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GUILLEN-HERNANDEZ, GILBERTO ANTONIO
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COA No. 01-18-00461-CR
Tr. Ct. No. 16-DCR-075926

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

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APPENDIX

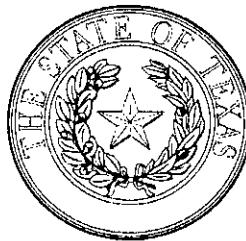
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OPINION FROM THE COURT

OF

APPEALS

Opinion issued July 2, 2019



In The
Court of Appeals
For The
First District of Texas

NO. 01-18-00461-CR

NO. 01-18-00462-CR

GILBERTO ANTONIO GUILLEN-HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 458th District Court
Fort Bend County, Texas
Trial Court Case Nos. 16-DCR-075926 & 17-DCR-076852

MEMORANDUM OPINION

Appellant, Gilberto Antonio Guillen-Hernandez, was found guilty by a jury of the continuous sexual abuse¹ and sexual assault² of his minor daughter,

¹ See TEX. PENAL CODE § 21.02 (continuous sexual abuse).

“Martha.”³ The jury assessed Appellant’s punishment at life in prison for the continuous-sexual abuse offense and at 20 years for the sexual-assault offense. Appellant appeals both judgments of conviction.⁴ In a single issue, raised in both appeals, Appellant argues that the trial court abused its discretion when it overruled his hearsay objection to the testimony of the outcry witness because Martha made the outcry through a Spanish-language interpreter.

We affirm both judgments of conviction.

Background

Martha is Appellant’s biological daughter. When she was 13 years old, Martha emigrated to Texas from El Salvador. Martha lived in El Salvador with her mother, but her mother did not come to Texas. Appellant already lived in Texas with his girlfriend, her children, and Martha’s half-sibling. Even though she had not seen Appellant since she was four years old, Martha moved in with Appellant and his family, who were living in a small trailer in Fort Bend County.

About a week after her arrival, Appellant sexually abused Martha by reaching under her clothes to massage her breasts and her vagina. Two months

² See *id.* § 22.011 (sexual assault).

³ “Martha” is a pseudonym used to protect the identity of the child complainant.

⁴ Appellate cause number 01-18-00461-CV corresponds to trial court cause number 16-DCR-075926 (continuous sexual abuse), and appellate cause number 01-18-00462-CR corresponds to trial court cause number 17-DCR-076852 (sexual assault).

later, the family moved to a larger trailer home where Martha lived with Appellant for approximately one year. Martha was sexually abused by Appellant from the ages of 13 to 15. She later testified at trial that, there, Appellant sexually abused her "many times" in multiple ways, including putting his penis and his fingers in her vagina and engaging in oral sex with her.

Martha did not tell anyone about the sexual abuse until she was 15 years old. She revealed to a teacher that Appellant was sexually abusing her, but she did not provide details of the abuse. The teacher contacted Child Protective Services (CPS) and reported the sexual abuse. CPS investigator, K. Amos, was sent to interview Martha at her school.

Amos learned that Martha did not speak English well because her native language was Spanish. Amos spoke some Spanish, but she was not proficient in the language. Amos needed a Spanish-English translator to interview Martha. Amos used a translator with Language Line, a translation company CPS commonly used and which Amos had used many times. During the interview, Amos and Martha were in a room together, and the translator was on speaker phone, translating both sides of the interview. Using her computer, Amos transcribed word-for-word what the translator was relaying as Martha's answers. Amos also made an audio recording of the interview on her computer, which she password protected.

The day after the interview, Martha underwent a sexual assault examination at the hospital. Using a Spanish-English translator, Martha told medical personnel

During the examination, Martha reported to the doctor that Appellant had started abusing her one or two weeks after she arrived in Texas. She said that the abuse had continued for two years, occurring two to three times per week.

Martha also reported to the doctor that the most recent sexual abuse had occurred two days earlier. During the examination, medical staff swabbed Martha's vagina and collected her underwear to preserve biological evidence. A forensic examination revealed the presence of semen on Martha's vaginal swab and in the crotch of her underwear.

Appellant's sexual abuse of Martha was reported to the Fort Bend County Sheriff's Office, which investigated the report. A search warrant was obtained for Appellant's cell phone. A photograph, taken in Martha's bedroom, was found on the phone. It showed Martha holding Appellant's erect penis.

A buccal swab was taken from Appellant for DNA analysis. A comparison of Appellant's DNA with the DNA profile obtained from the semen found in Martha's underwear showed that it was 9.52 septillion times more likely that the semen came from Appellant than an unknown person.

Martha also reported that Appellant had taken her to a motel to have sex. The police obtained surveillance video from the motel where Martha said Appellant had taken her. The surveillance video showed Appellant and Martha

walking toward a motel room. A receipt obtained from the motel confirmed that Appellant had rented a room that day.

Appellant was charged with the offenses of continuous sexual abuse and sexual assault. Pursuant to Code of Criminal Procedure article 38.072, the trial court conducted a pretrial hearing to determine whether CPS investigator Amos could testify at trial as an outcry witness.⁵ See TEX. CODE CRIM. PROC. art. 38.072. Amos testified at the hearing regarding the circumstances and content of the outcry. She testified about her use of the Spanish-English interpreter from Language Line to interview Martha. Amos also stated that she audio-recorded the interview on her computer.

At the end of the hearing, Appellant objected that Amos should not be permitted to testify as the outcry witness because Martha had not made a timely outcry. Appellant also objected to Amos's testimony on the basis that Amos could not verify the accuracy of the Spanish-English translation of Martha's outcry statement.

⁵ Code of Criminal Procedure article 38.072 provides that, regarding certain sexual offenses involving children under the age of 14, the first statement by the child to a person 18 years of age or older, other than the defendant, that describes the alleged offense is not inadmissible hearsay if other statutory requirements are met. TEX. CODE CRIM. PROC. art. 38.072, § 2(a)-(b) (setting out requirements, including that trial court must find that statement is "reliable based on the time, content, and circumstances of the statement"); *see Martinez v. State*, 178 S.W.3d 806, 811 (Tex. Crim. App. 2005) ("Article 38.072 is a rule of evidence admissibility, allowing trial courts to admit some hearsay statements in the prosecution of certain offenses against children when those statements are made under the specified conditions.").

