COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00126-CR

MICHAEL CHAPPELL APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 16TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F15-1399-16

MEMORANDUM OPINION[1]

A jury found Appellant Michael Chappell guilty of three counts of indecency with a child and one count of aggravated sexual assault. It assessed his punishment at nine years' incarceration for each indecency-with-a-child count and at 25 years' incarceration for the aggravated-sexual-assault count. The trial court ordered the four sentences to run consecutively.

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

To protect the complainant's identity, we use the alias "Julie." *See* Tex. R. App. P. 9.10(a)(3); 2nd Tex. App. (Fort Worth) Loc. R. 7. Because identifying the other people—given the number involved—by aliases or initials is confusing, we refer to them by how they are related to Julie.

In four issues, Chappell contends that the trial court abused its discretion (1) by admitting a telephone conversation that Julie's father overheard; (2) by admitting what Julie had told her boyfriend about the abuse; (3) by excluding from evidence a photograph of Julie's brother and her best friend kissing in her father's house; and (4) by excluding from evidence Julie's stepmother's two convictions from 12 years earlier. We affirm.

Background

Chappell met Julie's mother at work in 2006. Julie's mother left her husband, Julie's father, for Chappell. Julie's mother and father separated in 2006 and got divorced in 2007. Julie and her two brothers, both younger than she, went to live with Chappell and their mother.

When Julie was eight or nine, which would have been in 2008 or 2009, Chappell began looking at and touching Julie's private parts while she showered. Julie estimated that Chappell touched her more than 20 times.[2] In 2010 and

[2]Julie's father described Julie as outgoing until she was about nine when she became quiet and withdrawn. Julie's father testified that around that same time, Julie began plucking out her eyelashes.

2011, when Julie was about 11 years old, Chappell used baby oil and put his fingers in her private part on more than five occasions.

Julie said the touching stopped when she and her brothers moved in with their father and their stepmother in 2011. That move was precipitated by Chappell's injuring the older of Julie's two younger brothers while disciplining him. Charges were filed against Chappell but later dropped. As part of the investigation, Julie was asked whether she had been abused or molested, and she denied any abuse or molestation.

After the charges were dismissed, the younger of Julie's two brothers returned to live with Chappell and Julie's mother. Julie and the older brother continued to live with their father and stepmother but would visit Chappell, their mother, and the younger brother on weekends. Despite visiting only on weekends, Julie would nevertheless resist going. When Chappell was the one who came to pick up Julie and her brother at their father's home, Julie would look for any excuse not to go.

When Julie was 13, she told her best friend, who was a year younger, that Chappell had "messed with" her, which her friend took to mean something sexual. Julie asked the friend not to tell anyone.

In March 2014, however, when Julie was again complaining about having to go visit her mother, her best friend asked if it was because of Chappell, and Julie indicated that it was. When Julie's brother started calling her a brat for not wanting to go to their mother's, the best friend responded that Julie had her

reasons. Julie's brother then launched into a guessing game of what those reasons might be. Julie retreated into her closet, and when her brother asked Julie's friend whether someone had been "messing with" his sister, the friend remained silent. The friend's response (or lack thereof) tipped Julie's brother off that he had perhaps guessed right, so he went to their father.

Julie's father initially asked his wife, Julie's stepmother, to ask Julie's best friend whether Chappell had been "messing with" his daughter, and the friend said yes. When Julie's father went into her bedroom, Julie climbed into bed and hid. After her father asked if Chappell had been "messing with" her, she broke down crying and said yes. Julie's father did not press her for details; he too took the term "messing with" to mean something sexual.

Julie's father then asked Julie's stepmother to talk to his daughter for him. Julie then told her stepmother about the touching that had occurred in the shower but nothing else.

Julie's father called CPS and the police. Julie's brother described her as hiding in her closet and crying for two hours until the police arrived.

During Julie's forensic interview, she did not mention the use of baby oil. Julie testified at trial that the first time that she talked to someone at the Child Advocacy Center, she felt very uncomfortable and did not give any details.

Julie also spoke about the abuse to her boyfriend, who was a year older than she. He testified that they spoke twice in person and three or four times by

telephone about what Chappell had done to her. He was aware of the shower allegations and of the use of baby oil to touch her in the vaginal area.

