NO. 14-24-00149-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

ROGER ALLAN SMITH
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1678052
From the 177th District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Mr. Smith was charged with the felony offense of continuous sexual abuse of a child alleged to have occurred between March 1, 2016 and continuing through December 1, 2017. (C.R. at 103). On February 20, 2024, he entered a plea of not guilty and proceeded to trial by jury. (3 R.R. at 8). On February 23, 2024, the jury found Mr. Smith guilty as charged. (6 R.R. at 6). At the punishment portion of the trial, the jury sentenced him to life without parole in the Institutional Division of Texas Department of Criminal Justice. (6 R.R. at 39-41; C.R. at 354). Mr. Smith filed timely notice of appeal and, on February 26, 2024, the Harris County Public Defender's Office was appointed to represent him. (C.R. at 360-361). There was no Motion for New Trial filed. On April 2, 2024, undersigned counsel, of the Harris County Public Defender's Office, signed on as attorney of record.

ISSUES PRESENTED

ISSUE ONE:

DID THE TRIAL COURT ERR WHEN IT OVERRULED APPELLANT'S MOTION FOR AN INSTRUCTED VERDICT OF NOT GUILTY WHEN THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE FOR THE TRIAL COURT JUDGE TO ALLOW THE CASE TO GO TO THE JURY?

ISSUE TWO:

WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

ISSUE THREE:

IS THE ASSESSMENT OF THE $100 FINE FOR THE CHILD ABUSE FUND VALID WHEN THE TRIAL COURT FAILED TO ORALLY PRONOUNCE IT AT THE TIME OF SENTENCING?

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IS THE ASSESSMENT OF THE $185 STATE CONSOLIDATED COURT COST AND THE $105 LOCAL CONSOLIDATED COURT COST VALID WHEN THEY SHOULD BE ASSESSED ONLY ON OFFENSES COMMITTED ON OR AFTER JANUARY 1, 2020?

STATEMENT OF FACTS

On December 2, 2020, Mr. Smith was indicted for the offense of continuous sexual abuse of a child. According to the indictment "**ROGER ALAN SMITH**, hereafter styled the Defendant, heretofore on or about **March 1, 2016, continuing through December 1, 2017**, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age, including an act constituting the offense of aggravated sexual assault, committed against K.S. on or about March 1, 2016, and an act constituting the offense of aggravated sexual assault of a child, committed against K.S., on or about December 1, 2017, and the Defendant was at least seventeen years of age at the time of the commission of each of those acts." (C.R. at 103).

J.S., the Complainant's mother, would testify at trial that she has two children, R.S. and the Complainant. At the time of trial, the Complainant was twenty years old and R.S. was twelve. The Complainant was born female, but has since transitioned and now identifies as male. The Complainant never knew his biological father. J.S. has one sibling, J.P., who is her younger sister. She and her two children were close to her sister in the past, but not as close at the time of trial. J.S. met Appellant around April or May of 2008 and married him in March of 2009. She identified Appellant in the courtroom as Roger Alan Smith, the man she had married. The Complainant knew Appellant as his father and initially got along okay with him. Appellant is the biological father of her younger child. (3 R.R. at 11-18).

Beginning in 2012, J.S. homeschooled the Complainant and his younger sister. The Complainant was homeschooled through graduation, but her youngest child returned to school in the third grade. Appellant worked as an IT Communications Manager at San Jacinto College. He installed motion activated cameras throughout the interior and exterior of their home, but J.S. did not know if they were able to record. J.S. organized activities outside of the house while she was homeschooling her children. Some of the activities involved only the Complainant and some involved only her daughter. (3 R.R. at 19-26).

J.S. and Appellant decided the children would be able to get a cellphone and access social media on their thirteenth birthdays. The Complainant got a cellphone on his thirteenth birthday. He was expected to sign a contract that governed how he was allowed to use the phone and how he was allowed to use social media. (3 R.R. at 27-30; State's Exhibits 1 & 2). J.S. and Appellant placed monitoring software on the Complainant's cellphone so they knew where he was and they knew what he had typed. (3 R.R. at 32-33).

