Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00409-CR & 14-98-00410-CR

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L. D. GEORGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 740,196 and 775,925

O P I N I O N

L. D. George appeals his convictions by a jury for aggravated sexual assaults of two children, D.D. and J .L. The jury assessed his punishment in each case at 15 years imprisonment. In five points of error, appellant contends the trial court erred: (1) in refusing to admit defensive alibi evidence, and (2) by using the wrong indictment date in the jury instruction to calculate the ten-year limitation period for the date of the offense in J. L.'s case. He further asserts he received ineffective assistance of counsel, both indictments were defective, and the evidence was legally and factually insufficient to sustain his conviction. We affirm.

Appellant is the step-grandfather of D.D. and J. L. On or about September 30, 1988, D.D. was visiting appellant and his wife, Dorothy, at appellant's house; Dorothy was not home at the time. D.D. was sitting in bed in appellant's master bedroom watching television, and stated she was watching people have sex on television. D.D. asked appellant what they were doing, and appellant told D.D. they were making love. Appellant then removed D.D.'s underwear, placed his finger in D.D.'s vagina and moved it around, and then rubbed his penis against her vagina and rectum. D.D. told appellant that it hurt and asked him to stop, but appellant continued. After D.D. further complained to appellant that he was hurting her, he eventually stopped. D.D. stated she was six or seven years old at this time, and appellant told her not to tell anyone because they probably wouldn't believe her. D.D. subsequently wrote a note addressed to appellant stating: "Granddaddy, I love you but I don't want to have sex with you anymore." D.D. folded the note and hid it in the couch because appellant was sleeping at the time. Dorothy later discovered the note, became very angry, and told D.D. she was going to get a whipping for lying. D.D. called her mother, Cheryl Lee (Cheryl), told her about the note, and that she was about to get a whipping for it. Cheryl asked D.D. if the sexual assault had actually occurred, and D.D. told her mother it did not happen because she was afraid something would happen to appellant. D.D. did not tell anyone of the incident until 1996 when she learned that appellant had sexually assaulted her sister, J. L.

On August 6, 1996, J. L. visited her aunt, Linda Broussard (Linda) after a funeral and told Linda that appellant had sexually assaulted her when she was five or six years old, sometime around December 1, 1992. J . L. testified that appellant picked her up and put her on the counter in the bathroom, pulled her panties down, put his finger in her vagina, then put his penis in her vagina. J. L. did not tell anyone because she was afraid appellant or she would get into trouble. Linda called Cheryl and told her what J. L. had said, and the next day J. L. told Cheryl what had happened. Cheryl confronted Dorothy with this information, and Dorothy said both J. L. and D. D. were lying.

Dr. Robin Williams examined both J. L. and D. D. and testified that it was likely that both girls had been sexually abused.

Appellant testified that he did not sexually abuse J. L. and D.D. He testified that on September 30, 1988, he was in Virginia, and on December 1, 1992, he was somewhere in Washington. He admitted that he had seen D. D.'s note, but claimed it was a lie and that D. D. "copied it off the television."

In point one, appellant contends the trial court erred in refusing to admit into evidence his log records which he kept while driving his truck on business trips during the ten-year limitation period anterior to the indictment dates for the sexual assaults on J. L. and D. D. Appellant argues these records would show he was not present on the actual date of the offenses, and also would demonstrate "his whereabouts during much of the period included in the limitation period." Appellant argues on appeal that by refusing to admit the log books, the trial court denied appellant the right to present his defense of alibi.

The trial court refused to admit the log records because they were not relevant. Appellant made an informal bill of exceptions after the jury assessed his punishment and before sentencing. At this time, appellant stipulated that the log books showed that appellant was on the road some of the time and at home some of the time. The trial judge again told appellant's counsel that appellant was at home some of the time and "had access to his grandchildren." The trial judge again told appellant's counsel that he rejected the log books as evidence because they were not relevant.

A trial judge has broad discretion in admitting or excluding evidence. Only when a trial court has abused its discretion should an appellate court conclude that the ruling was erroneous. *Montgomery v. State*, 810 S.W.2d 372, 390-91 (Tex.Crim.App.1991) (op. on reh'g).

