NUMBER 13-15-00509-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JORGE ALBERTO MENDEZ GONZALEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 389th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Benavides and Longoria
Memorandum Opinion by Justice Longoria

Appellant Jorge Alberto Mendez Gonzalez was charged by indictment with two counts of indecency with a child, a second-degree felony, *see* TEX. PENAL CODE ANN. § 21.11(a)(1) (West, Westlaw through 2015 R.S.), and two counts of improper relationship

between an educator and student, a second-degree felony. *See id*. § 21.12(a)(1) (West, Westlaw through 2015 R.S.). By four issues, Gonzalez argues that the trial court should have granted his directed verdict, there is insufficient evidence to support the convictions for improper relationship between educator and student, the trial court erred in admitting certain e-mails, and the trial court erred in denying his motion to suppress. We affirm.

I. BACKGROUND

T.U.[1] was a fourteen-year-old high school student in La Joya, Texas. She was a freshman in high school when she met Gonzalez, her Spanish teacher. T.U. testified that she and Gonzalez bonded during her freshman year. She had recently lost a brother in a car accident, and he had recently lost his mother to cancer. At the end of the year, Gonzalez gave T.U. his contact information so they could stay in touch over the summer. T.U. further testified that during the next school year, she visited Gonzalez frequently in his classroom despite the fact that he was no longer her Spanish teacher. After some time, Gonzalez invited her to his classroom and stated, "I don't see you as a student. I see you as a woman." T.U. testified that she and Gonzalez often engaged in "kissing, making out, type of stuff." She indicated that Gonzalez would pick her up, she would wrap her legs around his waist, and he would grab her breasts and her buttocks over her clothes. According to T.U., such incidences occurred at least twenty times between September and October of 2013.

In October of 2013, T.U.'s mother began to suspect that T.U. and Gonzalez were hiding something. T.U. confessed to her mother that she and Gonzalez were in a

[1] We refer to complainant by her initials in order to protect her privacy. *See generally* TEX. R. APP. P. 9.8(b).

relationship. According to T.U., when questioned by the principal and A.C. Perez, an investigator for the school district, she initially denied having a relationship with Gonzalez. But after going home, she wrote a statement about her relationship with Gonzalez and signed it. Gonzalez was placed on administrative leave for two weeks. During his administrative leave, T.U. claims that she was "shut out" by the other students because Gonzalez was a well-liked teacher at the school. T.U. testified that because she did not want to jeopardize Gonzalez's career, she met again with Investigator Perez to recant her earlier written statement. She signed a second statement declaring that her allegations of having a relationship with Gonzalez were false.

After Gonzalez was reinstated at the school, he and T.U. continued to communicate through e-mail several times a day. T.U. testified that she had created four or five fake e-mail accounts to communicate with Gonzalez, and that Gonzalez had similarly created several fake e-mail accounts to communicate with her. T.U. testified that she saved the e-mails on a USB drive. Furthermore, according to T.U., she did not own a phone in the fall of 2014. Instead, she borrowed other people's phones to call Gonzalez and arrange private meetings where they would "have conversations and make out; we would rub our private parts together; he would touch my breasts over the clothing." Eventually her parents discovered the voluminous e-mails on the pen drive and insisted that T.U. inform the authorities. After an investigation by the police, Gonzalez was arrested.

Gonzalez pleaded not guilty and elected to have a jury trial. The jury found Gonzalez guilty on both counts of indecency with a child as well as both counts of improper relationship between educator and student. On each of the counts, the jury

assessed punishment at four years' imprisonment in the Institutional Division of the Texas Department of Justice, probated for four years, and a $5,000 fine, which was not suspended. At the formal sentencing, the trial court imposed a four-year prison sentence, probated for seven years as to each count, and allowed Gonzalez to make $65.00 monthly payments towards each fine. This appeal ensued.

II. LEGALLY SUFFICIENT EVIDENCE

By his first and second issues, Gonzalez argues that the trial court erred by denying his motion for directed verdict because there was legally insufficient evidence to support convictions on counts three and four for improper relationship between educator and student. *See id*.

A. Standard of Review and Applicable Law

In order to determine if the evidence is legally sufficient in a criminal case, the appellate court reviews all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 905 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). We give great deference to the trier of fact and assume the factfinder resolved all conflicts in the evidence in favor of the verdict. *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We will uphold the verdict unless the factfinder "must have had reasonable doubt as to any essential element." *Id.* at 517.

Sufficiency 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). Such a charge in this case would state that a person commits the offense of

improper relationship between educator and student if the person engages in sexual contact with a child who is enrolled at a primary or secondary school at which the person works. *See* TEX. PENAL CODE ANN. § 21.12(a)(1).

