Affirmed and Memorandum Opinion filed January 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00289-CR

EUDALIA BONILLA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 51,110

M E M O R A N D U M O P I N I O N

A jury convicted appellant, Eudalia Bonilla, of felony theft amounting to at least $1,500.00 but less than $20,000.00 (aggregated). In seven issues, appellant contends the evidence is legally insufficient to support the jury's verdict, her due process rights were violated, and the trial court erred in denying her request for a jury instruction on mistake of law and overruling her objection to the prosecutor's closing argument. We affirm.

I. BACKGROUND

Appellant is the mother of four children, including C.B., a female who was fourteen-years-old at the time of trial. Linda Nesmith is C.B.'s paternal grandmother and has had legal custody of C.B. since 1997.

In July 2004, Nesmith was interviewed by Texas Health and Human Services Commission ("HHSC") eligibility specialist Debbie Brock regarding Nesmith's eligibility for benefits, including food-assistance benefits for C.B. Brock discovered C.B. was already the subject of a benefits claim by appellant. Nesmith told Brock that C.B. had lived with her for several years and presented court documents establishing her legal custody of C.B. Brock notified appellant that she would no longer be allowed to claim C.B. as part of her household for benefits purposes. Appellant did not respond to the notice.

Appellant's alleged food-stamp fraud was referred to Kameshia McCoy, a senior fraud investigator with HHSC. McCoy concluded from her investigation that appellant's fraudulent activities began in April 2002. She also concluded appellant was overissued $4,093.43 from HHSC as a result of wrongfully claiming benefits for C.B.

Appellant was indicted for felony theft-aggregated. Following a jury trial and conviction, appellant entered into a plea agreement relative to punishment.

II. ANALYSIS

A. Legal Sufficiency of the Evidence

We begin by addressing appellant's issues challenging the legal sufficiency of the evidence supporting the jury's verdict. In her first issue, appellant contends the evidence is legally insufficient to support the jury's finding that she deceived HHSC by claiming C.B. as part of her household because an incorrect legal standard was used by the State and trial court for determining that C.B. did not "live with" appellant. In her third issue, appellant contends the evidence is legally insufficient to support the jury's finding that she was deceptive during the entire period used to determine the aggregate amount of the theft. In her fourth issue, appellant contends the evidence is legally insufficient to support the jury's finding that she had the requisite criminal intent to commit theft.

In determining legal sufficiency, we view all of the evidence in the light most favorable to the verdict and decide whether a trier of fact could have found each element of the offense beyond a reasonable doubt. *Young v. State*, 14 S.W.3d 748, 753 (Tex. Crim. App. 2000). The jury is the exclusive judge of the credibility of witnesses and the weight to be given their testimony; it is the exclusive province of the jury to reconcile conflicts in the evidence. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Thus, when performing a legal-sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the fact-finder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). We must resolve any inconsistencies in the testimony in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

1. Food-Stamp Eligibility Standards

We first consider whether an incorrect legal standard was used for determining whether appellant and C.B. lived together. Interpretation of federal food-stamp law and regulations is a question of law we consider *de novo*. *See Anderson v. State*, 193 S.W.3d 34, 38 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) ("Statutory interpretation is a question of law."); *see also In re R.C.T.*, No. 14-07-00642, 2009 WL 2517054, at *2 (Tex. App.—Houston [14th Dist.] June 18, 2009, pet. filed) (mem. op.) (interpreting state and federal statutory language *de novo*). We seek to ascertain the legislature's intent by focusing on the literal text of the statute, but may look beyond the plain meaning of the statute if its terms are ambiguous. *See Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991).

The parties agree that a "household" eligible to receive food stamps is defined in pertinent part as:

> [A] group of individuals who *live together* and customarily purchase food and prepare meals together for home consumption.
>
> [P]arents and their children 21 years of age or younger who *live together* . . . shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so.

