NUMBER 13-15-00609-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CRESENCIANO OLIVA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 445th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

A jury found appellant Cresenciano Oliva guilty of continuous sexual abuse of a child under fourteen years of age, aggravated sexual assault of a child, and indecency with a child by sexual contact. *See* TEX. PENAL CODE ANN. §§ 21.02, 22.01(a)(2)(B), 21.11(a)(1) (West, Westlaw through Ch. 49 2017 R.S.). The trial court sentenced

appellant to concurrent terms of confinement of twenty-five, twenty-five, and twenty years for each of the respective counts. In three issues, appellant complains that (1) the trial court erred in admitting evidence in violation of Texas Rules of Evidence 404(b) and 403; (2) the trial court erred in admitting medical records that contained testimony in violation of the Confrontation Clause of the U.S. Constitution; and (3) he received ineffective assistance of counsel at trial. We affirm.

I. BACKGROUND[1]

The indictment charging appellant with the aforementioned counts alleged, among the other two counts, that appellant engaged in continuous sexual abuse of the complainant, *see id*. §§ 21.02, of L.L.,[2] beginning on or about September 1, 2007 and continuing until May 1, 2011. Approximately two months before trial, the State filed a "Notice of Intent to Use Outcry Statement of Child Abuse Victim Pursuant to Article 38.072 of the Texas Code of Criminal Procedure" and a notice of "Intention to Use Extraneous Offenses and Prior Convictions."

The witnesses called by the State whose testimony is most relevant to understanding the general background of this appeal and the issues appellant raises are: (a) U.O., the complainant's mother; (b) L.L.; (c) M.J., an adult who claimed to have been abused by appellant when she was a minor; and (d) Sonia Edelman, a registered nurse and a clinical coordinator for the child-to-adult abuse-response team at Valley Baptist

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

[2] We use initials to refer to the complainant, her family, and alleged victims to protect their identify.

Medical Center.

A. U.O.

U.O. testified that she was born in Mexico City and immigrated to the United States with L.L. and L.L.'s younger sister. U.O. and her children resided with friends when she met appellant. When U.O.'s friends asked her to move out of their house, appellant, who was then fifty-eight years old, welcomed U.O., who was then twenty-two years old, and her daughters into his home. U.O. testified that she "didn't have any sentimental relationship with" appellant and that "[a]ll I needed was help from" appellant.

Instead of paying rent, U.O. cooked and cleaned the house. Months later, appellant demanded back payment for "everything that he had given" U.O., and she answered that she had no money. According to U.O., appellant told her, "I'm a man, you're a woman, and I need for you to pay me." Appellant then touched U.O., and they had sex. U.O. felt "demised [sic] as a woman." U.O. felt that she had to choose between having sex with appellant or living on the streets. She recalled that appellant's penis had "a brown mole [] [w]here the pee comes out." U.O. testified that appellant humiliated her by calling her a "wetback," prohibited her from communicating with anyone, and threatened to call immigration officials on her.

U.O. testified that she received anonymous phone calls warning her to take care of L.L. and not to leave L.L. with appellant. U.O. identified Roberto Oliva, appellant's son, as the anonymous caller. Appellant's nickname for L.L. from the time she was five or six years' old was "wife," which bothered U.O. because she believed that it sounded "bad" and "horrible." In October, 2014, L.L. told U.O. that appellant had sexually abused

her.

B. L.L.

L.L. testified that she and her mother moved into appellant's house when L.L. was approximately four years old. L.L. recounted a couple of instances where appellant made her uncomfortable. On the first night in appellant's house, L.L., U.O., and appellant slept together on a blanket-covered floor. While U.O. was getting ready to go to sleep, appellant pulled L.L. towards him and positioned her "butt" to where it was "against [appellant's] private part." Next, L.L. noted that one night she went to the bathroom and felt that appellant was giving her a "dirty stare."

According to L.L., appellant's conduct escalated to include oral sex in public and at the house. The public instances occurred when the family bought groceries every other Saturday afternoon. Appellant typically drove U.O., L.L., and L.L.'s then-infant brother to the H.E.B. in Harlingen, Texas. U.O. went in the store, leaving appellant alone with the children. L.L. usually had a lollypop or something to "munch on" while she waited in the front seat with appellant. L.L. testified that after a couple of uneventful trips, appellant unzipped his pants and he asked "[f]or [L.L.] to do what I was doing to the lollypop but to him." L.L. recounted that appellant has "a mole, like a spot near the tip of his penis" that was "darker than the rest of his skin." According to L.L., this behavior occurred until she was fifteen years' old. At that time, appellant moved out of the house.

