Affirmed and Majority and Concurring Opinions filed August 1, 2023.

In The

Fourteenth Court of Appeals

NO. 14-21-00691-CR

MARC ALEXANDER LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1640910

M A J O R I T Y O P I N I O N

A jury convicted appellant Marc Alexander Lewis of the first-degree felony of continuous sexual abuse of a young child. Tex. Penal Code § 21.02(b), (h). In seven issues, appellant contends the jury charge was erroneous, the trial court erred in admitting or excluding certain evidence including outcry testimony, appellant's trial counsel provided ineffective assistance, and the cumulative effect of the asserted errors denied him due process and a fair trial.

Concluding that his issues lack merit, we affirm.

Background

Appellant is the stepfather of the complainant, whom we refer to as Fiona.[1] Fiona's mother ("Mother") and appellant met when Fiona was two years old and Fiona's sister, Diane, was four years old. Mother had four additional children with appellant.

In May 2019, when Fiona was thirteen years old, she told Mother that appellant had vaginally and orally raped her. According to Mother, Fiona said the abuse began three years prior to the outcry and stopped three months before the outcry. Mother testified that Fiona said the abuse occurred in the house, in Mother's and appellant's bedroom, and in the car.

Fiona, sixteen years old at the time of trial, testified about the abuse. She recalled the first time appellant touched her inappropriately. Fiona was alone in the living room and appellant sat next to her and "started to push himself against" her chest. Appellant made Fiona take her shirt off and he removed his shirt. He began "messing with" her chest and put her hand on his penis under his shorts. Appellant used his hands to move her hand on his penis. Eventually, appellant leaned against Fiona, which felt like "he was adjusting his hips on [her.]"[2]

Fiona also recalled a time when she went into appellant's bedroom, where he pushed her onto the bed. Appellant forced her to perform oral sex on him. This form of sexual abuse occurred "[a] couple of times . . . every once in a while," both at home and in appellant's vehicle.

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[1] We refer to minors and family members by pseudonyms. *See* Tex. R. App. P. 9.10(a)(3).

[2] Fiona told Mother that the abuse began three years before her outcry in May 2019. Evidence indicates that Fiona was thirteen in May 2019. Thus, the jury could have reasonably inferred that the abuse began when Fiona was ten or possibly eleven.

When Fiona was in eighth grade, appellant called her into his bedroom, where he was sitting on the bed. Appellant closed the door, "threw [Fiona] on the bed," and began to undress her. He pushed his penis into her vagina, and she felt "[p]ain." Appellant vaginally raped Fiona "[e]very once in a while" and anally raped her once. Appellant told Fiona not to tell anyone what happened.

Fiona said she told Mother about the abuse after Mother asked "why [Fiona] changed, why [Fiona was] acting different and weird." Fiona did not report the abuse earlier because appellant threatened to hurt Fiona and anyone who found out. Fiona and Mother testified that as Fiona matured through middle school, appellant became more aggressive, mad, and verbally abusive.

Diane, Fiona's older sister, corroborated several aspects of Fiona's account. She testified that Fiona and appellant would spend time alone together. Appellant would ask Fiona to give him a massage, and they would go into his bedroom together with the door closed and locked. They would be in there for "about an hour to 30 minutes." Diane sometimes saw Fiona resisting going to the bedroom, but appellant was "persistent." Diane never heard Fiona crying or yelling or saying no.

Diane also testified about instances when appellant asked Diane to give him massages. Diane described straddling appellant and giving him a massage, while he rocked against her body. She could feel "a bulge" against her crotch. Diane told him that she was uncomfortable and, "[a]fter two or three times, he let [her] get off." This occurred when Diane was fifteen to seventeen years old.

The day after Fiona first told Mother about appellant's acts, Mother took her to the closest hospital, where Fiona reported sexual abuse. Nurse Harmony Pitman evaluated Fiona in the emergency room. Pitman testified that the reason for Fiona's visit was "[s]exual assault of a pediatric and abdominal pain." Pitman also

said that Fiona's demeanor was "[a]pprehensive, head down, not really forthcoming with answers, which is expected, which is typical for this complaint." But Fiona was more forthcoming after Mother left the room for the second half of the interview. After the interview, Pitman contacted child protective services ("CPS") and the Pasadena Police Department ("PPD"). PPD Officer Robert Barrionuevo was dispatched to the hospital, where he spoke with Fiona and Mother. The prosecutor asked Officer Barrionuevo if Fiona made "a disclosure of sexual abuse," but the court sustained appellant's hearsay objection and the officer did not answer.

The State offered as exhibit 3 medical records from Fiona's hospital visit. Appellant objected to "some discharge instructions that have a lot of hearsay, some information about sexual abuse." The State agreed to redact the exhibit to remove pages 36 through 40, and the court admitted exhibit 3 as redacted.

Officer Barrionuevo referred the case to PPD's detective division, and Detective Oscar Ibarra was assigned to investigate the allegation of sexual abuse. After reviewing Officer Barrionuevo's report, Detective Ibarra notified the Children's Assessment Center ("CAC") to schedule a forensic interview and medical exam.[3] Detective Ibarra took a statement from Fiona, who identified appellant as the person who sexually abused her. Detective Ibarra reviewed all the other statements made during the investigation. The prosecutor asked if he found those statements to be consistent, to which the officer answered, "Yes." Appellant objected on hearsay grounds, which the trial court overruled.

[3] At the time of Fiona's initial hospital visit, the hospital did not employ a pediatric sexual assault nurse examiner, so Pitman referred Fiona to the CAC.

