

No. 01-24-00767-CR

**IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS**

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GUADALUPE MARTINEZ

Appellant

DEBORAH M. YOUNG
Clerk of The Court

v.

THE STATE OF TEXAS

Appellee

On Appeal from Cause Number 1750426
From the 185th District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Mr. Martinez was charged with the felony offense of continuous sexual abuse of a child alleged to have occurred between February 17, 2017, and continuing through December 1, 2020. (C.R. at 43). On October 3, 2024, he entered a plea of not guilty and proceeded to trial by jury. (3 R.R. at 16). On October 8, 2024, the jury found Mr. Martinez guilty as charged. (C.R. at 254; 6 R.R. at 30). After the punishment portion of the trial, the trial court sentenced him to twenty-five (25) years in the Institutional Division of Texas Department of Criminal Justice. (6 R.R. at 31-58; C.R. at 254). Mr. Martinez filed timely notice of appeal, and, on October 8, 2024, the Harris County Public Defender's Office was appointed to represent him. (C.R. at 261-263). There was no Motion for New Trial filed. On December 4, 2024, undersigned counsel, of the Harris County Public Defender's Office, was assigned to this case.

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?

STATEMENT OF FACTS

On June 15, 2022, Mr. Martinez, Appellant, was indicted for the offense of continuous sexual abuse of a child. According to the indictment “**GUADALUPE FRANCISCO MARTINEZ**, hereafter styled the Defendant, heretofore on or about **February 17, 2017, continuing through December 1, 2020**, 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 indecency with child by contact, committed against L.Q. on or about February 21, 2017, and an act constituting the offense of indecency with child by contact, committed against L.Q., on or about December 1, 2020, and the Defendant was at least seventeen years of age at the time of the commission of each of those acts.” (C.R. at 43).

Arrisa M. testified that she is married to Baltazar S. and they have three children: W.S. (19), E.S. (16), and K.S. (4). (3 R.R. at 24). She described their living situation over the years, recounting how they moved from Guerrero, Mexico, to Houston, Texas, in 2005, while she was pregnant with W.S. (3 R.R. at 27). Upon arrival, they, along with her father-in-law, stayed with Appellant and his wife, Maria, in a small two-bedroom house. (3 R.R. at 29). She explained how the space was shared among them. (3 R.R. at 31).

They lived in that house until they moved to an apartment nearby in 2008. Shortly after the birth of E.S., Arrisa M. experienced postpartum depression and

decided to return to Mexico for a year. Instead of coming back to Houston, she moved to California, staying with her sister for about two years. Ultimately, in 2011, she returned to Houston. (3 R.R. at 35).

Arissa M. and her family would move back into Appellant's house, staying in the same small bedroom they lived in before. (3 R.R. at 36). During this time, Arissa M. worked part-time in a restaurant kitchen. Her husband worked in construction. (3 R.R. at 37). When E.S. was too young to be admitted into pre-kindergarten, she often spent time at Appellant's home playing or watching TV. (3 R.R. at 38).

In 2013, the family finally bought their own home. They continued visiting Appellant's house, often gathering there for Thanksgiving celebrations. (3 R.R. at 40). In 2020, they attended Thanksgiving at Appellant's home. The children spent time in his bedroom watching TV. (3 R.R. at 48).

During the gathering, Appellant was seen walking in and out of the bedroom multiple times. (3 R.R. at 49-50). Later that evening, Arissa M.'s niece, L.Q., made a strange remark, showing her own hand and saying, "[l]ook at his hand. I bit him," but the adults dismissed it as playful behavior. (3 R.R. at 60). In May, 2021, Arissa M. noticed E.S. behaving differently—she began having nightmares and sleeping in her mother's bed. (3 R.R. at 54). Concerned, Arissa M. checked E.S.'s cell phone messages and found conversations that deeply concerned her. After reading them, she immediately contacted her sister-in-law, Leticia S. (3 R.R. at 54).

