Opinion issued October 25, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00650-CR

MICHAEL JAMES GUERRA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1447236

MEMORANDUM OPINION

Appellant, Michael James Guerra, was found guilty by a jury of the offense of aggravated sexual assault of a child.[1] The jury assessed Appellant's punishment

[1] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (a)(2)(B) (Vernon Supp. 2015) (providing, as applicable to this case, that a person commits the offense of aggravated sexual assault if he intentionally or knowingly "causes the penetration of the anus or sexual organ of a child by any means," and the victim is younger than fourteen years of age).

at 50 years in prison. Appellant raises two issues on appeal. He contends that he received ineffective assistance of counsel at trial. Appellant also asserts that the trial court erred by refusing to admit redacted portions of the complainant's medical records into evidence.

We affirm.

Background

The complainant in this case, M.C., was born in 2001. Appellant is M.C.'s maternal uncle.

M.C.'s mother ("Mother") and father separated shortly after she was born. By the time she was seven or eight years old, M.C.'s father stopped communicating with her. In 2005, Mother married another man, but they divorced in 2010. After that, Mother rented a house and Mother's brother, Appellant, moved in with Mother and M.C. Appellant and M.C. became very close, and M.C. considered Appellant to be a father figure.

In 2013, Mother and M.C. moved to an apartment. Appellant moved in with his mother, who is M.C.'s grandmother ("Grandmother").

M.C. would often stay with Grandmother for a weekend or for longer periods of time in the summer. In August 2014, M.C., who was then 13 years old, went to spend a couple of weeks at Grandmother's house. Appellant was still living there. He was 33 years old.

On Sunday, August 17, 2014, Grandmother called Mother, requesting Mother to pick up M.C., even though they had planned for M.C. to stay longer. Grandmother sounded very upset on the phone. She indicated to Mother that she thought inappropriate things had been occurring between M.C. and Appellant.

Mother picked M.C. up from Grandmother's house. On the way home, M.C. repeatedly denied anything had happened between her and Appellant. Eventually, she broke down crying and disclosed to Mother that she and Appellant had sex the night before on the patio and had sex a total of eight times in the last couple of weeks.

When they arrived home, Mother called Grandmother, and Grandmother went to Mother's apartment. There, M.C. told Grandmother that she and Appellant had had sex. Grandmother contacted Appellant, who denied the allegation.

Grandmother decided that she did not believe M.C.'s claim. She asked Mother not to contact the police, stating the allegations should be handled within the family. Mother waited two weeks and then contacted the authorities to report the sexual abuse.

On September 8, 2014, Mother took M.C. to the Children's Assessment Center. There, M.C. spoke with forensic interviewer, C. Gonzalez. While there, M.C. also underwent a physical examination by Dr. M. Donaruma, a medical doctor.

Appellant was indicted for the first-degree felony offense of aggravated sexual-assault of a child. The case was tried to a jury in July 2015. Among the State's witnesses were Mother; the forensic interviewer, C. Gonzalez; Dr. Donaruma; M.C.; and a psychologist who testified as an expert on the effects of sexual abuse.

Mother testified that Grandmother called her on Sunday, August 17, 2014, to pick up M.C. Grandmother sounded upset and told Mother that she thought something sexual was happening between Appellant and M.C. because she had found blood on the patio that morning before she went to church. Grandmother told her that, when she had asked M.C. about the blood, M.C. had gotten defensive and told Grandmother that she had cut herself.

Mother said she initially found Grandmother's allegation that her brother had done anything inappropriate difficult to believe. Nonetheless, she went to pick up M.C. from Grandmother's house. When Mother arrived at the house, she stated that Grandmother and Appellant were not there. M.C. was there alone.

On the way home, Mother told M.C. that, if anyone had touched her inappropriately, she would not be in trouble and could tell her. At first, M.C. was adamant that nothing had happened. When Mother asked her about the blood on the patio, she testified that M.C. became defensive and mentioned to Mother that she had her period. Mother stated that she was skeptical because she knew that

M.C. had had her period for five days at that point and "after five days of being on your period, you're not going to bleed large droplets through your shorts onto the patio floor." Mother again assured M.C. that she would not be in trouble if something had happened. M.C. told Mother that she would not tell, even if something had happened, because she did not want to take Appellant away from his children. Mother said she continued to reassure M.C. that she would not be in trouble and told M.C. that she needed to tell her if something had happened. As Mother continued to reassure her, M.C. broke down and started to cry in a very emotional manner.

M.C. disclosed that she and Appellant had sex a total of eight times during her stay at Grandmother's house. She told Mother that she and Appellant had sex on the patio the previous night. Mother testified that M.C. told her that Appellant had "called her out onto the back patio. [M.C.] went out there. She said that he turned her around so that her back was against him and pulled her shorts down and bent her over the weight bench and had sex with her." M.C. had indicated that the blood on the patio had resulted from that sexual act.

M.C. said that, in addition to the patio, they had sex in the room where she slept and in Appellant's bedroom. Mother further stated that M.C. told her that it had hurt every time she and Appellant had sex. She testified that "[M.C.] said that he would force himself on her, she would try to push him off but she would just

relax and let him do it because she knew that he was much stronger than her and that it would probably just hurt her more to fight him." M.C. said Appellant told her that it "felt right" with her and did not "feel wrong." M.C. also told Mother that she and Appellant had performed oral sex on one another.

Mother further testified that M.C. had "fully intended to keep it a secret." She continued, "[W]hen she told me, she still didn't want to get him in trouble. She didn't want me to contact the authorities and she told me that if I did, she would tell them that I was lying because she didn't want to get him in trouble."

Mother stated that they called Grandmother, who came to their home. M.C. told Grandmother about the sexual abuse. Grandmother then called Appellant, who denied the allegations. Grandmother chose to believe Appellant and not to believe M.C. Mother testified that Grandmother asked her not to report the allegations to the authorities. Mother then waited two weeks to report M.C.'s abuse claims.

The State called M.C. to testify at trial. M.C. stated that, after she lost contact with her natural father, she had considered Appellant to be a father figure because he had always been there for her. She said the first time she noticed Appellant behaving inappropriately toward her was when she was 10 or 11 years old. She and Appellant were watching television together, and Appellant had been drinking. Appellant started to rub back and forth on the inside of M.C.'s thigh with

his hand. M.C. said that, at the time, she thought it was wrong and got up and moved away from Appellant. M.C. indicated that nothing happened again with Appellant until she stayed at Grandmother's in August 2014.

M.C. testified that, the night before she made her outcry, she and Appellant had been watching television in the living room. Grandmother was asleep in her bedroom, and Appellant's two daughters, who were also visiting, were asleep in another room.

While they watched a movie, Appellant put his finger in her vagina. M.C. tried to resist but, because Appellant was stronger, she could not stop him. M.C. testified that Appellant then told her to go outside onto the patio. There, he took off her shorts and her underwear, and he pulled down his shorts. She testified that Appellant "turned me around and made me bend over on this bench thing" and then "[h]e put his penis into my vagina." M.C. stated that it hurt when Appellant did this. She further testified that she told Appellant, "Stop. This isn't right," but Appellant would not stop.

M.C. also testified that one week earlier, on a Sunday morning, Appellant came into her bedroom while Grandmother was at church. Appellant got into bed with M.C. and had vaginal intercourse with her twice that morning. She said that Appellant told her that "it didn't feel wrong."

M.C. further testified that there were other instances when she and Appellant had sex during her stay with Grandmother. She said that sometimes they would have sex in her bed and sometimes in his bedroom. In addition to intercourse, M.C. stated that Appellant made her perform oral sex on him "a lot of times."

During her testimony, M.C. indicated that she felt the abuse had been her fault. She stated, "I could have said no, I could have told somebody, I could have prevented it, but I let it happen."

The forensic interviewer, C. Gonzalez, testified that she spoke with M.C. at the Children's Assessment Center on September 8, 2014. Gonzalez stated that M.C. disclosed that she had been sexually abused by Appellant on multiple days. Gonzalez testified that M.C. was "very detailed" in her description of the sexual abuse. Gonzalez stated that M.C. was consistent in her statements throughout the interview. M.C. was also able to provide "narrative details for each incident," which "[is] significant because it establishes credibility."

Gonzalez also confirmed that M.C. described "sensory details," such as what she saw, smelled, and felt during the sexual abuse. For example, M.C. recalled that Appellant smelled of alcohol. Gonzalez testified that sensory details are "significant because it places a child back. The more sensory details they're able to provide, the more that it establishes their credibility that they're saying the truth."

The State called Dr. Donaruma to testify regarding the sexual abuse medical examination she performed on M.C. at the Children's Assessment Center. Dr. Donaruma testified that, before examining M.C., she met with Mother and M.C. regarding M.C.'s medical history. As part of the history, Dr. Donaruma spoke with M.C. regarding her claims of sexual abuse. M.C. reported that her 33-year-old uncle had touched her "on my private area . . . with his penis" and that "no one else had ever touched her there." M.C. told Dr. Donaruma that the abuse happened eight times. M.C. recalled that Appellant had worn a condom one time.

M.C. told Dr. Donaruma that the sexual abuse had occurred about two weeks before the examination. Dr. Donaruma indicated that the two-week time period was significant because any injury to vaginal tissue usually heals in two weeks.

Dr. Donaruma conducted a head-to-toe examination of M.C., including an examination of her genitals. Dr. Donaruma testified that the examination revealed two deep "notches" on M.C.'s hymen. Dr. Donaruma stated that, while notching alone is "indeterminate" of whether penetration or sexual abuse has occurred, notching occurs much more frequently in teenage girls who have reported being sexually active. For this reason, Dr. Donaruma indicated that, while the notching on M.C.'s hymen does not prove that she had been sexually abused, the presence of the notching is "supportive of [the] history" of abuse provided by M.C.