CPS Investigator Danitra Fields-Frazier was assigned to investigate the sexual abuse allegation. Without detailing what was said, Fields-Frazier acknowledged that Fiona made a disclosure of sexual abuse.

Lisa Bourgoyne, the CAC's program director, testified regarding Fiona's interview at the CAC. Fiona disclosed to her interviewer that she had been sexually abused. The prosecutor asked if Fiona was able to give details, to which Bourgoyne answered, "Yes." Appellant objected on hearsay grounds. The trial court sustained the objection and instructed the jury to disregard Bourgoyne's answer. At a bench conference, the judge told counsel that she was not going to allow witnesses other than Mother to offer details beyond whether Fiona made a disclosure. Bourgoyne did not testify regarding the specifics of what Fiona stated during the interview.

CAC physician, Dr. Reena Isaac, performed Fiona's medical evaluation. Dr. Isaac testified that, according to Fiona, appellant touched her chest under her clothes with his hands; appellant touched her buttocks under her clothes "with his hand and his part"; and appellant touched her genitals under her clothes with his hand and "his part." Fiona reported penile-anal and penile-genital penetration. Fiona reported pain, but she was unsure if there had been bleeding. Fiona also reported "that she was made to touch his private part with both her hand and mouth." When asked how many times she had been touched inappropriately, Fiona said "A lot."

Dr. Isaac testified that most often in instances of child sexual abuse, the child does not disclose the abuse right after it happens but rather "it's delayed." Fiona told Dr. Isaac that the reason she had not disclosed the abuse before was because appellant threatened her and she was scared.

Dr. Whitney Crowson, a staff psychologist at the CAC, did not interview Fiona but reviewed her forensic interview and other records. Dr. Crowson testified generally about forensic interviews, delayed outcries, and the psychological impacts of sexual abuse. Dr. Crowson testified, without explaining specific acts, that Fiona disclosed sexual abuse in her forensic interview.

Appellant called two brothers who dated Fiona at different times while teenagers. We refer to the brothers as John and Paul. It was their opinion that Fiona was not a truthful person. Fiona's cousin and aunt also offered opinion testimony that Fiona was not a truthful person.

The indictment alleged that appellant,

> . . . on or about October 9, 2016 continuing through May 15, 2019, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age, including an act constituting the offense of aggravated sexual assault of a child, committed against F.B. on or about October 9, 2016, and an act constituting the offense of aggravated sexual assault of a child, committed against F.B. on or about May 15, 2019, and the Defendant was at least seventeen years of age at the time of the commission of each of those acts.

The jury found appellant guilty as charged in the indictment and assessed appellant's punishment at forty years' confinement with the Texas Department of Criminal Justice, Institutional Division and a $100 fine. The trial court signed a judgment in accordance with the jury's verdict, and appellant timely appealed.

Analysis

A. Jury Charge Issue

For the offense of continuous sexual abuse of a young child, the Penal Code requires the jury to agree unanimously that two or more acts of sexual abuse occurred during a period that is thirty or more days in duration. Tex. Penal Code

§ 21.02(b). In his first issue, appellant argues that the jury charge erroneously allowed the jury to convict him regardless whether the predicate acts occurred at least thirty days apart.

1. Standard of review

We evaluate complaints of jury charge error in two steps. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). First, we determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). Second, we review the record to determine whether sufficient harm was caused by the error to require reversal of the conviction. *Id.* We conclude that the charge language at issue was not erroneous and thus do not reach the harm issue.

2. The offense and the jury charge

The State charged appellant with violating Penal Code section 21.02, which provides in relevant part:

> (b) A person commits an offense if:
>
> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is:
>
> (A) a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense; or
>
> (B) a disabled individual.
>
> . . .
>
> (d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the

> defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

Tex. Penal Code § 21.02(b), (d).

Section 21.02 lists predicate offenses which constitute "act[s] of sexual abuse" to include the offenses of indecency with a child, *id.* § 21.11(a)(1), and aggravated sexual assault, *id.* § 22.021.

The Texas Court of Criminal Appeals has explained that, in section 21.02,

> the Legislature intended to permit one conviction for continuous sexual abuse based on the repeated acts of sexual abuse that occur over an extended period of time against a single complainant, even if the jury lacks unanimity as to each of the particular sexual acts or their time of occurrence, *so long as the jury members agree that at least two acts occurred during a period that is thirty or more days in duration*.

Price v. State, 434 S.W.3d 601, 605-06 (Tex. Crim. App. 2014) (emphasis added).

The jury charge in today's case tracked the statutory elements nearly verbatim. In relevant part, the charge provided:

> DEFINITIONS
>
> Our law provides that a person commits an offense if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and, at the time of the commission of each of the acts of sexual abuse, the person was 17 years of age or older and the victim is a child younger than 14 years of age. . . .
>
> CHARGE OF CONTINUOUS SEXUAL ABUSE OF A CHILD
>
> . . . [I]n order to find the defendant guilty beyond a reasonable doubt of the offense of continuous sexual abuse of a child, you must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

> Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, the defendant, Marc Alexander Lewis, heretofore on or about the 9th day of October, 2016 continuing through the 15th day of May, 2019, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age including an act constituting the offense of aggravated sexual assault of a child, committed against F.B. on or about October 9, 2016, and an act constituting the offense of aggravated sexual assault of a child, committed against F.B. on or about May 15, 2019, and the defendant was at least seventeen years of age at the time of the commission of each of those acts, then you will find the defendant guilty of continuous sexual abuse of a child, as charged in the indictment.

