In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00483-CR

WILLIAM LEE POND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 06-04-03788-CR

MEMORANDUM OPINION

Appellant, William Lee Pond, was convicted on two counts of aggravated sexual assault of a child. A jury found Pond guilty and sentenced him to sixty years confinement on each count. Pond appeals the trial court's judgments. Pond argues on appeal that the trial court erred in denying certain challenges for cause during voir dire, denying Pond's request to have the State elect which sexual act it would rely on for conviction, and in refusing to allow Pond to reopen the evidence to present testimony from an additional

witness. Pond further argues that the evidence is insufficient to support the trial court's judgments. We affirm the judgments of the trial court.

BACKGROUND

On February 26, 2006, officers with the Montgomery County Sheriff's Department responded to a 9-1-1 call by Toni Pain alleging a sexual assault. When Officer Gerald Bruce arrived at the scene Pain was "upset" and told him that she had arrived home from the store and found her husband, Pond, on top of her young daughter. Pain told Bruce that they were under a blanket and that Pond got up "fixing his pants" and went into the bathroom. Pain told Bruce that her daughter, A.P., who was eight years old at the time of the alleged assault, "pulled up her underwear and her pants." Pain further told Bruce that when Pain confronted Pond he admitted that he had been sexually assaulting A.P. "for six months."

Bruce testified that Pain indicated that Pond had fled the residence when she called the police. A.P. was not at the residence when Bruce arrived and he advised Pain that A.P. needed to be brought back to the residence. Police gathered evidence at the scene including the blanket that A.P. and Pond had been under, the pants Pond was wearing at the time of the assault, and the shorts and panties A.P. was wearing at the time of the assault. Police were unable to locate Pond. After speaking with the responding officers, Pain took A.P. to the hospital to be examined.

At the time of trial, A.P. was twelve years old. A.P. testified that on February 26, 2006, she was eight years old. A.P. stated that she did not recall how old she was the first time that her stepfather sexually assaulted her. A.P. testified that Pond touched her privates "with his private." She further testified that Pond touched the inside of her bottom with his private. A.P. did not tell her mom because she was scared. A.P. stated that the first time Pond assaulted her he told her not to tell anyone. A.P. explained that the assaults happened "a lot" at the "old house." A.P. also stated that at some point the abuse started happening again after they moved to the trailer on Fire Tower Road. A.P. told the jury that the assaults occurred in her room, her mom's room, and on the couch in the living room. A.P. explained that Pond would sometimes call her into her parents' bedroom and assault her. She further stated that sometimes he would get into the bed she shared with her little sister, take off his pants, take her shorts off, and put his private in her bottom. On some of these occasions Pond would fall asleep in her bed. A.P. further stated that the assaults happened "a lot" on the couch.

A.P. testified that on the day her mom walked in while Pond was assaulting her, Pond had called her over to the couch to come lay down with him, pulled her pants down, and "did the same thing he'd been doing." When asked if this meant, "the same thing that he did . . . with his private in your private?" A.P. responded, "Yes, sir." A.P. stated that her siblings were either outside or in their rooms during the assault. A.P. testified that she and Pond were under a blanket and Pond had his pants off. A.P. explained that she was

lying on the couch facing "up" when her mother walked in the back door and that she and Pond were both facing the kitchen. A.P. stated that when her mom walked in, Pond had his private in her bottom and he "jumped up and ran to [her mom's] room." A.P. stated that she was "pulling up [her] pants" when Pond ran to the bedroom. When Pain asked A.P. what was going on, she said "nothing" because she did not know what to say. A.P. stated that her mom went into the bedroom and began yelling at Pond. Thereafter, Pain told A.P. and her siblings they were leaving. Prior to leaving, Pain called all the kids into the bedroom to tell Pond goodbye. A.P. stated that Pond whispered into her ear that he was sorry and "don't let anyone do that to [her] ever again." Thereafter, Pain took A.P. and her siblings to Coldspring to Theresa and Leonard Pond's house.[1] A.P. testified that later that day her Uncle Leonard drove her back to her house.

Theresa Pond also testified at trial. Theresa testified that she was married to Leonard, Pond's cousin. Theresa testified that Pain called her "upset" and told her that she walked through her back door and "caught [Pond] and [A.P.] on the couch," and Pond "jumped up and ran to the bathroom" and "[A.P.] got up and pulled her pants up[.]" Pain brought the children to Theresa and Leonard's house in Coldspring. At some point Pain went back to the family's trailer in Conroe. Thereafter, Pain called the police. Theresa testified that she and Leonard drove the children back to Conroe. Theresa stated that she

[1] The testimony established that the man A.P. refers to as "Uncle Leonard" is Pond's cousin. For ease of reference we will refer to him as Uncle Leonard.

accompanied Pain and A.P. to the hospital and Leonard drove the other children back to Coldspring. Pain and her children stayed with Theresa and Leonard for about two weeks and then went to Alabama where they stayed with Pain's family for roughly three months.

