IN THE
TENTH COURT OF APPEALS

No. 10-15-00078-CR

JOHN DAVID GATES,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2013-283-C1

MEMORANDUM OPINION

In three issues, appellant, John David Gates, challenges his convictions for one count of continuous sexual abuse of a young child, three counts of indecency with a child by contact, and one count of aggravated sexual assault of a child. *See* TEX. PENAL CODE

ANN. § 21.11 (West 2011); *see also id.* §§ 21.02, 22.021 (West Supp. 2015). Because we overrule all of appellant's issues on appeal, we affirm.[1]

I. BACKGROUND

Here, appellant was charged in a five-count indictment with continuous sexual abuse of his adopted daughter, E.G., indecency with E.G. by contact, and aggravated sexual assault of E.G. The case was tried to a jury, and at the conclusion of the trial, the jury found appellant guilty on all counts. The jury assessed punishment as follows: (1) ninety-nine years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice for the continuous-sexual-abuse-of-a-young-child count; (2) ninety-nine years' imprisonment for the aggravated-sexual-assault-of-a-child count; and (3) twenty years' imprisonment on each of the three counts of indecency with a child by contact. The trial court ordered that the imposed sentences run concurrently and certified appellant's right of appeal. This appeal followed.

II. THE CHILD VICTIM'S LETTER

In his first issue, appellant argues that the trial court abused its discretion in admitting a letter the child victim wrote to appellant. More specifically, appellant contends that the letter was hearsay and should not have been admitted into evidence.

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

A. Standard of Review

We review a trial court's admission or exclusion of evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). When considering a trial court's decision to admit or exclude evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Id.* at 391; *see Manning v. State*, 114 S.W.3d 922, 926 (Tex. Crim. App. 2003).

B. Discussion

Detective Brad Bond of the McLennan County Sheriff's Office testified that he received a telephone call from M.G., the child victim's mother, on October 9, 2012, regarding allegations of sexual abuse perpetrated by appellant against E.G. During his investigation, Detective Bond received a letter from M.G. that had been written by E.G. The letter was admitted into evidence during Detective Bond's direct examination over appellant's hearsay objection. Detective Bond subsequently was allowed to read the contents of the letter, which was intended for appellant and stated the following:

> And it—read from the beginning.
>
> I'm hurting a lot right now. I know I made a promise to you but I came to a time were—I'm assuming, where, I couldn't keep it and I wish you would admit to the truth. You know what you did, and you are way older than me yet I am acting more responsible. You shouldn't hide from the truth

> anymore. It's pointless. I love and miss you so much, but I also hope you can find it in you to tell the truth.

Detective Bond testified that the letter was significant because,

> Well, during the [forensic] interview she mentioned that she [E.G.] and he [appellant] had an agreement that if she ever wanted to tell, try to talk to him first. She expressed, you know, the guilt of coming forward without discussing it with him first. And I thought this corroborated what she was saying in that interview.

On appeal, appellant argues that the letter was not admissible (1) as information acted on by Detective Bond because the jury already knew about appellant's suspected involvement, and (2) because the child victim was expected to testify later. Instead, appellant asserts that the letter should have been excluded as inadmissible hearsay.

"'An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.'" *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004). In the instant case, E.G. and Dr. William Lee Carter both testified about the substance of and the motivation behind E.G.'s letter without objection. In fact, the record reflects that the only objection made regarding the letter was the hearsay objection lodged during Detective Bond's testimony. Moreover, appellant did not obtain a running objection with regard to the letter. Because both E.G. and Dr. Carter testified about the letter without objection, we conclude that error, if any, in the admission of the complained-of letter was cured. *See Lane*, 151 S.W.3d at 193. We overrule appellant's first issue.

III. WITNESS TESTIMONY

In his second issue, appellant complains about testimony provided by a fellow teacher, Jean Sury, regarding an incident where her daughter spent the night at appellant's house. Though specifics were not provided, the witness was allowed to testify that something happened at appellant's house that night. Appellant argues that the trial court abused its discretion in failing to exclude this testimony as indirect hearsay.

