Reversed and Remanded and Memorandum Opinion filed June 14, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00537-CR

JUAN MENDOZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1469905

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

A jury convicted appellant, Juan Mendoza, of continuous sexual abuse of a young child and sentenced him to confinement in the Institutional Division of the Texas Department of Criminal Justice for thirty-five years. From that conviction, appellant brings this appeal claiming the evidence is insufficient and the jury charge was erroneous. We conclude the evidence is sufficient to support appellant's conviction but agree there is error in the charge that created such harm

appellant was deprived of a fair and impartial trial. Accordingly, we reverse and remand.

I. BACKGROUND

In March 2014, the complainant, Elsa[1], made an outcry of sexual abuse. At the time of the outcry, Elsa was sixteen. She disclosed that she had been sexually abused by appellant, her mother's former boyfriend, when she was ten or eleven years old. Subsequently, appellant was charged with continuous sexual abuse of a child.

The indictment in this case alleged that the period of abuse occurred between June 2, 2007, and March 2, 2008. However, Texas Penal Code Section 21.02, defining the offense of continuous sexual abuse of a young child, became effective September 1, 2007, and does not apply to an offense committed before that date. *See* Act of May 18, 2007, 80th Leg., R.S., ch. 593, §§ 1.17, 4.01(a), 2007 Tex. Gen. Laws 1120, 1127, 1148 (current version at Tex. Pen. Code Ann. § 21.02 (West Supp. 2015)). An offense is committed before the effective date of the statute if any element of the offense occurs before that date. *Id*. Further, section 21.02 applies only to the continuous sexual abuse of a child younger than fourteen. Tex. Penal Code Ann. § 21.02(b)(2) (West Supp. 2015). Thus, in order to lawfully convict appellant of continuous sexual abuse of a young child, the State had to prove that the period of abuse occurred between September 1, 2007, when the statute became effective, and March 24, 2011, Elsa's fourteenth birthday. *See* Tex. Penal Code Ann. § 21.02 (West Supp. 2015).

[1] To protect the privacy of the complainant in this case, we identify her by a pseudonym, "Elsa." We identify Elsa's mother as "Mary."

II. Sufficiency of the Evidence

In his first issue, appellant asserts the evidence is insufficient to prove that all elements of the offense occurred on or after the effective date of section 21.02. *Id.* Appellant does not claim that any of the elements of the offense occurred after Elsa's fourteenth birthday. Because appellant only challenges the sufficiency of the evidence to establish that the abuse occurred during the requisite time frame, we limit our discussion of the facts to those germane to that issue.

A. Relevant Facts

Courtney Nelson, the director of Elsa's high school dance team, testified that on March 24, 2014, Elsa came to her office. Elsa said she needed to tell Nelson something that only her brother knew, and that she had been raped by her mother's boyfriend when she was ten. Elsa told Nelson that "he was inside her" and "it had gone all the way."

Mary, Elsa's mother, testified with the assistance of an interpreter. She was called to the school and Elsa told her what had happened. According to Mary, appellant was her boyfriend and lived in her home, along with her four children and a female friend, in 2007 and 2008. Mary was not certain when she began dating appellant but suggested it was in 2007. Mary did not recall what grade Elsa was in when appellant lived with her. She testified that Elsa was in the first grade in the spring of 2004 and repeated the first grade.

Two photographs of Elsa were admitted into evidence. Mary testified they fairly and accurately depicted how Elsa looked when appellant lived with her. One of the photographs had been taken at school sometime from 2006 to 2007. Mary testified that Elsa was nine or ten in the photographs.

According to Mary, the relationship ended when appellant left for Mexico at the end of November or the beginning of December. Mary was unsure whether the year appellant left was 2008. When asked if there were an event that she remembered appellant's departure by, Mary said, "Hurricane Rita."[2] Mary did not recall how long appellant lived with her but suggested it was eight or nine months. When Mary was asked to recall a particular child's birthday or holiday that she celebrated with him present, Mary answered, "I'm not sure if it was Christmas or if it was New Year's. I don't remember." Mary testified that it was two or three years after appellant left for Mexico before she saw him again, and Elsa was then thirteen or fourteen.

