Opinion issued August 13, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00273-CR

FREDRICK FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Tarrant County, Texas
Trial Court Case No. 1503170D

MEMORANDUM OPINION

A jury convicted appellant Frederick Flores of aggravated sexual assault of a child and indecency with a child, and it assessed his punishment at forty years' imprisonment for aggravated sexual assault and twenty years' imprisonment for

indecency, to run concurrently.[1] On appeal, Flores asserts that the trial court[2] denied his right to present a defense by (1) excluding evidence showing the complainant's alternate source of sexual knowledge; (2) allowing a State's witness to testify about the complainant's credibility; and (3) limiting his cross-examination of the complainant's mother about any coaching that might have occurred prior to the forensic interview; and he argues that (4) Texas Code of Criminal Procedure article 102.0186 (assessing a "Child Abuse Prevention Fee" as a court cost) is unconstitutional.

We affirm.

Background

In 2014, Flores began dating a woman named S.R., who had a daughter named N.R. N.R. was born in 2011 and was approximately three years old when Flores and S.R. began dating. Flores and S.R. subsequently had a child together. In the spring of 2017, when N.R. was approximately six years old, she made an outcry to her mother by writing her a letter stating that Flores had sexually abused her. Flores

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1 *See* TEX. PENAL CODE § 22.021(a)(1)(B), 21.11(a).

2 Originally appealed to the Second Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. See TEX. GOV'T CODE ANN. § 73.001. In this transfer case, we will apply the law of the transferor court, the Second Court of Appeals. *See* TEX. R. APP. P. 41.3.

denied N.R.'s allegations, but S.R. left with N.R. and her younger daughter, and they went to N.R.'s grandmother's house. The next day, S.R. called the police.

The police referred N.R. for a sexual abuse examination by a sexual assault nurse examiner (SANE), also known as a "Child Advocacy Resource and Evaluation Team," or CARE, exam. Amy Ornelas was the SANE who conducted N.R.'s exam. N.R. told Ornelas that Flores made her rub "his private part" and put her mouth over it. N.R. also told Ornelas that Flores touched her vagina and anus, and he had attempted to penetrate her anally with his penis. N.R. told Ornelas that performing oral sex on Flores tasted "nasty." Flores was subsequently charged and tried for this conduct.

At trial, the State presented Ornelas's testimony in addition to the testimony of several other witnesses. N.R., who was eight years old at the time of trial, testified about Flores's abuse of her and the circumstances surrounding her outcry. N.R. again testified that Flores made her put her mouth on his "private part" and he "made me suck it." She stated that he did this "[l]ots of times," and she testified that when he forced her to perform oral sex on him it made her feel like she was going to throw up because "he made me put it all the way to my throat." She testified that she did not remember other acts of abuse because she did not want to remember it, stating, "I want to get it out of my head," and "I just want to forget about it."

N.R.'s mother, S.R., also testified regarding her relationship with Flores and N.R.'s outcry of abuse. During cross-examination, Flores's counsel questioned S.R. regarding sleeping arrangements once Flores moved in with her and N.R. She testified that the three of them shared a room, and N.R. frequently slept in the same bed as her and Flores. The following exchange then occurred at the bench:

> [Flores]: Your Honor, at this point, [N.R.] described sexual acts. I'm entitled to get into. I'm entitled to get into outside evidence about how she might have knowledge of those sexual acts that she described. I'm going to ask [S.R.] if she and [Flores] had sex while [N.R.] was in the room.
>
> [Court]: Have sex when?
>
> [Flores]: Have sex when [N.R.] was in the room.
>
> [State]: We are going to object to the relevance.
>
> [Court]: What is the relevance of that?
>
> [Flores]: Your Honor, she described sexual acts. I'm entitled to know how she might have had awareness of the sexual acts outside of the accusations.
>
> [Court]: I don't think we ought to get into that. I'll sustain the objection as relevance.
>
> [Flores]: Your Honor, there's going to be multiple instances where [N.R.]—of what [N.R.] could have witnessed them having sex, including oral, which is what she described. I am entitled to get into outside evidence of what she might have—
>
> [Court]: No, you're not entitled to get into outside evidence at all. They are trying a sexual assault case against [him], not having sex between the two of them, so...

