Opinion issued February 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00410-CR &

NO. 01-09-00411-CR

ASHLEY MALONE SPIKES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case Nos. 1197741 and 1197742

MEMORANDUM OPINION

A jury convicted appellant, Ashley Malone Spikes, of the first degree felony offense of aggravated sexual assault of a child and the second degree felony

offense of indecency with a child.[1] The jury assessed punishment at life imprisonment and twenty years' confinement, respectively, to run concurrently. On appeal, appellant contends that (1) the State presented perjured testimony in violation of ethical rules; (2) application of article 38.072 of the Code of Criminal Procedure violated appellant's confrontation clause rights; (3) the trial court erroneously allowed the State to shift the burden of proof during closing argument; (4) the State violated *Brady v. Maryland* by failing to disclose the complainant's alleged full recantation of her outcry testimony; (5) the trial court erred in excluding the recording of the complainant's Children's Assessment Center (CAC) interview, during which she partially recanted her outcry; (6) the State failed to present legally sufficient evidence that appellant committed the offenses; (7) the trial court erroneously admitted evidence concerning extraneous bad acts involving appellant and the complainant; and (8) appellant's trial counsel rendered ineffective assistance by failing to seek a limiting instruction regarding the use of the extraneous bad acts evidence in the written charge.

We affirm.

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[1] *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), 22.021(a)(1)(B)(i) (Vernon Supp. 2010). The charge for indecency with a child was tried in trial court cause number 1197741 and resulted in appellate cause number 01-09-00410-CR. The charge for aggravated sexual assault of a child was tried in trial court cause number 1197742 and resulted in appellate cause number 01-09-00411-CR.

Background

On March 2, 2008, Pamela and Patrick Arnett visited appellant's house for a barbecue dinner. Appellant and Patrick are cousins, and, according to both Arnetts, the two families were close and often spent time together. When the Arnetts arrived, they found appellant in the backyard barbecuing and his wife, Harriet, in the kitchen. Pamela testified that Harriet was smoking a cigarette and drinking wine and that she had a cut under her eye. Appellant and Patrick left to buy some beer for the barbecue, and Pamela talked with Harriet, who was shaking and crying. After appellant and Patrick returned and finished cooking, appellant and Harriet began arguing.

During the argument, appellant and Harriet's four children came into the kitchen to get ready for dinner. After appellant would not let his youngest daughter fix a plate of food, his argument with Harriet escalated and he hit her three times under the eye. Harriet then pulled a knife out of her jacket, and she and appellant struggled over the knife, cutting Harriet's hand in the process. Patrick separated appellant and Harriet, and he and Pamela took Harriet and the children back to their house for the night.

At the Arnetts' house, while Patrick went out to buy dinner, Harriet told Pamela that appellant had sexually abused the complainant, their eleven-year-old daughter, J.S. Later that evening, appellant arrived at the house, and he and Harriet

talked in his car for the entire night. The next day, Harriet took the children back to her house. Pamela and Patrick drove over after work to check on Harriet and the children and to discuss what Harriet had told Pamela the previous evening.

Pamela and Patrick spoke with J.S. in the playroom, a converted garage. Pamela testified that the normally cheerful J.S. spoke with her head down and that she was crying. J.S. told the Arnetts that "[her] daddy had been touching [her]." According to Pamela, J.S. stated that the abuse began when J.S. would give appellant "pedicures," during which J.S. would trim appellant's toenails and appellant would place his feet on her lap and wiggle his toes on her "private part." J.S. related that appellant then began touching her breasts under her bra and "tongue kiss[ing]" her. J.S. also stated that appellant twice tried to place the tip of his penis in her vagina, and he successfully penetrated her with his fingers. On one occasion, appellant placed "his private part in [J.S.'s] mouth" and she spit "something white" onto the floor of the playroom, which appellant then cleaned with bleach. J.S. told Pamela that "most of the time," these incidents occurred after J.S. came home from school and before Harriet came home from work. J.S. asked Pamela "why did God let this happen to her," and she told Pamela and Patrick that she wanted to make sure that appellant did not do the same thing to her younger sister.

Pamela and Patrick told Harriet that she needed to contact the police, which Harriet seemed reluctant to do. The next day, Pamela called Harriet and discovered that she still had not contacted the police. While Pamela drove over to their house, J.S. called her and told her that "she did not want [Pamela] to call the cops because her mama and her daddy would get in trouble and who was going to pay their bills[?]" Pamela and J.S. ultimately convinced Harriet to let them call the police. Pamela testified that she had had daily contact with Harriet, but, beginning the day after J.S. called the police, Harriet did not return Pamela's calls. Pamela and Patrick only saw Harriet and the children once after J.S. reported the alleged abuse, and they had previously seen the family on a regular basis.

Harris County Sheriff's Department Deputy C. Anderson responded to J.S.'s call. Deputy Anderson briefly spoke with Harriet, who informed him that J.S. told her that appellant had been sexually assaulting her. Harriet also stated that she believed J.S. J.S. appeared "really open," confident, and calm when she spoke to Deputy Anderson, and she did not cry. J.S. did not provide specific dates for each incident, but instead gave estimates, such as a particular month or year. J.S. took Deputy Anderson around the house to show him where the incidents occurred, and he testified that he could faintly smell bleach in the playroom.

