



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-17-00100-CR

MICHAEL ALAN SANDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 354th District Court
Hunt County, Texas
Trial Court No. 31,416

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

In March 2011, then six-year-old Anna made an outcry of sexual abuse against Michael Alan Sands, her mother's ex-boyfriend.¹ As a result of Anna's allegations, a Hunt County jury found Sands guilty of one count of aggravated sexual assault of a child² and one count of indecency with a child by contact.³ After finding that he had previously been convicted of a felony offense, Sands was assessed a punishment of imprisonment for life on each count, which the trial court ordered to be served consecutively.

On appeal, Sands complains that the trial court erred in excluding the testimony of Jack Sands in Sands' case-in-chief and challenges the sufficiency of evidence supporting his conviction under both counts. Because we find that (1) sufficient evidence supports Sands' convictions and (2) Sands' complaint regarding excluded testimony was not preserved, we affirm the trial court's judgment.

¹To protect the identity of the minor victims, we refer to them and their mothers by pseudonyms. *See* TEX. R. APP. P. 9.10.

²*See* Act of May 28, 2003, 78th Leg., R.S., ch. 896, §1, 2003 Tex. Gen. Laws 2721, 2721–22 (amended 2007, 2011, 2015, 2017) (current version at TEX. PENAL CODE § 22.021(a)(1)(B)(iii), (2)(B) (West Supp. 2017)).

³*See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West Supp. 2017).

(1) *Sufficient Evidence Supports Sands' Convictions*

Sands challenges the legal sufficiency of the evidence supporting his convictions. Sands argues that Anna's testimony was too general to support his convictions and also points to his own testimony in which he denied that he committed the acts.⁴

In evaluating legal sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury “to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Further, the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony and may “believe all of a witnesses' testimony, portions of it, or none of it.” *Thomas v. State*, 444 S.W.3d 4, 10 (Tex. Crim. App. 2014).

In our review, we consider “events occurring before, during[,] and after the commission of the offense and may rely on actions of the defendant [that] show an understanding and common design to do the prohibited act.” *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)

⁴Sands also points to the “testimony” of his father, Jack Sands (herein “Jack”), and cites Jack's affidavit attached to Sands' motion for new trial. As noted above, Jack did not testify at trial. Since the jury did not consider any testimony from Jack, whether in person or by affidavit, neither do we consider Jack's affidavit in our sufficiency determination.

(quoting *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985)). It is not required that each fact “point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.” *Id.* Circumstantial evidence and direct evidence are equally probative in establishing the guilt of a defendant, and guilt can be established by circumstantial evidence alone. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13 (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The “hypothetically correct” jury charge is “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.*

Under the relevant statute and the indictment, to obtain a conviction for aggravated sexual assault of a child, the State had to prove beyond a reasonable doubt that Sands (1) intentionally or knowingly (2) caused (3) the female sexual organ of Anna, (4) a child younger than 14 years of age, (5) to contact (6) the sexual organ of Sands. *See* Act of May 28, 2003, 78th Leg., R.S., ch. 896, § 1, 2003 Tex. Gen. Laws 2721, 2721–22 (amended 2007, 2011, 2015, 2017). To obtain a conviction for indecency with a child, the State had to prove beyond a reasonable doubt that Sands (1) with the intent to arouse or gratify Sands’ sexual desire, (2) engaged in sexual contact with

Anna, (3) who was younger than seventeen years of age, (4) by touching her (a) breasts or (b) genitals. TEX. PENAL CODE ANN. § 21.11(a)(1), (c)(1) (West Supp. 2017).