[Flores]: Your Honor, she described sexual acts.

[Court]: I have already ruled. Let's move on.

S.R. then went on to testify that she, Flores, and N.R. moved into a new home less than a year after moving in together, and they continued sharing the same room until she became pregnant with Flores's child. Later, during the same cross-examination, Flores again tried to broach the subject of the possibility that N.R. saw S.R. and Flores having sex. The State again objected, and the trial court sustained the objection.

Flores's cross-examination of S.R. shifted back to N.R.'s outcry of abuse and whether S.R. coached N.R. prior to her forensic interview:

[Flores]: Do you recall being concerned about [N.R.] making a good outcry?

[S.R.]: What do you mean by that?

[State]: Objection to speculation, Your Honor.

[Court]: Yeah, that's sustained.

. . . .

[Flores]: And did you talk to [N.R.]—without getting into anything that she said, did you have conversations with [N.R.] prior to her going in and—and doing a forensic interview?

[S.R.]: No.

[State]: Objection, Your Honor. That is to relevance. This is whether or not this offense occurred. Her conversations with her child don't have any relevance as to what happens in this trial.

[Flores]: Your Honor, they absolutely do in terms of whether or not she is re-enforcing stories. If a child is hearing coercive stories, if there are repetitive questions, whether or not she talks to her child about this, and how many times is relevant information.

[Court]: All right. That's sustained.

[Flores]: Just so I'm clear, Your Honor, you're saying that I can't ask S.R.—

[Court]: Objection, sustained.

[Flores]: —about any conversation she had with her child?

[Court]: Right.

The State also called Detective Buchanan, the law enforcement officer tasked with investigating the claim against Flores. He testified that he personally did not interview N.R., but he observed the forensic interview through closed circuit television from another room. Based on what N.R. said during the interview, he referred her for a CARE exam. The State asked whether Detective Buchanan was "making an evaluation of the case" as he investigated, and Detective Buchanan answered, "Yes." He testified that he did not obtain warrants in every case he worked on, but only in those cases "that [he] believed in." Flores did not object to this line of questioning.

The following exchange then occurred:

[State]: What goes into your decision on whether or not to write a warrant affidavit and ask for a warrant?

[Buchanan]: The victim's credibility, her consistency.

[State]: Does that also involve whether or not you believe a child was coached?

[Buchanan]: Yes, sir.

[State]: In the case of [N.R.], did you kind find her to be credible?

[Buchanan]: Yes, sir.

[State]: Did you find her to be consistent?

[Buchanan]: Yes, sir.

[Flores]: This is invading the province of the jury. The jury is the sole determinant of whether a witness is credible or not. Whether or not this officer finds her to be credible is irrelevant and invades the province.

[Court]: Overruled.

[State]: Say it again. You found [N.R.] to be credible?

[Buchanan]: Yes, sir.

[State]: You found [N.R.] to be consistent?

[Buchanan]: Yes, sir.

[State]: Did you have any concerns of [N.R.] being coached in this case?

[Buchanan]: No, sir.

[State]: Is that why you wrote the warrant?

[Buchanan]: Yes, sir.

Later, during cross-examination, Flores's counsel asked Detective Buchanan a series of questions regarding what instructions, if any, he gave to N.R.'s family

prior to the forensic interrogation. Flores asked whether Detective Buchanan had warned S.R. or other family members not to discuss the case or allegations with N.R. before the forensic interview, and he asked Detective Buchanan whether he had shared details of N.R.'s outcry with the forensic interviewer prior to the interview with N.R. Detective Buchanan answered "no" to these questions. Flores then asked:

> [Flores]: All right. Now, you said earlier the purpose behind this forensic interview and for you being there was to gather evidence?
>
> [Buchanan]: Yes, sir.
>
> [Flores]: And during that, did you gather evidence that was in addition to what you already heard from everybody else?
>
> [Buchanan]: It was more detailed evidence, yes, sir.
>
> [Flores]: All right. What inconsistencies did you see in what you had already investigated from—from what you saw on the forensic interview?
>
> [Buchanan]: I didn't see any inconsistencies.
>
> [Flores]: All right. When you specifically were at the closed-circuit television, did you take notes of what you heard and what you saw?
>
> [Buchanan]: Yes, sir.
>
> [Flores]: Did you make note of the child's nonverbals or any issues you had with the credibility of the child?
>
> [Buchanan]: No, sir.

