Affirmed and Memorandum Opinion filed March 17, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00028-CR

CLINTON RAY IVY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 413th Judicial District Court
Johnson County, Texas
Trial Court Cause No. F43633

MEMORANDUM OPINION

Appellant, Clinton Ray Ivy, appeals from his conviction for continuous sexual abuse of a young child.[1] A jury found him guilty and assessed punishment at 50 years' imprisonment. In a single issue on appeal, appellant contends that the trial court erred in admitting hearsay testimony that went beyond the scope of the State's notice of outcry testimony under article 38.072 of the Texas Code of Criminal Procedure. We affirm.

[1] This appeal was originally filed with the Tenth Court of Appeals and was transferred to this court. We apply precedent from this court unless it would be inconsistent with precedent from the transferor court. *See* Tex. R. App. P. 41.3.

Background

Appellant was indicted for continuous sexual abuse of a young child pursuant to section 21.02 of the Texas Penal Code. A person commits an offense under that section if (1) during a period of thirty or more days, the person commits two or more acts of sexual abuse against one or more victims, and (2) at the time of the commission of each of the acts, the person is at least seventeen years old and the victim or victims are younger than fourteen years old. Tex. Penal Code § 21.02(b). The indictment specifically alleged that appellant committed the offense against his former step-daughters, S.R. and S.L.[2] Prior to trial, the State filed notices of its intent to use outcry hearsay statements as permitted by article 38.072 of the Texas Code of Criminal Procedure. Each notice, one for S.R. and one for S.L., identified the girls' mother as the outcry witness.

The summaries of expected outcry testimony included in the notices informed appellant that the mother would testify that S.R. and S.L. told her that when she left the family residence, appellant would take them into his room and remove their clothing. He would then take them into a closet, make them touch his penis and put his penis into their mouths, and he would then ejaculate. The summaries further stated that appellant would enter each of the girl's rooms where he would touch and put his finger in their vaginas. According to the summaries, appellant told S.R. and S.L. that if they told their mother, appellant would kill the mother. Appellant allegedly committed these acts of abuse every time the mother left the residence.

A hearing was held on the reliability of the outcry statements under article 38.072, during which the mother and both girls testified. At the conclusion of the hearing, the trial court ruled that the mother was the proper outcry witness for both girls.

In her testimony at trial, the mother testified that S.R. and S.L. told her that appellant "touched them and made them do some nasty things." She further said that the

[2] To protect the children's privacy, we will refer to them and their mother by pseudonyms.

girls told her that appellant took them in the bedroom, made them take off their clothes, "touched them in their private areas," and "made them put his [penis] in their mouths and he [ejaculated] in it."[3] She further said that the girls told her that appellant tried to put his penis inside of one of them, but it did not penetrate. The mother testified that her daughters made these revelations after she informed them that she might be "getting back together" with appellant. She said that they were "real scared, real shaky," when they told her these things and that they said appellant told them he would kill the mother if the girls told her.

The mother further testified that S.R. told her that appellant would touch all over her, including on and inside her vagina. He would then tell her to lie on the bed where he would touch her on her private areas. In the closet, he would feel all over her and specifically all over her chest. Afterwards, appellant would take S.L. in the closet and then he would make them both lay on the bed and he would touch both of them, telling them it was "their little game . . . their little secret." Appellant's counsel objected several times during this portion of the mother's testimony, complaining that it was hearsay and exceeded the scope of the notice provided.

The mother further testified that S.L. told her that appellant would touch all over her, including inside of her, and that after he took her out of the closet, he would lay them both on the bed and touch them, telling them it was "their little game, their little secret." S.L. also reportedly told her mother that on some nights, appellant would put his hands down her pants and his hand over her mouth and tell her to be quiet. He would then try to stick his penis in her vagina. Appellant's counsel was granted a running objection that parts of the mother's testimony were hearsay that went beyond the notice provided by the State.

[3] In the mother's testimony, as well as that of each of the girls, euphemisms were used in place of particular body parts. It was clearly established at trial what the euphemisms stood for, so we will use the more formal terms in this opinion.

The mother additionally testified that she called Child Protective Services (CPS) the next day after her daughters' outcry statements to her. The girls were then interviewed at the Children's Advocacy Center and examined at Cook Children's Hospital. S.R. was eight and S.L. was six during the period of time in which the sexual abuse allegedly occurred. The mother stated that she had often left her children, S.R., S.L., and their brother, with appellant when she went to the store. The girls initially seemed okay with this but later would cry and beg to go with her.

In addition to the mother's testimony, the State introduced other evidence of appellant's guilt. Both Keene Police Department Detective Patrick Jones and Chief Rocky Alberti testified regarding a videotaped interview they conducted with appellant. Appellant appeared voluntarily for the interview, which occurred before he was arrested. The video also was played for the jury.