At home, appellant took L.L. to a room in the back of the house while U.O. took her evening shower, and L.L. performed oral sex on appellant or he performed oral sex on L.L. The events in the back room began around the same time as the public

instances, and they continued until L.L. was fifteen years' old. L.L. denied ever being vaginally penetrated by appellant, either by his penis or fingers. She recounted that he told her "he wasn't stupid," and L.L. took appellant's statement to mean that if she ever "spoke or said anything, there wasn't going to be any evidence that that actually happened."

When L.L. was fifteen years old, she began dating a boy who attended her high school. L.L. recalled that appellant became "mad jealous" when he learned that she was talking to boys. Appellant allegedly proclaimed to L.L., "I don't want you talking to boys because you're mine." Eventually, L.L. told her high-school boyfriend that she and appellant had engaged in oral sex for several years. L.L.'s boyfriend insisted that L.L. tell U.O. After U.O. learned of the events, she called the police.

C. M.J.[3]

M.J., who was fifty-five years old at the time of trial, testified to the jury that she was born and raised in Mexico and that appellant is her mother's half-brother. M.J. moved to the United States at thirteen years old. When M.J. was fourteen years' old, she began working in appellant's Harlingen house as a maid and babysitter for appellant, his then-wife, and their two children. M.J. testified that appellant sexually abused her by slapping her butt, grabbing her breasts and vagina, and having sexual intercourse with her. One day, appellant witnessed M.J. talking to a boy she had befriended. Appellant

[3] Before M.J. testified to the jury, a hearing was held outside the presence of the jury wherein M.J. was examined by the State and cross-examined by appellant. At the conclusion of the hearing, the trial court stated, "I've been listening and I have reviewed the case law and the statute. I have reviewed the evidence and performed the balancing test required by the statute and the Code of Criminal Procedure and have determined that I am going to admit the evidence with the proper instructions to the jury."

reacted by taking M.J. in the house and kicking her in the eye.

D. Edelman

Edelman oversees forensic staff, including nurse examiners and social workers, and she manages practical care, reviews "100 percent" of the records, makes improvements to policies and procedures, and serves as a resource person. Edelman described the protocol when a child is brought to Valley Baptist Medical Center for sexual abuse treatment. Part of the process involves taking a history that the complainant gives to the nurse. According to Edelman, nurse examiners would have

> a pad of paper that we take and we talk to them about that we're going to be taking a history down, much as somebody else might stand there and type it [into] a computer, but we're going to write it down and how important it is that we get every word they have to say. So we'll ask them to speak slowly so that we can make sure that we've written down everything they said. We take the verbatim history, which is the word for word.

Edelman described the reproductive anatomy of a female, and opined as to whether certain injuries and trauma are likely or unlikely. Specifically, Edelman testified, "[t]he number of times that we do locate genital trauma, I'm surprised because it's rare." Edelman reviewed a "Medical Forensic Examination Record" prepared by another nurse and read a narrative to the jury. Edelman also testified that the emergency department physician clinically diagnosed L.L. with the virus herpes simplex two. According to Edelman, a herpes infection may be spread through oral sex. Edelman executed a search warrant to examine appellant's penis and take photographs of it. She observed in person and through the photographs that appellant's penis had an area of brown discoloration at its tip.

II. Discussion

A. Extraneous Offenses

In his first issue, appellant argues that the trial court erred by admitting testimony from M.J. regarding sexual assaults appellant allegedly committed against M.J. approximately forty years earlier, when M.J. was a minor. Appellant acknowledges article 38.37 of the Texas Code of Criminal Procedure, but nonetheless argues that the trial court "violated" Texas Rules of Evidence 404(b) and 403. The State responds that appellant failed to object in the trial court and that his arguments are inadequately briefed for lack of record citations. Notwithstanding the lack of preservation and record citations, the State further argues that appellant fails to explain how the trial court abused its discretion under article 38.37, and that the trial court did not err in applying the Rule 403 balancing test.

