Affirm and Opinion Filed June 2, 2020

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00227-CR

KYLIL JAMALL KILLIAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-81862-2018

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Molberg

A jury convicted Kylil Jamall Killian of one count of continuous sexual abuse of a child under the age of fourteen and one count of indecency with a child by contact. The trial court assessed punishment of fifty years' imprisonment for the continuous sexual abuse of a child conviction and ten years' imprisonment for the indecency with a child by contact conviction, to run concurrently. In three issues, Killian contends his attorney rendered ineffective assistance of counsel, the evidence is not legally sufficient to support the convictions, and the trial court erred by

denying his motion for directed verdict on the indecency with a child by contact charge. We affirm the trial court's judgment.

BACKGROUND

On April 2, 2018, K.M. was in the fifth grade and on the school playground at recess when she saw someone who looked like Killian, her stepbrother, and she started crying. A friend took K.M. to the school counselor, and K.M. told the counselor Killian had raped her several times. The counselor reported the sexual abuse and contacted K.M.'s mother. The following day, Fernando Robledo, an investigator with the Collin County Sheriff's Office Child Abuse Task Force, interviewed Killian and scheduled a forensic interview for K.M. Investigator Robledo also scheduled and conducted a forensic interview of the school friend who was present when K.M. "initially outcried."

McKenzie McIntosh, a forensic interviewer at the Children's Advocacy Center of Collin County, interviewed K.M. on April 3, 2018. K.M. told McIntosh Killian began raping her when she was in the fourth grade and ten years old and he raped her several times until she was in the fifth grade and eleven years old. K.M. also told McIntosh Killian grabbed and groped her breasts and licked her nipples. As described herein, K.M. provided specific and compelling details of the sexual abuse to McIntosh.

Killian was charged by indictment with one count of continuous sexual abuse of a child and one count of indecency with a child by sexual contact. Killian pleaded not guilty, and he elected for the trial court to set punishment. After both sides rested and the jury was dismissed for the day, Killian's attorney moved for an instructed verdict on the indecency with a child by contact count on the grounds K.M. did not testify that Killian's mouth contacted her breasts. The trial court denied Killian's motion. A jury found Killian guilty on both counts. During the punishment phase, Philip Portwood, a former inmate who became acquainted with Killian during his confinement in the Collin County jail, testified on behalf of the State about statements Killian made while in prison. Testifying that Killian told him he sexually abused K.M., Portwood described the sexual abuse, as related to him by Killian, with specificity. Portwood also testified Killian told him that "the only way to get out of this is if [K.M.] were to die," and on several occasions, he asked Portwood to kill K.M. or find someone to kill her. At the conclusion of the punishment phase, the trial court sentenced Killian to fifty years' imprisonment for the continuous sexual abuse of a child conviction and ten years' imprisonment for the indecency with a child by contact conviction. This appeal followed.

ANALYSIS

Killian Failed to Establish He Had Ineffective Assistance of Counsel

In his first issue on appeal, Killian claims he received ineffective assistance of counsel because his attorney:

- Failed to object to statements by the prosecutor during voir dire that "improperly characterized the meaning of 'beyond a reasonable doubt'";
- Failed to object to a "widely accepted but improper definition by negation of 'beyond a reasonable doubt' in the court's charge to the jury";
- "Allow[ed] several of the State's witnesses to offer improper hearsay testimony";
- "Allow[ed] one of the State's witnesses to offer hearsay testimony in violation of the Confrontation Clause" under the Sixth Amendment to the United States Constitution;
- "Allow[ed] a State's witness to offer testimony commenting on the truthfulness of the complaining witness"; and,
- Failed to "investigate properly the basis of a punishment witness's testimony" for the purpose of impeachment.

