] 2010, pet. ref’d) (child’s statement to mother that “[defendant] is the one that got me pregnant” did not clearly describe alleged offense); *Thomas v. State*, 309 S.W.3d 576, 577–79 (Tex. App.—Houston 201, no pet.) (child did not describe offense when child told mother defendant toucher her private areas); *Reyes v. State*, 274 S.W.3d 724, 728–29 (Tex. App.—San Antonio 2008, pet. ref’d) (although child first acknowledged to social worker she had been abused, trial court did not err when it concluded that acknowledgment did not provide sufficient detail); *Smith v. State*, 131 S.W.3d 928, 931 (Tex. App—Eastland 2004, pet. ref’d) (child’s statement to mother that defendant had been performing oral sex on him did not relay any specific details about charged offense for purposes of determining proper outcry witness); *Josey v. State*, 97 S.W.3d 687, 692–93 (Tex. App.—Texarkana 2003, no pet.) (child’s statement to mother that defendant “fingered” him made only general allusion or insinuation that digital penetration had occurred where child did not explain what being “fingered” meant); *Castelan v. State*, 54 S.W.3d

469, 475–76 (Tex. App.—Corpus Christi 2001, no pet.) (grandmother was not proper outcry witness because child’s statement that defendant “put his thing in through the back” did not relay specific details of abuse).

The record shows that Connor was the first person to whom L.R. described, in a discernable manner, two or more acts of sexual abuse over a period of thirty or more days. Accordingly, we conclude the trial court did not err when it allowed Connor to testify as the outcry witness.

Issue one is decided against Gutierrez.

#### **IV. CONCLUSION**

The evidence is sufficient to support Gutierrez’s conviction for continuous sexual abuse of a young child. Also, the trial court did not err when it overruled Gutierrez’s objection to the designation of the forensic interviewer as the outcry witness.

The trial court’s judgments are affirmed.

/Douglas S. Lang/  
DOUGLAS S. LANG  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

NAHUN ENRIQUE GUTIERREZ,  
Appellant

No. 05-17-00772-CR      V.

THE STATE OF TEXAS, Appellee

On Appeal from the 366th Judicial District  
Court, Collin County, Texas  
Trial Court Cause No. 366-82750-2016.  
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 30th day of April, 2018.