IN THE
TENTH COURT OF APPEALS

No. 10-14-00402-CR

ADDAM JON-DAVID LOPEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 18th District Court
Johnson County, Texas
Trial Court No. F48410

MEMORANDUM OPINION

In four issues, appellant, Addam Jon-David Lopez, challenges his conviction for continuous sexual assault of a child. *See* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2014). Specifically, Lopez contends that the evidence supporting his conviction is insufficient and that the trial court erred in admitting the testimony of outcry witness Kacie Hand, a

forensic interviewer with the Children's Advocacy Center in Johnson County, Texas. Because we overrule all of Lopez's issues on appeal, we affirm.[1]

I. SUFFICIENCY OF THE EVIDENCE

In his first issue, Lopez contends that the evidence supporting his conviction is insufficient because the State did not prove beyond a reasonable doubt that the alleged sexual abuse occurred for a period of thirty days or more, as is required by section 21.02 of the Penal Code. *See id.*

A. Standard of Review

In *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011), the Texas Court of Criminal Appeals expressed our standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Id.

[1] As this is a memorandum opinion and the parties are familiar with the facts, we only recite those facts that are necessary to the disposition of the case. *See* TEX. R. APP. P. 47.1, 47.4.

Our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. Furthermore, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 13. Finally, it is well established that the factfinder is entitled to judge the credibility of the witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

The sufficiency of the evidence is measured by reference to the elements of the offense as defined by a hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically-correct jury charge does four things: (1) accurately sets out the law; (2) is authorized by the indictment; (3) does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability; and (4) adequately describes the particular offense for which the defendant was tried. *Id.*

B. Discussion

To prove continuous sexual abuse of a child in this case, the State was required to prove beyond a reasonable doubt that Lopez: (1) committed two or more acts of sexual abuse; (2) during a period that was at least thirty days in duration; and (3) that at the time of the acts of sexual abuse, Lopez was seventeen years of age or older and E.C. was a child younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 21.02(b); *Michell v. State*, 381 S.W.3d 554, 561 (Tex. App.—Eastland 2012, no pet.); *see also Oliver v. State*, No. 10-12-00389-CR, 2014 Tex. App. LEXIS 2836, at **29-30 (Tex. App.—Waco Mar. 13, 2014, no pet.) (mem. op., not designated for publication). The "acts of sexual abuse" alleged by the State included multiple instances of indecency with a child. Indecency with a child includes the touching of any part of a child's genitals with intent to arouse or gratify the sexual desire of any person. *See* TEX. PENAL CODE ANN. § 21.11(a)(1), (c)(1) (West 2011).

A child victim's testimony alone is sufficient to support a conviction for aggravated sexual assault of a child or indecency with a child. TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2014); *Abbott v. State*, 196 S.W.3d 334, 341 (Tex. App.—Waco 2006, pet. ref'd); *Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd); *see also Cantu v. State*, 366 S.W.3d 771, 775 (Tex. App.—Amarillo 2012, no pet.).

> The courts will give wide latitude to testimony given by child victims of sexual abuse. The victim's description of what happened need not be precise, and the child is not expected to communicate with the same level

> of sophistication as an adult. Corroboration of the victim's testimony by medical or physical evidence is not required.

Cantu, 366 S.W.3d at 776 (internal citations omitted).

Here, the State alleged that Lopez touched the genitals and anus of E.C. with the intent to arouse or gratify his sexual desire between the dates of January 1, 2013 and June 9, 2013. At trial, Captain David Blankenship of the Johnson County Sheriff's Department testified that the last incident of sexual abuse by Lopez against E.C. occurred sometime in June 2013 but that the abuse had reportedly been ongoing since January 2013, and had occurred about fifteen times. Captain Blankenship also testified to the following regarding the initiation of the investigation into Lopez:

> According to the report on June the 9th, the night before in the bedroom when Mr. Lopez was kissing on the mother in a fashion that seemed odd to her and trying to touch her and saying, Where is your mother, that prompted her to wonder if something was going on with her daughters, leading her to ask her children if any of them had been touched and all of them said no except for the youngest one who sleeps with them in the bed occasionally. Who, that night, he had his arm around her in the bed and then she put that child to bed and then when she got back in the bed is when that event occurred between Mr. Lopez and the mother.

Captain Blankenship also noted:

> Just, you know, being able to recall it but then being able to put specific dates to it, things like that. And again, the younger you are, you don't always keep track of time the way that an adult or an older teen may. You just know it happened and it happened about this time. Sometimes it may be it happened before Christmas or after. You might have to be so general that you have to ask those types of questions, you know.

