TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00432-CR

Christopher San German-Reyes, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 427TH JUDICIAL DISTRICT
NO. D-1-DC-14-301140, THE HONORABLE JIM CORONADO, JUDGE PRESIDING

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

A jury found appellant Christopher San German-Reyes guilty of aggravated sexual assault of a child for sexually abusing his girlfriend's eleven-year-old daughter.[1] *See* Tex. Penal Code § 22.021(a)(1)(B)(1), (2)(B). The jury assessed appellant's punishment at confinement for thirty years in the Texas Department of Criminal Justice. *See id.* §§ 12.32, 22.021(d). In three points of error, appellant complains about the admission of evidence. Finding no reversible error, we affirm the trial court's judgment of conviction.

[1] The State originally charged appellant with continuous sexual abuse of a young child, *see* Tex. Penal Code § 21.02, but abandoned the greater offense during trial.

BACKGROUND[2]

W.R. lived in an apartment with her mother, her three older siblings, and appellant, who was her mother's boyfriend.[3] When W.R. was eleven, appellant began touching her in a sexual manner. W.R. testified that when she was alone with appellant in their apartment after school, appellant would come into her room, take off her clothes, and put his fingers in her vagina. She explained that he would "put two fingers inside" and move them "up and down." She said that "it hurt" when he did this. W.R. also described an incident where she was driving with appellant to the flea market, and appellant touched her vagina over her clothes as he was driving the car. She tried to move away because she "didn't want him to touch [her]." On another occasion, appellant came into her bedroom after she had taken a shower. She was wearing only a towel, and appellant "picked [her] up and he started to touch [her] butt and [she] slapped him" so he stopped. W.R. also recalled an incident where appellant took off his pants and tried to show her his "dick" but she "covered [her] eyes and [she] told him no and told him to stop." W.R. said that appellant touched her four or five times but she only remembered two times that he "stuck his fingers inside."

W.R. disclosed appellant's sexual abuse of her to a friend one day after school and then later that afternoon to her older sister. Both girls encouraged her to tell her mother. So, later that evening, W.R. told her mother that appellant "had been touching [her]" on "her vagina and

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[2] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4. The facts recited are taken from the testimony and other evidence presented at trial.

[3] The record reflects that appellant and W.R.'s mother dated for eight years, though they only began living together after four years.

butt." The disclosure about the sexual abuse occurred in W.R.'s bedroom. Appellant was home, but in the living room watching television. After hearing her daughter's outcry, W.R.'s mother, T.O.-R., immediately called the police to report the sexual abuse.

DISCUSSION

In three points of error, appellant challenges the trial court's rulings admitting certain evidence: testimony about a comment that appellant made to a patrol officer who responded to T.O.-R.'s call to the police, the testimony of an emergency room physician who saw W.R. two days after the outcry, and testimony about statements that W.R. made to a sexual assault nurse examiner seven months later.

Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Sandoval v. State*, 409 S.W.3d 259, 297 (Tex. App.—Austin 2013, no pet.). An abuse of discretion does not occur unless the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). Further, we may not reverse the trial court's ruling unless the determination "falls outside the zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016); *see Henley*, 493 S.W.3d at 83 ("Before a reviewing court may reverse the trial court's decision, 'it must find the trial court's ruling was so

clearly wrong as to lie outside the zone within which reasonable people might disagree.'") (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)). An evidentiary ruling will be upheld if it is correct on any theory of law applicable to the case. *Henley*, 493 S.W.3d at 93; *Sandoval*, 409 S.W.3d at 297.

Appellant's Comment

Several officers from the Austin Police Department responded to the 911 call T.O.- R. made, including patrol officer Christopher Irwin. Initially, Officer Irwin supervised the children on the scene (W.R., her friend, and her siblings) while other officers talked to T.O.-R.[4] He stayed with them until the victim services counselor arrived on the scene. The officer then went and stood by the stairwell leading up to W.R.'s second-floor apartment to monitor the apartment as appellant was still inside. At one point, appellant walked out, and Officer Irwin detained him to prevent him from interfering with the investigation being conducted by the other officers. After frisking appellant for weapons,[5] he had appellant sit on the stairwell. Officer Irwin stood next to him. He did not question or interview appellant, just engaged in casual conversation with him. During that time, a "clearly juvenile female" passed by on the stairwell. Appellant looked at Officer Irwin, then said "beautiful" while looking at the girl as she walked by. Appellant reiterated his comment in Spanish. During the

[4] The record reflects that T.O-R. spoke limited English so the officers initially spoke to her using her oldest son as an interpreter. Later, a Spanish speaking officer arrived on the scene and confirmed what T.O.-R. told the officers about what W.R. had disclosed to her.

[5] Officer Irwin indicated that he performed the frisk for safety reasons because the police had been informed that appellant had access to knives in the apartment.

