Affirmed and Opinion filed February 22, 2001.

In The

Fourteenth Court of Appeals

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NOS. 14-98-00473-CR;
14-98-00476-CR; &
14-98-00477-CR

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LARRY LOUIS ESPINOZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 754,575, 754,574 & 723,584

O P I N I O N

Over his pleas of not guilty, a Harris County jury found Larry Louis Espinoza, appellant, guilty of two counts of indecency with a child and one count of aggravated sexual assault of a child. Appellant has brought three separate appeals, which we will discuss together. Concerning the two counts of indecency with a child, appellant contends that: (1) the evidence is legally insufficient to support the verdict, (2) the evidence is factually insufficient to support the verdict, and (3) the punishment violated appellant's constitutional right against

double jeopardy. In the appeal of the aggravated sexual assault of a child, appellant argues, the evidence is legally and factually insufficient to support the verdict. We affirm.

In his first and second point of error for each appeal, appellant argues that the evidence is insufficient to support the jury's verdict. We review legal sufficiency challenges to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The standard is the same in both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991). To review appellant's factual sufficiency issue, we must ask whether a neutral review of the evidence, both for and against the jury's finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *See Johnson v. State*, 23 S.W.3d 1-11,(Crim 2000).

A person commits the offense of indecency with a child if, with a child younger than 17 years and not his spouse, he engages in sexual contact with the child. *See* TEX. PEN. CODE ANN. § 21.11(a)(1). "Sexual contact" means "any touching of the anus, breast, or any part of the genitals of another person with the intent to arouse or gratify the sexual desire of any person." TEX. PEN. CODE ANN. § 21.01(2). A person commits the offense of aggravated sexual assault of a child if the person, intentionally or knowingly, causes the penetration of the mouth of a child by the sexual organ of the actor, and if the child is younger than 14 years. *See* TEX. PEN. CODE ANN. §§ 22.021(a)(1)(B)(ii) and 22.021(a)(2)(B).

Here, the evidence revealed that appellant's seven-year-old daughter got into her bed wearing a nightgown. Appellant ordered her to get in bed with him, removed her panties and touched the outside skin of her vagina. Next, he told his daughter to put her mouth on his penis and to "suck it like a lollipop." He also had her place her hands on his erect penis as well.

During the time his daughter put his penis in her mouth, appellant placed his hand on his daughter's vagina.

After reviewing the evidence in the light most favorable to the verdict, we find the evidence is legally sufficient to support the jury's verdict. Additionally, after conducting a neutral review of the evidence, we find the evidence is not so obviously weak as to undermine confidence in the jury's determination. Accordingly, we overrule appellant's first and second points of error in each appeal.

In his third point of error in his indecency with a child appeal, appellant argues he is being punished in violation of his constitutional right against double jeopardy under two separate indictments for the same offense. Appellant concedes he did not present his double jeopardy claim to the trial court. A defendant waives his double jeopardy claim by not objecting at trial when the violation is not clearly apparent on the face of the record. *See Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). A defendant is excused from this preservation requirement when "the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate state interests." *Id*. The *Gonzalez* test uses "and" to connect the two elements, thus, we must find that both of them are satisfied to hold appellant was not required to preserve his complaint. *See id*; *Murray v. State*, 24 S.W.3d 881, 888-89 (Tex. App.–Waco 2000, no pet. ref'd.).

Appellant was charged in two separate offenses of indecency with a child. The two indictments alleged appellant committed indecency with a child by separate means of sexual contact. Multiple violations of a single statute constitute separate and distinct offenses for double jeopardy purposes. *See Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999). Thus, each indictment permitted the jury to find appellant committed two distinct criminal offenses: (1) having the child touch his genitals and (2) by him touching the child's genitals. As such, any double jeopardy error was not on the face of the record, and we must find appellant waived this error.

Even if we found appellant did not waive his double jeopardy complaint, we would find there was no double jeopardy violation in this case.

Here, appellant was charged and convicted of two violations of *Texas Penal Code* section 22.11(a)(1). *See* TEX. PEN. CODE ANN. § 22.11(a)(1). First, appellant was convicted of violating section 22.11(a)(1) by touching the genitals of his daughter. Second, appellant was convicted of violating 22.11(a)(1) by having his daughter touch the his genitals. Each violation is a separate and distinct offense for double jeopardy purposes. *See Vick*, 991 S.W.2d at 833; *Cochran v. State*, 874 S.W.2d 769, 772 (Tex. App.—Houston [1st Dist.] 1994, no pet.). Thus, the double jeopardy clause was not violated when appellant was convicted of these two separate offenses.

Accordingly, we overrule appellant's third point of error. Having overruled this point of error, we affirm the judgments of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed February 22, 2001.
Panel consists of Justices Cannon, Draughn, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.