A defendant is entitled to reasonably effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI. The right to counsel, however, does not mean the right to errorless counsel. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013); *Rubio v. State*, 596 S.W.3d 410, 426 (Tex. App.—Dallas 2020, no pet.). In most cases, we review an ineffective assistance of counsel claim under the *Strickland v. Washington* standard, which

includes a performance prong and a prejudice prong. 466 U.S. 668, 687 (1984); *Rubio*, 596 S.W.3d at 426. To obtain a reversal of a conviction due to ineffective assistance of counsel under *Strickland*, an appellant must demonstrate by a preponderance of the evidence that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Rubio*, 596 S.W.3d at 426; *see also Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

Our review of counsel's representation under the first prong of *Strickland* is highly deferential. We indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance, including the possibility that counsel's actions were strategic. *Strickland*, 466 U.S. at 689; *Rubio*, 596 S.W.3d at 426; *see also Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We focus on the totality of the representation afforded and not on individual alleged errors. *Rubio*, 596 S.W.3d at 426; *see also Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). We consider the adequacy of assistance as viewed at the time of trial, not in hindsight. *Rubio*, 596 S.W.3d at 426; *see also Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). We may not second-guess counsel's strategic decisions, and defense counsel's trial strategy cannot be considered ineffective assistance of

counsel simply because another attorney would have used a different strategy. *Rubio*, 596 S.W.3d at 426; *see also Ex Parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).

To defeat the presumption of reasonable representation, an allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *Rubio*, 596 S.W.3d at 426; *see also Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). We will not speculate to find defense counsel ineffective. *Rubio*, 596 S.W.3d at 426; *Wilson v. State*, No. 05-17-01003-CR, 2018 WL 6333245, at *3 (Tex. App.—Dallas Nov. 29, 2018, no pet.) (mem. op., not designated for publication); *see also Wood v. State*, 260 S.W.3d 146, 148 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A silent record that provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Rubio*, 596 S.W.3d at 426; *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson*, 9 S.W.3d at 814. Thus, if the record does not contain affirmative evidence of trial counsel's reasoning or strategy, we normally presume counsel's performance was not deficient. *Rubio*, 596 S.W.3d at 426–27; *see also Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander*, 101 S.W.3d at 111. For these reasons, the record on direct appeal frequently is insufficiently

developed to support a claim of ineffective assistance of counsel. *Rubio*, 596 S.W.3d at 427. The best way to make a sufficient record to support such a claim is by a hearing on an application for writ of habeas corpus or, alternatively, a hearing on a motion for new trial. *Rubio*, 596 S.W.3d at 427; *see also Thompson*, 9 S.W.3d at 814–15; *Jackson*, 877 S.W.2d at 772–73 (Baird, J., concurring). Only when "counsel's ineffectiveness is so apparent from the record" will an appellant asserting an ineffective assistance of counsel claim prevail on direct appeal. *Rubio*, 596 S.W.3d at 427; *see also Freeman v. State*, 125 S.W.3d 505, 506–07 (Tex. Crim. App. 2003).

To show prejudice under the second prong of *Strickland*, an appellant must demonstrate a reasonable probability that the outcome would have differed but for trial counsel's errors. *Strickland*, 466 U.S. at 694; *see also Jackson*, 877 S.W.2d at 771. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jackson*, 877 S.W.2d at 771 (quoting *Strickland*, 466 U.S. at 694). It is not sufficient to show defense counsel's errors "had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, to establish prejudice, an appellant must show that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result was reliable." *Id.* at 687. Failure to satisfy either prong of the *Strickland* standard is fatal. *Rubio*, 596 S.W.3d at 427; *see also Perez*, 310 S.W.3d at 893; *Ex parte Martinez*, 195 S.W.3d 713, 730 n.14

(Tex. Crim. App. 2006); *Rylander*, 101 S.W.3d at 110. Thus, we need not examine both *Strickland* prongs if one cannot be met. *Rubio*, 596 S.W.3d at 427; *see also Strickland*, 466 U.S. at 697.

In rare cases, an appellant claiming ineffective assistance of counsel is not required to show prejudice; rather, prejudice is presumed and the appellant only is required to show deficient performance. *United States v. Cronic*, 466 U.S. 648, 658–60 (1984); *see also Florida v. Nixon*, 543 U.S. 175, 190 (2004); *Rubio*, 596 S.W.3d at 427. In *Cronic*, the Supreme Court identified three situations implicating the right to counsel so likely to prejudice the accused that prejudice is presumed: (1) the accused was denied the presence of counsel at a critical stage of trial, (2) counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or (3) circumstances at trial were such that, although counsel was available to assist the defendant during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. 466 U.S. at 659–60; *Rubio*, 596 S.W.3d at 427. *Cronic* applies when there is "a constructive denial of the assistance of counsel altogether." *Cannon v. State*, 252 S.W.3d 342, 349 (Tex. Crim. App. 2008) (citing *Cronic*, 466 U.S. at 658–59); *Rubio*, 596 S.W.3d at 427.