The trial court overruled Appellant's objections to Amos's testimony. The trial court made findings of fact and conclusions of law in which it concluded that Amos was the proper outcry witness and that Martha's outcry statement was admissible. In support of its ruling, the court found that Amos met the statutory requirements of Article 38.072. It also found that Amos "commonly used" Language Line translation service "to speak with Spanish speakers." And the court found that Amos "indicated that Martha . . . appeared to understand the translation."

At trial, Appellant again objected to Amos's testimony about Martha's outcry. Appellant argued that Amos's testimony constituted "double hearsay" because it was derived from the Language Line interpreter's Spanish to English translation of Martha's outcry statements. Appellant questioned the translation's reliability and accuracy because the audio recording that Amos made of Martha's outcry could not be accessed. Amos had password protected the recording and could not remember the password, so the recorded interview could not be played. Appellant argued that, because he could not listen to the recorded interview, there was no way to insure the translation's accuracy and reliability.

Outside the presence of the jury, the trial court conducted a hearing to determine the admissibility of Amos's testimony. After Amos was questioned on voir dire, the court found the translation to be reliable and overruled Appellant's

hearsay objection, permitting Amos to testify about Martha's outcry as translated by the Language Line interpreter.

Amos testified at trial that Martha told her that Appellant "had touched her with his hands, with his penis." Amos stated that Martha "said [Appellant] had put his mouth on her intimate parts. [Martha] said that she had been made to put her mouth on his penis. And she said that it had been happening for two years," beginning when Martha was 13. Martha told Amos that the sexual abuse happened at home and that it happened "all the time." Amos testified that Martha told her that Appellant had taken her to a motel two days before the interview to have sex. Amos said that she did not ask Martha "extensive details" about the abuse because she knew Martha would also undergo a separate forensic interview.

Martha also testified at trial. Martha described the sexual abuse by Appellant that she endured from ages 13 to 15. Other State's witnesses included the physician who conducted Martha's sexual assault examination, investigating police officers, and the forensic examiners who processed and analyzed the DNA evidence. In addition, the State offered documentary evidence, including Martha's medical records from the sexual-assault examination and the explicit photo from Appellant's cell phone as well as photographic and documentary evidence to support Martha's claim that Appellant took her to a motel to have sex.

The jury found Appellant guilty of the offenses of continuous sexual abuse of a child and sexual assault. The jury assessed Appellant's punishment at life in prison for the continuous sexual abuse offense and at 25 years in prison for the sexual assault offense. This appeal followed.

Admission of Amos's Testimony

In his sole issue, Appellant contends that the trial court abused its discretion by overruling his hearsay objection and admitting Amos's testimony regarding Martha's translated outcry statements.⁶ Appellant argues that, because the Language Line interpreter's translation was inadmissible hearsay, Amos's testimony regarding the translation should not have been admitted. The State responds that the translation did not add a layer of hearsay because the record shows that Martha authorized the interpreter to speak for her or adopted him as her agent for purposes of the translation of her outcry statement.

A. Standard of Review

A trial court has broad discretion in determining the admissibility of evidence. *Allridge v. State*, 850 S.W.2d 471, 492 (Tex. Crim. App. 1991).

⁶ Appellant does not contend that Amos's outcry testimony was hearsay because the requirements of Article 38.072 had not been satisfied. To the contrary, at the hearing on the admissibility of Amos's testimony during trial, Appellant's counsel acknowledged that Amos was "the appropriate outcry witness." Appellant's objection to Amos's testimony at trial was that the translation from Spanish to English of Martha's outcry statement added a layer of hearsay to which there was no exception to make it admissible.

Consequently, an appellate court reviews a trial court's decision admitting or excluding evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *Saavedra v. State*, 297 S.W.3d 342, 349 (Tex. Crim. App. 2009).

B. Applicable Legal Principles

Hearsay is an out-of-court statement offered for the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay statements are not admissible unless they fall under a recognized exception to the hearsay rule. *Id.* 802, 803. To be admissible, each level of hearsay must fall under an exception. *See Crane v. State*, 786 S.W.2d 338, 353–54 (Tex. Crim. App. 1990).

In the context of translations, the Court of Criminal Appeals has held that an interpreter's translation does not add a layer of hearsay if the interpreter is acting as a "language conduit," translating the statement of one who has authorized him to translate or adopted the interpreter as his agent. *Saavedra*, 297 S.W.3d at 346–47. To determine whether the interpreter was acting as an agent, courts consider the following four factors: (1) who supplied the interpreter, (2) whether the interpreter had a motive to mislead or distort, (3) the qualifications and language skills of the interpreter, and (4) whether actions taken after the translated statement were consistent with the statement. *Id.* at 348.

As the Court of Criminal Appeals noted in *Saavedra*, these four factors not only demonstrate whether the interpreter was acting as an agent and authorized to speak, but also relate to “the ultimate reliability of the proffered evidence—always a core consideration in fashioning any exception to the general rule against admitting hearsay evidence over objection.” *Id.* at 349. No one factor is either necessary or sufficient to establish that an interpreter acted as a language conduit; rather, the factors are related and must be considered together. *See Saavedra v. State*, No. 05-06-01450-CR, 2010 WL 2028111, at *4 (Tex. App.—Dallas May 24, 2010, no pet.) (mem. op., not designated for publication) (citing *Saavedra*, 297 S.W.3d at 349)). Finally, the proponent of the evidence bears the burden of demonstrating to the satisfaction of the trial court that, after taking these factors into account, the out-of-court translation is admissible. *Saavedra*, 297 S.W.3d at 349.

