Affirmed and Memorandum Opinion filed May 23, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00795-CR

JOHNNIE LEROY BROWN II, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 76813-CR

M E M O R A N D U M O P I N I O N

A jury convicted Johnnie Leroy Brown, II of two counts of continuous sexual abuse of a child and one count of aggravated sexual assault. The trial court sentenced him to thirty years' confinement for the two counts of continuous sexual abuse and forty years' confinement for the aggravated sexual assault. On appeal, appellant challenges his conviction arguing: (1) the trial court abused its discretion by admitting certain outcry testimony; (2) he did not receive effective assistance of

counsel; and (3) the trial court abused its discretion by overruling his objection to the testimony of certain witnesses for the State. We affirm.

I. Background

On November 2, 2013, appellant's daughter Julia revealed to her grandmother, Valerie, a sexual encounter she witnessed in the bathroom between appellant and his eight-year old son, Gaston.[1] Julia also told her grandmother that Gaston, her stepbrother, had sexually abused her. Julia told Valerie it happened when her mother, Bonnie, was not at home. At the time of the outcry, Julia was five years old.

The next day, Valerie telephoned Bonnie and told Bonnie what Julia had reported. In turn, Bonnie took Gaston out in the front yard and privately questioned him about what happened. Gaston told her that "dad made me put my head on his penis." Bonnie also spoke to appellant and his son Karl. Bonnie took all the children to stay with Valerie.

On November 8, 2013, Bonnie went with her mother, Valerie, to the police station. They met with Officer Mike Gangloff and Detective Rene Alvarado. Bonnie and Valerie each filed a written statement reporting the sexual abuse. On that same date, appellant met with Gangloff and Alvarado. Appellant waived his rights and gave a voluntary oral and written statement. Appellant asserted that he was in the bathroom masturbating when his eight-year old son, Gaston, walked in on him and licked on his genitalia. Appellant stated this was observed by

[1] To protect the privacy of the complainants in this case, we identify them by pseudonyms. Appellant's youngest son, 8 years, is identified as "Gaston." Appellant's older son, 10 years, is identified as "Karl." Appellant's older daughter, 6 years, is identified as "Julia." Appellant's wife, now ex-wife, is identified as "Bonnie." Bonnie's mother is identified only as "Valerie," and her aunt and uncle only by "Gloria" and "James" or "Jim." The ages of the children are as of 2013, when the outcry statements were made.

appellant's five-year-old daughter, Julia. Appellant implied in his statement that he had been sexually abused by his father.

After the meeting with the police, Child Protective Services ("CPS") became involved. On November 14, 2013, Bonnie and the four children went to the Brazoria County Children's Assessment Center ("CAC"). Ayrial Diop, a forensic interviewer with CAC, met with each child, and recorded the interviews on DVD. Julia asserted that Gaston had sexually assaulted her. Gaston maintained his grandpa had sexually assaulted him and Karl. Karl stated that his grandpa sexually assaulted him and Gaston. Karl further asserted that appellant would not do anything like that and that Gaston had confused appellant with grandpa.[2] The youngest child, at age two, was too young and immature to be interviewed. Susan Gonzalez, a CPS caseworker, observed the interviews at CAC and at their conclusion recommended CPS place the girls with Bonnie and the boys with Valerie's brother and sister-in-law, James and Gloria.

In November 2013, within one week of living with James and Gloria, Karl and Gaston disclosed the sexual abuse against them by appellant and their grandfather. Karl and Gaston each separately disclosed to Gloria that "he had to put his dad's penis in his mouth." Gloria did not report this conversation to authorities because it was her impression that the police knew this information and that was why Karl and Gaston were placed in her home.

In December 2014, Ruby Reese, a CPS case worker, met with appellant and referred him to a sex offender counselor; however, appellant could not afford the classes. During his initial meeting with Reese, appellant advised that he had not

[2] Detective Alvarado contacted the police department in Fort Lupton, Colorado and forwarded information regarding the sexual abuse of Karl and Gaston by their grandfather. He was charged with sexual assault of Karl and Gaston, plead guilty, and, at the time of appellant's trial, was serving time in prison.

been sexually abused by his father; rather, he was emotionally and physically abused by his father. Appellant told Reese that "it was easier for him to have ill feelings for his father if he said that he was sexually abused by him."

In January 2014, Julia underwent an examination with Trina St. John, a forensic nurse. Julia's medical examination was normal; however, Julia told the nurse that her brother, Gaston, has sexually assaulted her while Karl watched. Thereafter, Julia also met with Melody Jones, Ph.D., a psychologist, for an examination. Dr. Jones observed signs of depression in Julia and recommended counseling.

On February 14, 2014, while at Chick-fil-A with Gloria and James, Karl discussed in greater detail the sexual abuse by appellant against himself and Gaston. Gloria reported the additional details to the authorities. Consequently, in late February 2014, Nick Canto, a forensic interviewer with Scotty's House Child Advocacy Center, met separately with Karl and Gaston and conducted a "re-interview" or "continuing forensic interview."

