In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00065-CR

BOBBY RAYMOND ANDERSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 84th District Court
Hutchinson County, Texas
Trial Court No. 10,931; Honorable William D. Smith, Presiding

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January 10, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.[1]

Appellant, Bobby Raymond Anderson, was convicted by a jury of ten counts of indecency with a child by contact.[2] He was sentenced to ten consecutive periods of confinement of twenty years and assessed ten $10,000 fines, for a total of 200 years

[1] Justice Mackey K. Hancock, retired, not participating.

[2] See TEX. PENAL CODE ANN. § 21.11(a), (c) (West 2011). An offense under this section is a second degree felony. *Id.* at § 21.11(d).

confinement and a fine of $100,000.[3] Appellant asserts (1) the evidence is insufficient as to each conviction, (2) article 38.37, sec. 2 of the Texas Code of Criminal Procedure[4] is unconstitutional on its face, (3) article 38.37, sec. 2 is unconstitutional as applied, and (4) the trial court erred by failing to perform a balancing test under Rule 403 of the Texas Rules of Evidence before admitting extraneous offense evidence that was more prejudicial than probative. We affirm.

BACKGROUND

On November 15, 2012, an indictment issued in Cause Number 10,930 alleging Appellant had engaged in the continuous sexual abuse of M.A.,[5] a child younger than seventeen years of age.[6] That same day, a second indictment issued in Cause Number 10,931 alleging Appellant had committed ten separate acts of indecency with a child. The ten-count indictment alleged Appellant intentionally and knowingly contacted the breast of M.A., a child under the age of seventeen years of age, with the intent to arouse and gratify his sexual desire on or about November 1, 2008 (Count I), March 2, 2009 (Count III), February 1, 2012 (Count V), September 1, 2010 (Count VII), and March 1, 2011 (Count IX). The remaining five counts allege Appellant intentionally and

[3] Although Appellant was convicted of ten separate offenses, the trial court entered only one judgment. This court has held on several occasions that the better practice is to enter a separate judgment for each conviction.

[4] *See* TEX. CODE CRIM. PROC. ANN. art. 38.37, sec. 2 (West Supp. 2016) (providing for the admission of evidence of an extraneous offense in the prosecution of certain offenses, "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant"). Hereinafter, we will cite this article simply as "article 38.37, sec. 2" or "art. 38.37, sec. 2."

[5] To protect the privacy of persons who suffered sexual abuse as minors, we refer to them by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2014).

[6] *See* TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2016) (requiring that the victim be a child younger than fourteen years of age).

knowingly contacted the female sexual organ of M.A., a child under the age of seventeen years of age, with the intent to arouse and gratify his sexual desire on or about January 7, 2009 (Count II), November 1, 2009 (Count IV), May 1, 2010 (Count VI), January 1, 2011 (Count VIII), and April 1, 2011 (Count X).

In January 2015, during a pretrial hearing, the trial court consolidated the two indictments into one case, under Cause Number 10,931. The trial court also granted the State's motion to abandon portions of the continuous sexual abuse indictment. At the conclusion of the trial, Appellant successfully moved for an instructed verdict on the remainder of the continuous sexual abuse allegations.

TRIAL

M.A. testified at trial that Appellant, her stepfather, inappropriately touched her at all five of the family residences from 2001 through 2012, when she turned eighteen years of age. She testified that, on numerous occasions as early as 2001, while the family was living in Amarillo, Appellant touched her breasts. She recounted another incident when Appellant pulled off her shorts and underwear and placed her hand on his private part.

M.A. lived in Borger, from November 2004 to November 2008, when she was between nine and eleven years of age. She testified that when she was between ten and eleven years old, Appellant touched her vagina. In 2008 and 2009, M.A.'s family moved to Venezuela and later San Pedro, California. In both locations, Appellant touched her breasts multiple times inside and outside her clothes and touched her vagina multiple times, both inside and outside her clothes. She also recounted

instances where Appellant touched her breasts in a swimming pool in Venezuela and while passing her in a hallway in their California residence.

