NUMBER 13-15-00005-CR
NUMBER 13-15-00006-CR
NUMBER 13-15-00007-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JUAN JOE CANO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 130th District Court
of Matagorda County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Perkes
Memorandum Opinion by Justice Benavides

By three issues, appellant Juan Joe Cano challenges his conviction for indecency with a child by sexual contact, indecency with a child by exposure, and continuous sexual

assault of a child.[1] *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), 22.11(a)(2), and 21.02 (West, Westlaw through 2015 R.S.). Cano alleges: (1) the joinder of two of his cases was unfairly prejudicial; (2) the evidence was insufficient to support a conviction for indecency with a child by exposure; and (3) double jeopardy was violated by charging him with indecency with a child by contact and continuous sexual assault of a child. We affirm.

I. BACKGROUND[2]

In the summer of 2013, Corporal Maria Guajardo of the Bay City Police Department was assigned a case against Cano involving allegations of abuse by five complainants, Child 1, Child 2, Child 3, Child 4, and Child 5.[3] Based on the information the children provided in their forensic interviews, indictments were issued for Cano. He was charged with indecency with a child by contact with Child 1, indecency with a child by exposure with Child 2, and continuous sexual assault with Child 2, Child 3, Child 4, and Child 5. *See id.* §§ 21.11(a)(1), 22.11(a)(2), and 21.02. The children involved in the case were Cano's step-grandchildren. The State filed a motion to join the cause numbers for trial, which was granted. Prior to the beginning of trial, Cano filed a motion to sever, but after argument, the trial court denied the motion. *See id*. § 3.04 (West, Westlaw through 2015 R.S.). At trial, the jury found Cano guilty of all three offenses. Punishment was

[1] Cano was charged in three separate cause numbers that are on appeal with this Court: 14-026 (13-15-00005-CR); 14-027 (13-15-00006-CR); and 14-031 (13-15-00007-CR). The offenses were joined and tried in a consolidated trial. We will address the issues for all three cause numbers in one opinion.

[2] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

[3] Due to the age of the children and nature of the offenses, we will refer to the child complainants by pseudonym only.

assessed at two years' imprisonment in the Texas Department of Criminal Justice–Institutional Division for the indecency with a child by contact charge, two years' imprisonment, probated for two years, for the indecency with a child by exposure charge, and twenty-five years' imprisonment for the continuous sexual assault of a child charge.[4] This appeal followed.

II. EVIDENCE WAS SUFFICIENT[5]

By his second issue, Cano argues the evidence was insufficient to support his conviction for indecency with a child by exposure.

A. Standard of Review and Applicable Law

"The standard for determining whether the evidence is legally sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original); *see Brooks v. State*, 323 S.W.3d 893, 898–99 (Tex. Crim. App. 2010) (plurality op.). The fact-finder is the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899; *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). Reconciliation of conflicts in the evidence is within the fact-finder's exclusive province. *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000). We resolve any inconsistencies in the testimony in favor of the verdict. *Bynum v. State*,

[4] Cano was also charged with indecency with a child by exposure with Child 4, but the State dismissed the charge following the conclusion of the State's evidence.

[5] We will address Cano's issues out of order in this opinion.

767 S.W.2d 769, 776 (Tex. Crim. App. 1989) (en banc).

We measure the sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a 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*. The offense of indecency with a child by exposure, as alleged in the indictment, required the State to prove that appellant, with the intent to arouse or gratify the sexual desires of appellant, exposed his genitals, knowing that Child 2 was present. *See* TEX. PENAL CODE ANN. § 22.11(a)(2).

B. Discussion

Cano argues the evidence was insufficient to support his conviction for indecency with a child by exposure. During testimony, Child 2 stated that Cano had recently gotten out of the shower, walked into an open doorway, took off his towel exposing his genitals to her, and smiled before walking away. Cano offered this Court multiple hypothetical reasons he could have exposed himself to Child 2; however, a reasonable fact-finder could have found beyond a reasonable doubt that his action was intentional. The jury is allowed to draw reasonable inferences from the evidence, and we presume they did so. *See Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000) (en banc).

A jury was allowed to consider this instance of exposure to Child 2, as well as other

incidents of abuse about which she testified. We find the evidence was sufficient to support the jury's determination of guilt regarding the charge of indecency with a child by exposure. We overrule Cano's second issue.

III. JOINDER WAS PROPER

By his first issue, Cano argues that joining the indecency with a child by contact and the indecency with a child by exposure cases in a consolidated trial was unfairly prejudicial.

A. Standard of Review and Applicable Law

A "defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode." TEX. PENAL CODE ANN. § 3.02(a) (West, Westlaw though 2015 R.S.). "Criminal episode" means the "commission of two or more offenses, regardless of whether the harm is directed towards or inflicted upon more than one person or item of property, under the following circumstances . . . (2) the offenses are the repeated commission of the same or similar offenses." *Id*. § 3.01(2) (West, Westlaw through 2015 R.S.). However, "the right to severance under [Section 3.04] does not apply to a prosecution for offenses described by Section 3.03(b)[6] unless the court determines that the defendant or the state would be unfairly prejudiced by a joinder of offenses, in which event the judge may order the offenses to be tried separately or may order other relief as justice requires." *Id*. § 3.04(c) (West, Westlaw through 2015 R.S.).