Appellant was charged by indictment with the felony offense of "continuous sexual abuse of a child," to which appellant pleaded "not guilty." He was later reindicted for two counts of continuous sexual abuse of a child and two counts of aggravated sexual assault.[3]

On February 11, 2015, the State filed its notice of intent to introduce a hearsay statement, *i.e.*, an outcry statement of Gaston, through his stepmother, Bonnie. The notice included the following statement: "[Gaston] told [Bonnie] that

[3] Count one is continuous sexual abuse against Karl. Count two is continuous sexual abuse against Gaston. Count three is aggravated sexual assault against Julia (causing the mouth of Julia to contact the sexual organ of appellant). Count four is aggravated sexual assault against Julia (causing the sexual organ of Julia to contact the sexual organ of Gaston).

he was licking his dad's penis." On August 17, 2015, the State revised its notice to provide:

> [Gaston] told [Bonnie] that he licked/sucked the defendant's penis and that " 'he did it to daddy.' "

On August 17, 2015, the State filed its notice of intent to introduce hearsay statements, *i.e.*, outcry statements of Gaston and Karl, through their aunt, Gloria. The notice related to Gaston included the following statement:

> [Gaston] told Gloria . . . that his father, the defendant Johnnie Leroy Brown, II, would put his penis into [Gaston] and [Karl's] mouth. [Gaston] told Gloria . . . that this would happen when [Bonnie] was not home. [Gaston] stated to Gloria . . . that this happened a lot. Further, [Gaston] told Gloria . . . that on occasion the defendant woke [Gaston] and [Karl] up and put the defendant's penis into [Gaston] and [Karl's] mouth.

A jury trial commenced on August 31, 2015, and during the trial the State offered testimony from several witnesses including Karl, Gaston, and Julia, as well as Bonnie, Valerie, Gloria, an uncle, a neighbor, several police officers, forensic interviewers with CAC and Scotty's House, a CPS investigator and a case worker, a psychologist, a counselor at Scotty's House, and a forensic nurse. Appellant testified on his own behalf and denied the allegations contained in the indictment.

The jury found appellant guilty. The court sentenced him to thirty years' confinement on counts one and two, and forty years' confinement on count three, to run concurrently.[4] Appellant filed a motion for new trial, asserting "the verdict in this cause is contrary to the law and the evidence." Appellant's motion for new trial was overruled by operation of law. Appellant now appeals his conviction, raising three appellate issues with subparts.

[4] During the course of the trial, the State abandoned count four of the indictment.

II. Analysis

A. Outcry testimony

In his first issue, Appellant contends the trial court abused its discretion by admitting outcry testimony arguing three subpoints: (1) the state's notice of intent to introduce the statement of Bonnie was deficient; (2) the statement by Bonnie should not have been considered reliable; and (3) Gloria's[5] statement should not have been admitted as an outcry statement because it was Gaston's second declaration about the abuse.

1. Article 38.072 exception to the hearsay rule

Article 38.072 provides a statutory exception to the hearsay rule[6] 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 ones at issue in this case. *See* Tex. Code Crim. Proc. art. 38.072. Under article 38.072, the trial court may admit the statements of a child victim describing the alleged offense through an "outcry witness," *i.e.*, the first adult to whom the child made a statement about the alleged offense. *Id*. at 2(a)(3).

For the statement to qualify as an outcry statement, the child must have described the alleged offense in some discernible way and must have said or done more than generally insinuate that sexual abuse occurred. *Owens v. State*, 381 S.W.3d 696, 702 (Tex. App.—Texarkana 2012, no pet.); *see also Davidson v.*

[5] Appellant refers to Bonnie's mother, "Valerie" in his brief, but then cites to the testimony of Bonnie's aunt, Gloria, in the record. We presume the reference to Valerie is a mistake because his objection and the trial court's outcry hearing occurred during Gloria's testimony.

[6] Hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Tex. R. Evid. 801(d). Generally, hearsay statements are inadmissible unless permitted by statute or evidentiary rule. *See* Tex. R. Evid. 802, 803.

State, 80 S.W.3d 132, 136 (Tex. App.—Texarkana 2002, pet. ref'd) ("While there is no authority requiring a detailed summary, the summary of the outcry statement must be more than a general allusion to sexual abuse.").

a. Notice

To invoke the statutory exception to the prohibition on admitting hearsay, the State must notify the defendant of its intent to offer the evidence, provide the name of the outcry witness, and provide a summary of the statement. *See* Tex. Code Crim. Proc. art. 38.072 § 2(b)(1). The purpose of the notice requirements in article 38.072 is to avoid surprising the defendant with the introduction of outcry-hearsay testimony. *See Fetterolf v. State*, 782 S.W.2d 927, 930 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd); *see also 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. *Owens*, 381 S.W.3d at 703; *Davidson*, 80 S.W.3d at 136. The notice is sufficient if it reasonably informs the defendant of the essential facts related in the outcry statement. *Owens*, 381 S.W.3d at 703; *Davidson*, 80 S.W.3d at 136.

b. Indicia of reliability

"Article 38.072 also provides a mechanism that requires that the trial court determine on a case-by-case basis if the testimony reaches the level of reliability required to be admissible as an exception to the hearsay rule." *Norris v. State*, 788 S.W.2d 65, 71 (Tex. App.—Dallas 1990, pet ref'd); *see* Tex. Code Crim. Proc. art. 38.072 § 2. When evaluating indicia of reliability, the trial court examines the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of that statement. *See Shaw v. State*, 329 S.W.3d 645, 652 (Tex. App.—Houston [14th Dist.] 2010, pet.

ref'd); *Broderick v. State*, 89 S.W.3d 696, 699 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Although courts have enumerated factors[7] that may assist in ascertaining the reliability of an outcry statement, the focus of the inquiry must remain upon the outcry statement, not the abuse itself. *Broderick*, 89 S.W.3d at 699.

