COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

CASE NO.

11-03-00282-CR

BRUCE DOUGLAS XXXXX
Defendant-Appellant

v.

STATE OF TEXAS
Plaintiff-Appellee.

APPEAL FROM THE 90th DISTRICT COURT OF STEPHENS COUNTY, TEXAS

BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

On December 19, 2002, Bruce Douglas XXXXX was charged by indictment with two counts of aggravated sexual assault. *See* C.R. at 3.[1] Count 1 charged him with aggravated sexual assault against Vicki YYYYY by causing her to perform oral sex on him and Count 2 charged him with aggravated sexual assault against Abby YYYYY by digitally penetrating her vagina. *Id.*

A trial was held on August 25, 2003-August 26, 2003. The jury found Mr. XXXXX guilty on both counts on August 26, 2003. *See* C.R. at IV:58-61. That same day, the jury sentenced Mr. XXXXX to thirty-five years imprisonment and a $10,000 fine on each count. *Id*. at V:41-42. The Court ordered that imprisonment sentences be served consecutively. *Id*. at V:44-45.

On September 11, 2003, Mr. Harris filed a timely Notice of Appeal from his conviction and sentence. *See* C.R. at 130-31.

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[1] Citations to the Clerk's Record are to C.R. at page number. Citations to the Reporter's Record are to R.R. at volume number:page number.

ISSUE PRESENTED

Where the defendant is charged with sexual assault and the evidence indicates that there were multiple acts of sexual assault committed against the same victim, is the state, upon a motion by the defendant, required to elect the particular assault on which it will rely upon in proving the allegation contained in the indictment after resting its case?

STATEMENT OF FACTS

Abby YYYYY was born on September 18, 1990 and not married. *See* R.R. at IV:11, 20. She, along with her sister, Vicki, her mother, her step father, and Mr. XXXXX took a trip to Florida in Mr. XXXXX's truck when school was not in session. *Id*. at IV:14-16, 23. During the trip, Abby alleged that Mr. XXXXX put "his finger in [her] private" and committed other sexual acts against her. *Id*. at IV:16-17.[2] Abby also alleged that she saw Mr. XXXXX "do these things" to her sister. *Id*. at IV:18. Abby testified that Mr. XXXXX also sexually assaulted her at her family's home in Breckenridge, Texas including putting his finger inside of her. *Id*. at IV:18-19.

Vicki YYYYY was born on March 11, 1992 and has never been married. *Id*. at IV:26-27. She testified that, during the family's trip to Florida in Mr. XXXXX's truck, he put his mouth between her legs and his finger in her vagina. *Id*. at IV:32-33. He had also assaulted her before the trip to Florida at her Breckenridge, Texas house by putting "his thing" in her mouth and putting his hand and mouth between her legs. *Id*. at IV:33-34. Vicki testified that Mr. XXXXX "did this a lot while [she] was at the house" in Breckenridge. *Id*. at IV:35. James Reeves, a Stephens County Sheriff's Department employee,

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[2]There is no indication whether the truck was outside of Stephens County at the time of the alleged assaults.

testified regarding a statement taken from Mr. XXXXX upon his arrest. *Id*. at III:35-36. The statement was introduced into evidence as State's Exhibit 4. *Id*. at III:48. In the statement, made on October 14, 2002, Mr. XXXXX admitted sexually assaulting Abby six to eight weeks earlier including the touching inside and outside of her vagina. *See* State's Exhibit 4. Three to four weeks prior to the statement, Mr. XXXXX took Abby, Vicki, their mother and stepfather to Orlando, Florida in his truck. *Id*. During the eleven day trip, Mr. XXXXX admitted to touching inside and outside Abby's vagina four or five times. *Id*. After returning to the girls' house, Mr. XXXXX and Abby were "together" about three times. *Id*. Three or four times, Mr. XXXXX and the girls played "I Dare You" and this resulted in several sexual encounters including times when Mr. XXXXX kissed both girls on their vaginas and the girls dared each other to suck on his penis. *Id*. The last encounter Mr. XXXXX had was with Abby about ten days prior to the giving of his statement. *Id*.[3]

Adam Babilon, also employed by the Stephens County Sheriff Department, testified that the offense date alleged in the indictment, September 22, 2002, was

[3]Sheriff Reeves also received a letter from Mr. XXXXX postmarked October 16, 2002 that was introduced into evidence as State's Exhibit 5. *See* C.R. at III:49-51. In that letter, Mr. XXXXX admitted to being involved with minors, but attempted to excuse his behavior. *See* State's Exhibit 5.

selected because Abby and Vicki were adamant that this date was one of the dates on which they were assaulted by Mr. XXXXX. *Id*. at III:13, 29.

SUMMARY OF THE ARGUMENT

The law in Texas has long been that when evidence shows two or more acts of intercourse, each of which is an offense for which a defendant may be convicted and the indictment charges only one offense, it is error for a trial court not to require the state to elect which act it will rely upon to secure a conviction. Here, there was evidence adduced that Mr. XXXXX penetrated the mouth of Vicki YYYYY "a lot" and digitally penetrated Abby YYYYY on several occasions but there was no testimony regarding specific incidents. Therefore, it was error for the District Court to deny Mr. XXXXX's motion that the state be required to elect which alleged sexual assaults of Vicki YYYYY and Abby YYYYY it would rely upon at least by the close of the evidence, in order to prove the allegations set forth in the indictment.

