COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00510-CR

ANDREW WILLIAMS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 16TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F-2012-2873-E

MEMORANDUM OPINION[1]

A jury convicted Appellant Andrew Williams of two counts of aggravated sexual assault and assessed his punishment on each count at seven years' incarceration in the penitentiary. The trial court ordered the punishments to run consecutively. Appellant brings seven points. The first six involve State's Exhibit 31-A, which was not admitted into evidence but which was inadvertently given to

[1]*See* Tex. R. App. P. 47.4.

the jurors. The seventh issue attacks the admission into evidence of the complainant's forensic interview. We affirm.

I. The Offenses

In count one, the jury found Appellant guilty of aggravated sexual assault by the penetration of a child's sexual organ. *See* Tex. Penal Code Ann. § 22.021(a)(B)(i) (West Supp. 2016). In count two, the jury found Appellant guilty of aggravated sexual assault by his causing the child's mouth to contact his sexual organ. *See id.* § 22.021(a)(B)(v).

II. The Denial of Appellant's Motion for Mistrial

Appellant's first five points all complain that the trial court erred by denying his motion for mistrial because the jury received an unadmitted exhibit, State's Exhibit 31-A, that he asserts was adverse to him. In his brief, Appellant argues all five collectively. We will therefore analyze the five issues collectively. For the reasons given below, we hold there was no error and overrule all five points.[2]

[2]In his first point, Appellant complains that the trial court erred in denying his motion for mistrial. In his second point, he complains that the trial court failed to properly apply rule 21.3 of the Texas Rules of Appellate Procedure. In his third point, he contends the denial of his motion for mistrial violated his right to due process under the United States Constitution. In his fourth point, he argues the denial of his motion for mistrial violated his right to due course of law under the Texas Constitution. And under his fifth point, he maintains the denial of his motion for mistrial violated article 1.04 of the code of criminal procedure. Article 1.04 is a statutory due course of law provision. *See* Tex. Code Crim. Proc. Ann. art. 1.04 (West 2005).

A. An Earlier Mistrial, a Redacted State's Exhibit 31, and an Unredacted State's Exhibit 31-A

At the start of trial, the trial court announced that the case had previously ended in a mistrial. The State explained that (1) at the previous trial, it had admitted State's Exhibit 31, (2) it had subsequently redacted State's Exhibit 31, (3) it wanted admitted into evidence in this trial the redacted version identified as State's Exhibit 31, and (4) it wanted the original version identified as State's Exhibit 31-A and "retained in the Court's file for record purposes only." Appellant did not object. The trial court granted a motion in limine regarding any mention of the previous jury trial that had ended in a mistrial.

B. State's Exhibit 31-A is Inadvertently Given to the Jury

After the jury had retired to deliberate, the trial court went on the record to state that the jury had attempted to view a video but was not able to for unknown technical reasons. The trial court and the attorneys agreed upon a means for the jury to view the video with the bailiff's help. Shortly thereafter, however, the bailiff reported back that the jury had four videos—State's Exhibits 26 (photos), 31 (Appellant's redacted interview that was admitted into evidence), 31-A (Appellant's unredacted interview that was not admitted into evidence), and 33 (the complainant's forensic interview). The bailiff reported that he did not know which of the videos the jury had tried to watch because someone had already removed the DVD. The bailiff explained that he was not able to get the player to work either, so the jury could not have watched any of the videos.

Appellant requested assurance that State's Exhibit 31-A was not the video that the jury had attempted to watch, so the foreperson was brought in. The foreperson stated that the jury was trying to view the complainant's forensic interview, which the trial court determined was State's Exhibit 33. The foreperson explained that the jurors wanted to view the complainant's demeanor, so one of the other jurors went through the stack of videos and found the video with the complainant's interview. The foreperson said that [the bailiff] "brought them in and sat them in the middle of our table." Before that, the foreperson assured the trial court that no one had touched any of the videos.