According to M.A.'s testimony, the family again lived in Borger from 2009 to 2012, when she was between fourteen and seventeen years of age. She testified that, during the time she lived in Borger, Appellant touched her breasts one hundred to one hundred fifty times and touched her vagina underneath her underwear approximately fourteen to sixteen times. Sometimes, he would touch past the outer lips of her vagina. She also recounted specific instances where Appellant touched her vagina and breasts in her bedroom after pinning her against her bed in 2009, touched her breast in the game room in 2010, and touched her vagina while returning from Amarillo after purchasing tires in 2010. During this time, she was being home-schooled. While she was studying, Appellant would come up behind her, place his hand over her shoulder, and touch her breast.

M.A. further testified that when she was seventeen, she was "skyping"[7] with Mitch Poll. Appellant entered the room and she minimized the computer screen to hide the fact that she was skyping, but otherwise left the program running. With the video feed still running, Poll could see M.A. even though she had minimized the screen. Poll testified that he observed Appellant come up behind M.A., slide his arm around her, and touch her breast. He also testified that M.A. pushed him away, and after a few minutes, Appellant left the room.

[7] An online video chat program used over the Internet.

M.A. testified that when she was between fourteen and seventeen, Appellant would make inappropriate comments while touching her. He once asked her to give him oral sex. During another incident, he told her he would divorce her mother and marry her. During a third incident, he told her that when she went to college, she needed to find a pretty girl for him so he could visit on weekends and have fun. When she was between fifteen and sixteen years old, he told her he would have liked to have taken her virginity.

M.A. finally made an outcry to her mother, Delisa Anderson, because she was tired of keeping the incidents secret and was afraid what her boyfriend would do after she had told him about the inappropriate touching. She and her mother then went to the sheriff's office and told their story to Deputy Durk Downs.

Delisa testified she and M.A. went to the sheriff's office after M.A.'s outcry. She told Deputy Downs that Appellant had put his hand down M.A.'s pants, felt her genital area, and put his finger up her vagina, but not all the way. At a subsequent meeting with an investigator and crime victims' coordinator, Delisa told them that she believed her daughter would not lie, and Appellant was a manipulator. She also testified that later she came to disbelieve M.A. because her stories were inconsistent. In a letter sent from jail by Appellant to his mother, with instructions to share the letter with Delisa, Appellant wrote "I should have been thrown in prison 25 years ago." Delisa testified she thought Appellant was referencing guilt over an extra-marital affair.

Delisa further testified she gave the deputies the name of Appellant's ex-wife and told them they needed to check with his stepchildren by that earlier marriage because

she had discovered their names on his computer. She also testified there was one occasion when M.A. woke up in her and her husband's bed wearing no pants or underwear.

Deputy Downs testified that in August 2012, he met with Delisa and M.A. at the sheriff's office to discuss the alleged indecent behavior of Appellant toward M.A. Delisa did much of the talking and reported that Appellant had touched M.A. underneath her clothing. Deputy Downs described Delisa as very cooperative and testified that she suggested that he seek out Appellant's stepdaughters from a previous marriage. At the meeting and a subsequent interview with Delisa, he testified she never gave him the impression that she did not believe her daughter.

Deputy Downs further testified that after the first meeting, Delisa came forward with several letters she found at the residence that were written by Appellant the night before he was to accompany a deputy to the sheriff's office. In the letters, Appellant wrote the following:

> Sorry for you to have to deal with this. Sorry [Delisa] and [M.A.] for anything and everything. I can't pretend anymore. I've been discovered. Tried to hide so many times. None of this is anyone's fault, but all mine.
>
> * * *
>
> But it's my own fault, no one else's. I just wasn't strong enough, not as much as I wanted to be. I'm sorry for what you're about to face and for any pain I've caused in the last 15 years.
>
> * * *
>
> When I left Michigan in 10th grade, Dawn Manson told me her mother dreamed I was being chased by cops in Texas. Maybe I made it a self-fulfilling prophecy.
>
> * * *

> Always afraid of being found out. That's why I have never stayed in one place too long. I should have been thrown in prison 25 years ago. Have to go write another note now for the cops.