State's initial proffer of the testimony, Officer Irwin described the girl as "[p]repubescent, not developed into what you would think is a woman or even a high schooler."[6]

When the trial court asked the State about "how [it] would seek to have [the evidence of appellant's comment] admitted," the State responded,

> It was a statement made by the defendant, therefore, it's not hearsay. It was made to this officer. It was not in response to any type of question whatsoever. The officer stated that these girls -- or the girl who walked by was clearly a juvenile female. We are here to discuss -- or to prove a case on a child sex offense. We believe it's relevant. It's his own statement. It was not done in any way improperly by the police and it should be admissible.

Appellant objected to the admission of the evidence of his comment about the passing girl, arguing that

> it's not relevant because it's not related to the offense at issue here that [appellant] is being charged with. Even though it may be his statements [sic], it is completely more prejudicial than probative. There is no link as to that statement and that comment to what he is being accused of doing on that date, two weeks before, and supposedly before that.

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[6] Outside the presence of the jury, prior to the admission of Officer Irwin's testimony about appellant's comment, appellant's counsel also questioned the officer about the incident during a voir dire examination. Officer Irwin confirmed that "as a juvenile female walked by [appellant] told [the officer] beautiful." The officer then testified that "[appellant] then reiterated it in Spanish to clarify [the officer] understood what he was saying." Officer Irwin testified that he did not speak Spanish fluently, and believed that appellant said "bellisimo" even though the familiar term for beautiful in Spanish is "bella" or "bonita." When asked to clarify what he meant in his offense report when he stated that "this juvenile female was clearly a juvenile," the officer responded, "Prepubescent. . . . She was not developed in the sense that a -- as a grown woman. . . . She was preteen, prepubescent, not developed physically as a woman."

> And it's speculation as well as to what he was intending to mean. It says clearly a juvenile female but it's also speculative. And it's just more prejudicial than probative.

After hearing the proffer of the evidence and the voir dire examination of Officer Irwin, the trial court overruled appellant's objections, finding the statement "probative as well as relevant" and that the probative value outweighed any possible prejudice "in light of the allegations against [appellant]."

In his first point of error on appeal, appellant maintains that the trial court erred by admitting the evidence because it was not relevant, *see* Tex. R. Evid. 401 (defining relevant evidence), was inadmissible character conformity evidence, *see* Tex. R. Evid. 404(b)(1) (prohibiting admission of evidence of extraneous bad acts to prove character conformity), and was more prejudicial than probative, *see* Tex. R. Evid. 403 (allowing for exclusion of otherwise relevant evidence when probative value is substantially outweighed by danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence").

Assuming arguendo that the trial court erred by admitting Officer Irwin's testimony about appellant's comment, the admission of the evidence was not harmful.

The erroneous admission of evidence is non-constitutional error. *Sandoval*, 409 S.W.3d at 287; *see Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011); *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). Non-constitutional error requires reversal only if it affects the substantial rights of the accused. *See* Tex. R. App. P. 44.2(b); *Barshaw*, 342 S.W.3d at 93; *Sandoval*, 409 S.W.3d at 287. "'A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict.'" *Thomas v. State*, 505 S.W.3d 916,

926 (Tex. Crim. App. 2016) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). We will not overturn a criminal conviction for non-constitutional error if, after examining the record as a whole, we have fair assurance the error did not influence the jury, or influenced the jury only slightly. *Barshaw*, 342 S.W.3d at 93; *Sandoval*, 409 S.W.3d at 287.

In assessing potential harm, our focus is not on whether the outcome of the trial was proper despite the error but on whether the error had a substantial or injurious effect or influence on the jury's verdict. *Barshaw*, 342 S.W.3d at 93–94; *Sandoval*, 409 S.W.3d at 287–88. We review the entire record to ascertain the effect or influence on the verdict of the wrongfully admitted evidence. *Barshaw*, 342 S.W.3d at 93; *see Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010) (in conducting harm analysis "we examine the entire trial record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence"). We consider all the evidence that was admitted at trial, the nature of the evidence supporting the verdict, the character of the alleged error, and how the evidence might be considered in connection with other evidence in the case. *Barshaw*, 342 S.W.3d at 94; *Sandoval*, 409 S.W.3d at 288. We may also consider the jury instructions, the parties' theories of the case, closing arguments, voir dire, and whether the State emphasized the error. *Barshaw*, 342 S.W.3d at 94; *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000); *Sandoval*, 409 S.W.3d at 288. The weight of evidence of the defendant's guilt is also relevant in conducting a harm analysis under Rule 44.2(b). *Neal v. State*, 256 S.W.3d 264, 285 (Tex. Crim. App. 2008); *Motilla v. State*, 78 S.W.3d 352, 356–57 (Tex. Crim. App. 2002).

