Affirmed and Memorandum Opinion filed December 7, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00828-CR

ALBERT ALFONSO GARZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1169980

MEMORANDUM OPINION

A jury convicted appellant Albert Alfonso Garza of aggravated sexual assault of a child. In two issues, he challenges the admission of evidence of extraneous offenses and the trial court's refusal to give a reasonable doubt instruction in regards to those offenses. Because the character of the disputed offenses was not extraneous, we find no error and affirm the judgment below.

BACKGROUND

Appellant was charged by indictment in December 2008. The indictment alleged that "on or about June 30, 2006" appellant performed oral sex on the complainant, an eight-year-old boy. In an interview with the complainant the day before trial, the prosecutor learned that appellant may have committed the act on two prior occasions. Believing these additional offenses to be extraneous, the prosecutor notified appellant on the morning of trial of her intent to introduce testimony of the other acts into evidence. Appellant objected to the inadequate notice and orally moved for a continuance. The trial court denied his motion.

Without providing any specific dates, the complainant testified that he was sexually assaulted sometime in the summer of 2006, when his family was visiting appellant's family for a weekend of barbecuing and swimming. The complainant was in appellant's bedroom when he asked appellant for permission to play a video game. Appellant consented, but only on the condition that the complainant first remove his clothes. After taking off his pants, the complainant testified that appellant performed oral sex on him for about five seconds. The complainant testified that appellant then exposed himself and asked that the complainant perform oral sex on him as well. The complainant complied for two or three seconds before ultimately feeling uncomfortable and leaving the room.

The outcry was made in February 2008. From then until trial, the complainant only revealed to police a single incident of assault. The complainant testified that he felt safe talking with the prosecutor though, and mentioned that appellant had also assaulted him on two other occasions. The complainant testified that these occasions occurred in the same place and at some time before the event described during the summer of 2006. The only apparent variation on these occasions was that the complainant was not asked to perform oral sex on appellant.

The jury charge instructed that evidence of the two additional offenses was not admitted for showing appellant's propensity to act in conformity with that past conduct. Instead, the charge instructed that evidence of these past wrongs was admitted for the purpose of evaluating (1) appellant's state of mind on the occasion charged in the indictment, and (2) the previous and subsequent relationship between appellant and the complainant. *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 (West 2010). Appellant objected that the charge was erroneous because it did not include an additional instruction on the burden of proof. According to appellant, the charge should have included an instruction telling the jurors not to consider evidence of the two prior offenses unless they were persuaded beyond a reasonable doubt that the prior offenses had actually occurred. The trial court overruled the objection.

The jury found appellant guilty and assessed punishment at ten years' confinement. Following the jury's recommendation, the trial court suspended appellant's sentence and placed him on community supervision for a period of five years. Appellant now argues that the trial court erred in (1) admitting evidence of the extraneous offenses over his timely objection and request for a continuance, and (2) refusing to include in the jury charge a reasonable doubt instruction as to those extraneous offenses.

DISCUSSION

Appellant predicates both of his issues on the assumption that the two prior assaults were offenses extraneous to the crime charged in the indictment. In his first issue, he argues that adequate notice is required if the State wishes to introduce any evidence of an extraneous offense. *See id*. Because notice was first given on the morning of trial, appellant contends the trial court abused its discretion in denying his motion for continuance. In his second issue, appellant argues that because the additional offenses were extraneous, the trial court was required to include a reasonable doubt instruction pertaining to those offenses in the jury charge. *See George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994)

("[I]f the defendant so requests at the guilt/innocence phase of trial, the trial court must instruct the jury not to consider extraneous offense evidence admitted for a limited purpose unless it believes beyond a reasonable doubt that the defendant committed the extraneous offense."). We overrule both issues because the two prior offenses at issue were not extraneous.

An offense is not extraneous merely because the parties stipulated to that characterization at trial. *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997); *Shea v. State*, 167 S.W.3d 98, 103 n.2 (Tex. App.—Waco 2005, pet. ref'd). Regardless of whether the prior offense ultimately resulted in prosecution, the offense is only extraneous if the charging papers fail to reflect the act of misconduct. *Rankin v. State*, 953 S.W.2d 740, 741 (Tex. Crim. App. 1996).

Here, the indictment charged appellant with performing oral sex on the complainant "on or about June 30, 2006." The law is well-established that the State is not limited to prosecuting an offense specifically committed on the date alleged in the indictment. *See Rodriguez v. State*, 104 S.W.3d 87, 91 (Tex. Crim. App. 2003); *Sledge*, 953 S.W.2d at 256. Given the flexibility of the "on or about" language, an offense falls within the terms of the indictment—and therefore is not extraneous—so long as the offense is "alleged to have been committed before the return of the indictment and within the limitations period." *Ex parte Goodbread*, 967 S.W.2d 859, 865 (Tex. Crim. App. 1998). In 2006, the offense of aggravated sexual assault of a child carried a ten-year statute of limitations beginning on the eighteenth birthday of the complainant. TEX. CODE CRIM. PROC. ANN. art. 12.01(5) (West 2005). The two prior offenses in this case were alleged to have occurred prior to or during the summer of 2006, when the complainant was eight years old. Though the exact dates of the offenses remain unknown, they necessarily precede the 2008 date of the indictment and fall within the limitations period. Therefore, the offenses are not extraneous, as they are described within the terms of the indictment.

Because the offenses are not extraneous, the prosecutor was not required to give timely notice of her intent to introduce testimony of their commission into evidence. Accordingly, we conclude that the trial court did not abuse its discretion in denying appellant's motion for continuance. Likewise, because the offenses are described within the terms of the indictment, this case is not subject to the line of authority requiring a reasonable doubt instruction. If appellant wanted to limit the impact from the admission of prior offenses, his remedy was to seek an election of the occurrences on which the State sought to rely for conviction. *See Rodriguez*, 104 S.W.3d at 91. But the record does not reflect any such request. We therefore overrule appellant's two issues and affirm the judgment of the trial court.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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