Opinion issued November 10, 2011.

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-00204-CR and 01-10-00205-CR

STEPHEN ANDREW CHALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case Nos. 1189838 & 1250648

MEMORANDUM OPINION

A jury convicted appellant, Stephen Andrew Chalker, of indecency with a child[1] and aggravated sexual assault of a child[2] and assessed punishment at five

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1 *See* TEX. PENAL CODE ANN. § 21.11 (Vernon 2011).

years' and twenty years' confinement, respectively. In six points of error, appellant contends that (1) the trial court erred in sustaining the State's hearsay objection to the testimony of I.C., L.C.'s cousin; (2) he was denied effective assistance of counsel by his trial counsel's failure to present a bill of exception regarding I.C.'s testimony; (3) the trial court erred in sustaining the State's hearsay objection to testimony of Nancy Chalker, appellant's mother; (4) he was denied effective assistance of counsel by his trial counsel's failure to present a bill of exception regarding Nancy Chalker's testimony; (5) he was denied effective assistance of counsel by his trial counsel's failure to investigate and present forensic psychological evidence; and (6) he was denied effective assistance of counsel by his trial counsel's failure to present evidence of the complainant's motive to falsely accuse him of sexual abuse.

We modify the judgments and affirm as modified.

Background

The complainant, L.C., appellant's daughter, was born August 21, 1997. Appellant and L.C.'s mother, I.K., separated a month after her birth and divorced in March 1999. When L.C. turned three, appellant was granted custody for the 1st, 3rd, and 5th weekends of every month and every Wednesday evening. L.C.'s mother and appellant both remarried and had additional children.

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[2] *See* TEX. PENAL CODE ANN. § 21.021 (Vernon 2011).

L.C. first accused appellant of forcing her to touch his genitals, which resulted in the State charging him with indecency with a child. Later, she accused him of causing her mouth to contact his sexual organ, and the State added the charge of aggravated sexual assault of a child.

At appellant's trial, the State presented three outcry witnesses—L.C.'s mother, to whom L.C. made a hand gesture; Children's Assessment Center ("CAC") forensic interviewer Susan Odhiambo, to whom L.C. detailed the indecency with a child offense; and Rose Marie Moran, a therapist, to whom L.C. detailed the offense of aggravated sexual assault. The State filed a motion in limine, which the trial court granted, to exclude the hospital records relating to an allegation of sexual abuse of L.C. that appellant had made against I.K. in 2001.

I.K. testified regarding the details of L.C.'s outcry to her. L.C. was eleven years old at the time of her initial outcry. The day after L.C. made her outcry, I.K. contacted a counseling center, a family lawyer, and CPS. L.C. went to the CAC where she was interviewed and given a medical exam. She began counseling sessions with Rose Marie Moran at the DePelchin Children's Center.

Susan Odhiambo testified regarding the details L.C. shared with her during their interview. On cross-examination, Odhiambo agreed that children sometimes lie during these interviews. Moran testified that L.C. made an outcry of sexual assault to her. Moran detailed that she had worked once with a child who was

coached to make a false allegation because "the mother wanted to get custody of the child, and, therefore, was having the child accuse the father of abuse." She testified that L.C. talked about "some very conflicted relationships her father was having with his . . . wife . . . and her witnessing some abusive situations."

Defense counsel asked Moran about a child's "enhanc[ing] or advanc[ing] their allegations based on environmental influences, like television, Internet, friends, conversations." Moran replied that,

> I certainly can see that as a possibility in my opinion. And in the children that I have worked with, that has not been one of the issues that I have dealt with. You know, when I sit with a child, I do not take notes. I sit there and I study them. I study all their behavior language. I hear what they say and I hear what's underneath what they say. I watch their feelings. They don't know that I know what is going on, but, you know, I do. And genuineness, when a child is speaking—I don't want to sound presumptuous, but I trust my ability to read a child and whether or not they are talking about something that truly happened to them or whether it's something they are manufacturing.

Moran further testified that L.C. found appellant intimidating and was afraid of him.