Appellant moved for a mistrial because State's Exhibit 31-A was among the videos sent to the jury. Appellant stated that the label on State's Exhibit 31-A had the words "[m]istrial record" on it and argued that the jury's knowledge of an earlier mistrial was prejudicial.

The trial court responded that there was no evidence any of the jurors saw the label. The trial court said that the foreperson did not describe any of the jurors as having looked at the DVDs until the one juror looked for the complainant's forensic interview.

At this point, Appellant asked the trial court to speak with the juror who went through the DVDs. The State expressed reservations about asking the juror if she had seen the word "mistrial" on the label. The trial court asserted that it would simply ask the juror how she selected the complainant's DVD. The State expressed concern that handing to the juror the video with the word "mistrial" on

the label might itself poison the juror. The trial court responded by saying it would not hand the DVDs to her for review. When it came time to bring in the juror who went through the DVDs, the bailiff announced a new development—that two jurors, not just one, had handled the DVDs.

The first juror, Michelle, said that the jury had selected a video to watch but was not able to get the player to work. Michelle said there were a number of videos to choose from, and the jury wanted to watch two of them. The first one the jury wanted to view was the complainant's forensic interview at the Child Advocacy Center. Michelle said another juror selected that video and handed it to her, and she then walked it over to the player. Michelle did not know if the other juror had to look through the whole stack of videos before selecting the complainant's.

The second juror, who was not identified for record purposes, acknowledged she was the person who had located the video the jury wanted to watch and had handed it to Michelle. The second juror testified that the videos were sitting in front of her, so she "looked at each one" and "deciphered which one was the one that [we] were discussing that [we] wanted to see." The second juror said she then put the other three back. When asked how she made the selection, she responded that she relied on "whatever it said on the front" and identified one video as the complainant's, two as Appellant's, and the fourth as containing photos. She said she relied on what was written on the disks

themselves to determine which one to select. The trial court and the second juror then engaged in the following exchange:

> THE COURT: Other than reading the information that's written on the video, which is this right here, right? "Forensic video," is that what you're talking about?
>
> UNIDENTIFIED JUROR: Yes.
>
> THE COURT: Okay. Did you pay any attention to any of the rest of the markings on the video on the DVDs?
>
> UNIDENTIFIED JUROR: No. It was more [a] process of elimination. The other two had the defendant's name. One said "photos," and that one said "forensic interview." And then when I pulled it out it said, I think, [the complainant's] name on there.
>
> THE COURT: Okay. Thank you.

For clarification, the writings on the actual disk of State's Exhibit 31-A read "Andrew Williams Interview," "Δ Andrew Williams," and "DB#85 10/16/14." The sleeve containing State's Exhibit 31-A has "DB #85 10/16/14" written on the upper left and "31-A Mistrial Record" written on the State's Exhibit sticker in the lower right. The sleeve has a clear circular center through which the disk and the writings on it are visible.

The trial court then made the following findings and ruling:

> The Court has interviewed three of the jurors—the foreman or the presiding juror, the juror who selected the video to be played, and the juror who took that video and attempted to play it. The juror who selected the video to be played has indicated that she was looking at the writing on the actual DVDs themselves. And by doing so, she was able to deduct the DVD that she wished—that the jury wished to see, which was the forensic interview. There is nothing on the DVDs themselves that indicate anything regarding a video that was previously admitted in a previous trial of this matter.

> The Court is satisfied that these jurors have no understanding of anything about the label that's on Exhibit 31-A that underneath says, Mistrial record. And it's not even clear to the Court that that's what that label reads, because the word "mistrial" appears to be misspelled.
>
> [DEFENSE COUNSEL]: Your Honor, for the record, if I may, the label says—it may be misspelled, but it says "mistrial." It is apparent it is on the front of the DVD that was placed back inside the jury room. And so I would re-urge my motion for mistrial.
>
> THE COURT: And the Court will deny that motion.

At this point, it was 5 o'clock, and the trial court adjourned the proceedings for the day.