Sometime around 2016 to 2017, the Complainant became withdrawn. He would sit by himself during outings and was very moody. J.S. attributed this behavior to his age. In late October, 2019, the Complainant asked to go to a Halloween party at his friend's house. J.S. would drop him off and Appellant was going to pick him up at midnight. However, when Appellant arrived to pick him up, the Complainant was not at the party. J.S. began trying to contact the Complainant on his cellphone, but he did

not answer. She attempted to reach someone at the party and after speaking to one of the hosts, she tried to contact her sister. She was unable to reach her sister so she, Appellant, and R.S. got in her car and drove to her sister's house. (3 R.R. at 33-38).

On the way to her sister's house, Appellant said something like "I think she finally told somebody. I would be going to jail." J.S. then asked Appellant if he had "done something to [her] child." He repeated the response "they always believe the girls" without answering her question. When they arrived at her sister's house, she saw police cars and officers in the front yard. J.S. was not permitted to enter the house, but she spoke with some of the officers. Appellant remained in the car and did not speak with any of the police officers that evening. (3 R.R. at 39-41).

J.S. and Appellant began messaging one another as he waited in the car. (3. R.R. at 41- ;State's Exhibit 3). J.S. told Appellant the police were investigating sexual abuse and Appellant told J.S. he thought the police were "guarding" him so he would not leave. Appellant inquired as to whether or not he would be "taken in" and J.S. responded that she did not think he would be arrested at that time. J.S. waited outside her sister's home for several hours. She did not enter the house and she did not see the Complainant. Appellant left the scene in their vehicle while she and her daughter rode in a police car to a friend's house. Later the following day she returned to her sister's house and remained there with her two children. (3 R.R. at 53-56).

In addition to the police, J.S. spoke with someone from CPS who gave her more information as to what the Complainant was alleging happened to him. She told

Appellant what the allegations were via a messaging app called "Hang Out," but she did not have any physical contact with him after leaving her sister's house that early Sunday morning. J.S. did not go back to live her home with Appellant, but rather, she and her two children moved in with her sister and brother-in-law. She did communicate with Appellant regarding the retrieval of her property and pets from their home. (5 R.R. at 57-62; State's exhibit 4).

A few days later, she would again communicate with Appellant using the messaging app regarding items in the household. He told her he was taking the Linux server and the dog with him. (3 R.R. at 65-68; State's exhibit 5). J.S. would take the Complainant to the hospital for a suicide evaluation after realizing he had cut himself on his thighs. He had cut himself on his arms in the past. (3 R.R. at 68-69). J.S. recalled a strange conversation she had with Appellant prior to the Complainant's outcry. Appellant suggested they put the Complainant on birth control. J.S. did not think it was necessary at that time. (3 R.R. at 71-72).

A hearing was conducted in accordance with Article 38.072 of the Code of Criminal Procedure. Ms. J.P., the Complainant's aunt, would testify that she had a close relationship with the Complainant in October of 2019. On the evening of October 26, 2019, the Complainant called her and told her that her father was sexually abusing her. The Complainant asked if she could stay with her. The Complainant was dropped off at her house by a friend's mother. Ms. J.P. called the police. Before the police arrived, the Complainant told her about two instances when "he had forced her to rub and

perform oral sex, to perform oral sex on him." The Complainant was referring to Appellant and Ms. J.P. was able to identify him in the courtroom as the person she believed the Complainant was referring to when she disclosed the alleged sexual abused. (3 R.R. at 108-111). The trial court found the outcry statement "to be reliable and the outcry witness to be [J.P.]" (3 R.R. at 114).

Ms. J.P. testified before the jury that she is the Complainant's aunt. She has three children of her own and lives with them as well as her husband. The Complainant's mother is her sister. She knew Appellant from seeing him at family gatherings, but she was not close to him. She has known the Complainant as a female and now as a male. They had a close relationship for a while, but "[i]t had probably fallen off a little bit." (3 R.R. at 116- 118).

On October 27, 2019, when the Complainant was fifteen years old, she called her late in the evening. The Complainant told her she was at a party and asked if she could stay with her because her father was sexually abusing her. Ms. J.P. told the Complainant to come over and once she arrived, they called the police. The Complainant told her she had been forced to rub and perform oral sex on Appellant. The Complainant learned that Appellant was not her biological father when Ms. J.P. told the police he was in fact her step-father. The complainant would spend the night at her house that night and remain living with her for the following "eight to nine months." (3 R.R. at 118-121).

