In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00071-CR
NO. 09-15-00072-CR

ROY WAYNE JACKSON JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 12-12-13308 CR (Counts I and II)

MEMORANDUM OPINION

A jury found Roy Wayne Jackson Jr. (Jackson or Appellant) guilty of one count of continuous sexual abuse of a child and one count of aggravated sexual assault of a child, both first-degree felonies. *See* Tex. Penal Code Ann. §§ 21.02(b), 22.021(a)(1)(B) (West Supp. 2015).[1] The jury assessed punishment on each count at confinement for life and assessed a $10,000 fine, and the trial court

[1] In this Memorandum Opinion, we cite to the current versions of statutes if the subsequent amendments do not affect the outcome of this appeal.

granted the State's motion to cumulate the sentences. Jackson timely filed notices of appeal. We affirm.

THE INDICTMENT

On March 26, 2013, a grand jury indicted Jackson on three counts, wherein the grand jury alleged the following:[2]

> [COUNT NO. 1]
>
> . . . Roy Wayne Jackson Jr., the Defendant, . . . did then and there, during a period that was 30 or more days in duration, to-wit: from on or about September 1, 2007 through May 9, 2010, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against [B.R.], a child younger than 14 years of age, namely, Aggravated Sexual Assault of a Child, . . .
>
> COUNT NO. 2
>
> . . . on or about October 01, 2004 in Montgomery County, Texas, [Jackson], hereinafter styled Defendant, did then and there intentionally or knowingly cause the penetration of the sexual organ of [B.R.], a child who was then and there younger than 14 years of age, . . .
>
> COUNT NO. 3
>
> . . . on or about January 25, 2012 in Montgomery County, Texas, [Jackson], hereinafter styled Defendant, did then and there

[2] We identify the victim and her family members by using initials, and we refer to certain other witnesses by their roles in the investigation. *See* Tex. Const. art. I, § 30(a)(1) (granting crime victims the "right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

> intentionally or knowingly cause the penetration of the sexual organ of [B.R.], a child, . . . [.]

The State tried only the first two counts.[3]

EVIDENCE

Initial Complaint

The authorities were first notified of the alleged sexual assault in this case when J.R. made a voluntary statement and complaint to the Montgomery County Sheriff's office on February 21, 2012. According to the complaint, J.R. was a "[guardian] and [c]ousin" of the victim; J.R. stated that her fifteen-year-old cousin, B.R., had reported that Jackson, B.R.'s thirty-three-year-old stepfather, had sexually assaulted B.R. several times "over approximately the last seven years[.]" Part of J.R.'s statement read as follows:

> . . . [B.R.] told me that Roy had [] took her to a Motel 6 [F]riday and raped her and that it has been going on since she was little and that the baby that she was carrying was his, and that she had an abortion at the age of 14 that was his as well.

Testimony of Sexual Assault Nurse Examiner

A.H. (hereinafter the Nurse), the Sexual Assault Nurse Examiner (SANE) who examined B.R., testified that B.R. was fifteen years old at the time the Nurse

[3] In an earlier proceeding, the State tried all three counts, but that trial ended in a mistrial. *See Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, and 09-14-00140-CR, 2014 Tex. App. LEXIS 8542, at *1 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication).

performed the SANE exam. During the exam, B.R. told the Nurse that B.R. was then seven months pregnant and that her stepfather, Jackson, was the father of the baby. The Nurse agreed that B.R. would have been fifteen years of age when she got pregnant.

According to the Nurse, B.R. told her that Jackson stopped at a motel and after B.R. fell asleep at the motel, Jackson woke her up by taking off her pants and underpants. B.R. told the Nurse that Jackson then had sex with B.R. and that "[i]t has happened for a very long time[.]" B.R. also told the Nurse that the abuse started when B.R. was "around 8 or 9[.]"

Testimony of Children's Safe Harbor Interviewer

K.P., a forensic interviewer with Children's Safe Harbor (hereinafter the Interviewer), also testified that she interviewed B.R. in February of 2012, and at that time B.R. appeared to be pregnant. The Interviewer described B.R.'s account of Jackson's first sexual assault on B.R. when B.R. was eight years old and the family was living on Grove Lane. The Interviewer explained that B.R. stated that while B.R.'s mother was as at work, Jackson, her stepfather, came in the room and asked her brothers to go outside. B.R. recalled that she was on the couch watching SpongeBob, Jackson picked her up and took her back to his bedroom where he touched her on her chest, her thigh and her private area, he put his hands inside her

private area, and he also had sex with her. B.R. described to the Interviewer that it hurt and that she started to cry, and when Jackson was done he told B.R. to shower. B.R. stated she could see "red stuff" on her thighs. According to the Interviewer, B.R. told her that "it happened over and over and more than one time at Grove Lane[,] [] once a week." B.R. also told the Interviewer that B.R. was attending Ben Milam Elementary at the time, and B.R. said Jackson's bedroom had "wood walls or like wood paneling walls[]" and a computer desk with a computer and a television.