ARGUMENT

In both a written motion filed prior to trial and orally prior to opening statements in this case, Mr. XXXXX moved the Court to require the state to elect, at least by the close of the evidence, which alleged sexual assaults against Vicki YYYYY and Abby YYYYY it would rely upon in order to prove the allegations set forth in the indictment. *See* C.R. at 85-87 ("The Defendant moves the Court, at the close of the evidence, to require the State to elect the particular date an incident that it relies upon in seeking the conviction of the Defendant."); R.R. at II:4-7. The District Court denied the motion. *See* CR. at 84; R.R. at II:7.

At trial, Abby testified that Mr. XXXXX digitally penetrated her vagina on at least two occasions. *Id*. at IV:16-19. Vicki testified that Mr. XXXXX assaulted her "a lot" while they were in Breckenridge and the assaults included making her put "his thing" in her mouth. *Id*. at IV:33-35. The state also introduced Mr. XXXXX's confession in which he admitted numerous instances of digital penetration of the girls and causing them to perform oral sex on him. *See* State's Exhibit 4. The state contended that these multiple incidents of sexual assault on the girls were admissible under Tex. Code Crim. P. 38.37 and Tex. R. Evid. 404(b). *See* C.R. at III:52-53.

The law in Texas cannot be more clear. In a case "where more than one act of intercourse is shown, upon motion of the accused, the state should be required

to elect as to which act it will rely on for a conviction." *Bates v. State*, 305 S.W.2d 366, 368 (Tex. Crim. App. 1957) (citations omitted). *See also*, *Scoggan v. State*, 799 S.W.2d 679, 680 (Tex. Crim. App. 1980) ("When the evidence shows two or more acts of intercourse, each of which is an offense for which the defendant may be convicted, and the indictment charges only one offense, the State is required to elect which act it will rely upon to secure a conviction, provided the accused makes a motion for election."); *Crawford v. State*, 696 S.W.2d 903, 905-06 (Tex. Crim. App. 1985) (same). Failure to make such an election constitutes error. *See, e.g., Crosslin v. State*, 235 S.W. 905 (Tex. Crim. App. 1921).

This error is a constitutional violation. *Phillips v. State*, 2004 Tex. App. LEXIS 1819, *12 (Tex. App.--Houston[14th], Feb. 26, 2004) (attached hereto as Attachment A). *See also*, *Gutierrez v. State*, 8 S.W.3d 739, 747-48 (Tex. App.--Austin 1999). First, a failure to elect leaves the door wide open for the possibility of a non-unanimous verdict and a defendant has a constitutional right to a unanimous verdict. *See*, *Phillips*, 2004 Tex. App. LEXIS at *15-16; *Monlandes v. State*, 571 S.W.2d 3 (Tex. Crim. App. 1978) (Texas Constitution gives a defendant a right to a unanimous verdict.). Second, a failure to elect results in a defendant not having adequate notice as to which charge he must defend against, thus constituting a clear infringement on a defendant's constitutional rights to due

process and effective assistance of counsel. *See*, *Phillips*, 2004 Tex. App. LEXIS at *15-16. Third, a failure to elect leads to the possibility that a "jury might tend to convict not because it found beyond a reasonable doubt that each of the offenses was committed, but because it was convinced of guilt because of the number of alleged incidents." *Id*. Fourth, a failure to elect could impact a defendant's right to claim his constitutional right against double jeopardy in any future, related prosecutions. Finally, it hampers appellate review of the sufficiency of evidence. *Id*. at *22 n.13.[4] Consequently, using a constitutional error standard of review, Mr. XXXXX's conviction must be reversed unless there is no reasonable doubt whatsoever that the error did not contribute to the conviction. *Id*. at *19.

In this case, as noted above, there was evidence adduced that Mr. XXXXX penetrated the mouth of Vicki YYYYY "a lot" and digitally penetrated Abby YYYYY on several occasions. No specific dates were given by the girls, although Mr. XXXXX admitted to an approximate five to seven week period in which these multiple incidents occurred. Moreover, "[w]hen closing arguments were made, the State did not refer to any specific incidents or offenses. Not once did it point to a date or time...where even one offense occurred." *Id*. at *22. In

[4]For example, in this case, if the jury was relying upon the alleged assaults that took place inside of Mr. XXXXX's truck, there is no evidence to support the fact that the assaults took place in Stephens County.

fact, the state, in its closing referred the jury to Mr. XXXXX's statement so that it could "look at his statement that sets forth those things that he said he did and where he did those at." *See* R.R. at IV:48.

In short, if the state's evidence is to be believed, the various offenses occurred more than once and, because Mr. XXXXX's Motion to Require Election was denied, "[t]his would have allowed the jury to convict because some of the jurors relied on one offense and others relied on another." *Phillips*, 2004 Tex. App. LEXIS at *22. Clearly then, it cannot be said beyond any reasonable doubt that the District Court's error did not contribute to the conviction in this case. *Id*.[5]

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[5]Mr. XXXXX notes that even if the Court concluded that the District Court's error should be reviewed under a non-constitutional standard of review, when there is "uncertainty concerning which offense the State relied on for [a] conviction," a district court's failure to require election has more than a slight influence on the verdict and thus affects substantial rights. *See XXXXX v. State*, 3 S.W.2d 223, 227 (Tex. App.--Waco 1999) (State's evidence pointed to "two particular incidents" for which the jury could have found defendant guilty and "innumerable other instances" which the victim described generally for which the jury could have found the defendant guilty.).

PRAYER

In accordance with foregoing argument, this Court should reverse the convictions on Count 1 and 2 and order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 19th day of April, 2004, I caused a copy of the foregoing document to be served on the Stephens County District Attorney's Office, 516 4th Street, Graham, Texas 76540.

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F. Clinton Broden