Dr. Reena Isaac, a pediatrician, examined Elsa for sexual abuse and testified that she asked Elsa, "Do you know why you're here?" Dr. Isaac testified Elsa's response was, " 'When I was around ten or 11 years old,' . . . I think she said in the second grade, 'this man would have sex with me.' " Elsa identified the man as Juan Mendoza. Elsa said the type of sex was vaginal and anal and that he put his penis in her vagina and bottom. Elsa said it happened two or three times. According to Dr. Isaac, Elsa reported sexual contact occurred five times. Dr. Isaac's report reflects the alleged sexual contact was genital/anal. The first time Elsa remembered appellant touching her was when she was ten or eleven and she was eleven the last time it happened.

[2] Hurricane Rita made landfall in September 2005. Hurricane Ike made landfall in September 2008. *See Hurricane Rita Made Landfall 10 Years Ago on September 24*, HOUSTON PUBLIC MEDIA, http://www.houstonpublicmedia.org/articles/news/2015/09/24/127165/hurricane-rita-made-landfall-10-years-ago-on-september-24/ (last visited December 8, 2015); *Remembering Hurricane Ike*, HOUSTON PUBLIC MEDIA, http://www.houstonpublicmedia.org/articles/news/ 2009/09/08/16947/remembering-hurricane-ike/ (last visited December 8, 2015).

Darryl Peaks, a deputy investigator for the Harris County Sheriff's Office, testified that he interviewed Elsa. Elsa recounted details of two specific events. Peaks recalled that Elsa told him the second incident, which happened in the bathroom, occurred on the first day of fourth grade.

Elsa's testimony recounted four specific incidents. The first time Elsa recalled was during a game of hide-and-seek when appellant began touching her breasts and vagina. She did not know when it happened. The next incident described by Elsa occurred when she was lying on her mother's bed. She recounted that appellant rubbed his penis against her butt cheeks and placed his fingers, and then his penis, inside her vagina. Elsa then described an occasion on the living room floor when appellant put his penis inside her vagina and tried to put his penis inside her mouth. The last time, according to Elsa, occurred in the bathroom when appellant put his penis in her anus. Elsa testified it was the first day of school but she did not recall how old she was or what grade she was in. Elsa was asked, "How often would things like that happen?" She answered, "Every chance he could. . . Some weeks it was one time. Some it was more than once."

Elsa said that she repeated a grade. She testified that when appellant lived with them, she was in the third and fourth grades. Elsa testified she was in the third grade when she was nine and in the fourth grade when she was ten.

Luis S., a neighbor of Mary's, had lived with appellant since 2010. He met appellant in "2005 to 2006" when appellant was living with Mary. Luis did not recall how long Mary and appellant lived together but testified that appellant left at the end of 2006. Luis believed appellant returned in 2008. According to Luis, he recalled these things because he was arrested for driving while intoxicated in 2006 and had an accident in 2008.

David P. testified he arrived in the United States in February 2006 and lived next to Mary. A week or two later, David met appellant, who was living with Mary. According to David, appellant and Mary lived together "that same year but did not go past December." David testified appellant went to Mexico and David did not see him again until Hurricane Ike, in September of 2008. David also became appellant's roommate in 2010.

B. Standard of Review

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences from it, whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011); *see also Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). The jury is the exclusive judge of the credibility of the witnesses and the weight to be given to the evidence. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Further, we defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* This standard applies to both circumstantial and direct evidence. *Id.* We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

We measure the sufficiency of the evidence not by the instructions given to the jury, but by the elements of the offense as defined by the hypothetically correct jury charge for the case. *Zahorik v. State*, 475 S.W.3d 459, 464 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "Such a charge would be one that accurately sets out the

law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

The determination of what weight to give testimonial evidence rests within the sole province of the jury because it turns on an evaluation of credibility and demeanor. *Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The trier of fact may choose to believe or disbelieve any portion of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

C. Analysis

Although Elsa testified that she was in the third and fourth grades when appellant lived with them, she also testified that she was ten and eleven when the abuse occurred. The record reflects Elsa told Nelson that she was ten when she was sexually abused and told Isaac that she was ten or eleven. Mary testified that appellant lived with her in 2007 and 2008. She also testified he lived with her for eight or nine months and left in December. Further, Mary testified that Elsa was thirteen or fourteen when appellant returned from Mexico, three or four years later. Elsa testified the last time she was abused it was the first day of school. Further, according to Isaac, Elsa said that she was eleven years old the last time.

