Affirmed; Opinion Filed May 10, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00145-CR

No. 05-17-00146-CR

KEVIN ANTONIO ROJAS-GALLO, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1548215-T and No. F-1548216-T

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Myers
Opinion by Justice Lang

Following a plea of not guilty, appellant Kevin Antonio Rojas-Gallo was convicted by a jury of indecency with a child and continuous sexual abuse of a child. The jury assessed punishment at nine years' incarceration for the indecency charge and forty-seven years' incarceration for the continuous sexual abuse charge. The trial court sentenced appellant in accordance with the jury's verdicts and ordered the sentences to run consecutively.

In three issues on appeal, appellant asserts that (1) the trial court erred by failing to restrict the definition of intentionally to the nature of appellant's conduct in the jury charge, (2) the evidence is "insufficient" to prove venue, and (3) the "evidence is insufficient to prove the instances of abuse were thirty or more days in duration."

I. Factual and Procedural Background

This case involves two indictments. One indictment alleged in part that "on or about" April 22, 2015, "in the County of Dallas, State of Texas" appellant "did unlawfully then and there, with the intent to arouse and gratify the sexual desire of the defendant, expose the defendant's genitals, knowing that [A.A.], a child younger than 17 years and not the defendant's spouse, was present." The other indictment alleged that "on or about" December 1, 2014, "in the County of Dallas, State of Texas, appellant "did then and there intentionally and knowingly, during a period that was 30 or more days in duration, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against [A.G.], a child younger than 14 years of age."

At trial the State presented the testimony of A.A. A.A. testified that he lived in Garland, Texas from the time he was born until he was 12 years old. At the time of trial, A.A. was 14 years old. While in Garland, A.A. lived in a house with his brother A.G., his and A.G.'s mother, his sister, his uncle, his grandparents, and appellant, who was his mother's friend. Appellant lived with A.A. in the Garland home for "a few years." During this time, appellant made A.A. feel "uncomfortable" several times. The first time A.A. felt "uncomfortable" was when A.A. "walked in on [appellant] when he was putting a dress on." Additionally, appellant would go to A.A.'s room and "do[] strange things." One night when A.A. was asleep in his room he woke up to appellant, who was naked, "putting his penis in [A.A.'s] butt." During this incident, appellant's penis touched the "inside" of A.A.'s butt and "as soon as [appellant] put his penis inside," A.A. "woke up and started punching [appellant]." A.A. punched appellant "in the penis, one time in the stomach, and one time in the face." After that night, A.A. "started locking [himself] in [his] room" for "three or four days" because he was "freaked out" appellant would "try[] to do the same stuff to [him] again."

When A.A. turned 13, he and his family and appellant moved to Seagoville, Texas. One day while living in Seagoville, A.A. and his friend, B.F., were playing at A.A.'s home when A.A. "got tired and went to the living room, [and] fell asleep." While A.A. was asleep, appellant "came out of nowhere [and] put his legs around [A.A.'s] legs", pulled out his penis, and yelled "suck it" to A.A. During this incident, appellant's pants were unzipped, he was watching gay porn on his iPhone, and his hand was moving and "touching his penis." B.F. walked in while appellant was standing over A.A., causing appellant to "freak[] out." A.A. and B.F. then went outside and "decided to call the police" once A.A.'s mother returned home.

A.A. also testified about an incident he witnessed in Seagoville where appellant "tried to rape" A.G. This incident occurred when A.A. and A.G. were playing video games and A.G. left to go to the kitchen. While A.G. was in the kitchen, A.A. heard A.G. yell out A.A.'s name and scream "help me. Help me." When A.A. went to check on A.G., appellant had "tried to pull [A.G.'s] penis" and A.A. saw appellant "dragging [A.G.] to [appellant's] room." When appellant saw A.A. he "went inside his room and he left [A.G.] on the floor." A.A. witnessed A.G. laying on the floor on his back "crying and freaked out at the same time" and "shaking real bad."

A.A. was "12 or 13" years old the first time appellant touched him "in a way he shouldn't have" and was 14 years old when A.A. and B.F. called the police in Seagoville after appellant exposed himself. A.A. also testified that his mother was pregnant with a child, M., the first time appellant touched him and M. was "a month old" when appellant exposed himself to A.A.

