TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-13-00809-CR

Paul Boris Golceff, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2013-052, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Paul Boris Golceff of one count of aggravated sexual assault of a child and two counts of sexual performance by a child.[1] The district court rendered judgment on each verdict and assessed punishment at 40 years' imprisonment for each count, with the sentences to run consecutively.[2] In eight points of error on appeal, Golceff challenges the sufficiency of the evidence supporting each of his convictions, asserts that the district court abused its discretion in admitting evidence of his status as a sex offender and his prior conviction for the offense of solicitation of a minor, and claims that he received ineffective assistance of counsel when trial counsel failed to preserve error in the admissibility of certain evidence. We will affirm the judgments of conviction.

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[1] *See* Tex. Penal Code §§ 22.021, 43.25.

[2] *See* Tex. Code Crim. Proc. art. 42.08(a).

BACKGROUND

The jury heard evidence tending to show that Golceff and another man, Rudolph Figueroa, had multiple three-way phone conversations with A.K., a 13-year-old girl living in Illinois. A.K. testified that she came into contact with the men after meeting someone online who identified himself as "Jake Mancini" and who claimed to be a seventeen-year-old boy. According to A.K., "Jake" (allegedly Figueroa) eventually introduced her over the phone to his two uncles—"Uncle Rick" (also allegedly Figueroa) and "Uncle Paul" (allegedly Golceff). A.K. testified that her conversations with "Uncle Rick" and "Uncle Paul" involved "sexual stuff" that they had asked her to do, including acts of masturbation and bestiality, and that she had complied with their requests. Based on this and other evidence, which we discuss in more detail below, the State charged Golceff with one count of aggravated sexual assault of a child and two counts of sexual performance by a child. Because both Golceff and Figueroa were implicated in the offenses, the jury was instructed that it could convict Golceff as either the principal actor or as a party to each offense. The jury found Golceff guilty of each offense as charged and the district court rendered judgment on each verdict and sentenced Golceff to three consecutive 40-year sentences as noted above. This appeal followed.

ANALYSIS

Evidentiary sufficiency

In his first point of error, Golceff asserts that the evidence is insufficient to prove that any of the offenses were committed in Texas. In his second, third, and fourth points of error, Golceff

challenges the sufficiency of the evidence supporting each of the charged offenses.[3] In his fifth point of error, Golceff asserts that the evidence is insufficient to establish his identity as "Uncle Paul."

Standard of review

When reviewing the sufficiency of the evidence supporting a conviction, "the standard of review we apply is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[4] "This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts."[5] "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them."[6] "On appeal, reviewing courts 'determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.'"[7] "Thus, '[a]ppellate courts are not permitted to use a 'divide and conquer' strategy for evaluating sufficiency of the evidence' because that approach does not consider the cumulative

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[3] Golceff challenges the sufficiency of the evidence supporting his conviction either as a principal actor or as a party to each offense. Because we conclude that the evidence is sufficient to support Golceff's conviction as a principal actor for each offense, as discussed below, we need not consider whether the evidence is sufficient to support his guilt as a party. *See* Tex. R. App. P. 47.1.

[4] *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[5] *Id*.

[6] *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

[7] *Murray*, 457 S.W.3d at 448 (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

force of all the evidence."[8] "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination."[9] Moreover, "[o]ur review of 'all of the evidence' includes evidence that was properly and improperly admitted."[10] Finally, "the same standard of review is used for both circumstantial and direct evidence cases."[11] "Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient" to support a conviction.[12]

Whether the offenses were committed in Texas

In his first point of error, Golceff asserts that the evidence is insufficient to prove that the offenses were committed in Texas.[13] A person commits an offense in Texas if "either the conduct or a result that is an element of the offense occurs inside this state."[14] It is undisputed that the results of the charged offenses—A.K. penetrating herself and performing sexual acts—occurred

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[8] *Id*. (quoting *Hacker v. State*, 389 S.W.3d 860, 873 (Tex. Crim. App. 2013)).

[9] *Id*. at 448-49 (citing *Hooper*, 214 S.W.3d at 12).

[10] *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (citing *Clayton*, 235 S.W.3d at 778).

[11] *Id*. (citing *Hooper*, 214 S.W.3d at 13).

[12] *Id*. (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

[13] As both parties acknowledge in their briefs, the law is currently unclear regarding whether the State must prove this element of the offense beyond a reasonable doubt or merely by a preponderance of the evidence. *See Vaughn v. State*, 607 S.W.2d 914, 920 (Tex. Crim. App. 1980); *Jessop v. State*, 368 S.W.3d 653, 666 (Tex. App.—Austin 2012, no pet.). We need not decide that question today, however, as we conclude that the evidence in this case is sufficient under either standard.