Here, Killian asserts ineffective assistance of counsel claims under the *Strickland* standard.

Counsel's Failure To Object To State's Characterization Of, And Jury Charge Instruction On, "Reasonable Doubt" Standard Was Not Ineffective Assistance of Counsel

Killian directs his first and second ineffective assistance of counsel claims to his attorney's failure to object to the State's description during voir dire of, and the jury charge instruction on, the "reasonable doubt" burden of proof. Under *Strickland*, Killian first must show trial counsel's performance was deficient; second, Killian must show that counsel's deficient performance prejudiced the defense. 466 U.S. at 687; *Rubio*, 596 S.W.3d at 426. If Killian fails to meet either prong, we need not address the other prong. *Strickland*, 466 U.S. at 697; *Rubio*, 596 S.W.3d at 426.

During voir dire, the prosecutor told the jury:

> [In Texas], the standard is beyond a reasonable doubt. In a criminal case, that is our burden and it stays with the State. It never shifts over to the defense. It's always the State's burden to prove our case by that standard. It is the highest burden of proof in our justice system. . . . [I]t is the highest burden, but I'll tell you it has no legal definition.
>
> *So beyond a reasonable doubt means whatever it means to you, individually*. I hope that helps. Okay. Um, *because truly, we used to have a definition. It was well over a page long and it was more confusing than helpful. So, really it's what to you beyond a reasonable doubt means*.
>
> I can tell you a couple of things that it's not. *I can tell you that it does not mean beyond all possible doubt.* It also doesn't mean 100 percent. . . . You will not get a percentage. You will not get a proportion. There is no specific number that I can give you that is beyond a reasonable doubt.

(Emphasis added.) On appeal, Killian complains his attorney did not object to the prosecutor's statements that "reasonable doubt means whatever it means to you" and "[it does not mean] all possible doubt." According to Killian, his attorney's failure to object to the State's characterization of the burden of proof "undercut the fairness of Appellant's trial and undermined the reliability of the jury's verdict." Killian further argues trial counsel's failure to object to the prosecutor's description "prevented the trial court from correcting the error and prevented direct appellate review, amounting to ineffective assistance of counsel."

Killian also complains his attorney did not object to the "all possible doubt" language in the jury charge, which stated:

> In all criminal cases, the burden of proof is on the State throughout the trial and never shifts to the accused person. The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.
>
> *It is not required that the prosecution proves guilt beyond all possible doubt*; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.
>
> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. . . . The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
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> * * *

> You are instructed that any statements of counsel made during the course of trial or during argument not supported by the evidence, or statements of laws made by counsel not in harmony with the law as stated to you by the Court in these instructions, are to be wholly disregarded.

(Emphasis added.) On appeal, Killian argues counsel was ineffective because of the "difficulty of proving 'fundamental error' in this context" because "trial counsel's failure to object effectively waived appellate review of this error."

Texas courts are not required to give the jury a definition of the term "beyond a reasonable doubt." *Anderson v. State*, 414 S.W.3d 251, 256 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *see also Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000). Instead, jurors must use their common sense in determining what proof beyond a reasonable doubt means and whether that standard has been met. *Anderson*, 414 S.W.3d at 256. Under controlling law, Killian cannot show the trial court would have erred to overrule an objection to the jury charge. *See Woods v. State*, 152 S.W.3d 105, 114–15 (Tex. Crim. App. 2004) (trial court did not abuse its discretion by including jury charge instruction that "[it] is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all 'reasonable doubt' concerning the defendant's guilt"). Nor can Killian show the trial court would have erred by overruling an objection to the State's voir dire statements. *See id.*; *Fuller v. State*, 363 S.W.3d 583, 587 (Tex. Crim. App. 2012) (jurors should supply their own meaning of the

term "beyond a reasonable doubt" based on "their own common-sense understanding of the words"); *Murphy v. State*, 112 S.W.3d 592, 597 (Tex. Crim. App. 2003) ("each juror must decide for himself what amount of proof would constitute the threshold of beyond a reasonable doubt") (citing *Garrett v. State*, 851 S.W.2d 853, 859 (Tex. Crim. App. 1993) (holding "an individual juror must determine what proof beyond a reasonable doubt means to him, for the law does not tell him")); *Anderson*, 414 S.W.3d at 256. Therefore, Killian cannot show he was prejudiced by any alleged error in the jury charge or in the State's voir dire statements, i.e., that the outcome of the trial would have been different. *See Strickland*, 466 U.S. at 687; *Rubio*, 596 S.W.3d at 427; *Anderson*, 414 S.W.3d at 256.

