COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JOHN BARNES, JR.,	§	No. 08-20-00022-CR
Appellant,	§	Appeal from the
v.	§	109th District Court
THE STATE OF TEXAS,	§	of Andrews County, Texas
Appellee.	§	(TC# 7031)

OPINION

Appellant, John Barnes, Jr., was convicted of one count of continuous sexual abuse of a child. TEX.PENAL CODE ANN. § 21.02(b). In four issues, Appellant contends that: (1) his due process rights were violated because the amendment of the original indictment was not accomplished pursuant to the provisions of Articles 28.10 and 28.11 of the Texas Code of Criminal Procedure; (2) the evidence was insufficient because the State failed to identify the complainant by the pseudonym listed in the indictment; (3) the trial court abused its discretion by designating the incorrect outcry witness; and (4) the cumulative harm from his individual claims denied him a fair trial. We affirm.

Factual Background

Appellant began sexually assaulting the child-victim in this case, AT99, when she was

about eight years old. Appellant became AT99's step-father when he married AT99's mother, Ashley, but AT99 did not discover that he was her stepfather until she was sixteen years old. Appellant and Ashley had three other children. The family, including Appellant's parents, all resided together throughout AT99's childhood.

At trial, AT99 identified herself by her legal name and testified Appellant, her stepfather, had sexually assaulted her from the time she was seven or eight years old until she was fourteen years old. AT99 described the first incident that occurred when she was about eight years old where Appellant had her sit on top of his male part while he was laying down. She described several instances of Appellant putting his penis and fingers into her vagina, as well as times when Appellant would put his mouth on her vagina. AT99 also relayed one occasion when she was nine years old and Appellant put his penis into her "butt," which caused her a great deal of pain. AT99 explained Appellant threatened if she said anything to anyone about what they did, her siblings would be taken away. AT99 was thrown out of her home by Appellant when she was sixteen years old, at which time, she went to live with her boyfriend and his mother.

Appellant's theory at trial was AT99 fabricated the allegations against him because she wanted to prevent him from reporting her boyfriend to the police for assaulting her. Appellant's daughter testified she and her siblings, including AT99, lived primarily with their grandparents and Appellant did not live with them. Appellant also testified, stating his children, including AT99, were raised by his parents. He and his wife did not live with them. He also denied all the allegations.

The jury found Appellant guilty of continuous sexual abuse of a child and assessed a punishment of 45 years of incarceration. This appeal followed.

DISCUSSION

I. Abandonment or Amendment?

In Issue One, Appellant asserts his due process rights were violated because the trial court permitted the State to alter the indictment without giving him ten days' notice to respond in violation of Article 28.10 of the Texas Code of Criminal Procedure. Appellant further alleges because the provisions of Articles 28.10 and 28.11 were not followed, the jury returned a guilty verdict on an incorrect indictment. The State responds the "amendment" in Issue One was abandoned and thus does not have to conform to the requirements of Articles 28.10 and 28.11. The State further alleges Appellant failed to raise any objection to this issue prior to his appeal. We will resolve this issue on the merits and address whether the State's alteration of the indictment was an abandonment or an amendment.

A. Relevant facts

On September 15, 2016, Appellant was originally indicted for continuous sexual abuse of a child. TEX.PENAL CODE ANN. § 21.02(b). That indictment read as follows:

