COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00146-CR

HUEY COLLINS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 4 OF TARRANT COUNTY
TRIAL COURT NO. 1435521R

MEMORANDUM OPINION[1]

In four points, Appellant Huey Collins appeals his convictions for two counts of aggravated sexual assault of a child and two counts of indecency with a child by contact. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B) (West Supp. 2016), § 21.11(a) (West 2011). We affirm two of the trial court's judgments on

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

aggravated sexual assault, affirm a third as modified one of the indecency judgments, and vacate the other indecency judgment.

Background

This case arises from an outcry of sexual abuse by then-four-year-old Avery[2] against Appellant, her grandmother Mimi's boyfriend. Avery had a close relationship with Mimi and spent every weekend and school holidays at Mimi's house, where she had her own bedroom.

Avery's mother, Macy, testified that Appellant picked up Avery from daycare on Friday, September 26, 2014. The next evening, Avery called Macy late at night crying and saying that she wanted to come home. When Macy asked Avery what was wrong, Avery replied, "Nothing. Papa just made me watch a bad movie. I'll stay with my [M]imi." Macy testified that she did not think anything of it. When she arrived to pick up Avery the next day, Avery wanted to stay longer at her grandmother's.

The next day, however, there was an incident at Avery's daycare that concerned Macy.[3] Later that day when Macy and Avery were at home, Macy asked Avery if anybody had ever hurt her by touching her where they should not. According to Macy, Avery responded, "Yes. My papa touched my bad spot with

[2]In accordance with rule 9.8, we refer to children and family members by pseudonyms. Tex. R. App. P. 9.8 cmt; *see* Tex. R. App. P. 9.10(a)(3).

[3]Macy testified that Avery had been "playing doctor" with a friend and the incident was concerning because "[Avery] knows not to touch other children or anything of the sort."

his bad spot." Macy testified that Avery did not show a lot of emotion or appear distraught when she outcried[4] and did not mention any other incidents of assault. Avery told Macy that she did not tell Macy earlier because she was scared that Mimi would get in trouble and that Avery and Mimi would both go to jail.

Macy immediately contacted her mother, told her what Avery had said, and took Avery to Cook Children's Hospital. After an investigation, Appellant was charged with two counts of aggravated sexual assault of a child and two counts of indecency with a child by contact.

Avery was six when she testified at trial. Avery testified that Appellant put his private into her private and into her bottom.[5] She specifically testified that he touched his private to her private in the living room and that he touched his private to her bottom in the office. When asked how many times Appellant touched "his private to [her] private," Avery answered, "A lot." When asked what she meant by "a lot," Avery said, "All the time over there." However, she subsequently specified that Appellant touched his private to her bottom once. Using a female doll, Avery indicated that she was lying facing down on the couch

[4]Macy testified at trial that Avery later became angry or emotional whenever the subject of the assaults came up. About a month after the outcry, Avery started acting out in daycare and Macy had to withdraw Avery from daycare.

[5]At trial and in her interviews with the Sexual Assault Nurse Examiner (SANE) Theresa Fugate and with forensic interviewer Kacie Hand, Avery identified or referred to the genital area of a female as a "private" or "bad spot," the anal area of a female as the "bottom" or "bad spot," and the penis of a male as the "bad spot," "private," or "weiner."

when Appellant touched his private to her bottom. On cross-examination, Avery indicated that the assault occurred both on the couch and on a chair in the office and that she was wearing clothes when it happened. Avery testified that Mimi was in the kitchen next to the office when the assaults occurred. Avery testified that it hurt when Appellant touched her private and her bottom with his private, but she did not cry.

Fugate examined Avery on September 30, 2014, and described Avery as being cooperative, playful, and talkative during the exam. Fugate testified that Avery told her, "Papa touched me" and "Papa stuck his thing in my thing" and pointed to her genitalia. Avery then stated, "When I spent the night at his house last time, he touched me with his thing before we got in the pool, while we were in the living room, and on the chair in Mimi's office. He put it in me and it hurted." Fugate wrote in her notes that Avery "demonstrated with [her] hand" that Appellant had put his penis in her genital area:

> A: A lot of times I'll ask them to get a better idea of what they're talking about, if he touched like this or if he touched like this, and she demonstrated like this (indicating).
>
> Q: And, for the record, you're pointing in between your fingers?
>
> A: Yes.
>
> Q: And what do your fingers represent?
>
> A: This represents her vaginal area, her labia, and then his thing, she already pointed was his penis, his private area. And I asked her if he put it on top or if he went inside, and she demonstrated inside.