C. Analysis

Because the interpreter, employed by Language Lines translation service, was supplied by CPS, both sides agree that the interpreter was not supplied by either party in this case.⁷ *Cf. Diaz v. State*, No. 08-07-00323-CR, 2010 WL

⁷ Although CPS is a state agency, nothing shows that CPS or Amos were working with law enforcement or the prosecution with respect to Martha’s outcry statement. *See Wilkerson v. State*, 173 S.W.3d 521, 528–29 (Tex. Crim. App. 2005) (recognizing that law enforcement ferrets out crime, investigates its commissions, arrests perpetrators, and gathers evidence for possible prosecution

109703 at *8 (Tex. App.—El Paso 2010, pet. dism'd) (not designated for publication) (indicating that “neither party” supplied CPS caseworker who translated defendant’s confession to law enforcement). Thus, the first *Saavedra* factor is neutral, weighing neither in favor of nor against admissibility. *See Moland v. State*, No. 01-10-00869-CR, 2012 WL 403885, at *4 (Tex. App.—Houston [1st Dist.] Feb. 9, 2012, pet. ref'd) (not designated for publication) (determining that, when neither party supplied interpreter, first factor was neutral).

Regarding the second *Saavedra* factor, nothing in the record suggests that the Language Line interpreter had a motive to mislead or to distort Martha’s outcry statement. And nothing in the record shows that the interpreter was motivated to provide anything but an accurate translation to Amos. In fact, the trial court could have inferred that the interpreter had an incentive to provide an accurate translation because Amos testified that Language Line is a translation service that CPS commonly uses and that she had used the service “multiple times.” Thus, the second factor weighs in favor of admissibility. *See id.* (concluding that lack of evidence that translator had motive to mislead weighed in favor of admissibility); *Diaz*, 2010 WL 109703 at *8 (determining that record supported finding that CPS worker, who acted as interpreter, had no obvious motive to mislead); *see also Trevizo v. State*, No. 08-12-00063-CR, 2014 WL 260591, at *6 (Tex. App.—El

while CPS workers protect welfare and safety of children; usually, CPS and law enforcement run separate but parallel paths).

Paso Jan. 22, 2014, no pet.) (mem. op., not designated for publication) (stating that evidence showing that translator was provided as part of hospital's standard operating procedure weighed in favor of translation's reliability and neutrality).

Appellant correctly points out that the State did not offer any evidence regarding the interpreter's identity, qualifications, or language skills. *See Saavedra*, 297 S.W.3d at 348. Nor did the State offer into evidence the business records of Language Line, which may have shown the company's policies, procedures, and standards for its interpreters. The lack of evidence regarding the interpreter's qualifications and skills weighs against a finding of reliability and admissibility under the third factor. *See Han Ok Song v. State*, No. 08-13-00059-CR, 2015 WL 631163, *5 (Tex. App.—El Paso Feb. 13, 2015, no pet.) (not designated for publication).

However, there is evidence in the record indicating that Martha understood the interpreter because Martha's translated responses to Amos's questions were consistent with the questions. *See id.* Amos testified that, during the interview, she transcribed word for word on her computer the interpreter's translation of Martha's responses. When Appellant's counsel asked on voir dire how Amos knew the translated responses were accurate, Amos testified that she knew the responses were accurate because Martha's answers were responsive to her questions. Amos stated, "There wasn't any answers that didn't apply to what I had just asked."

Appellant's counsel then asked how Amos knew the "critical details" were accurately translated. Amos responded the "critical details required me to ask follow-up questions. And as I said, everything fit. Nothing was out of the ordinary or out of context."

In addition, Martha testified that she understood the Spanish interpreter's translation. She stated that she communicated with Amos through the interpreter for one to two hours. *See Trevizo*, 2014 WL 260591, at *6 (stating that "strongest indicator" that sexual-assault complainant adopted interpreter as her agent was fact that complainant continued to use interpreter throughout sexual assault examination).

Finally, under the fourth *Saavedra* factor, the record shows "actions taken" after the translation were consistent with the translated statement. *See* 297 S.W.3d at 348. The day after she was interviewed by Amos, Martha underwent a sexual-assault examination at the hospital. Amos testified that Martha "told the forensic nurse exactly what she told me, that her father had oral and vaginal sex with her . . . for the last two years." Amos agreed that the fact that Martha told "other adults" substantively the same information about the sexual abuse that the interpreter had relayed to Amos indicated that the interpreter's translation was accurate. *Cf. Trevizo*, 2014 WL 260591 at *6 (stating that translated statement had "indicia of reliability" because statements relayed by translator were substantively identical to those made to other adults).

statements given by others to police). The record supports admissibility under the fourth factor.

After applying the four *Saavedra* factors, we conclude that the trial court could have implicitly found that the interpreter was acting as Martha's agent or language conduit during the interview with Amos. We hold that it was within the trial court's discretion to overrule Appellant's hearsay objection and to admit Amos's testimony about Martha's translated statements. *See Driver v. State*, No. 01-07-00386-CR, 2009 WL 276539, at *6 (Tex. App.—Houston [1st Dist.] Feb. 5, 2009, pet. ref'd) (mem. op., not designated for publication) (holding that trial court did not abuse its discretion in admitting translated statement regarding identification of appellant when first and second factors were neutral, translator demonstrated language abilities in two other police interviews, and witness whose statements were translated was subject to cross-examination at trial where she repeated her identification of appellant through an interpreter).

We overrule Appellant's sole issue.

Conclusion

We affirm the judgment of conviction in each appeal.

Laura Carter Higley

Laura Carter Higley

Justice of the Court of Appeals

Panel consists of Chief Justice Radack and Justices Higley and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).

Laura Carter Higley, Justice of the Court of Appeals

APPENDIX

(C)

OPINION FROM THE TRIAL COURTS

No. 01-18-00461-CR & No. 01-18-00462-CR

IN THE COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS^{1st}
AT HOUSTON, TEXAS

FILED IN
COURT OF APPEALS
HOUSTON, TEXAS

4/5/2019 10:13:45 AM

CHRISTOPHER A. PRINE

CAUSE NO. 16-DCR-075926 & CAUSE NO. 17-DCR-076852

IN THE 458TH DISTRICT COURT
FORT BEND COUNTY, TEXAS

GILBERTO ANTONIO GUILLEN-HERNANDEZ, Appellant

VS.