L.C. testified at trial that when she would touch appellant's "private area" "it would get straighter" and "sometimes white stuff would come out." She also testified that appellant "would make [her] put [her] mouth on his private area." He would lock the door when this was occurring so no one could walk in on them. L.C. testified that appellant had previously slapped her for telling her mother that

he had put his wife in a headlock. L.C. testified that she liked her stepmother and her half-siblings. She testified that she told people she hated her father:

> [Counsel]: Did you ever tell anyone that you hated your father?
>
> [L.C.]: Yes.
>
> [Counsel]: Okay. Why did you tell them that you hated your father?
>
> [L.C.]: Because I didn't like the things he made me do to him and the things he did to me. And I didn't like seeing him and I told my mom and my friends that I didn't like him at all.

L.C. testified that her father had once spanked her with a belt or a switch because she was "talking back."

Appellant called I.C. and M.C., L.C.'s cousins. I.C. and M.C. spent the night with L.C. "most of the time" when she was visiting appellant's house. I.C. testified about L.C.'s relationship with her father:

> [Counsel]: Okay. Did [L.C.] ever tell you she was having any problems with her dad?
>
> [I.C.]: Just sometimes she said that whenever he would spank her, she told me that she hated him.
>
> [Counsel]: So, was there any other time that she said she hated him?
>
> [State]: Objection. Hearsay, Your Honor.
>
> [Court]: Sustained.

[Counsel]: What about her step mom . . . ?

[I.C.]: She didn't really like her.

[Counsel]: Okay. How did you know that she didn't like her?

[I.C.]: She—

[State]: Hearsay, Your Honor.

[Court]: . . . I sustain that as hearsay. You can't repeat what someone said. If they did something, you can say that because you saw it, but you can't repeat what someone says. Do you understand?

[I.C.]: Yes.

I.C. further testified that L.C. would "roll her eyes" and "talk back to her parents" and that they would spank her for that behavior. Appellant also asked I.C. about L.C.'s relationship with her siblings. I.C. testified that L.C. was nice to her brothers and sister, but she was also jealous of them and would sometimes hit them. M.C., I.C.'s sister, also testified about L.C.'s relationship with her family. She testified that L.C. did not like her stepmother and that she was "really jealous of [her brothers and sister] because they get more love than her."

Appellant's mother, Nancy Chalker, testified regarding her relationship with I.K.:

[Counsel]: Okay. Did you ever have any problems with [I.K.]?

[Nancy] Well, there was a time when [L.C.] had told something about—something that she would do to

her and—she said her mother had been doing some things to her and I was a witness to that.

[State]: Objection, Your Honor.

. . . .

[Court]: Don't repeat what somebody else told you.

[Nancy]: What if I hear somebody saying something to me?

[State]: Can we actually approach, Your Honor?

[Court]: Yes.

[State]: Judge, we're concerned this is bordering on the motion in limine.

[Court]: Yes, there is already a motion in limine and I have ruled on it and I'm not going to allow that. . . . Let's move on to something else.

Bianca Almaguer, who worked for CPS, testified that she was tasked with monitoring appellant and his family from March to December 2009 during the CPS investigation. She testified that she never witnessed any signs of abuse during this period of time. Appellant complied with all the requirements CPS demanded of him, and the CPS case is now closed. On cross-examination, Almaguer testified that there were abuse allegations against appellant regarding his use of severe punishment and violence between appellant and his wife.

Appellant's brother testified that he lived with appellant for approximately one year between 2003 and 2004 and that L.C. visited during that time. He

testified that L.C. and her stepmother were "[n]ot very close" and that her stepmother "never felt . . . that [L.C.] was part of her family." Appellant's brother testified that L.C. "didn't feel like her stepmother was treating her right. So, in other words, the bad stepmother thing comes into play there, but a lot more than just that."

