



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. PD-0034-21**

**CORNELL WITCHER, Appellant**

v.

**THE STATE OF TEXAS**

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW  
FROM THE SIXTH COURT OF APPEALS  
BOWIE COUNTY**

**KELLER, P.J., delivered the opinion of the Court in which HERVEY, YEARY, NEWELL and SLAUGHTER, JJ. joined. KEEL, J., filed a dissenting opinion in which RICHARDSON, WALKER and MCCLURE, JJ., joined.**

Appellant was convicted of continuous sexual abuse of a child. Holding that the evidence was insufficient to support the conviction, the court of appeals reversed the judgment. The question in this case is whether the State proved that Appellant's sexual abuse of the victim occurred over a period of thirty days or more.<sup>1</sup> Everyone agrees that there is evidence that the last instance of abuse occurred on July 26, 2018, two days before the child was examined by medical personnel. For the

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<sup>1</sup> See TEX. PENAL CODE 21.02(b) ("during a period that is 30 or more days in duration").

evidence to be sufficient to show a period of abuse of thirty days or more, then, there must be some evidence from which a rational jury could infer that the abuse began on or before June 26, 2018. There was evidence that the abuse began when the victim's brother went to jail and that he went to jail "around" June 10, 2018. The court of appeals concluded that a rational jury could only speculate from this evidence that the abuse began on or before June 26. We disagree and hold that a rational jury could have inferred it from the evidence.

## I. BACKGROUND

### A. The Testimony

The victim's sister testified as follows about when their brother (known as "Dayday") went to jail:

Q. In June of – maybe June 10<sup>th</sup>, give or take, did Dayday get arrested and end up in the Bowie County jail?

A. Yes, ma'am.

The victim testified about when the abuse began as follows:

Q. When Dayday moved out and Cornell was still staying at the house, did he start doing things to you that were not right.

A. Yes.

\* \* \*

Q. When did he start coming into the room and doing those things to you?

A. When my brother went to jail.

\* \* \*

Q. So, [Mary], just to be clear, he started coming in your room when Dayday went to jail; is that right?

A. Yes.

Sheriff's investigator Dustin Thompson testified as follows about when the brother went to jail:

Q. The period of time alleged in the indictment, the on or about date, June 10<sup>th</sup>, 2018 through July 28<sup>th</sup>, 2018. The testimony in this courtroom in front of this jury is that the abuse started in June when Dayday went to jail, okay?

A. Correct.

\* \* \*

Q. And, in fact, did you confirm that Dayday went to jail and was incarcerated around that time in 2008[sic]?

A. Yes, ma'am.

\* \* \*

Q. Okay. So from June 10<sup>th</sup>, 2018 to July 28<sup>th</sup>, 2018, that was a period of time 30 days or more in duration; is that correct?

A Correct.

\* \* \*

Q. Okay. Those dates, when Dayday went to jail, the June 10<sup>th</sup>, 2018 through July 28<sup>th</sup>, when they confronted him, 2018, those are the dates as close as possible that you could get to confirm by [Mary] and the other evidence in the case?

A. Correct.

### **B. Appeal**

The court of appeals concluded that certain testimony, when viewed in the light most favorable to the jury's verdict, established that the last instance of sexual abuse occurred on July 26, 2018.<sup>2</sup> But the court found that the testimony about the first instance of abuse was sparse and ambiguous.<sup>3</sup> The court of appeals concluded that the date the victim's brother went to jail was uncertain and speculative because the questions eliciting affirmative answers on the matter used the words "at some point," "around," "about," "maybe," and "give or take."<sup>4</sup> The court of appeals

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<sup>2</sup> *Witcher v. State*, No. 06-20-00040-CR, 2020 WL 7483953, \*4 (Tex. App.—Texarkana December 21, 2020) (not designated for publication).

<sup>3</sup> *Id.* at \*4.

<sup>4</sup> *Id.*

further concluded that, even if the testimony could support a finding that the brother went to jail on or before June 26, the victim’s testimony did not establish that the abuse began on the same day the brother went to jail.<sup>5</sup> The court found that the word “when” can “mean both a specific time or a general reference to a time span.”<sup>6</sup> For these reasons, the court of appeals concluded that there was nothing in the record that would allow a jury to “infer rather than speculate” that the first instance of abuse occurred on or before June 26.<sup>7</sup>

Because the jury charge did not require the jury to unanimously agree on which act of sexual abuse occurred, the court of appeals concluded it could not reform the conviction to a lesser-included offense.<sup>8</sup> Therefore, it remanded the case for a new trial on the lesser-included offenses of aggravated sexual assault of a child and indecency with a child.<sup>9</sup>

## II. ANALYSIS

The question here is whether the evidence is sufficient to support the “30 or more days” element of the continuous sexual abuse offense. In reviewing the sufficiency of the evidence under the standard set forth by the Supreme Court in *Jackson v. Virginia*, we determine whether, “viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>10</sup> This standard accords with the

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*5.

<sup>9</sup> *Id.*

<sup>10</sup> *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

jury's responsibility "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."<sup>11</sup> A jury is permitted to draw "reasonable inferences" from the evidence but may not come to conclusions "based on mere speculation."<sup>12</sup>

First, the victim's testimony was that Appellant started abusing her when her brother "went to" jail, not when he "was in" jail. From this testimony, a rational jury could conclude that the date the victim's brother went to jail is the date the abuse began.

Second, the victim's sister testified that their brother went to jail on June 10<sup>th</sup> "give or take." Investigator Thompson testified that the period of time alleged in the indictment was June 10, 2018 through July 28, 2018, and that he had confirmed that the brother was incarcerated "around that time." We conclude that this testimony is sufficient for a rational jury to infer that the brother was incarcerated on June 10<sup>th</sup> or at worst a few days afterwards. Given the context of the testimony, "around" could not have meant sixteen days or more later. And "give or take," means "approximately"—it would mean at most a few days out of the forty-eight day span from June 10 to July 28. It would not mean one third or more of the relevant time period.

Consequently, the jury could have rationally inferred, without resorting to speculation, that the abuse began on June 26 or earlier. We reverse the judgment of the court of appeals and remand the case to that court for further proceedings consistent with this opinion.<sup>13</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

<sup>13</sup> The court of appeals noted an error in the trial court's judgment but found it did not need to reach the issue because of its disposition. *See Witcher*, 2020 WL 7483953, at \*5 n.7.

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