E.C. testified that Lopez, her stepfather, touched her "private area" underneath her clothes with his hand.[2] E.C. recalled that this occurred about fifteen times and that it went on "for a long time." She also testified that Lopez's hand went inside her "private area" more than one time. With regard to timing, E.C. stated that the last time Lopez touched her was in the same month that she told her mother, which was in June 2013. Later, E.C. testified that the touching did not occur during the school year. Moreover, on cross-examination, E.C. noted that the sexual abuse was not occurring in December 2012 or in January 2013. However, E.C. later agreed with defense counsel that the sexual abuse probably started in January 2013, though she could not testify as to the exact dates that the touching occurred.

Hand later testified that E.C. told her that the touching began "in the middle when she was nine," which would have coincided with January 2013. Hand also recounted that E.C. told her that Lopez "put his hand down her pants until somebody came in and then he took it out to where no one would see" and that Lopez touched "her private area and her butt. And I clarified on an anatomical drawing what her private area is and she circled her genitals." E.C. also told Hand that the touching happened fifteen times and that the last incident transpired in June 2013.

[2] E.C. identified her "private area" as the place from where she pees. And though she told others that Lopez touched her butt, on cross-examination, E.C. could not remember when Lopez touched her butt.

Araceli Desmarais, the sexual-assault-nurse examiner who examined E.C., testified that E.C. told her that the sexual abuse had occurred more than fifteen times and that "it had been going on for a long time." According to Desmarais, E.C. could not remember when the sexual abuse began; however, E.C. told Desmarais that the last instance occurred on June 9, 2013.

Although E.C. was unable to articulate the exact times and dates of the sexual abuse perpetrated by Lopez, there was sufficient evidence to allow the jury to determine whether two or more instances of sexual abuse occurred during a period that was thirty days or more, especially given that the testimony established that the touching occurred at least fifteen times from January to June 2013. *See* TEX. PENAL CODE ANN. § 21.02(d) ("[M]embers of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse."); *Williams v. State*, 305 S.W.3d 886, 890 n.7 (Tex. App.—Fort Worth 2010, no pet.) ("Arguably this [the child's inability to articulate the exact dates when the abuse occurred] is precisely the kind of situation the Legislature considered when it enacted Section 21.02 of the Texas Penal Code." (citing *Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring))); *see also Oliver*, 2014 Tex. App. LEXIS 2836, at *34; *Cantu v. State*, No. 13-10-00270-CR, 2011 Tex. App. LEXIS 6658, at **14-16 (Tex. App.—Corpus Christi Aug. 22,

2011, pet. ref'd) (mem. op., not designated for publication) (concluding that the evidence supporting Cantu's conviction for continuous sexual abuse of a child is sufficient despite Cantu's argument that the child victims testified about a time line in broad generalities and one of the child victims allegedly never specifically testified about sexual abuse occurring during the time period specified in the indictment).

Therefore, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Lopez sexually abused E.C. during a period that is thirty or more days in duration. *See* TEX. PENAL CODE ANN. § 21.02; *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Michell*, 381 S.W.3d at 561; *Williams*, 305 S.W.3d at 890 n.7; *see also Oliver*, 2014 Tex. App. LEXIS 2836, at **34-35; *Cantu*, 2011 Tex. App. LEXIS 6658, at **14-16. Accordingly, we hold that the evidence was sufficient to support Lopez's conviction for continuous sexual abuse of a child. *See* TEX. PENAL CODE ANN. § 21.02; *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Michell*, 381 S.W.3d at 561; *Williams*, 305 S.W.3d at 890 n.7; *see also Oliver*, 2014 Tex. App. LEXIS 2836, at **34-35; *Cantu*, 2011 Tex. App. LEXIS 6658, at **14-16. We overrule Lopez's first issue.

II. HAND'S TESTIMONY

In his second, third, and fourth issues, Lopez complains about the testimony of Hand. In particular, Lopez contends that the trial court erred in admitting Hand's testimony because: (1) E.C.'s mother, not Hand, was the first person to whom E.C. made a statement about the offense; (2) the admission of Hand's testimony violated his right to

confrontation, cross-examination, due process, and due course of law; and because (3) Hand's testimony was not reliable based on the time, circumstances, and content of the outcry.