[14] Tex. Penal Code § 1.04(a)(1); *see Rodriguez v. State*, 146 S.W.3d 674, 675-76 (Tex. Crim. App. 2004).

in Illinois, where A.K. lived at the time of the offenses.[15] Consequently, to prove that the offenses were committed in Texas, the State needed to produce evidence from which the jury could have reasonably inferred that the prohibited conduct—in this case, calling A.K. and asking her to penetrate herself and perform sexual acts—occurred in Texas.[16]

The evidence tending to show that the phone calls originated from Texas included the following: (1) A.K. testified that "Uncle Paul" and "Uncle Rick" talked to her about visiting them in Texas and that "[t]hey wanted to buy [her] a train ticket" to Texas; (2) according to the testimony of Detective Jeremy Thayer, an Illinois police officer who had investigated the case, "Jake" had claimed to be from Corpus Christi; (3) Thayer also testified that officers had confirmed that the phone number that "Jake" had used to call A.K. belonged to Figueroa, who was a Corpus Christi resident; (4) Thayer testified that at around the time the calls were made, Figueroa had sold a computer at a pawn shop located in Corpus Christi; (5) Thayer further testified that while the investigation was ongoing, Figueroa had sent text messages to A.K.'s phone (which was in Thayer's possession at the time), and other officers had confirmed that these messages were sent by Figueroa while he was at his residence in Corpus Christi; (6) following Figueroa's arrest, voice and text messages were recovered from his phone that had been sent to Figueroa by a person named "Paul," who was subsequently identified as Golceff, who was a New Braunfels resident; (8) Detective Richard Groff of the New Braunfels Police Department, who had investigated

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[15] In fact, the record reflects that Figueroa was prosecuted and convicted in Illinois for his role in the offenses and is currently serving a sentence of ten years' imprisonment in an Illinois penitentiary.

[16] *See Rodriguez*, 146 S.W.3d at 675-76; *Vaughn*, 607 S.W.2d at 919; *see also Jessop*, 368 S.W.3d at 666.

Golceff's involvement in the offenses, testified that the cell phone that Golceff had used to communicate with Figueroa had been recovered at Golceff's residence in New Braunfels; (9) Detective Joe Tovar of the New Braunfels Police Department, who had also participated in the investigation, testified that following a search of the phone that had been seized from Golceff's New Braunfels residence, officers had recovered multiple photographs of A.K. in which she was posing partially clothed and engaging in sexual activity with a dog, as well as text messages from Figueroa to Golceff in which Figueroa had described some of his conversations with A.K.; (10) according to Detective Groff, the same phone that was seized from Golceff's New Braunfels residence also contained records of multiple phone calls between Figueroa and Golceff and also a record of a phone call between Golceff and A.K.; and (11) also according to Groff, at the time Golceff was communicating with Figueroa, Golceff worked in Austin and, according to text messages and call logs that were recovered from Golceff's phone, Golceff was meeting with Austin-area real-estate agents and attempting to buy a house in the Austin area.

In arguing that the above evidence is insufficient to prove that the offenses were committed in Texas, Golceff points to other evidence in the record tending to show that Golceff had a friend who lived in Colorado, that Golceff's parents had an address in Oregon, and that Golceff had indicated to a friend that he had at one time traveled overseas to Japan. Additionally, Golceff argues that calls from a cell phone are capable of being made from anywhere and that it was therefore possible for the calls to have been made from somewhere other than Texas. However, when the record supports conflicting inferences, we are to presume the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination.[17] We conclude that

[17] *See Clayton*, 235 S.W.3d at 778.

the combined and cumulative force of the above evidence, when viewed in the light most favorable to the verdict, supports a reasonable inference by the jury that Golceff was in Texas at the time the calls to A.K. were made and thus that the calls in which A.K. was asked to penetrate herself and perform sexual acts were made in Texas. On this record, we conclude that the evidence is sufficient to prove that the offenses were committed in Texas.[18]

We overrule Golceff's first point of error.

Aggravated sexual assault of a child

In Count III of the indictment, Golceff was charged with intentionally or knowingly causing the penetration of A.K.'s sexual organ with A.K.'s finger.[19] In his second point of error, Golceff asserts that the evidence is insufficient to prove that he committed this offense. Specifically, Golceff challenges the sufficiency of the evidence supporting the element of causation. Relying on one dictionary definition of "cause," Golceff asserts that causation requires some element of compulsion, either "by command, authority, or force,"[20] and he argues that there was no evidence presented that he had ever "compelled" A.K. to penetrate herself in any manner.

However, as the State observes, compulsion is not an element of causation in the Penal Code. Section 6.04 of the Penal Code, entitled "Causation: Conduct and Results," provides

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[18] *See, e.g.*, *Rodriguez*, 146 S.W.3d at 675-76; *Vaughn*, 607 S.W.2d at 919-20; *Yates v. State*, 370 S.W.3d 772, 773-75 (Tex. App.—Texarkana 2012, pet. ref'd); *Jessop*, 368 S.W.3d at 666; *Gunter v. State*, 327 S.W.3d 797, 800 (Tex. App.—Fort Worth 2010, no pet.); *Walker v. State*, 195 S.W.3d 250, 257-58 (Tex. App.—San Antonio 2006, no pet.); *Torres v. State*, 141 S.W.3d 645, 654 (Tex. App.—El Paso 2004, pet. ref'd); *James v. State*, 89 S.W.3d 86, 89 (Tex. App.—Corpus Christi 2002, no pet.).

