

**No. 14-24-00152-CR**

In the Court of Appeals  
for the  
Fourteenth District of Texas

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**HECTOR CALDERON**  
*Appellant*

v.

**THE STATE OF TEXAS,**  
*Appellee*

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No. 23-CR-1747 in the 56<sup>th</sup> District Court  
Galveston County, Texas

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**APPELLANT'S BRIEF**

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**ORAL ARGUMENT REQUESTED**

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Hon. Lonnie Cox

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## **Statement of the Case**

Appellant Hector Calderon was charged by indictment with the second degree felony offense of indecency with a child by contact. CR6; Tex. Pen. Code Ann. § 21.11(a) (West 2011). Calderon pled not guilty and a jury found him guilty. CR75. The trial court found that Calderon had been previously convicted of indecency with a child and sentenced him to automatic life in prison pursuant to Texas Penal Code § 12.42(c)(2). 4RR37-38. Calderon filed timely written notice of appeal. CR85.

## **Statement of Facts**

The complainant, M.G., was 27 at the time of the trial. 3RR62. M.G. lived with her grandmother from age two to thirteen, and during this time they usually shared a bed. 3RR63-65.

M.G. testified that Hector Calderon began doing work around the house for her grandmother in 2008 when M.G. was twelve. 3RR71. A relationship developed and Calderon moved into the house, always sleeping in a different room. 3RR72-73, 78. It was known amongst the family that Calderon was a registered sex offender. 3RR74.

M.G. testified about four touching incidents that occurred over several months in 2008 and 2009 when she was twelve. On the first occasion, M.G. was in bed lying between her grandmother and Calderon watching a movie and Calderon rubbed her

calves under the blanket. M.G. assumed he had intended to rub her grandmother's legs. 3RR81, 109.

Next, the three were watching a movie on the couch with Calderon seated in the middle and M.G. felt a hand brush her buttocks through a blanket. 3RR84, 114. She believed Calderon might have accidentally touched her while adjusting the blanket. 3RR85.

About two months later, Calderon came into the bedroom M.G. shared with her grandmother to say goodnight. As Calderon leaned over to hug her grandmother, he looked M.G. in the eye and his fingertips grazed her breast over her shirt. 3RR87-88, 116. M.G. then concluded that these incidents were not accidental. 3RR89. She did not tell anyone because she felt embarrassed. 3RR89.

In the fourth and final incident, M.G. had gone to bed alone and Calderon came in the bedroom to say goodnight. M.G. had been texting on a small flat cell phone under the blanket. She anticipated that he might try to touch her so she held the cell phone on top of her pelvis or pubic area over her clothing. 3RR90-91, 122. As Calderon stood beside the bed and said goodnight, he put his hand on the blanket right over the cell phone. 3RR90-91, 113. M.G. testified that his hand was bigger than the cell phone so part of his hand "would have been on my pelvic area." 3RR123. M.G. felt pressure on her "pelvic area" from his hand resting on the cell

phone but she did not specifically feel his fingers or palm. 3RR123-24. Neither of them said anything and Calderon walked out of the room. 3RR92-93.

M.G. reported the incidents to her grandmother shortly thereafter. 3RR93. M.G. also reported the touching to her aunt, Laurie Gorham.<sup>1</sup> 3RR42, 97. Calderon moved out of the house immediately. 3RR95. M.G.'s grandmother continued to see Calderon but M.G. was sent to stay with friends or family when Hector was present. 3RR95. M.G. assumed that the family did not make a police report because they wanted to avoid protective services intervention. 3RR96.

A few months after the final incident, M.G.'s grandmother passed away and M.G. lived briefly with her aunt before moving in with family friends. 3RR98-99. When M.G. was a college student, she decided that she needed to report the incidents to the police to prevent it from happening to someone else. 3RR102. She contacted the police in May of 2019. 3RR23.