We review a trial court's ruling to admit an outcry statement under article 38.072 for an abuse of discretion. *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)). We will uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *Chapman v. State*, 150 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

2. Bonnie's outcry testimony

Appellant asserts the trial court abused its discretion by admitting outcry testimony from Bonnie because (1) appellant did not receive sufficient notice and (2) the statement was unreliable. Appellant does not dispute that he timely received notice; rather, he maintains that the notice he received of Bonnie's testimony "did not discernibly describe an offense and only gave a general allusion

[7] The trial court may consider several factors when determining reliability: (1) whether the child victim testifies at trial and admits making the out-of-court statement, (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate, (3) whether other evidence corroborates the statement, (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults, (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty, (6) whether the statement is consistent with other evidence, (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate, (8) whether the child behaves abnormally after the contact, (9) whether the child has a motive to fabricate the statement, (10) whether the child expects punishment because of reporting the conduct, and (11) whether the accused had the opportunity to commit the offense. *Norris*, 788 S.W.2d at 71 (citing *Buckley v. State*, 758 S.W.2d 339, 343–44 (Tex. App.—Texarkana 1988, no pet.)).

that something in the area of child abuse had occurred." Additionally, appellant argues that the outcry statement provided by the State was deficient because it was not the same as what was admitted at trial. Because of these alleged deficiencies, appellant contends that the admitted testimony should have been deemed unreliable, and that the trial court abused its discretion in admitting it.

a. Whether the State complied with article 38.072's notice requirements

Here, the State's notice of Gaston's outcry statement to Bonnie provided that Gaston told Bonnie that "he licked/sucked the defendant's penis and that he did it to daddy." At trial, Bonnie testified that Gaston told her that "dad made me put my head on his penis." Defense counsel objected to admission of the statement, arguing he received insufficient notice of the content and nature of the statement and, on this basis, he objected to the statement's reliability. The trial court overruled counsel's objection as follows:

> . . . . I find that "Daddy made me put my head on his penis" is the best light you can put on what the notice they gave you. I overrule your objection as to the sufficiency of the notice and the consistency issue is —you know, you will be able to cross-examine her about the reasons. Now what weight the jury is going to give this is up to the jury. And I will allow to you [sic] cross-examine her about that. And so that objection is overruled for purposes of admission of this statement. . . .

Contrary to appellant's assertion, the outcry summary contained the necessary facts to provide appellant with notice of the content and scope of the outcry testimony. The State's notice when coupled with Bonnie's testimony leaves little doubt that the essential facts of the outcry statement related to oral sexual contact between appellant and his ten-year-old son. As such, the trial court did not abuse its discretion in admitting the testimony. *See Gottlich v. State*, 822 S.W.2d 734, 737 (Tex. App.—Fort Worth 1992, pet. ref'd) (holding trial court did not err

in admitting a hearsay statement not specifically included in outcry summary where statement described the circumstances leading up to the outcry statement and its details).

b. Whether Bonnie's outcry statement was reliable

Appellant maintains that Bonnie's statement should not have been considered reliable based upon its content. In this regard, appellant argues that the statement was "unclear and ambiguous as to whether sexual abuse had occurred."

Here, there is no dispute that Bonnie was the first person to whom Gaston described the abuse. Gaston's description was more than a "general allusion" to sexual abuse. As set forth in the outcry notice, "[Gaston] told [Bonnie] that he licked/sucked the defendant's penis and that he did it to daddy." This can only be interpreted as an allegation of oral sexual contact between the appellant and his son, Gaston. Both the outcry statement and the indictment[8] gave appellant sufficient notice of the offense charged. As such, we reject appellant's contention that the outcry statement was "unclear and ambiguous" whether sexual abuse had occurred.

Additionally, appellant's contention that the outcry statement was inconsistent with previous notices also is unavailing. It took time for Gaston to admit the full extent of appellant's sexual abuse. *See, e.g.*, *Jones v. State*, 817 S.W.2d 854, 858 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (admitting outcry testimony that did not specifically describe the alleged offense, but was closely related in time and scope to the offenses and relevant to the state of mind of the complainant, was not an abuse of discretion). Further, Bonnie's testimony did not

[8] In addition to setting forth the continuous nature of the sexual abuse against Gaston, the indictment accuses appellant, in pertinent part, of causing the "mouth" of Gaston to contact the sexual organ of the defendant.

differ in any meaningful way from the notices appellant received, as both cannot reasonably be interpreted as anything other than an allegation of oral sexual contact between the appellant and his son, Gaston. Bonnie's testimony regarding the time, content, and circumstances surrounding Gaston's outcry supports the trial judge's reliability determination.

We conclude the trial judge did not abuse his discretion in finding that the outcry statement was reliable and in admitting Bonnie's testimony. We overrule appellant's first issue.

