Opinion filed November 22, 2017

In The

Eleventh Court of Appeals

No. 11-16-00257-CR

DONALD DEAN KREGER JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 39th District Court
Haskell County, Texas
Trial Court Cause No. 6783

M E M O R A N D U M O P I N I O N

The jury found Donald Dean Kreger Jr. guilty of the first-degree felony offense of continuous sexual abuse of a child, as charged in the indictment.[1] The trial court assessed punishment and sentenced Appellant to confinement for life. On appeal, Appellant presents four issues. We affirm.

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[1]*See* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2016).

I. *The Charged Offense*

The grand jury indicted Appellant for the offense of continuous sexual abuse of a child.[2] The indictment alleged, in part, that Appellant was seventeen years of age or older and "did then and there during a period that was 30 or more days in duration, commit two or more acts of sexual abuse against" C.K., a child younger than fourteen years of age. A person commits the offense of continuous sexual abuse of a child if, (1) during a period of thirty or more days, the person commits two or more "acts of sexual abuse" and (2) at the time of the acts, the person is seventeen years of age or older and the victim is a child younger than fourteen years of age. PENAL § 21.02(b).

II. *Evidence at Trial*

C.K., the victim, is Appellant's daughter. C.K. lived with Appellant and her younger brother, D.K., in Rule, Texas, from age five to age thirteen. C.K. alleged that Appellant had penetrated her vagina and anus with his penis "[a] lot" during this time. She estimated that Appellant sexually abused her "probably" more than ten times between the ages of five and thirteen. C.K. told her mother about the sexual abuse when she was thirteen because she was "fed up with it."

A. C.K.'s Allegations of Sexual Abuse by Appellant

According to C.K., the sexual abuse started in Appellant's trailer house in Rule. She testified that Appellant sexually abused her for the first time in the trailer house when she was "about five," although C.K. could not remember exactly what Appellant did to her. She could not recall how many times Appellant had sexually abused her at the trailer house, but it was more than once.

C.K., D.K., and Appellant moved to a three-bedroom house on Sunny Avenue when C.K. was about five or six. In one instance at the house on Sunny Avenue,

[2]The grand jury also indicted Appellant for aggravated sexual assault as a lesser included offense.

Appellant vaginally penetrated C.K. while she and D.K. were asleep in Appellant's bed. According to C.K., Appellant "slept in the middle, I slept on one side, and my brother slept on the other," and "[w]e all went to sleep and he put his penis in my vagina." At trial, D.K. testified about the night that he slept in Appellant's bed with C.K.

D.K. testified that he and C.K. slept in Appellant's bed that night because they were "scared" of a thunderstorm. He explained, "[C.K.] was sleeping in front of my dad and I was sleeping behind him, and I felt -- all of a sudden, I felt a back-and-forth motion off of [Appellant]" that "stopped probably ten minutes after I had lai[n] down." D.K. thought that it was very unusual and had never felt that motion before.

The last instance of sexual abuse occurred at the house on Sunny Avenue when C.K. was thirteen. C.K. testified, "I was in my room. And then when I woke up, I was in his room." She said that Appellant "carried [her]" to his room, "put his penis inside [her] vagina," and then "told [her] not to tell anybody." After this incident, C.K. told her mother about the sexual abuse. C.K. and D.K. subsequently moved in with their aunt and uncle. Interim Police Chief Robert "Bob" Summers, conducted a criminal investigation, which included C.K. being taken to the hospital for a sexual assault examination by Susie Striegler, a sexual assault nurse examiner (SANE).

B. Striegler Conducted a Sexual Assault Examination.

Striegler, the SANE coordinator at Hendrick Medical Center in Abilene, conducted the examination of C.K. C.K. told Striegler that Appellant "had touched her with his bad spot in her vagina and her anus." Striegler testified that she was unable to complete the physical examination of C.K.'s vagina and anus because of "[e]xtreme redness," "swelling," "a large amount of white mucus," and an infection in C.K.'s vaginal area. She also observed a "small tear" in C.K.'s rectum.

Ultimately, Striegler opined that the "tear to [C.K.'s] rectum" and "extreme amount of discharge from her vagina . . . could be indicative of sexual abuse."

C. Appellant denied C.K.'s allegations, implied ill motives by his children, and offered alternate explanations for C.K.'s physical condition.