In conjunction with Dr. Donaruma's testimony, the State offered a redacted medical record from the doctor's sexual abuse examination of M.C. into evidence. The State had redacted information from the medical record indicating that, before the sexual abuse, M.C. had engaged in self-mutilation and had thought about suicide. The defense sought to have the redacted information admitted. Following an in-camera hearing, the trial court ruled that the redacted information would not be admitted, and the redacted medical record was admitted.

The State's last witness to testify during its case-in-chief was Dr. D. Madera, a psychologist with the Children's Assessment Center, who treats individuals with regard to child sexual abuse. Dr. Madera had not treated M.C. but was offered as an expert witness to testify about the symptoms exhibited by individuals who have been sexually abused. Dr. Madera testified that it is common for an outcry of abuse to be delayed. She stated that in 90% of sexual abuse cases the abuse is perpetrated by someone the child "knows, loves, or trusts." According to Dr. Madera, it is common for the abuse to occur in a home while others are present. She stated that the other people in the home often do not know that the abuse is occurring.

Dr. Madera stated that the abuser often "grooms" the child before the abuse begins. She indicated that grooming "is any act deliberately taken with the intent

to gain trust of that child" as a predicate to abusing the child. She stated the purpose of grooming is "to make the child feel responsible" for the abuse.

The defense cross-examined the State's witnesses and offered three witnesses during its case-in-chief: (1) Appellant's girlfriend, Lydia; (2) Grandmother; and (3) Appellant. The defense's trial strategy was to show that M.C. had fabricated the sexual abuse claim because she was jealous of Appellant's girlfriend, Lydia.

Lydia testified that, at the time of trial, she was living with Appellant and their young daughter. During her testimony, Lydia provided an alibi for Appellant for the night M.C. claimed Appellant had sexually abused her on the patio. Lydia testified that she spent that night, which was a Saturday, and the night before, Friday, at Grandmother's house. Lydia testified that, both nights, she had arrived at Grandmother's around 10:30 p.m. and left the house at around 6:00 a.m. the next morning. Because Lydia and Appellant did not want Grandmother to know that she was spending the night with Appellant, Lydia had entered the home quietly each night after Grandmother had gone to bed and left before she woke up. Grandmother never knew that Lydia was there. Lydia testified that she spent both nights in Appellant's bedroom with him. She confirmed that she was with Appellant "the whole time" on those nights.

Lydia stated that, when she entered the house the Friday night, she made eye contact with M.C., and M.C. gave her "a very nasty look." With respect to M.C., Lydia testified, "She's very disrespectful. She's very outspoken. She's very spoiled. She's hateful towards my daughter. As a mother, I prefer my daughter not to be around her." Lydia answered negatively when asked, "Did you notice anything [at] the time that you were there, on those two nights, that indicated that Michael would have assaulted this girl in any way?"

Grandmother also testified for the defense. Grandmother acknowledged that she found blood on the patio around 8:00 a.m. on Sunday, August 17, 2014. Grandmother testified that, when she asked M.C. about the blood, M.C. "said she had started on her period and it dripped down her legs and she apologized to me for making a mess and said, I cleaned it up."

On cross-examination, M.C. had testified that, when she and Appellant had sex on her bed, blood had gotten on her sheets. M.C. testified that she had asked Grandmother if she could use Grandmother's washing machine to launder the sheets. Grandmother testified that M.C. had never asked her to use the washing machine and that M.C. did not know how to operate the machine.

Grandmother also described M.C. as being "[a]ngry" and "[j]ealous if she doesn't obtain exactly what she wants when she wants it." Grandmother also said

M.C. was "manipulative." When asked whether she thought Appellant was guilty of sexually assaulting M.C., Grandmother said, "No."

On cross-examination, Grandmother admitted that she told one of the investigating police officers that she would lie for her children. Grandmother stated that she had not lied, but told the prosecutor on cross-examination, "I mean, as a parent, we would do anything for our children. I think you would, too, sir."

Grandmother also acknowledged that she was concerned when she saw the blood on the patio and was again concerned when M.C. told her she had her period and that blood had dripped down her leg onto the patio. She wondered why M.C. had been on the patio and testified, "I thought something unusual had occurred." Grandmother admitted that her "first suspicion" was that "something might be going on between [M.C.] and [Appellant]." Grandmother acknowledged that, because of this suspicion, she called Mother, asking her to pick up M.C. Grandmother agreed that she told Mother that she had found blood on the patio, and she thought Appellant "might have done something" to M.C. On the phone, Grandmother had pointed out to Mother that M.C. was growing up and her body was developing. Grandmother then clarified for the State that she was concerned "until I was able to think it through and realize [M.C.'s] previous attention-seeking methods." However, Grandmother also admitted that, at the time, she had been concerned enough to ask Mother to come pick up M.C. and that her concerns had

upset her to the point that she had to leave the house that day. On re-direct examination, Grandmother testified that, after she had time to reflect, she does not believe M.C.'s allegations against Appellant.

Appellant also testified in his own defense at trial. Appellant denied M.C.'s allegations of sexual abuse. He stated that he and M.C. had a close uncle-niece relationship. However, Appellant testified that he never placed his penis in M.C.'s vagina, engaged in oral sex with her, or touched her in an inappropriate manner.

Appellant testified that, during the nights of August 16 and 17, 2014, he was in his bedroom with Lydia. Appellant stated that Lydia arrived at 10:30 p.m., after Grandmother had gone to bed, and stayed all night with him. Appellant indicated that M.C. was jealous of Lydia.

Appellant acknowledged that, several years earlier, he had been accused of inappropriately touching his daughter, Anna, when she was approximately five years old.[2] Appellant indicated that he and Anna were interviewed by CPS about the allegations at that time; however, he was never charged with anything relating to the allegations and agreed that "[n]othing ever came of it." On cross-examination, Appellant indicated that it had been Anna's mother, not Anna, who

[2] "Anna" is a pseudonym.

had made the allegation against him.[3] Appellant stated that Anna's mother had thought it inappropriate that he had bathed Anna with his bare hand rather than using a washcloth. He said Anna's mother reported it to CPS. Appellant testified, "CPS investigated and said that there was no wrongdoing . . . ."

On direct examination, Appellant's counsel also asked, "Have you ever been in trouble?" Appellant responded that he had been convicted of assault in 2008.

Before it began its cross-examination of Appellant, outside the presence of the jury, the State pointed out that Appellant had another conviction for assault in 1999 and had received deferred adjudication in 2009 for robbery, reduced from aggravated robbery, which he had successfully completed in 2013. The State asserted it should be permitted to question Appellant about these offenses because Appellant had "opened the door" and left a false impression with the jury when he had disclosed only the 2008 assault in response to his attorney's question regarding whether he had ever been "in trouble." The trial court agreed with the State and permitted it to question Appellant whether he had been convicted of the 1999 assault and whether he had received deferred adjudication for robbery. On cross-examination, Appellant also acknowledged that the 2008 assault conviction had been for assault of a family member. Appellant had pleaded guilty to assaulting his then-wife (Anna's mother) and had served 90 days in jail.

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[3] Appellant was married to Anna's mother at one point. Appellant also has a younger daughter with Lydia.

After Appellant testified, the defense rested. The State called Appellant's nine-year-old daughter, Anna, to testify as a rebuttal witness. Appellant objected, but the trial court permitted Anna to testify, noting that her testimony was permitted to rebut the defensive theory of fabrication and was admissible under Code of Criminal Procedure Article 38.37 § 2(b).

Anna testified regarding an incident that had occurred when she was approximately six years old while Appellant gave her a bath. Anna said that Appellant was bathing her, using his bare hand to wash her rather than using a washcloth. She noticed that Appellant was spending much more time washing her "private area" than any other part of her body. Anna testified that Appellant then started to rub the front part of her private area harder and harder in a back and forth motion. She stated that it hurt her. Appellant then took his middle finger and stuck it inside what Anna called her "cookie," which she said was in the front part of her private area. Anna testified that, when Appellant stuck his finger inside her, it hurt, and it made her feel upset. Anna stated that she then told her mother what had happened.

Following closing arguments, the jury found Appellant guilty of the offense of aggravated sexual assault as charged in the indictment. During the punishment phase, Appellant stipulated that (1) he had been given deferred adjudication for robbery in 2009; (2) he had been convicted of the misdemeanor offense of assault-

family-violence in 2009, serving 90 days in jail, and (3) he had been convicted of assault-bodily injury in 1999, serving 60 days in jail. Appellant also stipulated that two other charges, misdemeanor criminal trespass-habitation in 1999 and another robbery offense in 2009, had been dismissed.

The State sought to show that Appellant had a propensity for violence. One of the victims from the 2009 robbery, for which Appellant received deferred adjudication, testified during the punishment phase. Appellant's ex-wife, Anna's mother, who had been the complainant in the 2009 assault-family-violence case, also testified regarding the facts underlying that offense.

In his defense at the punishment phase, Appellant presented the testimony of Grandmother; Lydia; and Lydia's mother. Each testified as to Appellant's good character. After hearing the evidence, the jury assessed Appellant's punishment at 50 years in prison.