Aggravated sexual assault is a nature-of-conduct offense. *See Young v. State*, 341 S.W.3d 417, 423 n.20 (Tex. Crim. App. 2011) (citing *Huffman v. State*, 267 S.W.3d 902, 906 (Tex. Crim. App. 2008); *Vick v. State*, 991 S.W.2d 830, 832 (Tex. Crim. App. 1999)). “A person acts intentionally, or with intent, with respect to the nature of his conduct . . . when it is his conscious objective or desire to engage in the conduct.” TEX. PENAL CODE ANN. § 6.03(a) (West 2011). “A person acts knowingly, or with knowledge . . . of his conduct when he is aware that his conduct is reasonably certain to cause the result.” TEX. PENAL CODE ANN. § 6.03(b) (West 2011). A culpable mental state can be established by circumstantial evidence and may be inferred “from any facts which tend to prove its existence, including the acts, words, [and] conduct of the accused, and the method of committing the crime.” *Louis v. State*, 329 S.W.3d 260, 268 (Tex. App.—Texarkana 2010), *aff’d*, 393 S.W.3d 246 (Tex. Crim. App. 2012) (citing *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Dunn v. State*, 13 S.W.3d 95, 98–99 (Tex. App.—Texarkana 2000, no pet.)).

At trial, the testimony showed that Sands and Anna’s mother, Shelly, were in a romantic relationship from December 2009 until October 2010. Anna turned six years old October 29, 2010. After his romantic relationship with Shelly ended, Sands continued to help Shelly by occasionally picking Anna up from school and taking her either to Jack’s house or Shelly’s house and staying with her until Shelly got off work. Shelly estimated that Sands picked Anna up from school six to twelve times between October 2010 and March 28, 2011. Shelly testified that, when she was

taking Anna to school on March 28, Anna became visibly upset when she told Anna that Sands would be picking her up from school.

Alicia Daun, who was a forensic interviewer for the Hunt County Children's Advocacy Center (CAC), interviewed Anna April 5, 2011. She testified that Anna told her that, when her mother told her Sands would be picking her up, she decided to tell her that Sands had touched her privates, which she identified as her vagina by circling an area on a drawing of a girl. Anna told her that Sands would tell her it was nap time and then do improper things to her. He would put her on his bed, put a blanket over her head, take her pants off, and pull her panties down. She identified the things with which Sands touched her privates by circling the hand and penis of a drawing of a boy. She said he touched her on the outside of her private part with both his hand and his penis. Daun also testified that Anna told her that Sands' clothes remained on. Anna said that it happened every time Sands picked her up from school and took her to his house, unless his friends or his father were there. Anna also said that it happened one time at her mother's apartment.

A recording of Anna's CAC interview that was introduced into evidence was generally consistent with Daun's testimony. Anna also testified at trial. Her testimony was consistent with her CAC interview. In addition, she testified that, when Sands would take her into his room, she would wake up with his elbow or something stabbing her in the side of her stomach and could feel him on top of her. She also testified that she could feel his frontal private parts against her frontal private parts,⁵ but she did not know whether his private parts were only on the outside of hers.

⁵At trial, Anna circled the front groin area on drawings of a girl and boy to indicate what she meant by her private parts and Sands' private parts, respectively.

There was also evidence that, in early 2015, Sands had sexual contact with CeCe, the then ten-year-old daughter of another woman he was dating. CeCe testified that the first time occurred when her mother was in the shower and Sands came to her bedroom to tuck her in. After she said good night, he wanted to cuddle and got into bed with her. He then put his hand up her shirt and underneath her bra and groped her breasts. He started to put his hand down her pants, but stopped. Kim Basinger, a registered nurse and sexual assault nurse examiner, examined CeCe November 19, 2015. She testified that CeCe told her that Sands touched her breasts under her clothes. CeCe also told her that Sands would throw her across the bed, then pull her to the edge of the bed and press his lower part against her lower part. Although they had their clothes on, Sands' lower part was hard. Basinger's report of her examination of CeCe also contains drawings on which CeCe indicated that her lower part was her vagina and that Sands' lower part was his penis.

Olivia Sands, Sands' stepmother, confirmed that Sands would pick Anna up from school and bring her to Jack's house. She testified that she never saw anything improper or questionable in Sands' behavior, but admitted that she was not at the house very often before March 2011. Sands denied the charges against him and testified that he never touched Anna in an inappropriate way, never made contact with her genitals, never groped her, and never received any sexual gratification with her. He attributed Anna's accusations to the bitterness between Shelly and him. He also denied touching CeCe's breasts and attributed her accusations to retaliation by her mother because he reported her to Child Protective Services. Sands also admitted that he had had sex with Shelly when she was fourteen and with another girl who was fifteen, when he was nineteen.