3. Application

Appellant argues that the phrase "during a period that is 30 or more days in duration" erroneously allowed the jury to convict him of conduct that occurred during a period that was less than thirty days in duration. The cornerstone of appellant's argument is *Smith v. State,* 340 S.W.3d 41 (Tex. App.—Houston [1st Dist.] 2011, no pet.), a case in which the charge stated that the jury could find the defendant guilty if it found that "on or about the 1st day of December, 2007, through the 1st day of September, 2008, *which said time period being a period that was 30 days or more in duration*, in Brazoria County, Texas, the defendant, Jesse James Smith, committed two or more acts of sexual abuse against [the complainant]." *Id.* at 50 (emphasis in original). As phrased, the court said, the charge irrelevantly noted that the period specified in the indictment—December 2007 to September 2008—was a time period that was thirty days or longer in duration. The appeals court concluded that the instruction "lacked clarity" because "it allowed the jury to find appellant guilty so long as two or more acts of sexual abuse occurred between December 2007 and September 2008 regardless of whether the acts occurred at least 30 days apart." *Id.* In other words, the

instruction erroneously implied that, because December 2007 and September 2008 were more than thirty days apart, any acts of abuse committed within that time period were sufficient to support a conviction, even if the acts of abuse themselves were not separated by thirty days. *See id.* at 50-51. The court proceeded to address harm and concluded that the appellant was not egregiously harmed by the error. *Id.* at 53.

Relying on *Smith*, the Amarillo Court of Appeals held the following charge language was error:

> Now, . . . if you unanimously believe from the evidence beyond a reasonable doubt that [appellant], *during a period that was 30 or more days in duration, to-wit: from on or about September 1, 2007 to on or about January 1, 2010,* in the County of Randall, and State of Texas, did then and there, when the defendant was 17 years of age or older, intentionally or knowingly commit two or more acts of sexual abuse against [A.F.], a child younger than 14 years of age ....

Jimenez v. State, No. 07-13-00303-CR, 2015 WL 6522867, at *5 (Tex. App.—Amarillo Oct. 26, 2015, pet. ref'd) (mem. op., not designated for publication) (emphasis added). The *Jimenez* court held that the application paragraph, like that in *Smith*, confused the statutory thirty-day-period requirement with the "on or about" period alleged in the indictment and was therefore error. *Id.* at *6. As in *Smith*, the court in *Jimenez* concluded the error did not harm the appellant. *Id.*

The Amarillo Court of Appeals later considered a jury charge more closely resembling the charge language before us. *See Turner v. State*, 573 S.W.3d 455, 461-63 (Tex. App.—Amarillo 2019, no pet.). The charge in *Turner* stated that the jury could convict the defendant of continuous sexual abuse if it determined that the defendant:

> on or about June 1, 2013 through August 1, 2013, in the County of Randall, and State of Texas, during a period that was 30 days or more

> in duration and when the Defendant was 17 years of age or older, did intentionally or knowingly commit two or more acts of sexual abuse.

Id. at 462. Though the language at issue in *Turner* was different from both *Smith* and *Jimenez*, the court reached the same result, explaining that, "[w]hile someone with an understanding of the statute might argue that this provision is clear, the express language used does not make it clear that the first and last acts must occur thirty or more days apart." *Id.* The court again held, however, that the error was not egregiously harmful. *Id.* at 464. More recently, the Texarkana Court of Appeals has followed the Amarillo court in holding that a jury instruction similar to the one in *Jimenez* was error, albeit harmless. *Lewis v. State*, No. 06-21-00021-CR, 2022 WL 630288, at *6 (Tex. App.—Texarkana Mar. 4, 2022, pet. ref'd) (mem. op., not designated for publication).[4]

Other intermediate appellate courts, including ours, have examined and upheld charge language tracking the Penal Code and almost identical to the text at issue here. Appellant does not discuss or mention this line of cases in his brief. In 2019, a panel of this court issued an unpublished opinion addressing and rejecting a jury charge complaint against charge language nearly identical to the charge at issue. In *Moreno v. State*, the charge read:

> Our law provides that a person commits an offense *if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse*, regardless of whether the acts of sexual abuse are committed against one or more victims; and, at the time of the commission of each of the acts of sexual abuse, the person was 17 years of age or older and the victim is a child younger than 14 years of age. . . .
>
> In order to find the defendant guilty of the offense of continuous sexual abuse of a young child, you are not required to agree

[4] The Court of Criminal Appeals refused to review *Jimenez* and *Lewis* but was not asked to review *Smith* or *Turner*.

> unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. *However, in order to find the defendant guilty of the offense of continuous sexual abuse of a young child, you must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse*. . . .
>
> [In order to convict the defendant, the jury must find that the defendant] on or about . . . August 26, 2013 continuing through August 2, 2016, did then and there unlawfully, *during a period of thirty or more days in duration*, commit at least two acts of sexual abuse.

Moreno v. State, No. 14-18-00113-CR, 2019 WL 2000905, at *3 (Tex. App.—Houston [14th Dist.] May 7, 2019, pet. ref'd) (mem. op., not designated for publication) (emphasis in original). Like appellant argues here, the appellant in *Moreno* urged that the charge authorized a conviction for predicate acts committed fewer than thirty days apart. We disagreed, holding that the charge tracked the statutory language in section 21.02 and did not authorize a non-unanimous verdict in the respect contended by the appellant. *See id.* The appellant petitioned the Court of Criminal Appeals to review the case, but that court refused the petition.