The standard of review for whether a trial court properly ruled on a motion to sever,

[6] Texas Penal Code section 3.03(b) refers to the sentences for offenses arising out of the same criminal episode. *See* TEX. PENAL CODE ANN. § 3.03(b) (West, Westlaw through 2015 R.S.).

when that determination is left to the trial court by statute, is abuse of discretion. *Matthews v. State*, 152 S.W.3d 723, 730 (Tex. App.—Tyler 2004, no pet.).

B. Discussion

The State filed a motion for joinder of Cano's cases, to which Cano responded with a motion to sever the cases. *See* TEX. PENAL CODE ANN. § 3.04(c). Counsel for the State and Cano argued before the trial court as follows:

> Cano: And what I filed on the motion for severance–I understand under that, Judge, it says that the right to severance in this section doesn't apply to prosecution for offenses described in [section] 3.03(b). And that's indecency with a child and the sex case we're talking about here, but it gives the Court the discretion to determine whether the defendant of the State would be unfairly prejudiced by joinder of the offenses. And under the statute, it leaves it up to the Judge; and I'm asking that you do that in that trying all these together would unfairly prejudice my client.
>
> That's all I have, your Honor.
>
> . . . .
>
> State: Your Honor, the State would respond that that is correct, that the right to severance doesn't apply for these cases unless you determine that there is–that it is unfairly prejudicial to this defendant. However, the State would say that it's not unfairly prejudicial to this defendant because under the right circumstances in these types of cases, 38.37 under the Code of Criminal Procedure, allows for this type of evidence to come in anyways.
>
> So essentially, regardless of if the cases are joined for trial or separated, the same evidence is gonna come in.
>
> Court: Okay. The motion to sever is denied.

"'There is no presumption that the joinder of cases involving aggravated sexual assault

against different children is unfairly prejudicial.'" *Hulsey v. State*, 211 S.W.3d 853, 858 (Tex. App.—Waco 2006, no pet.) (quoting *Salazar v. State*, 127 S.W.3d 355, 365 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd)). Here, the State referenced article 38.37 of the code of criminal procedure, which relates specifically to extraneous offenses or acts in the prosecution of sexual based offenses. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 (West, Westlaw through 2015 R.S.). Under article 38.37,

> evidence that the defendant has committed a separate offense as described by Subsection (a)(1) or (2) (sexual based offenses) may be admitted in the trial of an alleged offense described in Subsection (a)(1) or (2) 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.

See id., § 2(b). The State gave proper notice prior to trial of its intent to use extraneous sexual based offenses in Cano's trial. Therefore, even if the trial court had severed the cases, the State's argument that the offenses would have most likely been admissible was proper. The trial court did not abuse its discretion finding there would be no unfair prejudice to Cano to try the cause numbers together. We overrule Cano's first issue.

IV. NO DOUBLE JEOPARDY VIOLATION

By his third issue, Cano alleges his conviction for indecency with a child by contact could have formed part of the offense of continuous sexual assault and would have been a violation of double jeopardy. *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), 21.02.

A. Discussion

Cano was convicted of both indecency with a child by contact and continuous sexual assault. *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), 21.02. The complainant in the indecency with a child by contact case was Child 1. The complainants in the

continuous sexual assault case were Child 2, Child 3, Child 4, and Child 5. Cano argues the State claimed the event underlying the indecency with a child by contact charge occurred eight days after the time period the State relied on for the continuous sexual assault charge; yet in the motion for joinder, the State argued the events arose out of a single criminal episode. However, a "criminal episode" can encompass "offenses [that] are the repeated commission of the same or similar offenses." *See* TEX. PENAL CODE ANN. § 3.01.

"Both Texas and federal courts recognize that prosecutors have broad discretion in deciding which cases to prosecute." *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (en banc). "Thus, 'if the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether to prosecute and what charge to file generally rests entirely within his or her discretion.'" *Id*. (quoting *State v. Malone Serv. Co.*, 829 S.W.2d 763, 769 (Tex. 1992)).

The State had the discretion on how to charge Cano with the offenses they alleged he committed. Regardless of the time period alleged in the continuous sexual assault charge, the State was entitled to charge Child 1 as the complainant in a separate offense. No double jeopardy violation occurred since Child 1 was not an included complainant in the continuous sexual assault charge. The State argued that Cano committed the same or similar offenses in order to join them under the "same criminal episode." The trial court agreed and allowed the joinder of the cases. We overrule Cano's third issue.

V. CONCLUSION

We affirm the trial court's judgments.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
4th day of August, 2016.