Appellant testified at trial and denied C.K.'s accusations. He thought that D.K. had supported C.K.'s story because C.K. and D.K. were "close" as sister and brother. He also claimed that they had behavioral problems and were on Ritalin for a time. Appellant also claimed that C.K. was mad at him because he would not let her spend time with an older boy, Wilson, that she liked and had a crush on. He referred to an incident when a family friend, Tylynn Cross, had C.K. at her home in Rochester and Wilson was also there. Appellant asserted that C.K. was mad because Appellant would not agree to give her money so that Wilson could stay longer at Cross's home with C.K. Cross testified that C.K. was upset that Appellant would not give her money to help Wilson get to and from Cross's home.

Cross also explained how several times she found C.K. across the street in Bobby Muehle's bedroom, along with Gabriel, Bobby's niece. They played games on Muehle's computer—sometimes with the door shut, and Cross thought that was inappropriate because Muehle was a boy and C.K. and Gabriel were girls. Cross never saw Muehle touch C.K. Defense counsel questioned C.K. about whether she had ever complained of being molested by an "Uncle Johnny," but C.K. did not know who Uncle Johnny was and did not recall any incident with him. Defense counsel also called Kim Basinger, a SANE nurse, who testified that C.K. suffered from a vaginal "strep infection."[3] Basinger opined that C.K.'s strep infection and anal tear could have been the result of something other than sexual assault.

[3]Striegler was unaware of the strep diagnosis.

III. *Analysis*

In his first issue, Appellant argues that the State failed to adduce sufficient evidence on the manner and means of the alleged abuse, which he argues was an integral part of the offense. In his second issue, Appellant asserts that there was insufficient evidence to support the conviction because of a fatal variance between the allegations of "sexual abuse" in the indictment and the evidence at trial of any predicate offense. Appellant asserts in his third issue that, in its charge to the jury, the trial court failed to require that the jury find beyond a reasonable doubt that Appellant was guilty of a predicate offense. In his final issue, Appellant asserts that the trial court erred when it denied his challenge for cause to a venireman and refused to grant him a requested peremptory strike.

A. Issues One & Two: The State presented sufficient evidence that Appellant committed two or more acts of sexual abuse and there was no variance.

In his first and second issues, Appellant challenges the State's failure to specify the underlying predicate offense for continuous sexual abuse of a child in the indictment, which he claims resulted in insufficient evidence and a fatal variance. We will address his second issue and then address his first issue.

1. Appellant has waived any complaint about the indictment, and no variance exists.

In his second issue, Appellant claims that a variance arose because the indictment did not contain one or more of the eight predicate offenses outlined in Section 21.02 of the Texas Penal Code but, instead, only contained allegations of "sexual abuse." To convict a person of continuous sexual abuse of a child, the State has to prove the following: (1) a person commits two or more "acts of sexual abuse"; (2) during a period of thirty or more days; (3) against a child younger than fourteen years of age; and (4) the person is seventeen years of age or older. *Fulmer v. State*,

401 S.W.3d 305, 312 (Tex. App.—San Antonio 2013, pet. ref'd) (citing PENAL § 21.02(b)).

An "act of sexual abuse" is defined under Section 21.02(c) to include eight separate criminal offenses: (1) aggravated kidnapping, (2) indecency with a child, (3) sexual assault, (4) aggravated sexual assault, (5) burglary—under certain circumstances, (6) sexual performance by a child, (7) trafficking of persons, and (8) compelling prostitution. PENAL § 21.02(c).

A "variance" arises "when there is a discrepancy between the allegations in the charging instrument and the proof at trial." *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). There is a variance when "the State has proven the defendant guilty of a crime, but has proven its commission in a manner that varies from the allegations in the charging instrument." *Id.* This situation is not before us. Based on the indictment, in which the grand jury alleged that Appellant "commit[ted] two or more acts of sexual abuse against" C.K., the State was authorized to offer evidence of any of the eight predicate offenses under Section 21.02(c), including aggravated sexual assault. At trial, Appellant neither filed a motion to quash the indictment, nor did he request that the State be required to allege one or more of the eight predicate offenses. As a result, Appellant cannot, for the first time on appeal, make challenges to the indictment. *See Ex parte Morris*, 800 S.W.2d 225, 227 (Tex. Crim. App. 1990). Consequently, Appellant has waived any complaints about the charging instrument. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (West 2005).