Appellant's wife, Stephanie Chalker, testified that she met appellant in January 2003 and they moved in together in February of that year. She also testified that her relationship with L.C. was strained and that she confronted L.C. once "after finding out from my husband that her behavior was because her mom told her to do it." She testified that L.C. was "very disrespectful, picking on the kids, hitting them, talking back, not doing what she was told, arguing back," and that L.C. did not like her brothers and sister. She stated, "[L.C.] adored them at one point in time, but she is very jealous at them because they have their both parents together and she didn't. And she used to always want her mom and dad back together."

L.C.'s stepmother also testified about her feelings for L.C.:

> [Counsel]: How did you feel about [L.C.]? How do you feel about [L.C.]?
>
> [Stephanie]: She is a really smart girl. She gets everything she wants at her mom's house. When she comes over here, she has to fight for attention. Of course, having newborns, all of our attention and time is devoted to the babies. And as much as we'd like

> to do more activities, you know, as adults, we don't get to have a whole lot of time and actually having days off. I have never had a day off.

On cross-examination, she elaborated that she was not close to L.C. in part because L.C. was not her biological child.

Appellant testified that his wife and daughter had a strained relationship and that "[t]hey didn't get along at all." He stated:

> [Appellant]: When I overheard their conversation, either [L.C.] was being rude, like really rude, trying to get on [my wife's] nerves or [my wife]would say something that would offend [L.C.] and hurt her feelings and make her sad.
>
> [Counsel]: How did you feel about that?
>
> [Appellant]: I didn't like it. I didn't like the fact they argued. It wasn't good. It stressed me out.
>
> [Counsel]: Did you ever do anything to make the situation better or intervene?
>
> [Appellant]: A lot of times, I would try to intervene and tell them they didn't need to be arguing, they needed to stop, or I would send [L.C.] to her room. I had to live with [my wife]. So, she would come over and they just wouldn't get along. . . .

The fighting between L.C. and her stepmother escalated until appellant felt he had to choose between the two, and he essentially told L.C. that he would choose his wife. He explained his thoughts on why L.C. would falsely accuse him of assaulting her:

[Counsel]: What reason do you think she would come in here and tell all of these people that you committed those acts against her if they didn't happen?

[Appellant]: Well, I personally believe it was out of spite and jealously, probably anger. I mean, you know, when I married [her stepmother], they didn't get along, maybe.

[Counsel]: So, do you think that [L.C.] is smart enough and—

[Appellant]: I think she is smart enough and she knows more than she lets on to know.

[Counsel]: Do you believe that [L.C.] would do something like make allegations against you that could seriously harm you and they have to be proved?

[Appellant]: Yes, I do.

[Counsel]: Why would she do that?

. . . .

[Appellant]: Okay. For one, the last conversation I had with her, I told her that I might not be picking her up again and I might not be seeing her again because of the problems I was having with her and [my wife]. This was the day after we had the birthday party for her. And she got really upset about it.

[Counsel]: You think that would be enough to make her do something this serious?

[Appellant]: Well, I mean, I am here—I don't know what's going through her head, obviously, but . . . .

The jury found appellant guilty of indecency with a child and aggravated sexual assault of a child. The trial court sentenced appellant to five years'

confinement and twenty years' confinement, respectively. These sentences were cumulated pursuant to a motion by the State, and the trial court ordered that appellant serve the sentences consecutively when it made its oral pronouncement of the sentences on the record in open court. However, the written judgments reflect that appellant is to serve his sentences concurrently.

Appellant, represented by new counsel, moved for a new trial arguing that he received ineffective assistance of counsel. During the hearing on appellant's motion for a new trial, his trial counsel, Kennitra Foote, explained her trial strategy. She testified that she consulted with Dr. Long, "a psychologist or psychiatrist or an expert in the soft sciences," over the course of about three days in preparation for the trial. Foote stated that Dr. Long told her that the

> case was going to boil down to what I had already pretty much assessed, which is the credibility or the perceived truthfulness of each party. [Dr. Long] said that the alienation by [appellant's wife] of [L.C.] could definitely be a factor, but she said it would really all boil down to what [L.C.] ended up testifying to, which at that time I didn't know, and I don't think anybody else knew, I definitely didn't know she would be saying the things that she said.