Claudia Gonzalez, the director of forensic services at the Children's Assessment Center, reviewed the forensic interview of the Complainant that was conducted by a different interviewer at the CAC. At the time of the interview, the Complainant was fifteen years old and in the tenth grade. During the interview, the Complainant "appeared to struggle providing some details, emotional struggle and some time to think whenever the questions were posed as a processing to be able to provide the information that was being asked of her." As the interview went on, Ms. Gonzalez observed the Complainant's demeanor change. There was "[a] longer delay in response when questions were being asked, becoming more pensive." (3 R.R. at 123, 135-137; State's Exhibit 6).

The Complainant would testify that he is twenty years old and lives with his mother and younger sister. Growing up, the Complainant believed Appellant was his biological father until 2019 when his aunt told him he was in fact his step-father. The Complainant did not get along very well with his sister or his mother. His mother was strict about schoolwork. Although he attended public school until the third grade, after that his mother decided to homeschool her children. He would be homeschooled by his mother through high school. (3 R.R. at 144-148).

Appellant sometimes assisted the Complainant with his math homework. The Complainant had a computer that he used for school and on his thirteenth birthday, he received a cellphone. His parents made him sign an agreement that explained the rules of restrictions of his cellphone use. He also signed an agreement regarding the rules

and restrictions of social media. (3 R.R. at 149-155). At the time that he signed the agreements with regard to cellphone and social media use, he identified as a female. He began identifying as male in 2020. On October 26, 2019, he planned to attend a Halloween party at a friend's house. He also planned to make an outcry at that time. He had already told his friends about the alleged sexual abuse, but he had not told an adult yet. His friend's mother had him call his aunt to tell her about his allegations. He did not use his cellphone to call because he believed Appellant was monitoring its use. (3 R.R. at 156-162).

The Complainant's friend's mother took him to his aunt's house that evening. He gave his aunt more details about his allegations. Sometime later, he went to the Children's Assessment Center for an interview. The first incident he was able to recall was late at night when everyone else was asleep except for him and Appellant. Appellant was at his computer when he called the Complainant to come over to him. Appellant removed his pants and underwear and stuck his fingers in the Complainant's vagina. That was all he was able to recall about that alleged incident. (3 R.R. at 163-166).

The Complainant was unable to remember saying anything to Appellant or putting his clothes back on. He did not tell anyone about the incident. According to the Complainant, Appellant touched his chest while in the bed with his mother and sister sleeping next to them. Although unable to recall any specific incidents, according to the Complainant, Appellant touched him inappropriately several more times.

Eventually, although he was unable to remember when, Appellant made the Complainant rub his penis as well. (3 R.R. at 167-175). According to the Complainant, there were cameras inside the house, but Appellant would turn them off in order to commit the alleged sexual abuse. (3 R.R. at 185-186).

On cross-examination, the Complainant identified drawings that he had made of his several alternate personalities. "Ashe, Dean, Skylar Nate, Billie, Kate, Jack, Perry, Chase, Kyla, Derrick and Gwen" are alternative personalities represented in the drawings. The Complainant also wrote a letter to band called "BTS" while he was in a mental hospital. The Complainant admitted to writing notes saying such things as "I have a plan though," "I'll act heartbroken and then they'll believe it," and "I'll get rid of these notes so they can't read." He was unable to recall the context in which he had written the notes. (3 R.R. at 201-210).

Ms. Kayla Jackson, a licensed clinical social worker, began treating the Complainant in April 2021 for "trauma, like PTSD or anxiety, depression." The specific issues she was addressing with the Complainant included "[o]ften self-harm, behavior, suicidal ideation, social isolation." He demonstrates a "flat" affect meaning "[n]o expression, monotone voice." The Complainant was "[r]eluctant to speak about anything regarding the sexual abuse. Obviously, very uncomfortable, very fidgety." (4 R.R. at 20-25).

Ms. Giselle Lejeune, a registered forensic nurse at Texas Children's Hospital, treated the Complainant on October 28, 2019, for suicidal ideation. She described the

Complainant as "withdrawn, sitting on the bed, soft spoken and not good eye contact, but was cooperative." The Complainant told her "she wanted to kill herself. And the reason why was because her dad was sexually abusing her." "[H]er dad would make her rub his genitals and would rub her with his hands and his genitals, too." "[H]e was touching her. Would touch different parts of her body." According to the Complainant, the most recent incident had occurred the previous Wednesday. Ms. Lejeune conducted a general examination with consent of the Complainant. She found "[m]ultiple linear, which is straight line abrasion heals both old and new to arms. They were all over her arms and all over her legs to and bottom by. They were everywhere. Back of her legs, front of her legs." The Complainant "was a cutter, so she was cutting herself." (4 R.R. at 26, 33-38).