The State also called A.G. to testify. A.G. recounted that the first time appellant made him feel uncomfortable was when A.G. was 7 years old and living in Garland. Appellant came into A.G.'s room, "pushed [A.G.] to the ground" and "pulled [A.G.'s] pants down." While A.G. was

on his stomach on the floor, appellant got "on top of" A.G. and went "back and forth" rubbing his penis against A.G.'s bottom.

A.G. also testified that the incidents with appellant continued when the family lived in Seagoville. One day, A.G. returned home from school and appellant came into A.G.'s room, tied a shirt on A.G.'s legs so A.G. could not kick him, and put "his inappropriate part inside of [A.G.'s] butt" "where the poop comes out." This caused the inside of A.G.'s bottom to "hurt[] a little" and when A.G. went "number two" in the bathroom "blood [would] com[e] out." Another incident occurred when A.G. returned home from school one day and went into the kitchen. While A.G. was in the kitchen, appellant "came towards" A.G., tied a shirt around A.G.'s legs and arms, pulled his and A.G.'s pants down, and put "his inappropriate part inside [A.G.'s] butt."

A.G. testified the incidents with appellant would happen "three, five, or more" times a week and appellant would "put his penis in [A.G.'s] bottom" "lots." A.G. did not know exactly how many times the incidents occurred because at the time of the trial, it had "been a while" and he did not "have that good of a memory." However, when A.G. was asked how many months or years appellant was "putting his penis in [A.G.'s] bottom," A.G. responded "a year or two." After the incidents with appellant, it hurt A.G. to go to the restroom and he was unable to sit down for three days "or more." The incidents with appellant occurred when A.G.'s mother was pregnant with M. and after M. was born.

On cross-examination, A.G. testified he could not remember how many total days the abuse took place. When asked if the abuse could have taken place in "just ten days," A.G. responded it could have. Additionally, when A.G. was asked if it was "fair to say that [he] [did not] know how long" the abuse took place, A.G. answered "yes." However on re-direct, A.G. testified that

appellant "was putting his penis inside [A.G.'s] bottom" for "I think a year, two, or a half" and that the incidents occurred for longer than one month.

The mother of both A.A. and A.G. also testified. She testified that her daughter, M., was born on June 2, 2014 and that in August of 2014 she and her family moved from Garland to Seagoville. In April of 2015, the mother of A.A. and A.G. returned home from work one day to see A.A., A.G., and B.F. waiting for her outside her Seagoville home. The three boys were crying and "scared…out of their mind." B.F. then told the mother of A.A. and A.G that he "saw [appellant] with his pants down masturbating and asking [A.A.] to suck his penis." The mother asked A.A. for confirmation and A.A. told his mother the incidents with appellant had "been going on since Garland and [they] [had] been happening to [A.G.] as well." A.A. also "told [his mother] that he was sitting on the couch and [appellant] came to him masturbating, asking him to suck his penis." The mother then took A.G. aside and confirmed with A.G. that appellant "had been raping [A.G.] since [the family][was] living in Garland." A.G. told his mother "about the anal penetration and [he] said that [appellant] used a little bottle, lubricant bottle." A.G. told his mother the incidents happened "a lot of times."

Yolanda Hamm, a school counselor at Seagoville North Elementary school, also testified for the State. On April 24, 2015, Hamm was approached by a third-grade teacher and A.G. The teacher was "very concerned with some information that A.G. had shared with him." After Hamm had a conversation with A.G., she made a report "about A.G. being in harm at his house" in regards to "sexual abuse" and sent the report to Child Protective Services, the State of Texas, the child abuse department, and the Seagoville Police Department.

The State also called Nakisha Biglow to testify, the director of the multidisciplinary team services department at the Dallas Children's Advocacy Center. The Dallas Children's Advocacy

Center conducts forensic interviews with children "once allegations of abuse or severe neglect have been made." Biglow testified that during a forensic interview there can be "certain red flags" that can make her "doubt if…something has happened to the child," such as the child being unable to "give any sensory details." Biglow interviewed A.A. and A.G., both of whom made an "outcry of sexual abuse" to Biglow. Biglow did not observe any "red flags" with either A.A. or A.G.'s interview. Biglow also interviewed B.F. and did not observe any "red flags."

