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COURT OF CRIMINAL APPEALS
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No. 04-15-00595-CR

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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

DAVID ARROYO,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Petition for Discretionary Review from the
Fourth Court of Appeals, San Antonio, Texas
No. 04-15-00595-CR

NICHOLAS "NICO" LaHOOD
Criminal District Attorney
Bexar County, Texas

ANDREW N. WARTHEN
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva
San Antonio, Texas 78205
(210) 335-1539
State Bar No. 24079547
awarthen@bexar.org

Attorneys for the State of Texas,
Petitioner

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Ray Olivarri**, Presiding Judge of the 399th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **David Arroyo** was the defendant in the trial court and appellant in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) David Arroyo was represented by **Monica Guerrero** and **Rochelle M. Acevedo**, 5150 Broadway Street, Suite 114, San Antonio, TX 78209.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Meredith Chacon** and **Grant Bryan**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Fourth Floor, San Antonio, TX 78205.

The appellate attorneys to the Fourth Court of Appeals were as follows:

1) David Arroyo was represented by **Andrea C. Polunsky**, 111 Soledad, Suite 332, San Antonio, TX 78205.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Laura E. Durban** and **Andrew N. Warthen**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

The State of Texas is represented in this petition by **Nicholas "Nico" LaHood**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

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STATEMENT REGARDING ORAL ARGUMENT

The State believes that oral argument will aid the Court in its resolution of the issues and, accordingly, requests oral argument.

This case presents the Court with a question of whether older case law has continued validity in the interpretation of a modern-day statute, and, if not, what definition should be adopted. The case relied on by the lower court interpreted a very different indecency-with-a-child statute than the one that exists today. The definitions of "breast" that it adopted are no longer applicable. Oral argument will aid in determining what definition should apply and whether the words "chest" and "breast" are synonyms under § 21.11 of the Texas Penal Code.

STATEMENT OF THE CASE

Appellant was convicted of six counts of indecency with a child by contact—three for touching the victim's genitals and three for touching her breasts. On appeal, he claimed, among other things, that the evidence was legally insufficient to find him guilty of touching the victim's breasts. The court of appeals agreed, reversed the relevant convictions, and entered a judgment of acquittal on those counts.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals's opinion was originally handed down on May 24, 2017. On June 1, 2017, the State filed a motion for rehearing. On July 19, 2017, the court of appeals overruled the State's motion for rehearing, but it vacated its earlier judgment, withdrew its original opinion, and issued a new judgment and opinion in their place. *Arroyo v. State*, No. 04-15-00595-CR, 2017 Tex. App. LEXIS 6632 (Tex. App.—San Antonio July 19, 2017, pet. filed) (mem. op., not designated for publication).

GROUNDS FOR REVIEW

1. In light of significant statutory changes, does *Nelson v. State* have continued validity when interpreting § 21.11 of the Texas Penal Code?

2. Under § 21.11 of the Texas Penal Code, what is a "breast"?

ARGUMENT

This Honorable Court should grant this petition because the court of appeals has misconstrued a statute; decided an important question of state law that has not been, but should be, settled by this Court; and decided an issue in a way that conflicts with another court of appeals. Tex. R. App. P. 66.3.

I. The evidence is sufficient to uphold a conviction under § 21.11 of the Penal Code when a victim states that the defendant touched his or her "chest" rather than his or her "breast."

a. Section 21.11 and the opinion of the court of appeals

Under the version of § 21.11 in effect at the time, in relevant part, one committed the offense of indecency with a child if, with the intent to arouse or gratify the sexual desire of any person, the actor touched the breast of a child under the age of 17 and not his spouse, regardless of the sex of the child. Tex. Penal Code Ann. § 21.11(a)(1), (c)(1) (West 2005). "Breast" is not defined by statute.

On appeal, no one disputed the facts at issue. The victim stated three times that appellant touched her "chest," as well as other parts of her body. (RR4 82-83, 86, 88.) Relying on *Nelson v. State*, 505 S.W.2d 551 (Tex. Crim. App. 1974), the

lower court concluded that when the victim says "chest" instead of "breast" the evidence is not legally sufficient.[1]

b. Nelson*'s holding*

In *Nelson*,[2] the defendant was convicted under article 535d, § 1 of the Revised Civil Statutes—a forerunner to § 21.11 of the Penal Code. As explained by the *Nelson* Court, article 535d, § 1, made it an offense, in relevant part, for a person to

> intentionally place or attempt to place his or her hands or any part of his hand or hands upon the breast of a female under the age of fourteen (14) years, or to in any way or manner fondle or attempt to fondle the breast of a female under the age of fourteen (14) years.