S. Torrance, a forensic child interviewer employed with the Alliance for Children who conducted N.R.'s forensic interview, testified at trial. She testified

regarding the general protocols she followed in the interview and the details of her interview with N.R. During the interview, N.R. disclosed details relating to Flores's sexual assault of her, telling Torrance that Flores had inserted his penis into her mouth and made her rub his penis with her hand. The State asked Torrance why the details supplied by N.R. during the interview were important, and she stated that the sensory or peripheral details were one way for investigators to test the credibility of the child's account. Torrance stated, without objection from Flores:

> [Torrance]: We look for those sensory details because especially with younger children when we are talking about sexual acts, for younger children to be able to describe something like oral sex with such tactile, concrete, sensory detail, it's—it's a good sign for the investigators to decide whether or not they find her statement credible. . . .
>
> . . . .
>
> [State]: And is it fair to say that throughout your interview with [N.R.] that she provided—or did she provide a lot of sensory and peripheral details or a little bit of sensory and peripheral details?
>
> [Torrance]: For her age, she provided a lot of peripheral and sensory details.

Torrance further testified that she is trained to watch for signs that a child has been "coached" or "told to tell us something or not tell us something." Torrance testified that she had no concerns that N.R. had been coached, nor did she note any other "red flags" during her interview with N.R. The following exchange occurred:

[State]: The Defense also asked you about your experience and training about when talking to kids. I guess there are situations where a kid may want to please the adults that they are talking to and answer their questions and give them the answer to the question that they are asking. Do you remember that?

[Torrance]: Yes.

[State]: Did you feel that [N.R.] was doing that with you?

[Torrance]: I did not, no.

Flores testified on his own behalf. He testified that, at various points in their relationship, he and S.R. shared a room with N.R., and, at times, all three shared the same bed. Flores denied any inappropriate contact between himself and N.R. His counsel then asked Flores about his "adult, consensual, sexual relations with [S.R.]," and the State objected, arguing that the trial court had already ruled that Flores could not provide evidence regarding the sexual relationship between S.R. and him. Flores's counsel asserted that "[w]e are in a different scenario now" because "the forensic interviewer testif[ied] . . . about these details, the sensory details" and both Torrance and Ornelas "said that it would only be things that a kid would know if they had experienced it. At that point, we are allowed to talk about alternate ways that—that—so we are in a different scenario now." The trial court sustained the State's objection, and Flores asked to make an offer of proof, which the trial court stated he could do after he concluded his testimony before the jury. Flores went on to testify before the jury that N.R. had accidentally seen him naked one or two times.

After he finished his testimony to the jury, Flores made an offer of proof regarding the testimony excluded by the trial court. He stated that N.R. saw him have sex with S.R. "on some occasions" because they all three shared a room. He testified that he and S.R. were sometimes "careless" about closing the door. He also testified that, on at least one occasion, he believed that N.R. saw them engaged in oral sex because she walked into the living room while they were engaged in the act. After the offer of proof, the trial court again ruled that it would not allow the testimony, concluding that it was not relevant and that the testimony regarding N.R.'s or S.R.'s previous sexual acts or knowledge was not admissible under various rules. Defendant then rested and closed his case.

The jury found Flores guilty of aggravated sexual assault of a child and indecency with a child. The jury assessed Flores's punishment at 40 years in prison on the aggravated sexual assault conviction and 20 years on the indecency conviction, to run concurrently. The final judgment for the aggravated sexual assault conviction included as court costs a "Child Abuse Prevention Fee" in the amount of $100 under Code of Criminal Procedure article 102.0186.

Admission of Evidence

Flores's first three issues on appeal complain of the trial court's evidentiary rulings.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). Under this standard, we may reverse the trial court only if its decision lies outside the zone of reasonable disagreement. *Id.* at 83. An abuse of discretion does not occur unless the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016).

