COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00169-CR

OSCAR RODRIGUEZ APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1441338R

MEMORANDUM OPINION[1]

Appellant Oscar Rodriguez appeals his conviction for continuous sexual abuse of a child. *See* Tex. Penal Code Ann. § 21.02(b) (West Supp. 2016). We affirm.

---

[1] *See* Tex. R. App. P. 47.4.

Background

Appellant is the father of the four complainants in this case—Alexia,[2] Beth, Caroline, and Doris—and their siblings, Jackson and Kelly. Alexia, Beth, Caroline, and Doris were 20, 18, 14, and 13, respectively, at the time of trial.

Appellant and his wife, Margaret (the mother of the six children), had a tumultuous and unstable relationship. As a family, they struggled financially, living from paycheck-to-paycheck, relying on government benefits, sharing small quarters, and often sleeping together in common beds. The family lived together in a small apartment in Houston until Appellant and Margaret separated in August 2009 when Appellant discovered that his wife had become romantically involved with a man she had met on the internet. When Appellant moved out, he took Alexia and Jackson with him to another apartment in Houston. Later, in December 2009, the three moved to Fort Worth. One month later, the other four children joined them in Fort Worth. From time to time, during attempts to reconcile, Margaret also lived with Appellant and their six children in Fort Worth. However, their reconciliations were never successful and she frequently lived elsewhere or with other people.

I. Appellant's abuse of Alexia in Houston

Alexia testified at trial that Appellant first abused her when the family was still living together in Houston and she was "nine or ten" years old and in "fourth

[2]In accordance with rule 9.8, we refer to children and family members by aliases. Tex. R. App. P. 9.8(b) & cmt.

or fifth" grade. According to Alexia, once she and Jackson moved to Fort Worth with Appellant, the abuse stopped. At trial, Alexia related the following details regarding the abuse:

- While the family was living in a two-bedroom apartment in Houston, the children shared a room. One night Appellant came into the children's room and got in bed with her, hugged her, and then—while the two were lying on their sides next to each other—put his hand over Alexia's "private part." Alexia pretended to be asleep, and soon Margaret came into the room, turned on the lights, and asked, "What are you doing?" to which Appellant replied, "I'm just sleeping with her."

- On another occasion, Appellant asked to look at her sexual organ to see if she had a clitoris. Alexia responded that she would rather see a doctor, but he insisted, "No. . . . I can fix it." Alexia said no again, but eventually Appellant "convince[d]" her to allow him to look. When he told her that she did have a clitoris, she again asked to go to the doctor, but he again said, "No, I can fix it." He then put his fingers in her sexual organ.

- After Appellant and Margaret separated and Appellant, Alexia, and Jackson moved into a one-bedroom apartment in Houston, all three of them slept in a king-sized bed together. During this time, Appellant forced Alexia—who was a freshman in high school by this time—to allow him to perform oral sex on her while he put a pillow over her face. Alexia testified, "I don't really remember what was happening because the pillow was over my head," but she recalled, "I did feel something warm. It was very warm and very sticky. At the time I didn't know what it was because he did clean it off of me, but it was sperm." Alexia also testified that Appellant penetrated her sexual organ with his penis to the point that it hurt her, although, according to her, it did not "go all the way in." Additionally, Alexia alleged that Appellant masturbated in front of her and showed her pornography.

- Alexia did not tell anyone about the abuse because she was embarrassed and feared that if she told her mother, "she would hate [Alexia]." Alexia also added that Appellant insisted that if anyone ever found out about the abuse, "No matter what, always say no, it didn't happen." He also warned her, "You're never going to see your sisters again or your mom. . . . [Y]ou're going to get me in a lot of problems."

According to Alexia, the abuse did not happen every day, but "when [Appellant] felt like it." She testified that when she was in the seventh, eighth, and ninth grades, it happened more than five times. The abuse stopped when Appellant, Alexia, and Jackson moved to Fort Worth in December 2009.