Nelson, 505 S.W.2d at 552 (quoting Tex. Rev. Civ. Stat. Ann. art. 535d, § 1, *repealed by* Acts 1973, 63rd Leg., ch. 399, § 1 (West 1974)). Nelson was accused by his nine-year-old daughter of rubbing her chest. *Id*. The question before the *Nelson* Court was whether his daughter's statement "He rubbed my chest" was

[1] In its original submission, the court of appeals completely ignored its own factually similar precedent. *See Moore v. State*, 397 S.W.3d 751 (Tex. App.—San Antonio 2013, no pet.). There, Moore was charged with touching the victim's breast, but the victim testified that Moore touched her "chest." The *Moore* Court rejected Moore's sufficiency challenge. In both its response brief and motion for rehearing, the State cited and argued *Moore*. Despite the State providing the lower court with a copy of the *Moore* indictment, the lower court's revised opinion said that *Moore* was distinguishable from this case because the *Moore* opinion itself did not give specifics about the charges against Moore. *Arroyo*, 2017 Tex. App. LEXIS 6632, at *7.

[2] *Nelson* was decided by one Commissioner Davis, and subsequently approved by this Court. *Nelson*, 505 S.W.2d at 551, 553.

sufficient proof to sustain the allegation in the indictment that Nelson "place[d] his hand against the breasts of" the complainant. *Id*.

The *Nelson* Court noted that no statute defined "breast." *Id*. It therefore looked to dictionary definitions of both "breast" and "chest" to see if the two terms sufficiently overlapped. *Id*. "Breast," the commissioner observed, was defined by Webster's Third New International Dictionary as "either of the two protuberant milk-producing glandular organs situated on the front of the chest or thorax in the human female . . ." and also "The fore or ventral part of the body between the neck and the abdomen, the front of the chest." *Id*. "Chest," on the other hand, was defined as "the part of the body enclosed by the ribs and breast bone." *Id*. Thus, the commissioner concluded that "the definition of 'chest' is broader than the definition of 'breast' and includes a larger area of the body than that encompassed by the latter." *Id*. Accordingly, Nelson's conviction was reversed.

c. Nelson *is incompatible with the modern statutory scheme*

The lower court adopted *Nelson*'s reasoning without much analysis of the case other than to recite its facts and holding. It should not have.

The statute at issue in *Nelson* was very different than the relevant version of § 21.11 because it limited culpability to touching or fondling the breast of a female under the age of 14. *Nelson*, 505 S.W.2d at 552. Relatedly, as noted by the *Nelson* Court, the legislature thereafter repealed that statute and enacted new statutory

language, defining "sexual contact" therein as "any touching of . . . the breast *of a female* 10 years or older" with the requisite intent. *Nelson*, 505 S.W.2d at 552 n.1 (quoting Tex. Penal Code Ann. §§ 21.01, 21.11 (West 1974) (emphasis added)). Thus, previous versions of the indecency-with-a-child statute focused on touching the breasts of girls.

However, modern versions of § 21.11 do not limit sexual contact to young girls. Boys under the age of 17 are also covered regardless of the listed body part touched. Tex. Penal Code Ann. § 21.11(a). Plainly, boys do not develop breasts, and no boy is going to testify that a defendant touched his "breast." Thus, it would make little sense to conclude that the legislature intended to make it a crime to touch a boy's "breast" unless "breast" and "chest" were synonymous terms. Thus, because the legislature has abrogated the distinction between boys and girls but has kept the term "breast" in the statute, there must have been an intention to expand the meaning of that term from those adopted in *Nelson*.

Likewise, if "breast" really were such a circumscribed term, it would not cover girls that have not yet developed breasts. It would be odd indeed if the legislature meant to criminalize touching a developed breast, but not an undeveloped chest. Limiting the definition of "breast" to developed breasts "would remove all pre-pubescent girls and all boys from the statute's protection from sexual touching of the breasts." *Chambers v. State*, 502 S.W.3d 891, 894

(Tex. App.—Texarkana 2016, pet. ref'd). Such an interpretation is "absurd and directly contrary to the legislative objective sought to be obtained in enacting the statute regarding indecency with a child." *Id*.