Q: So was it your understanding from what she told you that his penis not only contacted but went inside her vagina?

A: Yes.

Avery also told Fugate that Appellant had contacted her anus with his penis and that he had touched her genitals with his hand. Avery told Fugate that these instances happened in the pool, the living room, and in the chair in Mimi's office. Fugate testified that she believed Avery was telling her that the abuse happened multiple times because she described it taking place in three places, and that it was normal for a four-year-old child to be unable to give a specific time frame and details. Avery also told Fugate that Appellant told her not to tell anyone or they would both go to jail.

Hand, a forensic interviewer with Johnson County Children's Advocacy Center, interviewed Avery on October 2, 2014. Avery was alert, outgoing, and playful during the interview, articulated herself well, and was cooperative. Hand testified that Avery told her that "Papa's bad spot[6] went in her bad spot," and Hand clarified that Avery indicated on a drawing that Appellant's penis went in Avery's bottom and genital area. Avery described Appellant as taking his bad spot out of his bathing suit and she was on her knees when Appellant put his bad spot in her bottom. Avery also told Hand that Appellant had put his bad spot in

[6]Avery told Hand that Appellant's "bad spot" looked like her Uncle Nick's "bad spot," but also denied having ever seen Nick's "bad spot." When Hand asked Avery, "How do you know what his looks like?" Avery said, "Because he's a boy." Avery denied having seen any other boys' "bad spots."

her private. Avery told Hand that these incidents occurred in the living room and in the office of her Mimi's house, that it hurt, and that after both incidents she went swimming with Appellant. She also told Hand that Appellant said that she would go to jail with him if she told anyone about what had happened.

Hand testified that Avery told her that the abuse happened only one time, but that Avery specified that there were two different sex acts, one in which he put his penis in her anus and one in which he put his penis in her female sexual organ.

Avery's uncle, Nick, testified that he was living at Mimi's house with her and Appellant in September 2014. When asked if he ever saw Appellant and Avery "doing stuff that [he] felt was a little off," Nick testified,

> Yeah. There was the tickle game, which I don't quite understand, but any time that I would come in and they're playing the tickle game, they'd be laying on the couch like a man and a woman would be laying. I mean, I got nieces and nephews and they lay on me, but they don't lay with me.

Nick described them as lying on the couch like a couple the way a person might lie "with [his] wife with [his] arm around her or she's laying in front of you snuggled" and that Appellant's arm would be around Avery with his stomach to her back. He also testified that Avery would sometimes yell, "Uncle!" and he would go to the living room and Avery would say that they were "playing the tickle game." On cross-examination, Nick admitted that he had never seen Appellant holding Avery down, that he never saw her crying when he came in the living room and saw the two of them together, and that he never witnessed any sexual

contact between Appellant and Avery. Nick also admitted that he kept to himself while at the house because he did not get along with his mother, Mimi, which also caused problems between him and Appellant.

Nick heard Avery call her mother on the night of September 27 and testified that Avery was crying, "pretty upset," "terrified," and wanted to go home. He said that Avery cried for "at least an hour before [Mimi] got sick of it and finally called her mom."

After Avery's outcry to Macy, Nick was at the house when Mimi confronted Appellant and Appellant stated, "I did not stick anything in that little girl." Nick testified that Appellant was kicked out of the house but was allowed to move back in shortly after he was kicked out.

The jury found Appellant guilty of two counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, and the trial court assessed a punishment of 40 years' confinement for each count. All four judgments were entered listing convictions for aggravated sexual assault of a child.