A party is allowed to claim error in a ruling to admit or exclude evidence only if the error affects a "substantial right" of the party and, if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. *See* TEX. R. EVID. 103(a)(2); *see also* TEX. R. APP. P. 44.2(b) (providing that non-constitutional error "that does not affect substantial rights must be disregarded"); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *Rhyne v. State*, 387 S.W.3d 896, 905 (Tex. App.—Fort Worth 2012, no pet.). However, substantial rights are not affected by the erroneous admission of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Preservation of error is a systemic requirement on appeal; if an issue has not been preserved for appeal, the court of appeals should not address the merits of that issue. *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010). While no "hyper-technical or formalistic use of words or phrases" is required in order to preserve error, the proffering party must "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Golliday v. State*, 560 S.W.3d 664, 670 (Tex. Crim. App. 2018). Thus, to preserve error based on the erroneous admission of evidence, an appellant must make a timely and specific objection in the trial court. TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1(a)(1); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). Additionally, an objection must be made each time inadmissible evidence is offered unless the complaining party obtains a running objection or obtains a ruling on his complaint in a hearing outside the presence of the jury. *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008); *Merrit v. State*, 529 S.W.3d 549, 556 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

To preserve for appellate review a complaint that the trial court erroneously excluded evidence, the proponent of the evidence must perfect an offer of proof or a bill of exception. *Tristan v. State*, 393 S.W.3d 806, 810 (Tex. App.—Houston [1st Dist.] 2012, no pet.). An offer of proof must include "the meat of the actual

evidence," rather than a general, cursory summary, so that the appellate court can meaningfully assess whether the exclusion of the evidence was erroneous and harmful. *Castillo v. State*, 573 S.W.3d 869, 881 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd). The Court of Criminal Appeals has held that Rule of Evidence 103(a)(2) requires "a record that shows the excluded evidence so that we can judge its admissibility and determine whether the trial court abused its discretion by excluding it." *Holmes v. State*, 323 S.W.3d 163, 171 (Tex. Crim. App. 2009) (op. on reh'g). "The purpose of the offer of proof is to show what the witness's testimony would have been—otherwise, there is nothing before the appellate court to show reversible error in the trial court's ruling." *Bundy v. State*, 280 S.W.3d 425, 428–29 (Tex. App.—Fort Worth 2009, pet. ref'd) (citing *Stewart v. State*, 686 S.W.2d 118, 122 (Tex. Crim. App. 1984)).

B. Analysis

1. Exclusion of testimony

In his first issue, Flores asserts that the trial court prevented him from offering a complete defense by excluding S.R.'s and his own testimony regarding whether N.R. had seen S.R. and Flores have sex. He asserts that this testimony would have provided an alternate source for N.R.'s knowledge about sexual behavior.

The record contained testimony from both S.R. and Flores that, at times, they shared a room and even a bed with N.R. Flores further testified that N.R. had

accidentally seen him naked on one or two occasions due to the close living quarters. When he attempted to ask S.R. about occasions on which N.R. might have seem them engage in sexual behavior, the State objected on relevance grounds, and the trial court sustained the objection. Subsequently, when Flores sought to testify regarding an alternate source of N.R.'s knowledge of sex acts, including that she had seen him engage in oral sex with S.R., the State objected. The trial court sustained the objection, stating that the evidence was not relevant and that it was inadmissible under Rule of Evidence 412, which generally excludes evidence of specific instances of the complainant's past sexual conduct in a trial for aggravated sexual assault. *See* TEX. R. EVID. 412; *Hale v. State*, 140 S.W.3d 381, 396 (Tex. App.—Fort Worth 2004, pet. ref'd).

Rule 412 provides that evidence of the "reputation or opinion evidence of a victim's past sexual behavior" or evidence of "specific instances of a victim's past sexual behavior" are not admissible in a prosecution for aggravated sexual assault. TEX. R. EVID. 412(a). The rule then enumerates several exceptions to this general rule, stating that "[e]vidence of specific instances of a victim's past sexual behavior is admissible if" it:

> (A) is necessary to rebut or explain scientific or medical evidence offered by the prosecutor;
>
> (B) concerns past sexual behavior with the defendant and is offered by the defendant to prove consent;

(C) relates to the victim's motive or bias;

(D) is admissible under Rule 609 [concerning impeachment by evidence of a criminal conviction]; or

(E) is constitutionally required to be admitted.