We conclude Killian's ineffective assistance claims with respect to counsel's failure to object to the "reasonable doubt" language in the State's voir dire statements and in the jury charge fail.

Counsel's Failure To Object To Testimony Was Not Ineffective Assistance of Counsel

Killian next complains his trial attorney was ineffective for failing to object on hearsay grounds to the school counselor's testimony that K.M. told her that her stepbrother raped her and to Investigator Robledo's testimony that K.M.'s friend stated in her forensic interview that K.M. "told her that she was abused by her stepbrother," and the results of that forensic interview "seem[ed] consistent with the

timing of when [K.H.] outcried." Killian also complains trial counsel was ineffective for failing to object to testimony "commenting on the truthfulness of [K.M.]," specifically, McIntosh's testimony that K.M.'s forensic interview statements did not raise any red flags and McIntosh's description of K.M.'s "gestures" to her vagina when describing the sexual abuse. Under *Strickland,* Killian first must show trial counsel's performance was deficient. Unless Killian can show in the trial court record that his attorney's conduct was not the product of a strategic decision, we must presume counsel's conduct was adequate unless it was so outrageous that no competent attorney would have engaged in it. *Rubio*, 596 S.W.3d at 430; *see also State v. Morales*, 253 S.W.3d 686, 696–97 (Tex. Crim. App. 2008).

School Counselor's Testimony. At trial, the school counselor testified:

> [I] was in my office and she showed up at my door with another little girl and she was visibly upset. She wasn't crying, but she was upset. So she walked in my office. I told the other little girl to go on, and she came in and closed the door and sat down. And she told me that she had been raped by her stepbrother. And I asked her when that had happened and she told me it had been a month or two prior. I asked her did it happen that one time or more than once. And she told me it happened three or four times.
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> * * *
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> She was upset. She . . . told me that she had been on the playground and she had seen someone that looked like [her stepbrother] and it scared her. And I think . . . that's what triggered her that day at that moment to make that outcry.

Trial counsel did not object. There is no evidence in the record indicating trial counsel's reason for not objecting to the counselor's testimony on hearsay grounds.

The State contends counsel reasonably could have not objected for reasons of trial strategy. According to the State,

> [K.M.'s] credibility was a paramount issue in this case. As such, it would be reasonable trial strategy to point out inconsistencies and alternative explanations to guilt. . . . [K.M.] specifically used the word "rape" during her outcry—a word most ten and eleven year olds are not familiar with unless they have heard it before. . . . In light of the compelling details that K.M. was able to describe in her forensic interview, it would have been a reasonable trial strategy to attempt to show that K.M. could have been able to describe sexual abuse because she was repeating something she had heard. This trial strategy is indeed strengthened by K.M.'s use of a mature word. Therefore, there is sound trial strategy in choosing not to object.

We agree with the State. Judicial scrutiny of defense counsel's performance is highly deferential, and we must indulge a strong presumption that Killian's attorney was effective and his actions and decisions were reasonably professional and motivated by sound trial strategy. *Rubio*, 596 S.W.3d at 426; *see also Jackson*, 877 S.W.2d at 771. Killian has the burden to rebut this presumption with evidence illustrating his attorney's actions were not motivated by strategy, and he has not done so. To the contrary, the trial record shows Killian's attorney vigorously cross-examined the school counselor on her testimony in an apparent attempt to draw her credibility into question, asking her among other things:

> - "You seemed to have a recollection of most of the events, but [you] didn't make a note of who came in with her or who that child was to give to the resource officer?"

- "And you weren't working playground duty that day to supervise the kids out on the playground; is that right?"

- "[You] don't know where on the playground she was or if she was even on the playground, right?"

- "You don't know for sure where she was during that recess time, do you?"

- "[You] told the jury that the statement [K.M.] made to you was that she had been raped; is that right? . . . Now, is that your word, or is [it] the word that [K.M.] used? . . . You said she was in fifth grade. . . . Um, so 11 to 12 [years old], somewhere in there? . . . Um, she used the word 'raped'?"

