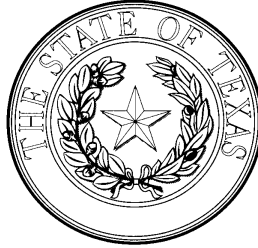


Opinion issued February 23, 2017



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00522-CR

WARREN WARRINGTON DOYLE, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1438634**

MEMORANDUM OPINION

Warren Doyle was convicted of aggravated sexual assault of a child under the age of 14 and sentenced to 30 years' confinement.¹ Although he pleaded guilty to the offense, Doyle challenges the sufficiency of the evidence to support his

¹ See TEX. PENAL CODE § 22.021(b).

conviction, arguing that there is a material variance between the indictment and the evidence of guilt.

We affirm.

Background

Warren Doyle, age 69, coached a softball team for children with special needs. His grandson was on the team, as was Kimberly,² a 12-year-old girl with autism. The team had an out-of-town tournament, and Doyle arranged to have an adjoining room with Kimberly and her mother. When Kimberly's mother became ill on the trip, Doyle offered to watch Kimberly in his room. In his hotel room, Doyle had Kimberly perform oral sex on him. He did so several more times during the trip.

Shortly after returning home from the softball tournament, Doyle came to Kimberly's home and offered to babysit her while Kimberly's mother ran an errand. While alone with Kimberly, he removed her clothes, had her perform oral sex on him, and initiated sexual intercourse, which led to him "partially" penetrating her. Three days later, after taking Kimberly on a trip alone to Kemah under the pretext of a team outing, Doyle again had Kimberly perform oral sex as he fondled her. A week later, Kimberly told her parents all that had occurred, and they contacted the police.

² The complainant is referred to by a pseudonym to protect her privacy and for ease of reading.

The original indictment asserted that Doyle had intentionally and knowingly caused the penetration of Kimberly's *mouth* with Doyle's sexual organ. The State moved to amend the indictment three months later, which the trial court permitted, to change the act constituting aggravated sexual assault to causing Kimberly's *sexual organ* to contact Doyle's sexual organ. Trial began four months later.

On the day of trial, Doyle chose to waive his right to trial, admit his guilt, and make a judicial confession to the charged offense. The trial court stated to Doyle, "You are charged by indictment with the offense of aggravated sexual assault of a child," and then asked him, "Do you know the details of that indictment or do I need to read it to you?" Doyle replied, "I know it." Doyle then pleaded guilty and confirmed that he was "pleading guilty because [he is] guilty and for no other reason."

Along with his oral admission of guilt, Doyle signed a judicial confession. It listed the act of sexual assault as causing Kimberly's *mouth* to contact Doyle's sexual organ, which was the act listed in the first indictment, not the live indictment as amended.

The trial court accepted Doyle's guilty plea but did not make any findings. The court stated that it would "withhold any finding" until it received the presentence investigation report. At the next hearing, three months later, the trial court asked whether the parties had reviewed the PSI report and whether they had

any “objections, additions or deletions” to it. Doyle stated that he had none. The PSI report was admitted. It stated that there had been no finding of guilt at the earlier court proceeding.

The PSI report contained Kimberly’s father’s recitation of her disclosure of the abuse. The report describes several incidents over a two-day period when Doyle had Kimberly engage in oral sex. It also described the incident when Doyle offered to babysit Kimberly in her home and, while alone with her, partially penetrated her before engaging in more oral sex. There was no other evidence during the sentencing hearing that described the acts underlying the sexual assault offense.

At the conclusion of the evidence, the trial court found Doyle guilty of aggravated sexual assault of a child under the age of 14 and sentenced him to 30 years’ confinement.

Sufficiency of Evidence

In a single issue, Doyle contends that the evidence is insufficient to support his guilty plea because there is a material variance between the allegations in the amended indictment and “the evidence the trial court accepted as the basis for its judgment.”

A. Statutory offense

A person commits the felony offense of aggravated sexual assault of a child if he intentionally or knowingly engages in one of several discrete acts, including causing “the penetration of the . . . sexual organ of a child by any means” and causing “the penetration of the mouth of a child by the sexual organ of the actor.” TEX. PENAL CODE § 22.021(b). Each statutorily specified means of committing aggravated sexual assault of a child is a separate offense, even though the various acts violate a single statute. *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999). “[I]f the State pleads one specific element from a penal offense that contains alternatives for that element, the sufficiency of the evidence is measured by the element that was actually pleaded, not any other statutory alternative element.” *Cada v. State*, 334 S.W.3d 766, 774 (Tex. Crim. App. 2011).

B. Variance

“As a general rule, a variance between the indictment and evidence at trial is fatal to a conviction. This is because due process guarantees the defendant notice of the charges against him.” *Reyes v. State*, 3 S.W.3d 623, 625 (Tex. App.—Houston [1st Dist.] 1999, no pet.). But not every variance is fatal; the variance must be material. *Gollihar v. State*, 46 S.W.3d 243, 248 (Tex. Crim. App. 2001). A variance is material only if it prejudices a defendant’s substantial rights. *Id.* at 247–48. A variance prejudices a defendant’s substantial rights if (1) the indictment, as

written, fails to inform the defendant of the crime charged so as to allow him to prepare an adequate defense at trial or (2) the indictment would subject the defendant to the risk of being prosecuted later for the same crime. *Id.* at 248. Variance claims routinely are analyzed as sufficiency of the evidence claims. *Id.* at 247.