Id. R. 412(b)(2).

At trial, Flores argued that evidence that N.R. observed several sexual encounters between S.R. and him was necessary to demonstrate an alternative source for N.R.'s knowledge about oral sex. He argued that Rule 412 did not prevent him from providing evidence regarding his and S.R.'s sexual relationship because S.R. was not the complainant. The trial court determined, however, that evidence regarding N.R.'s previous exposure to sex acts fell under Rule 412 because Flores was "trying to relate" the evidence of the sexual relations between S.R. and Flores to N.R. "by saying that, [N.R.] noticed these things and therefore she could come up with these statements or allegations that this [oral sex] had happened to her. So it does relate to her." *See, e.g, Roderick v. State*, 494 S.W.3d 868, 878 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (considering whether evidence that complainant observed sexual acts at home was admissible under Rule 412).

Flores cites *Hale v. State* to support his argument on appeal that this evidence was admissible under Rule 412(b)(2)(E). The court in *Hale* recognized that "[a] number of states have held that the United States Constitution compels the admission of evidence to show an alternative basis for a child victim's knowledge of sexual

matters," but it also noted that the Constitution requires "only the introduction of otherwise relevant and admissible evidence." 140 S.W.3d at 396. The *Hale* court held:

> Thus, before evidence of an alleged victim's sexual behavior may be admitted under rule 412(b)(2)(E), the defendant must first establish the relevancy of the evidence to a material issue in the case. TEX. R. EVID. 401. If the evidence is not relevant, it is not admissible. *See* TEX. R. EVID. 402. To show the relevancy of a child victim's prior sexual conduct as an alternate source of sexual knowledge, the defendant must establish that the prior acts clearly occurred and that the acts so closely resembled those of the present case that they could explain the victim's knowledge about the sexual matters in question.

Id.

Flores sought to introduce his own testimony that N.R. had opportunities to observe him and S.R. have sex, including one occasion in which N.R. walked into the living room while they engaged in oral sex. We conclude that Flores failed to show that this evidence was relevant and admissible. Nothing in his proffered testimony established that N.R.'s previous exposure to sex acts between Flores and S.R. "clearly occurred." He stated that he believed that she saw them on a couple of occasions because they would hear her footsteps or notice that a privacy curtain had moved. On the one occasion that he was aware that N.R. saw him having sex with S.R.—the time she walked into the room while they were engaged in oral sex—they "just stopped what [they] were doing and [they] just started watching TV." This testimony, however, does not establish what N.R. actually saw or understood about

these acts. *See id.* (to show relevancy, defendant must establish that prior acts clearly occurred).

Nor did Flores establish that the acts N.R. purportedly observed "so closely resembled those of the present case that they could explain [N.R.'s] knowledge about the sexual matters in question." Flores's proffered testimony indicated that N.R. had several opportunities to observe, briefly, consensual sexual encounters between adults. But the situations described by Flores are not substantially similar to the encounters described by N.R.

The Fourteenth Court of Appeals addressed a similar argument in *Roderick v. State*. In that case, the appellant sought to admit evidence that the complainant witnessed appellant and her brother engaging in oral sex. *Roderick*, 494 S.W.3d at 878. The Fourteenth Court recognized that the proffered evidence "suggests that [the complainant] may have been familiar with male anatomy, and may have understood the concept of oral sex as a result of having witnessed sexual contact between the appellant [and her brother]." The court continued:

> However, witnessing oral sex is not the same as undergoing the experience of it and being able to describe one's own physical reaction to it. The excluded evidence does not account for [the complainant's] ability to describe how her "private area" felt after being touched. During CPS forensic interviews, [the complainant] demonstrated how the appellant would touch her, how it felt, and described a rash she developed as a result of being touched. This evidence also does not account for [her] ability to describe the taste she experienced when the appellant made her perform oral sex. Therefore, the evidence proffered by the appellant fails to support his theory that [the complainant's]

> sexual knowledge was attributable to sexual activity she witnessed at home.

Id.

