Reversed and Acquittal Rendered in part and
Affirmed in part and Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00962-CR
&
NO. 14-98-00963-CR

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BENITO MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause Nos. 784,339 & 784,340

O P I N I O N

A jury found Appellant Benito Martinez guilty of two counts of aggravated sexual assault of his nine-year-old nephew, and the trial court assessed punishment at twenty years' confinement for each conviction. In two points of error, Martinez contends that (1) there is legally insufficient evidence of penetration for one offense and (2) either his due process rights were violated by an amendment to his indictment or there was legally insufficient evidence of the date of the offenses. We affirm as to cause of action 14-98-00962-CR, the

conviction for Martinez's penile contact with F.M.'s anus. We reverse and acquit Martinez in cause number 14-98-00963-CR, the conviction for penetration of Martinez's mouth with F.M.'s sexual organ.

BACKGROUND

Around Easter 1995, nine-year-old F.M. was left at home with Martinez, his paternal uncle, while his parents worked and his grandmother visited a friend. Martinez made F.M. lay face-down on the floor and pulled down the boy's shorts and underwear. Martinez then anally sodomized F.M. for about five minutes. When he let F.M. up, F.M. saw "white stuff" coming out of Martinez's penis. A few minutes later, Martinez sat in a chair and again anally sodomized F.M. When he stopped this, he got on his knees and licked F.M.'s penis.

STANDARD OF REVIEW

When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995); *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.* This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

POINT OF ERROR ONE

In his first point of error, Martinez challenges the legal sufficiency of the evidence of penetration. A person commits aggravated sexual assault if he intentionally and knowingly causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of

another person, including the actor. *See* TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(iii) (Vernon 1994). The State indicted Martinez for "intentionally and knowingly caus[ing] the sexual organ of [F.M.], a person younger than fourteen years of age, to penetrate the mouth of the Defendant." Thus, we examine the record, in the light most favorable to the verdict, to determine whether any evidence exists that F.M.'s penis penetrated Martinez's mouth.

The State may prove penetration by circumstantial evidence. *See Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). A child is not required to be able to testify about penetration, and he is not expected to testify with the same ability and clarity as is expected of mature and capable adults. *See id.* at 133-34. Evidence of the slightest penetration is sufficient to uphold a conviction, so long as it has been shown beyond a reasonable doubt. *See Luna v. State*, 515 S.W.2d 271, 273 (Tex. Crim. App. 1974). The Court of Criminal Appeals has discussed the definition of "penetration" in the context of aggravated sexual assault:

> In contexts like that of the Aggravated Sexual Assault statute, "penetrate" may mean "to enter into" or "to pass through." *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 1670 (Merriam-Webster 1981). Thus, in common parlance, mere contact with the outside of an object does not amount to a penetration of it. But pushing aside and reaching beneath a natural fold of skin into an area of the body not usually exposed to view, even in nakedness, is a significant intrusion beyond mere external contact.

Vernon v. State, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992).

In this case, F.M., who was twelve years old at the time of trial, testified that Martinez got onto his knees and "licked my middle part" one time. When asked how Martinez licked his penis, F.M. responded, "He put his tongue on my penis."[1] This was the only evidence offered by the State to show penetration of Martinez's mouth. While the tongue is a part of the mouth, *see Montoya v. State*, 841 S.W.2d 419, 422 (Tex. App.–Dallas 1992), *vacated on other grounds*, 906 S.W.2d 528 (Tex. 1995), the mouth is bounded externally by the lips. *See*

[1] F.M.'s testimony about his uncle's anal rape of him was much more explicit: "He put his penis on my heinie inside and then he started going up and down about for five minutes." When describing the rape that occurred while his uncle sat in a chair, F.M. was also able to confirm that his uncle's penis was inside F.M.'s anus.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1478 (1993). There is no evidence that F.M.'s penis passed through Martinez's lips in the slightest and entered his mouth. Had Martinez been indicted for causing F.M.'s sexual organ to contact Martinez's mouth, there would be sufficient evidence to affirm his conviction. *See, e.g., Jimenez v. State*, 953 S.W.2d 293, 296-97 (Tex. App.–Austin 1997, pet. ref'd). However, the indictment and conviction were for penetration, and there is no evidence of penetration.

Because there is no evidence of penetration, we sustain point of error one. We reverse Martinez's conviction in cause number 14-98-00963-CR and render an acquittal.

POINT OF ERROR TWO

In his second point of error, Martinez contends that his due process rights were violated when the offense date in the indictment was changed from June 1, 1995 to April 9, 1995.[2] He first argues that if the State can refile an indictment, his due process right to sufficient notice of the change has been violated. He argues alternatively that if the State cannot refile an indictment, its action in his case violated his due process right to sufficient evidence.

The rules of criminal procedure permit an amendment to an indictment after the defendant has been given notice. *See* TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989). An alteration in the alleged date of the offense is considered a permissible amendment. *See Eastep v. State*, 941 S.W.2d 130, 132 (Tex. Crim. App. 1997). Thus, we disagree with Martinez that the State cannot change an indictment. Further, Martinez did not object about insufficient notice when the indictment was amended nor when the trial court granted the State's motion to dismiss the first-filed case. A defendant must object about lack of notice in order to preserve error for appeal about a change in an indictment. *See Villalon v. State*, 805 S.W.2d 588, 590-91 (Tex. App.–Corpus Christi 1991, no pet.). Accordingly, we find that Martinez has waived any error regarding lack of notice.

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[2] A grand jury first indicted Martinez for an aggravated sexual assault occurring "on or about June 1, 1995." In May 1998, the grand jury re-indicted him, changing the date of the offense to on or about April 9, 1995. In August 1998, the State filed a motion to dismiss the first indictment, and the trial court granted the motion the day after voir dire.

Finally, there is legally sufficient evidence that the date Martinez anally sodomized his nephew was on or about April 9, 1995. F.M. reported the aggravated sexual assault to a counselor at school in June 1995. The counselor testified that he told her the rape had occurred earlier in the summer. F.M. further testified that he remembered seeing Easter eggs in the stores around the time of the rape. The record shows that in 1995, Easter was on April 9. Lastly, the evidence reflects that Martinez fled to Mexico for a year around April 17, 1995, leaving behind his wife and his job of the past six years, as well as abandoning his monthly probation meeting. This evidence, taken in the light most favorable to the verdict, is sufficient to show that the offense occurred on or about April 9, 1995.

Accordingly, because we find that (1) an indictment can be amended, (2) Martinez failed to preserve error by objecting to insufficient notice of the amendment to his indictment, and (3) there is legally sufficient evidence that the offense occurred on or about April 9, 1995, we overrule point of error two.

In conclusion, we reverse Martinez's conviction in cause number 14-98-00963-CR because there is no evidence of penetration of Martinez's mouth with F.M.'s sexual organ, and we render an acquittal. Further, having overruled Martinez's second point of error, we affirm his conviction in cause number 14-98-00962-CR.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Justices Robertson, Sears, and Lee.[*]

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

[*] Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.