Before evidence is admissible, it must be relevant as defined by rule 401, Texas Rules of Evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." TEX. R. EVID. 401; *Montgomery*, 810 S.W.2d at 386; *see also*

Mayes v. State, 816 S.W.2d 79, 84 (Tex.Crim.App.1991) (relevant evidence is any evidence which influences facts that have something to do with the ultimate determination of guilt or innocence in a particular case). In determining relevancy, the courts look at the purpose for offering the evidence and whether there is a direct or logical connection between the offered evidence and the proposition to be proved. So long as there is any reasonable logical nexus, the evidence will pass the relevancy test. *Butler v. State*, 936 S.W.2d 453, 458 (Tex.App.-Houston[14th Dist.] 1996, pet. ref'd); *Fletcher v. State*, 852 S.W.2d 271, 276-77 (Tex.App.--Dallas 1993, pet. ref'd).

To be effective, the alibi evidence must demonstrate the impossibility of the accused's presence at the scene of the crime at the time it was committed. *Arney v. State,* 580 S.W.2d 836, 840 (Tex.Crim.App.1979); *Villarreal v. State*, 821 S.W.2d 682, 684 (Tex.App.-San Antonio 1991, no pet.). The defense of alibi is designed to show that the defendant, during the entire time that the crime was being committed was so far from the place where the crime occurred that he could not have participated in the crime. *Villarreal,* 821 S.W.2d at 684. If the alibi evidence, although taken as true, does not sufficiently cover the time at or before the crime to render the defendant's presence impossible or highly improbable, then it proves nothing. *Id.* The court of criminal appeals recently held that a defendant is no longer entitled to a jury instruction on alibi. *Giesberg v. State*, 984 S.W.2d 245, 250 (Tex.Crim.App. 1998). A separate instruction on alibi as a defense would draw unwarranted attention to evidence that appellant was at another place when the crime was committed, and would therefore constitute an improper comment on the weight of the evidence. *Id.*

By appellant's stipulation, the log books showed appellant was on the road some of the time and home some of the time during the ten-years limitation period. Appellant admitted that D.D. and J. L. came to visit him during the ten-year limitation period when he was home after being on the road. Therefore, the trial court correctly found that the log books were not relevant because they could not prove that he was away from the scene when the assaults occurred. Therefore, the evidence would not have any tendency to make the existence of any fact that is of consequence to the determination of the action (appellant's being away from his

house when the sexual assaults occurred) more probable or less probable than it would be without the evidence. TEX. R. EVID. 401; *Montgomery*, 810 S.W.2d at 386; *see also Mayes v. State*, 816 S.W.2d 79, 84 (Tex.Crim.App.1991). The trial court did not err in refusing to admit appellant's log books into evidence because they would prove nothing.

Appellant further contends that by refusing to admit the log books, appellant has been denied due process of law, and his rights have been violated under the Sixth and Fourteenth Amendments of the United States Constitution, Article 1, Section 10 of the Texas Constitution, Article 1.05 of the Texas Rules of Criminal Procedure, and rules 401, 402, and 403 of the Texas Rules of Evidence. Appellant provides no argument to support these allegations, nor does he cite any authority in support of this claim. The failure to adequately brief the argument and provide authority to support a particular point of error waives the complaint. TEX. R. APP. P. 38.1(h); *Lawton v. State*, 913 S.W.2d 542, 558 (Tex.Crim.App.1995), *cert. denied*, 117 S.Ct. 88, 136 L.Ed.2d 44 (1996); *Yates v. State*, 941 S.W.2d 357, 363 (Tex.App.-Waco 1997, pet. ref'd); *Menchaca v. State*, 901 S.W.2d 640, 649-50 (Tex.App.--El Paso 1995, pet. ref'd). Appellant's point of error one is overruled.

In point two, appellant contends the trial court's jury charge in J. L.'s case (trial court cause number 775925; this cause number 14-98-00410-CR) allowed the jury to calculate the ten-year limitation period from "January 24, 1997, the date of the filing of the indictment," when the indictment in J. L.'s case was actually filed February 19, 1998. Appellant asserts the use of the earlier date in the jury charge allowed the State to prove the offenses occurred back to January 24, 1987, instead of February, 19, 1988, giving the State more than ten years in which to prove an offense.

Appellant made no objection to the jury charge, and does not allege he was egregiously harmed by this instruction. Jury charge error is generally examined under the standards of *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App.1984). An erroneous jury charge does not result in automatic reversal of a conviction. TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981 & Supp. 2000). *Almanza*, 686 S.W.2d at 171. When reviewing charge error, we

determine: (1) whether error actually exists in the charge; and (2) whether any resulting harm requires reversal. *See Almanza*, 686 S.W.2d at 171. Appellant did not object to the complained of error in the jury charge. Therefore, appellant must show the error is so egregious and created such harm that appellant has not had a fair and impartial trial. *Id.* The actual degree of harm must be reviewed in light of the charge as a whole, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *Id.*; *Duke v. State*, 950 S.W.2d 424, 426 (Tex.App.-Houston[1st Dist.] 1997, pet. ref'd).