The Interviewer recalled that B.R. also described two incidents that occurred when B.R. was eleven years old and the family lived in New Caney. The first incident occurred in B.R.'s bedroom when her mother was at work and her brothers were at a friend's house. B.R. told the Interviewer that Jackson came in, took off B.R.'s clothes, laid her on the floor, and had sexual intercourse with her. During the second incident, B.R.'s mother was out of town and her brothers were asleep. B.R. told the Interviewer that Jackson had been drinking "Jager" and music was blaring, and he pushed B.R. down on the bed and had sexual intercourse with her, and B.R. recalled that it hurt and she wanted Jackson to stop, but she was scared he would hurt her or hit her.

B.R. also told the Interviewer of another incident when B.R. lived in Lone Star, and B.R. said she was in the sixth or seventh grade. B.R. described two occasions when Jackson hit B.R. or punched her when she resisted:

> [B.R.] stated that he hit her in the eye after she told him to stop. . . . She said that he had put his -- pulled off her pants and panties and that it was in his bedroom and that her mom was at work. She said she thought her mom was working at Deerbrook at that time. . . .
>
> . . . .
>
> She talked about the next weekend following that, that he punched her in the nose. She said that he punched her in the nose after she told him to stop and that he told her to shut up. She said that she had just gotten back from a friend's house and her brothers were down the street.

The Interviewer further testified concerning another incident that B.R. said happened when B.R. was in seventh grade and lived in Splendora. B.R. described the Splendora house as brick, sitting in the middle of the yard, with the yard mostly sand, and on Old 59 by a place called Archie's. B.R. also told the Interviewer about an incident that occurred when everyone else was gone from the house, and Jackson pulled B.R. into his bedroom, told her to take off her clothes, and sexually assaulted her. The Interviewer said B.R. told her that such incidents occurred more than once in Splendora. B.R. told the Interviewer that B.R. was living in Splendora and in seventh grade when she became pregnant and her mother and stepfather took her to get an abortion, that B.R. reported the abuse to her mother when B.R.

was eight years old, and that when B.R. was eleven years old, B.R. told her stepfather's (Jackson's) mother about the abuse.

The prosecutor questioned the Interviewer about the nature of the accounts B.R. described:

> [State's attorney]: Now, when a child gives you details like it felt dirty or when a child gives you sensory details, why is that important to you?
>
> [The Interviewer]: Sensory details are details that are hard for children to make up. I mean, they are just details that are real important. And if you have a child tell you what they heard, what they smelled when things happen, those are things that we are taught, you know, are not -- are hard for parents to coach.

The Interviewer also testified that a child who has experienced sexual abuse may first disclose the abuse and later recant some of what they have disclosed, and that a child who has recanted may later reaffirm the disclosure.

Testimony of Nancy Hebert

Nancy Hebert (Hebert) testified that she is the chief prosecutor over the Crimes Against Children division of the Montgomery County District Attorney's office. Hebert testified that B.R. told her about an incident that occurred while B.R. was thirteen years old, when B.R. was attending Splendora Junior High, and living at a house on Old 59. According to Hebert, B.R. said the incident occurred in the summer or fall of 2009, on a trail while B.R. and Jackson were inside a truck.

According to Hebert, B.R. said that after they stopped the truck, Jackson took off B.R.'s sweatpants and underpants and he had sex with her. Jackson asked B.R. if she loved him, wanted to know if she would be with him, and told her he wanted her to leave with him when she was eighteen so he would not go to prison. Hebert testified that B.R. told her that was the first time Jackson had kissed her and that Jackson gave B.R. "Goldschlager" to drink to "loosen her up for what they were doing."

Hebert further testified that B.R. told Hebert that B.R. became pregnant when she was thirteen years old while living at the house in Splendora on Old 59 and that Jackson was the father of that child. B.R. further told Hebert that Jackson acknowledged to B.R. that he was the father of her baby but Jackson told B.R. that she was too young to take care of a baby and "if she couldn't be with him, then she couldn't have his baby." B.R. told Hebert that Jackson and B.R.'s mother took B.R. to Houston, where B.R. thought she was going for a regular checkup on the baby, but instead they took her for an abortion. According to Hebert, B.R. told Hebert:

> . . . that the Defendant had told her to lie and state that the father of the baby was someone by the name of Robert Johnson. She said that she remembers there being a big vacuum machine in the room and that the abortion was probably about two days or so after her 14th birthday.

