Affirmed and Opinion filed April 26, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00569-CR

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DAVID SOTO a/k/a FELIPE ORTIZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 769,524

O P I N I O N

Appellant was convicted by a jury of aggravated sexual assault of a child. The jury assessed punishment at forty years confinement. On appeal, he contends that: (1) the court erred by amending the indictment, without notice to him, to include his true name and alias; (2) because there is a variance in the name on the unamended indictment and the proof at trial, the evidence is legally insufficient to support his conviction; and (3) the court erred in submitting an erroneous instruction on "penetration" which was an improper definition and comment on the weight of the evidence. We affirm.

Background

Appellant was charged with aggravated sexual assault of an eleven-year-old girl. He was indicted under his alias, Felipe Ortiz. According to appellant, his legal name is David Soto. Until February 22, 1999, the pleadings and other filings in the record generally referred to appellant as Felipe Ortiz. On that date, appellant filed a motion for community supervision and motion for jury to assess punishment, both captioned "David Soto aka Felipe Ortiz." On February 23, 1999, appellant's counsel filed a motion for continuance referring to appellant as "David Soto aka Felipe Ortiz." After that date, most pleadings and filings referred to appellant in this manner. The jury charge referred to appellant only as David Soto. Sometime prior to trial, the court altered the indictment by interlineating through "Felipe Ortiz" and replacing it with the handwritten "David Soto AKA Felipe Ortiz," along with the initials of the judge.[1] There was no motion by the state requesting an amendment nor is there any indication appellant was given any formal notice of the change. Appellant made no objection on the record to the change in the indictment nor did he object to the name David Soto in the charge.

During the charge conference, the state offered the following instruction: "Penetration between the labia of the female's private parts by the male sexual organ of the defendant is sufficient although the vagina was not entered." Trial counsel objected that it "suggests and misleads the jury to believe that that requires a finding of penetration upon the placing of the male sexual organ on the outside structures of the female organ. . . ." The court overruled the objection and the instruction was included in the charge.

Indictment

Appellant's first two issues argue (1) that the court erred by amending the indictment under section 28.10 of the code of criminal procedure, without notice to him, to reflect a name change; and (2) because there is a fatal variance in the name on the unamended indictment

[1] We can infer the change was likely made on or about February 22, 1999, when appellant began filing motions in his legal name.

and the proof at trial, the evidence is legally insufficient to support his conviction.

We first note that the court of criminal appeals has held that changing the name of the defendant in an indictment does not constitute an amendment under article 28.10;[2] rather article 26.08 controls. Article 26.08 provides:

> If the defendant, or his counsel for him, suggests that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself or his counsel for him, the style of the case changed so as to give his true name, and the cause proceed as if the true name had been first recited in the indictment.

TEX. CODE CRIM. PROC. ANN. art. 26.08 (Vernon 1989). Based on this mandatory language, the court of criminal appeals has held that the act of changing the name of a defendant is a ministerial act. *Wynn v. State*, 864 S.W.2d 539, 540 (Tex. Crim. App. 1993); *Kelley v. State*, 823 S.W.2d 300, 302 (Tex. Crim. App. 1992)

According to appellant, David Soto is his true name. Prior to trial, he undeniably notified the court of his true name by way of his own motions. During trial, Soto's counsel called appellant to the stand as "David Soto" and he testified as such. Therefore, when the court made the interlineation, it did so to reflect appellant's true name according to appellant. The court's interlineation did not constitute an amendment to the indictment but was simply a ministerial act which, upon being informed by defendant of his true name, it was required to perform under section 26.08. *Wynn*, 864 S.W.2d at 540; *Kelley*, 823 S.W.2d at 302. In view of this, the court did not err in making the change. Nor was the evidence legally insufficient to prove appellant was the person as alleged in the indictment. We overrule appellant's first two issues.

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[2] Article 28.10 provides that "[a]n indictment ... may not be amended over the defendant's objection as to form or substance if the amended indictment ... charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced." TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989).

Instruction

Appellant next complains that the court erred by improperly defining penetration in the jury charge and that such definition was an improper comment on the weight of the evidence. The court instructed: "Penetration between the labia of the female's private parts by the male sexual organ of the defendant is sufficient although the vagina was not entered."

We first note that appellant did not object in the trial court that the instruction was an improper comment on the weight of the evidence. The closest statement appellant made to that effect was it "suggests and misleads the jury to believe that that requires a finding of penetration upon the placing of the male sexual organ on the outside structures of the female organ. . . ." We do not see how this puts the court on notice the instruction was an improper comment on the weight of the evidence. If anything, it appears to be an objection that the instruction is an incorrect statement of the law. Thus, appellant has failed to preserve this issue for review. We therefore find the court did not err in submitting the disputed jury instruction and overrule appellant's third issue.[3]

[3] We note that materially the same language has long been held to be a proper instruction in a sexual assault case. *Henry v. State*, 103 S.W.2d 377, 380 (1937) (holding "any degree of penetration, however slight, of the person of prosecuting witness by defendant" a proper instruction); *Campos v. State*, 356 S.W.2d 317, 319 (1962) ("the slightest penetration of the body of the female by the sexual organ of the male is sufficient to prove penetration"). Additionally, the court's language is not a definition. *Wilson v. State*, 905 S.W.2d 46, 48-49 (Tex. App.—Corpus Christi 1995, no pet.); *Rawlings v. State*, 874 S.W.2d 740, 744 (Tex. App.—Fort Worth 1994, no pet.). The better practice, however, would be to instruct in the neutral third party–not by specifically mentioning the defendant.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 26, 2001.

Panel consists of Justices Fowler, Wittig, and Amidei.[4]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Former Justice Maurice Amidei sitting by assignment.