A. Sury's Testimony

Sury testified that she had previously taught with appellant at Hewitt Elementary School and that her daughter and E.G. are friends. Thereafter, Sury was asked the following questions about an incident that purportedly transpired at appellant's house:

> Q [The State]: And I want to take you back to one incident where I believe your daughter went to her house.
>
> A [Sury]: Yes.
>
> Q: Do you know what I'm talking about?
>
> A: Yes. My daughter said—it was about 5th grade—
>
> [Defense counsel]: Your Honor, objection to hearsay. They haven't brought this daughter in.
>
> [The State]: Judge, I'll rephrase the question to you.
>
> . . . .
>
> Q [The State]: All right. And without going into what your daughter said, was there anything in particular that had occurred while your daughter was at their house?

[Defense counsel]: Objection; hearsay. She wasn't there, Your Honor.

. . . .

THE COURT: Overruled as to was there an occurrence. But ma'am you can't get into any specifics of what was said.

. . . .

Q [The State]: All right. So, Ms. Sury, I'll re-ask the question. When your daughter went over to spend the night with [E.G.]—

A [Sury]: Yes.

Q: —was there anything that you learned about afterwards that raised a concern to you?

A: Yes.

Q: And without going into what that was, did she ever go back and spend the night again?

A: I do not remember if she went back. I don't think she did after that, but I don't remember.

B. Discussion

As shown above, Sury testified that she learned that something had transpired on the night her daughter spent the night at appellant's house and that this incident concerned her. Appellant did not object to this testimony, nor did he obtain a running objection to any and all references to the incident at trial. However, on appeal, appellant complains about all references to the incident at his house. Like before, because appellant failed to object to Sury's later testimony, and because appellant did not obtain a running

objection to this testimony, we conclude that error, if any, in the admission of the complained-of testimony was cured. *See Lane*, 151 S.W.3d at 193.

And even if appellant had properly objected to Sury's later testimony, we note that:

> Generally, errors concerning the admission of the State's evidence over a defendant's objection are non-constitutional errors. *See Easley v. State*, 424 S.W.3d 535, 539 (Tex. Crim. App. 2014). Thus, the trial court's error in admitting . . . testimony should be disregarded unless the error affected [appellant's] substantial rights. *See* TEX. R. APP. P. 44.2(b); *see also Reyes v. State*, No. 03-10-00082-CR, 2011 Tex. App. LEXIS 4811, at *17 (Tex. App.—Austin June 24, 2011, no pet.) ([mem. op.,] not designated for publication). "[S]ubstantial rights are not affected by the erroneous admission of evidence 'if the appellate court, after examining the record as a whole, has 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) (quoting *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)).

Washington, v. State, 457 S.W.3d 634, 636 (Tex. App.—Waco 2015, no pet.).

At trial, Sury only testified that an "incident" occurred at appellant's house and that she could not remember if her daughter spent the night at appellant's house again because of her concern. No additional details about the "incident" were provided, including what exactly happened and whether appellant was present on the night Sury's daughter spent the night.

Furthermore, the record contains ample evidence documenting appellant's relationship with E.G., including testimony from M.G. that appellant treated E.G. like a spouse and that she observed "a million different red flags over the years," as well as from E.G. regarding the numerous instances of sexual abuse. *See* TEX. CODE CRIM. PROC.

ANN. art. 38.07 (West Supp. 2015); *Lee v. State*, 186 S.W.3d 649, 655 (Tex. App.—Dallas 2006, pet. ref'd); *see also Martinez v. State*, No. 10-14-00035-CR, 2014 Tex. App. LEXIS 11230, at *5 (Tex. App.—Waco Oct. 9, 2014, pet. ref'd) (mem. op., not designated for publication) ("The testimony of a child victim alone is sufficient to support a conviction for continuous sexual abuse of a child." (internal citations omitted)); *Cox v. State*, No. 10-11-00414-CR, 2013 Tex. App. LEXIS 4073, at *10 (Tex. App.—Waco Mar. 28, 2013, pet. ref'd) (mem. op., not designated for publication) ("We note that the testimony of a child victim is sufficient to support a conviction for aggravated sexual assault or indecency with a child[,] and corroboration is not required." (internal citations omitted)). Therefore, after reviewing the record, we cannot say that appellant has demonstrated that the alleged error in the admission of this evidence had a substantial and injurious effect or influenced the jury's verdict. *See* TEX. R. APP. P. 44.2(b); *see also Solomon*, 49 S.W.3d at 365; *Johnson*, 967 S.W.2d at 417. And based on the foregoing, any error in the admission of the complained-of testimony was harmless. *See* TEX. R. APP. P. 44.2(b). We overrule appellant's second issue.