Detective Deana Felan, with the child crimes unit of the Harris County Sheriff's Office, was assigned to this case on January 21, 2020. She first "reviewed the original offense report and then reviewed anybody else who had entered documentation in this report." Detective Felan also reviewed the medical records from the Complainants visit to Texas Children's Hospital on October 28, 2019. She did not go back to the scene of the alleged incidents of sexual abuse. She spoke with the Complaint's mother on February 10, 2020 and she interviewed Appellant on May 28, 2020. She identified Appellant in the courtroom as the same individual she had previously interviewed. Over objection, a recording of that interview was played for the jury. (4 R.R. at 47-48, 53-56, 61-68; State's Exhibit 8).

Dr. Whitney Crowson, a psychologist at the Harris County Children's Assessment Center, testified regarding general concepts that impact children who have been sexually abused. She had never met the Complainant, she did not review the forensic interview, and she knew absolutely nothing about this specific case. (4 R.R. at 80-117).

Dr. Alissa Sherry, a clinical psychologist, reviewed multiple interviews and records in this case including psychiatric records, "[t]he CPS records, Deer Park police records. The Harris County offense report from the police department." She "reviewed the child advocacy center interview," "drawings the [the Complainant] had drawn," "the Houston Behavioral Health Hospital records," the "Texas Children's Hospital records," "emergency room records," and "pediatrician records," "therapist records," and "various letters, poems annotations" written by the Complainant. Dr. Sherry looked "at all the data that is available in this case" in order to "help the jury understand how different areas of social science might be able to explain some of the things that have been alleged." (4 R.R. at 124, 133-136).

According to Dr. Sherry, there are four different categories of false allegations. "Some of it are just sort of accidental factors like a child may say something and a therapist may have a viewpoint that children never lie." "The second group are just misunderstandings." "Like, if you have a four year old girl and she comes home to mom and says, 'Daddy touched me.' And really when you get talking about it it's really that daddy was helping her go to the bathroom and they were at the park or something like

that." "The next category has to do with the mental health problems of either the person making the outcry or the parent of the other child to which an outcry has happened." "[T]he last group, …when a child makes a deliberate false allegation, usually to get out of a certain type living arrangement or situation they don't like anymore." (4 R.R. at 136-137).

Dr. Sherry expressed concerns with the Children's Assessment Center because [t]heir stated objective is to help the police and the Prosecutor to help prosecute crimes that deal with child abuse." "[T]he number one first thing about a forensic interview is you've got to go in there with an open mind and not with an agenda or bias about something you're trying to accomplish." In this case, with regard to the forensic interview, there were two areas of feedback she would give to the interviewer. First, she would have obtained more background information regarding the Complainant's exposure to sexual imagery on-line or otherwise and second, she observed the interviewer "ask …one question a few too many times maybe about whether or not the Defendant had said anything during the alleged abuse situations." (4 R.R. at 138-140).

According to Dr. Sherry, the Complainant "was not giving any what they call like autobiographical memories of things that were really – that had really happened…" "There didn't seem to be any what they call event specific knowledge what they call it in cognitive psychology and memory science." "[E]vent specific knowledge that's the kind of knowledge that where people give you ideas about their sensory memories and their perceptual memories. So things that they felt, heard, and saw in sort of their

emotional experiences of this situation." When something really happened to someone, their memories are "kind of vivid, visceral kind of explanations or descriptions that seem to come from first person point of view… [v]ersus reports of things that don't have that visceral type of feeling to it. It seems like they're telling you something they saw happen to someone else." (4 R.R. at 141-142).

Dr. Sherry opined that the diagnosis the Complainant received while in the in-patient mental hospital was most accurate. "With the major depressive disorder, the current severe psychotic features, generalized anxiety disorder and borderline personality traits." "[P]sychosis is a term that is used to describe when someone is no longer in touch with reality. They might be paranoid about things that aren't really happening, They might hear voices or see images that aren't really there." "So when someone has major depressive with psychotic features it means the further they get into their depression the more likely it is for them to start not perceiving reality the way that other people perceive reality." (5 R.R. at 11-12).