3. Gloria's outcry testimony

Appellant asserts the trial judge abused its discretion by admitting outcry testimony from Gloria because (1) her testimony was hearsay and unreliable and (2) her testimony was the second outcry statement of Gaston regarding the same alleged offense and, thus, prohibited. Appellant argues that before more than one outcry witness may testify, the outcry must be about different events, and not simply a repetition of the same event as related by the victim to different individuals.

a. Whether the State complied with article 38.072's notice requirements

Appellant does not dispute that he timely received notice of the outcry statement; rather, he maintains that the trial court abused its discretion by letting both Bonnie and Gloria testify regarding Gaston's statements. Specifically, in his brief, appellant cites to and complains of a specific exchange in the record in which Gloria testified about conversations she had with Gaston and Karl shortly after the boys arrived at her house in November 2013.

State: Okay. Now with regard to [Gaston], did he ever tell you anything regarding his father?

Witness: Yes

State: All right, within the time span of when they start living with you, how long after they start living within you do you get that information from [Gaston]?

Witness: Within the first week.

State: And how did that conversation come up with [Gaston]?

Witness: Again, that was at night when it was time to go to sleep. He was very scared and crying.

* * *

State: Hang on. I'm sorry. Specific act of abuse. What did he tell you?

Witness: That he had had to put his dad's penis in his mouth.

Defense counsel objected to Gloria's testimony as follows:

> I do have an objection, Your Honor, and it's based primarily upon the witness' testimony that she doesn't remember. I believe at first her testimony was that the first outcry took place on Valentine's Day, February 14th, at the Chick Fila [sic] in Bryan. And then upon cross-examination she testified that it actually took place in November of 2013 in her home in Brenham. I think given her admission that she couldn't remember I think her testimony concerning these statements is inherently unreliable and so therefore we will object as being hearsay.

The trial court found the statements made in Chick fil A in February 2014 were not outcry statements. The trial court admitted the statements made in Brenham in November 2013, however, reasoning as follows:

> All right. Because the outcry is the first time they say something. When they expound on it later, that's not outcry. Okay. She remembers November of 2013, both Karl and Gaston. She was present and this is the first time she heard about this, in November. Now it fits within outcry. Your reliability issue goes to the weight. I think that -- well, this Court as a gatekeeper finds there is enough reliability for the jury to hear it. So I'm going to allow the November outcries. Karl was by himself when he told [her] and then Gaston. I don't want the witness to speculate about he might have told me about

> pornography. Only what you exactly remember about the conversations with Karl and the conversation with Gaston. I think what you said was that Gaston, you talked about the penis in the mouth but you also said -- and I think he might have mentioned watching pornography. He might have is not reliable.

The trial court further explained its ruling:

> . . .We're walking a very fine line with outcry. Because what this is is [sic] hearsay. And hearsay doesn't ordinarily come in. It's an exception to the law. Now and hearsay can only come in once. So I find that the activity with the penis fits under the outcry. I have a problem with -- the fact that he said it then or said it later about watching pornographic movies with his father is after the outcry can't come in again. I mean it can't -- he can tell you about the penis but whatever he tells you at that time is the outcry. If he expounds later on about other stuff, that's not an outcry again. There can only be one outcry.

The trial court did not allow any testimony regarding pornography to come in through Gloria's outcry statement.

Article 38.072 allows the first person to whom the child described the offense in some discernible manner to testify about the statements the child made. Tex. Code Crim. Proc. art. 38.072; *see also Zarco v. State*, 210 S.W.3d 816, 832 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Because of the way in which the statute is written, an outcry witness is not person-specific, but event-specific. *Broderick*, 35 S.W.3d at 73. Before more than one outcry witness may testify, however, the outcry must be about different events and not simply a repetition of the same event as related by the victim to different individuals. *Id*. There may be only one outcry witness to the victim's statement about a single event, and the proper outcry witness to a single event is the first adult person other than the defendant to whom the victim made a statement describing the incident. *Id.*; *see also Thomas v. State*, 1 S.W.3d 138, 142 (Tex. App.—Texarkana 1999, pet. ref'd) (holding proper outcry witness is not to be determined by comparing the

statements the child gave to different individuals and then deciding which person received the most detailed statement about the offense).

As set forth, *supra*, in accordance with article 38.072, the State designated Gaston's step-mother (Bonnie) and Gloria as outcry witnesses. Tex. Code Crim. Proc. art. 38.072. After Bonnie testified regarding Gaston's outcry statement, the State then called Gloria to testify about Gaston's statements to her. The State argues that Gloria's testimony is admissible under article 38.072 as an outcry statement because it concerns different occasions of oral sexual contact between Gaston and appellant than set forth by Bonnie in her testimony. According to the State, Gloria's testimony relates to prior oral sexual contact between appellant and Gaston in the boys' shared bedroom, not to the bathroom incident about which Bonnie testified. While Gloria testified she had no knowledge of any incident between Gaston and appellant in a bathroom, Gloria did not testify where the sexual contact occurred. Thus, contrary to the contention of the State, it is not clear from Gloria's testimony that Gaston's statements to her regarding the sexual abuse by appellant concerned a different occasion from that addressed in his statements to Bonnie. Because Bonnie had testified previously that Gaston told her "dad made me put my head on his penis," Gloria's testimony regarding Gaston's statement to her that "he had had to put his dad's penis in his mouth" constituted inadmissible hearsay. *See Thomas*, 1 S.W.3d at 142. Thus, the trial court abused its discretion by admitting Gloria's hearsay testimony over appellant's objection. *See Josey v. State*, 97 S.W.3d 687, 698 (Tex. App.—Texarkana 2003, no pet.) (holding trial court erred by permitting testimony of third outcry witness as to same event over defendant's hearsay objection); *Broderick*, 35 S.W.3d at 73–74 (holding trial court erred by permitting testimony of second outcry witness as to same event

over defendant's hearsay objection). This conclusion, however, does not end our review; we must analyze the error for harm. Tex. R. App. P. 44.2.