When court resumed the next morning, Appellant renewed his motion for mistrial. Appellant stressed that the juror was aware there were four disks and stressed that the word "mistrial" was on the label of State's Exhibit 31-A. Appellant also pointed out that now the jury was not going to get back the same number of videos.

The State responded that the case law required the jury to "actually . . . know what the evidence is." The State argued that the juror looked only at the face of the disk and not at the label and that there was nothing suggesting any juror saw the actual label. Finally, the State asserted the word "mistrial" was misspelled as "mistrail."[3] Regarding the number of disks, the State proposed instructing the jury that one disk was inadvertently sent back.

[3]On appeal, the State concedes the word "mistrial" is not misspelled. The State attributes the confusion over the spelling to the writer's cacography.

The trial court stated that there was no dispute the jury was not able to view any of the videos. Regarding the label, the trial court said,

> I am further of the opinion, after talking to the juror who actually handled the DVD disk, that she has no recall or seem[s] to have any understanding of the exhibit labels themselves. She was looking at the writing that is on the disk itself that's written in what appears to be some sort of a Sharpie marker that states the name of the defendant, and also indicates that there's a forensic interview and that there's a photo. So I do not believe that it is any sort of fatal error.

Regarding the absence of a fourth DVD, the trial court asked for a proposed instruction. At this point, the State suggested sending an instruction only if the jury asked about the missing fourth DVD.

Appellant argued that an instruction could not cure the error. Appellant also noted that not all the jurors had been questioned. Appellant contended that the jury had a DVD with the word "mistrial" on the label, which was something neither the parties nor the trial court wanted the jurors to know.

The trial court then asked for authority that a jury's knowledge of a mistrial was incurable reversible error. Appellant did not know of any. The trial court again denied Appellant's motion for mistrial.

C. Standard of Review

When reviewing a motion for mistrial based upon a jury's examination of evidence that had not been admitted at trial, the Texas Court of Criminal Appeals relied on rule 21.3(f) of the Texas Rules of Appellate Procedure, which addresses motions for new trial based upon, among other things, a jury's

consideration of other evidence. *See Bustamante v. State*, 106 S.W.3d 738, 742–43 (Tex. Crim. App. 2003); *see also* Tex. R. App. P. 21.3(f); *Woodall v. State*, 77 S.W.3d 388, 392 (Tex. App.—Fort Worth 2002, pet. ref'd). The court wrote that a two-prong test must be satisfied: (1) the evidence must have been received by the jury, and (2) the evidence must be detrimental or adverse to the defendant. *Bustamante*, 106 S.W.3d at 743. When determining whether evidence was "received" by the jury, courts may consider how extensively the jury examined the evidence and whether the trial court gave the jury an instruction to disregard. *Id.*

Whether the jury has received the evidence is a fact question that the trial court decides. *Woodall*, 77 S.W.3d at 392–93. We will not disturb a trial court's decision to overrule a motion for mistrial absent an abuse of discretion. *See id.* at 393. A trial court does not abuse its discretion in overruling a motion for mistrial where the jurors' testimony is conflicting. *See id.* At a hearing on a motion for mistrial, the trial judge is the trier of fact and the sole judge of the credibility of the witnesses. *See id.* Appellant's position was that the errors were incurable by instruction and that the only remedy was to declare a mistrial.

Whether evidence is "received" is a question of degree. *See Martinez v. State*, 846 S.W.2d 348, 350 (Tex. App.—Corpus Christi 1993, pet. ref'd). For example, "a passing remark will not constitute receipt of other evidence." *Id.* "[I]t [is] incumbent upon [an] appellant to show that the jury was actually aware of the 'other evidence.'" *Gibson v. State*, 29 S.W.3d 221, 225 (Tex. App.—Houston

[14th Dist.] 2000, pet. ref'd). In *Gibson*, the court wrote, "Mere physical receipt of 'other evidence' when the 'other evidence' is a lengthy written report, obscured by a fax cover page, will not show that the jury 'received' the evidence." *Id.*