Pain also testified at trial. Pain testified that A.P. was born in March 1997 and she started dating Pond in May 1997. Pain and Pond were married in October 2004. Pain had two children, J.P. and A.P., prior to marrying Pond, and Pain and Pond had two children together. At the time of trial, Pain and Pond were divorced, purportedly as a result of the February 26 incident. Pain testified that in December 2002 they moved to the trailer on Fire Tower Road in Conroe. According to Pain, Pond would lay down with A.P. under a blanket. Pain further testified that Pond would go lay down with the girls at night to "put them to sleep." Pain told the jury that after lying down with the girls, Pond would often want to have sex with her. If she refused, he would watch porn and masturbate.

In November 2005, Pond was diagnosed with testicular cancer. At the time of the alleged assault on February 26, Pond had been home from the hospital for about a week. Pain testified that Pond was still able to have sex. Pain stated that on February 26 she walked through the back door of their trailer and saw A.P. jump up from the couch and when she got into the kitchen A.P. appeared to have "just pulled her shorts up." According to Pain, Pond ducked down and ran in front of the kitchen bar to the bathroom in the master bedroom. Pain stated that Pond's shirt was off. Pain testified that she asked A.P. what was going on and she said, "Nothing." Pain told A.P. to go to her room and

then Pain went into the bedroom to confront Pond. Pain explained that she met Pond as he was coming out of the master bathroom and the "look on his face" was "like he just got caught doing something." Pain testified that she started screaming because she knew what had happened "by the look on his face." According to Pain, Pond did not deny sexually assaulting A.P. Pain stated that Pond admitted he had been having sex with A.P. "for six months." According to Pain, Pond was crying and said he was sorry. Pain testified that Pond said "he was going to take the shotgun and go out back and shoot himself."

Pain stated that for "an hour or two" she alternated between talking to A.P., who was in her bedroom, and talking to Pond, who was in the master bedroom. Pain testified that A.P. told her that Pond put "his private part . . . in her bottom." Pain told the kids they were leaving and took them to Coldspring. At some point thereafter, Pain returned to their trailer in Conroe and called the police. Pain stated that when she called the cops Pond "looked scared" and "took off into the woods across the street." Pond eventually turned himself in to the police.

The jury convicted Pond of two counts of aggravated sexual assault and sentenced him to sixty years confinement on each count. This appeal followed. Pond asserts nine issues on appeal. Pond argues on appeal that the trial court erred in denying certain challenges for cause during voir dire, denying Pond's request to have the State elect which sexual act it would rely on for conviction, and in refusing to allow Pond to reopen and

present evidence from an additional witness. Pond also argues that the evidence is insufficient to support the trial court's judgments.

CHALLENGES FOR CAUSE

In issues one through three, Pond argues that the trial court erred in denying Pond's challenges for cause to jurors numbered 12, 19, and 39. The State and the defense are entitled to jurors who can consider the entire range of punishment for the charged offense. *Cardenas v. State*, 325 S.W.3d 179, 184 (Tex. Crim. App. 2010). A juror who states he cannot consider the minimum punishment for a particular offense is subject to challenge for cause. *Id*. at 185. The opposing party or trial judge may further examine the potential juror to ensure that he fully understands his position. *Id*. Unless there is further clarification or vacillation by the potential juror, the trial court must grant a challenge for cause to a juror who has stated that he cannot consider the full range of punishment. *Id*.

We begin by addressing Pond's challenges to jurors numbered 19 and 39. Pond challenged Juror No. 19 for cause on the basis that Juror No. 19 was unable to consider the full range of punishment. Pond challenged Juror No. 39 on the basis that Juror No. 39 could not consider the full range of punishment and stated she would lean towards believing the child. The proponent of a challenge for cause has the burden of establishing his challenge has merit. *Feldman v. State*, 71 S.W.3d 738, 747 (Tex. Crim. App. 2002), *superseded by statute on other grounds*, Tex. Code Crim. Proc. Ann. art. 37.071, *as recognized in Coleman v. State*, No. AP-75478, 2009 WL 4696064, at *11 & n.46 (Tex.