When Appellant was in jail, he wrote several letters intended for Delisa and M.A., that were delivered through his mother. Appellant wrote "[M.A.] you have always been such an inspiration. How many times have I wished I was as good a person as you are."

Delisa later brought some items she found in Appellant's car to Deputy Downs, including his passport and $10,000. Delisa thought her husband was preparing to leave town. Deputy Downs later contacted three of Appellant's stepdaughters from a previous marriage.

During the State's case-in-chief, the State offered the testimony of two adult witnesses (C.A. and D.M.) concerning their being sexually molested by Appellant when they were children. Prior to receiving their testimony, the trial court held a hearing outside the presence of the jury. *See* art. 38.37, sec. 2-a.[8] The trial court heard the testimony to be offered by the State from the two witnesses and determined their testimony met the requirements of article 38.37, sec. 2. The trial court also decided to offer a limiting instruction to the jury prior to the presentation of their testimony.

[8] Among other testimony, article 38.37 permits a trial court to admit evidence that a defendant has committed a separate past crime, wrong, or act related to the sexual abuse of a child that is not the subject of an indictment for which a defendant is currently being tried for sexual abuse of a child for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. *See* art. 38.37, sec. 2(b). Before the evidence described by art. 38.37, sec. 2(b) may be admitted, however, the trial court must conduct a hearing outside the presence of the jury to determine whether the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt. *See* art. 38.37, sec. 2-a.

Prior to permitting C.A. to testify at trial, the court gave the jury a limiting instruction.[9] C.A. then testified she was Appellant's stepdaughter from a previous marriage. She described a number of situations where Appellant inappropriately touched her breast and thighs. She stated this occurred thirty to fifty times a year and that, approximately thirty times, he peeked behind the shower curtain when she was taking a shower. One such incident occurred while her mother was out of town working. During that incident, C.A. was watching television late at night when Appellant came up behind her, pulled her shorts down, and laid on top of her. She could feel his sexual organ against her, and when she rose up, Appellant rolled off. He was naked.

Prior to admitting D.M.'s testimony, the trial court issued a similar limiting instruction to the jury without objection. D.M. testified she was also Appellant's stepdaughter from the same previous marriage described by C.A. She testified that, when she was eleven or twelve, Appellant would sit close to her, put his hand on her thigh, and move his hand closer to her vaginal area. He would call for her to come to him on a pretense, and when she arrived, he would be sitting with his pants undone with an erection. He would also enter her bedroom naked and ask to get in bed. He also rubbed her crotch area with his hand atop her clothes and beneath her clothes. During one such instance, when she was in the sixth grade, she was on the couch with him when he suddenly forced her to have intercourse.

[9] The trial court gave the following limiting instruction without objection:

> Now, before we proceed . . . the Court will give you an instruction that, regarding the testimony of this witness, that you may consider that testimony if you do find beyond a reasonable doubt that the testimony is, in fact, true, and that you can consider that for any—any bearing it has in this case on relevant matters, including character of defendant and the acts performed in conformity with the character of that defendant.

Paula Griffin, a legal assistant for a local attorney, testified for the defense. She testified Delisa and M.A. visited her office several times to discuss with her employer the allegations against Appellant. She described M.A.'s demeanor as unusual, happy, and "joking around." On the third visit, she described M.A. as "chipper" while her mother was "distraught." She also testified M.A.'s stories would change.

At the conclusion of the trial, the court issued its jury charge without objection. The jury charge stated as follows:

III.

> The State has alleged in its indictment that the offenses occurred 'on or about' November 1, 2008, January 1, 2009, March 1, 2009, November 1, 2009, February 1, 2010, May 1, 2010, September 1, 2010, January 1, 2011, March 1, 2011, and April 1, 2011. However, the State is only required to prove the offenses occurred before the date of the indictment was presented and not necessarily precisely on the dates alleged in the indictment.

XV.

> You are further instructed that certain evidence was admitted regarding the defendant having allegedly committed offenses of indecency with a child and sexual assault of a child against victims not named in the indictment. You can only consider said evidence if you believe the evidence beyond a reasonable doubt. Then and only then, can you consider that evidence for its bearing on any relevant matters including the character of the defendant and acts performed in conformity with the character of the defendant.