II. Appellant's abuse of Beth

Beth testified that Appellant began abusing her approximately a year after she and her four siblings moved to Fort Worth to join Appellant and the other two children. She was in the sixth grade and under the age of 14 at the time. Beth testified as follows:

- The first incident of abuse occurred when Beth was asleep in a king-sized bed with Appellant and her sisters, Caroline and Doris. Beth recalled, "It was dark and I couldn't move," and, "I remember him grabbing my hand and putting it on his privates, and I didn't know what to do. I was - - couldn't move, and then I remember him going down on me." She then clarified that he had put her hand on his penis underneath his clothes and then performed oral sex on her. Beth went back to sleep and "tried to make it seem like it didn't happen," but when she woke up the next morning, Appellant told her to take a shower and she did.

- Appellant did other things that made Beth uncomfortable. For example, "He was always like - - he would always play around with us like - - like he would like blow on our neck, it would tickle, and he would touch our boobs saying that - - squeezing them saying it will make them grow." This would usually happen when she or one of her sisters was sitting on his lap.

- When Beth was in the sixth grade, Appellant left a hickey on her neck, and when she asked Appellant, "What are my friends going to say?" he replied, "Just tell them your boyfriend did it."

- Sometimes, Beth could "feel [Appellant's] privates," including his erection, when they were sleeping in the same bed, so she would ask him to move and he would put a pillow between them. That made her feel "weird [and] grossed out."

Beth eventually began to distance herself from Appellant and refused to let him hug her "because it bothered [her] so much." But, like Alexia, Beth testified that she was afraid to tell anyone about the abuse because she thought others viewed Appellant as a good father.

III. Appellant's abuse of Caroline

According to Caroline, Appellant began abusing her after she moved to Fort Worth, when she was "12 or 13" and in the sixth grade. At trial, Caroline testified:

- Sometimes when he was in his room watching TV with the lights off, he would call to her and say, "You should come lay down with me and let's go to sleep." Although she would initially say, "no," she would eventually fall asleep. At that point, Appellant "would put his hands in my clothes, touching my vagina, going and just feeling down there. And I would like move so like - - to make sure his hand - - like he took off his hand, and he would just like feel - - he would feel on me, and I would wake up in the middle of the night and go to the restroom and just cry."

- After waking up, crying, and leaving the room, Caroline would not return to Appellant's bedroom, but instead would "make sure that the door was closed so he wouldn't see m[e] pass to go to the . . . living room. And I would just sleep on the couch until it was morning."

- Appellant penetrated Caroline's sexual organ with his finger more than five times, but she did not know if it happened more than ten times.

Caroline also testified that sometimes the abuse would occur while Doris was in the same bed, but Caroline did not think that Doris realized what was happening.

IV. Appellant's abuse of Doris

According to Doris, who was just 13 years old at the time of trial, Appellant abused her at least once while she and Caroline were sharing a bed. At trial, she testified to that incident as follows:

- She was awakened to the feeling of "movement in [her] vagina," but she pretended to continue sleeping because she was scared and "[she] didn't think [her] dad would do that." Eventually Appellant stopped, they both fell asleep, and they never spoke about the incident.

- When asked if she remembered Appellant doing the same thing on any other occasion, she testified, "No, but I know it happened multiple times . . . . Because like we slept in the same bed. Like it would happen probably like once a week, but not like every week."

According to Doris, she was too scared and embarrassed to report this to anyone.

V. Kelly's testimony to Appellant's inappropriate comments

Kelly was 17 at the time of trial and she testified that although Appellant never touched her inappropriately, his inappropriate comments did make her feel so uncomfortable that she deliberately avoided him. Specifically, she testified to the following:

- When she was 11, she and Appellant were in the car when he said to her, "Hey, on the commercial, I saw that girls, they can have a ball in their private part." Then he told her that he wanted to check her for the "ball."

- Appellant did not act on his suggestion, but the incident made Kelly uncomfortable, and she did not think it was "right" because, "[H]e's my dad."

Kelly testified that since that day, she "felt uncomfortable with him" and "didn't want to get near him or sit next to him on the couch or be alone with him in

a car or anything." According to Kelly, as a result, she "didn't wear short skirts, short shorts or tank tops. I didn't wear anything like that because I felt uncomfortable with him."