Considering that *Nelson*'s definitions of "breast" do not fit within the modern objective of protecting all children, this Court should grant this petition and order full briefing to determine whether the court of appeals erred in relying upon *Nelson* when addressing convictions under § 21.11.

d. Under § 21.11, "chest" and "breast" are synonyms

If *Nelson* is abrogated, this Court must still address what exactly is a "breast" under § 21.11 and, by extension, whether the court of appeals erred when it concluded that testimony about touching a "chest" was insufficient to prove touching a "breast." "Breast" is not defined by any statute, and, as discussed above, *Nelson*'s definitions are simply incompatible with § 21.11's modern focus and scope. But the Sixth Court of Appeals recently had an opportunity to apply a modern definition.

In *Chambers v. State*, the defendant was convicted of indecency for touching a six-year-old child's breasts. *Chambers*, 502 S.W.3d at 892. On appeal, Chambers argued that the evidence was insufficient because, since the complainant was too young to have developed breasts, he could not have possibly touched them in violation of § 21.11. *Id*. Chambers, like appellant, had argued that *Nelson*'s

definitions of "breast" should control. *Id*. at 893. The *Chambers* Court disagreed, stating *Nelson* was inapplicable when construing § 21.11. *Id*. at 893 n.4.

Instead, the *Chambers* Court adopted a more appropriate definition of "breast," namely, "the fore or ventral part of the body between the neck and the abdomen." *Id*. at 894 n.6 (quoting *Merriam-Webster's Collegiate Dictionary* 152 (11th ed. 2006)). That definition fits within the modern statutory scheme better than the definitions adopted in *Nelson* because it is more inclusive and covers the breast area of both boys and undeveloped girls. Importantly, in the dictionary used by the *Chambers* Court, "chest" is defined, in part, by adopting the definition of "breast." That is, Merriam-Webster's treats "chest" and "breast" as synonymous terms.

Other sources also equate "chest" and "breast." For instance, the widely used Dictionary.com simply defines "breast" in part as "chest." *Breast Definition*, Dictionary.com, http://www.dictionary.com/browse/breast?s=t (last visited July 26, 2017). Likewise, the Oxford English Dictionary online defines "breast" in part as "A person's chest," and "the chest of a bird or mammal." *Breast Definition*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/us/breast (last visited July 26, 2017).

Moreover, the Oxford Thesaurus and Thesaurus.com both list "chest" as a synonym for "breast." *Breast Synonyms*, Oxford English Thesaurus,

https://en.oxforddictionaries.com/thesaurus/breast (last visited July 26, 2017); *Breast Synonyms*, Thesaurus.com, http://www.thesaurus.com/browse/breast?s=t (last visited July 26, 2017).

In addition, this Court has stated, "When analyzing the sufficiency of the evidence, undefined statutory terms are to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance." *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011). There can be little doubt that in "common parlance" the words "chest" and "breast" are interchangeable.

The lower court did not offer any definition of its own. It merely declared that *Nelson* controlled without considering whether its definitions are still relevant. Since no statute defines "breast," this Court should grant this petition and order full briefing to decide what constitutes a "breast" under § 21.11 and, accordingly, whether the evidence was sufficient to uphold appellant's convictions.

PRAYER

The State prays that this Honorable Court grant this petition and reverse the court of appeals.

Respectfully submitted,

Nicholas "Nico" LaHood
Criminal District Attorney
Bexar County, Texas

/s/*Andrew N. Warthen*
Andrew N. Warthen
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva Street
San Antonio, Texas 78205
Phone: (210) 335-1539
Email: awarthen@bexar.org
State Bar No. 24079547

Attorneys for the State

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this petition is 1,944. I also certify that a true and correct copy of this petition for discretionary review was emailed to respondent David Arroyo's attorney, Andrea C. Polunsky, at apolunsky@gmail.com, and to Stacey Soule, State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov, on this the 26th day of July, 2017.

/s/*Andrew N. Warthen*
Andrew N. Warthen
Assistant Criminal District Attorney

Attorney for the State

Appendix

Arroyo v. State

Court of Appeals of Texas, Fourth District, San Antonio

July 19, 2017, Delivered; July 19, 2017, Filed

No. 04-15-00595-CR

Reporter
2017 Tex. App. LEXIS 6632 *

David ARROYO, Appellant v. The STATE of Texas, Appellee

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] From the 399th Judicial District Court, Bexar County, Texas. Trial Court No. 2013CR8109. Honorable Ray Olivarri, Judge Presiding.