Subsections (b) & (c) of Article 12.05, Texas Code of Criminal Procedure, provide:

> (b) The time during the pendency of an indictment, information, or complaint shall not be computed in the period of limitation.
>
> (c) The term "during the pendency," as used herein, means that period of time beginning with the day the indictment, information, or complaint is filed in a court of competent jurisdiction, and ending with the day such accusation is, by an order of a trial court having jurisdiction thereof, determined to be invalid for any reason.

TEX. CODE CRIM. PROC. ANN. art. 12.05(b)&(c) (Vernon 1977 & Supp. 2000).

The indictment complained of was a re-indictment of appellant under the same penal statute. The first indictment was filed January 24, 1997, and tolled the ten-year statute of limitations when filed. The record reflects the 1997 indictment was pending at the time appellant was re-indicted in 1998. Therefore, the re-indictment dated February 19, 1998, could still utilize the earlier date of filing for computation of the ten-year limitation period because the time during the pendency of an indictment shall not be computed in the period of limitation under article 12.05(b).

The Court of Criminal Appeals held in *Ex parte Slavin*, 554 S.W.2d 691 (Tex.Cr.App.1977), that under Article 12.05(b) the time that an invalid first indictment is pending in the trial court tolls the statute of limitations as long as the second indictment is brought under the same penal statute as the invalid first indictment. Appellant was re-indicted

to add another count of aggravated sexual assault on J. L. Therefore, the second indictment was brought under the same penal statute, and limitations were tolled from January 24, 1997, until the date of the second indictment, February 19, 1998. *See Prince v. State*, 914 S.W.2d 672, 674 (Tex.App.-Eastland 1996, pet. ref'd) (1983 indictment held invalid; appellant re-indicted in 1994 for same offense; limitations tolled from 1983 indictment until 1994 indictment, and calculated from 1983 indictment which added 11 more years to the statute of limitations). *See also Mata v. State*, 991 S.W.2d 900, 902 (Tex.App.–Beaumont 1999, pet.ref'd) (appellant re-indicted for sexual assault two years after limitations had run but while original indictment pending; the court of appeals found article 12.05(b) tolled limitations "during the pendency" of the original indictment). The jury charge therefore correctly allowed the jury find any offense within a ten-year period prior to January 24, 1997.

Appellant has not claimed nor demonstrated egregious harm. Assuming *arguendo* he is claiming egregious harm, the evidence shows that J. L. was sexually assaulted when she was five or six years of age, which would have been between December 1, 1991, and December 1, 1993. The re-indictment dated February 19, 1988, alleged she was assaulted on or about December 1, 1992. Therefore, the evidence establishes the sexual assault was well within the ten-year period anterior to February 19, 1998. Egregious harm is not shown where the omission in the charge concerns an incidental defensive theory or a defensive theory not raised by appellant. *See Williams v. State*, 851 S.W.2d 282, 289 (Tex.Crim.App.1993) (holding that any error in not submitting fact issue of safeness to jury was not egregious harm where safeness was not even incidental theory of defense and where error had minimal impact on appellant's trial); *Lawrence v. State*, 700 S.W.2d 208, 213 (Tex.Crim.App.1985) (determining that voluntary manslaughter was incidental theory of defense such that subtle deletion of State's burden of proof on absence of sudden passion in charge could not realistically have caused egregious harm). Thus, the trial court's failure to instruct the jury to calculate the ten-year limitation period from February 19,1998, caused no egregious harm because appellant raised no defensive theory involving the limitations period, nor was any such theory mentioned in closing arguments.

Furthermore, appellant again asserts the trial court's jury charge violates the same constitutional and statutory provisions he raised under point of error one, and again provides no argument nor authority in support of these conclusions. His contention that the jury charge violates these rights is overruled. TEX. R. APP. P. 38.1(h). We find no error in the jury charge and we overrule appellant's point of error two.

In point three, appellant contends he received ineffective assistance of trial counsel for the following reasons:

1. Counsel asked Cheryl if she was aware of "an allegation" made by J. F. against appellant at the same time J. L. and D. D. made their allegations. There is nothing in the record to indicate what "allegation" was made, whether an assault, sexual assault, or other crime.