b. Harm analysis

Having determined that the trial court erred by admitting Gloria's testimony regarding Gaston's statement over appellant's hearsay objection, we now apply a Rule 44.2(b) harm analysis. Tex. R. App. P. 44.2; *see Josey*, 97 S.W.3d at 698; *Broderick*, 35 S.W.3d at 73–74. The reviewing court must deem the error harmless if, after reviewing the entire record, the court is reasonably assured the error did not influence the jury's verdict or had but a slight effect. *Josey*, 97 S.W.3d at 698. If the same or similar evidence is admitted without objection at another point during the trial, the improper admission of the evidence will not constitute reversible error. *Id*.

Gloria's hearsay outcry testimony was Gaston stated that he had had to put his dad's penis in his mouth. Gloria's hearsay testimony was not harmful in light of Gaston's detailed, factually specific testimony concerning his father's sexual assaults against him. *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *see also Padilla v. State*, 278 S.W.3d 98, 107 (Tex. App.—Texarkana 2009, pet. ref'd).

We are reasonably assured that the error in admitting Gloria's hearsay outcry testimony did not influence the jury's verdict or had but a slight effect. *See* Tex. R. App. P. 44.2(b); *see also Anderson v. State*, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986). We overrule appellant's first issue.

B. Ineffective assistance of counsel

In his second issue, appellant contends he was denied effective assistance of counsel at trial. Appellant asserts his trial counsel was deficient in three respects:

(1) soliciting damaging and improper opinion testimony; (2) failing to request the trial court instruct the jury to disregard inadmissible evidence; and (3) failing to object to improper victim impact testimony at the guilt/innocence phase of trial.

1. Standard of review

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). To prove a claim of ineffective assistance, an appellant must establish, by a preponderance of the evidence, that (1) his counsel's representation fell below the objective standard of reasonableness, and (2) there is a reasonable probability that but for counsel's deficiency the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *see Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In considering an ineffective-assistance claim, we indulge a strong presumption that counsel's actions fell within the wide range of reasonable professional behavior and were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689; *Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Thompson*, 9 S.W.3d at 814. In most cases, direct appeal is an inadequate vehicle for raising such a claim because the record is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson*, 9 S.W.3d at 813–14. When the record is silent regarding trial counsel's strategy, as here,[9] we will not find deficient performance

[9] Appellant filed a motion for new trial, but it did not include any grounds of ineffective assistance of counsel.

unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *Id*. at 483 (quoting *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992) (en banc)). Counsel's performance is judged by "the totality of the representation," and "judicial scrutiny of counsel's performance must be highly deferential" with every effort made to eliminate the distorting effects of hindsight. *Id*.; *accord Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). The *Strickland* court cautioned us to avoid an intrusive post-trial inquiry into attorney performance because such an inquiry would encourage the proliferation of ineffectiveness challenges. *Robertson*, 187 S.W.3d at 483 (citing *Strickland*, 466 U.S. at 690).

To that end, we are instructed that, in order for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record. *Lopez*, 343 S.W.3d at 142. The Texas Court of Criminal Appeals further advises, "[w]hen such direct evidence is not available, we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." *Id*. at 143.

2. Soliciting damaging and improper opinion testimony

Appellant asserts his trial counsel was ineffective for "soliciting damaging and improper opinion testimony" from detective Rene Alvarado. Specifically, defense counsel cross-examined Alvarado regarding his opinion whether children often make untrue allegations:

> Q: And would you agree with me that in the course of conducting the investigations you've been involved in that children will often make allegations that aren't true:
>
> A: That's very rare.
>
> Q: That's very rare that children make accusations that aren't true?
>
> A: When it comes to sexual abuse, it's very rare.
>
> * * *
>
> Q: Okay. So it's your testimony that it's very uncommon for children to lie with respect to allegations of sexual abuse?
>
> A: That's my experience.

Appellant argues that this line of questioning "bolstered" the credibility of the State's witnesses. Appellant maintains that there is no legitimate trial strategy to asking this line of questioning unless counsel knew that the witness would answer favorably for appellant.

After receiving these responses, defense counsel went on to question Alvarado as follows:

> Q: So if a child gives you inconsistent versions of an event relating to sexual assault are you telling the jury that that doesn't cause you to pause in any way?
>
> A: The investigation has to continue.
>
> Q: Okay. So you will go forward with the investigation even when you're presented with inconsistencies?
>
> A: Yes, sir.

Contrary to appellant's contention, his defense counsel could have believed, as a matter of trial strategy, that this line of questions helped appellant by demonstrating the bias of Detective Alvarado—*e.g.*, showing that the detective believed appellant's guilt in spite of inconsistencies in the complainants' initial statements concerning the abuse. It prompted the State, on redirect examination, to clarify with Detective Alvarado as follows:

> Q. When you stated that inconsistencies don't stop an investigation from going forward, why did you state that? What do you mean by that?
>
> A. We have to prove or disprove the allegations. Inconsistencies, you haven't proved anything.
>
> Q. Okay. And so what do you do after that?
>
> A. You continue the investigation.
>
> Q. In an attempt to prove or disprove?
>
> A. Yes, sir.