She testified that she interviewed seven of appellant's family members including M.C., I.C., and his mother, brother, and wife and prepared their testimony. Counsel read books and conducted internet research about parental alienation. She also explained that her trial strategy was affected by the trial court's rulings excluding M.C.'s and I.C.'s testimony regarding specific

conversations with L.C., appellant's mother's testimony regarding her discussions with L.C.'s mother, and evidence of the 2001 accusations against L.C.'s mother. Foote believed that testimony was admissible and thought it would demonstrate the dysfunction in the family that would motivate L.C. to make a false accusation against her father.

Regarding Foote's decision not to call an expert witness to testify, appellant asked:

> [Appellant]: Now, were you aware that an expert witness can consider evidence that might not be admissible as a basis for explaining an opinion?
>
> [Foote]: Yes.
>
> . . . .
>
> [appellant]: So, things that the Court deemed inadmissible might have been explained by an expert in presenting your defense that you thought was relevant?
>
> [Foote]: Yes, it's possible.
>
> . . . .
>
> [Appellant]: So, were you able, during the course of the trial, based on the Court's ruling, to go back and get an expert to bring in to support your defenses?
>
> [Foote]: I could have, but I didn't.

Foote later explained why she did not call an expert:

> I really—I didn't call an expert because [L.C.]'s testimony was so strong, I felt that if I went out and got an expert after the fact, if I had called Dr. Long in to come and testify regarding, you know, the information that she already knew, that it was going to make him, [appellant], look like, I guess, more of a monster than what—even though [L.C.] didn't paint him as one, I didn't want to sully that connection or that relationship they had anymore by bringing someone in to call her a liar.
>
> . . . .
>
> . . . Rose Marie Moran, who was the therapist that had been dealing with [L.C.], she actually was—she wasn't an expert that I brought, but at the same time, she did go over the alienation and contamination. We talked about that in cross-examination. And, actually, she was a very good witness for that information. She was warm. She was very direct and open. And unlike most people that are brought in, you know, for the other side, she didn't have any hostility.
>
> So, the questions that I asked her—and, actually, that's another reason why I didn't feel that I needed to go out and get somebody because she was actually a very good source of information. I even asked her, you know, what percentage of children have you dealt with, and she said she's dealt with a lot of high-risk children in very bad situations. I asked her what percentage of the children that she dealt with had been found to be untruthful. And she admitted there was a percentage, it was a small percentage, but there were children that had been untruthful. And she went on to say that when she found them out, she did expose them. And she had several times where she actually had to come into court and expose the children for being untruthful.

Appellant also asked Foote about her decision not to file bills of exception:

> [Appellant]: You're aware that without a bill of exceptions being made as to excluded testimony, nothing is being presented for appellate review?

[Foote]: Yes, I'm aware of that.

[Appellant]: So, you are aware during the course of trial you did not preserve any error concerning exclusion of any testimony by the Court?

[Foote]: Actually, that's not true. I didn't do a bill of exceptions, but I did object and I did make statements on the record regarding the testimony or the exclusion of the testimony, but, no, I didn't do a bill of exceptions.

At the hearing on the motion for new trial, I.C. and M.C. both testified that L.C. told them that her stepmother would not let her be in a family photo, which made her feel excluded and unwanted. They also both testified that L.C. did not get along with her stepmother and had told them she did not like her stepmother and appellant. Appellant's mother did not testify at the motion for new trial hearing, so there is no record of what her testimony would have been had it not been excluded as hearsay.

Appellant called Dr. Jerome Banks Brown to testify as an expert at the hearing on the motion for new trial. He discussed false allegations of sexual abuse made by children, specifically that "the probability of a false allegation is greatly increased, probably tripled in divorce or child custody battle situations." He stated that as an expert in situations such as this he would create a social history:

[Appellant]: And in creating a social history, what does the expert do?