Chappell testified and denied touching Julie inappropriately. Julie's mother believed Chappell over her daughter. The younger of Julie's two brothers likewise believed Chappell and not Julie.

The State alleged that Chappell molested Julie while she lived with him and her mother. The four counts allegedly occurred in 2008, 2009, 2010, and 2011, respectively. Chappell does not contest the sufficiency of the evidence.

Standard of review

All four of Chappell's issues attack either the admission or exclusion of evidence. We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. Before an appellate court may reverse the trial court's decision, "it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

Julie's father's testimony about the telephone conversation he overheard was hearsay but was harmless.

In Chappell's first point, he asserts that the trial court abused its discretion by admitting Julie's father's testimony recounting what he overheard his daughter say about the allegations during a telephone conversation.

Julie's father testified that they lived in the country and that their property had a chicken coop. After Julie's outcry, he recalled overhearing one of her telephone conversations while she was in the chicken coop. He did not know to whom she was talking, but she was very upset and angry. He explained, "She was having a conversation . . . about how upset she was with her mother about what [Chappell] had done and how mad she was at [Chappell]." Julie was not aware that her father was within earshot.

On cross-examination, defense counsel asked whether Julie said why she was mad at Chappell, and Julie's father said, "For what he had done to her." But defense counsel then showed that what Chappell had "done to her" could have referred to the fact that Chappell had broken up Julie's parents' marriage or could have referred to how Chappell had injured her brother.

Chappell asserts that an overheard telephone conversation is hearsay. *See Jennings v. State*, 748 S.W.2d 606, 608 (Tex. App.—Fort Worth 1988, pet. ref'd). The State raises only the "state of mind" hearsay exception under rule 803(3) of the rules of evidence. Tex. R. Evid. 803(3). Yet, as Chappell points out in his reply brief and as we agree, Julie's father's testimony went beyond that Julie was angry at Chappell and at her mother and included the reason—her belief that Chappell had done something to her to justify her anger. "[A] witness may testify [that] a declarant [said], 'I am scared,' but not, 'I am scared because the defendant threatened me.'" *See Delapaz v. State*, 228 S.W.3d 183, 207 (Tex. App.—Dallas 2007, pet. ref'd) (quoting *United States v. Ledford*, 443 F.3d 702,

709 (10th Cir. 2005), *cert. denied*, 549 U.S. 867 (2006), *and abrogated on other grounds by United States v. Little*, 829 F.3d 1177, 1181–82 (10th Cir. 2016)). The statement, "I am scared," indicates an actual state of mind or condition, but the statement, "I am scared because the defendant threatened me," expresses the declarant's belief about why he or she is frightened and is thus expressly outside the state-of-mind exception. *Id.* So the State's proffered hearsay exception does not apply.

We note the general rule that error regarding improperly admitted evidence is waived if that same evidence comes in later without objection. *Taylor v. State*, 264 S.W.3d 914, 918 (Tex. App.—Fort Worth 2008, no pet.) (quoting *Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993)). Here, moments after the trial court overruled his objection, Chappell elicited the same information about which he initially objected. Error is not waived, however, when it is brought in later in an effort to meet, rebut, destroy, deny, or explain the improperly admitted evidence. *Id.* at 918–19. Chappell here was clearly attempting to meet and rebut the improperly admitted evidence. We hold that Chappell's complaint was preserved and that the admission of Julie's father's hearsay testimony was error. *See id.*; *see also Delapaz*, 228 S.W.3d at 207–08.

Chappell agrees that the error is not constitutional and that the substantial-rights harm analysis under rule 44.2(b) applies. Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266,

271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). Conversely, an error does not affect a substantial right if we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may also consider the jury instructions, the State's theory and any defensive theories, whether the State emphasized the error, closing arguments, and even voir dire, if applicable. *Id.* at 355–56.

Applying the required review, we hold that the error was harmless. On cross-examination, defense counsel successfully pointed out that Julie was angry at Chappell because of what he had "done to her" but that what precisely he had done to her was ambiguous. Julie had multiple reasons to be angry at Chappell and her mother. Her mother had left her father for Chappell. Chappell had injured—had allegedly choked—one of her brothers, and Julie's mother, thinking her son had lied about the incident, believed Chappell. Other evidence showed that both Chappell and Julie's mother did not like Julie's best friend and, after the best friend visited them one time, refused to invite her back. To the extent Julie

was referring to the sexual abuse, other evidence showed that the only person to whom she spoke over the telephone about the allegations was her boyfriend, and her boyfriend's testimony established that what she had told him was consistent with what she had told others.