In addition to our court, the Third, Fourth, and Fifth Courts of Appeals, in unpublished opinions, have rejected the same argument appellant advances in this case and involving materially indistinguishable charge language. *See Hernandez-Silva v. State*, No. 03-19-00219-CR, 2020 WL 4726632, at *7-8 (Tex. App.—Austin Aug. 14, 2020, pet. ref'd) (mem. op., not designated for publication); *McKinney v. State*, No. 05-14-01350-CR, 2016 WL 3963369, at *16 (Tex. App.—Dallas July 18, 2016, pet. ref'd) (mem. op., not designated for publication); *Quintero v. State*, No. 04-13-00596-CR, 2015 WL 1914595, at *1-2 (Tex. App.—San Antonio Apr. 15, 2015, pet. ref'd) (mem. op., not designated for publication);

Knowles v. State, No. 04-12-00180-CR, 2013 WL 1149063, at *5 (Tex. App.—San Antonio Mar. 20, 2013, pet. ref'd) (mem. op., not designated for publication).

Last year, and after our decision in *Moreno*, a different panel of this court again evaluated whether the jury charge language at issue constitutes error. *Pelcastre v. State*, 654 S.W.3d 579, 588 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd). Noting conflicting intermediate appellate court decisions on the matter, our court did not address the merits of the asserted charge error but proceeded to conduct a harm analysis and held that the appellant suffered no egregious harm. *Id.* at 587 n.3, 588-90.[5] In the process, we noted that the issue of jury charge error merited Court of Criminal Appeals review. *Id.* at 588 n.4. A concurring justice agreed, though he opined that that charge instruction in that case did not constitute error. *Id.* at 592 (Wilson, J., concurring). Again declining to review the question of charge error, the Court of Criminal Appeals refused the appellant's petition for discretionary review in *Pelcastre*.

As the same question is presented to this court yet again, we believe it appropriate to decide appellant's charge error argument on the merits, as we did in *Moreno*. To begin with, we conclude that *Smith* is inapposite because it involved materially distinguishable charge language. In contrast to *Smith*, the abstract paragraph now before us provided: "Our law provides that a person commits [the offense of continuous sexual abuse of a child] if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse [against a child]. . ." This follows the statutory text of section 21.02 almost verbatim. Further, the application paragraph instructed the jury that to find appellant guilty,

[5] In recently addressing a similar charge complaint, the Fort Worth Court of Appeals assumed error but affirmed the judgment because it also concluded the error was harmless. *Williams v. State*, No. 02-20-00104-CR, 2021 WL 5227167, at *6-7 (Tex. App.—Fort Worth Nov. 10, 2021, no pet.) (mem. op., not designated for publication).

the jury must find that appellant, between "on or about the 9th day of October, 2016 continuing through the 15th day of May, 2019, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age." Unlike the charge in *Smith*, the charge here did not imply that because the dates alleged in the indictment were separated by more than thirty days, that alone was sufficient to satisfy the statute. Instead, the language "during a period of time of thirty or more days in duration" refers to the "commit at least two acts of sexual abuse" language. Thus, the charge tracked the language of the statute, which provides that a person commits the offense of sexual abuse of a child if, "during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse." Tex. Penal Code § 21.02(b)(1).

The present charge is almost identical to the charge in *Moreno*, in which we overruled a jury charge complaint like appellant's, albeit in an unpublished disposition. As in *Moreno*, the present charge clearly provided that two or more acts of sexual abuse, if the jury found they occurred, must have occurred during a period that continued for not less than thirty days in duration to support a conviction, and that the jury must unanimously so find. *See Moreno*, 2019 WL 2000905, at *3. Contrary to appellant's assertions, the jury could not properly have convicted appellant under this charge if the jury determined that appellant committed at least two acts of sexual abuse, all within a period of less than thirty days. Instead, jurors could only convict if the acts of sexual abuse occurred during a period of thirty or more days in duration. *See id.*; Tex. Penal Code § 21.02.

Generally, a jury charge that tracks statutory language is not erroneous. *See Casey v. State*, 215 S.W.3d 870, 888 (Tex. Crim. App. 2007) (holding that charge tracking language of statute was not erroneous and "declin[ing] appellant's

invitation to act as a super-legislature and rewrite [the statute]"); *Martinez v. State*, 924 S.W.2d 693, 699 (Tex. Crim. App. 1996) ("Following the law as it is set out by the Texas Legislature will not be deemed error on the part of a trial judge."). To be sure, as this court has explained, merely following statutory text is not always sufficient to further the charge's purpose of preventing confusion. *See Navarro v. State*, 469 S.W.3d 687, 698-99 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("A charge will not prevent confusion if the statutory text on which it is based has a variable meaning in the eyes of the jury.").[6]

We do not believe this particular statutory text to be confusing, and we do not fault the trial judge for having followed it in instructing the jury. The Court of Criminal Appeals has interpreted section 21.02 as expressing legislative intent to "permit one conviction for continuous sexual abuse based on the repeated acts of sexual abuse that occur over an extended period of time against a single complainant, even if the jury lacks unanimity as to each of the particular sexual acts or their time of occurrence, *so long as the jury members agree that at least two acts occurred during a period that is thirty or more days in duration*." *Price*, 434 S.W.3d at 605-06 (emphasis added). We presume that the Legislature is aware of relevant case law when it enacts, or declines to amend, statutes. *See In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) (orig. proceeding) ("We presume that the Legislature is aware of relevant case law when it enacts or modifies statutes."); *Miller v. State*, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000) (court presumed that Legislature was aware of both how courts have been interpreting prior version of a statute and of the court's prior opinions when it enacted current version of statute);

[6] In *Navarro*, we examined whether the charge should have included the definition of a statutory term and whether the term at issue had acquired a technical or established legal meaning. *Id.* (citing *Medford v. State*, 13 S.W.3d 769, 771-72 (Tex. Crim. App. 2000); *Middleton v. State*, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003) (plurality op.)).