Discussion

Appellant brings four points on appeal. In his first two points, Appellant argues that the convictions for two counts of indecency with a child by contact violate double jeopardy. In his third point, he argues that the trial court erred in allowing multiple outcry witnesses to testify. And in his fourth point, he argues

that two of the judgments of conviction incorrectly reflect convictions for aggravated sexual assault of a child rather than for indecency with a child.

I. Double jeopardy

Appellant argues that the offenses alleged in counts three and four, the charges for indecency with a child by contact, were subsumed by those charges in counts one and two for aggravated sexual assault of a child. Because the State concedes, and we agree, that the second conviction for indecency with a child by contact was subsumed by the charges for aggravated sexual assault, we sustain Appellant's second point and vacate that judgment of conviction. As for count 3, the State argues that there were three distinct acts of sexual contact committed by Appellant against Avery and therefore three separate convictions were warranted.

The Double Jeopardy Clause of the United States Constitution provides that no person shall be subjected to twice having life or limb in jeopardy for the same offense. U.S. Const. amend. V. Generally, this clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977); *Ex parte Cavazos*, 203 S.W.3d 333, 336 (Tex. Crim. App. 2006).

Impermissible multiple punishments occur when the same criminal act is punished twice under two distinct statutory provisions and the legislature intended that the conduct be punished only once. *Bigon v. State*, 252 S.W.3d

360, 370 (Tex. Crim. App. 2008). A multiple-punishments double-jeopardy violation may arise in two situations: (1) the lesser-included offense context, in which the same conduct is punished twice (once for the basic conduct, and a second time for that same conduct plus more); and (2) multiple punishments for the same criminal act under two distinct statutes when the legislature intended that the conduct be punished only once. *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006). The ultimate question is whether the legislature intended to impose multiple punishments. *Id.* at 688; *see Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 678 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.").

Appellant was convicted of two counts of aggravated sexual assault of a child and two counts of indecency with a child. The jury charge instructed the jury to find Appellant guilty of aggravated sexual assault as charged in count one if it believed that Appellant "did . . . knowingly cause [his] sexual organ to contact the sexual organ of [Avery]" and to find him guilty of aggravated sexual assault as charged in count two if it believed that Appellant "did . . . knowingly cause [his] sexual organ to contact the anus of Avery." It further instructed the jury to find

Appellant guilty of indecency with a child by contact if it believed that Appellant "did . . . engage in sexual contact by touching the genitals of [Avery]."[7]

The court of criminal appeals has held that indecency with a child by contact may be a lesser-included offense of aggravated sexual assault and, therefore, where the evidence does not indicate that more than one offense took place, convictions for both aggravated sexual assault and indecency with a child by contact will violate double jeopardy. *Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998). The State does not dispute this in its brief in this case, but rather, the parties' arguments turn on whether the evidence presented three separate incidents of sexual contact or only two. *See*, *e.g.*, *Maldonado v. State*, 461 S.W.3d 144, 147 (Tex. Crim. App. 2015) ("While indecency with a child by contact may be a lesser-included offense of sexual assault by penetration when the two offenses are predicated on the same act, there is no jeopardy violation when each offense is based on a separate act."). We therefore turn to the evidence presented at trial.

The State argues that there was evidence of three distinct acts of sexual contact: (1) contact with Avery's sexual organ by Appellant's penis in the living room, (2) contact with Avery's anus by Appellant's penis in the office of the home, and (3) contact with Avery's sexual organ by Appellant's hand. Of the

[7]The State concedes that the second conviction for indecency with a child by contact is subsumed by the convictions for aggravated sexual assault and therefore must be set aside and, as discussed above, we agree.

three acts, Appellant takes issue with the third, contact by Appellant's hand with Avery's sexual organ, because only Fugate, the SANE, testified that such contact occurred.

Reading from her notes, Fugate testified that Avery told her:

> Per patient, "Papa touched me." When asked with what, patient stated, "Papa stuck his thing in my thing." And I put patient pointed to genitalia. When asked when, patient stated, "When I spent the night at his house last time, he touched me with his thing before we got in the pool, while we were in the living room, and on the chair in Mimi's office. He put it in me and it hurted." And then I also put in quotation "patient demonstrated with hand" . . . where he put it.