Crim. App. Dec. 9, 2009). "We review a trial court's ruling on a challenge for cause with considerable deference because the trial judge is in the best position to evaluate a veniremember's demeanor and responses." *Gardner v. State*, 306 S.W.3d 274, 295-96 (Tex. Crim. App. 2009). We will reverse a trial court's ruling on a challenge for cause only for a clear abuse of discretion. *Id*. at 296. Particular deference is afforded the trial court's ruling when a veniremember's answers are "ambiguous, vacillitating, unclear, or contradictory[.]" *Id*.

Juror No. 19 initially stated that if he found the defendant guilty he would be unable to consider the minimum of five years in prison. When the State asked Juror No. 19 follow-up questions, Juror 19 stated that he did not "know any of the particulars to the case" but "as a general statement" he "probably [would] not be able to" consider the full range of punishment. However, Juror 19 agreed he could "keep an open mind" as to punishment and base his verdict on the evidence. We conclude the trial court did not abuse its discretion in denying Pond's challenge for cause to Juror No. 19. *See Gardner*, 306 S.W.3d at 296. We overrule issue two.

During voir dire, Juror No. 39 initially stated that she did not believe she could consider the full range of punishment. Nevertheless, like Juror No. 19, when asked follow-up questions regarding this position, Juror No. 39 clarified that whether she could consider the minimum punishment would depend on the facts and evidence presented. Juror No. 39 raised her hand when defense counsel asked if anyone would "always believe

a child who makes an outcry of sexual assault?" When defense counsel followed up with questions regarding Juror No. 39's position on a child's credibility, Juror No. 39 clarified that she would merely "tend to believe [the child] more," at the outset of the case. Specifically, the exchange was as follows:

> [Counsel:] . . . I questioned you earlier that, if a child were to make an outcry of sexual assault, that you would always take that child's statement to be true.
>
> [Juror 39:] No. I would tend to believe them more.
>
> [Counsel:] Okay. And so, with --
>
> [Juror 39:] At first.
>
> [Counsel:] So, as we start off here today, the child would receive more credibility than any other witness? Is that a fair statement?
>
> [Juror 39:] Starting out, yeah.
>
> [Counsel:] . . . And I think you stated that you would not be able to presume [the defendant] to be innocent at this time; is that correct?
>
> [Juror 39:] No, I would -- I don't know.
>
> THE COURT: Would you be willing to wait to hear the evidence before you decide --
>
> [Juror 39:] Yeah, I would try to; but I would lean toward the girl.

A juror who cannot impartially judge the credibility of the witnesses is challengeable for cause for having bias or prejudice in favor of or against the defendant. Tex. Code Crim. Proc. Ann. art. 35.16(a)(9) (West 2006); *see also Jones v. State*, 982

S.W.2d 386, 389 (Tex. Crim. App. 1998). Pursuant to article 35.16(a)(9), a juror must be "open-minded and persuadable, with no *extreme* or *absolute* positions regarding the credibility" of a particular witness. *Ladd v. State*, 3 S.W.3d 547, 560 (Tex. Crim. App. 1999). However, the fact that a witness is "more or less skeptical of a certain category of witness" does not make him subject to challenge for cause. *Feldman*, 71 S.W.3d at 747 (holding trial judge did not err in denying challenge for cause to veniremember who stated that he would "lean towards" believing a police officer over a layperson); *see also Ladd*, 3 S.W.3d at 560 (recognizing that veniremembers are not challengeable for cause "simply because they would give certain classes of witnesses a slight edge in terms of credibility"); *Jones*, 982 S.W.2d at 389 (holding veniremember not challengeable for cause because she stated she would be more skeptical of accomplice witness testimony); *compare Hernandez v. State*, 563 S.W.2d 947, 950 (Tex. Crim. App. 1978) (holding veniremember was subject to challenge for cause because she stated that she would *always* believe police officers who testified at trial). Juror No. 39 did not take an absolute position with regard to the credibility of any witness. The fact that Juror No. 39 would initially "lean toward" a child alleging a sexual assault does not make her subject to challenge for cause. *See Feldman*, 71 S.W.3d at 747; *Ladd*, 3 S.W.3d at 560. On this record, we conclude the trial court did not abuse its discretion in denying the challenge for cause to Juror No. 39. *See Feldman*, 71 S.W.3d at 747; *Ladd*, 3 S.W.3d at 560. We overrule issue three.

During voir dire, Juror No. 12 agreed that she could not consider "the full range of punishment, the minimum being five [years]," if she found the defendant guilty of aggravated sexual assault. Neither the State, nor defense counsel, asked any follow-up questions of Juror No. 12 regarding her position or her understanding of the law. Defense counsel challenged Juror No. 12 for cause. The trial court denied the challenge.