VI. The daughters' outcries and the ensuing investigation.

In April 2014, Alexia, Beth, and Kelly left Appellant's house to live with Margaret at their Aunt Laura's house in Fort Worth. Shortly after they moved in with Laura, Beth told Laura about the abuse, and Laura told Margaret. At the time, Beth thought she was the only one of her siblings who had been abused by Appellant, but when Alexia overheard Beth telling Laura and Margaret, she also came forward and told them Appellant had abused her. Margaret immediately called the police to report the abuse and Child Protective Services opened an investigation. Caroline and Doris made their outcries of abuse about a month later.

Appellant was charged with having committed continuous sexual abuse of Alexia, Beth, Caroline, and Doris from September 1, 2007 through April 1, 2014. The indictment specifically alleged that over a period of more than 30 days, Appellant committed:

1. aggravated sexual assault against Alexia by penetrating her sexual organ with his finger,

2. aggravated sexual assault against Alexia by contacting her sexual organ with Appellant's mouth,

3. aggravated sexual assault against Alexia by causing her sexual organ to contact Appellant's sexual organ,

4. indecency with a child against Alexia by touching her genitals,

5. aggravated sexual assault against Beth by contacting her sexual organ with Appellant's mouth,

6. indecency with a child against Beth by causing her to touch Appellant's genitals,

7. aggravated sexual assault against Caroline by penetrating her sexual organ with his finger,

8. indecency with a child against Caroline by touching her genitals, and

9. aggravated sexual assault against Doris by penetrating her sexual organ with his finger.[3]

The indictment alleged that these acts occurred when all four of the complainants were younger than 14 years of age.

VII. Appellant's strategy at trial

Appellant denied abusing any of his daughters and instead offered differing theories on why the girls were lying. He also attempted to portray Margaret as the mastermind behind the allegations, which he contended were motivated by jealousy over Appellant's financial success. Appellant called a number of character witnesses—neighbors, church acquaintances, and relatives including his son Jackson—all of whom testified about never having observed anything inappropriate between Appellant and his daughters and of their general impression of Appellant as that of a good father.

---

[3]These nine acts are not listed in the order in which they appeared in the indictment. For ease of reading, we have renumbered them according to victim, in alphabetical order.

VIII. The jury charge and verdict

During the charge conference, Appellant's counsel argued that the allegations against Appellant related to Alexia should have been severed because they took place in Harris County, not Tarrant County, and that Tarrant County was therefore an improper venue. In response to his argument, the trial court omitted from the jury charge the four allegations of abuse related to Alexia. Nevertheless, the trial court noted that while it was "uncomfortable" submitting the charges related to Alexia to the jury, her testimony regarding the abuse was still admissible as evidence of extraneous offenses under article 38.37 of the code of criminal procedure. *See* Tex. Code Crim. Proc. Ann. art. 38.37 § 2 (West Supp. 2016). The trial court also pointed out that prior to Alexia's testimony, the jury had received a limiting instruction related to extraneous offense evidence. Appellant's counsel did not challenge the trial court's assertion that Alexia's testimony was admissible under article 38.37, but he noted on the record that he "might have presented [his] case differently" if he had known from the outset that there would only be three complainants, and he requested a mistrial.

Additionally, the trial court included an instruction in the charge that before the jury could consider any evidence of a crime or act committed by Appellant against Alexia or Kelly, it had to believe the crime or act occurred beyond a reasonable doubt, and if it decided that it had, it could only consider the evidence "for any bearing it ha[d] on [Appellant]'s intent, plan, character, or any acts performed in conformity with that character." In its application paragraph, the

charge instructed the jury that it should find Appellant guilty of continuous sexual abuse if it found that, between September 1, 2007, and April 1, 2014, Appellant "intentionally or knowingly, during a period of time that [was] 30 days or more in duration, commit two or more acts of sexual abuse" by

(1) committing aggravated sexual assault of Doris by penetrating her sexual organ with his finger,

(2) committing aggravated sexual assault of Caroline by penetrating her sexual organ with his finger,

(3) committing aggravated sexual assault of Beth by contacting her sexual organ with his mouth,

(4) committing indecency with a child by touching Caroline's genitals, and

(5) committing indecency with a child by causing Beth to touch his genitals.