We find the case of *Martines v. State*, 371 S.W.232, 246–48 (Tex. App.—Houston [1st Dist.] 2011, no pet.) instructive on the preservation issue. In *Martines*, the trial court determined that extraneous-offense evidence was admissible under article 38.37. *Id.* at 248. After the determination, the defendant objected under rule 404, but he did not object under rule 403. *Id*. The First Court of Appeals held that any error regarding rule 403 was waived because it was the defendant's responsibility to request that the trial court exclude the evidence under rule 403 on the ground that the prejudicial effect of the evidence substantially outweighed the probative value. *Id*.

In this case, Appellant's brief provides no record citations wherein an objection to the admission of the extraneous offenses recounted by M.J. was ever lodged—under either rule 404 or 403—much less overruled. Accordingly, appellant's arguments are

unpreserved. *See* TEX. R. APP. P. 38.1(f) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."), 33.1(a) (providing that as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion and the trial court ruled on the request, objection, or motion, either expressly or implicitly); *see also Martines*, 371 S.W.at 248.

Appellant's first issue is overruled.

B. Medical Records

In appellant's second issue, he complains that the State failed to provide him with timely copies of medical records from Valley Baptist Medical Center that the State offered as it was examining Edelman and that the trial court admitted as "State's Exhibit 3" over appellant's objection regarding untimely service. Appellant also complains that the medical records contained hearsay statements and the jury's consideration of such statements violated the Confrontation Clause of the U.S. Constitution. Before us, appellant's notice and constitutional arguments are fused together, but they were raised in that order and at different times in the trial court. We address them separately to stay faithful to when they were presented to the trial court.

1. General Standard of Review

We will not reverse a trial court's decision to admit evidence absent a clear abuse of discretion. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008). The trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement. *Id*.

2. Notice of Business Records Affidavit

"The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14 days before trial." TEX. R. EVID. 902(10)(A); *see also Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd) (applying rule 902(10) in a criminal defendant's appeal regarding an adverse evidentiary ruling). "The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a." TEX. R. EVID. 902(10)(A). When a letter, properly addressed and postage prepaid, is mailed, there exists a presumption that the notice was duly received by the addressee. *Thomas v. Ray*, 889 S.W.2d 237, 238 (Tex. 1994) (orig. proceeding) (citing *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987)). This presumption may be rebutted by an offer of proof of nonreceipt. *Thomas*, 889 S.W.2d at 238. In the absence of any proof to the contrary, the presumption has the force of a rule of law. *Id*.

The clerk's record contains a "Notice of Business Record" filed by the State on May 19, 2015 that provides, among other things, "A photographically reproduced copies of business records which would be admissible under Rule 803(6) or (7) have been served on defense counsel along with the accompanying affidavit of the person who would otherwise provide the prerequisites of Rule 803 (6) or (7)." The notice goes on to identify Linda R. Gonzalez as the Custodian of Records for Valley Baptist Medical Center. At the end of the notice is a certificate of service, signed by an assistant district attorney, that provides "a true and correct copy of this Notice has been served on defense counsel." State's Exhibit 3 begins with an affidavit signed by Linda R. Gonzalez on May 13, 2015, and attached to the affidavit are one-hundred forty-two pages of medical records relating

to L.L.

The State contends that the certificate of service dooms appellant's timeliness argument. However, the State's position in the trial court was not entirely consistent. The discussion regarding appellant's objection provides,

> APPELLANT: Your Honor, we didn't get these records until last week. Whether or not they've been on file, he's not the custodian of records either so I don't understand how this can be admitted.
>
> STATE: Well, the custodian of records has an affidavit. That's how it all works. The custodian of record—
>
> COURT: Was that on file for 30 days?
>
> STATE: It's been on file for more than 14 days, surely. It's probably been on file for more than 30 days, but 14 days is all that's required for this one, Your Honor. And we faxed that notice to Mr. Garcia so he's known that. He's had plenty of opportunity—
>
> APPELLANT: We did not have an opportunity to review those records until just recently when we came to the Court again and requested those records.
>
> COURT: But you have had an opportunity to review them?
>
> APPELLANT: We have not had them for more than 14 days.
>
> STATE: Well, Your Honor, I have a copy of the motion that we filed with the Court. It was filed on May 19th, of 2015 with the accompanying Certificate of Service that it was faxed to Mr. Garcia on the 19th day of May, 2015, if you'd like to see that.
>
> APPELLANT: Which is fine, Your Honor, except that they did not provide us the records because they said, "We don't have to provide you the records," and then they finally had to provide the records but it wasn't until a week ago.
>
> STATE: Well, they're on file with the clerk's office. This is what we do in every case, Your Honor. We file this motion so that he knows that these are now on file. ***We don't have to actually***

make him a copy and go over to his office and hand him copies.