. . . .

> The doctor had told her to wait at least three weeks before having any type of sexual relations. And the Defendant had sex with her after that three weeks -- the second those three weeks were up.

According to Hebert, B.R. said that when she was living at the Splendora home,

> . . . the Defendant wanted her to take birth control pills and she did not want to take birth control pills. So she didn't take the birth control pills. And when he found that out, he wanted to put her on a patch.

Hebert agreed that B.R. later recanted her story at a hearing three days after Hebert interviewed B.R.

Testimony of Detective Gordy

Detective Trey Gordy (Gordy), a detective with the Montgomery County Sheriff's office, testified for the State. According to Gordy, the records stated that B.R. was in foster care and had a history of abuse by her stepfather, who is the father of her baby. Gordy testified that records stated B.R. had two pregnancies and that the SANE report gave the date of B.R.'s last sexual abuse by Jackson as February 17, 2012.

Gordy testified that he subpoenaed records from the school that B.R. attended at the time. In the school records, he found a medical excuse for minor outpatient surgery, which would have been right after B.R. turned fourteen. Gordy testified that he then subpoenaed the medical records from that clinic. According to

the medical records he obtained from a women's center in Houston, B.R. was fourteen years old and living at an address on Old Highway 59 in Splendora when she received treatment at the clinic. In Gordy's opinion, the records corroborated some of the details in B.R.'s outcries in this case. Gordy stated that the medical records from the women's center included a sonogram taken on May 12, 2010, a few days after B.R.'s fourteenth birthday, which indicated she was fourteen weeks pregnant at that time. The medical records from the women's center indicate they performed an abortion on B.R. Gordy agreed that a copy of B.R.'s student ID from Splendora Junior High was included in the abortion records. According to Gordy, the records from the women's center did not name the father of B.R.'s baby.

Gordy testified that he interviewed B.R. and that J.R., B.R.'s cousin and guardian, was the person who called the police. Gordy agreed that in talking with B.R., he learned of several places the sexual abuse by Jackson could have happened, "The 2005, Grove Lane, the New Caney home, Wild Oak and Lone Star, Old 59 and Splendora[.]" Gordy testified that B.R. never said she had sex with Robert Johnson but that the name "Robert Johnson" was a name that Jackson told her to make up. According to Gordy, B.R. said "she only had sex with one person[]" and that person was Jackson. Gordy explained that B.R. told Gordy that Jackson's sexual assaults on B.R. "continued after the abortion."

State's Exhibit 66, a handwritten letter signed by B.R., was admitted into evidence. In the letter it states that Jackson was not the father of B.R.'s child, and it names one of B.R.'s stepbrothers as the father. Gordy testified that he had become aware that Jackson's family was tampering with the complainant in this case. According to Gordy, the results of the DNA testing he received indicated that Jackson is the father of B.R.'s baby. Gordy agreed that there is no physical evidence to show that B.R. had a history of abuse from age eight to age fourteen but that there is evidence corroborating that B.R. was pregnant at age fourteen and younger.

Testimony of Inmate

An inmate from the jail (hereinafter the Inmate) also testified for the State. The Inmate stated he met Jackson in jail, and that Jackson told him that Jackson first had sex with B.R. when B.R. was eight years old and that Jackson got B.R. pregnant. The Inmate also said that Jackson told him that Jackson had sex with B.R. between the ages of eight and fifteen in motels. Jackson did not tell the Inmate the name of the child with whom he was having sex, although Jackson did tell him that it was the daughter of one of his girlfriends.

The Inmate further testified that he helped Jackson write a letter, that the letter was going to be sent to Jackson's mother, who was then going to send it to

B.R. via text message, and that the letter was intended to be B.R.'s statement. The Inmate stated that the prosecutor had not promised him anything in exchange for his testimony.

Testimony of Sara Shields

Sara Shields (Shields), a forensic biologist who previously worked as a DNA analyst with Bode Technology (Bode), testified for the State. Shields explained that when she was working for Bode, she analyzed DNA evidence in this case for the Montgomery County Sheriff's office. Shields testified that

> Based on the DNA profiles obtained from [B.R.] and Roy Wayne Jackson, Roy Jackson cannot be excluded as the possible biological father of [B.R.'s child].
>
> . . . .
>
> . . . this DNA evidence is 705 million times more likely if Roy Jackson is the biological father of [B.R.'s child] as compared to unrelated individuals of U.S. Caucasian descent.
>
> . . . .
>
> Th[e] probability is 99.99999986 percent that [Jackson] is the father.