[19] Tex. Penal Code § 22.021(a)(1)(B)(i), (2)(B).

[20] *See* Merriam-Webster's Collegiate Dictionary 196 (11th ed. 2014).

that "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."[21] Thus, "[p]roof of causation is sufficient if the evidence establishes that 'but for' the defendant's conduct, the alleged result would not have occurred."[22] Moreover, the aggravated-sexual-assault statute provides that penetration of a child's sexual organ can be caused "by any means."[23] There is no requirement that the penetration be caused by compulsion, force, or threats.

"Whether such a causal connection exists is a question for the jury's determination."[24] "Circumstantial evidence may be used to establish a causal connection," and the "jury may draw

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[21] Tex. Penal Code § 6.04(a). As this Court has previously observed, "[t]he concept of 'but for' causation contained in this statute is consistent with the common meaning of 'cause.'" *Williams v. State*, No. 03-11-00598-CR, 2013 Tex. App. LEXIS 15454, at *17 n.8 (Tex. App.—Austin Dec. 13, 2013, pet. ref'd) (mem. op., not designated for publication) (citing Webster's Third New Int'l Dictionary 356 (2002) (defining transitive verb "cause" as "to serve as cause or occasion of; bring into existence; make"); American Heritage Dictionary 214 (1973) (defining transitive verb "cause" as "to be the cause of; effect; make happen; bring about")); *see also* Tex. Gov't Code § 311.011(a) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage").

[22] *Barcenes v. State*, 940 S.W.2d 739, 745 (Tex. App.—San Antonio 1997, pet. ref'd) (citing *Lowe v. State*, 676 S.W.2d 658, 661 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd)); *see also Wright v. State*, 494 S.W.3d 352, 362 (Tex. App.—Eastland 2015, pet. ref'd) ("'But for' causation, as referred to in Section 6.04(a), must be established between an accused's conduct and the resulting harm." (citing *Robbins v. State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986))).

[23] Tex. Penal Code § 22.021(a)(1)(B)(i).

[24] *Wooten v. State*, 267 S.W.3d 289, 295 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *see Fountain v. State*, 401 S.W.3d 344, 358 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (citing *Dorsche v. State*, 514 S.W.2d 755, 757 (Tex. Crim. App. 1974); *Hale v. State*, 194 S.W.3d 39, 42 (Tex. App.—Texarkana 2006, no pet.)).

reasonable inferences regarding the ultimate facts from basic facts" to find that the defendant's conduct caused the resulting harm.[25]

In this case, evidence regarding causation was elicited from the testimony of A.K.:

Q. Did they ever ask you to touch yourself?

A. Yeah.

Q. What did they ask you, specifically, about that?

A. They wanted me to finger myself.

Q. Now, when you say "they," are you talking about Paul and—

A. Yeah.

Q. —Uncle Rick and—

A. Paul, Rick, and Jake.

Q. When you were talking to these guys, would they be on the phone at the same time?

A. Yeah. I never talked to Paul without Jake.

Q. Okay. So it would be, like, a three-way call?

A. Uh-huh.

. . . .

Q. In particular, you said they had asked you to do some of these things. I want to go back, though, to when they asked you to touch yourself. Did you ever do that?

A. I did.

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[25] *Wooten*, 267 S.W.3d at 296 (citing *Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000); *Garcia v. State*, 112 S.W.3d 839, 853 (Tex. App.—Houston [14th Dist.] 2003, no pet.)); *see Turner v. State*, 435 S.W.3d 280, 283 (Tex. App.—Waco 2014, pet. ref'd).

Q. Can you tell us about that?

A. I tried it a few times, but it wasn't comfortable at all. I didn't like it. It didn't feel right. So for most of the conversations, I—it would be me imitating, like, what it would sound like if I was fingering myself or something.

. . . .

Q. You had talked about [how] they asked you to finger yourself?

A. Uh-huh.

Q. Did you know what that was, originally?

A. No, I didn't.

Q. Did they tell you?

A. Yes, they did.

Q. And you said you actually did that a couple of times—

A. Yes.

Q. When you say you did that, what are we talking about, exactly?

A. It's sticking your finger up your vagina, kind of masturbating, I guess.

On cross-examination, A.K. additionally testified as follows:

Q. Okay. And how did Paul make you do anything?

A. He told me to over the phone.

Q. Did he threaten you in any way if you wouldn't do this?

A. Not necessarily.

Q. What does "not necessarily" mean?

A. It means no, he wasn't threatening me. But this is an old man telling a 13-year-old girl what to do, and as a kid, I was told I'm supposed to do what adults tell me to do.