On cross-examination, Arissa M. admitted that she never personally saw anything inappropriate between Appellant and E.S. other than phone messages. (3 R.R. at 61-63). When asked about the messages, she admitted that she selectively saved certain ones while leaving others on the phone. (3 R.R. at 64). Arissa M. never suspected any wrongdoing, but she insisted that her daughter's behavior changed after Thanksgiving 2020. (3 R.R. at 66).

Leticia S. testified that she has four children: A.S., L.Q., K.S., and J.S. and she supports them by working split shifts at a pizza parlor. Her sister, Maria (Blanca), was married to Mr. Francisco Martinez and she identified Appellant in the courtroom as her brother-in-law, Francisco Martinez. (3 R.R. at 69). Leticia S. had nine siblings, four of whom lived in Houston. Baltazar S., her brother, was married to Arissa M.. (3 R.R. at 70). She lived with Maria and Francisco Martinez for about six months while pregnant with L.Q., but moved out to live with her daughter's father. (3 R.R. at 72). She continued visiting Appellant's house after they moved out, but not frequently. (3 R.R. at 73).

Leticia S. confirmed that she too spent Thanksgiving at Appellant's house with her children in 2020. The house was small. It had two bedrooms and a small study where their father lived. She confirmed that on that day, L.Q., K.S., and E.S. spent time in Appellant's bedroom watching TV while the adults were in the living room. (3 R.R. at 76).

Leticia S. saw Appellant enter the room where the girls were. She never saw him exit the room, but she opined that he remained in the room for about half an hour. (3 R.R. at 79). She later noticed that L.Q. left the room visibly upset. When asked about it, L.Q. did not immediately say anything. (3 R.R. at 81). In May of 2021, she received a phone call from Arissa M. Without revealing what was said, she confirmed that this call prompted her to report a situation to a school psychologist, which led to a CPS investigation. (3 R.R. at 82).

On cross-examination, Leticia S. admitted she never objected when Appellant hugged, lifted, or played with L.Q. in the living room. She admitted that no other adults expressed concerns and that she never called CPS before May of 2021. (3 R.R. at 86-88). Leticia S. admitted that she knew L.Q.'s behavior that night was odd and L.Q. bit Appellant's hand, but she never asked him about it. (3 R.R. at 89). She did not bring up any concerns with Maria (Blanca) during the drive home. (3 R.R. at 92).

Karla Rodas, an investigator for Child Protective Services (CPS), explained that she had been with CPS for five years and of the approximately 500 to 1000 cases of child abuse, neglect, physical abuse, and sexual abuse she investigated throughout her career, not all allegations were found to be true, as some cases turned out to be false accusations. (3 R.R. at 98). According to Rodas, the process CPS follows when handling sexual abuse cases includes speaking to the children, setting up forensic interviews, arranging medical exams, and coordinating with law enforcement. (3 R.R. at 99-100).

Rodas recalled the summer of 2021 when she was assigned to Appellant's case. She explained that the case began when L.Q. reported allegations of sexual abuse against Appellant. (3 R.R. at 102). As part of her investigation, she spoke with three children—L.Q., K.S., and E.S.—and later met with their mothers. She conducted interviews with the children separately, meeting E.S. at her home and K.S. and L.Q. at school. (3 R.R. at 103-104). Following these conversations, she scheduled forensic interviews and medical exams for the children. She also ensured they were placed on a waitlist for therapy at the Children's Assessment Center. (3 R.R. at 108).

Rodas reached out to Appellant as part of her standard investigative process. She spoke to him in Spanish over the phone for about ten minutes. During their conversation, she informed him about the allegations against him. Although Appellant initially did not recall being bitten by L.Q., as the conversation progressed, he remembered it. (3 R.R. at 106-107).

After completing her investigation, Rodas reviewed her findings with her supervisor, and the case was given a disposition of "Reason to Believe," meaning that CPS found sufficient evidence to support the allegations. (3 R.R. at 109). During cross-examination, Rodas admitted the conversation she had with Appellant was not recorded, but that Appellant cooperated fully, answered all her questions, and never requested a lawyer. She reiterated that although Appellant initially forgot about having been bit, he later admitted it. (3 R.R. at 110-111).