Susan Spjut, a forensic nurse for Memorial-Hermann Hospital, testified that she examined J.S. on March 5, 2008. According to Spjut, J.S. told her the following before the examination:

> My father was fondling me since I was very small, since I was 4 or 5. He was, like, playing with me with his hands, my private part, the front. He put his fingers in about midway but not all the way in. When he tried to get in, I'd push him off because I was scared. He kissed me, what they call French-kissing, in the mouth, his tongue. He would stick his hands in my bra and squeeze my breast. He said, "You know you like it." I didn't like it. He told me to promise not to tell anybody. The last time was December 1st, fondling. I made sure I wasn't alone with him after that.

Spjut stated that she did not observe any trauma in the genital examination, but she was not surprised by this finding. She also noted in her records that J.S. was "calm and cooperative" during the exam, and she agreed with the State that this demeanor is "normal for a young girl under those circumstances."

Harris County Sheriff's Department Sergeant J. Fitzgerald works at the Children's Assessment Center (CAC) and was assigned to J.S.'s case shortly after J.S. reported the alleged abuse. Sergeant Fitzgerald observed, via closed-circuit television, the forensic interview of J.S on March 11, 2008. According to Sergeant Fitzgerald, J.S. "recant[ed] on the aggravated sexual assault [allegations]" during the interview, but she "maintain[ed] the indecency" allegations against appellant.

Dr. Michelle Lyn, the medical director for the CAC, testified that she examined J.S. at the CAC on March 11. Dr. Lyn first asked J.S. why she was at

the CAC, and J.S. responded that she was there because "[she] need[s] to get checked to see if [she has] penetration or disease." J.S. further stated that her father "touched [her] on [her] breasts and butt" and that this began when J.S. was five or six years old. When Dr. Lyn asked J.S. what penetration means to her, J.S. responded "touching inside." Dr. Lyn then asked if there was anything else that J.S. wanted to tell her. J.S. told Dr. Lyn that she "wanted to make it clear to [Lyn] that she was lying about penetration. [J.S.] said she was afraid of a false report before the trial." Dr. Lyn testified that this statement was unusual, and that no child had ever said that to her before. Dr. Lyn asked J.S. if she understood the difference between the truth and a lie, and after J.S. responded that she did, Dr. Lyn then asked whether J.S. told the truth or a lie the night she went to the hospital. J.S. responded that she "told Ms. Susan [Spjut] the truth" and she was telling Dr. Lyn the truth—appellant touched her. Dr. Lyn testified that J.S. had normal genitalia, but that this finding did not rule out the occurrence of penetration. According to Dr. Lyn, the best evidence of sexual abuse is the disclosure of the child.

The State indicted appellant for aggravated sexual assault of a child, alleging that appellant penetrated J.S.'s sexual organ with his finger, and indecency with a child, alleging that appellant touched J.S.'s breast. Appellant moved pre-trial for the discovery of exculpatory and mitigating evidence, specifically, the video

recording of J.S.'s CAC forensic interview. Appellant also filed a pre-trial motion in limine, seeking to exclude "all extraneous crime or misconduct evidence," including allegations of sexual contact between appellant and J.S. beyond the two instances alleged in the indictment. The trial court denied this request.

Before opening statements, the trial court held a hearing to determine the appropriate outcry witness. At the hearing, Sergeant Fitzgerald testified that, after he reviewed J.S.'s forensic interview, he spoke with Harriet because he initially believed that she was the outcry witness. When he spoke with her, however, she indicated that J.S. had not told her the details of appellant's conduct. Pamela then testified regarding her conversation with J.S., and the trial court ruled that Pamela was the proper outcry witness.

At this hearing, defense counsel also expressed concern over J.S.'s availability to testify, because the State indicated during voir dire that J.S. "might not be available for cross-examination . . . [because she] may have perjured herself." The State responded that it was "not going to call [J.S.] for obvious reasons," but she was available to testify if the defense wished to call her. Neither party called J.S. as a witness.

During voir dire, the State presented the following hypothetical:

> Hypothetically speaking, if a child changes their situation and says it didn't happen, and as prosecutor you don't believe they are telling you the truth now but they told you the truth in the beginning, under the rules of ethics, I cannot call them to the stand. Yet, I do in good faith

> believe when called to the stand, they would commit perjury and you can't call them to the stand in order to get in the other statement. There are other ways you can make that case, hypothetically speaking.

The State briefly mentioned during its opening statement that the jury would not hear from J.S. or Harriet "because [J.S.] has recanted."

