Affirm as modified; Opinion Filed October 31, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01186-CR

RAYMON HERNAN LIRA VILLASIS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F13-34125-N

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Evans

Raymon Hernan Lira Villasis was charged by indictment with continuous sexual abuse of a child under the age of fourteen. Appellant waived his right to a jury and was tried by the court on a plea of not guilty. The trial court found appellant guilty of continuous sexual abuse of a child, as alleged in the indictment, and sentenced him to thirty-five years' imprisonment. On appeal, appellant challenges the sufficiency of the evidence. He also claims that he is entitled to a new punishment hearing because the trial court violated his right to common law allocution. In a cross-issue, the State requests that we modify the judgment to reflect that the complainant was thirteen at the time of the offense and that the trial court assessed punishment without a plea bargain. We modify the trial court's judgment to reflect that there was no plea bargain and that

the victim was thirteen years old at the time of the offense. As modified, we affirm the trial court's judgment.

BACKGROUND

Candy Villasis first met appellant in 2007 over the phone on "the party line." Appellant lived in Tulsa, Oklahoma; Candy and her four children lived in Dallas. The complainant, N.M., was seven or eight years old at that time and was Candy's oldest child. After several months of talking on the phone, Candy and her children went to Tulsa to meet appellant. After spending the weekend with appellant, she decided that she and the children would stay in Tulsa and live with him.[1] Two and half years later, appellant and Candy got married. They had two children together, one in 2009 and the other in 2010. Candy testified that N.M. and appellant spent a lot of time together and that she allowed appellant to be like a father figure to N.M.

In October 2011, the family left Tulsa and moved to Dallas. Candy worked fulltime as an apartment manager at an apartment complex in Irving while appellant stayed home with the children. They lived in a two-bedroom apartment in the complex.

On December 11, 2011, Candy's brother Arturo, his wife Evelyn, and their children were at Candy's apartment for movie night. While Candy and appellant were out getting food for the group, N.M. had appellant's phone. At one point, N.M. left appellant's phone on the bed and walked away. Evelyn took the phone and looked through the photos.[2] She discovered that there were three or four nude photos of N.M. After they left the apartment, Evelyn called her mother-in-law, Sarah, and told her what she had seen.

[1] N.M. was not with Candy and the other three children during the weekend in Tulsa because she was in Mexico with her grandmother, Sarah. However, Candy returned to Dallas early morning on Tuesday to pick up the complainant and bring her to Tulsa.

[2] Evelyn testified that she wanted to look through the phone because she believed that appellant took a lot of pictures of N.M. and wanted to find out if there was any reason for him to be taking so many pictures of the child.

Later that night, Sarah went to Candy's apartment and took Candy and the children back to her apartment. N.M. told her grandmother that appellant had been sexually abusing her. The police were called. N.M. was later taken to Children's Medical Center where a genital examination was performed. The examination showed an injury to N.M.'s hymen indicating that something had penetrated past the hymen.

N.M. testified that appellant began sexually abusing her in Tulsa when she was ten years old. Her testimony revealed that when they lived in Tulsa, appellant penetrated her vagina almost every day with either his finger or his penis.

The evidence also shows that appellant continued the sexual abuse after the family moved back to Dallas. N.M. testified that her birthday was September 30, and that the move to Dallas occurred shortly after her birthday when she was twelve or thirteen years old.[3] She testified that the first time appellant sexually abused her in Dallas was sometime after her birthday but before October 31, and that the last time he abused her was two days before the movie night when Evelyn saw the photos in appellant's phone. N.M. testified that both of those incidences involved the contact and penetration of N.M.'s vagina with appellant's penis.[4] She also testified that appellant once tried to insert his penis into her anus, but gave up when she struggled too much.

ANALYSIS

I. Sufficiency of the Evidence

[3] Both Candy and N.M. testified that N.M.'s date of birth is September 30, 1998. Thus, N.M. was thirteen years old when the family moved to Dallas in 2011.

[4] In setting forth the evidence of sexual abuse after the move to Dallas, the State's brief states that the complainant testified that this occurred almost every day. Although it can be argued that N.M.'s testimony describing the pain she felt during these penetrating acts can be interpreted to imply that it happened every day when the prosecutor asked why she was in pain and N.M. answered, "Because even though it happened like my whole life every day, every single day, it still hurt," the record cite the State uses to support this statement refers to N.M.'s testimony about the daily abuse in Tulsa, not Dallas. The testimony regarding the abuse in Dallas was focused primarily on the two incidences of penetration already described and does not specifically indicate that such abuse occurred "almost daily."

Appellant was charged with having committed continuous sexual abuse of a child. The indictment alleged that on or about September 1, 2007, during a period that was thirty or more days in duration, appellant committed two or more acts of sexual abuse against N.M. by the contact and penetration of N.M.'s female sexual organ by appellant's sexual organ, and by the contact and penetration of N.M.'s anus by appellant's sexual organ. Appellant contends that the evidence is legally insufficient to support the conviction because the State failed to prove that at least thirty days had elapsed between the single act of anal sexual abuse and any of the other acts of penile-vaginal sexual abuse about which N.M. testified. Appellant's claim is without merit.