STATE OF TEXAS, Appellee

STATE'S BRIEF ON DIRECT APPEAL

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ORAL ARGUMENT NOT REQUESTED

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SUBJECT: Hearing/Trial

CAUSE NUMBER:

16 OCR 075926

STYLE: State

Guilberto Antonio Guillen Hernandez

v.

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SUPPLEMENTAL IDENTITY OF COUNSEL

Pursuant to Tex. R. App. P. 38.2(a)(1)(A), the State supplements Appellant's list of parties to the trial court's final judgment and provides the mailing address for the State's attorneys:

Brian Middleton	District Attorney, 268th Judicial District
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PARTY & RECORD REFERENCES

In this brief, Appellee, the State of Texas, will be referred to as "the State" or "the prosecutor(s)."

The Appellant, Gilberto Antonio Guillen-Hernandez, will be referred to as "Appellant," "Gilberto Guillen-Hernandez," or "defendant."

The complainant will be known by the pseudonym "Martha Gold" pursuant to Texas Code of Criminal Procedure Chapter 57, concerning the confidentiality of identifying information of sex offense victims.

In this brief, the following record citation forms will be used:

- Clerk's Record will be cited as "(C.R. at page)."
- Reporter's Record will be cited as "(Volume R.R. at page)."
- State's Exhibits will be cited as "(State's Exhibit Number)."

No. 01-18-00461-CR & No. 01-18-00462-CR

IN THE COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS
CAUSE NO. 16-DCR-075926 & CAUSE NO. 17-DCR-076852
IN THE 458TH DISTRICT COURT
FORT BEND COUNTY, TEXAS
GILBERTO ANTONIO GUILLEN-HERNANDEZ, Appellant

VS.

STATE OF TEXAS, Appellee

STATE'S BRIEF ON DIRECT APPEAL

TO THE HONORABLE FIRST COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant appeals his conviction for the offenses of Continuous Sexual Abuse of a Young Child and Sexual Assault of a Child; the child victim in each case was his daughter (4 R.R. at 191). The jury assessed Appellant's punishment at life imprisonment in the Texas Department of Corrections – Institutional Division on the Continuous Sexual Abuse of Young Child case and twenty years in the Texas Department of Corrections – Institutional Division on the Sexual Assault of a Child Case (C.R. at 87). Appellant was sentenced in accordance with the jury's verdict on April 30, 2018 (C.R. at 91). Appellant timely filed his notice of appeal on May 18, 2018 (C.R. at 94). Appellant did not file a motion for new trial.

Pursuant to Texas Code of Criminal Procedure Article 38.072, on February 19, 2018, the court held a pretrial hearing to determine the proper outcry witness (2 R.R. at 2-113). On March 6, 2019, the court entered Findings of Facts and Conclusions of Law (C.R. at 33).

STATEMENT OF ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, oral argument is not requested.

STATEMENT OF FACTS

Pursuant to Tex. R. App. P. 38.2(a)(1)(B), the State challenges all factual assertions contained in Appellant's brief, except for inculpatory admissions, and submits its version of the facts below and in its response to Appellant's issues.

Family background

Martha Gold (pseudonym) is the biological child of the Appellant (4 R.R. at 67). In 2014, at age thirteen, Martha left her home in El Salvador and immigrated to the United States, where she lived with the Appellant, his common-law wife, her brother, and her stepsiblings in a trailer located at 712 East Sycamore Street, Fresno, Fort Bend County, Texas (4 R.R. at 66-68, 72; 6 R.R. at 72; State's Exhibit 3). Before moving to the United States, Martha had not seen the Appellant since she was four years old (4 R.R. at 69). Martha's sisters and mother – the family she had lived with in El Salvador – did not come with her (4 R.R. at 65).

Sexual Abuse

Within a week of Martha's arrival, the Appellant started to sexually abuse her (4 R.R. at 83-84, 98). When Martha was thirteen years old and living in a small trailer in Fresno, the Appellant placed his hands inside of her clothing, grabbed her breasts with his hands, and massaged her vagina with his hands (4 R.R. at 87-88, 99). That was the only time Appellant sexually abused Martha in the small trailer (4 R.R. at 101).

In October of 2014, when Martha was still thirteen years old, the family moved to a larger trailer on the same piece of land in Fresno (4 R.R. at 101-102, 104; State's Exhibit 5). In the large trailer, where Martha lived from ages thirteen to fifteen, the Appellant sexually abused Martha multiple times in multiple ways (4 R.R. at 103, 109). Appellant would come into Martha's room, get into her bed, take off her clothing, and put his penis inside of her vagina (4 R.R. at 106-107). Appellant also touched Martha's vagina multiple times and put his fingers inside of her vagina (4 R.R. at 109). When Martha was fifteen years old, Appellant took her to a motel for the purposes of having sex with her (4. R.R. at 112-113, 116).

Martha's stepmother was unaware Appellant was sexually abusing her, but noticed Appellant acted inappropriately by holding Martha's hand, having her sit on his lap, and sleeping in her room (6 R.R. at 79, 81, 83).

Martha's Outcry

Martha, due to shame and fear, did not tell anyone about the abuse until she was fifteen years old and in the 9th grade (4 R.R. at 118-119). Martha disclosed she was being sexually abused to her teacher, Ms. Flora Niznik, but did not give her any details (4 R.R. at 119-120). After speaking to Ms. Niznik, Martha spoke to Kesha Amos, an employee of Child Protective Services (4 R.R. at 121). As Ms. Amos is not fluent in Spanish, they spoke through a telephone translator (4 R.R. at 121-122, 142). The conversation was lengthy and Martha had no problems

understanding the telephone translator (4 R.R. at 122, 142).

Martha was referred to Texas Children's Hospital for a sexual assault examination (5 R.R. at 38). Martha informed the physician who performed the examination that her father had been sexually assaulting her two to three times per week, starting approximately one week after she arrived from El Salvador, when she was thirteen years old (5 R.R. at 40-41). Martha advised that the most recent sexual assault occurred on November 27, 2016, when she was fifteen years old, and that the Appellant did not wear a condom (5 R.R. at 41-42). In an effort to preserve any biological material expelled at the time of the sexual assault for later testing, Texas Children's staff swabbed Martha's mouth, vagina, and anus, and collected her underwear (5 R.R. at 12-13, 44-45, 75). Because Martha is a Spanish speaker, a Spanish-language interpreter was present for the exam and translated for the medical staff (5 R.R. at 59).