“The testimony of a child victim alone is sufficient to support a conviction for aggravated sexual assault or indecency with a child.” *Scott v. State*, 202 S.W.3d 405, 408 (Tex. App.—Texarkana 2006, pet. ref’d). Anna’s testimony and statements given to others establishes all the elements of both aggravated sexual assault of a child and indecency with a child by contact. Although Sands denied that he ever acted inappropriately with Anna, the jury could have found his testimony was not credible. Anna’s testimony showed that Sands performed the acts on multiple occasions, from which the jury could reasonably infer that his actions were intentional or knowing. On each occasion, which occurred when she was six years old, Sand removed her pants and contacted her sexual organ with either his hand or his penis.

Although Anna’s testimony is ambiguous as to whether Sand’s pants were up or down during the touching, both aggravated sexual assault of a child and indecency with a child by contact may be established when the contact is through clothing. TEX. PENAL CODE ANN. § 21.11(c); *see IslasMartinez v. State*, 452 S.W.3d 874, 879–80 (Tex. App.—Dallas 2014, pet. ref’d); *Cagle v. State*, 976 S.W.2d 879, 882 (Tex. App.—Tyler 1998, no pet.). Further, for indecency with a child, intent to arouse or gratify the sexual desire may be inferred “from conduct, remarks, or all the surrounding circumstances,” or “from conduct alone.” *Scott*, 202 S.W.3d at 408 (citing *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981)). In this case, a reasonable jury could infer from the nature of the conduct, the multiple occurrences involving Anna and CeCe, and Sands’ care in insuring no one else was present that Sands’ touching of Anna was done with the intent to arouse or gratify Sands’ sexual desire.

Based on this record, we find that there is legally sufficient evidence to support Sands' convictions for aggravated sexual assault of a child and indecency with a child. Therefore, we overrule this issue.

(2) *Sands' Complaint Regarding Excluded Testimony Was Not Preserved*

Sands also complains that the trial court erred in excluding Jack's testimony, because of a violation of "the Rule" regarding exclusion of witnesses.⁶ See TEX. R. EVID. 614. Sands argues that excluding Jack's testimony violated his constitutional rights to a fair trial and due process. He contends that the trial court abused its discretion in excluding what Sands contends was crucial testimony because there is no evidence that Jack violated the Rule and, even if he did, no evidence that Sands or his trial counsel consented, procured, or otherwise had knowledge of Jack's violation

⁶Before opening statements, Jack was sworn as a witness. After Sands invoked the Rule, the trial court instructed Jack regarding the Rule, including that he could not talk to anyone else about the case, except the attorneys involved in the case, or look at any media concerning the case. At the end of the second day of trial, the State informed the trial court that Jack had had a telephone conversation with Sands at the jail in which they discussed that one of Jack's co-workers had been selected for the jury. In questioning by the trial court, Jack affirmed that he understood that he was not allowed to talk with anyone about the case, except one of the attorneys. He also informed the trial court that, since the trial began, he had generally discussed what was going on with Sands' girlfriend, Margaret Gardener. Gardener told the trial court that she had been present for all of the witness testimony during the trial and that she had talked to Jack about what the witnesses said. She also acknowledged hearing the trial court instruct the witnesses about the Rule and affirmed that she had understood the instruction. Nevertheless, she agreed that she had flagrantly violated the Rule by telling Jack about the witnesses' testimony. She also stated that she had asked Jack specific questions related to the testimony, which he answered. The trial court then barred Gardener from the courtroom for the remainder of the trial. After the State rested its case, Sands informed the trial court that he would call Jack as a witness, and the trial court excluded Jack's testimony based on his violation of the Rule. In objecting to the trial court's ruling, Sands stated:

Well, since we're on the record, I want to state to the Court in good faith that from the Defense perspective that he is a critical fact witness. It was his home where the allegations were alleged to have occurred. And that it is critical to substantiate some of the things that my client will testify to when I call him.