The charge also instructed that the jury must find that Beth, Caroline, and Doris were under the age of 14 at the time the offenses were committed.

The jury found Appellant guilty of continuous sexual abuse. Appellant elected to be sentenced by the trial court, and the court sentenced him to 40 years' confinement. On appeal, Appellant complains that the trial court erred by denying his motions to quash the indictment and by permitting improper jury argument.

Discussion

Appellant brings three points on appeal. His first two points relate to his motions to quash the indictment and his third point argues that the State made

improper jury arguments during the guilt phase of the trial. We will address each point in turn.

I. **"Constitutional" Motion to Quash the Indictment**

Appellant's "Constitutional Motion to Quash the Indictment, Motion for Severance, and Alternatively, Motion to Designate Events," which the trial court denied, sought to (a) quash the indictment for failure to give proper notice because it did not allege a specific date on which the offense occurred and (b) sever the case on the basis of the multiple offenses and complainants alleged in the case; or, alternatively, to (c) require the State to designate the events on which it would proceed to trial. In his first point, Appellant argues that the trial court's denial improperly allowed the case to "proceed with multiple victims, with no designation of which event was actually the one on trial and which was a mere extraneous matter, for each victim, [and] the effect was to . . . allow facts [that occurred] prior to the enactment of the [continuous sexual abuse] statute, Sept. 1, 2007, and additionally allow facts [that occurred] when two of the four girl[s'] ages exceeded that allowed under the same law."

A. **Sufficiency of the Indictment**

We review the sufficiency of an indictment de novo. *Smith v. State*, 309 S.W.3d 10, 13–14 (Tex. Crim. App. 2010). An accused is guaranteed the right to be informed of the nature and cause of the accusations against him in all criminal actions. U.S. Const. amend. VI; Tex. Const. art. I, § 10; *see State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). An indictment is sufficient if it

"charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give defendant notice of the particular offense with which he is charged." Tex. Code Crim. Proc. Ann. art. 21.11 (West 2009). It is well established that in most circumstances, a charging instrument possesses sufficient specificity to provide a defendant with notice of a charged offense when it tracks the language of a criminal statute. *State v. Edmond*, 933 S.W.2d 120, 128 (Tex. Crim. App. 1996).

Section 21.02 provides that a person commits continuous sexual abuse of children if:

> (1) during a period that is more than 30 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(b).

The indictment against Appellant alleged that on or about September 1, 2007, through April 1, 2014 (a period longer than 30 days), he committed six acts of aggravated sexual assault of a child and three acts of indecency with a child by contact (two or more acts of sexual abuse), against his four daughters (more than one victim) who were younger than 14 at the time of the abuse, and Appellant was over 17 at the time of the abuse.

Appellant makes two arguments that the indictment is insufficient because it alleged that the sexual abuse took place "on or about September 1, 2007" through April 1, 2014. First, Appellant urges that this allegation permitted evidence of acts of abuse that would have occurred after Alexia and Beth turned 14 but within the alleged time period of September 1, 2007, and April 1, 2014. Second, Appellant argues that the indictment permitted evidence of acts of abuse that took place prior to the effective date of the continuous sexual abuse statute—September 1, 2007—because the alleged time period in the indictment started "on or about September 1, 2007."

Appellant's first argument brings forth an evidentiary challenge—whether the abuse alleged by Alexia and Beth took place after they turned 14 years old—that, even if correct, would not render the indictment insufficient. Evidentiary matters of this nature will not render an indictment insufficient because they are not relevant to the sufficiency of notice provided by the indictment. *See Moff*, 154 S.W.3d at 603 (holding the State is not required to "lay out its case in the indictment"); *Sledge v. State*, 953 S.W.2d 253, 255–56 (Tex. Crim. App. 1997) (holding the State does not need to allege a specific date in the indictment); *State v. Espinoza*, No. 05-09-01260-CR, 2010 WL 2598982, at *9 (Tex. App.—Dallas June 30, 2010, pet. ref'd) (not designated for publication) (noting that the dates on which each specific act of sexual abuse occurred is an evidentiary matter and inclusion of such dates is not essential to provide notice in indictment). We therefore overrule this portion of his argument.

