

Reversed and Remanded and Opinion Filed May 23, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-00948-CR

**THE STATE OF TEXAS, Appellant
V.
MICHAEL A. GALOFARO, Appellee**

**On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F14-00297**

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Myers
Opinion by Justice Bridges

The State of Texas appeals the trial court's order granting Michael A. Galofaro's double jeopardy motion and barring the State from prosecuting him. In a single issue, the State argues the trial court erred in ruling that Galofaro's prior acquittal on one charge of indecency with a child barred prosecution for two other acts of alleged indecency. We reverse the trial court's order and remand for further proceedings.

In May 2011, Galofaro was indicted for the offense of indecency with a child by contact. The indictment alleged the offense took place on or about June 1, 1999, and further alleged Galofaro caused the complainant, a child younger than 17 and not Galofaro's spouse, "to engage in sexual contact by causing the hand of complainant to contact the genitals of" Galofaro. In May 2014, in a trial before the court, complainant testified Galofaro had him touch Galofaro's

genitals before complainant could play a video game. On another occasion, when complainant was “just a little bit older,” Galofaro made complainant pull his pants down inside a “standup shower room,” and Galofaro pulled his pants down and rubbed complainant’s genitals. On a third occasion, Galofaro took complainant behind an entertainment center in the living room and “was just touching” complainant until “somebody walked in.” At that point, Galofaro “pushed [complainant] out casually, and then [Galofaro] walked out casually.”

On cross examination, defense counsel elicited complainant’s testimony that he was between five and seven years old when Galofaro assaulted him. Complainant reported the abuse to police when he turned eighteen. After complainant reported the abuse, a doctor evaluated him. Before the evaluation, the doctor told complainant’s mother that he was “faking.” Following some additional questioning concerning complainant’s age “at the time the events took place,” the trial judge stated she did not “need to hear anything else from the defense.” The trial judge asked if the State had “any other evidence to put on.” After a side bar conference, the prosecutor said she was not going to call an additional witness. However, the prosecutor stated she was “going to make an election as to the offense that we’re proceeding on. It will be the last time that [complainant] described where he was behind the entertainment center in the living room and the defendant touched him behind that entertainment center.” Both the prosecutor and Galofaro’s counsel rested and waived closing, and the trial judge found Galofaro not guilty.

In June 2014, Galofaro was again indicted on a charge of indecency with a child by contact. The indictment alleged the offense took place on or about May 1, 1999, and further alleged Galofaro caused the complainant, a child younger than 17 and not Galofaro’s spouse, “to engage in sexual contact by causing the hand of complainant to contact the genitals of” Galofaro. Galofaro filed a motion seeking a hearing to determine whether the indictment should be barred by double jeopardy. At a hearing on Galofaro’s motion, the State argued complainant described

three different acts of indecency at the prior trial, and the State elected to proceed on the “one where the defendant and the complainant were in the living room.” Thus, the prosecutor argued, jeopardy did not attach to the other offenses. The trial court granted Galofaro’s motion and ordered that the State was barred from further prosecuting Galofaro. This appeal followed.

In a single issue, the State argues the trial court erred in ruling that Galofaro’s acquittal on one act of indecency with a child barred prosecution on two other acts of indecency. Specifically, the State argues it formally elected prosecution on only one of the three acts presented at trial, and double jeopardy should, therefore, not bar prosecution on the other two acts.

The Fifth Amendment's Double Jeopardy Clause provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Ex Parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013).

For Double Jeopardy purposes, “[t]he same offense means the identical criminal act, not the same offense by name.” *Ex Parte Goodbread*, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998) (citing *Luna v. State*, 493 S.W.2d 854 (Tex. Crim. App. 1973)). The State may place a defendant in jeopardy for multiple offenses by failing to elect after presenting proof of multiple instances of conduct that conform to the indictment:

If evidence of more than one offense is admitted and a conviction for either could be had under the indictment, and neither the State nor the court elects, a plea of former conviction is good upon a prosecution based upon one of said offenses, it being uncertain for which one the conviction was had.

Id. (quoting *Walker v. State*, 473 S.W.2d 499, 500 (Tex. Crim. App. 1971)). Hence, trial upon an indictment does not bar every offense that could be prosecuted under its language; instead, trial upon the indictment bars prosecution only for offenses for which proof was offered at trial. *Id.* at 861. And even for the latter category, the State or the trial court can exclude an instance of conduct from the jeopardy bar through an election. *Id.*

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) (citing *Crawford v. State*, 696 S.W.2d 903 (Tex. Cr. App. 1985)). The State has the privilege to delay election until such stage in the development of the evidence as would give the State an opportunity to intelligently determine upon which transaction it prefers to rely for a conviction. *Phillips v. State*, 193 S.W.3d 904, 912 (Tex. Crim. App. 2006) (citing *O'Neal*, 746 S.W.2d at 771).

Here, at trial, following the prosecutor's examination of complainant and defense counsel's cross examination, the trial judge stated she did not "need to hear anything else from the defense." The trial judge asked if the State had "any other evidence to put on." After a side bar conference, the prosecutor said she was not going to call an additional witness. However, the prosecutor stated she was "going to make an election as to the offense that we're proceeding on. It will be the last time that [complainant] described where he was behind the entertainment center in the living room and the defendant touched him behind that entertainment center." The State indicted Galofaro on an indecency charge, and the new indictment alleged the same offense but on or about a different date.

We conclude the State's election of the "living room" offense excluded the other two instances of conduct from the jeopardy bar. *Goodbread*, 967 S.W.2d at 860-61. The State's

election, made at the conclusion of the State's case, was timely. *See Phillips*, 193 S.W.3d at 912; *O'Neal*, 746 S.W.2d at 771. Under these circumstances, we conclude the trial court erred in ruling that double jeopardy barred the prosecution of Galofaro for two other indecency offenses about which complainant testified. *See Goodbread*, 967 S.W.2d at 860-61. We sustain the State's issue.

We reverse the trial court's order and remand for further proceedings.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

140948F.U05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

THE STATE OF TEXAS, Appellant

No. 05-14-00948-CR V.

MICHAEL A. GALOFARO, Appellee

On Appeal from the 195th Judicial District
Court, Dallas County, Texas

Trial Court Cause No. F14-00297.

Opinion delivered by Justice Bridges.

Justices Francis and Myers participating.

Based on the Court's opinion of this date, the order of the trial court granting Michael A. Galofaro's "motion for double jeopardy" is **REVERSED** and the cause **REMANDED** for further proceedings consistent with this opinion.

Judgment entered May 23, 2016.