COURT: I'm going to rule that they are admitted into evidence.

(Emphasis added).

a. Trial Court Error

Contrary to the State's apparent belief, rule 902(10)(A) provides that the "proponent of a record **must *serve* <u>the record</u>** and the accompanying affidavit on each other party to the case at least 14 days before trial." TEX. R. EVID. 902(10)(A) (emphasis added). Service must be made in accordance with Texas Rule of Civil Procedure 21a. *Id*. The certificate of service, which provides "a true and correct copy of this Notice has been served on defense counsel," leaves open the possibility that the notice, but not the affidavit and accompanying records were served. The State's admission confirmed this possibility. The trial court abused its discretion by admitting medical records when the State admitted that it had not complied with rule 901(10)(A). *See McCarty*, 257 S.W.3d at 239 (providing that appellate review of a trial court's decision to admit evidence over objection is an abuse-of-discretion standard); TEX. R. EVID. 902(10)(A).

b. Harmless Error Analysis

The erroneous admission of the medical records requires a harmless error analysis. *See* TEX. R. APP. P. 44.2(b) ("Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see also Valentine v. State*, No. 06–04–00035–CR, 2005 WL 267795, *3 (Tex. App.—Texarkana Feb. 4, 2005, pet. ref'd) (mem. op., not designated for publication) (applying a harmless error analysis where documents were assumed to have been erroneously admitted under the business records

exception in Texas Rule of Evidence 803(6)).

Under rule 44.2(b), we disregard any error that does not affect appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict. *Simpson v. State*, 119 S.W.3d 262, 266 (Tex. Crim. App. 2003). In assessing the likelihood the jury's decision was adversely affected by the error, we consider everything in the record, including any testimony or physical evidence, the nature of the evidence supporting the verdict, the character of the alleged error, and how it might be considered in connection with other evidence in the case. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). We may also consider the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire, and whether the State emphasized the error. *Id*. at 518–19. Additionally, the presence of overwhelming evidence of guilt plays a determinative role in this analysis. *Neal v. State*, 256 S.W.3d 264, 285 (Tex. Crim. App. 2008).

After the medical records were admitted, the State asked Edelman to read from a narrative of "Goldie Strader, RN, CA/CP SANE," who did not testify at trial. Strader's narrative is part of a "Medical Forensic Examination Record" contained in the medical records. The narrative provides,

> Patient states, "Cresencano [sic] was my step-father. Me and my mom were here illegally, when I was 3 or 4 we moved into his house and a year later he started abusing me, like, touching me without my mom knowing. He would touch my breast, my female part (patient indicates female sexual organ by pointing) on the outside, my butt with clothes and without clothes on or he would stick his hand inside my clothes. He would touch on the outside, with time he would ask me to do oral sex on him then he would do oral sex on me (patient indicates female sexual organ by pointing). His

> penis would go in my mouth and his mouth would and tongue would go inside (patient indicates female sexual organ by pointing). When I would do oral sex, like after, he'd like have sperm come out of his penis into his hands. He would tell me he's not stupid and that is why he wouldn't put his thing in me cause people would be able to tell."

As Edelman was reading the middle of the last sentence, appellant objected, arguing,

> APPELLANT: Your Honor, I'm going to object to her reading to this jury. It's repetitious. She's already testified, I mean, there are things that she said—
>
> COURT: Response?
>
> STATE: Well, Your Honor—
>
> APPELLANT: —it's repetitious and I won't have an opportunity to cross-examine that witness again in regards to any new evidence that may show up on those records that we did not have an opportunity to cross-examin[e] her on.
>
> COURT: Response, please?
>
> STATE: Your Honor, this is something that's already in evidence, so the jury can read it if they want to. And then this is also—it's made in the course of medical treatment, so that's an exception to hearsay, so the jury actually can hear that statement.
>
> APPELLANT: Well, Your Honor, we're here for her opinion, and if she's—unless it's her opinion that she knows this material, all we need is her opinion, not to her—to repeat everything we've been here for a whole day listening.
>
> STATE: Well, her medical opinion requires the full knowledge of all the facts surrounding the case and that would include—
>
> COURT: I'm going to allow the testimony. The objection is overruled.