In the instant case, the jury heard testimony from W.R. describing the sexual abuse. Specifically, the jury heard W.R. testify that, on multiple occasions when she was eleven, appellant

penetrated her vagina with his fingers. She provided details about the abuse incidents, including specifics about what he did, when he did it, where they were, and how it made her feel. She also told the jury about other occasions when appellant touched her private parts over her clothing, tried to touch her bottom, and exposed his penis to her.

In addition to W.R.'s testimony, the jury heard other evidence supporting a finding of appellant's guilt, such as the outcry testimony of W.R.'s mother, again detailing the sexual abuse perpetrated by appellant. Further, the jury heard the testimony of W.R.'s friend and older sister who both described W.R.'s disclosure of the sexual abuse to them and W.R.'s outcry to her mom, the ER doctor's testimony concerning the general exam she conducted two days after W.R. made her outcry, the sexual assault nurse examiner's testimony concerning the sexual assault examination she performed later, the forensic interviewer's testimony about W.R.'s demeanor when she described the abuse to her in the forensic interview, and the testimony of the State's expert, a psychologist with expertise in treating sexually abused children, who testified regarding the dynamics of child sexual abuse.

Appellant elicited evidence supporting his defensive theory that W.R. fabricated the allegations "because her father [was] telling her for [appellant] not to be with her mom," including evidence that when W.R. was four years old she accused her mother's then-boyfriend of "kissing her, hugging her, and basically being inappropriate with her" but later told her mother "that it wasn't true and that her father told her basically to lie and to make it up." However, considering the evidence as a whole, we conclude that the evidence supporting the jury's verdict was strong and whether the comment at issue was admitted does not strengthen or detract from that evidence. The comment did

not inherently reflect sexual attraction or connote sexual misconduct, and, given the state of the record, was fairly innocuous. We also note the State's limited focus on the comment. Only one witness, Officer Irwin, testified about the comment, and the State made no references to the comment in closing argument. Removing appellant's comment from consideration, there remains significant evidence supporting the jury's finding of guilt.

Given the detailed nature of W.R.'s testimony and other evidence in the record, we have fair assurance that hearing the brief testimony concerning appellant's single-word comment to Officer Irwin did not influence the jury, or influenced the jury only slightly. Thus, because the error, if any, did not have a substantial and injurious effect or influence in determining the jury's verdict, it did not affect appellant's substantial rights. Accordingly, the trial court's error, if any, was harmless. We overrule appellant's first point of error.

Testimony of ER Doctor

Two days after reporting the sexual abuse to the police, T.O-R. took W.R. to the hospital because she was concerned about her daughter's health and felt frustrated that the police did not seem to be taking any immediate action. W.R. was seen at Dell Children's Hospital by Dr. Rebecca Floyed, one of the emergency room physicians, who performed a physical assessment of W.R. When the State offered Dr. Floyed's testimony at trial, appellant objected, arguing that the testimony was not relevant because the results of the doctor's examination of W.R.—no finding of acute injury—were inconclusive as to sexual assault. After the State responded to the trial court's inquires about why the evidence was material and probative, the trial court overruled appellant's objection.

Dr. Floyed testified that she saw W.R. in the emergency room for an allegation of sexual abuse, specifically that W.R. had been digitally penetrated. She did not perform a full sexual assault examination but rather a general physical exam. Although the exam did include looking at the genital area, it was not as detailed an exam as a complete sexual assault (or SANE) exam.[7] The doctor testified that her findings on the genital exam were that "everything was normal"; "[t]here were no lacerations or tears or discharge or bleeding." She indicated that this finding "could be" consistent with digital penetration and also that it was "possible" that this finding is inconsistent with allegations of digital penetration. Dr. Floyed also explained the reason for the lack of physical findings. She concluded her testimony on direct examination by confirming that "[her] examination [did not] prove or disprove whether an assault actually occurred."

In his second point of error, appellant argues that the trial court erred in admitting Dr. Floyed's testimony because it was not relevant since it "did not aid the jury . . . in determining the truth or falsity of any fact relevant to the alleged offense." We disagree.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Henley*, 493 S.W.3d at 83; *see* Tex. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). To be relevant, evidence must be

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[7] The doctor explained that when a full SANE exam is done, the practitioner uses a colposcope, which "is a special magnifying glass that allows you to see the cervix and the inner parts of the vaginal area more closely." A typical SANE exam may also include evidence collection, depending on when the exam is conducted in relation to the sexual assault.

material and probative. *Henley*, 493 S.W.3d at 83; *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001); *Sheppard v. State*, No. 03-10-00868-CR, 2012 WL 6698963, at *5 (Tex. App.—Austin Dec. 21, 2012, no pet.) (mem. op., not designated for publication). Evidence is material if is it "shown to be addressed to the proof of a material proposition," which is "any fact that is of consequence to the determination of the action." *Henley*, 493 S.W.3d at 83 (quoting *Miller*, 36 S.W.3d at 507, in turn quoting 1 Steven Goode et al., *Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal* § 401.1 (2d ed. 1993 & Supp. 1995)); *Sheppard*, 2012 WL 6698963, at *5. Evidence is probative if it tends to make the existence of the fact more or less probable than it would be without the evidence. *Henley*, 493 S.W.3d at 83–84; *Miller*, 36 S.W.3d at 507. Thus, proffered evidence is relevant if it has been shown to be material to a fact in issue and if it makes that fact more probable than it would be without the evidence. *Miller*, 36 S.W.3d at 507; *Sheppard*, 2012 WL 6698963, at *5.