Borderline personality disorder is "basically sort of a pervasive disorder that starts in adolescence or early adulthood. It's kind of developmental in nature where people have problems with their interpersonal relationships. Problems controlling their anger. Problems with things like impulse control, suicidality, things like that." Of the nine symptoms that are potentially present in order to receive a diagnosis of borderline personality, five musty be identifiable. The Complainant demonstrated eight of the nine symptoms.

The Complainant demonstrated "frantic efforts to avoid real or imagined abandonment," "[a] pattern of unstable and intense interpersonal relationships characterized by altering between extremes of idealization and devaluation," The Complainant had trouble making friends because "people had abused him." The Complainant demonstrated "markedly and persistently unstable self-image and sense of self." Sometimes there is overlap between this and gender dysphoria. The Complainant, for example, "had this online relationship with a boy and then at some point she comes out as gay. And then at some point she's nonbinary and now she identifies and has transitioned to being a boy." (5 R.R. at 13-18).

Impulsivity is also a symptom of borderline personality disorder. The Complainant "started to have problems with impulsivity when she was pretty young. I think when she was about 8 or 9 years old she was diagnosed with something called trichotillomania, which is a hair pulling, a disorder where you pull out your hair and eyelashes and eyebrows." The Complainant would "take food and hoard food in her room." The Complainant demonstrated "recurrent suicidal behavior, gestures or threats or self-mutilating behavior." Sometimes this behavior is used "to manipulatre other people, so that they can get out of things they're supposed to be responsible for or somehow manipulate a situation, because the last thing that someone else wants whether it's a parent or friend or loved one is for someone to try to kill themselves because of something that you did." (5 R.R. at 19-20).

"[B]orderline personality disorder people have this sort of intense sense of need, emotional and interpersonal need and always feel like that they don't get enough from people. There is never enough love to kind of fill up their cup in some ways. They feel they have to manipulate other people to give them the love that they need." Emotional instability is another symptom demonstrated by the complainant. "People with borderline personality, their moods swing up and down. They have these big mood swings and their mood swings can be very reactive." "You see this in [the Complainant's] records, particularly in the hospital." (5 R.R. at 21-22).

The Complainant demonstrated "[i]nappropriate intense anger or difficulty controlling anger" and "stress-related psychosis" when he became very stressed and slipped into altered states. "[T] fact that she would note visual hallucination kind of speaks to that kind of quasi not quite psychotic, but sort of psychotic type of processing." (5 R.R. at 23-26; Defense Exhibit 17). According to Dr. Sherry, the borderline personality traits exhibited could explain the Complainant's outcry. (5 R.R. at 33). The Complaint's testimony at trial contradicted his testimony at the forensic interview. "[W]hen she was asked about how frequently these things happen that in the CAC interview she couldn't even say whether any one of these things had happened more than once. It was like, maybe. I don't know, where in court she said that these things happened on a regular basis over the course of years." "In fact, studies on other concepts like sexual harassment and things like that they found that one of the biggest predictors of whether or not someone is lying or making up a false allegation of sexual

harassment is the diagnosis of borderline personality." The only behavior that children demonstrate that can help distinguish between a sexually abused child and a child who has not been sexually abused is over-sexualized behavior "like compulsive masturbating in public or going up to strangers or people and trying to touch their genitals and things like that." The Complainant did not demonstrate that unique symptom. (5 R.R. at 36, 38-40).

SUMMARY OF THE ARGUMENTS

First, the evidence was insufficient to support Appellant's conviction for continuous sexual abuse of a child as a result of the uncertainty about the specific conduct that allegedly occurred and when it occurred.

Second, fines must be orally assessed to be valid. The $100 child abuse prevention fine was not orally pronounced. Nonetheless, it was assessed in the written judgment. The fine should be struck from the judgment because it was not orally pronounced.

Finally, the $185 state consolidated court cost and $15 local consolidated court cost should only be assessed on offenses committed on or after the effective date of the act creating these costs (January 1, 2020). Appellant allegedly committed the offence between March 1, 2016, continuing through December 1, 2017. Accordingly, the trial court erred in assessing these costs.

ARGUMENTS

ISSUE ONE[1]

DID THE TRIAL COURT ERR WHEN IT OVERRULED APPELLANT'S MOTION FOR AN INSTRUCTED VERDICT OF NOT GUILTY WHEN THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE FOR THE TRIAL COURT JUDGE TO ALLOW THE CASE TO GO TO THE JURY?