We apply similar reasoning here, and we conclude that the trial court did not abuse its discretion in refusing to permit S.R.'s or Flores's testimony about sexual encounters that N.R. might have observed. Even assuming that N.R. saw the acts described in Flores's offer of proof, those brief observations do not account for her ability to describe how it felt and tasted to perform those acts on Flores. *See id.* ("Because appellant did not establish that the prior acts so closely resembled those of the present case that they could explain [the complainant's] knowledge about the sexual matters in question, the trial court did not abuse its discretion."); *Hale*, 140 S.W.3d at 397 (holding that appellant did not establish admissibility of evidence of victim's previous sexual knowledge because he did not "establish that the prior acts clearly occurred, nor did he prove that the acts so closely resembled the acts alleged against appellant that they could explain the victims' knowledge about the sexual matters in question").

We overrule Flores's first issue.

2. Limitation of cross-examination

In his third issue on appeal, Flores argues that the trial court violated his Sixth Amendment right of confrontation by limiting his cross-examination of S.R. when he attempted to question her regarding conversations she may have had with N.R.

about the sexual abuse prior to her CARE interview. We conclude that this complaint was not preserved for review on appeal.

Flores asserts for the first time on appeal that the trial court's limitation of his cross-examination of S.R. violated his Sixth Amendment right of confrontation. However, Flores raised no objection on this ground, so this complaint is not preserved. *See Golliday v. State*, 560 S.W.3d 664, 670–71 (Tex. Crim. App. 2018) (confirming rule that Confrontation Clause complaints must be preserved through specific objection and stating, "Parties are not permitted to 'bootstrap a constitutional issue from the most innocuous trial objection,' and trial courts must be presented with and have the chance to rule on the specific constitutional basis for admission because it can have such heavy implications on appeal"); *Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005) (preservation requirements apply to confrontation complaints).

We overrule Flores's third issue.

3. Detective Buchanan's opinion of N.R.'s credibility

In his second issue, Flores argues that the trial court erred in allowing Detective Buchanan to testify that, based upon his observation of her forensic interview, he found N.R. credible.

The State argues that Flores failed to preserve this complaint for appeal because he failed to object to testimony regarding N.R.'s credibility each time such

evidence was offered. *See, e.g.*, *Lopez*, 253 S.W.3d at 684 (providing that party must object each time inadmissible evidence is offered or obtain running objection); *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (stating that error in admission of evidence is cured where same evidence comes in elsewhere without objection). Although he did object after the detective testified that N.R. was "consistent," Flores did not obtain a running objection, nor did he renew his objection when the State again asked the detective whether he found N.R. to be credible and consistent. Even if this was sufficient to preserve his objection to Detective Buchanan's opinion on N.R.'s credibility, we conclude that any error in overruling Flores's objection did not affect Flores's substantial rights.

Any error in admitting expert testimony is non-constitutional and requires reversal only if it affects the substantial rights of the accused. *See* TEX. R. APP. P. 44.2(b) (stating non-constitutional error must be disregarded unless it affects substantial right); *Barshaw*, 342 S.W.3d at 93; *Petriciolet v. State*, 442 S.W.3d 643, 653 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). The "danger posed by the erroneous admission of expert testimony that was a direct comment on the complainant's credibility was that the jury could have allowed that testimony to supplant its decision." *Barshaw*, 342 S.W.3d at 94 (quoting *Schutz v. State*, 63 S.W.3d at 445).

In assessing the likelihood that the jury's decision was improperly influenced, we consider the record as a whole, including testimony and physical evidence, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *See id.*; *see also Motilla*, 78 S.W.3d at 355. Factors that we may consider include (1) the strength of the evidence of the appellant's guilt; (2) whether the jury heard the same or substantially similar admissible evidence through another source; (3) the strength or weakness of an expert's conclusions, including whether the expert's opinion was effectively refuted; and (4) whether the State directed the jury's attention to the expert's testimony during argument. *See Motilla*, 78 S.W.3d at 355; *Petriciolet*, 442 S.W.3d at 654.