7 U.S.C.A. § 2012(i) (West 1999) (emphasis added), *amended by* Farm Security and Rural

Investment Act of 2002, Pub. L. No. 107-171, § 4112(b)(1), 116 Stat. 134, 312–13 (2002) (current version at 7 U.S.C.A. § 2012(n) (West Supp. 2009))[1]; *see also* 7 C.F.R. § 273.1(a), (b)(1)(ii) (2009) (containing language defining "household" in accord with language contained in 7 U.S.C.A. § 2012).[2]

The meaning of the phrase "live together," which the parties concede is not defined, is at the heart of appellant's first issue. Appellant explains that the State, in attempting to establish she was ineligible to receive food stamps for C.B., presented evidence that (1) she did not have legal custody of C.B., (2) a person can claim a child if the child lived with her more than fifty percent of the time, and (3) C.B. lived with Nesmith, not appellant. Appellant argues these are not valid standards or evidence for determining whether she and C.B. lived together according to federal food stamp law and regulations.

"The Food and Nutrition Service of the Department of Agriculture conducts the food stamp program . . . , and the Secretary of Agriculture issues regulations necessary for its administration." *Shaffer v. Block*, 705 F.2d 805, 809 (2d Cir. 1983).[3] For purpose of determining what constitutes a "household," the Department has decided not to define "living together," instead instructing that such concept should be determined by "application of a reasonable judgment based on the circumstances of a particular living arrangement." 47 Fed. Reg. 52,328, 52,329 (1982); s*ee also Baca v. Ariz. Dep't of Econ.*

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[1] The 1999 version of, and 2002 amendment to, subsection 2012(i) are substantially the same as the current version section 2012(n). *See* 7 U.S.C.A. § 2012(n) (West Supp. 2009).

[2] The language used to define "household" in 7 C.F.R. 273.1, subsections (a) and (b)(1)(ii), is the same now as it was during the period appellant allegedly committed theft. *See* 65 Fed. Reg. 64586 (Oct. 30, 2000) (amending subsections (a) and (b) of section 273.1).

At the time appellant's fraud allegedly began, the income assistance services program was in Texas Department of Human Services ("DHS"); "DHS include[d] or exclude[d] people from the food stamp household as specified in the Food Stamp Act of 1977 . . . ." *See* 24 Tex. Reg. 6515 (1999), adopting amendment proposed at 24 Tex. Reg. 4973 (2004) (former 40 Tex. Admin. Code § 3.501(c)). In 2004, subsection 3.501(c) was repealed and section 3.151 was substituted. *See* 29 Tex. Reg. 2664 (2004) & 29 Tex. Reg. 2673 (2004), adopting proposed section and repeal at 28 Tex. Reg. 9748 (2003) & 29 Tex. Reg. 9772 (2003) (former 40 Tex. Admin. Code § 3.151). The language in section 3.151 expressed that benefits were provided by household "as defined in 7 C.F.R. § 273.1." *See* 28 Tex. Reg. 9748 (adopting language still used at 1 Tex. Admin. Code § 372.151). That same year, section 3.151 was transposed to Title 1 of the Texas Administrative Code, section 372.151. *See* 29 Tex. Reg. 6361 (2004) (current version at 1 Tex. Admin. Code § 372.151 (2009) (Tex. Health & Human Servs. Comm'n, Receiving SNAP Benefits). This transposition made HHSC responsible for income assistance services.

[3] The "food stamp program" is now referred to as the "supplemental nutrition assistance program." *See* 7 U.S.C.A. § 2012(l) (West Supp. 2009).

Sec., 951 P.2d 1235, 1238 (Ariz. Ct. App. 1997). "Although the food stamp program is administered at the national level by the [Department], it is administered by state agencies at the local level. The state agencies are responsible for determining, in accordance with uniform national standards, which applicant households are eligible for the issuance of food stamps . . . ." *Shaffer*, 705 F.2d at 809 (citations omitted). "No plan of operation submitted by a State agency shall be approved unless the standards of eligibility meet those established by the Secretary, and no State agency shall impose any other standards of eligibility as a condition for participating in the program." 7 U.S.C.A. § 2014(b) (West 1999) (current version at 7 U.S.C.A. § 2014(b) (West Supp. 2009)). Additionally, no one may be a member of more than one household in a given month. 7 C.F.R. § 273.3(a) (2009).[4] We rely on the foregoing in reviewing HHSC's methodology for determining appellant and C.B. did not "live together."