Elsa's date of birth was June 2, 1997. Thus Elsa was ten at the beginning of 2008, turned eleven that summer, and was eleven on the first day of school in 2008. Because Elsa repeated one grade, on the first day of school in 2008, August 28th, she would have entered the fifth grade.[3] From the evidence, a rational trier of

[3] *See generally* HISD CONNECT, http://www.nctq.org/docs/32-08_7315.pdf (last visited December 8, 2015) (listing August 25, 2008, as the first day of school for students attending school in the Houston Independent School District during the 2008-2009 school year).

fact could have found the last time Elsa was sexually abused she was eleven and it was the first day of school in 2008. Elsa testified the sexual abuse occurred at least weekly. Thus the jury could have found that thirty days or more before the first day of school appellant committed a prior act of sexual abuse. Considering all the evidence in a light most favorable to the verdict, we conclude a rational fact finder could have found beyond a reasonable doubt that after September 1, 2007, during a period of time of thirty or more days, appellant committed at least two acts of sexual abuse. *See Jackson*, 443 U.S. at 319; *Gear*, 340 S.W.3d at 746. Accordingly, we overrule appellant's first issue.

III. CHARGE ERROR AND EGREGIOUS HARM

Appellant's second issue contends the jury charge was erroneous. Specifically, appellant asserts the charge authorized the jury to convict him of the offense based on acts of sexual abuse committed before September 1, 2007, the effective date of the statute. The State concedes, and we agree, the charge was erroneous.

The opening paragraph of the charge stated:

> The defendant[,] Juan Mendoza, stands charged by indictment with the offense of continuous sexual abuse of a young child alleged to have been committed on or about June 2, 2007[,] continuing through March 2[,] 2008 . . .

Moreover, the application portion of the charge provided:

> Now if you find from the evidence beyond a reasonable doubt that in Harris County[,] Texas the defendant, Juan Mendoza[,] heretofore on or about June 2, 2007[,] continuing through March 2, 2008, did then and there unlawfully, during a period of time of thirty or more days in duration[,] commit at least two acts of sexual abuse against a child younger than fourteen years of age, including an act constituting the offense of aggravated sexual assault of a child committed against [the complainant] on or about June 2, 2007, and an

> act constituting the offense of aggravated sexual assault of a child committed against [the complainant] on or about March 2, 2008, and the defendant was at least seventeen years of age at the time of the commission of those acts . . .

The jury was instructed as follows in the abstract portion of the charge:

> You are further instructed that the State is not bound by the specific date which the offense[,] if any, is alleged in the indictment to have been committed, but that a conviction may be had upon proof beyond a reasonable doubt that the offense, if any[,] was committed at any time within the period of limitations[.] There is no limitations period applicable to the offenses of continuous sexual abuse of a young child and aggravated sexual assault of a child[.]

The charge failed to include an instruction that the jurors were permitted to convict appellant of continuous sexual abuse of a child based only on acts of sexual abuse that were committed on or after September 1, 2007. Because the charge presented the jury with a "broader chronological perimeter" than the statute permits, it was erroneous. *See Martin v. State*, 335 S.W.3d 867, 876 (Tex. App.—Austin 2011, pet. ref'd). *See also Gomez v. State*, 459 S.W.3d 651, 660 (Tex. App.—Tyler 2015, pet. ref'd), *cert. denied*¸136 S.Ct. 1201 (2016); *Kuhn v. State*, 393 S.W.3d 519, 524 (Tex. App.—Austin 2013, pet. ref'd).

Appellant acknowledges the error was not objected to and therefore reversal is required only if we find the error was so egregious and created such harm that he was deprived of a fair and impartial trial. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). We review the degree of harm in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, counsels' arguments, and any other relevant information revealed by the trial record as a whole. *See Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011); and *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). *See also Villarreal v. State*, 453 S.W.3d 429 (Tex. Crim. App. 2015).

Appellant must show he suffered actual rather than theoretical harm. *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). For actual harm to be established, the error must have affected the very basis of the case, deprived the defendant of a valuable right, vitally affected a defensive theory, or made a case for conviction clearly and significantly more persuasive. *Id; see also Taylor,* 332 S.W.3d at 490. "Moreover, we do not require direct evidence of harm to establish egregious harm." *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

A. The Entirety of the Jury Charge

The opening paragraph of the charge and the application paragraph erroneously instructed the jury that it could convict appellant for acts committed prior to September 1, 2007. The abstract portion of the charge instructed the jury that the State had to prove only that the acts were committed prior to the time the indictment was presented. Also, the charge failed to include an instruction that in order to convict appellant of the charged offense, the jury could only consider acts that occurred on or after September 1, 2007.

