Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00743-CR

Paul **SALAZAR**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR5303
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 11, 2017

AFFIRM

Appellant, Paul Salazar, was indicted on two counts, which alleged he: (1) committed two or more acts of sexual abuse against a child during a period that was thirty days or more in duration, from on or about October 1, 2011 through September 12, 2013; and (2) exposed part of his genitals, with the intent to arouse or gratify the sexual desire of any person and knowing the complainant child was present on or about September 12, 2013. A jury found appellant guilty on both counts. The jury assessed punishment under count one at thirty-five years' confinement and under count

two at twenty years' confinement, plus a $10,000 fine. In two issues on appeal, appellant challenges the sufficiency of the evidence regarding the dates alleged in both counts. We affirm.

BACKGROUND

Appellant and Leslie had two children together—a daughter, D.S. who is the complainant here, and a son, J.S. D.S. was born on February 20, 2005.[1] Although appellant and Leslie ended their relationship in either 2011 or 2012, appellant saw his children at least three times a week. Leslie testified appellant lived at three locations—on Catlin Street, on Cincinnati Street, and on West Fall—during the period of 2011 to 2013.

On the evening of Sunday, September 15, 2013, Leslie was at a laundromat with her two children. D.S. was eight years old and in the third grade. At some point, D.S. told Leslie, "My daddy molested me." When Leslie asked D.S. when the last time this happened, D.S. responded, "It was Thursday," which was September 12, 2013. Leslie said that on September 12, appellant stayed with D.S. and J.S. at her home while she was away.

After the September 15 outcry, Leslie and her children drove to the home of Leslie's mother, where D.S. told her maternal grandmother what she told Leslie. Leslie, her mother, and D.S. then drove to appellant's mother's house, where D.S. repeated what happened. Leslie, her mother, and D.S. returned home and called the police. According to Leslie, D.S. told the police officer, "That [appellant] had molested her and the last time was on Thursday when [J.S.] was upstairs and [appellant] and [D.S.] were downstairs." Leslie testified D.S. said the first time "it happened to her" was when D.S. was in the first grade, and she stayed home because she was sick. Leslie testified she had asked appellant to stay with D.S. on this day at Leslie's apartment. According to Leslie, D.S. said appellant "took her up to [Leslie's] bed and touched her private

[1] Trial commenced on October 10, 2016 at which time D.S. was eleven years old and in the sixth grade.

areas [under her clothes]," but he "did not insert anything into her vagina." At the time, the family lived in an apartment on Riverside. D.S. also told the officer about another incident when appellant put his penis in her mouth. Leslie later brought D.S. to a doctor for a physical examination and to ChildSafe for a forensic interview.

Leslie clarified the first abuse would have occurred in 2011, when D.S. was in the first grade, and about five or six years old. Leslie said she was not aware of any sexual abuse until the 2013 outcry. However, prior to the outcry she noticed a change in D.S.'s behavior between the first and third grade. She said D.S. was at first "a typical princess girl," who dressed up as favorite storybook princesses. However, starting in first grade, she played with dolls less, began roughhousing with boys, said she wanted to be a boy, decided she wanted to cut her hair short, and was seen once by her grandmother urinating while standing up.

Tina Castillo, the San Antonio Police Officer dispatched on Leslie's call to the police, described D.S. as shy, scared, and hunched over looking at the floor. She said she was not told about any "sexual contact" occurring on Thursday, and she only knew of a "kiss" occurring on Thursday.

Caroline Briones, who was a Bexar County Community Resources forensic interviewer in 2013, interviewed D.S. at ChildSafe on October 11, 2013. Briones said D.S. could state generally what happened, but had a difficult time stating specifically what happened. Briones testified D.S. was specific about what happened the first time, but was not specific about the other times. Instead, when D.S. talked about the other incidents, she said, "that would happen. Those things would happen when I was in first and second grade and the summer. And she also said [one time on] a weekend."

D.S. told Briones the first incident of abuse happened when D.S. was home from school sick, and her father stayed with her. According to what D.S. told Briones, appellant laid D.S. on

her mother's bed, removed her pajama pants and underwear, removed his pajama pants and underwear, and then laid with the front of his body to the back of her body. D.S. said appellant put his "private against her butt," "she could feel him rubbing there," and he "was getting closer to her trying to put it in." Appellant then turned D.S. around "putting it in the front private." Appellant also made D.S. kiss him using their tongues.