In deciding that Nesmith was eligible to claim C.B., Brock considered Nesmith's statement, reviewed Nesmith's custody documents, and sent appellant a letter giving her notice of, and an opportunity to contest, C.B.'s removal as a person for whom appellant receives benefits. Brock explained that a person "lives with" another if she resides with that person over fifty percent of the time. HHSC employee Majorie Kehr bolstered this assertion by testifying that whomever a child lives with "most of the time" is likely to be eligible for benefits for the child. Kehr further stated that eligibility is determined on a case-by-case basis, and HHSC may take an applicant's word on where a child lives or may require verification. During her investigation of appellant, McCoy relied on court documents establishing that Nesmith had custody of C.B. and statements from Nesmith and other individuals, and she interviewed appellant. McCoy testified that appellant stated she "picked [C.B.] up" on Fridays and had possession of C.B. on weekends. McCoy did not recall the minimum number of days a person must reside with other individuals before she is considered part of that "household," but expressed, "[I]t has to be permanent."

[4] Subsection (a) of 7 C.F.R. 273.3 is the same now as it was during the period appellant allegedly committed theft. *See* 61 Fed. Reg. 54317 (Oct. 17, 1996) (amending subsection (a) of section 273.3).

In short, the record reflects HHSC personnel determined appellant and C.B. did not "live together" based on (1) Nesmith's statements and custody of C.B., (2) appellant's failure to respond to Brock's letter, and (3) appellant's explanation that C.B. was with her only during weekends. We emphasize HHSC afforded appellant the opportunity to explain why C.B. was part of her household. Accordingly, HHSC's standards for determining appellant's eligibility did not contravene the Department of Agriculture's statement that "living together" should be determined by "application of a reasonable judgment based on the circumstances of a particular living arrangement." 47 Fed. Reg. at 52,329.[5]

2. Legal-Sufficiency Analysis

Having concluded HHSC's standards for determining appellant and C.B. did not "live together" did not violate food-stamp law and regulations, we next consider whether the evidence is legally sufficient to support the jury's findings that appellant (1) deceived HHSC by claiming C.B. during a period when appellant and C.B. did not live together, (2) was deceptive during the entire period used to determine the aggregate value of the theft, and (3) had the requisite criminal intent to commit theft.

A person commits the offense of theft if he "unlawfully appropriates property with intent to deprive the owner of property." Tex. Pen. Code Ann. § 31.03(a) (Vernon 2003). A person acts with intent when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (Vernon 2003). Appropriation is unlawful if it is accomplished without the owner's effective consent. *Id.* § 31.03(b)(1). Consent is not effective if it is induced by deception. *Id.* § 31.01(3)(A) (Vernon 2003). "Deception" means:

> [C]reating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true[.]

[5] Appellant cites *Robinson v. Block* as support that HHSC's standards violated federal law. 869 F.2d. 202 (3d Cir. 1989). The court in *Robinson* held a state department determination that siblings lived together whenever they had the same address was inconsistent with the federal mandate to consider all circumstances. *Id.* at 212–14. Appellant's reliance on *Robinson* is unpersuasive because HHSC personnel considered the particular circumstances of her situation.

Id. § 31.01(1)(A). Deception and intent may be inferred from the circumstances. *See Lewis v. State*, 715 S.W.2d 655, 657 (Tex. Crim. App. 1986); *Christensen v. State*, 240 S.W.3d 25, 32 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) ("A jury may infer intent from any facts that tend to prove its existence, such as the acts, words, and conduct of the defendant.").

Appellant posits several reasons the evidence is legally insufficient to support the jury's findings that she acted deceptively or with criminal intent. She asserts the State relied solely on three governmental-assistance applications as proof of her deception: (1) application of January 15, 2004, in which appellant claimed C.B.; (2) application of May 4, 2004, in which appellant did not claim C.B.; and (3) application of June 15, 2004, in which appellant claimed C.B., but noted "Gone for summer."[6] Appellant argues the January 15 application is the only possible evidence she deceptively sought benefits for C.B., and any deception ended when she did not claim C.B. in her May 4 application. According to appellant, the only evidence possibly inferring she received benefits by deception was for a four-month period for which an amount of overissuance was not specified. Appellant also argues the applications support her contention that she complied with HHSC's eligibility standards because they reflect she consciously attempted to determine when she could and could not claim C.B., even noting when C.B. was absent during the summer. Finally, appellant emphasizes her testimony that she called HHSC frequently to add and remove C.B., creating so much paperwork that HHSC instructed her to cease claiming C.B. However, viewing all the evidence in the light most favorable to the verdict, we conclude that the jury could have found each challenged element beyond a reasonable doubt.

