Affirmed as Modified and Memorandum Opinion filed November 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00711-CR

RICK ALEXANDER REYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1397396

MEMORANDUM OPINION

We consider ten issues in this appeal from a conviction for aggravated sexual assault of a child. Finding only clerical error, we overrule all ten issues, we modify the judgment to correct the clerical error, and we affirm the judgment as modified.

BACKGROUND

When she was three years old, the complainant told her father that she had been touched inappropriately by appellant, her stepfather. The father took the

complainant to the hospital, which found no signs of trauma, but in an interview with a forensic pediatrician, the complainant indicated that she may have been sexually abused.

The complainant told the pediatrician that appellant had touched her "coo-ca." When asked to identify her coo-ca, the complainant pointed to her vagina. The complainant denied that appellant had touched her coo-ca with his hands or feet. She explained that appellant had used a "stick" instead. With a drawing, the complainant signaled that the stick was shaped like a rectangle and that it was located between appellant's legs. She also said that the stick "is always on him" and that "germs" come out of it.

In another interview with a child advocate, which was recorded on video, the complainant gave somewhat conflicting statements about her abuse. At one point, she told the advocate that nothing had ever happened to hurt her. But later, the complainant said that she had gone to the hospital because her coo-ca hurt, and she explained that her coo-ca hurt because appellant had put his stick in there and "it gets blood." The complainant also said that the stick was dirty and that appellant got the stick from "outside."

Despite the conflicting statements, appellant was charged with aggravated sexual assault of a child. He pleaded not guilty to that charge, and his case proceeded to a trial by jury, where he represented himself.

At the time of trial, the complainant was two weeks shy of her seventh birthday, and as in her previous interview with the advocate, the complainant's statements at trial were not entirely consistent. She testified that no one has ever hurt her. She also said that she had told her father that appellant had *not* touched her. However, the complainant testified that she had seen the video of her advocate's

interview, and she said that the statements made in that video were true and should be believed.

The jury convicted appellant as charged and assessed his punishment at fifty years' imprisonment.

SUFFICIENCY OF THE EVIDENCE (Issue One)

When reviewing the legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense. *See Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistences in the evidence are resolved in favor of the verdict. *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

The scope of our review is all of the evidence, whether it was properly or improperly admitted at trial. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *See Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial

evidence alone can be sufficient to establish guilt. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

To obtain a conviction in this case, the State was required to prove beyond a reasonable doubt that appellant intentionally or knowingly caused his sexual organ to contact the sexual organ of the complainant. *See* Tex. Penal Code § 22.021(a). We conclude that the State met this burden.

The jury heard testimony from several witnesses that appellant had touched the complainant's "coo-ca" with his "stick." The complainant indicated to both the forensic pediatrician and the child advocate that her coo-ca is her vagina. The complainant also indicated in a drawing that appellant's stick "is always on him," between his legs, and that "germs" come out of the stick. The jury could have reasonably determined that the complainant was describing appellant's penis.

There was also indirect evidence that supported a finding of sexual assault. During her interview with the forensic pediatrician, the complainant exhibited new, regressive behaviors that had not been noted before in her medical history. These behaviors included sucking her thumbs, biting her nails, and giving herself hickies. The pediatrician explained that these behaviors were self-soothing techniques that are consistent in children who have suffered sexual abuse.

The complainant's demeanor also showed that she was avoiding discussions of sexual abuse. In her interview with the pediatrician, the complainant tried to choke herself by wrapping a doll around her neck. And in her interview with the advocate, the complainant repeatedly said that she did not want to answer questions about appellant and her coo-ca. The advocate explained that these avoidance techniques can occur in children who have been abused and who do not want to talk about the abuse.

Appellant argues that the evidence conclusively establishes reasonable doubt because, in her interview with the advocate, the complainant indicated that appellant's stick was not his penis, but rather a literal stick from "outside," as if from a tree. Based on that statement, appellant believes that the greatest offense that he could have committed was indecency with a child, which had been submitted to (and rejected by) the jury as a lesser-included offense.