Appellant's trial counsel filed a motion for new trial, asserting that the evidence was insufficient to support the judgment of conviction. Appellant then retained new counsel, who filed an amended motion for new trial. In the amended motion, Appellant claimed that he had received ineffective assistance of counsel during trial. Appellant cited 18 acts or omissions by counsel that he asserted demonstrated counsel performed deficiently. Specifically, Appellant claimed counsel acted deficiently because he (1) elicited testimony from Appellant

regarding his 2009 assault conviction, thereby opening the door to questioning by the State regarding other extraneous offenses committed by Appellant; (2) did not object when the State cross-examined Appellant regarding his criminal history beyond the scope of what the trial court had ruled it would permit; (3) did not object that forensic interviewer, C. Gonzalez, was improperly testifying as an outcry witness; (4) did not object to the improper bolstering of M.C.'s testimony; (5) failed to present available impeachment evidence against Mother; (6) neglected to impeach M.C. on eight separate points with available impeachment evidence; (7) "opened the door" to the sexual-abuse testimony of his daughter, Anna; (8) failed to object to the propriety of allowing Anna to testify pursuant to Code of Criminal Procedure Article 38.37 § 2(b); (9) did not prepare a defense to Anna's allegations of sexual abuse; (10) failed to investigate and call witnesses who could testify that M.C. has a reputation in the community for not being a truthful person; and (11) did not properly investigate and call available character witnesses to testify on Appellant's behalf at the punishment phase.

In support of the amended motion for new trial, Appellant offered 23 exhibits, including Appellant's unsworn declaration, affidavits from Appellant's family and friends, the trial transcript, M.C.'s school records, and business records form the CPS.

Defense counsel signed an affidavit, responding to Appellant's claim that he had performed deficiently at trial. In his affidavit, defense counsel addressed each specific act or omission claimed by Appellant as constituting ineffective assistance of counsel, explaining his underlying trial strategies.

The trial court conducted a hearing on Appellant's amended motion for new trial. No live testimony was presented, but the exhibits offered by Appellant in support of his motion were admitted into evidence. After hearing the arguments of counsel, the trial court denied Appellant's amended motion for new trial. Appellant now appeals, raising two issues.

Ineffective Assistance of Counsel

In his first issue, Appellant contends that the trial court abused its discretion when it did not grant his motion for new trial based on his claim that he received ineffective assistance of counsel at trial. To support his first issue, Appellant identifies 18 sub-issues, detailing the various acts and omissions of trial counsel that he claims constitutes ineffective assistance of counsel.

A. Applicable Legal Principles

When, as here, an appellant has presented issues of ineffective assistance in a motion for new trial, we review the trial court's denial of the motion for an abuse of discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012); *see also Ramirez v. State*, 301 S.W.3d 410, 415 (Tex. App.—Austin 2009, no pet.)

("[W]hen analyzing the trial court's failure to grant a motion for new trial on the basis of ineffective assistance of counsel, we view the relevant legal standards through the prism of abuse of discretion."). Under this standard, we view the evidence in the light most favorable to the trial court's ruling on the motion for new trial, and we defer to the trial court's credibility determinations. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014).

An abuse of discretion occurs only when no reasonable view of the record would support the trial court's ruling. *Riley*, 378 S.W.3d at 457. Applying this deferential standard, we will hold that a trial court has abused its discretion when its decision is so clearly wrong as to lie outside the zone of reasonable disagreement. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). In other words, we will reverse the trial court's denial of the defendant's motion for new trial only if the trial court's decision is clearly erroneous and arbitrary. *See Riley*, 378 S.W.3d at 457.

Allegations of ineffective assistance of counsel must be firmly rooted in the record. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) his counsel's performance was deficient, i.e., that his assistance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*,

466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). The defendant has the burden to establish both prongs by a preponderance of the evidence; failure to make either showing defeats an ineffectiveness claim. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011); *see also Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

Under the first *Strickland* prong, any judicial review of whether counsel's performance was deficient "must be highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A court making such a determination must engage in a strong presumption that counsel's conduct fell within the wide range of reasonable assistance and that the complained-of act or omission might be considered sound trial strategy. *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012). "The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel." *Id.* "The *Strickland* test is judged by the 'totality of the representation,' not by counsel's isolated acts or omissions, and the test is applied from the viewpoint of an attorney at the time he acted, not through 20/20 hindsight." *Id.*

Under the second *Strickland* prong, a defendant must show more than "that the errors had some conceivable effect on the outcome of the proceeding." *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010) (quoting *Strickland*, 466

U.S. at 693, 104 S. Ct. at 2067). Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). Thus, he must show that there is a reasonable probability that, but for his attorney's errors, the jury would have had a reasonable doubt about his guilt or that the extent of his punishment would have been less. *See Burruss v. State*, 20 S.W.3d 179, 186 (Tex. App.—Texarkana 2000, pet. ref'd); *see also Bone v. State*, 77 S.W.3d 828, 836–37 (Tex. Crim. App. 2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

B. Analysis

1. Extraneous-Offense Evidence

In his first sub-issue, Appellant complains that trial counsel performed deficiently when he elicited testimony from Appellant regarding Appellant's assault-family-violence conviction, thereby "opening the door" to two otherwise inadmissible extraneous offenses. During the defense's case-in-chief, trial counsel elicited the following testimony from Appellant on direct examination:

Defense Counsel]: Have you ever been in trouble before?

[Appellant]: Yes, sir.

Q. When was that?

A. I believe 2008.[4]

Q. Okay. And what was that about?

A. Assault.

Q. And were you convicted on that?

A. Yes, sir.

Q. All right. Did you know you had a right not to testify today?

A. Yes, sir.

Q. And if you had not testified, we would not be talking about that assault; is that right?

A. Yes, sir.

Q. But you chose to do so anyway, didn't you?

A. Yes, sir.

Q. And what are you telling this jury today?

A. I'd rather tell my story instead of just, you know, sit back and not say anything and let other people tell it for me, you know. I mean, this is the worst thing that's happened in my life, by far, and I wanted to get my side of the story out there.

Before beginning its cross-examination, the State pointed out that, in addition to the 2008 assault conviction, Appellant had been convicted of assault in 1999 and had received deferred adjudication for robbery in 2009. The State asserted that the defense had opened the door to the admission of those extraneous

[4] The record shows Appellant was convicted of assault-family-violence in November 2009 not in 2008.

offenses when Appellant had identified only the 2008 assault in response to counsel's question whether he had "been in trouble [with the law] before." The State argued that the jury had been left with the false impression that Appellant had no other criminal history other than the 2008 assault. The trial court agreed, permitting the State to question Appellant about the 1999 assault and the 2009 robbery. However, the trial court set parameters on the State's questioning, ruling that the State could not introduce evidence indicating that the robbery had been reduced from an aggravated robbery or that Appellant had been arrested for another aggravated robbery that had been dismissed. The trial court also held that the State could not question Appellant about the details of the 1999 assault or the 2009 robbery.

On cross-examination, Appellant agreed that the 2008 assault conviction—about which he had testified—was more precisely a conviction for assault family violence for which he served 90 days in jail. He also acknowledged that the complainant in that case had been a woman, his ex-wife.

The State asked Appellant whether he had also been convicted of assault in 1999, and Appellant answered affirmatively. Upon further questioning, Appellant explained that the 1999 assault had involved a fist fight when he was 17 or 18 years old. Appellant also acknowledged that he had been charged with robbery in 2009. Appellant clarified that he had not been convicted of that offense but had

received deferred adjudication and was placed on "probation," which he had successfully completed in May 2013.

In his amended motion for new trial, Appellant asserted, "Trial counsel elicited Defendant's partial criminal history during direct examination, which the Judge might have found to be inadmissible, opening the door to otherwise inadmissible priors." Appellant claimed that counsel's performance was deficient because he "never obtained a ruling on whether or not the Judge would allow his prior assault-family member conviction into evidence before introducing its existence before the jury." In other words, Appellant criticized counsel for introducing the 2008 assault-family-violence conviction without knowing for certain whether the trial court would allow the State to introduce the offense during its cross-examination of Appellant.

In his affidavit, defense counsel explained his trial strategy for introducing the assault-family-violence conviction:

> As trial progressed, Mr. Guerra continued to be adamant in testifying in his defense. It has been my experience, when a client is testifying, the best course of action is to be upfront about criminal history and anything else that the State may present in rebuttal. In preparing Mr. Guerra to testify we decided to be proactive in discussing his criminal history in front of the jury. In our meetings, Mr. Guerra believed that his prior history along with his willingness to testify might actually add to the jury seeing him as credible. We both believed that his willingness to testify despite his criminal record would show that he did not commit the offense.

The affidavit shows that, as he began his direct examination of Appellant, counsel believed that the conviction might be introduced by the State during its cross-examination of Appellant. This belief was supported by the State's filing of a notice of intent to use evidence of prior convictions and extraneous offenses, including the assault family violence conviction. In his affidavit, counsel explained that his strategy was "to be proactive" in introducing the offense so that it would appear that Appellant was being "upfront about [his] criminal history" before it could be introduced by the State.

We have previously held that eliciting testimony from the accused as to his own prior convictions can be a matter of sound trial strategy, if the prior convictions are admissible. *Martin v. State*, 265 S.W.3d 435, 443 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Rodriguez v. State*, 129 S.W.3d 551, 558–59 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)). The question becomes, then, whether it was reasonable for trial counsel to believe that the assault-family-violence conviction was admissible.

Generally, when a defendant testifies, prior convictions for felonies or misdemeanors involving moral turpitude may be admitted into evidence for impeachment purposes. TEX. R. EVID. 609(a)(1). Texas courts have held that assault-family-violence, particularly when, as here, the victim is a woman, is an offense involving moral turpitude. *See Jackson v. State*, 50 S.W.3d 579, 592 (Tex.