> [T]hat . . . JOHN BARNES, JR, hereinafter styled Defendant, then and there, during a period that was 30 days or more in duration, to-wit: from on or about January 1, 2007 through December 31, 2012, when the Defendant was 17 years of age or older, commit two or more acts of sexual abuse against AT99, a child younger than 14 years of age at the time, in that on or about 1st day of January, 2007, the Defendant, did commit Aggravated Sexual Assault of a Child by intentionally and knowingly cause the penetration of the sexual organs of AT99, by defendant's finger;
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> on or about 1st day of January 2008, the Defendant, did commit Aggravated Sexual Assault of a Child by intentionally and knowingly cause the penetration of the sexual organs of AT99, by use of the defendants [sic] mouth;
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> on or about 1st day of January, 2009, the Defendant, did commit Aggravated Sexual Assault of a Child by intentionally and knowingly cause the penetration of the anus of AT99, by the defendant's sexual organ;
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> on or about 1st day of January, 2010, the Defendant, did commit Aggravated Sexual Assault of a Child by intentionally and knowingly causing the sexual organ of the Defendant to contact and penetrate the female sexual organ of AT99;

> And on or about 1st day of January, 2011, the Defendant committed Indecency with Child by then and there, with the intent to arouse or gratify the sexual desire of the defendant, engage in sexual contact with AT99, by touching the breast of the complainant, a child younger than 17 years of age.

On March 8, 2018, the State filed a motion for leave to amend the indictment so that it would more closely track the statute. In its motion, the State requested alterations to the language of the first four original manner and means paragraphs that left the elements of the charge from the original indictment intact. Also requested was the abandonment of the fifth manner and means paragraph which alleged appellant committed the individual act of indecency with a child. The record reflects it was immediately granted by the trial court and the order granting leave to amend the indictment was filed on March 8, 2018. The altered indictment read as follows:

> [T]hat . . . JOHN BARNES, JR, hereinafter styled Defendant, then and there, during a period that was 30 days or more in duration, to-wit: from on or about January 1, 2007 through December 31, 2012, when the Defendant was 17 years of age or older, commit two or more acts of sexual abuse against, a child younger than 14 years of age at the time, in that on or about 1st day of January, 2007, the Defendant, did then and there intentionally and knowingly cause the penetration of the sexual organ of AT99, a child who was then and there younger than 14 years of age, by the Defendant's finger; and further;
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> On or about 1st day of January 2008, the Defendant did then and there intentionally and knowingly cause the sexual organ of AT99, a child who was then and there younger than 14 years of age, to contact the mouth of Defendant;
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> On or about 1st day of January, 2009, the Defendant, did then and there intentionally and knowingly cause the penetration of the anus of AT99, a child who was then and there younger than 14 years of age, by the Defendant's sexual organ;
>
> On or about 1st day of January, 2010, the Defendant, did then and there intentionally and knowingly cause the sexual organ of AT99, a child who was then and there younger than 14 years of age, to contact the sexual organ of Defendant[.]

Trial began on January 14, 2020. When the trial court asked the State to read the indictment, the State reminded the trial court the indictment had been amended. The State then proceeded to read the altered indictment and after it did so, Appellant made no objection and pleaded not guilty.

At the jury charge conference, Appellant stated he had no objection to the charge. The jury

charge tracked the relevant language of the altered indictment.

B. Applicable law

Amending an indictment under Articles 28.10 and 28.11 requires a motion from the State requesting amendment of the indictment, an order from the trial court granting the indictment, and documentation in the record reflecting the changes to the indictment sufficient to give the defendant fair notice of the charges against him. *See Perez v. State*, 429 S.W.3d 639, 642–43 (Tex.Crim.App. 2014); *Riney v. State*, 28 S.W.3d 561, 565 (Tex.Crim.App. 2000). However, not all alterations of an indictment are amendments. *Eastep v. State*, 941 S.W.2d 130, 132 (Tex.Crim.App. 1997), *overruled on other grounds by Gollihar v. State*, 46 S.W.3d 243, 256 (Tex.Crim.App. 2001), and by *Riney*, 28 S.W.3d at 565. An amendment is an alteration to the face of an indictment that affects its substance. *Id*. By contrast, if the substance of the indictment is not affected by the alteration, it is considered an abandonment. *Id*. In *Eastep*, the Court of Criminal Appeals recognized three scenarios where the alteration of a charging instrument constitutes an abandonment rather than an amendment: (1) abandonment of one or more alternative means of committing an offense; (2) abandonment of an allegation that effectively reduces the prosecution to a lesser included offense; and (3) abandonment of surplusage, that is, language not legally essential to constitute the offense alleged. *Id*. at 135. An abandonment is not subject to the requirements of Articles 28.10 and 28.11. *Id*.