Before cross-examination of Sergeant Fitzgerald, defense counsel informed the trial court that he wished to introduce the recording of J.S.'s CAC interview so he could question Fitzgerald about it. The State objected on hearsay grounds, and the trial court sustained the objection. After asking Sergeant Fitzgerald several questions, defense counsel again attempted to introduce the video, and the trial court stated that "[n]either side can introduce it. It's hearsay. State tried to introduce it. Can't do it. It's hearsay." When defense counsel asked Sergeant Fitzgerald how many times J.S. recanted during the interview, the trial court again sustained the State's hearsay objection and ruled that the State did not open the door to allowing the admission of the interview tape during its direct examination of Fitzgerald. Defense counsel did not articulate, during any of these three exchanges, a specific hearsay exception or rationale that would allow admission of the recording. The trial court did not admit any portion of the CAC video into evidence.

Sergeant Fitzgerald agreed that J.S. talked about an incident that had allegedly occurred in December 2007 at several different times during her

interview. Once she mentioned that no touching occurred, then she stated that appellant touched her inside of her panties, and then she stated that appellant touched her on her breast. Sergeant Fitzgerald did not investigate the discrepancies to determine whether these were three separate events. Deputy Anderson, who also reviewed the recording, agreed that J.S. stated during the interview that she had lied regarding the sexual assault allegations against appellant and that she was angry with her father about a financial argument that he had with Harriet.

M.D., appellant's eldest son, testified that he and his younger brother would arrive home from school before J.S. and their other sister, and that appellant would not come home until around five or six o'clock at night. Usually, when appellant was home, the four children would either watch television or play outside, and M.D. could not think of a time when his sisters would be alone in the house with appellant. M.D. testified that he did not believe appellant could have done anything to J.S or that appellant ever had an opportunity to be alone with J.S.

Appellant testified on his own behalf and denied all of the allegations against him. He stated that he did not hit Harriet on March 2, but, instead, she started yelling at him when their daughter wanted to fix a plate of food and she "came at [him]" with a knife. Appellant also testified that he had never been alone with J.S. at any point during her life. Appellant conceded that he would

occasionally arrive home from work around 2:30 in the afternoon, before the children arrived home from school.

Appellant further testified that J.S., Pamela, and Patrick were all lying about the allegations and that he did not believe that Harriet "put anybody up to lying." Appellant stated that, although he was close with Patrick, they were not like brothers, and Patrick and Pamela were lying about how close their family was to appellant's family. When asked whether he heard Pamela's testimony regarding her phone conversation with J.S., appellant stated, "I wasn't really paying attention to Pam. She was just a joke up here." Appellant opined that Pamela was "fake crying" while testifying and that she was "some kind of actress."

During closing argument, the prosecutor mentioned, as he had in his opening statement, that neither J.S. nor Harriet had testified, reminded the jurors of the hypothetical he had posed during voir dire, and stated that the State could not call J.S. or Harriet to testify because "[w]e're morally—we're ethically barred from putting someone on the witness stand, swearing them to tell the truth when we don't believe that they will tell the truth." The prosecutor further stated that he has "a great duty to see that justice is done and [he is] forbidden to solicit perjury to get it." He mentioned that he had J.S. available at the courthouse to testify, but he could not put her on the stand. Defense counsel objected on improper argument

grounds, contending that he did not have a duty to call J.S. as a witness. The trial court informed the jury that "[t]he defense has no duty to call."

The jury convicted appellant of aggravated sexual assault of a child and indecency with a child, and assessed punishment at life imprisonment and twenty years' confinement, respectively.

Presentation of Perjured Testimony

In his first issue, appellant contends that the State presented perjured testimony in violation of ethical rules when it called Pamela to testify regarding J.S.'s outcry statement.

The Fourteenth Amendment prohibits the State from knowingly using perjured testimony. *Vasquez v. State*, 67 S.W.3d 229, 239 (Tex. Crim. App. 2002). A person commits perjury if, with the intent to deceive and with knowledge of the statement's meaning, she makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath. TEX. PENAL CODE ANN. § 37.02(a)(1) (Vernon 2003). Even if the prosecutor does not instigate the perjury, he is obligated to correct any perjured testimony given by one of his witnesses. *Vasquez*, 67 S.W.3d at 239 (citing *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381 (1985) and *Ex Parte Castellano*, 863 S.W.2d 476, 480 (Tex. Crim. App. 1993)). A due process violation occurs if (1) the prosecutor knowingly uses perjured testimony

and (2) the reviewing court cannot determine beyond a reasonable doubt that the testimony was harmless. *Bagley*, 473 U.S. at 679 n.9, 105 S. Ct. at 3381.

Appellant contends that the State violated State Bar Rules 3.04(b) and 3.04(c)(3) by presenting Pamela's allegedly perjured testimony. Appellant does not cite the specific rules, apply the rules to the facts of this case, or otherwise present authority supporting this contention. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Appellant also did not present this complaint to the trial court when Pamela testified. *See* TEX. R. APP. P. 33.1(a)(1) (requiring timely complaint made to trial court to preserve issue for appellate review). Additionally, appellant cites to no authority holding that the trial court should have found that Pamela committed perjury when she testified to J.S.'s outcry statement. Therefore, we hold that this issue is not preserved for appellate review.