Danny Titus, a detective in the Seagoville Police Department, also testified. Titus testified he was called to A.A. and A.G.'s home in Seagoville to investigate the alleged offenses and that Seagoville is located in Dallas County.

Defense counsel called appellant to testify. Appellant denied ever attempting a sexual act with either A.A. or A.G. and testified he "never touched the kids" in the Garland home. Appellant also denied attempting to force A.A. to perform oral sex on him or attempting to force A.G. to have sex with him in the Seagoville home. Appellant believed "[A.A] was always rude and he never liked [appellant] because [he] looked gay." According to appellant, the day before the police were called to the Seagoville residence, appellant and the mother of A.A. and A.G. had decided to move to a bigger apartment. A.A. got upset about moving and "told [appellant] that he was going to lie to his mom and tell his mom that [appellant] had done stuff to him because he didn't want [appellant] to move in with them to the bigger apartment."

II. Jury Charge Error

A. Standard of Review

We review alleged jury charge error in two steps. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether error exists in the charge. *Id.* at 649. Second, if charge error exists, we review the record to determine whether the error caused sufficient harm

to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). Where, as here, the defendant did not raise a timely objection to the jury instructions, "reversal is required only if the error was fundamental in the sense that it was so egregious and created such harm that the defendant was deprived of a fair and impartial trial." *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). Error is egregiously harmful if it "affect[s] the very basis of the case, deprive[s] the defendant of a valuable right, or vitally affect[s] a defensive theory." *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013). In analyzing harm, we consider "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Egregious harm is a "high and difficult standard which must be borne out by the trial record." *Young v. State*, 283 S.W.3d 854, 880 (Tex. Crim. App. 2009). The defendant must have suffered "actual rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

B. Applicable Law

Section 6.03 of the Texas Penal Code delineates three "conduct elements" that may be in involved in an offense: "(1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct." *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989); *see also* TEX. PENAL CODE. ANN. § 6.03. (West 2011). "In a jury charge, the language in regard to the culpable mental state must be tailored to the conduct elements of the offense." *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015). "It is error for a trial judge to not limit the definitions of the culpable mental states as they relate to the conduct elements involved in the particular offense." *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994). "Where

the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious." *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999).

A person commits indecency with a child if, "with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person ... with intent to arouse or gratify the sexual desire of any person ... exposes the person's anus or any part of the person's genitals, knowing the child is present." TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West Supp. 2017). Indecency with a child by exposure is a nature of the conduct offense. *Loving v. State*, 401 S.W.3d 642, 649 (Tex. Crim. App. 2013).

C. Application of the Law to the Facts

In his first issue, appellant contends the trial court "erred by failing to restrict the definition of intentionally to the nature of appellant's conduct" in the jury charge. According to appellant, the charge "misdirected the jury to the evidence presented at trial of the trauma caused A.A. rather than whether [a]ppellant's conduct was intended to gratify himself." The charge of the court stated in part:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

The State concedes that the inclusion of improper conduct elements in the abstract portion of the jury charge constituted error, but argues appellant was not egregiously harmed by that error. We conclude the trial court erred by including the complained-of conduct elements in the abstract portion of the jury charge. *See Cook*, 884 S.W.2d at 491. However, in assessing harm resulting from the inclusion of improper conduct elements in the definitions of culpable mental states, we "may consider the degree, if any, to which the culpable mental states were limited by the

application portions of the jury charge." *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994) (quoting *Cook v. State*, 884 S.W.2d 485, 492 n.6. (Tex. Crim. App. 1994)). In the case before us, the record shows the application portion of the charge in this case stated in part:

> NOW, bearing in mind the foregoing instructions, if you find and believe from the evidence beyond a reasonable doubt that the defendant, Kevin Rojasgallo, on or about the 22nd day of April, 2015, in the County of Dallas and State of Texas, did unlawfully then and there, with the intent to arouse or gratify the sexual desire of the defendant, expose the defendant's genitals, knowing that [A.A.], a child younger than 17 years and not the defendant's spouse, was present, then you will find the defendant guilty of the offense of indecency with a child, as charged in the indictment.