Appellant was charged with committing continuous sexual abuse of a child in violation of Section 21.02 of the Texas Penal Code which provides that a person commits the offense of continuous sexual abuse of a child if, during a period of time that is thirty days or more in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts are committed against one or more victims, and if, at the time of each of the acts, the actor is seventeen years of

age or older and the victim is younger than fourteen. TEX.PENAL CODE ANN. § 21.02(b). Section 21.02(c) defines "act of sexual abuse" as "any act that is a violation of one or more" of eight specifically enumerated sections of the Penal Code, including, as alleged this case, an act of aggravated sexual assault under Penal Code section 22.021 and indecency with a child under Penal Code section 21.11(a)(1)). *Id.* at 21.02(c). Essentially, Section 21.02(c) sets forth various alternative means by which a defendant may commit a violation. *See Buxton v. State*, 526 S.W.3d 666, 679 (Tex.App.—Houston [1st Dist.] 2017, pet. ref'd); *Holton v. State*, 487 S.W.3d 600, 609 (Tex.App.—El Paso 2015, no pet.). These individual acts of sexual abuse are not elements of the offense, but rather "the manner and means by which the actus reus element is committed." *See Jacobsen v. State*, 325 S.W.3d 733, 737 (Tex.App.—Austin 2010, no pet.)(Under the plain language of 21.02, "it is the commission of two or more acts of sexual abuse over the specified time period—that is, the pattern of behavior or the series of acts—that is the actus reus element of the offense.").

C. Analysis

In the instant case, the indictment initially included the predicate act of indecency with a child as one of the specific means by which Appellant allegedly committed the offense of continuous sexual abuse of a child. The State subsequently moved for leave to amend the indictment to remove the paragraph that alleged indecency with a child as one of the specific means by which Appellant committed the offense. The change to the indictment sought by the State, and approved by the trial court, did not affect the substance of the indictment, as it only removed one of the "acts of sexual abuse" that was not an element of the charged offense, but merely one of the specific means by which the offense is committed. *See Holton,* 487 S.W.3d at 609; *Jacobsen*, 325 S.W.3d at 737. Thus, while the State referred to the alteration as an amendment, it was, in fact, an

abandonment of one of the alleged means. *See Eastep*, 941 S.W.2d at 135; *Garcia v. State*, 537 S.W.2d 930, 933 (Tex.Crim.App. 1976)(An abandonment of a theory charged as one of the means of committing an offense is still an abandonment even if the State referred to it as an amendment in its motion.).

We conclude that the State's action in this case was an abandonment rather than an amendment to an indictment and because such an abandonment is not subject to the requirements of Articles 28.10 and 28.11, Appellant's due process rights were not violated. *See Eastep*, 941 S.W.2d at 135.

Issue One is overruled.

II. Legal Sufficiency

In Issue Two, Appellant contends the evidence is legally insufficient to support his conviction based on a variance between the indictment and the proof at trial. Specifically, Appellant argues the State failed to prove the complainant was the individual listed in the indictment. We will address whether Appellant's complained-of variance is material, as only a material variance will render the evidence insufficient. *See Gollihar*, 46 S.W.3d at 258 ("An immaterial variance is disregarded in a sufficiency of the evidence review.").