D. Discussion

There is no dispute that the jury was not able to watch State's Exhibit 31-A. The only dispute is whether the jury became aware of the prior mistrial by virtue of the word "mistrial" on the label of State's Exhibit 31-A. The trial court stated that there was nothing to suggest that the juror who handled the DVDs actually saw the word "mistrial" on the label. The juror's testimony supports this. The juror testified that she was looking for the complainant's DVD and, by looking at the DVD disks themselves, eliminated the others. Although State's Exhibit 31-A was in the possession of the jury, the record does not show that the jury was actually aware of the word "mistrial" on its label. The label was not "received" by the jury, and State's Exhibit 31-A was not otherwise detrimental or adverse to Appellant. *See Bustamante*, 106 S.W.3d at 743; *Martinez*, 846 S.W.2d at 350. Deferring to the trial court's findings, we hold that the trial court did not abuse its discretion overruling Appellant's motion for mistrial. *See Woodall*, 77 S.W.3d at 393. We overrule Appellant's points one through five. *See Gibson*, 29 S.W.3d at 226.

III. Trial Court's Failure to Give Instructions

In Appellant's sixth point, he complains that the trial court abused its discretion by failing to instruct the jury not to consider the improperly-received

evidence and by failing to instruct the jury regarding the subsequent removal of State's Exhibit 31-A. Appellant never requested instructions regarding not considering State's Exhibit 31-A and regarding the subsequent removal of State's Exhibit 31-A.

To preserve an error for appeal, a defendant should (1) make a timely objection, (2) request an instruction to disregard, and (3) move for a mistrial if an instruction to disregard is not sufficient to cure the error. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). If a defendant fails to request an instruction to disregard, a timely motion for mistrial is nevertheless sufficient to preserve error if the error is incurable. *Id.* at 70. However, if the error is curable, "[t]he party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could have been 'cured' by such an instruction." *Id.* Consequently, if a defendant does not request an instruction to disregard, our review is limited to the question of whether the complained-of testimony could have been cured by such an instruction. *Id.*

We hold that the errors were curable by instructions. The Texas Court of Criminal Appeals in *Bustamante* anticipated an instruction being capable of curing such error, absent aggravating circumstances. *See* 106 S.W.3d at 743. In Appellant's points one through five, we held there were no aggravating circumstances. Accordingly, any error was curable. Because such an error was curable by instruction, we further hold that an instruction informing the jurors that they now had fewer exhibits because one document was inadvertently tendered

to them would have similarly been capable of curing any error associated with the number of videos here being reduced from four to three. We overrule Appellant's sixth point.

IV. The Admission of the Complainant's Forensic Interview

In point seven, Appellant contends the trial court erred by admitting State's Exhibit 33 over his objection. State's Exhibit 33 was the complainant's forensic interview. The trial court admitted State's Exhibit 33 as a prior consistent statement offered to rebut an express or implied charge of recent fabrication or improper influence or motive under rule 801(e) of the Texas Rules of Evidence.

A. Standard of Review

Before a prior consistent statement becomes admissible, five requirements must first be met under rule 801(e)(1)(B) of the rules of evidence: (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony by the opponent; (3) the proponent must offer a prior statement that is consistent with the declarant's challenged in-court testimony; (4) the prior consistent statement must be offered to rebut an express or implied charge of recent fabrication; and (5) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. *Hammons v. State*, 239 S.W.3d 798, 804 (Tex. Crim. App. 2007); *Bosquez v. State*, 446 S.W.3d 581, 585 (Tex. App.—Fort Worth 2014, pet. ref'd). "The rule sets forth a minimal foundation requirement of an implied or express charge of

fabrication or improper motive." *Hammons*, 239 S.W.3d at 804. This minimal foundation requires only a suggestion that a witness consciously altered her testimony. *Id.*

The trial court must look at the totality of the cross-examination in determining whether recent fabrication was implied. *Hammons*, 239 S.W.3d at 808. Merely questioning a witness's credibility does not equate to a charge of recent fabrication. *Id.*; *Bosquez*, 446 S.W.3d at 586. Nevertheless, depending on the tone and tenor of the questioning, the cross-examiner's demeanor, facial expressions, pregnant pauses, and other nonverbal cues, the benign questioning of credibility could subtly imply recent fabrication. *Hammons*, 239 S.W.3d at 808.