Appellant's argument implicates the weight and credibility of the evidence, which we cannot reevaluate. The jury was free to believe the complainant's statement that the stick was between appellant's legs (i.e., his penis) and disbelieve her statement that the stick was an object that appellant found outside. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) ("The jury, being the judges of the facts and credibility of the witnesses, could choose to believe or not believe the witnesses, or any portion of their testimony."). And given the complainant's very young age, her limited vocabulary, and the other evidence of avoidance, the jury could have reasonably determined that the complainant's reference to a stick from outside was not strictly literal.

We conclude that the evidence, when viewed in the light most favorable to the verdict, would enable a rational jury to find every essential element of the offense beyond a reasonable doubt.

RIGHT TO COUNSEL (Issue Two)

While he was represented by appointed counsel, appellant filed several pro se motions with the court. We highlight three of those motions here.

First, appellant moved to terminate counsel, complaining that there was an unspecified conflict of interest and that counsel had failed to utilize evidence that

allegedly proved his innocence. Appellant requested the appointment of new counsel to represent him, but no action was taken on the motion.

Second, appellant moved for hybrid representation, with the aim of filing pretrial motions without the assistance of his counsel. No action was taken on this motion either.

Third, appellant moved to represent himself, which prompted the trial court to conduct a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975). At the beginning of the hearing, appellant asserted that he wanted to proceed pro se because he believed that he was not "adequately being represented or defended." When the trial court pressed for a more detailed explanation, appellant said, "Well, my life is on the line and my attorney has not come up to see me, has not given me my discovery, has done nothing for me and I've been here for 367 days."

The court turned to counsel, who suggested that the primary disagreement related to an entirely different matter involving appellant's desire to offer CPS records into evidence. The records showed that CPS had terminated an investigation without finding probable cause against appellant. Counsel explained, "Mr. Reyes and his family has interpreted that to mean there's no case, that he's not guilty of an offense. I have informed him and his family, frankly ad nauseum, that CPS records are not admissible on either side. So whatever CPS did is whatever CPS did."

Counsel also explained that producing a witness from CPS would not be a reasonable trial strategy. Counsel said that he would be limited to asking just two questions of a CPS witness: "Did you initiate an investigation with regard to this matter?" and "At some point in time did you terminate your investigation?" Counsel anticipated that the answers to both questions would be "yes," and he knew that the reason for the second answer was that the complainant's mother had refused to cooperate with CPS. Counsel then said that once he passed the witness, he would

expect the prosecutor to ask this question: "After you terminated your investigation were criminal charges filed against Mr. Reyes?" Knowing that the answer to this question would also be "yes," counsel believed that the witness "would clearly leave the impression with the jury that CPS found that there was some basis for this case," and counsel said that he could not prevent that impression because his own questions had opened the door.

The trial court agreed with counsel's analysis and advised appellant that the CPS records were not admissible. Appellant said, "Well, under [Rule] 613 they are." The court responded, "Well, I'm not going to argue with you. They're not admissible. They don't come in, they will not come into the case regardless if you ask for them or your attorney. So if that's your biggest disagreement with this attorney, you're just barking up the wrong tree."

When the court asked if there was any other reason for his dissatisfaction with counsel, appellant complained that counsel had not filed any motions on his behalf. Appellant specifically mentioned a motion to reinstate bond, but the court said that counsel had filed such a motion, and the motion had been denied.

The discussion then turned to a suppression issue:

Court:	What other motions is he supposed to be filing for you that he hasn't filed?
Appellant:	Motion to suppress outcry statement.
Court:	Suppress what?
Appellant:	Suppress the outcry statement, suppress everything. There's nothing.
Court:	There's nothing to—
Appellant:	I stand before you with no violation.
Court:	You can't suppress an outcry statement, sir.
Appellant:	Why not?