App.—Fort Worth 2001, pet. ref'd) (holding male on female misdemeanor assault constitutes crime of moral turpitude); *Lopez v. State*, 990 S.W.2d 770, 778 (Tex. App.—Austin 1999, no pet.) (holding same as *Jackson*); *Hardeman v. State*, 868 S.W.2d 404, 407 (Tex. App.—Austin 1993, pet. dism'd) (holding that conviction for misdemeanor assault "by a man against a woman is a crime involving moral turpitude and therefore is admissible as impeaching evidence under [R]ule 609"); *see also Esquivel v. State*, No. 03–15–00439–CR, 2016 WL 1691969, at *5 (Tex. App.—Austin Apr. 21, 2016, no pet.) ("[The] convictions involved allegations of assault family violence, and courts have held that assault family violence in the circumstances present here is an offense that involves moral turpitude.") (mem. op., not designated for publication); *Campos v. State*, 458 S.W.3d 120, 149 (Tex. App.—Houston [1st Dist.] 2015) (determining that conviction for misdemeanor assault on minor family member constitutes crime of moral turpitude and may be used for impeachment purposes), *vacated on other grounds*, 466 S.W.3d 181, 182 (Tex. Crim. App. 2015).

A trial court's ruling on the admissibility of a prior conviction is reviewed under an abuse of discretion standard. *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992). When a party seeks to have a conviction involving moral turpitude introduced, the trial court should conduct a balancing test to determine if the probative value of the prior conviction is outweighed by its prejudicial effect.

TEX. R. EVID. 609(a)(2). In a standard rule 609(a) balancing analysis, the following non-exclusive factors should be considered: (1) the impeachment value of the previous convictions; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent criminal history; (3) the similarity of the prior offenses and the present offense; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue.[5] *Theus*, 845 S.W.2d at 880.

Appellant asserts that defense counsel performed deficiently because he elicited testimony from Appellant about the assault-family-violence conviction without first requesting a *Theus* hearing to determine whether the trial court would permit the State to offer the conviction into evidence. To prove that counsel performed deficiently in this regard, Appellant needed to show that, after applying the *Theus* factors, it would have been an abuse of discretion for the trial court to have admitted the conviction. *See Cavitt v. State*, No. 01–13–00900–CR, 2015 WL 1869499, at *15 (Tex. App.—Houston [1st Dist.] Apr. 23, 2015, pet. ref'd).

Applying the first *Theus* factor to the assault-family-violence conviction, we note that the impeachment value of a crime involving deception is higher than that of a crime involving violence. *Theus*, 845 S.W.2d at 881. For this reason, the first

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[5] A separate analysis applies if the conviction is more than ten years old. TEX. R. EVID. 609(b). Appellant's assault-family-violence conviction is less than 10 years old.

factor weighs against admitting evidence of Appellant's prior conviction for assault-family-violence because it is a crime of violence. *See Esquivel*, 2016 WL 1691969, at *5 (citing *Dale v. State*, 90 S.W.3d 826, 830 (Tex. App.—San Antonio 2002, pet. ref'd) (explaining that assault does not involve deception)).

The second *Theus* factor weighs in favor of admittance. Regarding temporal proximity, the record shows that the assault-family-violence conviction was approximately five years before the instant conviction, well within the ten-year period provided by TEX. R. EVID. 609(b). *See Berry v. State*, 179 S.W.3d 175, 180 (Tex. App.—Texarkana 2005, no pet.). Though he does not appear to have any convictions subsequent to the assault-family-violence conviction, Appellant does have a history of "running afoul of the law." *See Theus*, 845 S.W.2d at 881 ("[T]he second factor will favor admission if the past crime is recent and if the witness has demonstrated a propensity for running afoul of the law.").

Regarding the similarity between the past crime and the crime charged, even though the earlier assault-family-violence offense did not have a sexual component, assault-family-violence and aggravated sexual assault are both assaultive offenses, which in each case here, were perpetrated against a female family member. "If . . . the past crime and the charged crime are similar, the third factor will militate against admission." *Id.* Thus, the third factor weighs against admission in this case.

Lastly, application of both the fourth and fifth *Theus* factors weigh heavily in favor of admissibility of assault-family-violence conviction. Here, only Appellant and M.C. can provide testimony about whether Appellant actually sexually assaulted her. *See Cavitt*, 2015 WL 1869499 at *17.

Affording the wide discretion mandated by *Theus*, the trial court could have reasonably determined that the assault-family-violence conviction was admissible. Appellant has not shown otherwise. Thus, in ruling on the amended motion for new trial, it was reasonable for the trial court to find that defense counsel's trial strategy of introducing the prior conviction was a sound tactical decision. *See Martin*, 265 S.W.3d at 445; *see also Huerta v. State*, 359 S.W.3d 887, 891–92 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (acknowledging counsel is not ineffective for deciding "to blunt the effect of a prior conviction by discussing it candidly on direct examination"). From this, the trial court could have further determined that Appellant failed to meet his burden of proving counsel was ineffective for eliciting testimony about the assault-family-violence conviction. *Cf. Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (holding counsel did not perform deficiently, during the cross-examination of a State's witness, by opening door to admittance of extraneous murders allegedly committed by defendant when counsel did so in pursuit of a valid strategy: to show "a bias as to why [the witness was] testifying").

We overrule Appellant's first sub-issue.

2. Scope of Cross-Examination

By his second sub-issue, Appellant contends that trial counsel's performance was deficient because he did not object when the State asked questions about the 1999 assault and 2009 robbery in contravention of the trial court's ruling that the State not delve into the facts of those prior offenses.

In his affidavit, trial counsel indicated that he did not object because he did not want the jury to think that "we were hiding something from them[,] which was counter to the whole purpose of my client taking the stand in his own defense." The trial court could have reasonably found that avoiding an appearance that Appellant was attempting to hide facts from the jury was a legitimate trial strategy. *See Haagensen v. State*, 346 S.W.3d 758, 766 (Tex. App.—Texarkana 2011, no pet.). Appellant failed to show that the trial court abused its discretion in overruling his motion for new trial on this point.

We overrule Appellant's second sub-issue.

3. Impeaching M.C. with Prior Inconsistent Statements

In sub-issues seven through eleven, Appellant points out that a number of the details of the sexual abuse provided by M.C. to the forensic interviewer, C. Gonzalez, differed from the details given by M.C. in her trial testimony. Appellant asserts that trial counsel's performance was deficient because he did not impeach

M.C. regarding the inconsistencies between what she told Gonzalez and what she said at trial. Specifically, in his brief, Appellant points to following inconsistencies in M.C.'s statements:

- M.C. told Gonzalez that "no one has ever put their mouth on her body, no one has made her put her mouth on their body," but she testified at trial that Appellant made her give him oral sex many times.

- M.C. indicated to Gonzalez that, because she had her period, she had placed a shirt on the bed before she and Appellant had sex "so she would not have to wash the sheets," while at trial she testified she had washed the sheets in Grandmother's washing machine.

- M.C. told Gonzalez that she never saw Appellant "put anything on his body," but at trial M.C. indicated that Appellant had used a condom one time.

- M.C. conveyed to Gonzalez that Grandmother was always asleep when the sexual abuse happened but at trial M.C. testified that the abuse took place twice while Grandmother was at church.

- M.C. indicated to Gonzalez that she bled only the first five or six times the abuse occurred whereas at trial she testified that she had her period the last four times the abuse occurred but not the first four times.

In his affidavit responding to Appellant's amended motion for new trial, trial counsel explained the strategic reasons why he had not offered evidence of M.C.'s prior inconsistent statements. Counsel averred, "when [as here] the State is arguing that a disclosure is gradual[,] pointing out the lack of disclosure in prior statements does not benefit our defense." He also stated that "[g]oing back over allegations of sexual assault only serves to again highlight the alleged abuse."

Counsel explained, "I did not want to focus on the sexual aspects of what [M.C.] had stated." Instead, counsel explained,

> I wanted to focus on the fact that she stated that she had washed the items that had her menstrual blood on them in order to get the blood out. I wanted to highlight the fact that her grandmother stated that could not be true because [M.C.] had never used the washing machine and did not know how to operate the washing machine. I knew that I could effectively show this hole in [M.C.'s] story, through the testimony of the child's grandmother . . . who was going to testify for the Defense.

We recognize that Rule of Evidence 613(a) permits a party to impeach a witness with a prior inconsistent statement, provided that the proper predicate is laid. TEX. R. EVID. 613(a). However, as we have also previously recognized, "A decision not to raise inconsistent testimony or impeach a witness may constitute sound trial strategy because the attempt to impeach may be more harmful than beneficial." *Briones v. State*, No. 01–14–00121–CR, 2016 WL 2944274, at *11 (Tex. App.—Houston [1st Dist.] May 19, 2016, no pet.) (mem. op., not designated for publication) (citing *Fernandez v. State*, No. 01–14–00334–CR, 2015 WL 1967618, at *4 (Tex. App.—Houston [1st Dist.] Apr. 30, 2015, pet. ref'd) (mem. op., not designated for publication); *Harris v. State*, No. 01–88–00991–CR, 1990 WL 39468, at *4 (Tex. App.—Houston [1st Dist.] Apr. 5, 1990, pet. ref'd) (not designated for publication)). As counsel explained, much of the impeachment evidence cited by Appellant could have served to highlight the sexual aspects of the case, a potential detriment to Appellant. Moreover, a defendant's attack on a

complainant, with weak and seemingly trivial impeachment evidence at trial, could unintentionally serve to reinforce the image of the complainant as the victim of the defendant. *See Ex parte McFarland*, 163 S.W.3d 743, 756 (Tex. Crim. App. 2005). "It is frequently a sound trial strategy not to attack a sympathetic [witness] without very strong impeachment." *Id.* Given trial counsel's explanation of the strategic reasons regarding why he did not introduce M.C.'s inconsistent statements—highlighting the potentially detrimental effects of introducing those statements—we conclude that the trial court, in denying Appellant's motion for new trial, could have reasonably determined that Appellant did not show counsel's performance was deficient for not introducing the inconsistent statements.