Dr. Marcella Donaruma, an associate professor of pediatrics at Baylor College of Medicine and a physician at Texas Children's Hospital and the Children's Assessment Center, would testify as an expert witness. She detailed the process of conducting medical evaluations for child sexual abuse victims, explaining that exams often take place in a child-friendly environment at the Children's Assessment Center. (4 R.R. at 28-31). She described how children are referred by law enforcement, Child Protective Services (CPS), or medical providers and emphasized the importance of making children feel safe during examinations.

On July 22, 2021, Dr. Donaruma examined L.Q. who was 12 years old at that time. The referral came from CPS caseworker Karla Rodas for a sexual abuse evaluation. (4 R.R. at 35). However, L.Q. declined both the physical and anogenital exams, which meant no forensic medical evidence could be collected. Dr. Donaruma explained that it is common for child abuse survivors to refuse examinations, and they are never forced to participate. (4 R.R. at 34).

During her interview with L.Q., Dr. Donaruma documented the child's responses in verbatim quotes. L.Q. recounted an incident when she was 8 or 9 years old while visiting her aunt and uncle's house. She stated that Martinez had grabbed her, thrown her to the floor, and touched her vagina over her clothes. (4 R.R. at 40). L.Q. described how she avoided wearing shorts when visiting and how he had thrown her onto a bed, covering her mouth when she tried to resist. (4 R.R. at 41). L.Q. also mentioned protecting her younger sister and cousin from Martinez's advances. (4 R.R.

at 42). She could not specify how many times the abuse occurred but noted that it happened on holidays when the family visited. Dr. Donaruma confirmed that L.Q.'s statements were consistent with sexual abuse allegations, marking her case as "child discloses sexual abuse" in her report. (4 R.R. at 46).

Baltazar S. testified that he is the husband of Arissa M. and father of W.S., E.S., and K.S. (4 R.R. at 56). He confirmed that his sister, Maria, was married to Appellant and he identified Appellant as the same man. (4 R.R. at 58). Baltazar S. recounted how he moved to the U.S. in 2015 with his pregnant wife, Arissa M. They initially lived at Appellant's house in Houston off and on for two-year intervals after their arrival. (4 R.R. at 60). When their son W.S. was born, he lived there with them. When they didn't live there, they would live in an apartment. (4 R.R. at 61).

When they had to move in with Appellant and his sister the second time, Arissa M. and their daughter E.S. left for Mexico where they remained for two years. Baltazar S. was left living with Appellant and his family. (4 R.R. at 62). When his wife and daughter returned, they stayed living with his sister and Appellant for a little over a year before they were finally able to move out permanently. (4 R.R. at 63; State's Exhibit 13). Baltazar S. testified that he and his family often spent holidays at Appellant's house. He recalled, the children, including his daughter E.S. and others, would often go into Appellant's bedroom to watch movies during these holiday gatherings. (4 R.R. at 68-69).

The usual group of family members gathered at Appellant's house for Thanksgiving in 2020. (4 R.R. at 71). As most of the adults socialized, Appellant invited the children into his bedroom. Baltazar S. testified that he saw Appellant go into the room and stay for about 30 minutes while the other adults were outside on the porch or in the living room. (4 R.R. at 73). When Appellant emerged from the bedroom he had a bite mark on his hand. (4 R.R. at 74). When questioned about the bite, Appellant said that "nothing happened." Baltazar S. thought the children looked scared and he found the incident suspicious. (4 R.R. at 75). His family left around 11:30pm that night. By the time they left he thought the atmosphere had changed, and something seemed wrong.

On cross-examination, Baltazar S. confirmed that he had no prior disputes with Appellant and Appellant had always welcomed his family into the home. (4 R.R. at 79). Baltazar S. hesitated before admitting that he had witnessed what he now believed to be inappropriate behavior, but he never reported it to the police or prosecutors. (4 R.R. at 80-82).