The record before us is silent concerning trial counsel's motivations and trial strategy because Killian did not file a substantive motion for new trial, and no hearing was conducted. The trial transcript indicates trial counsel cross-examined the school counselor, and his decision to not object reasonably may have been strategic. We otherwise may not speculate as to why trial counsel did not object to the counselor's testimony. *Rubio*, 596 S.W.3d at 435 (when trial record is silent as to reasons defense counsel did not object to witness testimony "we must presume the actions taken by trial counsel were part of a strategic plan for representing his client"); *see also Thompson*, 9 S.W.3d at 814 (declining to speculate as to reason defense counsel failed to object where the record is silent); *Green v. State*, 191 S.W.3d 888, 894–95 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (holding a silent record regarding counsel's motivation for not objecting prevents finding that counsel's performance was deficient); *see also Walker v. State*, No. 12-13-00076-

CR, 2014 WL 357193, at *2 (Tex. App.—Tyler Jan. 31, 2014, pet. ref'd) (mem. op., not designated for publication) (trial counsel's failure to object to hearsay testimony not ineffective assistance because counsel's reason for decision not demonstrated by record). We conclude Killian failed to rebut the presumption his attorney's decision to not object to the counselor's testimony was reasonable.

Investigator Robledo's Testimony. Killian complains trial counsel did not object on hearsay grounds to Investigator Robledo's testimony that after watching K.M.'s forensic interview, he forensically interviewed the child who was with K.M. at the time of her outcry and "[K.M.] told her that she was abused by her stepbrother." According to Investigator Robledo, the results of that forensic interview "seem[ed] consistent with the timing of when [K.H.] outcried[.]"

The record does not include evidence regarding trial counsel's reasons or strategy for not objecting to Investigator Robledo's testimony. The record does, however, reflect that trial counsel cross-examined Investigator Robledo. Where, as here, the record is silent as to counsel's reason for failing to object, the appellant fails to rebut the presumption that counsel acted reasonably. *Rubio*, 596 S.W.3d at 435; *see also Thompson*, 9 S.W.3d at 814. Absent explanations for trial counsel's reasons or strategy for not objecting to Investigator Robledo's testimony, Killian has failed to overcome the presumption that the challenged actions were sound trial strategy, and his claim fails.

McIntosh's Testimony. Killian complains trial counsel did not object to McIntosh's testimony that K.M.'s forensic interview statements did not raise any red flags or to her description of K.M.'s "gestures" to her vagina when describing the sexual abuse, on the grounds the testimony commented on the truthfulness of K.M.'s statements and bolstered K.M.'s credibility. McIntosh testified:

> Q [Trial counsel]. Um, at any point did [K.M.] say that anyone had told her what to say in the course of her interview?
>
> A. I asked her and she said, no, they just told her to tell the truth.
>
> Q. Um, did you have any red flags, um, while you were interviewing her?
>
> A. No.
>
> Q. Was her story very consistent?
>
> A. Yes.
>
> Q. Was it chronological?
>
> A. Yes.
>
> Q. Did it match her emotional and developmental age?
>
> A. Yes.
>
> Q. Was there anything that gave you, um—or anything she said that got you—made you believe she was going [sic] coached?
>
> A. No.
>
> Q. Um, and if you had thought she was being coached in any way, would you have explored that?
>
> A. Absolutely.

McIntosh also testified that K.M. "put her hands on her female sex organ" when "she was showing me where her flower was," and "often times she was rubbing her stomach" when she was talking about the sexual abuse. According to McIntosh, sometimes a child "gestures or is acting out with their body" because "they don't have the appropriate vocabulary to describe the things that are happening. Sometimes it's easier for them to use their bodies to tell you about it."

An expert witness may testify if her scientific, technical, or other specialized knowledge will assist the jury in determining a fact issue. TEX. R. EVID. 702. However, an expert witness testimony must aid the jury and not supplant its determination. TEX. R. EVID. 704; *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Expert witness testimony concerning child sexual abuse does not aid the jury when it constitutes a direct opinion on the child victim's truthfulness and in essence, decides an ultimate fact issue for the jury. *Yount v. State,* 872 S.W.2d 706, 708 (Tex. Crim. App. 1993). Expert witness testimony should only be admitted when it is helpful to the jury and limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror. *Williams v. State,* 895 S.W.2d 363, 366 (Tex. Crim. App. 1994). Expert witness testimony that a child victim exhibits elements or characteristics that have been empirically shown to be common among sexually abused children is relevant and

admissible under Rule 702 because it is specialized knowledge that is helpful to the jury. *Duckett v. State*, 797 S.W.2d 906, 920 (Tex. Crim. App. 1990).

