PD-0639-18

PD-0639-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/21/2018 9:54 AM
Accepted 6/21/2018 10:33 AM
DEANA WILLIAMSON
CLERK

ORAL ARGUMENT REQUESTED.

Case No.____________________

FILED
COURT OF CRIMINAL APPEALS
6/21/2018
DEANA WILLIAMSON, CLERK

In the Texas Court of Criminal Appeals

DAVID R. GRIFFITH,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

On Discretionary Review from the Tenth Court of Appeals, in cause no. 10-14-00245-CR; Direct Appeal in cause number C-35408-CR; County Court at Law, Navarro County, Texas, the Honorable Amanda Putman, presiding.

Petition for Discretionary Review

Niles Illich
The Law Office of Niles Illich, Ph.D.,
J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: 972-802-1788
Facsimile: (972) 236-0088
Email: Niles@appealstx.com

1. Identity of Parties, Counsel, and Judges

Appellate Panel: Chief Justice Tom Gray (**dissenting Justice on motion for rehearing**)
Justice Rex D. Davis (**authoring Justice**)
Justice Al Scoggins

Appellant: David R. Griffith

Trial Attorney: **Michael Crawford**
TBA: 24063972
416 N. 14th St.
Corsicana, Texas 75110

Appellate Counsel: **Michael Crawford**
TBA: 24063972
416 N. 14th St.
Corsicana, Texas 75110

Damara H. Watkins
TBA: 00787740
1541 Princeton Drive
Corsicana, Texas 75110-1523

Niles Illich (commencing with motion for Panel Rehearing)
TBA: 24069969
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce, Suite 400
Dallas, Texas 75202

Trial Judge: The Honorable Amanda Doan Putman
Navarro County Court at Law
300 W. 3rd Ave., Suite 103
Corsicana, Texas 75110

State of Texas: THE STATE OF TEXAS/NAVARRO COUNTY DISTRICT ATTORNEY'S OFFICE

Trial/Appellate Counsel:

R. Lowell Thompson
Robert L. Koehl
James Kingman
Amy Cadwell
Navarro County District Attorney's Office
300 W. 3rd Avenue, Suite 102.
Corsicana, Texas 75151

State Prosecuting Attorney: STACEY M. SOULE

Stacey M. Soule
Office of the State Prosecuting Attorney
209 W. 14th Street
Austin, Texas 78701

2. TABLE OF CONTENTS

1. IDENTITY OF PARTIES, COUNSEL, AND JUDGES 2

2. TABLE OF CONTENTS 4

3. TABLE OF AUTHORITIES 6

4. STATEMENT REGARDING ORAL ARGUMENT 8

5. STATEMENT OF THE CASE 8

6. GROUNDS FOR REVIEW 10

7. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED 10

8. JUSTIFICATION FOR REVIEW 13

9. **FIRST ARGUMENT**: The Navarro County Court at Law never acquired subject-matter jurisdiction to hear this trial 14

I. Appellant's First Issue 14

II. Standard of Review 14

III. Error Preservation 14

IV. Law 14

A. Section 25.1771 of the Texas Government Code 14

B. Section 25.003(a) of the Texas Government Code 15

C. Section 26.045 of the Texas Government Code 15

D. Section 25.1772(1) of the Texas Government Code 15

V. Facts 16

VI. Analysis 16

A. The Orders Erroneously Conflate the Judge with the Court in which that Judge Presides 18

B. The Orders Fail to Account for the Required Administrative Acts in § 25.1772(a)(1)(D) 19

C. Conclusion 20
VII. Conclusion and Prayer..21

10. **SECOND ARGUMENT**: As explained by the dissent, the evidence was insufficent to support the inference that a second assault occurred before the victim's fourteenth birthday..22
I. Issue Presented..22
II. Standard of Review 22
III. Facts 23
IV. Conclusion 26
CERTIFICATE OF COMPLIANCE 27
CERTIFICATE OF SERVICE...28
APPENDIX………………………………………..……………………………...29

3. TABLE OF AUTHORITIES

Cases

Bass v. State,
427 S.W.2d 624, 626 (Tex.Cr.App. 1968) 14

Davis v. State,
227 S.W.3d 733, 737 (Tex. Crim. App. 2007) 14

Davis v. State,
956 S.W.2d 555, 556 (Tex. Crim. App. 1997) 18

Gallagher v. State,
690 S.W.2d 587, 588-89 (Tex. Crim. App. 1985) 14

Hooper v. State,
214 S.W.3d 9, 15-16 (Tex. Crim. App. 2007). 24, 26

In re: Griffith,
No. 10-18-00131-CR, 2018 Tex. App. LEXIS 3710 (Tex. App.—Waco 2018, orig. proceeding) 9

Jackson v. Virginia,
443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979)....................22

Nix v. State,
65 S.W.3d 664, 668 (Tex. Crim. App. 2001) 14

Williams v. State,
235 S.W.3d 742, 750 (Tex. Crim. App. 2007) 22

Woodward v. State,
86 Tex.Crim. 632, 218 S.W. 760 (1920) 14

Statutes

TEX. GOV'T CODE § 25.003(a) 15
TEX. GOV'T CODE § 25.177 15
TEX. GOV'T CODE § 25.1772 16
TEX. GOV'T CODE § 508.145 13
TEX. PENAL CODE § 21.02(b) 8, 11

Rules

TEX. R. APP. P. 66.3 (a) and (c) 13

To the Honorable Judges of the Court of Criminal Appeals:

David R. Griffith, Appellant, presents this Petition for Discretionary Review.

4. STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. This petition presents two issues. The first issue is unusually technical; in this issue Appellant contends that the trial court lacked jurisdiction to hear this case. The second issue addresses Chief Justice Gray's dissent to Appellant's motion for panel rehearing and thus addresses issues on which the justices of the intermediate-appellate court disagree. For these reasons Appellant believes that oral argument will facilitate this Court's decision-making process.