We overrule Appellant's sub-issues seven through eleven.

4. Impeaching M.C. with Past Mental Health and Behavioral Issues

In sub-issues twelve through fourteen, Appellant contends that he showed his trial counsel performed deficiently because counsel did not seek to impeach M.C. with evidence that she has a history of mental health problems and behavioral issues, which pre-dated the sexual abuse in this case. In support of his amended motion for new trial, Appellant offered various documents he asserted his trial counsel should have offered to impeach M.C. Appellant offered CPS records, involving M.C.'s family, which indicate that, before M.C. made the instant sexual-abuse allegations, she had a history of suicidal thoughts, self-mutilation, and

bipolar disorder. Appellant also pointed to the information redacted from the medical record of Dr. Donaruma's examination of M.C. at the Children's Assessment Center. The redacted information indicated that M.C. "was currently in therapy" and that she had a history of self-mutilation by cutting herself with a knife and of "previous suicidal ideations."

Additionally, Appellant pointed to M.C.'s school records, which Appellant asserted show M.C. "has a history of getting in trouble in school for inappropriate physical contact with a peer." Appellant further pointed to a CPS record from 2007. At that time, M.C. had reported that her older brother "uses his fingers to make bruises on my legs," while she was asleep. The record indicates that then-six-year-old M.C. later admitted that "she lied" about her brother bruising her.

In his affidavit, trial counsel explained why he had not attempted to impeach M.C. with evidence of her past mental-health and behavioral issues:

> The mental health issues, school problems, and prior CPS involvement [were] all prior to any of the alleged sexual assaults . . . . I . . . believed that tearing down the child in this case may backfire with the jury. It may have also played into the State's theory of the case which seemed to portray [M.C.] as a vulnerable child. Tearing her down [or] my going into a prior history of self-mutilation, problems at school, and prior CPS investigations could have portrayed her as that vulnerable child with my client as the predator. With regard to the prior CPS investigation, I did not believe that it would be advantageous to bring up that case. The CPS investigation had to do with [M.C.] telling CPS that her brother had hit her, but then telling CPS that her brother had in fact not hit her, and that she just said that to get out of gym. Beyond those limited facts it was not clear what the CPS investigation entailed. I did not believe that bringing this

> investigation out would help. I believed that it could harm our defense because it would highlight that she herself had told CPS that it didn't happen, which was the opposite of our case, and that it would again distract from our defense in this case.

In short, trial counsel articulated that he did not pursue introducing M.C.'s past mental health or behavioral issues because he did not want to risk alienating the jury by attacking a vulnerable child, and he did not want to aid the State by making it appear that M.C. was a disturbed child who was easily manipulated by Appellant. Based on this affidavit testimony, the trial court could have reasonably concluded that trial counsel's decision not to impeach M.C., a child-victim of sexual assault, based on her previous mental health and behavioral issues was reasonable trial strategy. *See Rockwood v. State*, 524 S.W.2d 292, 293 (Tex. Crim. App. 1975) (holding that counsel's decision not to cross-examine victim because he "did not want to antagonize the jury" was sound trial strategy); *Davis v. State*, 276 S.W.3d 491, 502 (Tex. App.—Waco 2008, pet. ref'd) (recognizing counsel's decision not to impeach witnesses may be "sound trial strategy"); *Ponce v. State*, 901 S.W.2d 537, 541 (Tex. App.—El Paso 1995, no pet.) (noting that not impeaching victim of assault can be sound trial strategy). It was within the trial court's discretion to deny Appellant's amended motion for new trial on these sub-points.

We overrule Appellant's sub-issues twelve through fourteen.

5. Impeaching Mother

By his sixth sub-issue, Appellant contends that trial counsel was deficient because he did not offer available evidence to impeach Mother. On cross-examination, Mother denied that she had "a problem with alcohol." In support of his amended motion for new trial, Appellant offered the affidavit of A. Loa, who stated that he had been willing and available to testify at trial. Loa averred that he would have testified that "Mother does have a drinking problem. I have seen her get extremely drunk several times. She got so drunk one time at my house that she broke a bottle of wine in my living room."

In his affidavit, trial counsel responded, explaining,

> The State called several witnesses, some of which testified to things with small inconsistencies that did not go to the heart of our case or our defensive strategies. [Mother], who is the mother of [M.C.], testified about the day that [M.C.] outcried to her. As the mother of the child, her testimony came across very emotional and powerful. During cross-examination, I did not think that it was best to continue to go after the mother of the child, especially on matters that would have distracted from our theory of the case. . . . I did ask [Mother] if she had a drinking problem on cross-examination . . . . This was in hopes that it would plant a seed in the jury's mind that [she] did in fact have a drinking problem and had denied it and was therefore, not a credible witness. In my opinion, calling a separate witness to impeach [Mother], on something as irrelevant as her drinking habits, would have served no purpose and would not have aided our defense.

As intimated by trial counsel, attempting to impeach the mother of a child sexual-assault victim, who had just given emotional and powerful testimony, about some minor tangential issue, may have the undesired effect of antagonizing and

alienating the jury. *See Rockwood*, 524 S.W.2d at 293 (indicating, in child-sexual-assault case, that it was counsel's strategy not to vigorously cross-examine child or her mother because he did not want to antagonize the jury or have jury sympathize with them). The trial court could have reasonably determined that trial counsel's decision not to impeach Mother about her drinking fell within the range of reasonable professional assistance. Accordingly, the trial court did not abuse its discretion when it did not grant Appellant a new trial based on this point.

We overrule Appellant's sixth sub-issue.

6. Calling Witnesses to Testify Regarding M.C.'s Reputation

In his seventeenth sub-issue, Appellant asserts, "Trial counsel failed to investigate and subpoena witnesses who would have testified that it is their opinion that [M.C.] is not a truthful person and that she has a reputation in the community for not being a truthful person." *See* TEX. R. EVID. 608(a). To support this point, Appellant offered the affidavit of M.C.'s uncle, Rudy, who is Appellant's brother. Rudy stated that he was "willing and available to testify at [Appellant's] trial regarding my opinion that [M.C.] is not at truthful person." He further stated, "I would have also testified that I am familiar with the reputation of [M.C.], my niece, in the community in which she lives based on discussions with others concerning [M.C.] and she has a reputation for not being a truthful person."

Addressing this point in his affidavit, trial counsel testified,

> During our pretrial meetings with Mr. Guerra and his family, it became clear that their family had strong feelings about [M.C.'s] reputation for truthfulness. My investigator, [C.] Dawson interviewed many witnesses in regards to this case. In the end, I believed that the best witnesses to produce evidence of [M.C.'s] character were [Grandmother], the child's own grandmother, and Lydia [], the mother of one of Mr. Guerra's children. I believed that they would be most effective in advancing our theory of the case. I believed that [Grandmother] specifically would be extremely persuasive; being that she was related to [M.C.]. I believed that Lydia [] would be effective in that she would be able to show that [M.C.] had a motive of jealously and retaliation against [Appellant]. I believed that those witnesses would be the best in regards to putting [M.C.'s] credibility into question. Both witnesses effectively testified and put forward that they did not believe that [M.C.] was telling the truth. In addition, [Grandmother] testified that [M.C.] was very manipulative. I do not believe that we would have been aided in our defense of calling multiple witnesses to testify that [M.C.] had a reputation of . . . not being truthful when we had effectively put that testimony before the jury through other testimony, including from her own grandmother.

In his brief, Appellant criticizes the strategic reasons offered by counsel for deciding to call Grandmother and Lydia to address the issue of M.C.'s credibility. Appellant asserts that they did not testify directly about M.C.'s "character for truthfulness." However, Grandmother testified that M.C. is manipulative and characterized M.C. as being "[a]ngry." Grandmother also stated that M.C. is "[j]ealous if she doesn't obtain exactly what she wants when she wants it." Lydia's testimony assisted in laying the foundation for the defense to argue that M.C. was lying about the assault because she was jealous of Lydia.

In any event, the reasons articulated by counsel for calling only Grandmother and Lydia to address the issue of M.C.'s credibility were such that

the trial court could have determined that counsel made a reasonable, strategic decision that the trial court could not second-guess in hind-sight. *See Marinos v. State*, 186 S.W.3d 167, 181 (Tex. App.—Austin 2006, pet. ref'd) (holding that counsel's decision not to call defendant's father and brother to testify that the complainant, the defendant's ex-wife, was not a truthful person "was within the range of reasonable professional judgment"). For this reason, it was within the trial court's discretion to deny Appellant's request for a new trial based on his claim that counsel failed to investigate and call adequate character witnesses to discredit M.C.

We overrule Appellant's seventeenth sub-issue.

7. Objecting to Gonzalez's Testimony as an Improper Outcry Witness

By his fifteenth sub-issue, Appellant contends that his counsel performed deficiently by failing to make a hearsay objection to forensic interviewer Gonzalez's testimony in which she related the details of the sexual abuse disclosed to her by M.C. during the interview.

Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing," offered "to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d). Hearsay is inadmissible unless otherwise provided by statute, the rules of evidence, or other rules prescribed under statutory authority. TEX. R. EVID. 802. Certain hearsay statements from children who were

the victims of sexual offenses are admissible when they were "made to the first person, 18 years of age or older, other than the defendant" to whom the child made a statement about the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 2016); *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). Before an "outcry statement" to an adult may be admitted at trial, the trial court must determine—in a hearing conducted outside the presence of the jury—that the statement is reliable based on the time, content, and circumstances of the statement. TEX. CODE CRIM. PROC. ANN. art. 38.072. Here, Mother was certified under the Article 38.072 procedure as the outcry witness, and Mother testified at trial regarding the details of the sexual abuse that M.C. had related to her.