To preserve error and show harm regarding a trial court's denial of a challenge for cause, a defendant must: (1) assert a clear and specific challenge for cause, (2) exercise a preemptory challenge on a veniremember whom the trial court should have excused for cause, (3) exhaust all of his preemptory challenges, (4) request additional preemptory challenges that were denied, and (5) identify the objectionable veniremember who actually sat on the jury whom he would have struck otherwise. *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010); *Busby v. State*, 253 S.W.3d 661, 670 (Tex. Crim. App. 2008); *see also Cardenas*, 325 S.W.3d at 184 n.13; *Loredo v. State*, 159 S.W.3d 920, 923 (Tex. Crim. App. 2004).

Pond asserted a clear and specific challenge for cause. Pond exercised a preemptory challenge to Juror No. 12. Counsel stated:

> At this time, Your Honor, since that request has been denied, and those challenges for cause have been overruled, we report to use preemptory challenges on No[s]. 12, 13, 19, 39, 45. And as such objectional jurors Nos. 7, 15, 19, 29, and 40 will be left on the panel. And we're asking the Court to give us five additional preemptory challenges to cure any potential error or harm.

The trial court denied Pond's request for additional preemptory strikes. While Pond identified Juror No. 19 as one of the five objectionable jurors who sat on the jury, Juror No. 19 was struck from the panel. Juror No. 19 did not sit on the jury. Pond used five preemptory strikes to remove jurors he had challenged for cause. However, only four identified objectionable jurors sat on the jury as a result of the trial court's denial of Pond's challenges for cause. Thus, the record demonstrates that Pond exercised four of his peremptory challenges on jurors that were not properly subject to challenges for cause, and that Pond, instead, could have utilized these four peremptory challenges to strike the jurors he identifies who were seated on the jury that were objectionable to him. Consequently, Pond cannot demonstrate that the objectionable jurors were seated based on the trial court's allocation of peremptory challenges as opposed to the strategy he exercised in utilizing his peremptory challenges. We conclude that Pond has not preserved error or shown harm. *See Davis*, 329 S.W.3d at 807; *Busby*, 253 S.W.3d at 670; *Loredo*, 159 S.W.3d at 923. We overrule issue one.

ELECTION

In issue four, Pond argues that the trial court erred in denying Pond's request that the State elect which sexual act it would rely on for conviction. In issue five, Pond contends that he was denied his right to effective assistance of counsel on appeal as a result of the State's failure to elect. Pond argues that the State's failure to elect prevented

appellate counsel from adequately evaluating the sufficiency of the evidence to support the jury's verdict.

When an accused is charged with multiple offenses in a single indictment, the Code of Criminal Procedure requires that each separate offense be set out in a separate "count." Tex. Code Crim. Proc. Ann. art. 21.24(a) (West 2009); *Martinez v. State*, 225 S.W.3d 550, 555 (Tex. Crim. App. 2007). Different methods of committing a particular offense within a single count may be alleged in different paragraphs. Tex. Code Crim. Proc. Ann. art. 21.24(b) (West 2009); *Martinez*, 225 S.W.3d at 555. In the present case, the indictment charged Pond with two counts of aggravated sexual assault. The indictment charged in pertinent part:

[COUNT NO. 1]

> . . . **William Lee Pond**, hereinafter styled Defendant, on or about **February 26, 2006**, . . . did then and there intentionally and knowingly cause the penetration of the female sexual organ of [A.P.] by inserting his sexual organ; . . . ,
>
> **Paragraph B**
>
> . . . on or about **February 26, 2006** . . . Defendant, did then and there intentionally and knowingly cause the sexual organ of [A.P.] to contact the sexual organ of the Defendant, . . . ,
>
> **COUNT NO. 2**
>
> . . . on or about February 26, 2006 . . . Defendant, did then and there intentionally and knowingly cause the penetration of the anus of [A.P.] by inserting his sexual organ; . . . ,

Paragraph B

> . . . on or about **February 26, 2006** . . . Defendant, did then and there intentionally and knowingly cause the sexual organ of the Defendant to contact the anus of [A.P.] . . . .

"The general rule is that where one act of intercourse is alleged in the indictment and more than one act of intercourse is shown by the evidence in a sexual assault trial, the State must elect the act upon which it would rely for conviction." *O'Neal v. State*, 746 S.W.2d 769, 771 (Tex. Crim. App. 1988). An exception to the rule exists where several acts of intercourse are committed by "one continuous act of force and threats, and are part of the same criminal transaction." *Id.* Generally, the State must make its election at or by the resting of its case in chief so that a defendant has notice of the acts he may be called upon to defend and is able to put forward a vigorous defense. *Id.* at 772; *see also Phillips v. State*, 193 S.W.3d 904, 912 (Tex. Crim. App. 2006). However, when a defendant waits until the close of all the evidence to move for election, he forfeits his right to an election at the close of the State's evidence. *Phillips*, 193 S.W.3d at 912. Under such circumstances, a defendant waives his right to notice prior to presenting his defense but preserves his right to a unanimous jury verdict. *Id.*