Confrontation Clause Violation

Appellant also contends in his first issue that, in permitting the State to rely upon Pamela's testimony regarding J.S.'s outcry statement instead of calling J.S. herself to the witness stand, the trial court denied appellant his Sixth Amendment right to confront the witnesses against him and improperly shifted the burden of production to appellant to call J.S. as a witness so that he could cross-examine her.

Code of Criminal Procedure article 38.072 allows the State to introduce the outcry statement of a child abuse victim as an exception to the hearsay rule in certain circumstances, in addition to or in lieu of the child's testimony at trial. Act of June 13, 1985, 69th Leg., R.S., ch. 590, sec. 1, 1985 Tex. Gen. Laws 2222, 2223 (amended 2009) (current version at TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 2010)). The Court of Criminal Appeals has held that article 38.072, in some instances, can "operate either to deprive an accused of his constitutional right to confront the out-of-court child declarant, or to compel him to call the child to the stand himself in order to attain that right, in violation of due process and due course of law." *Holland v. State*, 802 S.W.2d 696, 699 (Tex. Crim. App. 1991) (citing *Long v. State*, 742 S.W.2d 302, 312 (Tex. Crim. App. 1987)). Specifically, when the State introduces the out-of-court statement of a child declarant into evidence, pursuant to article 38.072, but does not present the child declarant for cross-examination at trial and does not demonstrate the reliability of the child's out-of-court statement and the necessity for relying upon that statement instead of live testimony, article 38.072 is unconstitutional as applied to a defendant. *Id.* (citing *Long*, 742 S.W.2d at 312). To preserve this claim for appellate review, the defendant "must lodge a proper and timely objection at trial." *Id.* (citing *Briggs v. State*, 789 S.W.2d 918, 921 (Tex. Crim. App. 1990)); *Mitchell v. State*, 238 S.W.3d 405, 408–09 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

To obtain admission of an out-of-court statement of a child, the State can either (1) "announce its intention to call the child declarant to the stand to allow confrontation without the accused having to call the child to the stand himself"; or (2) demonstrate that the out-of-court statement is reliable under the totality of the circumstances in which it was made and that using the statement is necessary to protect the welfare of the particular child witness. *Holland*, 802 S.W.2d at 700; *Idaho v. Wright*, 497 U.S. 805, 819, 110 S. Ct. 3139, 3148 (1990) ("'[P]articularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."). Necessity is determined on a case-by-case basis, and the State must demonstrate that the particular child witness would be traumatized by the presence of the defendant and that the resulting emotional distress would be "more than mere nervousness or excitement or some reluctance to testify." *Maryland v. Craig*, 497 U.S. 836, 855–56, 110 S. Ct. 3157, 3169 (1990); *Marx v. State*, 987 S.W.2d 577, 580 (Tex. Crim. App. 1999) ("The requisite necessity to justify the use of such a special testimonial procedure in a child abuse case may be shown if the trial court determines that use of the procedure is necessary to prevent significant emotional trauma to the child witness caused by the defendant's presence."). When the State offers an out-of-court statement of a child witness at

trial, the defendant must object "on the basis of confrontation and/or due process and due course of law" to preserve a claim that article 38.072 has been unconstitutionally applied. *Holland*, 802 S.W.2d at 699–700.

In *Holland*, the State introduced the child declarant's out-of-court statement into evidence, but it did not call the child witness to testify, nor did it make "a particularized showing of necessity." *Id.* However, the defendant did not timely object to the outcry testimony on confrontation grounds. *Id.* Instead, Holland objected on the ground that the showing of reliability of the statement was deficient, an objection which the Court of Criminal Appeals construed as a hearsay objection, not a confrontation objection. *Id.* The *Holland* Court noted that the hearsay and confrontation doctrines "are neither synonymous nor necessarily coextensive," and thus objecting solely on hearsay grounds does not preserve a confrontation claim for appellate review. *Id.*; *Mitchell*, 238 S.W.3d at 409; *see also Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) (citing *Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004)); *Bargas v. State*, 252 S.W.3d 876, 895 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Though appellant objected to Bohannan as an outcry witness, he failed to voice any objection under the confrontation clause, and, therefore, waived this argument.").

Here, the State did not offer J.S.'s out-of-court statement as evidence. Rather, it relied upon the testimony of an outcry witness. Appellant filed a written

objection to the use of Pamela Arnett as the outcry witness. Appellant based his objection upon the reliability of the outcry statement and on the claim that Pamela was not the first adult to whom J.S. had made an outcry. Appellant never raised an objection to Arnett's testimony based on confrontation clause, due process, or due course of law violations. Appellant's hearsay objections did not preserve error on his confrontation clause claim. *See Holland*, 802 S.W.2d at 700; *Mitchell*, 238 S.W.3d at 409. We therefore hold that, to the extent appellant contends that the State's reliance on Pamela's outcry testimony and its failure to call J.S. as a witness violated his confrontation rights and inappropriately shifted the burden of production, appellant failed to preserve this complaint for appellate review.

