**Affirmed and Memorandum Opinion filed July 14, 2020.**


**In the**

# Fourteenth Court of Appeals

**NO. 14-19-00027-CR**

**RUBEN RAMOS, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 19th District Court**
**McLennan County, Texas**
**Trial Court Cause No. 2015-502-C1**

## MEMORANDUM OPINION

A jury found appellant Ruben Ramos guilty of four counts of second degree felony indecency with a child by contact for engaging in sexual contact with complainant A.B.[1] when she was younger than 17 years of age. Act of May 18, 2009, 81st Leg., R.S., ch. 260, § 1, sec. 21.11(a)(1), 2009 Tex. Gen. Laws 710, 710 (former Tex. Penal Code § 21.11(a)(1), since amended). The jury assessed

[1] We use the complainant's initials because she was a minor at the time the offense was committed. *See* Tex. R. App. P. 9.10(a)(3), (b).

punishment at imprisonment for life and a $10,000 fine for each count, with the trial court ordering the sentence in count II to run consecutively after the sentence in count III, and the sentences in counts I, III, and IV to run concurrently. Tex. Penal Code Ann. § 12.32 (first degree felony punishment); Act of May 18, 2007, 80th Leg., R.S., ch. 593, § 1.14, 2007 Tex. Gen. Laws 1120, 1125 (former Tex. Penal Code § 12.42(b), since amended) (penalty for repeat and habitual felony offenders on trial for second degree felony).[2] Appellant raises four issues: (1) the State's election of the particular offenses to be prosecuted was insufficient, allowing for a non-unanimous verdict and depriving appellant of proper notice of the specific acts at issue; (2) the trial court erred by allowing a non-expert witness to testify beyond his personal knowledge; (3) the trial court's admission of outcry testimony under Code of Criminal Procedure article 38.072 violated appellant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and (4) the trial court erred in denying appellant's motion to dismiss the indictment for violation of appellant's right to a speedy trial under the Sixth Amendment to the United States Constitution. We affirm.[3]

## I. BACKGROUND

The State indicted appellant on four counts of indecency with a child by contact in February 2015. In November 2018, with trial set for early December

[2] Appellant pleaded true to allegations in the State's notice to enhance the punishment range based on three prior felony convictions for burglary of a habitation, thereby increasing the applicable penalty range from that of a second degree felony to that of a first degree felony for each count.

[3] The Supreme Court of Texas ordered the Court of Appeals for the Tenth District of Texas to transfer this case (No. 10-18-00377-CR) to this court. Misc. Docket No. 18-9166 (Tex. Dec. 20, 2018); *see* Tex. Gov't Code Ann. §§ 73.001, .002. Because of the transfer, we decide the case in accordance with the precedent of the transferor court under principles of stare decisis if our decision otherwise would have been inconsistent with the transferor court's precedent. *See* Tex. R. App. P. 41.3.

2018, appellant moved to dismiss the indictment on the grounds that his Sixth Amendment right to a speedy trial had been violated. The trial court denied the motion.

At trial, complainant A.B. testified that appellant abused her approximately "every other day" when she was between ages six and ten, at which age A.B. made an outcry of abuse to her grandmother, E. Richards. According to A.B., the abuse consisted of appellant touching A.B.'s genitals and forcing A.B. to touch his genitals.

The trial court admitted Richards' testimony concerning A.B.'s outcry pursuant to Code of Criminal Procedure article 38.072 over objection from the defense that the statute, as applied in this case, violated the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; Tex. Code Crim. Proc. Ann. art. 38.072. The trial court also admitted certain testimony from Waco Police Department Peace Officer Lundquist concerning the investigation of A.B.'s claims over appellant's objection that Lundquist lacked personal knowledge of the investigation.

At the close of the State's evidence, appellant moved for an election by the State as to the specific acts upon which the State would rely for conviction. The State elected the "first" and "last" incidents of the two types of sexual contact alleged by A.B. to satisfy the four counts in the indictment. Appellant objected that this election was insufficiently specific. The trial court overruled the objection.

## II. ANALYSIS

### A. Sufficiency of the State's election

In his first issue, appellant argues that the State's election at the close of its evidence was insufficient because the election failed to ensure that the jury reached

a unanimous verdict and did not provide the defense with proper notice.