Shields also testified that Jackson's three sons were excluded as the biological father for B.R.'s infant son.

Testimony of Foster Parent

R.H. testified for the State that she and her husband currently foster several children, including B.R. and K.R., who is B.R.'s son. B.R. was pregnant at the time B.R. first started staying with R.H. According to R.H., she was suspicious that B.R. was in contact with B.R.'s mother, which was something that CPS did not allow. R.H. found phones other than what R.H. and her husband had allowed B.R. to use, and that one phone was in B.R.'s bed and another phone was in the woods next to her house. When R.H. found the phones, R.H. gave the phones to Detective Gordy.

According to R.H., when she was searching B.R.'s room, she also found a letter B.R. had written that R.H. described as B.R.'s "own statement saying that stepdad never touched her and that -- I believe that's what it says -- and that brother -- that her brother [J.J.], they had had a relationship and that [J.J.] was the one that was [K.R.'s] father." According to R.H., B.R.'s letter was in a journal and B.R. had not sent it to anyone.

Testimony of Officer Ochoa

Officer Javier Ochoa (Ochoa), a patrol officer with the Montgomery County Sheriff's office, testified for the State. Ochoa testified that, prior to serving as a patrol officer, he had worked in the jail as a detention officer and as a deputy,

where one of his duties was to inspect jail cells. Ochoa stated that he inspected Jackson's cell in December of 2013, and that he found some mail belonging to Jackson, including State's Exhibit 67, which was admitted into evidence. Ochoa agreed that Exhibit 67 was a page with two columns, the names of B.R. and her mother, A.R., at the top of the page, and with questions in each column. Ochoa testified that when he obtained the sheet of paper, he made copies and turned it in to his shift supervisor. Ochoa agreed that the page included several written statements, including: "Are they able to use when I got arrested over [A.R.]?", "How do I explain why I was at the hotel [B.R.] said she went to?", and "I bet [woman's name] would say I was with her them nights they said I was with [B.R.]"

Testimony of Joey Ashton

Joey Ashton (Ashton), a criminal investigator with the Montgomery County District Attorney's office, also testified for the State. Ashton stated that he is the custodian of records for the Montgomery County Sheriff's office for inmate jail calls. Ashton testified he had been the lead investigator on this case, that he had "dealt with jail calls for a very long time[,]" and that he had obtained "new information dealing with this case and specifically to the possibility of witness tampering and other issues."

Ashton recalled a prior occasion on which B.R. had testified in court and agreed that B.R. wanted to "change her story[]" to claim that one of her stepbrothers, and not Jackson, was the father of her child. Ashton testified that, after this incident, the investigation turned toward the possibility of tampering, DNA testing, and inspecting Jackson's jail cell and monitoring his phone calls. Ashton explained that he did a search of the jail telephone system by using Jackson's pin number, which showed that Jackson "was using other people's pin numbers[]" to make calls to two women, a girlfriend and his mother.

Ashton agreed he had listened to all the recorded phone calls included in State's Exhibit 72 and he recognized Jackson's voice in the recorded calls. He agreed that he heard Jackson say in one of the recorded phone calls that "it happened one time but in a different county and it was consensual[]" and that "if it's consensual and they're going to get married, he can't get in trouble[.]" Ashton also agreed that at one point in a recorded call, he heard Jackson say "Remember, it has got to be a different county. The only thing is what's the safest county to say this happened in[.]" Audio recordings of conversations between Jackson and his mother were played for the jury, and in one of the recorded phone conversations, Jackson dictated a statement to his mother for B.R. to use, saying B.R. has been

"forced . . . to say things," that she was afraid to tell the truth because of threats to take away her child, and that "R.J. has never done nothing to me."

Testimony of Lawrence Thompson

Lawrence Thompson, PhD (Thompson), a psychologist with the Harris County Children's Assessment Center, testified at trial for the State. Thompson stated that he did not know B.R. or A.R. and that he had not reviewed the offense reports in this matter, and his purpose was to testify concerning his "clinical experience with child sexual abuse and the literature pertaining to child sexual abuse[.]" Thompson testified that "it is not uncommon at all for a child to have mixed feelings about their perpetrator[]" and that in some cases, a child may try to protect the person who is abusing them by saying the abuse did not happen. Thompson explained that children may recant their accusations of abuse, not only if the abuse actually did not occur, but also because "[s]ometimes kids can be coerced by other family members or other people in their lives to say something didn't happen when it did."