Sergeant Patricia Gerardo, a certified peace officer with the Special Victims Division of the Houston Police Department (HPD), described how she became involved in the case after Child Protective Services (CPS) referred it to her division. By the time she was assigned, L.Q. and E.S. had undergone forensic interviews at the Children's Assessment Center (CAC). (4 R.R. at 86-90).

Because forensic interviews are conducted only once to prevent retraumatizing a child, she reviewed the forensic interviews and medical records and determined that the suspect in the case was Appellant and the forensic interviews indicated genital contact had occurred. (4 R.R. at 88-91).

According to Sergeant Gerardo, L.Q. underwent a medical exam, but E.S. refused. (4 R.R. at 93). She interviewed L.Q. and E.S.'s parents, as well as Appellant who agreed to a voluntary interview at the CAC. (4 R.R. at 94). According to Gerardo, Appellant did not request an attorney before or during the interview. She clarified that because the interview was voluntary, he was not Mirandized. (4 R.R. at 98-108; State's Exhibit 3).

Amanda Rocha testified that she worked as a forensic evaluation clinician at the Children's Assessment Center (CAC) for nearly five years before becoming a therapist and forensic interviewer with Legacy Community Health. (4 R.R. at 111).

Rocha described the Children's Assessment Center (CAC) as a multidisciplinary organization that provides forensic interviews, therapy, medical evaluations, and law enforcement collaboration for victims of abuse. It is one of many similar centers nationwide designed to support child victims and their families while reducing trauma. She explained that forensic interviews at CAC are structured to avoid leading questions and allow the child to share their experiences in their own words. (4 R.R. at 112-114). According to Rocha, the two main stages of an interview include:

1. **Rapport-building** – The child is introduced to the setting, establishes comfort, and practices telling a narrative (such as describing a fun event or daily routine).
2. **Substantive phase** – The child is asked open-ended questions about why they are there and what they want to share (4 R.R. at 116).

Rocha emphasized that children are never forced to talk about abuse and if they choose to talk about something unrelated, they are not redirected. She described the forensic interview rooms at CAC as child-friendly spaces. (4 R.R. at 118-119). Rocha confirmed that she interviewed L.Q. at the CAC on July 22, 2021, when L.Q. was 12 years old. (4 R.R. at 124).

Leticia S. would testify about what she learned from her daughter, L.Q., about an incident that occurred in May 2021. (4 R.R. at 125). Leticia S. testified that in May 2021, she received a phone call from her sister-in-law, Arissa M., informing her that something had happened involving L.Q. (4 R.R. at 126). Shortly after, L.Q. revealed to her that her uncle, Appellant, had touched her when she was 9 years old. (4 R.R. at 127). Leticia S. asked her daughter for details, but both L.Q. and her sister told their mother they were afraid and refused to say more than that Appellant had touched them. (4 R.R. at 128).

Leticia S. explained that her daughters had been afraid to speak up at first but finally told her when she directly asked them about what was happening. After the revelation, Leticia S. spoke with her children's school counselor to seek advice on what steps to take next. (4 R.R. at 129-130). The counselor advised her how to report what

her daughters had disclosed. (4 R.R. at 131). On cross-examination, Leticia S. confirmed that she did ask, but L.Q. refused to give more specifics about what happened. (4 R.R. at 132). After CPS became involved, L.Q. gave a few details. She stated that Appellant would play with them, pick them up, sit them on the bed, and touch them. (4 R.R. at 132-133).

K.Q., a 14-year-old eighth grader, described spending the holiday at her Aunt Maria's house. She, along with her mother, sister L.Q., and other family members spent Thanksgiving, 2020, together and she recalled the presence of Appellant, whom she identified in the courtroom. K.Q. recounted how she, her sister, and her cousin E.S. spent time in a bedroom playing a mobile game called BitLife. While they were in the room, Appellant entered and began tickling them. At one point, her sister L.Q., bit him. Appellant left the room and K.Q. went to the living room to inform her mother about the bite. She asked her mother to check Appellant's hand for a mark. She did not disclose any further details about what had transpired. (5 R.R. at 5-16).