5. STATEMENT OF THE CASE

The State of Texas charged Appellant with continuous sexual abuse of a child. TEX. PENAL CODE § 21.02(b) (LexisNexis, Lexis Advance through the 2017 Regular Session and 1st C.S., 85th Legislature). [CR 10]. The case went to trial in the statutory County Court at Law of Navarro County. Although the complaining witness recanted her allegations against Appellant, the jury found Appellant guilty and sentenced him to serve 38 years in the custody of the Texas Department of Criminal Justice. [CR 182].

Appellant appealed this conviction in appellate cause number 10-14-00245-CR. *Griffith v. State*, No. 10-14-00245-CR, 2018 Tex. App. LEXIS 2407, at *1

(App.—Waco Apr. 4, 2018)(memo. op.)(not designated for publication). The Tenth Court of Appeals affirmed the trial court's verdict. *Id.* Appellant moved for rehearing, which the intermediate-appellate court denied over the dissent of Chief Justice Gray on May 23, 2018. [Dissent, 1]. Chief Justice Gray wrote:

> Upon rehearing I am persuaded that while there is evidence of two or more sexual assaults, the evidence is insufficient for the jury to reasonably infer that the second assault occurred before the victim's fourteenth birthday. [In this case] the victim recanted. . .
>
> The second assault could have occurred before her [fourteenth] birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after . . . her fourteenth birthday. That is what distinguishes speculation from inferences. Something that allows the jury to reasonably infer the required finding. (emphasis added.).

[Dissent, 1].

Appellant also filed a petition for writ of mandamus in the Tenth Court of Appeals that raised the jurisdictional issue that Appellant presents in this petition. The intermediate-appellate court denied this petition with a short opinion; a motion for rehearing has been pending since May 27, 2018. *In re: Griffith*, No. 10-18-00131-CR, 2018 Tex. App. LEXIS 3710 (Tex. App.—Waco May, orig. proceeding).

6. <u>GROUNDS FOR REVIEW</u>

Griffith asks this Court to grant this petition and to answer these questions:

1) Did the Navarro County Court at Law have subject-matter jurisdiction to hear Griffith's case?; and,

2) Whether, as stated by Justice Gray in his dissent from Appellant's motion for rehearing, the evidence allowed the jury to have reasonably inferred that the second assault occurred on or before the victim's fourteenth birthday?

7. <u>STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED</u>

The procedural history of this case begins with an administrative order from December 2011 and an amended-administrative order from February 2012 before settling with the indictment in January 2014.

A. The December Order

On December 9, 2011 the judges of the 13th District Court, the Navarro County Court at Law, and the Navarro County Constitutional Court at Law each signed a joint order entitled, "Administrative Order—Case Management/Assignment Plan Among the Said Navarro County Courts." This order (the "December Order") explained that "The [District] *Court* <u>transfers</u> all <u>odd number felony cases</u> as well as companion even number cases, filed on or after January 1, 2012, to the County Court at Law to conduct . . . jury and bench trials; . . ." (emphasis added). The order also explained that "<u>The *County Court at Law* agrees to accept all odd number felony cases</u> as well as companion even number

cases filed on or after January 1, 2012 to . . . conduct jury and bench trials . . ..” (emphasis added). This order is not part of the record.

B. The February Order

On February 16, 2012, the same courts issued an amended-joint order entitled, “Administrative Order—Case Management/Assignment Plan Among the Said Navarro County Courts (Amended February 16, 2012).” (the “February Order”). This order states, “Felony cases filed with the District Clerk on or after January 1, 2012, shall be randomly assigned as follows:. . . Cases beginning with a ‘C’ shall be automatically assigned by the District *Court* to the County Court at Law.” The amended order from February 2012 removed the language from the December Order in which the *County Court at Law* agreed to automatically accept cases transferred to it by the 13th District Court. This order is not part of the record.

C. Griffith’s Case

In January 2014, the Navarro County District Attorney’s Office, secured an indictment against Appellant. [CR 10]. This indictment charged Griffith with continuous sexual abuse of a child. TEX. PENAL CODE § 21.02(b). Griffith’s case received the cause number “C35408CR.” [CR 11]. The trial court record contains no order that transferred or assigned the case to the Navarro County Court at Law. And the administrative orders from February 2012 and December 2011, which are not part of the record, fail to vest jurisdiction in the Navarro County Statutory Court

at Law. TEX. GOV'T CODE § 25.1772(a)(1)(D). Yet the Navarro County Court at Law heard this felony trial.

Before and during trial, the fifteen-year old victim recanted her claims of sexual abuse. [5 RR 195; 6 RR 59; 10 RR 239-88; 12 RR 211-12]. As a result, the jury's verdict relies on outcry witness testimony. [11 RR 29]. But the victim's outcry was delayed and the outcry witnesses could not testify to precisely when the assaults occurred. [11 RR 29]. Instead, the evidence was that the first assault occurred in a home in Dawson, Texas, and the second assault occurred after the victim had moved to a different home in Frost, Texas. [11 RR 29]. Importantly, however, shortly after the victim's move to Frost she turned fourteen. [5 RR 14; 36]. Because the victim denied that these assaults ever occurred, she provided no testimony that could have allowed the jury to infer when the second assault occurred. [5 RR 195; 6 RR 59; 10 RR 239-88; 12 RR 211-12]. The outcry witnesses did not know when the assaults occurred other than one assault occurred in Dawson and one occurred in Frost; no outcry witness knew when the second assault occurred relative to the victim's fourteenth birthday. [11 RR 14; 29; 36]. So, as Chief Justice Gray wrote in dissent, "the evidence is insufficient for the jury to reasonably infer that the second assault occurred before the victim's fourteenth birthday."

Yet a jury convicted Griffith and sentenced him to spend 38 years in the custody of the Texas Department of Criminal Justice without the possibility of

parole. TEX. GOV'T CODE § 508.145 (LexisNexis, Lexis Advance through the 2017 Regular Session and 1st C.S., 85th Legislature). [CR 182].

8. JUSTIFICATION FOR REVIEW

Appellant asks this Court to grant review under Rule 66.3 for these reasons:

> (e) the justices of the Tenth Court of Appeals disagree on a material question of law necessary to the court's decision. This disagreement is whether the evidence allowed the jury to properly infer that the second assault occurred on or before the victim's fourteenth birthday;
>
> (f) the Tenth Court of Appeals' decision has departed from the standard that this Court set in *Hooper* distinguishing between speculation and an inference.