Testimony of Thomas Mock

Thomas Mock (Mock), a jailer at the Montgomery County Sheriff's office, testified that his responsibilities included inmate mail procedures. Mock recalled having been asked to copy Jackson's mail. The State's attorney asked Mock about

a letter and envelope admitted as State's Exhibit 68, which was addressed to Jackson's mother, with the name "Roger Van Dyke" as the sender in the return address, and which also stated "Legal Mail[,] Attorney[.]" The State's attorney published the contents of the letter, which included the following:

> She needs to say she was pressured by V[___]. All we need is her to [] write this out. Send one to the lawyer and the judge. With a number to be reached.
>
> We need to do this before trial. She just needs to say she was afraid to say the truth because she slept with me without my knowledge. I didn't know it was his kid.

Testimony of A.R.

A.R., the mother of B.R., testified for the defense. A.R. recalled living on Grove Lane, in New Caney, at a Wild Oaks address, and off Old 59 near Archie's grocery. A.R. also testified that she remembered wood paneling and a computer desk in the master bedroom of the home on Grove Lane.

On direct examination, A.R. did not recall that B.R. told her that Jackson was raping B.R. when she was eight or nine years old, nor did she recall that B.R. ever told her Jackson was raping her or touching her. However on cross-examination, A.R. agreed that she had told Detective Gordy that, sometime before B.R. had the abortion, B.R. came to her and said Jackson "was touching her and was messing with her[]" but that B.R. later changed her statement. A.R. agreed that she had told the police that B.R. had told her Jackson had touched her sometime

after B.R. was eight years old but that B.R. later told her "[n]o mom. I was just really mad at him[.]" A.R. agreed that when B.R. "partially outcried" to her, she never called the police or CPS or the district attorney's office. And A.R. testified that she "kept [her] eyes open[]" afterwards but that she never saw anything strange between Jackson and B.R. A.R. testified that when B.R. got pregnant at age thirteen, a boy named Robert was the father. A.R. agreed that she and Jackson took B.R. to the abortion clinic.

A.R. testified that A.R. was thirteen years old when she first got pregnant by Jackson, and then A.R. got pregnant by Jackson again when she was fifteen, and again after she was of age. A.R. agreed that her mother had called the police because A.R. got pregnant at age thirteen and that a case was filed against Jackson in 1997 for aggravated sexual assault of a child. A.R. also agreed that after the 1997 case was filed, Jackson took A.R. to Missouri. She further agreed that she signed an affidavit of non-prosecution, explaining that her parents had filed charges in order to get her to come back home. A.R. agreed that her parents also signed affidavits of non-prosecution and that the case against Jackson was dismissed. Neither B.R. nor Jackson testified at trial.

ISSUES ON APPEAL

Jackson raises three issues on appeal. In his first issue, he challenges the sufficiency of the evidence to support his conviction. In his second issue, Jackson challenges the admission of Shields's testimony because the State failed to properly establish that Bode Technology, the lab for which Shields worked, was accredited by the Texas Department of Public Safety as required by statute. And in his final issue, Jackson complains that the trial court erred in admitting evidence of extraneous acts that prejudiced the jury.

FACTUAL SUFFICIENCY

In his first issue, Jackson argues that the evidence is insufficient to support his convictions on both charges. In particular, he argues that no physical evidence corroborated any sexual abuse of B.R., that B.R. had recanted her accusations against Jackson, and that B.R.'s son K.R. was conceived when she was older than fourteen years of age.

Legal and factual sufficiency challenges are reviewed under the standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). In reviewing a sufficiency challenge to a criminal conviction, we view all the evidence in the light most favorable to the verdict. *Id.* at 899. Based on the evidence admitted during the trial,

together with the reasonable inferences that are available from the evidence, we then determine whether a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). This standard allows the jury to weigh the evidence, to fairly resolve any conflicts in the testimony, and to draw reasonable inferences from the basic facts. *Id.* (citing *Jackson*, 443 U.S. at 319).

The jury heard testimony from the Nurse, the Interviewer, and Hebert, concerning B.R.'s account of numerous sexual assaults by Jackson that began when B.R. was eight years old. The Nurse testified that B.R. told her that that B.R. was "around 8 or 9" when Jackson started having sex with B.R. The Inmate also testified that Jackson told him that he had sex with B.R. when B.R. was eight years old and also that Jackson got B.R. pregnant. A.R., the victim's mother, testified that B.R. had told her Jackson had touched her sometime after B.R. was eight years old, although A.R. also stated that B.R. later denied it happened. The initial statement to the police made by J.R., B.R.'s guardian and cousin, reported that "it has been going on since [B.R.] was little . . . and that she had an abortion at the age of 14 that was [Jackson's] as well."