E.S., a 16-year-old high school student, testified about her experiences with her uncle, Appellant. She identified him in the courtroom and confirmed that she had lived in his house with her parents, siblings, and grandfather when she was younger. She recalled how Appellant sometimes played the role of a fun uncle, but he had touched her inappropriately multiple times when she was a child. (5 R.R. at 17-23). According to E.S. the first incident occurred in the kitchen when she was about five or six years old. Martinez would lift her up and put his hands under her underwear, touching her in

a circular motion. He did not say anything, but she recalled the strong smell of alcohol on him. She remembered similar incidents occurring in other areas of the house. She described feeling confused and uncomfortable but did not understand what was happening at the time. (5 R.R. at 24-29).

She did not tell anyone about these incidents until her mother discovered text messages, she sent to a different cousin on her phone warning her not to visit Appellant's house. Her mother confronted her, but she was initially too overwhelmed to speak. She later told her mother about what had happened, and her mother contacted other family members and Child Protective Services (CPS). (5 R.R. at 30-36).

E.S. testified about Thanksgiving in 2020, when Appellant attempted to touch her and her cousin. Her cousin, L.Q., proceeded to bite him and he left the room. Later that night, when questioned by the adults in the house who noticed Appellant's injuries, he denied everything and attempted to hide his hand. E.S. later began experiencing nightmares and flashbacks about what Martinez had done to her as a child. (5 R.R. at 37-39).

On cross-examination, E.S. admitted that she never reported the incidents to her parents, teachers, or other adults at the time and she continued visiting Appellant's house after the alleged abuse. (5 R.R. at 40-49).

L.Q., a 15-year-old high school student, identified Mr. Martinez in the courtroom. She began by talking about her background, family relationships, and school

life. L.Q. described her close bond with her younger sister, K.Q., and her cousin, E.S. She recalled frequent visits to her aunt's house, where Appellant, also known as "Paco," lived. (5 R.R. at 50-55). L.Q. recounted how she and the other children often spent time in Appellant's bedroom watching movies or playing on their phones. At first, these visits seemed normal, but when she was about eight years old, Appellant's behavior became inappropriate. She described feeling confused and scared, unsure of what was happening or how to respond. (5 R.R. at 56-64).

As L.Q. got older, she became more aware of Appellant's actions and realized they were not normal. She described multiple instances of being held down or lifted off the ground while he inappropriately touched her. She was too afraid to speak out, believing that no one would believe her. The abuse continued until Thanksgiving of 2020, when a pivotal event took place. (5 R.R. at 65-72). On Thanksgiving 2020, L.Q., her sister, and E.S. were in Appellant's bedroom when he entered, put on a movie, and later initiated another "game." She instinctively tried to avoid him, jumping on and off the bed to escape. However, Appellant eventually caught her, held her down, and began touching her again. This time, L.Q. fought back—she bit Appellant's hand to make him stop. Appellant, startled and in pain, quickly left the room. (5 R.R. at 73-79).

After the incident, L.Q. went to the bathroom, trying to process what had just happened. Meanwhile, her sister K.Q. noticed Appellant hiding his bitten hand and told their mother. L.Q. did not immediately tell anyone what had happened, feeling fearful and uncertain. She only confided in E.S. later that evening when her mother scolded

her for biting Appellant. L.Q. remained silent about the real reason behind her action because she was afraid of how her family would react. (5 R.R. at 80-85).

