



Guerrero v. State

Court of Appeals of Texas, Fourteenth District, Houston

May 1, 2025, Memorandum Opinion Filed

NO. 14-23-00794-CR

Reporter

2025 Tex. App. LEXIS 2975 *; 2025 LX 11870

BENITO GUERRERO, JR., Appellant V. THE STATE OF TEXAS, Appellee

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Core Terms

sexual intercourse, deviate, solicitation, online, sexual, condom, message, comfortable, texted

Opinion

[*1] On Appeal from the 443rd District Court

Ellis County, Texas

Trial Court Cause No. 47607CR

MEMORANDUM OPINION

Appellant Benito Guerrero, Jr. appeals his conviction for online solicitation of a minor. In his sole issue appellant asserts that the evidence is legally insufficient to support his conviction. Concluding that the evidence is legally sufficient to support the conviction, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment with online solicitation of a minor. He

pleaded "not guilty." The jury found him guilty as charged and assessed punishment at six years' confinement and a \$2,500 fine. The jury recommended that the imposition of appellant's sentence be suspended and that appellant be placed on community supervision. The trial court suspended the fine and the sentence of confinement, and placed appellant on community supervision for eight years. Appellant timely perfected appeal to the Tenth Court of Appeals, and the Supreme Court of Texas ordered the appeal transferred to this court. 1

II. ISSUE AND ANALYSIS

Does legally sufficient evidence support appellant's conviction?

In his sole issue, appellant asserts that the evidence is legally insufficient [*2] to support his conviction for online solicitation of a minor under Penal Code section 22.021(c). When reviewing the sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. See [*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 \(1979\)](#); [*Zuniga v. State*, 551 S.W.3d 729, 732 \(Tex. Crim. App. 2018\)](#). We defer to the fact finder to fairly resolve conflicts in testimony, weight the evidence, and draw reasonable inferences from basic to ultimate facts.

Issasi v. State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Circumstantial evidence is just as probative as direct evidence and can in itself be enough to support a conviction. [*Hooper v. State*, 214 S.W.3d 9, 13 \(Tex. Crim. App. 2007\)](#). The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. [*Dunham v. State*, 666 S.W.3d 477, 482 \(Tex. Crim. App.](#)

1 In transfer cases, the transferee court must decide the appeal in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. See Tex. R. App. P. 41.3.

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2023).

A person commits the offense of online solicitation of a minor under [*Texas Penal Code section 22.021\(c\)*](#) if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial [*3] online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in deviate sexual intercourse or sexual intercourse 2 with the actor or another person. See Tex. Penal Code Ann. § 33.021(c) (West, Westlaw through 2023 4th C.S.). "Minor" means:

(A) an individual who is younger than 17 years of age; or (B) an individual whom the actor believes to be younger than 17 years of age. See *id.* §33.021(a)(1). For the purposes of this offense, "deviate sexual intercourse" means (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object, and "sexual intercourse" means any penetration of the female sex organ by the male sex organ. See *id.* §§ 21.01(1),(3); 33.021(a)(2) (West, Westlaw through 2023 4th C.S.). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. See *id.* § 6.03(b).

Appellant argues that the evidence is legally insufficient to support a finding that appellant had the intent to engage in deviate sexual intercourse or sexual [*4] intercourse with the minor. See [*Tex. Penal Code Ann. § 33.021\(c\)*](#). Appellant does not challenge the legal sufficiency of the evidence as to the other elements of the offense. To commit this offense a person must have the requisite intent at the time of the solicitation. See [*Tuazon v. State*, 661 S.W.3d 178, 183 \(Tex. App.-Dallas](#)

2We do not consider any evidence of an intent that the minor will engage in sexual contact, because the term "sexual contact" was not included in the offense charged in the indictment.

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2023, no pet.). An express statement of intent is not required. See [*Cervantes v. State*, 594 S.W.3d 667, 673 \(Tex. App.-Waco 2019, no pet.\)](#). Rather, proof of intent often depends on circumstantial evidence. See [*Giddens v. State*, 256 S.W.3d 426, 434 \(Tex. App.-Waco 2008, pet. ref'd\)](#). A jury may infer a defendant's intent from his acts, words, and conduct, as well as any other evidence the jury determines proves the existence of the required intent. See [*Brown v. State*, 122 S.W.3d 794, 800-801 \(Tex. Crim. App. 2003\)](#).

Officer Juan Rios of the Texas Department of Public Safety testified regarding his communications with appellant in May 2021 while Officer Rios was operating under the online persona of "Adam," a fifteen-year-old boy. The

evidence showed that on May 3, 2021, appellant started a chat on an online dating application with a person whose profile said his name was "Adam," but who actually was Officer Rios. Appellant asked Adam what he was "into," and Adam said **[*5]** he liked "dudees," indicating that he liked men. Appellant then asked, "You bttm [bottom]?", referencing a sexual position and then added, "Let me slide in you," followed by a drool emoji. Adam confessed that he was "kinda [y]oung," and then gave appellant a phone number and indicated that appellant should contact him at that number. Appellant texted Adam at that number, and they started a text exchange. Appellant said that Adam's profile said he was 19. Adam indicated that he put that age to avoid getting kicked off of the dating application for being too young. Appellant asked Adam how old he was, and Adam said,

"almost 16," meaning that he was 15 years old.