The Interviewer's and Hebert's testimony concerning the sexual assaults B.R. told them about included details concerning the location of the assault, time

of the year when the assault occurred, features of the house where the assault occurred, where her mother and brothers were at the time, what was on TV, what Jackson had been drinking, and details of the assaults. The Interviewer testified that such "[s]ensory details are details that are hard for children to make up."

Although Hebert agreed that B.R. recanted her story after Hebert's interview with B.R., Dr. Thompson testified that children may recant their accusations of abuse because of coercion by family members or others or to protect their abuser. The jury heard Detective Gordy testify that he had become aware that Jackson's family was tampering with the complainant in this case. The jury also heard a recorded telephone call between Jackson and his mother wherein Jackson dictated a statement to his mother for B.R. to use. The Inmate also testified that he helped Jackson write a statement intended for use by B.R. In addition to the foregoing testimony, B.R.'s school and medical records were admitted into evidence and contained information that supported B.R.'s description of the sexual abuse and sexual assaults.

The jury, as the judge of the facts and credibility of the witnesses, could choose to believe or not believe the witnesses, or any portion of their testimony, despite contradictory evidence. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (citing *Esquivel v. State*, 506 S.W.2d 613 (Tex. Crim. App. 1974)).

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could find, beyond a reasonable doubt, that Jackson committed the offenses of continuous sexual abuse of a child younger than fourteen years of age and aggravated sexual assault of a child younger than fourteen years of age. *See* Tex. Penal Code Ann. §§ 21.02(b), 22.021(a)(1)(B). The evidence is legally and factually sufficient to support the jury's verdict, and we overrule Jackson's first issue.

ACCREDITATION OF BODE TECHNOLOGY

Article 38.35 of the Texas Code of Criminal Procedure provides that

> . . . a forensic analysis of physical evidence under this article and expert testimony relating to the evidence are not admissible in a criminal action if, at the time of the analysis, the crime laboratory conducting the analysis was not accredited by the [public safety director of the Texas Department of Public Safety] under Section 411.0205, Government Code.

Tex. Code Crim. Proc. Ann. art. 38.35(a)(3), (d)(1) (West Supp. 2015). In his second issue on appeal, Jackson argues that the DNA test results offered through Shields's testimony were inadmissible because the State failed to show that the lab for which Shields worked when she performed the DNA analysis was accredited by the Texas Department of Public Safety. Jackson argues that "the Court was entering evidence into the record concerning the credibility of Bode" and that the admission of Shields's testimony was harmful to him because "there was

admittedly a lack of any physical evidence to substantiate that the offense occurred as alleged."

At trial, Shields testified that, when she worked for Bode, she was assigned to work on cases for the Montgomery County Sheriff's office. When the State asked Shields if Bode was a certified lab, Shields responded "[t]hey are certified by ASCLD Lab, which is the American Society of Crime Laboratory Directors, as well as FQSI, which stands for Forensic Quality Services International." After Shields described the evidence received and analyses she performed on the evidence, but before she addressed the results of the analyses, the defense asked to take Shields on voir dire. The defense asked Shields if Shields knew whether Bode was accredited by the Texas Department of Public Safety, to which Shields responded "I don't believe Bode is directly accredited by DPS. I don't think DPS had the accrediting authority for other laboratories, as far as I'm aware." Jackson objected to "any admissibility of any evidence since this witness said that Bode Laboratories is not accredited by DPS."

The trial court subsequently conducted a hearing outside the presence of the jury. During this hearing, the defense counsel stated

> Your Honor, if you go to the DPS accredited Web site -- or the DPS Web site, they have a listing of all the labs that are accredited by DPS in accordance with 38.35. DPS does give accreditation to each lab that will provide admissible testimony.

The State argued that the witness was properly qualified as an expert under the Rules of Evidence and that "[s]he testified that the lab is accredited by ASCLD, which is the same accreditation as our DPS labs." The defense responded that

> Your Honor, I have absolutely no doubt that she is more than qualified under 702 and 703. I'm not doing a Daubert Kelly hearing. What I'm saying, Judge, is according to the law, according to the Texas Code of Criminal Procedures 38.35, unless she can provide evidence that this lab -- that she or the State can provide evidence that this lab is accredited, any analysis, any DNA is not admissible.

The court overruled the defense's objection.

Following Shields's testimony about the results of DNA analysis, the court stated outside the presence of the jury:

> Okay. So because your objection was that they were not certified and because I was doing research on 38.35 to -- just to make sure that my ruling was correct, in the course of it, there is a list online of the non[-]Texas certified DNA laboratories. And included in that list is Bode Technologies in Virginia. And it looks like from 7-26-2012 to 7-25-2017 and 2-6-2013 to 2-6-2017, that they have been -- they are currently current.