Here, we first note the record is silent as to why trial counsel did not object to McIntosh's testimony, and this issue was not addressed in Killian's motion for new trial. Without a record on this issue, we will not speculate on trial counsel's reasons or strategy for not objecting to McIntosh's testimony. Moreover, for Killian to succeed on his ineffective assistance of counsel claim, he must demonstrate that if his attorney had objected, the trial court would have erred in overruling the objection. *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996); *see also Rubio*, 596 S.W.3d at 435 (record must show trial court would have sustained an objection by defense counsel). Although Killian characterizes McIntosh's testimony as bolstering the truthfulness of K.M.'s statements, McIntosh did not testify that she believed K.M.'s statements to her were true or offer an opinion as to whether Killian committed the acts described by K.M. Her testimony went to characteristics and actions that are common among sexually abused children. *Vasquez v. State*, No. 05-11-01096-CR, 2012 WL 3125171, at *4 (Tex. App.—Dallas Aug. 2, 2012, pet. ref'd) (mem. op., not designated for publication). McIntosh's testimony was not a direct comment on the truthfulness or of K.M.'s statements or her credibility. Therefore, the complained-of testimony was appropriate and properly admitted, and Killian has

not demonstrated by a preponderance of the evidence that the trial court would have erred in overruling any objection to McIntosh's testimony on this ground.

Counsel's Alleged Failure To Investigate
Jailhouse Statements

During the punishment phase, Portwood testified on behalf of the State about statements Killian made while in prison. Portwood testified that Killian told him he sexually abused K.M. ten to twelve times; the sexual abuse occurred in his and K.M.'s bedrooms; he would leave the door open so he could hear if anyone was coming; he climaxed in his shorts, except he once climaxed on K.M.'s leg; after one incident of sexual abuse K.M. slapped him on the face and said "you raped me"; he took notes of Killian's statements after their discussions; Killian asked him several times to personally kill K.M. or to find someone to kill K.M.; and Killian wrote K.M.'s address on a piece of paper and gave it to Portwood on the day he posted bond.

On appeal, Killian complains his attorney was ineffective for failing to conduct a "proper independent factual investigation regarding Portwood's testimony" for the purpose of impeachment. Killian, however, fails to proffer any facts from the trial record showing his attorney failed to investigate his jailhouse statements to Portwood. We may not assume that because a record is silent as to whether counsel conducted an investigation, he made no investigation. In fact, the trial record reflects defense counsel cross-examined Portwood and challenged his

credibility and the reliability of his testimony on Killian's jailhouse statements. Specifically, trial counsel elicited testimony by Portwood that he had "at least three first-degree felonies," he did not know if Killian's jailhouse statements were "a repetition of what his attorneys and his investigator had told him what the evidence was," and he "knew that if [he] provided information to the State that could help [him]."

We conclude the trial record contains no evidence indicating trial counsel failed to sufficiently investigate Portwood's testimony about Killian's jailhouse statements. Therefore, Killian has failed to overcome the presumption that his attorney's actions were reasonably professional.

We resolve Killian's first issue against him.

The Evidence Was Legally Sufficient To Support the Convictions

In his second issue, Killian claims the evidence was legally insufficient to establish his identity as the person who committed the offenses.

In a legal sufficiency challenge, we determine whether, viewing all of the evidence in the light most favorable to the jury's verdict, any rational jury could have found the essential elements of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 397, 318–19 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). Evidence may be legally insufficient when the record contains either no evidence of an essential element, only a modicum of

evidence of an element, or if it conclusively establishes a reasonable doubt. *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013). We may not substitute our judgment for that of the factfinder or re-weigh the evidence. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The factfinder is the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given to their testimony. *Merritt v. State*, 368 S.W.3d 516, 525–26 (Tex. Crim. App. 2012). Therefore, we presume the jury resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that determination. *Id.*

A person commits continuous sexual abuse of a young child if, during a period of thirty or more days, the person is seventeen years of age or older and commits two or more acts of sexual abuse against a child younger than fourteen years of age. TEX. PENAL CODE § 21.02(b). A person commits indecency with a child by contact if the person engages in sexual contact with a child younger than seventeen years old or causes the child to engage in sexual contact. TEX. PENAL CODE § 21.11(a)(1). In this case, the indictment alleged Killian contacted K.M.'s breasts with his mouth.