A. Facts

The record reflects that, prior to trial, the State filed a notice of its intent to offer the hearsay testimony of Hand. In its notice, the State alleged that Hand was the first person eighteen years of age or older to whom E.C. made a statement about the offenses. The trial court conducted a hearing on the State's notice prior to the taking of any witness testimony. At the hearing, Hand testified about her forensic interview with E.C. Following Hand's testimony, Lopez objected to the reliability of Hand's testimony, arguing that the testimony was vague and contradictory. Lopez also objected to hearsay and under the Confrontation Clause of the United States Constitution because E.C. did not testify at the outcry-witness hearing. In addition, Lopez objected on due-process grounds, asserting that E.C.'s outcry referenced fifteen acts of sexual abuse; however, she only provided specific details for two of the fifteen alleged acts in her interview with Hand. The trial court determined that Hand's testimony was reliable based on the time, content, and circumstances and permitted Hand to testify as the outcry witness. Lopez did not reassert his objections when the State proffered Hand's testimony at trial.

B. Applicable Law

The trial court has broad discretion in determining the proper outcry witness, and its determination will not be disturbed absent an abuse of discretion. *Sims v. State*, 12 S.W.3d 499, 500 (Tex. App.—Dallas 1999, pet. ref'd) (citing *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990); *Schuster v. State*, 852 S.W.2d 766, 768 (Tex. App.—Fort Worth 1993, pet. ref'd)).

The outcry testimony of a child victim is hearsay when it is offered for the truth of the matter asserted. *Dorado v. State*, 843 S.W.2d 37, 38 (Tex. Crim. App. 1992). However, it is admissible if it falls within an exception to the hearsay rule. *Id.* In child-abuse cases, Texas Code of Criminal Procedure article 38.072, section 2(a) provides for the admission of hearsay statements describing the offense that are made by the child victim, who is twelve years or younger, to the first person eighteen years or older. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a). To qualify as a proper outcry statement, the child must have described the alleged offense in some discernible way and must have more than generally insinuated that sexual abuse occurred. *See Sims*, 12 S.W.3d at 500.

Article 38.072 of the Code of Criminal Procedure states that the trial court must hold a hearing outside the presence of the jury to determine whether the outcry statements are reliable based on the time, content, and circumstances of the statements. TEX. CODE CRIM. PROC. ANN. art. 38.072, §2(b)(2); *see Sanchez v. State*, 354 S.W.3d 476, 484-85 (Tex. Crim. App. 2011). Indeed, the Texas Court of Criminal Appeals has stated that

article 38.072 "charges the trial court with determining the reliability based on 'the time, content, and circumstances of the statement'; it does not charge the trial court with determining the reliability of the statement based on the credibility of the outcry witness." *Sanchez*, 354 S.W.3d at 487-88 (quoting TEX. CODE CRIM. PROC. ANN. art. 38.072, §2(b)(2)). More specifically, the *Sanchez* Court stated that article 38.072 does not authorize "elaborate mini-trials in which defendants could cross-examine the outcry witness regarding biases in order to ferret out background evidence of prompting or manipulation." *Id.* at 488. Furthermore, "[t]rial courts have great discretion in how they manage their Article 38.072 hearings." *Id.*

C. Discussion

For numerous reasons, we cannot say that the trial court erred in admitting Hand's testimony. First, Hand's testimony was admissible hearsay, in light of the exception provided by section 2(a)(2) of article 38.072. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)(2). Section 2(a)(2) of article 38.072 provides that the proper outcry witness is the first person at least eighteen years old to whom the child victim made a statement about the offense. *See id.* In *Hanson v. State*, this Court stated that the proper outcry witness is the adult to whom the complainant first told how they were abused, when they were abused, and where the abuse occurred. 180 S.W.3d 726, 729 (Tex. App.—Waco 2005, no pet.). The Court of Criminal Appeals has noted that the proper outcry witness is the first adult "to whom the child makes a statement that in some discernible manner describes

the alleged offense. [This] statement must be more than words which give a general allusion that something in the area of child abuse was going on." *Garcia*, 792 S.W.2d at 91.