Improper Jury Argument

Appellant further contends in his first issue that the trial court improperly allowed the State to shift the burden of proof to appellant during closing argument when the prosecutor stated that:

> And then there is the issue of [J.S.]. And I'm allowed to respond to arguments that defense counsel makes and said that we should have had her on the stand. Why didn't you bring her? And y'all know why we didn't put her on the stand. I have a great duty to see that justice is done and I'm forbidden to solicit perjury to get it.

Appellant did not object to this argument.

Before a defendant may complain on appeal that a jury argument was erroneous or that an instruction to disregard could not have cured an erroneous jury

argument, the defendant must show that he objected to the allegedly improper argument and pursued his objection to an adverse ruling. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Mathis v. State*, 67 S.W.3d 918, 927 (Tex. Crim. App. 2002) ("But even if the [erroneous jury argument] was such that it could not be cured by an instruction, appellant would be required to object and request a mistrial."); *McDonald v. State*, 186 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also* TEX. R. APP. P. 33.1(a)(1).

Because appellant failed to object and pursue his objection to an adverse ruling, we hold that appellant did not preserve his claim of improper jury argument for appellate review.

We overrule appellant's first issue.

Non-Disclosure of *Brady* Material

In his second issue, appellant contends that the State failed to disclose exculpatory evidence, specifically, J.S.'s "full recantation" of the allegations, in violation of *Brady v. Maryland*.

In *Brady*, the United State Supreme Court held that the prosecution's suppression of evidence favorable to a defendant violates due process if the evidence is material to either guilt or punishment, without regard to the good or bad faith of the prosecution. *Brady*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). When

evidence withheld in violation of *Brady* is disclosed at trial, the defendant's failure to request a continuance waives the error "or at least indicates that the delay in receiving the evidence was not truly prejudicial." *Apolinar v. State*, 106 S.W.3d 407, 421 (Tex. App.—Houston [1st Dist.] 2003), *aff'd on other grounds*, 155 S.W.3d 184 (Tex. Crim. App. 2005); *see also Jones v. State*, 234 S.W.3d 151, 158 (Tex. App.—San Antonio 2007, no pet.) (holding that defendant must request continuance and present *Brady* complaint in motion for new trial to preserve complaint for appellate review); *Smith v. State*, 314 S.W.3d 576, 586 (Tex. App.—Texarkana 2010, no pet.) (holding *Brady* challenge not preserved because trial court never ruled on complaint).

Appellant contends that the State disclosed that J.S. had fully recanted her initial outcry testimony during voir dire, and the State later referenced the full recantation during the outcry witness hearing and in opening statements. Appellant did not request a continuance, or otherwise ever inform the trial court that the State had violated *Brady* by failing to disclose an alleged full recantation by J.S. We therefore hold that appellant failed to preserve his *Brady* complaint for appellate review.

We overrule appellant's second issue.

Exclusion of Forensic Interview Recording

In his third issue, appellant contends that the trial court erred in excluding the recording of J.S.'s CAC forensic interview because, contrary to the trial court's ruling, the video did not constitute inadmissible hearsay.

We review a trial court's decision to exclude evidence for an abuse of discretion. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008); *Roberts v. State*, 29 S.W.3d 596, 600 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). If the trial court's decision is reasonably supported by the record and correct on any theory of law applicable to the case, we will uphold the decision. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009); *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000). We review the trial court's ruling in light of the evidence before the court at the time it made the ruling. *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002) (citing *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000)).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). As a general rule, hearsay is inadmissible "unless it falls

within one of the many exceptions." *Willover*, 70 S.W.3d at 845; TEX. R. EVID. 802. To admit evidence pursuant to a hearsay exception, "the proponent of the evidence must specify which exception he is relying upon." *Willover*, 70 S.W.3d at 845; *Reyna*, 168 S.W.3d at 177 ("So it is not enough to tell the judge that evidence is admissible. The proponent, if he is the losing party on appeal, must have told the judge why the evidence was admissible."). It is the duty of the appellant, not the trial court, to articulate the applicable hearsay exception or specify how the challenged evidence is not hearsay. *Willover*, 70 S.W.3d at 845–46. The party complaining on appeal "must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule or statute in question and its precise and proper application to the evidence in question." *Martinez v. State*, 91 S.W.3d 331, 335–36 (Tex. Crim. App. 2002). The issue is "whether the complaining party on appeal brought to the trial court's attention the very complaint the party is now making on appeal." *Reyna*, 168 S.W.3d at 177 (quoting *Martinez*, 91 S.W.3d at 336); *see also Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("To avoid forfeiting a complaint on appeal, the party must 'let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.'" (quoting *Lankston v. State*, 827 S.W.2d 907, 908–09 (Tex. Crim. App. 1992))). Preservation of error also depends on

whether the complaint made on appeal comports with the complaint made at trial. *Pena*, 285 S.W.3d at 464 (citing *Reyna*, 168 S.W.3d at 177).