> [Brown]: Well, there is a certain, let's say, amount of information that the mental health professional needs to have, typically, to render an opinion, to give a diagnosis, to make a treatment plan. There [are] certain areas of a person's life that are not relevant, there are certain areas of their life that's very relevant. And, hopefully, the mental health professional will cover those with the materials he's gathering, including the material from the person he is examining directly. In creating said history he would interview witnesses and family members, look at documents pertaining to the relationship between the parties.

Brown went on to testify that creating a social history would include looking at documents that pertain to the relationship between the parties, such as prior medical records, documents pertaining to child support and custody, threats made by one spouse against the other, and "statements made by a child to another child, animus towards a parent or statements concerning feeling excluded."

The trial court denied appellant's motion for new trial, and this appeal followed.

Hearsay

In his first and third points of error, appellant argues that the trial court erred in sustaining the State's hearsay objection to I.C.'s and appellant's mother's testimony. I.C.'s testimony concerned conversations she had with L.C., while appellant's mother's testimony concerned conversations with L.C.'s mother.

Hearsay is a statement, other than one made by the declarant while testifying at trial, that a party offers to prove the truth of the matter asserted. TEX. R. EVID. 801(d); *Baldree v. State*, 248 S.W.3d 224, 230–31 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Hearsay statements are inadmissible, except as provided by statute or other rule. TEX. R. EVID. 802. A statement that is not offered to prove the truth of the matter asserted, but rather is offered for some other reason, does not constitute hearsay. *Guidry v. State*, 9 S.W.3d 133, 152 (Tex. Crim. App. 1999) (citing *Jones v. State*, 843 S.W.2d 487, 499 (Tex. Crim. App. 1992), *overruled on other grounds*, *Maxwell v. State*, 48 S.W.3d 196 (Tex. Crim. App. 2001)); *Yanez v. State*, 199 S.W.3d 293, 307 (Tex. App.—Corpus Christi 2006, pet. ref'd) ("A statement not offered to prove the truth of the matter asserted is not hearsay."). "Matter asserted" includes any matter explicitly asserted and any matter impliedly asserted by the statement "if the probative value of the statement as offered flows from the declarant's belief as to the matter." TEX. R. EVID. 801(c).

A. Standard of Review

To admit evidence pursuant to a hearsay exception, "the proponent of the evidence must specify which exception he is relying upon." *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002); *see also Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005) ("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).

An appellate court reviewing a trial court's ruling on the admissibility of evidence employs an abuse of discretion standard of review. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). The appellate court will uphold the

trial court's ruling if it was within the zone of reasonable disagreement. *Id.* In addition, the appellate court must review the trial court's ruling in light of the evidence before the trial court at the time the ruling was made. *Id.*

B. Analysis

The State objected twice to I.C.'s testimony on the basis of hearsay, and both times the trial court sustained the objection without any argument by Foote, appellant's trial counsel:

> [Foote]: So, was there any other time that she said she hated him?
>
> [State]: Objection. Hearsay, Your Honor.
>
> [Court]: Sustained.
>
> [Foote]: What about her step mom . . .?
>
> [I.C.]: She didn't really like her.
>
> [Foote]: Okay. How did you know that she didn't like her?
>
> [I.C.]: She—
>
> [State]: Hearsay, Your Honor.
>
> [Court]: . . . I sustain that as hearsay. You can't repeat what someone said. If they did something, you can say that because you saw it, but you can't repeat what someone says. Do you understand?
>
> [I.C.]: Yes.

[Foote]: So, how did you know other than saying—what made you—did she do things to show you she didn't like her step mom?

Again, when the State objected to appellant's mother's testimony on the basis of hearsay, the trial court sustained the objection without argument from Foote:

[Foote]: Okay. Did you ever have any problems with [I.K.]?

[Nancy]: Well, there was a time when [L.C.] had told something about—something that she would do to her and—she said her mother had been doing some things to her and I was a witness to that.

[State]: Objection, Your Honor.

Appellant's trial counsel did not make any argument to the trial court regarding why the evidence was admissible, either because it was not hearsay or because a particular hearsay exception applied. Thus, these arguments are not preserved for appeal. *See Reyna*, 168 S.W.3d at 177; *Willover*, 70 S.W.3d at 845.