The investigation

The Fort Bend County Sheriff's Office investigated the sexual abuse of Martha Gold. Lead detective Joe Luera took photographs of Martha's home and seized a cellular telephone belonging to the Appellant (5 R.R. at 152). A search warrant was obtained permitting law enforcement to search the contents of the phone (5 R.R. at 173-174). Detective Matthew Carl performed a forensic extraction on Appellant's cellular telephone (5 R.R. at 114). In reviewing the

extraction, law enforcement discovered a photograph of Martha's hand on the Appellant's erect penis (4 R.R. at 130; State's Exhibit 23). The photograph was taken in Martha's room at the big trailer (4 R.R. at 131-132; State's Exhibit 23; State's Exhibit 35).

Detective Luera also visited the Deluxe Inn, a motel located at 2445 Reed Road, Houston, Fort Bend County, Texas 77051, to determine if he could corroborate Martha's statement that Appellant had recently taken her there to sexually assault her (5 R.R. at 90, 162). From motel staff, Detective Luera received surveillance footage and a receipt confirming that the Appellant brought Martha to the location and rented a room (5 R.R. at 163-164; State's Exhibit 36).

Detective Luera also spoke with the Appellant (5 R.R. at 143). During that meeting, Detective Luera asked for, and received, consent to take a buccal swab of the Appellant (5 R.R. at 144). Appellant's buccal swab and Martha's sexual assault kit were submitted to the Texas Department of Public Safety Forensic Crime Lab for processing (5 R.R. at 188). DPS employee Amanda Balasko was one of the employees who assisted in the analysis of the sexual assault kit collected from Martha (5 R.R. at 219). During her preliminary analysis, Ms. Balasko confirmed the presence of semen on vaginal swabs taken from Martha and a swab taken from the inside of Martha's underwear (5 R.R. at 225, 235). Ms. Balasko also prepared the known samples of the buccal swabs from Martha and the

Appellant – for comparison with any genetic material taken from the sexual assault kit (5 R.R. at 239). Forensic scientist Kathleen McKinney conducted the interpretation of the DNA analysis of the items prepared by Ms. Balasko (6 R.R. at 6, 18; State's Exhibit 43). In analyzing the swab of semen from the crotch of Martha's underwear, Ms. McKinney found it was 9.52 septillion times – a number larger than the world's population –more likely that the semen came from Appellant than an unknown person (6 R.R. at 43-44).

Testimony of the Outcry Witness

Kesha Amos, the CPS caseworker to whom Martha made her outcry, testified both at a pre-trial outcry hearing pursuant to Texas Code of Criminal Procedure Article 38.072 and during the jury trial (2 R.R. 50-66; 4 R.R. at 157-204). On February 19, 2018, at the pretrial hearing, Ms. Amos testified that she used a commonly used telephonic interpreting service called MasterWord Language Line to speak to Martha about the sexual abuse (2 R.R. at 52). Ms. Amos then transcribed the interpretation into her report (2 R.R. at 113). Appellant's counsel argued that Ms. Amos's testimony constituted inadmissible hearsay due to the use of the translator (2 R.R. at 71). At the close of arguments, the court requested each side provide proposed orders by March 2, 2018 (2 R.R. at 75). On March 6, 2018, the court entered Findings of Facts and Conclusions of Law as it pertained to the outcry hearing (C.R. at 33). In addition to finding the

testimony of Kesha Amos met the statutory requirements of Texas Code of Criminal Procedure Article 38.072, the court found that Ms. Amos used a commonly used Spanish language translation service and that Martha appeared to understand the translation (C.R. at 33).

At trial, Appellant's counsel renewed his objection to the admission of Martha's statements through Ms. Amos as double hearsay (4 R.R. at 174-148). Outside of the presence of the jury, Appellant's counsel took Ms. Amos on voir dire. Ms. Amos advised she would be able to spot errors in translation because she was asking detailed questions and follow up questions, and nothing was out of context (4 R.R. at 160). Ms. Amos advised that she recorded the translation verbatim in her notes, which Appellant's counsel had a copy of (4 R.R. at 149-150, 160, 165). Ms. Amos advised that Martha told the forensic nurse the same information, corroborating the accuracy of the translation (4 R.R. at 167-168).

After listening to arguments of counsel and Ms. Amos' testimony, the court found the outcry statement to be reliable based on the totality of the circumstances and overruled Appellant's objection (4 R.R. at 171).

Ms. Amos testified in front of the jury to the statements Martha made to her through the Spanish language translator (4 R.R. at 187-195).

SUMMARY OF THE STATE'S ARGUMENT

In Appellant's sole point of error, he argues that the court erred when it permitted the designated outcry witness to testify to the child victim's statements in trial, on the basis that the outcry witness utilized the services of a Spanish-language interpreter to speak to the child victim. The record shows that the child victim adopted the Spanish-language interpreter as her language conduit. Therefore, the use of the translator does not add an additional level of hearsay. Pursuant to Texas Code of Criminal Procedure Article 38.072, the outcry witness was properly permitted to testify to the child victim's statements, as the elements of the statutory hearsay exception were met.

Further, no prejudice or harm can be shown. Appellant's issue should be overruled.

STATE'S ARGUMENT

Appellant's Sole Point of Error

"The trial court erred in allowing a CPS investigator to testify about hearsay statements made to her by an out-of-court [sic] interpreter service which were translated from Spanish to English."

State's Answer

Appellant failed to include sufficient record citations in his argument as required by Rule of Appellate Procedure 38.1(i), and the argument is inadequately briefed. The trial court did not abuse its discretion in permitting a CPS caseworker to testify to the statements the child victim made regarding sexual abuse to a translator. The CPS caseworker was properly designated as the outcry witness under Texas Code of Criminal Procedure Article 38.072, and the child victim adopted the translator as her language conduit.