ISSUE TWO

IS THE EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN THE CONVICTION?

A. Standard of Review

This Court reviews the sufficiency of the evidence challenge under the now familiar *Jackson v. Virginia* standard.[2] Under this standard, this Court views all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts.[3] The trier of fact is the sole judge of the weight and credibility of the evidence.[4] Thus, this Court may not re-evaluate the weight and

[1] Issues One and Two will be presented in a single argument because a challenge to the denial of a motion for instructed verdict is a challenge to the sufficiency of the evidence. *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App.), *cert. denied*, 540 U.S. 1051 (2003).
[2] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).
[3] *Jackson*, 443 U.S. at 319.; *Clayton*, 235 S.W.3d at 778.
[4] Tex. Code Crim. Proc. art. 38.04; *Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008).

credibility of the evidence in order to substitute its judgement for that of the fact finder.[5] Instead, this Court "determine[s] whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict."[6] This Court presumes that the factfinder resolved any conflicting inferences in favor of the prosecution and defers to that.[7]

Sufficiency of the evidence is measured against the elements as defined by the hypothetically correct jury charge for the case, not the charge actually given.[8] A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.[9] But this court may not affirm a conviction based on legal or factual grounds that were not submitted to the jury.[10] The law is authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument.[11] The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt of an actor.[12] The term "sexual abuse" is defined by

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[5] *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).
[6] *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).
[7] *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.
[8] *Hardy v. State*, 281 S.W.3d 414, 421 (Tex. Crim. App. 2009).; *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).
[9] *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001); *Malik*, 953 S.W.2d at 240..
[10] *Malik*, 953 S.W.2d at 238 n.3.
[11] *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crm. App. 2000).
[12] *Clayton*, 235 S.W.3d at 778; *Hooper* 214 S.W.3d at 13.

statute. "Sexual abuse" includes "indecency with a child if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child"[13] and "aggravated sexual assault."[14] "One element of continuous sexual abuse of a child is two or more violations of enumerated penal code sections."[15] No jury unanimity as to which violation of the enumerated penal code sections is required, "so long as the jury members agree that at least two acts occurred during a period that is thirty days or more in duration."[16] The Elements of Continuous Sexual Abuse

The Texas Penal Code provides, in relevant part, that a person seventeen years of age or older commits an offense if, during a period that is thirty days or more in duration, the person commits two or more acts of "sexual abuse" against a child or children younger than fourteen years of age.[17]

B. Insufficient Evidence Supports Appellant's Conviction for Continuous Sexual Abuse of a Child

The window for offense conduct to support the conviction for continuous sexual abuse is between March 1, 2016, continuing through December 1, 2017. Even with this range, this record leaves questions about the conduct supporting this

[13] Tex. Penal Code § 21.11(a)(1).
[14] Tex. Penal Code 22.021; Id. § 21.02(c).
[15] *Lee v. State*, 537 S.W.3d 924, 926 (Tex. Crim. App. 2017).
[16] *Price v. State*, 434 S.W.3d 601, 601 (Tex. Crim. App. 2014).
[17] Tex. Pen. Code § 21.02(b).

conviction. The complainant's date of birth is February 14, 2004. Although he testified that he received a cellphone for his thirteenth birthday, it was his belief that the contract for use that he signed was signed on February 14, 2013. He would have been nine years old, not thirteen years old. (3 R.R. at 154-155). The Complainant would have turned thirteen years old on February 14, 2017. There is no testimony regarding any incidents occurring in either 2016 or 2017. Six years after he signed the cellphone contact, he decided it was time to "make an outcry" to a friend's mother at a Halloween party on October 26, 2019. (3 R.R. at 159). The Complainant planned to say Appellant was abusing him. (3 R.R. at 160-161).

The first incident he was able to recall occurred sometime after his thirteenth birthday, but he clearly did not understand when that was. He previously testified that his thirteenth birthday was February 14, 2013, when he received a cellphone. According to the Complainant, it occurred late at night when everyone else was asleep except for him and Appellant. Appellant was at his computer when he called the Complainant to come over to him. Although he could not remember what he was wearing, Appellant allegedly removed his pants and underwear, turned him around, and stuck his fingers in the Complainant's vagina. When asked how it felt, the Complainant could only recall his emotional reaction of "confused ad scared." That was all he was able to recall about that alleged incident. (3 R.R. at 163-166).