Arroyo v. State, 2017 Tex. App. LEXIS 4684 (Tex. App. San Antonio, May 24, 2017)

Disposition: REVERSED AND RENDERED IN PART; AFFIRMED IN PART.

Case Summary

Overview

HOLDINGS: [1]-Convictions were improper under *Tex. Penal Code Ann. § 21.11(a)(1), (c)(1) (2011)* because the evidence was legally insufficient to support a finding that defendant touched the alleged victim's breasts; [2]-Defendant did not preserve his Confrontation Clause complaint under the Sixth and Fourteenth Amendments for appellate review under *Tex. R. App. P. 33.1(a)(1)* because he did not clearly articulate that the Confrontation Clause demanded admission of the evidence about the witness's uncles; [3]-Outcry testimony under *Tex. Code Crim. Proc. Ann. art. 38.072, § 2(b)(2) (Supp. 2016)* was harmless under *Tex. R. App. P. 44.2(b)* because the outcry testimony provided no details about any of the six incidents other than that defendant touched the alleged victim under her pants, and the alleged victim provided specific details relating to the six separate incidents.

Outcome
Affirmed in part, reversed and rendered in part.

Counsel: For APPELLANT: Andrea Carol Polunsky, San Antonio, TX.

For APPELLEE: Laura E. Durbin, Assistant Criminal District Attorney, San Antonio, TX; Andrew Warthen, Paul Elizondo Tower, San Antonio, TX.

Judges: Opinion by: Sandee Bryan Marion, Chief Justice. Sitting: Sandee Bryan Marion, Chief Justice, Rebeca C. Martinez, Justice, Irene Rios, Justice.

Opinion by: Sandee Bryan Marion

Opinion

MEMORANDUM OPINION

OPINION ON MOTION FOR REHEARING

REVERSED AND RENDERED IN PART; AFFIRMED IN PART

In an opinion and judgment dated May 24, 2017, we affirmed the trial court's judgments of conviction on three counts, and reversed the trial court's judgments on three other counts and rendered an acquittal on those counts. The State filed a motion for rehearing. To clarify our discussion, we vacate our earlier judgment, withdraw our earlier opinion, and issue this opinion and judgment in their place. Concluding our original analysis was correct, we overrule the State's motion for rehearing.

A jury found appellant, David Arroyo, guilty on six counts of indecency with a **[*2]** child by contact. In three issues on appeal, appellant (1) challenges the sufficiency of the evidence in support of the verdicts, (2) asserts the trial court violated his right to confront a witness, and (3) asserts the trial court erred by admitting outcry testimony. We conclude the evidence in support of appellant's convictions on counts two, four, and six is insufficient; therefore, we reverse those convictions and render an acquittal. We affirm appellant's convictions on counts one, three, and five.

SUFFICIENCY OF THE EVIDENCE

In six counts, appellant was charged with engaging in sexual contact with a child younger than seventeen years by touching K.E.'s breasts and genitals on three different dates. The trial court signed six judgments of conviction, one for each count. On appeal, appellant asserts there is no evidence he touched K.E.'s breasts or genitals.

A person commits indecency with a child if he engages in sexual contact with a child younger than seventeen years of age. *TEX. PEN. CODE ANN. § 21.11(a)(1)* (West 2011). In this context, "sexual contact" includes touching a child's breast or any part of a child's genitals, including touching through clothing, if the act is committed with the intent to arouse or **[*3]** gratify the sexual desire of any person. *Id. § 21.11(c)(1)*. When an appellant challenges the sufficiency of the evidence supporting the jury's verdict, we review all of the evidence in the light most favorable to the verdict to determine whether, based on the evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *Isassi v. State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010)*. The jury is the sole judge of credibility and the weight attached to the testimony of the witnesses. *Merritt v. State, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012)*. When the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Id. at 525-26*.

Before calling K.E. to testify, the State called G.S., who was K.E.'s cousin. G.S. was thirty-one years old at the time of trial and she testified about appellant's touching her on more than one occasion almost twenty-five years earlier. G.S. testified appellant would slide his hand up her shorts and through her underwear to touch her vagina, and he also would touch her vagina outside of her clothing.