At trial, A.P. testified that Pond sexually assaulted her over a period of years by penetrating her anus and sexual organ. A.P. testified generally about the repeated abuse. A.P. also testified about the specific sexual assault that occurred on February 26. The evidence presented at trial regarding Pond's repeated sexual assaults obligated the State to

elect which of these acts it would rely upon for conviction upon timely request of Pond. *See Phillips*, 193 S.W.3d at 906-10, 912-13 (holding that the State was required to elect where it alleged three acts in the indictment and the evidence established both specific instances of sexual assault consistent with those alleged in the indictment and that other similar acts occurred over an extended period of time). If Pond had moved for election at the close of the State's evidence, the trial court would have been obligated to require the State to elect at that time. Pond moved for an election but did not do so until the close of all the evidence. Therefore, while Pond waived any complaint regarding notice of such election during the evidentiary stage of the trial, he preserved his right to a unanimous jury verdict. *See Phillips*, 193 S.W.3d at 912. On appeal, the State concedes that Pond was entitled to an election but argues that the trial court's error was harmless. We agree.

Election error which implicates jury unanimity is analyzed under the harm standard applicable to constitutional errors. *Dixon v. State*, 201 S.W.3d 731, 734 (Tex. Crim. App. 2006) (citing *Phillips*, 193 S.W.3d at 913-14). Under this analysis we must reverse unless we find beyond a reasonable doubt that the error "did not contribute to the conviction or had but slight effect." *Phillips*, 193 S.W.3d at 914; *see also* Tex. R. App. P. 44.2(a). "'[E]rror in failing to require the State to elect is harmless when there is detailed testimony as to one occurrence and general, very vague and unspecific testimony as to other occurrences.'" *Hulsey v. State*, 211 S.W.3d 853, 857 (Tex. App.—Waco 2006, no pet.) (quoting *Phillips v. State*, 130 S.W.3d 343, 355 (Tex. App.—Houston [14th Dist.] 2004),

aff'd, 193 S.W.3d 904 (Tex. Crim. App. 2006)); *see also O'Neal*, 746 S.W.2d at 772. Under such circumstances, it is clear to the jury which act the State is relying on for conviction. *See Hulsey*, 130 S.W.3d at 857 ("Under this evidence, it would have been clear to Hulsey and the jury that the State was relying on these two occurrences to convict."); *see also Phillips*, 130 S.W.3d at 354 ("[W]e hold that the jury would have known the specific act on which the State relied.").

In *O'Neal*, the indictment charged the defendant with committing the offense "'on or about the 26th day of April, 1984.'" *O'Neal*, 746 S.W.2d at 772. In its opening statement, the State focused on the act of intercourse that occurred on or about April 24, 1984. *Id*. Additionally, the witnesses testified about the events that transpired on the night of April 24, 1984. *Id*. In regards to prior acts of intercourse, the complainant testified that her stepfather had been having intercourse with her every other night since she was five years old. *Id*. The complainant's stepsister further testified that she had witnessed similar occurrences between the defendant and the complainant regularly for the past two to three years. *Id*. The Court in *O'Neal* concluded that by the close of the State's case, "it was clear that the act upon which the State would rely for conviction occurred on April 24, 1984." *Id*. The Court held the State's belated election was harmless error. *Id*. at 773; *see also Phillips*, 130 S.W.3d at 354; *Hulsey*, 211 S.W.3d at 856-57; *compare O'Neal*, 746 S.W.2d at 772, *and Phillips*, 130 S.W.3d at 354, *with Farr v. State*, 140 S.W.3d 895, 900-01 (Tex. App.—Houston [14th Dist.] 2004) ("[T]his case does

not present a situation in which the complainant gave a detailed account of one sexual act in addition to testifying that it occurred on a regular basis[.]"), *aff'd sub nom. Phillips*, 193 S.W.3d at 914.

In the present case, during opening statement, the prosecutor discussed the alleged February 26 incident in detail. Officer Bruce also testified regarding his response to Pain's 9-1-1 call and his initial investigation into the February 26 incident. A forensic DNA specialist testified regarding stains that were extracted from the blanket that was used during the February 26 incident. As set forth above, A.P. testified in detail regarding the February 26 incident. In fact, the testimony of all the State's witnesses focused on the February 26 incident and subsequent investigation.