D.S. also told Briones that appellant pushed her head down under the covers and put her mouth on his penis. D.S. said another time appellant made her hand go up and down on his penis. D.S. said these incidents all occurred when she was six and seven years old, while she was in the first and second grades, and in the summer between those years. D.S. told Briones nothing happened when she was eight years old and in the third grade. However, Briones clarified D.S. would have been eight years old for part of the second grade.

Dr. Nancy Kellogg preformed the medical exam on D.S. on October 28, 2013. Dr. Kellogg testified D.S. said she was six years old the first time anything happened and she was eight years old and in the third grade the last time anything happened. D.S. told Dr. Kellogg, "My dad would sometimes take care of me when I was sick. He kinda molested me." When asked to clarify "molest," D.S. said, "He touched me where he's not supposed to with his hand, mostly the lower area," and she gestured to her buttocks and her genital area. D.S. also told Dr. Kellogg that appellant touched her with his front private, "sometimes in my front private and mostly the back private," he put her hand on his private, and he made her put her mouth on his private.

D.S. testified the first incident happened when she was at home with her father because she was sick. She was asleep in her bedroom when her father picked her up and carried her to her mother's bedroom and laid her on the bed. Appellant removed her pants and underwear and removed his underwear. As they both lay under the covers, appellant made her kiss him. When she turned around, appellant "put his private into [her] behind . . . where [she] go[es] to the

restroom." She turned back again to face appellant, and he "put his private into [her] front part," which she said was where she urinates when she goes to the bathroom. Appellant laid on his back and made her hand go up and down on his penis. He also put her mouth on his penis.

D.S. said there were other times when appellant put his "private part" in her "private part," or put her mouth on his "private part." Sometimes this would happen at Leslie's home on Riverside and sometimes at appellant's residence. D.S. stated no abuse happened when she was eight years old, but she could not remember how old she was when she was in the third grade.

STANDARD OF REVIEW

When an appellant challenges the sufficiency of the evidence supporting the jury's verdict, we review all the evidence in the light most favorable to the verdict to determine whether, based on the evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The jury is the sole judge of credibility and the weight attached to the testimony of the witnesses. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). When the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Id.* at 525-26.

COUNT TWO: INDECENCY BY EXPOSURE

As applicable here, the elements of indecency with a child by exposure are: (1) the defendant; (2) with a child less than seventeen years of age; (3) with intent to arouse or gratify the sexual desire of any person; (4) exposed his genitals; (5) knowing a child was present. *See* TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West 2011). Appellant's first issue challenges the sufficiency of the evidence on count two, which alleged that, "on or about the 12th day of September, 2013, in Bexar County, Texas, [appellant] did with the intent to arouse or gratify the sexual desire of any

person, expose part of his genitals, knowing that [the complainant], a female child, was present." Appellant argues count two is date specific and there is no evidence to support the jury's finding that he exposed himself on September 12, 2013.

D.S. made her outcry about the September 12, 2013 "Thursday" incident when she was eight years old and in the third grade. However, neither Leslie nor D.S. testified to specifically what happened on or about September 12, 2013. Courts recognize the difficulty children often have in remembering specific dates or ages, and that they frequently relate the time of the occurrence of an event to other significant dates or events, such as holidays, or seasons, or the grade they are in at school at the time of the event, as D.S. did here. *See, e.g., Michell v. State*, 381 S.W.3d 554, 561 (Tex. App.—Eastland 2012, no pet.) (child complainant could not provide specific dates of sexual abuse, but could provide details of where the abuse took place, the grade she was in, and the season of the year); *see also, e.g., Smith v. State*, 340 S.W.3d 41, 48 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (child complainant related time of abuse to when her mother was pregnant with twins and when the twins were two weeks old).

Also, the State is not required to allege a specific date in an indictment. *Sledge v. State*, 953 S.W.2d 253, 255 (Tex. Crim. App. 1997). An indictment is sufficient if, among other things, the alleged date is "anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation." TEX. CODE CRIM. PROC. ANN. art. 21.02(6) (West 2009). Thus, the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is before the presentment of the indictment and within the statutory limitation period. *Sledge*, 953 S.W.2d at 256. Therefore, here, the State could prove appellant exposed himself knowing D.S. was in the room on a date other than September 12, 2013 as long as the date was before September 12, 2013. There is no statute

of limitations for continuous sexual abuse of a child or indecency with a child. TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(D), (E) (West Supp. 2016).