IV. ARTICLE 38.37 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

In his third issue, appellant complains that the State was allowed to introduce evidence under article 38.37 of the Texas Code of Criminal Procedure that appellant had engaged in improper conduct with another daughter. Appellant contends that due

process prohibits the use of such evidence to establish that he is a criminal, in general. Accordingly, appellant argues that article 38.37 is unconstitutional.

Recently, in *Balboa v. State*, we addressed a similar challenge to article 38.37 and concluded that the statute is constitutional. *See* No. 10-15-00024-CR, 2016 Tex. App. LEXIS 908, at **10-12 (Tex. App.—Waco Jan. 28, 2016, no pet. h.) (mem. op., not designated for publication). Citing the *Harris* decision from the Fourteenth Court of Appeals, we noted that section 2(b) of article 38.37 was intended to: (1) bring the Texas Rules of Evidence in line with Federal Rule of Evidence 413(a), which several federal courts have determined does not violate the Due Process Clause of the United States Constitution because it does not implicate a fundamental right; and (2) "'give prosecutors additional resources to prosecute sex crimes committed against children.'" *Id.* at *10 (quoting *Harris v. State*, No. 14-14-00152-CR, 2015 Tex. App. LEXIS 8723 (Tex. App.—Houston [14th Dist.] Aug. 20, 2015, no pet.)). Moreover,

> a defendant's right to a fair trial is protected by numerous procedural safeguards contained in the statute, including: (1) the requirement that the trial court conduct a hearing before the evidence is introduced to determine whether the evidence will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; (2) defense counsel's right to challenge any witness's testimony by cross-examination at the hearing; and (3) the requirement that the State give defendant notice of its intent to introduce the evidence in its case-in-chief not later than the thirtieth day before trial.

Id. at **10-11 (citing *Harris*, 2015 Tex. App. LEXIS 8723, at **12-13). "And finally, the *Harris* Court explained that section 2 of article 38.37 does not impermissibly lessen the State's burden of proof in this case." *Id.* at *11 (citing *Harris*, 2015 Tex. App. LEXIS 8723, at *13).

It is also worth mentioning that several other Texas courts have also arrived at the same conclusion—that article 38.37 is constitutional. *See Belcher v. State*, 474 S.W.3d 840, 2015 Tex. App. LEXIS 9352, at *12 (Tex. App.—Tyler Sept. 2, 2015, no pet.) (concluding, after explaining the aforementioned safeguards, that the "admission of evidence of Appellant's other sexual crimes and bad acts against children . . . did not deprive Appellant of due process of law, and Article 38.37, Section 2(b) is constitutional"); *see also Bezerra v. State*, No. 07-15-00018-CR, ___ S.W.3d ___, 2016 Tex. App. LEXIS 467, at **6-9 (Tex. App.—Amarillo Jan. 14, 2016, no pet. h.) (holding that article 38.37, section 2 is constitutional); *Robisheaux v. State*, No. 03-14-00329-CR, ___ S.W.3d ___, 2016 Tex. App. LEXIS 66, at **5-12 (Tex. App.—Austin Jan. 7, 2016, no pet. h.) (holding that article 38.37, section 2 is not unconstitutional on its face).

Here, the record reflects that the safeguards outlined in *Harris*, *Balboa*, and the other cases cited above were followed. Therefore, based on the foregoing, we cannot say that the trial court abused its discretion in admitting the complained-of evidence. *See Martinez*, 327 S.W.3d at 736; *Manning*, 114 S.W.3d at 926; *Montgomery*, 810 S.W.2d at 380. As such, we overrule appellant's third issue.

V. CONCLUSION

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

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed March 10, 2016
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