Court: An outcry statement is a statement made by the complaining witness as to what supposedly happened. It's admissible in court.

Appellant: Excuse me, I'm sorry.

Court: It's admissible.

Appellant: Well, under time, circumstances and relevance, there's no reliability or nothing.[1]

Court: I just told you, it's admissible.

Appellant: Well, I'm sorry—

Court: So what other motions would [you] have him file?

Appellant: I don't know.

The court scolded appellant, "You don't have any idea what you're doing," but appellant persisted in his desire to represent himself. The court then inquired into appellant's educational background, his familiarity with the law, and whether he had any history of mental illness. After warning appellant of the dangers and disadvantages of self-representation, the court granted appellant's motion and allowed him to proceed pro se, with counsel remaining on standby.

Now, in his second issue, appellant contends that the trial court reversibly erred by granting his own motion. He explains that his Sixth Amendment right to counsel was denied because the trial court forced him to choose between ineffective representation and self-representation. The thrust of this argument appears to be that, instead of limiting appellant to a Hobson's choice, the trial court should have appointed him substitute counsel.

[1] The trial court was already required to conduct a hearing to consider this issue. *See Sanchez v. State*, 354 S.W.3d 476, 484–85 (Tex. Crim. App. 2011) ("Outside the presence of the jury, the trial court must hold a hearing to determine, 'based on the time, content, and circumstances of the statement' whether the victim's out-of-court statement is 'reliable.' Finally, the victim must either testify, or be available to testify, 'at the proceeding in court or in any other manner provided by law.'" (quoting Tex. Code Crim. Proc. art. 38.072)).

To the extent that appellant complains about the denial of substitute counsel, this issue is not properly before us because appellant made no request for substitute counsel at the *Faretta* hearing. *See* Tex. R. App. P. 33.1 (a complaint for appellate review must be preserved by a ruling on "a timely request, objection, or motion").

And to the extent that appellant complains about being denied the right to counsel, this issue lacks merit. The Court of Criminal Appeals has already rejected the argument that "forcing a Hobson's choice between going to trial with unacceptable appointed counsel and self-representation will render any supposed waiver of counsel involuntary." *See Burgess v. State*, 816 S.W.2d 424, 427–28 (Tex. Crim. App. 1991).

The trial court took appropriate measures to ensure that appellant knowingly asserted his right to self-representation. The court inquired into appellant's level of education and the court admonished appellant regarding the risks of proceeding pro se. "Given the option to proceed with unwanted counsel or to represent himself, and adequately admonished as to the dangers and disadvantages, [appellant] persisted in his assertion of his right to self-representation. Implicit in that assertion is a valid waiver of the right to counsel." *Id.* at 429.

Just like the defendant in *Burgess*, appellant waived his right to counsel in his motion for self-representation and at the *Faretta* hearing. Appellant's unproven claim that his appointed counsel was ineffective does not make his waiver involuntary or violate the Sixth Amendment. We overrule this issue.

MOTION FOR SUBSTITUTE COUNSEL (Issue Three)

Having been granted the right to represent himself, appellant questioned the venire panel without the assistance of his standby counsel. The questioning was not very effective, as appellant spent a large portion of his time reading from a stack of

papers. Some members of the panel expressed their dismay that appellant was representing himself, and they implored him to accept his standby counsel. Appellant refused: "If I knew [standby counsel] would help me, then I would; but I promise you, he is not trying to help me. He is not." Later, while still in front of the panel, appellant orally moved for substitute counsel:

> Appellant: Now, I would love to if they gave me another attorney because anybody—but before y'all came in here, me and [standby counsel] almost went at it because there's no communication.
>
> Court: Okay. Sir, that's enough. Have a seat, please. Thank you so much.
>
> Appellant: Before everybody, can I have another counsel?
>
> Court: Absolutely not.

Now, in his third issue, appellant contends that the trial court abused its discretion by denying his request for substitute counsel.

We can dispose of this issue on two independent grounds.

