NUMBER 13-18-00663-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BRAULIO ALEJANDRO GARCIA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 130th District Court of Matagorda County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

Appellant Braulio Alejandro Garcia appeals his conviction for aggravated sexual assault of a child, a first-degree felony. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (a)(2)(B). Appellant presents three issues: the trial court erred when it allowed (1) inadmissible hearsay from an improper outcry witness and (2) two expert witnesses to

testify beyond the scope of their expertise; and (3) the evidence is insufficient to support his conviction. We affirm.

I. BACKGROUND

In 2017, appellant was indicted for continuous sexual assault of a child younger than fourteen years of age, a first-degree felony. *See id.* § 21.02. The State alleged the offense occurred in 2007 and that the victim was appellant's daughter, D.G., who was under six years of age at the time of the offense. Appellant pleaded not guilty and proceeded to trial.

At trial, the jury heard testimony from multiple witnesses, including D.G., her mother, family members, law enforcement personnel, a forensic certified sexual assault nurse examiner (SANE), and staff from D.G.'s high school.

D.G.'s mother, M.F., testified that, in 2015, D.G. informed her that appellant had "raped her" when D.G. was a young child. Specifically, M.F. testified that D.G. told her she was asleep in bed when appellant entered the room "and that he went in there and he, you know, did—he penetrated her[; he] had sex with her." According to M.F., D.G. told her the abuse occurred at appellant's mother's house while M.F. was away in the military, which she estimated to be "about 2007." M.F. then contacted the police.

D.G. testified that she was born towards the end of 2001. She testified that the first adult she told about the sexual abuse was her mother, and that she also told her math teacher and softball coach, Joshua Ervin. D.G. explained she had been cutting herself and that Ervin noticed and inquired about her injuries. Eventually, D.G. told Ervin that she "was sexually assaulted when [she] was little" by her "biological father." D.G. testified that "it happened, like, not all the times but sometimes." Ervin referred D.G. to the school's

nurse and counselor. D.G. informed both the nurse and counselor of the same. D.G. testified the assault occurred at her paternal grandmother's house when her mom was away in the army.

The case was submitted to the jury only with instructions for the lesser included offense of aggravated sexual assault of a child. *See id.* § 22.021(a)(1)(B)(iii), (a)(2)(B). Specifically, the charge provided that a "person commits the offense of aggravated sexual assault if the person intentionally or knowingly causes the sexual organ of a child to contact or penetrate the sexual organ of another person, including the actor and the victim is younger than 14 years of age." *See id.* The jury found appellant guilty and assessed punishment at fifty years' imprisonment in the Texas Department of Criminal Justice. This appeal followed.

II. EVIDENTIARY SUFFICIENCY

By his third issue, which we address first, appellant argues the evidence was insufficient to support the elements of the offense.

A. Standard of Review & Applicable Law

Legal sufficiency is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009). "Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theory of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

In a sufficiency review, we consider the evidence in the light most favorable to the verdict to determine whether any rational finder of fact could have found the essential

elements of the offense beyond a reasonable doubt. *Chambers v. State*, 580 S.W.3d 149, 156 (Tex. Crim. App. 2019); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In our analysis, we defer to the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19). When the record contains conflicting inferences, we presume that the trier of fact resolved any such conflicts in favor of the prosecution, and we must defer to that resolution. *Padilla v. State*, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010) (citing *Jackson*, 443 U.S. at 326).

The uncorroborated testimony of the child is sufficient, standing alone, to support a conviction for aggravated sexual assault of a child. TEX. CODE CRIM. PROC. ANN. art. 38.07; *Prestiano v. State*, 581 S.W.3d 935, 941 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (op. on reh'g); *Gonzalez v. State*, 522 S.W.3d 48, 57 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Gonzalez Soto v. State*, 267 S.W.3d 327, 332 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.). The child need not directly and explicitly testify as to contact or penetration with the same clarity and ability of an adult witness to prove these facts beyond a reasonable doubt. *See Villalon v. State*, 791 S.W.2d 130, 133–35 (Tex. Crim. App. 1990); *Gonzalez Soto*, 267 S.W.3d at 332.

B. Analysis

Here, a hypothetically correct jury charge would instruct the jury to find appellant guilty if (1) he intentionally or knowingly caused the sexual organ of D.G. to contact or penetrate the sexual organ of another person, including his, when (2) D.G. was younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (a)(2)(B);

see also Prestiano, 581 S.W.3d at 941. D.G. testified that, when she was five years old, appellant entered her room when she was sleeping, pulled down her underwear, and "raped" her by inserting his penis in her vagina. D.G.'s testimony supports all the elements of the offense. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (a)(2)(B). We conclude the evidence is legally sufficient. *See Gonzalez Soto*, 267 S.W.3d at 332 ("The testimony of a child sexual abuse victim alone is sufficient to support a conviction for indecency with a child or aggravated sexual assault.").