Although Gonzalez testified regarding the details of the sexual abuse disclosed to her by M.C., Gonzalez was not certified as an outcry witness pursuant to Article 38.072. For this reason, Appellant asserts that trial counsel should have made a hearsay objection to Gonzalez's testimony about the details of the sexual abuse disclosed to her by M.C. during the forensic interview.

Even if we assume that trial counsel performed deficiently in failing to make a hearsay objection, Appellant did not show that a successful hearsay objection to Gonzalez's testimony would have changed the outcome of his trial, as required under the second *Strickland* prong to establish ineffective assistance of counsel. *See Strickland*, 466 U.S at 694, 104 S. Ct. at 2068. In addition to Gonzalez's

testimony, Mother testified about the details of the sexual abuse disclosed to her by M.C., and M.C. testified in great detail about the sexual abuse. Dr. Donaruma also testified about the details of the sexual abuse as disclosed by M.C. to her as part of her medical examination of M.C. Thus, Gonzalez's testimony was cumulative of other evidence offered without objection at trial.

We have previously held that the failure to object to cumulative evidence is harmless and will not support a claim of ineffective assistance of counsel. *Marlow v. State*, 886 S.W.2d 314, 318 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (holding failure to object to hearsay testimony was harmless where appellant's testimony contained essentially the same evidence). Appellant has not shown, by a preponderance of the evidence, that there is a reasonable probability that the result of the trial would have been different had counsel objected to the complained-of testimony based on hearsay. *See Strickland*, 466 U.S at 694, 104 S. Ct. at 2068. For this reason, the trial court did not abuse its discretion when it denied the amended motion for new trial relating to the hearsay point.

We overrule Appellant's fifteenth sub-issue.

8. Improper Bolstering of Witness Testimony

In his third sub-issue, Appellant asserts that trial counsel was constitutionally ineffective because he did not object to improper bolstering of the State's witnesses during the guilt-innocence phase of trial. Appellant first

complains that defense counsel did not object to improper opinion testimony, given by forensic interviewer Gonzalez, regarding M.C.'s truthfulness and credibility. Specifically, Appellant asserts counsel should have objected to the following testimony of Gonzalez:

> [Gonzalez]: Yes, she was able to give-provide narrative details for each incident.
>
> [Prosecutor]: And why is that significant?
>
> A. It's significant because it establishes credibility.
>
> . . . .
>
> Q. Why are these sensory details, why are they significant and important in a forensic interview?
>
> A. They're significant because it places a child back. The more sensory details they're able to provide, the more that it establishes their credibility that they're saying the truth.

Trial counsel offered the following explanation why he did not object to the above-testimony:

> I do not and did not believe that Ms. Gonzalez was bolstering [M.C.]. She never stated that she believed that [M.C.] was in fact telling the truth or that [M.C.] was an honest person. Ms. Gonzalez simply talked about some the things that she looks for in a forensic interview. She stated that there are things in a forensic interview that can lend to the credibility of an outcry, but did not say in fact that [M.C.] was in fact telling the truth. I believed that objecting to witness bolstering would only have served to draw attention to her testimony and specifically to those parts of her testimony.

It is elemental that the determination of a witness's truthfulness lies solely within the jury's province. *See Yount v. State*, 872 S.W.2d 706, 709–10 (Tex. Crim. App. 1993). Rule of Evidence 702 prohibits an expert witness from testifying that a particular witness is truthful. TEX. R. EVID. 702; *see Yount*, 872 S.W.2d at 712. Non-expert testimony may be offered to support the credibility of a witness in the form of opinion or reputation, but "the evidence may refer only to character for truthfulness or untruthfulness." TEX. R. EVID. 608(a)(1). Under Rule 608, a lay witness may not testify to the complainant's truthfulness in the particular allegations. *See Schutz v. State*, 957 S.W.2d 52, 72 (Tex. Crim. App. 1997); *see also Fuller v. State*, 224 S.W.3d 823, 833 (Tex. App.—Texarkana 2007, no pet.) (holding counsel ineffective when counsel failed to object to numerous witnesses' testimony directly indicating that the complainant was credible and truthful). However, courts have held that forensic interviewers, such as Gonzalez, may testify regarding the techniques and methodology used when interviewing a child sex-abuse complainant and may also testify how the techniques reveal whether a complainant has been coached by an outside source to make allegations of abuse. *See Reynolds v. State*, 227 S.W.3d 355, 366 (Tex. App.—Texarkana 2007, no pet.) (holding that testimony "explaining how [witness] interviews children and the steps taken to ask nonleading questions" does not constitute opinion on witness's credibility); *Cantu v. State*, 366 S.W.3d 771, 777–78 (Tex. App.—Amarillo 2012,

no pet.) (holding that testimony did not convey interviewer's opinion regarding whether child was truthful; rather, testimony indicated only that interviewer believed allegations came from child rather than from someone telling child what to say); *Charley v. State*, No. 05–08–01694–CR, 2011 WL 386858, at *4–5 (Tex. App.—Dallas Feb. 8, 2011, no pet.) (mem. op., not designated for publication) (concluding expert was not asked and did not testify that child was telling the truth; rather, testimony was that child was able to provide sensory details which was important because she would not have been able to do so had she been coached).

Here, counsel's affidavit indicates that he considered Gonzalez's testimony to be innocuous and more akin to testimony discussing the techniques and methodology used by forensic interviewers to investigate abuse claims. Counsel also indicated that he did not object because he did not want to "draw attention" to this part of Gonzalez's testimony, thereby increasing the significance of the testimony in the eyes of the jury.

Courts have recognized that an attorney's decision not to object to inadmissible evidence may be a reasonable trial strategy. *See Bollinger v. State*, 224 S.W.3d 768, 781 (Tex. App.—Eastland 2007, pet. ref'd) (observing that counsel may choose not to object to evidence because "an objection might draw unwanted attention to a particular issue"); *Cooper v. State*, 788 S.W.2d 612, 618 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (overruling ineffective-assistance

issue when objection to allegedly inadmissible testimony would have likely focused jury's attention on fact that was unfavorable to defendant). Thus, the trial court here, in denying Appellant's amended motion for new trial, could have determined that trial counsel's decision not to object to the complained-of testimony fell within an objective standard of reasonableness.

Appellant also asserted in his motion for new trial that the prosecutor had engaged in improper bolstering of the State's witnesses during closing argument. Appellant pointed out that the prosecutor had remarked that M.C. and Anna had both told the truth when testifying. Appellant asserted that defense counsel should have objected to the State's argument on the ground that the prosecutor was "inserting his opinion regarding [M.C.'s and Anna's] credibility for truthfulness."

Appellant specifically cites the following portions of the State's closing argument:

> [M.C.] got on that stand and she told you the truth. And that's why we're here, because she told the truth. And as much as they don't want you to believe that, you saw it in her face and you saw it in the evidence that we produced all day yesterday and this morning because that's what happened. Because [M.C.] got on that stand and told the truth. Just like she had told the truth time and time before, just like she had told the truth to Dr. Donaruma, just like she had told the truth to [C.] Gonzalez and told the truth to her mother and to her grandmother and to the 12 of you. . . .
>
> And they want you to believe that that didn't happen. They want you to believe that she made all of that up. But we know that it's true.
>
> . . . .

> That's not the only reason why we know that [M.C.] was telling the truth.
>
> . . . .
>
> And it's that emotion, it's that sadness that you were able to see in [Anna], that fear and that loss that she had of her father that you were able to see and that's how we know that she was telling the truth.

In his affidavit, defense counsel addressed Appellant's assertion that he should have objected to the foregoing portions of the State's argument:

> My experience is that constant objections wear on juries and reduce the effectiveness of objections. This is especially true during closing arguments when an objection can serve to highlight an argument made by the State. During closing argument, the State argued several times that [M.C.] and [Anna] had told the truth. In my experience this was argument that the Judge would have allowed during a closing argument and any objection would have been futile and would have been disadvantageous to our case. I also did not believe that the prosecutor ever specifically provided his opinion only argument on the case. At no point, did the prosecutor state "In my opinion . . .", so I believe that any inference that the prosecutor made were with the rules of closing argument.

The approved areas of jury argument are (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to the argument of opposing counsel, and (4) plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). "A prosecutor may argue his opinion concerning a witness's credibility or the truth of witness's testimony only if the opinion is based on reasonable deductions from the evidence and does not constitute unsworn testimony." *Gonzalez v. State*, 337 S.W.3d 473, 483 (Tex. App.—Houston [1st

Dist.] 2011, pet. ref'd) (citing *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985)). "Wide latitude is allowed without limitation in drawing inferences from the evidence, so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith." *Id.* (citing *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988)). "In examining challenges to a jury argument, a court considers the remark in the context in which it appears." *Id.*

Here, when placed in context, the prosecutor's complained-of remarks were based on reasonable deductions from the evidence. The prosecutor's remarks were made in conjunction with the prosecutor's calling the jury's attention to M.C.'s demeanor on the stand and his reminding the jury that M.C. had broken down crying while testifying. The prosecutor also remarked that M.C. was telling the truth in conjunction with reminding the jury of Dr. Donaruma's testimony that the notching on M.C.'s hymen was consistent with M.C.'s claim of sexual abuse. Similarly, the prosecutor argued to the jury that they could deduce that Anna was telling the truth by the fear and sadness she displayed while testifying about her father, Appellant.

