Affirmed and Memorandum Opinion filed June 4, 2020

In The

Fourteenth Court of Appeals

NO. 14-18-00811-CR

RAY SUSTAITA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1564975

MEMORANDUM OPINION

Appellant Ray Sustaita was convicted of indecency with a child by contact. He raises two issues on appeal. In his first issue, he contends that the trial court erred by allowing multiple "outcry" witnesses to testify in violation of Article 38.072 of the Code of Criminal Procedure. In his second issue, appellant argues that the trial court erred in allowing the complainant to take the stand with both a toy and a support person without making the required findings under Article 38.074 of the Code of Criminal Procedure. We affirm.

I. OUTCRY WITNESSES

In his first issue, appellant asserts that the trial court erred by "permitting multiple 'outcry' witnesses to testify about the same events, specifically, Dr. Anadita Pal, who was not noted as such." On appeal, Appellant concedes that the complainant's mother was the proper outcry witness in this case. The State contends that appellant has failed to preserve this issue for review because appellant did not object to the doctor's testimony. The State argues that even if appellant had preserved error, the doctor's testimony was admissible under an exception to the hearsay rule—for the purpose of medical treatment or diagnosis—and any possible error was harmless.

A. Applicable Law

We review the trial court's decision on the admission of evidence for an abuse of discretion. *Merrit v. State*, 529 S.W.3d 549, 553 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). A trial court abuses its discretion if the decision falls outside the zone of reasonable disagreement. *Id.*

Article 38.072 of the Code of Criminal Procedure provides a statutory exception to allow the State to introduce outcry statements, which would otherwise be considered hearsay, under certain conditions. Tex. Code Crim. Proc. art. 38.072. An outcry witness is the first person over the age of eighteen, other than the defendant, to whom the child made a statement regarding the offense, extraneous offense, wrong, or act. *See id*. art. 38.072, § 2(a)(3).

The improper admission of hearsay testimony is non-constitutional error that is harmless unless the error affected appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004); *Merrit*, 529 S.W.3d at 556. An error is harmless if we are reasonably assured that

the error did not influence the verdict or had only a slight effect. *See Garcia*, 126 S.W.3d at 927; *Shaw v. State*, 329 S.W.3d 645, 653 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Likewise, the improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *See Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *Shaw*, 329 S.W.3d at 653; *Trevino v. State*, 218 S.W.3d 234, 240 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

B. Background

The State filed a notice with the trial court at least fourteen days in advance of trial notifying appellant of the State's intent to use outcry statements through two witnesses—the complainant's mother and a forensic interviewer with the Children's Assessment Center. At trial, the State offered the testimony of the complainant's mother as the outcry witness under Article 38.072. The trial court conducted a hearing outside of the presence of the jury to determine whether the requirements of Article 38.072 were met. At the end of the hearing, appellant objected to the testimony as hearsay. The trial court concluded that the mother's statement was "reliable based on the time, content and circumstances of the statement. Therefore it is an exception to the hearsay rule; so, I'm overruling your objection now for the purpose of the record."

After the jury returned to the courtroom, the State proceeded to direct examination of the mother. When the State began to elicit the outcry testimony, appellant's counsel objected on the basis of hearsay, and the trial court overruled the objection. Appellant's trial counsel requested to approach the bench to confer with the trial court regarding his objection stating, "for the record, Judge, I want to make it clear that I'm objecting to any outcry statements." The trial court indicated

that the objections were overruled and allowed counsel to have a running objection.

The complainant's mother testified that in November 2016, the family was having a barbeque at a family member's house. The complainant felt tired and went inside to rest and watch television on the couch. Approximately thirty seconds later, appellant went into the house. The mother felt concerned about the complainant and sent the complainant's father into the home to check on her. When the father came in the door, he witnessed appellant move abruptly away from the complainant and out of the room. The father then brought the complainant back outside to the mother. Later, when the mother and the complainant were alone, the complainant stated that appellant had asked her to go to the restroom with him. The mother found this behavior disturbing, and the family left the barbeque immediately.

In January 2017, the complainant told her mother that on other occasions when the complainant was over at her grandmother and appellant's home, appellant had exposed his penis and touched the complainant on her vagina both underneath and over her clothing. The complainant told her mother that these incidents occurred in the computer-workout room and in the bathroom at her grandmother's home. The complainant also stated that she had put her mouth on appellant's penis.

The complainant testified that appellant touched her "private part," "where she didn't want to be touched." The complainant could not recall how many times appellant had touched her "private part." Mostly the incidents occurred in the computer-workout room. Appellant touched her with his hand and showed her his penis. At the barbeque, appellant asked the complainant to go to the bathroom with him.