Ex parte Blume, 618 S.W.2d 373, 377 (Tex. Crim. App. 1981) (it is presumed that the Legislature, when it meets to consider enacting new laws or repealing old laws, is aware of the court's decisions). Since *Price*, the Legislature has been presumptively aware of the Court of Criminal Appeals' interpretation of section 21.02, but it has done nothing to amend the statute to add any language that appellant contends is needed.[7]

For these reasons, we hold that the challenged jury charge language is not erroneous. *See Hernandez-Silva*, 2020 WL 4726632, at *7-8; *McKinney*, 2016 WL 3963369, at *16; *Quintero*, 2015 WL 1914595, at *1-2; *Knowles*, 2013 WL 1149063, at *5. Because we hold that there was no error in the charge as alleged, we need not consider appellant's argument regarding harm. *See Moreno*, 2019 WL 2000905, at *2. We overrule appellant's first issue.

B. Evidentiary Rulings

In his second, third, fourth, and fifth issues, appellant challenges various evidentiary rulings.

1. Standard of review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial court abuses its discretion if the decision falls outside the zone of reasonable disagreement—that is, the ruling was "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* at 83 (quotation omitted). If

[7] Nor has the Legislature amended section 21.02 despite recommendations for including additional charge language set forth in the pattern jury charge for continuous sexual abuse of a young child. *See* Comm. on Pattern Jury Charges—Criminal, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Crimes against Persons & Property* CPJC 84.2 (2020). The pattern jury charge recommends that the following language be added: "With regard to element 2, you must all agree that at least thirty days passed between the first and last acts of sexual abuse committed by the defendant." *Id.*

the trial court's evidentiary ruling is correct under any applicable theory of law and is reasonably supported by the record, it will not be disturbed even if the trial court gave a wrong or insufficient reason for the ruling. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). We may not substitute our own decision for that of the trial court. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018).

2. Outcry testimony

In his second issue, appellant argues that the trial court erred by admitting outcry hearsay testimony from witnesses other than Mother.

Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing" and that "a party offers in evidence to prove the truth of the matter asserted in the statement." Tex. R. Evid. 801(d). Hearsay is generally inadmissible, *see id.* R. 802, but article 38.072 of the Code of Criminal Procedure specifies that an outcry statement is not inadmissible on hearsay grounds in cases involving certain sexual offenses against a child if the statement "describe[s] . . . the alleged offense," is "made by the child," and is "made to the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense." Tex. Code Crim. Proc. art. 38.072, § 2(a). For statements described in section 2(a) to be admissible, the offering party must comply with notice requirements; the trial court must find, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and the child either testifies or is available to testify. *See id.* § 2(b)(2). "The phrase 'time, content, and circumstances' refers to '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.'" *Buentello v. State*, 512 S.W.3d 508, 517 (Tex. App.—

Houston [1st Dist.] 2016, pet. ref'd) (quoting article 38.072 and *Broderick v. State*, 89 S.W.3d 696, 699 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd)).

When interpreting article 38.072, the Court of Criminal Appeals has explained that the provision refers to the first adult "to whom the child makes a statement that in some discernible manner describes the alleged offense." *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). In other words, "the statement must be more than words that give a general allusion that something in the area of sexual abuse was going on." *Id.* In general, the proper outcry witness is the first adult to whom the alleged victim relates "how, when, and where" the abuse occurred. *See Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd); *but see Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd) (explaining that "the 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"). In cases where a child has allegedly been the victim of more than one act of sexual abuse, multiple outcry witnesses may testify about separate acts of abuse committed by the defendant against the child. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011).

The State offered Mother as the outcry witness. The trial court conducted the requisite hearing outside the presence of the jury and determined that Mother "may testify as outcry witness." As summarized above, both Mother and Fiona testified at trial.

Appellant complains that the court admitted testimony or evidence from the following witnesses when it should have excluded the evidence as inadmissible hearsay:

- Detective Ibarra, who testified that he collected or reviewed statements during the investigation and those statements were "consistent."
- Dr. Isaac, who testified regarding the medical exam performed at the CAC.
- Lisa Bourgoyne, who testified regarding the forensic interview and who confirmed the Fiona made a disclosure of sexual abuse.
- Dr. Crowson, who confirmed that Fiona made a disclosure of sexual abuse during her forensic interview.
- Harmony Pitman, the emergency room nurse, who testified that Fiona came to the emergency room because of "sexual assault of a pediatric and abdominal pain."
- Danitra Fields-Frazier, the CPS investigator, who testified that Fiona made a disclosure of sexual abuse.

Appellant also complains about one page in State's exhibit 3, Fiona's hospital records. Although the State redacted several pages, one remaining page, page 25, contained hearsay details of the alleged abuse, including that the described acts occurred more than twenty times.

We begin with appellant's challenge to exhibit 3. Although appellant successfully objected to parts of exhibit 3 and the trial court ordered those parts redacted, appellant failed to specifically draw the trial court's attention to the hearsay on page 25 and thus waived any error as to that particular page. *See, e.g.*, *Flores v. State*, 513 S.W.3d 146, 174 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) ("At that point, it was incumbent on appellant to identify with specificity any other objectionable portions of the medical records."). Additionally, Pitman read

the narrative from page 25 while testifying, and appellant did not object. *See Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (error in the admission of evidence is cured where the same evidence comes in elsewhere without objection). Thus, appellant suffered no harm from any error in the admission of exhibit 3.

We next turn to the testimony of the six witnesses at issue. As to two of them, Dr. Isaac and Pitman, appellant did not raise a hearsay objection during their testimony and thus did not preserve his appellate complaints as to those witnesses. *See* Tex. R. App. P. 33.1(a).