State's Reply to Appellant's Sole Point of Error

Appellant asserts that the trial court abused its discretion by allowing Kesha Amos, the CPS investigator who was designated by the court as the proper outcry witness, to testify to the statements of the child victim, as translated by a Spanish-speaking telephone interpreter, as it is hearsay. Appellant argues this error was harmful, because without the outcry statement, there were "clear doubts" as to whether the offense of Continuous Sexual Abuse of Young Child occurred.

A. Appellant has inadequately briefed his issue and therefore presents nothing for review.

As a preliminary matter, Appellant provides insufficient record citations in his argument. Pursuant to Texas Rule of Appellate Procedure 38.1(i), Appellant's

“brief must contain a clear and concise argument for the contentions made, with appropriate citations to the authorities and to the record.” TEX. R. APP. P. 38.1(i). For example, Appellant asserts, “Kesha Amos could not testify as to the level of Spanish speaking proficiency of the translator supplied by MasterWord Language Line,” but provides no record citation in support of that contention.

Although appellate courts “construe appellate rules liberally, we are under no duty to make an independent search of the record to determine whether an assertion of reversible error is valid.” *Belle v. State*, 543 S.W.3d 871, 880 (Tex. App.—Houston [14th Dist.] 2018; no pet.).

Appellant waived review of his issue and it should be overruled.

B. Martha Gold adopted the telephonic translator as her language conduit for the purposes of her conversation with Kesha Amos

An interpreter’s translation does not add a layer of hearsay if the interpreter is acting as a “language conduit,” or translating the statement of one who has authorized him to do so. *Saavedra v. State*, 297 S.W.3d 342, 348 (Tex. Crim. App. 2009). In determining whether a declarant has adopted an interpreter as his agent, the courts have considered factors including: (1) who supplied the interpreter; (2) whether the interpreter had any motive to mislead or distort; (3) the interpreter’s qualifications and language skills; and (4) whether actions taken subsequent to the translated statement were consistent with the statement as translated. *Id.* These factors are not an exclusive list and no one factor is determinative; the “core

consideration" is the "ultimate reliability of the proffered evidence." *Id.* at 349. The trial court overruled Appellant's hearsay objection but made no specific ruling as to whether Martha adopted the MasterWord Language Line translator as her conduit (4 R.R. at 171). However, since the court overruled the objection, the appellate court may infer "that the trial judge only found one level of hearsay and that the translator was a language conduit by implication." *Trevizo v. State*, 2017 WL 260591 (Tex. App. – El Paso 2014, no pet.)(not designated for publication)(where a Spanish-speaking victim spoke to a sexual assault nurse examiner via a telephonic translator for the purposes of medical diagnosis or treatment). *See also Ramirez v. State*, 2007 WL 3072005 (Tex. App. – Houston [14th Dist.] 2007, pet. ref'd)(not designated for publication)(where the court found it was "inferred from the record" that the defendant, a Memorial Hermann patient, acquiesced to a security officer translating his statements to nurses).

i. Child Protective Services, not law enforcement, provided the interpreter

Testimony regarding Martha's outcry came from Kesha Amos, the Child Protective Services caseworker assigned to the case (4 R.R. at 181). Ms. Amos advised that because Martha was more comfortable conversing in Spanish, she utilized a telephone translator called the MasterWord Language Line to assist in their communications (4 R.R. at 187-188). While employees of Child Protective Services are state government employees:

“[o]ur law recognizes that different types of state employees serve different roles [...] Child Protective Services (CPS) workers’ [...] mission is to protect the welfare and safety of children in the community. Although this duty may at times entail the investigation of child abuse claims, that alone does not transform CPS workers into law enforcement officers or their agents. Nor does the fact a CPS worker is statutorily required to report suspected child abuse to law enforcement authorities transform a CPS worker into an agent of law enforcement. All citizens are statutorily required to report suspected child abuse to the authorities.”

Wilkerson v. State, 173 S.W.3d 521, 528 (Tex. Crim. App. 2005). *See also Diaz v. State*, 2010 WL 109703 at *8 (Tex. App. – El Paso 2010, pet. dism’d)(not designated for publication)(where, in examining the language conduit factors, the court found that “neither party” supplied the CPS caseworker who translated the defendant’s confession to law enforcement).

Kesha Amos was an employee of Child Protective Services, not law enforcement, and supplied the interpreter (4 R.R. at 181, 187).

ii. *Appellant points to no evidence in the record that the interpreter had a motive to mislead or distort the translation*

During her testimony, Ms. Amos advised that MasterWord Language Line is routinely used during CPS investigations when the caseworker and the victim or witnesses do not speak the same language (4 R.R. at 187-188). *See Trevizo v. State*, 2017 WL 260591 (Tex. App. – El Paso 2014, no pet.)(not designated for publication)(where a telephonic translator provided as part of standard operating procedure weighed in favor of reliability and neutrality). Ms. Amos did not know

the identity of the person who translated for Martha Gold, but stated she believes the translators hired by the service are experts (4 R.R. at 200, 209). Ms. Amos stated that she believed the translation was done properly because she asked multiple follow up questions and none of the answers were out of context (4 R.R. at 200). Ms. Amos also stated that she typed Martha's translated answers word-for-word into her report, including any misinterpretations (4 R.R. at 188-190, 211). As part of discovery and pursuant to a court order, this report was turned over to Appellant's attorney (C.R. at 17-18, 66). Appellant's counsel was permitted to question Ms. Amos at a pretrial hearing, on voir dire at trial, and in front of the jury at trial; at no time did he point to any mistranslations (4 R.R. at 157-168; 4 R.R. at 181-213). Given how vociferously Appellant's counsel fought to keep Ms. Amos from testifying, it can be inferred from the record that no mistranslations suggesting a motive to distort were discovered. *See Diaz v. State*, 2010 WL 109703 at *8 (Tex. App. – El Paso 2010, pet. dism'd)(not designated for publication)(where the court found “no evidence” that a CPS caseworker translating for the defendant had any reason to mislead); *Cassidy v. State*, 149 S.W.3d 712 (Tex. App. – Austin 2004 pet. ref'd), *abrogated on other grounds by Wall v. State*, 184 S.W.3d 730 (Tex. Crim. App. 2006)(where a co-worker translating for a victim had “no obvious motive” to mislead); *Driver v. State*, 2009 WL 276539 (Tex. App. – Houston [1st Dist.] 2009, pet. ref'd)(where the court

found no record evidence to show a motive to mislead or distort when the victim's daughter served as translator). Further, Ms. Amos testified that CPS uses a third-party language service, rather than someone known to the child victim, to ensure impartiality (4 R.R. at 163).