First, appellant did not make his request for substitute counsel and obtain an adverse ruling on that request until the first day of trial, when it was far too late. *See Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) ("Thus, an accused may not wait until the day of trial to demand different counsel or to request that counsel be dismissed so that he may retain other counsel.").

Second, appellant did not carry his burden of establishing good cause for the appointment of substitute counsel. *See Hill v. State*, 686 S.W.2d 184, 187 (Tex. Crim. App. 1985) ("In addition to making the court aware of his dissatisfaction with counsel and stating the grounds for the dissatisfaction, a defendant also bears the responsibility of substantiating his claim."). Appellant offered no reason in connection with his motion, other than to suggest that there was a personality

conflict, which is generally not a valid ground for new counsel. *See King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000).

Notwithstanding the tardiness of his request, appellant argues in this court that he established good cause because he showed that his appointed counsel would not use his CPS records or move to suppress an outcry statement. These grounds were asserted at the *Faretta* hearing some eighteen months earlier, when appellant requested self-representation, not new representation. Appellant did not reurge those grounds when he requested substitute counsel during voir dire, and thus, those grounds cannot support a holding that the trial court abused its discretion when it denied appellant's motion for new counsel.

DISCOVERY (Issue Four)

At the end of the *Faretta* hearing, and after the trial court granted appellant's motion to represent himself, appellant made a general request for his discovery. The court answered that the discovery would be made available to him, and standby counsel added that he would ensure that appellant received all of the discovery to which he is entitled.

Eighteen months later, on the morning of voir dire, appellant requested a continuance, claiming that he had not received all of his discovery. The trial court turned to the prosecutor and asked how the discovery had been tendered to the defense. The prosecutor responded that its notices were on file at the time of the *Faretta* hearing, when appellant was still represented by counsel. The prosecutor also represented that "there have been multiple conversations between standby counsel, who is his prior defense attorney, regarding what's in the file, regarding discovery, regarding what's been turned over, regarding all the information that the State has provided."

The trial court asked standby counsel if the prosecutor's representation was correct, and counsel affirmed that it was. Counsel added that appellant refused to accept his discovery:

> I've made several attempts to communicate with Mr. Reyes and he simply refuses to talk to me, refusing to even take paperwork from me.
>
> As an example, when the Court granted his request to a *Faretta* hearing to represent himself, the Court gave me the Court's signed order. Mr. Reyes refused to even come to the window to accept the signed order giving him what he wanted. I then gave it to [the bailiff]; he refused to take it from [the bailiff], as well.
>
> Mr. Reyes refuses to have any type of communication with me, whatsoever. I attempted to give him page by page of the offense report in this case and I instructed him that under the law he can take whatever notes, he can write it verbatim. He demanded that he receive an unredacted copy of the offense report. He's not Michael Moore, he's not entitled to that. He has refused any offer that I've had to provide him with discovery in this case to the point where he won't even come to the window to talk with me.

Appellant challenged his standby counsel's claims:

> He hasn't been up there to the jailhouse to see me not one time even before I was granted self-representation. Not one time has he ever had a one-on-one consultation with me in the holdover. This man has done nothing for me. And it shows directly on the district clerk's file that he has not filed one motion other than become my attorney in said case.
>
> There is no—and if you ask [the bailiff] over here, that never transpired. I've never, ever, ever been allowed to see any of the State's file at all. And I would respectfully request, please, a continuance so I can examine said evidence because I have nothing in my possession, no expert testimony. Nothing.

The court turned to the bailiff and asked whether he remembered the encounter between appellant and his standby counsel. The bailiff said that he

remembered that counsel had sought appellant's signature on some paperwork, and that appellant had refused to sign. Counsel left the paperwork with the bailiff, and the bailiff asked appellant if he would sign it, but again appellant refused to sign.

The trial court determined that appellant "already had [his] discovery" and denied the request for a continuance.