When the State called K.E., the State first asked her whether appellant ever did anything that made her uncomfortable. She said that, **[*4]** before her grandfather died, appellant would play with her hair by twirling it and rub her neck and arms. After her grandfather's death, the touching changed. On counts one and two, K.E. testified that on the day of her grandfather's funeral, appellant started to play with her hair and rub her neck. She was eleven years old at the time.

> And then he got more — he started touching my chest and it kind of — I'm crying, so I'm not — I don't know how to explain it. I knew it was wrong, I just didn't say anything at the time. . . .
>
> . . .
>
> I don't know what happened. Like I didn't make him stop. He started rubbing on my leg and he kept rubbing on my leg and then he went further up my skirt . . . .

When asked where appellant touched her when he

went up her leg, K.E. responded, "My vagina underneath my skirt." She said appellant did not penetrate her vagina, but he "was just moving his hand around like — it sounds weird, but like how you would pet a cat . . . ."

On counts three and four, K.E. testified she was in the sixth grade, and she and appellant were sitting on the couch watching television

> . . . and then it started off the same, like he started with my hair, moved down my neck and then go down **[*5]** — just down my chest and then go back to the leg and then it goes back to underneath what I wore, which was a skirt again because that was part of my [school] uniform.

On counts five and six, K.E. testified she was at appellant's house and they were sitting on a couch talking about music. K.E. said, "Then it started off the same, started with my hair, to my face, to my neck, to my chest, down my leg, and back up my skirt [and inside her underwear]." The State asked K.E.:

> Q. Okay. Same kind of rubbing as before?
> A. Uh-huh.
> Q. Was there anything different about it this time than the other times?
> . . .
> A. No.

The State then asked generally:

> Q. Okay, I'm sorry. Then I'll back up to that [time after the grandfather's funeral]. There was the time at the funeral and there's two times in the — after school at your house and then the time with him?
> A. Yes.
> Q. At his house?
> A. Uh-huh.
> Q. Okay. All very similar, though?
> A. Yes.
> Q. Okay. Was there any one of them that was different in any way? Did he do anything different or was it always those same things that he did?
> A. The same.

Appellant contends the evidence is insufficient to support the jury's verdict on counts two, four, and six, which alleged touching **[*6]** of K.E.'s breasts, because K.E. only testified he touched her "chest" and not her breasts. Appellant relies on *Nelson v. State, 505 S.W.2d 551 (Tex. Crim. App. 1974)*, for his argument that a child's testimony that she was touched on the "chest" is insufficient to support an allegation that an accused touched a victim's "breasts." In *Nelson*, the question before the Court of Criminal Appeals was whether the victim's testimony that "he rubbed my chest" was sufficient to sustain the allegation in the indictment that the defendant did "place his hand against the breasts" of the victim. The complainant provided no other testimony regarding the touching. The Court found the evidence insufficient because the definition of "chest" was broader than the definition of "breast" and "includes a larger area of the body than that encompassed by the latter." *Id. at 552*. The Court acknowledged other cases where the victim had used words different from those in the indictment to describe the area of the body fondled, and distinguished those cases because the victims' testimony was sufficient to identify the area of the body alleged to have been violated by the accused. *Id.* However, the Court concluded the same was not true in the case before it, and held the testimony **[*7]** "'He rubbed my chest' was insufficient proof to sustain the averment in the indictment that appellant did 'place his hand against the breasts' of the prosecutrix." *Id.*

In its motion for rehearing, the State relies on this court's opinion in *Moore v. State, 397 S.W.3d 751 (Tex. App.—San Antonio 2013, no pet.)*. While it is true the child's testimony in *Moore* is similar to the testimony in this case, the *Moore* opinion states only that the defendant was "convicted of two counts of indecency with a child and one count of sexual assault." *Id. at 753*. The opinion provides no specific details about the indictment or about how the jury charge instructed the jury on the two indecency counts. Conversely, in this case, the indictment and jury charge were specific:

> In six counts, appellant was charged with *engaging in sexual contact* with a child younger than seventeen years *by touching K.E.'s breasts* and genitals on three different dates. The trial court signed six judgments of conviction, one for each count. [Emphasis added]

Therefore, we conclude *Moore* is distinguishable.