When one particular act of sexual assault is alleged in the indictment, and more than one incident of that same act of sexual assault is shown by the evidence, the State must elect the act upon which it would rely for conviction. *O'Neal v. State*, 746 S.W.2d 769, 771 (Tex. Crim. App. 1988) (collecting cases and discussing *Crosslin v. State*, 235 S.W. 905 (Tex. Crim. App. 1921)). Once the State rests its case in chief, upon a timely request by the defendant, the trial court must order the State to make an election. *Phillips v. State*, 193 S.W.3d 904, 909 (Tex. Crim. App. 2006) (reexamining and reaffirming *O'Neal*).

The Court of Criminal Appeals has set forth the following purposes undergirding the election requirement:

> • to protect the accused from the introduction of extraneous offenses;
>
> • to minimize the risk that the jury might choose to convict, not because one or more crimes were proved beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty;
>
> • to ensure unanimous verdicts; that is, all of the jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred; and
>
> • to give the defendant notice of the particular offense the State intends to rely upon for prosecution and afford the defendant an opportunity to defend.

*Id.* at 909–10. Here, appellant was charged with four counts of indecency with a child by contact. The defense moved for election by the State at the close of the State's evidence, and the State elected as follows:

> Count I: The first time appellant made complainant touch his genitals with her hand.
>
> Count II: The first time appellant touched complainant's genitals with his hand.

> Count III: The last time appellant made complainant touch his genitals with her hand.
>
> Count IV: The last time appellant touched complainant's genitals with his hand.

Although conceding the State made an election as required by the trial court, appellant argues that the State's election was not specific enough. Similar language, however, has been held to be sufficiently specific to meet the election requirement. *See Reza v. State*, 339 S.W.3d 706, 711–12 (Tex. App.—Fort Worth 2011, pet. ref'd) (following elections were sufficient: "the first time [appellant] put cream on his finger, put his finger down [complainant]'s pants, and penetrated her sexual organ" and "the first time [appellant] 'ever laid [complainant] on her side, spooned up behind her and put his penis between her legs, making contact with her sexual organ'").

Appellant argues that the language of the State's election nonetheless runs afoul of two factors set forth by the Court of Criminal Appeals in *Phillips*—risk of a non-unanimous verdict and failure to provide adequate notice to the defense. 193 S.W.3d at 909–10. We first note that the Court of Criminal Appeals has previously applied the *Phillips* factors in conducting a harm analysis when the State had made no election at all. *See Owings v. State*, 541 S.W.3d 144, 150–51 (Tex. Crim. App. 2017); *Dixon v. State*, 201 S.W.3d 731, 734 (Tex. Crim. App. 2006). Even addressing appellant's arguments in the context of this case, the arguments fail. Regarding the unanimity of the verdict, the State's case rested on the credibility of A.B., as there was no eyewitness testimony or physical evidence corroborating her account of appellant's abuse of her. Because A.B. testified to a generalized pattern of abuse occurring over a period of years, appellant argues that merely designating the "first" and "last" instances of certain types of abuse is too vague to properly guide the jury to a unanimous verdict. However, the Court of Criminal Appeals has

held that when allegations of sexual abuse derive solely from a child complainant, and the child presents generalized, undifferentiated testimony of ongoing abuse, "[t]here is no basis anywhere in the record for the jury to believe that one incident occurred and another did not. Either they all did or they all did not." *Owings*, 541 S.W.3d at 152; *see Dixon*, 201 S.W.3d at 735 ("The child was either credible in giving [her] unified account or she was not."). Consequently, because there is "no danger . . . that some jurors might have believed that one incident occurred and another or others did not," there is also "'no remotely significant risk' of a non-unanimous verdict." *Owings*, 541 S.W.3d at 152–53.

Likewise, regarding appellant's argument that the language of the elections deprived him of proper notice as to which acts the State intended to rely upon for conviction, when, as here, the defense is "a blanket denial that any incident of sexual abuse ever happened," the Court of Criminal Appeals has rejected claims of insufficient notice. *See id.* at 153. Since the defense was "the same as to each incident," there is "no risk that Appellant was deprived of adequate notice of which offense to defend against." *Id*.[4]

We overrule appellant's first issue.[5]

[4] While there may be cases in which the trial court's failure to require an election may leave the defendant no choice but to make a blanket denial, *see Garcia v. State*, No. PD-0035-18, 2019 WL 6167834, at *8 (Tex. Crim. App. Nov. 20, 2019), *cert. denied*, No. 19-7779, 2020 WL 1978982 (Apr. 27, 2020), appellant does not specify any defensive arguments he was precluded from making due to the language of the elections in this case.