Appellant also points to conflicting evidence in support of his contention that he did not sexually assault D.G.; however, the jury was free to disregard that evidence and believe the evidence in support of appellant's guilt, and we must defer to that determination.[1] *See Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000) ("[R]econciliation of conflicts in evidence is within the exclusive province of the jury.") *Vasquez v. State*, 819 S.W.2d 932, 935 (Tex. App.—Corpus Christi-Edinburg 1991, pet. ref'd) ("It is within the jury's province . . . to judge the credibility of the witnesses."); *see also Gonzalez*, 522 S.W.3d at 56–57.

We overrule appellant's third issue.

III. OUTCRY WITNESS

By his first issue, appellant argues the trial court erred when it allowed inadmissible hearsay from M.F. because she was an improper outcry witness.

[1] For example, appellant points to testimony from family members providing that they never observed any inappropriate behavior between D.G. and appellant or between appellant and any other children and argues D.G. was not credible because she waited "approximately nine years" to make an outcry of sexual abuse. Appellant also points to the normal results of D.G.'s genital exam conducted approximately nine years after the alleged sexual assault; however, the SANE testified in addition that an individual can be a victim of sexual assault and have a completely normal genital exam.

A. Applicable Law & Standard of Review

Hearsay is an out-of-court statement that a party offers in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). Generally, hearsay is not admissible unless provided for by the Rules of Evidence, a statute, or other rule. TEX. R. EVID. 802.

One recognized exception to the general prohibition against hearsay allows, in the prosecution for certain sexual abuse cases involving children, the admission of the child's out-of-court statement concerning the abuse made to an outcry witness. *See Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). Under article 38.072 of the code of criminal procedure, a child complainant's out-of-court statement is admissible if it describes the alleged offense, was made by the child against whom the charged offense was allegedly committed, and was made to the first person, eighteen years of age or older, other than the defendant, to whom the child made a statement about the offense. TEX. CODE CRIM. PROC. ANN. art. 38.072(a); *Sanchez*, 354 S.W.3d at 484. The child's statement "must be 'more than words which give a general allusion that something in the area of child abuse is going on'; it must be made in some discernable manner and is event-specific rather than person-specific." *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011) (quoting *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)). Hearsay testimony from more than one outcry witness may be admissible under article 38.072 "only if the witnesses testify about different events." *Id.*

Article 38.072 has procedural requirements, including that the party intending to offer the statement must, on or before the fourteenth day before trial begins, notify the adverse party of its intention to offer the statement, provide the name of the outcry

witness, and provide a written summary of the statement. TEX. CODE CRIM. PROC. ANN. art. 38.072(b)(1); *Sanchez*, 354 S.W.3d at 484. Outside the presence of the jury, the trial court must conduct a hearing and find that the statement is reliable "based on the time, content, and circumstances of the statement." TEX. CODE CRIM. PROC. ANN. art. 38.072(b)(2); *see Sanchez*, 354 S.W.3d at 484–85, 488 ("The only task [article 38.072] assigns the trial court is to determine whether, based on the time, content, and circumstances of the statement, the outcry is reliable."). The child complainant must testify or be available to testify at the proceeding in court. TEX. CODE CRIM. PROC. ANN. art. 38.072(b)(3); *Sanchez*, 354 S.W.3d at 485.

The trial court has broad discretion to determine which of several witnesses is an outcry witness, and we will not disturb this decision absent a clear abuse of discretion. *Chapman v. State*, 150 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). A trial court abuses its discretion when its decision is outside the zone of reasonable disagreement. *Id.*

B. Analysis

Here, before the beginning of trial, the trial court held a hearing in compliance with article 38.072 to determine the reliability and admissibility of D.G.'s outcry to her mother. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072. At the hearing, the State elicited the following testimony from D.G.:

[State]:	So, did you tell anyone that the defendant had sexually assaulted you?
[D.G.]:	Yes, sir.
[State]:	Who did you first tell?
[D.G.]:	I first told my friend.

[State]: And what is her name?

[D.G.]: [A. L.]

[State]: And how old was [A.L.] at the time you told her?

[D.G.]: We were probably like 13.

[State]: About 13 or so?

[D.G.]: Yes.

[State]: Did you tell—did you tell your sister?

[D.G.] Yes, sir.

[State]: How old was your sister when you told her?

[D.G.]: She was probably 15 or 14.

[State]: Okay. And, so, who's the first adult person that you told?

[D.G.]: Josh Ervin.

[State]: Okay. Had you spoken with your mother before you talked with Josh?

[D.G.]: Oh, yes, sir.

[State]: Did you tell her what had happened to you?

[D.G.]: Yes, sir.

[State]: Now, Josh Ervin was a coach of yours?

[D.G.]: Yes, sir.

[State]: And you told him some things later on as well?

[D.G.]: Yes, sir.

[State]: But your mom was the first adult that you talked to?

[D.G.]: Yes, sir.

While D.G. initially testified that Ervin was the first adult she told about the abuse, the record indicates that she subsequently clarified that she told Ervin after she told her mother. During cross examination, D.G. stated the same:

> [Defense Counsel]: Okay. So, eight years—let's just take it to the point where you told your mother—or you told your coach first what happened?
>
> [D.G.]: My mother.