In addition to testifying about the February 26 incident, A.P. also testified generally regarding the first time she was sexually assaulted by Pond and the repeated abuse. A.P. stated that she believed she was "in first [grade] or kindergarten" the first time Pond assaulted her and that on that occasion he did "[t]he same thing" he's been doing and that he told her not to tell anyone. She explained that by doing the "same thing" she meant that he touched her privates with his private, touched the inside of her bottom with his private. She stated that she did not remember how many times it happened at the "old house" but that it "happened a lot." A.P. further testified that the assaults at the trailer took place in her room, her mom's room, and on the couch. She confirmed that the assaults occurred the same way; Pond tried to put his private inside her private and put his private inside her

bottom. A.P. testified that there were occasions on which Pond would get into the bed she shared with her sister and sexually assault her. A.P. testified that the assaults happened "practically all the time."

While there was general testimony in the record regarding repeated instances of abuse, there was only specific, detailed testimony regarding the February 26 incident. Because the State's evidence was focused on the sexual assault that occurred on February 26, we conclude that it was clear to the jury that the State was relying on that occurrence to convict Pond. Thus, the trial court's error in failing to require the State to elect was harmless. *See O'Neal*, 746 S.W.2d at 772-73; *Hulsey*, 211 S.W.3d at 856-57; *Phillips*, 130 S.W.3d at 354. We overrule issue four.

Additionally, because we conclude under this evidence it was clear to the jury which incident of alleged sexual assault the State was relying on for conviction, we find Pond's fifth issue unpersuasive. Appellate counsel was not prevented from adequately presenting a sufficiency issue on appeal. We conclude that the State's failure to elect did not result in a denial of the effective assistance of appellate counsel. We overrule issue five.

SUFFICIENCY OF THE EVIDENCE

In issues six and seven, Pond argues that the evidence is legally and factually insufficient to support the jury's verdict. In *Brooks v. State*, the Court of Criminal Appeals concluded that there is no meaningful distinction between legal and factual

sufficiency review in a criminal case. 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The Court held that "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id*. at 912 (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). Therefore, in determining whether there is sufficient evidence to support the jury verdict, we must review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). "The *Jackson* standard of review gives full play to the jury's responsibility to fairly resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences from the evidence." *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 3411, 177 L.Ed.2d 326 (2010).

A.P. testified in detail regarding the sexual assault that occurred on February 26. Pain and Theresa also testified regarding the events that occurred on February 26. Pain testified that when she confronted Pond he did not deny the assault and admitted that he had been assaulting A.P. for six months. Law enforcement and medical personnel testified regarding statements made by A.P. and Pain regarding the February 26 incident.

In arguing the evidence is insufficient, Pond points to evidence that A.P.'s genital exam was "completely normal" and the fact that there was no semen or blood recovered

from A.P. Tiffany Dusang, the sexual assault nurse examiner, who examined A.P. following the February 26 incident, testified that A.P. was able to describe the February 26 incident. Dusang testified that she found no injury to the vagina or anus of A.P., however, she did observe three bruises on the buttocks. Dusang explained that her findings in this case were consistent with sexual abuse. Dusang explained that "less than 5 percent" of children examined show injury as a result of sexual assault because generally the person who assaults them "is somebody that they know" and "have a loving relationship with" and who does not want to physically hurt them.

Pond testified on his own behalf that on or around November 2005 he was diagnosed with testicular cancer. Pond explained that one of his testicles started to swell and swelled to the "size of a coke can," which caused him to have to "contain" his testicle with his hand during sex. According to Pond, he could not comfortably have sex on the couch. In November 2005, following this diagnosis, Pond had surgery to have the testicle removed. Pond explained he began chemotherapy following surgery. Pond stated that he had been in the hospital the week prior to the alleged February 26 incident, and that he was throwing up and hurting when he returned home.

Pond told the jury that A.P.'s allegations are "untrue" and that he believes she made the allegations because "her mom made her." Pond testified that he has never touched A.P. inappropriately. Regarding the alleged February 26 incident, Pond stated that he was sleeping on the couch, and Pain woke him up and said she was going to the store.

According to Pond, when Pain arrived home, he was in the bathroom and she came into the bathroom and started yelling that he had been cheating on her. Pond testified that Pain believed he was cheating because there was a condom missing and, at some point after the confrontation she left with the children**.** Pond explained that Pain later returned to the trailer and called the police and stated he had been molesting her daughter. Pond stated that he fled from the residence because he was scared and later turned himself in because he believed there was a warrant out for his arrest and he was on probation.