The Complainant was unable to remember saying anything to Appellant or putting his clothes back on. He did not tell anyone about the incident. According to

the Complainant, Appellant touched his chest while in the bed with his mother and sister sleeping next to them. Although unable to recall any specific incidents, according to the Complainant, Appellant touched him inappropriately several more times "after his 13th birthday." Eventually, although he was unable to remember when, Appellant made the Complainant rub his penis as well. (3 R.R. at 167-173).

Q. Did anything else happen when your hand was in his pants? Did you do anything else or did anything else happen?

A. I don't know.

Q. Do you recall if anything ever came out of his body when your hand was in his pants?

A. No, ma'am.

Q. And when he made you put your hand in his pants was that before or after he had touched your vagina and penetrated your vagina with his finger?

A. It was after.

Q. Had he stopped penetrating your vagina at the time you put your hands in his pants?

A. I don't remember.

Q. Do you recall approximately how old you were when that happened?

A. I don't know.

(3 R.R. at 174).

Q. Can you give an estimate of how many times the Defendant would have forced you to touch his penis?

A. I don't know.

Q. To be clear did any of those happen before you were 14 years old?

A. I think so.

Q. Other than penetrating you with his fingers, penetrating your vagina with his fingers and making you rub his penis was there a time where things started to escalate more as far as sexual contact?

A. Yes, ma'am.

Q. Do you recall about how old you would have been when it started to escalate more?

A. 14, I think.

(3 R.R. at 175-176).

Q. Did this putting his mouth on your vagina did that continue for sometime? Did that happen more than once?

A. It happened more than once.

Q. Do you remember how often it happened?

A. I can only remember two specific times.

Q. Two times he put his moth on your vagina?

A. Yes, ma'am.

Q. Do you remember how old you were when that happened?

A. 14.

(3 R.R. at 177).

The Complainant would further testify about alleged incident that occurred just prior to his outcry in October of 2019. He would have been fifteen years old at that time. (3 R.R. at 179-182). The last incident he claimed occurred the Wednesday before his outcry, but he could not remember what happened even though it was the alleged final episode. (3 R.R. at 182-183).

Claudia Gonzalez, the director of forensic services at the Children's Assessment Center, would characterize the Complainant as struggling to provide details during the interview. The Complainant required "some time to think whenever the questions were posed as a processing to be able to provide the information that was being asked of her." As the interview went on, Ms. Gonzalez observed the Complainant's demeanor change. There was "[a] longer delay in response when questions were being asked, becoming more pensive." (3 R.R. at 123, 135-137; State's Exhibit 6).

According to Dr. Sherry, during the forensic interview, the Complainant "was not giving any what they call like autobiographical memories of things that were really – that had really happened…" "There didn't seem to be any what they call event specific knowledge what they call it in cognitive psychology and memory science." "[E]vent specific knowledge that's the kind of knowledge that where people give you ideas about their sensory memories and their perceptual memories. So things that they felt, heard, and saw in sort of their emotional experiences of this situation." When something really

happened to someone, their memories are "kind of vivid, visceral kind of explanations or descriptions that seem to come from first person point of view… [v]ersus reports of things that don't have that visceral type of feeling to it. It seems like they're telling you something they saw happen to someone else." (4 R.R. at 141-142).

C. Conclusion

Though no jury unanimity is required, this is so vague as to leave the fact finder wondering what acts were actually committed and when. Put another way, how can the fact finder conclude beyond a reasonable doubt that acts occurred if the evidence doesn't show what the acts were or when they occurred? Coupled with that, the Complainants complete inability to give any information about the frequency or timing of the occurrences, and that the Complainant could say only that it occurred several times in the house, there is a real question whether the incidents occurred over the requisite 30-day timeframe. Compounding the problem further, the Complainant could only say that "it" occurred more than once. This created more uncertainty and question about whether the incidents occurred in the required timeframe for a continuous sexual abuse conviction.

In sum, the vague and nonspecific nature of the State's evidence leaves the charge wanting for evidentiary support. Without more certainty about what conduct occurred when, it is not possible to affirm this conviction. Appellant's conviction should therefore be reversed and this Court should remand to the trial court to amend the judgment to reflect acquittal.