We conclude that the trial court did not abuse its discretion when it found D.G.'s mother a proper outcry witness. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072; *Chapman*, 150 S.W.3d at 813.

At trial, M.F. testified that D.G. told her appellant "raped" her at his mother's house when M.F. was away in the military in 2007. Appellant objected to this testimony on the basis that it was hearsay, and the trial court overruled the objection. As previously concluded, because M.F. was a proper outcry witness, her statements concerning the outcry made by D.G. were admissible. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072(a); *Sanchez*, 354 S.W.3d at 484.

In any event, improper outcry-witness testimony is harmless when other properly admitted witness testimony sets forth the same facts. *See Allen v. State*, 436 S.W.3d 815, 822 (Tex. App.—Texarkana 2014, pet. ref'd); *see also* TEX. R. APP. P. 44.2; *Skiba v. State*, No. 13-17-00045-CV, 2018 WL 6626724, at *3 (Tex. App.—Corpus Christi–Edinburg Dec. 19, 2018, pet. ref'd) (mem. op., not designated for publication). D.G. testified that appellant entered her room at night and "raped her" by inserting his penis in her vagina; therefore, any error associated with the admission of M.F.'s testimony providing the same would be harmless. *See Allen*, 436 S.W.3d at 822; *see also Skiba*, 2018 WL 6626724, at *3.

We overrule appellant's first issue.

IV. EXPERT TESTIMONY

By his second issue, appellant argues that the trial court erred when it allowed two of the State's witnesses to "testify beyond the scope of their expertise." Specifically, he complains that (1) the investigator's testimony regarding a "delayed outcry" was "hearsay and beyond the scope of her expertise"; and (2) the SANE's testimony regarding D.G.'s answers to questions asked during the medical exam were "speculative" and beyond the scope of her expertise.

A. Applicable Law & Standard of Review

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical or otherwise specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. TEX. R. EVID. 702. "[T]he trial court's judgment regarding experts' qualifications and the admissibility of expert testimony is subject to an abuse of discretion standard of review." *Lagrone v. State*, 942 S.W.2d 602, 616 (Tex. Crim. App. 1997). Furthermore, a complaint on appeal must comport with the objection at trial; therefore, if a party fails to properly object to the alleged errors at trial, these errors can be forfeited. *See* TEX. R. APP. P. 33.1; *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012).

B. Analysis

Here, appellant did not object to any of the testimony provided by the investigator. Thus, he failed to preserve for our review his complaint regarding the investigator's testimony. *See* TEX. R. APP. P. 33.1; *Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App.

2011); *see also Keate v. State*, No. 03-10-00077-CR, 2012 WL 896200, at *13 (Tex. App.—Austin Mar. 16, 2012, no pet.) (mem. op., not designated for publication).

Appellant objected to the SANE's testimony about what D.G. told her when she asked D.G. "Can you tell me why you are here today?" Appellant objected on the basis that it was hearsay and not for the purpose of a medical diagnosis. The trial court overruled the objection, and the SANE testified about D.G.'s statements to her regarding the history of the abuse and that her father was the abuser. On appeal, appellant complains that the testimony was "speculative" and beyond the scope of her expertise.

At trial, appellant objected to the testimony because it was "hearsay" and not made "for medical diagnosis or treatment." Thus, to the extent appellant complains of the testimony on appeal because it was speculative or beyond the scope of her expertise, we conclude he failed to preserve that argument for our review because this argument differs from the one made at trial. *See* TEX. R. APP. P. 33.1; *Clark*, 365 S.W.3d at 339.

Appellant also argues the statements D.G. made to the SANE were not for medical diagnosis or treatment and therefore were not admissible as an exception to hearsay. *See* TEX. R. EVID. 803(4). We disagree. *See Bargas v. State*, 252 S.W.3d 876, 896 (Tex. App—Houston [14th Dist.] 2008, no pet.) ("Because treatment of child abuse involves removing child from abusive setting, the identity of abuser is pertinent to medical treatment of the child."); *Mendoza v. State*, 69 S.W.3d 628, 634 (Tex. App.—Corpus Christi–Edinburg 2002, pet. ref'd) (concluding that child's statements to nurse about nature of the child's injuries and naming the defendant as the person who caused them were admissible under medical diagnosis exception); *Beheler v. State*, 3 S.W.3d 182, 189 (Tex. App.—Fort Worth 1999, pet. ref'd) ("The object of a sexual assault exam is to

ascertain whether the child has been sexually abused and to determine whether further medical attention is needed. Thus, statements describing acts of sexual abuse are pertinent to the medical treatment of the child."). The record shows that the complained of statements were given to a SANE at Matagorda Regional Medical Center for the purpose of medical diagnosis and treatment.

We overrule appellant's second issue.

V. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Chief Justice

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

Delivered and filed the
30th day of July, 2020.