In summary, A.K. testified that she had "fingered herself" on multiple occasions in response to Golceff and Figueroa telling her to do so. A.K. also testified that she did not know what "fingering herself" meant prior to Golceff and Figueroa explaining it to her and that it "wasn't comfortable at all," but she did it anyway because Golceff was an adult and she "was told . . . to do what adults tell [her] to do." Viewing the above evidence in the light most favorable to the verdict, we conclude that it supports the jury's finding that A.K. would not have penetrated herself but for Golceff and Figueroa telling her to do so. Accordingly, the evidence is sufficient to prove that Golceff caused A.K. to penetrate her sexual organ with her finger and thus that he committed the offense of aggravated sexual assault of a child as charged in Count III of the indictment.[26]

We overrule Golceff's second point of error.

Sexual performance by a child – masturbation

The evidence summarized above also formed the basis for the allegations in Count I of the indictment, in which Golceff was charged with intentionally or knowingly employing, authorizing, or inducing A.K. to engage in sexual conduct or a sexual performance consisting of

[26] *See* Tex. Penal Code § 22.021(a)(1)(B)(i) (providing that penetration of child's sexual organ can be caused "by any means"); *see also Kuhn v. State*, 393 S.W.3d 519, 531 (Tex. App.—Austin 2013, pet. ref'd) ("We are aware of no authority, and [appellant] cites to none, holding that the conduct element of this offense cannot include using the child's own hands or fingers to cause the penetration."). *Cf. Waggoner v. State*, 897 S.W.2d 510, 511-12 (Tex. App.—Austin 1995, no pet.) (holding that when similar statute provided that offense can be caused "by any means," State "need not show that an accused used force or threats" to cause resulting harm).

either: (1) the penetration of A.K.'s sexual organ with A.K.'s finger or (2) the touching of A.K.'s genitals or part of her genitals with A.K.'s hands or finger.[27] In his third point of error, Golceff asserts that the evidence is insufficient to prove that Golceff "induced" A.K. to engage in the sexual conduct or performance.[28]

Because the Penal Code does not define "induce," we are to apply its common meaning.[29] That common meaning, as recognized by numerous Texas courts, including this one, denotes "to move by persuasion or influence" or "to persuade, prevail upon, or bring about."[30] Thus, to support Golceff's conviction for sexual performance by a child, the State needed to present evidence from which the jury could have found that Golceff had persuaded or influenced A.K. to engage in the alleged sexual conduct or performance.

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[27] *See* Tex. Penal Code § 43.25(a)(2), (b).

[28] Although the charge also provided that Golceff could be convicted based on a finding that he had "employed" or "authorized" A.K. to engage in the sexual conduct or performance, the State's emphasis during trial was on whether Golceff had "induced" A.K. to engage in the sexual conduct or performance and that is the focus of the parties' arguments on appeal.

[29] *See* Tex. Gov't Code § 311.011(a).

[30] *See, e.g.*, *Ex parte Fujisaka*, 472 S.W.3d 792, 797 (Tex. App.—Dallas 2015, pet. ref'd); *Bell v. State*, 326 S.W.3d 716, 720-21 (Tex. App.—Dallas 2010, pet. ref'd, untimely filed); *Dornbusch v. State*, 156 S.W.3d 859, 866 (Tex. App.—Corpus Christi 2005, pet. ref'd); *Garay v. State*, 954 S.W.2d 59, 64 (Tex. App.—San Antonio 1997, pet. ref'd); *see also Marino v. State*, No. 09-15-00350-CR, 2016 Tex. App. LEXIS 9214, at *13-18 (Tex. App.—Beaumont Aug. 24, 2016, no pet.) (mem. op., not designated for publication); *Schaefer v. State*, No. 03-11-00345-CR, 2014 Tex. App. LEXIS 7408, at *9-11 (Tex. App.—Austin July 10, 2014, pet. ref'd) (mem. op., not designated for publication); *Melder v. State*, No. 12-12-00400-CR, 2014 Tex. App. LEXIS 5130, at *17-18 (Tex. App.—Tyler May 14, 2014, pet. ref'd) (mem. op., not designated for publication); *Baker v. State*, No. 10-11-00449-CR, 2012 Tex. App. LEXIS 9345, at *30-31 (Tex. App.—Waco Nov. 8, 2012, no pet.) (mem. op., not designated for publication); *Dorval v. State*, No. 03-03-00570-CR, 2004 Tex. App. LEXIS 6813, at *2-3 (Tex. App.—Austin July 29, 2004, no pet.) (mem. op., not designated for publication).