"Counsel is not ineffective for failing to raise an objection that lacks merit." *Bradley v. State*, 359 S.W.3d 912, 919 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing *Cooper v. State*, 707 S.W.2d 686, 689 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd)). Thus, the trial court could have determined, in denying

Appellant's amended motion for new trial, that Appellant did not receive ineffective assistance of counsel when his attorney did not object to proper closing argument.

We overrule Appellant's third sub-issue.

9. Eliciting Testimony Regarding Anna's Allegations

In his fourth sub-issue, Appellant contends that his trial counsel provided deficient representation because he "opened the door" to the testimony of Appellant's daughter, Anna, on rebuttal regarding her allegation that Appellant had touched her inappropriately.

On direct examination, defense counsel had elicited the following testimony from Appellant regarding Anna's allegation:

> [Defense counsel]: Let me ask you something else. Who's [Anna]?
>
> [Appellant]: My daughter.
>
> [Defense counsel]: Okay. Have you ever inappropriately touched your daughter?
>
> [Appellant]: No, sir.
>
> [Defense counsel]: Have you ever been accused of inappropriately touching your daughter?
>
> [Appellant]: Yes, sir.
>
> [Defense counsel] And was that investigated by CPS?
>
> [Appellant]: Yes, sir.

. . . .

> [Defense counsel]: Okay. But nothing was ever charged. Nothing ever came of that, did it?
>
> [Appellant]: No, sir.

In his affidavit, defense counsel noted that the trial judge "made it clear several times that she would allow [Anna] to testify." Before Anna testified on rebuttal, the trial court stated, "For the reasons that I previously articulated, I believe the testimony of this other alleged victim is admissible for many reasons[.]" Defense counsel then objected to the admission of Anna's testimony. Overruling the objection, the trial court reasoned,

> [I]t's clear that this—under the current status of the law, these types of offenses are admissible in a sexual assault trial under the new version of [Code of Criminal Procedure Article] 38.372 [sic]; however, even under the prior law they would be admissible to rebut a defensive theory of fabrication. And so, I am going to allow the testimony.

Article 38.37 § 2(b) permits the admission of evidence, which shows that the defendant committed sex crimes against children other than the victim of the alleged offense "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of defendant." *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 § 2(b) (Vernon Supp. 2015). Here, as the trial court indicated, Anna's testimony was admissible under Article 38.37 § 2(b).

In his affidavit, defense counsel explained why he introduced evidence of Anna's allegations during direct examination:

> I believe that [Anna's] testimony was eventually going to come out based on my experience in these cases and with [Article] 38.37, as well as [the trial court's] previous rulings. I do not believe that our introduction of testimony regarding [Anna's] prior allegations had a material impact on the case since it would have likely been introduced in rebuttal and our introduction allowed us to present the first impression of that CPS investigation.

Defense counsel's affidavit demonstrates that he made the strategic decision to introduce Anna's allegations during the defense's case-in-chief, thereby giving the defense the tactical advantage of diffusing the impact of the allegation before it was introduced by the State. It also allowed the defense to appear candid and open with the jury. And it further allowed the defense to disclose the allegation and then immediately show CPS did not take action on the allegation after speaking to the parties.

Courts have held similar proactive tactics by defense counsel based on similar motivations to be sound trial strategy. *See Martin*, 265 S.W.3d at 445 (noting that "appellant's candor before the jury concerning his prior convictions was a strategic attempt to appear open and honest, and to lessen the impact of any impeachment on the issue"); *see also Huerta*, 359 S.W.3d at 891–92 (recognizing that it is "common practice for defense attorneys to elicit such testimony because doing so removes the sting from an attack that would otherwise come from the

state"). Given the strategic reason articulated by counsel, the trial court did not abuse its discretion in denying Appellant's amended motion for new trial with respect to counsel's decision to introduce Anna's allegation of sexual abuse as part of the defense's case-in-chief.

We overrule Appellant's fourth sub-issue.

10. Objecting to Article 38.37 § 2(b)

By his fifth sub-issue, Appellant asserts that defense counsel was ineffective because he did not object to the admission of Anna's testimony under Article 38.37 § 2(b) of the Code of Criminal Procedure. Specifically, Appellant argued in his amended motion for new trial that defense counsel should have objected to the admission of Anna's testimony on the grounds that admitting her testimony "violates his right to trial by an impartial jury, his right to be informed of the nature and cause of accusations against him, his right to effective assistance of counsel, his right to be presumed innocent until proven guilty, and other rights guaranteed to him under established principles of law."

To establish ineffective assistance of counsel based on a failure to object, Appellant was required to demonstrate that the trial court would have erred in overruling the objection had trial counsel objected. *See Vaughn v. State*, 931 S.W.2d 564, 566–67 (Tex. Crim. App. 1996). Appellant failed to do so. Appellant has provided neither legal argument nor citation to legal authority in his amended

motion for new trial or on appeal to support his argument that trial counsel should have objected to the admission of Anna's testimony on the bases identified. *See* TEX. R. APP. PROC. 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."); *McCarthy v. State*, 65 S.W.3d 47, 49 n.2 (Tex. Crim. App. 2001) (stating that issue containing no supporting authority or argument is inadequately briefed and presents nothing for review). Appellant has not shown that the trial court abused its discretion by denying his amended motion for new trial with regard to this point.

We overrule sub-issue five.

11. Preparing Defense to Anna's Abuse Allegation

In his sixteenth sub-issue, Appellant contends that trial counsel failed to adequately prepare a defense to Anna's allegation that Appellant had sexually abused her while bathing her.

Appellant pointed to his testimony at trial in which he stated, "CPS investigated and said that there was no wrongdoing [with regard to Anna's allegation] and that was it." Appellant indicated that Anna had not made the allegation; rather, the allegation had been instigated by Anna's mother. In his amended motion for new trial, Appellant claimed that trial counsel was ineffective because he "failed to produce a witness to testify that no wrongdoing was found

and failed to acquire and introduce the [CPS] records to support [Appellant's] testimony and to contradict [Anna's] allegations."

Generally, a failure to call witnesses does not constitute ineffective assistance of counsel without a showing that the witnesses were available to testify and that their testimony would have benefited the accused. *Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986). In support of his new trial motion, Appellant did not show that any witnesses were available to testify on his behalf regarding CPS's findings or that any testimony given would have benefitted him. Moreover, "[t]he decision whether to call a witness is clearly trial strategy and, as such, is a prerogative of trial counsel." *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Similarly, Appellant did not show that the CPS records were available or would have benefited him. *See Brown v. State*, 797 S.W.2d 686, 688 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (overruling claim that counsel was ineffective for failing to offer documents accused claimed corroborated his testimony when he did not show such documents existed).

Appellant also asserted that counsel did not adequately prepare for his cross-examination of Anna. Throughout her testimony, Anna referred to Appellant by his first name, Michael, and she stated that she was afraid of him. In support of his amended motion for new trial, Appellant offered text messages that he had

received from Anna. In the messages, Anna refers to Appellant as "Dad" or "Daddy," rather than "Michael." Appellant averred that the messages also show that Anna was not afraid of him because they reveal "[Anna] was texting him pictures, talking about movies, and telling him she loved him as recently as April 2015, just three months prior to her testimony."

Appellant points out that, at trial, to rebut Anna's testimony, trial counsel did not offer the text messages. Instead, he sought to have Michael testify about the content of the text messages or to have his cell phone with the messages introduced into evidence. The State objected to Appellant testifying about the content of the text messages and to the admittance of the cell phone into evidence. The trial court sustained the State's objections. Appellant indicates that trial counsel should have been prepared with the text messages in print form, ready to offer into evidence.

In his affidavit, counsel explained why he had not offered the printed text messages to rebut Anna's testimony:

> On direct examination, [Anna] testified that she was in fact afraid of her father, Mr. Guerra, and that she had seen him be violent in the past. This was very different from the relationship that my client had described to me. It seemed to me that in our previous meetings Mr. Guerra had downplayed the extent of domestic violence that had occurred previously. We had met many times prior to trial and discussed his relationship with his daughter. At no point did we have any indication that Mr. Guerra had anything, but a normal relationship with his daughter. Mr. Guerra informed me at that point that he had text messages that his daughter had sent to him. These text messages showed contact between his daughter and himself. They were fairly benign in content, asking a father, Mr. Guerra, to buy her things. This

> was potentially problematic for several reasons. Offering a select history of his text messages could potentially open the door to multiple text messages from his phone, which could have opened the door to many potential problems. It also showed that Mr. Guerra was having contact with a potential State's witness, and could have appeared that there was witness tampering in violation of the court's order.

Counsel's affidavit testimony demonstrates that he did not seek to introduce the text messages because he feared it would open the door for the admission of other text messages, which may have been unfavorable to Appellant. Counsel also expressed concern that the text messages may have allowed the State to inquire whether Appellant had violated the trial court's order to refrain from having contact with the State's witnesses. A defense strategy that seeks to avoid the introduction of evidence that is harmful to a defendant is not constitutionally infirm. *See Ex parte McFarland*, 163 S.W.3d at 756.

We conclude that the trial could have reasonably determined that Appellant failed to show that his counsel's representation fell below an objectively reasonable standard with regard to his claim that counsel did not adequately prepare for Anna's testimony. As such, the trial court was within its discretion to deny Appellant's request for new trial based on this point.

We overrule Appellant's sixteenth sub-issue.

12. Punishment Phase Character Witnesses

In his eighteenth sub-issue, Appellant asserts that defense counsel was ineffective because he did not investigate or call all the potential witnesses that were available to testify on Appellant's behalf during the punishment phase of trial. To support this assertion, Appellant offered the affidavits of 13 people, who stated that they had been willing and available to testify on Appellant's behalf at the punishment phase. Appellant asserts that these potential witnesses would have testified about the "care and love [Appellant has] for his family and friends, his hard working character, and their opinion that he is a good person."