An implication of fabrication can be solidified when looking at the trial as a whole—including the voir dire, opening statements, and closing arguments. *Id.*; *Bosquez*, 446 S.W.3d at 585. A reviewing court should look at the purpose of the impeaching party, all the circumstances, and the trial court's interpretation of the implication. *Hammons*, 239 S.W.3d at 808.

B. Whether There was an Express or Implied Charge of Recent Fabrication or Improper Influence or Motive

For the reasons given below, we hold the record supports the trial court's interpretation that Appellant either intended to subtly imply recent fabrication or that the jury would have understood Appellant's line of questioning as implying recent fabrication, regardless of whether that was Appellant's intent.

1. Voir Dire

During voir dire, defense counsel introduced the hair-in-the-food analogy. Included within his analogy was the idea that if the hair came from an extraneous source, the meal should be rejected. Defense counsel and the venire members engaged in the following exchange during voir dire:

> [Defense counsel]: Isn't that a fun picture? Can y'all see it? Look close. Look close. Right there. There is the hair in the food.
>
> POTENTIAL JUROR: Whew.
>
> [Defense counsel]: Yea, whew, Hmm. What do you do?
>
> POTENTIAL JUROR: Depends where it is.
>
> [Defense counsel]: Say that again?
>
> POTENTIAL JUROR: Is it your hair in that picture?
>
> [Defense counsel]: Certainly not my hair. It's at a restaurant.
>
> POTENTIAL JUROR: It's too dark.
>
> [Defense counsel]: Let me get somebody—Ms. Jefferson, you thought you were going to get away.
>
> What do you do when you find a hair in your food at the restaurant?
>
> POTENTIAL JUROR: Ask for a manager.
>
> [Defense counsel]: Say that again?
>
> POTENTIAL JUROR: Ask for the manager.
>
> [Defense counsel]: Okay, you ask for the manager. All right. Somebody else, what else would you do?
>
> POTENTIAL JUROR: Take the hair out.

[Defense counsel]: Take the hair out, all right.

POTENTIAL JUROR: Discard the food.

[Defense counsel]: Discard the food.

POTENTIAL JUROR: Stop eating.

[Defense counsel]: Stop eating.

POTENTIAL JUROR: Return it.

[Defense counsel]: Return it. You've got choices, don't you? All right, you can even take it out and finish.

POTENTIAL JURORS: Whew.

[Defense counsel]: You can. All right. Not saying that I have, but that's something that you can do. You can pick it up and finish eating. You can stop eating and say nothing, push it away.

You can complain and send it back.

You can eat around it.

POTENTIAL JUROR: Eww.

POTENTIAL JUROR: Gross.

[Defense counsel]: How many hairs are you willing to eat when somebody's story doesn't match? All right. That what you're doing, okay? If you see inconsistencies in somebody's story, you've got a hair in your food.

When you see inconsistencies with people, when you see those things that take away from their credibility, there comes a point when you say, I'm done, I'm not listening anymore, all right?

How many hairs are you willing to eat? At what point do you say, I'm done listening, all right? That's scary stuff, isn't it? Especially when you're sitting in here and you're looking at somebody and sending somebody to the pen if they're convicted. How many hairs are you going to be willing to eat?

> I'm hunting, anybody want to volunteer? Ms. Young, what are your thoughts on this?
>
> POTENTIAL JUROR: Personally for food, I would not eat that.
>
> [Defense counsel]: Right. Okay. What about when somebody starts telling you a story and you start seeing a hair in their story [sic]?
>
> POTENTIAL JUROR: I discredit them.
>
> [Defense counsel]: Okay.
>
> POTENTIAL JUROR: If the story isn't adding up, then there's no reason to continue on that line.
>
> [Defense counsel]: Even if their story has a lot of good elements in it, right?