The application portion of the jury charge correctly instructed the jury that in order to convict appellant of indecency with a child it was required to find beyond a reasonable doubt that appellant exposed his genitals with the intent to arouse or gratify the sexual desire of appellant. The application paragraph is the "heart and soul" of the jury charge. *See Vasquez v. State*, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012). "Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious." *Medina*, 7 S.W.3d at 640. In the absence of contrary evidence, we presume the jury followed the trial court's instructions in the application paragraphs of the charge. *See Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996). Therefore, on this record, we conclude appellant was not egregiously harmed by the error in question. We decide against appellant on his first issue.

III. Venue

A. Standard of Review

In a criminal case, "[t]he State need prove venue only by a preponderance of the evidence." *Murphy v. State*, 112 S.W.3d 592, 604 (Tex. Crim. App. 2003); TEX. CODE CRIM. PROC. ANN. ART. 13.17 (West 2015). Appellate courts "presume that venue was proved in the trial court unless

it was disputed in the trial court or the record affirmatively shows the contrary." *Meraz v. State*, 415 S.W.3d 502, 506 (Tex. App.—San Antonio 2013, pet. ref'd). Proof of venue may be established by either direct or circumstantial evidence and the jury may "make reasonable inferences from the evidence to decide the issue of venue." *Edwards v. State*, 97 S.W.3d 279, 291 (Tex. App.—Houston [14th Dist] 2003, pet. ref'd). Evidence is sufficient to establish venue if "from the evidence the jury may reasonably conclude that the offense was committed in the county alleged." *Rippee v. State*, 384 S.W.2d 717, 718 (Tex. Crim. App. 1964). In determining the legal sufficiency of the evidence, appellate courts view "all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found" by a preponderance of the evidence that the offense occurred in the county alleged. *Vanschoyck v. State*, 189 S.W.3d 333, 336 (Tex. App.—Texarkana 2006, pet. ref'd).

B. Applicable Law

The continuous sexual abuse statute "creates a single offense." *Meraz*, 415 S.W.3d at 505; *see also* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2017). The statute allows the State to seek "one conviction for a 'series' of acts of sexual abuse with evidence that, during the relevant time period, appellant committed two or more different acts that section 21.02 defines as means of committing a single criminal offense and not as two or more separate criminal offenses." *Render v. State*, 316 S.W.3d 846, 857 (Tex. App.—Dallas 2010, pet. ref'd). "The location or place where the sexual abuse was committed is not an element of the offense" and "the legislature d[oes] not require that all elements of the offense be committed in one county." *Meraz*, 415 S.W.3d at 505; *see also* TEX.CODE CRIM. PROC. ANN. art. 13.15 (West 2015) ("Sexual assault may be prosecuted in the county in which it is committed."). "When conduct constituting a single offense

is committed in more than one county, venue under the general venue rule is proper in any of those counties." *Meraz,* 415 S.W.3d at 505.

C. Application of the Law to the Facts

In his second issue, appellant contends "the State relied upon proof that the element of [sexual abuse] series occurred in Garland and then in Seagoville" and therefore the evidence in this case is "insufficient" to prove venue because the "prosecutor failed to elicit evidence that Garland is in Dallas County."

In this case, the State presented evidence that appellant began committing acts of sexual abuse against A.A. and A.G. in Garland, Texas and continued to commit acts of sexual abuse against A.A. and A.G. in Seagoville, Texas. Specifically, A.A. testified appellant "put his penis inside" A.A. in the Garland home and A.G. testified that appellant rubbed his penis "back and forth" against A.G.'s bottom in the Garland home. A.G. also testified that the abuse continued in Seagoville, where appellant "put his penis in [A.G.'s] bottom" "lots." On this record, we conclude a rational trier of fact could have found by a preponderance of the evidence that appellant committed elements of the offense of continuous sexual abuse of a child in both Garland and Seagoville. The elements of continuous sexual abuse of a child are not required to be committed in one county. *See Meraz,* 415 S.W.3d at 505. When continuing sexual abuse of a child is committed in more than one county, venue is proper in any of those counties. *See id.* Detective Titus testified that Seagoville is located in Dallas County. From this evidence, we conclude a rational trier of fact could have found by a preponderance of the evidence that elements of continuous sexual abuse occurred in Dallas County. Therefore, venue was proper in Dallas County. We decide against appellant on his second issue.