A. The variance doctrine

Generally, a variance between the indictment and the evidence at trial is fatal to a conviction. *Stevens v. State*, 891 S.W.2d 649, 650 (Tex.Crim.App. 1995). "This is because Due Process guarantees the defendant notice of the charges against him." *Id*. However, not every variance between the indictment and the proof presented at trial is fatal. *Id*. "The object of the doctrine of variance between allegations of an indictment is to avoid surprise, and for such variance to be material it must be such as to mislead the party to his prejudice." *Id*., (quoting *Plessinger v.*

State, 536 S.W.2d 380, 381 (Tex.Crim.App. 1976)). Simply put, a variance is fatal only if it is material. *Id*.

B. Identity of the complainant

Appellant's argument the evidence is legally insufficient to support his conviction because the complainant identified herself at trial by her legal name instead of the pseudonym listed in the indictment has been rejected by the Texas Court of Criminal Appeals. *Stevens*, 891 S.W.2d at 650-51. In *Stevens*, a pseudonym in the indictment was used to refer to the complainant, but during trial, the complainant was identified by his legal name. *Id*. at 651. The defendant complained because of this, there was a fatal variance between the indictment and the evidence at trial. *Id*. The Court disagreed and held that if a defendant's due process right to notice is satisfied, the fatal variance doctrine is inapplicable to pseudonym cases. *Id*. The Court reasoned the legislature allowed sex offense victims to be referred to by a pseudonym in order to protect their privacy, not to deprive defendants of notice of the offense for which they were indicted. *Id*. In overruling defendant's claim, the Court found defendant had not and could not allege he was surprised to learn the victim's identity, where he had referred to the victim by his legal name throughout the proceedings and had not claimed that his due process right to notice was violated. *Id*.

Here, the record shows the complainant was referred to by her legal name at a pretrial hearing and at trial by all the trial participants, including Appellant, and her year of birth, 1999, was established at both proceedings. The initials of her legal name correspond with the pseudonym initials and her date of birth of 1999. Thus, the pseudonym of AT99 was clear enough to ascertain it referred to the complainant. *See Nunez v. State*, No. 13-17-00671-CR, 2019 WL 1831715, at *3 (Tex.App.—Corpus Christi April 25, 2019, pet. ref'd)(mem. op., not designated for publication)(finding defendant could not claim he was misled about the identity of the

complainants where he failed to express any surprise and the pseudonyms used were clear enough to make it obvious which child complainant was being referred to). Additionally, at trial, the investigating detective testified the complainant had been assigned the pseudonym of AT99 to protect her privacy, the forensic interviewer referred to the complainant as AT99, and at closing, the State explained the pseudonym came from the initials of AT99's legal name and her year of birth. At no time during this testimony or closing arguments did Appellant claim to be confused about the pseudonym or complaint's identity. *See id*. Finally, like the defendant in *Stevens*, Appellant has not claimed and is unable to claim his due process right to notice of the charges against him was violated or that at any time during the proceedings, he was surprised or misled about the identity of the victim. *See Stevens*, 891 S.W.2d at 651. Because the variance between the indictment and the name used at trial was not material, we conclude the evidence is legally sufficient to establish the complainant's identity. *See Gollihar*, 46 S.W.3d at 257.

Issue Two is overruled.

III. Proper outcry witness

In Issue Three, Appellant asserts the trial court abused its discretion in designating Yovanna Hernandez, a forensic interviewer with the Midland Children's Advocacy Center, an outcry witness, claiming other individuals who complainant spoke with about the sexual abuse were more appropriate.

A. Standard of review and applicable law

We review a trial court's decision to admit an outcry statement for abuse of discretion. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex.Crim.App. 1990). Article 38.072 of the Texas Code of Criminal Procedure allows the admission of a hearsay statement describing sexual abuse made by a child-abuse victim to an outcry witness. *See Rodgers v. State*, 442 S.W.3d 547, 552 (Tex.App.—

Dallas 2014, pet. ref'd). For the outcry statement to be admissible, the witness must be the first person over the age of eighteen to whom the child made a statement about the offense. *See* TEX.CODE CRIM.PROC.ANN. art. 38.072. A proper outcry witness, however, is not the first adult to whom the child made any outcry, but rather the first adult to whom the child described the abuse in some discernible way. *Garcia*, 792 S.W.2d at 91. The statement must describe the alleged offense in some discernable manner and must be more than a general allusion that something in the area of child abuse was occurring. *Id*. at 92.