C. Code of Criminal Procedure article 1.15

When a criminal defendant challenges the sufficiency of the evidence after pleading guilty, Article 1.15 dictates the sufficiency of the evidence required to support the conviction. TEX. CODE CRIM. PROC. art. 1.15. It provides that, even when a defendant pleads guilty to a felony offense, the State is required “to introduce evidence into the record showing the guilt of the defendant.” *Id.* It continues that “said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same.” *Id.*; see *Menefee v. State*, 287 S.W.3d 9, 13–14 (Tex. Crim. App. 2009).

When a defendant pleads guilty, the State is not required to prove the defendant’s guilt beyond a reasonable doubt. *Staggs v. State*, 314 S.W.3d 155, 159 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Instead, “the supporting evidence must simply embrace every essential element of the charged offense.” *Id.* The supporting evidence may take several forms, including a stipulation as to what the

evidence would have been at trial. *See id.* Such a stipulation can be, but does not necessary have to be, accompanied by an admission to the veracity or accuracy of the stipulated evidence. *See id.*

When a defendant pleads guilty and stipulates to the truth of the evidence against him, the stipulation is considered a judicial confession. *Stone v. State*, 919 S.W.2d 424, 426–27 (Tex. Crim. App. 1996). “A judicial confession alone is sufficient evidence to sustain a conviction upon a guilty plea under article 1.15.” *Stewart v. State*, 12 S.W.3d 146, 148 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *see Gutierrez v. State*, 176 S.W.3d 394, 396 (Tex. App.—Houston [1st Dist.] 2004, pet. ref’d) (same). However, “a stipulation of evidence or judicial confession that fails to establish every element of the offense charged will not authorize the trial court to convict.” *Menefee*, 287 S.W.3d at 14.

When a stipulation or confession is deficient and does not establish every element of the offense charged, the lack of evidence “may be compensated for by other competent evidence in the record.” *Id.* This includes evidence presented during a sentencing hearing. *Stewart*, 12 S.W.3d at 147–49 (stating that “article 1.15 does not distinguish between evidence offered at the guilt/innocence phase and the punishment phase of the trial” and “simply requires that there be evidence in ‘the record showing the guilt of the defendant.’” (quoting TEX. CODE CRIM. PROC. art. 1.15)); *Menefee v. State*, No. 12–07–00001–CR, 2010 WL 3247816, at

*1, *6–7 (Tex. App.—Tyler Aug. 18, 2010, pet. ref'd) (mem. op., not designated for publication) (on remand, finding evidence at sentencing hearing sufficient to support guilty plea).

D. Evidence satisfies Article 1.15

To satisfy the sufficiency requirements of Article 1.15, the State was required to offer supporting evidence that embraced every element of the charged offense. *Staggs*, 314 S.W.3d at 159. To the extent Doyle’s written confession failed to do so because it referenced a means of sexual contact not included in the amended indictment, the evidence received during the sentencing hearing, including the PSI report, compensated for the deficiency. *See Menefee*, 287 S.W.3d at 18–19; *Stewart*, 12 S.W.3d at 147–49. The PSI report stated that Doyle partially penetrated Kimberly’s sexual organ with his own, which meets the statutory requirement as specified in the amended indictment. *See TEX. PENAL CODE* § 22.021(b).

E. Statutory construction argument

Doyle argues that, even if the evidence received at the sentencing hearing is adequate to support his guilty plea, such evidence must be disregarded because the record does not support the conclusion that the trial court met another requirement Doyle argues is contained in Article 1.15—that the trial court actually “accept” the evidence “as the basis for its judgment” of conviction.

The statutory language Doyle relies on is found in the middle of Article 1.15 and states that “it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and *said evidence shall be accepted by the court as the basis for its judgment* and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same.” TEX. CODE CRIM. PROC. art. 1.15 (emphasis added).

According to Doyle, there is no indication in the record that the trial court “accepted” the evidence at the sentencing hearing “as the basis for its judgment” of conviction. He argues that the record, instead, indicates that the trial court determined guilt based only on what transpired when Doyle entered his guilty plea three months earlier without regard to evidence received later. We do not agree with Doyle’s construction of Article 1.15 or his view of the record.

We review issues of statutory construction de novo. *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Our primary objective in construing statutes is to give effect to the Legislature’s intent. *Id.* “We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired.” *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). Otherwise, we construe the statute’s words according to their plain and common meaning unless a contrary intention is apparent from the context or such a construction leads to absurd results. *Id.*

The plain meaning of the text of Article 1.15 does not support Doyle's argument. Article 1.15 does not impose a duty on the trial court to designate which body of evidence supported, and by implication which did not support, its judgment. Instead, it requires the trial court to accept the evidence of guilt the State offered, without differentiation: "[I]t shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment." TEX. CODE CRIM. PROC. art. 1.15; *cf. Stewart*, 12 S.W.3d at 148 ("Article 1.15 simply requires that there be evidence in 'the record showing the guilt of the defendant.'").

The record does not support Doyle's argument either. The trial court did not limit the evidence of guilt to that received before the sentencing hearing. Instead, following Doyle's guilty plea, the trial court expressly stated that it would "withhold any findings" to await the PSI report that was admitted as evidence at the sentencing hearing. Only after that evidence was admitted, did the trial court find Doyle guilty.

Because there was sufficient evidence to support Doyle's conviction for aggravated sexual assault of a child, we overrule Doyle's single issue.

Conclusion

We affirm.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

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