TEX. R. APP. P. 66.3 (e) & (f).

Appellant also asks this Court to review this case because the Navarro County Statutory Court at Law lacked subject-matter jurisdiction and so the judgment is void.

9. FIRST ARGUMENT

I. Appellant's First Issue

Griffith contends that the Navarro County Court at Law lacked jurisdiction to hear this case and for that reason the judgment is void ab initio. The Navarro County Court at Law has concurrent jurisdiction with the 13th Judicial District Court only by virtue of § 25.1772 of the Texas Government Code. Section 25.1772 places one specific requirement on a district court judge "presiding in Navarro County" and one specific requirement on the County Court at Law judge before the County Court at Law acquires jurisdiction to hear a felony-jury trial. In this case neither requirement was met. Was the judgment void ab initio?

II. Standard of Review

This Court reviews jurisdictional claims de novo. *Gallagher v. State*, 690 S.W.2d 587, 588-89 (Tex. Crim. App. 1985) (applying de novo review to question of jurisdiction of convicting court); *Bass v. State*, 427 S.W.2d 624, 626 (Tex.Cr.App. 1968).

III. Error Preservation

A claim that the trial court lacked subject-matter jurisdiction can be raised for the first time in a petition for discretionary review. *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001); *Davis v. State*, 227 S.W.3d 733, 737 (Tex. Crim. App. 2007); *Gallagher*, 690 S.W.2d at 588-89.

IV. Law

A. Section 25.1771 of the Texas Government Code

This section states, "Navarro County has one statutory county court, the County Court at Law of Navarro County." (emphasis added). TEX. GOV'T CODE § 25.1771.

B. Section 25.003(a) of the Texas Government Code

This section provides that "A statutory county court has jurisdiction over all causes and proceedings, civil and criminal, original and appellate, prescribed by law for [constitutional] county courts." (emphasis added). TEX. GOV'T CODE § 25.003(a).

C. Section 26.045 of the Texas Government Code

Entitled, "Original Criminal Jurisdiction," this section provides original jurisdiction for constitutional county courts and reads:

> (a) Except as provided by Subsection (c), a county court has exclusive original jurisdiction of misdemeanors other than misdemeanors involving official misconduct and cases in which the highest fine that may be imposed is $500 or less.

. . .

TEX. GOV'T CODE § 26.045.

D. Section 25.1772(1) of the Texas Government Code

This section, entitled, "Navarro County Court at Law Provisions," provides that:

> (a) In addition to the jurisdiction provided by Section 25.0003 and other law, and except as limited by Subsection (b), a county court at law in Navarro County has concurrent jurisdiction with the district court in:

(1) felony cases to:

(A) conduct arraignments;
(B) conduct pretrial hearings;
(C) accept guilty pleas; and
(D) conduct jury trials on *assignment* of a district *judge* presiding in Navarro County and *acceptance* of the assignment by the *judge* of the county court at law; (emphasis added).

. . .

TEX. GOV'T CODE § 25.1772(a)(1).

V. Facts

Here, there is no evidence in the record that "a district judge presiding in Navarro County" assigned this particular case to the County Court at Law nor is there any evidence that the judge of the County Court at Law "accepted the assignment," as required by § 25.1772(a)(1)(D). *Id*.

VI. Analysis

The Navarro County Court at Law is a statutory court and its jurisdiction is both established and limited by statute. The Navarro County Court at Law acquires subject-matter jurisdiction to hear a felony trial only from § 25.1772(a)(1)(D) of the Texas Government Code. This section requires that: (1) "a district judge presiding in Navarro County" have assigned this particular case to the County Court at Law and, (2) that the judge of the County Court at Law have "accepted the assignment" of this particular case. *Id*. Here, however, there is no evidence (in the record or

outside the record) to establish that either of these required acts occurred. Without completing these statutorily-required-administrative acts, the Navarro County Court at Law was without subject-matter jurisdiction to hear this trial. *Id*.

Although outside the record, the February 2012 and December 2011 (which can only be located by going to the webpages of the respective courts[1]) administrative orders fail to confer jurisdiction. But, even if this Court decides it is allowable to go outside of the record and to consider these orders, the orders are inadequate because they fail to comply with the plain language of § 25.1772(a)(1)(D) of the Government Code and thus could not have conferred subject-matter jurisdiction on this trial court to hear this felony trial. *See* TEX. GOV'T CODE § 25.1772(a)(1)(D).

---

[1] The County Court at Law's website explains, "This court has concurrent jurisdiction with the 13th District Court, except for capital murder, and routinely hears civil, criminal, family, and juvenile cases. This court can also hear class A & B misdemeanors, probate matters, and appeals from the justice and municipal courts." Hyperlinks enabled. Click on URL to go to webpage. http://www.co.navarro.tx.us/default.aspx?Navarro_County/County.Court (last visited on June 19, 2018).

December Order from County Court at Law's website: http://www.co.navarro.tx.us/default.aspx?Navarro_County/County.Court.Orders (last visited on June 19, 2018); specific order at: http://tools.cira.state.tx.us/users/0113/docs/CourtAtLaw/CCL_-_NAVCNTYCORTSCASEMNG_13DIST.pdf (last visited on June 19, 2018).

February Order from 13th Judicial District Court's website: http://www.co.navarro.tx.us/default.aspx?Navarro_County/District.Court.13Orders (last visited on April 20, 2018); specific order at: http://tools.cira.state.tx.us/users/0113/docs/DistrictJudge/DJ_-_ADMIN_ORDER_13TH_DIST.pdf (last visited on June 19, 2018).

The orders failed to confer jurisdiction because: (1) they confused a judge and the court in which the judge presides when § 25.1772(a)(1)(D) requires the judge—not the court—to act; and, (2) because the orders fail to accomplish both of the required acts in § 25.1772(a)(1)(D).