It is well-settled that the State may plead alternative "manner and means" in the conjunctive, and proof of any one "manner and means" will support a guilty verdict. *See Lawton v. State*, 913 S.W.2d 542, 551 (Tex. Crim. App. 1995); *Lehman v. State*, 792 S.W.2d 82, 84 (Tex. Crim. App. 1990). For the offense of continuous sexual assault of a child, the statute creates a single element of a "series" of sexual abuse. *See* TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2016); *Render v. State*, 316 S.W.3d 846, 858 (Tex. App.—Dallas 2010, pet. ref'd.). The individual acts of sexual abuse set forth in the statute are simply the "manner and means" by which the series is committed. *Holton v. State*, 487 S.W.3d 600, 607 (Tex. App.—El Paso 2015, no pet.); *Fulmer v. State*, 401 S.W.3d 305, 312 (Tex. App.—San Antonio 2013, pet. ref'd); *Lane v. State*, 357 S.W.3d 770, 776 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Under the statute, the act-of-sexual-abuse element is defined as any act that is, among other things, aggravated sexual assault under penal code section 22.021. *See* TEX. PENAL CODE ANN. § 21.02(c)(4) (West Supp. 2016). Section 22.021 identifies several alternative means of committing aggravated sexual assault, including intentionally or knowingly penetrating the sexual organ of a child, causing the penetration of the anus of a child, or causing the anus of a

child to contact the sexual organ of another person. *See* TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B)(i), (a)(1)(B)(iv) (West Supp. 2016).

In this case, the indictment charging appellant with penetrating the child's sexual organ and contacting and penetrating the child's anus is proper conjunctive pleading of an alternative means of commission of the offense of aggravated sexual assault. *See Hilliard v. State*, 652 S.W.2d 602, 605–06 (Tex. App.—Austin 1983, pet. ref'd untimely filed); *Rundell v. State*, No. 04-94-00641-CR, 1996 WL 23438, *1 (Tex. App.—San Antonio Jan. 24, 1996, pet. ref'd) (not designated for publication). Proof of any two acts constituting the offense of aggravated sexual assault during a period that was thirty or more days in duration satisfies the act-of-sexual-abuse element required in the continuous sexual assault of a child statute. Appellant does not contest that the State proved two acts of penetration of N.M.'s female sexual organ by appellant's sexual organ during a period that was thirty or more days in duration. N.M. testified that the first time appellant sexually abused her in Dallas was sometime after her birthday but before October 31, and that the last time he abused her was two days before the movie night when Evelyn saw the photos in appellant's phone. N.M. testified that both of those incidences involved the contact and penetration of N.M.'s vagina with appellant's penis. Evelyn testified that the movie night in which she discovered the pictures was December 11. The trial court specifically found the testimony of both N.M. and Evelyn to be credible. A child victim's testimony is sufficient to support a conviction for sexual assault. TEX. CODE CRIM. PROC. ANN. art. 38.07(b)(1) (West Supp. 2016). "Logically, a child's testimony alone is also sufficient to establish the predicate offenses to prove continuous sexual assault of a child." *Bays v. State*, No. 06-10-00114-CR, 2011 WL 6091757, *3 (Tex. App.—Texarkana December 7, 2011, pet. ref'd) (mem. op., not designated for publication). We conclude that the evidence is sufficient to support the conviction. We overrule appellant's first issue.

II. Common Law Allocution

In his second issue, appellant claims the trial court violated his right to common law allocution. The State argues that appellant did not preserve the allocution issue because he did not object in the trial court.

The record reflects that immediately after pronouncing appellant's sentence, the trial court asked appellant's counsel if there was any reason in law to prevent the court from sentencing his client. Counsel replied that there was "no reason" and did not otherwise object. Appellant contends "at law" limited him to statutory allocution, and that by limiting its question to statutory allocution the trial court deprived him of his common law right of allocution. *See* TEX. CODE CRIM. PROC. ANN. art. 42.07 (West 2014).

An appellant must timely object in the trial court to complain on appeal he was denied his right to allocution. *See* TEX. R. APP. P. 33.1; *Tenon v. State*, 563 S.W.2d 622, 623 (Tex. Crim. App. [Panel Op.] 1978); *see also Gallegos–Perez v. State*, 05-16-00015-CR, 2016 WL 6519113, at *2 (Tex. App.—Dallas Nov. 1, 2016, no pet.) (mem. op., not designated for publication). Because appellant did not do so, he has not preserved the issue for our review.

III. Modification of Judgment

In a cross-issue on appeal, the State requests that we modify the judgment to reflect that the complainant was thirteen at the time of the offense and that the trial court assessed punishment without a plea bargain. This Court has the authority to modify an incorrect judgment to correct a clerical error when the evidence necessary to correct the judgment appears in the record. *See Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). The evidence at trial showed that the complainant was thirteen years old at the time of the offense. The written judgment states that she was ten at the time of the offense. Further, the record shows that the trial court assessed

punishment without a plea bargain. However, the written judgment states that appellant was sentenced pursuant to a plea bargain. We modify the trial court's judgment to reflect that there was no plea bargain and that the victim was thirteen years old at the time of the offense.

CONCLUSION

As modified, we affirm the trial court's judgment.

/David W. Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RAYMON HERNAN LIRA VILLASIS, Appellant

No. 05-16-01186-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-34125-N.
Opinion delivered by Justice Evans, Justices Lang and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The Section entitled "Terms of Plea Bargain" is modified to state "N/A."

The age of the victim at the time of the offense is changed from "10 years" to "13 years."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 31st day of October, 2017.