Fugate subsequently testified that she asked Avery, "Did [Appellant] touch you with his hand?" and Avery answered, "Yes." In arguing that this contact occurred as a separate and distinct act from the contact that took place in the living room and the office, the State relies upon the following exchange:

> Q: So were there three different acts that she told you about?
>
> A: Yes.
>
> Q: So we have penis to vagina, penis to butt, and then his hand to her vagina?
>
> A: Yes.
>
> Q: And it looks like from your account that there were three different places that that happened, as well. Am I hearing that right?
>
> A: Yes.
>
> Q: And those were in the pool, the living room, and in the chair in Mimi's office?
>
> A: Yes.

Fugate later testified that Avery "described three different places:"

> Q: And based on your conversation with [Avery], did you believe she was telling you that this happened just this one time or multiple times?
>
> A: Multiple times.
>
> Q: Why was that?
>
> A: She described three different places.
>
> Q: So we don't know if those three places all happened at the same time—
>
> A: Right.
>
> Q: --or over time?
>
> A: Right.

Appellant argues that Fugate's testimony conflicts with that of Avery, Hand, and Macy, none of whom testified to a third incident of sexual conduct in a third location. But it is not our role to settle conflicts in the record; that is the exclusive province of the jury. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014); *see also Martines v. State*, 371 S.W.3d 232, 239–40 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("We may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact-finder."). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Murray v. State*, 457 S.W.3d 446, 448–49 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

Fugate's testimony provided evidence of a third act of sexual contact by Appellant's hand of Avery's genitals. Additionally, Avery stated that acts of

sexual abuse by Appellant had occurred "a lot" and "all the time over there" and had occurred on other weekends as well. Based on all of the evidence presented at trial, the jury was supplied with evidence of three distinct acts of sexual abuse in three distinct locations: (1) contact by Appellant's penis with Avery's sexual organ in the living room, (2) contact by Appellant's penis with Avery's anus in the office, and (3) contact by Appellant's hand with Avery's sexual organ in the pool. Count three for indecency with a child by contact was therefore not subsumed by either count of aggravated sexual assault of a child. *See, e.g.*, *Hart v. State*, 481 S.W.3d 679, 684 (Tex. App.—Amarillo 2015, no pet.) (overruling double jeopardy complaint where, although the charged offenses of indecency by contact and aggravated sexual assault occurred during a single incident, they constituted two separate and distinct acts).

We therefore overrule Appellant's first point.

II. Multiple outcry witnesses

In his third point, Appellant argues that the trial court erred in allowing both Macy and Hand to testify as outcry witnesses.

Article 38.072 provides that, in the prosecution of a sexual offense committed against a child, statements that describe the alleged offense made by the child and that were made "to the first person . . . to whom the child . . . made a statement about the offense" are admissible. Tex. Code Crim. Proc. Ann. art. 38.072 (West Supp. 2016). A trial court's decision that an outcry statement is reliable and admissible under article 38.072 will not be disturbed absent a clear

abuse of discretion. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990). If the court's decision falls outside the "zone of reasonable disagreement," it has abused its discretion. *Rankin v. State*, 974 S.W.2d 707, 718 (Tex. Crim. App. 1996) (op. on reh'g).

The court of criminal appeals has interpreted article 38.072 as meaning that the outcry witness "must be the first person, 18 years or older, to whom the child makes a statement that in some discernible manner describes the alleged offense." *Garcia*, 792 S.W.2d at 91. Further, "the statement must be more than words which give a general allusion that something in the area of child abuse was going on." *Id.* In so holding, the court of criminal appeals observed that, by choosing the wording of the "first person" requirement, the legislature "was obviously striking a balance between the general prohibition against hearsay and the specific societal desire to curb the sexual abuse of children," explaining,

> That balance is the focal point of our analysis. The portion of the statute catering to the hearsay prohibition demands that only the "first person" is allowed to testify. But the societal interest in curbing child abuse would hardly be served if all that "first person" had to testify to was a general allegation from the child that something in the area of child abuse was going on at home. Thus we decline to read the statute as meaning that any statement that arguably relates to what later evolves into an allegation of child abuse against a particular person will satisfy the requisites of [article 38.072, Section 2(a)(2)].