Senior fraud investigator McCoy reviewed HHSC caseworker notes from appellant's application interviews for the duration of the alleged fraud, which, according to McCoy, began in April 2002. McCoy testified, "I was able to obtain court records . . . saying [C.B.] was in Mrs. Nesmith's custody. And basically, I went through the caseworker's documentation and for each interview it suggested that [appellant] said [C.B.] was, in fact, in her household, and I got more information suggesting that she was

[6] McCoy testified that these were the only applications she could locate.

not." McCoy testified appellant told her that C.B. was staying with Nesmith in order to attend school, but that appellant had possession of C.B. during weekends.[7] While McCoy did not investigate whether C.B. lived with appellant on any single day, she testified that she was able to determine what months C.B. was part of appellant's household (although she did not disclose these specifics at trial).

McCoy testified appellant was overissued $4,093.43 in benefits after claiming C.B. as a member of her household. She calculated this amount using a computerized budget system that reflected the amount of benefits appellant received each month. McCoy input that C.B. was not part of appellant's household, and the system output the amount for which appellant was eligible absent C.B. She also calculated the amount appellant was overissued by claiming C.B. McCoy did not provide a monthly computation reflecting the incremental overpayments, and no document was admitted reflecting her method of computation.

The parties agree McCoy did not specify when the overissuance ended. Nevertheless, eligibility specialist Brock testified that she interviewed Nesmith in July 2004 and determined appellant was claiming C.B. Brock notified appellant she would no longer be allowed to claim benefits for C.B. According to Brock, C.B. was removed from appellant's benefits calculation when appellant failed to respond to the notification. Brock explained it was too late to recalculate appellant's benefits for August, but that C.B. could be included in Nesmith's benefits in September.[8] This testimony constituted some evidence supporting that appellant stopped receiving funds for C.B. by September 2004. This evidence also supported an inference McCoy's investigation ended in September 2004. Accordingly, there was evidence appellant received $4,093.43 in benefits for C.B. from on or around April 1, 2002 until on or around August 1, 2004.[9] Our next inquiry is

[7] Appellant testified she told McCoy she had possession of C.B. full time, not just on weekends. However, we resolve inconsistencies in favor of the verdict. *See Curry*, 30 S.W.3d at 406.

[8] Nesmith never received HHSC benefits for C.B. because Nesmith found employment, vitiating her need for assistance.

[9] Because it is alleged in the indictment the theft occurred from *on or around* April 1, 2002 to *on or around* August 1, 2004, it is irrelevant that McCoy's investigation may have included money overissued after August 1, 2004. It is well established the "on or about" language "allows the State to prove a date other than the one alleged in the indictment as

whether the evidence supported the jury's finding that appellant misappropriated these funds by deception and with the requisite criminal intent.

Two of the HHSC witnesses testified that whomever a child resides with the majority of the time is eligible to claim benefits for the child. Appellant testified she was told by HHSC personnel she could claim C.B. for months when she stayed with appellant at least fourteen or fifteen days. Appellant admitted she understood HHSC eligibility requirements when she claimed benefits for her children. Several witnesses testified that C.B. lived with Nesmith, but no witness specified how many days per month during the relevant time frame C.B. resided with Nesmith or appellant. Nevertheless, McCoy's testimony that appellant told her she retrieved C.B. on Fridays for the weekend supported that appellant did not have C.B. at least fourteen days per month.[10] Appellant's claiming and receiving benefits for C.B., despite not possessing her for the requisite amount of time, supported the jury's finding that appellant unlawfully appropriated the benefits by deceiving HHSC. *See* Tex. Penal Code Ann. §§ 31.01(1)(A), (3)(A); 31.03(b)(1). This evidence also supported that appellant intended to deprive HHSC of the benefits. Accordingly, we conclude the evidence is legally sufficient to support the jury's finding beyond a reasonable doubt that appellant unlawfully appropriated $4,093.43 from HHSC from on or about April 1, 2002 to on or about August 1, 2004, with intent to deprive HHSC of said amount. We overrule appellant's first, third, and fourth issues.[11]

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long as the date is anterior to the presentment of the indictment and within the statutory limitation period." *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997).

