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COA No. 04-18-00252-CR

5/8/2019

ESCOBEDO, BENJAMIN Tr. Ct. No. 2016CR4634

PD-0056-19

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

7H49B

Deana Williamson, Clerk

BENJAMIN ESCOBEDO  
GARZA WEST - TDC # 2194525  
4250 HIGHWAY 202  
BEEVILLE, TX 78102

8-10/30

BEEVILLE, TX 78102



**Fourth Court of Appeals  
San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-18-00252-CR

**Benjamin ESCOBEDO,  
Appellant**

v.

**The STATE of Texas,  
Appellee**

From the 227th Judicial District Court, Bexar County, Texas  
Trial Court No. 2016CR4634  
Honorable Kevin M. O'Connell, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice  
Rebeca C. Martinez, Justice  
Irene Rios, Justice

Delivered and Filed: December 27, 2018

**AFFIRMED IN PART, REVERSED AND VACATED IN PART**

Appellant Benjamin Escobedo ("Escobedo") appeals from his convictions for continuous sexual abuse of a child, sexual assault of a child, and indecency with a child by contact. We affirm the trial court's judgment regarding the conviction for continuous sexual abuse of a child and reverse and vacate the judgment regarding the convictions for sexual assault of a child and indecency with a child by contact.

## Background

For several years, Escobedo lived with his girlfriend Griselda, their child, and Griselda's three children from a prior relationship—a son and two daughters. Griselda's daughters—C.Z. and J.Z.—are the complainants in this case. Griselda's son died prior to trial.

C.Z. was born on September 2, 1999 and was eighteen at the time of trial. C.Z. testified that Escobedo began coming into her room at night and touching her inappropriately when she was nine or ten years old. On multiple occasions, Escobedo touched C.Z.'s vagina and breasts with his hand and grabbed C.Z.'s hand and forced her to touch Escobedo's penis. On one occasion, Escobedo touched C.Z.'s anus with his penis. C.Z. testified Escobedo touched her inappropriately on more than ten occasions.<sup>1</sup>

J.Z. was fifteen at the time of trial. J.Z. testified that Escobedo began touching her inappropriately when she was ten years old. Escobedo touched J.Z.'s vagina and attempted to put his penis inside her vagina. J.Z. testified Escobedo touched her inappropriately on more than ten occasions. After C.Z. admitted to Griselda that Escobedo had been abusing her, J.Z. initially was afraid to make her own outcry because she was afraid someone would get hurt, especially since her older brother was so angry. J.Z. had never told C.Z. what Escobedo was doing to her because J.Z. did not want to make C.Z. cry. J.Z. eventually made an outcry to her mother and a ChildSafe advocate.<sup>2</sup>

Griselda testified she was unaware that Escobedo had been abusing her daughters until February 19 or 20, 2015, when her son's school contacted her because her son was being

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<sup>1</sup> SANE nurse Carmen Berusquia conducted the sexual assault examination of C.Z. C.Z.'s statements to Berusquia were consistent with her testimony at trial. Items collected from C.Z. and the SANE examination tested negative for semen.

<sup>2</sup> San Antonio Police Detective Cesar Rodriguez testified he received a call on April 8, 2015 from Griselda stating that J.Z. had made an outcry of sexual abuse by Escobedo.

disruptive. When her son came home from school, Griselda had a conversation with him and determined she needed to talk to C.Z.<sup>3</sup> Griselda picked C.Z. up from school and asked her if Escobedo had been touching her inappropriately. C.Z. broke down in tears and admitted Escobedo had been touching her. Griselda contacted her mother, her sisters, and a friend to tell them what happened. She then called Escobedo and told him to come home and “[t]ell me it’s not true.” Griselda’s son called his and his sisters’ biological father who, in turn, contacted the police. Escobedo refused to come to the house but agreed to meet Griselda at a nearby Taco Cabana. Griselda did not go to the Taco Cabana; instead she and her children went to the police station downtown.<sup>4</sup>