Edelman then finished reading the last sentence.

As appellant argued, all of Strader's narrative is cumulative of the testimony provided by L.L. Accordingly, its admission fails to present any harm under rule 44.2(b).

Franks v. State, 90 S.W.3d 771, 805–06 (Tex. App.—Fort Worth 2002, no pet.) (concluding that admission of evidence was harmless where same evidence was introduced through several other witnesses).

3. Hearsay and Confrontation Clause

Appellant also argues that "the records contained hearsay statements which were in violation of the right to confrontation by the United State and Texas Constitutions." On appeal, the State argues that appellant "fails to cite to the record as to where" the confrontation clause objection was made during trial. The State also argues that appellant "did not object at trial that the medical records were testimonial."

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The right to confrontation prohibits the admission of testimonial statements unless (1) the witness appears at trial and is cross-examined, or (2) the witness is unavailable to testify, and the accused had a prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36, 59 (2004); *Langham v. State*, 305 S.W.3d 568, 575–76 (Tex. Crim. App. 2010).

Appellant's confrontation clause argument focuses on his inability to cross-examine Strader. However, the statement Edelman read to the jury did not come from Strader, it allegedly came from L.L., whom appellant cross-examined. Edelman testified that nurse examiners would have taken the history "verbatim" and "word for word." The trial court may have focused on this disconnect between appellant's objection and the *actual* declarant in overruling appellant's objection. *See Crawford*, 541 U.S. at 59; *see*

also Segura v. State, No. 05-15-00032-CR, 2015 WL 8273712, at *5 (Tex. App.—Dallas Dec. 8, 2015, no pet.) (mem. op., not designated for publication) (concluding that the trial court did not abuse its discretion in overruling a confrontation clause or *Crawford* objection where, among other things, the appellant had the opportunity to cross-examine the actual declarant). We hold that the trial court did not abuse its discretion in overruling appellant's objection regarding lack of an opportunity to cross-examine the witness.

Appellant's second issue is overruled.

C. Ineffective Assistance of Counsel

In his third issue, appellant complains about several instances of ineffective assistance of counsel. None of the complaints are accompanied by citations to authority that establish appellant's trial counsel was deficient. Instead, the only legal authority appellant cites is to basic rules of law dealing with an ineffective assistance of counsel claim.

1. Standard of Review and Applicable Law

Ineffective assistance of counsel claims are evaluated under the two-part test articulated by the Supreme Court in *Strickland v. Washington*, requiring that the appellant first show that counsel's performance was deficient, or that counsel's assistance fell below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687–89 (1984)). Appellant must also show that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Thompson*, 9 S.W.3d at 812. Appellant must prove ineffective assistance of counsel by a preponderance of the evidence. *Id*.

Appellant must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that his actions could be considered sound trial strategy. *See Strickland*, 466 U.S. at 689.

2. Analysis

Appellant's assertions of ineffective assistance of trial counsel present nothing for us to review. *Id*.; *see also Tyson v. State*, 857 S.W.2d 697, 700 (Tex. App.—Houston [14th Dist.] 1993, no pet.) (holding that an appellant who provides no references to the record and cites no authority in support of allegations of ineffective assistance presents nothing for review) (citing *Pierce v. State*, 777 S.W.2d 399, 418 (Tex. Crim. App. 1989) (en banc)). Under *Strickland's* first prong, appellant must demonstrate that his trial counsel's performance was deficient, or that counsel's assistance fell below an objective standard of reasonableness. Such a test coupled with the rules of appellate procedure requires appellant to provide us with record references and citations to relevant authority so that we may determine whether appellant's trial counsel was deficient or that his assistance fell below an objective standard of reasonableness. *Thompson*, 9 S.W.3d at 812; *see also Keck v. State*, No. 14-07-00933-CR, 2009 WL 3003257, at *6 (Tex. App.—Houston [14th Dist.] Apr. 2, 2009, no pet.) (mem. op., not designated for publication) (holding that conclusory statements containing no citations to authority present nothing for appellate review where an appellant set forth the standard of review and classified her counsel's conduct as erroneous in numerous instances at trial). We cannot employ an analysis under the first prong of *Strickland* without such references and citations. *See* TEX. R. APP. P. 38.1(i); *Tyson*, 857 S.W.2d at 700.

Appellant's third issue is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
15th day of June, 2017.