IV. Sufficiency of the Evidence

A. Standard of Review

We review a challenge to the sufficiency of the evidence under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). Evidence is sufficient to support a conviction if, "after 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." *Jackson,* 443 U.S. at 319. The *Jackson* standard is the "only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). We "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).

We are mindful that "[t]he trier of fact is the sole judge of the weight and credibility of the evidence." *Sartain v. State*, 228 S.W.3d 416, 424 (Tex. App.—Fort Worth 2007, pet. ref'd). We give "full play to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson,* 443 U.S. at 319. "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). "When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination." *Dobbs v. State*, 434 S.W.3d 166, 169 (Tex. Crim. App. 2014). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id.*

B. Applicable law

A person commits the offense of continuous sexual abuse against a child if: "(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age." TEX. PENAL CODE ANN. § 21.02. Therefore, "to convict the appellant of this offense, the jury must have found that appellant committed at least two acts of sexual abuse over a period of at least thirty days." *Render v. State*, 316 S.W.3d 846, 859 (Tex. App.—Dallas 2010, pet. ref'd).

C. Application of the Law to the Facts

In his third issue, appellant contends the "evidence is insufficient to prove that two or more events [of sexual abuse] occurred over the course of 30 or more days." Specifically, appellant argues "[t]he proof of duration came from the complaining witness who contradicted himself" and therefore "no reasonable jury could have found that elements beyond a reasonable doubt."

During trial, A.A. and A.G. testified to multiple incidents involving appellant that occurred in Garland and Seagoville. A.A. testified that appellant "put[] his penis in [A.A.'s] butt" in the Garland home and that he was "12 or 13" years old the first time appellant touched him "in a way he shouldn't have." A.A. told his mother that the abuse continued in Seagoville and he was 14 years old when appellant exposed himself to A.A. A.A. also testified that his mother was pregnant with M. the first time appellant touched him and M. was "a month old" when appellant exposed himself to A.A.

A.G. testified he was 7 years old when appellant came into his room in the Garland home, pulled A.G.'s pants down, and rubbed his penis against A.G.'s bottom. A.G. also testified to two specific occurrences in Seagoville where appellant "put his penis in [A.G.'s] bottom." The incidents with appellant would happen "three, five, or more" times a week and appellant would anally penetrate A.G. "lots." The incidents with appellant occurred for "a year or two" and after an incident occurred with appellant, A.G. was unable to sit down for three days "or more."

On cross-examination, A.G. responded he did not know exactly how many times appellant anally penetrated him because it had "been a while" and he did not "have that good of a memory." When A.G. was asked by the defense if the abuse could have taken place in "just ten days" A.G. responded that it could have. However, on re-direct, A.G. testified that appellant assaulted him for longer than one month.

A.A and A.G.'s mother testified that A.G. told her appellant "had been raping" A.G. "since [the family] was living in Garland." The family moved from Garland to Seagoville in August of 2014 and both A.A. and A.G. told their mother the abuse was ongoing in April of 2015.

As explained above, A.A. and A.G. provided explicit details about the incidents with appellant and the locations where the incidents occurred. Additionally, the record indicates A.A. and A.G. disclosed the incidents to three witnesses: their mother, a school counselor, and a forensic interviewer at the Dallas Children's Advocacy Center.

Appellant claims the evidence is insufficient to support his conviction because A.G. "contradicted himself" and "simply agreed with whomever was asking him questions." However, appellant's sufficiency challenge relates to the credibility of the witnesses. Because the jury is the sole judge of a witness's credibility and the weight to be given to the testimony, the jury may believe or disbelieve the contrary evidence. *See Sartain*, 228 S.W.3d 416. We must afford due

deference to the jury's determination. *See Dobbs*, 434 S.W.3d 166. On this record, we conclude a rational trier of fact could have found the essential elements of continued sexual abuse of a child beyond a reasonable doubt. We decide against appellant on his third issue.

V. Conclusion

We decide appellant's first, second, and third issues against him. We affirm the trial court's judgment.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

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In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

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