It was only after E.S. told her own mother, Arissa M., about the abuse that L.Q.'s mother, Leticia S., was informed. Even then, L.Q. struggled to disclose the full details, saying only that Appellant had touched her. She later participated in a forensic interview and a CPS investigation but found it difficult to fully articulate her experiences. She admitted that, despite the abuse, she never told her grandfather, who also lived in the house, and avoided discussing the matter with other family members. (5 R.R. at 86-92). On cross-examination, L.Q. admitted that she continued visiting Paco's house even after the abuse began. According to L.Q., she had no choice, as she was brought there by her family for holidays and special occasions. (5 R.R. at 93-97).

Detective Ana Moreno testified about her involvement in this case. She explained that she was assigned to the Children's Assessment Center as part of the special victim's division of the Houston Police Department. Her role in the case was to assist Officer Patricia Gerardo in the interrogation of Appellant. Officer Gerardo initially conducted the interview, and Detective Moreno entered the room later to continue questioning. Moreno described her approach to interviews, explaining that her goal was to gain the confidence of the suspect to encourage honesty. She admitted to using certain tactics, such as pretending to relate to a suspect's experience, to build rapport. (5 R.R. at 98-103).

During the interrogation, Moreno questioned Appellant about allegations involving his interactions with young girls, specifically during Thanksgiving of 2020. Appellant described playing with the children, throwing them onto the bed, and interacting with them physically. He denied any inappropriate intentions but acknowledged that he may have accidentally touched them while playing. He expressed discomfort and claimed he did not realize what was happening at the time. He admitted that one of the girls had tried to bite him, but he did not report it to anyone because he considered it insignificant. Throughout the interrogation, Appellant insisted that his actions were misinterpreted and denied any wrongdoing. (5 R.R. at 104-138).

During the interrogation, Appellant recounted an incident where the girls had removed his blanket while he was asleep, which startled him. He claimed they had asked him if he saw them as "women" and referenced seeing their parents' behavior. He maintained that he scolded them and told them to leave. Moreno asked if the interactions aroused him, and Martinez firmly denied that they did. He viewed the girls as his nieces and had no inappropriate intentions. (5 R.R. at 113-123).

S.M., a 17-year-old high school student from Houston, Texas, testified on Appellant's behalf. She explained her relationship with E.S. She stated that Appellant was her uncle on her mother's side and that she had visited his house often during holidays or on Saturdays since 2007. She never lived with him or spent the night at his residence. (5 R.R. at 143-146).

S.M. recounted that although she and E.S. had been close when they were younger, their relationship faded after E.S. moved away in 2020. She denied ever discussing Appellant negatively with E.S. and she contradicted allegations that she had once called him a bad person. (5 R.R. at 149-151). S.M. explained that she had learned about the allegations against Appellant through E.S.'s mother, Arissa M., via text messages. However, she admitted that she had never spoken to E.S. directly about the claims and had no personal knowledge of any incidents. She emphasized that she had never witnessed any inappropriate behavior from Appellant and described him as a kind person who would give children money and treats but never act inappropriately. (5 R.R. at 152-155).

Sa.M., also a young woman from Houston, Texas, testified that she had known Appellant, her uncle, her entire life and visited his house almost every weekend as a child. (5 R.R. at 157). Sa.M. never lived with her uncle, nor did she spend the night at his house. She described her uncle as treating her very well, stating that after both of her parents passed away, he became like a father figure to her. She emphasized that she still saw him as someone she looked up to and admired. (5 R.R. at 158). She had never seen anything unusual happen at Appellant's house. She described him as a playful and caring person who would create a fun atmosphere for the children. (5 R.R. at 159).

SUMMARY OF THE ARGUMENTS

The evidence was insufficient to support Appellant's conviction for continuous sexual abuse of a child because of the uncertainty about when and what specific conduct allegedly occurred.

ARGUMENT

ISSUE ONE¹

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

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).

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 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

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).

⁵ *Denberry 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 *Gollibar 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.

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 statute. “Sexual abuse” includes “indecenty 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

¹¹ *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

¹² *Clayton*, 235 S.W.3d at 778; *Hooper* 214 S.W.3d at 13.

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).