ISSUE THREE

IS THE ASSESSMENT OF THE $100 FINE FOR THE CHILD ABUSE FUND VALID WHEN THE TRIAL COURT FAILED TO ORALLY PRONOUNCE IT AT THE TIME OF SENTENCING?

" A defendant's sentence must be orally pronounced in his presence."[18] Fines are part of a defendant's sentence:

> [F]ines generally must be orally pronounced in the defendant's presence. TEX. CODE CRIM. PROC. Art. 42.03 § 1(a); Taylor v. State, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). Fines are punitive, and they are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Texas Penal; Code, which is entitled "Punishments." See Weir, 278 S.W.3d at 366.[19]

Here, the trial court did not pronounce the $100 child-abuse prevention fine. Nevertheless, the fine appeared on the bill of costs.[20] There was no oral pronouncement here. Accordingly, the fine should be stricken from the written judgment. This is because when there is a conflict between the oral pronouncement and the written judgment, the oral pronouncement controls.[21] The controlling act here is the trial court's action in pronouncing no general fine whatsoever.

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[18] *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004)(citing Tex. Code Crim. Proc. art. 42.03, § 1(a))
[19] *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). The reference to *Weir* is to *Weir v. State*, 278 S.W.3d 364 (Tex. Crim. App. 2009).
[20] C.R. at 355.
[21] *Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014).

ISSUE FOUR

IS THE ASSESSMENT OF THE $185 STATE CONSOLIDATED COURT COST AND THE $105 LOCAL CONSOLIDATED COURT COST VALID WHEN THEY SHOULD BE ASSESSED ONLY ON OFFENSES COMMITTED ON OR AFTER JANUARY 1, 2020?

The written judgment declares there is to be a total of $820 in court costs assessed against Appellant.[22] A review of t he "criminal Bill of Costs" accompanying the judgment lists ten court costs.[23] The second is a $185 state consolidated court cost. The third is a $105 local consolidated court cost. These two costs total $290.

The two consolidated court costs were created by the 86th Legislature as part of Senate Bill 346. The $185 state consolidated court cost was created in Section 1.03 of the bill.[24] The $105 local consolidated court cost was created in Section 1.05.[25] Senate Bill 346's effective date was January 1, 2020.[26] The two consolidated court costs are to be assessed only on "an offense committed on or after the effective date of" the Act.[27] "An offense committed before the effective date of [the] Act is governed by the law in effect on the date the offense was committed."[28] The bill says, "the former law is continued in effect for that purpose."[29]

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[22] C.R. at 358.
[23] C.R. at 358.
[24] Act of May 21, 2019, 86th Leg., R.S., ch. 1352, § 1.05 Tex. Gen. Laws 3985 (codified as Tex. Loc. Gov't § 134.101(a))
[25] Act of May 21, 2019, 86th Leg., R.S., ch. 1352, § 1.05, 2019 Tex. Gen Laws 3985 (codified as Tex. Local Gov't § 134.101(a))
[26] Act of May 21, 2019, 86th Leg., R.S., ch. 1352, § 5.04, 2019 Tex. Gen. Laws 4035.
[27] Act of May 21, 2019, 86th Leg., R.S., § 501, 2019 Tex. Gen. Laws 4035.
[28] Id.
[29] Id.

Here, the offense was alleged to have occurred between March 1, 2016, continuing through December 1, 2017.[30] That date precedes Senate Bill 346's effective date of January 1, 2020 by several years. Appellant therefor asks this Court to remand this case for the correction of the bill of costs.

[30] C.R. at 103.

PRAYER

Appellant prays this court reverse his conviction and remand this case to the trial court for entrance of a judgment of acquittal.

Appellant also asks this Court to strike the $100 child-abuse-prevention fine from the judgment because it was not orally pronounced and find that incorrect court costs were assessed. He prays for a remand of this case for a proper court-cost assessment.

Appellant prays for any such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of *Tex. R. App. Proc. 9.4(e)(i)*.

1. Inclusive of the portions exempted by *Tex. R. App. Proc. 9.4 (i)(1)*, this brief contains 7,849 words printed in a proportionally spaced typeface.

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/s/ Daucie Schindler
DAUCIE SCHINDLER

CERTIFICATE OF SERVICE

I certify that on the 30st day of August 2024, a copy of the foregoing instrument has been electronically served upon the Appellate Division of the Harris County District Attorney's Office.

/s/ Daucie Schindler
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