Before cross-examining Sergeant Fitzgerald, appellant informed the trial court that he wanted to admit the recording of J.S.'s forensic interview and question Fitzgerald, who observed the interview via closed-circuit television, about the contents. The State objected on hearsay grounds and the trial court sustained the objection. Appellant did not respond to the objection or assert that the recording fell within a specific hearsay exception. After asking Sergeant Fitzgerald whether he had watched the entire recording, appellant again sought admission of the video. The trial court responded that the video was hearsay and neither appellant nor the State could introduce it. Appellant then asked Sergeant Fitzgerald how many times J.S. had recanted her initial outcry during the interview. The State again objected on hearsay grounds and the trial court sustained the objection. Appellant argued that the State "on direct [examination of Sergeant Fitzgerald] opened the door on the conversation," but he did not otherwise argue that the contents of the recording satisfied the requirements of a particular hearsay exception.

At trial, appellant argued that the recording was admissible because, by questioning Sergeant Fitzgerald about the video on direct examination, the State opened the door to the introduction of the otherwise inadmissible recording. *See*,

e.g., *Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997) ("[O]therwise inadmissible evidence may be admitted if the party against whom the evidence is offered 'opens the door.'"). On appeal, appellant contends that the recording was admissible "to impeach the complainant, to show fabrication by the complainant, . . . to impeach the emotional demeanor of the complainant as depicted by Pamela Arnett, . . . [and] as evidence of a prior inconsistent statement given the number of statements previously admitted." Appellant did not present any of these rationales for admission of the recording to the trial court, and appellant does not argue on appeal that the State opened the door to the admission of the recording by questioning Sergeant Fitzgerald about it. Appellant's statement during trial that the State "on direct opened the door on the conversation" is insufficient to alert the trial court that he was asserting that the recording was admissible to impeach J.S.'s credibility. *See Tovar v. State*, 221 S.W.3d 185, 189 & n.2 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that, although defense counsel's objection that he did not think that he had "opened the door" made in response to State's assertion that counsel had opened door to admission of prior consistent statement preserved error on prior consistent statement basis, objection was insufficient to alert trial court that defendant was also asserting Rule 107 objection). Because appellant did not specify the particular hearsay exception upon which he was relying for admission of the recording, and his argument in

favor of admission in the trial court does not comport with his argument on appeal, we hold that appellant failed to preserve for appellate review his contention that the trial court erroneously excluded the forensic interview recording. *See Willover*, 70 S.W.3d at 845–46; *Reyna*, 168 S.W.3d at 177; *see also Pena*, 285 S.W.3d at 464 (holding complaint preserved if argument on appeal comports with argument at trial).

We overrule appellant's third issue.

Sufficiency of the Evidence

In his fourth issue, appellant contends that the State failed to present legally sufficient evidence to support his convictions for aggravated sexual assault of a child and indecency with a child.[2]

A. Standard of Review

In a sufficiency of the evidence review, we view the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt.

[2] Appellant briefly contends that the State failed to present factually sufficient evidence to support his conviction. The Court of Criminal Appeals overruled *Clewis v. State* and its progeny and abolished factual sufficiency review in *Brooks v. State*. 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (directing that evidence be reviewed only under the sufficiency standard described in *Jackson v. Virginia*); *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet. h.) (construing majority holding in *Brooks*). We therefore construe appellant's contention as solely challenging the sufficiency of the evidence.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000). A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *Id.* We may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the fact-finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

B. Aggravated Sexual Assault of a Child and Indecency with a Child

To prove that appellant committed aggravated sexual assault of a child, the State was required to establish that appellant intentionally or knowingly caused the penetration of the sexual organ of J.S., a child under the age of seventeen, with his finger. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i) (Vernon Supp. 2010). To prove that appellant committed the offense of indecency with a child, the State had to establish that appellant intentionally and knowingly engaged in sexual contact with J.S., a child younger than seventeen, by touching her breast with the intention of arousing or gratifying the sexual desire of appellant. *Id.* § 21.11(a)(1), (c) (Vernon Supp. 2010). The requisite mental state for indecency with a child—

intent to arouse or gratify the sexual desire of any person—can be inferred from the defendant's conduct, remarks, and all surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981); *Bazanes v. State*, 310 S.W.3d 32, 37 (Tex. App.—Fort Worth 2010, pet. ref'd).

Outcry testimony admitted pursuant to article 38.072 is admitted as an exception to the hearsay rule, and is thus considered substantive evidence, admissible for the truth of the matter asserted. *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991). This evidence has probative value, and is, by itself, sufficient to support the jury's verdict. *Id.*; *Bargas v. State*, 252 S.W.3d at 888 (holding that outcry testimony retains probative value even if contradictory evidence admitted). The State has no burden to present corroborating or physical evidence. *See Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006); *Eubanks v. State*, 326 S.W.3d 231, 241 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) ("There is no requirement that outcry testimony admitted as substantive evidence be corroborated or substantiated by the victim or independent evidence."); *Benton v. State*, 237 S.W.3d 400, 404 (Tex. App.—Waco 2007, pet. ref'd).