Appellant has failed to overcome the presumption that trial counsel's actions were part of his trial strategy. The record is silent as to trial counsel's reasons for this line of questioning. To find appellant's trial counsel ineffective on the basis of the record before this Court would require us to speculate, which we will not do. *See Thompson*, 9 S.W.3d at 814; *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). As such, appellant's assertion of ineffective assistance of counsel on this basis is overruled

3. Failure to request that the jury be instructed to disregard the witnesses' answers

Appellant next claims his trial counsel was ineffective for failing to request a limiting instruction after the trial court sustained his objection to certain testimony from the State's witnesses. Appellant contends his trial counsel made numerous objections to inadmissible material which were sustained; however, defense

counsel did not request an instruction to disregard or move for a mistrial. Appellant maintains that his trial counsel should have requested an instruction for the jury to disregard in five instances, after the following objections were sustained:

Alvarado Testimony (2 instances)

STATE: And based on your observations and this conversation with the Defendant, who did it seem as if he was protecting by not telling his wife?

WITNESS: Himself.

DEFENSE: Objection. Calls for speculation.

COURT: I'll sustain the objection.

STATE: Based on your conversation and your observations of the Defendant, did you form an opinion as to who he was trying to protect when he didn't tell his wife?

DEFENSE: Again, Your Honor, objection. That calls for speculation.

COURT: Well, that doesn't call for an expert opinion in my mind. The jury can draw their own conclusions.

* * *

STATE: All right. Based on your training and experience with regard to these particular kinds of cases do you have an opinion as to say whether or not it's common or uncommon for children to tend to open up after time?

DEFENSE: Objection, Your Honor. Calls for speculation. And I don't believe he's been qualified as an expert to render that type of an opinion. So we would object pursuant to Rule 702 as well.

COURT: Well, I'll sustain the objection. To the question as asked I sustain the objection.

STATE: Now based on your training and experience and your observations in this particular case did you form an opinion about whether or not that's common for that to happen?

WITNESS: It's very common.

DEFENSE: Excuse me. I object relevance and the previous objections I stated, speculation, Rule 702.

COURT: Okay. Y'all approach. I sustain the objection.

Valerie Testimony (2 instances)

STATE: All right. Now when [Julia] whispered to you, what was your reaction?

WITNESS: Shock.

STATE: Based on that what, if anything, did you do then when she whisper[ed] to you?

WITNESS: I questioned her. I said, Are you sure? And she said yes.

DEFENSE: Objection. Hearsay, Your Honor, as to what she said.

COURT: I'll sustain the objection.

* * *

STATE: Okay. Why the delay?

WITNESS: Lindsay asked me to give her time to figure out what was really going on. She felt her husband was a victim and she wanted -- that felt for him he needed therapy, she said. She was telling me things and she was trying to talk to him.

DEFENSE: Object to what she told her as hearsay.

COURT: I agree. Sustained.

Gloria Testimony (1 instance)

STATE: When you talked to [Karl] tell me how that conversation came up.

WITNESS: He was very scared, crying, in a new different place, taken from his family and he was just scared.

STATE: And what did he tell you?

WITNESS: He felt guilty because he felt like --

DEFENSE: Objection. Calls for speculation.

COURT: I understand. You're going to have to say what he told you.

WITNESS: He told me that.

STATE: Let me clarify my question because -- did he say that he felt guilty? Is that -- is that what he said?

WITNESS: Yes.

DEFENSE: That would be hearsay, Your Honor, and outside the outcry. I object.

COURT: I sustain that objection. You're -- you know the hearsay exception to the hearsay rule is very narrow.

Appellant has failed to rebut the presumption that trial counsel's actions resulted from a reasonable decision. Trial counsel may have strategically determined that the likelihood of success, and its potential benefits, was outweighed by the potential of drawing further attention to the testimony in question. *See Webb v. State*, 995 S.W.2d 295, 301 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Duren v. State*, 87 S.W.3d 719, 734 (Tex. App.—Texarkana 2002, pet. struck). "[C]ounsel may have had a legitimate belief that requesting further relief would have only highlighted the objectionable testimony." *Cueva v. State*, 339 S.W.3d 839, 875 (Tex. App.—Corpus Christi 2011, pet. ref'd).

Appellant has failed to overcome the presumption that trial counsel's actions and inactions were part of his trial strategy. Although appellant filed a motion for new trial, the only claim he advanced in that motion was that the verdict was contrary to the law and the evidence. Because no ineffective assistance claim was advanced in the motion, no hearing was conducted to explore appellant's counsel's trial strategy. In the absence of a proper evidentiary record, it is difficult to show that trial counsel's performance was deficient. *See Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003); *Jackson*, 877 S.W.2d at 771.

Counsel's allegedly improper actions do not amount to an error sufficiently egregious to satisfy the first prong of *Strickland* on a silent record. *See Strickland*, 466 U.S. at 687. As such, appellant's assertion of ineffective assistance of counsel on these grounds is overruled.