Now, in his original brief, appellant argues that he was denied the due process of law because the State failed to provide him with discovery in accordance with Article 39.14 of the Code of Criminal Procedure. In a reply brief, appellant clarifies that this point arises from the State's failure to give him adequate notice of who would testify as the outcry witness.

The notice requirements for outcry witnesses are listed under Article 38.072 of the Code of Criminal Procedure—not Article 39.14. Notice is adequate under Article 38.072 if, at least two weeks before trial, the party offering the outcry statement (1) notifies the adverse party of its intention to do so, (2) provides the adverse party with the name of the witness who will provide the outcry statement, and (3) provides the adverse party with a written summary of the outcry statement. *See* Tex. Code Crim. Proc. art. 38.072, § 2(b).

The State complied with Article 38.072 by giving notice to appellant almost two years before trial. Even though appellant was still represented by counsel at that time, the record belies any suggestion that appellant was not personally aware of the State's intent. One month after the State filed its notice, appellant—acting pro se—moved to suppress the outcry statement. We conclude that appellant's notice and discovery arguments are without merit.

OUTCRY WITNESSES (Issues Five and Six)

In his next two issues, appellant argues that the trial court reversibly erred by allowing two different witnesses to testify as outcry witnesses.

The Complainant's Father. Appellant focuses first on the complainant's father. In a hearing conducted outside the presence of the jury, the father testified that the complainant had confided in him that appellant had touched her coo-ca. The father also testified about whether the complainant had previously discussed the touching with any other person:

> I asked her if she had told her mom and she said yes, but—and then I told her, "Well—you know, what did she tell you?" She said, "Well, she says that [appellant] doesn't do that."

Even though the father testified that the complainant had previously discussed the abuse with her mother, the trial court found that the father qualified as an outcry witness under Article 38.072. The trial court then allowed the father to testify as an outcry witness in front of the jury.

Appellant contends that the trial court's ruling was clearly erroneous. He explains that, to be an outcry witness under Article 38.072, the witness must be "the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense." *See* Tex. Code Crim. Proc. art. 38.072, § 2(a)(3). Appellant argues that the father cannot meet these requirements because his own testimony establishes that he was not the first person to have been told about the abuse.

The State responds that error was not preserved because appellant did not specifically object that the father was not the first person to have been told about the abuse. The State is correct; appellant objected on an entirely different basis. The record of the proceeding establishes the following:

Court: So tell me again what this hearing is about.

State: Judge, the State's contention is that under 38.072 that we have a hearing outside presence of the jury for the Court to do a gatekeeping matter as to who the outcry witness is, the first adult over 18 that the child under 14 told about the sexual abuse.

Court: Well, how come I've never done one of those unless there's somebody challenging?

Appellant: Yes, sir. I object.

Court: Excuse me, I'm talking.

Appellant: I'm sorry.

Court: Is there a challenge as to who the outcry witness is?

State: I have not been made known there's a challenge to who the outcry witness is.

Court: So I'm not sure why we are having a hearing.

Appellant: Your Honor, may I address the Court?

Court: Yes.

Appellant: I was objecting on the basis that I had no notice 14 days prior to the trial.

Court: You're objecting to what?

Appellant: That I had no notice, sir, under Article 38—

Court: Notice of what?

Appellant: Under Article 38—

Court: Don't quote any of that to me, I know you don't know anything about the law. What is it that you're objecting to?

Appellant: The notice requirement.

Court: What notice?

Appellant: The notice requirement under Article 38.072. I had no notice prior—

Court: Notice of what?

Appellant: Of the outcry statements to be introduced into evidence.

State: Your Honor, that's been on file for many months.

Court: I know, we already went over that. All right. Let's proceed.

Even though the hearing began with a reference to the eligibility requirements of outcry witnesses, appellant did not specifically challenge the father's eligibility in this case. He did not cross-examine the father, put on any evidence, or offer any closing argument. Appellant's only specific objection was that he had not received timely notice of the outcry statement.