But Chappell contends that it is precisely this—the corroboration of other evidence—that creates the harm because it bolsters or incrementally adds credence to her allegations. We disagree. The jury heard 14 witnesses' testimony on guilt/innocence on four different days. We hold that this one ambiguous statement did not influence the jury or had, at best, but the slightest of effects. *See Solomon*, 49 S.W.3d at 365. This overheard conversation was not the fulcrum upon which the State's case turned.

We overrule Chappell's first point.

Chappell's complaint about Julie's boyfriend's alleged hearsay testimony was not preserved.

In Chappell's second point, he contends that the trial court abused its discretion by admitting Julie's boyfriend's testimony relating what Julie had told him about the allegations in this case.

When Julie's boyfriend was asked what she had told him about what Chappell had done to her, Chappell objected on the basis of hearsay, and the trial court overruled his objection. Her boyfriend then answered, "That she was touched." Chappell did not ask for or receive a running objection.

The boyfriend then testified, without an objection, that Julie had said it had happened when she was nine or ten and that it went on for a few years. He added that Julie had said that it would happen while she was in the shower and that Chappell would use baby oil to touch her in the vaginal area.

Although Chappell objected the first time Julie's boyfriend was asked about what she had told him, Chappell did not object when Julie's boyfriend later testified about Julie's outcry in greater detail. *See Black v. State*, 358 S.W.3d 823, 829 (Tex. App.—Fort Worth 2012, pet. ref'd) (requiring running objection). Because the evidence came in later without an objection, we hold that the alleged error was not preserved. *See Taylor*, 264 S.W.3d at 918.

We overrule Chappell's second point.

Chappell's complaint regarding the exclusion of a particular photograph was not preserved.

In Chappell's third point, he argues that the trial court abused its discretion by excluding evidence—a photograph allegedly showing Julie's older brother kissing her best friend in her father's house—that Chappell offered for the proposition that Julie's father and stepmother were much less strict than

Chappell and Julie's mother.[3] Chappell's contention was that Julie fabricated the abuse allegations because she preferred to live with her more lenient father.[4]

Chappell never made this photograph part of the trial-court record, nor did he make a bill of exception. *See* Tex. R. App. P. 33.2. The photograph itself is likewise not part of our appellate record. Any alleged error has not been preserved.[5] *See Graham v. State*, 631 S.W.2d 597, 599 (Tex. App.—Fort Worth 1982, no pet.) (citing *Baldwin v. State*, 538 S.W.2d 109, 113 (Tex. Crim. App. 1976)); *see also Bivins v. State*, 706 S.W.2d 165, 167–68 (Tex. App.—Beaumont 1986, pet. ref'd).

We overrule Chappell's third point.

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[3]At trial, Chappell also argued that the photograph was admissible to impeach Julie's brother and best friend, who both denied kissing each other. The trial court balked at this proposition because neither Julie's brother nor her best friend was on the stand when Chappell tried to get the photograph admitted but, rather, Julie's mother was. Chappell does not pursue this argument on appeal.

[4]Julie was already living with her father during the week. On the day her brother, father, and stepmother learned of the abuse, Julie had already gotten her mother's permission to remain at her father's home that weekend.

[5]The record shows that Chappell intended to reoffer the photograph later when he called the younger of Julie's two brothers because the photograph was discovered on that younger brother's telephone. But when the younger brother testified, Chappell made no attempt to offer the photograph.

The trial court did not abuse its discretion by excluding Julie's stepmother's 12-year-old convictions.

In Chappell's fourth point, he maintains that the trial court abused its discretion by excluding his evidence of Julie's stepmother's 12-year-old convictions for burglary and prostitution.

Rule 609(b) of the rules of evidence sets out when convictions that are more than ten years old are admissible:

> **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

Tex. R. Evid. 609(b).