During the course of the interview, the police officers suggested to appellant that they may have recovered DNA evidence in the form of semen from the girls' clothes.[4] The officers asked appellant suggestive questions regarding how the supposed DNA evidence may have ended up in various places. Appellant responded by discussing approximately a dozen occurrences of sexual situations or contact between himself and either S.R., S.L., or both. Several of appellant's descriptions involved situations where the girls surprised him while he was masturbating (they supposedly opened a closet door or pulled back a shower curtain or bed sheets), and appellant then ejaculated, hitting the girls with his semen. In several other descriptions, appellant recounted one or the other of the girls grabbing his penis when he had an erection: once in a hot tub, once at a lake, and once when the children barged in on appellant and the mother having sex. Appellant stated that another time he had passed out drunk, and when he woke, the girls were

[4] In their testimony, the officers acknowledged that these representations were untrue and that no DNA evidence had been recovered during their investigation.

playing with his erect penis. His descriptions included times when his penis accidentally touched the girls' mouths and when semen got on their mouths.

S.R. and S.L. also testified at trial; they were respectively nine and seven at the time of trial. S.R. stated that appellant made her put his penis in her mouth. She said it happened more than once and every time her mom went to the store. It occurred either in the closet or on the bed and while her sister was there. She said he disrobed the girls but did not touch them. She did not recall appellant telling her not to tell.

S.L. also testified that appellant made her put his penis in her mouth. She said it happened while her mom was at the store and that it happened both on the bed and in the closet, but she could not recall whether it happened on more than one occasion. She additionally testified that appellant told her not to tell her mother, but she did not remember what he said would happen if she did tell her mother.

Araceli Desmarais, a sexual assault nurse examiner with Cook Children's Hospital, testified that she interviewed and examined S.R. and S.L. Both girls told Desmarais that appellant made them put his penis in their mouths and then something emitted from it. Regarding S.R., Desmarais concluded that there was mouth-to-penis and hand-to-penis contact but no vagina-to-penis contact. She further concluded that the contact occurred more than once and that appellant ejaculated during the contact. Desmarais testified that S.L. told her that appellant put his penis and his finger in her vaginal area and that it hurt. She also described kissing, anal contact, and mouth-to-vagina contact. She said that appellant showed her a movie with naked people in it and told her not to tell her mother.

Desmarais additionally noted that S. R. disclosed in her interview that the biological father of S.R. and S.L, who is not appellant, had touched S.R.'s vagina and that he washed her there with his bare hand in the bathtub. S.L. also described the biological father washing S.L. with his bare hand. Desmarais explained the notion of "progressive outcry," where victims of sexual abuse initially hold back some allegations and only

reveal the entire story as they become more comfortable with the interviewer. She acknowledged that S.L. did not initially reveal some of the worst allegations but did so only when asked specific questions.

Desmarais testified that the intake form for the hospital revealed that allegations concerning the girls had previously been made against their biological father and that the mother had allegedly coached the girls to make such allegations. She said that a physical examination of the girls revealed intact hymens but that this was not unusual in cases of sexual abuse. She stated that she made no physical findings of sexual abuse but concluded that there had been sexual abuse of S.R. and S.L.

Appellant's counsel called CPS investigator Kelli Longwith to testify. She described a May 2008 investigation of S.R. and S.L.'s biological father for suspected abuse. The investigation concluded that no physical or sexual abuse had occurred and that the mother of the two girls had coached them to make the allegations. The mother apparently was motivated by a pending divorce which involved child custody issues. Prior to the investigation, S.R. had made an outcry to her teacher about her biological father. S.R.'s first grade teacher, Cindy Whitehead, also testified that S.R. told her that she was afraid her biological father was going to rape and beat her and her siblings. Whitehead further explained that S.R. told her that S.R.'s mother "was trying to make it where her real father would not get them."

Standards of Review

As stated above, in his sole issue on appeal, appellant contends that the trial court erred in admitting hearsay testimony that went beyond the scope of the State's notice of outcry testimony under article 38.072 of the Code of Criminal Procedure. Hearsay statements are generally inadmissible unless permitted by statute or evidentiary rule. *See* Tex. R. Evid. 802, 803. Article 38.072 provides a statutory exception to the hearsay rule that allows the State to introduce outcry statements, which would otherwise be considered inadmissible hearsay, made by a child victim of certain offenses, including the

one at issue in the present case. Tex. Code Crim. Proc. art. 38.072. It permits the statements of a child victim describing the alleged offense to be admitted through an "outcry witness," i.e., the first adult to whom the child made a statement about the alleged offense. *Id.*

In order to invoke the statutory exception, the State must notify the defendant of its intent, provide the name of the outcry witness, and provide a summary of the statement. *See id.* art. 38.072 § 2(b)(1). The purpose of these requirements is to avoid surprising the defendant with the introduction of outcry hearsay testimony. *See Gay v. State*, 981 S.W.2d 864, 866 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). To achieve this purpose, the written summary must give the defendant adequate notice of the content and scope of the outcry testimony. *Davidson v. State*, 80 S.W.3d 132, 136 (Tex. App.—Texarkana 2002, pet. ref'd). The notice is sufficient if it reasonably informs the defendant of the essential facts related in the outcry statement. *Id.* A trial court's determination that an outcry statement is admissible under article 38.072 is reviewed under an abuse of discretion standard. *Nino v. State*, 223 S.W.3d 749, 752 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990)).