Appellant argues in a reply brief that he preserved error because he lodged a hearsay complaint to the outcry statement in a pretrial motion to suppress. Four grounds were asserted in support of that motion. First, appellant claimed that Article 38.072 is unconstitutional because it violates his right to confront adverse witnesses. Second, he claimed that "the statement or statements are unreliable under the totality of the circumstances."[2] Third, he claimed that "the statements contain multiple unreliable hearsay," citing Rule 805 of the Texas Rules of Evidence. And fourth, he claimed that "the statements and offer do not comply with Article 38.072 requirements." Nowhere in his pretrial motion did appellant specifically object that the complainant's father was not the first person to hear about the alleged abuse.

To preserve an issue for appeal, a party must assert a timely objection on specific grounds, unless the specific grounds are apparent from the context. *See* Tex. R. App. P. 33.1. "As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Douds*

[2] Appellant indicated at the *Faretta* hearing that the outcry statement should be challenged on the basis of its reliability, but he did not reurge that challenge at the subsequent hearing under Article 38.072.

v. State, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

At the pretrial hearing, appellant specifically complained about a single point—whether he had received timely notice, not whether the complainant's father was the first person who was told about the abuse. Because appellant did not apprise the trial court that he was complaining about the father's eligibility as an outcry witness, we agree with the State that appellant did not preserve error relating to the father's designation as an outcry witness.

The Forensic Pediatrician. Next, appellant complains about outcry statements that were elicited from the complainant's forensic pediatrician. As with the previous issue, appellant argues that these statements were inadmissible hearsay because the pediatrician was not the first person who was told about the abuse, meaning the pediatrician did not qualify as an outcry witness under Article 38.072.

The pediatrician testified that she physically examined the complainant. The pediatrician also recounted that, during the examination, the complainant said that appellant was going to jail because he had touched her coo-ca. The pediatrician asked the complainant to identify her coo-ca, and she pointed directly to her vagina.

Appellant did not lodge an objection to this portion of the pediatrician's testimony. Accordingly, he waived any error relating to the admission of that testimony. *See* Tex. R. App. P. 33.1.

TRUTHFULNESS TESTIMONY (Issue Seven)

The State's second witness was a police detective who testified that she had watched the video interview of the complainant and the child advocate. The detective's testimony included the following excerpt, which is the focus of appellant's seventh issue:

Q. In your review of the forensic interview, what did you determine from your investigation?

A. From reviewing it, I did not see that—she's 3 years old. And in my 25 years of experience in law enforcement, I know—I don't think—children are not known to lie. They may stretch the truth a little, but there is truth within.

Appellant: Objection, nonresponse. [sic]

Court: I didn't hear you.

Appellant: Objection, nonresponse. [sic]

Court: It's overruled. Go ahead, ma'am.

Witness: Yes, sir.

A. Children are allowed—they tell the truth. There's truth in between everything that they're saying. They don't just make things up in a sense of something as a sexual assault.

Appellant argues that the trial court abused its discretion by admitting this testimony, relying on cases that hold that "expert" testimony about the truthfulness of a person is improper. *See Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) ("Expert testimony does not assist the jury if it constitutes 'a direct opinion on the truthfulness' of a child complainant's allegations."); *Yount v. State*, 872 S.W.2d 706, 712 (Tex. Crim. App. 1993) ("We hold that Rule 702 does not permit an expert to give an opinion that the complainant or class of persons to which the complainant belongs is truthful.").