San Antonio Police Officer Mario Moreno responded to a lewd conduct call between 7:00 p.m. and 10:00 p.m. on February 19, 2015. Officer Moreno was dispatched to Griselda’s and Escobedo’s house, where he received information that Escobedo would be at a nearby Taco Cabana and willing to talk to police. Police officers went to the Taco Cabana, and when Escobedo arrived and stepped outside of his truck, police officers ordered Escobedo to the ground at gunpoint, placed him in handcuffs, and checked his person for weapons. Officer Moreno testified this procedure, called a “felony stop,” is performed “to avoid a fight or a confrontation, to avoid—you know, basically to protect us and them just so everything is done in the safest manner possible.” When placed in handcuffs, Escobedo asked if he was under arrest, and Officer Moreno told him “no, he’s just being investigated [and] detained.”

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<sup>3</sup> At trial, C.Z. testified that the night before, her brother had come into her bedroom and turned on the lights.

<sup>4</sup> Before going to the police station, C.Z. was interviewed at home by San Antonio Police Officer Eliser Zavala. C.Z. told Officer Zavala that Escobedo had woken her up the previous night by touching her vagina and breasts, and Escobedo had sexually abused her in the past. Officer Zavala also interviewed C.Z.’s brother, whose statements were consistent with C.Z.’s statements.

Family members subsequently arrived at the Taco Cabana and were, in Officer Moreno's description, "like an angry mob." Officer Moreno placed Escobedo in his patrol car "to keep him safe as well from the family who was upset." Officer Moreno testified: "Once [Escobedo] was detained in the patrol car, he—he asked what the next step was going to be. And I told him that detectives wanted to speak with them, and he agreed that he wanted to speak with the detectives." Officers then transported Escobedo to police headquarters.

When Escobedo arrived at police headquarters, he was interviewed by San Antonio Police Detective Mark Garza. Escobedo's handcuffs were removed prior to the interview, and Detective Garza informed Escobedo that he was not under arrest and was free to leave. Detective Garza testified he told Escobedo: "he was there voluntarily. He was not under arrest. He could leave at any time he wanted to. I told him that he was being accused of some things and if he would like to discuss[ ] them. He did. And so I interviewed him on DVD with that discussion."

Escobedo was indicted on five counts:

(1) Count I: continuous sexual abuse of a child between January 4, 2013 and February 19, 2015 by:

(a) Engaging in sexual contact with J.Z. by touching her genitals;

Count I — (b) Engaging in sexual contact with C.Z. by touching her genitals;

Count II — (c) Causing the contact of C.Z.'s anus by Escobedo's sexual organ;

Count III — (d) Causing C.Z.'s sexual organ to contact Escobedo's mouth; and

Count IV — (e) Engaging in sexual contact with C.Z. by causing C.Z. to touch Escobedo's genitals.

(c) — (2) Count II: causing the contact of C.Z.'s anus by Escobedo's sexual organ on January 4, 2014;

(d) — (3) Count III: causing C.Z.'s sexual organ to contact Escobedo's mouth on November 1, 2014;

(e) - (4) Count IV: engaging in sexual contact with C.Z. by causing C.Z. to touch Escobedo's genitals on July 5, 2014;

(b) - (5) Count V: engaging in sexual contact with C.Z by touching her genitals on February 19, 2015.

The jury found Escobedo guilty of Counts I, II, IV, and V and acquitted him of Count III. The trial court sentenced Escobedo to a 50-year term of imprisonment for each count, running concurrently.

### **Double Jeopardy**

In his first issue, Escobedo argues the trial court erred by overruling his pretrial motion to quash the indictment. Specifically, Escobedo argues the indictment charges him with continuous sexual abuse of a child and several predicate offenses against the same child during the same time frame, which violates his constitutional right against double jeopardy.