We overrule appellant's first and third points of error.

Ineffective Assistance

In his second, fourth, fifth, and sixth points of error, appellant argues that he was denied effective assistance of counsel. First, he argues that his trial counsel fell below a reasonable standard of representation by failing to present bills of exception regarding I.C.'s and appellant's mother's testimony. Next, he argues

that trial counsel failed to investigate and present forensic psychological evidence. Finally, appellant argues that trial counsel failed to present evidence of L.C.'s motive to present false allegations of sexual abuse.

A. Standard of Review

To make a showing of ineffective assistance of counsel, an appellant must demonstrate that (1) his counsel's performance was deficient and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Cannon v. State*, 252 S.W.3d 342, 348–49 (Tex. Crim. App. 2008). The appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

The appellant must first show that his counsel's performance fell below an objective standard of reasonableness. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). 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; *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). Our review is highly deferential to counsel, and we do not speculate regarding counsel's trial strategy. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, the appellant must provide an appellate record that affirmatively demonstrates that counsel's performance was not based on sound strategy. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see Thompson*, 9 S.W.3d at 813 (holding that record must affirmatively demonstrate alleged ineffectiveness).

B. Failure to Present Bills of Exception

In his second and fourth points of error, appellant argues that because his trial counsel did not proffer a bill of exception regarding the testimony excluded as hearsay, that the error is not preserved for appeal. Based on this alleged mistake, appellant argues that his trial counsel provided ineffective assistance. We construe appellant's argument to be that his trial counsel was ineffective in failing either to get the evidence admitted or to preserve error.

Appellant has not shown that he was prejudiced by any failure on Foote's part to present I.C.'s or appellant's mother's testimony or to preserve his right to challenge on appeal the trial court's exclusion of that testimony. Appellant argues that I.C.'s and M.C.'s testimony, as established at the motion for new trial hearing, would have related conversations with L.C. that would "impeach [her] testimony regarding the very essence of the allegations against appellant." However, the majority of the testimony presented by I.C. at the motion for new trial hearing was also presented in some way at trial—the trial record is replete with testimony from I.C., M.C., L.C., I.K., Almaguer, the CPS investigator, appellant, and his brother and wife that L.C. had problems with both her father and her stepmother, that she was jealous of her half-siblings, that L.C. felt excluded, and that the relationships between L.C.'s mother, appellant, and his wife were strained.

The only specific incident related by I.C. during the hearing on the motion for new trial that was not contained in the trial record is the incident when appellant's wife excluded L.C. from family photographs. In light of all of the similar evidence that was presented at trial, this one incident is not so significant that we can conclude that the outcome of the trial would have been different had the jury heard that testimony.

Likewise, appellant does not present any argument that additional testimony by appellant's mother concerning L.C.'s mother's "acrimonious relationship" with

appellant would have changed the course of the proceedings. The trial record contained evidence that L.C.'s mother and appellant were divorced and had a strained relationship. Thus, appellant has failed to demonstrate ineffective assistance of counsel on these grounds. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Cannon*, 252 S.W.3d at 348–49.

We overrule appellant's second and fourth points of error.

C. Failure to Investigate and Present Forensic Psychological Evidence

In his fifth point of error, appellant argues he was denied effective assistance of counsel because Foote failed to investigate and present forensic psychological evidence. Specifically, she did not rely on an expert at trial.

Trial counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996) (quoting *Strickland,* 466 U.S. at 691, 104 S. Ct. at 2066). A decision to not investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* (quoting *Strickland,* 466 U.S. at 691, 104 S. Ct. at 2066). In determining whether trial counsel adequately investigated potential mitigating evidence, "we focus on whether the investigation supporting [trial] counsel's decision not to introduce mitigating evidence . . . *was itself reasonable.*" *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536 (2003)

(emphasis in original); *Freeman v. State*, 167 S.W.3d 114, 117 (Tex. App.—Waco 2005, no pet.). Trial counsel is not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Freeman*, 167 S.W.3d at 117. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 521–22, 123 S. Ct. at 2535 (quoting *Strickland*, 466 U.S. at 690–91, 104 S. Ct. 2052).