Thereafter, the jury convicted Appellant of ten counts of indecency with M.A. He was then sentenced to confinement for twenty years and a fine of $10,000 on each count. This appeal followed.

ANALYSIS

Appellant asserts (1) the evidence is insufficient to convict him of all ten counts in the indictment because M.A.'s testimony coupled with the article 38.37 evidence was insufficient for a jury to convict him, (2) article 38.37, sec. 2 is unconstitutional because it denies defendants due process by permitting the introduction of purely inflammatory, prejudicial character evidence, (3) the trial court unconstitutionally applied article 38.37, sec. 2 in this case because the extraneous offenses were not in conformity with the acts alleged in the indictment, and (4) the trial court erred by failing to perform a balancing test under Texas Rule of Evidence 403 prior to admitting the article 38.37, sec. 2 evidence. Logic dictates that we consider the constitutional challenges first.

ISSUES TWO AND THREE—CONSTITUTIONALITY

Appellant asserts he was denied due process because article 38.37, sec. 2 is unconstitutional and alternatively, that the trial court unconstitutionally applied article 38.37, sec. 2 in this case because the extraneous offenses were dissimilar to the acts alleged in the indictment. We disagree.

Both issues were recently addressed by this court in *Bezerra v. State*, 485 S.W.3d 133 (Tex. App.—Amarillo 2016, pet. ref'd). In *Bezerra*, this court held that article 38.37, sec. 2 is constitutional and the admission of this type of extraneous offense evidence does not violate a defendant's due process rights. *Id.* at 140 (adopting the reasoning of the court in *Harris v. State*, 475 S.W.3d 395, 402-403 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)). *See also Robisheaux v. State*, 483 S.W.3d 205, 209-213 (Tex. App.—Austin 2016, pet. ref'd); *Belcher v. State,* 474 S.W.3d 840, 844-47 (Tex. App.—Tyler 2015, no pet.).

Further, although the extraneous offenses admitted in *Bezerra* were somewhat factually dissimilar from those in the indictment, there were factual similarities between the testimony of the victim and that of his adopted daughter by a prior marriage. *Bezerra*, 485 S.W.3d at 141. The evidence supporting the multi-count indictment showed the defendant rubbed the victim's legs over her clothing near her privates, put her hands on his private area, and had her massage him. *Id.* The State's article 38.37, sec. 2 evidence showed that the defendant had previously sexually assaulted his adopted daughter by touching her vagina multiple times, making her touch his private area, and asking her to masturbate him. *Id.* This court held that because the evidence supporting both the indicted offenses and extraneous offenses involved appellant assaulting children by touching their privates with his hand and making them touch his privates, the offenses were sufficiently similar to be admissible and probative. *Id.*

Similarly here, the indicted offenses and extraneous offense evidence involved Appellant's stepdaughters in both marriages and his rubbing their private areas atop and underneath their clothes. The evidence was relevant and probative because it established Appellant had a history of attempts to groom and then sexually abuse his stepdaughters in both marriages by touching their breasts and privates.

In addition, any impermissible inference or unfair prejudice can be ameliorated by the trial court's limiting instructions. *Beam v. State*, 447 S.W.3d 401, 405 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Furthermore, the testimony of the two women did not consume an inordinate amount of time or repeat evidence that had already been admitted. *See Robisheaux*, 483 S.W.3d at 221. There was also a substantial need by the State for such evidence because there was no physical evidence to support M.A.'s

accusations and she was the only eyewitness to the offenses alleged. *See Belcher*, 474 S.W.3d at 848. Accordingly, the evidence was admissible because it was relevant and probative, the trial court lessened any prejudice through its instructions, the evidence required a minimal amount of time to develop, and the State had a substantial need for that evidence. *See Beam*, 447 S.W.3d at 404-05. Issues two and three are overruled.