Other courts of appeal have found similar charge error mitigated by a correct application paragraph immediately preceding the error or a correct instruction in the first paragraph of the charge that the offense was alleged to have been committed on or about September 1, 2007, through some later date. *See Gomez*, 459 S.W.3d at 661; *see also Kuhn*, 393 S.W.3d at 529. It has also been held that the inclusion of a limiting instruction that directed the jury's attention to the start date of the offense weighed against finding the defendant was denied a fair and impartial trial. *Kuhn*, 393 S.W.3d at 530. Because the jury in this case was never correctly instructed on the applicable law, this factor weighs in favor of finding the error in the charge was egregious.

B. The State of the Evidence

The defensive theory presented at trial was that the sexual abuse never happened, not that it happened before September 1, 2007. Thus the specific issue relevant to the charge error in this case was not contested during trial. The record reflects that appellant focused his defense not on the timing of the incidents, but on Elsa's credibility. Since the dates did not vitally affect a defensive theory, this factor weighs against a finding of egregious harm. *See Kuhn*, 393 S.W.3d at 528; *Martin*, 335 S.W.3d at 876; and *Taylor*, 332 S.W.3d at 493.[4]

C. Arguments of Counsel and other Relevant Information

The indictment, read to the jury at the beginning of trial, contains the same time period as that set forth in the charge, June 2, 2007, to March 2, 2008. During closing arguments, neither the State nor defense counsel directed the jury's attention to the effective date of the statute. As noted above, the defense's theory was that the sexual abuse did not happen and counsel's only argument regarding the dates was to that purpose.

The State argued the dates did not matter because if they were wrong, "all that does is make [Elsa] younger. That means the sexual abuse didn't happen when she was ten. That means we're talking about a nine-year-old, about an eight-year-old. That is more disgusting." The State referred to the charge and said, "why have I put on or about in those yellow blanks, is because the date actually doesn't matter." The State recited the instruction set forth above that informed the jury it was not bound by a specific date that the offense was alleged in the indictment to have been committed. According to the State, "You can believe that it all happened

[4] The State argues there was sufficient evidence for the jury to find the sexual abuse occurred in 2008, after the effective date of the statute, which also would weigh against a finding of egregious harm. *See Gomez*, 459 S.W.3d at 663; *Kuhn*, 393 S.W.3d at 529; and *Martin*, 335 S.W.3d at 876.

in 2005, 2006. All that does, like I said, is make [Elsa] nine, if not eight." The State informed the jury that the charge "also tells you in here that all I have to do to you is prove it was committed within the period of limitations."

The State repeatedly argued the jury could convict appellant of the offense for acts that occurred *before* the effective date of the statute. The jury was never made aware the statute was not in effect before September 1, 2007, and the indictment's alleged the first offense occurred "on or about" a date three months before the statute went into effect. The State repeatedly misinformed the jury that it was irrelevant when the abuse occurred. *But see Kuhn*, 393 S.W.3d at 530-31 (concluding the State's closing argument weighed against a finding of egregious harm where the State directed the jury's attention to the effective date of the statute and the application paragraph which contained a correct statement of the law applicable to the case.); *Gomez*, 459 S.W.3d at 663 (same). Accordingly, this factor weighs heavily in favor of finding the error in the charge was egregious.

D. Conclusion Regarding Harm

Appellant was "entitled to be convicted upon a correct statement of the law." *Hutch*, 922 S.W.2d at 174. The State's argument that the charge error in this case did not result in egregious harm is based upon the sufficiency of the evidence for the jury to have found the abuse occurred in 2008 and appellant's defensive theory that there was no abuse. We are mindful of the importance of these factors and agree that in this case they weigh against appellant. However, there are other factors and in this case they weigh heavily in favor of appellant.

The charge error in this case was complete and never corrected. A jury that followed the trial judge's instructions would have discounted as irrelevant any evidence that the abuse occurred before September 1, 2007. The charge error was further compounded by the State's closing argument, which repeatedly stressed it

was irrelevant when the acts of abuse occurred. These errors made the case for conviction clearly and significantly more persuasive. *See Taylor*, 332 S.W.3d at 490. We therefore conclude the jury charge error egregiously harmed appellant and sustain his second point of error.

Accordingly, we reverse the trial court's judgment of conviction and remand this cause to the trial court for further proceedings.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Donovan, and Brown.
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