When an appellant argues that his trial counsel's conduct amounted to ineffective assistance by failing to call an expert witness, the appellant must show that the expert's testimony would have been beneficial to him. *See Cate v. State*, 124 S.W.3d 922, 927 (Tex. App.—Amarillo 2004, pet. ref'd); *Teixeira v. State*, 89 S.W.3d 190, 194 (Tex. App.—Texarkana 2002, pet. ref'd). The appellant must also show that the witness was available to testify. *Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986); *Johnston v. State*, 959 S.W.2d 230, 236 (Tex. App.—Dallas 1997, no pet.).

Foote testified that she investigated a potential forensic psychological defense by meeting with an expert, Dr. Long, and that, after this meeting, she chose not to present this defense. Foote testified that she decided not to have Dr.

Long testify because she did not want to appear to be attacking L.C., which Foote believed would have further damaged appellant's credibility with the jury, and because she believed the relevant testimony was covered by her cross-examination of Moran. We must assume, absent evidence to the contrary, that Foote's decision not to hire an expert to testify was driven by sound trial strategy. *See Bone*, 77 S.W.3d at 833.

Appellant relies primarily on two cases, *Wright v. State* and *Ex Parte Briggs*, to support his proposition that Foote's failure to hire an expert amounts to ineffective assistance of counsel. *Ex Parte Briggs* is factually distinguishable. Briggs's trial counsel told his client he could not fully investigate the medical records or consult with experts until he had been paid an additional $2,500–$7,500. 187 S.W.3d 458, 466 (Tex. Crim. App. 2005). The court noted counsel's action "was not a 'strategic' decision, it was an economic one." *Id.* at 467. The Court of Criminal Appeals held that while counsel is not required to pay for experts out of his own pocket, he must work to advance his client's best defense and find another way to provide expert testimony. *Id.* at 467–68.

Here, unlike in *Briggs*, there is no assertion that trial counsel's decision was an economic one or something similar; rather, Foote explained that she did not want to "sully that connection or that relationship [between appellant and L.C.] anymore by bringing someone in to call [L.C.] a liar." *See Ex parte McFarland*,

163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (holding that it is valid trial strategy not to attack sympathetic witness).

In *Wright v. State*, defense counsel stated he did not hire an expert "because (1) he was told that any expert he hired would not be able to interview the complainant, and (2) by the time he had received [the therapist's] notes, he did not have time to contact an expert." *Wright v. State*, 223 S.W.3d 36, 43 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Wright's defense counsel also stated that he had trouble reading the report by the therapist who interviewed the complainant because he could not read the therapist's handwriting and he thought the therapist would provide a typed report with his findings. *Id.* Wright later presented expert testimony at the motion for new trial hearing on potentially improper interview techniques used by the therapist on the complainant. *Id.* at 39, 41. This Court concluded that exculpatory evidence in the therapist's notes, expert testimony about deviations from standard protocol reflected in the notes, and expert testimony concerning false allegations of sexual assault in connection with divorce proceedings constitute powerful evidence that would have supported appellant's defensive theory, and the failure to use this evidence constituted ineffective assistance of counsel. *Id.* at 44–45.

The evidence presented by appellant regarding what an expert witness would have contributed to his defense is much less than that presented in *Wright*. Here,

appellant's expert did not discuss any potential exculpatory evidence, but he testified generally about allegations of sexual abuse. Appellant's expert did not specifically identify any testimony that would have supported appellant's defense; he only testified regarding what type of investigation he would have conducted.

Foote testified that she investigated appellant's case and consulted with an expert, and appellant has not proven that the level of consultation and other investigation was not reasonable. *See Wiggins*, 539 U.S. at 523, 123 S. Ct. 2536; *Freeman*, 167 S.W.3d at 117. Nor has appellant established that Foote's decision not to call an expert was not part of a sound strategy. *See Bone*, 77 S.W.3d at 833. Additionally, appellant has not demonstrated, with specificity, what the expert would have testified to that would have aided his defense—a requirement to succeed in a claim of ineffective assistance of counsel for failure to call an expert witness. *See Cate*, 124 S.W.3d at 927; *Teixeira*, 89 S.W.3d at 194.