[5] We note that Texas courts have struggled to apply the election requirement in cases involving "generic, undifferentiated, ongoing acts of sexual abuse of young children." *Dixon*, 201 S.W.3d at 737 (Cochran, J., concurring). In her concurrence in *Dixon*, Judge Cochran predicted a "train wreck in Texas law" due to the difficulties of applying the election requirement in abuse cases. *Id.* Judge Cochran called on the legislature to enact "a new penal statute that focuses upon a continuing course of conduct crime"—which the legislature did the next year in 2007 when it enacted Penal Code section 21.02 criminalizing continuous sexual abuse of a young child or children. *See id.*; *see also* Tex. Penal Code Ann. § 21.02. Still, some cases that could be charged under section 21.02 are not, leaving the courts to continue to grapple

**B. Testimony outside personal knowledge**

In his second issue, appellant contends that the trial court erred by allowing Waco Police Department Peace Officer Lundquist to testify about the investigation of A.B.'s claims because Lundquist did not directly participate in the investigation, and consequently lacked personal knowledge of it.

Lundquist testified that he was not the detective who investigated the case, and in fact was not on the crimes-against-children unit when the case was investigated. He was testifying because the detective who did investigate the case, Peace Officer Belcher, was on vacation. The following exchange then occurred between Lundquist and the State:

> Q. Okay, so you're not going to testify about, you know, the in's and out's of his investigation, but you're here just to educate the jury really on, you know, how a crimes against children case works and if those protocols were followed in this case. Is that right?
>
> A. Right.
>
> Q. So in your view of everything, were the proper protocols followed in this case?
>
> A. Yes.
>
> Q. How long after the child made an outcry of abuse did her forensic examination happen?
>
> A. I'm going to have to consult the report here—
>
> Q. Please do.
>
> A. —real quick, so I believe that this came in through the hospital. That's a difficult question to answer, because the child made an outcry, and I think it was the next day was taken to the hospital, and a SAFE exam was performed, but—but further on down in the

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with election requirements in cases involving allegations of the continuous sexual abuse of children. *See Owings*, 541 S.W.3d at 163 (Walker, J., concurring) (discussing enactment of section 21.02 and explaining that it "was designed for cases like this one, and if Appellant was charged under the statute, the issue involving election of offenses before the Court today would have been avoided").

investigation, I think Det. Belcher learned that this had happened numerous times prior, and so it—it—the SAFE exam was conducted shortly after the initial outcry.

Q. Right.

[DEFENSE COUNSEL]: Your Honor, I'm going to object as to this matter being outside his personal knowledge. He wasn't there when this investigation was being performed, and I do not believe the State has actually qualified him as an expert.

THE COURT: Overruled.

Q. [THE STATE] So you said that this child actually had a SAFE examination?

A. Correct.

Q. It was the day after her outcry?

A. I believe so.

Q. Okay, and then she had a forensic interview that was done on her. Is that right?

A. Yes.

Q. And that was actually a week or two after?

A. I believe so.

Q. Okay, and—

[DEFENSE COUNSEL]: Your Honor, may I just obtain a running objection then?

THE COURT: Granted.

. . . .

Q. Okay, so throughout your review of this case you said all the proper protocols were followed?

A. From what I've reviewed, yes.

Q. Okay, so there was—looking at it, reviewing it as a sergeant of crimes against children, do you see any problems with the way Brent Belcher conducted his investigation?

A. No.

Appellant argues that Lundquist's testimony was improperly admitted over

appellant's objection that Lundquist was testifying as to matters beyond his personal knowledge. Appellant points to three pieces of testimony in particular: Lundquist's testimony (1) that the detective conducting the investigation "learned it had happened numerous times prior," (2) regarding the timeline of the steps in the investigation, and (3) that the investigation was conducted "properly."

Rule 602 states "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Tex. R. Evid. 602. Unless the witness is testifying as an expert or giving a lay opinion based on his own perceptions, he may not report anything but his own personal observations and experiences. *Bigby v. State*, 892 S.W.2d 864, 889 (Tex. Crim. App. 1994). Lundquist candidly testified that he did not participate in the investigation and was not even in the crimes-against-children unit at the time the investigation was conducted. The trial court accordingly erred in overruling appellant's objection under Rule 602 to Lundquist's testimony about the investigation. *See* Tex. R. Evid. 602.