The complainant's pediatrician also testified. The pediatrician testified that the complainant had visited for an annual "well child exam." During the checkup, the doctor's treatments, procedures, and diagnosis were documented in the complainant's medical records. The complainant's 125-page medical record was admitted into evidence. Appellant's counsel indicated he had no objection to the medical record. The pediatrician testified that she saw the complainant in January 2017. She then read from the complainant's medical record of the visit:

> *Q*. So, if you could, if you look to your screen to the left, you'll see the medical records there. If you could, please just read for us the notes that you took in order to determine your treatment plan for that day.
>
> *A*. Okay. Mother and father accompany the child. After speaking to mother alone, she states that the child made a claim that paternal grandmother's husband [appellant], not the child's grandfather, touched her inappropriately on two occasions and exposed his genitals to her.
>
> In November the child was found to be alone with him at grandmother's house. And when dad walked into the room, [appellant] was startled and got up and left the room. Parents became suspicious at that time and questioned [complainant] about it. She then told parents that [appellant] asked her to go to the restroom with her (sic) and touched her inappropriately in her private area, and on one occasion exposed himself to her.
>
> The first incident was prior to this occasion, and mom is not sure when that occurred. Since then the child has not been allowed to go to the home, and a police report has been filed. The police informed mother and child that the child needs a medical exam, and that is why they're here today.
>
> Mother notices that the child is very self-conscious, sometimes seems sad. She has noticed this change over the last few months. She has also complained of dysuria on and off. There is no odored, discharge or any other symptoms.
>
> When speaking to the child alone, she also states that [appellant] touched her with his hand in the private area two times.

She states that this -- it made her feel bad, and she told her mom she feels safe at home and has not seen [appellant] since.[1]

The pediatrician testified that she ordered some testing for sexually transmitted diseases as a result of the examination and examined the complainant for physical injuries.

C. Analysis

During the mother's testimony, appellant obtained a running objection to "any outcry statements." Appellant did not request a running objection that would apply to outcry statements by any witness other than the mother and it is not clear from the record that the trial court understood this objection to apply in such a way. While the objection itself was specific to "outcry statements," it is uncertain from this record that the testimony of the pediatrician was being offered as outcry testimony, as opposed to another purpose. The State did not disclose the pediatrician as an outcry witness, but instead listed the pediatrician's medical report as a business record in the pre-trial filings.[2] Appellant had the opportunity to object to the medical report and the pediatrician's testimony but failed to do so. "[A]n advocate who lodges a running objection should take pains to make sure it does not encompass too broad a reach of subject matter over too broad a time or over multiple witnesses." *Sattiewhite v. State*, 786 S.W.2d 271, 283 n.4 (Tex. Crim. App. 1989); *see also Ford v. State*, 919 S.W.2d 107, 113–14 (Tex. Crim. App. 1996) (holding claim preserved when defendant objected to "'any and all impact evidence' as 'to all witnesses' testifying to such" and record showed the "trial court clearly understood such complaint and ruled adversely thereon").

[1] At the time this evidence was introduced, appellant made no objections.

[2] Appellant also did not lodge an objection that the State failed to disclose the pediatrician as an outcry witness as required under Article 38.072. *See* Tex. Code Crim. Proc. art. 38.072.

Under the circumstances presented in this case, the running objection applied only to outcry statements by the mother during her trial testimony. *See Sattiewhite*, 786 S.W.2d at 283 n.4; *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985), *overruled on other grounds by Hernandez v. State*, 757 S.W.2d 744, 751–52 n.15 (Tex. Crim. App. 1988); *Stafford v. State*, 248 S.W.3d 400, 410 (Tex. App.—Beaumont 2008, pet. ref'd). Appellant's objection did not suffice to preserve a complaint that the pediatrician was offering outcry testimony. *See Sattiewhite*, 786 S.W.2d at 283 n.4; *Goodman*, 701 S.W.2d at 863; *Stafford*, 248 S.W.3d at 410. Appellant did not voice this complaint during the pediatrician's testimony. Appellant thus failed to preserve error on this issue.

Even if appellant had preserved this issue for review, we would find no merit in it. During direct examination of the pediatrician, the State introduced the complainant's medical records into evidence. Appellant stated that he had no objections to the admission of the medical records. The pediatrician went on to read directly from the medical records exhibit to the jury, namely the notes from the conversations that she had with the complainant and the mother during the office visit. *See Mayes*, 816 S.W.2d at 88; *Shaw*, 329 S.W.3d at 653; *Trevino*, 218 S.W.3d at 240. The State argues that had appellant objected to this medical evidence rather than state that appellant had "no objection," then the State would have sought to have the evidence admitted through Texas Rule of Evidence 803(4) as medical diagnosis or treatment exception to the hearsay rule. *See* Tex. R. Evid. 803(4); *Flores v. State*, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

The mother and the complainant also testified to the same facts as were detailed in the medical report. The pediatrician's testimony was cumulative of

evidence admitted elsewhere.[3] Thus, even if appellant had preserved error, he could not prevail on this point because he has not shown harm by the admission of the pediatrician's testimony. *See Merrit*, 529 S.W.3d at 557 (holding error in admission of hearsay statement was harmless where similar testimony was developed and offered through two other witnesses); *Matz*, 21 S.W.3d at 912–13 (no harm in admission of complainant's videotaped statement regarding assault because complainant's admissible live testimony established the same facts). Harmless error would provide no basis for appellate relief. *See Garcia*, 126 S.W.3d at 921 (holding error that did not influence verdict or had only slight effect is not harmful). We overrule appellant's first issue.