For similar reasons, Appellant's second argument—that the indictment permitted evidence of acts of abuse that took place prior to the effective date of the continuous sexual abuse statute—also fails. The primary purpose of specifying a date in the indictment is to show that the prosecution is not barred by the statute of limitations, not to notify the accused of the date of the offense. *Garcia v. State*, 981 S.W.2d 683, 686 (Tex. Crim. App. 1998); *see also Wright v. State*, 28 S.W.3d 526, 532 (Tex. Crim. App. 2000) ("'on or about' language of an indictment allows the state to prove a date other than the one alleged as long as the date proven is anterior to the presentment of the indictment and within the statutory limitation period"). Thus, an indictment does not have to specify a precise date or a "narrow window of time" within which the charged offense occurred in order to satisfy constitutional notice requirements. *Garcia*, 981 S.W.2d at 685–86.

The offense of continuous sexual abuse was created "in response to a need to address sexual assaults against young children who are normally unable to identify the exact dates of 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) (citing *Mitchell v. State*, 381 S.W.3d 554, 561 (Tex. App.—Eastland 2012, no pet.)), *cert. denied*, 137 S. Ct. 303 (2016); *see also Dixon v. State*, 201 S.W.3d 731, 736–37 (Tex. Crim. App. 2006) (Cochran, J., concurring) (recognizing the difficulties in prosecuting sexual offenses committed against young children because young children may not "be able to differentiate one

instance of sexual exposure, contact, or penetration from another or have an understanding of arithmetic sufficient to accurately indicate the number of offenses”). Whether any acts of abuse occurred prior to September 1, 2007, is another evidentiary matter that does not render the indictment insufficient. *See Moff*, 154 S.W.3d at 603; *Sledge*, 953 S.W.2d at 255–56.

However, even if we take into account the testimony of the children, Alexia was the only daughter who testified to abuse that might have taken place prior to September 1, 2007, when she testified that it may have started in 2004, when she was as young as nine years old. Beth, Caroline, and Doris testified that Appellant did not abuse them until they moved to Fort Worth in 2010. Appellant was not convicted based on the allegations of abuse committed against Alexia, and since his abuse of the remaining three girls took place beginning in 2010 at the earliest, there is not a theory under which the jury could have rationally found that Appellant abused the children in a 30-day period that took place before 2007. We therefore overrule this portion of Appellant’s first point.

B. Severance and designation

We review the trial court’s decisions on a motion to sever and a request to designate for an abuse of discretion. *O’Neal v. State*, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988); *Salazar v. State*, 127 S.W.3d 355, 365 (Tex. App.—Houston [14th Dist.] 2004, pet ref’d).

Appellant’s arguments requesting a severance or, alternatively, a designation by the State display a misunderstanding of the offense of continuous

sexual abuse. Appellant argued that the allegations should be separated by victim into four separate offenses, but the applicable statute expressly provides that the offense of continuous sexual abuse may be committed "against one or more victims." Tex. Penal Code Ann. § 21.02(b). Appellant provides no authority for his argument that the offense of continuous sexual abuse could or should be severed into separate cases, and we decline to so hold.

Similarly, Appellant's argument that the State should have been required to designate the events on which it would proceed to trial relies upon caselaw applicable to sexual assault charges in which the State was required to make an election of the act it would rely upon for conviction. *See O'Neal*, 746 S.W.2d at 771. Appellant has provided us with no authority to impose such a requirement in the context of a charge for continuous sexual abuse and we have found no authority for imposing such requirement. We therefore overrule the remainder of Appellant's first point.