Regarding the other four witnesses—Detective Ibarra, Bourgoyne, Dr. Crowson, and Fields-Frazier—we conclude that any error in the admission of their testimony was harmless. The improper admission of hearsay testimony is non-constitutional error that is harmless unless the error affected the defendant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004); *Nino v. State*, 223 S.W.3d 749, 754 (Tex. App.—Houston [14th Dist.] 2007, no pet.). An error is harmless if we are reasonably assured that the error did not influence the verdict or had only a slight effect. *See Garcia*, 126 S.W.3d at 927; *Shaw v. State*, 329 S.W.3d 645, 653 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Likewise, the improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *See Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *Shaw*, 329 S.W.3d at 653 (citing *Nino*, 223 S.W.3d at 754); *Chapman v. State*, 150 S.W.3d 809, 814 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

This court has held consistently that any error in the admission of a witness's hearsay description of the complainant's outcry statement is harmless when the complainant and other witnesses provided substantially the same account of the

offense. *See Merrit v. State*, 529 S.W.3d 549, 557 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd); *Nino*, 223 S.W.3d at 754; *see also Chapman*, 150 S.W.3d at 814-15. And, when the objected-to witness testimony describing the complainant's statement contained far less detail than the complainant's own testimony about the sexual abuse, this court has held any error in the admission of outcry testimony is harmless. *Shaw*, 329 S.W.3d at 653-54.

As in these cases, any error in the admission of testimony from Detective Ibarra, Bourgoyne, Dr. Crowson, and Fields-Frazier about Fiona's out-of-court statements confirming that she had been sexually abused was harmless, because Fiona, Mother, and Dr. Isaac testified about the sexual abuse in much greater detail. *See Merrit*, 529 S.W.3d at 557; *Shaw*, 329 S.W.3d at 653-54.

We overrule appellant's second issue.

3. Extraneous bad acts

In his third issue, appellant argues that the trial court erred by allowing evidence of extraneous bad acts when the State failed to comply with statutory notice requirements.

Generally, extraneous crimes, wrongs, or other acts are not admissible during the guilt phase of a trial in order to prove the defendant's character and that the defendant committed the charged offense in conformity with the character. Tex. R. Evid. 404(b); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). Exceptions exist, however, and one is contained in article 38.37 of the Code of Criminal Procedure. It applies in certain sexual abuse cases, including continuous sexual abuse of a young child. *See* Tex. Code Crim. Proc. art. 38.37, § 2(a)(1)(B). Under that statute, and "[n]otwithstanding Rules 404 and 405, Texas Rules of Evidence, . . . evidence that the defendant has committed a separate

offense described by Subsection (a)(1) or (2)[8] may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2)[9] for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." Tex. Code Crim. Proc. art. 38.37, § 2(b). The State must give the defendant notice of the State's intent to introduce in the case in chief evidence described by article 38.37 not later than the thirtieth day before the date of the defendant's trial. *See id.* art. 38.37, § 3; *see also* Tex. R. Evid. 404(b) (the prosecution must provide reasonable notice of the intent to offer extraneous-offense evidence in its case-in-chief upon request by a defendant).

Appellant complains that the State introduced the following extraneous bad acts without complying with the statutory notice requirements: appellant's verbal abuse (i.e., calling Fiona and Diane "names" or calling them "stupid," as Mother and Diane testified); and appellant's requests that Diane give him massages, including one instance when appellant made Diane straddle him and she felt a "bulge" against her "crotch area."

The name-calling instances appellant cites are not extraneous crimes or bad acts as contemplated by rule 404. *See, e.g.*, *Zahirniak v. State*, No. 10-16-00336-CR, 2019 WL 1837340, at *5 (Tex. App.—Waco Apr. 24, 2019, pet. ref'd) (mem. op., not designated for publication) ("The text message exchange between Zach and Appellant could be described, as the State notes, as 'rude, tasteless or unseemly,' but the messages do not rise to the level of crimes or bad acts requiring notice under Rule 404(b)."). Thus, no notice was required under the statute.

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[8] Separate offenses include, among others, indecency with a child. *See* Tex. Penal Code § 21.11.

[9] Alleged offenses include, among others, continuous sexual abuse of a child. Tex. Penal Code § 21.02.

We also find no merit in appellant's challenge to Diane's testimony about the massages. Presuming that Diane's testimony described a separate offense under subsection (a)(1) or (2), notice is required only when the State intends to introduce the evidence in its case in chief. *See* Tex. Code Crim. Proc. art. 38.37, § 3. Here, it is undisputed that the State offered Diane's testimony after both sides rested and specifically to rebut the defensive theory of fabrication. In this circumstance, the notice requirement is inapplicable. *See Collmorgen v. State*, No. 01-18-00773-CR, 2020 WL 4210494, at *7-8 & n.3 (Tex. App.—Houston [1st Dist.] July 23, 2020, pet. ref'd) (mem. op., not designated for publication).

The trial court's ruling was not an abuse of discretion, and we overrule appellant's third issue.

4. Complainant's sexual history

In his fourth issue, appellant argues that the trial court erred by excluding evidence of Fiona's sexual history with a third party that contradicted Fiona's report to the CAC. During the State's case-in-chief, Dr. Isaac testified that Fiona reported no history of voluntary sexual activity during the CAC medical examination. The court also admitted State's exhibit 7—the CAC's initial assessment report—which indicates Fiona reported she was not sexually active. Outside the presence of the jury, appellant notified the court that he intended to elicit testimony from John that he and Fiona had been sexually active. The trial judge stated, "[A]ny reference to any sexual activity of the complainant with other individuals is irrelevant to these proceedings; and so, we're not going to be going into anything like that. . . . [And] the inflammatory or prejudicial effects of this line of questioning outweighs the probative value." Appellant then offered proof of John's expected testimony, including that John had sex with Fiona when she was thirteen years old. On appeal, appellant contends the trial court's exclusionary

ruling violated his rights under the rules of evidence and the Confrontation Clause because John's testimony "was necessary to clear up the unfair and false impression that [Fiona] was not sexually active."