#### **A. Preservation of error**

Before we reach the merits of Escobedo's issue on appeal, we must address the State's argument that Escobedo has not preserved it. The State argues Escobedo's pro se motion to quash the indictment did not mention double jeopardy explicitly or implicitly and, even if it did, a motion to quash the indictment was not the proper vehicle for asserting a double jeopardy challenge.

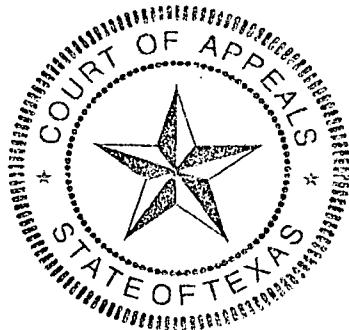
Although Escobedo frames his issue as whether the trial court erred in denying his motion to quash the indictment, it is clear that he is raising a double jeopardy issue. As the State acknowledges, because of the "fundamental nature" of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal if "(1) the undisputed facts show the double-jeopardy violation is clearly apparent from the face of the record, and (2) enforcement of the usual rules of procedural default serves no legitimate state interest." *Garfias v. State*, 424 S.W.3d 54, 57–58 (Tex. Crim. App. 2014), *cert. denied*, 135 S. Ct. 359 (2014); *see also Gonzalez v. State*, 516 S.W.3d 18, 23 (Tex. App.—Corpus Christi 2016, pet. ref'd) (reviewing double jeopardy issue even though trial court did not err by denying appellant's motion to quash the

THE STATE OF TEXAS  
TO THE 227TH JUDICIAL DISTRICT  
Before our Court of Appeals for the Fourth  
revise or reverse your judgment between  
Benjamin Escobedo, Appellant  
v.  
The State of Texas, Appellee  
No. 04-18-00252-CR and Tr. Ct. No. 2  
was determined, and therein our Court of A

In accordance with this court's op  
to Appellant's conviction for the  
**AFFIRMED**. The trial court's jud  
offenses of sexual assault of a chil  
Counts II, IV, and V, are **REVERS**

WHEREFORE, WE COMMAND YOU t  
District of Texas, in this behalf and in all th

Witness the Hon. Sandee Bryan Marion, C  
with the seal of the Court affixed and the C



indictment on that basis); *Price v. State*, 413 S.W.3d 158, 161 (Tex. App.—Beaumont 2013) (addressing double jeopardy argument in continuous sexual abuse case even though appellant's complaints about indictment were waived), *aff'd*, 434 S.W.3d 601 (Tex. Crim. App. 2014).

Here, the double jeopardy violation is apparent from the face of the record, and it would serve no legitimate state interest to deprive Escobedo of the opportunity to raise the double jeopardy issue at this time. Therefore, we conclude Escobedo's first issue is not waived and turn to the merits.

#### B. Double jeopardy

The double jeopardy clause of the Fifth Amendment protects a defendant from “(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.” *Garfias*, 424 S.W.3d at 58. “In the multiple-punishments context, two offenses may be the same if one offense stands in relation to the other as a lesser-included offense, or if the two offenses are defined under distinct statutory provisions but the Legislature has made it clear that only one punishment is intended.” *Littrell v. State*, 271 S.W.3d 273, 275–76 (Tex. Crim. App. 2008). “Sameness in this context is a matter of legislative intent.” *Id.* at 276.

Double jeopardy may be implicated where, as here, a defendant charged with continuous sexual abuse of a child is also charged with additional predicate offenses. A person commits the offense of “continuous sexual abuse of a child” if he commits two or more “acts of sexual abuse” of a child younger than fourteen years of age during a period that is thirty or more days in duration, regardless of whether the acts of sexual abuse are committed against one or more victims. TEX. PENAL CODE ANN. § 21.02(b). Subsection (c) of the statute lists the predicate offenses that may constitute an “act of sexual abuse.” See *id.* § 21.02(c) (listing eight offenses, including sexual assault and indecency with a child by contact). The Legislature addressed the statute’s double

These were the same predicate offenses  
to support count I.