The jury heard testimony that the abuse occurred at Leslie's home and the two locations where appellant lived between 2011 and 2013, when D.S. would have been seven to eight years old and in the second or third grade. Although D.S. said no abuse occurred when she was eight years old, she told Dr. Kellogg she was eight years old and in the third grade "the last time." We presume the jury resolved any conflicts in favor of the verdict, and we defer to that determination. We conclude the jury could have determined, beyond a reasonable doubt, the last incident of abuse occurred on or before September 12, 2013.

CONTINUOUS SEXUAL ABUSE

The offense of continuous sexual abuse of a child has five elements: (1) a person (2) who is seventeen or older (3) commits a series of two or more acts of sexual abuse (4) during a period of thirty or more days in duration, and (5) each time the victim is younger than fourteen. TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2016). The State alleged six acts of sexual abuse against D.S. Three acts alleged appellant penetrated D.S.'s mouth, sexual organ, and anus with appellant's sexual organ. Three acts alleged sexual contact: appellant touched D.S.'s genitals, appellant caused D.S. to touch part of his genitals, and appellant touched D.S.'s anus. The State alleged the acts occurred in a period of thirty days or more occurring between October 1, 2011 and September 12, 2013. Although the State alleged six acts of sexual abuse against D.S., the State was not required to prove all of the acts of sexual abuse charged in the indictment. Instead, the State was required to show, at a minimum, only that appellant committed two of the alleged acts of sexual abuse against D.S. during a period of at least thirty days in duration. *See id.* § 21.02(b)(1).

In his second issue, appellant's complaint focuses on whether the State proved sexual assault happened at least twice during a period more than thirty days apart. According to appellant,

the six instances of sexual abuse are attributable to the "first time" or one single day in Leslie's home. Appellant contends there is no evidence these events occurred anywhere else with any specificity to establish the "more than thirty day" period.

The Texas Legislature "created the offense of continuous sexual abuse of a child in response to a need to address sexual assaults against young children who are normally unable to identify the exact dates of the offenses when there are ongoing acts of sexual abuse." *Baez v. State*, 486 S.W.3d 592, 595 (Tex. App.—San Antonio 2015, pet. ref'd) (quoting *Michell*, 381 S.W.3d at 561). Although the exact dates of the abuse do not need to be proven, "[t]he jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse." TEX. PENAL CODE § 21.02(d). Also, the jury is not required to unanimously agree on which specific acts of sexual abuse defendant committed or the exact date on which those acts were committed. *Baez*, 486 S.W.3d at 595.

The jury heard testimony that the abuse started in 2011 at Leslie's apartment when D.S. was in the first grade and either five or six years old, and occurred again at the two locations where appellant lived between 2011 and 2013, when D.S. would have been seven to eight years old and in the second or third grade. Although D.S. said no abuse occurred when she was eight years old, she told Dr. Kellogg she was eight years old and in the third grade "the last time." Although D.S. provided details about the first incident, when she was in the first grade, D.S. could not provide details about the later other incidents. However, D.S. referred to "other incidents" during the time period when she was in the first and second grade, the summer, and a weekend, and occurring at her mother's apartment and one or both of appellant's residences.

Because the jury heard testimony that the abuse happened more than one time and at more than one location, we conclude a rational trier of fact could have found appellant committed two or more acts of sexual abuse over a span of thirty or more days. Therefore, the evidence is legally

sufficient to establish that element of the offense. *See Williams v. State*, 305 S.W.3d 886, 890 (Tex. App.—Texarkana 2010, no pet.) (J.A. said the acts occurred "more than twice," but was unable to speak to the span of time over which these abuses occurred; J.A.'s mother said she asked J.A., "How many times did he do that to you?" and J.A. replied, "Just about every time that I went out there to stay with grandmother." The mother testified that, as part of her normal habit or routine, whenever she went to work early in the morning, J.A. went to stay with her grandparents, and the mother regularly worked these early morning shifts during the five-month period alleged in the indictment.).

CONCLUSION

We overrule appellant's issues on appeal and affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

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