II. Motion to Quash the Indictment based on Venue

Appellant's "Motion to Quash the Indictment – Venue Improper," which the trial court also denied, sought to quash the indictment as to the four allegations of abuse as to Alexia. In his motion, Appellant argued that because the abuse alleged by Alexia took place in Harris County, not Tarrant County as alleged in the indictment, the four acts in the indictment related to Alexia should have been quashed.

In his brief to this court, Appellant admits that the charges of abuse related to Alexia were not included in the jury charge submitted to the jury. But Appellant argues that the trial court's decision to omit that accusation from the jury charge did not remedy the harm from denying the motion to quash because Alexia's testimony was "already before the jury" and his counsel may have adjusted his strategy if Alexia had not testified.

Appellant's argument fails because even if we were to assume, without deciding, that the trial court erred in denying the motion to quash based on improper venue, Appellant has not shown that any such error affected his substantial rights. *See* Tex. R. App. P. 44.2(b); *Schmutz v. State*, 440 S.W.3d 29, 31 (Tex. Crim. App. 2014) (holding that venue error at trial is subject to a review for harm by using the standard for nonconstitutional errors under rule 44.2(b)). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may also consider the jury instructions, the State's

theory and any defensive theories, whether the State emphasized the error, closing arguments, and even voir dire, if applicable. *Id.* at 355–56.

Alexia's testimony was admissible as evidence of extraneous offenses committed by Appellant under article 38.37. Tex. Code Crim. Proc. Ann. art. 38.37, § 2. Evidence of a separate offense committed by the defendant, such as aggravated sexual assault of a child, may be admitted in the trial of continuous sexual abuse charges "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." *Id.* art. 38.37, § 2(b). At the time the trial court deleted Alexia's accusation from the application paragraph of the jury charge, the trial court noted that it agreed with the State that her testimony was still admissible under article 38.37.

Because Alexia's testimony was admissible under article 38.37, and the jury was properly charged on the use of this extraneous offense testimony in its deliberations, we hold that any error in denying Appellant's motion to quash for improper venue was harmless. For the above reasons, we overrule Appellant's second point.

III. Improper jury argument

In his third point, Appellant argues that the trial court erred by denying his request for a mistrial after the State made what he alleges were improper jury arguments. His objections to the prosecutor's arguments can be divided into two categories: (1) the prosecutor's attempts to explain why the counts of abuse

committed against Alexia as they were included in the indictment were not part of the charge of continuous sexual abuse in the jury charge and (2) the prosecutor's references to Alexia's testimony in general. Appellant argues that all of the references to Alexia were to facts that were outside the record.

Appellant's counsel objected to the following statements by the prosecutor:

> Now let's talk about [Alexia], because the charge the judge read to you is a little different than the indictment that you first heard. I don't know if you realized that. It's different because we are acting in an abundance of caution.
>
> [APPELLANT'S COUNSEL]: Judge, I'm going to object - -
>
> THE COURT: That's sustained.
>
> [APPELLANT'S COUNSEL]: I would ask the jury be instructed to disregard.
>
> THE COURT: We are not doing anything. The judge has submitted the law applicable to the case which you follow. What the lawyers say is not evidence.
>
> [APPELLANT'S COUNSEL]: I would respectfully submit that the Court's instruction cannot cure the error, outside the record, and I would ask for a mistrial.
>
> THE COURT: All right. Can everyone go by what I read, follow those instructions and understand to what extent the evidence involving the different named complainants can be used and for what purpose when I read that?
>
> SEVERAL JURY MEMBERS: Yes.
>
> THE COURT: Can you follow that instruction which is the same and in some cases different than what I gave you during the course of the trial of what evidence could be considered for what purpose?
>
> SEVERAL JURY MEMBERS: Yes.

THE COURT: That will be denied. Motion for mistrial is denied.

[PROSECUTOR]: When [Alexia] testified, she said that her abuse, from what she remembers, only happened in Houston and that when she moved to Fort Worth, it stopped.