One way to construe this line of argument is that even if the meal is otherwise delicious, if it is contaminated from an external source, the diner should reject the meal. By analogy, if testimony that otherwise might seem valid is contaminated by an external source, the jury should reject the testimony.

2. Opening Statements

During opening statements, defense counsel suggested to the jury that the complainant accused Appellant to redirect her parents' wrath away from her relationship with her boyfriend to someone else—Appellant—and, further, that the complainant accused Appellant to exchange her parents' anger at her over her relationship with her boyfriend to compassion for her because Appellant had raped her. The remainder of defense counsel's opening statements asserted that the evidence the State was otherwise going to present was inconsistent with

and would not support the complainant's allegations against Appellant. For example, when questioned by the detective, Appellant denied having sexual relations with the complainant. Another example was the State's assertion that noises from the ceiling fans, air-conditioner, and a CPAP machine explained away why the complainant's parents did not hear their daughter's scream for help. "You're going to see inconsistencies in things that the State says." Accordingly, Appellant's defense was two-pronged: First, the complainant was not telling the truth, and second, the State's attempts to buttress the complainant's false allegations were risible.

3. Cross-Examination of Complainant

During Appellant's cross-examination of the complainant, after inquiring about possible inconsistencies in her testimony, defense counsel inquired about her recent contacts with the district attorney's office:

> [Defense counsel]: How many times have you met with the district attorney's office to prepare for trial?
>
> [Complainant]: I'm not sure.
>
> [Defense counsel]: Have you met with them, say, within the last month?
>
> [Complainant]: Yes.
>
> [Defense counsel]: Had you met with them earlier this year other than within the last month?
>
> [Complainant]: I'm not sure.

Immediately after Appellant questioned the complainant about why her story was changing, Appellant asked the complainant how often and how recently she had met with the district attorney's office. Defense counsel was asking the jury to connect the dots, and in this instance, the dots were not terribly far apart. The implication that the district attorney's office had been the cause or the source of the changes in her story was there for the jurors to seize.

4. Defense Counsel's Statement Outside the Jury's Presence

While there was a break in the complainant's testimony and while outside jury's presence, defense counsel stated to the trial court that his next line of questions "would be what they [the prosecutors and the complainant] talked about in their preparation for trial." To clarify his position, defense counsel added, "If they had conversations about what she—I mean, her testimony has changed from that trial to this trial." The trial court warned defense counsel that going into how the prosecutors and the complainant prepared for trial was not proper cross-examination whereas any inconsistencies in her present testimony and her prior testimony and any prior sworn statements were. Even though the jurors did not hear these statements by defense counsel, the trial court did. The trial court could have reasonably drawn from these statements that defense counsel's objective was to imply recent fabrication as a result of meeting with the district attorney's office.

5. The State Moves to Admit State's Exhibit 33

The next day, referring to *Hammons v. State*, the State offered State's Exhibit 33 as prior consistent statements of a witness offered to rebut an express or implied charge of recent fabrication or improper motive. The State argued that Appellant was implying that the complainant was fabricating testimony under the district attorney's tutelage. Defense counsel denied implying anything of the sort and asserted the complainant had been lying from the start. The trial court responded that two motives were involved—the complainant's initial motive to report the offense and her later motive to embellish her story. The trial court stated it saw the issue in the latter light, that is, whether the complainant was trying "to present herself or the offense in a different light or a more positive light." The State argued that the implication could not be otherwise when Appellant specifically inquired about how often and how recently the complainant had met with prosecutors, to which the trial court responded, "I understand." The State indicated it was going to offer the video through the forensic interviewer. The trial court stated its ruling as follows:

> Here's what my ruling is on this. Because there—because I believe there has been at least some suggestion placed in the mind of the jury that this witness has been prepped by the district attorney's office, and may or may not have changed her story or fabricated some part of her story that didn't originally exist, I'm going to allow them to play the video from the forensic interview for that purpose.