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

The window for the offense conducts to support the conviction for continuous sexual abuse is between February 17, 2017, continuing through December 1, 2020. Even with this range, this record leaves questions about the conduct supporting this conviction. The complainant's mother testified that her date of birth is February 21, 2009. She "was about 8 years old" when they began taking her to Appellant's house to visit and she "was 9 or 10, something like that" at the time of Thanksgiving, 2020. (3 R.R. at 75-76). Although she witnesses Appellant play with and hugging L.Q. at Thanksgiving, she didn't see anything wrong with how he interacted with her and neither did anyone else. She didn't think anything of it when she found out L.Q. bit Appellant. (3 R.R. 87-90). Although Appellant acknowledged the bite at Thanksgiving, he categorically denied the allegations of sexual abuse. (3 R.R. at 106-107; States's Exhibits 3, 4, and 5).

Dr. Marcella Donurama performed the sexual abuse examination on L.Q. on July 22, 2021, but L.Q. declined to do an actual physical examination. (4 R.R. at 33-35). Dr. Donurama testified that during the examination, L.Q. told her that she thought she was about 8 or 9 years old when she "went to visit [her] uncle and [her] aunt and [her] uncle was there. He carries us touching." Then "[l]ast year on Christmas – or was it Thanksgiving – he came in and closed the door and he tried to grab my cousin but we tried to protect her and he ends up grabbing me and he throws me on the floor so no

one can see.” She further stated that “[h]e touched my vagina” with “[h]is hand.” (4 R.R. at 40). She would tell a different interviewer that on July 22, 2021, she was twelve years old. (4 R.R. at 124, 140).

K.Q. would testify that she is fourteen years old, and her birthday is September 24, 2010. L.Q. is her older sister. (5 R.R. at 5-7). K.Q. did not offer testimony about any specific instance of alleged sexual abuse and did not offer any details about what led to the bite on Thanksgiving.

E.S. would similarly testify that she recalled Thanksgiving when L.Q. bit Appellant. She alleged that the inappropriate touching had occurred “[m]ore than once,” but she could not remember when it first occurred. She thought it might have been when she was around 5 or 6 years old. According to E.S., Appellant put his hand down her pants and under her underwear and touch her vagina with his fingers. She did not tell anyone about this touching, but her mom found messages between her and her cousin talking about it so she had to tell her mother. (5 R.R. at 23-30). Although L.Q. told E.S. about instances of alleged inappropriate touching, she did not testify regarding any specifics of their conversation.

L.Q. would testify that she is 15 years old, and her birthday is February 21, 2009. She recognized Appellant in the courtroom as her uncle who she often referred to as “Paco.” (5 R.R. at 51, 59). Her earliest memories of uncle are from when she was about 6 years old. This would have been sometime in 2015. She would play a game with him where he chased her around the room and she was able to recall an incident

when he finally caught her he “put her on the floor and proceed to like start touching” her. (5 R.R. at 63-66). She was able to recall playing in Appellant’s room at Thanksgiving of 2020, when Appellant came into the room to play. He chased them around the room and finally caught her when she fell to the ground. His hand was on her stomach holding her down and begins to move toward her vagina. He touched her over her clothes. At some point she bit him on the hand, and he left the room. Her sister told her mother about the bite, but no one ever inquired or was told what brought it on. (5 R.R. at 75-89). Other than the incident at Thanksgiving, 2020, she was unable to provide specifics about when any other of the alleged incidents of inappropriate touching had occurred.

C. Conclusion

Though no jury unanimity is required, this is so vague as to leave the fact finder wondering what acts, other than those alleged on Thanksgiving, were actually committed and when. There is no specific testimony with regard to any other instances of inappropriate touching that occurred.

In sum, 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.

PRAYER

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

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 6,789 words printed in a proportionally spaced typeface.
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3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in *Tex. R. App. Proc. 9.4(j)*, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

/s/ Dancie Schindler
DAUCIE SCHINDLER

CERTIFICATE OF SERVICE

I certify that on the 2nd day of April 2025, 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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