The State presented evidence that in 2000 Calderon was charged with indecency with a child by contact involving his seven-year-old granddaughter. 3RR129. Calderon entered a guilty plea to the reduced charge of indecency with a child by exposure. 3RR130, 141; State's Exhibit 4.

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<sup>1</sup> Gorham testified that around 2008 she was told by M.G.'s grandmother that M.G. had reported being inappropriately touched. 3RR42. Gorham did not make a police report because she believed that the grandmother was going to handle it by ensuring that Calderon had no further contact with M.G. 3RR45.

## **Issue Presented**

The evidence is legally insufficient to sustain the conviction.

## **Summary of the Argument**

The evidence is legally insufficient to sustain the conviction because the facts and circumstances fail to prove beyond a reasonable doubt that Calderon intended to touch M.G.'s genitals to arouse and gratify his sexual desire. The evidence shows that Calderon placed his hand on top of a blanket in the context of saying goodnight and made contact with a cell phone that was under the blanket and over M.G.'s pelvic area. These facts do not support a rational inference that Calderon intended to engage in sexual contact. Calderon must be acquitted.

## **Arguments**

### **A. Standard of Review**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires every state criminal conviction to be supported by evidence that a rational trier of fact could accept as sufficient to prove all the elements of the offense charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App.1993).

In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all evidence in the light most favorable

to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). If the record supports conflicting inferences, the reviewing court must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326. The factfinder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

**B. The evidence fails to prove beyond a reasonable doubt that Calderon engaged in sexual contact with the specific intent to arouse or gratify.**

The indictment alleged that Calderon “did then and there, with the intent to arouse or gratify the sexual desire of said defendant, intentionally or knowingly engage in sexual contact with M.G. by touching the genitals of M.G.” CR6.

A person commits the offense of indecency with a child if the person engages in sexual contact with a child. Tex. Penal Code Ann. § 21.11(a)(1) (West 2011). “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. *Id.* § 21.11(c).

A person acts intentionally with respect to the nature of the conduct or a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a). The fact-finder usually must infer intent from circumstantial evidence rather than direct proof. *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). The specific intent to arouse or gratify the sexual desire of any person may be inferred from the defendant's conduct, his remarks, and all the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981); *McDonald v. State*, 148 S.W.3d 598, 600 (Tex.App.-Houston [14th Dist.] 2004), *aff'd*, 179 S.W.3d 571 (Tex. Crim. App. 2005).

Typically, circumstantial evidence is sufficient to prove intent to arouse and gratify where the circumstances involve overt and/or repeated sexual acts. *See, e.g., Ranson v. State*, 707 S.W.2d 96, 97 (Tex. Crim. App. 1986) (finding sufficient evidence of intent where complainant "testified that appellant placed his mouth on her genitals and breasts and inserted his finger inside her vagina"); *Stephenson v. State*, 673 S.W.3d 370, 384 (Tex. App.—Fort Worth 2023, pet. ref'd) (appellant's repeated grabbing complainant's penis was indicative of intent to arouse and

gratify); *Corporan v. State*, 586 S.W.3d 550, 562 (Tex. App.—Austin 2019, no pet.) (holding that the jury could have inferred appellant’s sexual intent where appellant put his hand underneath complainant’s pants and underwear, “cupped” her genital area, and “pinched” her sexual organ, asking her, “How does that feel?”); *Abbott v. State*, 196 S.W.3d 334, 340 (Tex. App.—Waco 2006, pet. ref’d) (evidence sufficient to prove intent to arouse and gratify where victim testified that defendant had touched her private spots more than one time and that, during one incident, defendant unzipped her pants and touched her privates); *Gottlich v. State*, 822 S.W.2d 734, 741 (Tex. App.—Fort Worth 1992, pet. ref’d) (holding that testimony that appellant placed his hand in a thirteen-year-old girl’s panties and “played” with her “private” was sufficient for a rational trier of fact to infer the element of intent to arouse or gratify sexual desire).