Appellant also argues that the there was a fatal variance between the evidence and the indictment because the State adduced evidence of aggravated sexual assault but alleged two or more acts of sexual abuse. As we explained, an "act of sexual abuse" under Section 21.02(c) includes aggravated sexual assault. PENAL § 21.02(c)(4). This and the other predicate offenses are not an element of the offense

of continuous sexual abuse of a child but, rather, the manner and means of committing an "act of sexual abuse." *See Fulmer*, 401 S.W.3d at 312; *see also Soliz v. State*, 353 S.W.3d 850, 851 (Tex. Crim. App. 2011) (construing "[s]ubsection (c) [as] list[ing] the offenses that *may be used as elements* of an offense under subsection (b)" (emphasis added)).

A motion to set aside, dismiss, or quash an indictment should be made at the first opportunity and must be presented to the trial court prior to an announcement by that party that it is ready for trial. *Neal v. State*, 150 S.W.3d 169, 176 (Tex. Crim. App. 2004) (citing *Valadez v. State*, 408 S.W.2d 109, 111 (Tex. Crim. App. 1966); *Wilson v. State*, 398 S.W.2d 291, 293 (Tex. Crim. App. 1966) (op. on reh'g)). In this case, because Appellant did not file a motion to quash and object to the indictment, the State was not required to specify the underlying predicate offenses in the indictment. *See Neal*, 150 S.W.3d at 175–76; *see also* TEX. R. APP. P. 33.1; *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008) ("[I]f the prohibited conduct is statutorily defined to include more than one manner or means of commission, the State must, *upon timely request*, allege the particular manner or means it seeks to establish." (emphasis added) (quoting *Saathoff v. State*, 891 S.W.2d 264, 266 (Tex. Crim. App. 1994))); *cf. Geick v. State*, 349 S.W.3d 542, 546 (Tex. Crim. App. 2011) ("In order to charge theft, absent a notice-based motion to quash, a charging instrument need allege only the statutory elements of the offense: the charged person unlawfully appropriated property with the intent to deprive the owner of property."). Because Appellant did not seek to require that the State be more specific in the indictment, the State was authorized to prove what it alleged in the indictment: that Appellant "commit[ted] two or more acts of sexual abuse against C.K." The State could adduce evidence of any of the eight predicate offenses constituting an "act of sexual abuse." *See* PENAL § 21.02(c), (d). Accordingly, we hold that there was no variance. We overrule Appellant's second issue.

2. The State adduced sufficient evidence for the jury to find that Appellant committed the offense of continuous sexual abuse of a child beyond a reasonable doubt.

In his first issue, Appellant contends that the State adduced insufficient evidence to convict him of continuous sexual abuse of a child. We review a sufficiency challenge by asking whether any rational jury could have found Appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *see also Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) ("[S]ufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case."). This court views all of the evidence in the light most favorable to the jury's verdict and determines whether any rational jury could have found each element of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The trier of fact may believe all, some, or none of a witness's testimony because the factfinder is the sole judge of the weight and credibility of the witnesses. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd).

The State elicited testimony from C.K. that Appellant, who was older than seventeen years of age, penetrated C.K.'s vagina and anus with his penis multiple times while she was under the age of fourteen. C.K. estimated that Appellant sexually abused her "probably" more than ten times between the ages of five and thirteen. C.K. testified specifically about two instances where Appellant vaginally penetrated her with his penis at the house on Sunny Avenue. C.K.'s testimony showed that Appellant committed two or more acts of aggravated sexual assault by intentionally or knowingly causing the penetration of her anus or sexual organ while she was under the age of fourteen. *See* PENAL § 22.021(a)(1)(B)(i), (a)(2)(B) (defining aggravated sexual assault as intentionally "caus[ing] the penetration of the

anus or sexual organ" of a child who "is younger than [fourteen] years of age"). C.K.'s testimony alone is sufficient to support a conviction for continuous sexual abuse of a child. *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.—Dallas 2017, no pet.); *see* CRIM. PROC. art. 38.07(a) (West Supp. 2016); *see also Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (concluding child victim's testimony alone was sufficient to establish element of penetration beyond a reasonable doubt).

In addition, other testimony raised inferences that supported C.K.'s allegations of sexual abuse. D.K. testified that the night he slept in Appellant's bed with C.K., he "felt a back-and-forth motion off of [Appellant]" that "stopped probably ten minutes after [D.K.] had lai[n] down." Striegler observed extreme redness, swelling, white mucus, and an infection in C.K.'s vaginal area. She also observed a "small tear" in C.K.'s rectum. Striegler testified that the "tear to [C.K.'s] rectum" and "extreme amount of discharge from her vagina . . . could be indicative of sexual abuse."