Discussion

Appellant complains that the mother was permitted to testify over objection beyond the scope of the summaries provided for her testimony.[5] Although appellant suggests that the mother provided a "plethora" of statements beyond the scope of the summaries and her hearing testimony, he specifically complains regarding her testimony that the girls told her that: (1) appellant would lay them down on the bed and feel all over them; (2) he touched all over S.R.'s chest; and (3) he sometimes would put his hand

[5] Although in his briefing, appellant only specifically complains regarding the notice and testimony related to S.L.'s outcry, we will consider his complaint as challenging the outcry testimony related to both S.L. and S.R. Appellant's counsel properly objected below to the testimony relating to both girls.

down S.L.'s pants and a hand over her mouth and tell her to be quiet while he tried to put his penis inside her.

We agree with appellant that portions of the mother's testimony went beyond the scope of the summaries and that the testimony in question was regarding essential facts. *See generally Klein v. State*, 191 S.W.3d 766, 781 (Tex. App.—Fort Worth 2006) (holding that summary provided "essential facts" of the outcry statement and that complained-of testimony beyond the scope of the summary went to "nonessential facts," i.e., facts describing peripheral circumstances or circumstances leading up to the outcry statement), *rev'd on other grounds*, 273 S.W.3d 297 (Tex. Crim. App. 2008).[6] The mother's testimony included conduct of a nature not revealed in the summaries, particularly the allegation that appellant attempted to put his penis in S.L. The trial court erred in permitting this testimony over timely objection. *See Wheeler v. State*, 79 S.W.3d 78, 84 (Tex. App.—Beaumont 2002, no pet.) (holding trial court erred in admitting testimony not described in article 38.072 notice).

However, our analysis does not end there. We may not reverse a conviction due to erroneous admission of hearsay testimony unless we determine that it affected appellant's substantial rights. *See* Tex. R. Evid. 103(a); Tex. R. App. P. 44.2(b); *Dorado v. State*, 843 S.W.2d 37, 38 (Tex. Crim. App. 1992) (requiring a nonconstitutional harm analysis for hearsay statements incorrectly admitted as exceptions under article 38.072). An error affects a substantial right "when the error [has] a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Thus, we affirm a criminal conviction despite nonconstitutional error if, after examining the record as a whole, we are left with the fair assurance that the error

[6] The State suggests that any error in the admission of the mother's testimony was cured when similar testimony was elicited from Araceli Desmarais. *See generally Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) ("An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection."). We disagree. Desmarais did not provide the same testimony as the mother. Desmarais testified regarding what the girls told her in the interviews, not regarding what the girls told their mother. Furthermore, the details of the two accounts were different in some respects.

did not influence the jury or influenced the jury only slightly. *Schutz v. State*, 63 S.W.3d 442, 443 (Tex. Crim. App. 2001); *see also O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (holding that error must be considered harmful if "grave doubt" exists as to whether it had a "substantial and injurious effect or influence" upon the jury). We consider the entire record in assessing any impact that the error had on the jury's decision, including the nature of the evidence supporting the verdict, as well as the character of the error and its relationship to other evidence, to determine if the error substantially affected an appellant's rights. *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000).

Here, the mother's testimony beyond the scope of the article 38.072 summaries was relatively minor evidence in light of the substantial evidence of appellant's guilt from other sources. As recounted in some detail above, the two girls themselves provided significant testimony regarding the abuse they suffered. The outcry testimony from their mother which was in keeping with the summaries was far more detailed than the few statements that were not contained in the summaries. Araceli Desmarais, the sexual assault nurse examiner, provided even more detailed testimony regarding statements by the girls than did the mother. According to Desmarais, it was common for subsequent investigators to obtain greater detail from child victims because of a process she termed "progressive outcry," through which victims become more comfortable about recounting abuse over time. Desmarais specifically testified that S.L. described appellant putting his penis in her vaginal area, an allegation similar to one of the complained-of statements in the mother's testimony.

It is further likely that the jury viewed the videotape of appellant's interview with police as strongly indicative of his guilt. The jury could have reasonably concluded that appellant concocted numerous far-fetched explanations for sexual contact with his step-daughters, as seen in the videotape, in an attempt to evade prosecution. In the light of the substantial evidence against appellant from numerous sources, we are left with the fair

assurance that the trial court's error in admitting certain hearsay testimony either did not influence the jury or only influenced the jury slightly. *See Schutz*, 63 S.W.3d at 443; *see also Biggs v. State*, 921 S.W.2d 282, 87–88 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (holding error in admitting hearsay outcry statements was harmless at least in part because of the nature of other evidence, including complainant's testimony and defendant's own admission to certain conduct around children). Accordingly, we find such error to be harmless and overrule appellant's sole issue.

We affirm the trial court's judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Hedges, Justice Jamison, and Senior Justice Mirabal.[7]
Do Not Publish — TEX. R. APP. P. 47.2(b).

[7] Senior Justice Margaret Garner Mirabal sitting by assignment.