Appellant is unable to point to any evidence in the record suggesting the MasterWord Language Line translator had any motive to distort or mislead.

iii. Appellant points to no evidence that the MasterWord Language Line interpreter was not qualified

In considering the language conduit factors, there are no formal requirements regarding an interpreter's proficiency. *Gomez v. State*, 49 S.W.3d 456, 458 (Tex. App. – Houston [1st Dist.] 2001, pet. ref'd). The court can rely on the fact that an interpreter possessed sufficient fluency to carry on conversations.

Id. at 460. Requiring formalized requirements, as Appellant suggests, is inconsistent with the “core consideration” of the language conduit factors - the “ultimate reliability of the proffered evidence.” *Saavedra v. State*, 297 S.W.3d at 348; *See also Driver v. State*, 2009 WL 276539 at *7 (where the court found no evidence that a lay translator’s language skills were insufficient).

The record is clear that the Masterword Language Line interpreter was sufficiently fluent in Spanish to interpret for Martha. It is clear that Martha is a native Spanish speaker – her first language was Spanish, she had an English-language tutor, and she testified in Spanish (4 R.R. at 59, 71, 120). Martha

testified that she understood the Spanish translation from the person on the telephone (4 R.R. at 122). Martha stated that she understands and can speak some English, and that the telephonic translator translated what she said in Spanish into English for Ms. Amos (4 R.R. at 122, 139). The fact that Martha, a native Spanish speaker, was able to communicate with the telephonic translator with no issues demonstrates the translator's proficiency. *See Ramirez v. State*, 2007 WL 3072005 at *3 (Tex. App. – Houston [14th Dist.] 2007, pet. ref'd)(not designated for publication)(where the court found a security guard translating for a defendant, though not a certified translator, was qualified to translate as a language conduit).

Further, the record supports the trial court's conclusion that Martha purposefully utilized the translator as her language conduit. Martha testified that she chose to speak to the CPS caseworker and that she did so by speaking into the phone on the table so that the telephonic translator would be able to interpret for her (4 R.R. at 124-142). Martha stated this conversation went on for approximately one to two hours (4 R.R. at 142). *See Trevizo v. State*, 2017 WL 260591 at *6 (where the court found the “strongest indicator” that a victim adopted the translator as her language conduit was the “fact that she continued to address [the translator] throughout the duration of the sexual assault examination.”)

It is clear, from the content, context, and length of the conversation, that Martha purposely utilized the MasterWord Language Line translator as her conduit

and that said translator was able to properly translate for Martha.

iv. *Actions taken subsequent to the translated outcry statement were consistent with the translation*

The reliability and accuracy of Martha's translated statement is made clear by examining actions taken subsequent to the translations. While Appellant correctly states the proper legal standard, he conducts incorrect analysis. Appellant argues that there were "so few" actions subsequent to the translation, because there were "no known prior acts of statements by Martha Gold that preceded the translated discussion." (Emphasis added). The proper analysis is to examine actions subsequent to, or succeeding, rather than examine actions prior to, or proceeding the translated statement. *See BLACK'S LAW DICTIONARY* 685 (3RD POCKET ED. 2006) ("**subsequent**, *adj.* occurring later; coming after something else.")

The actions taken subsequent to Martha's outcry support the trial court's finding that it was reliable. Based on the details provided by Martha via the telephonic translator, she was taken for a medical examination (5 R.R. at 37; State's Exhibit 28; State's Exhibit 29). Martha gave similar details to the nurse who conducted her examination (5 R.R. at 80). Based on those details, Martha's underwear was collected as evidence and processed for DNA (5 R.R. at 12-13, 44-45; 6 R.R. at 43-44). Further, based on the information provided by Martha, law enforcement obtained a search warrant for Appellant's cellular telephone and

discovered, consistent with Martha's statement, a photograph of Appellant's sexually abusing her (5 R.R. at 130; State's Exhibit 23). Additionally, based on and consistent with Martha's statement, law enforcement went to the Deluxe Inn and located surveillance footage of Appellant taking Martha to a motel (5 R.R. at 163-164; State's Exhibit 36). *See Trevizo v. State*, 2017 WL 260591 at *6 (where the court acknowledged a victim's "substantively identical" statement to a known party provided an "independent indicia of reliability" to her statement to an unknown telephonic translator.)

While Martha's subsequent statements were substantially similar to the initial outcry, any discrepancies were explained by testimony regarding CPS policies and the process of disclosure. Ms. Amos testified that as a CPS caseworker, she does not ask about sexual abuse in great detail because that is the job of a forensic interviewer (4 R.R. at 212-213). She explained that to avoid retraumatizing a child victim by asking them to relive their abuse multiple times to multiple parties, the preference was to have the forensic interviewer conduct a recorded interview (4 R.R. at 213). Fiona Remko, the Director of the Child Advocacy Center, explained that disclosure is a process which can be made even more difficult if the abuser is a parent (6 R.R. at 107). She went on to explain that chronic abuse, like the abuse suffered by Martha, can affect a child's ability to recall details about specific events (6 R.R. at 109-110). During trial, Martha

testified that she could not remember every single detail, but that her memory was better back during the initial investigation (4 R.R. at 124).

Appellant's analysis regarding events occurring prior to Martha's outcry is improper. In conducting the proper analysis, it is clear that actions taken subsequent to Martha's outcry support the trial court's determination that the translated statement is reliable.

In reviewing all the language conduit factors, and taking into consideration the core consideration of reliability, the record supports that Martha adopted the MasterWord Language Line interpreter as her language conduit for the purposes of speaking to Kesha Amos. Issue One should be overruled.