ISSUE FOUR—RULE 403 BALANCING TEST

By his fourth issue, Appellant asserts the trial court erred by failing to perform a balancing test under Texas Rule of Evidence 403[10] prior to admitting evidence under article 38.37, sec. 2(b). Again, we disagree.

Extraneous offense evidence admissible under article 38.37, sec. 2 is still subject to exclusion under Rule 403's balancing test. *Bezerra*, 485 S.W.3d at 141. *See* TEX. R. EVID. 403. Rule 403 states that relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. *Montgomery v. State*, 810 S.W.2d 372, 377 (Tex. Crim. App. 1991) (op. on reh'g). When analyzing these competing interests, the trial court should consider the following factors: (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational yet indelible way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. *See State v. Melchler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005).

[10] Hereinafter, we will refer or cite to Rule 403 of the Texas Rules of Evidence simply as "Rule 403."

The trial court is not, however, required to articulate the application or results of its balancing test on the record. *Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998). Rather, unless the record indicates otherwise, the trial court is presumed to have engaged in the required balancing test once a party objects on the ground of Rule 403 and the judge rules on that objection. *Id.* (finding no error when trial court listened to defendant's Rule 403 objections and then overruled them without explanation); *Santellan v. State*, 939 S.W.2d 155, 173 (Tex. Crim. App. 1997) (finding that the trial court has no discretion as to whether or not to engage in a balancing test once a sufficient objection invoking Rule 403 has been made).

We review the trial court's application of a balancing test and the resultant admission or exclusion of evidence under an abuse of discretion standard. *Jones v. State*, 944 S.W.2d 642, 651 (Tex. Crim. App. 1996); *Montgomery*, 810 S.W.2d at 378-79. In doing so, we too must take into account the same factors a trial court should consider when conducting its balancing test. *See Melchler*, 153 S.W.3d at 405.

Since the record in this case does not indicate otherwise, we must presume the trial court conducted a balancing test based upon Appellant's objection and its subsequent ruling. *See Rojas*, 986 S.W.2d at 250; *Santellan*, 939 S.W.2d at 173. As to the first factor concerning the probative value of the evidence, because Rule 403 favors the admissibility of relevant evidence, there is a presumption that relevant evidence will be more probative than prejudicial. *Massey v. State*, 933 S.W.2d 141, 154 (Tex. Crim. App. 1996); *Montgomery,* 810 S.W.2d at 389. Moreover, we have already determined in the prior section discussing issues three and four that the State's article 38.37, sec. 2

evidence was both relevant and probative. Accordingly, the first factor favors admission of the contested evidence.

The second factor requires that we evaluate whether the extraneous offense evidence had the potential to irrationally impress the jury. Here, the extraneous offense evidence was quite similar to the charged offenses in that both offenses involved the sexual assault of a stepchild. Furthermore, the offenses were not so dissimilar in character as to lead the jury into forming some irrational yet indelible impression regarding Appellant's character and any impermissible inference was minimized through the trial court's limiting instructions. This factor, therefore, tends to support admission of the extraneous offense evidence.

The third factor evaluates the time required to develop the extraneous offense evidence. Here, although the prosecution spent a significant amount of time developing and discussing Appellant's sexual assault of C.A. and D.M., much of that time was consumed in the context of the article 38.37, sec. 2-a hearing. While this time-efficiency factor may weigh in favor of exclusion of the evidence, a thorough evaluation of this factor dictates that we take into consideration the practical considerations of having to evaluate the contested evidence outside the presence of the jury before again presenting it for its consideration.

The fourth factor addresses the proponent's need for the extraneous offense evidence. As we discussed above in the context of our constitutionality evaluation, the prosecution's need for the evidence was significant because, not only was M.A's testimony the only direct evidence presented in support of allegations contained in the

indictment, it was also critical because Appellant had attacked her credibility by raising questions concerning the consistency of her version of the events and her mother's lack of confidence in her truthfulness.

Balancing these factors together, we find the trial court acted within the zone of reasonable disagreement when it implicitly determined that the probative value of the extraneous offense evidence was not substantially outweighed by its prejudicial effect. Accordingly, the trial court did not abuse its discretion when it admitted that evidence or failed to articulate its balancing analysis. Appellant's fourth issue is overruled.