Now, she turned 14 . . . [a]nd we know that she moved up here on December 8th of 2009. So because there's a possibility that it's unclear of when - - if she was under 14 at the time of the abuse - -

[APPELLANT'S COUNSEL]: I'm going to object to this. We're not trying that case. It's not been submitted to the jury and why and when and whatever you gave - -

THE COURT: Approach.

(Discussion at the bench, on the record:)

THE COURT: I want to make it clear. I have granted the severance. It doesn't happen. We don't talk about it. We don't talk about voir dire. You're arguing facts not in evidence. You're arguing the rulings of the Court.

And, Dawn, I don't want to hear a word about anything other than she is not a victim in our case, but what happened in Houston, you can argue facts, but you can't argue why decisions are made. Those are the Court decisions. Are we clear?

[PROSECUTOR]: Yes.

. . . .

(End of bench discussion)

THE COURT: I'll sustain the objection to her talking about why the law is - - what the law is. You can argue the facts.

[APPELLANT'S COUNSEL]: I would ask the Court to instruct the jury to disregard the - -

THE COURT: All right. Disregard the stuff of why we - - anything happens and ignore the last statement of the prosecutor and follow the law in the charge.

Everyone understand that instruction?

SEVERAL JURY MEMBERS: Yes.

[APPELLANT'S COUNSEL]: With all due respect, Judge, this is the second time in about 30 seconds that happened, and I don't think the error can be cured by a subsequent instruction for the second incident, and I would ask for - - respectfully ask for a mistrial.

THE COURT: Can you follow the instruction to disregard?

SEVERAL JURY MEMBERS: Yes.

THE COURT: If you couldn't, would you tell me?

SEVERAL JURY MEMBERS: Yes.

THE COURT: That will be denied.

Additionally, the following exchange occurred:

[PROSECUTOR:] And then [Alexia], it's true, she is not something that you can consider as far as the indictment is concerned, but you heard from her, also. And what did she tell you? This started when she was as young as ten in Houston. And he had actual sex with [Alexia]. He had sex - -

[APPELLANT'S COUNSEL]: Judge, I'm going to object.

[PROSECUTOR]: - - with his own daughter.

[APPELLANT'S COUNSEL]: Excuse me.

I'm going to object to [Alexia]. It's not for the jury's consideration. It's not talking about state of mind or plan, motive of the Defendant, and I object to it.

THE COURT: I will overrule your objection but remind the jury the limited purposes for which you can consider that testimony, if at all.

You may continue.

[PROSECUTOR]: Thank you.

He also performed oral sex on [Alexia]. [Alexia] also suffered chronic - -

[APPELLANT'S COUNSEL]: Judge, can I have a running objection - - I'm sorry - -

THE COURT: You may.

[APPELLANT'S COUNSEL]: - - to that comment, as well.

THE COURT: To . . .

[APPELLANT'S COUNSEL]: To what she just said.

THE COURT: To anything about [Alexia] you have a running objection.

You may continue.

[PROSECUTOR]: Thank you.

Chronic sexual abuse at her own father's hands. Four of his five daughters, chronic sexual abuse, spanning years. Is it even a question that we've proven over a period of 30 days to you? We've proven years to you, four daughters over a period of four years as indicted. Four years - -

THE COURT: I sustain the objection to four daughters over a period of years. There's only three that are applicable to this trial.

Does the jury understand that?

SEVERAL JURY MEMBERS: Yes.

THE COURT: So your running objection is sustained to that comment.

[APPELLANT'S COUNSEL]: And you've given an instruction. I would ask for a mistrial. This is the fourth time we've discussed this.

THE COURT: I've given a - - I sustained your objection as a precaution. That will be denied.

[APPELLANT'S COUNSEL]: Mistrial is denied?

> THE COURT: Yes.
>
> You may continue.
>
> [PROSECUTOR]: Four years of chronic sexual abuse. Forget [Alexia]. You know, forget it. Forget [Alexia].

Although the prosecutor told the jury to "[f]orget [Alexia]," she mentioned Alexia's testimony at least four more times.