A complainant's recantation of earlier outcry testimony does not destroy the probative value of that testimony. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). In *Chambers*, the trial court admitted a videotape of the

complainant, in which she told the investigating officer that her stepfather had been molesting her for several years. *Id.* at 459. Chambers called the complainant as a witness at trial, and she recanted her earlier statement. *Id.* at 460. The Court of Criminal Appeals noted that the jury observed the complainant's demeanor and was entitled to reconcile conflicts in the testimony and to disbelieve her recantation. *Id.* at 461; *see also Saldaña v. State*, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd) ("Furthermore, when a witness recants prior testimony, it is up to the fact finder to determine whether to believe the original statement or the recantation. A fact finder is fully entitled to disbelieve a witness's recantation."); *Jackson v. State*, 110 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) ("[A] criminal conviction, which requires proof beyond a reasonable doubt, may rest on hearsay despite the lack of the complainant's testimony or even the complainant's recantation.").

Here, Pamela testified that, during her outcry, J.S. stated that appellant had been touching her over the course of several years. According to J.S., the sexual contact began when J.S. would give her father "pedicures," and he would place his feet in her lap and wiggle his toes on J.S.'s "private part." The contact progressed to "tongue-kissing," appellant touching J.S. on her breast under her bra, digital penetration, two attempts at vaginal intercourse, and oral sex. J.S. told Pamela that most of the incidents occurred in the converted playroom and would take place

after J.S. arrived home from school and before Harriet returned from work. Pamela's testimony regarding J.S.'s outcry statement alone is sufficient to support the jury's verdict. *See Rodriguez*, 819 S.W.2d at 873; *Bargas*, 252 S.W.3d at 888; *see also Lee*, 176 S.W.3d at 458 (holding that State need not present corroborating physical evidence).

During her first forensic examination at Memorial-Hermann Hospital, J.S. told Susan Spjut that:

> My father was fondling me since I was very small, since I was 4 or 5. He was, like, playing with me with his hands, my private part, the front. He put his fingers in about midway but not all the way in. When he tried to get in, I'd push him off because I was scared. He kissed me, what they call French-kissing, in the mouth, his tongue. He would stick his hands in my bra and squeeze my breast. He said, "You know you like it." I didn't like it. He told me to promise not to tell anybody. The last time was December 1st, fondling. I made sure I wasn't alone with him after that.

Sergeant Fitzgerald stated that, during her forensic interview, J.S. recanted the allegations relating to aggravated sexual assault, but she "maintain[ed] the indecency" allegations. J.S. revealed that she lied regarding the sexual assault allegations because she was angry with appellant over a financial dispute that he had had with Harriet. Dr. Lyn testified that, during the forensic medical examination at the CAC, J.S. stated that appellant touched her on her "breasts and butt," but she also "wanted to make it clear to [Lyn] that she was lying about penetration. [J.S.] said she was afraid of a false report before the trial." Lyn

testified that she had never heard a child say this during an examination before, and the statement struck her as unusual. Lyn asked if J.S. had told a lie when she went to the hospital, and J.S. stated that she "told Ms. Susan [Spjut] the truth" and she was telling Dr. Lyn the truth when she said that appellant touched her inappropriately.

Pamela and Patrick Arnett both testified that they were aware that J.S. had partially recanted her outcry, but they opined that they believed that her initial outcry was true. Pamela stated that J.S. called her the day after the outcry and asked her not to inform the police because she was concerned that her parents would get in trouble and she did not know who would pay the family's bills if that happened. Pamela expressed concern that, the day after J.S. informed the police, Harriet, who had always seemed reluctant to involve the police, stopped returning Pamela's calls, suggesting that perhaps Harriet influenced and motivated J.S.'s partial recantation.

Even if the complaining witness recants, her earlier outcry testimony retains probative value.[3] *Chambers*, 805 S.W.2d at 461. In this situation, it is the role of the fact finder, who weighs the evidence and evaluates credibility, to determine whether to believe the original statement or the recantation, and "[a] fact finder is

[3] There is no evidence that J.S. ever recanted the indecency with a child allegations. J.S. consistently stated, in her initial outcry to Pamela, her examination with Spjut, her forensic interview, and her examination with Lyn, that appellant touched her breasts under her bra.

fully entitled to disbelieve a witness's recantation." *Saldaña*, 287 S.W.3d at 60; *see also Maldonado v. State*, 887 S.W.2d 508, 509 (Tex. App.—San Antonio 1994, no pet.) ("Just because the complaining witness recants incriminating testimony does not mean the evidence is insufficient."). In convicting appellant, the jury made a credibility determination to believe J.S.'s initial outcry instead of her recantation and appellant's testimony denying the allegations and stating that he had never been alone with his daughter. We afford almost complete deference to this determination. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

Thus, viewing the evidence in the light most favorable to the verdict, we hold that the evidence was sufficient for a rational fact finder to have found beyond a reasonable doubt that appellant caused the penetration of J.S.'s sexual organ with his finger and that appellant, with the intent to arouse or gratify his sexual desire, touched J.S.'s breast.

We overrule appellant's fourth issue.