To be relevant, "[e]vidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence." *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004); *Razo v. State*, No. 01-15-00290-CR, 2016 WL 4253906, at *3 (Tex. App.—Houston [1st Dist.] Aug. 11, 2016, no pet.) (mem. op., not designated for publication); *Sheppard*, 2012 WL 6698963, at *5; *see Mendiola v. State*, 21 S.W.3d 282, 284 (Tex. Crim. App. 2000) ("The evidence in question is relevant even if it only provides a 'small nudge' in proving or disproving a fact of consequence to the trial."). "[E]vidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant." *Mendiola*, 21 S.W.3d at 284 (quoting *Montgomery*, 810 S.W.2d at 376). Even

"marginally probative" evidence should be admitted if "it has any tendency at all, even potentially, to make a fact of consequence more or less likely." *Fuller v. State*, 829 S.W.2d 191, 198 (Tex. Crim. App. 1992); *Razo*, 2016 WL 4253906, at *3.

"There is no purely legal test to determine whether evidence will tend to prove or disprove a proposition—it is a test of logic and common sense." *Miller*, 36 S.W.3d at 507; *see Brown v. State*, No. 14-07-00184-CR, 2008 WL 516783, at *2 (Tex. App.—Houston [14th Dist.] Feb. 28, 2008, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, 191 S.W.3d 370, 373 (Tex. App.—Waco 2006, no pet.); *Davis v. State*, No. 06-05-00132-CR, 2006 WL 483228, at *1 (Tex. App.—Texarkana Mar. 2, 2006, no pet.) (mem. op., not designated for publication). Relevancy is determined by whether "a reasonable person, with some experience in the real world, [would] believe that the particular piece of evidence is helpful in determining the truth or falsity" of any fact of consequence. *Montgomery*, 810 S.W.2d at 376 (internal quotations omitted); *Razo*, 2016 WL 4253906, at *3.

The ultimate issue in this case was whether appellant engaged in sexual conduct with eleven-year-old W.R. The child described multiple instances in which appellant engaged in inappropriate sexual conduct with her, including penetrating her sexual organ with his fingers on at least two occasions. She provided specific facts and sensory details when testifying about what happened, where it happened, and (in general terms) when it happened. In addition, W.R.'s mother, T.O.-R., testified pursuant to the outcry statute about her daughter's outcry to her, detailing what

W.R. told her appellant had done.[8] T.O.-R. said that her daughter told her that appellant had been touching her private parts, specifically her vagina and buttocks. She recounted that W.R. also showed her where appellant had touched her by pointing to her private parts. T.O.-R. explained that W.R. told her that appellant touched her inside her clothes and would put his fingers inside her vagina. She said that her daughter told her that appellant did this multiple times and it hurt. She also testified that W.R. said that she did not tell because she was afraid.

Because W.R. was under seventeen years of age at the time of the offense, her testimony alone is sufficient proof of the allegations in the indictment. *See* Tex. Code Crim. Proc. art. 38.07(a), (b)(1) (uncorroborated testimony of child victim is sufficient to support conviction for sexual offense if child victim seventeen years of age or younger at time of offense); *Villarreal v. State*, 470 S.W.3d 168, 170–71 (Tex. App.—Austin 2015, no pet.); *Johnson v. State*, 419 S.W.3d 665, 671 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). Similarly, T.O.-R.'s uncorroborated outcry testimony was substantive evidence of the crime. *Bays v. State*, 396 S.W.3d 580, 582 n.1 (Tex. Crim. App. 2013); *see Martinez v. State*, 178 S.W.3d 806, 811 (Tex.

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[8] Article 38.072 of the Texas Code of Criminal Procedure, the outcry statute, concerns the admissibility of certain hearsay evidence in specified crimes against a child younger than fourteen years old or a person with disabilities. *See* Tex. Code Crim. Proc. art. 38.072. Because it is often traumatic for children to testify in a courtroom setting, the Legislature enacted article 38.072 to make admissible the testimony of the first adult in whom a child confides regarding sexual or physical abuse. *Martinez v. State*, 178 S.W.3d 806, 810–11 (Tex. Crim. App. 2005). The child's statement to the adult is commonly known as the "outcry," and the adult who testifies about the outcry is commonly known as the "outcry witness." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). Outcry testimony admitted pursuant to article 38.072 is considered substantive evidence, admissible for the truth of the matter asserted in the testimony. *Martinez*, 178 S.W.3d at 810–11; *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991); *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.—Fort Worth 2005, no pet.).