B. Analysis

Gonzalez does not challenge his convictions on counts one and two for indecency with a child. Instead, he argues that, based on the statutory definitions of "sexual contact," there is insufficient evidence to support his convictions for counts three and four for the offense of improper relationship between educator and student.

Both offenses of indecency with a child and improper relationship between an educator and student are found in Chapter 21 of the Texas Penal Code. For the offense of indecency with a child,

> sexual contact means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:
>
> (1) any touching by a person, *including touching through clothing*, of the anus, breast, or any part of the genitals of a child; or
>
> (2) any touching of any part of the body of a child, *including touching through clothing*, with the anus, breast, or any part of the genitals of a person.

See id. § 21.11(a)(1) (emphasis added). However, for the offense of improper relationship between educator and student, section 21.12 of the Texas Penal Code contains no specific definition of sexual contact. *See id*. § 21.12(a)(1). Instead, we must refer to the definition given at the beginning of Chapter 21: "Sexual contact means, except as provided by Section 21.11 [the section governing indecency with a child], any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.* § 21.01(2) (West, Westlaw through 2015 R.S.). Unlike the specific definition given in the indecency with a child statute, the

baseline definition of sexual contact given for Chapter 21 offenses does not specifically refer to touching through clothing. *See id*. Based on the difference in these definitions, Gonzalez asks us to conclude that there can be no offense under section 21.12 without proof of touching under the clothes. In other words, he argues that touching through the clothing is insufficient to support a conviction for improper relationship between an educator and student. However, the State argues that sexual contact may include touching over clothing, even in the context of improper relationship between educator and student. We agree with the State.

The Court of Appeals in Dallas addressed a similar argument several years ago. *See IslasMartinez v. State*, 452 S.W.3d 874, 879 (Tex. App.—Dallas 2014, pet. ref'd). The defendant in that case argued that because the 2001 amendments to section 21.11 added the "through clothing" language to the definition of sexual contact for the offense of indecency with a child, it was implied that the offense of aggravated sexual assault of a child required proof of under-the-clothing contact since the definition of sexual contact applicable to that offense did not include through-the-clothing language. *See id.* However, the court disagreed.

> In 2001, the legislature amended the definition of "sexual contact" for indecency with a child to include touching through clothing. But indecency with a child is a different offense, and the legislature did not amend the statute for aggravated sexual assault of a child. The term "contact" was not statutorily defined before 2001, and it remains statutorily undefined. Consequently, we presume the legislature knew the construction that courts had given to the term when it chose not to define it. And we presume the legislature intended the same construction to continue to be applied after the 2001 amendments.

Id. Even though there are a few differences between our present case and *IslaMartinez*, we find the court's analysis in *IslaMartinez* to be instructive. For example, in *IslaMartinez*

the defendant was charged with aggravated assault of a child whereas in the present case, the defendant was charged with indecency with a child in addition to inappropriate relationship between educator and student. And "contact" is not specifically defined for aggravated sexual assault of a child whereas "sexual contact" is generally defined for section 21 offenses. However, there is an important similarity: both defendants make the same exact argument. The argument is that because indecency with a child was amended to include touching through the clothes, then by implication other sexual offenses without that phrase must require under-the-clothing touching.

However, just like in *IslaMartinez*, we disagree with that interpretation. Section 21.12 was not enacted until 2003, two years after the 2001 amendments. *See* TEX. PENAL CODE ANN. § 21.12. We can presume the legislature knew the construction that courts had given to the term sexual contact; furthermore, we presume that the legislature intended the same construction to be applied for Section 21.12 since it was enacted several years after the amendments but did not give a new definition for the term. *See IslasMartinez*, 452 S.W.3d at 879. And Texas jurisprudence prior to 2001 makes it clear that the term "sexual contact" does not require under-the-clothing contact.

> [T]he essence of the act of touching is to perceive by the sense of feeling. It is a matter of the commonest knowledge that the interposition of a layer of fabric between a person's hand and an object upon which the hand is placed will not prevent that person from feeling the object thus concealed. Were we to accept appellant's contention that he did not "touch" the officer's genitals because no flesh-to-flesh contact was made, absurd results would follow. Under such an analysis, a defendant who thrust his hand beneath a victim's undergarments and fondled his or her genitals in a public place could not be prosecuted for public lewdness if he were wearing a glove.

Resnick v. State, 574 S.W.2d 558, 560 (Tex. Crim. App. 1978); *see also Miles v. State*, 247 S.W.2d 898, 899 (1952) (observing that sexual contact with a child could occur

through the clothes); *IslasMartinez*, 452 S.W.3d at 879 (holding that sexual contact does not require under-the-clothing touching for aggravated sexual assault).