A. The Orders Erroneously Conflate the Judge with the Court in which that Judge Presides

This Court has long recognized that a distinction exists between the judge of a court and the court itself. In *Davis*, this Court wrote:

> Jurisdiction, in its narrow sense, is something possessed by courts, not by judges. The judge is merely an officer of the court, like the lawyers, the bailiff and the court reporter. He is not the court itself. The authority and powers of a judge are incident to, and grow out of, the jurisdiction of the court itself. Strictly speaking then, jurisdiction encompasses only the power of the tribunal over the subject matter and the person. (internal citations and quotations removed).

Davis v. State, 956 S.W.2d 555, 557-58 (Tex. Crim. App. 1997).

Although this Court distinguishes between the judge of a court and the court itself, both the February Order and the December Order confuse a judge with the court in which that judge presides. As an example, the February Order states, "Felony cases filed with the District Clerk on or after January 1, 2012, shall be randomly assigned as follows:. . . Cases beginning with a 'C' shall be automatically assigned by the District *Court* to the County Court at Law." This sentence does not comport with the plain language of § 25.1772(a)(1)(D) because under this sentence the court acts rather than the judge; § 25.1772(a)(1)(D) does not allow for the court

to act and instead plainly requires the judge to act. *See* TEX. GOV'T CODE § 25.1772(a)(1)(D). Accordingly, because the order failed to comply with the plain language of § 25.1772(a)(1)(D), the order could not have conferred subject-matter jurisdiction on the Navarro County Court at Law to hear this felony trial. Both the February and December Orders make this mistake.

B. The Orders Fail to Account for the Required Administrative Acts in § 25.1772(a)(1)(D)

Section 25.1172(a)(1)(D) allows the Navarro County Court at Law to: "conduct [felony] jury trials on [(1)] *assignment* of a district *judge* presiding in Navarro County and [(2)] *acceptance* of the assignment by the *judge* of the county court at law." *Id*.

If this Court determines that it is allowable to look outside the record to these orders and that there is no meaningful distinction between a judge and the court in which that judge presides, the February Order, which amended and superseded the December Order, still fails to confer jurisdiction. The February Order provides no provision for the judge of the County Court at Law or even the County Court itself to accept the assignment—the second requirement of § 25.1772(a)(1)(D)—and the record has no evidence of such an acceptance. *See* TEX. GOV'T CODE § 25.1772(a)(1)(D). Indeed, the February Order, in amending the December Order, specifically removed the "automatic acceptance" provision. Therefore, the Navarro

County Court at Law could not have acquired subject-matter jurisdiction under the February Order alone.

C. Conclusion

Thus, the Navarro County Court at Law never acquired subject-matter jurisdiction to hear this felony trial under § 25.1772(a)(1)(D) because:

(1) there is no order in the record that assigns or transfers this case to the Navarro County Court at Law;

(2) the February 2012 and December 2011 Orders created an automatic action on behalf of the 13th Judicial District Court and/or the Navarro County Court at Law instead of on behalf of the judges of these respective courts, as required by the statute;

(3) even if this Court rejects the distinction between a judge and a court, the February Order superseded the December Order and the February Order removed the language from the December Order in which the assignment was "automatically accepted" by the County Court at Law. Here the record contains no evidence that the presiding judge of the Navarro County Court at Law accepted the assignment nor does the record include any evidence that the Navarro County Court at Law, as an entity distinct from the judge, accepted the assignment; and,

(4) there is no evidence that "a presiding district court judge" or even the 13th Judicial District Court assigned this trial to the Navarro County Court at Law.[2]

For these reasons the Navarro County Court at Law never acquired subject-matter jurisdiction under § 25.1772(a)(1)(D) and the judgment against Appellant is void.

Thus, Appellant asks this Court to grant his petition and to vacate the trial court's judgment and remand this case for a new trial in a court of competent jurisdiction.

VII. Conclusion and Prayer

For this reason, Appellant asks this Court to grant his petition and vacate the trial court's judgment and to remand this case for a new trial in a court of competent jurisdiction.

[2] Appellant has developed this jurisdictional argument further in his mandamus but cannot include it here because of the word limit in Rule 9.

10. <u>SECOND ARGUMENT</u>

I. Issue Presented

In his second issue, Griffith contends that the intermediate-appellate court erred when it concluded that the evidence was legally sufficient to allow the Court to <u>infer</u> that the second assault occurred before the victim's fourteenth birthday. [Slip Op., 6].

Griffith contends that the Panel erred when it concluded that:

> Donna also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation. <u>The jury could reasonably have concluded from the **foregoing** testimony that Griffith sexually abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days</u>.

[Slip Op., 6].

II. Standard of Review

This Court reviews the legal sufficiency of the evidence under the familiar standard derived from *Jackson*. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979).

III. Facts

Appellant argued that no rational jury could have concluded that two or more of the assaults occurred before A.G.'s fourteenth birthday.[3] [Appellant's Brief, 28]. In response, the State argued that the jury could rely generally on the witnesses' testimony including their "demeanor and tone of voice" to conclude that two assaults occurred before A.G.'s fourteenth birthday. [State's Brief, 23-24].

All parties agree that the evidence supports an inference that one instance of sexual abuse occurred before A.G. turned fourteen. According to the State, the question facing the intermediate-appellate court was "could a rational jury have determined that the second sexual assault occurred sometime in the approximately three full months between when the victim moved from Dawson in January 2013 and when she turned fourteen on April 4, 2013?" [State's Brief, 22].

The intermediate-appellate court agreed and wrote:

> Donna also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation. The jury could reasonably have concluded from the foregoing testimony that Griffith sexually abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of

[3] Griffith contends that he has never committed a sexual assault. That said, because he has been convicted of committing several such assaults, this motion refers to the assaults as if they occurred. This motion uses this wording to comport with the conventional language used in such motions but in no way should this language be interpreted as Griffith acknowledging that any such assault occurred.

> time between the two incidents of sexual abuse exceeded thirty days. (emphasis added).

[Slip Op., 6].

The intermediate-appellate court's analysis failed to heed this Court's admonishments from *Hooper*. In *Hooper*, this Court wrote,

> juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. To correctly apply the *Jackson* standard, it is vital that courts of appeals understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt.. . . A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. (emphasis added).

Hooper v. State, 214 S.W.3d 9, 15-16 (Tex. Crim. App. 2007).