Crim. App. 2005) ("[The first adult a child confides in regarding the abuse] may recite the child's out-of-court statements concerning the offense, and that testimony is substantive evidence of the crime."); *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991) ("Under Art. 38.072, by both the terms of the statute and by the legislative history, outcry testimony admitted in compliance with Art. 38.072 is admitted as an exception to the hearsay rule, meaning it is considered substantive evidence, admissible for the truth of the matter asserted in the testimony."); *see also Eubanks v. State*, 326 S.W.3d 231, 241 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) ("Outcry testimony can be legally sufficient evidence to support a conviction. There is no requirement that outcry testimony admitted as substantive evidence be corroborated or substantiated by the victim or independent evidence.") (internal citation omitted).

Because both W.R. and T.O.-R. were witnesses providing substantive evidence of the alleged offense, whether they were credible witnesses was a "fact that [was] of consequence to the determination of the action." The fact W.R. was willing to undergo a physical examination, including a genital exam, at the hospital, and that T.O.-R. found it necessary to take her daughter for that exam tends to show that they were truthful in their statements to the police about the sexual abuse and in their testimony at trial. It was not necessary that Dr. Floyed's testimony "by itself prove or disprove" whether a sexual assault had occurred; it sufficed that this evidence provided "a small nudge" in proving that W.R. and her mother were truthful. The doctor's testimony had a tendency to make it more probable that W.R. and T.O.-R were telling the truth. Thus, the evidence was relevant to the credibility of these witnesses.

Moreover, while the State has no burden to produce any corroborating or physical evidence, *see Cerda v. State*, No. 03-12-00582-CR, 2014 WL 4179359, at *9 (Tex. App.—Austin Aug. 22, 2014, pet. ref'd) (mem. op., not designated for publication); *Martines v. State*, 371 S.W.3d 232, 240 (Tex. App.—Houston [1st Dist.] 2011, no pet.), "[t]he lack of physical or forensic evidence is a factor for the jury to consider in weighing the evidence," *see Cerda*, 2014 WL 4179359, at *9 (quoting *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004) *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006)). In this day and age, given the prevalence of forensic science in our society and its role in criminal investigations, jurors expect to see forensic evidence or hear an explanation as to why such evidence is not available.

Dr. Floyed testified that "[i]t's more common to not finding [sic] anything, especially in younger children. Also because it had been a week since she had any contact with the perpetrator, any injuries that could have been sustained would have been healed long before, usually within 48 to 72 hours." She explained that the sexual organ of a female heals "very rapidly because it is a very vascular area" and, because the genital area heals "very, very quickly," it is normal not to see injuries to the vaginal area or the sexual organ of a female if time has passed since the sexual assault. She clarified the time span, stating that "the majority of the literature shows that beyond 24 hours it's really unlikely in a young child to have any findings from a sexual assault." While the results of the exam were not conclusive proof that W.R. had been sexually assaulted, the results "were pieces in the evidentiary puzzle for the jury to consider" in determining whether appellant had sexually assaulted her. *See Stewart*, 129 S.W.3d at 96–97 (concluding that even though intoxilyzer breath test results were not "conclusive proof" that appellant was intoxicated at time she drove, test

results were relevant evidence as breath test results were "pieces in the evidentiary puzzle for the jury to consider").

Because Dr. Floyed's testimony was relevant to witness credibility as well as the investigative process, we conclude that the trial court did not abuse its discretion in overruling appellant's objection and admitting her testimony. We overrule appellant's second point of error.

Testimony of Sexual Assault Nurse Examiner

Seven months after the sexual abuse was reported to police, Debra Rodriguez, a sexual assault nurse examiner (SANE) certified in pediatrics, performed a sexual assault examination on W.R. at the request of law enforcement. At trial, the State offered the nurse's testimony about the examination, including the statements that W.R. made to her about the sexual abuse. The State specifically informed the trial court that it sought to utilize Rule 803(4), an exception to the hearsay rule that allows for the admission of statements made for purposes of medical diagnosis or treatment.

The hearsay exception under Rule 803(4) applies to any statement that: "(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause." Tex. R. Evid. 803(4). To establish this exception, the proponent of the evidence must show that (1) the out-of-court declarant was aware that the statements were made for purposes of medical diagnosis or treatment, and that proper diagnosis or treatment depended upon the veracity of the statements, and (2) the statements are pertinent to diagnosis or treatment, that is, it was reasonable for the care provider to rely on the statements in diagnosing or treating the declarant. *Taylor*, 268 S.W.3d at 588–89, 591; *Fahrni v. State*, 473 S.W.3d 486, 497 (Tex. App.—Texarkana 2015, pet. ref'd);

Prieto v. State, 337 S.W.3d 918, 921 (Tex. App.—Amarillo 2011, pet. ref'd); *Mbugua v. State*, 312 S.W.3d 657, 670–71 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

Appellant objected to the nurse's testimony. He first argued that the testimony was not relevant because the exam was "so far removed from the incident" and was not probative because the ER doctor already testified that an exam had been conducted. Specific to W.R.'s statements to the SANE about the sexual abuse, appellant asserted that the exception did not apply because "there [was] no reason for medical diagnosis at this point" and that it was "just a follow-up" done "out of protocol." He further argued that testimony about the statements that W.R. made to the nurse was "too prejudicial" and was "bolstering" as "another outcry witness."