We first observe that there was extensive, unobjected-to evidence for the jury to consider in reaching its verdict regarding the credibility of either Flores or N.R. *See Barshaw*, 342 S.W.3d at 96 ("Even in cases in which credibility is paramount, Texas courts have found harmless error when the inadmissible expert testimony was only a small portion of a large amount of evidence presented that the jury could have considered in assessing the victim's credibility."). N.R. herself testified at trial that Flores had forced her to perform oral sex "lots of times." S.R., Ornelas, and Torrance likewise testified that she made similar statements to them. Torrance testified, without objection, that the details in N.R.'s disclosure and her consistency in her

account were signs of her credibility. Detective Buchanan testified without objection that he only attempted to obtain arrest warrants in cases that he "believed in," and he obtained a warrant to arrest Flores and moved forward with prosecuting him based in large part on his observation of N.R.'s forensic interview. *See Washington v. State*, 485 S.W.3d 633, 638–39 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (noting error in admission of evidence may be rendered harmless when substantially similar evidence is admitted elsewhere without objection); *Sandoval v. State*, 409 S.W.3d 259, 295 (Tex. App.—Austin 2013, no pet.) (finding detective's testimony explaining his doubts about defendant's credibility and his belief of child sexual abuse victim's account not particularly powerful given that he forwarded case to district attorney's office for prosecution after investigation and, therefore, factfinder could logically assume that detective found victim credible, her allegations truthful, and believed appellant was guilty of committing alleged sexual assault).

Furthermore, both N.R. and Flores testified at trial, allowing the jury to observe both witnesses and to draw its own conclusions regarding their credibility. The State did not emphasize or direct the jury's attention to Detective Buchanan's testimony during closing argument. Instead, both the State and the trial court's jury charge repeatedly informed the jury that it was the sole judge of the credibility of the witnesses. *See Flores v. State*, 513 S.W.3d 146, 171–72 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (holding trial court's error in admitting psychologist's

testimony regarding children's truthfulness did not affect defendant's substantial rights where testimony was not calculated to inflame jury's emotions, substantially similar testimony was allowed without objection, jury charge instructed jury that it was the sole judge of credibility of witnesses and weight to be given to their testimony, and jury heard complainant provide detailed account regarding defendant's sexual assault); *Lopez v. State*, 288 S.W.3d 148, 159 (Tex. App.—Corpus Christi 2009, pet. ref'd) (holding that trial court's error in admitting testimony was harmless where jurors had been instructed that they were exclusive judges of credibility of witnesses and had received ample evidence through which they could form their own opinion of victim's credibility).

After examining the record as a whole, we conclude that any error in the trial court's admission of Detective Buchanan's testimony regarding N.R.'s credibility did not have a substantial and injurious effect or influence in determining the jury's verdict. *See Petriciolet*, 442 S.W.3d at 653. There is no indication that the jury allowed Detective Buchanan's direct comment that N.R.'s account of the assault during the forensic exam was credible and consistent to supplant its own decision-making process. *See Barshaw*, 342 S.W.3d at 94.

We overrule Flores's second issue.

Child Abuse Prevention Fee

In his fourth issue, Flores asserts that the $100 Child Abuse Prevention Fee assessed against him as a court cost in the aggravated sexual assault judgment was unconstitutional.[3] Flores argues that the child abuse prevention fee violates the separation of power clause and is, thus, facially unconstitutional.

The Second Court of Appeals addressed and rejected these same arguments in *Horton v. State*. 530 S.W.3d 717, 725 (Tex. App.—Fort Worth 2017, no pet.) (citing *Ingram v. State*, 503 S.W.3d 745, 748-49 (Tex. App.—Fort Worth 2016, pet. ref'd)). The Second Court of Appeals found that the fee is facially constitutional and used for legitimate criminal justice purposes. *See id.* (holding article 102.0186 to be facially constitutional); *Ingram*, 503 S.W.3d at 748–50 (reasoning that "[b]ecause the imposition of this cost is limited to those defendants found guilty of crimes against children, the $100 imposed to be deposited in 'the county child abuse prevention fund' is related to the administration of the criminal justice system such that this cost is not facially unconstitutional."). Because this Court has not addressed this issue and because this appeal was transferred from the Second Court of Appeals, we will apply its precedent and therefore overrule Flores's issue. *See* TEX. R. APP. P. 41.3.

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[3] Flores's appellate counsel acknowledges that the Second Court of Appeals has rejected this argument and states that "[t]he matter is presented here to preserve it for further review."

We overrule Flores's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Goodman, and Hightower.

Do not publish. Tex. R. App. P. 47.2(b).