The State responds that appellant failed to preserve this issue. Again, we agree with the State. Appellant objected on the specific basis that the detective's testimony was nonresponsive, not that her testimony was improper "expert" testimony under Rule 702. Because appellant's argument in this court does not correspond with the objection he made at trial, we conclude that the argument is waived. *See Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004); *Brent v. State*, 401 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

Appellant also complains about a second portion of the detective's testimony, which we reproduce here:

> Q. So based on this disclosure in the forensic interview, where were you at in the investigation? What was the next step for you?
>
> A. The next step would be to speak to the mother.
>
> Q. Did you interview the parties in this case?
>
> A. Yes, I did.
>
> Q. Did you interview the defendant?
>
> A. Yes, I did.
>
> Q. Did you interview the biological mother, [M.M.]?
>
> A. Yes, I did.
>
> Q. Did you interview [the father]?
>
> A. Yes, I did.
>
> Q. When you had conducted that investigation, what was your determination after doing all that investigation?
>
> A. I work off of the proof and the facts that I have at hand. And I found that—
>
> Appellant: Objection, this calls for a conclusion.
>
> Court: It's overruled.
>
> A. And I found that the victim was being truthful in her statement.

Appellant did not object following that final answer, but he argues now that the answer "add[s] insult to injury" because the prosecutor elicited more testimony about the truthfulness of the complainant. We disagree with appellant's characterization. The prosecutor did not specifically solicit a comment about the complainant's truthfulness. For instance, the prosecutor did not inquire into the possibility of "false allegations" or "coaching," as in another case where we have found improper opinion testimony. *See Lane v. State*, 257 S.W.3d 22, 24–25 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Based on the context, the trial court

could have reasonably determined that the prosecutor was only attempting to establish a chronology in the detective's investigation. Indeed, the prosecutor passed the witness after establishing in just two follow-up questions that charges were filed against appellant and that a warrant had issued for his arrest.

Appellant could have objected after the detective opined that the complainant had been truthful, or he could have moved for an instruction to disregard. *See Haggerty v. State*, 491 S.W.2d 916, 917 (Tex. Crim. App. 1973) ("A prompt instruction to disregard an unresponsive answer is usually sufficient to cure error, if any."). But because he did neither, we conclude that any error relating to the detective's testimony has not been preserved. *See* Tex. R. App. P. 33.1.

MOTION FOR NEW TRIAL (Issue Eight)

Following his conviction, appellant received appellate counsel, who filed a motion for new trial on his behalf. The trial court did not conduct a hearing on the motion, which was overruled by operation of law. Appellant now argues that the trial court abused its discretion by refusing to hold a hearing.

Before we can consider the merits of appellant's complaint, the record must show that appellant "presented" his motion to the trial court. *See Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005). Presentment occurs when the defendant gives the trial court actual notice of his motion and a request for a hearing. *Id.* Presentment must be apparent from the record, and it may be shown by such proof as the judge's signature or notation on the motion or proposed order, an entry on the docket sheet showing presentment, or the setting of a hearing date. *See Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009) (providing a nonexclusive list of methods of proof). Without proof of presentment, the defendant preserves nothing for appellate review. *See Rozell*, 176 S.W.3d at 230.

Appellant filed his motion for new trial with a blank certificate of presentment. The certificate had signature lines for the trial judge and the clerk of the court, but they were both unsigned. More than a month after he filed his motion, appellant filed an addendum containing a certificate of presentment signed only by the clerk of the court.

The clerk's signature is not sufficient to show that appellant presented his motion to the trial court. *See Carranza v. State*, 960 S.W.2d 76, 78 (Tex. Crim. App. 1998) ("The filing of a motion for new trial alone is not sufficient to show presentment."); *Butler v. State*, 6 S.W.3d 636, 639 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) ("Presentment requires a defendant to go beyond simply filing the motion for new trial with the clerk of the trial court."). And nothing else in the record establishes that appellant gave the trial court actual notice of his motion and request for a hearing. Therefore, the presentment requirement is lacking, and nothing is preserved for appellate review. *See Rozell*, 176 S.W.3d at 230.