Pond's cousin, Leonard Pond, also testified at trial. Leonard testified that on the morning of February 26, Pain and Pond and their four children came out to his house to go fishing. According to Leonard, the fishing trip ended early and Pond and his family went home. Leonard testified that at some point later in the day, Pain brought the children back to his house. Leonard told the jury that the following day, A.P. "got upset" and said "her daddy is going to jail for something he didn't do." According to Leonard, he was unaware of the alleged February 26 incident and assumed that A.P. was referencing Pond's probation.

In rebuttal, the State presented the testimony of Theresa's daughter, Brittany Goodwin. At the time of trial, Goodwin was seventeen years old. Goodwin testified that at the time of the February 26 incident she was fourteen years old. Goodwin explained that she was at the home on the day of the alleged assault. Goodwin recalled that when Pain and the children arrived at their home in Coldspring, Pain "was upset." Goodwin

stated that A.P. stayed the night at their house that night and told her that Pond had been sexually assaulting her for a while and that Pain "had caught them." Goodwin told the jury that A.P. stated that when her mom walked in "they were putting their clothes on," and that Pond "act[ed] like nothing was going on" and "ran into the bedroom." Goodwin testified that A.P. was scared. Goodwin further testified that Leonard was at the house on the day of the assault when Pain arrived with the children, was aware of what had happened, and appeared to have been upset.

Determinations about the credibility of each witness and about whether to believe or disbelieve any portion of a witness's testimony are left to the jury. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When a jury is faced with conflicting testimony and returns a verdict of guilty, we presume the jury resolved the conflicts in the testimony in favor of the prosecution. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). It was within the province of the jury to either believe the testimony of the State's witnesses regarding the alleged February 26 incident or to believe the testimony of Pond and his witnesses. The jury believed the testimony of A.P. and Pain. On the record before us, we find a rational jury could find the elements of the offenses as charged in the indictment beyond a reasonable doubt. The evidence is sufficient to support the jury's verdicts. We overrule issues six and seven.

MOTION TO REOPEN

In issues eight and nine, Pond argues that the trial court erred in denying his request to reopen evidence and introduce testimony from J.P., A.P.'s brother, and that the trial court abused its discretion in finding J.P. incompetent to testify at trial. After the State and Pond rested, the State presented a bill of review regarding the testimony of J.P., which the State sought to introduce in rebuttal as an extraneous sexual assault committed by Pond.

At the time of trial, J.P. was thirteen years old. J.P. explained that he understood the difference between the truth and a lie. J.P. testified that prior to the family going to Alabama, Pond had touched him "[i]n the private area." J.P. stated that Pond touched him "in the front," "[q]uite a few times." J.P. explained that the touching was on the outside of his pants and that he was always clothed during the assaults. J.P. stated that he did not recall how old he was when the inappropriate touching occurred but that it made him uncomfortable. J.P. stated that he did not tell his mother. J.P. explained that he had testified in Pond's first trial but that nobody ever asked him if anything like this had happened to him.[2] J.P. explained that he did not tell anyone that Pond had inappropriately touched him during the first trial because he was nervous. J.P. stated that he eventually

[2] Pond was initially tried for the charged offense in March 2008. However, Pond's first trial resulted in a hung jury. In addressing motions in limine, counsel for both parties agreed that no reference would be made in the underlying proceeding to the first trial of this cause. To the extent necessary, the first trial was referenced only as an earlier proceeding or hearing.

told his mother about the assaults. When defense counsel questioned J.P., he stated that he did not remember when he first told his mother about the assaults but that it was when he was living in the trailer on Fire Tower Road. J.P. explained that following the February 26 incident, his mother questioned him and his siblings about whether Pond had touched them inappropriately, and he told her "no."

Defense counsel elicited the following testimony from J.P. regarding when he first told his mother about the assaults:

> [Counsel:] And when was the first time you made mention of this to anybody?
>
> [J.P.:] When my mom told me that he did -- said he did it back in jail.
>
> [Counsel:] Okay.
>
> [J.P.:] They had him on TV.
>
> [Counsel:] . . . So, this would have been . . . kind of a long time ago when he was in jail when he was on TV, right? Yes?
>
> [J.P.:] Yes.
>
> [Counsel:] That's when you first told your mom about it, right?
>
> [J.P.:] Yes.

Thereafter, the following exchange took place on the record:

> THE COURT: [J.P.], were you just telling [defense counsel] that you told your mom before that first hearing, that first big hearing in the other building?
>
> [J.P.:] No. I told her after that.

THE COURT: That's what I thought.

. . . .

[Counsel:] You told her shortly thereafter?

[J.P.:] Yes.

. . . .

THE COURT: . . . So, before the first trial with Mr. Pond, you had not told your mom?

[J.P.:] No.

. . . .

[Counsel:] And so, you remember -- if he was on T.V., it was when he first got arrested, do you recall that?