Rule of Evidence 412 is a "rape shield" law intended to shield a sexual-assault victim from the introduction of highly embarrassing, prejudicial, and irrelevant evidence of prior sexual behavior. *See Allen v. State*, 700 S.W.2d 924, 929 (Tex. Crim. App. 1985); *Kissoon v. State*, No. 02-12-00289-CR, 2013 WL 4679195, at *2 (Tex. App.—Fort Worth Aug. 29, 2013, pet. ref'd) (mem. op., not designated for publication). The rule prohibits the admission of evidence of a sexual-assault victim's previous sexual conduct unless it falls within five exceptions: (1) it is necessary to rebut or explain scientific or medical evidence offered by the State; (2) it concerns past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged; (3) it relates to the motive or bias of the alleged victim; (4) it is admissible under rule 609; or (5) it is constitutionally required to be admitted. Tex. R. Evid. 412(b)(2). Further, the probative value of the evidence must outweigh the danger of unfair prejudice. Tex. R. Evid. 412(b)(3).

We need not decide whether John's expected testimony falls within one of the enumerated exceptions in rule 412 because, even presuming it does, we may affirm the exclusionary ruling based on the trial court's finding that the probative value of the evidence was outweighed by the danger of unfair prejudice. *See id.* In determining whether the prejudicial effect of evidence substantially outweighs its probative value, we engage the familiar balancing test under rule 403, specifically: (1) how compellingly the evidence serves to make a fact of consequence more or less probable; (2) the evidence's potential to impress the jury in some irrational but

indelible way; (3) the trial time that the proponent will require to develop the evidence; and (4) the proponent's need for the evidence. *See Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002).

To the extent appellant offered John's testimony to show that Fiona provided a false statement to the CAC and was therefore untrustworthy, John's testimony carries diminished probative value, considering that appellant presented character evidence from at least three other witnesses, including Paul, who opined that Fiona was not truthful. Thus, John's testimony was not compelling evidence to make a fact of consequence more or less probable, nor did appellant necessarily need John's testimony to attack Fiona as untruthful. *See Woods v. State*, 301 S.W.3d 327, 335 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Moreover, assuming the truth of John's testimony, this evidence had the potential to impress the jury in an irrational and indelible way, especially considering Fiona's young age when she and John had sex. *See Allen*, 700 S.W.2d at 929. Appellant has directed us to no case supporting his argument that the probative value of John's limited testimony outweighed the danger of unfair prejudice, nor has he offered substantive discussion on the point in his brief. Weighing the relevant factors, we conclude that the probative value of the evidence, if any, of Fiona's sexual history was substantially outweighed by the prejudicial effect of the evidence. *See* Tex. R. Evid. 403, 412(b)(3). Accordingly, we hold that the trial court acted within the zone of reasonable disagreement by excluding John's testimony. *See Woods*, 301 S.W.3d at 335.

We overrule appellant's fourth issue.

5. Bases of witness's opinion

In his fifth issue, appellant argues that the trial court erred by excluding re-direct testimony from Paul regarding the specific bases for his opinion that Fiona was not trustworthy.

Appellant called Paul during his case-in-chief to challenge Fiona's credibility. Paul knew Fiona from school and briefly dated her. In Paul's opinion, Fiona was not a truthful person. On cross-examination, the prosecutor asked if Paul and Fiona shared classes together, to which he answered, "No -- I don't remember. Not sure." The prosecutor then asked, "So, how did you meet her?" Paul said, "By after school and during school." The prosecutor said, "So, your opinion is based on sometimes you hung out with her after school in your brief time dating her; is that right?" Paul answered, "Yes, ma'am." The prosecutor passed the witness.

On re-direct, appellant's counsel wanted to inquire further into the bases of Paul's opinion. The State objected to "hearsay and improper evidence -- character evidence." At a bench conference, appellant's counsel said, "[The State] asked the question of what was your opinion based on . . . [a]nd that is what I want to go into." The judge said, "It was a cross-examination question about -- like about a time spent with her and what the exposure and length of time was." After the court reporter read back the prosecutor's last question, the judge stated, "So, I think it was just based on the amount of time or length of time and how long he knew her. So, we're not getting into any specific instances." In an offer of proof outside the jury's presence, Paul identified several extraneous instances when he believed Fiona was dishonest with him.[10] Appellant acknowledges that the type of evidence

[10] None of the instances described had any factual connection to the charges against appellant.

he sought to solicit on re-direct is generally inadmissible, but he complains that the court's exclusion was an abuse because the testimony would have clarified the bases of Paul's opinion after the State "opened the door" to that subject.

"Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Tex. R. Evid. 404(a)(1). The general rule barring evidence of a person's character or character trait is subject to the exception allowing for the admission of "[e]vidence of a witness's character" under rule 608. Tex. R. Evid. 404(a)(4). Under that rule, "[a] witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character," but "a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness" with the exception of evidence of certain criminal convictions not at issue in this case. *See* Tex. R. Evid. 608; *see also Hammer v. State*, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009) (stating that "[a] witness's general character for truthfulness or credibility may not be attacked by cross-examining him (or offering extrinsic evidence) concerning specific prior instances of untruthfulness").