The State may prove the identity of the defendant by direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). The testimony of a child victim alone is sufficient to support a conviction for continuous sexual abuse of a child. *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.—Dallas 2017, no pet.). A victim's

outcry statement alone is sufficient to support convictions for indecency with a child by contact and continuous sexual abuse of a child. *Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd); *see also Delbrey v. State*, No. 05-18-00790-CR, 2019 WL 3773851, at *3 (Tex. App.—Dallas Aug. 12, 2019, no pet.) (mem. op., not designated for publication).

In this case, K.M. testified that Killian touched and groped her breasts, and he touched and put his hand in her "flower," which she identified as her vagina. K.M. testified Killian put his "stick," which she identified as the male body organ used to "pee," in her "flower" and she told the jury point-blank, "He raped me." Killian started sexually abusing K.M. when she was in the fourth grade and the abuse continued through her fifth grade year, occurring multiple times in her bedroom. K.M. testified she was able to see Killian. The jury heard K.M. describe how Killian sexually abused her: he came into her bedroom, he "pulled [her] to the edge of the bed," he stood on the floor beside the bed while she was laying "on her back," he held her hips with his hands, "he put his stick in [her] flower," and he moved his "stick" "[b]ack and forth." When Killian was done, he "took [his stick] out" and exited K.M.'s bedroom, leaving her to cry, alone, in her room. K.M. testified that one morning, Killian told her in the daylight that "he wouldn't do it again," but she did not believe him. In the courtroom, K.M. identified Killian as the person who committed the offenses.

In addition to K.M.'s testimony, McIntosh testified that K.M. identified Killian as the perpetrator in her forensic interview. During the forensic interview, K.M. told McIntosh she "saw him pulling her off the bed," "he told her that she was good," and she felt liquid on her inner thigh when "he came out." When Killian was done sexually assaulting K.M., she would find a tissue to wipe off the liquid and cry. The jury heard McIntosh testify:

> [On a Saturday b]efore he was going to work, he walked into her room and he dragged her off the b[e]d. She said that it happened about the same way. She said what was different this time, um, was that she saw the liquid this time and it was white. [A]nd she said that, again, he was pushing his joystick in and out of her flower. [T]his time he told her he wouldn't do it again, [a]nd he hugged her. And [K.M.] said that she slapped him on his face because she knew he was lying about not doing it again. And then she said he left.

K.M. told McIntosh that Killian "grabbed" her breasts "and licked them on the nipples."

As the sole judge of the credibility of the witnesses, the jury had the discretion to believe or disbelieve all or part of K.M.'s and McIntosh's trial testimony. *See Bustamante v. State*, 106 S.W.3d 738, 741 (Tex. Crim. App. 2003). Their testimony, alone, suffices to support Killian's convictions on both charges. The evidence supporting Killian's guilt is not so weak or so against the great weight and preponderance of the evidence as to render the jury's verdict clearly wrong and manifestly unjust. Viewing all of the evidence in the light most favorable to the

verdict, we conclude a rational trier of fact could conclude beyond a reasonable doubt Killian is the person who committed the charged offenses, and the evidence is legally sufficient to support the convictions.

We resolve Killian's second issue against him.

The Trial Court Did Not Err By Denying Killian's Motion for Directed Verdict

In his third issue, Killian argues the trial court erred by denying his motion for directed verdict on the charge of indecency with a child by contact. According to Killian, because K.M. did not testify that Killian's mouth contacted her breasts, the admission of McIntosh's testimony that Killian licked K.M.'s nipples and breasts "violated the Confrontation Clause and cannot be considered as evidence sufficient to support [his] conviction on that charge." The State responds that because Killian's third issues raises two grounds of error—violation of the Confrontation Clause and sufficiency of the evidence—Killian has presented nothing for review; Killian failed to preserve his Confrontation Clause complaint by not raising it in the trial court when K.M. did not offer testimony that Killian's mouth contacted her breasts; McIntosh's testimony did not violate the Confrontation Clause because K.M. testified at trial, defense counsel cross-examined her, and Killian had ample opportunity to question K.M. about her forensic interview statements; and the evidence was sufficient to convict Killian for indecency with a child by contact based on McIntosh's testimony.