2. By extensive cross-examination of D.D., counsel "opened the door" to extraneous acts evidence by the State.

3. Counsel failed to subpoena the original log records to prove his whereabouts during the ten-year periods anterior to the indictments.

4. Counsel failed to request a jury instruction on the defense of alibi.

5. Counsel failed to object to the trial court's charge on the incorrect indictment date in the instruction to the jury concerning the calculation to the ten-year limitation period.

6. Counsel pursued the defensive theory of alibi that had no merit.

The U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*; *Hathorn v.*

State, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992), *cert. denied,* 113 S.Ct. 3062 (1993). A reasonable probability is defined as probability sufficient to undermine confidence in the outcome. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670. The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson,* 877 S.W.2d at771. We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id*. In *Jackson,* the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Id.* at 772. *See also Jackson v. State,* 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant filed a motion for new trial, but did not raise ineffectiveness of trial counsel in his motion. Appellant did not request a hearing on his motion for new trial, and therefore failed to develop evidence of trial counsel's strategy as was suggested by Judge Baird in his concurring opinion in *Jackson*, 877 S.W.2d at 772. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an

ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial); *Phetvongkham v. State,* 841 S.W.2d 928, 932 (Tex.App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim). *See also Beck v. State,* 976 S.W.2d 265, 266 (Tex.App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim).

In the present case, the record is silent as to the reasons appellant's trial counsel chose the course she did. The first prong of *Strickland* is not met in this case. *Jackson,* 877 S.W.2d at 771; *Jackson,* 973 S.W.2d at 957. Due to the lack of evidence in the record concerning trial counsel's reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Id.* Because appellant produced no evidence concerning trial counsel's reasons for choosing the course he did, nor did he demonstrate prejudice to his defense, we overrule appellant's contention in point of error three that his trial counsel was ineffective.

In point four, appellant contends the two indictments alleged that he committed the offenses "on or about" specific dates was too general to give him adequate notice of the charges. Appellant's motion to set aside the indictments was denied by the trial court after the trial commenced.

It is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period. *See* art. 21.02(6), Texas Code of Criminal Procedure; *Sledge v. State,* 953 S.W.2d 253, 256 (Tex.Crim.App. 1997); *Scoggan v. State,* 799 S.W.2d 679, 680 n. 3 (Tex.Crim.App.1990) ("[t]he State is not bound by the date alleged in the indictment . . . so long as the date proved is a date anterior to the presentment of indictment and the crime's occurrence is not so remote as to be barred by limitation"); *Thomas v. State,* 753 S.W.2d 688, 692 (Tex.Crim.App.1988) ("[w]here an

indictment alleges that some relevant event transpired 'on or about' a particular date, the accused is put on notice to prepare for proof that the event happened at any time within the statutory period of limitations"). We hold that the "on or about" language in the indictments in this case were not fundamentally defective, and appellant was put on notice to prepare for proof that these offenses happened at any time within the ten-year limitation period. We overrule appellant's point of error four.

In point of error five, appellant contends the evidence is legally and factually insufficient to sustain a guilty verdict by the jury.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id.* In conducting a factual sufficiency review, the court of

appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id.*

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App.1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id.*

Both J. L. and D. D. testified that appellant sexually assaulted them within the ten-year limitation period as we have set forth in our fact summary and need not repeat here. Dr. Williams examined J. L. and D. D. and found sexual assault of the girls was likely. Appellant denied committing the acts, but produced *no* evidence of alibi to establish his presence elsewhere when the acts occurred. Appellant's defensive theory was that the girls were lying, and he was innocent. Taking the evidence in the light most favorable to the verdict, we find a rational juror could have found all the essential elements of aggravated assault of J. L. and D.D. beyond a reasonable doubt. We hold the evidence was legally sufficient to sustain appellant's conviction.

Appellant further contends the same evidence is factually insufficient under *Clewis* to show he committed the offenses. Appellant denied committing the offenses, but could not

prove he was elsewhere when the offenses occurred. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant committed the offenses is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We find the evidence is factually sufficient to sustain appellant's conviction, and we overrule his point of error five.

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Bill Cannon
Justice

Judgment rendered and Opinion filed March 2, 2000.

Panel consists of Justices Cannon, Draughn, and Hutson-Dunn .*

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

* Senior Justices Bill Cannon, Joe L. Draughn, and D. Camille Hutson-Dunn sitting by assignment.