4. Failing to object to victim impact testimony at guilt/innocence phase of trial

Appellant also claims his trial counsel was ineffective at the guilt-innocence stage of his trial for failing to object to certain victim impact testimony.

When an ineffective assistance of counsel claim concerns the failure to object to the admission of evidence, the Appellant must establish both that the evidence was inadmissible and that its admission probably affected the outcome of the trial. *Hollis v. State*, 219 S.W.3d 446, 463 (Tex. App.—Austin 2007, no pet.); *Cooper v. State*, 707 S.W.2d 686, 688 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). In this situation, the appellant must show that, if the evidence had been objected to, its denial would have been reversible error.

Victim impact evidence consists of "two distinct, but related, types [of evidence]: victim character evidence and victim impact evidence." *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002). Victim impact evidence is generally recognized as evidence concerning the effect of the appellant's crime on others, particularly the victim's family members. *See id*. (describing impact evidence as that which is designed to remind the jury that defendant's criminal conduct has foreseeable consequences to the community and victim's family); *Mosely v. State*, 983 S.W.2d 249, 261 (Tex. Crim. App. 1998) (en banc) (defining impact evidence in homicide cases as the effect that the victim's death will have on others, particularly the victim's family members). "Victim character evidence is a subset of victim impact evidence." *Lynch v. State*, No. 01-15-00421-CR, 2016 WL

2587159, at *6 (Tex. App.—Houston [1st Dist.] May 1, 2016, pet. ref'd) (mem. op.). Victim character evidence is defined as evidence concerning the good qualities of the victim; it is "designed to give the jury 'a quick glimpse of the life that the [defendant] chose to extinguish, to remind the jury that the person whose life was taken was a unique human being.' " *Salazar*, 90 S.W.3d at 335 (quoting *Payne v. Tennessee*, 501 U.S. 808, 830–31 (1991) (O'Connor, J., concurring)).

Victim impact and victim character testimony typically are irrelevant at the guilt-innocence phase of a trial because such evidence does not tend to make more or less probable the existence of any fact of consequence with respect to guilt or innocence. *See Love v. State*, 199 S.W.3d 447, 456–57 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Miller–El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990)). However, victim impact testimony may be admissible during the guilt-innocence phase as a " 'circumstance of the offense.' " or if the testimony "would have a tendency to make more or less probable a fact of consequence at the guilt stage; that is, whether appellant committed the crimes at all." *Longoria v. State*, 148 S.W.3d 657, 660 (Tex. App.—Houston [14th Dist.], pet. ref'd) (citing *Miller-El*, 782 S.W.2d at 895).

Appellant identifies the following statements from Gloria's testimony as victim impact evidence:

Testimony regarding counseling

Q: You mentioned earlier that they — again, they come and live with you in November and you mentioned getting them into counseling. Why did you do that?

A: Because of the type of abuse that they had gone through. We were advised by CPS and also we could see that we would need counseling to be able to deal with the trauma that they were put through.

Testimony regarding effect of appellant's phone contact with boys

Q: Talk to me about —tell me about how those [calls between appellant and boys] were set up. How did they generally go? Who would call who?

A: We would generally call — or Jim actually would make — initiate the phone calls and he would text [appellant] and tell him what time or ask him what time we could call and generally it was on a Friday night and then we would call that, you know, at that time, whatever they had set up.

***

Q: Did you see an effect on the boys?

A: Yes.

Q: And what was that?

A: Confusion.

Q: Why? What do you mean by that?

A: They love their dad. But yet they were hurt and angry because of the situation they were in now and the fact that they were removed from their family and their sisters and their friends because what he had done to them.

Testimony regarding behavior issues

Q: Going back to some of the behavioral issues that you've had with them, have you had — have you seen with regard to behavioral issues trying to make sense of this or dealing with it? From the boys?

A: There is just a lot of anger and, you know, that comes out in outbursts at home, at school. Just —

Q: Let me ask this. Have either of them had thoughts of hurting themselves?

A: Yes.

Appellant contends the above testimony violated the prohibition about introduction of victim impact statements during the guilt-innocence phase at trial.

Appellant's trial counsel did not object to the testimony discussed. This is the basis for appellant's claim of ineffective assistance of counsel.

The State argues that victim impact testimony was admissible as a "circumstance of the offense." *Longoria*, 148 S.W.3d at 659. We agree. In this case, testimony regarding the boys' behavior, counseling, and effects of phone calls with appellant would have a tendency to make more or less probable a fact of consequence at the guilt stage; that is, whether appellant committed the crimes at all. Additionally, the evidence rebutted appellant's theory that the boys fabricated the allegations against him or were confusing sexual acts by their grandfather, not the appellant.

Because the victim impact testimony would have been admissible in this case, we cannot say, therefore, that appellant's trial counsel's failure to object to the testimony fell below the objective standard of professional norms. *See Longoria*, 148 S.W.3d at 659-60 (holding attorney's failure to object to victim-impact testimony did not fall below objective standard of reasonableness because the "testimony regarding the girls' behavior and long-term prognosis would have a tendency to make more or less probable a fact of consequence at the guilt stage; that is, whether appellant committed the crimes at all).