Turning to harm, non-constitutional error is reversible only if that error affected appellant's substantial rights to a fair trial. *See* Tex. R. App. P. 44.2(b); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* But, if the improperly admitted evidence did not influence the jury or had but a slight effect upon its deliberations, such non-constitutional error is harmless. *Id.* In performing a harm analysis, we examine the entire record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence. *Id.*

We first consider Lundquist's testimony that the detective conducting the investigation "learned it had happened numerous times prior":

> Q. How long after the child made an outcry of abuse did her forensic examination happen?
>
> A. I'm going to have to consult the report here—
>
> Q. Please do.
>
> A. —real quick, so I believe that this came in through the hospital. That's a difficult question to answer, because the child made an outcry, and I think it was the next day was taken to the hospital, and a SAFE exam was performed, but—**but further on down in the investigation, I think Det. Belcher learned that this had happened numerous times prior, and so it**—it—the SAFE exam was conducted shortly after the initial outcry.

(Emphasis added.) Lundquist's statement is difficult to decipher, as it comes as an aside in the midst of his real-time review of a report that had not been identified (and was not admitted into evidence), and was given in response to a question not about what Belcher had "learned" during his investigation, but rather about when A.B.'s sexual-assault forensic examination (SAFE) was performed. Even if the jury understood Lundquist's statement that "this had happened numerous times prior" as referring to abuse of A.B. by appellant, any prejudicial effect is mitigated by the statement's vague wording and oblique context, as well as the fact that the State did not ask any follow up questions relating to that comment or otherwise highlight it. We conclude that this comment did not affect appellant's substantial rights.

Regarding the "timeline" of the investigation, as above, Lundquist testified that the SAFE examination was conducted the day after A.B.'s outcry, and also testified that a forensic interview was conducted one to two weeks later; the jury later heard this same evidence from the SAFE examiner and the forensic interviewer. As a result, the testimony was harmless with respect to the timeline. *See Saldano v. State*, 232 S.W.3d 77, 102 (Tex. Crim. App. 2007) (improper admission of evidence is harmless if trial record contains other, properly admitted

evidence probative of same matter).

Finally, with regard to the investigation having been conducted "properly," Lundquist testified without objection that "the proper protocols were followed in this case"; only after this testimony did appellant raise any objection regarding his lack of personal knowledge. As a result, the testimony was harmless with respect to the propriety of the investigation. *See id.*; *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("[O]verruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."). Finding the trial court's error harmless, we overrule appellant's second issue.

**C. Due process**

In his third issue, appellant contends that Code of Criminal Procedure article 38.072, as applied in this case, violated his constitutional right to due process under the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend. XIV, § 1; Tex. Code Crim. Proc. Ann. art. 38.072. Article 38.072, entitled "Hearsay Statement of Certain Abuse Victims," applies in the prosecution of certain offenses under the Penal Code, including chapter 21 offenses, if committed against a child younger than 14 years of age. Tex. Code Crim. Proc. Ann. art. 38.072, § 1. In such cases, article 38.072 governs the admissibility of (among other things) statements that describe the alleged offense that "were made by the child . . . against whom the charged offense was committed . . . to the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense. . . ." *Id.* § 2(a). A statement meeting these requirements "is not inadmissible because of the hearsay rule" provided certain criteria concerning notice and reliability are met and the child is available to testify. *Id.* § 2(b). "Though the terms do not appear in the statute, the victim's out-of-court statement

is commonly known as an 'outcry,' and an adult who testifies about the outcry is commonly known as an 'outcry witness.'" *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011).

Over appellant's objection "on the grounds that the statute is unconstitutional and violating [appellant's] due process rights," the trial court admitted the testimony of outcry witness Richards, A.B.'s grandmother, under article 38.072. Richards testified that one day when A.B. was approximately ten years old, A.B. seemed upset after seeing appellant. When Richards asked A.B. if she was "okay," A.B. disclosed that appellant had tried to kiss her earlier that day and had touched her genital area in the past.

Appellant contends that "it was error to allow the outcry testimony from the victim's grandmother," because "it served no purpose other than to bolster the victim's testimony and present it to the jury more than once."[6] "Bolstering" is an evidentiary objection predating the 1985 adoption of the Texas Rules of Criminal Evidence (since 1998 the Texas Rules of Evidence), and is an objection to "evidence the *sole* purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit." *Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993).