Here, the State presented evidence tending to show that A.K. had been introduced to Golceff and Figueroa through "Jake," whom A.K. believed at the time was a seventeen-year-old boy who had expressed interest in her. A.K. testified that she "really liked" Jake and that she had considered him to be her "first boyfriend." A.K. also testified that Jake had responded to gymnastics videos of her that she had posted online and that he was "very flattering" to her, engaging in "nonstop texting" with her "the whole day" after she had given him her phone number. A.K. also testified that Jake had introduced Golceff and Figueroa to her as his uncles, that "Paul, Rick, and Jake" had all asked her on multiple occasions to "finger herself," and that she had "never talked to Paul without Jake." Based on this and other evidence, the jury could have reasonably inferred that Golceff, by pretending to be one of Jake's "uncles," had persuaded or influenced A.K. to engage in sexual conduct due to what the jury could have reasonably inferred was a desire on the part of A.K., a thirteen-year-old girl, to comply with the requests of her seventeen-year-old "boyfriend" and his uncles, both of whom, the jury could have further inferred, were perceived by A.K. to be adult authority figures whom she should obey in order to please "Jake" and because she was "supposed to do what adults tell [her] to do." Viewed in the light most favorable to the verdict, we conclude that the combined and cumulative force of the above evidence is sufficient to prove that Golceff had induced A.K. to engage in masturbation and thus that he had committed the offense of sexual performance by a child as charged in Count I of the indictment.[31]

We overrule Golceff's third point of error.

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[31] *See Bell*, 326 S.W.3d at 720; *Dornbusch*, 156 S.W.3d at 868; *see also Marino*, 2016 Tex. App. LEXIS 9214, at *17-18; *Schaefer*, 2014 Tex. App. LEXIS 7408, at *11-12; *Dorval*, 2004 Tex. App. LEXIS 6813, at *2-3.

Sexual performance by a child – bestiality

In Count II of the indictment, Golceff was charged with intentionally or knowingly employing, authorizing, or inducing A.K. to engage in sexual conduct or a sexual performance consisting of sexual intercourse, simulated sexual intercourse, or sexual bestiality between A.K. and a dog.[32] In his fourth point of error, Golceff asserts that the evidence is insufficient to prove that A.K. had actually engaged in sexual intercourse, simulated sexual intercourse, or sexual bestiality with a dog or that Golceff had actually "employed, authorized, or induced" A.K. to do so.

The word "bestiality" is not defined in the Penal Code. However, the common meaning of the term is "sexual relations between a human and an animal."[33] In this case, A.K. provided the following testimony concerning the bestiality allegations:

> Q. Very specifically, Uncle Paul—what kind of sexual stuff would he talk to you about?
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> A. Jake would tell Paul how I would do things with my dog. I know I did some of the stuff, but it was getting to the point where they would say I was having sex with my dog, and that's what they thought I was doing.
>
> Q. Okay.
>
> A. And so Paul would ask me about that. He would tell me to have sex with my dog while I was on the phone with him. And I remember specifically he would say he had a black Labrador, and he wanted me to come over to his house sometime and have sex with his dog while he was watching.
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> Q. Okay. Was there something involving peanut butter?
>
> A. Yeah. They would want me to spread peanut butter on my vagina and have the dog lick it off.

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[32] *See* Tex. Penal Code § 43.25(a)(2), (b).

[33] *See* Webster's Third New Int'l Dictionary 208 (2002).

Q. Did they ask you to do other sexual things?

A. Yeah. They wanted me to suck my dog's penis and rub it—

Q. Okay.

A. —and kiss the dog, like, make out with it.

. . . .

A. . . . . And when it came to the dog, like, licking peanut butter, after I tried it the first time, I would just—

Q. Hold on just a second. You actually did that?

A. Yes.

Q. All right.

A. I would just put peanut butter on my arm and have it lick it off. And they would want to hear the dog licking it, so I would just hold up the phone to that.

In addition to considering A.K.'s testimony, the jury also reviewed multiple photographs of A.K. that were recovered from Golceff's phone. In one of the photographs, A.K.'s head appears to be positioned between what appears to be the legs of a black dog.[34]

In summary, A.K. testified that Golceff had told her to have sex and engage in certain sex acts with her dog. There was also photographic evidence from which the jury could have reasonably inferred that A.K. had engaged in at least one sexual act with a dog. Further, A.K. indicated that she had permitted the dog to lick peanut butter off parts of her body, including, on at

[34] As Golceff argued during trial and again argues on appeal, it is difficult to discern from the photograph whether the black object in the photograph is an actual dog. However, as the district court observed when overruling Golceff's objection to the admissibility of the photo, "It's up to the jury to determine what it is," and, based on the other evidence presented, it would be reasonable for the jury to infer that the object was in fact a dog.

least one occasion, her vagina. Viewed in the light most favorable to the verdict, the above evidence supports the jury's findings that Golceff had asked A.K. to engage in sexual relations with a dog and that A.K. had complied with Golceff's requests. And, as we have previously discussed, the record also supports the jury's finding that Golceff had induced, i.e., persuaded or influenced, A.K. to engage in that conduct by pretending to be one of the uncles of "Jake," whom A.K. viewed as her "first boyfriend." Accordingly, the evidence is sufficient to prove that Golceff had committed the offense of sexual performance by a child as charged in Count II of the indictment.