In this case there is no evidence of overt sexual conduct. The evidence shows that Calderon placed his hand on top of a blanket in the context of saying goodnight and made contact with a cell phone that was under the blanket and over M.G.’s pelvic area. These facts do not support a rational inference that Calderon intended to engage in sexual contact.

**1. The evidence, at best, shows contact with the “pelvic area,” not genitals.**

While M.G. initially gave testimony that Calderon put his hand on top of her vagina or genitals, she later clarified that his hand touched only the cell phone and possibly her “pelvic area”:

Q. What you just told the jury today is that Hector didn’t touch your genitals. He touched your cell phone that you had placed on top of your genital area; is that correct?

A. That’s correct.

3RR113-14.

Q. The third time and the last time, he touched your cell phone that was near your genitals?

A. That was on top of my genitals, yes.

Q. Okay. So, did -- do you -- your -- his fingers never touched your genitals, did they?

A. No.

Q. All right. They only touched the cell phone?

A. On top of my genitals, yes.

3RR114.

Q. Okay. When we talked about that incident when you told us earlier on the stand, where was it you told me you had placed that very small Nokia phone?

A. Right on top of -- of my pelvis or pubic area.

Q. Okay. So, right on top of your pubic area. And when Mr. Calderon came in, where exactly did his hand go?

A. It was right on top of the phone.

Q. Right on top of the phone. And you just told us his phone -- his hand is larger than that phone?

A. Yes.

Q. And he placed -- did he place that -- was he holding his fingers up, or did he place his hand on you on top of that phone?

A. I'm not certain.

Q. Okay. Do you remember him like pulling his hand away, or did he just -- do you remember feeling his hand on you?

A. I remember feeling his hand on me.

Q. Okay. And the part of your body that his hand was on was what?

A. On the top of my vagina.

3RR122.

Q. Did he touch the top of your vagina with his hands? Yes or no?

A. If his hand -- since his hand was bigger than the phone, then part of his hand would have been on my pelvic area.

Q. Did you feel the phone on your pelvic area and his hand?

A. I just felt pressure on my pelvic area.

Q. Okay. So, you felt pressure. So, his hand was on a phone. Correct?

A. Correct.

3RR123.

The term “genitals” includes the pubic mound (mons veneris) and vulva immediately surrounding the vagina. *See Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977) (explaining that “genitals” includes not only the vagina but also “the vulva which immediately surrounds the vagina”); *Lujan v. State*, 626 S.W.2d 854, 859 (Tex. App.—San Antonio 1981, pet. ref’d) (“Vulva” is defined as the external parts of the female genital organs, including the labia majora, the labia minora, mons veneris, clitoris, perineum, and the vestibule or entrance of the vagina).

The term “genitals” does not include the entire pelvic area, *i.e.*, the lower abdomen between the hips. While leeway is given to child victims, mature and capable adults are expected to testify with clarity. *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990). M.G. gave her testimony as a 27-year-old, college-educated adult. A rational jury could not infer beyond a reasonable doubt that Calderon intended to engage in sexual contact when his hand contacted a cell phone and caused her to feel pressure only on her “pelvic area.”

**2. A rational jury could not rule out accidental touching because the contact occurred through a blanket and a cell phone.**

M.G. testified that the contact occurred over a blanket while she lay in bed. It is common experience that it can be difficult to perceive how a body is positioned under a blanket, which makes it even more speculative that Calderon intended to

engage in sexual contact. *See Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014) (the trier of fact may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence). The record evidence lacks critical information from which a rational jury could rule out an accidental touch.