[10] The prosecutor emphasized this testimony during jury argument: "[Appellant] said, I have the child on the weekends. At the most there [are] five weekends a month. So, that's ten days a month. That doesn't follow the defense theory if you have it at least half of the time then you have possession of that child."

[11] Appellant further argues her situation is analogous to those where "contract disputes are prosecuted under the criminal law," because there is a dispute as to whether she believed she was entitled to the overissued benefits. Appellant cites cases holding a conviction for theft is unsupported by mere evidence that a defendant accepted money pursuant to a civil contract but failed to perform fully under the contract, *i.e.*, a bona fide dispute exists regarding ownership of the money. *See Jacobs v. State*, 230 S.W.3d 225, 231–32 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Bokor v. State*, 114 S.W.3d 558, 560–61 (Tex. App.—Fort Worth 2002, no pet.); *Stockman v. State*, 826 S.W.2d 627, 636 (Tex. App.—Dallas 1992, pet. ref'd). These cases are not analogous because, here, there is evidence appellant knew C.B. had to reside with her a certain number of days per month but did not.

B. Due Process

We next consider issues two and five, in which appellant contends her due process rights were violated. In her second issue, appellant contends she was convicted on less or different evidence than required by law at the time of the offense because HHSC used standards of "living together" not in conformity with federal food-stamp law and regulations. Having concluded the standards used by HHSC did not violate federal food-stamp law and regulations, we overrule this issue.

In her fifth issue, appellant contends her conviction violated due process because she was never apprised that she may not be eligible to claim C.B., even though due process requires laws and regulations be drawn and administered in a manner giving citizens fair warning of what is illegal. Appellant argues the law for determining who lives together for purposes of food-stamp eligibility is so vague even HHSC could not apply it, and she was left unaware of possible violations. Appellant appears to argue that the federal law and HHSC's standards for determining what constitutes a "household" eligible to receive food stamps is unconstitutional both on its face and as applied to her. Appellant has waived this issue by failing to challenge the constitutionality of food stamp law and regulations in the trial court.[12] Nevertheless, appellant's contention is without merit.

It is a basic principle of due process that a statute is void for vagueness if its prohibitions are not clearly defined. *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006). A statute is invalid if it fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *Id.* A plaintiff who engages in conduct clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. *Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989). When challenging the constitutionality of a statute, it is incumbent upon a defendant to show that, in its operation, the statute is unconstitutional to her in her situation. *Id.*

[12] *See Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (holding defendant may not assert "a facial challenge to the constitutionality of a statute" for the first time on appeal); *Dockstader v. State*, 233 S.W.3d 98, 102 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (explaining defendant must preserve an as-applied challenge to constitutionality of a statute).

As mentioned *supra*, the Department of Agriculture has deferred to state agencies to determine whether two or more persons live together as a "household." HHSC personnel testified that eligibility is determined on a case-by-case basis and a parent is eligible to claim a child who resides with her a majority of the time. Appellant testified she was told she could claim a child who resides with her at least fourteen days per month and that she was aware of HHSC's eligibility standards when she claimed benefits for her children. Thus, the evidence supported that appellant understood the legal requisites for claiming benefits. The food stamp law is not unconstitutionally vague as applied to her situation and, therefore, is also not unconstitutionally vague on its face. *See Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992). Accordingly, we overrule appellant's fifth issue.

C. Instruction on Mistake of Law

In her sixth issue, appellant contends the trial court erred by denying her request for an instruction in the jury charge on mistake of law. Appellant asserts the evidence presented at trial raised an issue on mistake of law under subsection 8.03(b)(1) of the Texas Penal Code, entitling her to an instruction on the affirmative defense.