The trial court questioned the State about what medical diagnosis was being sought six or seven months after the outcry of abuse, particularly after the exam at the hospital. The State explained that a more detailed sexual assault examination could yield a more extensive diagnosis or reveal further treatment needs. The court concluded that the more detailed examination was "an appropriate recourse to make for that diagnosis rather than just for treatment, and that the exception exists for diagnosis." The court then addressed the issue of whether the evidence was cumulative. The State made a proffer of the statements that W.R. made to Nurse Rodriguez. The court ultimately overruled appellant's objections, concluding that the testimony was "certainly relevant and material and probative, and more probative than prejudicial. And the examination was for purpose of diagnosis, for legitimate purpose of diagnosis."

In his third point of error, appellant argues that the trial court erroneously admitted the SANE's testimony about the statements that W.R. made to her under the medical diagnosis

exception contained in Rule 803(4). He does not, however, challenge the court's finding that the statements were "pertinent to diagnosis or treatment." *See* Tex. R. Evid. 803(4)(A). Instead, appellant argues that there "was no evidence adduced by the State whatsoever, to show that [W.R.] understood that she was visiting with SANE nurse Rodriguez for the purpose of medical diagnosis or treatment. Nor was there any showing by the State to show that the child understood the need to be truthful with the SANE nurse in order to receive the proper medical diagnosis or treatment. The State failed to satisfy its burden in justifying admission of the complainant's statements as an exception to the hearsay rule under Rule 803(4)."

To preserve error, a party must timely object and state the grounds for the objection with enough specificity to make the trial judge aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1)(A); *see Thomas*, 505 S.W.3d at 924 ; *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). The objection must be sufficiently clear to give the judge and opposing counsel an opportunity to address and, if necessary, correct the purported error. *Thomas*, 505 S.W.3d at 924; *Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App. 2011); *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009). If a trial objection does not comport with arguments on appeal, error has not been preserved. *Thomas*, 505 S.W.3d at 924; *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996); *see also Yazdchi*, 428 S.W.3d at 844.

At trial, appellant objected to the admission of W.R.'s statements to the SANE under the medical diagnosis exception because, he asserted, the statements were not made for purposes of medical diagnosis or treatment but simply as part of a forensic gathering of evidence—a follow-up pursuant to the investigative protocol of law enforcement. Appellant's objection before this Court

seems to concede that the statements were made for purposes of medical diagnosis or treatment (or at least he does not challenge the trial court's finding that they were) but maintains that the same is still inadmissible because there is no assurance that W.R. understood the necessity to speak truthfully to the SANE.

The medical diagnosis or treatment exception of Rule 803(4) has two components: veracity and pertinence. *See Taylor*, 268 S.W.3d at 588–89, 591. While it is clear from the context that appellant objected to the admission of W.R.'s statements under the medical diagnosis exception, his argument at trial focused solely on the issue of pertinence. The issue of veracity was not raised at all. The entirety of the court's discussion with the State and appellant's counsel centered on how the statements were pertinent to medical diagnosis or treatment when the SANE exam was performed so many months after the abuse (or the outcry of the abuse) and after the ER doctor had already performed an exam. Appellant's complaint now centers upon the alleged lack of indicia of W.R.'s awareness and understanding of veracity. The issue, as presented on appeal, does not comport with the objection argued at trial. *See, e.g.*, *Tuckness v. State*, No. 07-12-00235-CR, 2013 WL 6255702, at *3 (Tex. App.—Amarillo Nov. 21, 2013, pet. ref'd) (mem. op., not designated for publication).

Appellant's failure to state, or even allude to, the veracity component of the exception under Rule 803(4) deprived the trial court and the State of the opportunity to address or correct the purported error. *See Smith v. State*, 499 S.W.3d 1, 7–8 (Tex. Crim. App. 2016) ("There are two main purposes behind requiring a timely and specific objection. First, the judge needs to be sufficiently informed of the basis of the objection and at a time when he has the chance to rule on the issue at

hand. Second, opposing counsel must have the chance to remove the objection or provide other testimony."). Thus, the record reflects that appellant failed to properly preserve his complaint that the trial court erred in admitting the SANE's testimony about W.R.'s statements to her about the sexual abuse because the State failed to demonstrate the veracity component of the exception.