Moreover, the record is silent as to why appellant's trial counsel failed to object, and, therefore, is insufficient to overcome the presumption that counsel's actions were part of a strategic plan. *See Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000) (finding no ineffective assistance on direct appeal when counsel failed to object to improper victim impact testimony of an extraneous offense when record was silent as to counsel's motivations); *see also Montez v. State*, No. 14-05-00182, 2006 WL 916437, at *6-7 (Tex. App.—Houston [14th Dist.] Apr. 6, 2006, pet. ref'd) (mem. op.) (record is silent as to why appellant's counsel failed to object

to victim impact testimony during guilt-innocence phase of trial, and, therefore, is insufficient to overcome the presumption that counsel's actions were part of a strategic plan). As such, appellant fails to meet the first prong of the *Strickland* test. Appellant's assertion of ineffective assistance of counsel on this basis is overruled.

In summary, having rejected all of appellant's ineffective-assistance claims, we overrule his second issue.

C. Admission of witness testimony

In his final issue, appellant contends the trial court abused its discretion by allowing two expert witnesses, a psychologist, Dr. Melody Jones, and a forensic nurse, Trina St. John, to testify over his objection. Appellant maintains their testimony should have been excluded because the State failed to disclose timely these witnesses as experts under article 39.14(b) of the Texas Code of Criminal Procedure and the trial court's order requiring the State to disclose experts before November 10, 2014.

Upon request, the State must give notice of whom it intends to call as a witness. *See* Tex. Code Crim. Proc. art. 39.14(b); *see also Hightower v. State*, 629 S.W.2d 920, 925 (Tex. Crim. App. [Panel Op.] 1981); *Depena v. State*, 148 S.W.3d 461, 465 (Tex. App.—Corpus Christi 2004, no pet.). When the trial judge grants a motion for discovery, and the prosecution fails to disclose the evidence ordered disclosed by the trial judge, that evidence should not be admitted into evidence by the State during the trial. *Lindley v. State*, 635 S.W.2d 541, 543 (Tex. Crim. App. 1982). If a trial court allows an unlisted witness to testify over objection, the decision is reviewed for an abuse of discretion. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993); *Cureton v. State*, 800 S.W.2d 259, 262 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

We consider two factors when determining whether the trial court abused its discretion in allowing an undisclosed witness to testify: (1) whether the prosecutor acted in bad faith in failing to provide the defense with the witness's name and (2) whether the defendant could have reasonably anticipated that the witness would testify despite the State's failure to disclose the name. *Bridge v. State*, 726 S.W.2d 558, 566–67 (Tex. Crim. App. 1986); *Cureton*, 800 S.W.2d at 262. Absent appellant's ability to show these factors on appeal, the trial court's decision allowing the testimony will not be disturbed. *Castaneda v. State*, 28 S.W.3d 216, 223 (Tex. App.—El Paso 2000, pet. ref'd).

In considering whether the State acted in bad faith, reviewing courts have considered the following three areas of inquiry: (1) whether the defense shows that the State intended to deceive; (2) whether the State's notice left the defense adequate time to prepare; and (3) whether the State freely provided the defense with information (*e.g.*, by promptly notifying the defense of new witnesses, by providing updated witnesses lists, or by maintaining an open file policy). *Martinez v. State*, 131 S.W.3d 22, 29 (Tex. App.—San Antonio 2003, no pet.).

On October 22, 2014, the trial judge ordered the State to disclose its expert witnesses to defense counsel no later than November 10, 2014. At that time, the case was set on the court's trial docket for December 2014. Trial was rescheduled several times and, ultimately, went forward on August 31, 2015. The identities of Dr. Jones and St. John were disclosed in the State's second amended notice of potential witnesses and expert witnesses on August 18, 2015—13 days before trial began.

At trial, defense counsel objected to the testimony of Dr. Jones and St. John on the basis they were not timely disclosed timely. Outside the presence of the jury, the trial court noted that the original deadline of November 10, 2014, was

"void" upon the case being continued from the December trial date. He further found there should be no surprise to the defense that these individuals were called as witnesses. The trial court overruled appellant's objection. Nevertheless, the trial court allowed defense counsel the opportunity to examine the witnesses outside the presence of the jury before they testified.

Here, the record does not establish that the State acted in bad faith. First, appellant has not shown in the record that the State's failure to disclose timely the identities of either Dr. Jones or St. John was an intentional effort to deceive. Appellant also fails to demonstrate in the record that the State's notice of 13 days before trial left the defense inadequate time to prepare or that the State failed to freely provide the defense with information. Nor does appellant point to any facts in the record that would indicate the State failed to freely provide information to appellant. To the contrary, at trial, defense counsel admitted the following:

> I just want to make sure that the record is clear. And I am in no way, shape, form or fashion suggesting that Mr. Clayton attempted to surprise me with this witness and I have absolutely no doubt that the minute he discovered her identity he notified me as he has done throughout the pretrial discovery process. His conduct in that regard has been exemplary and particularly with respect to Brady material so I just want the record to be clear on that.

Appellant makes no claim that he was prejudiced by receiving the State's notice 13 days before trial instead of 20 days.

We hold that appellant has not demonstrated the State acted in bad faith in not disclosing Dr. Jones' and St. John's identities more than 13 days before trial. Therefore, the trial court did not abuse its discretion by allowing Dr. Jones and St. John to testify. We overrule appellant's third issue.

III. Conclusion

Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan, and Brown.
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