We overrule Golceff's fourth point of error.

Identity

We next address Golceff's fifth point of error, in which he asserts that the evidence is insufficient to establish his identity as the perpetrator of the offenses. Specifically, Golceff contends that the State failed to provide sufficient evidence that he was the "Uncle Paul" to whom A.K. had referred in her testimony.

The State must prove beyond a reasonable doubt that the accused is the person who committed the charged offense.[35] However, identity may be established by direct evidence, circumstantial evidence, or even inferences.[36] "When there is no direct evidence of the perpetrator's

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[35] *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984); *Kromah v. State*, 283 S.W.3d 47, 50 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd); *Wiggins v. State*, 255 S.W.3d 766, 771 (Tex. App.—Texarkana 2008, no pet.); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd).

[36] *See Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009) (citing *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986)); *Roberson*, 16 S.W.3d at 167.

identity elicited from trial witnesses, no formalized procedure is required for the State to prove the identity of the accused."[37]

Here, the State provided the following evidence to establish Golceff's identity as "Uncle Paul": (1) Golceff and the person with whom A.K. spoke on the phone shared the same first name, "Paul"; (2) A.K. testified that "Uncle Paul" had "a really thick, country accent," and Detective Groff, who had spoken with Golceff during the investigation, testified similarly; (3) A.K. testified that "Paul" had told her that he wanted her to have sex with his black Labrador dog, and Groff testified that a black Labrador dog was found at Golceff's residence; (4) Detective Thayer testified that during his interrogation of Figueroa, Figueroa had told Thayer "that the person he was talking to was his friend Paul that he believed was from San Antonio or Austin," and there was other evidence presented that Golceff worked in Austin and was attempting to buy a house there; (5) a phone was found in Golceff's possession that contained a call log that included Figueroa's phone number, A.K.'s phone number, photographs of A.K., and text messages referring specifically to A.K.; (6) Golceff's phone also contained records of hundreds of text messages, multimedia messages, and voice calls between Golceff and Figueroa that were sent and received at around the times that Figueroa had called A.K.; and (7) when speaking with police officers, Golceff initially denied but subsequently acknowledged that he knew Figueroa.

In arguing that the above evidence is insufficient to prove his identity as the perpetrator, Golceff points to the absence of direct evidence in the record establishing his identity as "Uncle Paul," including the absence of any phone records tending to show that Golceff and

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[37] *Roberson*, 16 S.W.3d at 167 (citing *Sepulveda v. State*, 729 S.W.2d 954, 957 (Tex. App.—Corpus Christi 1987, pet. ref'd)).

Figueroa were ever on the phone at the same time, the absence of any in-court identification by A.K. of Golceff, or any statement from Figueroa confirming Golceff's identity as "Uncle Paul." Again, however, "circumstantial evidence is as probative as direct evidence in establishing guilt."[38] Viewing the totality of the above evidence and all reasonable inferences therefrom in the light most favorable to the verdict, we conclude that the evidence is sufficient to support the jury's finding that Golceff was the "Uncle Paul" to whom A.K. had referred in her testimony.[39]

We overrule Golceff's fifth point of error.

Evidence admissibility

In his sixth point of error, Golceff asserts that the district court abused its discretion in admitting evidence of Golceff's status as a sex offender and his prior conviction for the offense of criminal solicitation of a minor. In response, the State argues that Golceff failed to preserve error on the admissibility of this evidence in the court below.

To preserve error for appellate review, the record must show that: (1) the complaining party made a timely and specific request, objection, or motion; and (2) the trial judge either ruled on the request, objection, or motion (expressly or implicitly), or he refused to rule and

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[38] *See Clayton*, 235 S.W.3d at 778.

[39] *See Gardner*, 306 S.W.3d at 285-86; *Earls*, 707 S.W.2d at 85; *Miller*, 667 S.W.2d at 776; *Jones v. State*, 458 S.W.3d 625, 630-31 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *Gilmore v. State*, 397 S.W.3d 226, 240 (Tex. App.—Fort Worth 2012, pet. ref'd); *Orellana v. State*, 381 S.W.3d 645, 653-54 (Tex. App.—San Antonio 2012, pet. ref'd); *Wiggins*, 255 S.W.3d at 771-72; *Roberson*, 16 S.W.3d at 167-68; *Manemann v. State*, 878 S.W.2d 334, 338 (Tex. App.—Austin 1994, pet. ref'd); *see also Haule v. State*, No. 03-04-00802-CR, 2006 Tex. App. LEXIS 734, at *7-9 (Tex. App.—Austin Jan. 26, 2006, no pet.) (mem. op., not designated for publication) (holding that inability of witness to "independently identify the voice she heard on the phone does not render the evidence as a whole insufficient to prove that [the defendant] was the caller" when other circumstantial evidence in record tended to establish that fact).

the complaining party objected to that refusal.[40] Moreover, the complaining party must object each time the inadmissible evidence is offered during trial, unless: (1) counsel requests and obtains a running objection to the evidence or (2) counsel requests a hearing outside the presence of the jury and obtains a ruling at that time.[41]

Here, Golceff acknowledges that he did not object to the admissibility of the challenged evidence during trial, but he asserts that he obtained an adverse ruling on its admissibility in a pretrial hearing on his motion in limine. However, it is well-established that motions in limine do not preserve error,[42] and the record does not support Golceff's claim that the district court made a final ruling on the admissibility of the evidence at that time.[43] Accordingly, we conclude that Golceff

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[40] Tex. R. App. P. 33.1; *see Wilson v. State*, 71 S.W.3d 346, 349-50 (Tex. Crim. App. 2002).

