Rules of evidence may or may not apply to Discretionary Waiver and Transfer hearing.[In the Matter of D.S.](17-3-13)

On July 27, 2017, the Ft. Worth Court of Appeals held that even assuming that the rules of evidence applied to Section–54.02(j) waiver and transfer hearing, any error allowing objected to hearsay testimony at trial was harmless because the very same testimony was admitted later without objection.

¶ 17-3-13. **In the Matter of D.S.**, MEMORANDUM, No. 02-17-00050-CV, 2017 WL 3187021 (Tex.App.—Ft. Worth, 7/27/2017).

**Facts:** On August 8, 2016, the State initiated in juvenile court a jurisdiction waiver and transfer proceeding against twenty-three-year-old D.S. under section 54.02(j) of the family code, alleging that when he was fifteen years old, he committed the offenses of aggravated sexual assault of a child and indecency with a child by contact.

In its waiver and transfer petition, the State alleged that on or about May 1, 2009, D.S. committed three counts of aggravated sexual assault of a child by intentionally or knowingly (1) causing the anus of D.R., a child younger than fourteen years of age, to contact the sexual organ of D.S.; (2) causing the penetration of the mouth of D.R., a child younger than fourteen years of age, by D.S.’s sexual organ; and (3) causing the sexual organ of D.R., a child younger than fourteen years of age, to contact the mouth of D.S. See Tex. Penal Code Ann. § 22.021(a)(1)(B), (a)(2)(B) (West Supp. 2016). It also alleged that on or about May 1, 2009, D.S. committed two counts of indecency with a child by contact by (1) engaging in sexual contact with D.R., a child younger than seventeen years of age, by touching D.R.’s sexual organ with intent to arouse or gratify the sexual desire of D.S.; and (2) causing D.R., a child younger than seventeen years of age, to engage in sexual contact by causing, with intent to arouse or gratify D.S.’s sexual desire, D.R. to touch the sexual organ of D.S. See id. § 21.11(a)(1), (c) (West 2011).

The only evidence presented at D.S.’s waiver and transfer hearing was the testimony of two witnesses: Corporal Benjamin Banes, who, during the time relevant to this appeal, was a detective with the Fort Worth Police Department assigned to the Crimes Against Children Unit, and Patsy Paxton, a Tarrant County Juvenile Services court officer. Corporal Banes testified that he had been assigned a case of sexual assault of a child involving D.S. after D.R.’s father, A.R., phoned police on January 4, 2015, to report that D.R. had been sexually assaulted. He testified that during the course of his investigation, he interviewed D.R. about the alleged sexual assault. D.R. told Corporal Banes that during the spring of his fifth grade year, D.R. and D.S. were at D.R.’s residence in Fort Worth when D.S. caused D.S.’s sexual organ to contact D.R.’s anus; that D.S. caused D.S.’s sexual organ to penetrate D.R.’s mouth; that D.S.’s mouth contacted D.R.’s sexual organ; that D.S. touched D.R.’s sexual organ or genitals; and that D.R. touched D.S.’s sexual organ or genitals. Corporal Banes testified that his investigation revealed that at the time this alleged conduct occurred, D.R. would have been eleven years old, and D.S. would have been fifteen. Corporal Banes stated that during his investigation, he did not receive any information that D.R. was being untruthful or that he had made up the allegations against D.S.

On cross-examination, D.S.’s counsel attempted to develop a line of questioning intended to establish that D.M., another person who shared D.S.’s first name, was the person who had sexually assaulted D.R. and that D.R. had misidentified D.S. as the person who had allegedly sexually assaulted him. To establish that theory, D.S.’s counsel referred to a video of an interview Corporal Banes conducted of A.R. The video, however, was not introduced into evidence at D.S.’s waiver and transfer hearing and is not a part of our record. And Corporal Banes testified that he did not remember there having been two persons mentioned with D.S.’s first name during the course of his investigation. Corporal Banes did, however, acknowledge that although D.S. had been a childhood friend of D.R.’s older brother for many years, D.R. was not able to provide D.S.’s last name when Corporal Banes interviewed him. However, Corporal Banes also testified that he was able to identify D.S. as the person who had committed the alleged sexual assault against D.R. because A.R. had provided him with a Facebook-type photograph with D.S.’s face circled and told him that the person indicated in that photograph was the person who D.R. said had committed the alleged sexual assault.

Paxton testified that part of her duties as a Tarrant County Juvenile Services court officer included performing psychological or prediagnostic evaluations of respondents before the juvenile adjudication process. She testified that although the juvenile court had ordered that a psychological evaluation be performed on D.S., one had not been obtained because D.S.’s counsel never consented. She also testified that D.S.’s counsel had met with her and stated that D.S. had passed a polygraph examination and was declining to submit to the psychological evaluation. On cross-examination, Paxton testified that she had read the polygraph results, that D.S. had been asked the same questions that were before the juvenile court, and that the results stated there was no deception indicated.