The intermediate-appellate court's analysis did not include a presumption. Instead, the court relied on inferences to bridge the gap between the evidence adduced at trial and evidence sufficient to support the verdict. [Slip Op., 6].

As this Court has explained, "an inference is a conclusion reached by considering other facts and deducing a logical consequence from them." *Id*. Here, the court properly inferred that the first assault occurred before April 4, 2013 because there was evidence that the assault occurred while A.G. lived in Dawson and

evidence that A.G. moved from Dawson in January 2013, therefore, based on this evidence, the intermediate-appellate court could reasonably infer that the first incident occurred before April 4, 2013.

Although the intermediate-appellate court properly inferred that the first assault occurred before April 4, 2013, the Panel lacked the evidence to infer that a second assault also occurred before April 4, 2013. [Slip Op., 5]. The court relied on the following facts to conclude that the second incident occurred before April 4, 2013 and not sometime in the remaining 26 days of April or in May or June:

> As noted, Bailey and Washburn testified that A.G. told them that subsequent acts of abuse occurred in Frost, Texas [as opposed to Dawson, Texas]. Bailey further testified that A.G., in her outcry statement, had told Donna that Griffith had inappropriately touched her. Donna confirmed that A.G. made such an accusation, although she stated that she thought A.G. was hallucinating due to an overdose of Ambien. Donna also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation.

[Slip Op., 6].

These facts, however, provide none of the necessary evidence to justify the inference that the second incident of sexual abuse occurred on or before April 4, 2013. Instead, to reach this conclusion, the court had to speculate that a second act occurred in January, February, March, or the first four days of April 2013 instead of

the later twenty-six days of April, or in May or June of 2013. The facts that the court relied on, however, do not allow such an inference.

As this Court has explained, "[a] conclusion reached by speculation may not be completely unreasonable"—and here the conclusion in the majority opinion is entirely possible—but even if the speculation is "reasonable" the evidence remains legally insufficient to support the verdict. *Id*. Here, no facts permit the logical inference from the testimony to the conclusion. *Id*. So, for this reason, the evidence was legally insufficient to have allowed the intermediate-appellate court to have inferred that the second assault occurred before the victim's fourteenth birthday.

IV. Conclusion

This case falls squarely within the admonishments issued by this Court in *Hooper*. Here the evidence allows for reasonable speculation but the evidence does not support the inference that the second assault occurred on or before April 4, 2013. Thus the evidence does not support the verdict. Appellant asks this Court to grant discretionary review and to find that the evidence could not support the verdict.

CONCLUSION AND PRAYER

Accordingly, for these reasons, Griffith prays that this Court will grant his petition.

Respectfully Submitted,

/s/ Niles Illich

Niles Illich
SBOT: 24069969
Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802−1788
Facsimile: (972) 236−0088
Email: Niles@appealstx.com

CERTIFICATE OF COMPLIANCE

This is to certify that this motion complies with Rule 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure because it is computer generated and contains 4,727 words of the allowed 4,943. The sections excepted by Rule 9.4(i) include 1,412 words. Thus the brief contains 3,531 words and complies with Rule 9.4(i)(2)(D). This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

Certificate of Service

This is to certify that on June 20, 2018 that a true and correct copy of this Petition was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

Counsel for the State:
Lthompson@navarrocounty.org
rkoehl@navarrocounty.org

Counsel for Appellant:
mjc@michaeljcrawfordlaw.com

State Prosecuting Attorney:
information@spa.texas.gov

/s/ Niles Illich
Niles Illich

Appendix

Table of Contents:

Tab 1: Slip Opinion from the Intermediate-Appellate Court

Tab 2: Dissent to Order Denying Motion for Rehearing

Tab One

IN THE
TENTH COURT OF APPEALS

No. 10-14-00245-CR

DAVID R. GRIFFITH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court at Law
Navarro County, Texas
Trial Court No. C-35408-CR

MEMORANDUM OPINION

A jury found Appellant David Ray Griffith guilty of continuous sexual abuse of a child and assessed his punishment at thirty-eight years' incarceration. Griffith appeals in four issues. We will affirm.

The basic facts are not disputed. When Griffith's daughter A.G. was fourteen years old, she made an outcry of sexual abuse against him that was reported to Child Protective Services and the Navarro County Sheriff's Office. After Griffith's arrest, A.G. recanted her sexual-abuse claims and subsequently testified at trial that Griffith did not sexually

abuse her. The evidence against Griffith consisted of the testimony from outcry witnesses and others regarding A.G.'s initial claims of abuse, the CPS report regarding A.G.'s claims, and the video of Griffith's interview by law enforcement.

Sufficiency of the Evidence

In his second issue, Griffith argues that the evidence is legally insufficient to support his conviction and that the trial court erred in denying his motion for directed verdict.

A challenge to a trial court's ruling on a motion for directed verdict is a challenge to the sufficiency of the evidence to support a conviction and is reviewed under the same standard. *See Smith v. State*, 499 S.W.3d 1, 6 (Tex. Crim. App. 2016); *see also Mills v. State*, 440 S.W.3d 69, 71 (Tex. App.—Waco 2012, pet. ref'd). The Court of Criminal Appeals has expressed our constitutional standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793. Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 13. Finally, it is well established that the factfinder "is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties." *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

We measure the sufficiency of the evidence by the elements of the offense as defined in a hypothetically correct jury charge for the case. *Cada v. State*, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011). Such a charge would be 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 theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.*; *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001). The law as authorized by the indictment means the statutory elements of the charged offense as modified by the charging instrument. *See Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

To prove continuous sexual abuse of a child in this case, the State was required to prove beyond a reasonable doubt that (1) Griffith committed two or more acts of sexual abuse during a period that was at least thirty days in duration, and (2) at the time of the acts of sexual abuse, Griffith was seventeen years of age or older and A.G. was a child younger than fourteen years of age. *See* TEX. PEN. CODE ANN. § 21.02(b) (West Supp. 2017);[1] *see also Buxton v. State*, 526 S.W.3d 666, 676 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The State need not prove the exact dates of the abuse, only that "there were two or more acts of sexual abuse that occurred during a period that was thirty or more days in duration." *Brown v. State*, 381 S.W.3d 565, 574 (Tex. App.—Eastland 2012, no pet.).