Despite Adam's confession of his age, appellant continued chatting and asked Adam what he was "into." Adam said he had kissed a guy before, but nothing more than that. Adam asked appellant what he had done and "where should we start [?]" Appellant told him that he had been with a man here and there

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"but nothing serious." Appellant said that he had had sex with a guy before,

"[u]sually just to spend time with [people] until we're comfortable and well you know ha ha." When Adam said he was inexperienced, Appellant graphically explained **[*6]** sexual positions and said that protection is responsible and that men should wear condoms." Appellant said, "that's why you should ask for [their] stats, I'm DDF. Meaning disease [and] drug free." Appellant and Adam exchanged photos of themselves, with Officer Rios sending a photo of a young man. Adam said he had to go, but he asked appellant to contact him later.

About four hours later appellant texted Adam. Appellant said Adam should come over to where appellant was. Adam said he wished he could drive, and asked

"you got a cool truck [because] I want on." 3 Appellant replied, "I got something you can get on," followed by a devil emoji. Officer Rios testified that this message showed an intent to engage in deviate sexual intercourse with Adam. Adam responded to appellant's message with two GIF (graphics interchange format) files indicating that appellant was really naughty and should behave. Appellant responded, "Lmfao."

Adam texted appellant at 7:00 a.m. the next morning and said he was getting ready to go to school. The two engaged in general conversation. Adam texted appellant again at 11:14 a.m. saying that he was in class. Appellant asked Adam what he was going to do, and Adam said **[*7]** he was available starting at 4 p.m. that day. Appellant later asked Adam if he going to be free that day, and Adam said he would be. A little later appellant said he did not think he would be able to meet that day. Adam replied with a tear emoji and said he was looking forward to meeting appellant. Appellant told Adam he would see what he could do and asked Adam if he was sure he wanted to "meet up." Adam said he wanted to do so. Appellant and

3 Officer Rios explained this was a typo for "I want one."

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Adam agreed to meet at Getzendaner Park in Waxahachie, near where Adam claimed to live. Appellant asked Adam twice for a photo of Adam when Adam said he was about to take a shower. They traded more sexual innuendos and discussed where to meet in the park. Adam asked if he should just jump in appellant's car and lay the seat down. Appellant responded, "Lol [with laughing emoji] I'm unsure you can just jump in and we can go for a ride? Talk see what you wanna know."

Adam asked if appellant was bringing a condom. Appellant responded, "Let's not intend to go that far until you are comfortable" and said he did not bring a condom.

After Appellant arrived in the park he was arrested and brought **[*8]** to the police station for an interview. Officer Rios kept up the fiction that Adam was a real person. Appellant wrote an apology letter saying that he was only

trying to give Adam information and help him understand his sexuality and that appellant did not intend to take advantage of Adam. During the interview appellant repeatedly said that he had no intent to have sex with Adam.

Investigator McIntosh analyzed appellant's cell phone web searches, and he discovered searches by appellant on May 3 and 4, for adult pornography websites. There was also a search for the park where appellant was to meet Adam.

Appellant notes that he did not bring a condom to the meeting. Although appellant did not bring a condom to the park or request Adam do so, a condom is not required to engage in deviate sexual intercourse. Lead Investigator Brian McIntosh said that by saying he was disease and drug free appellant may have been suggesting that a condom was not needed.

Officer Rios made various statements regarding his opinion as to appellant's intent. Officer Rios testified that appellant intended to have "a meet and greet with a sexual encounter at the end." Officer Rios also testified that appellant intended [*9] to meet and greet Adam and then to see where it went, and that some sexual

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encounter would happen, although it might stop short of sexual intercourse. Nonetheless, Officer Rios was called back to the stand, and when asked what appellant's intent was when he went to the park to meet Adam, Officer Rios testified that based on the totality of the circumstances Officer Rios believes appellant was there to engage in deviate sexual intercourse.

Some of the evidence at trial indicates that appellant did not have an intent to engage in deviate sexual intercourse with Adam. Appellant did say, "Let's not intend to go that far until you are comfortable." On the other hand Adam's texts indicated that he might already be "comfortable," and appellant could have expected Adam to become "comfortable" during the meeting. To the extent there was evidence that appellant did not have an intent to engage in deviate sexual intercourse with Adam, we presume the jury discredited this evidence. See [Turro, 867 S.W.2d 43, 47 \(Tex. Crim. App. 1993\)](#); [Carr v. State, 477 S.W.3d 335, 339 \(Tex. App.-Houston \[14th Dist.\] 2015, pet. ref'd\)](#).

Under the applicable standard of review, we conclude that a rational trier of fact could have found beyond a reasonable doubt that (1) when appellant solicited Adam to meet him, appellant had the intent to engage [*10] in deviate sexual intercourse with Adam; and (2) appellant over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicited a minor to meet appellant, with the intent that the minor will engage in deviate sexual intercourse with appellant. See [Tex. Penal Code Ann. § 33.021\(c\)](#); [McLeod v. State, 693 S.W.3d 634, 643-44](#) (Tex. App.-

Houston [1st Dist.] 2023, pet. ref'd); [Tuazon, 661 S.W.3d at 182-84](#); [Smith v. State, 631 S.W.3d 484, 492-94 \(Tex. App.-Eastland 2021, no pet.\)](#). Therefore, the trial evidence was legally sufficient to support appellant's conviction for the offense of online solicitation of a minor. We overrule appellant's sole issue and

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affirm the trial court's judgment.

/s/ Randy Wilson

Justice

Panel consists of Justices Wilson, Hart, and McLaughlin. Do Not Publish - TEX. R. APP. P. 47.2(b).

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