Even if we were to assume that the issue has been properly preserved, the admission of the complained-of testimony does not warrant reversal. As we just noted, appellant complains that the State failed to demonstrate the veracity component of the medical diagnosis exception because the record does not establish that W.R. was aware that the statements were made for the purpose of medical diagnosis or treatment or that W.R. understood that a proper diagnosis depended on the veracity of her statements.

To determine whether a child understands the importance of truthfulness when speaking to medical personnel, the reviewing court looks to the entire record. *Franklin v. State*, 459 S.W.3d 670, 676–77 (Tex. App.—Texarkana 2015, pet. ref'd); *Green v. State*, 191 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Although the exception requires some showing that the declarant was made aware that proper diagnosis or treatment depended on the veracity of her statement, the method of meeting that requirement differs depending on whether the statement was made to a medical or non-medical professional. *See Taylor*, 268 S.W.3d at 589–591. In the mental health context, "it is incumbent upon the proponent of the hearsay exception to make the record reflect both 1) that truth-telling was a vital component of the particular course of therapy or treatment involved, and 2) that it is readily apparent that the child-declarant was aware that this was the case." *Id.* at 590. However, in the medical care context, "it seems only natural to presume

that adults, and even children of a sufficient age or apparent maturity, will have an implicit awareness that the doctor's questions are designed to elicit accurate information and that veracity will serve their best interest." *Id.* at 589. Consequently, the Court of Criminal Appeals has recognized "the almost universal tendency of courts under these circumstances to assay the record, not for evidence of such an awareness, but for any evidence that would *negate* such an awareness, even while recognizing that the burden is on the proponent of the hearsay to show that the Rule 803(4) exception applies." *Id.*

The Court of Criminal Appeals has not required the proponent of statements to a sexual assault nurse examiner to affirmatively demonstrate that the child declarant was aware of the purpose of the statements and the need for veracity, and we decline to do so in this case. Unlike statements made to non-medical professionals, which require affirmative evidence in the record on the issue of veracity, courts can infer from the record that the victim knew it was important to tell a SANE the truth in order to obtain medical treatment or diagnosis, particularly in the absence of evidence to the contrary. *See Franklin*, 459 S.W.3d at 677; *Prieto*, 337 S.W.3d at 921. In this case, Nurse Rodriguez testified about the standard procedure of the exam, which included asking the child patient "questions about why she is here." She indicated that she followed this procedure with W.R. and W.R. "said she was there because she got abused" and then further explained that she had been sexually abused.

We acknowledge that the limited evidence in this record does not demonstrate the usual "circumstances" that typically allow for the inference of a child's awareness that honesty would serve her best interest when talking to a SANE. For example, the record reflects that the

SANE exam did not take place in a classic medical setting (such as a hospital, clinic, or doctor's office)—that is, "on the physician's cold examination table," *see Taylor*, 268 S.W.3d at 589—but at the Center for Child Protection. Also, the record does not explicitly show that W.R. was informed that she was meeting with a nurse for a medical exam. In her testimony, Nurse Rodriguez gave no details about the exchange between herself and W.R. prior to taking the medical history. Nurse Rodriguez did not indicate that she identified herself as a nurse to W.R., that she explained that she was meeting with her to conduct a medical examination, or that she detailed the procedure for her. Nor did Nurse Rodriguez express that, in her opinion, W.R. understood that the exam was for medical diagnosis or treatment.

Nevertheless, while a more developed record with details about the interaction between Nurse Rodriguez and W.R. might better establish the veracity component of the exception, *see, e.g.*, *Franklin*, 459 S.W.3d at 677–78 (evidence was sufficient to support an inference that children understood need to be truthful during SANE evaluation where SANE testified that prior to examination she identified herself as nurse to children; she explained to them that she was meeting with them to conduct medical examination; she detailed procedures of examination to children; and, in her opinion, children understood that examination was for medical diagnosis and treatment); *Prieto*, 337 S.W.3d at 921(SANE testified as to her duties and responsibilities as SANE, that sexual assault examination process includes obtaining history from child and explaining process to child, and that child indicated that she understood why she was at medical center to undergo examination); *Lathan v. State*, No. 04-12-00486-CR, 2013 WL 1641166, at *2 (Tex. App.—San Antonio Apr. 17, 2013, no pet.) (mem. op., not designated for publication) (SANE testified that child

was aware that she was SANE and knew purpose of examination, that she informed child that they were going to discuss exactly what happened and then she would conduct physical examination of her, and that child understood physical examination was being performed because of what happened to her), we conclude that a review of the entire record in this case supports a finding that W.R. understood the importance of truthfulness when speaking to medical personnel.

