IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0880-16

RONALD EDGAR LEE, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS TAYLOR COUNTY

KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, ALCALA, RICHARDSON, YEARY, NEWELL, and WALKER, JJ., joined. YEARY, J., filed a concurring opinion in which KELLER, P.J., joined. KEASLER, J., concurred.

O P I N I O N

A jury convicted Appellant of continuous sexual abuse of a child.[1] It assessed a

[1] In terms relevant to this case, Texas Penal Code § 21.02 provides as follows:
(b) A person commits an offense if:
(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
(2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.

life sentence. Appellant claimed on appeal that the evidence was insufficient to support his conviction. The Eastland Court of Appeals held the evidence was sufficient and affirmed the trial court. *Lee v. State*, 497 S.W.3d 591, 594 (Tex. App.—Eastland 2016). We granted Appellant's petition for discretionary review to determine if the court of appeals erred in holding that the evidence was sufficient. We conclude that the lower court did err. We reform the judgment to reflect a conviction for the lesser-included offense of aggravated sexual assault of a child and remand for a new punishment hearing.

The evidence showed that Appellant committed aggravated sexual assault against his young stepdaughter exactly twice, once in New Jersey and once in Texas. The assaults were temporally separated by at least 30 days. The issue is whether the commission of an out-of-state aggravated sexual assault will support a conviction for continuous sexual abuse of a child. Because the statutory definition of "sexual abuse" requires acts that are violations of Texas law, we hold that an out-of-state act will not support such a conviction.

Court of Appeals' Opinion

The court of appeals held that because Appellant was charged with continuous sexual abuse under Penal Code Section 21.02, and the conduct prohibited under the statute is the commission of two or more acts of sexual abuse over a specified time, Texas has jurisdiction if part of the prohibited conduct element occurred in Texas. *Lee*, 497

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws . . . (4) aggravated sexual assault under Section 22.021.

S.W.3d at 593-94. According to the court of appeals, the individual acts of aggravated sexual assault were the manner and means by which the offense of continuous sexual abuse of a child was committed. *Id*. at 594. The court of appeals said that the location where the sexual abuse was committed was not an element of the offense, so the State's only obligation was to prove that the county of prosecution had venue. Because one act of sexual abuse occurred in Taylor County, the court of appeals said that the evidence was sufficient to prove venue. *Id*.

Arguments of the Parties

Appellant argues that proof of two or more violations of Texas law is an essential element of the continuous-sexual-abuse offense, and because the first alleged act of abuse occurred in New Jersey, it was not a "violation" of Texas law. Appellant argues that territorial jurisdiction does not allow conduct outside the state to retroactively become a violation of Texas law. Rather, the act has to be a violation of one of the enumerated Texas penal laws at the time it is committed for it to be one of the two or more violations that must be proven to sustain a conviction under Section 21.02. Because Texas does not have jurisdiction over events that occurred in New Jersey, Appellant argues that the aggravated sexual assault that occurred there was not a violation of Texas law, and the evidence was insufficient to show that he committed two or more violations of the Texas Penal Code as required by Section 21.02.

The State maintains that Appellant was not charged with aggravated sexual assault

for the act in New Jersey. The State argues that continuous sexual abuse of a child is a single offense, not an aggregate of separate offenses, and aggravated sexual assault under section 22.021 is an element of that offense. The State says that under Penal Code section 1.04(a), Texas has jurisdiction over the case as long as one element of the offense occurred in Texas. Citing *Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004), the State says that, even when other Penal Code sections are enumerated as elements of an offense, territorial jurisdiction is established if an element occurs in Texas.

Analysis

The evidence must be sufficient to establish each element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). One element of continuous sexual abuse of a child is two or more violations of enumerated penal code sections. TEX. PENAL CODE § 21.02(b). Each predicate offense must be a violation of Texas law. TEX. PENAL CODE § 21.02(c).

Texas has jurisdiction over an offense if either a conduct element or a result element occurs inside the state. TEX. PENAL CODE § 1.04(a)(1). In *Rodriguez*, we upheld a capital murder conviction where the defendant kidnapped a man in Texas and murdered him in Mexico. The capital-murder statute at issue in *Rodriguez* applies to a person who commits murder "as defined under Section 19.02(b)(1)" in the course of committing another listed offense, including kidnapping. Because kidnapping was an element of the capital murder, and the kidnapping occurred in Texas, jurisdiction was established. We

said, "the legislature's inclusion of the elements of § 19.02(b)(1) in the capital-murder statute by reference only was not intended to require that the murder be committed in Texas . . . ." 146 S.W.3d at 677. In other words, a perpetrator can commit a murder "as defined under section 19.02(b)(1)" outside of Texas. But he cannot commit an act that "is a violation" of Texas law outside of Texas. Because "act of sexual abuse" requires an act that "is a violation" of Texas law, Appellant's act in New Jersey may not be considered one of the predicate offenses necessary for a conviction under Section 21.02. We agree that Texas had territorial jurisdiction of continuous sexual abuse of a child, but the evidence was insufficient to sustain a conviction because only one violation of Texas law was proven, and that was the aggravated sexual assault committed in Texas.

Conclusion

When an appellate court finds the evidence insufficient to establish an element of the charged offense, but the jury necessarily found the defendant guilty of a lesser offense for which the evidence is sufficient, the appellate court must reform the judgment to reflect the lesser-included offense and remand for a new punishment hearing. *Thornton v. State*, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014). In this instance, the jury necessarily found Appellant guilty of aggravated sexual assault, which is a lesser-included offense of continuous sexual abuse of a child as charged in this case. *See Soliz v. State*, 353 S.W.3d 850, 854 (Tex. Crim. App. 2011). Accordingly, we reform the judgment to reflect a conviction for aggravated sexual assault of a child and remand for a

new punishment hearing.

Delivered: October 4, 2017

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