In cases involving a child-complainant, the issue is not whether a child uses the specific technical term used in the statute. Instead, the question is whether the child sufficiently communicates to the trier **[*8]** of fact that sexual contact occurred by a touching of her breasts or genitals even though the language used by the child is different from that in the statute describing the part of the body. *See* *Clark v. State, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)*; *see also* *In re A.B., 162 S.W.3d 598, 602 (Tex. App.—El Paso 2005, no pet.)* (evidence sufficient when child characterized her private parts as the "front" and the "bottom" and she pointed to them; she explained defendant touched her "front" and in the "bottom" using his fingers; she also understood the difference between "inside" and "outside"); *Guia v. State, 723 S.W.2d 763, 765 (Tex. App.—Dallas 1986, writ ref'd)* (being touched where one "uses the restroom" or "tee-teed" sufficient to establish sexual contact with child's genitals).

At the time of the offenses, K.E. was eleven years old. By the time of trial, K.E. was eighteen years old and, therefore, not an unsophisticated child-complainant. K.E. said the touching always started the same way with appellant touching her hair and moving his hand down her neck, chest and leg, and the touching always ended with appellant moving his hand up her skirt. We also note the State did not attempt to have K.E. clarify what she meant by the word "chest" and the State did not ask for more details about where appellant touched K.E. on her "chest." On this record and in view of the holding **[*9]** in *Nelson*, we must conclude the evidence is legally insufficient to support a finding that appellant touched K.E.'s breasts as alleged in counts two, four, and six.

Appellant also asserts the evidence is insufficient to support the jury's verdict on counts three and five, which alleged touching of K.E.'s genitals. Appellant contends the evidence is insufficient because K.E. did not testify appellant touched either her vagina or genitals.[1] On count one, K.E. testified appellant moved his hand up her skirt, touched her vagina, and moved his hand "like how you would pet a cat." On count three, she said appellant moved his hand under her skirt. On count five, she said appellant moved his hand under her skirt and inside her underwear. K.E. testified he touched or rubbed her in the same way each of the three times. We conclude the jury could have reasonably inferred appellant touched K.E.'s vagina on each of the three occasions based on his pattern of moving his hands down K.E's leg and up under her clothing and because K.E. testified appellant always did "those same things" when he touched her under her clothing. Therefore, we conclude the evidence is legally sufficient to support a finding **[*10]** that appellant touched K.E.'s genitals as alleged in counts one, three, and five.

CONFRONTATION CLAUSE VIOLATION

Appellant asserts the trial court violated his *Sixth* and *Fourteenth Amendment* rights to confront a witness. During trial, at the State's request, a hearing was held outside the jury's presence on the admissibility of G.S.'s testimony. During the hearing, G.S. testified she was molested by appellant and two uncles. Defense counsel asked for the names of the uncles, and the State objected on relevancy and *Texas Rule of Evidence 412* grounds. Defense counsel responded that the testimony about the two uncles was relevant to whether G.S. was confusing appellant with one or both of her uncles. The trial court refused to allow

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[1] Count one also alleged contact with K.E.'s genitals; however, on appeal, appellant does not challenge the sufficiency of the evidence in support of the verdict on that count. Appellant only asserts K.E.'s testimony was contradictory and cursory. We defer to the jury's assessment of credibility and weight. *Merritt, 368 S.W.3d at 525-26*.

G.S. to name her uncles, but allowed defense counsel to question G.S., still outside the jury's presence, about what her uncles did. When the trial court ruled the jury could hear testimony from G.S. regarding her allegations against appellant but not regarding allegations against her uncles, defense counsel objected on various grounds. However, defense counsel did not object that appellant's right to confront the witness was violated.

In order to preserve alleged error for appellate review, a party must make **[*11]** a timely objection to the trial court or make some request or motion apprising the trial court what the party seeks by the line of questioning, thereby giving the trial court an opportunity to remedy any purported error. *See TEX. R. APP. P. 33.1(a)*. An explicit objection is not necessary if "the specific grounds" of the complaint are "apparent from the context" of the trial proceeding. *Tex. R. App. P. 33.1(a)(1)*. Because appellant did not clearly articulate that the *Confrontation Clause* demanded admission of the evidence about G.S.'s uncles, the trial court was not given an opportunity to rule upon a *Confrontation Clause* complaint. *See Reyna v. State, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005)*. Failure to object to a *Confrontation Clause* error at trial waives the complaint on appeal. *Wright v. State, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000)* (objection on hearsay and *Rule 107* grounds did not preserve *Confrontation Clause* complaint); *see also Reyna, 168 S.W.3d at 179* (holding failure to articulate "that the *Confrontation Clause* demanded admission of the evidence" foreclosed trial court's opportunity to rule on that issue and resulted in waiver of issue on appeal). Accordingly, appellant has not preserved his *Confrontation Clause* complaint for appellate review. *See Tex. R. App. P. 33.1*.