In reviewing a claim of jury-charge error, we first determine whether there was charge error. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985), *overruled on other grounds, Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988). A defendant is entitled to an affirmative-defensive instruction on every issue raised by the evidence, regardless of the strength of the evidence. *Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). The defendant's testimony alone may be sufficient to raise a defensive theory requiring a charge. *Id.*

Subsection 8.03(b)(1) states:

> (b) It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:
>
> (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question[.]

Tex. Penal Code Ann. § 8.03(b)(1) (Vernon 2003).

At the charge conference, appellant requested an instruction on mistake of law based on a grant of permission by HHSC. Appellant testified that she received oral instruction from HHSC personnel on when and whether to claim C.B. Thus, the operative question is whether subsection 8.03(b)(1) requires a *written* grant of permission. We have found no cases specifically interpreting "grant of permission." However, the Court of Criminal Appeals and several intermediate appellate courts, including this court, have emphasized that an official statement must be in writing to constitute the basis of a mistake-of-law defense. *See Austin v. State*, 541 S.W.2d 162, 166 (Tex. Crim. App. 1976); *Kuhns v. State*, No. 03-01-00063-CR, 2002 WL 463223, at *11 (Tex. App.—Austin March 28, 2002, pet. ref'd) (not designated for publication); *Boyd v. State*, No. 14-94-00796-CR, 1996 WL 153979, at *1 (Tex. App.—Houston [14th Dist.] April 4, 1996, no pet.) (not designated for publication); *Linder v. State*, 734 S.W.2d 168, 171 (Tex. App.—Waco 1987 pet. ref'd). We conclude that an official statement of the law in a grant of permission must be in writing for a defendant to assert mistake of law based on that statement.[13] Here, there was no evidence appellant received any official written statement pertaining to eligibility for benefits. Thus, the trial court did not err in denying appellant's request for an instruction on mistake of law. We overrule appellant's sixth issue.

D. Jury Argument

In her seventh and final issue, appellant contends the trial court erred in overruling her objection during jury argument when the prosecutor opined on the credibility of C.B.:

> [PROSECUTOR:] My argument is this: I am not going to put a witness on the stand that I don't personally believe. Okay. You watched her testify and he calls her the most credible witness. I guess opinion is different because I find her the most incredible -- well, next to the defendant -- second most incredible witness on the stand. What is she going to do, ladies and gentlemen? I feel sorry for the poor girl. She has got a grandmother, and

[13] Relying on rules of grammar and common usage, we conclude "written order or grant of permission" means "written order" and "written grant of permission." *See* Tex. Gov't Code Ann. § 311.011(a) (Vernon 2005); *see also Osterberg v. Peca*, 12 S.W.3d 31, 37–39 (Tex. 2000); *State v. Huggins*, 802 So.2d 276, 278 (Fla. 2001) (phrases where an adjective is followed by a list of nouns "are commonly construed to mean that the adjective modifies subsequent nouns, for example, 'qualified man or woman' and 'governmental fine or penalty' mean 'qualified man or qualified woman' and 'governmental fine or governmental penalty,' respectively.").

she has got her mother sitting in the courtroom. She is being asked basically to prosecute her mom. She catches what's going on.

She may not understand the potential range of punishment and the whole aspect of the division of what's a misdemeanor and what's a felony and what's what, but she knows something serious that 12 of you are sitting in this box okay. She knows something is very serious. I am not going to put a witness that I don't personally believe. I will not cross.

[DEFENSE COUNSEL:] Judge, I think he's going beyond the record on this.

[PROSECUTOR:] He called.

[DEFENSE COUNSEL:] But he's saying what he didn't believe.

THE COURT: Overruled.

We conclude no error occurred because appellant's counsel invited the prosecutor's argument on C.B.'s credibility. *See Longoria v. State*, 154 S.W.3d 747, 766 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("Under the invited argument rule, a prosecutor is entitled to respond to defensive argument that goes outside the record, so long as the prosecutor's argument does not stray beyond the scope of the invitation."). Specifically, during closing argument, appellant's counsel expressed that the State did not call C.B. as a witness or even talk to her until the morning of her testimony (argument supported by the record), but then later commented on C.B.'s veracity by arguing, "We can't get any better than [C.B.] She is the one. She told it like it is. We could have brought witnesses to say the same thing but why? You don't believe her, you are not going to believe anybody else." Accordingly, we overrule appellant's seventh issue.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

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