The record established that Gonzalez repeatedly touched T.U.'s breasts and buttocks through her clothing in a manner meant to arouse sexual desires of T.U. and/or Gonzalez. Therefore, we conclude that there was legally sufficient evidence to support the convictions for counts three and four for improper relationship between educator and student. We overrule Gonzalez's first and second issue.

III. E-MAIL AUTHENTICATION

In his third issue, Gonzalez argues that the trial court erred in admitting e-mails that the State did not properly authenticate.

A. Standard of Review and Applicable Law

Whether or not to admit evidence at trial is a preliminary question to be decided by the trial court. *See* TEX. R. EVID. 104(a) (West, Westlaw through 2015 R.S.). A trial court's decision whether to admit evidence is reviewed under an abuse of discretion standard and will not be reversed if it is within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

> In a jury trial, it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic.

Butler v. State, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015).

B. Analysis

Gonzalez challenges the admission of twenty-five e-mails, identified as State's Exhibits 10-35, purported to have been exchanged between T.U. and Gonzalez.

Gonzalez points to the following exchange as the only authentication for the e-mails that the State offered:

> Q. [T.U.], are you familiar with State's Exhibits 10 through 35?
>
> A. Yes.
>
> Q. And how are you familiar with them?
>
> A. They're the emails that we wrote back and forth to each other.
>
> Q. And you're familiar with the contents of those emails?
>
> A. Yes.
>
> Q. And, in fact, what did you do with those emails after you had received them or sent them to the defendant?
>
> A. I saved them.

According to Gonzalez, this was insufficient to authenticate the e-mails. Gonzalez suggests several of the "traditional techniques" of authenticating e-mails under Rule 901 of the Texas Rules of Evidence that the State should have used, such as the "reply letter doctrine," demonstrating that the e-mail contains information that only the purported author of the e-mail would be likely to know, and showing that the purported author undertook actions consistent with the messages in the e-mails. *See* TEX. R. EVID. 901 (West, Westlaw through 2015 R.S.).

While it is true that the content of the e-mail itself is one method commonly used to authenticate e-mails, Gonzalez has overlooked another common method.

> Authentication can be accomplished in various ways. For example, *evidence may be authenticated by testimony from a witness with knowledge that a matter is what it is claimed to be*. Evidence may also be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Generally, these two rules are the most common authentication techniques used for e-mail, websites, text messages, and other electronic evidence.

Manuel v. State, 357 S.W.3d 66, 74–75 (Tex. App.—Tyler 2011, pet. ref'd) (emphasis added); *see* TEX. R. EVID. 901(b)(1), (4). T.U. testified that the e-mails admitted into evidence were the e-mails that she and Gonzalez sent back and forth to one another. As a participant in the e-mail correspondence, she had personal knowledge that the e-mails were what the State claimed them to be. On this record, the trial court could have properly concluded that the State supplied "facts sufficient to support a reasonable jury determination that the proffered evidence is authentic." *Butler*, 459 S.W.3d at 600. We conclude that the trial court did not abuse its discretion in admitting these e-mails. We overrule Gonzalez's third issue.

IV. MOTION TO SUPPRESS

In his fourth issue, Gonzalez argues that the trial court erred in denying his motion to suppress evidence obtained from his cell phone.

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). We give almost complete deference to a trial court's findings of facts but review de novo mixed questions of law and fact that do not depend on credibility or demeanor. *Id*. But we generally uphold the trial court's findings if they are "supported by the record." *Miller v. State*, 393 S.W.3d 255, 262 (Tex. Crim. App. 2012).

B. Analysis

Gonzalez complains that the search warrant used to obtain content from his cell phone was insufficient. There was a search warrant that was signed and issued to search Gonzalez's phone; however, the content from his cell phone that Gonzalez challenges

was obtained through a subpoena duces tecum served on Sprint Telecommunications Corporation. And during the pre-trial hearing on the motion to suppress, once the State introduced the subpoenaed records from Sprint, Gonzalez's counsel stated, "If these are records based on the subpoena, then I don't have an objection."

Courts have advised against finding the phrase "no objection" to signify that the party intends to waive an "earlier-preserved error . . . when the record otherwise establishes that no waiver was intended or understood." *Stairhime v. State*, 463 S.W.3d 902, 906 (Tex. Crim. App. 2015). However, Gonzalez did not simply claim that he had "no objection." He specifically qualified his statement by asserting that if the phone records being admitted were obtained by the subpoena duces tecum, then he had no objection; Gonzalez only objected if the records were obtained by a search warrant. The record clearly illustrates that the phone records wereobtained by the subpoena. Accordingly, Gonzalez has waived this issue. *See* TEX. R. APP. P. 33.1. We overrule Gonzalez's fourth issue.

V. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

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

Delivered and filed the
6th day of April, 2017.