OFFER OF PROOF (Issue Nine)

After the State rested, appellant tried to call to the stand a CPS investigator. When the bailiff informed the court that the CPS investigator was not in the hallway, appellant approached the bench and asked to make an offer of proof. The trial court excused the jury, and then appellant stated the following:

> I would like to make an offer to the Court because this witness is material to my defense. She will establish the complaining witness's motive to falsify testimony, and the outcry witness—or I'm saying the outcry witness's motive to testify. On numerous occasions [the complainant] recanted to her, to the gentlemen with the ADA here, both when the first allegations ensued that was physical abuse. She told [the CPS investigator] that I hadn't done anything to her and that she wasn't afraid of me.

> Two months later on June 2nd when the sexual abuse allegation came in because supposedly I was applying vaginal ointment to her bottom, that I was sexually abusing her when the Baytown Police Department told her—told [the father] to call back and to call La Porte because they live in La Porte. When he called back three days later on July 11, he changed—he changed the story, as well, again. And [the CPS investigator] and [a CPS caseworker] can testify to all that.

The trial court learned that the CPS investigator was absent because appellant had not issued a subpoena for her to appear at the most recent court setting. The trial court suggested that all of the proffered testimony was hearsay, and the court advised appellant to call a different witness.

Appellant now contends that the trial court denied him his absolute right to make an offer of proof. The State responds that appellant has mischaracterized the record, and we agree.

An offer of proof may be in question-and-answer form, or it may be in the form of a concise statement by counsel. *See Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998) (per curiam). Here, appellant, while representing himself, gave a concise statement about the testimony he anticipated from the CPS investigator. The record accordingly shows that appellant was allowed to make an offer of proof. Appellant's ninth issue is without merit.

CUMULATIVE ERROR (Issue Ten)

In his final issue, appellant argues that multiple errors in their cumulative effect rendered his trial fundamentally unfair.

Cumulative error is an independent ground for relief. *See Linney v. State*, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring in refusal of petition for review). A string of harmless errors does not arithmetically create reversible, cumulative error. *Id.* Instead, cumulative error occurs when multiple

harmless errors synergistically cast a shadow upon the integrity of the verdict. *Id.* The defendant must specify which underlying errors cumulatively affected his rights, and he must describe how those errors acted synergistically to deprive him of his rights. *Id.*

Here, appellant complains of a number of so-called "errors," including: (1) the trial court effectively forced appellant to proceed pro se, (2) the trial court refused appellant the opportunity to make an offer of proof, (3) the trial court allowed the complainant's father and pediatrician to testify as outcry witnesses, (4) the trial court allowed a police detective to testify about the truthfulness of the complainant, and (5) the trial court denied appellant a hearing on his motion for new trial. As we explained in previous sections of this opinion, either no error occurred with respect to these complaints or error was not preserved. We cannot consider "non-errors" in an analysis for cumulative error. *See Hughes v. State*, 24 S.W.3d 833, 844 (Tex. Crim. App. 2000); *Vasquez v. State*, 501 S.W.3d 691, 705–06 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

Appellant also complains about the prosecutor, saying that he was "permitted to time and time again use impermissible tactics to bolster the credibility of the complainant." Appellant provides no citations to the record for this claim. We cannot determine if appellant is complaining about a ruling that the trial court made (which may or may not be error), or some unchallenged action that the prosecutor took (which ordinarily cannot be error). *See Snowden v. State*, 353 S.W.3d 815, 821 (Tex. Crim. App. 2011) ("The *parties* do not ordinarily commit error; the *trial court* does, whenever it acts, or fails to act, over the legitimate objection of a party . . . .").

Appellant has not established any errors to be considered in an analysis for cumulative error. Accordingly, we overrule this issue.

CLERICAL ERROR AND CONCLUSION

The judgment reflects that appellant was represented by counsel at trial, which is clearly erroneous. We have the power to modify the judgment to correct this clerical error. *See* Tex. R. App. P. 43.2(b). On our own motion, we modify the judgment to reflect that appellant appeared at trial pro se, with standby counsel at his side, after having knowingly, intelligently, and voluntarily waived his right to counsel. The judgment is affirmed as so modified.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Brown, and Wise.
Do Not Publish — Tex. R. App. P. 47.2(b).