Admission of Extraneous Offense Evidence

Appellant contends, in his fifth issue, that the trial court erred in admitting evidence of appellant's extraneous bad acts involving J.S. because, according to

appellant, evidence of these acts is admissible only after the credibility of the complainant has been attacked.[4]

Appellant filed a pre-trial motion in limine, seeking to exclude all "extraneous crime or misconduct evidence, which is not alleged in the indictment," including allegations that appellant kissed J.S. when she was four years old, attempted vaginal intercourse with J.S. when she was five years old, and kissed her and attempted oral sex with her when she was seven years old. The trial court denied appellant's motion in limine.

A motion in limine "is a preliminary matter and normally preserves nothing for appellate review." *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) (citing *Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985)); *Johnson v. State*, 981 S.W.2d 759, 760 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) ("The general rule is that a motion in limine does not preserve error."). To preserve error regarding the subject matter of a motion in limine, the appellant must object at the time the subject is raised during the trial. *Fuller*, 253 S.W.3d at

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[4] Section 2 of article 38.37 of the Code of Criminal Procedure provides that: "Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child." TEX. CODE CRIM. PROC. ANN. art. 38.37 § 2 (Vernon Supp. 2010). The statute does not restrict admission of this evidence to introduction solely after an attack on the complainant's credibility.

232; *see also* TEX. R. APP. P. 33.1(a)(1)(A) (stating that, to preserve error, appellant must make timely request, objection, or motion stating grounds for ruling with sufficient specificity to make trial court aware of the complaint). If the appellant does not object at the time the subject matter is introduced, the appellant waives appellate review of any error associated with the evidence. *Fuller*, 253 S.W.3d at 232–33.

During trial, Pamela testified that J.S. told the Arnetts about several instances of sexual contact between appellant and herself. Pamela testified that J.S. told them that the abuse began by appellant's placing his feet in J.S.'s lap and wiggling his toes on her "private part." The abuse then progressed to "tongue-kissing," touching J.S. on her breast under her bra, attempted vaginal intercourse, digital penetration, and oral sex. Appellant did not object to this testimony.

Because appellant did not object to the introduction of the extraneous bad acts evidence at the time Pamela testified regarding J.S.'s outcry statement, we hold that appellant failed to preserve for appellate review his contention that the trial court erroneously admitted this evidence.

We overrule appellant's fifth issue.

Ineffective Assistance of Counsel

Finally, appellant contends in his sixth issue that his trial counsel rendered ineffective assistance by failing to request a limiting instruction in the written

charge restricting the jury's consideration of appellant's alleged extraneous bad acts involving J.S. unless it found beyond a reasonable doubt that appellant had committed those extraneous acts.

To prevail on a claim of ineffective assistance of counsel, the appellant must demonstrate, by a preponderance of the evidence, (1) that his trial counsel's performance was deficient and (2) that a reasonable probability exists that, but for the deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). The appellant must first show that his counsel's performance fell below an objective standard of reasonableness, which does not require showing that counsel's representation was without error. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). The second prong of *Strickland* requires the appellant to demonstrate prejudice—a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Thompson*, 9 S.W.3d at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and therefore the appellant must overcome the presumption that the challenged action constituted

"sound trial strategy." *Id.* at 689, 104 S. Ct. at 2065; *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

Failure to request a jury instruction may, under the facts of a particular case, render the defense attorney's assistance ineffective if the trial court would have erred in refusing such an instruction had counsel requested it. *See Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992). The Court of Criminal Appeals has held that:

> [A] limiting instruction concerning the use of extraneous offense evidence should be requested, and given, in the guilt-stage charge *only if* the defendant requested a limiting instruction at the time the evidence was first admitted. When the defendant has properly requested a limiting instruction in the jury charge, the trial court must also include an instruction on the State's burden of proof at that time.

Delgado v. State, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007) (emphasis added).

Here, appellant contends only that his counsel's failure to request an instruction in the written charge constituted ineffective assistance. Appellant did not object or request a Rule 404(b) limiting instruction at the time Pamela testified to appellant's extraneous acts involving J.S. Because appellant did not request a limiting instruction at the time of Pamela's testimony, the extraneous act evidence became "part of the general evidence and [could] be used for all purposes," and therefore a limiting instruction in the charge was not necessary. *See id.* (citing *Hammock v. State*, 46 S.W.3d 889, 895 (Tex. Crim. App. 2001)). Under these circumstances, the trial court would not have erred in refusing to include a limiting

instruction in the charge had appellant requested one; thus, defense counsel's failure to request submission of a limiting instruction in the charge does not constitute deficient performance. *See Vasquez*, 830 S.W.2d at 951 (holding that failure to request instruction when trial court would have erred in refusing instruction constituted deficient performance under *Strickland*); *Hammock*, 46 S.W.3d at 895 ("Because the evidence in question was admitted for all purposes, a limiting instruction on the evidence was not 'within the law applicable to the case,' and the trial court was not required to include a limiting instruction in the charge to the jury." (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007))).

Because appellant has not established that his counsel's failure to request a jury instruction in the charge limiting the use of the extraneous bad acts evidence constituted deficient performance under the first prong of *Strickland*, we hold that appellant has not demonstrated that he received ineffective assistance of counsel.

We overrule appellant's sixth issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Bland.

Do not publish. TEX. R. APP. P. 47.2.