Rulings on the admissibility of evidence are typically reviewed under a non-constitutional framework. *See Easley v. State*, 424 S.W.3d 535, 539–40 (Tex. Crim. App. 2014) (collecting cases and explaining that "review of our previous cases shows that even the erroneous admission of potentially damaging evidence warranted a non-constitutional harm analysis"). Appellant cites no authority establishing that bolstering implicates the due-process protections of the

[6] Appellant did not raise a bolstering objection at trial, and we do not address whether bolstering was a viable or meritorious objection here.

Fourteenth Amendment, and otherwise fails to explain why we should treat this evidentiary argument as a constitutional concern. As appellant has failed to assert a cognizable due-process claim, we overrule appellant's third issue.

**D. Speedy trial**

In his fourth issue, appellant claims that the trial court erred in denying his motion to dismiss the indictment on the grounds that his Sixth Amendment right to a speedy trial had been violated. U.S. Const. amend. VI. Courts analyze speedy trial claims by balancing the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice inflicted on the defendant by the delay. *Zamorano v. State*, 84 S.W.3d 643, 647–48 (Tex. Crim. App. 2002) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

The delay of more than three-and-a-half years between the February 2015 indictment and the December 2018 trial satisfies the first factor, triggering the remaining inquiries and weighing heavily in favor of finding a speedy trial violation. *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) (interval of three-and-a-half years sufficient to trigger *Barker* inquiry and "weighs heavily in favor of finding a violation of the speedy trial right").

Regarding the reason for the delay, the State, which bears the burden as to this factor, points to two reasons—the trial court's crowded docket and appellant twice changing lawyers between indictment and trial. A trial court's crowded docket weighs somewhat in favor of finding a violation. *Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003) (delay attributable to crowded trial court docket weighs in favor of finding Sixth Amendment violation, "although not heavily"). Regarding appellant's changing representation, appellant argues that he "wanted a speedy trial from the beginning, but his first two attorneys did not present this request to the [trial] court," conceding that "the delay of Appellant's first attorneys

in pushing the case to trial" contributed to the gap between indictment and trial. Although appellant argues that this delay "should not be held against [him] because he did eventually find an attorney that would push for a speedy trial," appellant's allegations of inaction by his own counsel do not constitute evidence of delay attributable to the State.

Regarding the assertion of his right, appellant did not move to dismiss on speedy-trial grounds until the month before his trial, more than three-and-a-half years after the indictment. A defendant's lack of a timely demand for a speedy trial "indicates strongly that he did not really want a speedy trial," and "inaction weighs more heavily against a violation the longer the delay becomes." *Dragoo*, 96 S.W.3d at 314. The length of appellant's delay in asserting his speedy trial rights weights "very heavily" against him in this case. *Id.* at 315 (three-and-a-half-year delay in asserting right "weighs very heavily against finding a violation of the speedy trial right"). In addition, appellant moved to dismiss on speedy-trial grounds, rather than for a speedy trial itself, which also weighs against him. *See Cantu v. State*, 253 S.W.3d 273, 283 (Tex. Crim. App. 2008) ("Filing for a dismissal instead of a speedy trial will generally weaken a speedy-trial claim because it shows a desire to have no trial instead of a speedy one.").

Regarding prejudice, appellant claims that "the memories of the different witnesses have faded," and that the delay "has compromised Appellant's ability to locate potential witnesses who might be able to testify and rebut the State's claims." Appellant, however, provides no specifics regarding faded memories or absent witnesses. Generalized, unsupported assertions that potentially beneficial evidence is no longer available due to the delay of trial are of little or no significance. *See Deeb v. State*, 815 S.W.2d 692, 706 (Tex. Crim. App. 1991); *see also State v. Munoz*, 991 S.W.2d 818, 829 (Tex. Crim. App. 1999) (lapses of

memory constitute showing of prejudice only if they are demonstrated to be related to outcome of case).

Weighing the factors, we conclude that appellant was not denied his Sixth Amendment right to a speedy trial. Although the delay between the indictment and trial was lengthy and there is evidence the delay was due in part to the trial court's crowded docket (which weighs against the State), appellant's failure to promptly assert his speedy-trial right, his request for a dismissal instead of a trial, and his failure to show prejudice all weigh against a finding of a Sixth Amendment violation. We overrule appellant's fourth issue.

## III. CONCLUSION

We affirm the judgment of the trial court.

/s/ Charles A. Spain
Justice

Panel consists of Justices Zimmerer, Spain, and Hassan.
Do Not Publish — TEX. R. APP. P. 47.2(b).