D.S. argues that the trial court reversibly erred by admitting hearsay at the waiver and transfer hearing. He complains specifically about certain testimony from Corporal Banes.

**Held:** Affirmed.

**Memorandum Opinion:** Corporal Banes testified that he had been assigned to investigate an alleged sexual-assault-of-a-child case involving D.S. after the alleged victim’s father, A.R., called the police to report that D.S. had sexually assaulted his child, D.R. Corporal Banes testified that he interviewed D.R. as part of his investigation and that D.R. told him what D.S. had done. When the State asked Corporal Banes to tell the court what D.R. said D.S. had done, D.S. raised a hearsay objection, which the trial court overruled.2 Corporal Banes answered that D.R. told him that when he was eleven years old and D.S. was fifteen, “[D.S.] touched [D.R.’s] penis with his hand, had [D.R.] touch [D.S.’s] penis with [D.R.’s] hand” and that D.R. “also described oral sex both ways and that [D.S.] penetrated [D.R.’s] anus with [D.S.’s] penis[,] and then after that had happened, [D.S.] again put his penis in [D.R.’s] mouth.” D.S. argues that the trial court reversibly erred by admitting this testimony.

We review a trial court’s decision to admit evidence for an abuse of discretion. See Serv. Corp. Int’l v. Guerra, 348 S.W.3d 221, 235 (Tex. 2011); In re M.R., No. 02–15–00221–CV, 2015 WL 6759249, at \*6 (Tex. App.–Fort Worth Nov. 3, 2015, no pet.) (mem. op.). But even if a trial court’s decision to admit evidence was erroneous, we nevertheless will not reverse the trial court’s judgment unless the complaining party shows that such error was harmful—that is, unless the complaining party shows that the error in admitting the evidence probably caused the rendition of an improper judgment. See Tex. R. App. P. 44.1; Owens–Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998).

The crux of D.S.’s argument is his contention that the rules of evidence apply to a waiver and transfer proceeding under family code section 54.02(j). D.S. argues that family code section 51.17(c) makes the rules of evidence applicable to such proceedings. Section 51.17(c) provides, “Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title.” Tex. Fam. Code Ann. § 51.17(c) (West 2014).

We need not and do not reach the question of whether family code section 51.17(c) makes the rules of evidence applicable to a waiver and transfer proceeding conducted under family code section 54.02(j) because we conclude that even assuming it does and that the trial court erred by admitting the complained-of testimony, D.S. cannot show that any such error probably caused the rendition of an improper judgment. Tex. R. App. P. 44.1; see H.Y., 512 S.W.3d at 473–75, (declining to decide whether family code section 51.17(c) makes the rules of evidence applicable to a juvenile waiver and transfer proceeding because appellant could not show harm from the allegedly erroneous admission of hearsay testimony). Error in the admission of objected-to evidence is generally harmless if the complaining party later allows the same or similar evidence to be introduced without objection. See Bay Area Healthcare Grp., Ltd. v. McShane, 239 S.W.3d 231, 235–36 (Tex. 2007). The record here shows that the same evidence to which D.S. objected came in without objection shortly thereafter. Specifically, just a little while after the State asked Corporal Banes to relate what D.R. had said to him during his interview and D.S. objected, the State covered that very same ground with him again, this time without objection:

[State]: You described all the contacts that [D.R.] told you [D.S.] had with him, but I want to make sure I’m clear for the record.

[Corporal Banes]: Okay.

[State]: You described that [D.S.] caused [D.S.’s] sexual organ to contact [D.R.’s] anus?

[Corporal Banes]: Correct.

[State]: You described that [D.S.] caused [D.S.’s] sexual organ to penetrate [D.R.’s] mouth?

[Corporal Banes]: Correct.

[State]: You described that [D.S.’s] mouth contacted [D.R.’s] sexual organ?

[Corporal Banes]: Correct.

[State]: You described that [D.S.] touched [D.R.’s] sexual organ or genitals?

[Corporal Banes]: Correct.

[State]: And you described that [D.R.] touched [D.S.’s] sexual organ or genitals?

[Corporal Banes]: That’s correct.

[State]: Okay. Did he describe anything else?

[Corporal Banes]: Not that I recall.

**Conclusion:** Thus, even assuming the rules of evidence applied to D.S.’s section–54.02(j) waiver and transfer hearing and the trial court erred by admitting the testimony that D.S. objected to, any such error was harmless because Corporal Banes subsequently provided the very same testimony without objection. Tex. R. App. P. 44.1; see Bay Area, 239 S.W.3d at 235–36 (Tex. 2007) (holding that appellant failed to preserve complaint that trial court erred in admitting testimony over his objection because the same evidence was later admitted without objection); see also H.Y., 512 S.W.3d at 473–75 (holding that any error in admission of objected-to evidence in juvenile transfer proceeding was harmless because virtually all of the complained-of evidence was contained in a probation report, which was admitted without objection).

We overrule D.S.’s second issue. Having overruled both of D.S.’s issues, we affirm the juvenile court’s order waiving its jurisdiction and transferring D.S.’s case to criminal district court.