Id.

Thus, courts have interpreted the statute as providing that the proper outcry witness is generally the first adult to whom the complainant describes

"how, when, and where" the abuse occurred. *Reyes v. State*, 274 S.W.3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref'd). And outcry testimony is event-specific, not person-specific; thus, multiple outcry witnesses can testify when the outcry statements are about different events and not merely a repetition of the same events. *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd); *see also Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011).

A hearing was held outside the presence of the jury to address Appellant's objection to Macy and Hand's testimony under article 38.072. Macy testified that Avery told her that Appellant "touched her bad spot with his bad [spot]." When asked, "Besides [Avery] saying that he put his thing in her thing, did she go into any more detail with you?" Macy replied, "No." Macy explained that she was angry and walked away to call Mimi and then took Avery to the hospital. On cross-examination, Macy testified that Avery did not specify what she meant by "bad spot," but that was a term they had used before.

Hand testified that she was the first person told about particular sex acts, particularly that Appellant had put his penis in Avery's sexual organ and in her anal area. She testified that the abuse occurred in the living room and the office, although she did not specify which individual act took place in which room. Avery also told Hand that Appellant was wearing a bathing suit and described the position of her body at the time of the assault.

Although Appellant has phrased his point on appeal as an objection to both Macy and Hand testifying, his objection on appeal is to Hand's testimony. And, in support of that argument, Appellant argues in his brief to this court that because Macy's testimony was more than a "general allusion of sexual abuse," it encompassed Hand's testimony.[8]

In the case of *Josey v. State*, the trial court considered the outcry testimony of the complainant's mother and of a forensic interviewer. 97 S.W.3d 687, 692 (Tex. App.—Texarkana 2003, no pet.). The complainant, a nine-year-old boy, told his mother that the defendant had forced him to participate in oral sex with the defendant and the complainant's stepbrother and described the assaults in explicit detail. *Id.* The complainant also told his mother that the defendant "fingered" him, but did not explain what that term meant or give further

---

[8]This conflicts somewhat with Appellant's counsel's argument at trial, where he admitted that Macy's testimony was "very vague." Although Appellant argued to the trial court that Hand's testimony was subsumed in Macy's testimony, Appellant's counsel also characterized Macy's testimony as "very vague":

> [T]here were no detail[s] as to what the bad spot was, whether it was vagina or whether it was anus. Very vague. So that very well could be the same thing that was described by Ms. Hand, that we feel that they're the same outcry, and so to allow both of them to testify as outcry, we believe, would be improper.

Appellant's counsel admitted that Macy "didn't go into [the] specifics" and that "the vagueness of [Avery's] outcry very well could be the same as what Ms. Hand testified to because it was vague, because [Avery] didn't go into specifics about where it happened or when it happened, just my—his thing went into my thing is basically what Ms. Hand testified to."

details of the assault. *Id.* The complainant subsequently met with a forensic interviewer and went into graphic detail regarding both the oral assault and the "fingering." *Id.* The trial court ruled that the complainant's mother was the outcry witness for the acts of oral sex but that the forensic interviewer was the outcry witness for the act of digital penetration. *Id.* In holding that the trial court was correct in allowing both the mother and the forensic interviewer to testify, the Texarkana court held that the complainant's statement to his mother about being "fingered" was no more than a general allusion or insinuation that an assault by digital penetration had occurred. *Id.* at 693.[9]

We view the testimony by Macy in this case to be similar to that by the mother in *Josey*. Avery did not provide any details or specifics regarding the assaults in her outcry to Macy. According to Macy, Avery did not provide anything at all beyond a statement that Appellant "put his bad spot in her bad spot." And while Macy testified that she knew what Avery meant when she said "bad spot," the jury did not hear any evidence regarding the meaning she attributed to it, and testimony at trial showed that Avery referred to both her