There is no dispute that Griffith was over the age of seventeen at all times relevant to this case. Griffith specifically argues that there was insufficient evidence to establish that two or more acts of abuse occurred prior to A.G.'s fourteenth birthday and that, if those acts occurred, they were committed more than thirty days apart.

The evidence regarding what acts of sexual abuse occurred and when they occurred, came through the testimony of outcry witnesses Glenda Washburn, the mother of the friend whom A.G. first told of the abuse, and Lydia Bailey, a forensic investigator with the Children's Advocacy Center. As stated above, A.G. recanted her outcry statements. She testified that Griffith did not sexually abuse her at any time and that she had fabricated the allegations against him. A.G. also denied during her testimony that she told Washburn or Bailey that any acts of abuse occurred before her fourteenth

---

[1] The statute has been amended since proceedings began against Griffith, but none of those changes affected the statute's application to this case.

birthday. But, the outcry testimony of a child under the age of seventeen is alone sufficient to prove the allegations in the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a), (b)(1) (West Supp. 2017); *see also Saldaña v. State*, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd). There is no requirement that the outcry testimony be corroborated or substantiated by the victim or by independent evidence. *Rodriguez v. State*, 819 S.W.2d 871, 874 (Tex. Crim. App. 1991); *see also Eubanks v. State*, 326 S.W.3d 231, 241 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). If a child victim recants her outcry, "it is up to the fact finder to determine whether to believe the original statement or the recantation." *Saldaña*, 287 S.W.3d at 60 (citing *Chambers*, 805 S.W.2d at 461). The factfinder is fully entitled to disbelieve a witness's recantation. *Id*.

Bailey testified that A.G. told her that the first incident of sexual abuse by Griffith occurred during Spring Break in 2012 when A.G.'s family was living in a mobile home in Dawson, Texas. Washburn testified that A.G. also told her that the first incident of abuse occurred in Dawson. Bailey and Washburn further testified that A.G. told them that the subsequent incidents of abuse occurred after her family moved to Frost, Texas. Testimony from Donna Griffith, Griffith's wife and A.G.'s mother, and Brenda O'Pry, Donna's mother, established that the move to Frost occurred in January 2013. Seth Fuller, who investigated the case while a deputy with the Navarro County Sheriff's Office, testified that Spring Break in the Dawson schools was from March 18th through 22nd in 2012. A.G. was born on April 4, 1999; therefore, she turned thirteen on April 4, 2012. This evidence was, thus, sufficient for the jury to reasonably conclude beyond a reasonable doubt that the first incident of sexual abuse occurred prior to A.G.'s fourteenth birthday.

As noted, Bailey and Washburn testified that A.G. told them that subsequent acts of abuse occurred in Frost, Texas. Bailey further testified that A.G., in her outcry statement, had told Donna that Griffith had inappropriately touched her. Donna confirmed that A.G. made such an accusation, although she stated that she thought A.G. was hallucinating due to an overdose of Ambien. Donna also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation. The jury could reasonably have concluded from the foregoing testimony that Griffith sexually abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days.

Having considered all of the evidence in the light most favorable to the verdict, we conclude that there was sufficient evidence presented for the jury to find beyond a reasonable doubt that Griffith committed two or more acts of sexual abuse against A.G. when she was younger than fourteen years of age and that the acts occurred more than thirty days apart. Griffith's second issue is overruled.

Outcry Statements

In his first issue, Griffith argues that the trial court erred in allowing witnesses to testify about outcry statements made by A.G. regarding offenses that were allegedly committed against her after she had turned fourteen years of age.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). Outcry testimony is viewed under the same standard. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990); *see also Jones v. State*, No. 10-13-00106-CR, 2014 WL 3556520, at *1 (Tex. App.—Waco Jul. 3, 2014, pet. ref'd) (mem. op., not designated for publication). "Under an abuse of discretion standard, an appellate court should not disturb the trial court's decision if the ruling was within the zone of reasonable disagreement." *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008). We will uphold an evidentiary ruling on appeal if it is correct on any theory of law that finds support in the record. *Gonzalez v. State*, 195 S.W.3d 114, 126 (Tex. Crim. App. 2006); *Dering v. State*, 465 S.W.3d 668, 670 (Tex. App.—Eastland 2015, no pet.).

Generally, hearsay statements are not admissible unless they fall within the exceptions provided in Rules of Evidence 803 or 804, or they are allowed "by other rules prescribed pursuant to statutory authority." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011) (quoting TEX. R. EVID. 802). Article 38.072 of the Code of Criminal Procedure is one statutory authority that permits the admission of an out-of-court statement of a child sexual-abuse complainant "so long as that statement is a description of the offense and is offered into evidence by the first adult the complainant told of the

offense." *Id.*; *see also* TEX. CODE CRIM. PROC. ANN. art 38.072 (West Supp. 2017). "Outcry testimony admitted in compliance with article 38.072 is considered substantive evidence and is admissible for the truth of the matter asserted in the testimony." *Buentello v. State*, 512 S.W.3d 508, 518 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *see also Garrett v. State*, No. 12-15-00208-CR, 2017 WL 1075710, at *5 (Tex. App.—Tyler Mar. 22, 2017, no pet.) (mem. op., not designated for publication) (citing *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.—Fort Worth 2005, no pet.)). Outcry testimony is admissible from more than one witness if the witnesses testify about different events. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011). But there may be only one outcry witness per event. *Id.*

A.G.'s accusations against Griffith consisted of four incidents, two of which the trial court determined were committed after A.G. had turned fourteen. After an article 38.072 hearing, the trial court determined that two separate outcry witnesses would be allowed to testify: Washburn and Bailey, who would be permitted to testify about different sexual acts committed against A.G. The trial court also determined that only the two incidents that allegedly occurred when A.G. was younger than fourteen would be admissible—the incident that occurred over Spring Break in Dawson and the incident that occurred after the family moved to Frost.