Here, E.C. told her mother that Lopez "touches her privates"; that he "put his fingers inside her privates"; and that Lopez did it when her mother was asleep or not at home for a "long time." However, E.C.'s statements to her mother did not sufficiently describe the dates when Lopez touched her. E.C. later provided more details regarding the sexual abuse when she told Hand that Lopez touched her on her genitals and butt fifteen times from January to June 2013 and that the abuse always occurred at their residence on the couch or on her mother's bed. *See Smith v. State*, 131 S.W.3d 928, 931 (Tex. App.—Eastland 2004, pet. ref'd) (concluding that Collin County Child Advocacy Center worker Connie Palmer was a proper outcry witness because the child victim provided more detail to Palmer than the child's doctor or mother, the latter of whom was only told that "[appellant] had been performing oral sex on him for about a year"); *see also Castelan v. State*, 54 S.W.3d 469, 475-76 (Tex. App.—Corpus Christi 2001, no pet.) (concluding that a school counselor was a proper outcry witness because the child victim only told his grandmother that appellant had "put his thing in through the back," and because the child victim described the alleged incidents of abuse in great detail to the school counselor). Given that the trial court has broad discretion in determining the proper outcry witness, we cannot say that the trial court abused its discretion in

concluding that Hand was the proper outcry witness under article 38.072. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)(2); *see also Garcia*, 792 S.W.2d at 91; *Smith*, 131 S.W.3d at 931; *Castelan*, 54 S.W.3d at 475-76; *Sims*, 12 S.W.3d at 500; *Schuster*, 852 S.W.2d at 768.

Additionally, we cannot say that Hand's testimony violated Lopez's rights to confrontation and due process. The Court of Criminal Appeals has held that the "[a]dmission of a victim's outcry statement to another under the authority of Art. 38.072, V.A.C.C.P., does not implicate a denial of a defendant's right to confrontation of the witnesses against him because of the requirement of § 2(b)(3) that the child testifies or be available to testify in the proceedings against the accused." *Villalon v. State*, 791 S.W.2d 130, 136 (Tex. Crim. App. 1990). In the instant case, Lopez's Sixth Amendment right to confrontation was not infringed upon because the State called E.C. to testify during its case-in-chief and tendered her to Lopez for cross-examination. *See id.*

Moreover, we cannot say that the trial court abused its discretion in determining that E.C.'s outcry to Hand was reliable because the record indicates that E.C. made her outcry statement to Hand two days after the last act of sexual abuse; E.C. demonstrated during the interview that she understood the difference between telling the truth and telling a lie and promised to tell the truth; E.C. used age-appropriate words and described two detailed acts of sexual abuse; and E.C. made her statements to Hand in response to open-ended, non-suggestive questions. *See Broderick v. State*, 89 S.W.3d 696, 699 (Tex.

App.—Houston [1st Dist.] 2002, pet. ref'd)[3]; *see also Jones v. State*, No. 10-13-00106-CR, 2014 Tex. App. LEXIS 7209, at **9-10 (Tex. App.—Waco July 3, 2014, pet. ref'd) (mem. op., not designated for publication). Considering these facts, we conclude that the trial court did not abuse its discretion in determining that E.C.'s outcry statement was reliable based on the time, content, and circumstances of the statement. *See Broderick*, 89 S.W.3d at 699; *see also Jones*, 2014 Tex. App. LEXIS 7209, at **9-12.

And finally, we note that the substance of Hand's testimony is substantially similar to the testimony provided at trial by E.C. Further, the State offered, and the trial court admitted into evidence, the video recording of Hand's forensic interview of E.C. at the Johnson County Children's Advocacy Center. Lopez did not object to the admission of the video recording, and the record reflects that he used the video himself during trial. Therefore, any error in the admission of Hand's live testimony was cured by unobjected-

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[3] Specifically, the *Broderick* Court stated the following:

> The trial court must conduct an inquiry into the reliability of the outcry statement, examining the "time, content, and circumstances of the statement." The phrase "time, content, and circumstances" refers to "the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of that statement." Although courts have enumerated factors that may assist in ascertaining the reliability of an outcry statement, the focus of the inquiry must remain upon the outcry statement, not the abuse itself. The indicia of reliability enumerated in *Norris* and similar cases, while useful to determine whether the outcry statement is admissible as an exception to the hearsay rule, should not be expanded into a requirement that the court examine the circumstances of the alleged abuse. A child's outcry statement may be held reliable even when it contains vague or inconsistent statements about the actual details of the sexual abuse.

89 S.W.3d 696, 699 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (internal citations omitted).

to testimony provided by E.C. and the admission of the video recording of E.C.'s forensic interview. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) ("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection."); *see also Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("Our rule . . . is that overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."). We overrule Lopez's final three issues.

III. CONCLUSION

Having overruled all of Lopez's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed January 14, 2016
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