And, obviously, under those circumstances it's exceedingly prejudicial to the Defense to deny us this witness. I understand the Court's ruling, but I just want to make it clear the significance of the anticipated testimony based upon my interviews with Mr. Jack Sands and what he knows and what he would be testifying about.

of the Rule. See *Webb v. State*, 766 S.W.2d 236, 245 (Tex. Crim. App. 1989); *Taylor v. State*, 173 S.W.3d 851, 853 (Tex. App.—Texarkana 2005, no pet).

As the State points out, however, to preserve the complaint, Sands must have made an adequate offer of proof. See TEX. R. EVID. 103(a)(2); *Mays v. State*, 285 S.W.3d 884, 889–90 (Tex. Crim. App. 2009); *Love v. State*, 861 S.W.2d 899, 903 (Tex. Crim. App. 1993); *Duke v. State*, 365 S.W.3d 722, 725–26 (Tex. App.—Texarkana 2012, pet. ref’d). To preserve error regarding the exclusion of evidence by the trial court, the complaining party must make an offer of proof setting forth the substance of the excluded evidence. *Mays*, 285 S.W.3d at 889; *Love*, 861 S.W.2d at 903; *Duke*, 365 S.W.3d at 725. Under Rule 103(a)(2), A party may claim error in a ruling to . . . exclude evidence only if the error affects a substantial right of the party and . . . (2) . . . a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. TEX. R. EVID. 103(a)(2). The complaining party may make the offer of proof through questions and answers, or by counsel making a concise statement of the evidence. *Mays*, 285 S.W.3d at 889. “If an offer of proof is made in the form of a concise statement, the concise statement must include a reasonably specific summary of the proposed testimony.” *Duke*, 365 S.W.3d at 726 (citing *Love*, 861 S.W.2d at 901; *Harty v. State*, 229 S.W.3d 849, 854 (Tex. App.—Texarkana 2007, pet. ref’d)). The purpose of the offer of proof is “to enable an appellate court to determine whether the exclusion was erroneous and harmful” and, secondarily, “to permit the trial judge to reconsider his ruling in light of the actual evidence.” *Mays*, 285 S.W.3d at 890 (quoting 1 Steven Goode et. al., *Texas Practice Series: Guide to the Texas Rules of Evidence* § 103.3 (2d ed. 1993)).

In this case, although Sands argued that Jack’s testimony was critical to his defense, he did not inform the trial court of the substance of Jack’s anticipated testimony at any time during the trial. It was only when he filed his first amended motion for new trial with Jack’s affidavit attached that Sands informed the trial court of Jack’s anticipated testimony. However, to complain about the ruling excluding Jack’s testimony, Sands had to make an offer of proof “as soon as practicable—and before the court read . . . its charge to the jury.” TEX. R. EVID. 103(c). An offer of proof made after the trial court reads its charge to the jury is untimely and will not preserve error. *Riley v. State*, No. 06-10-00130-CR, 2012 WL 5866651, at *2 (Tex. App.—Texarkana Nov. 20, 2012, no pet.) (mem. op., not designated for publication);⁷ *Hernandez v. State*, 127 S.W.3d 206, 217 n.4 (Tex. App.—Houston [1st Dist.] 2003, pet. ref’d); *Shafer v. State*, 82 S.W.3d 553, 555 (Tex. App.—San Antonio 2002, pet. ref’d). Since no timely offer of proof was made regarding Jack’s excluded testimony, nothing has been preserved for our review. We overrule this issue.

For the reasons stated, we affirm the trial court’s judgment.

Josh R. Morriss III
Chief Justice

Date Submitted: April 17, 2018
Date Decided: May 2, 2018

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⁷Although unpublished opinions have no precedential value, we may take guidance from them “as an aid in developing reasoning that may be employed.” *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref’d).