Thus, appellant has not proven ineffective assistance of counsel in not investigating the forensic psychological evidence or in not obtaining an expert to testify.

We overrule appellant's fifth point of error.

D. Failure to Present Evidence of Complainant's Motive for False Allegation

In his sixth point of error, appellant argues that Foote did not provide effective assistance because she did not present evidence as to L.C.'s motive to

present false allegations of sexual abuse, including the poor relationships among L.C., her mother, her stepmother, and appellant.

Appellant contends that because the full testimony of I.C., M.C., and appellant's mother was not developed, Foote did not sufficiently present appellant's defensive theory—that the family acrimony provided a motive for L.C. to make a false allegation. Appellant argues that the excluded evidence would have been admissible had it been introduced through expert testimony. However, as stated above, appellant failed to prove that trial counsel's decision not to employ an expert was not part of a sound trial strategy.

Furthermore, appellant has not shown that he was harmed by Foote's failure to develop this particular evidence further. As we have already stated, the trial record contained testimony from multiple witnesses concerning the strained relationships in L.C.'s family. L.C., appellant, and his wife all testified that L.C. did not get along with her stepmother and siblings. Appellant testified that he had told L.C. that she might need to quit visiting his home because of this strife. Appellant's brother testified that L.C. "didn't feel like her stepmother was treating her right. So, in other words, the bad stepmother thing comes into play there, but a lot more than just that." Testimony that L.C.'s mother and appellant were divorced introduced the potential for false allegations pursuant to divorce and custody issues, as did appellant's wife's testimony that she once confronted L.C. about her

bad behavior when she learned that L.C. misbehaved "because her mom told her to do it." It was apparent in the record that L.C. and her stepmother did not get along, that L.C. was jealous of her siblings, and that her father was likely to choose them over her. Appellant does not establish that additional evidence concerning the acrimony in the family would have further demonstrated L.C.'s motive to file a false allegation, thereby changing the result of the trial.

Appellant relies on *S.J.P. v. Thaler*, where the defendant's trial counsel failed to investigate, failed to use character witnesses at trial, introduced a prior offense that harmed appellant's defense, allowed prosecution witnesses to testify without any objection, did not hire an expert to aid his defense, and failed to present testimony that, if used, could have clearly rebutted the State's case. No. 4:09-CV-112-A, 2010 WL 5094307, at *16–17 (N.D. Tex. Dec. 3, 2010). *S.J.P.* is distinguishable from the instant case.

Here, Foote testified that she investigated appellant's case and that she made a strategic decision not to call an expert to testify, she thoroughly cross-examined the State's witnesses, and she called several witnesses on appellant's behalf. Appellant does not raise any specific testimony that would have clearly rebutted the State's case. Thus, appellant has failed to demonstrate ineffective assistance of counsel on these grounds. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Cannon*, 252 S.W.3d at 348–49.

We overrule appellant's sixth point of error.

Reformation of Judgments

The State asks that we reform the judgments to reflect that appellant's sentences are to run consecutively. This Court has the authority to modify incorrect judgments when the necessary data and information to do so are available. *See* TEX. R. APP. P. 43.2(b) (providing that court of appeals may modify judgment and affirm as modified); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). The oral pronouncement of a sentence controls if there are variations between the pronouncement and the written judgment, which simply memorializes the pronouncement. *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998).

Here, the trial court ordered that appellant serve both sentences consecutively when it made its oral pronouncement of the sentences on the record in open court. This pronouncement controls over the written judgments, which reflect that appellant is to serve his sentences concurrently. Therefore, we modify the written judgments to reflect that appellant is to serve his sentences consecutively.

Conclusion

We modify the judgments of the trial court and affirm as modified.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).