OUTCRY STATEMENT

The State provided pre-trial notice of its intent to call K.E.'s mother, Felicia, as the outcry witness. The trial court did not conduct a pre-trial admissibility hearing pursuant to *Texas Code of Criminal Procedure 38.072, section 2(b)(2)*. Before Felicia testified to what **[*12]** K.E. told her, defense counsel raised a hearsay objection. The State responded that it had given notice of its intent to call Felicia as the outcry witness, and the trial court allowed the testimony without conducting any further hearing. On appeal, appellant asserts the trial court erred.

At trial, Felicia testified K.E. told her: "[Appellant] molested me," and "He did things to me that he should not have done to me." Felicia admitted K.E. never went into detail about what appellant did, except to say appellant touched her "underneath her pants." Felicia said K.E. told her the first time this happened was the day of K.E.'s grandfather's funeral.

An outcry statement is not inadmissible because of the hearsay rule if, among other requirements, "the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement." *Tex. Crim. Proc. Code Ann. art. 38.072, § 2(b)(2)* (West Supp. 2016). Here, appellant did not object to the trial court about the lack of an *article 38.072* hearing. However, once appellant raised his hearsay objection to Felicia's testimony, the burden shifted to the State, as the proponent of the hearsay evidence, to establish compliance **[*13]** with *article 38.072*, which the State failed to do. *Long v. State, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990)* (agreeing with appellant that his objection to hearsay sufficed to invoke *article 38.072* procedures, and merely because he did not specify that his objection was lodged pursuant to that statute did not deprive him of review on appeal); *Mosley v. State, 960 S.W.2d 200, 203 (Tex. App.—Corpus Christi 1997, no pet.)* (same).

Assuming without deciding the trial court erred by admitting Felicia's testimony, we next consider whether the error harmed appellant. We review this error as non-constitutional error. *See TEX. R. APP. P. 44.2(b)* ("Any other error, defect, irregularity, or

variance that does not affect substantial rights must be disregarded."). We will not overturn a criminal conviction for nonconstitutional error if, after examining the record as a whole, we have a fair assurance the error did not influence the jury, or had but a slight effect. *Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)*; *Broderick v. State, 35 S.W.3d 67, 74-75 (Tex. App.—Texarkana 2000, pet. ref'd)* (concluding admission of inadmissible hearsay, including erroneous designation of outcry witness, is nonconstitutional error, and it will be considered harmless if appellate court, after examining the record as a whole, is reasonably assured error did not influence jury verdict or had but a slight effect). In this case, because the same or similar evidence was admitted without objection at trial, we hold the error **[*14]** was harmless. *Mayes v. State, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991)*; *Nino v. State, 223 S.W.3d 749, 754 (Tex. App.—Houston [14th Dist.] 2007, no pet.)*.

Felicia's outcry testimony provided no details about any of the six incidents other than that appellant touched K.E. under her pants. However, K.E. provided specific details relating to the six separate incidents. Thus, we cannot conclude the trial court's error in admitting Felicia's testimony about the offense had a substantial and injurious effect or influence in determining the jury's verdict. *See Nino, 223 S.W.3d at 754* (concluding party who objected to outcry evidence but failed to object to other substantially similar evidence waived any error in admission of objected-to evidence); *West v. State, 121 S.W.3d 95, 105 (Tex. App.—Fort Worth 2003, pet. ref'd)* (holding error in admitting outcry testimony did not influence jury's verdict or had but a slight effect because complainant provided detailed testimony relating to offense); *Thomas v. State, 1 S.W.3d 138, 142 (Tex. App.—Texarkana 1999, pet. ref'd)* (holding error in admitting child complainant's mother's outcry testimony was harmless, where record was replete with testimony from witnesses other than mother concerning complainant's statements about offense).

CONCLUSION

For the reasons stated above, we reverse the trial court's judgments on counts two, four, and six, and render an acquittal on those counts. We affirm the remaining judgments.

Sandee Bryan Marion, Chief Justice

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