[9]Although the initial ruling by the trial court was to allow the forensic interviewer to testify only to the act of digital penetration, the forensic interviewer's testimony also included the complainant's allegations and descriptions about acts of oral sex. *Josey*, 97 S.W.3d at 694. The trial court permitted this under the theory that, during cross-examination to the forensic interviewer's testimony, defense counsel opened the door regarding the acts of oral sex, and the Texarkana court affirmed the trial court's determination. *Id.* at 694–95. In this case, the State does not argue that defense counsel opened the door to Hand's testimony.

genital area and her anal area as her "bad spot." Appellant's counsel admitted as much at trial in his argument when he described Macy's testimony as "very vague" and pointed out that Macy did not identify what the "bad spot" was or specify "where it happened or when it happened."

Because Macy's testimony to Avery's outcry was a general allusion to abuse, we hold that the trial court erred in allowing Macy to testify as an outcry witness. *See Garcia*, 792 S.W.2d at 91; *cf. Bargas v. State*, 252 S.W.3d 876, 894 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding grandmother's testimony to complainant's statement that someone had touched her private parts was not admissible as an outcry because it was a general allusion to abuse); *Sims v. State*, 12 S.W.3d 499, 500 (Tex. App.—Dallas 1999, pet. ref'd) (holding that complainant's statement to her mother that defendant "had touched her private parts" could be reasonably determined to be nothing more than a general allusion to abuse).

Having found error, we must conduct a harm analysis to determine whether the error calls for reversal of the judgment. Tex. R. App. P. 44.2. Improper admission of hearsay is nonconstitutional error, *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); thus, we apply rule 44.2(b) and disregard the error if it did not affect appellant's substantial rights. Tex. R. App. P. 44.2(b); *see Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999).

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*, 967 S.W.2d at 417.

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.

"Admission of inadmissible evidence is harmless error if other evidence that proves the same fact that the inadmissible evidence sought to prove is admitted without objection at trial." *Broderick v. State*, 35 S.W.3d 67, 75 (Tex. App.—Texarkana 2000, pet. ref'd). Appellant did not object to Avery's specific testimony regarding the allegations of sexual abuse nor to Fugate's testimony regarding Avery's statements about the abuse. In our review of the record, allowing Macy to testify to Avery's statement to her that Appellant "touched

[Avery's] bad spot with his bad spot" was harmless when considered in light of Avery's testimony to the same allegation and in greater detail, as well as Fugate's testimony regarding Avery's statements during her medical examination. *See, e.g.*, *Elder v. State*, 132 S.W.3d 20, 27–28 (Tex. App.—Fort Worth 2004, pet. ref'd) (holding improper admission of outcry testimony was harmless where evidence "the same as or similar" to that witness's testimony was admitted through several other witnesses without objection), *cert. denied*, 544 U.S. 925 (2005); *West v. State*, 121 S.W.3d 95, 105 (Tex. App.—Fort Worth 2003, pet. ref'd) (holding improper admission of outcry testimony was harmless in light of complainant's "detailed, factually specific testimony" concerning the assault).

We therefore overrule Appellant's third point.

III. Judgments

In his fourth point, Appellant points out that the judgments of conviction improperly reflect four convictions for aggravated sexual assault of a child. The State concedes that the judgments are incorrect, in two respects: (1) one of the aggravated sexual assault convictions should be modified to reflect a conviction for indecency with a child by contact, and (2) as discussed above, another of the aggravated sexual assault convictions should be set aside because it is barred by double jeopardy. We agree and therefore sustain Appellant's fourth point.

We are permitted to modify a trial court's judgment and affirm it as modified. Tex. R. App. P. 43.2(b). We therefore order that the third judgment be

modified to reflect a conviction for indecency with a child by contact, not aggravated sexual assault, and that the fourth conviction be vacated and set aside altogether.

Conclusion

Having overruled Appellant's first and third points and sustained Appellant's second and fourth points, we affirm two of the trial court's judgments of conviction for aggravated sexual assault of a child, affirm the third judgment as modified to reflect a conviction for indecency with a child, and vacate the final conviction as set out above.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

GABRIEL, J., filed a concurring opinion.

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

DELIVERED: January 12, 2017