B. Pretrial outcry-witness hearing

At the pretrial outcry-witness hearing, held pursuant to Article 38.072 of the Texas Code of Criminal Procedure, AT99 testified she tried to tell her mom about the abuse, but she was unable to relay any details because her mom did not believe her. In July of 2016, she told her Aunt Susan defendant had molested her and then Aunt Susan told her Aunt Delilah. Aunt Delilah then contacted CPS, after which AT99 spoke with the forensic interviewer, Ms. Hernandez. AT99 explained she did not go into any details about how Appellant molested her with her Aunt Susan or Aunt Delilah. AT99 did not reveal the details of the abuse until she was interviewed by Ms. Hernandez, and she fully described the incidences verbally and with drawings.

On cross-examination, AT99 testified since 2015, she lived with her boyfriend, Joshua Ortiz, and his mother. On one occasion, she told Joshua and his mother the defendant had molested her, but she did not give them details.

The State argued Ms. Hernandez was the proper outcry witness because she was the first person to whom AT99 described the abuse in the type of detail that could lead to a criminal charge, including the specifics of the penetration and where the abuse had occurred. Appellant argued the more appropriate outcry witness would be Joshua Ortiz, his mother, or AT99's Aunt Susan.

The trial court overruled Appellant's objection and designated Ms. Hernandez as the proper outcry witness, stating AT99's statements to Ms. Hernandez, who was over the age of eighteen, were "in sufficient detail to articulate a specific chargeable act[.]"

C. Outcry witness's testimony

At trial, Ms. Hernandez testified she had interviewed a young woman who identified herself by the pseudonym AT99. AT99 told her from the time she was 8 years old, her stepfather, Appellant, had touched her many times in sexually inappropriate ways. AT99 explained this occurred in both homes they lived-in and Appellant had touched her on her front and back private parts with his penis, fingers, mouth, and tongue. AT99 described instances of vaginal and anal penetration, as well as instances of oral contact.

D. Analysis

The trial court could have reasonably concluded AT99's statements to Joshua Ortiz, his mother, and her aunts were nothing more than general allusions that some type of child abuse had occurred, and the statements did not describe the alleged offense in some discernible manner, as her statement to Ms. Hernandez did. *Garcia*, 792 S.W.2d at 91. Moreover, because AT99 testified to the same facts as Ms. Hernandez's complained-of outcry testimony, any error in the admission of Ms. Hernandez's outcry testimony was cured and thus harmless. *See Gibson v. State*, 595 S.W.3d 321, 327 (Tex.App.—Austin 2020, no pet.)("In cases involving the improper admission of outcry testimony, the error is harmless when the victim testifies in court to the same or similar statements that were improperly admitted or other evidence setting forth the same facts is admitted without objection.").

Accordingly, because the record supports Ms. Hernandez was the first person over the age of eighteen to whom AT99 made a statement about the sexual abuse, the trial court did not abuse

its discretion by designating Ms. Hernandez as the proper outcry witness.

Issue Three is overruled.

IV. Cumulative Error

In Issue Four, Appellant asserts the harm stemming from each of his individual issues resulted in cumulative error and denied him a fair trial. We have held "multiple errors may be harmful in their cumulating effect on the defense even if each error would be harmless standing on its own." *Castruita v. State*, 584 S.W.3d 88, 114 (Tex.App.—El Paso 2018, pet. ref'd). There can be no cumulative error, however, if the individual claims of error lack merit. *Id*. Because we find no merit to Appellant's first three issues, we are bound to overrule Issue Four.

V. Conclusion

For these reasons, we affirm.

May 6, 2022

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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