Appellant testified and denied the accusations against him. Appellant believed that D.K. and C.K. fabricated the allegations against him, but the jury chose to believe C.K. and others and disbelieve Appellant. We defer to the trier of fact's resolution of any conflicting inferences raised in the evidence and presume that the trier of fact resolved such conflicts in favor of the verdict. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 894; *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999) (citing *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993)). After a review of the record, we hold that a rational jury could have found beyond a reasonable doubt that Appellant committed the offense of continuous sexual abuse of a child. We overrule Appellant's first issue.

B. <u>Issue Three</u>: The trial court did not err when it charged the jury that it had to unanimously find that Appellant committed two or more acts of sexual abuse during a period of thirty or more days.

In Appellant's third issue, he argues that the trial court erred in its charge to the jury because the trial court failed to require the jury to find that Appellant "was guilty of a predicate offense" beyond a reasonable doubt. The first step in assessing a jury-charge issue "is to decide whether error exists." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If Appellant fails to object to the jury charge, and error exists, then we will reverse only if Appellant has suffered "egregious harm." *Id.* at 744; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). In his brief, Appellant refers to the jury charge, which provides:

> Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, DONALD DEAN KREGER JR., beginning on or about the 1st day of March, 2006, in the County of Haskell, and State of Texas, as alleged in the indictment, did then and there during a period that was 30 or more days in duration, commit two or more acts of sexual abuse against [C.K.], a child younger than fourteen [] years of age, and said DONALD DEAN KREGER JR., was [seventeen] years of age or older, you will find the Defendant Guilty.
>
> If you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

The trial court also instructed the jury on the "lesser included" offense of aggravated sexual assault found in Count II of the indictment.

Appellant asserts that the jury had to find a predicate offense different than the lesser included offense; that the trial court erred when it failed to instruct the jury that it had to unanimously agree on which predicate offense was committed, apart from the lesser included offense of aggravated sexual assault; and that Appellant suffered egregious harm. As we explain below, we disagree that the trial court erred.

First, the trial court provided the jury with a list of predicate offenses that would constitute an act of sexual abuse. The trial court further instructed the jury that it did not have to unanimously agree on which specific acts of sexual abuse had been committed but had to unanimously agree that two or more acts of sexual abuse had occurred during a period of thirty or more days. Appellant is mistaken about the necessity of the jury to unanimously find two particular predicate offenses because the law only requires what the trial court explained in the charge. *See* PENAL § 21.02(d); *Render v. State*, 316 S.W.3d 846, 856 (Tex. App.—Dallas 2010, pet. ref'd). We hold that the parts of the jury charge that Appellant has challenged are not erroneous because the charge tracked the allegations in the indictment and properly instructed the jury that it had to unanimously find that Appellant committed two or more acts of sexual abuse against C.K. during a period of thirty or more days. *See* PENAL § 21.02(d); *Render*, 316 S.W.3d at 856. We further note that, to the extent that Appellant's jury-charge complaint is actually another sufficiency-of-the-evidence argument, the State, as we previously have explained, adduced sufficient evidence to convict Appellant of the charged offense. We overrule Appellant's third issue.

C. Issue Four: Appellant failed to preserve error to complain about the trial court's denial of his challenge for cause.

In his fourth issue, Appellant argues that the trial court erred when it denied his challenge for cause to Veniremember Mathis. Appellant claims that his challenge to Mathis should have been granted because Mathis had initially responded that he would require Appellant to prove that he was innocent of the charged offense. *See* CRIM. PROC. art. 35.16(a)(9) (West 2006). In order to preserve error for a trial court's denial of a challenge for cause, a party must:

> (1) assert a clear and specific challenge for cause; (2) use a peremptory strike on the complained-of veniremember; (3) exhaust his peremptory strikes; (4) request additional peremptory strikes; (5) identify an

> objectionable juror; and (6) claim that he would have struck the objectionable juror with a peremptory strike if he had one to use.

Allen v. State, 108 S.W.3d 281, 282 (Tex. Crim. App. 2003). The record reflects that Appellant asserted a challenge for cause against Mathis on grounds of bias and used a peremptory strike against Mathis. Appellant exhausted his peremptory strikes and requested additional strikes. Appellant, however, failed to meet the fifth and sixth requirements. Appellant neither identified an objectionable juror that sat on the jury, nor did he assert that he would have struck that juror with a peremptory strike if he had one. *See id.*; *see also* TEX. R. APP. P. 33.1. Because Appellant did not fulfill requirements five and six, he has not preserved this issue on appeal. *Allen*, 108 S.W.3d at 282. We overrule Appellant's fourth issue.

IV. *This Court's Ruling*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

November 22, 2017

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.