In his affidavit, trial counsel explained why he had limited the character witnesses during the punishment phase to Grandmother, Lydia, and Lydia's mother:

> In our prior meetings with Mr. Guerra, we discussed the potential need for witnesses and the need for potential punishment witnesses several times. Mr. Guerra and I discussed who those potential witnesses and punishment witnesses might be. It was agreed that some of the best potential punishment witnesses in this case were his mother . . . as well as [Lydia] the mother of his youngest child. . . . We believed that both witnesses would be the most sympathetic and highlight the fact that a low sentence was appropriate. In my experience these types of witnesses would show that Mr. Guerra was needed to support his daughter and his family. Both witnesses testified to his good character and positive relationship with his family and children. In addition, I called . . . the mother of Lydia [] to testify to Michael Guerra's good character, including his love for his family, his respectfulness, his hard working character, and the need to have Mr. Guerra in his family's life. In addition, the State had presented

> testimony from several of its witnesses that Mr. Guerra was good with children and had been a constant presence in the life of his family, providing support and assistance whenever he was able. I did not believe that parading countless family members before the jury would be effective. That approach tends to lessen the effectiveness of the more powerful and important witnesses. Based on my prior meetings with Mr. Guerra and his family, I was aware that there were other witnesses available to call and some of them present at that time, but I did not believe that to be the best strategy during the punishment phase of this trial. The witnesses that did testify in the punishment phase were the witnesses that Mr. Guerra and I had specifically chosen to testify. I do not believe that presenting further witnesses would have resulted in a different outcome based on the fact that the evidence that they would have testified to was covered with other witnesses and would have become repetitive and reduced the effectiveness of the witnesses that did testify.

"[A] criminal defense attorney has a responsibility to his client to conduct a legal and factual investigation of a case and to seek out and interview potential witnesses." *Briones*, 2016 WL 2944274, at *8 (citing *Ex parte Duffy*, 607 S.W.2d 507, 517 (Tex. Crim. App. 1980); *Rodd v. State*, 886 S.W.2d 381, 384 (Tex.App.—Houston [1st Dist.] 1994, pet. ref'd)). Here, counsel's affidavit testimony indicates that he investigated potential punishment-phase witnesses by discussing the matter with Appellant. Counsel further indicated that he was aware that additional witnesses were available, but he and Appellant made the strategic decision not to call them. Counsel believed that too many witnesses giving similar testimony would "lessen the effectiveness of the more powerful and important witnesses" that he did call to testify. The trial court, as the sole judge of the weight and credibility of the evidence in determining the motion for new trial, was entitled

to believe counsel's affidavit testimony. *See Odelugo v. State*, 443 S.W.3d 131, 137 (Tex. Crim. App. 2014).

The decision whether to present witnesses is largely a matter of trial strategy. *Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd). An attorney's decision not to present particular witnesses at the punishment stage may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant. *Id.*

Here, counsel's affidavit demonstrated that he based his decision not to call additional witnesses on a determination that their testimony would be more harmful than helpful to Appellant. Thus, it was within the trial court's discretion to find that counsel was not ineffective for failing to call additional witnesses at the punishment phase. We hold that the trial court properly denied Appellant's amended motion for new trial on this point.

We overrule sub-issue eighteen. Having overruled all 18 sub-issues, Appellant's first issue is overruled.

Redacted Medical Record

In his second issue, Appellant contends that the trial court erred in refusing to admit the omitted portions of M.C.'s medical record from the sexual-abuse

examination performed by Dr. Donaruma at the Children's Assessment Center.[6] Appellant asserts that the information redacted from the medical record was admissible under Rule of Evidence 107.

A. Standard of Review

The standard of review for a trial court's ruling under the Rules of Evidence is abuse of discretion. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). If the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment. *Id.*

B. Analysis

Before it offered M.C.'s medical record from the sexual-abuse examination into evidence, the State redacted certain information from the record. In the patient history portion of the record, the State omitted the following information (1) M.C. had been prescribed certain medications in the past, (2) she had "suicidal ideation," and (3) she had engaged in "self mutilation."[7] Under the heading "additional history," the State redacted the following information:

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[6] Appellant also raised this as a ground in his amended motion for new trial. As presented on appeal, we understand Appellant's issue to challenge the trial court's evidentiary decision rather than its decision to deny the new trial motion.

[7] Appellant does not point us to where in the record an unredacted copy of the medical record appears for our review. We only have the redacted version that was admitted into evidence. However, the trial court, in reviewing the document,

> Patient reports that she is currently living with mother and maternal uncle's ex-girlfriend. Patient states that she had previous suicidal ideations with a plan. Last was approximately one year ago. She reports history of cutting that started when she was in the sixth grade. She reports that she used a knife and learned about the technique via a friend. She states that it did not help her feel better and she recently stopped cutting this past summer.

Also omitted was information that "[c]hild is currently in therapy." Under the heading "Physical Exam Notes," the notation "several linear healed scars noted on inner left forearm" was also redacted.

When the State sought to offer the redacted record into evidence, defense counsel objected on the ground that it was "not a complete document." The trial court conditionally admitted the document, subject to a later ruling.

The trial court subsequently conducted an in-camera hearing to determine whether the redacted information from the medical record should be admitted. The defense offered the following argument for including the redacted information:

> Your Honor, those are the redactions that we feel should be included in the report and we feel that the report in its entirety, because that's the assessment—that's part of the assessment that Dr. Donurama made and that was—those were items that she used in making her final—her final finding, which we find significant. She says this finding is indeterminate. It's hard to determine what she means there unless we have the complete report. For that and other reasons, the defendant is entitled to a fair trial and without those—those are very, very significant findings regarding this complaining witness.

> stated on the record that it had both a redacted and unredacted copy before it. The specific language that was omitted, and the page in the medical record on which the omitted language appeared, was read into the record.

Dr. Donaruma's "final finding," referenced by defense counsel, is found at the end of the medical record and reads as follows:

> 13 yo female with clear history of genital/genital contact & fondling by her maternal uncle on more than one occasion. Physical exam today is significant for deep notch versus a healed transection noted in the hymenal rim. This finding is indeterminate & could be a normal variant or indicate prior penetrating trauma. This finding is indeterminate & could be a normal variant or indicate prior penetrating trauma. . . .

The State responded, asserting that the redacted information was inadmissible because it concerned matters predating the sexual abuse in this case, and it constituted improper character evidence. The State averred that none of the omitted information had factored into Dr. Donaruma's final "indeterminate" finding at the end of record.

The trial court then asked the State: "How do I know that those did not play a part—[the defense] has made the argument that [the omitted information] formed a part of the doctor's diagnosis in this case and so that absent those facts, it may have a bearing on what [Dr. Donaruma] ultimately concluded." The State responded: "Because the [doctor's] conclusion [at the end of the medical record] ultimately was an indeterminate finding with regard to notches in the vaginal area, not with regard to cutting on the arm . . . . It makes no mention of any of the self-mutilation, any of the cutting that had occurred prior to the abuse." The defense replied: "Judge, I think it does directly relate to the situation, also to the character

of the defendant and there's no way that anybody here can know whether suicidal tendencies have stopped before then or not. There's no way to know that . . . ."

The trial court then ruled that the medical record would be admitted without the redacted information. The trial court stated, "[A]s far as [for] purposes . . . of this record and the doctor's diagnosis, there doesn't appear to be anything in here to indicate that [the redacted information] formed any part in her determination at the end of the record and so the records will stand with the redactions."

On appeal, Appellant asserts that the redacted information should have been admitted pursuant to Rule of Evidence 107. That rule, known as the "Rule of Optional Completeness," provides:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given.

TEX. R. EVID. 107.

The Court of Criminal Appeals has explained that Rule 107 serves to permit an opponent of the alleged incomplete writing to introduce the remainder of the writing to correct any false or misleading impressions left with the jury by the incomplete writing. *Walters v. State*, 247 S.W.3d 204, 217–18 (Tex. Crim. App. 2007). The rule allows the admission of otherwise inadmissible evidence to fully

and fairly explain a matter broached by the adverse party. *Id*. However, the omitted portion of the statement must be on the same subject and must be necessary to make the admitted portion fully understood. *Sauceda*, 129 S.W.3d at 123.

Here, Dr. Donaruma indicated that her final finding, regarding whether M.C. had been vaginally penetrated, was "indeterminate," meaning that she could not determine whether M.C. had been penetrated, as M.C. claimed. Dr. Donaruma indicated that her "indeterminate" finding was based on her physical examination of M.C., more particularly her observation that M.C. has hymenal notching. The defense offered nothing at the hearing to demonstrate that the redacted information, including, M.C.'s prior self-mutilation and suicidal ideation, was necessary to understand the doctor's "indeterminate" finding. Thus, the record shows that the trial court could have reasonably found that the defense did not establish that the omitted information was necessary to make the admitted portion of the medical record fully understood, as Rule 107 requires.

In addition, introduction of the redacted information would not have corrected any false or misleading impressions left with the jury by the incomplete writing. To the contrary, we agree with the State that the trial court could have reasonably determined that admitting the redacted information had the potential to confuse the issues. *See* TEX. R. EVID. 403. We hold that the trial court properly

exercised its discretion when it denied Appellant's request to admit the information redacted from M.C.'s medical record.[8] *See Reynolds v. State*, 856 S.W.2d 547, 550 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (holding that portion of witness statement sought to be admitted by State was not admissible under Rule 107 because it was "wholly unrelated to the matter at issue").

We overrule Appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Higley and Huddle.

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

[8] For this reason, the trial court also properly denied Appellant's amended motion for new trial on this point.