Over Griffith's objection, Washburn testified that A.G. told her that Griffith had sex with A.G. in three rooms in A.G.'s home: her parent's room, her sister's room, and "his" room. Washburn also testified, without a contemporaneous objection, that A.G. told her that the sexual contact occurred "[t]hree or four times." Bailey testified that A.G. told her that Griffith had sexual contact with A.G. on four separate occasions and that he

placed his mouth on her vagina on each occasion. No other details regarding the third and fourth incidents were elicited by the State from Washburn or Bailey. A.G. recanted all of her claims of sexual abuse when she testified, but she admitted on cross-examination, without objection from Griffith, that she had told Bailey the specific details of the third and fourth sexual encounters.

To preserve error regarding the admission of evidence, a party must make a proper objection and get a ruling. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004). Griffith argues that he was not required to additionally object to the hearsay testimony given by Washburn and Bailey because he objected to the testimony regarding the third and fourth incidents at the article 38.072 hearing. Assuming without deciding that Griffith sufficiently preserved this evidentiary objection, we conclude there was no error.

The violation of an evidentiary rule that results in the erroneous admission of evidence constitutes non-constitutional error. *See Martin v. State*, 176 S.W.3d 887, 897 (Tex. App.—Fort Worth 2005, no pet.). Under Rule of Appellate Procedure 44.2(b), an appellate court must disregard non-constitutional error unless the error affected the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *see also Gerron v. State*, 524 S.W.3d 308, 325 (Tex. App.—Waco 2016, pet. ref'd). A substantial right is affected when the erroneously admitted evidence, viewed in light of the record as a whole, had "a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). In assessing the likelihood that the jury's decision was improperly influenced, we must consider the entire record, including

such things as the testimony and physical evidence admitted, the nature of the evidence supporting the verdict, the character of the error and how it might be considered in connection with other evidence, the jury instructions, the State's theories, defensive theories, closing arguments, voir dire, and whether the State emphasized the error. *Barshaw v. State*, 342 S.W3d 91, 94 (Tex. Crim. App. 2011).

As noted, neither Washburn nor Bailey went into the details of the third and fourth incidents. However, as also previously noted, the details of those incidents were elicited from A.G. without objection. Griffith himself highlighted details of the third and fourth incidents when cross-examining CPS investigator Amy Taylor regarding the details of the CPS report prepared in the case. After examining the record as a whole, we are assured that either the error did not influence the jury or did so only slightly. The testimony was not calculated to inflame the jury's emotions; substantially similar testimony was allowed without objection; the jury charge instructed the jury that it was the sole judge of the credibility of the witnesses and the weight to be given to their testimony; and the jury heard A.G. admit without objection that she told Bailey the details of the third and fourth incidents. *See Flores v. State*, 513 S.W.3d 146, 172 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (psychologist's testimony about credibility of class of persons did not affect defendant's substantial rights as it was not calculated to inflame jury's emotions, substantially similar testimony was allowed without objection, jury charge instructed jury it was sole judge of credibility, and jury heard victim provide detailed account of sexual assault). Griffith's first issue is overruled.

Opinion Testimony

In his third issue, Griffith asserts that the trial court erred in allowing witnesses to comment on the credibility of A.G. and the veracity of her allegations and recantation. Griffith identifies the improper opinion witnesses as: (1) Jerry Johnson, pastor of the church that the O'Pry's and Washburns attended, who made the initial call to CPS regarding A.G.'s allegations; and (2) CPS investigator Taylor.

A direct opinion on the truthfulness of a child victim of sexual abuse, from either a lay witness or an expert witness, is inadmissible. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); *see also Dauben v. State*, No. 10-13-00044-CR, 2014 WL 2566469, at *2 (Tex. App.—Waco Jun. 5, 2014, pet. ref'd, untimely filed) (mem. op., not designated for publication). A direct opinion as to the truthfulness of a witness "crosses the line" and does more than "assist the trier of fact to understand the evidence or to determine a fact in issue," it decides an issue for the jury. *Dauben*, 2014 WL 2566469, at *2.

Assuming without deciding that eliciting opinions from Johnson and Taylor was error, similar opinions were elicited from other witnesses without objection, including Bailey and Fuller. Bailey testified that she believed that A.G. had been coerced and coached into recanting her claims of abuse. Fuller testified that he believed A.G.'s outcry of abuse was genuine. Additionally, S.W., the friend whom A.G. first told of the abuse, testified that she did not believe that A.G. had made up the allegations of abuse, as did O'Pry.

As previously noted, error in the improper admission of evidence is not critical if the same or similar evidence is admitted without objection at another point in the trial.

Estrada v. State, 313 S.W.3d 274, 302 n. 29 (Tex. Crim. App. 2010); *see Lane*, 151 S.W.3d at 193 (error in admission of evidence is cured where same evidence comes in elsewhere without objection). Because Griffith did not object to similar opinion testimony from other witnesses, any error is harmless. *See Duncan v. State*, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (any error in admitting evidence cured when same evidence comes in elsewhere without objection). Griffith's third issue is overruled.

Admission of CPS Report

In his fourth issue, Griffith argues that the trial court erred in allowing the State to introduce the CPS report compiled in this case because it contained inadmissible hearsay. The trial court admitted the CPS report over Griffith's objection. The State moved to admit the report during Griffith's cross-examination of Taylor, arguing that Griffith had "opened the door" by questioning Taylor regarding information in the report that was derived from hearsay statements. The State identified two areas that Griffith covered during his cross-examination that came directly from the report: (1) a disagreement between CPS and the prosecutor as to whether A.G. should remain in her home even after Griffith moved out; and (2) the conversation between Taylor and A.G. when A.G. first recanted her claims of sexual abuse. The trial court originally ruled the CPS report inadmissible but subsequently permitted introduction of the report, after the details of A.G.'s forensic interview were redacted.

As previously noted, a trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard and will be overruled only if the reviewing court determines that the trial court's ruling was so clearly wrong as to lie

outside the zone within which reasonable people might disagree. *See Bigon*, 252 S.W.3d at 367.