[41] *See Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003) (citing *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991)).

[42] *See Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App. 2007); *Martinez*, 98 S.W.3d at 193; *Wilkerson v. State*, 881 S.W.2d 321, 326 (Tex. Crim. App. 1994); *Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985); *Romo v. State*, 577 S.W.2d 251, 252 (Tex. Crim. App. 1979); *see also Harnett v. State*, 38 S.W.3d 650, 655 (Tex. App.—Austin 2000, pet. ref'd) ("A ruling on a motion in limine does not purport to be one on the merits but one regarding the administration of the trial.").

[43] Although the district court stated at the hearing that it "tend[ed] to agree" with the State's argument that the evidence would be admissible, the court indicated that it would make its final ruling during trial, explaining on the record: "Now, if y'all want to—at the time it comes up, if you want to go on record and have a separate hearing on that, make your objection, we'll do it at that time. And I think, also, [State's attorney], at that time you might want to put on your proof of the prior event—the prior conviction at that time. . . . Put it in the record." Later, when denying the motion in limine, the district court added, "I'm just saying that they can bring it up as an objection at the time and go through the process." Thus, the district court made no evidentiary ruling during the pretrial hearing on Golceff's motion in limine. *See Manns v. State*, 122 S.W.3d 171, 189-90 (Tex. Crim. App. 2003); *Brock v. State*, 495 S.W.3d 1, 20-21 (Tex. App.—Waco 2016, pet. ref'd). *Cf. Geuder v. State*, 115 S.W.3d 11, 13-16 (Tex. Crim. App. 2003) (concluding that defendant preserved error on admissibility of evidence when defendant, during trial, "sought a

failed to preserve error, if any, in the admission of evidence related to his prior conviction for a sex offense and status as a sex offender.

We overrule Golceff's sixth point of error.

Ineffective assistance of counsel

In his seventh and eighth points of error, Golceff asserts that he received ineffective assistance of counsel during trial. Specifically, in his seventh point of error, Golceff claims that trial counsel was ineffective in failing to object to the admissibility of evidence that Golceff had contacted or retained counsel in the case. In his eighth point of error, Golceff claims that counsel was ineffective in failing to preserve error regarding the admissibility of the extraneous-offense evidence related to his status as a sex offender and his prior conviction for a sex offense.

"Ineffective-assistance-of-counsel claims are governed by the familiar *Strickland* framework: To prevail, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense."[44] "An attorney's performance is deficient if it is not within the range of competence demanded of attorneys in criminal cases as reflected by prevailing professional norms, and courts indulge in a strong presumption that counsel's conduct was not deficient."[45] "If trial counsel has not been afforded the opportunity to explain the reasons for his conduct, we will not find him to be deficient unless the challenged conduct was 'so outrageous

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definitive final ruling on a timely and specific motion to exclude evidence," and "the trial court expressly ruled on that objection").

[44] *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[45] *Id*. (citing *Strickland*, 466 U.S. at 689).

that no competent attorney would have engaged in it.'"[46] In other words, in the absence of a record explaining the reasons for counsel's decisions, we will not find counsel's performance deficient if any reasonably sound strategic motivation can be imagined.[47]

Strickland establishes a similarly high bar for establishing prejudice: "A defendant suffers prejudice if there is a reasonable probability that, absent the deficient performance, the outcome [of the proceeding] would have been different."[48] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[49] "It will not suffice for Appellant to show 'that the errors had some conceivable effect on the outcome of the proceeding.'"[50] "Rather, he must show that 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'"[51]

Moreover, to successfully assert that trial counsel's failure to object or preserve error amounted to ineffective assistance, the appellant must show that there was error to preserve

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[46] *Id*. at 308 (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)).

[47] *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

[48] *Nava*, 415 S.W.3d at 308 (citing *Strickland*, 466 U.S. at 694).

[49] *Id*.

[50] *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 693).

