

Appendix A. Memorandum

We, the State, can provide members of our prosecutorial team to meet our goal of a successful prosecution, and we, the State need not any viable evidence to convict child or any other sexual offenses. We are the government. Thus, usurping the jury's function.

The questions presented before this Honorable Court are a matter not only applicable to Texas, but to the system of jurisprudence in this nation. In today's world with all the various and varieties of alleged sexual misconduct, this Honorable Court must set appropriate standards that protect the rights of the victims of such crimes, and also the rights of an accused.

Federal Courts have acknowledged "some degree of discomfiture" when the government employs such practices, as used in present case, "since uncontrolled, such use of expert testimony may have the effect of providing the government with additional summation by having the expert interpret the evidence". *United States v. Brown*, 776 F.2d 397, 401 (2nd Cir. 1985); *United States v. Nersesian*, 824 F.2d 1294, 1308 (2nd Cir. 1987). "The [State], government cannot satisfy its burden of proof by taking the easy route of calling an 'expert' whose expertise happens to be the defendant." See *United States v. Dukagjini*, 326 F.3d 45, 53 (2nd Cir. 2003).



IN THE
TENTH COURT OF APPEALS

No. 10-17-00127-CR

JOSE J. SALAZAR-HERNANDEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2015-1834-C2

MEMORANDUM OPINION

Jose Salazar-Hernandez was indicted in Count 1 for the offense of continuous sexual abuse of a child, and he was indicted in Counts 2, 3, 4, and 5 for the offense of indecency with a child by contact. The jury convicted Appellant in Counts 1, 2, and 4. The jury found Appellant not guilty in Counts 3 and 5. The jury assessed punishment at 30 years confinement in Count 1 and 7 years confinement and a \$10,000 fine in both Counts 2 and 4. We affirm.

Sufficiency of the Evidence

In the sole issue on appeal, Appellant argues that the evidence is insufficient to support his convictions. The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the 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 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011), *cert den'd*, 132 S.Ct. 2712, 183 L.Ed.2d 71 (2012).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to

establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Finally, it is well established that 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).

When S.S. was eleven years-old she reported that Appellant, her father, had been touching her inappropriately. Kerry Burkley, Program Director for the Children's Advocacy Center testified at trial that he interviewed S.S. at the center. S.S. told Burkley that Appellant first touched her "boobs" when she was six years-old, and he continued touching her inappropriately until she was around ten years-old. S.S. told Burkley that Appellant touched her "middle part" with his hand and also with his "middle part¹." S.S. also told Burkley that Appellant had her touch his "middle part" on one occasion. S.S. related to Burkley specific instances of Appellant touching her "boobs" and her "middle part."

Dr. Ann Sims testified that she examined S.S. and that S.S. reported Appellant began touching her inappropriately when she was six years-old. S.S. told Dr. Sims that Appellant touched her "boobs" and that he touched her "private area" both over and underneath her clothes. S.S. also stated to Dr. Sims that Appellant touched her private area with his male sexual organ. Dr. Sims stated that S.S. had a "deep notch" in her

¹ S.S. indicated to Burkley that her "middle part" is her female sexual organ and Appellant's "middle part" is his male sexual organ.

hymen that could have been caused by trauma. Dr. Sims testified that there was nothing in the exam that indicated the abuse did not happen.

S.S. testified that Appellant first touched her "boobs" when she was six years-old and asked for help putting on her shirt. S.S. stated that when she was eight years-old, Appellant touched her chest again and tried to touch her "middle part." S.S. testified about another incident where Appellant tried to get on top of her and also another time when he picked up her legs and tried to put his "middle part" in her shorts. S.S. further testified that Appellant made her touch his "middle part." During her testimony, S.S. indicated that some of the incidents may have been a dream. S.S. was having trouble processing some of the events and stated that she was trying to "remember what actually happened and try to work it out in [her] thoughts and think about how it actually happened." S.S. testified, however, that the abuse did happen and that Appellant touched her "middle part" three or four times with his hand and his "middle part" and that he touched her breasts eight or nine times.

S.S.'s mother testified at trial that S.S. never opened up to her about the abuse. She further testified that she does not know if Appellant is guilty and that she "can't pick a side." Appellant testified at trial and denied all of S.S.'s allegations.

The Texas Penal Code provides that a person commits the offense of continuous sexual abuse of a child if:

(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and

(2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

TEX. PENAL CODE ANN. § 21.02 (b) (West Supp. 2017). The statute provides that "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

(1) aggravated kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;

(2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;

(3) sexual assault under Section 22.011;

(4) aggravated sexual assault under Section 22.021;

(5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)-(4);

(6) sexual performance by a child under Section 43.25;

(7) trafficking of persons under Section 20A.02(a)(7) or (8); and

(8) compelling prostitution under Section 43.05(a)(2).

TEX. PENAL CODE ANN. § 21.02 (c) (West Supp. 2017). To convict Appellant for the offense of indecency with a child, the jury was required to find that Appellant engaged in sexual contact with S.S. by touching, including through the clothing, the breast of S.S., with the intent to arouse or gratify his sexual desire. *See* TEX. PENAL CODE ANN. § 21.11 (a)(c) (West Supp. 2017).

The jury heard evidence from Dr. Sims and Kerry Burkley that S.S. said Appellant touched her female sexual organ with both his hand and his male sexual organ on more

than one occasion. S.S. said that Appellant began touching her when she was six years-old and it continued until she was ten. S.S. also told Dr. Sims and Burkley that Appellant touched her "boobs" on more than one occasion. Although S.S. testified that she was having trouble processing all of the events and believes some of the events may have been a dream, she stated that the abuse did happen. S.S. testified that Appellant touched her "middle part" three or four times and her breasts eight or nine times. The jury heard evidence that the touching occurred over a four year period. 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 at 461. We find that the evidence is sufficient to support Appellant's convictions for continuous sexual abuse of a child and indecency with a child. We overrule the sole issue on appeal.

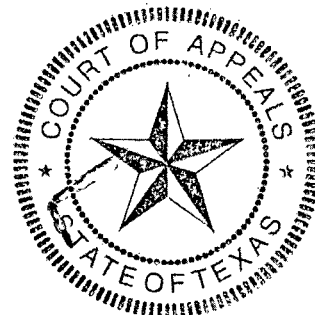
We affirm the trial court's judgment.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins

Affirmed

Opinion delivered and filed May 23, 2018
[CRPM]



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T.C. No. 2015-1834-C2

PD-0611-18

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

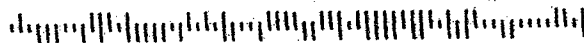
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Appendix C

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On this day, the Appellant's Pro Se motion for rehearing has been denied.

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Appendix D

MIWNAB 75570