Documents such as the CPS report may qualify as business records under Rule 803(6) of the Rules of Evidence and therefore admissible as an exception to the hearsay rule, but the information contained therein may still constitute inadmissible hearsay. *See* TEX. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."); *see also Cheek v. State*, 119 S.W.3d 475, 479 (Tex. App.—El Paso 2003, no pet.). "When hearsay contains hearsay, the Rules of Evidence require that each part of the combined statements be within an exception to the hearsay rule." *Sanchez*, 354 S.W.3d at 485-86; *see also Barnes v. State*, No. 05-16-01184-CR, 2017 WL 5897746, at *5 (Tex. App.—Dallas Nov. 29, 2017, no pet.) (mem. op., not designated for publication) ("When business records contain 'hearsay within hearsay,' the proponent must establish that the multiple hearsay statements are independently admissible."). Even if a report does not qualify as a business record or if statements in the report are inadmissible as hearsay, the report may become admissible if one side elicits testimony that "opens the door" to the introduction of the report under Rule 107 of the Rules of Evidence. *See Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). Rule 107, known as the "rule of optional completeness," provides, in pertinent part:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary

> to explain or allow the trier of fact to fully understand the part offered by the opponent.

TEX. R. EVID. 107. The rule permits the introduction of otherwise inadmissible evidence when it is necessary to fully explain a matter that has been raised by the adverse party. *Ibenyenwa v. State*, 367 S.W.3d 420, 423 (Tex. App.—Fort Worth 2012, pet. ref'd). The rule is designed "to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing." *Walters v. State*, 247 S.W.3d 204, 218 (Tex. Crim. App. 2007). However, the rule is not invoked "by the mere reference to a document, statement, or act." *Id*. To be admitted under the rule, "the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood.'" *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011) (quoting *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004)).

Griffith argues that the State did not claim that his questioning of Taylor left a false impression with the jury or that the jury could have been misled on a particular point. However, when debating the admissibility of the CPS report, the State specifically argued in regard to the conversation between Taylor and A.G., "He wants to pick and choose so the jury only hears she recanted without hearing all of the factors and all of the hearsay that was before and after it." Because Griffith questioned Taylor on only portions of the report, he left the jury with a false impression regarding the conversation with Taylor when A.G. first recanted her claims of abuse. Additionally, Griffith's questions regarding the conversations between Taylor and the prosecutor could have left the jury with the false impression that CPS had determined that A.G. was safe in her home after Griffith

moved out. In a similar case dealing with a child advocacy center videotape of a child victim, our sister court determined that the entire videotape should be admitted when

> (1) defense counsel asks questions concerning some of the complainant's statements on the videotape; (2) defense counsel's questions leave the possibility of the jury receiving a false impression from hearing only a part of the conversation, with statements taken out of context; and (3) the videotape is necessary for the conversation to be fully understood.

Cline v. State, No. 13-11-00734-CR, 2013 WL 398916, at *4 (Tex. App.—Corpus Christi Jan. 13, 2013, no pet.) (mem. op., not designated for publication). In light of the record, we conclude that the trial court did not err in admitting the CPS report under rule 107.

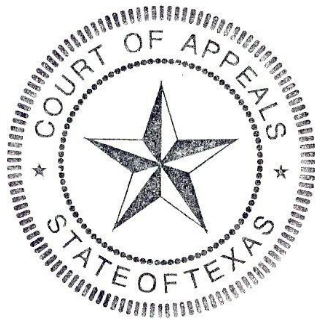
Additionally, once the report was offered, Griffith had the obligation to specifically identify the portions of the report that contained inadmissible hearsay. *See* TEX. R. EVID. 103(a)(1) (stating that party may claim error in ruling to admit evidence only if error affects substantial right and party timely objected and stated specific grounds for objection); TEX. R. APP. P. 33.1(a) (stating that complaints are not preserved for appellate review if not raised to trial court by timely objection that stated grounds for ruling with sufficient specificity to make trial court aware of complaint). When an exhibit contains both admissible and inadmissible material, an objection must specifically refer to the material deemed objectionable. *Flores v. State*, 513 S.W.3d at 174. A general objection to an entire document without specific reference to challenged material does not inform the trial court of a specific objection and does not preserve error for appeal. *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995). Griffith made a general hearsay objection to the CPS report, as well as general objections regarding violations of the Confrontation Clause, the Sixth Amendment, and U.S. Supreme Court authority. Although given the

opportunity to specify which portions of the report he specifically found objectionable, Griffith only identified the information provided in one of the intake calls and the criminal history of Donna, an objection that he subsequently withdrew. Even if the trial court sustained his objection to the statements from the intake call, the same information from the second intake call was contained in the report. In light of the foregoing, Griffith's fourth issue is overruled.

Having overruled all of Griffith's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed April 4, 2018
Do not publish
[CRPM]



Tab Two

IN THE
TENTH COURT OF APPEALS

No. 10-14-00245-CR

DAVID R. GRIFFITH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court at Law
Navarro County, Texas
Trial Court No. C-35408-CR

ORDER ON REHEARING

Appellant has filed a Motion for Panel Rehearing.

Having considered the motion, Appellant's motion for panel rehearing is denied by the Court. *See* TEX. R. APP. P. 49.3.

PER CURIAM

Before Chief Justice Gray,*
Justice Davis, and
Justice Scoggins
Motion denied
Order issued and filed May 23, 2018

*(Chief Justice Gray dissents. A separate opinion will not issue. He provides the following note:

Upon rehearing I am persuaded that while there is evidence of two or more sexual assaults, the evidence is insufficient for the jury to reasonably infer the second assault occurred before the victim's fourteenth birthday. Because the victim recanted prior to trial, the State had to rely on the victim's out-cry statements. The testimony about the out-cry statements established two locations where the victim lived at the time of the assaults, but the out-cry statements did not clearly establish the dates each assault occurred. Based on other evidence the dates the assaults could have occurred were bracketed by where the victim was living at the time of each assault. The victim had her fourteenth birthday when she lived at the second location. She was also living at the second location when the second assault occurred. The second assault could have been before her birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after she was living at the new location and before her fourteenth birthday. That is what distinguishes speculation from inferences. Something that allows the jury to reasonably infer the required finding. Recognizing that the State is entitled to file a response before a motion for rehearing is granted, I would request a response.

I respectfully dissent to the denial of the motion for rehearing.)