Rule 609(b) acknowledges that the admission of convictions—even those over ten years old—will have a prejudicial effect. *Id.* To be admissible, then, the probative value of the convictions must substantially outweigh that prejudicial effect. *Id.* In this case, we cannot say that the trial court abused its discretion by concluding that the convictions' probative value did not substantially outweigh their prejudicial effect.

Chappell relies on *Theus v. State* for the position that the two convictions were admissible because their probative value as impeachment evidence outweighed any minimal prejudicial effect. 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). The court there set out a nonexclusive list of factors to consider when

weighing the probative value of convictions against their prejudicial effect when a defendant testifies:

- the impeachment value of the prior crime,
- the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history,
- the similarity between the past crime and the offense being prosecuted,
- the importance of the defendant's testimony, and
- the importance of the credibility issue.

Id. The underlying principles remain the same even when the witness is someone other than the defendant. *See Lucas v. State*, 791 S.W.2d 35, 51 (Tex. Crim. App. 1989); *see also Moore v. State*, 143 S.W.3d 305, 312–13 (Tex. App.—Waco 2004, pet. ref'd). We accord the trial court "wide discretion" when weighing the factors and when deciding whether to admit a prior conviction. *Theus*, 845 S.W.2d at 881.

The *Theus* analysis is conducted under rule 609(a) of the rules of evidence. *Id.* at 879. Because rule 609(b) explicitly addresses convictions older than ten years, rule 609(a) necessarily addresses the admission of convictions of ten years or less. Tex. R. Evid. 609. Under that framework, the probative value of the convictions must simply (not substantially) outweigh the prejudicial effect. *Id.*

In Chappell's reply brief, he acknowledges that because the two convictions are more than ten years old, to be admissible their probative value had to not just outweigh but *substantially* outweigh their prejudicial effect. *See Meadows v. State*, 455 S.W.3d 166,170–71 (Tex. Crim. App. 2015).

As a convicted burglar and prostitute, the stepmother had two prior probative convictions. Burglary is a crime of deception. *White v. State*, 21 S.W.3d 642, 647 (Tex. App.—Waco 2000, pet. ref'd). Prostitution is a crime of moral turpitude. *Holgin v. State*, 480 S.W.2d 405, 408 (Tex. Crim. App. 1972). Because the stepmother was testifying in a parental capacity, the prostitution conviction was potentially prejudicial in ways the burglary conviction was not.

The State conceded that Julie's stepmother, in the 12 years since the two convictions, had received deferred adjudication on two second-degree felonies for drug possession. Subsequent "bad" activity is not necessarily limited to convictions. *See Lucas*, 791 S.W.2d at 51–52. Consequently, the stepmother's rehabilitation was not without blemishes; this would have further diluted some of the prejudice from the 12-year-old convictions. *See Meadows*, 455 S.W.3d at 170.[6] On the other hand, there is no similarity between the stepmother's convictions and Chappell's case. The stepmother was not testifying to exonerate herself.

Finally, although the stepmother was the first adult outcry witness to whom Julie gave any details, Julie herself testified, and the jury saw her forensic interview. The stepmother's testimony thus took on far less importance, and her credibility played a significantly reduced role. *See Moore*, 143 S.W.3d at 313; *see*

[6]*Meadows* recognized that tacking was no longer permitted. *Id.* at 171. Tacking allowed intervening convictions to remove the taint of remoteness from older convictions. *Id.* at 170. Intervening convictions can still be used under rule 609(b) as other "specific facts and circumstances." *Id.*

also Holmes v. State, No. 11-14-00143-CR, 2015 WL 5191704, at *4 (Tex. App.—Eastland Aug. 21, 2015, pet. ref'd) (mem. op., not designated for publication) (prohibiting under rule 609(b) impeachment with prostitution conviction).

This is not a case where all the factors should have inexorably led the trial court to but one ruling. According the trial court wide latitude, we hold that it did not abuse its discretion when it ruled that the probative value of the stepmother's two 12-year-old convictions did not substantially outweigh their prejudicial effects. *See* Tex. R. Evid. 609(b); *Henley*, 493 S.W.3d at 82–83; *Theus*, 845 S.W.2d at 881.

We overrule Chappell's fourth point.

Conclusion

Having overruled Chappell's four points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: GABRIEL, SUDDERTH, and KERR, JJ.

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

DELIVERED: June 22, 2017