To be permissible, the State's jury argument must fall within one of the following four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement. *Felder v. State*, 848 S.W.2d 85, 94–95 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 829 (1993); *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973).

First, we must note that any reference by the State to Alexia's testimony to the abuse was not a reference to facts outside the record, but to evidence in the record that the jury was entitled to consider as evidence of extraneous offenses under article 38.37. Tex. Code Crim. Proc. Ann. art. 38.37, § 2. The trial court's action of omitting the allegations of abuse committed against Alexia from the jury charge did not have the effect of striking Alexia's testimony from the record or otherwise rendering the evidence irrelevant or worthless of consideration by the jury. Under the instructions of the court and the law, her testimony about the acts of abuse could still be considered "for any bearing the evidence ha[d] on relevant matters, including the character of the defendant and acts performed in

conformity with the character of the defendant." *Id.* art. 38.37, § 2(b). We therefore disagree with and overrule Appellant's argument as to the State's references to Alexia's testimony to the facts of abuse committed by Appellant.

Regarding the State's attempts to explain the difference between the indictment and the jury charge, Appellant applies the wrong analysis in focusing on whether the prosecutor's statements were improper. Because the trial court granted his objection to the prosecutor's statement, the issue is whether the trial court abused its discretion by denying Appellant's request for a mistrial. *Hawkins v. State*, 135 S.W.3d 72, 76–78 (Tex. Crim. App. 2004). Only in extreme circumstances, when the prejudice caused by the improper argument is incurable, i.e., "so prejudicial that expenditure of further time and expense would be wasteful and futile," will a mistrial be required. *Id.*; *see also Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003), *cert. denied*, 542 U.S. 905 (2004). The comments by the prosecutor in this case do not meet this threshold requirement.

In determining whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of conviction absent the misconduct. *Hawkins*, 135 S.W.3d at 77; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999).

While we do not condone the prosecutor's acts in disregarding the trial court's admonishment and ignoring the trial court's explicit ruling by repeating the

argument to which the trial court had sustained an objection, Appellant has provided us with no basis to hold that the prosecutor's comments were substantially prejudicial. The prosecutor's argument regarding the decision to exclude the charges related to Alexia from the jury charge did not inject new facts into the case, as Appellant argues, but merely pointed out the discrepancy between the indictment and the jury charge—both of which had been read aloud to the jury.

Whether the prosecutor attributed the discrepancy to an "abundance of caution," or had she even attributed it to the throwing of caution to the wind, we fail to see how such a statement would inject any prejudice into the proceeding. As such, it does not rise to the degree of severity to warrant a mistrial. *See Stewart v. State*, 221 S.W.3d 306, 314 (Tex. App.—Fort Worth 2007, no pet.) (holding that prosecutor's arguments were not improper and did not inject new facts into the case).

In any event, the trial court took curative measures by explaining to the jury that the prosecutor's statements were not evidence and admonished the jury to "[d]isregard the stuff of why . . . anything happens and ignore the last statement of the prosecutor and follow the law in the charge." And each time it instructed the jury to disregard the prosecutor's statements, the trial court asked the jury members if they understood, to which several members of the jury replied that they did. This factor does not weigh in favor of granting a mistrial. *See Hawkins*,

135 S.W.3d at 84 (noting that a requested curative instruction is generally considered effective to cure harm caused by an improper comment).

Finally, the jury was presented with the considerable testimony of Appellant's four daughters to the abuse they suffered at his hands. Even if we were to disregard Alexia's testimony, Beth, Caroline, and Doris each testified to instances of abuse that included digital penetration, oral sex, and inappropriate touching that took place on repeated occasions over a period of several years. Kelly additionally testified to inappropriate comments made by Appellant. In considering the record apart from the prosecutor's comments, we cannot conclude that the prosecutor's comments threatened the certainty of conviction to a degree warranting a mistrial. Thus, even assuming the prosecutor's comments were prejudicial, they were not so prejudicial as to warrant the extreme remedy of granting a mistrial. We therefore overrule Appellant's third point.

Conclusion

Having overruled Appellant's three points, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; SUDDERTH and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: September 7, 2017