[J.P.:] No. But my mom told me that when I went up there.

[Counsel:] . . . what did your mom tell you? Did she tell you the first hearing didn't go the way she wanted it or --

[J.P.:] She told me that she[sic] had did it to me and [A.P], but I don't remember.

[Counsel:] Okay. So, your mom told you that this happened to you and [A.P.], but you didn't remember?

[J.P.:] Yes.

[Counsel:] So, she refreshed your memory and helped you remember it?

[J.P.:] Yeah.

. . . .

THE COURT: Did you remember first and tell your mom?

[J.P.:] No.

THE COURT: Your mother knew that --

[J.P.:] My mom told me. And I started to think about it, and I remembered.

[Counsel:] Judge, we have no objection to the admission of his testimony. In fact, we want the jury to hear it.

The State further questioned J.P. as follows:

[State:] Do you remember this happening to you?

[J.P.:] No. I remember it, but I don't remember what day it was.

[State:] Okay. Tell us what you remember? What you remember. Not what your mom told you, [J.P.], what you remember?

[J.P.:] That he was touching me inappropriately.
[State:] And where was he touching you?

[J.P.:] In the private area.

[State:] Okay. Now, are you here based upon something that your mom told you or based upon what you remember?

[J.P.:] What I remember.

The State stated that it did not wish to call J.P. to testify. Defense counsel made a motion to reopen its case in order to call J.P. as a witness. Defense counsel argued that the testimony of J.P. supported the defensive theory that Pain had coached A.P. to say that Pond had sexually assaulted her. The trial court concluded that it could not find beyond a reasonable doubt that Pond had committed the extraneous offense and excluded the

evidence. The trial court denied Pond's request to reopen. The following day, Pond presented a bill of review regarding J.P.'s potential trial testimony. Pond argued he should be allowed to reopen his case pursuant to article 36.02 of the Code of Criminal Procedure to call J.P. as a witness. The trial court denied this request and concluded that J.P. was incompetent to testify under Rule 601 of the Rules of Evidence and the factors enumerated in *Reyna v. State*, 797 S.W.2d 189, 191-92 (Tex. App.—Corpus Christi 1990, no pet.).

We review a trial court's denial of a request to reopen the evidence under an abuse of discretion standard. *Reeves v. State*, 113 S.W.3d 791, 794 (Tex. App.—Dallas 2003, no pet.) (citing *Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003)). A trial court must allow the introduction of evidence at any time before the conclusion of argument if it appears necessary to the due administration of justice. Tex. Code Crim. Proc. Ann. art. 36.02 (West 2007). "'[D]ue administration of justice' means a judge should reopen the case if the evidence would materially change the case in the proponent's favor." *Peek*, 106 S.W.3d at 79. To establish a material change, the proponent of the evidence must show that the evidence is more than "just relevant – it must actually make a difference in the case." *Id*. Among the factors to consider in determining the materiality of the evidence under article 36.02 are the weight of the evidence, its probative value, the issue upon which it is offered, and whether it is cumulative. *See id*. at 77-79.

In the present case, the State concedes that because J.P. was present and ready to testify and the substance of his testimony was apparent at the conclusion of the hearing, the only question is whether the trial court abused its discretion in determining that J.P.'s testimony was not necessary to the due administration of justice. *See generally Reeves*, 113 S.W.3d at 795. We are not persuaded that J.P.'s testimony would have materially changed the case in Pond's favor. Pond testified at trial that Pain manipulated or coached A.P. to make the allegations against him because Pain believed Pond was cheating on her. In addition, Pond's cousin Leonard testified that A.P. told him that Pond was going to go to jail for "something he didn't do." The jury heard testimony regarding Pond's theory that Pain was behind the allegations, as well as his testimony regarding the events of February 26. The jury also heard testimony from A.P., Pain, Theresa, Goodwin, and law enforcement personnel regarding the events of February 26. J.P.'s testimony regarding how he came to recall that he had been touched inappropriately centered on a conversation J.P. had with his mother after Pond's first trial, well after the February 26 incident of A.P. Moreover, J.P. testified that his testimony was based on what he remembered and not what his mother told him. On this record, we cannot conclude that J.P.'s testimony would have materially changed the case in Pond's favor.

We hold the trial court did not abuse its discretion in denying Pond's motion to reopen evidence to introduce the testimony of J.P. We overrule issue eight. Because we

overrule issue eight, we need not address the merits of issue nine. Having overruled the issues raised on appeal, we affirm the judgments of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted March 10, 2011
Opinion Delivered June 15, 2011
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Before Gaultney, Kreger, and Horton, JJ.