[51] *Id*. (quoting *Strickland*, 466 U.S. at 695).

or that the trial court would have committed error in overruling a proper objection.[52] The failure to object to admissible evidence does not constitute ineffective assistance.[53]

Evidence that Golceff had contacted or retained counsel

"Evidence that a person has contacted or retained an attorney is not admissible on the issue of whether the person committed a criminal offense. In a criminal case, neither the judge nor the attorney representing the state may comment on the fact that the defendant has contacted or retained an attorney in the case"[54] Here, Detective Groff testified that, when he first spoke with Golceff regarding the offenses, Golceff ended his discussion with Groff and "requested that he have legal counsel." Trial counsel did not object to this testimony. Nor did counsel object to the admission of phone records tending to show that Golceff had contacted counsel or a comment made by the prosecutor during closing argument that Golceff had contacted counsel.

However, evidence and statements tending to show that a person did not wish to speak to the police in the absence of counsel are more properly characterized as "an attempt by [the suspect] to convey his desire to remain silent."[55] And pre-arrest silence in response to

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[52] *See Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

[53] *See, e.g.*, *White*, 160 S.W.3d at 53; *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002); *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Muniz v. State*, 851 S.W.2d 238, 258 (Tex. Crim. App. 1993); *Hollis v. State*, 219 S.W.3d 446, 463 (Tex. App.—Austin 2007, no pet.).

[54] Tex. Code Crim. Proc. art. 38.38.

[55] *See State v. Lee*, 15 S.W.3d 921, 923-24 (Tex. Crim. App. 2000), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007); *see also Segovia v. State*, No. 14-08-00176-CR, 2009 Tex. App. LEXIS 4559, at *21-22 (Tex. App.—Houston

police questioning is admissible.[56] Thus, the district court would not have abused its discretion in overruling an objection to both the evidence presented and the prosecutor's comment referring to that evidence on the ground that the evidence was admissible to show that Golceff did not want to talk to the police. Accordingly, we cannot conclude that counsel was deficient in failing to object.[57] Moreover, even if counsel should have objected, we could not conclude on this record that the failure to object prejudiced Golceff. The evidence tending to show that Golceff had contacted counsel was isolated, and the comment by the prosecutor was brief. In light of the other evidence in the case implicating Golceff in the offenses, which we summarize below, we cannot say that there is a reasonable probability that if counsel had objected, "the outcome of the proceeding would have been different."[58]

We overrule Golceff's seventh point of error.

Extraneous-offense evidence

As previously explained, trial counsel failed to preserve error in the admissibility of evidence tending to show that Golceff was a registered sex offender and that he had a prior conviction for the offense of criminal solicitation of a minor. However, assuming without deciding that this evidence was inadmissible and that counsel should have objected to it, we cannot

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[14th Dist.] 2009, pet. ref'd) (mem. op., not designated for publication); *Dinsmore v. State*, No. 14-06-01089-CR, 2008 Tex. App. LEXIS 3730, 2008 WL 2133198, at *3 (Tex. App.—Houston [14th Dist.] May 20, 2008, no pet.) (mem. op., not designated for publication).

[56] *See Waldo v. State*, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988); *Rosas v. State*, 76 S.W.3d 771, 776 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

[57] *See Dinsmore*, 2008 Tex. App. LEXIS 3730, at *8.

[58] *See Strickland*, 466 U.S. at 694.

conclude on this record that there is a reasonable probability that, absent counsel's failure to object, the outcome of the proceeding would have been different, i.e., that "the factfinder would have had a reasonable doubt respecting guilt."[59] The properly admitted evidence in this case included the following: (1) A.K.'s testimony, in which she described in detail the sex acts that "Uncle Paul" had asked her to perform and that she had in fact performed; (2) sexually suggestive photos of A.K. that were found on Golceff's phone, including one that appeared to show A.K. engaging in a sex act with a dog; (3) the presence of Figueroa's phone number and A.K.'s phone number in Golceff's phone, and the phone log indicating that Golceff had called A.K. on one occasion at 11:17 p.m.; (4) hundreds of text messages and other communications between Golceff and Figueroa that were found on Golceff's phone, many of which contained conversations relating to sex with underage girls, and some of which referred specifically to A.K. by name; (5) Golceff's admission to police officers that he knew Figueroa; (6) Figueroa's statement to police officers identifying the person with whom he had been communicating as "Paul . . . from San Antonio or Austin," both of which are near where Golceff resided in New Braunfels; (7) the black Labrador dog that was found at Golceff's residence, which was consistent with the type of dog that, according to A.K., "Uncle Paul" had described to her when discussing his desire to have her engage in sex with a dog; and (8) the fact that "Uncle Paul" and Golceff shared the same first name. In light of what can fairly be characterized as "overwhelming" evidence supporting the jury's findings that Golceff was guilty of committing the alleged offenses, we cannot conclude on this record that Golceff "has met the burden of showing

[59] *See Perez*, 310 S.W.3d at 894.

that the decision reached would reasonably likely have been different absent the errors" made by counsel in failing to object to the extraneous-offense evidence.[60]

We overrule Golceff's eighth point of error

CONCLUSION

We affirm the judgments of conviction.

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field

Affirmed

Filed: December 22, 2016

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[60] *See Strickland*, 466 U.S. at 695-96 ("In making this determination [of prejudice], a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").