Paul's testimony admitted on direct examination and cross-examination does not veer outside the boundaries established by rules 404 and 608. Appellant offered Paul's opinion of Fiona's untruthfulness, as the rules allow. *See* Tex. R. Evid. 608(a). The prosecutor's question on cross-examination permissibly attempted to establish merely that Paul spent limited time with Fiona. The State did not inquire about any specific instances of Fiona's conduct that would have supported a reputation for truthfulness nor is evidence of that sort admissible. *See*

Tex. R. Evid. 608(b).[11] By rejecting appellant's attempt to establish on re-direct examination the reasons Paul considered Fiona untrustworthy by reference to specific instances, the trial court simply excluded the very type of evidence the rules proscribe. *See Lape v. State*, 893 S.W.2d 949, 959 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (in trial for sexual assault of a child, although testimony of witness that alleged victim was not always truthful was admissible for purpose of attacking victim's credibility, testimony concerning alleged specific instances when witness claimed victim was lying were not admissible).

We disagree with appellant that the State opened the door to specific instances of Fiona's conduct illustrating occasions of her untruthfulness unrelated to the facts of this case merely by questioning the extent of Paul's contact with her. *See, e.g., Davila v. State*, No. 05-05-00830-CR, 2006 WL 1680857, at *6 (Tex. App.—Dallas June 20, 2006, pet. stricken) (mem. op., not designated for publication) (prosecutor's general question regarding decedent's behavior and witness's general answer did not open the door to defense counsel's attempt to elicit specifics regarding decedent's criminal history). Appellant directs us to no case endorsing the admission of such evidence under these circumstances. On this record, we conclude the trial court did not abuse its discretion in sustaining the State's objection to appellant's attempt to elicit re-direct testimony regarding specific instances of Fiona's untruthfulness. We overrule appellant's fifth issue.

[11] Once appellant attacked Fiona's character for truthfulness, the State's rehabilitative evidence may not take the form of specific instances of her conduct to support her character for truthfulness. *See* Tex. R. Evid. 608(b); *Hammer*, 296 S.W.3d at 563.

C. Ineffective Assistance of Counsel

In his sixth issue, appellant argues that his trial counsel was ineffective by failing to object to the alleged jury charge error asserted in his first issue and failing to object to the hearsay evidence discussed in his second issue.

We examine claims of ineffective assistance of counsel under the familiar two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Robison v. State*, 461 S.W.3d 194, 202 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Under *Strickland*, the defendant must prove that his trial counsel's representation was deficient and that the deficient performance was so serious that it deprived him of a fair trial. *Strickland*, 466 U.S. at 687. Counsel's representation is deficient if it falls below an objective standard of reasonableness, based on prevailing professional norms. *Id.* at 688. The prejudice prong requires showing a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Id.* at 688-92.

Our review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable professional assistance. *See Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007); *Donald v. State*, 543 S.W.3d 466, 477 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (op. on reh'g). The Court of Criminal Appeals also has stated that if counsel has not had an opportunity to explain the challenged actions, we may not find deficient performance unless the 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).

Because we have considered the jury charge issue on the merits and have concluded that there was no error in the jury charge, we necessarily find appellant has also failed to show he received ineffective assistance of counsel in this regard.

See Riles v. State, 595 S.W.2d 858, 861 (Tex. Crim. App. 1980). Further, concerning counsel's failure to object to hearsay testimony, the record is silent as to counsel's motivations or strategy. Because appellant failed to produce any information regarding counsel's reasons for not objecting to certain hearsay evidence, appellant failed to meet his burden under *Strickland*'s first prong, and we need not consider the requirements of the second prong. *See Lopez v. State*, 343 S.W.3d 137, 143-44 (Tex. Crim. App. 2011); *Johnson v. State*, 624 S.W.3d 579, 586 (Tex. Crim. App. 2021) ("Counsel gets the benefit of the doubt from a silent record.").

We overrule appellant's sixth issue.

D. Cumulative Error

In his seventh issue, appellant argues that the "cumulative effect" of the complained-of errors denied him due process and a fair trial.

"It is conceivable that a number of errors may be found harmful in their cumulative effect." *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). However, the cumulative-error doctrine affords relief only when constitutional errors so "fatally infect the trial" that they violate the trial's "fundamental fairness." *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004). The cumulative-error doctrine does not apply unless the appellant preserved his complaints in the trial court and demonstrates on appeal that the trial court erred. *See Chamberlain*, 998 S.W.2d at 238 ("[W]e are aware of no authority holding that non-errors may in their cumulative effect cause error."). If a defendant fails to prove any error as to his complaints separately, there is no cumulative harm. *Buntion v. State*, 482 S.W.3d 58, 79 (Tex. Crim. App. 2016); *see also Taylor v. State*, No. 05-14-00821-CR, 2016 WL 7439194, at *9 (Tex. App.—Dallas Dec. 27, 2016, pet. ref'd) (mem. op., not designated for publication) (rejecting defendant's

cumulative-error contention after concluding that only one arguable error was preserved, which was harmless, such that there were "no errors to cumulate").

Here, appellant's cumulative-error contention lacks merit because we have concluded, as to his preserved appellate issues, that there was no reversible error as alleged. *See Bell*, 367 F.3d at 471; *Buntion*, 482 S.W.3d at 79; *Chamberlain*, 998 S.W.2d at 238; *Taylor*, 2016 WL 7439194, at *9. Accordingly, we overrule appellant's seventh and final issue.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and Spain. (Spain, J., concurring)

Publish — Tex. R. App. P. 47.2(b).