The defense commented that the court was "reading into the record this," and the following exchange ensued:

> [The Court]: . . . So because your objection was that they were not certified, to make sure my ruling was correct, in the course of it, this is -- there is a list online of the non[-]Texas certified DNA laboratories?
>
> [Defense attorney]: Yes.

[The Court]: Okay. I just want to make sure that you're not being disingenuous with the Court.

[Defense attorney]: I'm not, Judge.

[The Court]: Because it was my impression from what you said that you were questioning whether or not Bode was a qualified or an accepted lab. I mean, obviously they have the -- whatever it's called -- the ASCLD or whatever, the national --

[Defense attorney]: Certification.

[The Court]: Certification, yes. But what says the State?

[State's attorney]: We just ask the Court to take judicial notice that Bode Labs is an accredited lab or in agreement according to DPS under 38.35.

[Defense attorney]: And, Judge, I don't think you can make judicial notice of that. . . .

. . . .

[The Court]: You were the one that brought up the online list, which is the reason why I went online to look. . . .

. . . .

I'm going to find that Bode appears to be certified. I'm going to maintain my previous ruling. But I wanted to make you aware of the fact that I -- I think -- unless you show me otherwise, I think they are certified by DPS.

When reviewing a trial court's ruling on the admission of evidence, an appellate court applies an abuse of discretion standard of review. *Casey v. State*,

215 S.W.3d 870, 879 (Tex. Crim. App. 2007) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id.* at 879 (citing *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996)). The erroneous admission of evidence is non-constitutional error that requires reversal only if it affects the substantial rights of the accused. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011); *Casey*, 215 S.W.3d at 885; *see also* Tex. R. App. P. 44.2(b). We will not overturn a criminal conviction for non-constitutional error if, after examining the record as a whole, we have fair assurance the error did not influence the jury, or influenced the jury only slightly. *Barshaw*, 342 S.W.3d at 93; *Casey*, 215 S.W.3d at 885; *see also* Tex. R. App. P. 44.2(b).

Article 38.35 of the Texas Code of Criminal Procedure does not specify how accreditation shall be established. *See* Tex. Code Crim. Proc. art. 38.35. However, in our criminal justice system, the proponent of evidence ordinarily has the burden of establishing admissibility of the proffered evidence. *Pierson v. State*, 426 S.W.3d 763, 770-71 (Tex. Crim. App. 2014) (quoting *Vinson v. State*, 252 S.W.3d 336, 340 (Tex. Crim. App. 2008)). A court may take judicial notice of an adjudicative fact on its own or when a party requests it to do so, when the court is supplied with the necessary information. *See* Tex. R. Evid. 201.

The witness testified that Bode was "certified by ASCLD Lab, which is the American Society of Crime Laboratory Directors, as well as FQSI, which stands for Forensic Quality Services International." And, Jackson's attorney invited the trial court to go onto the Texas "DPS accredited Web site" to see a list of DPS approved labs. The trial court ruled that she had determined that Bode was certified and overruled the objection. We cannot say that the trial court erred in allowing the admission of the report or the testimony.

Nevertheless, even if the trial court erred in overruling Jackson's objection regarding Bode's accreditation status or in admitting Shields's testimony, we also conclude such error was harmless. The jury heard from many witnesses other than Shields: the Nurse, the Interviewer, Nancy Hebert, Detective Gordy, the Inmate, R.H., Officer Ochoa, Thomas Mock, Joey Ashton, Dr. Thompson, and A.R. The jury also considered multiple exhibits that were admitted into evidence. Even if the challenged testimony from Shields was inadmissible, the jury could have concluded beyond a reasonable doubt from the remaining evidence that Jackson was guilty of the offenses of continuous sexual abuse of a child younger than fourteen years of age and aggravated sexual assault of a child younger than fourteen years of age. *See* Tex. Penal Code Ann. §§ 21.02(b), 22.021(a)(1)(B).

Therefore, any error in admitting Shields's testimony and the DNA results was harmless, and we overrule Jackson's second issue on appeal.

RULE 403

In his final issue, Jackson argues the trial court erred in admitting "prejudicial testimony on an extraneous act [that] cause[d] irreparable harm" and should have been excluded under Rule 403. More specifically, Jackson objects to the admission of A.R.'s testimony as to her age when her sons, who were fathered by Jackson, were born; and, Jackson objects to the testimony relating to the fact that A.R.'s mother had attempted to file charges against Jackson in 1997 because A.R. became pregnant at age thirteen by Jackson. Jackson argues the evidence was unfairly prejudicial because it allowed the jury to infer "that the Appellant had done this before to the alleged victim's mother[]" and thereby increased the probability that Jackson would be found guilty for extraneous acts against A.R. rather than against B.R.

Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. The Rule 403 balancing factors include, but are not limited to, the following: (1) the probative

value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). The rules of evidence favor the admission of relevant evidence and carry a presumption that relevant evidence is more probative than prejudicial. *Jones v. State*, 944 S.W.2d 642, 652 (Tex. Crim. App. 1996).

Evidentiary rulings are committed to the trial court's sound discretion. *See Prible v. State*, 175 S.W.3d 724, 734 (Tex. Crim. App. 2005). A trial court's Rule 403 decision will be reversed only if the decision is outside the "zone of reasonable disagreement." *Id.*; *Salazar v. State*, 38 S.W.3d 141, 151 (Tex. Crim. App. 2001). Additionally, even if the trial court abused its discretion in admitting certain evidence, reversal of constitutional error is only appropriate if the court determines beyond a reasonable doubt that the error probably contributed to the defendant's conviction or punishment, and any error that does not affect substantial rights must be disregarded. *See* Tex. R. App. P. 44.2.

Jackson did not make an objection under Rule 404 at trial. We note that his objection at trial was that the evidence in question was not relevant and that it was prejudicial under Rule 403. An objection based upon Rule 401 or 403 does not

preserve an objection regarding "prior bad acts" and the admission or exclusion of extraneous evidence under Rule 404. *See Montgomery*, 810 S.W.2d at 389 (objecting party must make Rule 403 and 404(b) objections separately); *see also* Tex. R. App. P. 33.1(a); *Medina v. State*, 7 S.W.3d 633, 643 (Tex. Crim. App. 1999) (holding appellant's relevancy objection at trial did not preserve error concerning Rule 404 extraneous-offense claim); *Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993) (explaining that an objection at trial based on hearsay or relevancy does not preserve error for appeal as to Rule 404(b)). Even when the extraneous offense or prior bad act occurred several years earlier, the temporal remoteness of extraneous offenses is only one factor a court may consider in making a Rule 403 decision to admit evidence of such offenses. *See Gaytan v. State*, 331 S.W.3d 218, 226-28 (Tex. App.—Austin 2011, pet. ref'd) (evidence of several extraneous offenses that occurred twenty-four and twenty-eight years prior to charged offenses of sexual assault and indecency with a child were admissible under Rule 403); *Newton*, 301 S.W.3d at 318-22 (extraneous offenses that occurred twenty-five years before the charged offenses of sexual assault and indecency with a child admissible under Rule 403). Therefore, we cannot say that the trial court erred in overruling Jackson's objections.

Further, we note that even if Jackson had made a Rule 404 objection at trial to what he now calls "prior bad acts," extraneous-offense evidence, Rule 404(b) itself contains a non-exhaustive list of possible exceptions to the general rule prohibiting evidence of other crimes, wrongs, or acts. Tex. R. Evid. 404(b). Additionally, this type of evidence may have been admissible under Texas Code of Criminal Procedure Art. 38.37. Tex. Code Crim. Proc. Ann. art. 38.37; *Manning v. State*, Nos. 09-13-00533-CR, 09-13-00534-CR, 2015 Tex. App. LEXIS 12439, at **4-5 (Tex. App.—Beaumont Dec. 9, 2015, no pet.) (mem. op., not designated for publication) ("In a prosecution for sexual abuse of a child, the character of the defendant is relevant, and the tendency that such evidence may have to show that a defendant is the type of person who abuses children does not make the testimony inadmissible. *See* Tex. Code Crim. Proc. Ann. art. 38.37, § 2. In cases involving the sexual abuse of a child, this type of evidence is admissible because article 38.37, section 2 creates an exception to the Rules of Evidence that otherwise makes character evidence inadmissible. *Compare* Tex. R. Evid. 404(b) *with* Tex. Code Crim. Proc. Ann. art. 38.37, § 2.").

In this matter, A.R. testified as a witness on behalf of Jackson. A.R. agreed on cross-examination that she was thirteen years old when she first got pregnant by Jackson, and then she got pregnant by Jackson again when she was fifteen. A.R.

also agreed that she and her daughter look alike. The trial court in this case could have reasonably concluded that the evidence in question was admissible and that the probative force of the evidence outweighed the possibility of prejudice. Accordingly, we conclude the trial court did not abuse its discretion in admitting the evidence and we overrule Appellant's third issue.

Having overruled all of Appellant's issues, we affirm the judgments of the trial court.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on December 1, 2015
Opinion Delivered March 23, 2016
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.