II. SUPPORT ITEMS UNDER ARTICLE 38.074

Appellant's second issue on appeal is that the trial court erred by allowing the complainant to testify with a toy and a support person because the trial court did not "make the findings by a 'preponderance of the evidence'" as required by Article 38.074. Appellant contends that because the procedures of Article 38.074 were not followed, he suffered prejudice from the jury because the presence of the support person evoked "feelings of sympathy and compassion" for the complainant.

A. Applicable Law

Under Article 38.074(b) of the Code of Criminal Procedure, upon motion "the court shall allow the child to have a toy . . . or allow a support person to be

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[3] Appellant complains on appeal that the "cumulative testimony was both prejudicial and harmful," but made no objection to the evidence as cumulative at trial. To the extent, if any, appellant complains the evidence is cumulative, any such error is not preserved for review. *See Matz v. State*, 21 S.W.3d 911, 913 n.2 (Tex. App.—Fort Worth 2000, pet. ref'd) (complaint that testimony was harmful because it was "bolstering in its purest form" was not preserved where defendant failed to object on that basis in trial court).

present in close proximity to the child during the child's testimony" if certain conditions are met. Tex. Code Crim. Proc. art. 38.074(b). The court must find by a preponderance of the evidence that the child cannot reliably testify without possession of the item or presence of the support person and granting the motion would not likely prejudice the trier of fact in evaluating the child's testimony. *Id*.

B. Background

The trial court conducted a hearing outside of the jury's presence to question the complainant about her need for a support person and item:

> THE COURT: Who is your friend sitting next to you?
>
> THE WITNESS: Angelica.
>
> THE COURT: So, would it make you feel more comfortable if she was with you there while you testified?
>
> THE WITNESS: Uh-huh.
>
> THE COURT: And what -- do you have a little toy with you, too? Does that make you feel more comfortable?
>
> MR. BROWN: Uh-huh.
>
> THE COURT: Well, then, at the State's request, they've asked that --
>
> THE WITNESS: Angelica.
>
> THE COURT: -- be allowed to sit with the complainant. And I believe based on her age that it would be appropriate and not unduly prejudicial, certainly understanding you can't help her answer the questions, assist her or block her view of the defendant or the jury from her.
>
> MR. BROWN: Judge, just for the record, I'll object under 403.
>
> THE COURT: Okay. Your objection is overruled.

Appellant made no further argument or objection to the complainant having a support person and small toy with her while testifying.

C. Analysis

Appellant objected "under 403" and failed to make any other argument about the presence of the support person, toy, or the trial court's failure to explicitly state that it made its findings by a preponderance of the evidence. Appellant's attorney never asked the trial court to provide more specific findings than it made during the hearing concerning the complainant's need for a support person and item. Because appellant failed to complain to the trial court regarding its alleged failure to adhere to the procedures of Article 38.074, appellant's complaints are not preserved for review on appeal. *See* Tex. R. App. P. 33.1(a); *Smith v. State*, 491 S.W.3d 864, 875–76 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (defendant did not preserve argument that trial court failed to adhere to procedures set out in Article 38.074 when he objected to the testimony at trial as "overly prejudicial"); *Lambeth v. State*, 523 S.W.3d 244, 247 (Tex. App.—Beaumont 2017, no pet.) (defendant never asked trial court to provide more specific findings under Article 38.074, thus complaints not preserved for appellate review); *cf. State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008) (noting that if the trial court fails to make an express finding on an issue to resolve questions of disputed fact on a motion to suppress, the necessary findings will be inferred to support the ruling "if the record evidence (viewed in the light most favorable to the ruling) supports [the trial court's] implied fact findings"). An objection under Texas Rule of Evidence 403 is an objection to the admission of evidence and does not preserve a complaint that the requirements of Article 38.704 have not been satisfied.

At the time of trial, the complainant was eight years old and in third grade. The trial court questioned the complainant outside of the presence of the jury and observed her demeanor before allowing her to testify. The trial court had already heard the testimony of the complainant's mother describing the child, as well as

testimony from the forensic interviewer, who described the complainant as "scared" and "timid" at initial interviews and discussions about the topic of the sexual abuse. Even if appellant had preserved his Article 38.704 complaint for merits review, we could not say that the record does not support the trial court's conclusion that the requirements of Article 38.074 were met by a preponderance of the evidence. *See Lambeth*, 523 S.W.3d at 247 ("Based on the trial court's oral findings in the hearing and its ruling, we imply the trial court made the findings required to support its ruling" under Article 38.074).

We overrule appellant's second issue on appeal.

III. CONCLUSION

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

/s/ Ken Wise

Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan.

Do Not Publish — TEX. R. APP. P. 47.2(b).