An issue is multifarious if it raises multiple complaints or grounds for reversal in a single issue. *Busby v. State*, 253 S.W.3d 661, 667 (Tex. Crim. App. 2008); *In re S.K.A.*, 236 S.W.3d 875, 894 (Tex. App.—Texarkana 2007, pet. denied). By combining independent grounds together in a single issue, an appellant risks rejection of his arguments on the basis that nothing has been presented for review. *Wood v. State*, 18 S.W.3d 642, 649 n.6 (Tex. Crim. App. 2000) (refusing to address multifarious grounds). The Texas Court of Criminal Appeals repeatedly has warned litigants that raising multifarious points of error presents nothing for review. *See id.*; *County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989) ("Appellant presents nothing for review in this point of error because his argument is multifarious."); *see also Mays v. State*, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010); *Sterling v. State*, 800 S.W.2d 513, 521 (Tex. Crim. App. 1990); *Taylor v. State*, No. 05-95-01172-CR, 1997 WL 468425, at *2 (Tex. App.—Dallas Aug. 18, 1997, pet. ref'd) (not designated for publication) ("A point of error is multifarious if it combines more than one contention in a single point. . . . A multifarious point of error presents nothing for our review.") (internal citations omitted).

Here, Killian's third point of error is multifarious because it presents joinder of more than one legal theory and raises more than one specific complaint—one based on the constitutional right to confront and cross-examine witnesses and the other challenging the sufficiency of the evidence. The Confrontation Clause of the

Sixth Amendment to the United States Constitution grants the right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI. The principal purpose of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing before the trier of fact. *See Woodall v. State*, 336 S.W.3d 634, 641–42 (Tex. Crim. App. 2011). A challenge to the sufficiency of the evidence ordinarily would ask us to consider whether a rational trier of fact could conclude beyond a reasonable doubt that Killian mouth contacted K.M.'s breast. Killian, however, does not make this argument. Rather, he appears to make a cause-and-effect argument, i.e., that because admission of McIntosh's testimony respecting the indecency with a child charge violated the Confrontation Clause, that testimony therefore is not sufficient to support the conviction. By failing to separate his complaints or provide a substantive analysis on each ground, Killian combines independent grounds together in a single issue. Killian's third point of error fails because it presents multifarious joinder of grounds, which this Court disapproves.

Even if Killian's third point of error was not multifarious—which it is—his arguments would fail. Not only does Killian raise his Confrontation Clause issue for the first time on appeal, thereby waiving that complaint, *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990), he also had a full and fair opportunity to cross-examine K.M. with respect to the indecency with a child by contact charge.

To implicate the Confrontation Clause, an out-of-court statement must have been made by a witness absent from trial and be testimonial in nature. *Woodall*, 336 S.W.3d at 642. When "the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 59 at n.9 (2004)). At trial, McIntosh testified before K.M. testified. Because K.M. was available and did in fact testify during the State's case in chief, Killian was afforded a full and fair opportunity to cross-examine her. Killian's confrontation rights thus were vindicated. While defense counsel cross-examined K.M., he did not question her about McIntosh's testimony with respect to the indecency with a child by contact charge. And, the law is well-settled that a child victim's outcry statement alone can suffice to support conviction for indecency with a child by contact.[1] *Tear*, 74 S.W.3d at 560; *see also Delbrey*, 2019 WL 3773851, at *3. Accordingly, the evidence was legally sufficient to support Killian's conviction for the offense of indecency with a child by contact. *See Delbrey*, 2019 WL 3773851, at *3. We conclude the trial court did not err by denying Killian's motion for directed verdict.

[1] A challenge to the denial of a motion for directed verdict is a challenge to the sufficiency of the evidence. *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 203). We review the evidence in the light most favorable to the verdict and we will affirm if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.*

We resolve Killian's third issue against him. We affirm the trial court's judgment.

/Ken Molberg//
KEN MOLBERG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KYLIL JAMALL KILLIAN, Appellant No. 05-19-00227-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 416th Judicial District Court, Collin County, Texas Trial Court Cause No. 416-81862-2018. Opinion delivered by Justice Molberg. Justices Bridges and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 2nd day of June, 2020.