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE

Having determined the evidence properly before the jury, when reviewing the sufficiency of that evidence, we view all evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011) (holding that *Jackson* standard is the only standard to use when determining sufficiency of evidence). We measure sufficiency of the evidence according to "the elements of the offense as defined by" the hypothetically correct jury charge for the case. *See Malik v. State,* 953 S.W.2d 234, 240 (Tex. Crim. App. 1990). Further, jurors are the exclusive judges of the facts, the credibility of witnesses, and the weight to be given to the testimony. *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008). Consequently, we do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), and any inconsistencies in the evidence are resolved in favor of the

adjudication. *Matson v. State,* 819 S.W.2d 839, 843 (Tex. Crim. App. 1999).

The essential elements of the offense of indecency with a child are that (1) a person (2) engages in sexual contact with (3) a child younger than seventeen years of age. TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011). In the context of this section, "sexual contact" occurs if, with the intent to arouse or gratify the sexual desire of any person, a person touches the anus, breast, or any part of the genitals of a child younger than seventeen years of age, including touching through the child's clothing. *Id.* at § 21.11(c).

Furthermore, a child's uncorroborated testimony is sufficient to support a conviction for indecency with a child. *See* art. 38.07 (providing that, if at the time the sexual offense is alleged to have occurred the victim was seventeen years of age or younger, then a conviction is "supportable on the uncorroborated testimony of the victim"). *See also Martinez v. State*, 178 S.W.3d 806, 814 (Tex. Crim. App. 2005) (noting that article 38.07 "deals with the *sufficiency* of evidence required to sustain a conviction for" certain sexual offenses) (emphasis in original). Under those circumstances, the State did not have the burden to produce any corroborating or physical evidence. *Martines v. State*, 371 S.W.3d 232, 240 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Here, M.A.'s testimony alone was sufficient evidence enough to allow a rational trier of fact in this case to find that the essential elements of the offense had been established by the State. M.A.'s testimony was also supported by the testimony of Deputy Downs, Poll, C.A., D.M., and even Delisa. Furthermore, the jury was free to

disbelieve defense-favorable testimony offered by Delisa and Griffin, and they were at liberty to find that Appellant's statements in his letters were incriminating because they reasonably could have been the direct result of law enforcement learning of his sexual abuse of M.A. rather than references to an extra-marital affair.

Specifically, Appellant asserts the State's evidence is insufficient because the State should have been required to prove with more specificity the dates the actual sexual misconduct occurred as alleged in the indictment. In that regard we note that the State is not bound by the "on or about" date alleged in the indictment. *Yzaguirre v. State*, 957 S.W.2d 38, 40 (Tex. Crim. App. 1998). The "on or about" language in the indictment allows the State to prove a date other than the date alleged in the indictment, as long as the date is anterior to the presentment of the indictment and within the offense's statutory limitation period. *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997). Here, Appellant does not assert that any offense alleged in the indictment was outside the offense's statutory limitation period and he does not challenge the language in the jury charge that comports with the above-stated legal principles.[11]

Appellant contends the evidence presented showed seven specific instances of breast touching and only one specific instance of vaginal touching. He then posits that because the indictment listed five instances of breast touching and five instances of vaginal touching, the evidence must be insufficient as to four of the counts alleging vaginal touching. While M.A. may not have described five distinct instances of vaginal

[11] If what Appellant asserts is that the State should have been required to make an election, Appellant did not make any such request to the trial court after the State rested at trial. "Once the State rests, *upon a timely request by the defendant*, the trial court must order the State to make an election, and failure to do so is error." *See Reza v. State,* 339 S.W.3d 706, 710 (Tex. App.—Fort Worth 2011, pet. ref'd) (emphasis added).

touching, she did testify that vaginal touching occurred more than five times in a particular residence, within a particular year or span of years corresponding with her age and the allegations in the indictment. As such, M.A.'s testimony sufficiently established Appellant's guilt as to all five counts of vaginal touching. Appellant's first issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

Patrick A. Pirtle
Justice

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