After arriving at the Center for Child Protection, W.R. and her mother were given paperwork to complete, which included a patient history. W.R. was then taken to the "exam floor" where she was interviewed by Nurse Rodriguez in an interview room before being taken into the exam room for the physical part of the exam. W.R. was eleven years old at that time and was sufficiently mature to be interviewed outside her mother's presence. W.R. knew she was there because she "got [sexually] abused," and W.R. had previously undergone a medical exam because of the sexual assault. Thus, the record demonstrates that W.R. was a child "of a sufficient age [and] apparent maturity," and that she understood that she was there because of the sexual assault. More importantly, there is nothing in the record that negates a finding that W.R. appreciated the need to be truthful. *See Taylor*, 268 S.W.3d at 589; *Mata v. State*, No. 03-15-00220-CR, 2016 WL 859037, at *5 (Tex. App.—Austin Mar. 4, 2016, no pet.) (mem. op., not designated for publication); *Hernandez v. State*, No. 03-08-00795-CR, 2010 WL 2788875, at *4 (Tex. App.—Austin July 13, 2010, no pet.) (mem. op., not designated for publication). Because the evidence supports an inference that W.R. understood the need to be truthful, we cannot conclude that the trial court abused its discretion by admitting the complained-of hearsay testimony under Rule 803(4). *See Barnes v. State*, 165 S.W.3d 75, 83 (Tex. App.—Austin 2005, no pet.); *see also Mata*,

2016 WL 859037, at *5; *Thomas v. State*, No. 03-11-00254-CR, 2013 WL 4516168, at *3 (Tex. App.—Austin Aug. 23, 2013, no pet.) (mem. op., not designated for publication).

Moreover, even if the trial court erred in admitting the evidence because the State failed to carry its burden of establishing the predicate of the medical diagnosis exception, any error in admitting Nurse Rodriguez's testimony about W.R.'s statements regarding the sexual abuse did not harm appellant.

As we noted previously, the erroneous admission of evidence is non-constitutional error, *Sandoval*, 409 S.W.3d at 287; *see Barshaw*, 342 S.W.3d at 93; *Casey*, 215 S.W.3d at 885, which requires reversal only if it affects the substantial rights of the accused, *see* Tex. R. App. P. 44.2(b); *Barshaw*, 342 S.W.3d at 93; *Sandoval*, 409 S.W.3d at 287. And again, "'[a] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict.'" *Thomas*, 505 S.W.3d at 926 (quoting *King*, 953 S.W.2d at 271).

It is well settled that the improper admission of evidence is rendered harmless when other evidence proving the same fact is properly admitted elsewhere (or comes in elsewhere without objection). *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999); *Anderson v. State*, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986); *Land v. State*, 291 S.W.3d 23, 28 (Tex. App.—Texarkana 2009, pet. ref'd); *Russell v. State*, 290 S.W.3d 387, 399 (Tex. App.—Beaumont 2009, no pet.); *Sanchez v. State*, 269 S.W.3d 169, 172 (Tex. App.—Amarillo 2008, pet. ref'd); *Hitt v. State*, 53 S.W.3d 697, 708 (Tex. App.—Austin 2001, pet. ref'd); *cf. Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) (overruling of objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the

complained-of ruling); *Amos v. State*, 478 S.W.3d 764, 768–69 (Tex. App.—Fort Worth 2015, pet. ref'd); *Saldinger v. State*, 474 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *Lund v. State*, 366 S.W.3d 848, 857 (Tex. App.—Texarkana 2012, pet. ref'd).

Here, Nurse Rodriguez testified only very briefly about what W.R. told her about the sexual abuse:

> [W.R.] said she was there because she got abused. I asked her what type of abuse and she stated to me sexual abuse. Then report[ed] [that appellant], her mother's boyfriend, took her clothes off and touched [her] with his hands inside [her] vagina.

Prior to her testimony, W.R. had already testified about the details of the sexual abuse. In addition, her mother had already testified about W.R.'s outcry disclosing the sexual abuse. Their testimony established the same facts, in much greater detail, as the challenged portions of Nurse Rodriguez's testimony.

Having reviewed the record as a whole, we conclude that even assuming the challenged portions of the nurse's testimony were improperly admitted, because Nurse Rodriguez's limited testimony was duplicative of the testimony of W.R. and her mother, any error in admitting the testimony did not affect appellant's substantial rights and was harmless. *See Anderson*, 717 S.W.2d at 627 ("Whether or not the testimony complained of was admissible as an exception to the hearsay rule is irrelevant. If the fact to which the hearsay relates is sufficiently proved by other competent and unobjected to evidence, as in the instant case, the admission of the hearsay is properly deemed harmless and does not constitute reversible error."); *see, e.g.*, *Infante v. State*, 404 S.W.3d 656, 663 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Land*, 291 S.W.3d at 28;

Greene v. State, 287 S.W.3d 277, 285 (Tex. App.—Eastland 2009, pet. ref'd); *Smith v. State*, 236 S.W.3d 282, 300 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

For the above reasons, we overrule appellant's third point of error.

CONCLUSION

Having overruled appellant's three points of error, we affirm the trial court's judgment of conviction.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: May17, 2017

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