C. Martha's statements were properly admitted as an exception to hearsay

Texas Code of Criminal Procedure Article 38.072 creates a statutory hearsay exception permitting an adult to testify to the text of a child victim's description of sexual abuse, in addition to the circumstances surrounding the statement and the child victim's demeanor. TEX. CODE. CRIM. PROC. Art. 38.072 (2)(b). In order for the outcry witness to be able to testify to the child's statements regarding the sexual abuse, the State must meet and follow the guidelines set forth in Texas Code of Criminal Procedure Article 38.072, including a hearing outside the presence of the jury. *Id.* The court properly held the outcry hearing on February 19, 2018 and the State presented Kesha Amos as the outcry witness (2 R.R. at 50-66). On

March 6, 2018, after arguments of counsel, the court entered Findings of Facts and Conclusions of Law, finding all of the requirements of Texas Code of Criminal Procedure Article 38.072 were met and designating Kesha Amos as the outcry witness (C.R. at 33-36).

The provisions of Texas Code of Criminal Procedure Article 38.072 were met. Accordingly, Ms. Amos properly testified to the statements made by Martha Gold describing her abuse. Issue One should be overruled.

D. Assuming, arguendo, that the court erred in admitting statements made through the telephonic translator, Appellant cannot show harm

Even if the trial court erred in permitting Ms. Amos to testify, Appellant cannot make a *prima facie* case that he suffered harm as a result. A criminal conviction should be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance the error did not influence the jury, or had but a slight effect. TEX. R. APP. P. 44.2(B). Appellate courts must examine the record as a whole, including “testimony and physical evidence, the nature of the evidence supporting the verdict, and the character of the error and its relationship to other evidence.” *Schultz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001). The introduction of inadmissible evidence may be harmless “if other evidence at trial is admitted without objection and it proves the same fact that the inadmissible evidence sought to prove.” *Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986).

To support his contention that the admission of the translated outcry statement caused harmful error, Appellant argues that the record is “void [sic] of any properly admitted evidence” regarding Martha’s age during the sexual abuse. Appellant appears to waive any claim of error with regard to the conviction for Sexual Assault of a Child, stating it is “undisputed [that] on November 27, 2016, appellant drove Martha Gold to a local hotel and committed an act of sexual assault when she was almost 16.” (Emphasis added). This act of sexual assault is the basis for the Sexual Assault of a Child indictment and conviction (6 R.R. at 181).

Martha Gold’s trial testimony, taken alone, was sufficient for the jury to find all of the elements of the offense of Continuous Sexual Abuse of Young Child. TEX. PENAL CODE, § 21.02(d) (West 2014). Appellant argues that Martha “was not clear about specific dates, time periods, or how old she was” and that other witnesses were “unable to provide dates to establish occurrences and time periods.” However, the State is not required to prove an exact date upon which sexual abuse occurred, and the jury is not required to agree on either the date or the act of sexual abuse that occurred so long as they believe there are two acts of sexual abuse during a period that is more than thirty days in duration. *See* TEX. PENAL CODE, § 21.02(d) (West 2014); *McMillan v. State*, 388 S.W.3d 866 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Testimony from an improperly designated outcry witness can be harmless error when the child victim provides detailed testimony about the offense. *West v. State*, 121 S.W.3d 95, 105 (Tex. App. – Fort Worth, 2003, pet. ref'd). At trial, Martha was clear that the sexual abuse started when she was thirteen years of age, in Fort Bend County, Texas (4 R.R. at 83-84). Martha advised that Appellant started by massaging her vagina with his hands and grabbing her breasts (4 R.R. at 87-89, 99). Martha testified that Appellant escalated his abuse, putting his finger and penis inside of her vagina (4 R.R. at 106-109). Martha testified that this occurred “many times” from when she was thirteen until she was fifteen (4 R.R. at 103). Martha stated that the last time Appellant abused her was when she was fifteen years old, but that he had been having sexual intercourse with her other times before that (4 R.R. at 116). With regard to how often the abuse occurred, Dr. Campbell, who performed the medical examination, testified that Martha stated the sexual assaults occurred “two to three times a week” soon after Martha arrived from El Salvador (5 R.R. at 41).

Further, the same or similar evidence was admitted at trial without objection. Improper admission of evidence is not harmful if the same or similar evidence is admitted without objection at another point in the trial. *Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991). Dr. Patricia Campbell, the physician who performed Martha’s sexual assault examination, also testified regarding statements

Martha made about Appellant sexually abusing her (5 R.R. at 40). Dr. Campbell advised that as part of the examination, Martha told her that Appellant started to sexually assault her shortly after she came to the United States, including “vaginal penetration with his penis, oral sex was performed on him, oral sex was performed on her [...]” (5 R.R. at 40). Dr. Campbell stated Martha informed her the sexual assaults occurred “two to three times a week” soon after Martha arrived from El Salvador (5 R.R. at 41). Dr. Campbell also advised that she spoke to Martha via a Spanish interpreter (5 R.R. at 59). Appellant’s attorney raised no objections to this testimony (5 R.R. at 40-59). Additionally, Appellant’s attorney had no objection to the admission of Dr. Campbell’s report, memorializing Martha Gold’s statements (5 R.R. at 37; State’s Exhibit 28; State’s Exhibit 29). By failing to object to Dr. Campbell’s renditions of statements made by Martha through an unknown Spanish language interpreter, and the admission of the medical records detailing said conversation, Appellant has waived any error related to the admission of Ms. Amos’s testimony. *Nino v. State*, 223 S.W.3d 749 (Tex. App. – Houston [14th Dist.] 2007, no pet.).

When examining the record as a whole, any error in admitting Ms. Amos’s testimony did not influence the jury, or had but a slight effect. Appellant cannot show harm. Issue One should be overruled.

PRAYER

The State prays that the judgment of the trial court be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the State's Appellate Brief contains 5,293 words as counted by Microsoft Word, which is less than the 15,000 word limit for a brief.

/s/ Claire Morneau Andresen
Claire Morneau Andresen

CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's appellate brief was e-served on April 5, 2019, on Mr. James Rivera, Attorney for Appellant.

/s/ Claire Morneau Andresen
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