When the forensic interviewer subsequently testified, the video, State's Exhibit 33, was admitted and played for the jury.

6. The Complainant is Recalled

Later in the trial, when the complainant was recalled, Appellant again linked perceived inconsistencies in her testimony with subsequent meetings with the district attorney's office:

> [Defense counsel:] [Complainant], do you recall meeting with some members of the district attorney's office back in March of this year?
>
> [Complainant:] I think so.
>
> [Defense counsel:] Do you remember when you were telling them about the order of events from that night, telling them that these things were—everything was happening pretty quickly and was happening fast?
>
> [Complainant:] I think so.
>
> [Defense counsel:] Do you remember telling them that when you screamed, you screamed for two or three seconds before he covered your mouth?
>
> [Complainant:] Not even two or three.
>
> [Defense counsel:] So you don't recall telling them that—that you got two—got in two or three seconds of screaming? You don't recall that?
>
> [Complainant:] I'm not sure.
>
> [Defense counsel:] Do you recall from that day telling them the reason that you screamed was because he had put his penis inside your vagina?
>
> [Complainant:] Yes.
>
> . . . .
>
> [Defense counsel:] Do you remember telling the—I'm going back to this meeting that you had in March.

> Do you remember telling the assistant D.A.'s that you were meeting with that you were surprised that no one woke up when you screamed?
>
> [Complainant:] I don't recall that.
>
> [Defense counsel:] Do you recall testifying at another time that you don't recall whether or not [Appellant] ever got completely naked?
>
> [Complainant:] Yes.
>
> [Defense counsel:] When you spoke to Ms. Elder at the Child Advocacy Center, do you recall telling her that you saw him completely naked?
>
> [Complainant:] No.

From this exchange, Appellant's linkage of the inconsistencies in the complainant's stories and her meetings with the district attorney's office is made a second time. The implication is, once again, one of recent fabrication or improper influence.

7. Final Arguments

During final arguments, Appellant returned to the hair-in-the-food analogy. Defense counsel argued:

> This is what the D.A.'s office is trying to get you to eat right now. They've got you a plate of hair. Push the plate away. You don't have to eat this. You can tell the district attorney's office and you can tell Detective Bearden don't bring me a plate of food with a bunch of hair in it. I need you to come back and find [Appellant] not guilty of this. Not guilty.

This argument effectively allowed the jury to find Appellant not guilty without necessarily having to disbelieve the complainant. Rather, this argument allowed the jury to find Appellant not guilty by virtue of the district attorney's office

contaminating the evidence. The district attorney's office was the source of the hair in the food, and the district attorney's office was the reason the meal as a whole should be rejected.

8. Holding

Looking at the trial as a whole, we hold that the record supports the trial court's conclusion that there was a suggestion that the complainant altered her testimony, which is the minimal foundation required. *See Hammons*, 239 S.W.3d at 804 (stating minimum foundation is suggestion of altered testimony); *Bosquez*, 446 S.W.3d at 585 (authorizing looking at trial as a whole). The record supports the trial court's finding that there was an implied or express charge of fabrication or improper motive. *See Hammons*, 239 S.W.3d at 804; *see also Lawton v. State*, 913 S.W.2d 542, 561 (Tex. Crim. App. 1995) ("[A]ppellant questioned [the witness] during cross-examination about the preparations he and the district attorney had undertaken for his trial testimony. Appellant never flatly accused [the witness] of fabricating his testimony with the State's assistance, but it was clearly implied that [his] testimony was influenced by the district attorney's tutelage."), *cert. denied*, 519 U.S. 826 (1996), *overruled on other grounds*, *Mosley v. State*, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998). We hold that the trial court's admission of the forensic interview was not an abuse of discretion. *See Woodall*, 77 S.W.3d at 393. We overrule Appellant's seventh point.

V. Conclusion

Having overruled Appellant's seven points, we affirm the trial court's judgment convicting Appellant of two counts of aggravated sexual assault.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: GARDNER, MEIER, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2016