- There was no evidence concerning the thickness or stiffness of the blanket from which the jury could infer that the contours of objects underneath would be discernable.
- The fact that Calderon placed his hand over a cell phone indicates that the blanket likely obscured what was underneath.
- There was no evidence concerning how M.G.'s body was positioned under the blanket. If a person were lying very flat, in a twisted position, or at an angle in the bed, the possibility of a mistaken or accidental touch through a blanket would be more likely.
- There was no evidence regarding the lighting the bedroom. Dim lighting would make the possibility of a mistaken or accidental touch through a blanket even more likely.
- There was no evidence that Calderon moved his hand around to find or feel the contours of any body part. *See Hoffman v. State*, No. 06-08-00073-CR, 2008 WL 4425657, at \*3 (Tex. App.—Texarkana Oct. 2,

2008, no pet.) (mem. op., not designated for publication) (evidence that appellant placed his hand on complainant's private parts and moved his hand around was sufficient to prove intent to arouse or gratify).

- Calderon made no statements indicating a specific intent to arouse or gratify. *See Montgomery v. State*, 810 S.W.2d 372, 396 (Tex. Crim. App. 1991) (en banc) (op. on reh'g) (defendant's instruction to victim to not reveal the incident to anyone "shows a consciousness of wrongdoing which in turn leads to an inference" that the touching was done with "specific intent to arouse and gratify his own sexual desire.").
- M.G. did not react or say anything to convey that the touch was offensive or inappropriate.

The facts surrounding the incident are simply too ambiguous to support a finding beyond a reasonable doubt that Calderon, when he placed his hand on the blanket, had the specific intent to touch M.G.'s genitals to arouse and gratify himself. A jury could not rule out, beyond a reasonable doubt, that Calderon intended only an affectionate touch on M.G.'s hip or side as he said goodnight.

The only reported case finding sufficient evidence of sexual intent from an over-blanket touch involved contact that was clearly sexual. In *Tienda v. State*, 479 S.W.3d 863, 869 (Tex. App.—Eastland 2015, no pet.), the complainant reported that

the defendant lay on top of her while she was in bed and moved “up and down,” rubbing his pelvis and genital area on her. This occurred three times and she reported that she could feel his erect penis. *Id.* at 869-70. The appellant argued that the evidence was insufficient because both he and the complainant were clothed and because the complainant was covered with a blanket. *Id.* at 873. The court of appeals held that a rational trier of fact could have found beyond a reasonable doubt that Appellant possessed sexual intent from these facts. *Id.*

The facts here are starkly different. The touch was momentary, it was through a blanket *and* a cell phone, there was no movement, and there was no obvious evidence of arousal.

The other touching incidents described by M.G. do not create a rational inference that Calderon intended to touch M.G.’s genitals to arouse and gratify. M.G. described three occasions in which Calderon rubbed her lower legs, his hand grazed her buttocks, and his hand grazed her breast. Each of these touches was ambiguous as to sexual intent and/or so fleeting as to suggest accident. There was no testimony that he had attempted on other occasions to touch her genitals, which would be overtly sexual conduct demonstrating intent.

While the State admitted evidence of a prior conviction for indecency by exposure (reduced from a charge of indecency by contact) involving Calderon’s minor granddaughter, the underlying facts were not admitted. Hence, there was no

evidence that touching on the genitals was a signature or modus operandi. *Ranson v. State*, 707 S.W.2d 96, 97 (Tex. Crim. App. 1986) (noting that evidence of common pattern of similar acts is admissible as tending to prove intent); *C.F. v. State*, 897 S.W.2d 464, 472 (Tex. App.—El Paso 1995, no pet.) (holding that appellant's repeat conduct gives rise to the conclusion that he acted with intent to arouse or gratify his sexual desire).

Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). Calderon's brief touch through a blanket and a cell phone placed over M.G.'s pelvic area in the context of saying goodnight does not rationally support an inference beyond a reasonable doubt that he intended to touch her genitals to arouse or gratify his sexual desire.

A verdict that is irrational must be overturned. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

## **Prayer**

Appellant respectfully requests that the Court reverse the conviction and render an acquittal.

Respectfully submitted,

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